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Removing Recalcitrant County Clerks in Kentucky

Shawn D. Chapman

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Removing Recalcitrant County Clerks in Kentucky

Shawn D. Chapman¹

ABSTRACT

Events in 2015 surrounding Rowan County Clerk Kim Davis showed how removing county clerks from office is not a simple task in Kentucky. At present, removal can be accomplished only by the same difficult means required to remove a state-wide executive officer, meaning the county clerk has the same tenure as the governor and attorney general. Historically, however, the county clerk was removable by other, lesser means, as were all other county officers. Today, the other county officers are still removable by those lesser means, but the county clerk is not, resulting in a removal gap. That gap first appeared in 1976 and, based on a review of the available historical materials, was the result of mere oversight when the Kentucky Constitution was revised substantially to implement a new judicial branch. The gap should be filled, though it will likely require a constitutional amendment.

¹ Attorney in Lexington, Kentucky. J.D., University of Kentucky College of Law, 2002; B.A., University of Kentucky, 1999. The author would like to extend his gratitude to his wife, Jessica Moss, and to Stefan Bing, Jason Bailey, and John Roach for their helpful comments, criticism, and encouragement; and to the staff of the Kentucky State Law Library (Jennifer Frazier, Eric Henninger, and Charles Brock) for their invaluable assistance in finding and procuring many of the research materials used in writing this Article. He may be reached at shawnchapman@gmail.com.

TABLE OF CONTENTS

ABSTRACT.....	261
TABLE OF CONTENTS.....	262
INTRODUCTION	264
I. THE COUNTY CLERK'S ROLE IN KENTUCKY.....	267
II. KENTUCKY'S HISTORICALLY COMPREHENSIVE SYSTEM OF OFFICER REMOVAL	276
A. <i>The Upper Tier: Once and Future Officers</i>	277
i. Impeachment	277
ii. Vote Buying, Felonies, and High Misdemeanors—Oh My!	286
B. <i>The Lower Tier: Removal of Specific Officers</i>	295
i. The General Assembly: The Power of Each House to Expel Its Own Members	296
ii. The Judiciary: Removal by Address, and Retirement and Removal.....	299
iii. County Officers: Removal by Conviction for Malfeasance, Misfeasance, or Nonfeasance.....	314
iv. Court Clerks: Removal by the "Supreme Court"	322
C. <i>Removal Conclusions</i>	329
III. THE MYSTERY OF THE MISSING REMOVAL MECHANISM FOR COUNTY CLERKS.....	331
A. <i>The Removal "Gap" and How it Came to Be</i>	332
i. The State of the Kentucky Judiciary Leading Up to 1975 and the Push for Reform.....	332
ii. The Successful Judicial Article.....	337
B. <i>Why Did the Gap Come to Be?</i>	338
i. The Materials Leading Up to the Amendment	338
a. <i>The KCJI Questionnaire</i>	339
b. <i>The Initial Draft of the Proposed Amendment</i>	342
c. <i>The KCJI's Educational Materials</i>	342
d. <i>The KCJI's Grant Application</i>	346
e. <i>Newspaper and Television Accounts</i>	346
f. <i>Conclusion</i>	348
ii. The 1966 Proposed Constitution	348
iii. James Amato Interview	351
IV. THE PROBLEM AND SOLUTIONS PROPOSED	352
A. <i>The Removal "Gap" for County Clerks</i>	352
B. <i>The Solutions</i>	353
i. Legislative Options—"High Misdemeanors".....	353
ii. Constitutional Options.....	357
a. <i>Removal by the Supreme Court</i>	357
b. <i>Removal by the Fiscal Court</i>	358

2016–2017	Removing Recalcitrant County Clerks in Kentucky	263
	<i>c. Expanding Section 227 to Include the County Clerks.....</i>	<i>359</i>
	<i>C. The Proposed Solutions Applied.....</i>	<i>360</i>
	CONCLUSION	362

INTRODUCTION

On Thursday, September 3, 2015, Judge David Bunning held Kim Davis, the now-famous county clerk of Rowan County, Kentucky, in contempt of court and ordered her jailed¹ for refusing to issue marriage licenses to same-sex couples in the wake of the United States Supreme Court's ruling in *Obergefell v. Hodges*.² She did not stay in jail long,³ and her case has since been rendered moot,⁴ but the situation was nonetheless troubling: incarcerating a public official because she refused to comply with a court order.⁵ Though courts commonly employ jailing for contempt, it is nonetheless a fairly extreme, and inherently coercive, remedy.⁶

But *why* did it come to this? Not *why* in the broad sense of why the district court ordered Davis to issue marriage licenses or whether that was a correct decision. Rather, the concern is with a more limited question. Regardless of the

¹ See Alan Blinder & Tamar Lewin, *Clerk Chooses Jail Over Deal on Gay Unions*, N.Y. TIMES, A1 (Sept. 4, 2015), <http://www.nytimes.com/2015/09/04/us/kim-davis-same-sex-marriage.html> [<https://perma.cc/47TM-B44H>] (reporting Davis jailed for contempt on Thursday, September 3, 2015). Judge Bunning had previously issued a preliminary injunction requiring Davis to issue marriage licenses to same-sex couples, see *Miller v. Davis*, 123 F. Supp. 3d 924, 944 (E.D. Ky. 2015), and she subsequently violated the injunction, resulting in the contempt finding, see Blinder & Lewin, *supra*.

² See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

³ See Alan Blinder & Richard Pérez-Peña, *Kim Davis, Released From Kentucky Jail, Won't Say if She Will Keep Defying Court*, N.Y. TIMES (Sept. 8, 2015), <http://www.nytimes.com/2015/09/09/us/kim-davis-same-sex-marriage.html> [<https://perma.cc/7NTX-DRRG>] (reporting Davis released from jail after five nights) [hereinafter Blinder & Pérez-Peña, *Kim Davis, Released from Kentucky Jail*].

⁴ See *Miller v. Davis*, No. 15-5880, 2016 WL 3755870, at *1 (6th Cir. July 13, 2016) (ordering case dismissed as moot because of change in Kentucky law about the content of marriage licenses).

⁵ This Article expresses no opinion on whether Judge Bunning acted correctly in holding Davis in contempt or even whether he properly applied *Obergefell*. The interest here is in exploring the removal process for Kentucky's state and county officials.

⁶ See, e.g., *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 822 (1987) (Scalia, J., concurring in judgment) (noting that contempt proceedings allow judges to exercise legislative, executive, and judicial functions, creating "the prospect of 'the most tyrannical licentiousness'" (quoting *Anderson v. Dunn*, 19 U.S. 204, 228 (1821))); *Fisher v. Pace*, 336 U.S. 155, 167 (1949) (Murphy, J., dissenting) ("The contempt power is an extraordinary remedy . . ."); *SEC v. Life Partners, Inc.*, 912 F. Supp. 4, 11 (D.D.C. 1996) (noting "the 'extraordinary nature' of the remedy of civil contempt" (quoting *Joshi v. Prof'l Health Servs.*, 817 F.2d 877, 879 n.2 (D.C. Cir. 1987))); *Nat'l Labor Relations Bd. v. Shurtenda Steaks, Inc.*, 424 F.2d 192, 194 (10th Cir. 1970) (describing civil contempt as a "severe" remedy); *Lewis v. Lewis*, 875 S.W.2d 862, 864 (Ky. 1993) (noting that power "to enforce [a court's] judgment by means of incarceration of a person who is found in contempt . . . is extraordinary"); see also Margaret Meriwether Cordray, *Contempt Sanctions and the Excessive Fines Clause*, 76 N.C. L. REV. 407, 416 (1998) ("Although only the minimal civil protections apply in coercive contempt proceedings, the ability of judges to impose severe, even crushing, coercive sanctions is not constrained in any significant way."); Philip A. Hostak, *International Union, United Mine Workers v. Bagwell: A Paradigm Shift in the Distinction Between Civil and Criminal Contempt*, 81 CORNELL L. REV. 181, 184 n.17 (1995) ("Because of the limitless and open-ended nature of coercive sanctions, coercive contempt can be extremely harsh, particularly for those whose disobedience is predicated on ethical or religious principles . . .").

specifics of Kim Davis's case,⁷ there can be little doubt county clerks can and do commit misconduct of various sorts in office, thereby raising serious questions about whether they should continue to hold office. Historically, such conduct has ranged from the mundanely negligent to the criminal—conduct that has not been left in the past.⁸ For example, since Kim Davis's case first made the news, another county clerk has been accused of serious misconduct for mishandling public money, resulting in a felony indictment, followed shortly by conviction and resignation from office.⁹

Assuming a situation arises where there is a colorable claim that a county clerk has committed or is committing some type of misconduct, the question is why this remedy—contempt of court—instead of another? Why was Davis not simply removed from office? Presumably, this occurred because no other remedy presently exists that is not at least equally extreme or too politically difficult. Multiple news stories have attempted to answer the question posted ubiquitously on social media: why not just fire her?¹⁰ Admirably, most of those stories have reached the right answer: county clerks, like other elected officials, cannot simply be fired.¹¹ They are not mere employees of the state or county; they are, instead, government officers elected under the Kentucky Constitution.¹²

One prominent news source, however, has suggested a county clerk like Davis can be prosecuted for and convicted of a criminal offense—official misconduct—

⁷ There are, in fact, non-frivolous arguments that Davis should have been protected by Kentucky's version of the Religious Freedom Restoration Act (RFRA) and was entitled to an accommodation under that statute. See Eugene Volokh, *When Does Your Religion Legally Excuse You from Doing Part of Your Job?*, WASH. POST: VOLOKH CONSPIRACY (Sept. 4, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/09/04/when-does-your-religion-legally-excuse-you-from-doing-part-of-your-job/> [<https://perma.cc/RHM9-JDAP>] (discussing KY. REV. STAT. ANN. § 446.350 (West 2016)).

⁸ See *infra* notes 452–493 and accompanying text.

⁹ Bill Estep, *Elliott County Clerk, Deputy Charged: Audit Says \$15,000 Missing*, LEXINGTON HERALD-LEADER (June 9, 2016, 10:35 AM), <http://www.kentucky.com/news/state/article82712797.html> [<https://perma.cc/YF8M-9HCX>] (reporting that the Elliott County Clerk had been indicted for abuse of public trust, a Class D felony); Press Release, Ky. Att'y Gen., Beshar: Former Elliott County Clerk, Former Deputy Clerk Sentenced (Aug. 12, 2016), <http://kentucky.gov/Pages/Activity-stream.aspx?n=AttorneyGeneral&qprId=158> [<https://perma.cc/JNU8-3CJ3>] (noting that clerk and deputy clerk entered guilty plea, were sentenced, and were ordered to resign from office).

¹⁰ Polly Mosendz, *Why Kentucky Clerk Kim Davis Can't Be Fired for Refusing to Issue Same-Sex Marriage Licenses*, NEWSWEEK (Sept. 4, 2015, 3:37 PM), <http://www.newsweek.com/why-kim-davis-cant-be-fired-marriage-licenses-368902> [<https://perma.cc/8KPW-933E>]; Andrew Wolfson, *Kim Davis and the Law: Q&A in Clerk Standoff*, LOUISVILLE COURIER-JOURNAL (Sept. 2, 2015, 8:48 AM), <http://www.courier-journal.com/story/news/local/2015/09/01/kim-davis-and-law-q-clerk-standoff/71530778/> [<https://perma.cc/7UXV-VN3W>].

¹¹ See, e.g., Wolfson, *supra* note 10 (reporting that a county clerk, as an elected official, cannot be fired).

¹² See KY. CONST. § 99 (calling for election of “a County Court Clerk,” among other officers, in each county).

that would vacate her office.¹³ This conclusion is largely incorrect, as this type of removal occurs only upon conviction for certain significant crimes, such as vote buying or a felony, among which official misconduct is not included.¹⁴ Nevertheless, as the same news source correctly noted, county clerks, as elected officials in Kentucky, may be removed through impeachment by the General Assembly.¹⁵ Of course, that is “unlikely to happen, and . . . would take awhile,”¹⁶ if only because the General Assembly only meets for a relatively short time each year,¹⁷ not to mention the politically and historically difficult task of successfully removing an officer through impeachment.¹⁸

A more interesting question is why must courts resort to the also-extreme remedy of impeachment when other county officers are removable through a merely local process—conviction for malfeasance, misfeasance, or nonfeasance—that does not even carry a jail sentence? This question has been raised in some of the local news coverage. For example, Andrew Wolfson, a reporter in Louisville, Kentucky, has noted that various county officers, including the county judge/executive, sheriff, and county attorney, can be removed from office under a statute if convicted of “malfeasance in office, or willful neglect in the discharge of official duties,”¹⁹ but that “for some reason lost to history, the statute doesn’t include county clerks.”²⁰ The answer, however, is not lost to history. In fact, county clerks were never meant to be included in that statute or the constitutional provision under which it was passed. Instead, court clerks were historically removable by a different less-than-impeachment process.

Removal of elected officers is governed primarily by the Kentucky Constitution, though in many cases it is accomplished in part through enabling statutes. This constitutional removal system has historically had two tiers. The first or “upper” tier applied to all officers, including the statewide officers, and consisted of two processes—impeachment and conviction for certain serious crimes.²¹ This tier is the more extreme of the two because its processes, in addition to removal from

¹³ Alan Blinder & Richard Pérez-Peña, *Kentucky Clerk Denies Same-Sex Marriage Licenses, Defying Court*, N.Y. TIMES (Sept. 1, 2015), <http://www.nytimes.com/2015/09/02/us/same-sex-marriage-kentucky-kim-davis.html> [<https://perma.cc/6Q4H-FH3U>] [hereinafter Blinder & Pérez-Peña, *Kentucky Clerk Denies Same-Sex Marriage Licenses*].

¹⁴ See *infra* Subsection II.A.ii.

¹⁵ Blinder & Pérez-Peña, *supra* note 13; Richard Pérez-Peña, *What’s Next for Kim Davis and Kentucky’s Gay Marriage Standoff*, N.Y. TIMES (Sept. 2, 2015), <http://www.nytimes.com/interactive/2015/09/02/us/same-sex-marriage-kentucky-supreme-court.html> [<https://perma.cc/59BZ-YY5U>] (“The State House . . . could impeach her—akin to an indictment—by a simple majority vote.”); Wolfson, *supra* note 10 (“She is an elected official and can only be removed from office for impeachment.”); see also *infra* Subsection II.A.i.

¹⁶ Pérez-Peña, *supra* note 15.

¹⁷ See KY. CONST. §§ 36, 42.

¹⁸ See *infra* Subsection II.A.i. (discussing the rarity of impeachment in Kentucky).

¹⁹ KY. REV. STAT. ANN. § 61.170(1) (West 2016).

²⁰ Wolfson, *supra* note 10.

²¹ See *infra* Section II.A.

office, can result in future ineligibility for any state office. The second or “lower” tier applied to specific classes of officials, namely, members of the General Assembly, judges, county officials (other than the county clerk), and clerks of courts.²² Each class of official in the second tier has had its own removal mechanism, and those mechanisms were applicable only to the class of officer mentioned in the constitutional provision creating the method.²³

This last class of officers, clerks of courts, includes the county clerk. Court clerks have historically been removable by the state’s highest court.²⁴ Although the other court clerks, with one exception, are still removable by the state’s highest court, as of 1976, the county clerks no longer are. Thus, the lack of a removal mechanism for recalcitrant (or worse) county clerks is a modern problem. This problem was created by a mere oversight when the new Judicial Article substantially amended the Kentucky Constitution in 1975.²⁵

Part I of this Article discusses the historical context of the office of county clerk. Part II explores Kentucky’s two-tier removal system generally and explains why the existing removal mechanisms that apply to the county clerk are unlikely to be effective and how the remaining methods either never did or no longer apply to the county clerk’s office. This, however, means Kentucky’s removal system has a “gap” where county clerks are concerned, in that they are the only non-executive constitutional officers who can be removed only by the upper tier removal mechanisms, though it is not obvious why that is the case. Part III offers an answer to the historical mystery of the missing removal mechanism for county clerks. Finally, Part IV explores possible solutions to the resulting problem and recommends one, though it will require a constitutional amendment.

I. THE COUNTY CLERK’S ROLE IN KENTUCKY

To understand where the county-clerk-removal oversight came from, it is necessary to understand the county clerk’s role, both presently and historically, and the office’s origin in Kentucky. The office has existed since Kentucky became a state in 1792, and had persisted under each of the state’s four constitutions.²⁶

Under the present constitution, enacted in 1891, the office of county clerk is one of several county-level elected offices. Those offices are laid out in section 99 of the Kentucky Constitution, which provides for the election of the county judge,

²² See *infra* Section II.B.

²³ See *infra* Section II.B.

²⁴ For most of Kentucky’s history, its highest court was called the Court of Appeals, although the constitutions also described it a “Supreme Court.” Since 1976, the highest court has been called the Supreme Court. See KY. CONST. § 110.

²⁵ See *infra* Part III. The Judicial Article was adopted in 1975, but did not go into effect until 1976.

²⁶ KY. CONST. of 1792, art. VI, § 5; KY. CONST. of 1799, art. IV, § 10; KY. CONST. of 1850, art. VI, § 3; KY. CONST. § 97.

county attorney, sheriff, jailer, and others.²⁷ That section also provides for the election of a “County Court Clerk.”²⁸ At some point, “county clerk” became the regularly used term,²⁹ and this term appears in most statutes today.³⁰ But it is nonetheless important to remember that the county clerk is, technically, the clerk of the county court.

A bit of digression is necessary, then, because the story of the clerk of the county court is, perhaps obviously, tied to that of the county court. And what is the county court? Since 1978, it is essentially nonfunctional, at least as a judicial court.³¹ But historically, county courts were integral parts of Kentucky’s local government.³²

Kentucky’s first constitution created a judicial branch largely tracking that of the federal constitution, as it created a “supreme court,” and left the creation of “inferior courts” to the legislature.³³ Unlike the federal constitution, however, it directly created some lesser *judgeships* by requiring the appointment of “[a] competent number of justices of the peace . . . in each county,”³⁴ although the full scope of their role in the court system was left to the General Assembly. Acting under this purview, the General Assembly made justices of the peace the basic judicial officers of the state, giving them jurisdiction to hear minor cases on their

²⁷ See KY. CONST. § 99 (providing for the election “in each county a Judge of the County Court, a County Court Clerk, a County Attorney, Sheriff, Jailer, Coroner, Surveyor and Assessor, and in each Justice’s District one Justice of the Peace and one Constable”). This provision’s present form is the result of two amendments, one in 1984 to remove the term limits for the office of sheriff, 1984 Ky. Acts 48–49, and another in 1992 primarily to change the election dates of the listed officers, 1992 Ky. Acts 439.

²⁸ KY. CONST. § 99.

²⁹ The shortened title appeared in a Kentucky decision as early as 1827, see *Williamson’s Heirs v. Johnston’s & Nash’s Heirs*, 20 Ky. (4 T.B. Mon.) 253, 255 (1827) (recording first use of the shortened title that appears in a Westlaw search), but only became used somewhat frequently in the 1850s, see, e.g., *Scarce v. Page*, 51 Ky. (12 B. Mon.) 311, 314 (1851). Omission of the word “court” certainly makes sense in modern usage, given the substantial changes to the court system in the 1970s in which the county court’s judicial functions were removed.

³⁰ E.g., KY. REV. STAT. ANN. § 355.9-710 (West 2016). In fact, an exact-phrase search of Westlaw’s “Kentucky Statutes – Unannotated” database for the term “county clerk” yields over 850 results, whereas a search for “county court clerk” yields only a dozen.

³¹ In 1978, the county courts lost their judicial functions to the current district courts. See *infra* notes 80–81 and accompanying text.

³² See generally ROBERT M. IRELAND, *THE COUNTY COURTS IN ANTEBELLUM KENTUCKY* (1972) [hereinafter IRELAND, *COUNTY COURTS*]; see also Kurt X. Metzmeier, *History of the Courts of Kentucky, in UNITED AT LAST: THE JUDICIAL ARTICLE AND THE STRUGGLE TO REFORM KENTUCKY’S COURTS* 15, 18 (Kurt X. Metzmeier ed., 2006) (discussing the tradition of county court day in the nineteenth century) [hereinafter Metzmeier, *History of the Courts of Kentucky*].

³³ See KY. CONST. of 1792, art. V, § 1 (“The judicial power of this Commonwealth, both as to matters of law and equity, shall be vested in one supreme court, which shall be styled the Court of Appeals, and in such inferior courts as the Legislature may, from time to time, ordain and establish.”).

³⁴ KY. CONST. OF 1792, art. V, § 6.

own.³⁵ But the justices of the peace also served on other courts. Acting under the power to create inferior courts, the General Assembly established at least two inferior courts³⁶—the courts of quarter sessions³⁷ and the county courts.³⁸ These courts were superior to the individual justices of the peace and heard their appeals.³⁹ Although both were initially presided over by the justices of the peace,⁴⁰ the same justices could not preside on both courts.⁴¹

The courts of quarter sessions were the general trial courts.⁴² They were given the “power, authority and jurisdiction to hear and determine all causes whatsoever, at the common law or in chancery within their respective counties.”⁴³ These courts also had criminal jurisdiction, though generally not over “such criminal causes where the judgment upon conviction shall be for the loss of life or member.”⁴⁴

The antebellum county courts were the direct ancestors of the modern county court and, indirectly, the modern fiscal court.⁴⁵ They “had jurisdiction over civil matters not vested in the Courts of Quarter-Sessions, especially cases concerning wills, probate issues and guardianship.”⁴⁶ But the county court was more than a court of law; it also had “significant administrative and legislative duties (it served

³⁵ 1 WILLIAM LITTELL, *THE STATUTE LAW OF KENTUCKY* ch. 23, §§ 2–3, at 91–93 (Frankfort, Ky., William Hunter 1809) (reprinting 1792 act laying out the first courts and describing the justices’ individual jurisdiction).

³⁶ There was also a third court, the court of oyer and terminer, a statewide general criminal court presided over by three judges, rather than justices of the peace. See 1 LITTELL, *supra* note 35, ch. 23, §§ 13–14, at 98–99. But “[b]ecause of the sprawling nature of the state and its crude roads, in practice this court was little used.” Metzmeier, *History of the Courts of Kentucky*, *supra* note 32, at 17.

³⁷ Metzmeier, *History of the Courts of Kentucky*, *supra* note 32, at 16, 153 n.10. The court of quarter sessions was created, and its jurisdiction is outlined specifically in sections 6, 8, and 9 of the law initially creating the lower courts. See 1 LITTELL, *supra* note 35, ch. 23, §§ 6, 8–9, at 94–98.

³⁸ Metzmeier, *History of the Courts of Kentucky*, *supra* note 32, at 16, 153 n.10.

³⁹ 1 LITTELL, *supra* note 35, ch. 23, §§ 2–3, at 91–93 (reprinting 1792 act allowing appeals to court of quarter sessions); *id.* ch. 73, § 1, at 157 (reprinting 1792 act providing for some single justice decisions to be appealed to the “court to be held for the county”); see also Metzmeier, *History of the Courts of Kentucky*, *supra* note 32, at 16.

⁴⁰ See 1 LITTELL, *supra* note 35, ch. 23, § 4, at 93 (stating the county court “shall consist of the justices appointed for each county”); *id.* ch. 23, § 6, at 94 (stating the court of quarter sessions “shall consist of three justices, to be appointed for that purpose, out of the justices of the peace for that county”).

⁴¹ IRELAND, *COUNTY COURTS*, *supra* note 32, at 2–3 n.5; see also 1 LITTELL, *supra* note 35, ch. 23, § 18, at 101 (“Every person exercising the office of justice of a court of quarter sessions, shall cease to have any power or authority as a member of the county court.”).

⁴² IRELAND, *COUNTY COURTS*, *supra* note 32, at 2.

⁴³ 1 LITTELL, *supra* note 35, ch. 23, § 6, at 94.

⁴⁴ *Id.*

⁴⁵ The justices of the peace, when performing administrative functions, sat as the court of claims, at least as of 1850. IRELAND, *COUNTY COURTS*, *supra* note 32, at 168. Eventually, that court became known as the fiscal court. *Id.* There are, however, references to the justices of the peace sitting as a court of claims much earlier. See, e.g., 3 WILLIAM LITTELL, *THE STATUTE LAW OF KENTUCKY*, ch. 386, at 374–75 (Frankfort, Ky., Johnston & Pleasants 1809) (reprinting 1806 act discussing justices sitting as “court of claims”).

⁴⁶ Metzmeier, *History of the Courts of Kentucky*, *supra* note 32, at 16.

as the sole county governmental body).⁴⁷ Since Kentucky's beginning as a state, then, the county court has been a part of county government.

And some version of the county clerk has also been part of Kentucky county government since the beginning. Although the office of "county court clerk" was not mentioned directly in the 1792 constitution, the document provided, "Each court shall appoint its own clerk, who shall hold his office during good behavior."⁴⁸ This necessarily included a clerk for each of the county courts once the General Assembly created them.

Kentucky adopted a new constitution in 1799. The county courts were expressly retained in the 1799 constitution, rather than being subject to the whim of the General Assembly.⁴⁹ That constitution, again, did not describe the judicial jurisdiction of the county courts, leaving that to the General Assembly. It did, however, set out some of their county-administrative duties, which included appointing various inferior county officers⁵⁰ and recommending to the governor persons to fill certain other county offices.⁵¹ The provision for clerks of the state's courts remained the same, with clerks holding their offices during "good behavior."⁵² Each court was again to appoint its own clerk.⁵³

⁴⁷ *Id.*

⁴⁸ KY. CONST. of 1792, art. VI, § 5.

⁴⁹ KY. CONST. of 1799, art. IV, § 5 ("There shall be established in each county, now or which may hereafter be erected within this Commonwealth, a county court.").

⁵⁰ See KY. CONST. of 1799, art. III, § 9 ("*Provided, also,* That the county courts shall be authorized by law to appoint inspectors, collectors, and their deputies, surveyors of the highways, constables, jailers, and such other inferior officers, whose jurisdiction may be confined within the limits of a county.").

⁵¹ See KY. CONST. of 1799, art. III, § 31 ("Sheriffs shall be hereafter appointed in the following manner: When the time of a sheriff for any county may be about to expire, the county court for the same (a majority of all its justices being present) shall, in the months of September, October, or November next preceding thereto, recommend to the Governor two proper persons to fill the office, who are then justices of the county court; and who shall, in such recommendation, pay a just regard to seniority in office and a regular rotation. One of the persons so recommended shall be commissioned by the Governor, and shall hold his office for two years, if he so long behave well, and until a successor be duly qualified. If the county court shall omit, in the months aforesaid, to make such a recommendation, the Governor shall then nominate, and by and with the advice and consent of the Senate, appoint a fit person to fill such office."); KY. CONST. of 1799, art. IV, § 8 ("When a surveyor, or coroner, or a justice of the peace, shall be needed in any county, the county court for the same, a majority of all its justices concurring therein, shall recommend to the Governor two proper persons to fill the office; one of whom he shall appoint thereto: *Provided, however,* that if the county court shall, for twelve months, omit to make such recommendation, after being requested by the Governor to recommend proper persons, he shall then nominate, and by and with the advice and consent of the Senate, appoint a fit person to fill such office.").

⁵² KY. CONST. of 1799, art. IV, § 10 ("Each court shall appoint its own clerk, who shall hold his office during good behavior; but no person shall be appointed clerk, only pro tempore, who shall not produce to the court appointing him, a certificate from a majority of the judges of the Court of Appeals, that he hath been examined by their clerk, in their presence, and under their direction, and that they judge him to be well qualified to execute the office of clerk to any court of the same dignity with that for which he offers himself. They shall be removable for breach of good behavior by the Court of Appeals only, who shall be judges of the fact as well as of the law. Two-thirds of the members present must concur in the sentence.").

⁵³ *Id.*

Kentucky enacted yet another constitution in 1850. Again, the county courts were expressly retained,⁵⁴ but their form was changed substantially. They were no longer to be presided over by justices of the peace, at least initially. Instead, a new officer, *judge* of the county court, was created to sit on these courts.⁵⁵ Specifically, there were three county judges in each court: a presiding judge and two associate judges. Justices of the peace were retained, but they were lesser judicial officers whose judgments were appealable to the county courts.⁵⁶ The new constitution, however, gave the General Assembly the power to abolish the associate county judges and assign the justices of the peace to the county court again, which it promptly did in its 1850–1851 session.⁵⁷

The county court's judicial jurisdiction was again not described directly, though it was laid out indirectly to "be regulated by law, and, until changed, [was to] be the same [then] vested in the county courts of this State."⁵⁸ Apparently, the court's duties "were still mainly administrative and legislative,"⁵⁹ and its primary responsibility was to "set the county levy."⁶⁰ Its administrative power, however, had been somewhat curtailed; the power to appoint county officers previously appearing in the 1799 constitution was removed. As of 1850, those offices were to be filled by election.⁶¹

⁵³ KY. CONST. of 1799, art. IV, § 10.

⁵⁴ KY. CONST. of 1850, art. IV, § 29 ("A County Court shall be established in each county now existing, or which may hereafter be erected within this Commonwealth, to consist of a presiding judge and two associate judges, any two of whom shall constitute a court for the transaction of business: Provided, the General Assembly may, at any time, abolish the office of the associate judges, whenever it shall be deemed expedient; in which event they may associate with said court any or all of the justices of the peace for the transaction of business.").

⁵⁵ See KY. CONST. of 1850, art. IV, § 29 ("[The] County Court shall . . . consist of a presiding judge and two associate judges, any two of whom shall constitute a court for the transaction of business . . .").

⁵⁶ See KY. CONST. of 1850, art. IV, § 34 ("Each county in this State shall be laid off into districts of convenient size as the General Assembly may, from time to time, direct. Two justices of the peace shall be elected in each district by the qualified voters therein, at such time and place as may be prescribed by law, for the term of four years, whose jurisdiction shall be co-extensive with the county . . ."); Metzmeier, *History of the Courts of Kentucky*, *supra* note 32, at 22 (citing 1852 Ky. Acts ch. 22, art. 20–23).

⁵⁷ KY. CONST. of 1850, art. IV, § 29; ROBERT M. IRELAND, *LITTLE KINGDOMS: THE COUNTIES OF KENTUCKY, 1850–1891*, 124 (1977) [hereinafter IRELAND, *LITTLE KINGDOMS*].

⁵⁸ KY. CONST. of 1850, art. IV, § 33.

⁵⁹ Metzmeier, *History of the Courts of Kentucky*, *supra* note 32, at 22 (citing 1852 Ky. Acts ch. 22, art. 20–23).

⁶⁰ IRELAND, *LITTLE KINGDOMS*, *supra* note 57, at 124; see also KY. CONST. of 1850, art. IV, § 37 ("The General Assembly may provide, by law, that the justices of the peace in each county shall sit at the court of claims, and assist in laying the county levy and making appropriations only.").

⁶¹ See KY. CONST. of 1850, art. VI, § 1 (providing for election of "Surveyor, Coroner, and Jailer, for each county"); *id.* art. VI, § 4 (providing for election of "Sheriff . . . in each county"); *id.* art. VI, § 11 (providing for election of "County Assessor").

The "County Court Clerk" first appeared as a named constitutional officer in the 1850 constitution.⁶² One of the biggest changes in the 1850 constitution was that all officers, including judges, were to be elected.⁶³ This included the clerk of the county court.⁶⁴

Kentucky adopted still another constitution in 1891, most of which is still in effect. Again, the county court was expressly retained. Thus, each county had (and still has) a county court, now consisting of only the county judge.⁶⁵ As under the preceding constitution, county-court judges were elected.⁶⁶ Under that constitution at that time, the county court still functioned as a judicial court with some judicial jurisdiction, as prescribed by law,⁶⁷ which remained "basically unchanged" from before the 1891 constitution.⁶⁸ The 1891 constitution also retained the justices of the peace, finally calling their courts by name—"justices' courts"—at least in the title above the relevant section in some editions.⁶⁹ The jurisdiction of these courts was also "basically unchanged."⁷⁰

The 1891 constitution added a new court, at least in name, called the "fiscal court."⁷¹ The fiscal court had previously existed as the court of claims and was

⁶² See KY. CONST. of 1850, art. VI, § 1 ("A Commonwealth's Attorney for each judicial district, and a Circuit Court Clerk for each county, shall be elected, whose term of office shall be the same as that of the Circuit Judges; also a *County Court Clerk*, an Attorney, Surveyor, Coroner, and Jailor, for each county, whose term of office shall be the same as that of the Presiding Judge of the County Court." (emphasis added)).

⁶³ See GEORGE L. WILLIS, SR., KENTUCKY CONSTITUTIONS & CONSTITUTIONAL CONVENTIONS: A HUNDRED AND FIFTY YEARS OF STATE POLITICS AND ORGANIC-LAW MAKING 39 (1930) ("After the slavery question the really big changes made by the 1849-50 or third convention—the big things done to the State government—had to do with making the chief State offices elective rather than appointive . . .").

⁶⁴ KY. CONST. of 1850, art. VI, § 1.

⁶⁵ KY. CONST. § 140.

⁶⁶ KY. CONST. § 99 ("[T]here shall be elected in each county a Judge of the County Court . . .").

⁶⁷ See KY. CONST. § 141 (repealed 1976) ("The jurisdiction of the County Court shall be uniform throughout the State, and shall be regulated by general law, and, until changed, shall be the same as now vested in the County Courts of this State by law.").

⁶⁸ Metzmeier, *History of the Courts of Kentucky*, *supra* note 32, at 24.

⁶⁹ KY. CONST. § 142 (including "Justices' Courts" as a title above the section).

⁷⁰ Metzmeier, *History of the Courts of Kentucky*, *supra* note 32, at 24.

⁷¹ See KY. CONST. § 144 ("Counties shall have a Fiscal Court, which may consist of the Judge of the County Court and the Justices of the Peace, in which Court the Judge of the County Court shall preside, if present; or a county may have three Commissioners, to be elected from the county at large, who, together with the Judge of the County Court, shall constitute the Fiscal Court. A majority of the members of said Court shall constitute a Court for the transaction of business. But where, for county governmental purposes, a city is by law separated from the remainder of the county, such Commissioners may be elected from the part of the county outside of such city.").

presided over by a county judge and the justices of the peace.⁷² Like the court of claims, one of the fiscal court's primary responsibilities was to "set the county levy."⁷³ The fiscal court under the 1891 constitution consisted of the county judge and either the justices of the peace or, alternatively, a set of three commissioners.⁷⁴ The term *fiscal court* was a way to describe when the county judge and justices of the peace acted administratively, such as when they levied taxes, rather than judicially. As noted above, the office of county-court clerk was also retained as an elected office in 1891.⁷⁵

Under the 1891 constitution, there were five different trial courts, including the county court,⁷⁶ and one solely appellate court, the Court of Appeals. The system of courts established under the 1891 constitution left a lot to be desired. Indeed, as one commentator has noted, "Criticism of the system of courts devised by the 1890 convention began almost as soon as the ink dried on the new charter."⁷⁷

Though the debate over the judicial system simmered for a long time before there was significant reform, it did finally come. In November 1975, Kentucky's voters approved a constitutional amendment commonly referred to as the Judicial Article.⁷⁸ The Judicial Article repealed the existing judicial provisions of the 1891 constitution and created a largely new, unified court system, called the Court of

⁷² Before the Civil War, the fiscal court had been called the court of claims. IRELAND, COUNTY COURTS, *supra* note 32, at 168; *see also* KY. CONST. of 1850, art. IV, § 37 ("The General Assembly may provide, by law, that the justices of the peace in each county shall sit at the court of claims, and assist in laying the county levy and making appropriations only."); 3 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION ASSEMBLED AT FRANKFORT, ON THE EIGHTH DAY OF SEPTEMBER, 1890, TO ADOPT, AMEND OR CHANGE THE CONSTITUTION OF THE STATE OF KENTUCKY 3574 (Frankfort, Ky., E. Polk Johnson 1891) (statement of Delegate Hopkins) (stating that the General Assembly had acted under the 1850 constitution so "the Justices of the Peace were associated with the County Judge in the transaction of the fiscal affairs of the county, commonly known as the Court of Claims") [hereinafter 3 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES].

⁷³ IRELAND, LITTLE KINGDOMS, *supra* note 57, at 124.

⁷⁴ *See* KY. CONST. § 144. As of 2003, only 15 of Kentucky's 120 counties had adopted the commissioner form of the fiscal court. KY. LEGISLATIVE RESEARCH COMM'N, COUNTY GOVERNMENT IN KENTUCKY, INFORMATIONAL BULLETIN NO. 115, at 8–9 (rev'd ed. 2003), <https://kydlgweb.ky.gov/Documents/Counties/IB%20115.pdf> [<https://perma.cc/DCT5-TX42>].

⁷⁵ KY. CONST. § 99.

⁷⁶ *See* KY. CONST. § 125 (establishing the circuit court); *id.* § 139 (establishing a quarterly court); *id.* § 140 (establishing a county court); *id.* § 142 (establishing justices' court); *id.* § 143 (allowing police court). These provisions date from 1891; they were repealed in 1976. *See infra* notes 78–83 and accompanying text.

⁷⁷ Kurt X. Metzmeier, *A Constitutional Amendment to Reform Kentucky's Courts*, in UNITED AT LAST: THE JUDICIAL ARTICLE AND THE STRUGGLE TO REFORM KENTUCKY'S COURTS 27, 27 (Kurt X. Metzmeier ed., 2006) [hereinafter Metzmeier, *Constitutional Amendment*].

⁷⁸ Kentucky's present constitution is not divided into articles, which would ordinarily then be subdivided into sections, as was the case with the first three constitutions. Instead, it consists simply of a series of more than 260 sequentially numbered sections. Nevertheless, sections related to a common subject, such as the court system, are grouped together, and, in most printed versions, are given an unnumbered heading. *See, e.g.*, KY. CONST. §§ 109–124 (headed by "The Judicial Department"). These groups are sometimes referred to as "articles" to make reference to multiple sections easier.

Justice.⁷⁹ The new system had four tiers (two trial levels and two appellate levels). The amendment did away with many of the existing trial courts, such as the municipal and police courts, and most of their former jurisdiction was consolidated in the new lowest trial court, the district court.⁸⁰ Of course, not all of the lower courts were eliminated as official bodies. The county and fiscal courts were retained, but only for county administrative purposes. The new Judicial Article left intact the “nonjudicial powers and duties [conferred] upon the county judge and justices of the peace.”⁸¹ In other words, the county judge and the justices were stripped of their judicial jurisdiction, meaning their primary responsibilities were as members of the fiscal court. The county judge is now referred to as the county judge/executive.⁸² And justices of the peace are often called magistrates.⁸³

The amendment did little to the office of county clerk, though it did a great deal with respect to removal from office. The provision creating the office and providing for filling it by election, section 99, was not repealed or otherwise amended by the new article.⁸⁴ But the provision providing for removal of the clerks of all courts, including the county clerk, section 124,⁸⁵ was repealed.⁸⁶ A new

⁷⁹ KY. CONST. § 109.

