UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	CASE NO. 04C 7403
	)	
Plaintiff,	)	Judge Filip
	)	
v.	)	Magistrate Judge Keys
	)	
WILLIAM J. BENSON,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S "THE LAW THAT NEVER WAS" BRIEF

Comes now Defendant, William J. Benson, by and through his undersigned attorney, who respectfully submits this brief pursuant to the court's briefing schedule.

INTRODUCTION

The United States asserts that Defendant Benson falsely claims the Sixteenth Amendment to the United States Constitution was not properly ratified by the several States, and he should be enjoined, therefore, from making that claim. (Complaint, Doc. 1, ¶ 8.) Benson responds that his speech is absolutely true. A clearly defined factual question has thus been presented to the Court for resolution, namely: is Benson's speech regarding the Sixteenth Amendment true or false?

At the outset of this litigation commenced by the United States, Benson challenged whether this Court had jurisdiction to decide the truth or falsity of Benson's statement. (Motion to Dismiss, Doc. 11.) Benson also asserted that he would be deprived of due process of law if any conclusive presumption regarding the Sixteenth Amendment's ratification were applied against him to this fact question. *See id.* In denying Benson's motion, the Court concluded it *did* have jurisdiction to determine whether or not the Sixteenth Amendment had been properly

ratified, and to avoid the due process problem, also authorized Benson to submit a 25-page brief "regarding history on ratification of the Sixteenth Amendment." (Minute Order, Doc. 26.)

I. Section 205 of the Revised Statutes and the So-Called "Enrolled Bill Rule," to the Extent they Impose Conclusive Presumptions as to State Ratification of Proposed Constitutional Amendments, are Contrary to Article V of the Constitution of the United States and Cannot Stand.

Article V of the United States Constitution requires the legislatures of three fourths of the several States to ratify a proposed constitutional amendment. Anything less constitutes a failed attempt to amend the Constitution. *See Field v. Clark*, 143 U.S. 649, 669 (1892). Government officials of thirty-six out of forty-eight states sending certificates to Washington, D.C. stating that their particular legislature has ratified a proposed amendment is simply not good enough. Each legislature must have, in fact, ratified the proposed constitutional amendment. Significantly here, Defendant Benson – and indeed the American People – cannot be subject to a direct tax on their property without apportionment unless the Sixteenth Amendment has actually been ratified. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, *aff. reh.*, 158 U.S. 601 (1895).

Defendant's Benson's book, The Law That Never Was, shows that Secretary of State Knox and his solicitor looked at "official notices"[1] from the States, and duly noted that the certificates contained "substantial" errors, as well as lesser errors in spelling, punctuation, and

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[1] Section 205 of the Revised Statutes stated, at the time relevant hereto:

> Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States.

capitalization. In the face of these significant defects, however, Knox concluded that because a State has no power to amend a proposed amendment, a presumption arose that such errors were mere mistakes in recitation on the certificates. Quite to the contrary, as Benson's Motion to Dismiss proved, the State of Oklahoma *did* intentionally attempt to amend the proposed Sixteenth Amendment. That showing established that Secretary of State Knox did not have reliable proof before him of the proposed amendment's ratification, and furthermore, that the administratively convenient presumption as to mere "recitation" errors was wholly incorrect and worked a fraud.

In discussing the effect of the Secretary of State receiving the "official notice[s]" referenced in Rev. Stat. § 205, the Seventh Circuit observed, citing to *Leser v. Garnett*, 258 U.S. 130, 137 (1922), that: "[O]fficial notice to the Secretary, duly authenticated, that they had done so [ratified the nineteenth amendment] was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts." *United States v. Foster*, 789 F.2d 457, 462-63 (1986).

In *Leser*, the United States Supreme Court opined:

> The proclamation by the Secretary certified that from official documents on file in the Department of State it appeared that the proposed Amendment was ratified by the legislature of thirty-six States, and that it "has become valid to all intents and purposes as a part of the Constitution of the United States." As the legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts. The rule declared in *Field v. Clark*, 143 U.S. 649, 669-673, is applicable here.

