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The Kentucky Bill of Rights: A Bicentennial Celebration

BY KEN GORMLEY* AND RHONDA G. HARTMAN**

INTRODUCTION

The bicentennial year of the Kentucky Constitution seems a particularly appropriate time to celebrate the Kentucky Bill of

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This Article is an outgrowth of a seminar held in Lexington, Kentucky in December of 1990, sponsored by the Supreme and Superior Courts of Kentucky on the subject of state constitutional law. I would like to thank Chief Justice Robert F. Stephens and the other members of those distinguished courts, for inviting me to participate as a faculty member.

This project is a special one for me, since my own roots are so deeply intertwined with Kentucky. Like many early Kentuckians, my great-grandfather settled in Virginia, then moved to Lexington, serving as a soldier in the Civil War under General "Light Horse" Harry Lee. My father grew up in a stone house on South Main Street in Versailles, a colorful world of tobacco, horses, and bluegrass, that later played a vivid part in my own childhood summers.

This Article is dedicated to my father, William T. Gormley Sr., who instilled a love of Kentucky heritage in all of us. To the Estills of Maysville, the Gormleys of Frankfort, the Morgans of Lexington, and the Gilkisons and Tilghmans of Versailles. To the late Governor Albert M. "Happy" Chandler, who found my father his first job.

My special appreciation, finally, to Justice Charles Leibson of the Kentucky Supreme Court, who contributed insightful comments on an earlier draft of this Article. And to Rhonda Hartman, who did most of the hard work.

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Rights, which guarantees the people of Kentucky the liberties essential for a democratic society. Kentucky’s Bill of Rights, which has had an extraordinary history, is eminently worthy of study because it is the barrier between the powers and prerogatives of the state and the liberties of the people.

In 1792, Kentucky attained statehood as farmers, planters, and politicians assembled in Danville for the first constitutional convention. The delegates to the convention drafted and ratified Kentucky’s first permanent constitution in 1792. This document was modeled after the constitutions of certain leading colonies and, in many respects, after early English documents such as the Magna Charta and the English Bill of Rights. Since the adoption, Kentucky has had three constitutional conventions, in 1799, 1849, and 1891, to revise the original. Ratified on September 28, 1891, the present state constitution has remained in force for one hundred years, a testimonial both to the wisdom of its draftsmen and the vitality of the people.

To discover the full meaning of Kentucky’s Bill of Rights, two hundred years after its ratification, Kentucky’s courts and legal practitioners need full access to its history. This Article demonstrates that most of the guaranties in Kentucky’s Bill of Rights were adopted from Pennsylvania’s 1790 constitution, which in turn derived from early English documents. Accordingly, both sources, the Pennsylvania Constitution of 1790 and various early English documents, should be considered in interpreting Kentucky’s Bill of Rights.

This Article undertakes a section-by-section analysis of the present Kentucky Bill of Rights, providing a background for persons interested in the history of individual liberties in Kentucky. First, the Article traces the textual evolution of the Bill of Rights through Kentucky’s four constitutions. Next, selected Kentucky Supreme Court and Kentucky Court of Appeals decisions are analyzed to provide insight into the courts’ interpretation of the modern Kentucky Bill of Rights, and a framework for future constitutional development.

1 Ky. Const. §§ 1-26.
3 See id. at 1.
4 See id. at 1, 22, 124.
5 For a discussion regarding Kentucky’s constitutions, see generally Dietzmann, The Four Constitutions of Kentucky, 15 Ky. L.J. 116 (1926-27).
I. Origins of the Kentucky Bill of Rights

When Kentucky separated from Virginia in 1790, the task of writing the first state constitution was as significant as attaining statehood. For early Kentuckians, drafting a constitution was critical to establishing a proper foundation for the state and attracting educated and talented people to govern it. Unlike the progressive and established societies of states like Pennsylvania, Massachusetts and Virginia, Kentucky's population was an amalgam of pioneers and latecomers.\(^6\) Over half of the citizens hailed from Virginia; many served in the Revolution, establishing themselves in Kentucky with military land warrants.\(^7\) As a consequence, the Kentucky society of the late 1700s was so new that Kentuckians saw "none about them to whom or to whose families they had been accustomed to think themselves inferior."\(^8\)

Even Kentucky's elite lacked the knowledge and experience in government needed to write a constitution. Kentucky had "very few characters who [had] turned their attention to these important subjects."\(^9\) Political unknowns and Kentucky gentry alike shared a lack of preparation for the task of drafting a state constitution. Few had attended college, and none of the new leaders possessed more than an ordinary English education.\(^10\) The paucity of lawyers, educated men, and politicians of established reputation led Kentucky's elite to seek assistance from leaders of the eastern states, most notably Pennsylvania and Virginia.\(^11\)

Between 1785 and 1791, Kentucky gentlemen sent a deluge of letters, soliciting advice from notables like Thomas Jefferson, jurist Edmond Pendleton, and lawyer George Nicholas.\(^12\) The Kentuckians persistently sought the assistance of James Madison, even inviting him to write the constitution. His abilities for constitution drafting were esteemed, and he was reputed to share personal ties with Kentuckians.\(^13\) Madison, however, declined the invitation, based on his "[i]gnorance of many local circumstances," that "must be consulted in such work."\(^14\)

\(^6\) See J. Coward, supra note 2, at 21.
\(^7\) Id.
\(^8\) Id. at 10, 24.
\(^9\) Id. at 11.
\(^10\) Id. at 11, 21-22.
\(^11\) Id.
\(^12\) Id. at 11.
\(^13\) Id.
\(^14\) Id.
Finally, a convention of 45 delegates met in Danville on April 2, 1792, for a mere 18 days, without Jefferson or Madison. This convention was led primarily by George Nicholas, who had commanded a company of Virginia troops in the Revolutionary War, served as a member of the Virginia constitutional convention, and settled on a plantation in Mercer County, near Danville. Nicholas quickly earned a reputation as a leading statesman. Shortly after the convention he received an appointment as Kentucky's first Attorney General. 15

Kentucky folklore suggests that Jefferson secretly penned the first Kentucky Bill of Rights. 16 This myth has been fostered by the lack of recorded history concerning the events of the convention. The official Journal left the proceedings shrouded in mystery. 17 However, research for this Article discloses that the Kentucky Bill of Rights was not in fact drafted by Thomas Jefferson. A comparison of the Kentucky Bill of Rights of 1792 and a number of earlier, now defunct constitutions of the leading colonies, demonstrates unequivocally that the original Kentucky Bill of Rights was borrowed almost verbatim from the Pennsylvania Constitution of 1790. 18

History supports this conclusion. Joan Wells Coward, a leading historian of the Kentucky Constitution, has written that, although James Madison declined Kentucky's invitation to draft its Constitution, "[H]e recommended a reading of a recently published volume of state constitutions for materials upon which to draw." 19 A letter from James Madison to Caleb Wallace, a district court judge, confirms this recommendation. 20 Although Coward concludes that

15 See THE LAWYER AND LAWMAKERS OF KENTUCKY 215-16 (H. Levin ed. 1897).

16 See Gatewood v. Matthews, 403 S.W.2d 716, 718 (Ky. 1966) ("These words were supposedly penned by Thomas Jefferson as section 2, Article XII, of the 1792 Constitution."); see also LEGISLATIVE RESEARCH COMM., INFORMATIONAL BULLETIN No. 29, KENTUCKY'S CONSTITUTIONAL DEVELOPMENT 3 (1960) ("This constitution was a brief document modeled in many respects after the constitution of the United States. In the main it reflected the thinking exemplified by Jefferson."); 1 A. STOKES, CHURCH AND STATE IN THE UNITED STATES 444-45 (1950).

17 See J. COWARD, supra note 2, at 25. The Journal did indicate the contribution of George Nicholas, by extending formal thanks "for his particular attention to and zealous and useful assistance in conducting the business while a member of this House." Id.

18 For a comparison of the Kentucky Bill of Rights of 1792 and the Pennsylvania Bill of Rights of 1790, see the Appendix.

19 J. COWARD, supra note 2, at 11.

20 Letter from James Madison to Caleb Wallace (Aug. 23, 1785) noted in J. COWARD, supra note 2, at 11 n.28.
"Kentuckians were on their own,"21 in fact, Nicholas and the other delegates took Madison's advice seriously, choosing to adopt the recent Pennsylvania Bill of Rights as their own.

This discovery is not surprising. Most early state constitutions borrowed heavily from those of leading colonies, particularly Pennsylvania, New York, Delaware, and Virginia.22 People like Benjamin Franklin and Jefferson, who played important roles in drafting the leading constitutions, were the symbols of American independence; it was natural to look to them for guidance.

This link in the Kentucky Constitution's history is valuable because it allows courts and lawyers to trace the provisions of the Bill of Rights to their earliest origins. In fact, many of the individual liberties contained in both the Kentucky and Pennsylvania Bills of Rights originated in several early English documents. These documents protected what were considered basic rights of Englishmen, which existed in England long before the colonies' independence.23 The similarity between the rights preserved in both the English and colonial documents supports the conclusion that the drafters of early state constitutions relied heavily upon the English documents. Specifically, an examination of the Kentucky Bill of Rights of 1792 shows that it may be traced ultimately to the Magna Charta and the English Bill of Rights.

Before examining the origins of specific provisions of the Kentucky Constitution in more detail, it is important to gain a general familiarity with the most important English documents that significantly influenced the constitutional draftsmen of both Pennsylvania and Kentucky. The foremost of these, the Magna Charta, was adopted in 121524 and safeguarded several rights that were

21 J. CowARD, supra note 2, at 11.
22 See generally W. ADAMS, THE FIRST AMERICAN CONSTITUTIONS 82, 94 (1980). Discussing the origins and enactments of the first state constitutions, Adams states that, [F]or the most part, the North Carolinians did not work out original formulations, particularly in the declaration of rights. Most of the clauses in their declaration were taken over from Virginia, Pennsylvania, and Maryland.... [T]he citizens of Vermont adopted a constitution and a declaration of rights, both of which they had taken almost word for word from Pennsylvania.

Id.
23 See generally E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (J.G.A. Rocock ed. 1987). A central theme of Burke's is that the rights of Englishmen, reflected in the Petition of Right, Magna Charta and the Declaration of Right, are derived from tradition and are to be transmitted to posterity. Id.
24 See MAGNA CHARTA (1215), reprinted in 1 KY. REV. STAT. ANN. 839-45 (Michie/ Bobbs-Merrill 1988) [hereinafter KRS].
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subsequently guarantied by both the Kentucky and Pennsylvania Bill of Rights.

The Magna Charta originated the guaranty of freedom of religion in its first chapter:

[T]he Church of England shall be free, and shall have all her whole rights and liberties inviolable. (2) We have granted also, and given to all the freemen of our realm, for us and our heirs forever, these liberties underwritten, to have and to hold to them and their heirs, of us and our heirs forever.25

Although the Magna Charta did not expressly bar cruel and unusual punishment, it stated that, "A freeman shall not be amerced for a small fault, but after the manner of the fault; and for a great fault, after the greatness thereof."26 Another chapter of the Magna Charta provided specific compensation for the taking of property, specifically horses, carts, and timber, by a sheriff or bailiff.27 Further, the Magna Charta explicitly required that witnesses for the accused be heard prior to conviction: "No bailiff from henceforth, shall put any man to his law upon his own bare saying, without credible witnesses to prove it."28

Another guaranty in the Magna Charta, the right to trial by jury, was especially significant in the development of English law because the citizenry had frequently been subjected to punishment through secret proceedings in the infamous Court of Star Chamber.29 The Magna Charta stated:

No freeman shall be taken, or imprisoned, or be disseised of his freehold or liberties, or free customs, or be outlawed or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man, either justice or right.30

A notable, though seldom employed, provision in Kentucky's current Bill of Rights may have also originated in the Magna

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25 Magna Charta, reprinted in 1 KRS, supra note 24, at 839.
26 Id. This chapter also specified limitations on how certain persons, including earls, barons and men of the church, could be punished. See id.
27 See id. at 842 (eighth chapter). This provision required the person taking property to pay ten pence a day for a carriage with two horses. See id.
28 Id. at 843 (twenty-eighth chapter).
29 For a discussion of this period and its excesses, see J. Gay, The Court of Star Chamber and its Records to the Reign of Elizabeth I (1985).
30 Magna Charta, reprinted in 1 KRS, supra note 24, at 843 (twenty-ninth chapter).
Charta. The Kentucky constitutional provision guarantying the inherent rights of the people in broad, unspecified terms resembles the Magna Charta provision granting "to all archbishops, bishops, abbots, priors, earls, barons, and ... all freemen," the liberties embodied in the Magna Charta. A second major English document influencing the Pennsylvania and Kentucky Constitutions was the Petition of Right, adopted in 1627 by Parliament. The Petition of Right, enacted during the reign of King Edward III, entrenched due process in English law, providing: "[N]o man of what estate or condition that he may be, should be taken out of his land or tenements, nor taken nor imprisoned, nor disinherited, nor put to death without being brought to answer by due process of law." By requiring that a prisoner be brought before a court within a specified time to determine if his or her detention was lawful, the English Habeas Corpus Act also influenced the development of individual rights in Kentucky. The Act also established the double jeopardy doctrine, as well as the right to a speedy trial. The Act was incorporated into the Pennsylvania Constitution of 1776, and, in turn, worked its way into the Kentucky Constitution of 1792. A final influential document was the English Bill of Rights, enacted in 1689, the first year of the reign of William and Mary. Reaffirming the right to trial by jury and the ban on cruel and unusual punishment, the English Bill of Rights declared the right to petition and to freely speak. The right to petition the King, like the right to petition government included in the Kentucky

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31 See Ky. Const. § 1 ("All men are, by nature, free and equal, and have certain inherent and inalienable rights. . . .")
32 MAGNA CHARTA, reprinted in 1 KRS, supra note 24, at 839 (introduction section).
33 PETITION OF RIGHT (1627), reprinted in W. McELREATH, A TREATISE OF STATE CONSTITUTIONS 196-99 (1912).
34 Id. at 194.
35 The Habeas Corpus Act (1680), reprinted in W. McELREATH, supra note 33, at 200-08.
36 Id. at 200-01.
37 Id. at 194.
38 See KY. CONST. of 1792, art. XII, §§ 10, 12.
39 See ENGLISH BILL OF RIGHTS (1689), reprinted in W. McELREATH, supra note 33, at 209-12.
40 Id. at 212.
41 Id. at 211 ("That it is the right of subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal.")
Constitution of 1792,⁴¹ embodies the fundamental principle that citizens have a right to request changes in their government. Freedom of speech was also guarantied in the English Bill of Rights: "[T]he freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament."⁴²

Although the liberties embodied in these English documents, i.e., the Magna Charta, the Petition of Right, the English Habeas Corpus Act and the English Bill of Rights, certainly contributed to the origin of the Kentucky Bill of Rights, these early English freedoms have taken on unique meanings in the United States. The remainder of this Article discusses and analyzes the origin and evolution of each provision of the Kentucky Bill of Rights⁴³ and shows how the courts and citizens of Kentucky have molded these provisions to reflect their own unique political culture.