⁸⁰ See generally 1974 Ky. Acts 168–171. This Act, of course, did not amend the constitution automatically. Instead, it proposed the amendment, which was voted on and approved at the general election of 1975. *General Election Results, Constitutional Amendments* (Nov. 4, 1975), <http://elect.ky.gov/SiteCollectionDocuments/Election%20Results/1973-1979/75const.pdf> [<https://perma.cc/8NLM-QS7A>] (listing language voted on and the votes). Upon approval of the amendment, it took effect on January 1, 1976. 1974 Ky. Acts 168–171.

⁸¹ KY. CONST. § 124 (repealed 1976).

⁸² See, e.g., KY. REV. STAT. ANN. § 67.710 (West 2016) (describing role of county judge/executive as “the chief executive of the county”); see also Ky. Op. Att’y Gen. 80-40 (1980) (noting that the General Assembly had passed a bill commanding the Reviser of Statutes to replace the words “county judge” with “County judge/executive” throughout existing statutes). According to the Attorney General, there is now “no such thing as a ‘county court,’” because “[t]he county judge was stripped of his judicial functions in the Judicial Reform [of 1975].” Ky. Op. Att’y Gen. 80-40 (1980). That Opinion of the Attorney General infers that the office of county judge/executive was *created* by the legislature. *Id.* The problem with this claim, however, is that the Kentucky Constitution retained the office of county judge even after the 1975 amendment, see KY. CONST. § 140, with the county judge to remain as “the chief executive, administrative and fiscal officer of the county,” *id.* § 124. The better interpretation is that the legislature created a new title for the county judge, and assigned new duties and powers to the office.

⁸³ KY. REV. STAT. ANN. § 67.042 (West 2016) (noting that justices elected in cities of the first class “shall be entitled a magistrate/representative”); *Polston v. King*, 965 S.W.2d 143, 144 (Ky. 1998) (referring to magistrates sitting on the fiscal court).

⁸⁴ See Ky. Const. § 99 (showing the section remained unchanged after 1975 amendment).

⁸⁵ KY. CONST. § 124 (repealed 1976) (“The Clerks of the Court of Appeals, Circuit and County Courts, shall be removable from office by the Court of Appeals, upon information and good cause shown. The court shall be judge of the facts as well as the law. Two-thirds of the members present must concur in the sentence.”).

⁸⁶ Compare *id.* (explaining how all clerks were to be removed “upon information and good cause shown” with two-thirds of the present members of the court concurrence), with KY. CONST. § 114 (“The clerks of the Circuit Court shall be removable from office by the Supreme Court upon good cause shown.”) and *id.* § 124 (repealing any section of the constitution existing before 1976 that conflicted with the provisions of sections 110 through 125).

provision about court clerks, the present section 114, was added to replace the old one, but it does not mention county clerks.⁸⁷ Thus, the county clerk's office and means of election were left intact, but one of the existing means of removal was taken out. This subject will be taken up in more detail below. Nor were the county clerk's duties and powers affected by the Judicial Article. Indeed, the clerk's duties and powers were never listed in any of the constitutions. Instead, those have been found elsewhere in the law, usually in statutes.

The county clerk has always been a record-keeper. Though the office's responsibilities originally included maintaining the judicial records of the county court,⁸⁸ this was not all. The office has traditionally kept property records and carried out other administrative tasks,⁸⁹ and its overall responsibilities increased and grew more complex over time.⁹⁰ That complexity has lessened somewhat, since the county court no longer has judicial responsibilities and thus the county clerks' responsibilities no longer extend to judicial records, but the clerks' duties are still numerous.

For example, in most places, the county clerk "at his option, shall be clerk of the fiscal court."⁹¹ Otherwise, the fiscal court may choose its clerk.⁹² The county clerk's primary responsibilities⁹³ now relate to recording and keeping legal instruments;⁹⁴ preparing tax bills⁹⁵ and collecting taxes and fees;⁹⁶ registering motor-vehicle titles⁹⁷

⁸⁷ See KY. CONST. § 114 (describing the various appointments and elections of clerks throughout the levels of the court system).

⁸⁸ See *Kinnison v. Carpenter*, 72 Ky. (9 Bush) 599, 602 (1873) ("It is the duty of the clerk of a county court to draft all the orders, and prepare such other writings as may be required of him by the presiding judge and necessary for the transaction of the business of the court.").

⁸⁹ IRELAND, COUNTY COURTS, *supra* note 32, at 92 n.17 ("The duties of the clerk of the county court included the recording of various legal documents such as deeds and wills, the selling of various licenses including those to operate billiards tables and sell watches, and the keeping of the county court order book."); IRELAND, LITTLE KINGDOMS, *supra* note 57, at 34 (noting under the 1850 constitution, the "clerk became not only a recorder of many kinds of legal documents but also an auditor of tax records and a compiler of statistics.").

⁹⁰ IRELAND, LITTLE KINGDOMS, *supra* note 57, at 34 (noting under the 1850 constitution that "the responsibilities of the office did grow more complex as the economy . . . matured").

⁹¹ KY. REV. STAT. ANN. § 67.120(1) (West 2016).

⁹² *Id.* § 67.120(2).

⁹³ For a more complete listing in one place of the county clerk's duties, see LEGISLATIVE RESEARCH COMM'N, DUTIES OF ELECTED COUNTY OFFICIALS, INFORMATIONAL BULLETIN NO. 114, at 51–69 (rev'd ed. 2016), <http://www.lrc.ky.gov/lrcpubs/ib114.pdf> [<https://perma.cc/MNL2-DLZJ>].

⁹⁴ KY. REV. STAT. ANN. § 382.300 (West 2016) (deeds, real estate mortgages, and powers of attorney); *id.* § 382.090 (real estate options); *id.* § 382.100 (contracts for the sale of real property); *id.* § 382.120 (affidavits of descent); *id.* § 382.080 (leases for certain rights and privileges); *id.* § 73.250 (maps, surveys, and plats); *id.* § 382.200 (alphabetical cross-index of the deeds, mortgages, and leases recorded); *id.* §§ 76.080, 376.230 (mechanics' and materialmen's liens); *id.* § 382.480 (federal tax and other liens); *id.* § 14A.2-040 (various corporate and other business entity filings, such as articles of incorporation and organization).

⁹⁵ *Id.* § 133.220(1)–(3) (requiring clerk to prepare county tax bills).

and issuing license plates;⁹⁸ issuing other licenses;⁹⁹ and registering voters,¹⁰⁰ acting as an election officer,¹⁰¹ and handling ballots and election machinery.¹⁰² The county clerk is also tasked with various functions related to marriage records, including issuing marriage licenses,¹⁰³ which is what led to Mrs. Davis's troubles.

II. KENTUCKY'S HISTORICALLY COMPREHENSIVE SYSTEM OF OFFICER REMOVAL

Historically, Kentucky has had a comprehensive two-tier removal system as prescribed by its constitution. The upper tier applies to all civil officers, from the governor on down to the meanest magistrate. The lower tier consists of methods applying to specific officers outside the executive branch, and includes legislators, judges, county officers, and court clerks. The end result for all of these processes is removal from office. The primary difference between the two tiers, other than to whom they apply, is that the upper tier can result not only in removal from office but also disqualification from future office. Although historically, every official outside the executive branch was subject to both tiers, this is no longer the case. As of 1976, the county clerk alone joined the rarified air of the statewide executive branch and is now removable only by the upper-tier methods.

⁹⁶ *Id.* § 134.805(5) (ad valorem tax on motor vehicles); *id.* § 138.460 (use tax on motor vehicles); *id.* § 142.010 (taxes on various documents, such as marriage licenses and real and personal property filings).

⁹⁷ *Id.* §§ 186A.035, 186A.040, 186A.042, 186A.125, 186A.165 (describing some of county clerks' duties with respect to motor vehicle registration).

⁹⁸ *Id.* § 186.230 (describing county clerks' duties as to the licensing of motor vehicles).

⁹⁹ *Id.* § 243.600 (county liquor licenses); *id.* § 359.050 (grain warehouseman's license); *id.* § 150.195(2), (7)–(9) (hunting and fishing licenses); *id.* §§ 231.000, 231.010, 231.040, 231.050 (licenses to operate "places of entertainment," including "roadhouse[s]," and "any place having therein or thereon any person engaging in the practice of being a medium, clairvoyant, soothsayer, palmist, phrenologist, spiritualist, or like activity, or one who, with or without the use of cards, crystal ball, tea leaves, or any other object or device, engages in the practice of telling the fortune of another").

¹⁰⁰ *Id.* §§ 116.045, 116.095 (describing some of clerks' duties with respect to voter registration).

¹⁰¹ *Id.* § 117.035 (describing clerks' role on county board of elections).

¹⁰² *Id.* § 117.135 (making county clerk custodian of voting machines); *id.* § 117.195 (making county clerk responsible for delivering voting machines and ballots); *id.* § 118.385(2) (requiring clerk to maintain voting records after an election); *id.* § 118.305 (describing duties as to ballot preparation); *id.* § 424.290 (publishing notice of election ballot).

¹⁰³ *Id.* § 402.220 (completed marriage certificates are filed with the county clerk); *id.* § 402.230 (county clerk to keep a register of such certificates); *id.* § 402.080 ("No marriage shall be solemnized without a license therefor. The license shall be issued by the clerk of the county in which the female resides at the time, unless the female is eighteen (18) years of age or over or a widow, and the license is issued on her application in person or by writing signed by her, in which case it may be issued by any county clerk."); *see also id.* § 402.100, (requiring that each county clerk "make available to the public the form prescribed by the Department for Libraries and Archives for the issuance of a marriage license"). The latter provision previously spoke explicitly of the county clerk "issuing a marriage license" and required the clerk or the clerk's deputy to sign the license. These requirements were removed from the statute in 2016. 2016 Ky. Acts ch. 132.

A. The Upper Tier: Once and Future Officers

The upper tier consists of two removal methods that apply to all civil officers: impeachment under sections 66 through 68, and conviction of certain significant crimes under sections 150 and 151. These methods are rarely invoked, are politically difficult to accomplish, or are limited in scope to significant (criminal) misconduct, and thus are unlikely to be used against a county clerk.

i. Impeachment

The most well-known removal method is impeachment: “The Governor and all civil officers shall be liable to impeachment for any misdemeanors in office”¹⁰⁴ Impeachment results in removal from office, but it may also result in the officer’s disqualification from all future public office.¹⁰⁵ Although the county clerk is a county-level official, rather than a state-level official like the governor or attorney general, impeachment is nevertheless an option for removal. It’s just not a very good one.

First, although impeachment is directed in part at “concern for the public good,” “any impeachment may involve political undercurrents.”¹⁰⁶ Indeed, some have argued that impeachment “is by nature, structure, and design an *essentially* political process,”¹⁰⁷ and, because it requires action by the whole General Assembly, it is a *difficult* political process. In Kentucky, the power of impeachment, that is, the power to issue articles of impeachment, belongs solely to the House of Representatives.¹⁰⁸ Articles of impeachment are like an indictment charging an officeholder with committing misconduct sufficient to require removal from office. Impeachments are then “tried by the Senate,” and conviction requires “the concurrence of two-thirds of the Senators present.”¹⁰⁹

¹⁰⁴ KY. CONST. § 68. Impeachment provisions had been included in each of Kentucky’s other constitutions also. See KY. CONST. of 1792, art. IV, §§ 1–3; KY. CONST. of 1799, art. V, §§ 1–3; KY. CONST. of 1850, art. V, §§ 1–3.

¹⁰⁵ KY. CONST. § 68 (“[The] judgment in such cases shall not extend further than removal from office, and disqualification to hold any office of honor, trust or profit under this Commonwealth . . .”).

¹⁰⁶ ANITA TAYLOR, LEGISLATIVE RESEARCH COMM’N, IMPEACHMENT IN KENTUCKY, INFORMATIONAL BULLETIN NO. 176, at 2 (1991), <http://www.lrc.ky.gov/lrcpubs/IB176.pdf> [<https://perma.cc/YRL4-YH96>].

¹⁰⁷ Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 5 (1989) (emphasis added) [hereinafter Gerhardt, *Constitutional Limits*].

¹⁰⁸ KY. CONST. § 66.

¹⁰⁹ *Id.* § 67.

This political difficulty is likely why “impeachment has been such a rare occurrence in Kentucky.”¹¹⁰ The most recent impeachment proceedings¹¹¹ were initiated in 1991 in a special session of the General Assembly against Ward “Butch” Burnette, the Commissioner of Agriculture, who had been convicted of theft by deception for having signed false time sheets for an employee.¹¹² The House issued articles of impeachment.¹¹³ Before the Senate could begin trying them, however, Burnette resigned and both houses voted to terminate the proceedings.¹¹⁴

According to the Legislative Research Commission, before 1991, “most historical accounts cite[d] only two impeachments in Kentucky,” specifically, the 1888 impeachment of James “Honest Dick” Tate and the 1916 impeachment of County Judge J.E. Williams.¹¹⁵ Tate was the infamous state treasurer who embezzled most of the state treasury (more than \$197,964), abandoned his office, disappeared, and was never found.¹¹⁶ He was impeached, tried, and found guilty, all in absentia.¹¹⁷ Judge Williams was accused of “corrupt misconduct and misdemeanors in . . . office,” which consisted of his improperly issuing arrest warrants, suspending or shortening criminal sentences, and failing to report fines

¹¹⁰ TAYLOR, *supra* note 106, at 1. Impeachment has also been rare at the federal level. As of 1989, “[s]ince the ratification of the Constitution, there ha[d] been only seventeen federal impeachment attempts—against thirteen federal judges, two Presidents, one United States Senator, and one cabinet officer—resulting in only five convictions.” Gerhardt, *Constitutional Limits*, *supra* note 107, at 10–11 (internal footnotes omitted). Since then, two more federal judges have been impeached. See *History of the Federal Judiciary*, FED. JUD. CTR., http://www.fjc.gov/history/home.nsf/page/judges_impeachments.html [<https://perma.cc/G4FB-E9K7>] (last visited Dec. 18, 2016). Of course, there has also been at least one more notorious impeachment since then, involving a sitting president. Michael J. Gerhardt, *Impeachment Defanged and Other Institutional Ramifications of the Clinton Scandals*, 60 MD. L. REV. 59, 72 (2001) [hereinafter Gerhardt, *Impeachment Defanged*].

¹¹¹ Here, “impeachment proceedings” means substantial steps taken by the House toward an impeachment. The term does not include the filing of petitions for impeachment that are never acted on by the House. See, e.g., *Collins v. Beshear*, No. 12-CV-347-KKC, 2013 WL 5350610, at *1–2 (E.D. Ky. Sept. 23, 2013) (detailing privately brought impeachment petition that failed to name the subjects of the petition and which the House refused to act on after it was referred to committee, presumably because it was frivolous).

¹¹² TAYLOR, *supra* note 106, at 14.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 13.

¹¹⁶ *Id.* For a full description of the charges against Tate, the articles of impeachment were reprinted in the Kentucky Senate Journal for the 1887–1888 session. KY. SENATE JOUR., Reg. Sess. of 1887, at 1048–51 (Mar. 24, 1888). Some of the charges were withdrawn and an additional charge was later added. *Id.* at 1120, 1142 (Mar. 29–30, 1888).

¹¹⁷ TAYLOR, *supra* note 106, at 13. Specifically, Tate was found guilty of all the remaining charges. KY. SENATE JOUR., Reg. Sess. of 1887, at 1144–50 (Mar. 24, 1888). A judgment of conviction removing Tate from office and disqualifying him from future offices was entered, and a certified copy was transmitted to the secretary of state. *Id.* at 1150–51, 1162–63.

he collected, among other charges.¹¹⁸ The House impeached him,¹¹⁹ but the Senate could not reach the two-thirds majority required for conviction.¹²⁰

In the course of preparing for the 1991 impeachment proceedings against Burnette, a third impeachment was discovered by then-Professor John Rogers,¹²¹ that of Thomas Jones, surveyor of Bourbon County, in 1803.¹²² Jones “was impeached for overcharging the state for work done, for failure to perform his duties, and for surveying the wrong tracts of land.”¹²³ He resigned during the trial, but the Senate nevertheless went forward with the proceedings, finding him guilty of some of the charges and permanently barring him from office.¹²⁴

Even with supplementation by Professor Rogers, the Legislative Research Commission’s historical account of impeachments is incomplete. There have, in fact, been at least four additional impeachment proceedings in Kentucky, though none resulted directly in removal by the Senate for various reasons. The oldest of these preceded Jones’s impeachment by two years. In 1801, impeachment proceedings were begun against Elijah Craig, a justice of the peace in Gallatin County.¹²⁵ Apparently, he was impeached, “and the charges supported,” but the matter “for want of time was not determined.”¹²⁶ Instead, Craig was later removed by other means, namely legislative address,¹²⁷ a process discussed below.

¹¹⁸ KY. HOUSE JOUR., Reg. Sess. of 1916, at 1085–1102 (Mar. 2, 1916) (laying out the twenty-charge articles of impeachment). His conduct has also been described generally as “misfeasance and malfeasance.” TAYLOR, *supra* note 106, at 13.

¹¹⁹ KY. HOUSE JOUR., Reg. Sess. of 1916, at 1101–02 (Mar. 2, 1916) (showing House adopting the proposed articles of impeachment).

¹²⁰ TAYLOR, *supra* note 106, at 13. The Senate’s Journal for 1916 consisted of three regular volumes and a separate, fourth volume dedicated to the impeachment proceedings. 3 KY. SENATE JOUR., Reg. Sess. of 1916, Index 40 (1916) (noting where the Senate’s procedural decisions were made but the impeachment proceedings themselves were reported in “Volume 4”). The title of the fourth volume is simply *Articles of Impeachment in Case of Commonwealth v. Williams*. 4 KY. SENATE JOUR., Reg. Sess. of 1916, at 1 (1916). The votes on the articles of impeachment took place on April 24, 1916. *Id.* at 66–80. Although there was a bare majority to convict on some of the charges, the required two-thirds vote was not met on any of them. *Id.*

¹²¹ TAYLOR, *supra* note 106, at 15 n.8 (describing how then-Professor John Rogers discovered an account of the impeachment while serving as special advisor to the House Impeachment Committee). Rogers is now Judge Rogers, who sits on the United States Court of Appeals for the Sixth Circuit.

¹²² *Id.* at 13.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ See 3 LITTELL, *supra* note 45, at 162–63 (laying out an act providing for the reimbursement of expenses to Craig’s impeachment petitioner and describing the proceedings against Craig summarily).

¹²⁶ *Id.* at 162.

¹²⁷ *Id.* at 99 (describing an act providing for the Commonwealth to pay the accuser’s costs, requiring Craig to pay his own costs, and stating that “he had been prosecuted . . . before the legislature, and the governor addressed for his removal”); Robert M. Ireland, *The Place of the Justice of the Peace in the Legislature and Party System of Kentucky, 1792–1850*, 13 AM. J. LEGAL HIST. 202, 209 n.20 (1969) (noting that “[t]he house voted . . . to withdraw articles of impeachment from the senate and to present an address to the governor seeking the removal”) [Ireland, *The Place of the Justice of the Peace*].

Another proceeding was begun by petition against William C. Rogers, the surveyor of Livingston County, in 1808.¹²⁸ The House impeached him, and the matter was referred to the Senate.¹²⁹ The Senate "resolved itself into a court of impeachment" to try the matter, and received Rogers' answer to the charges.¹³⁰ The Senate heard proof over two days, and the matter was "submitted to the decision of the court, without argument."¹³¹ The vote, however, was ultimately against removal, and Rogers was thus "acquitted and discharged from the . . . impeachment."¹³²

In 1847, John A. Duff, yet another surveyor, this time of Perry County, was impeached.¹³³ The county court had attempted to remove Duff from office as early as 1843, claiming that he had failed to post a performance bond, but he refused to vacate the office.¹³⁴ The matter wound through the circuit court for three years, when the court finally ruled against Duff.¹³⁵ He again refused to vacate the office.¹³⁶ He was finally impeached more than a year later, on allegations that, among other things, he extorted "a poor widow," engaged in corrupt surveying, and failed to post the required bond in several years.¹³⁷ In an attempt to terminate the proceedings, Duff resigned.¹³⁸ The managers of the prosecution, several members of the House, stated the prosecution should proceed.¹³⁹ The Senate concurred and ordered Duff to answer the articles of impeachment, with the matter to be taken up at the next legislative session.¹⁴⁰ If he failed to answer, the charges were to be treated as confessed.¹⁴¹

Duff's prosecution was taken back up at the next session.¹⁴² Duff moved to dismiss the proceedings, claiming they were improper because he was no longer in office,¹⁴³ but the Senate disagreed.¹⁴⁴ The prosecution continued, and some of the

¹²⁸ KY. HOUSE JOUR., Reg. Sess. of 1808, at 67 (1809) (stating that impeachment petition had been filed by James Logan and referred to a select committee for investigation).

¹²⁹ *Id.* at 79 (noting that the select committee's report was "concurred in," and reporting resolution that "Rodgers [sic] . . . be impeached upon the several charges specified in the said report" and that several members of the House were "appointed managers of the said impeachment").

¹³⁰ KY. SENATE JOUR., Reg. Sess. of 1809, at 39-41 (1810).

¹³¹ *Id.* at 48, 50.

¹³² *Id.* at 54.

¹³³ IRELAND, COUNTY COURTS, *supra* note 32, at 101-02.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 102; KY. SENATE JOUR., Reg. Sess. of 1846, at 437-51 (Jan. 13, 1847) (reporting receipt of the articles of impeachment and reprinting articles of impeachment).

¹³⁸ KY. SENATE JOUR., Reg. Sess. of 1846, at 450 (Jan. 13, 1847).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 451, 453.

¹⁴¹ *Id.* at 453.

¹⁴² See KY. SENATE JOUR., Reg. Sess. of 1847, at 371 (Jan. 11, 1848).

¹⁴³ *Id.* at 383-84 (Feb. 15, 1848).

¹⁴⁴ *Id.* at 384 (Feb. 16, 1848).

charges were dismissed.¹⁴⁵ Although Duff was acquitted of most of the remaining charges,¹⁴⁶ he was found guilty of one: failing to post his bond in five different years, which was a misdemeanor.¹⁴⁷ The Senate entered a judgment finding him guilty of that one offense, but stating, because he had resigned, “the judgment of the Senate [wa]s not deemed necessary on the question of removal.”¹⁴⁸ The judgment said nothing about disqualifying Duff from holding future office, despite the Senate’s option to do so,¹⁴⁹ but it did order him to pay costs.¹⁵⁰

One of the more interesting examples, at least given the source of his troubles and his prior difficulties with the General Assembly, was the impeachment of Benjamin Sebastian, one of the first three judges appointed to the Court of Appeals in 1792.¹⁵¹ Sebastian was involved in the so-called Spanish Conspiracy, in which James Wilkinson, a former general in the Continental Army and eventual first Governor of the Louisiana Territory, sought to have Kentucky secede from the United States and join Spain in the 1780s.¹⁵² Sebastian unquestionably had been involved in negotiations with Spain to obtain favorable trading terms (Spain, then possessing New Orleans, had a monopoly on trade up the Mississippi River).¹⁵³ But it was later revealed that he was directly involved in Wilkinson’s intrigues.¹⁵⁴ Apparently, he was given a pension by Spain of \$2,000 per year as a result, despite sitting as a judge in Kentucky,¹⁵⁵ in violation of his oaths.¹⁵⁶

Sebastian’s role eventually came to light in 1806 during the Aaron Burr Conspiracy, a possibly treasonous cabal led by former Vice President (and all-

¹⁴⁵ *Id.* at 386 (Feb. 21, 1848).

¹⁴⁶ *Id.* at 390–91.

¹⁴⁷ *Id.* at 386–87.

¹⁴⁸ *Id.* at 391.

¹⁴⁹ One member of the minority entered an opinion explaining his not-guilty vote, stating that he believed the evidence was insufficient. *Id.* But he also stated that “[n]otwithstanding [Duff’s] resignation, it is competent for the Senate to enquire [sic] into the truth of the charges against him, and pronounce judgment of disqualification to hold officer hereafter, if he shall be found guilty.” *Id.* at 392.

¹⁵⁰ *Id.* at 391.

¹⁵¹ See LOWELL H. HARRISON & JAMES C. KLOTTER, A NEW HISTORY OF KENTUCKY 67 (1997) (noting Sebastian was one of the first three judges); R. C. Richardson, *Court of Appeals: An Historic Outline from the Date of its Organization, with Character Sketches of its Judges, Reference to the Most Important Questions Heard and Decided, and Reminiscences of its Bar*, in THE LAWYERS AND LAWMAKERS OF KENTUCKY 44, 66 (H. Levin ed., Chicago, Lewis Publishing Co. 1897) (noting Caleb Wallace, Harry Innes, and Benjamin Sebastian constituted Kentucky’s first Court of Appeals). The General Assembly had attempted to remove Sebastian in 1795 through a different process. This proceeding is recounted below. See *infra* note 331 and accompanying text.

¹⁵² See HARRISON & KLOTTER, *supra* note 151, at 59–60, 74.

¹⁵³ *Id.* at 74.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*; see also KY. HOUSE JOUR., Reg. Sess. of 1806, at 72–73, 86 (Nov. 22, 1806).

¹⁵⁶ See THOMAS D. CLARK, A HISTORY OF KENTUCKY 292 (6th ed. 1988) (noting that Sebastian “had definitely violated every oath he had taken to Kentucky”).

around scoundrel¹⁵⁷) Aaron Burr, and involving Wilkinson, to carve out a new nation in North America from parts of the Louisiana Purchase.¹⁵⁸ Burr had travelled to Kentucky in 1805, where some of his activities supposedly occurred.¹⁵⁹ When Sebastian's dealings were revealed, impeachment proceedings were initiated.¹⁶⁰ He was essentially charged with committing quasi-treasonous acts and receiving a foreign pension while also sitting as a judge in Kentucky.¹⁶¹

Sebastian initially sought to challenge the allegations and requested time to put together evidence.¹⁶² The House declined the request¹⁶³ and only a short time later heard substantial evidence showing that Sebastian had, in fact, been receiving the pension.¹⁶⁴ Rather than face the proceedings, Sebastian resigned from the court.¹⁶⁵ Nevertheless, the House continued its investigation, calling Judge Harry Innes¹⁶⁶ to testify.¹⁶⁷ Judge Innes admitted his and Sebastian's involvement in negotiations with Spain "for commercial privileges, and finally for forcible separation from the rest of the confederacy."¹⁶⁸ The House committee concluded that Sebastian had been guilty as charged.¹⁶⁹ The Committee's "report was unanimously agreed to by

¹⁵⁷ John B. Cassoday, *James Kent and Joseph Story*, 12 YALE L.J. 146, 152 (1903) (recounting story of Chancellor Kent calling Burr a scoundrel to his face); see also Lin-Manuel Miranda, *The Story of Tonight (Reprise)*, in HAMILTON (2015) ("You are the worst, Burr!").

¹⁵⁸ See HARRISON & KLOTTER, *supra* note 151, at 85 (noting that details of the Spanish Conspiracy emerged during the Burr Conspiracy and led to Sebastian's difficulties).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*; see KY. HOUSE JOUR., Reg. Sess. of 1806, at 72–73 (Nov. 22, 1806); KY. HOUSE JOUR., Reg. Sess. of 1806, at 86 (Nov. 27, 1806).

¹⁶¹ KY. HOUSE JOUR., Reg. Sess. of 1806, at 72–73 (Nov. 22, 1806).

¹⁶² See *id.* at 86 (Nov. 27, 1806) (reproducing letter from Sebastian to the House in which he requested time to gather witnesses and evidence).

¹⁶³ *Id.* at 87.

¹⁶⁴ See *id.* at 96–114 (Dec. 2, 1806) (reproducing testimony and other evidence).

¹⁶⁵ See *id.* at 114 (stating "that the said Sebastian has resigned his office of judge of the Kentucky Court of Appeals"); 1 HENRY ADAMS, HISTORY OF THE UNITED STATES OF AMERICA DURING THE SECOND ADMINISTRATION OF THOMAS JEFFERSON 293 (1890) (stating he "instantly resigned").

¹⁶⁶ Sources differ on the spelling of the judge's last name, but both names refer to the same person. Compare Richardson, *supra* note 151, at 66 ("Innes"), with ADAMS, *supra* note 165, at 293 ("Innis").

¹⁶⁷ See ADAMS, *supra* note 165, at 293 ("The committee took no notice of this admission of guilt, but summoned Judge Innis to testify.")

¹⁶⁸ Z. F. SMITH, THE HISTORY OF KENTUCKY 431 (4th ed. 1901); see also ADAMS, *supra* note 165, at 293 ("Very reluctantly Innis appeared before the committee and began his evidence, but broke down in the attempt, and admitted the truth of what had been alleged.")

¹⁶⁹ The Committee reported as follows:

Whereupon your committee does not hesitate to declare as their opinion, that the information given to the house of representatives is substantially true, and correctly detailed—and that the said Judge Sebastian is guilty of having for several years received from the Spanish government, a pension paid in cash annually, to the amount of two thousand dollars.

the House,¹⁷⁰ meaning Sebastian was as good as impeached, but no further action was taken because he had resigned.¹⁷¹

This brings the total number of impeachments up to at least eight.¹⁷² Even so, that there have been only eight such events in over 220 years of statehood shows it is a rare practice. This rarity can be explained by more than just political unwillingness. No doubt, politics can create a kind of blindness for the House that reduces the incentive to even begin the impeachment process. Prosecuting other political actors for impeachment is an excellent way to make political enemies, after all, and thus the only proceedings likely to be brought by members of the House are those all but guaranteed to succeed.

That said, Kentucky does not require the process to be started by the House, just in it. By default, impeachment “may be instituted by the House of Representatives without a petition from any person.”¹⁷³ But “[a]ny person may, by written petition to the House of Representatives, signed by himself, verified by his own affidavit and the affidavits of such others as he deems necessary, and setting forth the facts, pray the impeachment of any officer.”¹⁷⁴

Again, there may be political pressure to ignore such private petitions. Despite the power of political spin doctors, however, it must be difficult at some basic level to ignore allegations that have been publicly thrust in your face. Although the House would not be required to proceed on it, a private petition alleging grievous

Your committee further report as their opinion, that whilst Judge Sebastian was in the exercise of his office in this state, and drawing his annual salary therefrom he was employed in carrying on with the agents of the Spanish government, an illicit, unjustifiable, and highly criminal intercourse, subversive of every duty he owed to the constituted authorities of our country, and highly derogatory to the character of Kentucky.

KY. HOUSE JOUR., Reg. Sess. of 1806, at 114 (Nov. 29, 1806).

¹⁷⁰ SMITH, *supra* note 168, at 431; *see also* KY. HOUSE JOUR., Reg. Sess. of 1806, at 114 (Nov. 29, 1806) (noting the report was unanimously agreed to by the fifty-three members of the House then present).

¹⁷¹ *See* KY. HOUSE JOUR., Reg. Sess. of 1806, at 114 (Nov. 29, 1806) (noting resolution “[t]hat any further proceedings to effect the removal of the said Sebastian from office is rendered unnecessary”).

¹⁷² *See supra* notes 110–171 and accompanying text (discussing the impeachment proceedings against (1) Ward “Butch” Burnette, (2) Judge “Honest Dick” Tate, (3) County Judge J.E. Williams, (4) Thomas Jones, (5) Elijah Craig, (6) William C. Rogers, (7) John A. Duff, and (8) Judge Benjamin Sebastian).

¹⁷³ KY. REV. STAT. ANN. § 63.020 (West 2016).

¹⁷⁴ *Id.* § 63.030(1).

crimes or misconduct in office would be hard to ignore. At the same time, a privately available petition process all but invites scurrilous or specious claims.¹⁷⁵

Fortunately, serious disincentives exist to bringing a private impeachment action. Specifically, a private party proceeding by petition faces substantial risk of paying costs at almost every step. A petition is first referred to a committee to investigate the allegations, which may include the calling of witnesses.¹⁷⁶ If the committee recommends against proceeding and the full House concurs and thus chooses not to proceed, “the petitioner shall be liable to witnesses and to the accused for the costs of investigation before the committee.”¹⁷⁷ If the committee recommends in favor of proceeding, it is to draft articles of impeachment, which are submitted to the whole House.¹⁷⁸ At that point, the House may exercise its power of impeachment. If it declines to do so, there is no statutory provision for the payment of costs. If it does impeach, the matter heads to the Senate for trial.¹⁷⁹ Then, if the public official is acquitted, “the petitioner shall pay the costs of the accused.”¹⁸⁰ And the costs may be enforced in court,¹⁸¹ which presumably may reduce the award to a money judgment.

But as noted above, successful impeachment has been exceedingly rare in Kentucky. Thus, the chances of a successful petition are low, meaning the chances of being forced to pay costs are high. Though the General Assembly has in the past covered the costs of proceedings that have defaulted onto the petitioner,¹⁸² such a practice is now unlikely, if not forbidden by the constitutional limits on special legislation.¹⁸³

¹⁷⁵ See *Collins v. Beshear*, No. 12-CV-347-KKC, 2013 WL 5350610, at *2 (E.D. Ky. Sept. 23, 2013) (detailing a privately brought impeachment petition that failed to name the subjects of the petition and which the House refused to act on after it was referred to committee); *Flint v. Ky. Legislative Ethics Comm’n*, No. 2014-CA-000745-MR, 2015 WL 2152871, at *1 (Ky. Ct. App. May 8, 2015) (noting an attempt “to initiate impeachment proceedings against the Governor of Kentucky, five Kentucky Supreme Court Justices, five Kentucky Court of Appeals Judges, five Jefferson Circuit Court Judges, and one Jefferson District Court Judge” that was not acted on); *cf. Campbell v. Commonwealth*, No. 2006-CA-002201-MR, 2007 WL 3037909, at *2 (Ky. Ct. App. Oct. 19, 2007) (discussing petition for impeachment filed with the Boone Circuit Court, which was the wrong forum).

¹⁷⁶ KY. REV. STAT. ANN. § 63.030(2) (West 2016).

¹⁷⁷ *Id.* § 63.070(1).

¹⁷⁸ *Id.* § 63.035(1).

¹⁷⁹ KY. CONST. § 67.

¹⁸⁰ KY. REV. STAT. ANN. § 63.070(2) (West 2016).

¹⁸¹ See *id.* § 63.070(3) (“Costs taxed pursuant to this section may be recovered on motion, after five (5) days’ notice, in a Circuit Court.”).

¹⁸² See, e.g., 3 LITTELL, *supra* note 45, at 162 (reprinting an act providing for the reimbursement of expenses to Elijah Craig’s impeachment petitioner and describing the proceedings summarily).

¹⁸³ See KY. CONST. § 58 (“The General Assembly shall neither audit nor allow any private claim against the Commonwealth, except for expenses incurred during the session at which the same was allowed; but may appropriate money to pay such claim as shall have been audited and allowed according to law.”); see also *id.* § 59 (barring special legislation “to remit fines, penalties or forfeitures”).

Additionally, there are practical difficulties for the impeachment process. The General Assembly only meets for a short time each year.¹⁸⁴ The only way for the General Assembly to meet as a whole body between sessions is by a special session, which may only be called by the Governor and is limited to subjects proclaimed by the Governor.¹⁸⁵ Generally speaking, such sessions are expensive¹⁸⁶ and rare as a result. Though at least one past Governor has been willing to call such a session for an impeachment,¹⁸⁷ the misconduct in question would have to be significant, or obviously criminal, to justify a special session. Thus, even if an official commits impeachable misconduct when the General Assembly is adjourned, that official would likely continue in office at least until the next session. For this reason, impeachment has been described as a “tardy remedy” that is “wholly inadequate” in addressing many types of misconduct.¹⁸⁸

Further, the Constitution limits impeachment to “misdemeanors in office.”¹⁸⁹ This suggests that a crime is required for impeachment, especially since the same provision goes on to say, “the party convicted [of an impeachment] shall, nevertheless, be subject and liable to indictment, trial and punishment by law.”¹⁹⁰

There has been some argument that a county clerk who declines to carry out his or her duties of office has committed a crime, namely, official misconduct, which is

¹⁸⁴ See *id.* § 42 (allowing only a sixty-day regular session in even-numbered years and setting a hard-date limit for sessions in each kind of year); see also *id.* § 36 (allowing only a thirty-day legislative session in odd-numbered years). Once articles of impeachment are issued, the Senate is not limited in how long it sits. See *id.* § 42 (“[T]hese limitations as to length of sessions shall not apply to the Senate when sitting as a court of impeachment.”).

¹⁸⁵ See *id.* § 80 (“[The Governor] may, on extraordinary occasions, convene the General Assembly at the seat of government, or at a different place, if that should have become dangerous from an enemy or from contagious diseases. In case of disagreement between the two Houses with respect to the time of adjournment, he may adjourn them to such time as he shall think proper, not exceeding four months. When he shall convene the General Assembly it shall be by proclamation, stating the subjects to be considered, and no other shall be considered.”).

¹⁸⁶ See Phil Pendleton, *Special Session Costs Taxpayers Thousands*, WKYT (Apr. 16, 2012, 4:44 PM), http://www.wkyt.com/home/headlines/Special_Session__147656795.html [https://perma.cc/G72E-2ESA] (noting a special session in 2012 cost over \$60,000 per day); see also Jack Brammer, *2015 Legislative Session Expected to Cost Kentucky Taxpayers \$3.56 Million*, LEXINGTON HERALD-LEADER (Jan. 5, 2015, 5:46 PM), <http://www.kentucky.com/news/politics-government/article44544786.html> [https://perma.cc/6WDF-7DT6] (noting that the General Assembly costs over \$65,000 per day when it sits as of 2015, albeit in regular session).

¹⁸⁷ See TAYLOR, *supra* note 106, at 14 (explaining that a special session was called for the impeachment of Ward “Butch” Burnette, the Commissioner of Agriculture, who had been convicted of theft by deception).

¹⁸⁸ *Commonwealth v. Rowe*, 66 S.W. 29, 30 (Ky. 1902).

¹⁸⁹ KY. CONST. § 68.

¹⁹⁰ *Id.*

a misdemeanor offense.¹⁹¹ Surely, such a crime would satisfy the Constitution's requirement of a misdemeanor in office, since this offense can only be committed in office. And if the General Assembly impeached and convicted a clerk of such conduct, removal would be appropriate. But the General Assembly seems unlikely to pursue such charges, at least in light of historical precedent, which shows that impeachments tend to follow either significant alleged misconduct or already proven (by ordinary criminal prosecution) lesser misconduct.¹⁹² Even so, many kinds of conduct might arguably justify removal of a government official, especially a county-level official, but not rise to the level required for impeachment.

ii. Vote Buying, Felonies, and High Misdemeanors—Oh My!