Leser, 258 U.S. at 137.

In *Field*, it was alleged that the enrolled bill at issue omitted a part of the act actually passed by Congress, and therefore the entire law was a nullity. *Field*, 143 U.S. at 668-69. The Appellants argued there:

> [T]hat a bill, signed by the speaker of the house of representatives and by the president of the senate, presented to and approved by the president of the United States, and delivered by the latter to the secretary of state, as an act passed by congress, does not become a law of the United States if it had not in fact been passed by congress.

Id.

And the Supreme Court absolutely agreed:

> In view of the express requirements of the constitution, the correctness of this general principle cannot be doubted. There is no authority in the presiding officers of the house of representatives and the senate to attest by their signatures, not in the president to approve, nor in the secretary of state to receive and cause to be published, as a legislative act, any bill not passed by congress.

Id.

Immediately after recognizing this uncontroversial bedrock principle, however, the *Field Court* chose to ignore it based on nothing more than Justice Story's rather incidental comment regarding the political reasons for keeping legislative journals. *Field*, 143 U.S. at 671 (citing 2 Story, Const. §§ 840-41):

> The signing by the speaker of the house of representatives, and by the president of the senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed congress. It is a declaration by the two houses, through their presiding officers, to the president, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass congress shall be presented to him. And when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed congress should be deemed complete and unimpeachable. As the president has no authority to approve a bill not passed by congress, an enrolled act in the custody of the secretary of state, and having the official attestations of the speaker of the house of representatives, of the president of the senate, and of the president of the United States, carries on its face a solemn assurance by the legislative and executive departments of the

> government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by congress. The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed congress, all bills authenticated in the manner stated; leaving the courts to determine, when the question properly arises, whether the act so authenticated, is in conformity with the constitution.

Field, 143 U.S. at 672.

In an apparent attempt to further justify its doctrinal departure, the Court explained:

> But the contention is that it cannot be regarded as a law of the United States if the journal of either house fails to show that it passed in the precise form in which it was signed by the presiding officers of the two houses, and approved by the president. It is said that, under any other view, it becomes possible for the speaker of the house of representatives and the president of the senate to impose upon the people as a law a bill that was never passed by congress. But this possibility is too remote to be seriously considered in the present inquiry. It suggests a deliberate conspiracy to which the presiding officers, the committees on enrolled bills, and the clerks of the two houses must necessarily be parties, all acting with a common purpose to defeat an expression of the popular will in the mode prescribed by the constitution. Judicial action, based upon such a suggestion, is forbidden by the respect due to a co-ordinate branch of the government.
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> The evils that may result from the recognition of the principle that an enrolled act, in the custody of the secretary of state, attested by the signatures of the presiding officers of the two houses of congress, and the approval of the president, is conclusive evidence that it was passed by congress, according to the forms of the constitution, would be far less than those that would certainly result from a rule making the validity of congressional enactments depend upon the manner in which the journals of the respective houses are kept by the subordinate officers charged with the duty of keeping them.

Id. at 672-73.

However much the Supreme Court was concerned over supposed policy "evils" and felt compelled to defer to politicians, it was duty-bound to act as a check and balance on the other two branches of government – particularly in a matter of such fundamental importance as amending the founding document that created the three branches of national government in the

first place.[2] Moreover, the simple but important fact remains that Article V of the Constitution of the United States demands actual passage of a proposed constitutional amendment. To the extent that *Field*, *Leser*, the so-called "enrolled bill rule," or Rev. Stat. § 205 seek to allow a proposed amendment not actually passed by the legislatures of three-fourths of the States to become an actual constitutional amendment, they are anathema to fundamental principles of constitutional law and ordered democratic liberty, and cannot stand.

The *Field Court* cited to various authorities for its opinion; for example, quoting Chief Justice Beasely in *Pangborn v. Young*:

> [I]t was impossible for the mind not to incline to the opinion that the framers of the constitution, in exacting the keeping of the journals, did not design to create records that were to be the ultimate and conclusive evidence of the conformity of legislative action to the constitutional provisions relating to the enactment of laws.