II. THE KENTUCKY BILL OF RIGHTS

A. Inherent and Inalienable Rights

§ 1. All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:⁴⁴

First: The right of enjoying and defending their lives and liberties.

Second: The right of worshipping Almighty God according to the dictates of their consciences.

Third: The right of seeking and pursuing their safety and happiness.

Fourth: The right of freely communicating their thoughts and opinions.

Fifth: The right of acquiring and protecting property.

Sixth: The right of assembling together in a peaceable manner for their common good, and of applying to those invested with the power of government for redress of grievances or other proper purposes, by petition, address of remonstrance.

⁴¹ Ky. Const. of 1792, art. XII, § 22 ("That the citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances, or other proper purposes, by petition, address, or remonstrance.").

⁴² English Bill of Rights, reprinted in W. McElreath, supra note 33, at 212.

⁴³ See infra notes 44-635 and accompanying text.

⁴⁴ Ky. Const. § 1.
Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons.

1. Textual Evolution

Section 1 of the Kentucky Bill of Rights affords to all persons a bundle of protections, combining discrete categories and declarations of rights that have remained virtually unchanged for two hundred years. The first subsection, intended as a catchall for "inherent and inalienable" rights, protects basic liberties against deprivation by the state. The free exercise of religion, embodied in the second subsection, was a basic tenet of Kentucky's ideology, and grants Kentuckians the right to worship "Almighty God according to the dictates of their consciences." Mirroring the free exercise of religion guaranty in the Pennsylvania Constitution of 1790, this provision has been neither narrowed nor altered to the present.

The first section of the Kentucky Bill of Rights, in subsection four, also embraces freedom of expression, a liberty identical to the right to express thoughts and opinions freely, as provided by the 1790 Pennsylvania Bill of Rights. By its very terms, this guaranty reflects Kentucky's commitment to a democratic society and the notion that the health of a self-governing society is nurtured by free speech.

The right to secure property, included in the fifth subsection, first appeared in Kentucky's third constitution. This inclusion indicates Kentucky's commitment, born during this period, to the protection of property.

Section 1, in its sixth paragraph, also safeguards the freedoms of assembly and petition, making the right to freedom of expression comprehensive. The Kentucky guaranty certainly was modeled after the provision guarantying freedom of assembly, set forth in the 1790 Pennsylvania Bill of Rights. The drafters of both the

41 Id.
42 See PA. CONST. of 1790, art. IX, § 3. For a comparison of the constitutions see infra Appendix.
43 Compare KY. CONST. of 1792 art. XII and KY. CONST. of 1799 art. X and KY. CONST. of 1850 art. XIII with KY. CONST. § 1.
44 See PA. CONST. of 1790, art. IX, § 7.
45 See KY. CONST. of 1850, art. XIII, § 3.
46 See KY. CONST. § 1.
47 See PA. CONST. of 1790, art. IX, § 20.
1792 Kentucky Constitution and the 1790 Pennsylvania Constitution meant this as a broad guaranty by allowing for governmental reform through "remonstrance." Remonstrance is defined as "[a] formal protest against the policy or conduct of the government or of certain officials drawn up and presented by aggrieved citizens." The intended breadth of this liberty is clear, since remonstrance, i.e., the right to protest against government actions, is discrete from petition, i.e., the liberty to ask the government to perform an affirmative act.

Finally, the right to bear arms is expressly provided in the final paragraph of the first section,\(^2\) reflecting the early American sentiment that freedom was born in revolution and won largely by the private arms of citizens.\(^4\) Resembling the guaranty provided by the 1790 Pennsylvania Constitution, this section reflects the Kentucky notion, of the late eighteenth century, that allowing arms in the hands of the people is one of the safeguards of freedom: "[A]n armed citizenry exceeds the dubious safety of a disarmed one."\(^5\)

2. *Judicial Interpretation*

\(a. \) "*The right of enjoying and defending their lives and liberties*"\(^5\)

The Kentucky Supreme Court has limited protection to the right of liberty secured by section 1, at least where it has concerned the penumbral freedom of association. In *Grzyb v. Evans*,\(^7\) a wrongful discharge action was filed against the King's Daughters' Hospital of Ashland by a former director of housekeeping and laundry. The employee, a male, had been terminated for fraternizing with a female hospital employee.\(^8\) The employee complained that his termination violated Kentucky's protection of freedom of association, guarantied implicitly by section 1, because he was terminated for associating with another employee.\(^9\)
The circuit court granted the hospital’s motion to dismiss, reasoning that the complaint lacked even a passing reference to a specific constitutional violation. The Kentucky Court of Appeals reversed, finding, as the employee had argued, a constitutional right to associate implicit in the personal liberty secured by section 1 of the Kentucky Bill of Rights. The Kentucky Supreme Court reversed this finding. Without expressly addressing the extent to which the “liberty” of section 1 might encompass a freedom of association, the court explained:

[T]he protections afforded Kentucky citizens under Kentucky Constitution Section 1 are against transgressions of government and lawmaking bodies. Thus, although the Court of Appeals made reference to [the employee’s] constitutionally protected rights of personal liberty, the constitutional protection of freedom of association does not limit the employer’s right to discharge an employee.

Thus, although the first clause of section 1 may include freedom of association, Grzyb suggests that such a liberty does not exist absent state action.

b. “The right of worshiping Almighty God according to the dictates of their consciences”

Interestingly, the freedom of exercise provision was drafted very broadly in the sense that it guarantied the free exercise of religion to “all men,” arguably including slaves and foreigners, rather than just to “citizens.” Such all-encompassing language was unusual, since those persons generally had no protected rights in Kentucky as of the late eighteenth century.

Interpreting this state constitutional right broadly, the Kentucky high court ruled in Bush v. Commonwealth that excluding a witness in a criminal case based on a religious belief or disbelief violated both the United States and Kentucky Constitutions. In Bush the Commonwealth proffered the testimony of C.C. Moore as a witness in a criminal action over defense counsel’s objection that Moore “was an Atheist,” and “did not believe in any God...

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60 Id. at 401-02.
61 Id. at 402.
62 Ky. Const. § 1.
63 See Ky. Const. of 1792, art. XII, § 3.
64 80 Ky. 244 (1882), rev’d on other grounds, 107 U.S. 110 (1883).
or future state of rewards and punishments." Defense counsel's objection was based on the common law rule that labelled an atheist incompetent to testify in court. The trial court overruled the objection, allowing Moore to testify.

On appeal, the court affirmed, declaring that "religious disbelief does not disqualify" a witness from testifying. In support of its affirmance, Judge Hines, writing for the court, invoked the first amendment of the federal constitution and the fifth section of the 1850 Kentucky Bill of Rights, explaining that:

The object of this provision was to make the divorce between church and state irrevocable, to establish unequivocally that the province of government is to deal with the temporal relations and affairs of men, and in no case with matters spiritual, and that, under no circumstances, should any burden be placed upon any one, or any penalty enforced on account of opinion in reference to religious or spiritual matters.

Focusing on the notion that a free society should regulate only the acts, not the thoughts, of its citizens, the court reasoned:

To apply the rule insisted upon would be to make a religious test, which is contrary as well to the letter as to the spirit of the constitution. If the test can be applied in this case, it may be applied in any, for, independent of this provision of the constitution, there is nothing to prevent the legislature from passing any law they think proper prescribing particular denominational standards of belief as a test of competency to give evidence.

Judge Hines concluded:

We think that this provision of the constitution not only permits persons to testify without regard to religious belief or disbelief, but that it was intended to prevent any inquiry into that belief for the purpose of affecting credibility. It places the Atheist, in

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66 See id. at 247-48.
67 Id. at 248.
68 The first amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. Const. amend. I. Gitlow v. New York, 268 U.S. 652, 666 (1925), extended the protections of the first amendment to the states, through the fourteenth amendment.
69 Bush, 80 Ky. at 249.
70 Id. at 250. The court further noted, "To proscribe or punish for religious or political opinions is of the essence of despotism." Id.
this regard, on the same footing as any other witness, and leaves the question as to the credibility to be inquired into the same way.\textsuperscript{71}

Twenty-two years later, in \textit{Louisville & Nashville R.R. v. Mayes,}\textsuperscript{72} the court cited "the thorough and enlightened" opinion by Judge Hines in \textit{Bush} approvingly, finding that a witness in a civil action may not be cross-examined as to religious belief for the purpose of discrediting him.\textsuperscript{73}

\textit{Bush} and \textit{Mayes} indicate a broad heritage of religious protection in Kentucky, under both the first amendment and section 1. While the import of the "disestablishment" clause of the Kentucky Bill of Rights parallels the first amendment, the textual differences between the provisions may provide fertile ground upon which to recognize religious protections that are uniquely Kentuckian.

c. "The right of freely communicating their thoughts and opinions"\textsuperscript{74}

The Kentucky Court of Appeals extended the guaranty of expression provided by this subsection to commercial speech in \textit{Kentucky Registry of Election Finance v. Louisville Bar Association.}\textsuperscript{75} While upholding a declaratory judgment rendered by the Franklin Circuit Court, to the effect that the Louisville Bar Association could publish the results of its judicial qualification poll with certain restrictions, by use of an advertisement paid by corporate funds, the court observed that publication of the results and receipt of the information by the voters were "fundamentally protected rights" under section 1 of the Kentucky Constitution.\textsuperscript{76} The court further explained:

It is well established that paid advertisements, even those involving "commercial speech" are entitled to first amendment protec-

\textsuperscript{71} \textit{Id.} at 251.
\textsuperscript{72} 80 S.W. 1096 (Ky. 1904).
\textsuperscript{73} Louisville & Nashville R.R. v. Mayes, 80 S.W. 1096, 1097 (Ky. 1904). In \textit{Mayes, J. H. Mayes,} a black preacher, filed an action against W. D. Bell, a conductor for the defendant company, asserting that Bell uttered vile and profane comments toward him. In an attempt to discredit his testimony at trial, Mayes' attorney probed Bell's religious beliefs during cross-examination by asking questions such as "Do you believe in the existence of a God?" and, "Do you believe in the divinity of Jesus Christ?" \textit{See id.} at 1096.
\textsuperscript{74} Ky. Const. § 1.
\textsuperscript{75} 579 S.W.2d 622 (Ky. Ct. App. 1979).
\textsuperscript{76} \textit{See} Kentucky Registry of Election Fin. v. Louisville Bar Ass'n, 579 S.W.2d 622, 626 (Ky. Ct. App. 1979).
tion. The protection also extends to the right of the public to receive information and ideas.\textsuperscript{77}

However, the Kentucky courts have interpreted the freedom of expression provision narrowly in cases involving the right to picket during an illegal strike, and have upheld injunctions against section 1 challenges when the freedom to express one's sentiments is outweighed by competing rights of others. For example, in \textit{Jefferson County Teachers Association v. Board of Education,}\textsuperscript{78} school teachers appealed from an injunction against striking in the public schools, contending that the court's order violated their right of free speech and expression.\textsuperscript{79} Finding meritless the teachers' contention, the court ruled that such a right is not absolute, but is limited "by the countervailing rights of others."\textsuperscript{80} In support of its ruling, the court reasoned:

[The injunction] prohibit[ed] the commission of illegal acts, and the rights of free speech and public assembly do not license violations of law. . . . "Where such illegality consists of violations of settled public policy, . . . the injured party has a right to be protected from the imminent harmful consequences of such action."\textsuperscript{81}

d. "\textit{The right of acquiring and protecting property}\textsuperscript{82}"

The Kentucky courts have defined property broadly to include livelihood and have not been hesitant to strike down laws unduly regulating professions. Under this subsection, the courts have invalidated acts prohibiting the use of trading stamps, prescribing hours of business for barber shops, and confiscating property through license fees.