The Kentucky Constitution also has a pair of provisions, sections 150 and 151, affecting an official's right to office in the face of three general types of criminal convictions—those concerning corrupt election practices (primarily vote buying), felonies, and high misdemeanors. Like impeachment, these provisions apply to all public officers. The first of these provisions, section 150, states in relevant part:

Every person shall be disqualified from holding any office of trust or profit for the term for which he shall have been elected who shall be convicted of having given, or consented to the giving, offer or promise of any money or other thing of value, to procure his election, or to influence the vote of any voter at such election; . . . and it shall be the duty of the General Assembly to provide for the enforcement of the provisions of this section. All persons shall be excluded from office who have been, or shall hereafter be, convicted of a felony, or of such high misdemeanor as may be prescribed by law, but such disability may be removed by pardon of the Governor. The privilege of free suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon, from power, bribery, tumult or other improper practices.¹⁹³

¹⁹¹ See Hillary Thornton, 'Official Misconduct Charge' Against Rowan County Clerk Kim Davis Referred to Attorney General, WKYT (Aug. 28, 2015, 11:05 AM), <http://www.wkyt.com/home/headlines/Supporters-opponents-gather-outside-Rowan-County-clerks-office-323227931.html> [https://perma.cc/EKX9-KRJH]; KY. REV. STAT. ANN. § 522.020(2) (West 2016) ("Official misconduct in the first degree is a Class A misdemeanor."); *id.* § 522.030(2) ("Official misconduct in the second degree is a Class B misdemeanor.").

¹⁹² See generally *supra* notes 110–171 and accompanying text.

¹⁹³ KY. CONST. § 150.

Essentially, this provision temporarily disqualifies from public office any person who is convicted of vote buying,¹⁹⁴ and permanently excludes (absent a pardon) from office anyone convicted of a felony or of any “high misdemeanor” designated by the legislature.¹⁹⁵ Of course, the temporary exclusion for vote buying can be converted to a permanent one by designating that crime as a felony or as a high misdemeanor that forfeits office, as the General Assembly has now done.¹⁹⁶ Thus, like with impeachment, section 150 can have an effect on an officer’s ability to hold future office.

The second of these provisions, section 151, empowers (indeed, commands) the General Assembly to “provide suitable means for depriving of office any person who, to procure his nomination or election, has, in his canvass or election, been guilty of any unlawful use of money, or other thing of value, or has been guilty of

¹⁹⁴ The drafters of the 1891 constitution spoke extensively of “bribery at elections,” though they did so in the same breath that they spoke of buying and selling votes. 2 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION ASSEMBLED AT FRANKFORT, ON THE EIGHTH DAY OF SEPTEMBER, 1890, TO ADOPT, AMEND OR CHANGE THE CONSTITUTION OF THE STATE OF KENTUCKY 2073 (Frankfort, Ky., E. Polk Johnson 1891) [hereinafter 2 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES]. The phrase *vote buying* is used here, rather than *bribery*, because it is more specific and more accurately captures the language used in section 150, namely, “having given, or consented to the giving, offer or promise of any money or other thing of value, to procure his election, or to influence the vote of any voter at such election.” KY. CONST. § 150. Bribery, as a broader category, is addressed expressly in section 151, along with other misconduct. KY. CONST. § 151.

¹⁹⁵ KY. CONST. § 150.

¹⁹⁶ See KY. REV. STAT. ANN. § 119.205(1)–(2) (West 2016) (making vote buying and selling a Class D felony).

fraud, intimidation, bribery, or any other corrupt practice."¹⁹⁷ Similar provisions were also included in the other Kentucky constitutions.¹⁹⁸

As to vote buying and felony convictions, removal should be automatic, that is, section 150 would seem to be self-executing,¹⁹⁹ although the General Assembly is still empowered to provide for enforcement of the section. Upon conviction for vote buying, the person is "disqualified from holding any office of trust or profit for the term for which he shall have been elected."²⁰⁰ This is not a permanent disqualification, limited as it is to the term to which the person is elected, and does not appear to apply to future office.²⁰¹ A felony conviction simply excludes the person from office.²⁰² This is a permanent disqualification, unless the governor pardons the convicted person.²⁰³

Under both provisions, removal may only be premised on a conviction, rather than the underlying illegal act. Such provisions are common throughout the United

¹⁹⁷ KY. CONST. § 151. This extends to "acts done by others with his authority, or ratified by him." *Id.*

¹⁹⁸ KY. CONST. of 1792, art. VIII, § 2 ("Laws shall be made to exclude from office and from suffrage, those who shall thereafter be convicted of bribery, perjury, forgery, or other high crimes or misdemeanors; the privilege of free suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practices."); KY. CONST. of 1792, art. I, § 27 ("Each Senator, Representative, and sheriff shall, before he be permitted to act as such, take an oath or make affirmation that he hath not, directly or indirectly, given or promised any bribe or treat to procure his election to the said office; and every person shall be disqualified from serving as a Senator, Representative, or sheriff for the term for which he shall have been elected, who shall be convicted of having given or offered any bribe or treat, or canvassed for the said office."); KY. CONST. of 1799, art. VI, § 3 ("Every person shall be disqualified from serving as Governor, Lieutenant Governor, Senator, or Representative, for the term for which he shall have been elected, who shall be convicted of having given or offered any bribe or treat to procure his election."); KY. CONST. of 1799, art. VI, § 4 ("Laws shall be made to exclude from office and from suffrage those who shall thereafter be convicted of bribery, perjury, forgery, or other high crimes or misdemeanors. The privilege of free suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practices."); KY. CONST. of 1850, art. VIII, § 3 ("Every person shall be disqualified from holding any office of trust or profit, for the term for which he shall have been elected, who shall be convicted of having given or offered any bribe or treat to procure his election."); KY. CONST. of 1850, art. VIII, § 4 ("Laws shall be made to exclude from office and from suffrage those who shall thereafter be convicted of bribery, perjury, forgery, or other crimes or high misdemeanors. The privilege of free suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practices.");

¹⁹⁹ See *Brooks v. Collett*, 178 S.W.2d 48, 48 (Ky. 1944) (holding that finality of felony conviction rendered removal proceeding moot); Ky. Op. Att'y Gen. 78-838 (Dec. 8, 1978) (opining that a felony conviction vacates office by itself).

²⁰⁰ KY. CONST. § 150.

²⁰¹ Cf. *Lovely v. Cockrell*, 35 S.W.2d 891, 892 (Ky. 1931) ("The act does not confer upon the courts the power to declare that a candidate who has violated any of its provisions shall be ineligible in the future to accept nominations or hold office.").

²⁰² KY. CONST. § 150.

²⁰³ See *id.* (qualifying the disqualification by stating that "such disability may be removed by pardon of the Governor").

States.²⁰⁴ Kentucky differs from many of those states, however, because it does not permit removal upon mere conviction, despite the Constitution's language.²⁰⁵ Instead, the conviction must be final on appeal to effect removal.²⁰⁶ This has created the unusual situation where some officials have continued to run their offices and to draw their salaries after conviction, even while incarcerated.²⁰⁷

²⁰⁴ See, e.g., WASH. REV. CODE ANN. § 9.92.120 (West 2016) ("The conviction of a public officer of any felony or malfeasance in office shall entail, in addition to such other penalty as may be imposed, the forfeiture of his or her office, and shall disqualify him or her from ever afterward holding any public office in this state."); see also *State ex rel. Zempel v. Twitchell*, 367 P.2d 985, 991 (Wash. 1962) ("[A]n overwhelming majority of cases from other jurisdictions have taken the position that the term 'conviction' . . . means simply conviction in a trial court.").

²⁰⁵ See *Twitchell*, 367 P.2d at 991 (noting that Kentucky is in a minority of states requiring a final conviction and citing examples).

²⁰⁶ *City of Pineville v. Collett*, 172 S.W.2d 640, 642 (Ky. 1943).

²⁰⁷ See *Former Sheriff Paul Browning Granted Parole*, KY. NEW ERA (Hopkinsville, Ky.), Oct. 30, 1985, at 1B (describing case of Paul Browning, a sheriff who was convicted of conspiracy to murder a political rival but who continued to run his office from prison until removed by the governor); Bill Estep, *Former Clay Circuit Judge, Magistrate Sentenced in Vote-Buying Case*, LEXINGTON HERALD-LEADER (Mar. 11, 2011, 12:00 AM), <http://www.kentucky.com/news/local/crime/article44083659.html> [<https://perma.cc/9HV7-US5X>] (noting case of a judge-executive "who denied wrongdoing, [and] remain[ed] in office as he appeal[ed]"); Ronnie Ellis, *Governor May Have Power to Remove Jailer Accused of Misconduct*, SENTINEL ECHO (London, Ky.), (Apr. 6, 2009), http://www.sentinel-echo.com/archives/governor-may-have-power-to-remove-jailer-accused-of-misconduct/article_b5aff4d5-f4f3-5dca-b53f-b5d299fa634e.html [<https://perma.cc/YC37-7RHT>] (reporting that "Barren County Jailer Leland Cox refuses to step down from his \$84,595 a year position" after entering a guilty plea).

One of the more interesting instances was in Knott County. In 2003, County Judge-Executive Donnie Newsome was convicted of vote buying but continued to hold office and conduct county business while incarcerated. John Cheves, *Judge Conducts Business from Jail*, LEXINGTON HERALD-LEADER (Nov. 9, 2003), <https://web.archive.org/web/20031125025420/http://www.kentucky.com/mld/kentucky/7219113.htm> [<https://perma.cc/N3DV-S5G6>]. As discussed above, although a felony conviction can justify an office holder's removal from office, that can only happen when the conviction is final on appeal. Newsome was thus able to stay in office at least several months after his conviction, at which point he resigned. See Josh Kegley, *Federal Appeals Court Upholds Conviction of Knott Judge-Executive in Vote-Buying Case*, LEXINGTON HERALD-LEADER (Sept. 11, 2012, 8:17 PM), <http://www.kentucky.com/news/politics-government/article44376504.html> [<https://perma.cc/T6H6-RH39>] (noting Newsome served ten months before he resigned); Bill Estep, *Imprisoned Knott County Judge-Executive Is Tossed Out of Office*, LEXINGTON HERALD-LEADER (Mar. 8, 2013, 2:32 PM), <http://www.kentucky.com/news/politics-government/article44409093.html> [<https://perma.cc/S8J3-AG5D>] (noting that Newsome "held on to the office and salary of judge-executive throughout his 16-month sentence, resigning only when an appeals court upheld his conviction—after he'd served his sentence and returned to work"); see also Dori Hjalmarson, *2 Felons in Running for Knott Judge-Executive*, LEXINGTON HERALD-LEADER (Jan. 29, 2010, 12:00 AM), <http://www.kentucky.com/latest-news/article44021757.html> [<https://perma.cc/32GG-BD9E>] (noting that Newsome "resigned in 2005 after he lost an appeal in his vote-fraud case").

In theory, there are a couple of partial remedies when the officer is incarcerated. For example, according to a 1943 case, a convicted clerk could be ordered to “surrender the keys” to the clerk’s office and to surrender any records relating to the job.²⁰⁸ The rationale was that “there is no need for him to have them in his possession, since he is unable to perform his duties as clerk,”²⁰⁹ and that “an officer who is confined in jail is not in a very good position to insist he can be of service to the city.”²¹⁰

And the officer can be deprived of a salary for not carrying out the job’s required duties.²¹¹ Indeed, the Constitution expressly gives the General Assembly the power to make deductions from the salary of a public official “for neglect of official duties.”²¹² Acting under this provision, the General Assembly has provided for the deduction, on a per diem basis, from the salary of any state and county officer²¹³ who “fails or neglects to perform his duties, without a good excuse.”²¹⁴ The statute contemplates that an officer *pro tempore* will be appointed to fill in for the neglectful officer.²¹⁵

The Knott County situation is interesting because Newsome’s successor, Randy Thompson, was also convicted of vote buying and refused to step down from office. Estep, *Imprisoned Knott County Judge-Executive Is Tossed Out of Office*, *supra*; Martha Neil, *Jailed Ky. Judge-Executive Hasn’t Resigned; Will He, Like Predecessor, Hold Job in Prison?*, A.B.A. J., (Dec. 10, 2012, 5:11 PM), http://www.abajournal.com/news/article/jailed_ky_judge-executive_hasnt_resigned_will_he_like_predecessor_hold_job/ [https://perma.cc/6EUV-XW9A] (noting that Newsome had continued to hold his position until released from prison, when he resigned, and that his successor as County Judge-Executive, Randy Thompson, was also convicted and refused to resign). And, while Thompson’s appeal was pending, both he and Newsome ran again for the office in 2010. Hjalmarson, *supra*. This was possible because Thompson’s conviction was not yet final, since his appeal was pending, and Newsome’s civil rights had been restored by the governor. *Id.* Thompson won. Kegley, *supra*. Unlike Newsome, Thompson did not resign when his conviction became final, and locally, the conviction apparently was not seen as automatically vacating his office. Estep, *Imprisoned Knott County Judge-Executive Is Tossed Out of Office*, *supra*. Instead, a prosecutor went to court for an order of removal based on the conviction. *Id.*

²⁰⁸ *Collett*, 172 S.W.2d at 642.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² KY. CONST. § 235 (“The salaries of public officers shall not be changed during the terms for which they were elected; but it shall be the duty of the General Assembly to regulate, by a general law, in what cases and what deductions shall be made for neglect of official duties. This section shall apply to members of the General Assembly also.”).

²¹³ The provision purports to apply to “any officer paid in whole or in part out of the State Treasury or by any county.” KY. REV. STAT ANN. § 61.120(1) (West 2016). The only problem with this is that the procedural mechanism designating which judge or court is to enter the deduction order only names certain public officers (county attorney, county judge/executive, and Commonwealth’s attorney). *Id.* § 61.130. It is thus unclear how to proceed against other officers, such as the sheriff or county clerk; as to them, the deduction provision may be a dead letter.

²¹⁴ *Id.* § 61.120(1).

²¹⁵ *Id.* (“So much of the amount deducted as is necessary shall be applied to the payment of the special officer who performs the duty of the officer so failing.”).

If these remedies were used, the officer would retain the title and right to the office but would not receive its emoluments, which would effectively remove the officer. To some extent, that this approach has not been employed where the officer was incarcerated appears to be a result of ignorance of the law, at least where prosecutors or other officials, as reported in news stories, claim there is no remedy until the conviction becomes final.

But perhaps the 1943 case allowing an officer to be ordered to give up the tools of office simply no longer reflects how modern state and county offices work. The application of both of these partial remedies, surrendering the office or decreasing an officer's salary, depends on the officer being unable to perform the duties of the office while incarcerated. Obviously, the officer cannot perform some duties personally while incarcerated. A clerk, for example, would not be able to personally receive or file documents at a courthouse or other official place of business. But most duties do not have to be performed by the officer personally. Indeed, it is the rare state officer who exclusively does the work personally. Most officers employ deputies to assist them or to act in their stead, allowing officers to act primarily as managers of the office.²¹⁶ Through their deputies, they can, in essence, continue to run their offices from jail.²¹⁷

Though the felony and vote-buying provisions appear to be self-executing, they have not always been treated that way. For example, in 2012, Knott County Judge Randy Thompson, whose felony conviction had become final, refused to vacate his office.²¹⁸ Eventually, the fiscal court quit paying his salary, and he threatened legal action, forcing the county to file suit for a formal declaration removing him from office.²¹⁹ Thompson actually fought the removal attempt, according to news reports, claiming the suit filed to oust him had to be dismissed, and his removal had to be decided by a jury.²²⁰ His attempt failed, and the court declared his office vacant.²²¹

²¹⁶ See, e.g., Cheves, *supra* note 207 (noting that a deputy judge-executive and the fiscal court were handling daily operations while Judge-Executive Newsome was in prison).

²¹⁷ *Id.*

²¹⁸ Neil, *supra* note 207 (noting that “Thompson . . . said he won’t resign”).

²¹⁹ Amelia Holliday, *Ouster Suit Filed Against Knott Judge-Executive*, HAZARD HERALD (Feb. 13, 2013), 2013 WLNR 3628372.

²²⁰ *Judge Executive Files Response to Lawsuit*, WYMT-TV (Feb. 28, 2013, 11:10 PM), <https://web.archive.org/web/20130304021724/http://www.wkyt.com/wymt/home/headlines/Judge-executive-files-response-to-lawsuit-194102531.html> [<https://perma.cc/V6SE-GSS7>]; see also *Knott County Judge Removed from Office*, FLOYD COUNTY TIMES (Mar. 8, 2013), 2013 WLNR 5799767 (“Floyd County Commonwealth’s Attorney Brent Turner, acting on behalf of the commonwealth, filed a lawsuit last month to remove Thompson from office based on his status as a convicted felon. Thompson filed a response in an attempt to dismiss the suit, though his attempt was ultimately unsuccessful when a judge’s ruling on Friday ended his tenure as judge-executive in Knott County.”).

²²¹ Estep, *Imprisoned Knott County Judge-Executive Is Tossed Out of Office*, *supra* note 207.

This suit was presumably brought under the statutes allowing an action for usurpation of office.²²² These statutes expressly allow a suit to remove an officer whose office has been forfeited by misconduct. Either the Commonwealth's Attorney or the Attorney General may bring such an action, depending on the usurped office.²²³ These provisions appear to be the manifestation of the General Assembly's "duty . . . to provide for the enforcement of the provisions of . . . section [150]."²²⁴ It appears that both the drafters of the constitution and the General Assembly anticipated that some officers might not give up their offices willingly after a conviction or after their offices are otherwise vacated or forfeited.²²⁵

The high-misdemeanor disqualification in section 150 is permanent, like the felony disqualification, but the General Assembly must act to give it any effect. The disqualifying high misdemeanors must be "prescribed by law," that is, identified by the General Assembly as vacating a person's office.²²⁶ The General Assembly has done this in at least a few places. For example, any officer who violates the conflict-of-interest provision of the Kentucky Model Procurement Code²²⁷ "shall be guilty of a Class B misdemeanor, and in addition he shall be adjudged to have forfeited any statutory office or employment which he may hold."²²⁸

Perhaps a more germane example relates to the issuance of marriage licenses by the county clerk. Kentucky law prohibits certain people from marrying each other, such as those within a certain degree of kinship²²⁹ and those still married to other people.²³⁰ These are, for the most part, the traditional categories of prohibited

²²² See KY. REV. STAT. ANN. § 415.060 (West 2016) ("A person who continues to exercise an office after having committed an act, or omitted to do an act, the commission or omission of which, by law, creates a forfeiture of his office, may be proceeded against for usurpation thereof."); *id.* § 415.070 ("A person adjudged to have usurped an office or franchise shall be deprived thereof by the judgment of the court, and the person adjudged entitled thereto shall be placed in possession thereof; but no one shall be adjudged entitled thereto, unless the action be instituted by him. And the court shall have power to enforce its judgment by causing the books and papers, and all other things pertaining to the office or franchise, to be surrendered by the usurper; and by preventing him from further exercising or using the same; and may enforce its orders by fine and imprisonment until obeyed.").

²²³ See *id.* § 415.040 ("It shall be the duty of the several Commonwealth attorneys to institute the actions mentioned in this chapter against usurpers of county offices or franchises, if no other person be entitled thereto, or if the person entitled fail to institute the same during three (3) months after the usurpation."); *id.* § 415.050 ("For usurpation of other than county offices or franchises, the action by the Commonwealth shall be instituted and prosecuted by the Attorney General.").

²²⁴ KY. CONST. § 150.

²²⁵ See authorities cited *supra* note 199.

²²⁶ KY. CONST. § 150.

²²⁷ KY. REV. STAT. ANN. §§ 45A.330–45A.340 (West 2016). The purpose of the provisions is "to prescribe specific standards to guide public officers and employees in the conduct of their offices or employment, and to proscribe improper conduct to the extent to which such conduct may be sufficiently described to enable statutory prohibitions against it to be properly enforced." *Id.* § 45A.330.

²²⁸ *Id.* § 45A.990(3).

²²⁹ *Id.* § 402.010(1).

²³⁰ *Id.* § 402.020(1)(b).

marriages.²³¹ “Any [county] clerk who knowingly issues a marriage license to any persons prohibited by [statute] from marrying shall be guilty of a Class A misdemeanor”²³² More importantly, the clerk convicted of this offense is “removed from office by the judgment of the court in which he is convicted.”²³³

Section 151 complements section 150. As one commentator has noted: “While Section 150 prevents individuals convicted of certain crimes from holding office, section 151 provides for the *ouster* from office of those who have obtained the office through corrupt means.”²³⁴ In essence, section 151 exists to guarantee that certain corrupt practices, including vote buying, result in removal, regardless of whether they are designated felonies or high misdemeanors. Unlike most of section 150, section 151 “requires legislative action.”²³⁵ Indeed, that requirement exists in two ways: section 151 needs legislative action to be effective while also commanding legislative action. Specifically, it commands the General Assembly to pass laws providing for the removal from office of any person who has unlawfully used money or other thing of value to gain office, or has committed “fraud, intimidation, bribery, or any other corrupt practice.”²³⁶ Acting under this provision, the General Assembly has designated conviction for bribery and other specific corrupt election practices as resulting in forfeiture of an office.²³⁷

The General Assembly has also passed a separate statute, section 61.040 of the Kentucky Revised Statutes, to generally carry out the command of sections 150 and 151 of the Constitution. Thus, if any person holding a public office “is convicted of bribery, forgery, perjury or any felony, by a court of record in or out of this state, his office or post shall be vacated by such conviction.”²³⁸ This provision does not dictate a procedure to be followed, and instead simply states that the conviction vacates the office. Thus, while resort to a usurpation action may prove necessary to effectuate a removal after such a conviction, it should be unnecessary for the

²³¹ Under a provision added in 1998, the prohibition also extended to same-sex marriages. *Id.* § 402.020(1)(d) (West 2016); *see also* H.B. 13, Reg. Sess. (Ky. 1998) (enacting the provision). In 2004, this statutory prohibition was incorporated into the Kentucky Constitution, KY. CONST. § 233A, which was one of the state laws at issue in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015).

²³² KY. REV. STAT. ANN. § 402.990(6) (West 2016).

²³³ *Id.*

²³⁴ ROBERT M. IRELAND, THE KENTUCKY STATE CONSTITUTION 139 (2d. ed. 2012) [hereinafter IRELAND, STATE CONSTITUTION] (emphasis added).

²³⁵ *Id.*

²³⁶ KY. CONST. § 151.

²³⁷ KY. REV. STAT. ANN. § 119.175(1) (West 2016) (providing that any election officer who illegally records or receives a vote “shall forfeit any office he holds and be disqualified from ever holding any office”); *id.* § 119.205(1)–(2) (making the buying or selling of votes a Class D felony); *id.* §§ 121.150(12), 121.990(7) (making it illegal to give money to another person to donate to a campaign and prescribing forfeiture of office upon conviction of any officeholder); *id.* § 432.350 (prescribing that any government officer “who takes or agrees to take any bribe to do or omit to do any act in his official capacity shall forfeit his office and be disqualified from the right of suffrage for ten (10) years”).

²³⁸ *Id.* § 61.040. This provision applies to “any officer or deputy holding any office or post mentioned in KRS 61.010,” *id.*, which includes any “civil or military office or post of profit, trust, or honor under this state, [and] the deputation thereof,” *id.* § 61.010(1).

convictions covered by the statute. Still, given the stubbornness of some past officers, it is no doubt beneficial to have a statutory mechanism to translate the vacation of the office into an order of removal.

Removal under section 61.040, however, may be what the *New York Times* was referring to when it claimed that a conviction for any crime could remove a clerk from office.²³⁹ But, as noted above, not just any crime will do. The *New York Times* stated that some people had suggested Kim Davis could be charged with “official misconduct”²⁴⁰ under sections 522.020 or 522.030 of the Kentucky Revised Statutes and removed from office by conviction for that crime.²⁴¹

Again, whether Kim Davis has committed this offense is beyond the purview of this Article, though many argue she did exactly that. Even if she did commit official misconduct, conviction for the offense would have no effect on her ability to hold office at present. The crime is only a misdemeanor, which does not automatically disqualify one from office. And the General Assembly has not designated it as one of the misdemeanor offenses under section 150 that results in disqualification.²⁴²

This does not appear to be an oversight. The commentary to the official misconduct statutes by the Kentucky Crime Commission and Legislative Research Commission specifically notes that *removal* from office based on conviction for misconduct in public office is controlled primarily by section 61.170 of the Kentucky Revised Statutes and section 227 of the Kentucky Constitution, both of which are discussed below. Those provisions, however, “were not intended to be all

²³⁹ Blinder & Pérez-Peña, *Kentucky Clerk Denies Same-Sex Marriage Licenses*, *supra* note 13 (“Officials have said it might be possible to charge her with official misconduct, a misdemeanor; a conviction could result in a court order removing her.”).

²⁴⁰ The basic version of this offense, second-degree official misconduct, occurs when a “public servant” knowingly

Commits an act relating to his office which constitutes an unauthorized exercise of his official functions; or

Refrains from performing a duty imposed upon him by law or clearly inherent in the nature of his office; or

Violates any statute or lawfully adopted rule or regulation relating to his office.

KY. REV. STAT. ANN. § 522.030(1) (West 2016). Official misconduct in the second degree is a Class B misdemeanor, *id.* § 522.030(2), carrying a sentence of up to 90 days’ incarceration, *id.* § 532.090(2). The offense rises to the first-degree if the public servant also acts with “intent to obtain or confer a benefit or to injure another person or to deprive another person of a benefit.” *Id.* § 522.020(1). Official misconduct in the first degree is a Class A misdemeanor, *id.* § 522.020(2), which carries a sentence of incarceration for up to twelve months, *id.* § 532.090(1).

²⁴¹ Blinder & Pérez-Peña, *Kentucky Clerk Denies Same-Sex Marriage License*, *supra* note 13 (claiming that Kim Davis could be charged with official misconduct under Kentucky law and subsequently removed from office, but not pointing to a specific section of the Kentucky Revised Statutes).

²⁴² KY. CONST. § 150 (allowing General Assembly to designate misdemeanor offenses resulting in disqualification).

inclusive in the area of regulation of official misconduct.”²⁴³ Thus, the official-misconduct criminal statutes, which are in the Penal Code, were envisioned as a supplement to the removal provisions, imposing only criminal penalties.²⁴⁴

That said, conviction of a felony or other offense that would result in removal from office under sections 150 and 151 may not be any easier a process than impeachment. Certainly, such a prosecution is probably politically simpler than impeachment. But the evidentiary standards in a criminal trial, both in terms of admissibility and burden of proof, and the requirement of a unanimous verdict, are more demanding than in the impeachment context. Indeed, there may very well be instances where impeachment could be obtained but a criminal conviction could not. And it is not an effective remedy for all misconduct that might justify an officer’s removal. For example, it does not reach the sort of lesser misconduct in office, such as malfeasance or misfeasance, that would not justify incarceration or substantial fines but might justify removal. Nor does it reach neglect of duty, willful or otherwise, or incompetence.

B. The Lower Tier: Removal of Specific Officers

Removal of public officers has never been limited to the extreme remedy of impeachment or criminal conviction in Kentucky. Indeed, “[e]ach of [Kentucky’s] Constitutions has provided for the removal, by means other than impeachment, of officers from office before the expiration of the time for which they were appointed or elected.”²⁴⁵ Of course, a proceeding under sections 150 or 151 is an impeachment alternative, but it is as much a parallel process as an alternative one, since it has the same outcome. For the most part, the *alternative* methods are officer specific, and they result only in removal from office. These methods have not applied to the executive branch officers, such as the governor, attorney general, or secretary of state. Instead, these other removal methods are aimed at the other two branches of government, the General Assembly and the judiciary, and at lesser officers, such as county officials and clerks of the various courts. As explained

²⁴³ KY. REV. STAT. ANN. § 522.010 Ky. Crime Comm’n/Legis. Research Comm’n Cmt. (1974).

²⁴⁴ See *id.* (“Thus, uniformity of *penal* sanctions is obtained without disturbing expressed legislative policy regarding qualification to hold public office.”).

²⁴⁵ C.B. Seymour, *The Recall: From the Standpoint of Kentucky Legal History*, 21 YALE L.J. 372, 372 (1912).

below, however, none of those alternatives apply at present to county clerks in Kentucky.²⁴⁶

i. The General Assembly: The Power of Each House to Expel Its Own Members

Each house of Kentucky's General Assembly has the power "with the concurrence of two-thirds, [to] expel a member, but not a second time for the same cause."²⁴⁷ This power has existed under all four of Kentucky's constitutions.²⁴⁸

This power is a common, if not universal, one for American legislatures. The United States Congress has it,²⁴⁹ as do the legislature of most states.²⁵⁰ It is

²⁴⁶ This Article does not dedicate space to several other removal methods that are not part of the historical system of removal for misconduct or never would have applied to the county clerk. For example, peace officers, even though some are subject to at least one of the other removal methods discussed below (prosecution for malfeasance, KY. REV. STAT. ANN. § 61.170 (West 2016)), are also subject to removal by the Governor for "neglect of duty" under sections 63.100 to 63.130 of the Kentucky Revised Statutes as allowed by section 227 of the Kentucky Constitution, KY. CONST. § 227. That removal method, however, was not added to the constitution until 1919. *Id.* (showing the provision's amendment in 1919). And the county clerk, of course, is not a peace officer. Similarly, section 172 of the constitution allows removal of "any officer, or other person authorized to assess values for taxation, who shall commit any willful error in the performance of his duty," with such officer being "deemed guilty of misfeasance." KY. CONST. § 172. Although the county clerk has a role in issuing tax bills, the clerk does not assess property and instead only receives assessments from other government actors. *See, e.g.*, KY. REV. STAT. ANN. § 133.180 (West 2016) (noting that the county clerk receives an assessment done by the Department of Revenue).

This Article also does not address removal unrelated to conduct in office, such as accepting incompatible offices, *see, e.g.*, *Taylor v. Commonwealth*, 26 Ky. (3 J.J. Marsh.) 401, 407 (1830) (noting that accepting of an incompatible office vacates the former office), failing to post a required bond, *see, e.g.*, *Schuff v. Pflanz*, 35 S.W. 132, 133 (Ky. 1896) (discussing how failing to post bond can vacate office and distinguishing this process from other constitutional removal processes), or moving out of the district, where residence within the district is a requirement of office (except to the extent this is alleged to be willful neglect of official duties), *see, e.g.*, *Lyon v. Commonwealth*, 6 Ky. (3 Bibb) 430, 431–32 (1814) (describing an unsuccessful attempt to remove justice of the peace for removing himself from the county); *see also* KY. CONST. of 1850, art. IV, § 35 (noting that county judges and justices of the peace "shall vacate their offices by removal from the district or county in which they shall be appointed").

Nor does this Article dedicate any discussion to a removal method that, while historical, is little more than vestigial: conviction for dueling. *See* KY. CONST. § 239 ("Any person who shall, after the adoption of this Constitution, either directly or indirectly, give, accept or knowingly carry a challenge to any person or persons to fight in single combat, with a citizen of this State, with a deadly weapon, either in or out of the State, shall be deprived of the right to hold any office of honor or profit in this Commonwealth; and if said acts, or any of them, be committed within this State, the person or persons so committing them shall be further punished in such manner as the General Assembly may prescribe by law."); KY. REV. STAT. ANN. § 61.100 (West 2016) ("Any person convicted of sending, accepting or knowingly carrying a challenge, for the purpose described in KRS 437.030 [criminalizing dueling], shall forfeit any office of honor or profit held by him at the time he committed the offense, or when convicted thereof, and shall thereafter be disqualified to hold any such office.").

²⁴⁷ KY. CONST. § 39.

²⁴⁸ *See id.*; KY. CONST. of 1850, art. II, § 21; KY. CONST. of 1799, art. II, § 20; KY. CONST. of 1792, art. I, § 19.

²⁴⁹ U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.").

generally seen as a broad power, limited largely by each legislative house's own judgment.²⁵¹ It is, of course, a necessary power, and one that favors the autonomy of the legislature as a whole and of each house.²⁵² Although this power requires a super-majority of the relevant house, as does conviction on an impeachment, it nonetheless differs from impeachment. The power to expel is given to each house over its own members, and does not require coordination with the other house.²⁵³ While generally broad, the power is slightly limited in Kentucky, as it is in many states,²⁵⁴ but not the U.S. Congress, by the qualification that a legislator may not be expelled a second time for the same reason.²⁵⁵ This language, "seemingly a type of double-jeopardy guarantee, is better understood in structural terms: it allows the electorate to override a congressional expulsion decision by reelecting a given representative."²⁵⁶ In other words, the power to expel cannot affect a legislator's right to hold future office. The power to impeach allows for that harsher result, but it requires the effort of both houses.

The expulsion power appears to have been used sparingly. It was attempted against Humphrey Marshall, one of the first settlers of Lexington and cousin of Chief Justice John Marshall,²⁵⁷ in 1808 as part of lingering intrigues related to the

²⁵⁰ See ALA. CONST. art. IV, § 53; ARIZ. CONST. art. IV, pt. 2, § 11; ARK. CONST. art. 5, § 12; CAL. CONST. art. IV, § 5(a)(1); COLO. CONST. art. V, § 12; CONN. CONST. art. 3, § 13; DEL. CONST. art. II, § 9; FLA. CONST. art. III, § 4(d); HAW. CONST. art. III, § 12; IDAHO CONST. art. III, § 11; ILL. CONST. art. IV, § 6(d); IND. CONST. art. 4, § 14; ME. CONST. art. IV, pt. 3, § 4; OHIO CONST. art. II, § 6; PA. CONST. art. II, § 11; VA. CONST. art. IV, § 7.

²⁵¹ See *In re Chapman*, 166 U.S. 661, 669 (1897) ("The right to expel extends to all cases where the offense is such as in the judgment of the Senate is inconsistent with the trust and duty of a member."); *id.* at 670 (describing the power to expel as a "right inviolate"); Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 392 (2004) (noting, that "both congressional and judicial precedent have taken an expansive view of the expulsion power"). A related power, to decide the qualifications and elections of members, and to exclude members, has been subject to judicial review in some instances. See, e.g., *Powell v. McCormack*, 395 U.S. 486, 512 (1969) (allowing judicial review of House's exclusion); *Stephenson v. Woodward*, 182 S.W.3d 162, 167–69 (Ky. 2005) (allowing court decision as to state senator's qualifications to trump that of Senate itself). But that review "has not yet been extended to expulsion decisions." Vermeule, *supra*, at 393.

²⁵² See Vermeule, *supra* note 251, at 392 ("The framers' decision to lodge the powers of disqualification and expulsion in each house separately, without the participation of any outside institution, embodies two decisions, one in favor of cameral autonomy and one in favor of congressional autonomy.").

²⁵³ See KY. CONST. § 39 (giving each House the power to expel a member independently).

²⁵⁴ See ALA. CONST. art. IV, § 53 ("Each house shall have power . . . with the concurrence of two-thirds of the house, to expel a member, but not a second time for the same offense . . ."); ILL. CONST. art. IV, § 6(d) ("A member may be expelled only once for the same offense.").

²⁵⁵ Vermeule, *supra* note 251, at 383–84.

²⁵⁶ *Id.* at 384; see also *id.* at 396 ("A promising alternative to the supermajority requirement is embodied in state constitutional provisions that bar legislatures from twice expelling a member for the same conduct. The effect of the state provisions is to create a mechanism for outside review by lodging in the electorate a power to override the legislature's expulsion decision, so these provisions compromise legislative autonomy vis-à-vis the electorate." (internal footnote omitted)).

²⁵⁷ DAVID S. HEIDLER & JEANNE T. HEIDLER, *HENRY CLAY: THE ESSENTIAL AMERICAN* 56 (2010).

Spanish Conspiracy²⁵⁸ and a fight between some of the remaining Federalists and Henry Clay.²⁵⁹ Federal Judge Harry Innes, who had been on the receiving end of Marshall's allegations of involvement in the conspiracy, rallied his friends in the General Assembly to attack Marshall, who at that time was a member of the House of Representatives.²⁶⁰ The House appointed a committee to investigate Marshall, and the committee recommended that he be expelled for "moral turpitude."²⁶¹ The full House, however, saved him, rejecting the committee's recommendation and instead resolving by a 30–23 vote that the charges were "not supported by evidence, and that he ought to be exonerated from further answer thereto."²⁶²

Other than that, the expulsion power appears primarily to have been used during the Civil War against sympathizers to, and participants in, the Confederate rebellion. In fact, at least a dozen legislators were expelled from the General Assembly early in the war. In December 1861, the House began investigating the absence of several members from the session. The investigating committee reported that eight members under investigation²⁶³ were "directly or indirectly connected with, and giving 'aid and comfort' to, the Confederate army, and are now within the lines of said army, repudiating and acting against the governments of the United States and the Commonwealth of Kentucky."²⁶⁴ Four of them²⁶⁵ "were members of the Russellville Convention, which organized and established a provisional government in Kentucky, in violation of the Constitution, laws, and will of the people of the State, and which was revolutionary and rebellious."²⁶⁶ The committee recommended that all eight be expelled from the House.²⁶⁷ The full House adopted the recommendation as to all eight.²⁶⁸ Two members of the Senate

²⁵⁸ For additional Spanish Conspiracy intrigues, see *supra* notes 151–159 and accompanying text.

²⁵⁹ HEIDLER & HEIDLER, *supra* note 257, at 68–69.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 69.

²⁶² A. C. QUISENBERRY, *THE LIFE AND TIMES OF HON. HUMPHREY MARSHALL* 99 (1892). Some Kentucky sources erroneously state that Marshall was expelled and re-elected the next year. See, e.g., Mary K. Bonsteel Tachau, *Marshall, Humphrey*, in *THE KENTUCKY ENCYCLOPEDIA* 610 (John E. Kleber ed., 1992).

²⁶³ Those members were Daniel Matthewson, A. R. Boon, John M. Elliott, G.W. Silvertooth, G. R. Merritt, G.W. Ewing, J.C. Gilbert, and John Q. A. King. KY. HOUSE JOUR., Reg. Sess. of 1861, at 475 (Dec. 17, 1861). At least one of them, John M. Elliot, had been indicted for treason in federal court in November. See 2 LEWIS COLLINS & RICHARD H. COLLINS, *HISTORY OF KENTUCKY* 166 (1878). Apparently, several more had been the committee's subject, but there was insufficient evidence of their misconduct to pursue expulsion at that time. See, e.g., KY. HOUSE JOUR., Reg. Sess. of 1861, at 476 (Dec. 17, 1861). As discussed below, one of the men not pursued with these others was David May, who was expelled the next year. See *infra* note 270 and accompanying text.

²⁶⁴ KY. HOUSE JOUR. Reg. Sess. of 1861, at 475 (Dec. 17, 1861).

²⁶⁵ Daniel Matthewson, A. R. Boon, G. W. Silvertooth, and J. C. Gilbert. *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ See *id.* at 545–46 (Dec. 21, 1861) (adopting resolution of expulsion as to all but John Q.A. King and George Silvertooth, whose votes were postponed, by vote of 61–5); *id.* at 546–47 (adopting resolution as to King by 45–22 vote); *id.* at 547 (adopting resolution as to Silvertooth by 51–14 vote).

were also expelled in February 1862,²⁶⁹ and two other members of the House were expelled the next summer, all for similar reasons.²⁷⁰

ii. The Judiciary: Removal by Address, and Retirement and Removal

The judiciary also has its own “lesser” removal system. Historically, that process was removal by address of the legislature. Since 1976, however, members of the judiciary are removable by a process largely internal to the Kentucky Court of Justice—removal by a commission on retirement and removal.²⁷¹

Removal by address is one of the most historically important, though rarely used, alternative removal methods. Although it is no longer in the Kentucky Constitution, it is still present in the Kentucky Revised Statutes.²⁷² The statutes themselves do not expressly explain how this process is to work, nor are they clear as to whom it applies,²⁷³ but a review of the process’s history demonstrates that it applies only to the judiciary. Moreover, this method of removal would appear to be unconstitutional under the present constitution because it is no longer provided for by that document.