Field, 143 U.S. 673-74 (citing *Pangborn v. Young*, 32 N.J. Law 29, 37.)[3]

With all respect to the contrary, it is actually impossible for the mind not to incline exactly opposite; namely, that by exacting the keeping of legislative journals as well as mandating the only procedure by which law could be made, the framers unambiguously created the ultimate and conclusive evidence of the conformity of legislative action to constitutional requirements. After all, what other acceptable mechanism is there? The mere administrative proclamation of the Secretary of State, using his own presumptions of regularity, even in the face of substantial evidence to the contrary, even fraud? Apparently so, according to the *Field Court*:

> In *Sherman v. Story*, 30 Cal. 253, 276 [sic], the whole subject was carefully considered. The court, speaking through Mr. Justice SAWYER, said: "Better, far better, that a provision should occasionally find its way into the statute through mistake, or even fraud, than that every act, state and national, should, at any and all times, be liable to be put in issue and impeached by the journals, loose papers of the legislature, and parol evidence."

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[2] *See* The Federalist Papers, Nos. 47 and 51.

[3] The Westlaw cite for *Pangborn* is: 1866 WL 3640.

Field, 143 U.S. at 675 (quoting *Sherman v. Story*, 30 Cal. 253, 275 (1866)).

Contrary to those rather shocking anti-democratic assertions, it is never better for the government to act without actual constitutional authority in a constitutional republic. *See Gibbons v. Ogden*, 22 U.S. 1 (1824) (analyzing the repugnancy of a state law conflicting with a federal law over which the Constitution granted the federal government either exclusive or concurrent authority); *M'Culloch v. State of Maryland*, 17 U.S. 316, 407 (1819); *Marbury v. Madison*, 1 Cranch 137 (1803). Even the *Field Court*, though, recognized an exception existed where some express constitutional or statutory provision required some relaxation of the rule of conclusivity, in order that full effect might be given to such provisions. Moreover, the *Field Court* recognized that subsequent to the California Supreme Court *Sherman* decision, California adopted a new state constitution under which the legislative journals had been examined to impeach an enrolled bill. *Field*, 143 U.S. 675-76 (citing *County of San Mateo v Southern Pac. R. R. Co.*, 8 Sawy. 238, 294, 13 Fed. Rep. 722 (1882)).

Article V of the Constitution of the United States is exactly that sort of express constitutional provision, because it pertains to modifying the Supreme Law of the Land. And that Supreme Law prohibits the federal government from exercising any power whatsoever unless delegated to it by the Constitution. *Gibbons, supra*. Thus, one branch of government, neither out of respect for another branch of government nor from concern over some perceived evil, is entitled to declare the Supreme Law of the Land modified if in fact it was not modified.

Benson fully acknowledges the gravity of the questions before this Court and the weight of responsibility to decide them, but no more so here than what Judge Patel faced in *Korematsu v. United States*, 584 F.Supp. 1406 (N.D.Ca. 1984). There, upon a showing of Executive Department fraud, and calling into question two previously decided Supreme Court Decisions

regarding issues of a statute's constitutionality, a writ issued to correct a fraud that had been in existence since 1942. As noted by Chief Justice Burger in *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 678 (1970): "It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it." That particularly includes the federal government, which can never make an act proper if done in violation of the Constitution. The two concepts are wholly contrary to each other. *Gibbons, supra.*

Subsequent to the decision in *Leser*, the U.S. Supreme Court was confronted with the problem of statutes similar to Rev. Stat. § 205 – statutes that also create conclusive presumptions. In *Heiner v. Donnan*, 285 U.S. 312 (1932), the Court considered the constitutionality of an estate tax law which created a conclusive presumption that gifts made within two years of death were presumed to have been made in contemplation of death, and which consequently would include those gifts within an estate for estate tax purposes. Some parties involved with an estate challenged this law as unconstitutional because it created a conclusive presumption. The Supreme Court agreed:

> [A] statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert is so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment.

Heiner, 285 U.S. at 325.