In \textit{Lawton v. Steward Dry Goods,}\textsuperscript{83} the Kentucky high court announced that the right of acquiring property carried with it "as a necessary and inseparable incident, the right to engage in any

\textsuperscript{77} \textit{Id.} at 626-27 (citations omitted).
\textsuperscript{78} 463 S.W.2d 627 (Ky. 1970), \textit{cert. denied}, 404 U.S. 865 (1971).
\textsuperscript{80} \textit{Id.} at 630.
\textsuperscript{81} \textit{Id.} at 630 (quoting City of Los Angeles v. Los Angeles Bldg. & Constr. Trades Council, 210 P.2d 305, 309 (1949)).
\textsuperscript{82} KY. CONST. § 1.
\textsuperscript{83} 247 S.W. 14 (Ky. 1923).
business or occupation that is not injurious to the public weal."\textsuperscript{84} Accordingly, the court ruled that an act prohibiting the use of trading stamps in Kentucky could not be sustained because such legislative action was "fanciful" and, if permitted to its logical extent, "no business [would] be safe from legislative interference."\textsuperscript{85} The court observed, in dicta, that the framers of the Kentucky Bill of Rights recognized

[t]he difference between the savage and the civilized man [which] is due in no small degree to the fact that the former provides only for the moment, while the latter provides for the morrow. Indeed, the ownership of property is always an incentive to good citizenship, and good citizenship always contributes to good government, and therefore to the welfare and happiness of man.\textsuperscript{86}

Employing a similar analysis in \textit{City of Louisville v. Kuhn},\textsuperscript{87} the Kentucky high court invalidated a Louisville ordinance that made conducting "barber business" before 8 a.m. and after 6 p.m. unlawful. The court decided that

to deny the right of either the barber or of his patrons to render and receive such services within the reasonable time indicated would be followed by incalculable inconvenience and detriment to both the barber and his patrons.\textsuperscript{88}

The court held that the ordinance violated the right to secure property, finding that its "inhibitive provisions" limited \textit{pro tante} the right of all members of the barber profession to acquire property.\textsuperscript{89}

In \textit{Southern Linen Supply Co. v. Hazard},\textsuperscript{90} Kentucky's highest court ruled that a city ordinance establishing that licenses costing from $200 to $400 were required to operate laundries and linen services was offensive to the Kentucky Bill of Rights.\textsuperscript{91} Likewise, in \textit{City of Jackson v. Murray-Reed-Shone & Co.},\textsuperscript{92} the court found that a Jackson city ordinance requiring restaurants to close for

\begin{footnotesize}
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\item \textsuperscript{84} Lawton v. Steward Dry Goods, 247 S.W. 14, 16 (Ky. 1923).
\item \textsuperscript{85} \textit{Id.}
\item \textsuperscript{86} \textit{Id.}
\item \textsuperscript{87} 145 S.W.2d 851 (Ky. 1940).
\item \textsuperscript{88} \textit{City of Louisville v. Kuhn}, 145 S.W.2d 851, 854 (Ky. 1940).
\item \textsuperscript{89} See \textit{id.}
\item \textsuperscript{90} 151 S.W.2d 758 (Ky. 1941).
\item \textsuperscript{91} See \textit{Southern Linen Supply Co. v. Hazard}, 151 S.W.2d 758, 760 (Ky. 1941).
\item \textsuperscript{92} 178 S.W.2d 847 (Ky. 1944).
\end{itemize}
\end{footnotesize}
four hours after midnight was unreasonable, transgressing the dictates of this constitutional provision.93

In the final analysis, the decisions in Lawton, Kuhn, Hazard and Jackson all demonstrate Kentucky’s unwillingness to allow state and city governments to encroach unreasonably upon the property rights of Kentuckians.

e. "The right of assembling together in a peaceable manner for their common good, and of applying to those invested with the power of government for redress of grievances or other proper purposes, by petition, address or remonstrance"94

Although few cases have interpreted this provision of section 1, the right of assembly was closely protected in Boyd v. Deena Artware, Inc.95 At issue in Boyd was the constitutionality of an injunction preventing union employees from picketing their employer’s manufacturing plant and warehouse.96 The court held that the injunction was unconstitutional, as a violation of the right to assemble, stating:

Undoubtedly the injunction is clothed in such terms as to prohibit [the employees] from congregating in large number at or about [the employer’s] plant, although such assembly might be for a lawful purpose. In this respect, the prohibition is in absolute violation of Section I (6) of our Constitution.97

Boyd demonstrates the importance of the right to assemble in Kentucky.

f. "The right to bear arms in defense of themselves and of the state, subject to the power of the general assembly to enact laws to prevent persons from carrying concealed weapons"98

In Bliss v. Commonwealth,99 decided in 1822, the court relied upon section 23 of the Kentucky Bill of Rights of 1799 to invalidate a legislative act preventing persons from carrying concealed arms.100

93 See City of Jackson v. Murray-Reed-Shore & Co., 178 S.W.2d 847, 848 (Ky. 1944).
94 KY. CONST. § 1.
95 239 S.W.2d 86 (Ky. 1951).
96 See Boyd v. Deena Artware, Inc., 239 S.W.2d 86, 89 (Ky. 1951).
97 See id. at 89.
98 KY. CONST. § 1.
99 12 Ky. 90 (1822).
100 See Bliss v. Commonwealth, 12 Ky. 90, 91-92 (1822) (interpreting KY. CONST. of 1799, art. X, § 23).
Although the act did not "import an entire destruction of the right of the citizens to bear arms in defense of themselves and the state," the court ruled, "it is the right to bear arms in defense of the citizens and the state, that is secured by the constitution, and whatever restrains the full and complete exercise of that right" violates the Kentucky Bill of Rights. In response to the government's position that the act merely operated as a partial restraint on the right of citizens to bear arms, thereby allowing other forms of possessing weapons, the court firmly replied:

[It is the right entire and complete, as it existed at the adoption of the constitution; and if any portion of that right be impaired, immaterial how small the part may be, and immaterial the order of time at which it be done, it is equally forbidden by the constitution.]

The state constitution was changed in 1850 to allow the legislature to prohibit the carrying of concealed weapons. Still, in Holland v. Commonwealth, the court broadly interpreted the right to bear arms. On appeal, the court reversed a conviction for carrying a concealed deadly weapon in violation of a state statute because the defendant was a duly appointed peace officer. Characterizing the constitutional provision as an "affirmation of the faith that all men have the inherent right to arm themselves for the defense of themselves and of the state," the court cited this section as an exemplification of the broadest expression of the right to bear arms.

B. Absolute Power Does Not Exist in a Republic

§ 2. Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.

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101 Id. at 91.
102 Id.
103 Id. at 93.
104 See Ky. Const. of 1850, art. XIII, § 25; see also KRS, supra note 24, at § 527.020 (prohibiting the carrying of a concealed deadly weapon).
105 294 S.W.2d 83 (Ky. 1956).
106 See Holland v. Commonwealth, 294 S.W.2d 83, 84 (Ky. 1956) (interpreting the current Kentucky Bill of Rights).
107 Id. at 85.
108 See id.
109 Ky. Const. § 2.
1. *Textual Evolution*

The guaranty of section 2 was not included in the first Kentucky Bill of Rights but was added at the 1850 constitutional convention. It originally was intended as a safeguard against deprivation of the "inherent and inalienable rights" secured by sections 1 and 4.

Although recognizing the state government's power to regulate, section 2 prevents that power from being exercised in a capricious or discriminatory manner, particularly by the legislature. Undoubtedly, in the absence of such a provision, the Kentucky courts would still have the ability to invalidate legislative acts through the due process clause of the fourteenth amendment of the federal constitution. However, by expressly including this language in the state Bill of Rights, the draftsmen of 1850 afforded distinct protection to the inherent and inalienable rights of the state constitution, thereby affirming the independent vitality of the Kentucky Bill of Rights.

2. *Judicial Interpretation*

Referring to section 2 as the "pole star section" of the Kentucky Constitution, the Kentucky Supreme Court has declared:

Section 2 of our Constitution is simple, short and expresses a view of government and political philosophy that, in a very real sense, distinguishes this republic from all other forms of government which place little or no emphasis on the rights of individuals in a society.

In a series of decisions the courts of Kentucky have attempted to delineate which acts of government amount to an abrogation of the power prohibited by this section. The high court has, for example, struck down municipal legislation under which the granting of a permit was left to the unfettered discretion of a city agency. In *Bruner v. City of Danville*, *Kentucky Milk Mktg. & Antimonopoly Comm'n v. Kroger, Co.*, 691 S.W.2d 893, 899 (Ky. 1985).

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110 See Ky. Const. of 1850, art. XIII, § 2.

111 See supra notes 44-106 and accompanying text; infra notes 167-182 and accompanying text.

112 The due process clause guaranties "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ." U.S. Const. amend. XIV, § 1.

113 *Bruner v. City of Danville*, 394 S.W.2d 939, 941 (Ky. 1965).

114 *Kentucky Milk Mktg. & Antimonopoly Comm'n v. Kroger, Co.*, 691 S.W.2d 893, 899 (Ky. 1985).

115 394 S.W.2d 939 (Ky. 1965).
a license to conduct dances in Danville. His application was denied by the city without explanation. The court found that the conditions upon which the city granted or refused permits were so vague and indefinite that compliance with the requirements could only be determined by subjective, *ad hoc* judgments. Such a system was arbitrary, and thus invalid under section 2 of the Kentucky Constitution. Because Bruner engaged in the public enterprise of dance promotion, the court stated:

The freedom to engage in a lawful business is no less important, and indeed it would seem more essential to man's sustenance, than the liberty to utilize property as he sees fit. Certainly Section 2 of the Constitution applies to both.

According to the Kentucky high court, the legislature may not, under the guise of promoting the public interest, arbitrarily interfere with private business. In *Illinois Central R.R. v. Commonwealth*, a railroad company had been convicted of deducting wages from its employees for time spent voting, which was a misdemeanor under Kentucky law. The company was fined $100. The railroad company brought suit, claiming that because 4,849 of its employees had voted on election day, it would have lost $11,591.63 if the law were allowed, and that such a wage-payment-for-voting time provision was antagonistic to the Kentucky Constitution's proscription against the arbitrary exercise of power. On appeal, the court agreed. In refuting the state's contention that the legislature had a right to adopt the law under its police power to guard the general welfare, the court struck down the provision as offensive to section 2, explaining:

[I]t is always appropriate to remember that the police power is not without its limitations, since clearly it may not unreasonably invade and violate those private rights which are guarantied under [the] state constitution.

The court, in *Illinois Central*, further announced that section 2 inhibits the legislative power of this state from arbitrarily passing a law taking property away from one person and giving it to

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116 See Bruner v. City of Danville, 394 S.W.2d 939, 941 (Ky. 1965).
117 *Id.* at 942.
118 204 S.W.2d 973 (Ky. 1947), *cert. denied*, 344 U.S. 843 (1948).
120 *Id.* at 976.
another person without value received or without any contractual basis. And this inhibition still stands, regardless of the merit or glory or value or need of the person on the receiving end of the transaction.121

In 1985, the Kentucky Supreme Court characterized section 2 as "a curb" on the legislature, or any other public official, in the exercise of political power. At issue in Kentucky Milk Marketing & Antimonopoly Commission v. Kroger, Co.122 was the constitutionality of the Kentucky Milk Marketing Law, which prohibited retailers from selling milk below cost in an effort to prevent monopolies and unfair practices in the sale of milk and milk products.123 Determining that the law was a minimum mark-up law, rather than an anti-monopoly statute, the court found the statute unconstitutional. In invalidating the Act both on its face and in its enforcement by the antimonopoly commission,124 the court declared, "[A]n enactment of such nature is an arbitrary exercise of power by the General Assembly over the lives and property of free men."125 To support its conclusion that the law at issue was arbitrary, the court explained:

Whatever is contrary to democratic ideals, customs and maxims is arbitrary. Likewise, whatever is essentially unjust and unequal or exceeds the reasonable and legitimate interests of the people is arbitrary... If the action taken rests upon reasons so unsubstantial or the consequences are so unjust as to work a hardship, judicial power may be interposed to protect the rights of persons adversely affected. Our function is to decide a test of regularity and legality of a board's action by statutory law and by the constitutional protection against the exercise of arbitrary official power.126

The standard enunciated in Kroger has been used by the courts in analyzing the constitutionality of a variety of state and local laws. For example, the Kentucky Supreme Court struck down the state's Unfair Trade Practices Act, in 1989, as violative of section 2. In Remote Services, Inc. v. FDR Corp.,127 FDR Corporation

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121 Id. at 975.
122 691 S.W.2d 893 (Ky. 1985).
123 See id. at 896-97.
124 See id. at 899-900.
125 See id. at 900.
126 Id. at 899 (citations omitted).
127 764 S.W.2d 80 (Ky. 1989).
filed a complaint alleging that Remote Services had violated the state antitrust provision by selling gasoline products at less than cost for the purpose of injuring competitors and destroying competition. In response, Remote Services contended that the statute violated section 2. The trial court agreed, granting summary judgment for Remote Services. The Kentucky Court of Appeals reversed, reasoning that the act was a mere "trade-practice measure," and distinguishing it from the minimum retail mark-up law that was struck down as unconstitutional in Kroger. Reversing this decision, the Kentucky Supreme Court reinstated the trial court's grant of summary judgment, ruling that the act offended section 2 of the state Bill of Rights. Unlike the court of appeals, the supreme court was unable to distinguish Kroger. The court reasoned that the Act, like the milk marketing law at issue in Kroger, prohibited sales below cost for anti-competitive purposes, and "require[d] adherence to essentially the same cost determination formula." Accordingly, the court determined that the Act was a fortiori both "facially unconstitutional" and unconstitutional in its enforcement.