Removal by address is a lesser alternative to impeachment.²⁷⁴ At present, it appears in the same statutory scheme addressing impeachment.²⁷⁵ And like impeachment, “removal by address may be instituted by the House of Representatives without a petition from any person.”²⁷⁶ But again, like with impeachment, a private person may file a petition “to have an officer removed by address,”²⁷⁷ though unlike impeachment, a removal-by-address petition may be

²⁶⁹ See KY. SENATE JOUR., Reg. Sess. of 1861, at 404 (Feb. 15, 1862) (adopting resolution expelling William T. Anthony, by vote of 23–0, for being “actively engaged in the rebellion against the government” and “being a traitor”); *id.* at 404–05 (adopting resolution expelling John M. Johnson, by vote of 23–0, for “go[ing] within the lines of the so-called Confederate States” and “hold[ing] [a] position in the rebel army”).

²⁷⁰ See KY. HOUSE JOUR., Extraordinary Sess. of 1862, at 943–44 (Aug. 19, 1862) (reproducing committee report accusing Vincent Ash of having “joined Morgan’s rebel band” and adopting resolution to expel him by vote of 73–3); *id.* at 1043 (Aug. 29, 1862) (adopting resolution expelling David May, without recording vote).

²⁷¹ See KY. CONST. § 121 (“[A]ny justice of the Supreme Court or judge of the Court of Appeals, Circuit Court or District Court may be retired for disability or suspended without pay or removed for good cause by a commission.”).

²⁷² KY. REV. STAT. ANN. §§ 63.020, 63.060 (West 2016).

²⁷³ Although the language of the statutes would seem to encompass all officers, and thus put removal by address on the same footing at impeachment, as explained below, it is actually a limited removal power. Thus, it is discussed with removal provisions that apply only to a limited class of officers.

²⁷⁴ See Paul D. Carrington & Roger C. Cramton, *Original Sin and Judicial Independence: Providing Accountability for Justices*, 50 WM. & MARY L. REV. 1105, 1112 (2009) (“Address may reasonably be taken to impose less disapproval and humiliation on the addressee than does the term ‘impeachment.’”).

²⁷⁵ See KY. REV. STAT. ANN. §§ 63.020–63.075 (West 2016).

²⁷⁶ *Id.* § 63.020.

²⁷⁷ *Id.* § 63.060.

filed in either house of the General Assembly.²⁷⁸ The ensuing process is again familiar, at least at first: the petition is referred to committee,²⁷⁹ and if the committee recommends against the petition and that recommendation is not overruled by the whole body, the petitioner is liable for costs to witnesses and the accused.²⁸⁰

Unlike impeachment, however, the statutes are less clear as to what removal by address is or the process by which it works beyond its initiation by petition. For example, the statutes do not say what happens if the committee to which the petition is referred recommends in favor of the petition. Presumably, it goes before the whole body. But again, the statutes fail to say what happens if the first chamber, whether the House or the Senate, votes in favor of removal by address. Again presumably, it gets referred to the other body for a separate vote. The historical precedents discussed below and the requirement that both houses concur suggest this is exactly what happens.

Whereas impeachment is constitutionally applicable to “all civil officers,”²⁸¹ and by statute may be initiated privately against “any officer,”²⁸² nothing in the Constitution or statutes currently describes who is subject to removal by address. Instead, the process is completely absent from the present constitution, a telling omission. And the statutory petition provision states only that a private petition may be pursued against “an officer,”²⁸³ without defining which officers fit the bill. Of course, that could be read broadly to mean *any* officer, since every officer is *an officer*, but such a reading seems odd in light of the expressly broad applicability of the analogous impeachment provisions.

So what, then, is removal by address? And to whom does it apply? A little bit of history provides the answers.

Historically, removal by address was a request by both legislative houses to the executive to remove a judge from office. It originated in England as an alternative to impeachment.²⁸⁴ This mode of removal was rejected for federal judges in the United States, apparently “because of fear that the House of Representatives (in

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.* § 63.070(1).

²⁸¹ KY. CONST. § 68.

²⁸² KY. REV. STAT. ANN. § 63.030 (West 2016).

²⁸³ *Id.* § 63.060.

²⁸⁴ See Laurence Claus, *Constitutional Guarantees of the Judiciary: Jurisdiction, Tenure, and Beyond*, 54 AM. J. COMP. L. 459, 476 (2006) (describing removal by address under the English Act of Settlement of 1701 as distinct from impeachment); see also Raoul Berger, *Impeachment of Judges and “Good Behavior” Tenure*, 79 YALE L.J. 1475, 1495 n.100 (1970) (“In England an Address was a formal request made by both Houses of Parliament to the King, asking him to perform some act. By the Act of Settlement (1700), English judges were made removable by the Crown only upon an Address by both Houses.”); Stephen P. Daly, *The Conduct Commission and Agreed Disposition: Limiting Judicial Independence in Massachusetts*, 42 NEW ENG. L. REV. 509, 522–23 (2008) (describing it as distinct from impeachment because it is “contingent on executive removal”).

conjunction with the Executive) would abuse the power and ‘subject judges to the sway of political winds.’”²⁸⁵

But the practice was carried over into some states,²⁸⁶ including Kentucky. Indeed, provisions allowing for removal of most judges by address on concurrence of two-thirds of both houses of the General Assembly were originally included in all four of Kentucky’s constitutions.²⁸⁷ Interestingly, in the first constitution, the

²⁸⁵ Daly, *supra* note 284, 523 n.128 (quoting Alexa J. Smith, *Federal Judicial Impeachment: Defining Process Due*, 46 HASTINGS L.J. 639, 643 (1995)); *see also* Jack B. Weinstein, *The Limited Power of the Federal Courts of Appeals to Order a Case Reassigned to Another District Judge*, 120 F.R.D. 267, 272 (1988) (“Debate on a motion made on the floor of the [Constitutional] Convention to provide for removal by the President on application of the Senate and House of Representatives (a form of joint address) reveals the framers’ intent not to subject judges to extrabranched control except by impeachment. Gouverneur Morris called removal by address a contradiction in terms since it would subject judges serving during good behavior to removal without a trial; Edmund J. Randolph opposed the motion as weakening too much the independence of the Judges. Removal by address was explicitly rejected by the framers, the motion being defeated by a vote of seven to one, with three states absent. Removal upon impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors, of course, remained.” (citations and internal quotation marks omitted)).

²⁸⁶ *See* David M. Gold, *Judicial Elections and Judicial Review: Testing the Shugerman Thesis*, 40 OHIO N.U.L. REV. 39, 53 n.108 (2013) (“Many nineteenth-century state constitutions provided for removal by address, but the power was rarely exercised.”); Stephen J. Miller, *Does Good-Behavior Tenure Demand Faithfulness to the Law?*, 11 GEO. J.L. & PUB. POLICY 157, 162 (2013) (“Removal by address was retained by many newly independent American states . . .”).

²⁸⁷ *See* KY. CONST. of 1792, art. V, § 2 (“The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior; but for any reasonable cause which shall not be sufficient ground of impeachment, the Governor may remove any of them on the address of two-thirds of each branch of the Legislature.”); KY. CONST. of 1792, art. V, § 6 (allowing justices of the peace to be “removed . . . on the address of both Houses of the Legislature”); KY. CONST. of 1799, art. IV, § 3 (“The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior; but for any reasonable cause, which shall not be sufficient ground of impeachment, the Governor shall remove any of them, on the address of two-thirds of each House of the General Assembly: Provided, however, That the cause or causes for which such removal may be required shall be stated at length in such address, and on the journal of each House.”); KY. CONST. of 1799, art. IV, § 6 (allowing removal of justices of the peace “on the address of two-thirds of each House of the General Assembly”); KY. CONST. of 1850, art. IV, § 3 (“The Judges of the Court of Appeals shall, after their first term, hold their offices for eight years . . . but for any reasonable cause, the Governor shall remove any of them, on the address of two-thirds of each House of the General Assembly: Provided, however, That the cause or causes for which such removal may be required shall be stated at length in such address, and on the journal of each House.”); KY. CONST. of 1850, art. IV, § 23 (providing that circuit judges “shall be removable from office in the same manner as the judges of the Court of Appeals”); KY. CONST. § 117 (repealed 1976) (“For any reasonable cause the Governor shall remove [the judges of the Court of Appeals], or any one or more of them, on the address of two-thirds of each House of the General Assembly. *Provided*, The cause or causes for which said removal shall be required shall be stated at length in such address and in the journal of each House.”); KY. CONST. § 136 (repealed 1976) (providing for removal of circuit judges “in the same manner as the Judges of the Court of Appeals”). Some judicial officers, however, were removable by other methods in addition to address. *See infra* notes 385–386 and accompanying text (discussing provisions of 1792 and 1850 Constitutions allowing removal of justices of the peace and county judges for misbehavior, malfeasance, and misfeasance also).

governor appears to have retained some discretion over removal by address,²⁸⁸ which was in keeping with origin of the practice.²⁸⁹ But in the others, the power effectively belonged wholly to the General Assembly, as the governor's role was limited to acting in a merely ministerial capacity, with the Constitution commanding that he "shall remove" the judges so addressed.²⁹⁰

Generally speaking, the power was exercisable for almost "any reason"²⁹¹—including judicial ignorance,²⁹² drunkenness and sleeping on the job,²⁹³ and as a check on judicial review or perceived error in a decision²⁹⁴—at least in theory. In Kentucky, the power was originally directed to causes for which impeachment would be improper,²⁹⁵ suggesting both no overlap between the powers and that address was aimed at lesser misconduct. But later it was allowed "for any reasonable

²⁸⁸ See KY. CONST. of 1792, art. V, § 2 (noting the governor "may remove" judges on address of the legislature).

²⁸⁹ In England, it appears that Parliament did not have the final word, and its address was only a request for removal. See Saikrishna Prakash & Steven D. Smith, *How to Remove A Federal Judge*, 116 YALE L.J. 72, 97 n.96 (2006) ("Given the language of the Act of Settlement, the better view is that the Crown may, but need not, act upon any parliamentary request to remove a judge.").

²⁹⁰ KY. CONST. of 1799, art. IV, § 3; KY. CONST. of 1850, art. IV, § 3.

²⁹¹ Prakash & Smith, *supra* note 289, at 97; see also Thomas E. Plank *The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia*, 5 WM. & MARY BILL RTS. J. 1, 17 (1996) ("[T]he legislation creating removal by address contains no limitations on Parliament's power . . ."). In discussing the English origins of removal by address, Prakash and Smith note that it "was not a means of judging good behavior; rather, it was a means for Parliament to make sure that judges considered the wishes of Parliament, for Parliament might seek the removal of a judge for any reason and only Parliament could initiate this discretionary, nonjudicial removal process." Prakash & Smith, *supra* note 289, at 97. That power played out differently in the United States to some extent, since the process could be initiated by a private petition, at least in some places like Kentucky. Of course, the legislature could still decline to act on the petition, and thus held all the power.

²⁹² See *Gaines v. Buford*, 31 Ky. (1 Dana) 481, 498–99 (1833) (Underwood, J., *seriatim op.*) ("I do not mean that the opinions of the judiciary are too sacred for legislative investigation. On the contrary, I hold that the legislature may investigate the opinions of judges with a view to render them responsible for corruption, by impeachment, or for ignorance, by address and removal.").

²⁹³ See George A. Nilson, *What Do We Do When Things Go Bad Before an Elected Official's Time is Up?*, MD. BAR J. at 14 (Sept./Oct. 2000) ("There is only one reported instance in which 'address' was used to remove a judge in Maryland—Judge Henry Stump was removed in 1860 based on a number of charges, including that he had been intoxicated and asleep on the bench.").

²⁹⁴ See KY. HOUSE JOUR., Reg. Sess. of 1824, at 436 (Dec. 20, 1824) (proposing resolution proclaiming removal by address may be used "notwithstanding that error shall have been committed in the course of judicial decision" in response to judges' answer to petition for removal); *id.* at 493–94 (Dec. 31, 1824) (adopting the resolution); see also Gold, *supra* note 286, at 53 (discussing drafting debates of the 1850 Kentucky constitution, and noting speech in which a delegate argued in favor of lowering required vote for removal by address to a mere majority as a further check on the highest court's power to strike down legislation); accord *Yates v. Lansing*, 9 Johns. 395, 407 (N.Y. 1811) (noting that at common law, judges could not be questioned for judicial acts "except in parliament" (quoting 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN ch. 22, § 6 (n.p., n.d.))).

²⁹⁵ See KY. CONST. of 1792, art. V, § 2 (allowing removal by address for "any reasonable cause which shall not be sufficient ground of impeachment"); KY. CONST. of 1799, art. IV, § 3 (same).

cause,²⁹⁶ bringing it in line with the traditional understanding of the power as exercisable for almost any reason.

In practice, however, removal by address was very difficult to accomplish and was used infrequently. In the United Kingdom, it appears to have been used only one time in 300 years.²⁹⁷ Some commentators have stated that this difficulty arose because the power “became so burdened with procedural requirements that it was not much simpler than impeachment.”²⁹⁸ Its use in Kentucky has also been rare. Indeed, it has been so rare that it has been repeatedly claimed, albeit mistakenly, to have never been used.²⁹⁹

But procedural burdens alone do not account for its rarity. At least in Kentucky, where the procedural hurdles have not existed, the process, with its requirement of the support of two-thirds of both houses,³⁰⁰ has like impeachment been too politically difficult to carry out very often. Indeed, it was so politically difficult that it was easier to bring the state to a constitutional crisis than it was to remove judges by address.

This difficulty is what led to the Old Court–New Court crisis of 1824 to 1826 in which the General Assembly failed to remove judges from the Court of Appeals and, instead, tried to repeal the court and create a new one.³⁰¹ At the time, three

²⁹⁶ KY. CONST. of 1850, art. IV, § 3; KY. CONST. § 117 (repealed 1976).

²⁹⁷ Plank, *supra* note 291, at 17.

²⁹⁸ Gold, *supra* note 286, at 53 n.108 (citing JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 137 (1950)); *see also* Plank, *supra* note 291, at 17 (“Parliament has adopted considerable procedural and substantive limitations on its power . . .”).

²⁹⁹ *See* John Finley, *Appeals Court Judge Praises Court Reorganization Proposals*, THE COURIER-JOURNAL (Louisville, Ky.), Feb. 21, 1975, at B-11 (quoting Justice John Palmore as saying, “in Kentucky’s history that [removal of a judge] has never, ever been done”); THE JUDICIAL ARTICLE at 9:00–9:07 (Kentucky Educational Television 1975) (showing Morton Holbrook, a lawyer involved in passing the 1975 amendment creating the current judicial system, claim that removal under the then-existing removal mechanism “ha[d] never been accomplished since 1792,” the year Kentucky became a state); *Sample Lesson Plan for Use in High Schools* 5, in KENTUCKY CITIZENS FOR JUDICIAL IMPROVEMENT, INC., FINAL PROJECT REPORT 57 (1975–1976) (“Since 1792, not a single judge in Kentucky has been removed from office . . .”).

³⁰⁰ Unlike the impeachment provisions, which require the concurrence of two-thirds of senators “present,” the address provisions have all required simply two-thirds of each house, with no additional qualification, suggesting that two-thirds of the whole body, not just those present, was required. Nevertheless, in at least one instance, removal by address was accomplished on a vote of two-thirds of the members present, *see* KY. SENATE JOUR., Reg. Sess. of 1835, at 443 (Feb. 29, 1836) (recording 23–4 vote to remove Major I. Price from office of justice of the peace), but that was short of two-thirds of all the members, *cf.* 1831 Ky. Acts 165 (laying out senate into thirty-eight districts).

³⁰¹ *See generally* Theodore W. Ruger, “A Question Which Convulses a Nation”: The Early Republic’s Greatest Debate About the Judicial Review Power, 117 HARV. L. REV. 826, 844–51 (2004). For additional accounts of the “controversy,” *see* ARNDT M. STICKLES, THE CRITICAL COURT STRUGGLE IN KENTUCKY, 1819–1829, at 30–57 (1929); HARRISON & KLOTTER, *supra* note 151, at 109–10; CLARK, *supra* note 156, at 143; Seymour, *supra* note 245, at 373–78; John C. Doolan, *The Old Court–New Court Controversy*, 11 GREEN BAG 177, 177–86 (1899). Professor Ruger identifies several additional accounts. *See* Ruger, *supra*, at 834 n.33 (citing, e.g., B.J. Benthurum, *Old and New Court Controversy*, 6 KY. L.J. 173 (1918); Philip Lindsley, *The Old and the New Court: A Kentucky Judicial Episode*, 16 GREEN BAG 520 (1904)).

judges sat on the Court of Appeals, and they affirmed a pair of trial court decisions striking down as unconstitutional a popular debt-relief act.³⁰² The public's reaction was "vehement"³⁰³: "[T]o the majority of the people of Kentucky of that date the three judges seemed to be judicial tyrants who were obstructing the popular will and were in favor of the creditor class against the debtor class."³⁰⁴ So unpopular was this decision that removal of the judges "by address was the issue in the election of 1824."³⁰⁵ The pro-address (and pro-debt-relief) party won, and despite debate over whether removal by address was an appropriate vehicle for removing "a judge . . . merely for being wrong, albeit in good faith, in his interpretation of judicial authority,"³⁰⁶ removal proceedings were soon begun.³⁰⁷

It should be noted that several of these accounts, particularly Harrison's & Klotter's and Dr. Clark's, are somewhat suspect, at least from the perspective of *legal* history, if only because they include at least one potentially confusing error. Both Harrison & Klotter and Clark, claim both that a Fayette Circuit Court rendered the initial decision giving rise to *Lapsley v. Brashears*, 14 Ky. (4 Litt.) 46 (1823) (one of cases that led to the crisis), and that the presiding judge was Francis Preston Blair. HARRISON & KLOTTER, *supra* note 151, at 110; CLARK, *supra* note 156, at 143. Unquestionably, *Francis P. Blair* was involved in the Old Court-New Court situation—he was a local journalist and the clerk of the Franklin Circuit Court who was later appointed clerk of the new Court of Appeals. See generally ELBERT B. SMITH, FRANCIS PRESTON BLAIR 9 (1980). This same Francis P. Blair was later a member of Andrew Jackson's "Kitchen Cabinet." In their respective discussions of the Old Court-New Court controversy, and within scant pages of referring to Francis Preston Blair as the judge, both Harrison & Klotter and Dr. Clark, acknowledge Francis P. Blair's role as the New Court's clerk. HARRISON & KLOTTER, *supra* note 151, at 111; CLARK, *supra* note 156, at 145–46. Yet another historian, Stickles, refers to the *Lapsley* trial judge as "Judge Blair," with no first name. STICKLES, *supra*, at 31.

The problem is Francis P. Blair was not the trial judge in *Lapsley*. Indeed, no Judge Blair sat on the Fayette Circuit Court at that time. See *The Bar of Lexington*, in THE LAWYERS AND LAWMAKERS OF KENTUCKY 575, 576 (1897) (listing the judges to hold that office from its creation through 1897, without mentioning Blair). There was, however, a Judge Blair—William W. Blair—who also declared the debt relief law unconstitutional in 1822 in yet another case, *Rogers v. Mason*, but he served in Montgomery County. See MATTHEW G. SCHOENBACHLER, MURDER AND MADNESS: THE MYTH OF THE KENTUCKY TRAGEDY 319 (2009).

Moreover, *Lapsley* was not even brought in the Fayette Circuit Court. The underlying judgment in the case was rendered in Fayette County, but the cause that was appealed—a dispute over the replevin bond related to the underlying judgment—was pursued in the General Court. *Lapsley*, 14 Ky. at 47–48. The errors appear to stem from confusing *Lapsley* with Judge Blair's case in Montgomery County, and with presuming that the Judge Blair who decided *Rogers v. Mason*, the similar case, was Francis P. Blair. This is likely the case, as shown by Harrison's and Lowell's reliance on Stickles' account, which they describe as "the best study of the New Court-Old Court Controversy." HARRISON & KLOTTER, *supra* note 151, at 464.

³⁰² *Blair v. Williams*, 14 Ky. (4 Litt.) 34 (1823); *Lapsley v. Brashears*, 14 Ky. (4 Litt.) 47 (1823).

³⁰³ Ruger, *supra* note 301, at 849.

³⁰⁴ Seymour, *supra* note 245, at 376.

³⁰⁵ See *id.* at 375–76; see also Ruger, *supra* note 301, at 840 (noting that "critics of the court's exercise of judicial review made that the central issue in the campaign").

³⁰⁶ Ruger, *supra* note 301, at 850.

³⁰⁷ *Id.* Removal proceedings had also been undertaken against the trial judge in *Blair v. Williams*, James Clark, who originally declared the act unconstitutional in 1822. SCHOENBACHLER, *supra* note 301, at 101–02. That attempt failed, barely. See *id.* at 102 (noting that removal "fell four votes short," 59–35).

The proposed address carried both houses by a strong majority but failed to garner the two-thirds vote needed for removal.³⁰⁸ Instead, the pro-address legislators used their strong majority for an arguably more extreme remedy:³⁰⁹ to pass “a judicial reorganization bill that was subtle neither in intent nor in operation: it provided for immediate dissolution of the existing court of appeals and creation of a new ‘Supreme Court . . . styled the Court of Appeals.’”³¹⁰ The new law put four new judges on the court,³¹¹ and purported to limit the power of that court to declare legislation unconstitutional.³¹² Still, the old court continued to conduct business, and even struck down the act as unconstitutional.³¹³ And conflict between the clerk of the old court and the clerk of the new court almost led to violence.³¹⁴

The details of this crisis are better laid out elsewhere, but suffice to say that for a period of almost two years, Kentucky had two different courts claiming to have the last word. The voters were fickle, however, and in 1825, they voted for legislative candidates who supported the old court.³¹⁵ But those new legislators were not enough to repeal the law.³¹⁶ The “old court” party won still more seats in 1826, and was finally successful in repealing the new-court law (over the governor’s veto).³¹⁷

Although the General Assembly was unable to remove the judges by address, it nevertheless had sufficient political will to cause judicial chaos in Kentucky for two years. Practically speaking then, the address power is not one to be used lightly. Indeed, it appears that in the more than 200 years of Kentucky’s existence, despite several attempts, only two higher-court judges, as distinguished from justices of the

³⁰⁸ Ruger, *supra* note 301, at 850 (“Put to a vote in December 1824, the proposal to remove the judges by address received a substantial majority in each house but fell short of the requisite two-thirds approval.”); *id.* at 850 n.122 (“The motion passed the House 61–39 and the Senate 23–12.”).

³⁰⁹ See STICKLES, *supra* note 301, at 47–48 (“This was a bold, daring move, and if the state had been badly torn up and agitated before, only the use of the strongest superlatives could give any idea of what a storm now burst over the heads of the Kentucky people.”). Although it was an extreme approach, it was not unprecedented, having “been taken several times affecting the inferior courts and once affecting the court of appeals, but in the latter case the governor ignored the act and issued no new commissions.” *Id.* at 44.

³¹⁰ Ruger, *supra* note 301, at 851 (quoting An Act To Repeal the Law Organizing the Court of Appeals, and To Re-Organize a Court of Appeals, 1824–1825 Ky. Acts 44, 44 (1824)).

³¹¹ Seymour, *supra* note 245, at 376.

³¹² Ruger, *supra* note 301, at 851.

³¹³ Seymour, *supra* note 245, at 376.

³¹⁴ See, e.g., Ruger, *supra* note 301, at 853 (“Claiming to be the rightful judicial authority, the new court demanded that the old court release all of its records to the new institution’s custody. When the old-court judges refused, the new-court clerk, Francis Blair—an important young journalist in the state—risked a violent confrontation by staging a late-night break-in through a window in the old-court quarters to obtain the records.”).

³¹⁵ *Id.* at 854–55.

³¹⁶ *Id.*

³¹⁷ *Id.*

peace, have been successfully removed by address.³¹⁸ Those judges were William H. Burns³¹⁹ and Joshua F. Bullitt, both of whom were accused of being Confederate sympathizers.

Judge Burns was a circuit judge in Eastern Kentucky. In 1861, the House of Representatives learned that he had not been attending court and undertook to investigate by committee. The committee proposed he be removed by address on the grounds that he was accused of failing to discharge his duties, had taken service with the Confederate army and had been "aiding and assisting an armed body of men in rebellion and waging war against the State of Kentucky and the government of the United States," had violated his oath, and had committed treason against Kentucky and the United States.³²⁰ The House adopted the report by a vote of 68–8.³²¹ The Senate concurred in the proposed address unanimously.³²² The address appears to have been approved by the governor³²³ (not that he had a choice, per the constitution's language).³²⁴

Judge Bullitt was chief justice of the Court of Appeals in the 1860s. He was removed by legislative address in 1865.³²⁵ He was believed to be a Confederate sympathizer and his arrest was sought by a Union general, who had suggested the judge should be hanged.³²⁶ Bullitt left Kentucky for Canada to avoid arrest, justifiably fearing for his own safety,³²⁷ and he was removed from office because he

³¹⁸ These examples belie the claim, made repeatedly in the effort to pass the amended Judicial Article in 1975, that no judge had been removed in the history of the Commonwealth.

³¹⁹ Judge Burns' removal appears to contradict the statement in some historical sources that Judge Bullitt was the only "judge of [Kentucky's] high courts" to have been removed by address. Richardson, *supra* note 151, at 88. That said, although Richardson referred to Kentucky's "high courts," presumably referring to the courts above the justices of the peace, he might have been referring only to the Court of Appeals, in which case he was correct.

³²⁰ KY. HOUSE JOUR., Reg. Sess of 1861, at 610–11 (Feb. 18, 1862).

³²¹ *Id.* at 611–12.

³²² KY. SENATE JOUR., Reg. Sess. of 1861, at 423 (Feb. 20, 1862) (noting vote of 21–0); *see also id.* at 450 (Feb. 24, 1862) (reporting that "address for the removal of W.H. Burns, circuit judge of the 11th judicial circuit," along with several bills, had been "signed by the Speaker of the House of Representatives, the Speaker of the Senate affixed his signature thereto, and they were delivered to the committee to be presented to the Governor for his approval and signature").

³²³ *See* 1862 Ky. Acts 134.

³²⁴ KY. CONST. of 1850, art. IV, § 3 ("[T]he Governor *shall* remove . . . on the address of two-thirds of each House of the General Assembly . . ." (emphasis added)).

³²⁵ 1 LEWIS COLLINS & RICHARD H. COLLINS, HISTORY OF KENTUCKY 160 (rev. ed. 1882).

³²⁶ *Id.* at 151; Richardson, *supra* note 151, at 88.

³²⁷ Richardson, *supra* note 151, at 88.

had left the state of Kentucky.³²⁸ Interestingly, several years after the Civil War ended, the General Assembly passed a joint resolution disavowing the address.³²⁹

Proceedings for removal by address were instituted against other higher-court judges on several other occasions, but they were invariably unsuccessful. Perhaps the earliest instances came in 1795, when removal proceedings were begun against Benjamin Sebastian³³⁰ and George Muter, the two Kentucky Court of Appeals judges who had cast unpopular votes in a significant land case.³³¹ The attempts failed for want of a two-thirds majority in the Senate, and instead resulted in a House “resolution of censure that branded the judges unfit for office.”³³² This appears to have had at least some effect, as Muter changed his position the following year.³³³

In 1824, proceedings were initiated against Silas W. Robbins, a circuit judge, who was accused of “gross and multiplied offences in his official capacity, and against the principles of morality.”³³⁴ Although the committee assigned to

³²⁸ KY. HOUSE JOUR., Adjourned Sess. of 1867, at 817 (Mar. 13, 1869) (reprinting the address, which noted Bullitt was being removed because he had “vacated his said office by absenting himself from the sittings of said court and from this State, and having taken up his residence within the territory of a foreign government”); see also 1 COLLINS & COLLINS, *supra* note 325, at 160–62.

³²⁹ See KY. HOUSE JOUR., Adjourned Sess. of 1867, at 816 (Mar. 13, 1869) (proposing the following: “Resolved by the General Assembly of the Commonwealth of Kentucky, That it is our deliberate opinion that there was in fact no legal or constitutional cause for the removal of the said Hon. Joshua F. Bullitt; and the ground alleged therefor in the said address was palpably untrue; and the proceedings of the said General Assembly against him were a violation of the spirit of the Constitution (which guarantees to every man a fair and impartial trial); a flagrant outrage upon his constitutional rights; a manifest violation of all rules of equality and justice, and an insult to the honor and dignity of the Commonwealth of Kentucky.”); *id.* at 819 (adopting the resolution).

³³⁰ Sebastian was later pursued for impeachment, as recounted above. See *supra* notes 151–172 and accompanying text.

³³¹ See IRELAND, STATE, CONSTITUTION, *supra* note 234, at 6–7 (noting that the case was *Kenton v. McConnell* and that removal proceedings were begun but not identifying the judges by name); WILLIAM H. WHITSITT, THE LIFE AND TIMES OF JUDGE CALEB WALLACE 137 (1888) (noting the judges were Muter and Sebastian). Professor Ireland states that the opinion in *Kenton v. McConnell* was not officially reported, and cites instead the (*Lexington*) *Kentucky Gazette* from 1795. But it was eventually reprinted as part of *McConnell v. Kenton*, 1 Ky. (Hughes) 257, 276 (Ky. 1799).

³³² IRELAND, STATE CONSTITUTION, *supra* note 234, at 6.

³³³ See *id.* at 7 (noting that “the following year, one of the majority judges . . . revers[ed] his opinion in the case”); WHITSITT, *supra* note 331, at 138 (noting that the judges “had received a warning” and that in May 1796, “Muter joined with Judge Wallace [the dissenter] in an opinion just contrary to that which he had expressed the previous October”). This is also reflected in *Kenton*, 1 Ky. (Hughes) at 296–300, where yet another opinion of the court was reprinted, this time with Sebastian in dissent.

³³⁴ KY. HOUSE JOUR., Reg. Sess. of 1824, at 20–21 (Nov. 3, 1824). Many of the charges related to his acts concerned the appointment of a circuit court clerk to replace the recently resigned clerk, but they also included allegations of general dishonesty, bribery, unsuitability for the office, and a “traitorous disposition.” *Id.* at 21–27; see also *id.* at 117–18 (Nov. 17, 1824) (reprinting letter from Judge Robbins in which he described the accusations). Judge Robbins asked for the proceedings to be converted to those for impeachment, but the House does not appear to have taken this suggestion seriously. See *id.* at 74 (Nov. 12, 1824).

investigate the charges reported against removal,³³⁵ the House continued considering the evidence and put off a vote on whether to remove Judge Robbins.³³⁶ A subsequent report found some evidence of misconduct,³³⁷ and recommended chastising instead of removing the judge.³³⁸ In the full House, removal by address was again suggested but rejected.³³⁹ The General Assembly then voted against most of the proposed chastisement of the judge, voted in favor of one such resolution, and postponed consideration of another, at which time the original report would be reconsidered.³⁴⁰ The General Assembly does not appear to have ever taken back up the original report, at least not in the 1825 session that followed, and steps were later taken to reimburse Judge Robbins's expenses.³⁴¹

The General Assembly appears to have contemplated exercising its removal-by-address power against higher court judges at other times but, in each case, ultimately declined to exercise the power. For example, it took up the task of generally examining the qualifications of the state's circuit judges in 1835, with an eye toward their removal.³⁴² This was apparently at the request of the governor, who had sent a lengthy message to the General Assembly asking that various subjects be investigated, including the circuit courts, about which there had been

³³⁵ *Id.* at 352 (Dec. 10, 1824) (reporting the committee's finding that "there are no facts proved, which could authorize removal of Judge Robbins from office, either by impeachment or address, or which ought to destroy the confidence of the good people of this commonwealth in him, as an honest man or a competent judge").

³³⁶ *Id.* at 352, 359 (Dec. 10 & 14, 1824).

³³⁷ *Id.* at 360-76 (Dec. 14, 1824).

³³⁸ *Id.* at 375-76 (discussing adoption of a series of five resolutions of chastisement).

³³⁹ *Id.* at 375-77.

³⁴⁰ *Id.* at 378-80.

³⁴¹ See KY. HOUSE JOUR., Reg. Sess. of 1829, at 109 (Dec. 19, 1829) (noting proposed bill for reimbursement of Judges Robbins's expenses for the 1824 impeachment proceedings). Robbins later sued his accusers for libel. *Robbins v. Treadway*, 25 Ky. (2 J.J. Marsh.) 540, 540 (1829).

³⁴² See KY. HOUSE JOUR., Reg. Sess. of 1834, at 91 (Jan. 8, 1835) (noting adoption of following resolution: "*Resolved*, That the committee on the judiciary be instructed to inquire by the examination of witnesses, and such other legal method as they may choose to adopt, into the conduct of the circuit judges of this Commonwealth, and to report the facts to this House, and their opinion, whether the defect in the administration of justice arises from the nature of the system, the want of legal abilities and qualifications of the judges, or their habits of life disqualifying them from the discharge of their public duties, and if so, to report the name or names of such judge with the facts.").

significant complaint.³⁴³ Ultimately, five judges, including Silas Robbins again,³⁴⁴ were singled out.³⁴⁵ But none of them were removed.³⁴⁶

Although it appears that Judge Burns and Judge Bullitt were the only “judge[s] of [Kentucky’s] high courts” to have been removed by address,³⁴⁷ other sources note the process was used “from time to time”³⁴⁸ against the lesser judges, the justices of the peace, in the antebellum period. Indeed, this process was resorted to far more often than impeachment.³⁴⁹ Professor Ireland recounts more than twenty instances

³⁴³ *Id.* at 25–26 (Jan. 2, 1835) (reprinting Governor’s message noting, among other things, “complaints . . . among a large and respectable portion of the community, in reference to the circuit courts, and the manner in which their important and responsible functions are discharged”); *see also id.* at 33 (referring “so much of the Governor’s message as relates to the subject of the judiciary . . . to the committee of courts of justice”).

³⁴⁴ *Id.* at 207 (Feb. 2, 1835) (noting appointment of a “select committee” to look “into the official conduct of Judge Robbins,” in lieu of “the committee for courts of justice”).

³⁴⁵ The other judges were Henry O. Brown, *see* KY. HOUSE JOUR., Reg. Sess. of 1834, at 198 (Jan. 27, 1835) (appointing a committee to “inquire into the conduct . . . of Judge Brown”); *id.* at 244 (Feb. 11, 1835) (identifying him by his full name); William L. Kelly, *see id.* at 198 (Feb. 11, 1835) (appointing committee to “inquire into the conduct . . . Judge Kelly”); *id.* at 319 (Feb. 19, 1835) (noting report on “Judge Wm. L. Kelly” and thus identifying his full name); Walker Reid, *see id.* at 314 (Feb. 18, 1835) (noting report from committee for courts of justice on investigation into Judge Walker Reid); and John M. Hewitt, *see id.* at 326 (Feb. 29, 1835) (noting report “recommending his removal from office”).

³⁴⁶ Although the investigating committee gathered a great deal of evidence about Judge Brown, *id.* at 244–50 (Feb. 11, 1835) (reprinting summaries of 22 witnesses’ testimony), it recommended that no further action be taken, *id.* at 244. The full House agreed. *Id.* at 244–45 (noting 50–43 vote).

The committee investigating Judge Kelly originally asked to be relieved of “further considering of [the] case,” but the House required them to complete their investigation. *Id.* at 319 (Feb. 19, 1835). The committee later “made a report recommending his removal from office.” *Id.* at 348 (Feb. 23, 1835). The report concluded that he was a fair and impartial judge but that his use of “ardent spirits . . . endanger[ed] the administration of justice.” *Id.* at 363 (Feb. 25, 1835). The recommendation, however, failed to garner even a bare majority vote of the House, much less the required two-thirds supermajority. *Id.* at 364 (noting the vote of 65–25 against the proposed resolution).

Although the investigating committee found Judge Reid to be far from perfect, tending as he did to “vacillations of opinion,” it nevertheless proposed a resolution against his removal by address. *Id.* at 314 (Feb. 18, 1835). The House concurred in the resolution, which ended the matter. *Id.* As for Judge Hewitt, the committee investigating him reported in favor of a resolution proposing removal by address. *Id.* at 354–58 (Feb. 24, 1835). Upon the vote of the whole House, however, the resolution failed to garner the required two-thirds majority and was “declared . . . rejected.” *Id.* at 358. Judge Hewitt resigned not long after. KY. SENATE JOUR., Reg. Sess. of 1836, at 33 (Dec. 8, 1836). The select committee assigned to investigate Judge Robbins reported that “nothing . . . demand[ed] the further action of the legislature against said Robbins.” KY. HOUSE JOUR., Reg. Sess. of 1834, at 329 (Feb. 20, 1835). The House concurred in their report. *Id.*

³⁴⁷ Richardson, *supra* note 151, at 88. Richardson actually stated that Judge Bullitt was the only such judge. Perhaps he was referring to the Court of Appeals, in which case he was correct. But he referred to Kentucky’s “high courts,” presumably referring to the courts above the justices of the peace.

³⁴⁸ Ireland, *The Place of the Justice of the Peace*, *supra* note 127, at 207.

³⁴⁹ *See id.* (noting two removal methods, impeachment and address, and that “[t]he legislature normally utilized the latter method”).

of address proceedings in the early nineteenth century, several of which actually resulted in removal.³⁵⁰

Regardless of its use before 1850, there is little question that it was very rare. Indeed, it was so rare that it is practically lost to history in Kentucky, at least from the perspective of the practicing bench and bar. Indeed, this author had never heard of removal by address before beginning his research on this topic, though it is commonly discussed in the academic literature on impeachment and judicial removal at both the state and federal level.³⁵¹

As late as 1951, when the Kentucky Constitution still gave the General Assembly the power of removal by address, the Kentucky Court of Appeals seemed ignorant of its existence. In *Commonwealth v. Tartar*, authored by no less a luminary than Commissioner Watson Clay,³⁵² the court addressed whether judges can be prosecuted for misfeasance in office for neglect of their judicial duties.³⁵³ The court held that such prosecutions were improper because judges are essentially immune from prosecution for their judicial acts (or omissions).³⁵⁴ In lieu of such prosecutions, the court noted that judges could instead be impeached, which the court believed was a sufficient remedy.³⁵⁵ More importantly, the court noted: “[I]n the absence of other constitutional or statutory provisions, this method of attack must be considered *exclusive*.”³⁵⁶ The other-provision language qualifying this statement would surely have covered the removal-by-address provisions in the Constitution at that time,³⁵⁷ but nowhere did the court take notice of those provisions.

This could possibly be forgiven if the court was using “impeachment” as a shorthand way of referring to the uncommon procedure of address. For example,

³⁵⁰ *Id.* at 207–12 & nn.15–24 & 29; see also KY. SENATE JOUR., Reg. Sess. of 1834, at 443 (Feb. 29, 1835) (recording vote to remove Major I. Price from office of justice of the peace); KY. SENATE JOUR., Reg. Sess. of 1816, at 215 (Feb. 1, 1817) (recording Senate’s concurrence in House recommendation to remove Thomas S. Wingate from office of justice of the peace). Wingate later purported to resign from his post. *Id.* at 233 (Feb. 4, 1817) (recording Wingate’s resignation letter to the Senate).