> The earlier revenue acts created a prima facie presumption, which was made irrebuttable by the later act of 1926. A rebuttable presumption clearly is a rule of evidence which has the effect of shifting the burden of proof, *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1912); and it is hard to seen how a statutory rebuttable presumption is turned from a rule of evidence into a rule of substantive law as the result of a later statute making it conclusive. In both cases it is a substitute for proof; in the one open to challenge and disproof, and in the other conclusive. However, whether the latter presumption be treated as a rule of evidence or of substantive law, it constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and cannot be made to, exist in

> actuality, and the result is the same, unless we are ready to overrule the Schlesinger Case, as we are not; for that case dealt with a conclusive presumption, and the court held it invalid without regard to the question of its technical characterization. This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment. For example, *Bailey v. Alabama*, 219 U.S. 219 , 238, et seq., 31 S. Ct. 145; *Manley v. Georgia*, 279 U.S. 1 , 5-6, 49 S. Ct. 215. "It is apparent," this court said in the *Bailey* Case (219 U.S. 239 , 31 S. Ct. 145, 151) "that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions."
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> If a legislative body is without power to enact as a rule of evidence a statute denying a litigant the right to prove the facts of his case, certainly the power cannot be made to emerge by putting the enactment in the guise of a rule of substantive law.

Heiner, 285 U.S. at 329. *See also Schlesinger v. State of Wisconsin*, 270 U.S. 230 (1926); *Tot v. United States*, 319 U.S. 463, 468 -469 (1943) ("But the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated"); *Vlandis v. Kline*, 412 U.S. 441, (1973) ("Statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments"); *United States v. Bowen*, 414 F.2d 1268, 1273 (3rd Cir. 1969) ("We believe the regulation to be unconstitutional as violative of the due process clause of the Fifth Amendment insofar as it purports to establish such an irrebuttable presumption . . . No administrative agency, nor even a legislature, may make the proof of one fact conclusive proof of another fact in any proceeding, civil or criminal, to the detriment of a private party"); *United States v. Simmons*, 476 F.2d 33, 37 (9th Cir. 1973); *United States v. Perry*, 474 F.2d 983, 984 (10th Cir. 1973); *United States v. Lake*, 482 F.2d 146 (9th Cir. 1973); and *United States v. Belgrave*, 484 F.2d 915 (3rd Cir. 1973).

If the presumption of the Secretary of State's solicitor is irrebuttable – namely, that because a State is unable to amend a proposed constitutional amendment, none of them did so – such that facts to the contrary cannot be shown, then such irrebuttable presumption violates well-settled due process principles. So too, if Rev. Stat. § 205 and the enrolled bill rule create an irrebuttable presumption that a sufficient number of States actually ratified the proposed Sixteenth Amendment, such that facts to the contrary cannot be shown, then such irrebuttable presumption violates due process of law as well as Article V of the Constitution of the United States.

II. Proof that the Proposed Sixteenth Amendment was not Ratified by Three-Fourths of the Legislatures of the Several Union States, in Violation of Article V of the Constitution of the United States.

In connection with this Court's review of Benson's book, The Law That Never Was, Benson points to the following States as demonstrating the most egregious ratification violations, although other significant violations are detailed in his book.

A. Acknowledged Rejectments

Forty-eights states were in the Union in 1909. The memorandum of Secretary of State Knox's solicitor acknowledged the Secretary only received information from forty-two states, and of those, the States of Connecticut, New Hampshire, Rhode Island and Utah rejected the proposed Sixteenth Amendment. (LNW, pp. 6-7.) A review of that memorandum demands the conclusion that no "official notice" of passage was received from the six states of Florida, West Virginia, Virginia, Vermont, Massachusetts or Pennsylvania.