Most recently, in Commonwealth v. Foley, the Kentucky Supreme Court struck down a state law that prohibited bribery and related acts in connection with elections. The court relied on Kroger to conclude that the election law had been written "so broad and subject to such a vast array of interpretations" that it resulted in "an open invitation to arbitrary, retaliatory, selective, trivial, and therefore unjust criminal prosecution," in violation of section 2. However, in Thompson v. Fayette County Public Schools, the Kentucky Court of Appeals distinguished Kroger in holding that a Tates Creek School Board policy, making students ineligible for interscholastic athletic activities when their grade point average fell below satisfactory standards, did not offend the Kentucky Constitution. The court ruled that a policy requiring school athletes to maintain a 2.0 average is reasonable and not arbitrary, being

128 See Remote Services, Inc. v. FDR Corp., 764 S.W.2d 80, 81 (Ky. 1989).
129 See id. at 82.
130 Id.
131 See id. at 83.
132 798 S.W.2d 947 (Ky. 1990).
133 Commonwealth v. Foley, 798 S.W.2d 947, 953 (Ky. 1990).
134 786 S.W.2d 879 (Ky. Ct. App. 1990).
designed to minimize outside activities which distract from academic endeavors while providing incentive to make acceptable grades so the eligibility may again be retained. This policy does not in any way exceed the reasonable and legitimate interests of the school system.\textsuperscript{135}

Section 2 of the Kentucky Bill of Rights has also been interpreted to embrace the traditional concepts of fundamental fairness and impartiality implicit in both due process and equal protection jurisprudence. In \textit{Standard Oil Co. v. Boone County Board of Supervisors},\textsuperscript{136} holders of leasehold interests in real estate located near an airport and owned by a government agency filed a complaint challenging the tax assessment on their leasehold estates. The estates of other such leaseholders had been exempted from taxation. Specifically, they claimed that the taxes were assessed and levied in such a discriminatory fashion as to violate the Kentucky Constitution. The Kentucky Supreme Court disagreed. Casting section 2 as a bulwark against unreasonable discrimination,\textsuperscript{137} the court found that "[w]hen one person is being taxed and another is not, the sensible and constructive solution is to right the wrong by filling the omission rather than by adding another wrong."\textsuperscript{138} The court held that the unequal treatment must amount to a conscious violation of the principle of uniformity to offend section 2.\textsuperscript{139}

Lastly, in its recent decision in \textit{City of Louisville ex rel. Kuster v. Milligan},\textsuperscript{140} the Kentucky Supreme Court construed section 2 to prohibit the Civil Service Board from exercising absolute and arbitrary power without being subject to review, either by another administrative agency or by the courts.\textsuperscript{141}

\textbf{C. Equal Protection}

\textsection 3. All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges

\textsuperscript{135} Thompson v. Fayette County School Bd., 786 S.W.2d 879, 882 (Ky. Ct. App. 1990).
\textsuperscript{136} 562 S.W.2d 83 (Ky. 1978).
\textsuperscript{137} See \textit{Standard Oil Co. v. Boone County Bd. of Supervisors}, 562 S.W.2d 83, 85 (Ky. 1978).
\textsuperscript{138} \textit{Id}.
\textsuperscript{139} \textit{Id}.
\textsuperscript{140} 798 S.W.2d 454 (Ky. 1990).
\textsuperscript{141} See \textit{City of Louisville ex rel. Kuster v. Milligan}, 798 S.W.2d 454, 458 (Ky. 1990).
shall be made to any man or set of men, except in consideration of public services; but no property shall be exempt from taxation except as provided in this Constitution; and every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment.142

1. Textual Evolution

Equality, in a constitutional sense, generally means that the government may not treat similarly situated persons in a disparate manner. The equal protection clause of the present Kentucky Constitution can be traced to the constitution of 1792. That original provision stated:

That the general, great, and essential principles of liberty and free government may be recognized and unalterably established, we declare that all men, when they form a social compact, are equal, and that no man or set of men are entitled to exclusive or separate public emoluments or privileges from the community but in consideration of public services.143

This original provision, though similar to the first sentence of article IX, section 1 of Pennsylvania’s 1790 Constitution, departed substantially from the Pennsylvania equal protection guaranty, which declared: “[T]hat all men are born equally free and independent.”144

Most notably, the original Kentucky provision had given suffrage to all men, by intent or accident, including blacks. By 1799, however, slavery had become more entrenched in Kentucky and a large majority of the convention delegates favored protection of the practice. Hence, the convention members carefully narrowed the broader guaranty to exclude slaves by adding the word “free” to the preface, so that it read, “[A]ll free men, when they form a social compact, are equal...”145 Indeed, it is apparent from the text of the 1799 provision that the drafters intended to protect and legitimize slavery. It is, then, ironic that this provision later developed into Kentucky’s equal protection clause, a guaranty of the

142 KY. CONST. § 3.
143 KY. CONST. of 1792, art. XII, § 1.
144 PA. CONST. of 1790, art. X, § 1.
145 KY. CONST. of 1799, art. X, § 1.
rights of all persons, including those the original provision sought to enslave.\textsuperscript{146}

2. Judicial Interpretation

In \textit{Fischer v. Grieb},\textsuperscript{147} Kentucky's highest court lauded section 3 as distinguishing Kentucky's government "from governments based on favoritism," and called its "adoption . . . the greatest forward step in the development of the science of government."\textsuperscript{148} The court explained that section 3 places "all persons similarly situated upon a plane of equality under the law, and . . . fix[es] it so that it would be impossible for any class to obtain preferred treatment, or for those in power to grant governmental favors in return for political support."\textsuperscript{149} While section 3 does not forbid "classification based on reasonable and natural distinctions,"\textsuperscript{150} the court stated that it does prohibit classification "so arbitrary and unreasonable as to impose a burden upon or exclude one or more of a class without reasonable basis in fact."\textsuperscript{151}

In cases decided over the past ninety years, the Kentucky courts have sustained equal protection claims where the state has treated certain classes of citizens differently from others. For instance, in \textit{Allen v. Board of Education},\textsuperscript{152} two school teachers were involuntarily suspended under a policy promulgated by the school board that required a mandatory leave of absence for all employees of the board that were political candidates.\textsuperscript{153} The suspended teachers, who were running for public office, challenged the policy on the ground that it violated the equal protection provision of the state constitution. They contended that the classification was not rationally related to the interests sought to be protected.\textsuperscript{154} The Kentucky Court of Appeals agreed, finding that the school board had not shown that seeking political office was an activity that hindered

\textsuperscript{146} See, e.g., Trustees of Graded Free Colored Common Schools v. Trustees of Graded Free White Common Schools, 203 S.W. 520 (1918) (characterizing section as "equal protection clause of constitution").

\textsuperscript{147} 113 S.W. 1139 (Ky. 1938).

\textsuperscript{148} Fischer v. Grieb, 113 S.W. 1139, 1140 (Ky. 1938).

\textsuperscript{149} \textit{Id.}

\textsuperscript{150} \textit{Id.} at 1140.

\textsuperscript{151} \textit{Id.}

\textsuperscript{152} 584 S.W.2d 408 (Ky. Ct. App. 1979).

\textsuperscript{153} See \textit{Allen v. Board of Education}, 584 S.W.2d 408, 409 (Ky. Ct. App. 1979).

\textsuperscript{154} See \textit{id.} at 409-10.
teachers in the performance of their duties. In support of its finding, the court reasoned:

The mandatory leaves of absence were imposed only on those teachers seeking elective office. Teachers engaged in other time-consuming activities were not required to take a leave of absence. There was no showing that political campaigning was the only activity that would adversely affect the quality of education and warrant a mandatory leave of absence.

Although the equal protection clause of the Kentucky Constitution has been invoked frequently to challenge the constitutionality of legislation that classifies citizens in other respects, success has been infrequent. Even when the courts have doubted "the wisdom" of the legislature, they have been reluctant to find legislation unconstitutional. For example, in Vincent v. Connecticut, the constitutionality of a policy promulgated by the Kentucky Department for Human Resources that provided "caretaker benefits" to be paid to a "responsible relative" that lived separately from a "needy and disabled person" but that came into that person's home to provide services was at issue. The policy also permitted services for an individual living in the home of a relative, but only if it would have been "necessary to hire someone to come into the home to provide care." June Lee Vincent, who shared her home with and cared for her disabled mother, challenged the policy, claiming that it violated the state equal protection guaranty.

The court of appeals expressly doubted the wisdom of a policy that provided benefits "to an adult child who visits the home of a needy parent to care for the parent but denies those same benefits to a child who takes the needy parent into her home." However, the court "perceive[d] some rational basis for the policy," and therefore determined that the policy did not violate section 3 of the Kentucky Constitution. For similar reasons, the Kentucky Court of Appeals has determined that a statute relating to the revocation of a driver's license upon conviction for drunk driving

155 See id. at 410.
156 Id.
159 Id.
160 See id.
161 Id. at 101.
162 See id.
that provided potentially harsher penalties for drivers under age 18, did not violate the equal protection provision of the Kentucky Bill of Rights, because it was rationally based.

More recently, in *Commonwealth v. Express Mart, Inc.*, the state highway department filed a complaint against Express Mart for maintaining commercial billboards within view of the interstate highway, in violation of the Kentucky Billboard Act. Express Mart responded, asserting that enforcement of the act was impermissibly selective and therefore violative of Kentucky’s guaranty of equal protection under the laws. The circuit court ruled in favor of Express Mart, finding that the act was enforced in an unconstitutional manner because the department had applied the law more vigorously in wealthier communities. The court of appeals reversed the circuit court, finding “no evidence to support the conclusion that the statute was enforced in an unconstitutional manner.” The court observed that the act was enforced statewide, stating that the “mere fact that a higher percentage of legal actions may be prosecuted in some districts than in others does not amount to selective enforcement.” The court also stated in *dicta* that even if the evidence had supported a finding of unequal enforcement, there was “no evidence of invidious motive or unjustifiable classification.”

Throughout Kentucky’s constitutional history, persons have used this provision to challenge the government’s regulation of business. Although the courts of Kentucky have occasionally supported such attacks, the decisions have indicated that this provision offers only limited protection against the state’s police power.

**D. Inherent Rights Retained by the People**

§ 4. All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety, happiness and the protection of property. For the advancement of these ends, they have at all times an inalienable

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164 759 S.W.2d 600 (Ky. Ct. App. 1988).
166 See *id.* at 601-02.
167 *Id.* at 602.
168 *Id.*
169 *Id.*
and indefeasible right to alter, reform or abolish their government in such manner as they may deem proper.\textsuperscript{170}

1. \textit{Textual Evolution}

A similar provision guarantying the sovereign power of the people was taken verbatim from the Pennsylvania Constitution of 1790 and written into the 1792 Kentucky Constitution, which provided:

That all power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety, and happiness. For the advancement of these ends, they have at all times an inalienable and indefeasible right to alter, reform, or abolish their government in such manner as they may think proper.\textsuperscript{171}

This provision has checked political corruption, limited the power of the legislature to perpetrate fraud, and encouraged legislative responsiveness. The language of this provision memorialized the early experiences of Kentuckians in securing a government under which they possessed freedom of action not permitted by the English divine right of nobility. The guaranty has been a permanent fixture throughout Kentucky's two hundred year constitutional history.\textsuperscript{172} Indeed, the wording of the provision has remained relatively unaltered, with the minor exception that the phrase "and the protection of property" was added to the first sentence in 1850\textsuperscript{173} and "deem proper" displaced "think proper" in 1799.\textsuperscript{174}

2. \textit{Judicial Interpretation}

The doctrine of popular sovereignty, expressed by this section, was first recognized by the Kentucky high court in 1892. In \textit{Miller v. Johnson},\textsuperscript{175} the court stated:

It is conceded by all that the people are the source of all government power; and, as the stream cannot rise above its source, so

\begin{footnotesize}
\textsuperscript{170} Ky. Const. § 4.
\textsuperscript{171} Ky. Const. of 1792, art. XII, § 2; see also infra Appendix.
\textsuperscript{173} See Ky. Const. of 1850, art. XIII, § 4.
\textsuperscript{174} See Ky. Const. of 1799, art X, § 2.
\textsuperscript{175} 18 S.W. 522 (Ky. 1892).
\end{footnotesize}
there is not power above them. Sovereignty resides with them, and they are the supreme law-making power. Indeed, it has been declared in each of the several constitutions of this state that "all power is inherent in the people;" and this is true, from the very nature of our government.\textsuperscript{176}

In \textit{Gatewood v. Matthews},\textsuperscript{177} W. C. Gatewood and several other Kentucky residents and taxpayers brought an action to enjoin the state attorney general and secretary from certifying the question of adoption of a proposed new constitution. The general assembly had established a Constitution Revision Assembly to conduct a detailed study of each section of the Kentucky Constitution and recommend a draft of a reformed constitution to be published by two newspapers of general circulation within the state.\textsuperscript{178} However, the Kentucky Constitution had established, in sections 256 and 258, particular modes of amendment or revision to the state constitution.\textsuperscript{179} Gatewood and the other residents claimed that, taken together, those sections represented "exclusive" modes of changing the constitution.\textsuperscript{180} Before reaching the merits of the claim, the Kentucky Court of Appeals explained that section 4 represents a "viable principle of free government," noting that it has never been a "mere relic" or "museum piece."\textsuperscript{181} Rather, the court cautioned:

\begin{quote}
To the contrary, it seems clear to the majority of this Court that in each of our four constitutions the Bill of Rights has been purposefully set aside as supreme and inviolate because it represents those things that are basic and eternal, all other matters being transitory and subject to change. It follows that nothing else in the Constitution can be construed as a limitation, restriction or modification of any of these fundamental rights.\textsuperscript{182}
\end{quote}