³⁵¹ See generally Carrington & Cramton, *supra* note 274; Claus, *supra* note 284; Berger, *supra* note 284; Daly, *supra* note 284; Prakash & Smith, *supra* note 289.

³⁵² See Hilltop Basic Res., Inc. v. Cnty. of Boone, 180 S.W.3d 464, 467 (Ky. 2005) (noting “the esteemed and oft-quoted Commissioner Clay”).

³⁵³ *Commonwealth v. Tartar*, 239 S.W.2d 265, 266–67 (Ky. 1951).

³⁵⁴ *Id.* at 266.

³⁵⁵ *Id.* at 267.

³⁵⁶ *Id.* (emphasis added).

³⁵⁷ As noted above, circuit court judges were removable in the same way as Court of Appeals judges, KY. CONST. § 136 (repealed 1976) (“They shall be commissioned by the Governor, and continue in office until their successors shall have been qualified, but shall be removable in the same manner as the Judges of the Court of Appeals; and the removal of a Judge from his district shall vacate his office.”), who were removable on address of the general assembly; KY. CONST. § 117 (repealed 1976) (“For any reasonable cause the Governor shall remove them, or any one or more of them, on the address of two-thirds of each House of the General Assembly: *Provided*, The cause or causes for which said removal shall be required shall be stated at length in such address and in the journal of each House.”).

Morton Holbrook, who was heavily involved in promoting the amended Judicial Article in the 1970s,³⁵⁸ stated in a television special aired by Kentucky Educational Television that the then-existing judicial removal mechanism, referring to removal by address, was functionally impeachment, though he implicitly recognized it as a different process.³⁵⁹ But in many instances, the concepts were simply confused with each other. For example, when voters were considering whether to adopt the amended Judicial Article, Justice John Palmore frequently stated in newspaper articles that judges were removable only by impeachment, without recognizing, implicitly or otherwise, that removal by address was technically a different process.³⁶⁰

Such running together of the processes in the informal setting of a newspaper or television interview is understandable, but it is less so in the context of a judicial opinion, where precision is hopefully the goal. And in *Tartar*, the court explicitly invoked the impeachment provisions of the 1891 constitution, without referring to the then-existing provisions for removal by address.³⁶¹ And as explained above, removal by address, although similar to impeachment, is a different process.³⁶²

Regardless, removal by address was clearly a tool for removing *judicial* officers, whether a high-court judge or a humble justice of the peace. There is little suggestion that it has ever been contemplated as a procedure for removing non-judicial officers.³⁶³ But if removal by address is a process limited to removing members of the judiciary, then it does not apply outside the judicial branch of government, such as to county clerks, despite its continuing presence in the Kentucky Revised Statutes and lack of express limitation to judges.

Even if the removal-by-address statutes could be read as applying to non-judicial officers, or if they were invoked to remove a judge today, it is fairly clear

³⁵⁸ See Metzmeier, *Constitutional Amendment*, *supra* note 77, at 39 (listing him as a leading figure in the adoption of the judicial article and noting he was “eulogized . . . as the father of judicial reform”).

³⁵⁹ THE JUDICIAL ARTICLE, *supra* note 299, at 8:46–9:07.

³⁶⁰ *E.g.*, Finley, *supra* note 299 (quoting Justice Palmore as saying: “Right now if you’ve got a no-good judge somewhere, there isn’t any way to get rid of him before the next election except through the impeachment process.”).

³⁶¹ *Tartar*, 239 S.W.2d at 267 (citing KY. CONST. § 68, which deals only with impeachment).

³⁶² It is also worth noting that some judges, namely, the county judge and the justices of the peace, were removable by yet another method, prosecution for malfeasance or misfeasance, or neglect of official duties, under section 227 of the 1891 Kentucky Constitution, as discussed herein. See *infra* notes 385–386 and accompanying text.

³⁶³ Some commentators, however, have suggested that the power could be used against any officer if it had been included in the United States Constitution. See Gregory P. Joseph, *Opening Statement: Judicial Imperfection and Judicial Independence*, LITIGATION, Summer 1997, at 1, 2 (“On this analysis, the drafters [of the U.S. Constitution] rejected the then-common procedure of removal by Address, which existed under several state constitutions. This alternative would have allowed any civil officer, including a judge, to be removed upon a vote of both Houses of Congress (an Address) requesting the President to effect the removal.”). Of course, the power to remove by address was rejected for the federal constitution. And the historical record does not show that jurisdictions actually used removal by address against non-judicial officers. Indeed, when incorporated into state constitutions, such provisions appear uniformly to have applied only to judges.

that they are now unconstitutional. The present constitution does not confer this power on any body of government, it having been removed when the Judicial Article was adopted in 1975³⁶⁴ and replaced by a Retirement and Removal Commission.³⁶⁵ In the few instances Kentucky's courts have been confronted with the issue of applying extra-constitutional removal methods, they have held that civil officers may only be removed through methods adopted by the constitution. And any statute purporting to make an officer removable for any other reason (or with any other mechanism) has been held unconstitutional.

For example, in *Lowe v. Commonwealth*, proceeding under the 1850 constitution, the old Court of Appeals addressed a statute authorizing the county court to suspend the jailer, which "is virtually a removal."³⁶⁶ No such method of removal existed at that time in the constitution. Instead, the Constitution provided only for removal of that officer by impeachment,³⁶⁷ "a mode that applie[d] to and embrace[d] every civil officer in the State, from the highest to the lowest,"³⁶⁸ or by conviction for "malfeasance or misfeasance in office, or willful neglect in the discharge of their official duties,"³⁶⁹ "which only applie[d] to the officers mentioned in the section,"³⁷⁰ namely "[j]udges of the county court and justices of the peace, sheriffs, coroners, surveyors, jailers, county assessor, attorney for the county, and constables."³⁷¹

The Court then noted that whether the General Assembly could create other modes of removing officers was an open question. The answer was clearly that it could not:

[T]here can be but one view of this question, which is, that wherever the constitution has created an office and fixed its term, and has also declared upon what grounds, and in what mode, an incumbent of such office may be removed before the expiration

³⁶⁴ See 1974 Ky. Acts 170. Again, this Act did not actually accomplish the amendment. Rather, it proposed the amendment. The proposed amendment, however, was adopted at the general election of 1975.

³⁶⁵ See KY. CONST. § 121 ("Subject to rules of procedure to be established by the Supreme Court, and after notice and hearing, any justice of the Supreme Court or judge of the Court of Appeals, Circuit Court or District Court may be retired for disability or suspended without pay or removed for good cause by a commission composed of one judge of the Court of Appeals, selected by that court, one circuit judge and one district judge selected by a majority vote of the circuit judges and district judges, respectively, one member of the bar appointed by its governing body, and two persons, not members of the bench or bar, appointed by the Governor. The commission shall be a state body whose members shall hold office for four-year terms. Its actions shall be subject to judicial review by the Supreme Court.").

³⁶⁶ *Lowe v. Commonwealth*, 60 Ky. (3 Met.) 237, 239 (1860).

³⁶⁷ KY. CONST. of 1850, art. V, §§ 1-3.

³⁶⁸ *Lowe*, 60 Ky. at 240.

³⁶⁹ KY. CONST. of 1850, art. IV, § 36.

³⁷⁰ *Lowe*, 60 Ky. at 240.

³⁷¹ KY. CONST. of 1850, art. IV, § 36.

of his term, it is beyond the power of the legislature to remove such officer or suspend him from office for any other reason, or in any other mode, than the constitution itself has furnished.³⁷²

Not only was the answer clear, but the court also employed rather bombastic rhetoric to defend the decision.³⁷³ Relying on this reasoning, the court struck down the statute as “unconstitutional, inoperative, and of no effect,” and concluded “that the proceedings thereunder [we]re illegal and void.”³⁷⁴

There is little reason to think the law is different under the current constitution. In *Commonwealth ex rel. Attorney General v. Howard*, the old Court of Appeals addressed the practice of *quo warranto*,³⁷⁵ or the “common-law writ used to inquire into the authority by which a public office is held or a franchise is claimed.”³⁷⁶ The attorney general sought to remove a commonwealth’s attorney for corruption and other malfeasance under the *quo warranto* process,³⁷⁷ which was allegedly allowed under the old Civil Code of Practice in combination with section 233 of the constitution, which retained all common and statutory law in effect in Virginia in 1792.³⁷⁸ Though the court was hesitant to strike the code provision down as unconstitutional, it nevertheless noted that the commonwealth’s attorney was removable under the impeachment provisions of the constitution because he was a named constitutional officer and, relying on *Lowe*, concluded that *quo warranto* was not available to remove him because the legislature was not empowered under the constitution to employ that method.³⁷⁹

³⁷² *Lowe*, 60 Ky. at 241; see also *id.* at 242 (“In our opinion the fact that the framers of the constitution inserted in that instrument the several provisions fixing the terms of the offices thereby created, and prescribing the grounds upon which and the modes whereby the incumbents of such offices may be removed, is altogether sufficient to warrant the conclusion that those subjects were fully considered by them, and that they intended, by embodying said provisions in the constitution, to make them permanent and fixed, and thus to place the subjects to which they relate altogether beyond legislative control.”).

³⁷³ See, e.g., *id.* at 241 (“To recognize the existence of such power would be, in effect, to say that these provisions of the organic law of the land are subject to legislative caprice, and, to that extent, to defeat and violate the restrictions and safeguards which were inserted in the constitution in order to give it permanence and stability. The results of such a doctrine might be pernicious in the extreme.”).

³⁷⁴ *Id.* at 243.

³⁷⁵ *Commonwealth ex rel. Att’y Gen. v. Howard*, 180 S.W.2d 415, 416–17 (Ky. 1944).

³⁷⁶ *Quo Warranto*, BLACK’S LAW DICTIONARY (10th ed. 2014).

³⁷⁷ See *Howard*, 180 S.W.2d at 416.

³⁷⁸ See KY. CONST. § 233 (“All laws which, on the first day of June, one thousand seven hundred and ninety-two, were in force in the State of Virginia, and which are of a general nature and not local to that State, and not repugnant to this Constitution, nor to the laws which have been enacted by the General Assembly of this Commonwealth, shall be in force within this State until they shall be altered or repealed by the General Assembly.”).

³⁷⁹ See *Howard*, 180 S.W.2d at 419 (“It follows from what has been said that the procedure here adopted is not authorized by the provisions of the Code relied upon, nor was the legislature empowered to put into effect under § 233 the substituted *quo warranto* procedure, insofar as it applies to removal of a commonwealth’s attorney, a civil officer, named in the Constitution.”).

At least as the law stands now, if the constitution provides a removal mechanism, the legislature cannot employ a different one (existing or new). As noted above, removal by address no longer exists in the Kentucky Constitution. Judges, as civil officers, are of course removable by impeachment. Otherwise, they may only be removed by methods allowed by the constitution. The only other existing method is retirement and removal under section 121, which replaced the address provision in the 1891 constitution.³⁸⁰ The removal-by-address statutes, having been re-codified as part of the statutory revision in 1942 and having preexisted that by at least several decades, are a vestigial holdover from before the amended Judicial Article was passed. Under *Howard* and *Lowe*, those statutes no longer have any legitimacy.

And the constitutional substitute, retirement and removal, is limited to justices of the Supreme Court and judges of the Court of Appeals, Circuit Court, and District Court.³⁸¹ Omitted from this list are county-court judges, justices of the peace, and, most relevant to the broader discussion here, clerks of the county court. Like removal by address, retirement and removal simply does not extend beyond the judiciary.

iii. County Officers: Removal by Conviction for Malfeasance, Misfeasance, or Nonfeasance

As hinted in the previous section's discussion of *Lowe*, there is a lesser removal process for most county-level officers. Specifically, certain county officers "shall be subject to indictment or prosecution for misfeasance or malfeasance in office, or willful neglect in discharge of official duties, in such mode as may be prescribed by law."³⁸² "[U]pon conviction his office shall become vacant, but such officer shall have the right to appeal to the Court of Appeals."³⁸³ As used here, "Court of Appeals" has been read to refer to the Supreme Court of Kentucky.³⁸⁴ Provisions similar to this one and applicable to at least some officers were present in Kentucky's two earliest constitutions,³⁸⁵ though this method was not expanded to include most county officers until the 1850 constitution.³⁸⁶ The provision has also

³⁸⁰ See KY. CONST. § 121.

³⁸¹ See *id.*

³⁸² KY. CONST. § 227.

³⁸³ *Id.*

³⁸⁴ See *Woodward v. Commonwealth*, 949 S.W.2d 599, 601-02 (Ky. 1997).

³⁸⁵ See KY. CONST. of 1792, art. V, § 6 (allowing removal of justices of the peace "on conviction of misbehavior in office, or of any infamous crime"); KY. CONST. OF 1799, art. IV, § 6 (providing for removal of justices of the peace in the same manner as the first Kentucky Constitution).

³⁸⁶ See KY. CONST. of 1850, art. IV, § 36 ("Judges of the County Court and justices of the peace, sheriffs, coroners, surveyors, jailers, county assessor, attorney for the county, and constables, shall be subject to indictment or presentment for malfeasance or misfeasance in office, or willful neglect in the discharge of their official duties, in such mode as may be prescribed by law, subject to appeal to the Court of Appeals, and upon conviction, their offices shall become vacant.").

been codified by statute,³⁸⁷ and many of the cases dealing with this subject cite the statute without any reference to the constitutional provision making such a statute possible.³⁸⁸ Like removal under sections 150 and 151, an appeal suspends the removal unless and until the conviction is affirmed on appeal.³⁸⁹

So what exactly are malfeasance and misfeasance in office and willful neglect in discharge of official duties (also referred to as nonfeasance)³⁹⁰ under section 227? Neither the constitution nor the statutory codification of the offenses defines them. The trio has been collectively described as “official misconduct.”³⁹¹ At common law, they were prosecutable crimes.³⁹² They continued to be crimes under the 1850 constitution, though they had apparently been codified,³⁹³ and an additional punishment, removal from office, had been prescribed.³⁹⁴ Because they are not defined constitutionally or statutorily, and have their origins in the common law, Kentucky’s courts “look to case law for a definition.”³⁹⁵ Kentucky’s courts have repeatedly distinguished between the three.³⁹⁶ For example, they have been described as follows:

³⁸⁷ See KY. REV. STAT. ANN. § 61.170 (West 2016).

³⁸⁸ *E.g.*, *Commonwealth v. Boyle Cnty. Fiscal Court*, 68 S.W. 116, 118 (Ky. 1902) (quoting KY. STAT. § 3748 without referring to section 227 of the constitution).

³⁸⁹ See *Hazelrigg v. Douglass*, 104 S.W. 755, 758 (Ky. 1907).

³⁹⁰ See *Boyle Cnty. Fiscal Court*, 68 S.W. at 118 (using “nonfeasance” in lieu of willful neglect of official duty); *Donta v. Commonwealth*, 858 S.W.2d 719, 724 (Ky. Ct. App. 1993) (discussing offenses of “malfeasance, misfeasance and/or nonfeasance by executive officers”).

³⁹¹ *Standeford v. Wingate*, 63 Ky. (2 Duv.) 440, 464 (1866) (Williams, J., dissenting) (referring specifically to the removal power in article IV, § 36 of the 1850 constitution, which, as noted above, was exercisable for malfeasance or misfeasance in office, or willful neglect in the discharge of their official duties).

³⁹² See *Commonwealth v. Rowe*, 66 S.W. 29, 31 (Ky. 1902) (mentioning “the common-law offense of malfeasance in office”); *Commonwealth v. Tartar*, 239 S.W.2d 265, 266 (Ky. 1951) (mentioning “the common law offense of misfeasance in office”); see also *Commonwealth v. Bellis*, 494 A.2d 1072, 1073 (Pa. 1985) (discussing “the common law offenses of misfeasance, malfeasance and nonfeasance in office”).

³⁹³ See *Commonwealth v. Thompson*, 52 Ky. (13 B. Mon.) 159, 162 (1852) (noting a statute tracking article VI, § 36 of the 1850 constitution, and stating: “A proceeding against an officer under this statute for malfeasance in office is a criminal prosecution.”).

³⁹⁴ Some older cases suggest various officers were removable for this trio of “official misconduct” before the adoption of the 1850 constitution. See *Standeford*, 63 Ky. at 463–64 (Williams, J., dissenting) (noting that under the old constitution, “[n]early all of the State, district, and county officers were appointed during good behavior, which placed the incumbent beyond the control of the people or their representatives, save by expulsion for official misconduct, either of nonfeasance, misfeasance, or malfeasance”). Although that is true for some officers, see *supra* note 285, it does not appear to have been true for all of them, unless this refers to impeachment.

³⁹⁵ *Bailey v. Commonwealth*, 790 S.W.2d 233, 234–35 (Ky. 1990).

³⁹⁶ General malfeasance has also been distinguished from malfeasance *in office*, the offense under section 227, with the key distinction being that the latter requires an official act or action under color of office. See *id.* at 235. Presumably, the same distinction would apply to misfeasance and misfeasance in office.

Malfeasance is the unjust performance of some act which the party had no right, or which he had contracted not, to do. Misfeasance is the wrongful and injurious exercise of lawful authority, or the doing of a lawful act in an unlawful manner. Nonfeasance is the nonperformance of some act which ought to be performed.³⁹⁷

Malfeasance is the worst of the three, requiring "evil conduct or an illegal deed, the doing of that which one ought not to do, the performance of an act by an officer in his official capacity that is wholly illegal and wrongful."³⁹⁸ If there is no "evil intent or motive," the act "must have been done with such gross negligence as to be equivalent to fraud."³⁹⁹ More recently, the Kentucky Supreme Court has expressly held that evil intent is not absolutely required, and that willful, intentional, or grossly negligent conduct would suffice.⁴⁰⁰ Nevertheless, criminal culpability for malfeasance can only be shown by "a wrongful or unjust act that was an abuse of power."⁴⁰¹ Regardless of its exact definition, there is little question that malfeasance is distinguished from "[a]n honest mistake of an officer concerning the discharge of an official duty, although it may be the result of ignorance."⁴⁰² The gravamen of the offense appears to be corruption or negligence so extreme as to be indistinguishable from intentional misconduct.⁴⁰³ Examples of malfeasance include:

- A county judge knowingly ordering work on a non-county road, "violat[ing] both the laws of Kentucky and the regulations of [the

³⁹⁷ *Dudley v. City of Flemingsburg*, 72 S.W. 327, 327 (Ky. 1903); see also *Kinnison v. Carpenter*, 72 Ky. (9 Bush) 599, 608 (1873) (describing "*malfeasance*, or doing what the defendant ought not to do; *non-feasance*, or not doing what he ought to do; and *misfeasance*, or doing what he ought to do improperly").

³⁹⁸ *Fannin v. Commonwealth*, 331 S.W.2d 726, 728 (Ky. 1960); see also *Commonwealth v. Wood*, 76 S.W. 842, 843 (Ky. 1903) ("Corruption, in some form of words, must generally be averred; it is believed, always at common law." (citations omitted)).

³⁹⁹ *Wood*, 76 S.W. at 843.

⁴⁰⁰ *Woodward v. Commonwealth*, 984 S.W.2d 477, 480 (Ky. 1998).

⁴⁰¹ *Id.*

⁴⁰² *Wood*, 76 S.W. at 843; see also *id.* (requiring "evidence of something more than a mere mistake of duty"). But see *Sauer v. Fid. & Deposit Co. of Md.*, 234 S.W. 434, 436 (Ky. 1921) (concluding police officer's negligently driving ambulance, where it was his duty to drive it, "would be a malfeasance in the execution of the duties of his office"). This case may be explainable because it addressed whether a bond surety could be held liable, and not removal from office. Peace officers, while removable for malfeasance, misfeasance, and nonfeasance, were by then also removable for mere neglect. *Holliday v. Fields*, 275 S.W. 642, 645-46 (Ky. 1925) (discussing amendment of section 227 applicable to peace officers).

⁴⁰³ See *Wood*, 76 S.W. at 843 ("If the act is done with a corrupt purpose, or from a corrupt motive, or with a knowledge by the officer at the time that his official act is a violation of the law, or if the act is done so negligently or carelessly or recklessly as to show an utter want of care or of concern, and such as would be tantamount to a fraud, and therefore could be said to be fraudulently done, his act will be a malfeasance, but not otherwise.").

county],” and demoting the worker who had reported the improper work.⁴⁰⁴

- A justice of the peace taking money into court to be paid out to a claimant, and telling the payor it had been paid, but keeping the money and later claiming it was to satisfy a court-cost debt.⁴⁰⁵
- A clerk underreporting collected fees of over \$14,000 over the course of ten years, which, although not intentional, was “gross negligence, carelessness and recklessness so ‘as to show an utter want of care or of concern, and such as would be tantamount to a fraud, and therefore could be said to be fraudulently done.’”⁴⁰⁶
- A county judge “willfully, unlawfully, knowingly, and wrongfully exonerat[ing] certain named persons of their state taxes in various respective sums, and . . . thereby wrongfully and fraudulently depriv[ing] the state of specified sums of money as being taxes on the assessments so exonerated.”⁴⁰⁷
- A coroner holding of a murder inquest with no belief (or reason to believe) in foul play.⁴⁰⁸
- A constable accepting bribes to not pursue cases.⁴⁰⁹
- A county judge “willfully, wickedly, maliciously and corruptly issu[ing]” an arrest warrant on a “pretended charge.”⁴¹⁰
- A justice of the peace “willfully and corruptly failing and refusing to report the money collected on fines as provided by section 4252, Kentucky Statutes.”⁴¹¹

Misfeasance, unlike malfeasance (which requires a purely unlawful act,⁴¹² albeit an official one or one done under color of office), contemplates an act that could be lawful but which is done wrongfully. It is the “the wrong-doing of an official act.”⁴¹³ Examples of misfeasance are less common in the reported cases. The courts, however, have suggested that the following constitute the offense:

⁴⁰⁴ *Woodward*, 984 S.W.2d at 480–81. The court concluded: “There was sufficient evidence to demonstrate a wrongful and unjust intent.” *Id.* at 480.

⁴⁰⁵ *Fannin v. Commonwealth*, 331 S.W.2d 726, 728–29 (Ky. 1960).

⁴⁰⁶ *Commonwealth ex rel. Att’y Gen. v. Furste*, 156 S.W.2d 198, 200 (Ky. 1941) (quoting *Wood*, 76 S.W. at 843).

⁴⁰⁷ *Commonwealth v. Middleton*, 50 S.W.2d 6, 6 (Ky. 1932).

⁴⁰⁸ *Fuson v. Commonwealth*, 44 S.W.2d 578, 578–79 (Ky. 1931).

⁴⁰⁹ *Castle v. Commonwealth*, 24 S.W.2d 298, 298 (Ky. 1930).

⁴¹⁰ *Robbins v. Commonwealth*, 22 S.W.2d 440, 441 (Ky. 1929).

⁴¹¹ *Short v. Commonwealth*, 219 S.W. 165, 166 (Ky. 1920).

⁴¹² See *Fuson*, 44 S.W.2d at 579 (stating that malfeasance is the “doing of some act which the doer has no right to perform” (quoting JAMES M. ROBERSON, ROBERSON’S NEW KENTUCKY CRIMINAL LAW AND PROCEDURE § 1535, at 1689 (2d ed. 1927))).

⁴¹³ *Commonwealth v. Williams*, 79 Ky. 42, 45 (1880).

- A clerk's embezzlement of money.⁴¹⁴
- An oil inspector's mishandling of oil and gasoline tests—specifically, failing to obtain proper samples and to furnish reports, and allowing inspected companies to provide samples and to brand the products approved.⁴¹⁵
- A justice of the peace's procuring a fake witness to sign a search-warrant affidavit for a bootlegging operation.⁴¹⁶

The third category is willful neglect in the discharge of official duties,⁴¹⁷ which, as noted above, is also referred to as nonfeasance. "Nonfeasance is the willful omission by an officer to perform an official duty."⁴¹⁸ "[M]ere ignorance, inadvertence, or mistake" is insufficient;⁴¹⁹ instead, nonfeasance presents itself only if the "public officer willfully or intentionally disregards a duty imposed upon him by law."⁴²⁰ And the conduct must consist of more than an isolated incident.⁴²¹ Examples include:

- An officer's move from the district, even if not intended to be permanent, that limited the performance of duties.⁴²²
- A fiscal court's members' complete failure to maintain roads as required by statute.⁴²³
- Refusal to execute an arrest warrant when informed of the subject's location in town.⁴²⁴

⁴¹⁴ *In re Lynch*, 238 S.W.2d 118, 120 (Ky. 1951). This seems more like malfeasance, though.

⁴¹⁵ *Gilman v. Doak*, 237 S.W. 1069, 1070-71 (Ky. 1922). The court noted that if the evidence proved the conduct, the inspector would have "flagrantly violated his duties, prescribed by the Statutes." *Id.* at 1071.

⁴¹⁶ *Black v. Commonwealth*, 63 S.W.2d 598, 598 (Ky. 1933). The fake witness was another bootlegger who used a fake name. *Id.*

⁴¹⁷ The cases frequently take care to distinguish nonfeasance from both malfeasance and misfeasance. *See, e.g., Cottongim v. Stewart*, 142 S.W.2d 171, 177 (Ky. 1940) ("Nonfeasance is the omission of an act which a person ought to do; malfeasance is the doing, either through ignorance, inattention or malice, of that which the officer had no right to do." (quoting FLOYD R. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICERS AND OFFICERS § 665 (1890))).

⁴¹⁸ *Commonwealth v. Boyle Cnty. Fiscal Court*, 68 S.W. 116, 118 (Ky. 1902).

⁴¹⁹ *Lynch v. Commonwealth*, 73 S.W. 745, 746 (Ky. 1903).

⁴²⁰ *Id.*

⁴²¹ *See* KY. REV. STAT. ANN. § 522.010 Ky. Crime Comm'n/Legis. Research Comm'n Cmt. (West 1974) ("Willful neglect of official duty may be shown by a series of events which sustain a charge of habitual, continual and repeated neglect.")

⁴²² *See* *Curry v. Stewart*, 71 Ky. (8 Bush.) 560, 563 (1872) ("If a county judge or other officer, without intending a permanent change of residence, so absents himself from his county or district as to be guilty of 'willful neglect' in the discharge of his official duties, he may be liable to a prosecution in the manner provided for by section 36 of article 4 of the [1850] constitution, and, if convicted, removed from office by the judgment of a proper tribunal . . .").

⁴²³ *Boyle Cnty. Fiscal Court*, 68 S.W. at 116, 118. The court dismissed the indictment, however, because any liability fell on the members individually, not the fiscal court itself. *Id.* at 118.

- A jailer's intentionally allowing a prison prisoner to leave jail, where it was his statutory duty "to receive and keep all persons in the jail, lawfully committed thereto, until they were lawfully released."⁴²⁵

As noted above, Kentucky's courts have attempted to maintain a distinction among the three types of misconduct described in section 227. Unfortunately, they have not always succeeded.⁴²⁶ For example, the cases have not always distinguished perfectly between misfeasance and malfeasance⁴²⁷ even though there is a technical difference. Nor have they maintained a complete distinction between the first two categories (misfeasance and malfeasance) and the third category (nonfeasance),⁴²⁸ even though this should be the cleanest distinction.

It makes sense doctrinally, even though in the end the consequence for all three is the same, to maintain a distinction among the three offenses. Although the concepts of malfeasance, misfeasance, and even nonfeasance are often run together today, section 227 and its predecessor in the 1850 constitution were drafted at a time when stricter common-law distinctions were maintained. In this sense, section

⁴²⁴ *Phillips v. Ronald*, 66 Ky. (3 Bush.) 244, 245, 247 (1868). The court actually describe this as "gross negligence and disregard of official duties," *id.* at 247, but seems to fit the nonfeasance bill.

⁴²⁵ *Lynch*, 73 S.W. at 745. The court noted, however, that this liability would arise only "[i]f a public officer willfully or intentionally disregards a duty imposed upon him by law," and not "if the act is only one of mere negligence, ignorance, or inadvertence." *Id.* at 746.

⁴²⁶ See KY. REV. STAT ANN. § 522.010 Ky. Crime Comm'n/Legis. Research Comm'n Cmt. (West 1974) ("[W]hile misfeasance, malfeasance and nonfeasance are conceptually distinguishable, technical distinctions become elusive in an attempt at practical application to an existing factual situation. Thus, there is the problem of definition.")

⁴²⁷ See *Commonwealth v. Bartholomew*, 97 S.W.2d 591, 593, 596 (Ky. 1936) (noting constable was charged with *malfeasance* and later concluding "that the facts shown by the testimony do not sustain the alleged *misfeasance* charged in the indictment" (emphasis added)); *Holliday v. Fields*, 275 S.W. 642, 647 (Ky. 1925) (stating of both *malfeasance* and *misfeasance*: "It thus appears that at the time of the adoption of the amendment these terms, whether used in a legal or a popular sense, signified a trespass or wrongful act in the performance of official duty, or such gross neglect as was equivalent to fraud."); *Treasy v. City of Louisville*, 125 S.W. 706, 707 (Ky. 1910) (stating that biased application of statute "would be . . . misfeasance or malfeasance in office" without distinguishing between the two).

⁴²⁸ For example, the old Court of Appeals, in addressing a case where law enforcement was alleged to have suffered a nuisance on the side of the road, stated: "If the defendants knowingly have failed to discharge any official duty, they might be indicted for malfeasance in office." *Commonwealth v. Kinnaird*, 37 S.W. 840, 840 (Ky. 1896); accord *James v. Cammack*, 129 S.W. 582, 587 (Ky. 1910) (Hobson, J., dissenting) ("The circuit judge who fails to discharge his duties as required by this act will be guilty of a misfeasance in office."). But failure to perform a duty is, of course, nonfeasance, or willful neglect of duty, not malfeasance or misfeasance. *Nonfeasance*, BLACK'S LAW DICTIONARY (10th ed. 2014).

227 retains the strict difference between the two concepts that is not always observed in modern American law.⁴²⁹

The attempt to maintain clear distinctions between the three may have originally been driven by the pleading requirements of the 1800s and early 1900s, which were much stricter than the requirements today. For example, conduct such as a jailer's drunkenness could not satisfy the requirements of malfeasance, because there was "no complaint . . . the [officer] did not faithfully, honestly, and correctly discharge all his duties as an officer,"⁴³⁰ but the jailer's drunkenness could be (or could result in) nonfeasance, at least where he literally failed to complete some of his duties, such as transporting prisoners, as a result.⁴³¹

Though the pleading requirements are far less strict today, especially in indictments, courts should strive to maintain the distinctions between the three crimes. Each of the misconduct trio is a crime. Each thus requires a trial by jury and a unanimous verdict for a conviction.⁴³² The doctrinal distinction among them is still necessary and should be maintained in practice, if only to allow juries to be properly instructed.

A proceeding for one of the trio of official misconduct under section 227 may also be what the *New York Times* referred to when it noted that a county clerk

⁴²⁹ Compare *Misfeasance in Public Office*, BLACK'S LAW DICTIONARY (10th ed. 2014) (stating misfeasance in public office is "[a]lso termed malfeasance"), with *Malfeasance*, BLACK'S LAW DICTIONARY (6th ed. 1990) (stating malfeasance "differs from 'misfeasance'"). Mr. Garner, the current editor of *Black's Law Dictionary*, has stated elsewhere that the terms are "imprecise" as used in American English, BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE 559 (3d ed. 2011), which may explain the equating of the two in the current edition of *Black's*. He notes there is a clear-cut distinction between the terms in British English, where "*malfeasance* refers to an unlawful act, [and] *misfeasance* refers to an otherwise lawful act performed in a wrongful manner." *Id.* This distinction is what has mostly been embodied in Kentucky's use of the terms when dealing with misfeasance and malfeasance in office under section 227 and its predecessor.

⁴³⁰ *Commonwealth v. Williams*, 79 Ky. 42, 47 (1880). "There was, therefore, no misconduct as an officer on his part, however reprehensible his conduct as an individual may have been. It is only for misconduct in connection with his official duties that the constitution authorizes him to be removed from office upon an indictment, and as the only misconduct charged was individual and personal, and not official in its character, the judgment must be affirmed." *Id.* at 47–48.

⁴³¹ *Sanders v. Commonwealth*, 60 S.W.2d 586, 587–88 (Ky. 1933). The court noted that men drink intentionally and it is common knowledge that intoxication results; and thus the jailer's resulting failure to carry out his duties was willful neglect, rather than mere negligence. *Id.* at 590.

⁴³² Although the federal constitutional right of a unanimous jury verdict does not apply to the states, see *Apodaca v. Oregon*, 406 U.S. 404, 411 (1972), Kentucky's constitution also includes that right, see *Wells v. Commonwealth*, 561 S.W.2d 85, 87 (Ky. 1978) ("Section 7 of the Kentucky Constitution requires a unanimous verdict . . .").

could be removed if convicted of a crime, specifically, “official misconduct.”⁴³³ This view, however, is mistaken for multiple reasons.⁴³⁴

First, “official misconduct,” while criminalized, is different from malfeasance or misfeasance in office, or willful neglect of duty. Official misconduct, as a named statutory offense, is addressed in the Kentucky Penal Code and carries a criminal penalty (jail time) as a misdemeanor.⁴³⁵ As noted above, the official-misconduct offense was envisioned as a supplement to the removal provisions in section 227, providing only criminal penalties.⁴³⁶ Whether a conviction for official misconduct could justify removing a county clerk from office is also addressed above.⁴³⁷

But section 227, which is not self-implementing, is actually carried out in section 61.170 of the Kentucky Revised Statutes, which sits in a chapter containing general provisions related to offices and officers.⁴³⁸ This provision creates an offense of “malfeasance or neglect of county officers” under which certain county officers may be “indicted [and convicted] in the county in which they reside for misfeasance or malfeasance in office, or willful neglect in the discharge of official duties.”⁴³⁹ But unlike *official misconduct*, this offense carries no jail time; its only penalties are a fine and removal from office.⁴⁴⁰ Because it carries no jail time, it is more a violation than a criminal offense.

And there is little question that section 61.170, instead of the official-misconduct statute, is the statutory implementation of section 227. It names the same offenses listed in section 227 and is an express means of removing county officers.⁴⁴¹ Moreover, Kentucky’s highest court has expressly held that section

⁴³³ See Blinder & Pérez-Peña, *Kentucky Clerk Denies Same-Sex Marriage License*, *supra* note 13.

⁴³⁴ The New York Times is not alone in having confused the statutory crime of official misconduct with malfeasance, misfeasance, and nonfeasance. The Kentucky Court of Appeals ran them together in *Donta v. Commonwealth*, 858 S.W.2d 719 (Ky. Ct. App. 1993). In that case, the court was discussing an official-misconduct conviction, but appeared to assume it was the equivalent of the offenses of “malfeasance, misfeasance and/or nonfeasance by executive officers.” *Id.* at 724. It is perhaps forgivable to the extent the discussion was part of a larger one deciding whether official misconduct was a petty crime for which there was no constitutional right to a jury trial, rather than an in-depth examination of the nature of malfeasance, misfeasance, and nonfeasance.

⁴³⁵ See KY. REV. ST. ANN. § 522.020 (West 2016) (first-degree official misconduct, a Class A misdemeanor); *id.* § 522.030 (second-degree official misconduct, a Class B misdemeanor).

⁴³⁶ See KY. REV. ST. ANN. § 522.020 Kentucky Crime Comm’n/Legislative Research Comm’n Cmt. (West 1974) (“Thus, uniformity of *penal* sanctions is obtained without disturbing expressed legislative policy regarding qualification to hold public office.”).

⁴³⁷ See *supra* notes 238–240 and accompanying text.

⁴³⁸ See KY. REV. ST. ANN. ch. 61 (titled in part “General Provisions as to Offices and Officers”) (West 2016).

⁴³⁹ *Id.* § 61.170(1).

⁴⁴⁰ See *id.* (“[I]f convicted they shall be fined not less than one hundred (\$100) nor more than one thousand dollars (\$1,000), and the judgment of conviction shall declare the office held by such person vacant.”).

⁴⁴¹ Compare *id.* (naming misfeasance, malfeasance, and willful neglect as causes to vacate an office), with KY. CONST. § 227 (naming misfeasance, malfeasance, and willful neglect as causes for removal).

61.170, and its predecessor statute, Kentucky Statute 3748, which read substantially the same, were the legislature's implementation of section 227.⁴⁴²

Finally, and most importantly, the county clerk cannot be removed by this process because that office is not named in section 227 (nor in section 61.170). Instead, section 227 and any statutes relating to it at most apply to "Judges of the County Court, Justices of the Peace, Sheriffs, Coroners, Surveyors, Jailers, Assessors, County Attorneys and Constables."⁴⁴³ As noted in *Lowe v. Commonwealth*, the predecessor provision to section 227, which read substantially the same, "only applie[d] to the officers mentioned in the section."⁴⁴⁴

If there were any question based on the text of section 227 alone as to whether the provision was to intend to apply to the county-court clerk, it was settled during the drafting of the constitution when the question was expressly addressed. A delegate specifically asked: "Was not a County Court Clerk left out of that?"⁴⁴⁵ Another delegate responded that the county-court clerks, along with the other court clerks, were expressly excluded from section 227 and not subject to removal by "indictment, no matter what crime they may be guilty of."⁴⁴⁶ Instead, removal of clerks was to be accomplished by trial before the Court of Appeals,⁴⁴⁷ as further discussed below. An amendment adding clerks to section 227 was proposed, debated, and ultimately rejected.⁴⁴⁸ Thus, this provision cannot extend to the county clerk.

iv. Court Clerks: Removal by the "Supreme Court"

Finally, we come to the clerks of Kentucky's courts. Before 1976, Kentucky's court of last resort, the Court of Appeals, had the authority to remove the clerks of

⁴⁴² See *Shearer v. Hall*, 399 S.W.2d 701, 703 (Ky. 1965) ("Following the guidelines of this section [227] of the Constitution, the Legislature enacted KRS 61.170 which provided that justices of the peace and other named officers may be indicted for malfeasance or misfeasance in office or willful neglect in the discharge of official duties."); *Robbins v. Commonwealth*, 22 S.W.2d 440, 441 (Ky. 1929) (showing the similarities of the language in both Kentucky Statute 3748 and section 227 of the Kentucky Constitution).

⁴⁴³ KY. CONST. § 227; see also KY. REV. ST. ANN. § 61.170(1) (West 2016) (applying to "county judges/executive, justices of the peace, sheriffs, coroners, surveyors, jailers, county attorneys, and constables").

⁴⁴⁴ *Lowe v. Commonwealth*, 60 Ky. (3 Met.) 237, 240 (1860).

⁴⁴⁵ 4 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION ASSEMBLED AT FRANKFORT, ON THE EIGHTH DAY OF SEPTEMBER, 1980, TO ADOPT, AMEND, OR CHANGE THE CONSTITUTION OF THE STATE OF KENTUCKY 5203 (Frankfort, Ky., E. Polk Johnson 1980) (statement of Delegate Nunn) [hereinafter 4 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES].