Secretary of State Knox's Proclamation of Ratification, dated February 25, 1913, pursuant to Rev. Stat. § 205, accounted for thirty-six states, the minimum for ratification, and did not count the ten States of Utah, New Mexico, Florida, West Virginia, Virginia, New Jersey,

Connecticut, Rhode Island, New Hampshire or Vermont. Of those ten states, Utah, Florida, Connecticut and Rhode Island had rejected the proposed Amendment, there is no record of what Virginia did, and there is no record of a vote by the Vermont legislature. New Mexico and New Jersey attempted to ratify. West Virginia and New Hampshire each attempted to ratify, but after the February 25, 1913 date of Knox's Proclamation.[4]

B. Failures to Vote for Ratification

Kentucky: The Kentucky Senate did not vote on the same language as did the Kentucky House (H.R. 4), the words "on incomes" being omitted in the Senate. (LNW, p. 38.) The resolution was then engrossed again and sent back to the Senate. This time, however, the word "source" was changed to "sources." (LNW, p. 39.) The Senate voted not to pass the resolution, 9 yeas, 22 nays. (NW, p. 40.) Non-proper ratification being noted by the Governor, a second attempt was made. The House voted to pass H. Res. 20, but the Senate refused to take up and vote on the resolution. (LNW, p. 42-43.)

Kansas: The Kansas Senate voted on S.C.R. No. 2 and forwarded it to the House. The House made a substitution out of their Committee on the Judiciary, which passed the House. There is no record that the substitute was voted on by the Senate. (LNW, pp. 162-164.)

Tennessee: S.J.R. No. 14 was amended by the Senate Committee on Constitutional Amendments and the Senate voted on a motion to allow said amendment to substitute for the original, but there was no vote on whether the substitute should be ratified. (LNW, pp. 213-214.)

Vermont: There is no record of the House ever affirmatively voting to ratify the proposed amendment. (LNW, pp. 289-298.)

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[4] U.S. Senate Document No. 240, 71st Congress, purporting to set forth facts of the ratification of the Sixteenth Amendment contains numerous errors and cannot be relied upon.

C. Intentional Amendments and Language Differences in the State Ratification Process Render the Sixteenth Amendment's Alleged Ratification Null and Void.

Oklahoma: The Senate of the State of Oklahoma intentionally amended the proposed Sixteenth Amendment to read: "The Congress shall have power to lay on collect taxes on incomes, from whatever source derived, without apportionment among the several states, and from any census or enumeration." (LNW, pp. 63-65.)

Missouri: The proposed Sixteenth Amendment was intentionally amended, replacing the word "lay" with the word "levy." (LNW, p. 191.)

Washington: The Washington Senate intentionally changed the word "incomes" to "income." Punctuation was also intentionally changed. (LNW, p. 114.)

South Dakota: Both Houses of the South Dakota Legislature voted to ratify a joint resolution that left out the initial word "The." (LNW, pp. 240-241.)

Arkansas: Both Houses of the Arkansas Legislature voted to ratify a joint resolution that left out the initial word "The." (LNW, pp. 219-221.)

Idaho: Both Houses of the Idaho Legislature voted to ratify a joint resolution that changed the word "or" to the word "of" before the word "enumeration." (LNW, p. 101.)

California: Both Houses of the California Legislature voted to ratify a joint resolution that left out the initial word "The" and the word "or" before the word "enumeration." (LNW, p. 120.)

Maryland: Both Houses of the Maryland Legislature voted to ratify a joint resolution that left out the word "and" before the word "without." (NW, p. 70.)

Discussion: This much is not beyond dispute: if the speaker of the House attested to a bill as passed the House and the President of the Senate attested to a bill as passed the Senate, but

the bills were not identical in form and phraseology, no executive official could call the bill ratified. "At the heart of the notion of bicameralism is the requirement that any bill must be passed by both Houses of Congress in exactly the same form." *City of New York v. Clinton*, 985 F.Supp. 168, 178 (D.D.C. 1998).

Consider a case where a secretary of state – charged with publishing properly enrolled bills – published a bill that did not conform to the exact language as passed by both houses of a state legislature. The court issued a writ of prohibition precluding the secretary from publishing the bill and declared the bill void:

> Elementary principles of government show that [the bill in dispute] never took effect as law. **The senate and the house must agree on the exact text of any bill before they may send it to the governor. There may not be the slightest variance . . .**

Ashcroft v. Blunt, 696 S.W.2d 329, 331 (Mo. 1985) (emphasis added).