Concluding that the action taken by the legislature did not violate the form or spirit of the Kentucky Constitution,\textsuperscript{183} the court stated:

\begin{quote}
When the people vote on the proposed Constitution it will be an expression of the inalienable right of the ultimate sovereign to
\end{quote}

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\textsuperscript{176} Miller v. Johnson, 18 S.W. 522, 523 (Ky. 1892).
\textsuperscript{177} 403 S.W.2d 716 (Ky. 1966).
\textsuperscript{178} See \textit{Gatewood v. Matthews}, 403 S.W.2d 716, 717 (Ky. 1966).
\textsuperscript{179} See \textit{id.} at 718.
\textsuperscript{180} See \textit{id.}
\textsuperscript{181} \textit{Id.} at 720.
\textsuperscript{182} \textit{Id.} at 720-21.
\textsuperscript{183} See \textit{id.} at 721.
\end{flushleft}
reform the government. That right is guarantied by Section 4 of the Bill of Rights, and is not preempted by the inclusion in the Constitution of alternate modes of revision.184

E. Freedom of Conscience

§ 5. No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; and the civil rights, privileges or capacities of no person shall be taken away, or in any wise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience.185

1. Textual Evolution

The first Kentucky Constitution guarantied to all men the "right to worship Almighty God according to the dictates of their own consciences."186 It was not until the drafting of the Kentucky Constitution of 1890, however, that freedom of conscience was secured in a separate provision.187

Freedom of conscience ensures that every person has a right to believe as his or her conscience dictates. It also protects persons from being treated differently because of their faith; free exercise of religion, on the other hand, guaranties the right to practice a faith without being molested. The purpose of the section's "preferential treatment" language was to prohibit the denial of rights or privileges because of religious beliefs expressly, and to prevent state-sanctioned religious establishments or modes of worship. Indeed, the early constitutional history of Kentucky reflects the notion of disestablishment. Like Pennsylvania, the newly born Commonwealth of Kentucky did not have an established religion.188

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184 Id. at 721-22.
185 KY. CONST. § 5.
186 KY. CONST. of 1792, art. XII, § 3.
187 Compare KY. CONST. of 1850, art. XIII, § 5 with KY. CONST. § 5.
Article XII, section 3 of the 1792 Kentucky Constitution was modeled after the provision in the Pennsylvania Constitutions of 1776 and 1790.189 Both the Kentucky and Pennsylvania provisions stated:

That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man of right can be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; that no human authority can in any case whatever control or interfere with the rights of conscience; and that no preference shall ever be given by law to any religious societies or modes of worship.190

The only differences between the Pennsylvania Constitution of 1790 and the Kentucky Constitution of 1792 were the replacement of "establishments" by "societies," and the omission of some commas.191

Although the provisions in the Kentucky and Pennsylvania Constitutions were virtually identical, the notion of disestablishment reflected divergent meanings in the different regions. The most significant difference between Kentucky and Pennsylvania was that the former was still predominantly a frontier community. By contrast, Pennsylvania was a relatively old region, with diverse but strongly entrenched religious groups. Based on a sufficiently strong Christian consensus, Pennsylvania included in its otherwise radical 1776 constitution an oath for legislators to pledge their belief "in One God, the creator and governor of the universe," and acknowledged "the Scriptures of the Old and New Testament to be given by Divine inspiration."192 By 1790, this provision was reduced to one allowing disqualification for not "acknowledg[ing] the being of a God and a future state of rewards and punishments."193

By contrast, Kentucky's sentiment was anti-clerical, as evidenced by the state constitutional prohibition against clergy in the legislature and the governor's mansion.194 Even the largest religious group, the Baptists, adamantly opposed any establishment, having been dissenters both in the northern Congregationalist and southern

189 See infra Appendix.
190 Ky. Const. of 1792, art. XII, § 3; Pa. Const. of 1790, art. IX, § 3.
191 Pa. Const. of 1790, art. IX, § 3.
Anglican colonies. Not until the Great Revival, at the turn of the nineteenth century, was religion a frontier influence. It is not surprising, then, that since 1792, Kentucky's constitution has insisted "[t]hat the civil rights, privileges, and capacities of any citizen shall in no way be diminished or enlarged on account of his religion."  

2. Judicial Interpretation

It was not until the late nineteenth century that Kentucky's high court expressly construed the language warranting that "the civil rights, privileges, or capacities of any citizen shall in no wise be diminished or enlarged on account of his religion." In *Bush* v. *Commonwealth*, decided in 1882, the Court explained:

It is a declaration of absolute equality, which is violated when one class of citizens is held to have the civil capacity to testify in a court of justice because they entertain a certain opinion in regard to religion, while another class is denied to possess that capacity because they do not conform to the prescribed belief.

Holding that this section of the Kentucky Bill of Rights invalidated the common law rule that established the incompetency of an atheist to testify in a judicial proceeding, the Court reasoned further:

[A]n Atheist may testify in any case where property rights are in issue in a civil proceeding, and to deny the Commonwealth or the accused the same testimony when life or liberty is at stake presents an anomaly that is repugnant to every sense of justice.

Like the cases dealing with free exercise of religion under section 1, section 5 consistently has been interpreted to forbid government endorsement of religion in any fashion. Generally, these provisions have been found to limit the government's power to restrain the distribution of religious literature in public. For ex-

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195 See N.H. Sonne, Liberal Kentucky (1939); H. Wish, Society and Thought in Early America 248-50 (1950).
197 *Bush*, 80 Ky. at 244; see also *Lawson v. Commonwealth*, 291 Ky. 437 (1942) (commenting on rarity of establishment cases).
198 *Bush*, 80 Ky. at 249-50.
199 *Id.* at 251.
200 See supra notes 60-71 and accompanying text.
ample, in Seevers v. City of Somerset, the court held that an ordinance prohibiting persons from distributing literature without a permit was unconstitutional. Anne Seevers, an ordained Jehovah's Witness minister, was prosecuted for distributing religious literature in Somerset. Reversing her conviction, the court ruled that the ordinance ran afoul of the guaranties of free religious exercise in both the state and federal constitutions. The court relied upon the United States Supreme Court's decision in Murdock v. Pennsylvania, which held that a person distributing religious literature was engaged in religious, not commercial, activity and, therefore, any ordinance preventing this activity was unconstitutional.

Since the decision in Seevers, the Kentucky court has found that the rights secured by sections 1 and 5 may, on occasion, yield to countervailing concerns for public safety. For example, at issue in Mosier v. Barren County Board of Health was the constitutionality of a school board's resolution to require all schoolchildren to be vaccinated for smallpox, or be excluded from the city schools. In Mosier, parents of two schoolchildren sought to enjoin enforcement of the resolution, contending that there was no reasonable apprehension of a smallpox epidemic and that the compulsory vaccination interfered with their right to exercise their religion freely; their religion prohibited the injection of foreign substances into the veins of the children. The court, in affirming the trial court's refusal to enjoin enforcement of the resolution, held that while there could be no interference with the parents' religious beliefs concerning vaccination, those beliefs could not be permitted to endanger the health of the community by preventing children from being vaccinated against smallpox. The court explained:

[Religious freedom embraces two conceptions, "Freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. . . ." One may have any religious belief desired, but one's conduct remains subject to regulation for the protection of society.

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201 175 S.W.2d 18 (Ky. 1943).
202 See Seevers v. City of Somerset, 175 S.W.2d 18 (Ky. 1943).
203 319 U.S. 105 (1943).
204 See Seevers, 175 S.W.2d at 19 (citing Murdock, 319 U.S. at 116-17).
205 215 S.W.2d 967 (Ky. 1948).
206 See Mosier v. Barren County Board of Health, 215 S.W.2d 967, 967-68 (Ky. 1948).
207 See id. at 969.
208 Id. (quoting United States v. Ballard, 322 U.S. 78 (1944)) (citing Cartwell v. Connecticut, 310 U.S. 296 (1940)).
Recognizing that freedom of religion necessarily must yield, at times, to the concern for public welfare, the court observed that the constitutional guaranty of religious freedom "does not permit the practice of religious rites dangerous or detrimental to the lives, safety or health of the participants or to the public."209

Although the Kentucky courts repeatedly have demonstrated willingness to enforce the freedom of conscience provision, it has steadfastly refused to find that the wearing of religious attire by Roman Catholic nuns, while teaching in the Kentucky public schools, violates the constitutional guaranty of free exercise of religion: "[T]he garb does not teach ... the woman within teaches."210 In Rawlings v. Butler,211 the court found that nuns teaching in public schools, attired in traditional wear, neither attempted to force their religious views on pupils nor taught "religion" in the public schools.212 Rather, the court reasoned that the singular fact that the nuns had taken religious vows to the Catholic faith could not deprive them of their right to teach in public schools, so long as they do not inject religion or the dogma of their church. . . . The dress of the Sisters denotes modesty, unworldliness and an unselfish life. No mere significance or insignificance of garb can conceal a teacher's character. Her daily life would either exalt or make obnoxious the sectarian belief of a teacher.213

The courts of Kentucky also have interpreted section 5 as not prohibiting the allocation of state funds to non-profit hospitals that are open to all faiths without preference. In Kentucky Building Commission v. Effron,214 the Kentucky high court tracked the historical underpinnings of section 5, explaining:

The framers of the Kentucky Constitution, in writing § 5 into our Bill of rights . . . followed closely the Federal Constitution.

209 Id.
210 Rawlings v. Butler, 290 S.W.2d 801, 804 (Ky. 1956).
211 290 S.W.2d 801 (1956). In Rawlings, a class action was instituted on behalf of taxpayers from Casey, Marion, Washington, Nelson, Meade, and Grayson counties, contesting the expenditure of public money to pay the salaries of Roman Catholic nuns that taught in the public schools of these counties while wearing "religious garb and . . . symbols of their religion." See id. at 802.
212 See id. at 804 ("The religious views of these Sisters and their mode of dress are entirely personal to them.").
213 Id.
214 220 S.W.2d 836 (Ky. 1949).
It was their evidence purpose . . . to build "a wall of separation between Church and State" which had been so firmly erected in the Federal Constitution. Manifestly, the drafters of our Constitution did not intend to go so far as to prevent a public benefit, like a hospital in which the followers of all faiths and creeds are admitted, from receiving State aid merely because it was originally founded by a certain denomination whose members now serve on its board of trustees.215

Upholding a Kentucky law that authorized the allocation of public funds to privately owned hospitals, the court stated that such "social legislation" was intended to aid charitable institutions in caring for the afflicted and allow the state to assume the burden of operating hospitals as a public service to its citizens.216 Although these hospitals were charitable organizations sponsored and operated by religious sects, the court reasoned that it was never the intent of the framers of section 5 to prevent the state from aiding an institution that rendered public service "merely because the governing body of the institution is composed of one denomination."217

In sum, the Kentucky courts have utilized both sections 1 and 5 to prevent the government from encroaching on the boundary between church and state. For example, the freedom of conscience provision of section 5 has been used to prevent removal of persons from their professional positions because of their religious beliefs.218 The courts have found that freedom of religion may sometimes prevent the government from enacting otherwise reasonable regulations to advance state interests.

F. Free and Equal Electorate

§ 6. All elections shall be free and equal.219

1. Textual Evolution

The right to participate in free and equal elections has always been considered a fundamental right in Kentucky.220 It is not sur-
prising, therefore, to find that the right of all citizens to exercise an equal vote was guarantied in the first Kentucky Bill of Rights: "That elections shall be free and equal."\(^{221}\) This guaranty was modeled after the provision ensuring free and equal elections in the Pennsylvania Constitution of 1790.\(^{222}\) Except for the stylistic change of dropping the word "That," the provision in the present constitution is the same as it was in 1792.\(^{223}\)

2. Judicial Interpretation

In *Robertson v. Hopkins County*,\(^{224}\) Kentucky's highest court defined the requirement that elections be "free and equal" as meaning that all regulations of the election franchise should be uniform and impartial. In *Robertson*, a state statute provided that the school superintendent be elected by the voters of the county, but voters in first, second, third, and fourth class cities would be ineligible to vote. As a result, voters in the Madisonville school district that resided within the corporate limits of Madisonville had no voice in the selection of the superintendent. Voters that lived in the same school district, but outside of Madisonville's corporate limits, could vote.\(^{225}\)

Determining that the law discriminated between voters, and finding the election regulation unconstitutional, the Kentucky court expressly relied upon the Pennsylvania Supreme Court's decision in *Winston v. Moore*:\(^{226}\)

Section 6 of our Constitution declares that all elections shall be free and equal . . . . [S]uch a declaration means "that the voter shall not be physically restrained in the exercise of his right of franchise, by either civil or military authority, and that every voter shall have the same right as any other voter."\(^{227}\)

(1946). Lilburn Phelps states that this section of the Bill of Rights was accepted by the people of Kentucky without question. Phelps also discusses the constitution of 1891, particularly the events surrounding the constitutional convention of 1890, to which his father was a delegate. See *id.*

\(^{221}\) KY. CONST. of 1792, art. XII, § 5.

\(^{222}\) See *infra* Appendix.

\(^{223}\) Compare KY. CONST. of 1792, art. XII, § 5 with KY. CONST. § 6.

\(^{224}\) 56 S.W.2d 700 (Ky. 1933).