⁴⁴⁶ *Id.* at 5203–04 (statement of Delegate C. T. Allen).

⁴⁴⁷ *Id.* at 5204.

⁴⁴⁸ *Id.* at 5230–33.

all courts, including the county courts, for good cause.⁴⁴⁹ Kentucky's first three constitutions, and the initial version of its fourth, all contained a provision giving the court that power.⁴⁵⁰ Since the advent of the Kentucky Supreme Court as the highest court in 1976, however, that power no longer extends to the county clerks.⁴⁵¹

As discussed above, under the 1792 Constitution, the various courts appointed their own clerks.⁴⁵² But all of the clerks appointed under this section were "removable for breach of good behavior, by the Court of Appeals only."⁴⁵³ The Court of Appeals' judges were the "judges of the fact as well as of the law," and removal required that "two thirds of the members present . . . concur in the sentence."⁴⁵⁴ An almost identical provision was included in the 1799 Constitution, with the clerks of the various courts again removable by the Court of Appeals by a two-thirds vote.⁴⁵⁵

Although the county clerk was finally a named officer under the 1850 Constitution, and was popularly elected rather than appointed, the county clerk's removal was still governed substantially the same as before, with the clerk again removable by the Court of Appeals.⁴⁵⁶ This time, however, the clerk was removable for "good cause," and the qualifying word "only," referring to the Court of Appeals, was omitted.⁴⁵⁷

A similar removal provision was included in the 1891 Constitution, with the county-court clerk and other judicial court clerks being removable by the Court of Appeals for good cause.⁴⁵⁸ This removal mechanism differed from the others

⁴⁴⁹ See KY. CONST. § 124 (repealed 1976) ("The Clerks of the Court of Appeals, Circuit and County Courts, shall be removable from office by the Court of Appeals, upon information and good cause shown. The Court shall be judge of the facts as well as the law. Two-thirds of the members present must concur in the sentence.").

⁴⁵⁰ See *infra* notes 452–458 and accompanying text.

⁴⁵¹ See *infra* notes 490–493 and accompanying text.

⁴⁵² KY. CONST. of 1792, art. VI, § 5.

⁴⁵³ *Id.*

⁴⁵⁴ *Id.*

⁴⁵⁵ KY. CONST. of 1799, art. IV, § 10 ("They shall be removable for breach of good behavior by the Court of Appeals only, who shall be judges of the fact as well as of the law. Two-thirds of the members present must concur in the sentence.").

⁴⁵⁶ KY. CONST. of 1850, art. IV, § 39 ("The Clerks of the Court of Appeals, Circuit and County Courts, shall be removable from office by the Court of Appeals, upon information and good cause shown. The court shall be judges of the fact as well as the law. Two-thirds of the members present must concur in the sentence.").

⁴⁵⁷ *Id.*

⁴⁵⁸ See KY. CONST. § 124 (repealed 1976) ("The Clerks of the Court of Appeals, Circuit and County Courts, shall be removable from office by the Court of Appeals, upon information and good cause shown. The Court shall be judge of the facts as well as the law. Two-thirds of the members present must concur in the sentence.").

described above because it did not require affirmative misconduct or wrongdoing.⁴⁵⁹ It thus appears to applied to negligence and incompetence.

Although this power has been used more than a few times, it appears to have been used infrequently, especially under the third constitution.⁴⁶⁰ The first instance appears to have been in 1808, when the clerk of the Ohio County Circuit Court was accused of numerous bad acts, including buying votes; charging illegal fees; attempting to corrupt the sheriff to strike a juror from the rolls and, failing that, altering the court records to remove the juror from the rolls without the court's knowledge; urging a person to bring a slander suit and advising against the suit's dismissal even upon the plaintiff's motion; allowing alteration of a bond; and being an alien, that is, a citizen of Great Britain.⁴⁶¹ The court declined to consider the vote buying charges because they had nothing to do with the clerk's performance in office.⁴⁶² The court also declined to consider the alien charge, as it was not grounds for removal.⁴⁶³ But the court held that the clerk's erasure of the juror's name was a "breach of his duty,"⁴⁶⁴ and that permitting alteration of the bond was "an offense of a very deep cast" more criminal even than the "highly criminal" alteration of a private obligation.⁴⁶⁵ These acts "show[ed] such disregard of the duties of his office, as [to] render[] him unfit to have the custody of public records."⁴⁶⁶ As a result, the court found him to have breached good behavior and removed him, believing it had no choice.⁴⁶⁷

From that time through the 1990s, clerks have been removed for various reasons, ranging from mundane negligence to criminal conduct. Clerks have been

⁴⁵⁹ Cf. *Fid. & Cas. Co. of New York v. Boehnlein*, 260 S.W. 353, 354 (Ky. 1924) (finding faithful performance of official duties included misfeasance, malfeasance, nonfeasance, and negligence in the context of surety bonds).

⁴⁶⁰ See *IRELAND, LITTLE KINGDOMS*, *supra* note 57, at 35 ("Despite the increasing burdens of their office and their often low pay, there were few public complaints and little recorded litigation suggesting that the county court clerks of the period of the third constitution generally performed less than competently.").

⁴⁶¹ See *Commonwealth v. Barry*, 3 Ky. (Hard.) 237, 238-39 (1808).

⁴⁶² *Id.* at 239-40. Of course, he could have been removed by being "convicted of bribery, perjury, forgery, or other high crimes or misdemeanors." KY. CONST. of 1799, art. VI, § 4. The court noted this point, but stated that the process was different and would require a prosecution and conviction before the court would act on it to remove the clerk. See *Barry*, 3 Ky. (Hard.) at 240.

⁴⁶³ *Barry*, 3 Ky. (Hard.) at 240.

⁴⁶⁴ *Id.* at 244.

⁴⁶⁵ *Id.* at 245-46.

⁴⁶⁶ *Id.* at 247.

⁴⁶⁷ See *id.* ("It is not the province of this court to dispense mercy, but to pronounce the judgment of the law; which in this case they must do, however much they may regret that the defendant has been led astray by misguided influence, or his own passions or prejudices. Wherefore, it is considered and adjudged, that the said Daniel Barry, clerk of the Ohio circuit court, is guilty of a breach of good behavior in office And it is further considered, ordered and adjudged, that the said Daniel Barry, clerk of the Ohio circuit court aforesaid, for the breach of good behavior in office aforesaid, shall be, and he is hereby removed from his said office of clerk of the Ohio circuit court aforesaid, the members of this court concurring unanimously in this sentence.").

removed for forging orders for the payment of maintenance for a lunatic, keeping the money, and later altering records to cover up misdeeds;⁴⁶⁸ embezzling public funds, charging illegal fees, and making false entries in the order book “for a sinister purpose”;⁴⁶⁹ underreporting collection of fees and other charges, even if not done intentionally;⁴⁷⁰ and failing to maintain proper records, failing to deposit collected monies into a bank (and having a significant deficit in the existing funds), and failing to maintain funds in a interest-bearing account.⁴⁷¹

In many instances, despite serious charges and even findings of significant misdeeds, the court refused to remove the clerk. For example, in 1823, the court found a circuit court clerk had engaged in conduct that was technically “incompatibl[e] with the strict duties of his office,” specifically by allowing an unsworn person to act as his deputy.⁴⁷² Nonetheless, the court concluded, “His conduct on that occasion is not . . . of a character which . . . ought to induce his removal from office.”⁴⁷³ Other charges that the clerk failed to keep sufficient hours or hire adequate deputies were not founded on sufficient evidence,⁴⁷⁴ though the court did announce that appointing an incompetent deputy could require removal in the right circumstances.⁴⁷⁵ And other charges, such as that the clerk charged fees without (or before) performing services and thus essentially extorted money, though nominally “sufficient to authorize an expulsion . . . from office,”⁴⁷⁶ failed for

⁴⁶⁸ *Commonwealth v. Chambers*, 24 Ky. (1 J.J. Marsh.) 108 (1829). Interestingly, the court concluded that such conduct required removal even absent a corrupt motive. *See id.* 141–42 (Robertson, J., on rehearing) (noting that “if any official acts, unalloyed with a corrupt intent, can be considered a breach of good behaviour, this is one of them”).

⁴⁶⁹ *Commonwealth v. Rodes*, 45 Ky. (6 B. Mon.) 171, 194 (1845). The court had previously failed to remove Rodes in 1833, despite various serious charges, including that he had bought the office. *Id.* at 178, 186–87, 190.

⁴⁷⁰ *Commonwealth ex rel. Att’y Gen. v. Furste*, 156 S.W.2d 198, 198 (Ky. 1941). Interestingly, the court concluded that the clerk in question could only be removed for the remainder of the term (a little over a month) in which his misconduct occurred. *Id.* at 201. The same clerk had already been elected to another term and was to be allowed to take office. *Id.* The court had to issue its mandate ahead of schedule (there was still time to file a petition for rehearing under the rules) to give it any effect. *See Commonwealth ex rel. Att’y Gen. v. Furste*, 157 S.W.2d 59, 63 (Ky. 1941).

⁴⁷¹ *In re Overstreet*, 851 S.W.2d 458, 460 (Ky. 1993).

⁴⁷² *Commonwealth v. Arnold*, 13 Ky. (3 Litt.) 309, 317 (1823).

⁴⁷³ *Id.*

⁴⁷⁴ *Id.* at 317–18.

⁴⁷⁵ *See id.* at 318 (“We would not be understood to decide that an office may not, under peculiar circumstances, be forfeited by the appointment of an incompetent deputy. There are possible cases, where the public interest might be so materially affected by the acts of an ignorant and unskilful [sic] deputy, as to justify a removal of the principal from office, for having appointed such a deputy. But in this case it is perfectly clear, that no injury has resulted to any one by the acts of Miller. It appears never to have been intended by the defendant, that Miller, in his incapacitated condition, should exercise all the duties of the office, and in fact many of those duties were never attempted to be performed by him, and such as he actually performed, are not even suggested to have been incorrectly or unskilfully [sic] done.”).

⁴⁷⁶ *Id.* at 323.

want of “any thing like corruption or impure motive.”⁴⁷⁷ Of course, the court later departed from this motive requirement in some cases, noting that some conduct is so poor or negligent as to require removal regardless of good intent.⁴⁷⁸

The court also declined to remove clerks who were unqualified to hold office;⁴⁷⁹ had bought their office;⁴⁸⁰ collected fees in coins and paid them on to the state in

⁴⁷⁷ *Id.*

⁴⁷⁸ See, e.g., *Commonwealth v. Chambers*, 24 Ky. (1 J.J. Marsh.) 108, 160–61 (1829) (Underwood, J., on rehearing) (“I do not admit that it is necessary to attach to a clerk the turpitude of a criminal, to justify his removal from office. A very honest man may make a very indifferent clerk, and a man despicable for his vices may make an excellent clerk. It is proper to separate the character of the man, from the character of the officer, and when that is done, it may readily be perceived that there might be great propriety in making a distinction between the rules for the trial of the man for crime, and those for the trial of the officer, for breaches of good behaviour in office. This court has no power to remove a clerk for crimes committed, so long as he discharges the duties of his office well, nor should it be induced to overlook breaches of good behaviour, because the officer is honest as a man, or acts from good motives. The case of Judge Chase, impeached before the Senate of the United States, is not considered as parallel to the present. If it were necessary in his case to consider the *quo animo* with which he acted, in every instance, to justify a conviction under the charges and specifications brought forward against him, I do not perceive how it would necessarily follow, that this court should be controlled by the *quo animo* of a clerk. The case of Barry is an express authority to the contrary. The act of altering or making a false certificate of a record, in its consequences, is the same, let the *quo animo* of the clerk be what it may, good or bad. Removal from office is not intended as a punishment for the criminal act of the clerk, but it is designed to protect the community by insuring the faithful discharge of official duty, and by securing a preservation and integrity of the records. For criminal conduct, clerks can not [sic] be punished before this tribunal. In Barry’s case the court would not listen to a charge of bribery. The counsel for the accused, seem to me, to have looked upon the sentence of removal, as a punishment of some crime. It is not, I think, to be viewed in that light. If a clerk commits a forgery on the record this court would remove him for it, but it would belong to the circuit court to punish for the crime.”).

⁴⁷⁹ *Commonwealth v. Lancaster*, 15 Ky. (5 Litt.) 161, 161 (1824) (“[T]he mere want of qualification to be appointed, or to hold the office of [circuit] clerk, is not a ground for a prosecution for a breach of good behaviour.”).

⁴⁸⁰ *Commonwealth v. Rodes*, 31 Ky. (1 Dana) 595, 596 (1833). Apparently, the selling or leasing of the office of clerk was a very common practice in antebellum Kentucky. See IRELAND, COUNTY COURTS, *supra* note 32, at 91 (“Many clerkships of both the county and circuit courts were sold, often to the same man.”); *id.* at 92 (“On other occasions the clerkship was simply leased . . .”). This was because the clerk was paid through fees, rather than by salary, “the abundance of which made the office one of substantial profit.” *Id.* at 92 n.17. Thus, for example, the office of Clerk of the Fayette County Court was “farmed” out (or leased) for one year for \$1,000 in 1816. *Id.* at 92. Before the year was up, the office was sold to Rodes for \$6,000. *Id.*

For those keeping score, the \$6,000 Rodes paid in 1817 would have been equal to \$110,000 in 2014, as calculated under the Consumer Price Index (CPI). See Samuel H. Williamson, *Seven Ways to Compute the Relative Value of a U.S. Dollar Amount, 1774 to Present*, MEASURINGWORTH.COM (last visited Dec. 22, 2016), www.measuringworth.com/uscompare/ [https://perma.cc/J7W4-3K35] (The values can be input at that website, but the following URL will bring up the result of the calculations directly: <http://tinyurl.com/hneyytx> [https://perma.cc/265K-WC8J]). Even that number may be an underestimate, however, as there are other means of comparing value over time, many of which give a higher current value than does use the CPI. See Lawrence H. Officer & Samuel H. Williamson, *Measures of Worth*, MEASURINGWORTH.COM (last visited Dec. 22, 2016), <https://www.measuringworth.com/worthmeasures.php> [https://perma.cc/EGD2-GJTG] (showing six additional comparisons, all of which exceed the CPI calculation).

depreciated paper money;⁴⁸¹ antedated a marriage license and failed to take a required bond, and acquired the bond after the fact and post-dated it;⁴⁸² fell behind on paying fees over to the state and had his bond surety pay the money;⁴⁸³ and held money payable to the auditor of public accounts while an election contest for that office was pending.⁴⁸⁴

Removal proceedings against clerks were uncommon after 1850. Perhaps clerks simply began acting better as a group at that point as Professor Ireland has suggested occurred under the 1850 constitution.⁴⁸⁵ It is just as likely, however, at least in the latter half of the twentieth century, that removal became less necessary because clerks who came under fire for misconduct voluntarily removed themselves. Even now, clerks who are criminally prosecuted often resign as part of plea agreements,⁴⁸⁶ agree not to run for office again or hold other public office in return for dismissal of charges,⁴⁸⁷ or simply resign in the middle of an investigation.⁴⁸⁸

⁴⁸¹ *Rodes*, 31 Ky. at 596.

⁴⁸² *Id.* at 597. The court, however, acquitted him on this charge for want of a corrupt motive. *Id.* at 598.

⁴⁸³ *Commonwealth v. Chinn*, 62 S.W. 7, 9 (Ky. 1901). The clerk was charged with having sold his office to the surety for this conduct, in part, because any fees he collected as his alone were to be used to pay back the surety. The court concluded that his conduct showed carelessness, but that it was not a sale of his office. *Id.*

⁴⁸⁴ *Id.* at 9–10. He paid the money after the election contest was decided. *Id.* at 10.

⁴⁸⁵ IRELAND, *LITTLE KINGDOMS*, *supra* note 57, at 35 (“Despite the increasing burden of their office and their often low pay, there were few public complaints and little recorded litigation suggesting that the county court clerks of the period of the third constitution generally performed less than competently.”).

⁴⁸⁶ See Press Release, Ky. Att’y Gen., Attorney General Conway Announces Guilty Plea of Owsley County Clerk to Charges of Tax Evasion, Abuse of Public Trust (April 29, 2013), <http://migration.kentucky.gov/Newsroom/ag/gabbardplea.htm> [<https://perma.cc/R7LC-L5PJ>] (noting resignation of county clerk as part of plea agreement on abuse-of-public-trust and tax charges); see also Press Release, Ky. Att’y Gen., Attorney General Conway Announces Conviction And Resignation Of Elliott County Clerk (May 8, 2009), <http://migration.kentucky.gov/Newsroom/ag/Reedaisonconviction.htm> [<https://perma.cc/D68V-WZA9>] (noting that county clerk resigned as part of plea agreement in prosecution for official misconduct and misapplication of entrusted property).

⁴⁸⁷ See Bill Estep, *Charges Dropped Against Bell County Clerk Rebecca Blevins; She Won't Seek Re-election*, LEXINGTON HERALD-LEADER (Feb. 27, 2014, 2:19 PM), <http://www.kentucky.com/news/politics-government/article44473896.html> [<https://perma.cc/Z4J5-WNHV>] (describing plea agreement where charges were dismissed but clerk was allowed to “serve out the remainder of her term, which is over at the end of the year, but can’t seek re-election this year or ever hold another elective office”).

This is not a new phenomenon,⁴⁸⁹ but it appears to have become a more common outcome, at least with court clerks.

Of course, the 1891 constitution was amended substantially in 1975 with the adoption of the Judicial Article. The preexisting section 124 was removed and replaced with the current section 114. The new provision states that each appellate court, both the Supreme Court and the Court of Appeals, may appoint its own clerk “to serve as it shall determine.”⁴⁹⁰ Presumably, the qualifying language “as it shall determine” means each clerk serves at the court’s pleasure and may be removed with or without cause.⁴⁹¹

Section 114 also gives the Supreme Court the power to remove for good cause the clerks of the circuit courts, even though they are elected.⁴⁹² Removal no longer requires a two-thirds supermajority, and thus a mere majority of the court may

⁴⁸⁸ See Press Release, Jamie Neal, Ky. Admin. Office of the Courts, Lee County Circuit Court Clerk Retires Amid Investigation Into Possible Official Misconduct (Aug. 6, 2015), <http://courts.ky.gov/Pages/newsroom.aspx?viewMode=PressRelease&pressReleaseGUID=%7B232BA88E-9AF0-4756-ADEB-5E4812AFF5F8%7D> [<https://perma.cc/A4H7-R9KW>] (describing circuit clerk’s resignation during investigations by both Kentucky’s Administrative Office of the Courts and law enforcement). The clerk had been temporarily suspended while the investigation was pending. *Id.*; accord *In re* Suspension of Emma C. Adams, Lee County Circuit Court at 1 (Ky. Aug. 3, 2015) (unnumbered order of temporary suspension), <http://courts.ky.gov/Documents/NOI/NOI/suspensionorderemmaadams.pdf> [<https://perma.cc/ABB5-2CAC>]. She was eventually convicted of felony abuse of public trust. See Press Release, Ky. Att’y Gen., Attorney General Secures Felony Guilty Plea from Ex-Lee County Circuit Clerk (Feb. 19, 2016), <http://kentucky.gov/Pages/Activity-stream.aspx?n=AttorneyGeneral&prId=39> [<https://perma.cc/AS54-QPQD>].

⁴⁸⁹ See, e.g., *Logan County Fiscal Court v. Childress*, 243 S.W. 1038, 1039 (Ky. 1922) (describing how county treasurer charged with “malfeasance and misfeasance” in removal proceeding had resigned from office); cf. *Glass v. Jacoby*, 16 Ky. (Litt. Sel. Cas.) 181, 181 (1813) (noting that a county constable resigned during removal process).

⁴⁹⁰ KY. CONST. § 114(1)–(2).

⁴⁹¹ The Kentucky General Assembly certainly seems to agree. In its statutory implementation of section 114, it specifically provided each appellate court was to appoint a clerk as “to serve at its pleasure.” KY. REV. STAT. ANN. §§ 21A.030(1), 22A.040(1) (West 2016).

This understanding also comports with the Judicial Article’s handling of the appellate clerks in 1976. Specifically, when the Judicial Article was enacted, it included a schedule for its implementation so there would be a smooth transition. Among the transition provisions was one providing that the clerk of the Court of Appeals, who was to be elected at the same time the amendment was being voted on, would become the clerk of the new Supreme Court if the amendment passed. See 1974 Ky. S. Bill 183 § 2(6) (“The Clerk of the Court of Appeals elected at the election at which this amendment is adopted shall serve as the Clerk of the Supreme Court for the term for which he was elected . . .”). That clerk, however, was “subject to removal by the Supreme Court for good cause.” *Id.*

⁴⁹² KY. CONST. § 114(3) (“The clerks of the Circuit Court shall be elected in the manner provided elsewhere in this Constitution. The clerks of the Circuit Court shall serve as the clerks of the District Court. The clerks of the Circuit Court shall be removable from office by the Supreme Court upon good cause shown.”).

remove a circuit-court clerk.⁴⁹³ Missing from this provision, however, are the county court's clerks. And no analogous provision for county clerks exists elsewhere in the present constitution. In fact, the present constitution contains no provisions expressly providing for removal of county clerks. Thus, we are left to conclude that since 1976, Kentucky's highest court no longer has the authority under the constitution to remove a county clerk.

C. Removal Conclusions

The Court of Appeals' power to remove county clerks, originally for breach of good behavior and later for good cause, was part of a comprehensive system for removing constitutional officers, at least as of the 1850 constitution. Two methods under this system, impeachment and conviction for vote buying, felonies, or designated high misdemeanors, resulted in both removal from office and potentially disqualification from future office. These methods were applicable to all officers.

But outside the executive branch every officer was also subject to a lesser mode of removal. Most county officers were removable through indictment and prosecution for malfeasance, misfeasance, or neglect of their duties. Clerks of the county courts, like the clerks of the other courts (circuit and appellate), were removable by the Court of Appeals, even though they were also county-level officers.

Historically, this made sense because the county court was a judicial court, though it also had administrative duties. The duties of county-court clerks largely related to that judicial function (though they extended beyond that). And for that reason, during the debates over the 1891 constitution, several delegates noted that

⁴⁹³ Whether the two-thirds protection was meaningful in the past is doubtful, however. At most times throughout the eighteenth and nineteenth centuries, the Court of Appeals had only three or four members. See 1 LITTELL, *supra* note 35, ch. 24, § 1, at 102 (reprinting 1792 act establishing the court of appeals allowing three members); *id.* ch. 277, § 1, at 560 (reprinting 1796 act establishing the court of appeals as consisting of three members); 2 WILLIAM LITTELL, THE STATUTE LAW OF KENTUCKY ch. 358, § 4, at 443 (Frankfort, Ky., Johnston & Pleasants 1810) (reprinting 1801 act reestablishing court of appeals but with four members, three of whom could conduct business); 3 LITTELL, *supra* note 45, at 484 (reprinting 1808 act referencing four judges, and allowing two to conduct business in certain cases); 5 WILLIAM LITTELL, THE STATUTE LAW OF KENTUCKY, ch. 61, § 1, at 41 (Frankfort, Ky., Butler & Wood 1819) (reprinting 1813 act repealing part of the 1801 act declaring that "the court of appeals . . . shall be composed of four judges," and that "the court of appeals hereafter shall be composed of three judges only, two of whom shall make a court"); Seymour, *supra* note 245, at 374 (stating that "from 1813 until 1850 there were only three judges of the Court of Appeals at a time"); KY. CONST. of 1850, art. IV, § 4 (setting the number of judges at four, three of whom could conduct business).

For courts of those sizes, a mere majority would have constituted at least two-thirds of the court. It is not until the court reached its present size, with seven members, that the two-thirds requirement offered practical protection by requiring a supermajority of five votes. That became possible in the 1891 constitution, which authorized an increase of the court's size to between five and seven members. Metzmeier, *History of the Courts of Kentucky*, *supra* note 32, at 25. Acting under this provision in 1895, the General Assembly increased the court to seven members. *Id.*

county clerks should be removable by the Court of Appeals, rather than relying on the lengthy process of indictment and prosecution for malfeasance or misfeasance.⁴⁹⁴ They also noted that prosecution for malfeasance or misfeasance was too restrictive a process, both procedurally and in the scope of conduct that would justify removal, for what was viewed as such an important office.⁴⁹⁵

The county court is no longer a judicial body, however. And the fiscal court now carries out the administrative functions that the county court once fulfilled. The county clerk's duties have shifted, too, as the county court itself has been transformed. Though the clerk is still a record keeper, the office's main focus is no longer on keeping judicial records of cases. The clerk's duties have shifted toward those of a registrar of property, marriage, and other records. The county court's judicial function came to an end with the adoption of the Judicial Article in 1975. The county judge is now more commonly called the county judge/executive. The addition of "executive" to the title is telling, as the office is now largely executive in function. It also has some legislative function, as when the county judge/executive sits as part of the fiscal court, which functions as the county's legislative body.

But with the phasing out of the county court's judicial functions also came the end of the removal process for county clerks, which was simply elided from the Constitution in 1975. What had previously been a comprehensive removal system now seemed to have a gap. The classic constitutional approach had provided for a removal system with two levels. At the top were two removal processes applicable to all officers. The best known of these was impeachment, which was reserved for serious offenses, despite its ostensibly political nature. Criminal conviction for certain serious offenses also resulted in removal. Both processes also created the potential for future disqualification from office. State-level constitutional officers in the executive branch were and are removable only through these processes.

⁴⁹⁴ 4 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES, *supra* note 72, at 5231-34. At least one delegate objected to this method of removal for clerks, complaining that the drafting committee had not voted on it, 4 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES, *supra* note 445, at 4858 (statement of Delegate C. T. Allen), and stating that he was "unwilling to put in the Constitution a clause exempting Circuit and County Court Clerks from indictment [for malfeasance or misfeasance], and having them tried by the Court of Appeals," *id.* at 4859.

Delegate C. T. Allen was incorrect about whether the provision had been voted on by the committee. Delegate Hopkins reported that it had originally been left out of the report by mistake of the draftsman or printer, 3 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES, *supra* note 72, at 3572, 3575 (statement of Delegate Hopkins), and he recommended that it be added to the report, *see id.* at 3575. Ironically, Delegate Allen was present when the added section was first offered, having spoken immediately before Delegate Hopkins introduced it. *See id.* at 3575. There was no vote at that time, but the added section was later formally offered as an additional section and voted on. *Id.* at 3603. Again, Delegate Allen was present, having voted shortly before the added section was voted on and having spoken shortly thereafter. *Id.* at 3601, 3604.

Delegate Allen's objection to having a special removal process for clerks was not taken up until more than two weeks later. 4 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES, *supra* note 445, at 5230. He ultimately lost the debate. *See id.* at 5233 (reporting that he lost his motion to reconsider after vote of the convention).

⁴⁹⁵ 4 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES, *supra* note 445, at 5231.

All other officers, at least from 1850 to 1976, were also removable through other means specific to their offices. The General Assembly had the power to expel its own members. The General Assembly also had the power to remove judicial officers through address, which was originally limited to instances where impeachment was improper, though it was later expanded to be, in theory, a broader check on the judiciary. County-level officers, other than the clerks of the county and circuit courts, were removable by conviction for malfeasance, misfeasance, and nonfeasance. And finally, the clerks of all the state's courts, from the Court of Appeals down to the circuit and county courts, were removable by the Court of Appeals.

With the 1850 constitution, Kentucky had a comprehensive system of removal for these non-executive and lesser officers.⁴⁹⁶ All of them could be removed without resort to nigh-on-impossible impeachment or the messiness of a criminal trial in which the officer's liberty was at stake. But that changed in 1975 when the new Judicial Article was adopted. Although other removal methods were left intact, the methods for judges and county clerks were amended. The judicial removal process was simply replaced with the retirement and removal commission. The mechanism for removing county clerks, however, simply ceased to be.

III. THE MYSTERY OF THE MISSING REMOVAL MECHANISM FOR COUNTY CLERKS

So what happened in 1975? Why were county clerks singled out and elevated, in terms of removability, to the same level as the governor, attorney general, and secretary of state? What made county clerks special?

Unfortunately, there is no definitive answer. Nothing has been found in the historical record leading up to the adoption of the Judicial Article directly addressing the mechanism for removing county clerks. That does not mean we have no evidence about what was going on at the time. In fact, we know a great deal about the process leading up to the adoption of the Judicial Article and what

⁴⁹⁶ The earlier constitutions had no process less than impeachment for removing county officers other than justices of the peace. Thus, for example, surveyors and coroners effectively served for life under the 1799 constitution. IRELAND, COUNTY COURTS, *supra* note 32, at 79. That does not mean those other officers were not removable by a lesser system. The Kentucky Court of Appeals held that because the 1799 constitution only prescribed the appointment process for jailers and various other county officers, with no mention of their tenure, the General Assembly had "the power of prescribing the tenure of office, and regulating the duties of the officer." *Gorham v. Luckett*, 45 Ky. (6 B. Mon.) 146, 150 (1845). In 1799, the General Assembly had passed a statute making jailers serve "for and during the pleasure of the Court by whom they are appointed." *Id.* (quoting 2 STAT. LAW 861). But in 1802, the General Assembly passed a new statute allowing the County Court to remove a county jailer who "ha[d] been guilty of neglect of duty." *Id.* at 151 (quoting 3 LITT. LAWS OF KY. 69). The court read this to mean jailers could only be removed upon showing a neglect of duty. *Id.* at 154. The important takeaway, however, is that under the 1799 constitution, providing for non-impeachment removal for some county officers was left up to the legislature.

was discussed at that time. But we are left to infer from the lack of specific evidence. So what exactly happened leading up to 1975?

A. The Removal "Gap" and How it Came to Be

The "gap" is the product of changes to the judiciary in the 1970s. Just as the county-court clerk's story is tied to the story of the county court, so too is the change in the county clerk's status tied to the change in the county court's status. Thus, to some extent, an examination of that change is necessary.

i. The State of the Kentucky Judiciary Leading Up to
1975 and the Push for Reform

As noted above, Kentucky's present judicial system was the product of a significant amendment of the 1891 constitution in 1975. Kentucky's judicial system was fairly consistent under each of its four original constitutions, with an appellate court at the top, a general-jurisdiction trial court, and, below that, various lesser trial courts, such as the county, police, municipal, and justice's courts. The problem is that by 1975, hundreds of such lesser courts were operating across the state, with some reports suggesting they numbered well over one thousand.⁴⁹⁷

The judicial system was in shambles, and its problems were well known. Indeed, as early as 1924, a government commission found that the Court of Appeals was overworked and recommended a unified court system to help combat the problem.⁴⁹⁸ Though the defects in the system were numerous,⁴⁹⁹ of particular interest were the "overly politicized county judge with both judicial and

⁴⁹⁷ This number results from counting each "branch" of a given court, such as the Jefferson County Court or the Lexington Police Court, as a separate court. There were, for example, necessarily 120 county courts alone (one for each county). Morton Holbrook stated that there were more than 1,200 individuals exercising judicial authority in 1975. See THE JUDICIAL ARTICLE, *supra* note 299 at 15:35-15:50.

⁴⁹⁸ Metzmeier, *Constitutional Amendment*, *supra* note 77 at 27.

⁴⁹⁹ *Id.* (noting "poor judicial pay," "lack of uniformity in the work of circuit judges," and "unsupervised lower courts," among others).

administrative duties,”⁵⁰⁰ and the “innumerable specific defects’ in inferior trial courts caused by non-lawyer judges.”⁵⁰¹

Restructuring the court system was again recommended in the 1950s and the 1960s.⁵⁰² In 1966, a Constitutional Revision Assembly proposed the adoption of a brand new constitution to replace the 1891 constitution.⁵⁰³ Included among the significant changes in that proposed document was a new court system similar to the one eventually adopted in 1975. Voters failed to adopt the new constitution, however, with their refusal driven by “anxieties and ignorance, which were spawned by a failure to adequately explain the reform throughout the state.”⁵⁰⁴ Despite defeat, “judicial reformers immediately set out to pass a separate amendment reforming the courts.”⁵⁰⁵ They still voiced concern about the “confused patchwork of trial courts with overlapping jurisdiction, uneven justice around the state, and a growing backlog of appellate cases.”⁵⁰⁶

Most of the lesser courts were still presided over by non-lawyers, and some news accounts suggest they were little better than kangaroo courts. Litigants’ rights

⁵⁰⁰ *Id.* Professor Metzmeier cites THE JUDICIARY OF KENTUCKY: A REPORT BY THE EFFICIENCY COMMISSION OF KENTUCKY (1923). Metzmeier, *Constitutional Amendment*, *supra* note 77 at 157. It is unclear if this report was published separately or whether Professor Metzmeier is referring to the judiciary portion of a two-volume report by the Efficiency Commission that was submitted to the Governor and General Assembly on January 1, 1924. See 1 EFFICIENCY COMMISSION OF KENTUCKY, THE GOVERNMENT OF KENTUCKY: REPORT BY THE EFFICIENCY COMMISSION OF KENTUCKY 437–541 (1924). That report, a copy of which is available at the Kentucky State Law Library in the Capitol, dedicated more than 100 pages to the judiciary. *Id.* As to the county judge, it specifically complained: “It is unfortunate also that the [county] judge should exercise both judicial and administrative duties. The latter kind involves political influences certain to be prejudicial to the former.” *Id.* at 474.

⁵⁰¹ Metzmeier, *Constitutional Amendment*, *supra* note 77, at 27 (quoting THE JUDICIARY OF KENTUCKY: A REPORT BY THE EFFICIENCY COMMISSION OF KENTUCKY (1923)). The Efficiency Commission’s critique of lay judges went beyond even that reported by Professor Metzmeier: “Even with the best of motives, the lay magistrate’s work will often be mere twaddle” EFFICIENCY COMMISSION OF KENTUCKY, *supra* note 500, at 472.

⁵⁰² See MARY HELEN WILSON, KY. LEGIS. RESEARCH COMM’N, A PERSPECTIVE OF CONSTITUTIONAL REVISION IN KENTUCKY, INFORMATIONAL BULLETIN NO. 119, at 7 (1976) (“A restructuring of the courts had been advocated by the Constitution Revision Commission, 1950–1955, and the Constitution Revision Assembly, 1964–1966, but it had not been submitted to the voters as a single amendment until 1975.”).

⁵⁰³ *Id.* at 9–10.

⁵⁰⁴ See IRELAND, STATE CONSTITUTION, *supra* note 234, at 17.

⁵⁰⁵ Metzmeier, *Constitutional Amendment*, *supra* note 77, at 27.

⁵⁰⁶ *Id.*

were trampled,⁵⁰⁷ and there was a good deal of "cash register justice."⁵⁰⁸ Making matters worse, appeals from these lower courts were by trials *de novo* in the circuit court, which added a great deal of inefficiency to the system, although this saved it from being unconstitutional.⁵⁰⁹ By most accounts, the Court of Appeals was being overwhelmed, with an "enormous backlog" of over 1,000 cases in 1973 and most appeals taking more than two years from the time the briefs were filed.⁵¹⁰ By 1975, the backlog had dropped to only 600 cases, but the delay still averaged over two years.⁵¹¹ The Court of Appeals had come to rely on commissioners to assist in resolving cases and to draft opinions.⁵¹²

The renewed reform movement began in 1968, when the Kentucky Bar Association held a conference encouraging the drafting of a new judicial article.⁵¹³ A proposal to reform the courts was finally introduced at the 1972 legislative session, though supporters of the then-existing system of trial judges ultimately defeated it.⁵¹⁴ In 1973, the governor created the "Governor's Judicial Advisory Committee."⁵¹⁵ The Kentucky Bar Association continued to press for change, while "the Kentucky Crime Commission, the Court of Appeals and the General Assembly all had committees investigating court reform."⁵¹⁶ These committees, in turn, formed an Ad Hoc Drafting Committee⁵¹⁷ to begin drafting a bill.⁵¹⁸ The

⁵⁰⁷ See Opinion, *Kentuckians Deserve Better Than Horse-and-Buggy Justice*, THE COURIER-JOURNAL (Louisville, Ky.), June 27, 1975 (describing a case in which a lay judge "lacked legal training and later admitted almost total lack of knowledge of the constitutional rights of defendants in criminal cases and of the rules of trial procedure"). The defendant was "denied a series of basic guarantees—including his demand for a jury trial and his rights to have legal counsel and to confront witnesses against him." *Id.* But see *North v. Russell*, 427 U.S. 328, 335–37 (1976) (affirming the conviction referenced in the preceding article and generally upholding Kentucky's system of lay judges against due-process challenge because appeals were allowed by right and were tried *de novo*).

⁵⁰⁸ *Advocates Say Amendment Would Reduce 'Cash Register Justice'*, MESSENGER (Mayfield, Ky.), Oct. 8, 1975, at 14 (explaining cash-register justice was the result of system funded largely by fees and fines, rather than from the state treasury).

⁵⁰⁹ *North*, 427 U.S. at 335–37.

⁵¹⁰ Linda Raymond, *Justice Comes Slowly for Many in State Court of Appeals*, COURIER-JOURNAL (Louisville, Ky.), Oct. 16, 1973, at A6.

⁵¹¹ Mary Buckner, *Judicial Reform: Speedier Trials, 'Qualified' Judges Proposal's Aim*, LEXINGTON LEADER, June 16, 1975, at 17.

⁵¹² William E. Bivin, *The Historical Development of the Kentucky Courts*, 47 KY. L.J. 465, 488 (1959) (noting that the Court of Appeals had been authorized to employ commissioners as early as 1906, and had up to four on staff by 1928); Metzmeier, *History of the Courts of Kentucky*, *supra* note 32, at 25. Circuit judges were also assigned to serve as commissioners at times. *E.g.*, *Matthews v. Allen*, 360 S.W.2d 135, 136 (Ky. 1962).

⁵¹³ Metzmeier, *Constitutional Amendment*, *supra* note 77, at 29.

⁵¹⁴ *Id.*

⁵¹⁵ *Id.* at 31.