The Court went even further, noting the limits on the authority of so-called "authenticating" officers and cabining the discretion of such executive authority:

> No clerical employee has the authority to make any addition, deletion or modification in a bill as passed by both houses. Nor does it make any difference that the bill signed by the governor was the one signed by the speaker of the house and the president pro tempore of the senate and duly transmitted to him by the senate. **The authenticating officers have no more authority than does an enrolling clerk to make any change in the bill passed by the houses**.

Id. (emphasis added).

> When it is shown by unassailable proof, including the journals of the houses, that the bill signed by the governor was not passed by the houses, **the bill is a nullity and the secretary of state has no discretion**. He may not publish the bill as law.

Id. (emphasis added).

The court properly captured the nature of bicameralism: the necessity that the language as passed by both houses be the *exact* text from each body and that there may not be the *slightest*

variance between the text of the two. Mere clerical errors are sometimes enough, though many of these states have done so by modification of the enrolled bill rule:

> The bill which was signed by the presiding officers of the two branches of the Legislature and approved by the Governor was palpably not the one passed to be engrossed. The bill as passed to be engrossed was never enacted or approved by the Governor and was a nullity.

Carnegie Institute of Medicine v. Approving Authority for Schools, 213 N.E.2d 225, 228 (Mass. 1965); *see also State v. Fridley*, 616 P.2d 94 (Ariz. App. 1980); *In re Kornbluh*, 49 A.2d 255 (N.J. 1946); *Messer v. Jackson*, 171 So. 660 (Fla. 1936); *State v. Laiche*, 29 So. 700 (La. 1901).

Bicameralism took root in the federal legislative system to insure the temporal instinct of transient majorities expressed by the House was tempered with the presumed calmer judgment of the senatorial class, while simultaneously insuring the majority of the country's people found a voice, but that each of the independent state sovereigns found their voice as well, with population-based representation to be checked by state-based representation. *See* The Federalist, No. 39.

The federal/state bicameralism captured in Article V would seem to warrant the same requisite standard, or more so, as the standard of bicameralism (identical language in each bill authored either by the chosen agents of those bodies, or, as evinced in the journals of those legislatures). The hyper-technical formalism of bicameralism is intentional: provide clear guidance to the officials of the legislatures as to what will be a law, not substitute their judgment for the judgment of the official chosen by those branches to represent their will, and insure that a law is only a law when conforming to their exact intentions.

These precepts of bicameralism divested the courts of the authority to adjudicate, or enforce, any legislative enactment that failed its threshold, but also insured that no one legislative branch could have their version called the law over the objection of the other legislative branch

which passed a different textual law. In the same vein, one person's "spelling error" is another person's intentional drafting of different legislation. The question then arises as to whether the same rules govern Article V – the enrolled bill rule or the journal rule (which allows a peak behind the bill's authorship to the conduct of the legislative body at issue).

Benson urges that the journal rule must apply to the attempted modification of the Constitution of the United States under Article V, with even more power than when applied to mere state and federal legislative enactments. After all, the Supreme Law of the Land is at stake, and variances in language cannot be countenanced, much less justified. The concept of bicameralism applies to the acts of all the various legislative bodies and the slightest variance in any proposed constitutional amendment language between those bodies bars any ministerial official from labeling the proposed Amendment "ratified" within the meaning of Article V.

D. State Legislatures Violated State Constitutional and Legislative Rules Regarding Proposed Sixteenth Amendment Ratification, Rendering Inoperative any such Alleged Ratification.

Some States have specific state constitutional requirements for the ratification of proposed constitutional amendments, while others do not. Most all the States have specific state constitutional requirements for the passage of bills. Some of these states also include specific state constitutional requirements for the passage of resolutions, joint resolutions and/or concurrent resolutions. Some states have published Senate Rules, House Rules, and/or Joint Legislative Rules regarding how a bill is passed. Some of these States specifically state those rules apply to resolutions, some have special rules that apply only to resolutions, and some have

no rules that apply to resolutions.[5] At all events, a summary of state constitutional and legislative rules violations follows.