\(^{225}\) See Robertson v. Hopkins County, 56 S.W.2d 700, 701 (Ky. 1933).

\(^{226}\) 91 A. 520 (Pa. 1915).

\(^{227}\) Robertson, 56 S.W.2d at 701 (quoting Winston v. Moore, 91 A. 520, 522 (Pa. 1915)).
The court in *Robertson* further emphasized that all regulations of the election franchise must be "reasonable, uniform and impartial."\(^{228}\)

The Kentucky courts have likewise held that an election during which a substantial number of voters were precluded from casting votes because they did not receive ballots violated the Kentucky Bill of Rights. In *Wallbrecht v. Ingram*,\(^{229}\) the constitutional validity of an election was contested on the ground that three precincts in the county at issue had not been furnished with a sufficient number of ballots to permit all voters an opportunity to vote.\(^{230}\) In *Wallbrecht*, the issue was whether a Bell County election was "free and equal" within the meaning of section 6 of the Kentucky Constitution.\(^{231}\) In ruling that it was not, the court discussed the purpose of this constitutional provision:

Strictly speaking, a free and equal election is an election at which every person entitled to vote may do so if he desires, although, in dealing with the practical aspect of elections, it could hardly be said that, if only a few were prevented from voting, the election would not be free and equal, in the constitutional sense. The very purpose of elections is to obtain a full, fair, and free expression of the popular will upon the matter, whatever it may be, submitted to the people for their approval or rejection; and when any substantial number of legal voters are, from any cause, denied the right to vote, the election is not free and equal, in the meaning of the Constitution.\(^{232}\)

The court chose to interpret the guaranty of a free and equal election to all Kentuckians liberally, declaring that section 6 "admits of no evasions or exceptions" and explaining that not even good intentions "can be allowed to defeat its purpose or its meaning."\(^ {233}\) Even absent a finding of fraud or wrongdoing,\(^{234}\) the court held that section 6 of the Kentucky Bill of Rights was "mandatory," applying to all elections. Therefore, the provision was violated when any substantial number of persons are denied their right to vote.\(^ {235}\)

\(^{228}\) *Id.* (quoting 2 T. Cooley, *Constitutional Limitation* 1310 (8th ed. 1927)); *see also* Crockett v. Olive, 56 S.W.2d 702 (Ky. 1933) (companion case).

\(^{229}\) 175 S.W. 1022 (Ky. 1915).

\(^{230}\) See *Wallbrecht v. Ingram*, 175 S.W. 1022, 1026 (Ky. 1915).

\(^{231}\) *See id.* at 1026.

\(^{232}\) *Id.*

\(^{233}\) *Id.* at 1027.

\(^{234}\) *See id.*

\(^{235}\) *See id.* at 1026-27.
The right to "free and equal" elections applies to all general, but not primary, elections.\textsuperscript{236} Also, Kentucky courts have held that neither voting machines nor absentee voting interfere with this constitutional guaranty.\textsuperscript{237} In \textit{Grauman v. Jefferson County Fiscal Court},\textsuperscript{238} voters of Jefferson County contested the constitutional validity of the Kentucky Voting Machines Act, urging that where machines were not used in all precincts of the county, the election was not free and equal.\textsuperscript{239} Upholding the constitutional validity of the act, the Kentucky high court found that a vote cast by machine "has the same force as one cast by hand," and provided neither advantage nor disadvantage to particular voters.\textsuperscript{240} Recognizing that "there is no more opportunity for fraud," simply because one has cast a vote by machine,\textsuperscript{241} the court reasoned that section 6 is violated only "when the same opportunity for voting is not given to all persons entitled to the ballot, or when the right of franchise is restrained by civil or military authority."\textsuperscript{242}

One year after its decision in \textit{Grauman}, the court decided \textit{Commonwealth ex rel. Dummit v. O'Connell},\textsuperscript{243} which upheld the validity of a Kentucky law authorizing absentee voting in presidential and congressional elections by qualified voters. The purpose of the law was to provide the men and women of Kentucky that were serving in the armed forces during World War II a means of voting in those elections.\textsuperscript{244} Several voters challenged the law, claiming that it violated section 5 of the Kentucky Bill of Rights because it provided no method of registering absentee ballots on voting machines, which had been installed in some precincts, and thus required those ballots to be deposited in regular ballot boxes.\textsuperscript{245} Without much discussion, the court found "nothing in the state constitution [that] prohibited the use of a 'regular ballot box' for the deposit of 'absentee ballots' in precincts where voting machines were employed."\textsuperscript{246} In support of its finding, the court reasoned

\textsuperscript{236} See Davis v. Stahl, 154 S.W.2d 736, 737 (Ky. 1941); see also Hodge v. Bryan, 148 S.W. 21 (Ky. 1912).
\textsuperscript{237} See Grauman v. Jefferson County Fiscal Court, 171 S.W.2d 36 (Ky. 1943).
\textsuperscript{238} 171 S.W.2d 36 (Ky. 1943).
\textsuperscript{239} See id. at 36-37.
\textsuperscript{240} See id. at 37.
\textsuperscript{241} See id.
\textsuperscript{242} Id.
\textsuperscript{243} 181 S.W.2d 691 (Ky. 1944).
\textsuperscript{244} See Commonwealth ex rel. Dummit v. O'Connell, 181 S.W.2d 691, 692 (Ky. 1944).
\textsuperscript{245} See id.
\textsuperscript{246} Id. at 696.
simply: "[A] broad interpretation of the Act would require that the county official charged with the duty of furnishing ballot boxes in the other precincts should likewise furnish ballot boxes for the deposit of absentee ballots in precincts where voting machines are installed."^{247}

More recently, in *Commonwealth v. Foley*,^{248} the Kentucky Supreme Court held a law prohibiting bribery and related acts in connection with elections violative of section 6. The court determined that it would not be unreasonable to interpret the law to prohibit the use of money to influence voters, an interpretation that would be "repugnant to the concept of free elections."^{249} Elaborating on the meaning of the right secured by section 6 of the Kentucky Bill of Rights, the court stated:

> Among the most fundamental of constitutional rights is the right of citizens to involve themselves in the election process. Throughout Kentucky, thousands of citizens undertake support of candidates and parties and devote their time and money to the causes they support. Criminal statutes written in broad general terms and capable of arbitrary and selective enforcement threaten to undermine the willingness of such persons to get involved. No person in his right mind would risk inadvertent violation or arbitrary enforcement and trust only in a reasonable application of the statute.^250

The court further cautioned that such a law would likely result in the disenfranchisement of many citizens, resulting in "an infringement of their rights under Section 6 of the Constitution of Kentucky."^{251}

### G. Right to Trial by Jury

§ 7. The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution.^{252}

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^{247} *Id.*

^{248} 798 S.W.2d 947 (Ky. 1990).

^{249} *Commonwealth v. Foley*, 798 S.W.2d 947, 950 (Ky. 1990).

^{250} *Id.* at 953.

^{251} *Id.*

^{252} KY. CONST. § 7.
1. Textual Evolution

Kentuckians long have attached great significance to the right to trial by jury. A provision guarantying that right can be found in article XII, section 6 of the 1792 Kentucky Constitution, which is identical to article IX, section 6 of Pennsylvania’s 1790 Constitution. The original provision stated: “That trial by jury shall be as heretofore, and the right thereof remain inviolate.” The guaranty remained virtually unchanged until 1850, when it was qualified with the phrase “subject to such modifications” as authorized by the state constitution. This qualification seemed to limit the right to its pre-1850 definition, blocking any judicial broadening or constricting of the liberty.

2. Judicial Interpretation

The Kentucky courts have protected the right to trial by jury carefully. In construing section 7, the court in Johnson v. Holbrook held that the “ancient mode” of jury trial refers to the right of trial by jury as it existed under the practice of the territory prior to the adoption of its first constitution. In support of this construction of section 7, the court expressly stated: “A defendant is entitled to a jury trial only upon those common-law matters as to which a jury trial existed in 1791.”

Safeguarding the traditional trial by jury right, the court in Branham v. Commonwealth, refused to permit a defendant to agree to a trial by only seven jurors. Two years later in Jackson v. Commonwealth, the court reversed a felony conviction by eleven jurors, stating: “[T]his court . . . has committed itself to the doctrine . . . that [a] defendant cannot waive his constitutional right of trial by the ancient mode of trial by jury under felony charges.” Indeed, the Kentucky courts have found, especially in felony cases, that waiver of the right to jury trial is impermissible.

253 See infra Appendix.
254 Ky. Const. of 1792, art. XII, § 6.
256 302 S.W.2d 608 (Ky. 1957).
257 See Johnson v. Holbrook, 302 S.W.2d 608 (Ky. 1957).
258 Id.
259 273 S.W. 489 (Ky. 1925).
260 299 S.W. 983 (Ky. 1927) (later overruled by Short v. Commonwealth, 519 S.W.2d 828, 833 (Ky. 1975)).
261 Jackson v. Commonwealth, 299 S.W. 983, 984 (Ky. 1927).
In a number of cases interpreting section 7 of the Kentucky Constitution, the court originally prohibited a waiver by the defendant of his right to a jury in a felony trial. The court expressly stated, in *Allison v. Gray*, that "[t]he protection of the right" to trial by jury is so secure "that one accused of a felony may not waive it." In *Meyer v. Commonwealth*, the court refused to allow a defendant that plead not guilty to a charge of "wilful murder" to waive his right to a jury trial. However, the Kentucky courts have treated misdemeanors differently, finding that although a defendant in a misdemeanor trial "is entitled to 12 jurors," he or she "may agree to a lesser number or waive any number or all of the jurors." As shown above, initially Kentucky courts were strong defenders of the right to trial by jury. This stance was softened considerably in *Short v. Commonwealth*. In *Short*, the court held that a defendant may waive a jury trial, declaring that "current constitutional safeguards are so comprehensive that there remains no further necessity for the rule that an accused may not waive a jury trial." The court overturned the line of precedent established by *Branham, Jackson, Allison and Meyer*, adding: "[T]here is nothing in the Kentucky Constitution which denies an accused the right to waive a jury trial."

Furthermore, the Kentucky high court has rejected a literal interpretation of the right to trial by jury, determining that neither the qualifications of jurors nor the manner of their selection is controlled by section 7. In *Wendling v. Commonwealth*, the court explained that section 7 "does not attempt to regulate the manner in which jurors shall be selected or the qualifications they must possess, nor does it describe or designate the character or class of persons who must compose a jury."

Overall, the Kentucky courts have been consistent in their interpretation of the jury provision in the state constitution. Al-

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262 296 S.W.2d 735 (Ky. 1956) (later overruled by *Short*, 519 S.W.2d 828).
263 *Allison v. Gray*, 296 S.W.2d 735, 737 (Ky. 1956) (citations omitted).
264 472 S.W.2d 479 (Ky. 1971) (later overruled by *Short*, 519 S.W.2d 828).
265 *See Meyer v. Commonwealth*, 472 S.W.2d 479, 482 (Ky. 1971).
266 *Phipps v. Commonwealth*, 266 S.W. 651 (Ky. 1924).
267 519 S.W.2d 828 (Ky. 1975).
268 *Id.* at 832.
269 *Id.*
270 137 S.W. 205 (Ky. 1911).
271 *Wendling v. Commonwealth*, 137 S.W. 205, 207 (Ky. 1911).
though finding that a jury trial is not always necessary, the courts have been careful to protect the right when it is constitutionally required.

H. Liberty of Speech and Freedom of the Press

§ 8. Printing presses shall be free to every person who undertakes to examine the proceedings of the General Assembly or any branch of government, and no law shall ever be made to restrain the right thereof. Every person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty.272

1. Textual Evolution

One of the most closely guarded rights in Kentucky's early constitutional history was the freedom of expression. Because Kentuckians in the 1700s typically expressed their opinions through letters and newspapers, a narrow provision guarantying freedom of the press might have sufficed. However, the drafters of the state constitution included a broader clause that distinctly protected a more comprehensive right of expression. At the same time, the original clause contained a limitation common to many early state constitutions: citizens were "responsible for the abuse of that liberty."273 The original version of the freedom of speech and press provision read:

That the printing press shall be free to every person who undertakes to examine the proceedings of the legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communications of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.

The "freedom of thought and opinion" language was deleted from the provision in 1891, and "citizen" was changed to "person."274 Interestingly, the clause has specified, since 1792, that "no

272 Ky. Const. § 8.
273 Ky. Const. of 1792, art. XII, § 7.
274 See Ky. Const. § 8.
The inclusion of this language apparently made it easier for the courts to exercise judicial review of legislation challenged under this section.

2. Judicial Interpretation

Like the rights of free speech and press protected by the first amendment, which have been said to enjoy a special position in the hierarchy of rights, section 8 of the Kentucky Bill of Rights has been treated preferentially. Kentucky courts have broadly interpreted the free speech and press provision of the Kentucky Constitution, at least when the courts have found that these freedoms are not being abused. In *Riley v. Lee*, one of the first opinions interpreting this clause, the court found that freedom of expression is abused if a person maliciously publishes a falsehood about another:

> [I]t is the publication that is the gravamen of the action. . . . The citizen may, in what he honestly believes to be in the interest of morals and good order, and the suppression of immorality and disorder, criticize the acts of other individuals. So may the press. But in no case has the citizen the right to injure the rights of others, among the most sacred of which is the right to good name and fame. Their rights are absolute as his, and neither can injure the rights of the other.

Expansively interpreting the abuse proviso in the free speech provision, the court held false speech outside of the constitution’s protection. Further, the constitution was construed as not protecting a defendant that maliciously published an article to damage the plaintiff’s reputation.