⁵¹⁶ *Id.*

⁵¹⁷ *Id.* It is not clear this was the name of the committee, though Professor Metzmeier uses it as such. The committee is identified by other names elsewhere. See, *e.g.*, Application for Action Grant from the Kentucky Crime Commission (Dec. 26, 1974) (on file with the Kentucky State Law Library, and copy on file with author) (naming it as the "Ad Hoc Judicial Article Committee").

committee's first draft proposed merit selection of judges with retention elections, rather than selection by election on the front end.⁵¹⁹

A non-profit group, the Kentucky Citizens for Judicial Improvement, Inc. (KCJI), formed in 1973 with the goal of “educat[ing] Kentuckians about the benefits of judicial reform, while at the same time gauging the support for reform among ordinary people and incorporating those findings into drafting a new article that could make it through the 1974 General Assembly and be approved on the ballot.”⁵²⁰ To this end, the KCJI obtained significant grant funding,⁵²¹ and the group quickly leapt into its work. In the fall of 1973, it held a series of conferences “to involve the public in a process that up to then had been primarily the interest of the bench and bar.”⁵²²

KCJI also hired the John C. Kraft, Inc. polling firm “to survey the attitudes of Kentuckians about the state judicial system and judicial reform.”⁵²³ The results showed that Kentuckians generally favored some reforms, such as requiring judges to be licensed attorneys, but were opposed to some of the proposed reforms, such as merit appointment of judges.⁵²⁴ The KCJI also held a public meeting in late 1973, the Kentucky Citizens’ Conference for Judicial Improvement, at which the proposed amendment was studied and discussed.⁵²⁵

The results of the Kraft survey and the Citizens’ Conference led the Ad Hoc Committee to produce a revised draft of the bill leaving out some of the most objected-to reforms.⁵²⁶ The new version of the proposed bill would create the four-tiered system Kentucky has today and would require all judges to be licensed attorneys.⁵²⁷ It also would allow judges to be removed or otherwise disciplined by a Retirement and Removal Commission, which would replace the removal-by-address process.⁵²⁸ But instead of appointed judges, as had been the hope of many reformers, judicial elections would be retained at all levels.⁵²⁹

The proposed amendment was submitted to the General Assembly as Senate Bill 183 on February 4, 1974.⁵³⁰ After the bill was introduced, only some technical

⁵¹⁸ KY. CITIZENS FOR JUDICIAL IMPROVEMENT, INC., FINAL PROJECT REPORT 7 (1975) [hereinafter KCJI, FINAL PROJECT REPORT].

⁵¹⁹ See *id.* at 16 (noting that the “initial draft included the so-called ‘Missouri Plan’ which provided for the merit selection of judges”).

⁵²⁰ Metzmeier, *Constitutional Amendment*, *supra* note 77, at 31.

⁵²¹ *Id.*

⁵²² *Id.*

⁵²³ *Id.* at 32.

⁵²⁴ *Id.*

⁵²⁵ KCJI, FINAL PROJECT REPORT, *supra* note 518, at 11.

⁵²⁶ See *id.* at 16–17.

⁵²⁷ Metzmeier, *Constitutional Amendment*, *supra* note 77, at 33.

⁵²⁸ *Id.*

⁵²⁹ *Id.* at 32–33.

⁵³⁰ KCJI, FINAL PROJECT REPORT, *supra* note 518, at 17.

amendments were made.⁵³¹ Thus, the present Judicial Article is essentially the same as what was proposed in early 1974. Though the bill barely passed the Senate by the required three-fifths majority,⁵³² it garnered a strong majority in the House, passing 79-4.⁵³³ The bill, however, did not actually change the system or the constitution. Rather, it placed the proposal on the ballot, as required by the Constitution, at the next general election in 1975.⁵³⁴ In essence, Kentuckians were to vote on a constitutional referendum.

Leading up to the November 1975 election, the KCJI increased its efforts to convince Kentuckians to change their judicial system. It hired a new politically savvy director, James G. Amato.⁵³⁵ It "created a speakers' bureau of over 200 lawyers, judges and civil leaders, prepared to fan out throughout the commonwealth explaining the benefits of reforming Kentucky's judicial system."⁵³⁶ It also held a series of seminars across the state, which were "sparsely attended . . . [but] drew the attention of the local press which . . . filed stories that repeated the speakers' concerns with problems in Kentucky's judicial system and their description of how the proposed constitutional amendment would solve these problems."⁵³⁷ The KCJI also obtained endorsements from numerous citizens groups across the state.⁵³⁸ Newspapers across the state endorsed the amendment.⁵³⁹ And Kentucky Educational Television (KET) ran a special about the amendment multiple times.⁵⁴⁰

The group had its limits, however, because it had taken federal funds.⁵⁴¹ To engage in less restricted campaigning in favor of the amendment, reform supporters formed a new group, Kentuckians for Court Modernization, to engage in a direct advertising campaign in support of the amendment.⁵⁴²

Nevertheless, there was some opposition—primarily from groups like the county judges, who stood to lose power from the passage of the Judicial Article.⁵⁴³ Many perceived the controversy over the proposed amendment as essentially an urban-vs.-rural debate, and believed that the rural side would undoubtedly carry the

⁵³¹ Metzmeier, *Constitutional Amendment*, *supra* note 77, at 34; *see also* KY. SENATE JOUR., Reg. Sess. of 1974, at 641-45 (Mar. 5, 1974) (noting first reading of bill and reporting committee amendment consisting only of technical changes).

⁵³² *See* KY. SENATE JOUR., Reg. Sess. of 1974, at 780 (Mar. 7, 1974) (recording vote of 24 to 13); *see also* KY. CONST. § 256 (requiring a three-fifths majority for ratification of proposed amendments).

⁵³³ KY. HOUSE JOUR., Reg. Sess. of 1974, at 1872 (Mar. 15, 1974).

⁵³⁴ *See* 1974 Ky. Acts 171; *see also* KY. CONST. § 256 (requiring proposed amendments to be submitted to the voters of Kentucky for their ratification or rejection).

⁵³⁵ Metzmeier, *Constitutional Amendment*, *supra* note 77, at 35.

⁵³⁶ *Id.*

⁵³⁷ *Id.* at 36.

⁵³⁸ *Id.*

⁵³⁹ *Id.*

⁵⁴⁰ KCJI, FINAL PROJECT REPORT, *supra* note 518 at 4.

⁵⁴¹ Metzmeier, *Constitutional Amendment*, *supra* note 77, at 36.

⁵⁴² *Id.* at 36-37.

⁵⁴³ *Id.* at 37.

day when the votes were counted.⁵⁴⁴ But the KCJI had conducted a second poll, which suggested that the rural-urban divide could be overcome and that the proposed amendment was “a winner.”⁵⁴⁵

ii. The Successful Judicial Article

The second poll turned out to be right. The Judicial Article passed by a comfortable margin, with about 54% voting yes (215,419 to 180,124).⁵⁴⁶ Kentuckians had “radically revised Kentucky’s court system.”⁵⁴⁷ And it is fair to say that they did so quite intentionally. The majority of Kentuckians had voted yes on the following language:

Are you in favor of amending the constitution of the Commonwealth (by repealing the present sections 109 through 139, 141 and 143, and enacting in lieu thereof sections 109 through 124) to revise the Judicial Branch of Government by establishing one Court of Justice, composed of a Supreme Court, a Court of Appeals, a trial court of general jurisdiction known as the circuit court, and a trial court of limited jurisdiction known as the district court, but retain the nonjudicial powers and duties conferred upon the county judge and justices of the peace; providing for the location, composition, administration and jurisdiction of such courts; providing for the eligibility, term of office, election, removal, filling of vacancies, prohibited activities, compensation, and retirement of judges of such courts; providing for the election, selection and removal of the clerks of such courts; and providing a schedule of transition for those judges in office on the effective date of the amendment?⁵⁴⁸

The ballot measure did not replicate all of the language of the bill, but it summarized all of its main provisions. There is little question that voters could understand what they would be doing to the court system, at least in terms of what would be added after the old system was repealed.

The ballot language, by repealing section 124, removed the existing mechanism for removing county clerks, though the repeal language did so in an abstract manner without describing what was being repealed. In essence, to know that the

⁵⁴⁴ *Id.*

⁵⁴⁵ *Id.*

⁵⁴⁶ See *General Election Results, Constitutional Amendments*, KENTUCKY STATE BOARD OF ELECTIONS (Nov. 4, 1975), <http://elect.ky.gov/SiteCollectionDocuments/Election%20Results/1973-1979/75const.pdf> [<https://perma.cc/V4R3-5K35>].

⁵⁴⁷ Metzmeier, *Constitutional Amendment*, *supra* note 77, at 27.

⁵⁴⁸ *General Election Results*, *supra* note 546.

county-clerk removal provision was being repealed, a voter would have to know such a provision existed in the first place. At the same time, the ballot language indicated that a provision would be added for "elections, selection, and removal" of the clerks of "such courts" previously mentioned on the ballot. But those courts included only the Supreme Court, the Court of Appeals, the circuit court, and the district court, not the county court. It is possible a voter could have read the reference to "such courts" as including the county court, but that is not what the ballot language actually said. The office of county *judge* had been mentioned, but not the county *court*.

The language of Senate Bill 183 is even clearer. It, too, expressly repealed the provision allowing judicial removal of a county clerk,⁵⁴⁹ but it more obviously failed to create a new mechanism for removal of a county clerk. The new removal provision, section 114, mentioned only the clerks of the Supreme Court, Court of Appeals, and circuit court, and included a removal process only for the latter.⁵⁵⁰ Anyone familiar with the language of the bill, if asked about the clerks of the county court, could only have concluded that it said nothing about them.

The amendment did more than just radically change the judiciary. It also deleted the provision allowing removal of county clerks by the state's highest court, and it offered no substitute as it had for the other court clerks. Before that time, county clerks had always been removable by a second or lower tier mechanism, as had all other non-executive branch elected constitutional officers. But with the new amendment, this changed, and the "gap" was born.

B. Why Did the Gap Come to Be?

Both the repeal of the county-clerk-removal process and the failure to enact a substitute method appear to have been a matter of oversight. The tenor and content of the discussions leading up to the adoption of the Judicial Article and other historical materials suggest this hypothesis is correct.

i. The Materials Leading Up to the Amendment

The historical materials suggest that the people and organizations pursuing reform simply did not think about the office of county-court clerk. The focus of their efforts from the beginning was on reforming the court system itself, with the primary goals being a unified four-tier system, a requirement for judges to be trained lawyers, removal of the judicial functions of the county and justices courts, abolition of municipal and police courts, and, initially, merit selection of judges. Though this latter goal was compromised in favor of merit selection only for mid-

⁵⁴⁹ 1974 Ky. Acts 168 (proposing repeal of the then-existing judicial provisions).

⁵⁵⁰ KY. CONST. § 114. As noted above, the appellate courts have the power to remove their own clerks.

term vacancies with selection by election otherwise, the reformers' goals were otherwise accomplished. Fortunately, we can learn a lot about the reformers' process because the Kentucky State Law Library has retained a cache of documents about the effort to pass the Judicial Article and its ensuing implementation.⁵⁵¹ These documents are also silent when it comes to the county clerks.

a. The KCJI Questionnaire

Some of the earliest of these materials concern the 1973 poll conducted on KCJI's behalf to gauge Kentucky's interest in judicial reform. These documents come in two forms: letters between the KCJI and the polling company, and materials related to the poll itself, including a report summarizing its findings.

For the most part, the correspondence tells us little. For example, several of the letters are from members of the polling firm asking questions to facilitate the drafting of the questionnaire to be used.⁵⁵² Others deal with specific wording of the questionnaire.⁵⁵³ Fortunately, copies of both the first and second drafts of the questionnaire, included with the correspondence, are in the Kentucky State Law

⁵⁵¹ The collection consists of about ten boxes of materials. It includes a wide range of materials, such as the initial correspondence between the KCJI and a polling company in 1973 and the contract to conduct the poll, the original grant application to obtain KCJI's funding, hundreds of newspaper clippings from the three years leading up to the 1975 election, educational material created by the KCJI, and a lengthy final report by KCJI on the effort to promote the amendment.

⁵⁵² See Letter from Fran Farrell Kraft, John F. Kraft, Inc., to H. Paul Haynes, Sr., Exec. Dir., Kentucky Citizens for Judicial Improvement (Aug. 30, 1973) (on file with Kentucky State Law Library and with author) (asking for additional information about what the average voter would get out of the proposed amendment, questioning how the existing system was "outmoded and inefficient," requesting statistics on use of the court system, and pondering the cost of changing the judicial system); Letter from Ann M. Gosier, John F. Kraft, Inc., to H. Paul Haynes, Sr., Exec. Dir., Kentucky Citizens for Judicial Improvement (Sept. 5, 1973) (on file with Kentucky State Law Library and with author) (noting the first draft of the poll was coming along, asking how voting on the amendment will occur, and requesting copy of the proposed amendment to help "focus more clearly on the issue" and as "all part of developing a good questionnaire"); Letter from Fran Farrell Kraft, John F. Kraft, Inc., to H. Paul Haynes, Sr., Exec. Dir., Kentucky Citizens for Judicial Improvement (Sept. 11, 1973) (on file with Kentucky State Law Library and with author) (asking for a description of the existing trial courts and details about the Court of Appeals to "enable [them] to ask a more comprehensive 'simple' question").

⁵⁵³ See Memorandum from Fran Farrell Kraft, John F. Kraft, Inc., to Paul Haynes & Morton Holbrook (Oct. 12, 1973) (on file with Kentucky State Law Library and with author) (asking for comments on the accuracy of questions on the second draft of the questionnaire); Letter from H. Paul Haynes, Exec. Dir., Kentucky Citizens for Judicial Improvement, to Fran Farrell Kraft, John F. Kraft, Inc. (Oct. 15, 1973) (on file with Kentucky State Law Library and with author) (describing instances where questions in the questionnaire "are phrased inaccurately" and "wonder[ing] if the issue of whether Kentuckians would rather elect their judges rather than have them take office by merit selection has really been articulated").

Library's collection.⁵⁵⁴ These give us insight into what the KCJI was concerned with.⁵⁵⁵ Almost all of the questions are focused on the court system and the role of judges. For example, the first draft asks about the poll subjects' opinions about the performance of the existing court system,⁵⁵⁶ knowledge of the court system,⁵⁵⁷ opinions about lawyers,⁵⁵⁸ whether a judge should be a lawyer,⁵⁵⁹ general opinions about amending the constitution⁵⁶⁰ and reforming the courts,⁵⁶¹ and knowledge of the amount of the state budget dedicated to the courts.⁵⁶² It also asks the participants' opinions as to a "bunch of lower courts vs. [a] consolidated District Court," "one Court of Appeals vs. two appellate courts," and "impeachment by legislature vs. removal and censure by special judicial commission of judges."⁵⁶³ It also includes a rather open-ended question on selection of judges, giving as alternatives "initial appointment at random by [the] Governor and subsequent election," "elected only," appointment from a merit-chosen panel for higher court

⁵⁵⁴ At least what appears to be the first draft is included. It was included in a folder with the correspondence from August, September, and October 1973, but it is undated. It has many fewer questions (nine main questions with many subparts, totaling a little over fifty separate sub-questions) than the second and final drafts, and includes handwritten edits in red ink or pencil. It also appears to be incomplete, as it begins with question 2a. If the second draft, which is complete, is any indication, the missing first question asked a series of questions to determine the participant's baseline political beliefs and participation. *Compare* Second Draft of Questionnaire from Kraft (undated) (on file with the author and the Kentucky State Law Library (Box 1 of 11)) [hereinafter Second Draft of Kraft Questionnaire] (questions 1a, 1b (asking the participant's political party and self-identification as conservative, moderate, or liberal); question 1c (asking who the participant voted for in the 1972 gubernatorial election)) with First Draft of Questionnaire from Kraft (undated) (on file with the author and the Kentucky State Law Library, Box 1 of 11) [hereinafter First Draft of Kraft Questionnaire]. Although the second draft itself is undated, it was included with a memorandum from Fran Farrell Kraft to Paul Hayne and Morton Holbrook dated October 12, 1973 that referred to a draft other than the first draft. Second Draft of Kraft Questionnaire, *supra*.

⁵⁵⁵ A second survey was conducted in September and October 1975, just before the referendum election. KCJI, FINAL PROJECT REPORT, *supra* note 518, at 16.

⁵⁵⁶ *See, e.g.*, First Draft of Kraft Questionnaire, *supra* note 554, at question 2a, 2b, 4d ("First of all, how would you rate Kentucky's court system . . . ? Why? Did the judge try to be fair? Did he give it enough time?").

⁵⁵⁷ *See, e.g., id.* at question 3a, 3b ("Do you happen to know the names of some of the different courts? (FOR EACH COURT NAMED) Do you know what that court does, what kind of cases it handles?").

⁵⁵⁸ *See, e.g., id.* at question 5a, 5d ("All in all what do you think of lawyers or the legal profession as a whole? Do you feel they're really interested in 'justice' or just winning their case?").

⁵⁵⁹ *Id.* at question 6h ("Do you feel that a judge ought to be a lawyer and have had legal experience or do you think a man could make a good judge without much knowledge of the law?").

⁵⁶⁰ *See id.* at question 8a ("How do you feel about Kentucky's constitution—would you be in favor of amending it, or amending it only if absolutely necessary, or would you be against ever amending it?").

⁵⁶¹ *See, e.g., id.* at question 8c ("As you may have heard, there's been some talk about reforming Kentucky's court system. Do you think this sounds like a good idea, not so good an idea, a bad idea, or doesn't it matter to you?").

⁵⁶² *See, e.g., id.* at question 9a ("What percentage of the State budget would you guess goes to support Kentucky's court system—to pay the judges, clerks, and other court costs?"). This question includes a fleeting reference to "clerks" but is not concerned with their office or removal.

⁵⁶³ *Id.* at question 7b.

judges and judges in larger counties, and “all judges appointed by governor from selected qualified candidates and subsequently elected.”⁵⁶⁴

The second draft includes the same or similar questions in most instances.⁵⁶⁵ In some places, it asks more specific questions than the first draft, focusing, for example, on each of the lower trial courts one by one.⁵⁶⁶ In other places, the second draft solicits more detailed opinions than the first draft, such as about the judges’ performance.⁵⁶⁷ Generally speaking, the second draft covered the same material as the first but goes into more detail and attempts to quantify participants’ answers by giving them multiple-choice options, rather than allowing them open-ended answers. The second draft is very similar to the poll ultimately used, which follows the same format focusing on detailed questions.⁵⁶⁸

Generally speaking, all three versions of the questionnaire were directed toward Kentuckians’ opinions about the court system itself and its judges. None of the versions, neither the drafts nor the final questionnaire, include a single question about the office of county clerk, much less a question about removal of the county clerk.

Although that is far from definitive proof, a strong inference can be drawn from the utter failure to consider the office of county clerk, or clerk removal at all, in the polling, given the clerks’ importance in the effort to lobby for the adoption of the Judicial Article. We can conclude that the KCJI did not have the pollsters ask about that subject because it was not interested in it.

⁵⁶⁴ *Id.* at question 7c.

⁵⁶⁵ Compare, e.g., *id.* at question 2a (“First of all, how would you rate Kentucky’s court system . . . ?”), with, e.g., Second Draft of Kraft Questionnaire, *supra* note 554, at question 2a (“First of all, how would you rate Kentucky’s court system . . . ?”).

⁵⁶⁶ Compare, e.g., Second Draft of Kraft Questionnaire, *supra* note 554, at question 3a (asking if the participant had heard of the Justice of the Peace Court and what it was supposed to do), with, e.g., First Draft of Kraft Questionnaire, *supra* note 554, at question 3c, 3d (telling the questioner to list all the courts for the participant and asking whether he or she had heard of each court, and asking “Know what [a court from question 3c] does?”). Where the first draft asked a single general question about all the lower courts, the second draft asked separate questions about each of the other lower trial courts. See Second Draft of Kraft Questionnaire, *supra* note 554, at questions 4a–4c, 5a–5c, 6a–6c, 7a–7c, 8a–8c (police court, juvenile court, quarterly court, county court, and circuit court, respectively).

⁵⁶⁷ Compare First Draft of Kraft Questionnaire, *supra* note 554, at question 6d (asking participant to state whether a series of terms—e.g., “political, not qualified,” “not fair, really cracks down on certain things, lets others go” “apply to any judges or courts that [the participant] know[s] of”), with Second Draft of Kraft Questionnaire, *supra* note 554, at question 13c (asking the participant to answer “most,” “some,” “no,” or “not sure” as to each of the same terms).

⁵⁶⁸ Study Conducted for Kentucky Citizens for Judicial Improvement, Adult Attitude in Kentucky Toward Kentucky’s Court System and Judicial Reform (Nov. 1973) (on file with author and the Kentucky State Law Library) [hereinafter Final Poll]. For those interested, perhaps the easiest place to find the final poll is in the final report issued by the Kraft Company after it finished the 1973 polls, which is also included in files of the Kentucky State Law Library and of the author.

b. The Initial Draft of the Proposed Amendment

This disinterest is confirmed, again by inference, because the initial draft of the Judicial Article going into the polling apparently did not address the office of county clerk.⁵⁶⁹ Although the initial draft has not been located,⁵⁷⁰ the correspondence between KCJI and Kraft refers to the existing draft, describes some of its features, and suggests that KCJI had very specific reforms in mind.⁵⁷¹ For example, Paul Haynes, who was Executive Director of the KCJI during the polling phase, described various features of the “proposed article,” including a “unified, centralized court system” with “exclusive judicial power in one Court of Justice” with four tiers, a “powerful Chief Justice with both responsibility and authority to administer the entire system,” a new “Intermediate Appellate Court,” a new district court to “replace the several overlapping part-time judges of the lower courts,” and a “Removal and Retirement Commission which would have the power and authority to, when adequate cause was shown, to remove a judge.”⁵⁷² All of these changes made it into the final bill and, ultimately, the adopted Judicial Article. The only significant difference between the draft, at least as described by Paul Haynes, and the one eventually presented to the General Assembly in 1974 was that the draft proposed some merit selection of judges instead of their election across the board.⁵⁷³ Mr. Haynes said nothing about county clerks in his list of proposed changes. And, as noted above, Senate Bill 183 also said nothing about the county clerks, at least not directly, and instead only proposed repeal, via abstract language, of the then-existing county-clerk removal mechanism.

c. The KCJI's Educational Materials

As noted above, once the bill was passed by the General Assembly, the KCJI's mission became convincing voters that the amendment was a good thing. To this end, the KCJI undertook a massive educational campaign, including a series of ten

⁵⁶⁹ The Ad Hoc Drafting Committee had completed a draft by this time that proposed, among other things, the Missouri Plan for selecting judges. KCJI, FINAL PROJECT REPORT, *supra* note 518, at 16–17.

⁵⁷⁰ A copy does not appear to be included in the State Law Library's collection on the Judicial Article, and it has not been found elsewhere.

⁵⁷¹ See, e.g., Letter from H. Paul Haynes, Sr., to Mrs. John F. Kraft (Fran Farrell Kraft) (Aug. 20, 1973) (on file with Kentucky State Law Library and with author) (referring to a “proposed article”); Letter from Gosier, *supra* note 552 (referring to “a first draft of the wording which [KCJI] hope[d] to get through the legislature in relation to the amendment”).

⁵⁷² Letter from Haynes, *supra* note 571.

⁵⁷³ See *id.* (noting the proposed draft would require appointment of judges “in counties of over 200,000” but would give a “right of local option [for other counties] whereby areas can locally determine that they want their judges appointed rather than elected”). As noted above, the initial draft by the Ad Hoc Drafting Committee recommended the Missouri Plan for selection judges. It appears that by the time Mr. Haynes was communicating with Kraft, the proposal had already been amended to provide for judicial elections in less populous areas.

seminars across the state and the establishment of a speakers' bureau to talk to groups throughout the state.⁵⁷⁴ None of the material used in connection with this effort was addressed to any changes about county clerks, despite the fact that the proposed amendment would ultimately repeal the existing removal mechanism.

Without the recordings of the educational seminars, their content cannot be certainly ascertained. But many newspaper accounts of them are available, and through those, some idea of what was discussed can be established.⁵⁷⁵ The common thread throughout these articles is that the KCJI was preaching about the positive effects of the changes to the structure of the court system.⁵⁷⁶ The articles reporting on the seminars discuss various features of the proposed amendment, such as how it would change the structure of the courts (unifying them and adding an intermediate appellate court and a district court, which would take over the jurisdiction of the previous lower courts), the requirement for judges to be licensed lawyers and to take office primarily through non-partisan elections, and the proposed Retirement and Removal Commission, which would supplement the existing removal mechanism of impeachment.⁵⁷⁷

The educational materials used by the KCJI in their seminars and other efforts, however, are available. These include a pamphlet handed out at seminars and other public meetings and an information packet given to members of the KCJI's speakers' bureau.

The pamphlet, titled *Judicial Reform: A Modern Judicial System For Kentucky?*, was a typical tri-fold pamphlet or brochure.⁵⁷⁸ It described the structural changes that would come under the Judicial Article, selection of judges by non-partisan popular elections, and the Retirement and Removal

⁵⁷⁴ KCJI, FINAL PROJECT REPORT, *supra* note 518, at 3. The exact date of preparation of this report unknown, and is not stated in the report itself, but likely was prepared in 1975 or 1976.

⁵⁷⁵ Included in the collection of materials on the Judicial Article at the Kentucky State Law Library are hundreds of newspaper clippings from across the state covering the effort to pass the amendment. Many, if not most, of these clippings were photocopied and consolidated into a bound volume by Nancy Lancaster, who served on the KCJI's staff. That bound volume is included in the Kentucky State Law Library's cache and was an invaluable resource in researching this Article.

⁵⁷⁶ See, e.g., Maria Braden, *Amendment Seminar Draws 30 of 1300*, STATE JOURNAL (Frankfort, Ky.), June 25, 1975, at 1 (noting that James Amato hoped there would be "increased awareness of problems in the court system" and efforts by Becky Broadus, who conducted many of the seminars).

⁵⁷⁷ See Ron Schoolmeester, *Courting Justice . . . Amendment Would Cut Courtroom Backlogs*, KENTUCKY ENQUIRER (Cincinnati), June 15, 1975, at 1 (describing structural changes, lawyer-judge requirement, and removal commission); Ken Loomis, *Amendment to State Charter Called Step to Better Justice*, COURIER-JOURNAL (Louisville, Ky.), June 27, 1975, at B16 (discussing structural changes and lawyer-judge requirement); *Tipton, Warren Distribute Amendment Information*, HICKMAN COURIER (Hickman, Ky.), June 19, 1975, at 2 (discussing structural changes, lawyer-judge requirement, and non-partisan elections); Braden, *supra* note 576, at 1 (describing structural changes and lawyer-judge requirement).

⁵⁷⁸ KENTUCKY CITIZENS FOR JUDICIAL IMPROVEMENT, INC., JUDICIAL REFORM: A MODERN JUDICIAL SYSTEM FOR KENTUCKY? (Circa 1975) (on file at the Kentucky State Law Library and copy on file with author).

Commission.⁵⁷⁹ It also recounted the polling by the KCJI in 1973, which it claimed “revealed an overwhelming demand by the public for some sort of reform in the Kentucky Court System.”⁵⁸⁰ It also claimed that the survey was “carefully studied,” and that “[i]ts results instituted the final drafting and introduction of Senate Bill 183—now the proposed Constitutional Amendment to the Judicial Article.”⁵⁸¹ The only reference to clerks in the pamphlet is to the clerk of the Court of Appeals, who was to be “elected at the same time the Amendment is passed.”⁵⁸² The pamphlet noted that the elected clerk of the Court of Appeals “would serve as the first Clerk of the Supreme Court.”⁵⁸³ At least 5,000 of these pamphlets were handed out in the year leading to the adoption of the Judicial Article.⁵⁸⁴

The information packet, titled *Information Kit on the Judicial Article*,⁵⁸⁵ was aimed at educating and training members of the KCJI’s speakers’ bureau and an independent speakers’ bureau operated by the Kentucky Bar Association.⁵⁸⁶ Nine hundred copies of the packet were printed and distributed across the state.⁵⁸⁷ The packet included a letter to the recipient of the packet, a list of frequently asked questions (and answers), a template for a news release, a copy of Senate Bill 183 as finally enacted, a pair of diagrams showing the structure of both the existing and proposed court systems and number of judges at each level, a side-by-side comparison of the existing judicial provisions and the proposed provisions, a short history of the Kentucky courts, and a pair of prepared speeches (one for general audiences and one for religious audiences).⁵⁸⁸ Like the other materials, the main focus of the information kit was the courts themselves. Some of the material

⁵⁷⁹ *Id.*

⁵⁸⁰ *Id.*

⁵⁸¹ *Id.*

⁵⁸² *Id.*

⁵⁸³ *Id.*

⁵⁸⁴ Videotape: *The 1975 Judicial Article: How Did It Ever Pass?*, at 24:30–24:40 (Eastern Kentucky University, Dec. 7, 2000) (on file with the Kentucky State Law Library). This videotape is the first of three tapes recording the various sessions of a conference titled *Kentucky’s Judiciary: Looking Backward, Looking Ahead* on the occasion of the 25th anniversary of the Judicial Article. The person making the claim about the pamphlets was James Amato, former executive director of the KCJI.

The number 5,000 may be a significant underestimate. According to the KCJI’s *Final Project Report*, “over 190,000 informational brochures were disseminated across the state by various means.” KCJI, *FINAL PROJECT REPORT*, *supra* note 518, at 27. Although it is not completely clear that the “brochure” referred to there is the same pamphlet, the report later identifies it by name as one of two printed and distributed at part of the 190,000 total. *Id.* at 88. The report, however, is not clear as to whether 190,000 copies of each brochure was printed, or if the judicial reform pamphlet was only a fraction of them.

⁵⁸⁵ KENTUCKY CITIZENS FOR JUDICIAL IMPROVEMENT, INC., *INFORMATION KIT ON THE JUDICIAL ARTICLE* (Circa 1975) (various materials included in two-pocket folder) (on file at the Kentucky State Law Library and copy on file with author) [hereinafter *INFORMATION KIT*].

⁵⁸⁶ KCJI, *FINAL REPORT*, *supra* note 518, at 3.

⁵⁸⁷ *Id.*

⁵⁸⁸ A listing of the contents of the information kit in the KCJI’s *Final Project Report* states the information kit also included a copy of the Judicial Reform pamphlet and another pamphlet (or brochure) titled *Kentucky Court of Justice*. *Id.* at 84.

included passing references to clerks, but they say nothing about a removal process for them.

The kit's list of frequently asked questions opens with one about whether all judges would be appointed under the amendment.⁵⁸⁹ It also includes questions about whether county judges must be lawyers, the cost of the district courts, and whether justices of the peace and police courts will be done away with.⁵⁹⁰ None of its questions mentions clerks.

The history of the Kentucky courts in the packet is a "summary of an article by William E. Biven [sic]" that had been published by the Legislative Research Commission and the *Kentucky Law Journal*.⁵⁹¹ Like the other materials in the packet, it focuses on the structural changes to the court system over the course of its four constitutions.⁵⁹² Tellingly, the summary in the information kit omits any discussion of court clerks, despite the original article on which it was based having a short section about the 1850 constitution titled "Clerks of Courts,"⁵⁹³ which noted: "Clerks of all courts were removable by the Court of Appeals upon information and good cause shown, provided that two-thirds of the members present concurred."⁵⁹⁴ The article included no discussion of clerks under the 1891 constitution, however, which may explain the omission in the information kit's summary.

The kit's prepared speeches also focus on the courts. The general-audience speech first lays out the proposed changes to the courts and judges and then argues for adoption of the amendment, emphasizing how Kentucky had changed in the more than eighty years since the adoption of the 1891 constitution.⁵⁹⁵ The religious-audience speech also focuses on the courts, though its tone differs significantly.⁵⁹⁶

The information kit's materials simply do not discuss court clerks, with two exceptions. First, the copy of Senate Bill 183 discusses them abstractly, as described above. Second, the side-by-side comparison of the existing judicial provisions and the proposed amendment also discuss them, necessarily so as both include provisions related to clerks. The side-by-side comparison may be the only place where the removal of *county* clerks is referred to in all of the KCJJ's materials, but

⁵⁸⁹ INFORMATION KIT, *supra* note 585.

⁵⁹⁰ *Id.*

⁵⁹¹ *The Historical Development of the Kentucky Courts*, at 1, in INFORMATION KIT, *supra* note 585. The full article is accessible at William E. Bivin, *The Historical Development of the Kentucky Courts*, 47 KY. L.J. 465 (1959).

⁵⁹² See generally *The Historical Development of the Kentucky Courts*, in INFORMATION KIT, *supra* note 591.

⁵⁹³ Bivin, *supra* note 591, at 485.

⁵⁹⁴ *Id.* (citing KY. CONST. of 1850, art. IV, § 39).

⁵⁹⁵ See generally *Prepared Speech for General Audiences*, in INFORMATION KIT, *supra* note 585.

⁵⁹⁶ See generally *Prepare Speech for Religious Audiences*, in INFORMATION KIT, *supra* note 585.

it does so only because it reproduces section 124 of the 1891 constitution.⁵⁹⁷ The column beside it comparing the proposed amendment states only: "See section 114(2) of the proposed Judicial Article."⁵⁹⁸ This reference must have been in error, as that subsection relates only to the clerk of the new Court of Appeals.⁵⁹⁹ Subsection (3) refers to removal of the circuit-court clerk.⁶⁰⁰ But, again, it says nothing about removal of the county-court clerk.

d. The KCJI's Grant Application

The KCJI's application for a grant from the Kentucky Crime Commission, filed in late 1974, further shows that the KCJI never contemplated the issue of county-court clerk removal.⁶⁰¹ The purpose of the grant was to fund the KCJI's educational program leading up to the 1975 election. The application includes a nine-page narrative description of the project for which the funds were to be used. This description lays out the structure and function of the then-existing court system, problems with the court system, the process of drafting the proposed amended Judicial Article, and the new court of justice under the amended article, but it does not mention county clerks or a removal process for them (or any of the clerks).⁶⁰²

e. Newspaper and Television Accounts

Even outside the context of the KCJI's efforts, the historical record suggests that no question about removal of county clerks was anticipated. Dozens of newspaper articles and editorials leading up to the KCJI's educational seminars and after them contain content similar to the articles reporting on the KCJI's educational seminars; they primarily report the proposed changes to the courts and judiciary.⁶⁰³ A very small number of the articles mention that the proposed

⁵⁹⁷ *Side-by-Side Comparison of Existing Constitution and Proposed Judicial Article*, in INFORMATION KIT, *supra* note 585.

⁵⁹⁸ *Id.*

⁵⁹⁹ 1974 Ky. Acts. 169 (S.B. 183 § 114).

⁶⁰⁰ *Id.*

⁶⁰¹ KCJI's Application for Action Grant from the Kentucky Crime Commission (Dec. 26, 1974) (on file with the Kentucky State Law Library, and copy on file with author). According to the application, the grant was under the Omnibus Crime Control and Safe Streets Act of 1968 (P.L. 90-351). The application's pages are not numbered, and it includes appended material, such as a narrative statement and proposed budget.

⁶⁰² *Id.*

⁶⁰³ See Albert Dix, *Amendment on Changing Court System*, SENTINEL (Radcliffe, Ky.), Oct 30, 1975 (discussing structural changes, lawyer-judge requirement, removal commission, among other changes); Bill Mardis, *Local Reaction To Court Reform*, COMMONWEALTH JOURNAL (Somerset, Ky.), Oct. 28, 1975 (noting the structural changes); *Kentuckians Make Judicial Choice*, PARIS DAILY ENTERPRISE, Oct. 31, 1975, at 6 (describing structural changes, lawyer-judge requirement, removal commission, among other changes).

amendment included a provision addressed to circuit-court clerks⁶⁰⁴ and the Supreme Court's clerk.⁶⁰⁵ That makes sense, in a way, because the amendment included a provision directly addressing those offices. Some of those stories even mention removal of those clerks⁶⁰⁶ or removal of judges.⁶⁰⁷ Yet no articles have been located discussing removal of county-court clerks, even though that office was not abolished by the amendment.

As noted above, Kentucky Educational Television produced a thirty-minute program titled *The Judicial Article* intended to educate the public on the proposed Judicial Article.⁶⁰⁸ It aired at least two times leading up to the election in 1975. The program's host, Jack Petrey, opened by describing the existing court system and the general contours of the proposed amendment's effects on the courts.⁶⁰⁹ He did not mention county clerks. Much of the program consists of interviews with various lawyers, judges, and others favoring passage of the amendment,⁶¹⁰ and several people working against it,⁶¹¹ with additional commentary from Petrey interspersed throughout. Although the featured speakers discussed many facets of the proposed amendment, including removal of judges,⁶¹² the abolition of the then-existing lower courts in favor of the district courts,⁶¹³ the cost of the transition,⁶¹⁴ and the

⁶⁰⁴ Albert Dix, *Reorganizing the Courts: Four-Tiered, Unified System Proposed; Amendment Would Equalize the Judicial Process Throughout Kentucky*, THE STATE JOURNAL (Frankfort, Ky.), January 27, 1974, at 5 (noting that circuit court clerks "would continue to be elected as they are today but would handle the records of both Circuit and District Courts") [hereinafter Dix, *Reorganizing the Courts I*]; John Ed Pearce, *How Kentucky Can Change its Courts: A Sweeping Plan Will Face Voters in November; Here's What it Means*, COURIER-JOURNAL (Louisville, Ky.), Sept. 21, 1975, at D-1, D-4 ("Circuit court clerks would continue to be elected as they are now, though they would serve as clerks of the district courts as well as of the circuit courts."); John G. Heyburn, *Inadequate Judge Can Spoil Best System*, [KENTUCKY KERNEL?], Mar. 7, 1975, (noting that circuit clerks "would continue to be elected by popular vote").

⁶⁰⁵ Albert Dix, *Reorganizing the Courts—II: Election, Merit Combined to Pick Judges*, STATE JOURNAL (Frankfort, Ky.), January 28, 1975, at 1 (describing how the winner of that year's Court of Appeals clerk election would serve as the new Supreme Court's clerk) [hereinafter Dix, *Reorganizing the Courts II*]; Pearce, *supra* note 604 (explaining the Supreme Court and Court of Appeals would choose their own clerks); Heyburn, *supra* note 604 (noting Supreme Court and Court of Appeals would appoint their own clerks).

⁶⁰⁶ See, e.g., Dix, *Reorganizing the Courts II*, *supra* note 605 (describing how new Supreme Court's clerk could be removed by that court for "good cause").

⁶⁰⁷ Pearce, *supra* note 604 (discussing removal of judges under the existing constitution and the amendment).

⁶⁰⁸ See THE JUDICIAL ARTICLE, *supra* note 299.

⁶⁰⁹ *Id.* at 0:25–2:23.

⁶¹⁰ See generally *id.* (including Charles Coy, a lawyer; James Chenault, a circuit judge; William Gant, a prosecutor; Pleas Jones, a Court of Appeals judge; and Morton Holbrook, an Owensboro attorney who was active in the passage of the amendment).

⁶¹¹ See *id.* at 4:10–5:00 (featuring primarily the non-lawyer county judges, such as Wayne Rutherford of Pike County, Dave Pribble of Pendleton County, and James Fallin of Hancock County.).

⁶¹² *Id.* at 8:45–9:30.

⁶¹³ *Id.* at 9:45–11:21.

⁶¹⁴ *Id.* at 11:25–14:30.

requirement for all judges to be lawyers,⁶¹⁵ there was nary a mention of county clerks, much less a mention of a removal mechanism for them.

f. Conclusion

The common thread running through these materials is the omission of any real discussion of the county-court clerks. Every contemporaneous source found focuses on aspects of the courts themselves—like the proposed changes in structure of the courts, the method of selecting judges, the qualifications for judges, and the removal methods for judges. A few of them mention removal methods for clerks, but only insofar as they note the existence of section 124 of the 1891 constitution, or *circuit-court* clerk removal for good cause under the amendment. None of them discuss the repeal of the removal method for county-court clerks that was to occur upon the repeal of section 124.