Arkansas: Ar. Const. art VI, § 16 requires every resolution in which the concurrence of both houses of the General Assembly may be necessary to be presented to the Governor for approval before it shall take effect, and if vetoed, the resolution must be re-passed. The Governor vetoed S.J.R. 7 and the General Assembly did not re-pass it. (LNW, pp. 221-222.)

South Dakota: Senate Rule 47 requires all resolutions to lie on the table one day and be then referred to the Committee on Rules. (Journal of the Senate, Twelfth Session, Fifth Day, R. 47 (January 7, 1911).) S.J.R. No. 5 did not lie on the table for one day, nor was it referred to the Committee on Rules.

Kansas: Ks. Const. art II, § 128 requires each house to keep a journal and to record the votes on resolutions. There is no recordation of the vote taken by the Senate on the House substitute for S.C.R. No. 2.

Maryland: Maryland Rules of the Senate, Rule XXV, requires, after a resolution has been read the second time, that the President of the Senate put the question whether the resolution be engrossed for a third reading. Senate Rule XX requires resolutions be engrossed for a third reading. (Secretary of State, Maryland Manual, Rules of the Senate, R. XX and XXV (1909-1910).) In violation of these rules, the President of the Senate did not put the question, the question did not go to vote, nor was H.J.R. No. 2 engrossed for a third reading.

Mississippi: On March 27, 1910, the House made it clear they regarded H.J.R. No. 14 the same as a "bill." (LNW, p. 56.) Ms. Const. art IV, § 59 requires bills to be read a first and

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[5] Benson has custody of certified copies of the various States' Constitutions and Legislative Rules mentioned herein, all of which can be produced upon the court's request.

second time on two different days, and that they be read in full before the final vote on its passage. The House did not read H.J.R. No. 14 a first and second time on two different days. (LNW, pp. 55-56.) The Senate did not read H.J.R. No. 14 in full prior to the final vote. (LNW, p. 57.)

Texas: Tx. Const. art. III, § 38 requires the presiding officer of each house to sign, in the presence of each house over which he presides, all joints resolutions, after their titles have been publicly read before signing, and the facts of signing shall be entered on the journals. There is no record that the title was publicly read in the Senate. (LNW, p. 92.)

Montana: Mt. Const. art. V, § 27 requires the presiding officer of each house to sign, in the presence of each house over which he presides, all joints resolutions, after their titles have been publicly read, and the facts of signing shall be entered on the journals. There is no record that the title was publicly read in the Senate. (LNW, p. 128.)

North Carolina: N.C. Const. art II, §14 provides that no law shall be passed to impose any tax upon the people of the State unless the bill for that purpose has been read three several times in each house, on three different days, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal. House Rule 53 provides that all resolutions of a public nature shall be treated in all respects in a similar manner as public bills. (A Manual of North Carolina for the use of Members of the General Assembly, Session 1913 (E.M. Uzzell & Co., State Printers (1913).) The Senate read the resolution the third time the same day as the second reading, and did not record the yeas and nays of this vote in its journal. (LNW, p. 148.)

Colorado: In Colorado, resolutions were to be treated by the Legislature the same as bills. (Senate Rules Together with the Joint Rules Governing the House and Senate, Colorado,

1911, Senate Rules XV, section 3, Rule XXV, section 4, and Rule XXX, sections 1 and 2 (The Smith-Brooks Printing Co., State Printers, 1911).) Senate Rule XXV, section 4 requires the final question upon the second reading of every joint resolution originating in the Senate to be whether it shall be engrossed and read a third time. Co. Const. art V, § 22 requires every bill to be read at length, on three different days, in each House. The Senate failed to read S.C.R. No. 3 the second and third time, and thereby also violated Senate Rule XXV, section 4. (LNW, p. 169-170.) Co. Const. art V, § 26 requires the presiding officer of each house to sign, in the presence of each house over which he presides, all joint resolutions after their titles have been publicly read, immediately before signing, and the facts of signing shall be entered on the journals. Neither House publicly read the title of S.C.R. No. 3 immediately before signing.