In *Musselman v. Commonwealth*, a Kentucky statute prohibiting “an offensively coarse utterance” was held unconstitutional.

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276 The first amendment provides: “Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .” U.S. Const. amend. I.
278 11 S.W. 713 (Ky. 1889).
280 See id. at 715.
281 705 S.W.2d 476 (Ky. 1986).
282 KRS, supra note 24, at § 525.070(1)(b).
under section 8 of the Kentucky Constitution. In *Musselman*, a police officer stopped a vehicle, which had been speeding, driven by William Musselman. After being stopped, Musselman directed a diatribe of profanities toward the officer. The officer arrested Musselman for harassment by vulgar language, an offense under Kentucky law, which provided in pertinent part: "A person is guilty of harassment when with the intent to harass, annoy or alarm another person he ... [i]n a public place, makes an offensively coarse utterance, gesture or display, or addresses abusive language to any person present."\(^{283}\) Musselman was convicted of the offense in the trial court and appealed, contending that the statute was impermissibly broad and imposed an undue restriction on the constitutional guaranty of free speech. The court of appeals disagreed and affirmed the conviction, reasoning that the statute could be construed as "limited in its application to situations where the 'offensively coarse utterance' or abusive language amounts to 'fighting words' which have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."\(^{284}\) The Kentucky Supreme Court reversed, finding the statute unconstitutionally vague and overbroad.\(^{285}\) Characterizing the abusive nature of the comments uttered by Musselman as "deplorable,"\(^{286}\) and carefully noting that nothing in the opinion "should be construed as approving Musselman's abusive utterances,"\(^{287}\) the court criticized the legislature for not expressly aiming the language of the statute toward prohibiting only "fighting words or words which have a direct tendency to cause acts of violence."\(^{288}\)

In *Commonwealth v. Ashcraft*,\(^{289}\) the court of appeals struck down a statute that prohibited any person from upbraiding, insulting, or abusing any teacher of the public schools in the presence of a pupil. Ed Ashcraft, who was charged with violating this statute, urged that the complaint against him be dismissed, contending that the statute violated the state constitution. The court agreed with Ashcraft, ruling that the statute was unconstitutionally

\(^{283}\) *Musselman v. Commonwealth*, 705 S.W.2d 476, 477 (Ky. 1986) (quoting § 525.070(1)(b)).  
\(^{284}\) *Id.* at 477.  
\(^{285}\) *See id.* at 478.  
\(^{286}\) *Id.* at 477.  
\(^{287}\) *Id.* at 478.  
\(^{288}\) *Id.*  
vague and overbroad in violation of the freedom of expression guarantied in section 8 of the Kentucky Constitution.\textsuperscript{290} The court determined that Ashcraft's comments were protected speech, however "annoying and insulting" they were to the school teacher.\textsuperscript{291} The court also found that the statutory terms "upbraid, insult, and abuse" did not sufficiently inform a person of what actions were prohibited and, therefore, were vague and overbroad. The court observed: "[O]ne man's gross indignity might be another's cup of tea."\textsuperscript{292}

The Kentucky courts have delineated some limitations, but generally have interpreted the free speech and press provision of the Kentucky Constitution broadly. This trend may become increasingly important. The United States Supreme Court, as well as other federal courts, have been limiting the scope of protection offered by the first amendment.\textsuperscript{293} If speech is to be as fully protected in the future as in the past, the state constitution may have to play an increased role.

\section{Libel}

§ 9. In prosecution for the publication of papers investigating the official conduct of officers or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libel the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.\textsuperscript{294}

1. \textit{Textual Evolution}

This section was included in the original Kentucky Bill of Rights as article XII, section 8.\textsuperscript{295} Although this section was drafted identically to the provision incorporated in article IX, section 7 of the

\textsuperscript{291} See id. at 231-32.
\textsuperscript{292} Id. at 231.
\textsuperscript{293} See, e.g., California v. Mitchell Bros.' Santa Ana Theatre, 454 U.S. 90 (1981) (holding that city not required to prove "beyond a reasonable doubt" the obscenity of motion pictures); Young v. American Mini Theatres, 427 U.S. 50 (1975) (holding zoning ordinance prohibiting adult theaters from being near other adult theaters or residential areas not a violation of the first amendment).
\textsuperscript{294} KY. CONST. § 9.
\textsuperscript{295} See KY. CONST. of 1792, art. XII, § 8.
1790 Pennsylvania Bill of Rights,\textsuperscript{296} it has its roots in the English "Fox's Libel Act," which provided a safeguard in seditious libel prosecutions by turning the issue of guilt over to the jury, who could bring in a general verdict of guilty or not guilty. As a result of the Act, no judge could direct the jury to find a person guilty of seditious libel merely on proof of the publications.\textsuperscript{297} Similarly, section 9 was intended to prevent restraints on publications, reflecting the strong Kentucky commitment to free speech and expression. With a minor grammatical exception, this provision has remained intact during Kentucky's constitutional history.\textsuperscript{298}

2. Judicial Interpretation

In \textit{Walston v. Commonwealth},\textsuperscript{299} the Kentucky high court refused to construe the language of this section providing that "the jury shall have the right to determine the law and the facts, under the direction of the court," to prevent the court "from instructing the jury as to the law of the case or even directing their verdict."\textsuperscript{300} The court reasoned:

In prosecutions for libel, as in all other cases, it is the duty of the court to instruct the jury as to the law of the case, and it is the duty of the jury to accept the instructions of the court as the law of the case; but, if they disregard them and acquit the defendant on an issue of fact, the court could not for that reason grant a new trial.\textsuperscript{301}

J. Unreasonable Search and Seizure

\$10. The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.\textsuperscript{302}

\textsuperscript{296} See infra Appendix.
\textsuperscript{297} See Z. CHAFFEE, FREE SPEECH IN THE UNITED STATES 23, 35 (1941); J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 340-49 (1882).
\textsuperscript{298} Compare Ky. Const. of 1792, art. XII, \$ 8 and Ky. Const. of 1799, art. X, \$ 8 and Ky. Const. of 1850, art. XIII, \$ 10 with Ky. Const. \$ 9.
\textsuperscript{299} 106 S.W. 224 (Ky. 1907).
\textsuperscript{300} Id.
\textsuperscript{301} Id.
\textsuperscript{302} Ky. Const. \$ 10.
1. Textual Evolution

This guaranty against unreasonable search and seizure may be traced to article XII, section 9 of Kentucky's Constitution of 1792, and article IX, section 8 of Pennsylvania's Constitution of 1790. The original section provided:

That the people shall be secure in their persons, houses, papers, and possessions, from unreasonable searches and seizures; and that no warrant to search any place and to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.\textsuperscript{303}

Other than minor grammatical changes, this provision remains unchanged in Kentucky's present constitution.

2. Judicial Interpretation

The right to privacy is the underpinning of both the warrant and reasonableness clauses of the fourth amendment to the United States Constitution,\textsuperscript{304} and necessarily section 10. \textit{Commonwealth v. Johnson}\textsuperscript{305} is exemplary. In \textit{Johnson}, Charles David Johnson had been convicted of illegal drug possession, and possession of a handgun by a convicted felon. At trial, the state introduced drugs, drug paraphernalia, and a handgun that had been uncovered by police officers. These items were discovered by the officers while questioning Johnson outside his motel room. The officers shone a flashlight through a door left ajar and observed the drug paraphernalia and a white powder substance. Based upon this observation, the officers then shined the flashlight beam through a window and saw a handgun underneath the bed. The officers arrested Johnson, and after obtaining a search warrant, retrieved the drug paraphernalia, cocaine, and handgun.

The trial court denied Johnson's motion to suppress the evidence, deciding that the search was made incident to a lawful

\begin{footnotes}
\item[303] Ky. Const. of 1792, art. XII, § 9.
\item[304] The fourth amendment provides:
\begin{quote}
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
\end{quote}
\item[305] 777 S.W.2d 876 (Ky. 1989).
\end{footnotes}
arrest. The appeals court reversed, holding that the act of shining a flashlight beam into the hotel room amounted to a warrantless search in violation of Johnson's privacy rights, as announced in section 10 of the Kentucky Bill of Rights. Affirming the judgment of the court of appeals, the Kentucky Supreme Court dismissed the state's contention that the police had acted to safeguard their personal safety, finding "mere apprehension for personal safety and the opportunity such provides for pretext," insufficient to create an exception to the warrant requirement. The court remained unpersuaded that the police officers were authorized to observe continuously until the suspect was placed under the anticipated arrest. The court reasoned: "[I]f such an intrusion were permitted upon the basis of generalized police safety considerations, the police would be authorized to engage in forced, warrantless searches in a multitude of otherwise prohibited circumstances." Although recognizing the legitimacy of the officers' concern for their personal safety, the court expressly refused to carve out an exception to section 10: "This court and other courts have willingly found exceptions to various constitutional provisions to better insure the safety of police officers. We are not willing, however, to recognize exceptions so broad as to render meaningless the right secured by the Constitution of Kentucky."

Indeed, the courts of Kentucky have strictly enforced the guaranty against unreasonable search and seizure. As a result, convictions for crimes have frequently been reversed. In Lane v. Commonwealth, Cecil Lane was arrested for a traffic offense. Subsequent to the arrest, law enforcement officers searched his vehicle, finding seven cases of whiskey in the rear luggage compartment. Lane was tried and convicted of violating a local-option law in a dry territory. The appeals court reversed the conviction, finding that the contraband liquor was obtained as a result of an unreasonable search. The court held that any such articles, discovered as fruit of the warrantless search, were inadmissible.

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307 Id.
308 Id.
309 Id. (citations omitted).
310 386 S.W.2d 743 (Ky. 1964).
311 See Lane v. Commonwealth, 386 S.W.2d 743, 744-45 (Ky. 1964).
312 See id. at 746-47.
313 See id. at 745-46.
A valid warrant is based on probable cause, which is effectively established when sufficient facts are set forth in the affidavit upon which the warrant is issued. In *Shelton v. Commonwealth*, the warrant and supporting affidavit failed to state facts establishing probable cause. The appeals court reversed a conviction for drug possession because the affidavit and warrant authorizing the search of a briefcase did not state that the briefcase contained cocaine.

Kentucky courts, in accordance with section 10, have held that Kentucky's proscription against unreasonable search and seizure requires that the place to be searched must be described "as nearly as may be." In *Commonwealth v. Appleby*, the court explained: "Our constitution requires a description of such certainty as to reasonably identify the premises to be searched, and to enable the magistrate issuing the warrant to determine that the property to be searched is within his jurisdiction."

Demonstrating the protective thrust of section 10, the Kentucky Court of Appeals reversed a conviction for possession of a controlled substance in *Johantgen v. Commonwealth*. A warrant had been issued for the search of Daryl Driver, his residence, and "any other person believed to be involved in the illegal use of, possession of, or trafficking in controlled substances." The police arrived at the premises shortly before Driver, and searched Johantgen. The police officers found in Johantgen's front pants pocket a packet of heroin. Johantgen was subsequently convicted of possession of a controlled substance. Reversing Johantgen's conviction on appeal, the court emphasized that the state constitution required specificity in describing the person and property to be searched. Since the supporting affidavit had referred only to Driver, the court found the warrant defective because neither the warrant nor the affidavit contained a "recitation of facts indicating that any other person other than Driver occupied the premises, was present on the premises when probable cause arose, nor was there any

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314 W. LAFAVE & P. ISRAEL, CRIMINAL PROCEDURE § 3.3 (1985).
315 766 S.W.2d 628 (Ky. 1989).
316 See Shelton v. Commonwealth, 766 S.W.2d 628, 629 (Ky. 1989).
317 Commonwealth v. Appleby, 586 S.W.2d 266 (Ky. 1978); see KY. CONST. § 10.
318 586 S.W. 2d 266 (Ky. 1978).
319 Id. at 269 (citations omitted).
320 571 S.W.2d 110 (Ky. Ct. App. 1978).
322 See id. at 112.
description of persons whose identity was known or unknown to the affiant.\textsuperscript{323}

The Kentucky Supreme Court reached a similar conclusion in \textit{Rooker v. Commonwealth}.\textsuperscript{324} There, a circuit judge issued a search warrant based on an affidavit presented by a county sheriff. At the hearing on a motion to suppress the evidence obtained under the warrant, the issuing judge admitted that he had not read the affidavit before issuing the warrant. Consequently, the court held that the search was in violation of both the Kentucky and United States Constitutions, stating:

\begin{quote}
Part of the protection of the Fourth Amendment consists of requiring that inferences in determining probable cause be drawn by a neutral and detached issuing authority instead of the police or government agents. Where a judge issues a search warrant based upon an affidavit which he does not read, he makes no determination of probable cause but merely serves as a rubber stamp for the police. Such action is improper even though the affidavit actually shows probable cause.\textsuperscript{325}
\end{quote}

In other cases, however, Kentucky courts have retreated from a hard-line position, stating that the Kentucky Constitution "only prohibits unreasonable searches. . . ."\textsuperscript{326} In \textit{DeBerry v. Commonwealth},\textsuperscript{327} the court held that a person may be detained during an investigatory stop while police officers obtain information about the person and his vehicle by checking the serial numbers on his tires against a record of the serial numbers of reported stolen tires.\textsuperscript{328}

In \textit{Scillion v. Commonwealth},\textsuperscript{329} the court upheld the warrantless search of an automobile. In that case, a police officer stopped an automobile driven by Mike Cornwell and arrested him for driving without a license. The passenger, Scillion, was also arrested for permitting an unlicensed driver to operate his car. The auto-

\textsuperscript{321} Id.
\textsuperscript{324} 508 S.W.2d 570 (Ky. 1974).
\textsuperscript{322} Rooker v. Commonwealth, 508 S.W.2d 570, 571 (Ky. 1974) (citations omitted). Not only was the warrant in Rooker issued in violation of both the state and federal constitutions, but it also appeared to have violated Ky. R. CRIM. P. 2.04.
\textsuperscript{325} DeBerry v. Commonwealth, 500 S.W.2d 64, 65 (Ky. 1973), cert. denied, 415 U.S. 918 (1974) (citing Terry v. Ohio, 329 U.S. 1 (1968)).
\textsuperscript{326} 500 S.W.2d 64 (Ky. 1973), cert. denied, 415 U.S. 918 (1974).
\textsuperscript{327} See DeBerry v. Commonwealth, 500 S.W.2d 64, 65 (Ky. 1973), cert. denied, 415 U.S. 918 (1974).
\textsuperscript{328} 508 S.W.2d 307 (Ky. 1974).
\textsuperscript{329} 508 S.W.2d 307 (Ky. 1974).
mobile had been registered in the name of Scillion's wife. After both men stepped out of the auto and were searched by the officer, the officer noticed a leather glove protruding from under the seat of the car. He then searched the car, discovering incriminating evidence related to a burglary. Although the appeals court upheld the search as reasonable, the justification for the warrantless search was less than clear. Without much discussion, the court stated that if an officer has probable cause to arrest the occupants of an automobile, "he may place him or them under arrest and may forthwith proceed to search the automobile incident to the arrest." Thus, not all interpretations of section 10 have worked to the favor of the accused.