In some ways, this is simply an absence of evidence. But the 1975 proposed Judicial Article was discussed in depth and, no doubt, almost *ad nauseam* throughout the public sphere in Kentucky. Almost every aspect of the proposal was debated and picked apart. And at no point were the county-court clerks paid any mind. That absence—that omission—is conspicuous in hindsight. It necessarily gives us more than a mere suspicion that the parties interested in amending the judicial provisions of the Constitution in 1975 simply did not think about the effect of the amendments on the county clerks. The existence of a removal method for county clerks, and retaining such a method, was simply not on anyone's radar.

ii. The 1966 Proposed Constitution

That suspicion is confirmed once we move beyond the contemporaneous accounts. If, for example, we look further back, to the likely seed of the 1975 Judicial Article, we can see where the omission came from. As noted above, the 1975 amendment was not the first attempt to "fix" the 1891 constitution's perceived judicial failings, though it was the first successful one. That movement had its roots in the 1966 attempt to completely overhaul the Kentucky Constitution. As noted above, the 1966 proposed constitution included a brand new court system.⁶¹⁶ When the attempt to completely replace the Constitution failed in 1966, efforts turned to the narrow project of fixing the court system.

Proponents of the 1975 amendment appear to have relied heavily on the 1966 proposed judicial provisions. Although there were some significant differences

⁶¹⁵ *Id.* at 15:53–19:50.

⁶¹⁶ The full text of that proposed constitution is reprinted in JAMES T. FLEMING & JOHN E. REEVES, KY. LEGISLATIVE RESEARCH COMM'N, A COMPARISON ... THE PRESENT, THE PROPOSED KENTUCKY CONSTITUTIONS, INFORMATIONAL BULLETIN NO. 52 (Sept. 1966). The proposed constitution was printed side-by-side with the constitution adopted in 1891, along with commentary on the differences.

between the 1966 proposal and the 1975 amendment, they were very similar. For example, like the 1975 amendment, the 1966 proposal included a four-tiered system with two trial courts and two appellate courts,⁶¹⁷ and would have done away with existing lower courts.⁶¹⁸ Of course, one major difference between the 1966 proposal and the 1975 amendment was that the 1966 proposal used merit selection and retention elections for many judges.⁶¹⁹ Nonetheless, the 1966 proposal largely sounds like the original version of the 1975 amendment as drafted by the Ad Hoc Drafting Committee. That body appears simply to have resurrected the 1966 judicial provisions, at least as a starting point.

Like the 1975 amendment, the 1966 proposal would have allowed the Supreme Court and Court of Appeals to appoint their own clerks, although expressly “to serve at [their] pleasure,”⁶²⁰ and the circuit-court clerks were to remain elected and removable by the highest court.⁶²¹ Like the 1975 amendment, the judicial “article” of the 1966 proposal said nothing about the office of county-court clerk at all, and thus failed to include a removal mechanism specific to that office.

Unlike the 1975 amendment, that omission did not leave a removal hole in the 1966 proposal, nor did the 1966 proposal fail to deal with the office of county clerk. Recall that the 1966 proposal was a whole new constitution, not a piecemeal amendment or new article. As such, the 1966 proposal also addressed county governments.⁶²² This provision contained perhaps the biggest departure from prior practice in the proposal. In essence, the structure and composition of county government was no longer to be laid out in the constitution. Instead, it would have become the prerogative of the General Assembly, which would have had almost plenary power over the subject.⁶²³ The county offices in existence, which necessarily included the county clerk, would have continued as is until changed by the General

⁶¹⁷ KY. CONST. art. VI, § 1 (proposed 1966), *reprinted in* JAMES T. FLEMING & JOHN E. REEVES, KY. LEGISLATIVE RESEARCH COMM’N, A COMPARISON . . . THE PRESENT, THE PROPOSED KENTUCKY CONSTITUTIONS, INFORMATIONAL BULLETIN NO. 52 (Sept. 1966).

⁶¹⁸ *See id.* art. VI, § 29 (setting the schedule for expiration of the county, quarterly, justices’ and police courts).

⁶¹⁹ *See id.* art. VI, §§ 23–25 (providing for election of district judges and circuit judges in districts with a population under 50,000, appointment of other judges who were to be subject to retention elections under a variant of the Missouri Plan, and giving a local option to vote for a different selection method for circuit court judges).

⁶²⁰ *Id.* art. VI, §§ 6, 9.

⁶²¹ *Id.* art. VI, § 14.

⁶²² *See id.* art. VIII, §§ 1–2.

⁶²³ *See id.* art. VIII, § 1(1) (giving the General Assembly “the power to provide for the government, officers and functions of units of local government, and to create, alter, consolidate and dissolve them” but requiring local approval to abolish, consolidate with other governmental units, or change the boundaries of any county); *see also* FLEMING & REEVES, *supra* note 616, at 61 (commenting that article VIII, section 1 would give the General Assembly “ultimate power over the government and functions of local units”).

Assembly,⁶²⁴ and could not be changed for the remainder of the existing and one additional term.⁶²⁵ But after that, those offices could be changed in any way—including abolition—through ordinary legislation, rather than the onerous process of constitutional amendment.

The 1966 proposal did not include a removal mechanism directed at county clerks because it did not need one. Instead, it would have expanded the “-feasance” removal mechanism in section 227 beyond county officers to all “public officers,” except as provided elsewhere in the new constitution.⁶²⁶ Indictment or prosecution for misfeasance and malfeasance of office, and neglect in discharge of official duties, would no longer be limited to an express list of county officials. But the provision would have gone even further, allowing the General Assembly to “provide other manner, method or mode for the vacation of office, or the removal from office of any public officer for neglect of duty, and . . . [to] provide the method, manner or mode of reinstatement of such officers.”⁶²⁷ This would, for example, have allowed the General Assembly to pass a recall process.⁶²⁸

The 1966 proposal balanced the repeal of section 124’s county-clerk removal mechanism with the expansion of the power in section 227 to all officers and the grant to the General Assembly of a power to create new removal processes. When combined with the impeachment process, which was retained,⁶²⁹ this left a

⁶²⁴ KY. CONST. art. VIII, § 1(1) (proposed 1966), *reprinted in* JAMES T. FLEMING & JOHN E. REEVES, KY. LEGISLATIVE RESEARCH COMM’N, A COMPARISON . . . THE PRESENT, THE PROPOSED KENTUCKY CONSTITUTIONS, INFORMATIONAL BULLETIN NO. 52 (Sept. 1966). (“All elective offices of units of local government existing at the time of the adoption of this Constitution shall continue to be filled by election until such time as this may be changed by general law or charter.”); *see also* FLEMING & REEVES, *supra* note 616, at 62 (noting that under the 1966 amendment “[a]ll elective offices retain their present status until changed by general state law or by local charter”).

⁶²⁵ KY. CONST. art. VIII, § 1(2) (proposed 1966), *reprinted in* JAMES T. FLEMING & JOHN E. REEVES, KY. LEGISLATIVE RESEARCH COMM’N, A COMPARISON . . . THE PRESENT, THE PROPOSED KENTUCKY CONSTITUTIONS, INFORMATIONAL BULLETIN NO. 52 (Sept. 1966).

⁶²⁶ *Id.* art. XIII, § 2.

⁶²⁷ *Id.*

⁶²⁸ FLEMING & REEVES, *supra* note 616, at 96 (“Some delegates favored a specific recall procedure, and that is indeed possible under the second sentence by legislative enactment . . .”).

⁶²⁹ PROPOSED KY. CONST. art. IV, §§ 1–3 (proposed 1966), *reprinted in* JAMES T. FLEMING & JOHN E. REEVES, KY. LEGISLATIVE RESEARCH COMM’N, A COMPARISON . . . THE PRESENT, THE PROPOSED KENTUCKY CONSTITUTIONS, INFORMATIONAL BULLETIN NO. 52 (Sept. 1966)..

complete system of officer removal largely tracking the old one⁶³⁰—and indeed created the potential for a greatly expanded one. When only the judicial provisions were addressed in 1975, bringing forward much of what had been proposed in that respect in 1966 but leaving behind provisions related to other subjects, that balance was upset.

iii. James Amato Interview

Finally, a single but important datum supports this Article's hypothesis. In December 2015, a short telephone interview was conducted with James G. Amato, the former executive director of the KCJI. That interview was prompted by a letter to him laying out the theory that repeal of the county-clerk removal mechanism without replacing it "was merely an oversight because the focus in 1975 was on fixing the courts, not clerks."⁶³¹ In that interview, he indicated that he did not recall the county clerks, or a mechanism for their removal, being discussed at all and that he suspected it was indeed an oversight.⁶³² This does not definitively prove the point, but it is great evidence the omission was simply an oversight.

The oversight was amplified by the difficulty of amending the constitution, even with the cluster amendment—that is, a full replacement article, instead of an amendment to a single provision—used in 1975. Although the amendment no doubt literally undid the removal mechanism for county clerks, it is fairly clear that the real concern of the amendment was the judicial courts and officers, such as the circuit-court clerks, involved with them. It is no surprise, then, that there was no thought about addressing an officer like the county clerk, who not only was not a judge but would no longer be associated with a judicial office. There were so many

⁶³⁰ The 1966 proposed constitution did not retain the provisions (sections 150 and 151) for removal for vote buying, felony, and high-misdemeanor convictions. Instead, those powers were presumed to fall to the General Assembly if the 1891 provisions were omitted: "The 1891 Constitution authorizes the General Assembly to do several other things which power it would now have in the absence of the specific language: . . . set disqualifications from office, prohibit corrupt practices." FLEMING & REEVES, *supra* note 616, at 56. Although the absence of those provisions alone could not have given the General Assembly the power to create those removal processes, see *Commonwealth ex rel. Att'y. Gen. v. Howard*, 180 S.W.2d 415, 416–17 (Ky. 1944) (limiting removal to those methods listed in the constitution), the expansion of section 227 to all public officers, along with the addition to that provision of a general power to create new removal processes, would have allowed the General Assembly to recreate the removal mechanisms then existing in sections 150 and 151 through ordinary legislation. But the General Assembly would still have had to act, rather than relying on the new constitution alone for the process.

⁶³¹ See Letter from author, to James G. Amato, former Exec. Dir., Ky. Citizens for Judicial Improvement (Nov. 24, 2015) (on file with author).

⁶³² Telephone Interview with James G. Amato, former Exec. Dir., Ky. Citizens for Judicial Reform (Dec. 2, 2015). There is hesitation to describe the conversation as an interview as it was very short, not because of any unkindness by Mr. Amato, but because his call was unexpected and his initial response—that he did not recall the matter being discussed at all and suspected it was an oversight—resolved the author's questions.

moving parts to the Judicial Article, it is almost surprising that even bigger holes were not written into it, only to be discovered years or decades later.

IV. THE PROBLEM AND SOLUTIONS PROPOSED

A. The Removal "Gap" for County Clerks

Regardless whether this hypothesis is borne out by the evidence and actually solves the mystery of the missing county-clerk removal mechanism, or whether there is actually any significance to that "mystery" in the first place, there is little question that a gap exists in Kentucky's system for removing officers after the passage of the Judicial Article. As discussed above, the constitutions previously provided, at least as of 1850, a comprehensive system for removing constitutional public officials at both the state and county levels. The upper tier allowed removal of all officers though impeachment or conviction of a felony or designated high misdemeanor, or of a corrupt practice, such as vote buying. A second tier of removal mechanisms applied to officers outside the executive branch, though different methods applied to different classes of officers. The General Assembly could expel its own members, judges could be addressed out of office, and most county officers were removable locally, through conviction for malfeasance, misfeasance, or nonfeasance in office.

And the various court clerks, including the county clerks, were removable by action of the Court of Appeals. Although that process required action by one of the three coordinate departments of state government, like impeachment or removal by address, instead of a local process, it was nevertheless a lesser process because it required only a showing of "good cause" and did not require the rigor of obtaining and prosecuting a criminal indictment before a jury. And though this process also required a two-thirds majority of the members of the judging body, rather than a mere majority, it was an easier process than impeachment.

Each level of officer had a removal process with a level of political difficulty corresponding to the importance of the office. For the most part, as the level of office increased, the process of removal became more limited and difficult. Lesser officers were removable by more mundane, often local, proceedings. In short, the hierarchy of offices had a corresponding hierarchy of process.

That changed for one office—the county clerk—with the adoption of the Judicial Article. There was no longer a constitutional provision aimed directly at removal of county clerks, though such a lesser removal process had been part of each of Kentucky's constitutions until that point. Suddenly, county clerks were on par with the governor, the attorney general, and other statewide constitutional officers, who could be removed from office only by the most politically difficult method of impeachment or by conviction of a serious criminal offense.

So what made the office of county clerk so special? The answer is: nothing. The sudden elevation of their job tenure was the result of oversight. No one had even

contemplated, much less intended, that the amendment would do away with the lesser removal mechanism for county clerks.

Even if this hypothesis is wrong, and the repeal of the removal process was intentional, it cannot seriously be justified. Again, there is no reason to elevate the job tenure of a county officer to the same level as that of the governor, especially where no other county officers have that level of protection. Indeed, that is why the county clerk, like all the other lesser officers, was subject to a lesser removal process under the original versions of all four of Kentucky's constitutions—for more than 180 years!

B. The Solutions

What, then, can be done to fix this problem? Unfortunately, it will take a constitutional amendment for a real fix, though the General Assembly could effect piecemeal change. As discussed above, constitutional officers may only be removed by methods listed in the constitution. Thus, the General Assembly cannot create a special removal method through ordinary legislation.

i. Legislative Options—"High Misdemeanors"

The Constitution assigns the General Assembly the prerogative to dictate whether conviction of a given "high misdemeanor" can result in removal from office. This would work but only to the extent that a given situation fits the elements of the offense. Of course, where it does not, the General Assembly could alter the penalty for a crime that would apply, or it could create a new crime to fill the gap. This also assumes the General Assembly would designate the relevant misdemeanor as forfeiting office.

Since few misdemeanors now have that consequence, the General Assembly is left to act only responsively and in a piecemeal fashion. And this does nothing if the officer engages in bad conduct before the General Assembly acts. In fact, that is exactly the situation now. If a county clerk engages in bad conduct at least arguably covered by a misdemeanor statute that does not already prescribe forfeiture from office, the clerk's office is unaffected. The General Assembly could attempt to create retroactive disqualification (and thus effect removal) by statute, but such an effort would likely be subject to challenge as an *ex post facto* law. It is not clear whether such a challenge would succeed, since it is not obvious that removal from office is an increased punishment or simply a disqualification from office.⁶³³ That said, a similar complaint was raised and rejected during the drafting of section 150

⁶³³ Compare *Cummings v. Missouri*, 71 U.S. 277, 310–11 (1866) (describing "exclusion from the right to hold office as a punishment" and finding *ex post facto* violation), with *Hawker v. New York*, 170 U.S. 189, 191–94 (1898) (finding bar on practicing medicine enacted after felony conviction was not an *ex post facto* law).

of the 1891 constitution, which barred from office persons who had been convicted of a felony before its passage.⁶³⁴ Either way, it is doubtful that the litigation would be worth the headache, especially when better, more complete solutions are available.

Another potential solution would be for the General Assembly to designate the offenses listed in section 227 of the constitution—malfeasance and misfeasance in office, and willful neglect of official duties—as “high misdemeanors” allowing removal under section 150 of the constitution. As noted above, those offenses pre-existed the 1891 constitution, having been criminal offenses at common law. And the General Assembly may apply those offenses to any officers it sees fit, even those not mentioned in section 227 of the constitution.⁶³⁵

Thus, for example, the old Court of Appeals held that a Commonwealth’s Attorney could be prosecuted for the common-law offense of malfeasance, even though that office is not included in section 227.⁶³⁶ The court noted that the purpose of section 227 “was not to provide that only the officers named should be subject to indictment for misfeasance or malfeasance in office.”⁶³⁷ Instead, other officers were still prosecutable and could suffer criminal punishment for the offense, then as a misdemeanor at common law and now as a finable statutory offense. The difference was that those unnamed officers could not also be removed simply by being convicted of an offense named in section 227. Thus, the General Assembly could pass a statute resurrecting the common-law offenses and making them applicable to officers, such as the county clerk, who are not currently subject to them.⁶³⁸

Arguably, the General Assembly has already done this, albeit under a different name: official misconduct.⁶³⁹ Indeed, the commentary to the official-misconduct

⁶³⁴ 2 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES, *supra* note 194, at 2073 (arguing that the language barring from office those who have been convicted of a felony violated the bar on *ex post facto* laws) [hereinafter 2 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES]; *id.* at 2331 (statement of Delegate Carroll) (“declaring that persons who have been convicted of a felony shall be deprived of the right to vote and hold office is an *ex post facto* law”).

⁶³⁵ See KY. REV. STAT. ANN. § 522.010, Ky. Crime Comm’n/Legis. Research Comm’n Cmt. (West 1974) (noting that “the constitutional provisions were not intended to be all inclusive in the area of regulation of official misconduct,” and suggesting that official conduct could be criminalized outside section 227). No doubt, some textualists might object to reference to or reliance on the commentary to the statute. Kentucky, however, has passed two, for want of a better term, “meta statutes,” dictating that the penal laws “shall be liberally construed according to the fair import of their terms, to promote justice, and to effect the objects of the law,” *id.* § 500.303 (titled “Rule of Construction”), and that “[t]he commentary accompanying this code may be used as an aid in construing the provisions of this code,” *id.* § 500.100 (titled “Effect of Commentary”).

⁶³⁶ Commonwealth v. Rowe, 66 S.W. 29, 30–31 (Ky. 1902).

⁶³⁷ *Id.* at 30.

⁶³⁸ As discussed above, the General Assembly has codified the offenses of malfeasance, misfeasance, and nonfeasance, but it has only made those offenses applicable to the county officers listed in section 227 of the constitution. See KY. REV. STAT. ANN. § 61.170 (West 2016). Thus, other officers, such as the Commonwealth’s Attorneys and the county clerks, cannot be prosecuted for those offenses.

⁶³⁹ *Id.* §§ 522.010–522.030 (laying out two degrees of official misconduct).

statutes states that they, along with two other misconduct statutes,⁶⁴⁰ “embrace[] all punishable misconduct in office.”⁶⁴¹ The General Assembly could also add removal from office as a penalty for the offense. It would do so under the guise of its section 150 power to designate certain offenses as “high misdemeanors,” conviction for which result in removal from office.⁶⁴²

There are several problems with this approach, however. First, it would roll back an intentional attempt to modernize the law related to misconduct in office. When official misconduct was created as an offense in the modern Kentucky Penal Code, it was specifically intended to replace “a highly complex and fragmented network of constitutional and statutory provisions,”⁶⁴³ and to separate the penal functions of the law from those related to removal from office.⁶⁴⁴ Thus, the crime of official misconduct was intended to punish, in the traditional penal sense with incarceration and fine, misconduct related to a state or county officer’s official acts, whereas any removal concerns were left to the separate statute implementing the constitutional provisions allowing removal for malfeasance, misfeasance, and nonfeasance.⁶⁴⁵

The General Assembly’s decision here may have been driven by a second problem with designating official misconduct as a removable high misdemeanor: it is probably unconstitutional. The official-misconduct statute’s commentary suggests that official misconduct may not fit within the class of offenses for which removal may be had under section 227.⁶⁴⁶ The old Court of Appeals held specifically under the 1850 constitution’s precursor to section 227 that the

⁶⁴⁰ See *id.* § 522.040 (criminalizing misuse of confidential information); *id.* § 522.050 (criminalizing abuse of public trust).

⁶⁴¹ KY. REV. STAT. ANN. § 522.010 Ky. Crime Comm’n/Legis. Research Comm’n Cmt. (West 1974).

⁶⁴² KY. CONST. § 150.

⁶⁴³ KY. REV. STAT. ANN. § 522.010 Ky. Crime Comm’n/Legis. Research Comm’n Cmt. (West 1974); see also *id.* (noting “the inordinate number of statutory provisions relating to misconduct in office prior to the enactment of the Penal Code”).

⁶⁴⁴ See *id.* (“This Code simplifies the statutory scheme by repealing specific provisions which merely regulate conduct proscribed in this statute of broader applicability. Those which contain removal and forfeiture penalties were amended to exclude existing fines and penalties (which are governed by this chapter), but they remain unchanged as to the removal and forfeiture requirements. Thus, uniformity of *penal* sanctions is obtained without disturbing expressed legislative policy regarding qualification to hold public office.”).

⁶⁴⁵ Both degrees of official misconduct are misdemeanors, KY. REV. ST. ANN. § 522.020 (West 2016) (designating first-degree official misconduct as a Class A misdemeanor); *id.* § 522.030 (designating second-degree official misconduct as a Class B misdemeanor), which are punished by incarceration, *id.* § 532.090 (setting sentence of imprisonment for misdemeanors), and fine, *id.* § 534.040 (mandating a fine for both classes of misdemeanors unless the defendant is indigent).

⁶⁴⁶ See KY. REV. STAT. ANN. § 522.010 Ky. Crime Comm’n/Legis. Research Comm’n Cmt. (West 1974) (“The Constitution designates only three situations which demand removal from office, and the legislature cannot enlarge the class of offenses and prescribe that penalty for crimes outside the defined category The Kentucky Constitution does not preempt the field of regulation but limits the offense for which certain officers may be removed to those types of conduct which constituted misfeasance, malfeasance or willful neglect at common law.”).

legislature could not expand what constitutes removable malfeasance and misfeasance without violating the constitution.⁶⁴⁷ The court noted that the constitution's imposition of the penalty of removal from office for the named offenses "is an implied limitation upon the power of the legislature to extend the penalty to other cases."⁶⁴⁸

In that case, however, the legislature had simply named new conduct—intoxication while on duty—as misfeasance, even though such conduct had never before been misfeasance.⁶⁴⁹ What is proposed would not literally be an expansion of the offenses named in section 227. Instead, it would add a penalty to a different crime that was created as part of the Penal Code in 1976.

The question, then, would be whether taking advantage of this seeming loophole in the Constitution is permissible. If official misconduct is a different crime from misfeasance and malfeasance and not just another name for those crimes, then there is at least a case for the constitutionality of adding removal from office as a penalty for the crime of official misconduct.

At the same time, section 227 (along with impeachment) arguably occupies the field of removal for misconduct in office.⁶⁵⁰ Sections 150 and 151 instead would be limited to other misconduct: crimes either in obtaining office (e.g., vote buying) or unrelated to office (e.g., murder, which is a felony). That distinction, however, ignores that section 151 already appears to allow removal for some crimes in office, such as bribery (which would include the acceptance of bribes).⁶⁵¹ It also ignores the myriad statutes already prescribing removal from office for various types of misconduct in office.⁶⁵²

⁶⁴⁷ *Commonwealth v. Williams*, 79 Ky. 42, 45–46 (1880) ("The phrase 'misfeasance in office' had, at the time of the adoption of the constitution, a definite and well understood legal meaning. It described an offense which consisted in the wrong-doing of an official act. It embraced this single offense and no more, and it is for the courts and not the legislature to decide what acts constitute the offense denounced by the constitution; and if being in a state of intoxication, under the circumstances mentioned in the statute under which the appellee was indicted, did not constitute the offense of misfeasance in office, without the aid of the statute, the statute is unconstitutional as to such of the officers named in it as are also named in section 36, article 4, of the [1850] constitution.").

⁶⁴⁸ *Id.* at 46.

⁶⁴⁹ *See id.* at 44–45.

⁶⁵⁰ For example, it could be argued that the more specific provision, section 227 (applying to named offenses), would control over the more general provisions, sections 150 and 151, and the prescription of removal for certain named officers for certain named offenses was limited to those offices and offenses under the doctrine of *expressio unius est exclusio alterius* or "the expression of one thing is the exclusion of another." Whether either of these arguments is convincing is unclear, but an enterprising lawyer might make them.

⁶⁵¹ Section 151, however, could be read as applying only to corrupt practices with respect to elections, as suggested by Professor Robert Ireland. *See* IRELAND, STATE CONSTITUTION, *supra* note 234, at 139 ("Section 151 provides for the ouster from office of those who have obtained the office through corrupt means.").

⁶⁵² *See generally supra* notes 222–226 and accompanying text (giving examples of "high misdemeanors" resulting in removal related to the Kentucky Model Procurement Code and the county clerk's marriage license duties).

Moreover, even if official misconduct were its own category of crime, with no overlap with section 227, expansion of that offense would still leave unaddressed numerous scenarios where removal of the officer would be desirable. Indeed, if official misconduct differs from malfeasance, misfeasance, and nonfeasance, adding removal to the official misconduct statute does not reach the most likely types of misconduct in office that would justify removal. Thus, the clerk who commits official misconduct would be removable, but the clerk who instead commits one of the “-feasances” would not be.⁶⁵³ Adding removal as a penalty for official misconduct, while perhaps justifiable, is an incomplete solution, at least with respect to county clerks.

Still, other scenarios might justify removal that would not satisfy the requirements for official misconduct or even malfeasance, misfeasance, and nonfeasance. If an officer became incompetent, for example, from dementia or the onset of a significant mental illness that could not be accommodated, such an officer should probably be removed from office. But mental incompetence is not a crime, nor should it be.⁶⁵⁴

ii. Constitutional Options

For a lasting, more proactive solution, a constitutional amendment would be required. What, then, are the possible constitutional fixes?

a. *Removal by the Supreme Court*

The most obvious answer would be to return the county clerk to the oversight of the Court of Justice. Section 114 of the constitution could be amended to allow the Supreme Court to remove county clerks alongside circuit clerks for good cause. This would return them to the same status they enjoyed (or suffered) through Kentucky’s pre-Judicial Article history.

Such an approach would allow removal for a broader range of reasons, reaching both criminal behavior and all types of incompetence. There is likely to be some objection that this process is not responsive enough because it must take place in far-flung Frankfort. In fact, in the 1890 constitutional debates, one of the complaints about having a separate removal process for court clerks, rather than placing them under section 227, was that it “would be a slow process, and

⁶⁵³ For example, a negligently incompetent clerk who is unable to do the job properly has not committed official misconduct, though such action is likely misfeasance (the wrongful doing of an official act).

⁶⁵⁴ This was, in fact, one of the reasons that clerks were given their own removal process not requiring criminal convictions in the original 1891 constitution. See 4 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES, *supra* note 445, at 5231 (statement of Delegate Askew) (offering hypothetical of “the Clerk [who] goes crazy” and arguing “he should be gotten out of the office, but you could not indict him”).

ineffectual.”⁶⁵⁵ Although that argument was rejected, along with a proposal to make the “clerks . . . subject to indictment, the same as other county officers,”⁶⁵⁶ there is some truth to the notion that a state’s high court may not have time to concern itself with every misdeed of all 120 county clerks across the state who might demonstrate good cause for removal.

Again, the county clerks no longer have a substantive relationship with a judicial court. And the Supreme Court has no special expertise that would allow it to assess the county clerks particularly, as opposed to the clerks of the Court of Justice. While there is no doubt the Supreme Court could do the job, it simply makes no sense to have a judicial court overseeing a purely ministerial county officer.⁶⁵⁷ Just as the Supreme Court has no business in removing the Governor or the Attorney General, so too does it have no business in removing county officers with whom it has no other relationship.

b. Removal by the Fiscal Court

Alternatively, the fiscal court could be assigned the power to remove the county clerk. This would be analogous to the historical approach, with the clerk removable by that “court” for good cause. The appeal of this approach, of course, is that it assigns oversight of the clerk and responsibility for the removal decision to the governmental body with which the clerk is associated.

But it is far from clear that this approach would be effective, since its use would depend so much on the local political landscape. Where the clerk is politically powerful, removal may be too difficult, even when called for. On the other hand, removal under this approach may be too easy, politically, if the clerk is politically weak or if a power struggle with the local fiscal court develops. Although perhaps not as attractive as it was in the 1800s,⁶⁵⁸ the office of county clerk is still a sought-after job. Granting removal power to the local fiscal court could lead to power struggles over the office and delays. This was part of why the 1891 constitution placed removal responsibility with the Court of Appeals, rather than the local

⁶⁵⁵ *Id.* at 5976 (statement of Delegate Brents).

⁶⁵⁶ *Id.*

⁶⁵⁷ Some readers might also complain that assigning such a power to the Supreme Court would violate Kentucky’s strong doctrine of separation of powers, which “runs like a golden thread throughout the fabric of our government.” *In re Appointment of Clerk of Court of Appeals*, 297 S.W.2d 764, 767 (Ky. 1957). Of course, if the constitution is amended, the separation of powers problem is solved, as the bar on a department’s “exercis[ing] any power properly belonging to either of the others” expressly “except[s] . . . instances hereinafter expressly directed or permitted.” KY. CONST. § 28. Even without this exception, the grant of the power in the Constitution, as opposed to a statute or rule, would inherently create an exception to the doctrine.

⁶⁵⁸ *Cf. IRELAND, LITTLE KINGDOMS*, *supra* note 57, at 34 (stating the office of county clerk “was a position of great profit before 1850, and as such often sold to the highest bidder; it remained remarkably unchanged after mid-century”). *But see id.* at 34–35 (noting the decreasing pay for the position in less populous counties, and the generally “increasing burdens of their office and their often low pay” after 1850).

circuit court.⁶⁵⁹ This was true under the earlier versions of the constitution.⁶⁶⁰ It helps to have a decision-maker removed both geographically and politically from the clerk at issue.

c. Expanding Section 227 to Include the County Clerks

Perhaps the best (or rather, least worst) solution would be to add the clerk into section 227, thus allowing removal by prosecution for malfeasance or misfeasance in office, or willful neglect of duty. That would put the county clerk on the same footing as the other county officers. Whether this would be desirable depends on how difficult we want the removal process to be, and how broad its scope should be. Placing the county clerks under section 227 does not give them the geographical insulation that removal by the Supreme Court would, but that may no longer be necessary or desirable. When the possibility of local removal of county clerks was raised in the debates over the 1891 constitution, the realities of travel and communication were very different.⁶⁶¹ Requiring witnesses and the like to travel to Frankfort is no longer the hardship it once was.

Placing the clerks under section 227 would insulate them from politics compared to other methods, however, as they would not be subject to the whim of another explicitly political body—the fiscal court. Although juries have historically been seen as a democratic check on an overreaching government, that does not mean they are political in the sense of having party allegiances and the like. Even if individual jurors might have a political axe to grind, the modern process of jury selection, with random pool selection, robust *voir dire*, and the ability to strike for cause and peremptorily means politically biased jurors are unlikely to actually serve on a jury deciding a clerk's fate. And even if one or two succeeded, their votes

⁶⁵⁹ See 4 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES, *supra* note 445, at 5231–32 (noting Delegate Nunn's question of why county clerks could not be handled by local courts instead of bringing them to Frankfort, with Delegate Bronston's answer being: "I do not think Circuit Courts should have that right. It occurs to me there are various reasons why the Clerk of the Court of Appeals should be subject to removal, upon information by the Court of Appeals. The same reason might apply to the Clerk of the Circuit Court. If these officers deserve removal, there should be a way of doing it. That is the reason it was probably put in. There would be great delay by jury trial in the Circuit Court. It seems to me that the provision should stand as to these officers. It is not less severe; in fact, it is more severe.").

⁶⁶⁰ See *Page v. Hardin*, 47 Ky. (8 B. Mon.) 648, 676–77 (1848) (noting that the 1799 constitution "expressly provides for the removal of clerks of Courts by one tribunal alone, thus freeing them, except in the single case of the clerk of the Court of Appeals, from the danger of removal, under the influence of resentment, distaste, or dissatisfaction, or other feelings which might arise between officers placed in such close proximity in the discharge of their respective duties").

⁶⁶¹ See 4 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES, *supra* note 445, at 5204 (statement of Delegate C. T. Allen) (complaining that clerks "have to be brought to Frankfort to be tried by the Court of Appeals"); *id.* at 5232 (statement of Delegate C. T. Allen) (questioning why a clerk "and all his witnesses must come to Frankfort, at a great expense, and be tried by the Court of Appeals?").

would be checked by those of the other jurors and the requirement of unanimous juries in criminal prosecutions. Nonetheless, one of the complaints about proceedings under section 227 is that “[c]riminal trials may be influenced by local conditions, and it is sometimes difficult to indict or convict an influential officer.”⁶⁶² Thus, politics is still an issue, even under section 227.

Placing the county clerks under section 227 would also not solve the problem of a clerk who becomes mentally incompetent. Although both misfeasance and neglect of duty likely are broad enough to reach the simply incompetent clerk, they probably would not reach the clerk who develops dementia, for example. Such a sad state of affairs would not be willful and, thus, cannot be nonfeasance.

At the same time, no process exists for removal of the other county officers if they suffer the same circumstances. It may be, then, that a clerk removal process does not need to extend to such an extreme scenario, even though it was a concern in 1891.⁶⁶³ There is no reason to think that the office of county clerk needs to be more removable than the other county officers. The drafters of the 1891 constitution used a different removal process for clerks, in part, because of the importance of the office at that time. To some extent, that is still the case today, given the clerk’s role in maintaining property records and in conducting elections. Although other county officers have important roles, they are less likely to have a direct impact on, or daily interaction with, the citizenry. And unlike the clerk, most of their business is done publicly, as when the fiscal court sits in session. The clerk’s work, on the other hand, is largely ministerial and takes place either behind closed doors or at least not before a crowd.⁶⁶⁴ But the clerk, like other county officers, is still a public officer.

In the end, placing the county clerks under section 227 is probably the best option. With the county clerks’ disconnection from any judicial court, it makes no sense to place their fate with the Supreme Court. County clerks are now like any other county level officer. To the extent section 227 provides a sufficient removal mechanism for the other county officers, it should also suffice for the county clerks. They would be on the same footing as all the other officers, enjoying no greater job tenure (as they now do), nor any lesser (as they would under a mere good-cause removal standard).

C. The Proposed Solutions Applied

Although Kim Davis’s situation has been the springing-off point for much of the foregoing discussion, little space in this Article has been dedicated to evaluating

⁶⁶² *Holliday v. Fields*, 275 S.W. 642, 645 (Ky. 1925).

⁶⁶³ See 4 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES, *supra* note 445, at 5231.

⁶⁶⁴ This is not to suggest something sinister. Rather, the county clerk, like other ministerial officers, works in an office only open to the public in part. The clerk’s work, while public in a sense, is not subjected to, or even open to, the same sort of public scrutiny as occurs, for example, in an open meeting of the fiscal court.

her conduct. That has not been the point of this Article. Nevertheless, her conduct provides an example by which the efficacy of the various removal mechanisms can be evaluated.

Her conduct, viewed in even the most unfavorable light, likely would not suffice for impeachment. And even if it did, the process is so rare as to make her removal through that means highly unlikely.

Nor does her conduct appear to fall under sections 150 and 151 of the constitution. Her conduct certainly does not fit within the core conduct governed by those provisions. Refusing to grant marriage licenses, even if she is required to do so by law, is not the sort of corrupt practice or felonious conduct those provisions were aimed at. Although statutes, such as the official-misconduct statute, could arguably be expanded to cover her conduct as a “high misdemeanor,” again, even if viewed in the least favorable light, they are not the best fit for refusing to carry out one of many duties of office.

If the county clerks were removable for good cause, whether by the Supreme Court or the fiscal court, Davis’s conduct still likely would not support removal. As discussed above, most of the clerk removals throughout history have been caused by affirmative misconduct, such as embezzlement, altering court records, or negligent handling of public funds. Refusal to carry out but one of many duties of office arguably falls short of those types of misconduct. There would be little question that it is “incompatibl[e] with the strict duties of . . . office,” but at the same time, it may not be “of a character which . . . ought to induce h[er] removal from office” by a court.⁶⁶⁵ Although “good cause” is undoubtedly a low standard for removal, requiring simply any kind of misconduct, Davis’s conduct does not appear to rise to the same level as that which has historically justified removal.

Inclusion of the county clerk in section 227 would provide the most likely candidate for a legitimate means of removing Davis. She was accused of refusing to carry out some of the duties of her office: namely, the issuance of marriage licenses to couples legally entitled to become married. That fits squarely within willful neglect of official duties or nonfeasance. But if the arguments about Kentucky’s RFRA requiring an accommodation for her are correct, then a prosecution for nonfeasance should not be successful, since she would not have failed to carry out a legal duty. Again, no claims are made here as to whether she *should* be prosecuted if the removal mechanisms were expanded as described above. Her conduct is simply a test case against which to gauge the effectiveness of the various methods available to the General Assembly.

⁶⁶⁵ *Commonwealth v. Arnold*, 13 Ky. (3 Litt.) 309, 317 (1823).

CONCLUSION

Kentucky has historically had a comprehensive system for removing its state officers, from the highest to the lowest. Outside the highest officers, there has traditionally been a removal mechanism less than impeachment or conviction of a significant crime or corrupt practice. As we have seen, however, the lesser removal mechanism for county clerks was removed from the Constitution in 1975. The available evidence suggests this was a mere oversight, but there is no question that there is now a removal gap in the existing scheme for the county clerks relative to other county officers. And there is little question that the best fix for that hole would require a constitutional amendment, though there are multiple options that would suffice.

The bigger question is a practical one. Is there sufficient political will both in the General Assembly and the electorate to pass a constitutional amendment on this issue? Historically, it has been difficult to amend the 1891 constitution, which has, at this point, been in effect fifty percent longer than all three of its predecessors combined. As of 2012, the General Assembly had submitted only seventy-nine proposed amendments to voters, of which voters only approved forty,⁶⁶⁶ suggesting approximately the odds of a coin flip.

And constitutional amendments tend to be responsive. There must be evidence of a problem in need of fixing. As explained above, a problem exists *in theory*. But is there a practical problem? The truly “bad” clerks in the modern era have simply resigned when they have gotten into trouble. Unlike other county officers, such as sheriffs and county judges, no clerk in Kentucky has held on to office in the face of a felony conviction.

Of course, the electorate might respond to the obvious recent situation with Kim Davis. She certainly has her share of detractors, many of whom claim she should have been removed or should have resigned. But many of those people are not Kentucky voters, and she has many supporters who actually live in the state.

More importantly for purposes of this Article, Kim Davis’s conduct does not appear to be consistent with the type of conduct leading to the removal of clerks in the past. She has not, for example, stolen public funds or falsified records. Her detractors may claim that she obstructed the constitutional right to marry and affronted the dignity of those seeking marriage, and that such conduct may suffice for removal. But the General Assembly and the Kentucky electorate are unlikely to respond accordingly. Justified or not, Kim Davis’ conduct is unlikely to be the impetus for amending the Constitution to add back a lesser removal process for recalcitrant county clerks.

⁶⁶⁶ IRELAND, STATE CONSTITUTION, *supra* note 234, at 18.

Nonetheless, the General Assembly and the citizens of Kentucky should not wait for an extreme case before acting,⁶⁶⁷ and should instead move toward amending the constitution to allow removal of county clerks at the local level. Let Kim Davis's case be the innocuous canary in the coal mine showing that the office of county clerk is still a significant one. Kentucky needs a removal mechanism less difficult, less politically fraught, and less punitive than impeachment or conviction for a felony, high misdemeanor, or corrupt practice.

⁶⁶⁷ Again, as noted above, another county clerk has recently been accused of criminal conduct related to her office. Her case at least has to the potential to be an extreme one, if she is convicted and follows in the footsteps of other county officers who refused to vacate their offices while their appeals were pending.