Discussion: In those States that have specific state constitutional or legislative rules, two questions must be asked. First, does proof of violation of those state rules mean the proposed amendment was not, as a matter of law, ratified by one or another of the States' legislative bodies? That question is dispositively answered in the affirmative, in part by the bicameralism discussion at Section C, *ante*, and in other part by well-settled state and federal authority requiring strict compliance with procedural rules governing the creation of state and federal law.

Having answered the first question affirmatively, a second question arises: do those state constitutional or legislative rules themselves violate Article V, by inhibiting the "federal" function charged to the state legislatures in considering proposed federal constitutional amendments? Of course not. The above-referenced state constitutional and legislative rules that were violated during the Sixteenth Amendment ratification process did not impair the state legislatures from considering the proposed amendment, they merely provided proper mandatory procedures that the respective legislatives bodies had to follow during the course of their

deliberations and votes. Those rules, although seemingly technical, at first blush, preserve fundamental democratic principles such as open government, honest legislative deliberation, and regularity of process. The alternative would be legislative anarchy and citizen revolt.

Conceivably, though, a particular state constitutional provision or legislative rule might indeed impair the "federal" function of state legislatures passing on proposed constitutional amendments, such as a legislative bar on *any* consideration of such amendments. None of the state rules violated in the Sixteenth Amendment ratification process, however, were of that type; instead, as discussed above, these rules were generally applied to all matters of state legislative consideration, and simply protected the citizens' right to open and accountable government.

In *Trombetta v. State of Florida*, 353 F.Supp. 575 (D.C.Fla., 1973), the district court found a part of Florida's state constitution violative of Article V of the United States Constitution. That Florida constitutional provision, similar to Article II, Section 32 of the Constitution of the State of Tennessee in place at the relevant time, required a state general assembly election after the submission of a proposed federal constitutional amendment. The district court stated:

> The Florida provision, however, leaves full authority in the legislature while safeguarding the rights of a constituency to express itself concerning so vital a matter as a change in the constitution. This, to me, is not only salutary but in complete harmony with Article V. While the legislature, and only the legislature, can perform the Federal function, it necessarily acts in such capacity as the agent of the people of the state; or, indeed, it might not act at all. . .

Trombetta, 353 F. Supp. at 577.

Even the ambitious requirement of a state general assembly election upon submission of a proposed federal constitutional amendment, in the court's view, did not sufficiently impair the "federal" state legislative function of proposed amendment consideration to fun afoul of Article

V. How much more so here, when dealing with basic rules of legislative procedure regarding the making of law and the ratification of federal constitutional amendments.

CONCLUSION

As Secretary Knox's solicitor stated in his Memorandum, "under the provision of the Constitution a legislature is not authorized to alter in any way the amendment proposed by Congress, the function of the legislature consisting merely in the right to approve or disapprove the proposed amendment." *See* Benson, The Law That Never Was (Constitutional Research Assoc. 1985), p. 19 (hereinafter "LNW"). It is thus fundamental that if any State either intentionally amended the proposed Sixteenth Amendment, or voted on something other than the proposed amendment's precise language, that State did not ratify the actual proposed amendment. Well-settled bicameralism principles demand nothing less, and any improvident authority to the contrary must be contextualized or set aside. Similarly, state constitutions and legislatures *should* regulate the process by which federal constitutional amendments are considered, so long as they do not impair the "federal" function, just as all other state and federal law-making procedures are regulated, and have been, for hundreds of years. Anything less is an invitation to bureaucratic tyranny by administrative fiat. Open and accountable government, citizen confidence, and political stability are at stake, as Bill Benson knows so well.

Dated: July 28, 2005.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was sent to the Plaintiff, by sending a copy to its attorney of record, by first class mail, postage paid, to the following address:

Robert D. Metcalfe
Trial Attorney, Tax Division
U.S. Dept. of Justice
P.O. Box 7238
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Dated: July 28, 2005

_____
Daniel J. Treuden