Kentucky courts have also held that items in plain view can be seized by officers that are rightfully at a location. In Jones v. Commonwealth, the court stated that "it is proper to seize stolen or contraband property" in plain view, even though the items "are not described in the warrant." Additionally, in Cloar v. Commonwealth, the court upheld the seizure of a stolen motorcycle cover to support the defendant's conviction for receiving stolen goods, and wanton endangerment. The court reasoned that a seizure is lawful if a police officer is "lawfully engaged" in an activity in a particular place and inadvertently observes an object, in plain view, "that he had probable cause to associate with criminal activity." The court expressly found that "such a seizure is not infirm" under the Kentucky Constitution.

K. Rights of the Accused

§ 11. In all criminal prosecutions the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his

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331 Id. at 308 (quoting Commonwealth v. Hagan, 464 S.W.2d 261, 264 (Ky. 1971)).
332 416 S.W.2d 342 (Ky. 1967).
333 Jones v. Commonwealth, 416 S.W.2d 342, 343 (Ky. 1967).
336 Id. at 830.
337 Id. See also Basham v. Commonwealth, 675 S.W.2d 376, 384 (Ky. 1984), cert. denied, 470 U.S. 1050 (1984) (holding that the "mere act of examining property in plain view while on a lawful search and copying down serial numbers does not constitute an unreasonable seizure").
favor. He cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land; and in prosecutions by indictment or information, he shall have a speedy public trial by an impartial jury of the vicinage; but the General Assembly may provide by a general law for a change of venue in such prosecutions for both the defendant and the Commonwealth, the change to be made to the most convenient county in which a fair trial can be obtained.338

1. Textual Evolution

Section 11 announces the substantive and procedural guaranties afforded to persons accused of crimes and applies exclusively to criminal cases and public prosecutions.339 Similar to provisions of Pennsylvania340 and other state constitutions, section 11 of the Kentucky Bill of Rights sets forth a broad range of rights protecting criminal suspects, including the right to legal representation, the right to confrontation with the concomitant right to cross-examine witnesses, the privilege against self-incrimination, the right to a speedy and public trial, and the right to be tried before an impartial jury in the county where the crime was committed.

2. Judicial Interpretation

a. Representation

Since 1821, Kentucky courts have recognized that the accused has “the right to be heard by himself and counsel.”341 This right of representation has been the topic of several opinions by Kentucky courts. Among other things, these opinions teach that the right to self-representation is not absolute, but that a criminal

338 Ky. Const. § 11.
340 See infra Appendix.
341 See Olds v. Commonwealth, 10 Ky. (3 A.K. Marsh.) 465, 467 (1821). William Olds’ billiard table was listed for taxation. When Olds failed to turn over the table to the state, it sought to fine and trebly tax Olds, as well as to prosecute him for failing to enter the table for taxation. When Olds’ motion to dismiss the prosecution was rejected, he moved for a continuance on the ground that he sold the billiard table to Hawkins and, therefore, it should be listed for taxation as Hawkins’ property. Because Olds and his counsel were not permitted to argue the issue, the case was reversed. See Olds v. Commonwealth, 10 Ky. (3 A.K. Marsh.) 465, 465-68 (1821).
defendant has the right "to proceed to trial without counsel being in any way associated with him."\(^{342}\)

Once counsel has been appointed, an accused is not entitled to represent himself. An accused is entitled to have counsel present, "especially when [a] verdict is received" at trial, because the accused in an criminal case is typically "inexperienced."\(^{343}\) In *Wilcher v. Commonwealth*,\(^{344}\) the appeals court reversed a rape conviction, holding:

\[\text{This court has consistently ruled that the provision of our Bill of Rights to the effect that in all criminal prosecutions the accused has the right to be heard by himself and counsel means that the accused has the right to have his counsel present at each stage of the trial.}^{345}\]

Once adversary proceedings have begun, an accused is entitled to assistance of counsel, but only during "critical" stages.\(^{346}\) Kentucky courts have held that neither arraignment\(^{347}\) nor pronouncement of sentence\(^{348}\) are critical stages triggering the protections of section 11. The court has reasoned that counsel is only required to be present "where substantial rights of a criminally accused may be affected."\(^{349}\)

In *Cane v. Commonwealth*,\(^{350}\) the court determined that the presence of counsel is not required at preindictment identification procedures. Henry Thomas Cane, along with two accomplices, robbed a lady's clothing store while attired in women's clothing. A store clerk, who had been held at knifepoint by Cane during the robbery, identified his photograph from a book of mug shots on the morning of Cane's trial.\(^{351}\) Cane contended that he was denied his right to representation because his attorney was not

\[^{342}\text{Wake v. Barker, 514 S.W.2d 692, 695 (Ky. 1974). Eight months after the Kentucky Supreme Court's decision in Wake, the Supreme Court decided Faretta v. California, 422 U.S. 806, 835 (1975), holding that a state may not deny a defendant the right to conduct his own defense if his waiver was "knowing and intelligent."}^{343}\]

\[^{343}\text{Wilcher v. Commonwealth, 178 S.W.2d 949 (Ky. 1944).}^{344}\]

\[^{344}\text{178 S.W.2d 949, 949 (Ky. 1944).}^{345}\]

\[^{345}\text{Id. at 950-51.}^{346}\]

\[^{346}\text{See Collins v. Commonwealth, 433 S.W.2d 663, 665 (Ky. 1968).}^{347}\]

\[^{347}\text{See id.}^{348}\]

\[^{348}\text{See McIntosh v. Commonwealth, 368 S.W.2d 331, 335 (Ky. 1963).}^{349}\]

\[^{349}\text{Collins, 433 S.W.2d at 665.}^{350}\]

\[^{350}\text{556 S.W.2d 902 (Ky. 1977), cert. denied, 437 U.S. 906 (1978).}^{351}\]

\[^{351}\text{See Cane v. Commonwealth, 556 S.W.2d 902, 905-06 (Ky. 1977), cert. denied, 437 U.S. 906 (1978).}\]
present when the book was shown to the witness. The court felt that the defendant's constitutional right to representation did not include the right to have counsel present when witnesses are interviewed by the state's attorneys, even if such interviews occur on the day of trial and include an examination of photographs for identification purposes. Concluding that the right to representation guaranteed by section 11 of the Kentucky Bill of Rights "is no greater than the right of counsel guaranteed by the Sixth Amendment of the United States Constitution," the court stated that the right to cross-examine the witness was sufficient protection for the criminal defendant.

b. Confrontation and Cross-examination

Like its sixth amendment counterpart, the right to confrontation in Kentucky assures the opportunity to cross-examine opposing witnesses. In Hughes v. Commonwealth, the Kentucky Supreme Court reversed a conviction for first degree robbery because the trial court had admitted the hearsay testimony of a police officer, implicating the defendant in the robbery. The court stated that the defendant was convicted by a statement of an unknown person,

[W]ithout any showing of the reliability of the statement and without any opportunity of the [accused] to cross-examine the person who allegedly implicated him in the crime. This is precisely the situation which the confrontation clause of the Sixth Amendment to the United States Constitution and Section 11 of the Kentucky Constitution were designed to prevent.

Recently interpreting the right to confrontation liberally, the court, in Dean v. Commonwealth, held that the right of the

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352 See id. at 906.
353 Id.; see Ashcraft v. Commonwealth, 487 S.W.2d 892 (Ky. 1972) (applying the holding of the United States Supreme Court in Kirby v. Illinois, 406 U.S. 682 (1972), to find that the presence of counsel is not required at a pre-indictment lineup).
354 See Cane, 556 S.W.2d at 906.
355 The sixth amendment states, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI.
356 730 S.W.2d 934 (Ky. 1987).
357 See Hughes v. Commonwealth, 730 S.W.2d 934, 934 (Ky. 1987).
358 Id. at 934-35.
359 777 S.W.2d 900 (Ky. 1989).
c. Privilege against Self-incrimination

As early as 1839, Kentucky had recognized the well established idea "that no one is bound to make answer to, or discovery of, any matter which may subject him to a penalty or forfeiture, or expose him to infamous punishment." Indeed, it has long been a maxim of Kentucky law that no person shall be compelled to

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360 See Dean v. Commonwealth, 777 S.W.2d 900 (Ky. 1989).
361 See id. at 901.
362 See id.
363 See id.
364 See id. at 903.
365 Id.
366 Id.
367 Id.
368 Atterberry v. Knox & McKee, 38 Ky. (8 Dana) 282, 284 (1839).
incriminate himself. In *Kindt v. Murphy*, the court explained that the privilege against self-incrimination

was founded upon no statute but upon general acquiescence of the courts in a popular demand; and the maxim, which was a mere rule of evidence in England, has assumed the form of constitutional or statutory enactments in this country which have long been regarded as safeguards of civil liberty and as sacred and important as the privilege of the writ of habeas corpus or any of the other fundamental guaranties for the protection of personal rights.

Although the privilege against self-incrimination guarantied by section 11 applies both to criminal and civil proceedings, it has been held to protect only against "compulsory" self-incrimination, not against "voluntary" self-incrimination. In *Turner v. Commonwealth*, the court rejected the argument that receipt of an out-of-court admission made by the accused violated his constitutional privilege against self-incrimination. The defendant, who was accused of murder, testified that he had shot the victim, allegedly approaching with an axe, in self-defense. During cross-examination, the prosecutor introduced evidence of an admission made by the defendant that belied the defendant's contention of self-defense. Without discussion, the court stated that although the constitutional privilege meant that an accused could not be compelled to give testimony against himself, it did "not cover the case where the accused voluntarily makes admissions in or out of court."

A more significant aspect of the self-incrimination provision relates to a defendant's choice not to testify. Because defendants in criminal cases are protected from compelled self-incrimination by section 11, as well as by the fifth amendment of the United

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369 227 S.W.2d 895 (Ky. 1950).
370 Kindt v. Murphy, 227 S.W.2d 895, 898 (Ky. 1950).
371 See Akers v. Fuller, 228 S.W.2d 29, 31 (Ky. 1950). But see Cooper v. Keyes, 54 S.W.2d 933, 936 (Ky. 1932) (noting that provision applies only to evidence that may subject witness to criminal prosecution, not to evidence that may be used against witness in a civil action).
372 See Gentry v. Commonwealth, 286 S.W. 1040 (Ky. 1926).
373 13 S.W.2d 533 (Ky. 1929).
374 See Turner v. Commonwealth, 13 S.W.2d 533, 535 (Ky. 1929).
375 See id. at 533-34.
376 See id. at 534.
377 Id. at 535.
States Constitution, the prosecutor is prohibited from commenting at trial on a defendant’s failure to testify.

*d. Speedy Trial*

As early as 1903, Kentucky had recognized that the guaranties declared in this section of the Kentucky Constitution “are for the protection of the citizen, and no rule of practice, however ancient or sacred, should deprive him of them.” In *Jones v. Commonwealth*, Hiram Jones was indicted for the murder of a train conductor. He was accused of placing obstructions on a railroad track, derailing an engine operated by the victim. When Jones appeared for trial, the commonwealth’s attorney announced that the state was not ready to try the case and moved to discharge the witnesses and file the indictment away, reserving the right to reinstate it. Jones objected, demanding to be tried. The court denied Jones’ demand. Reversing this judgment, the Kentucky high court declared that by refusing to try Jones, and by allowing the commonwealth to redocket the case, the trial court had denied the defendant the right to a speedy trial under section 11. The court reasoned that to conclude otherwise would allow the state’s attorney to renew the prosecution at any time, while Jones stood powerless, however innocent he might be, “under a grave charge affecting his reputation and endangering his life or liberty.”

*e. Public Trial*

The right to a “public trial” in the Kentucky Constitution, like the guaranty of a public trial in the sixth amendment to the United States Constitution, is a right personal to the accused. In *Lexington Herald-Leader Co. v. Meigs*, Sherman Wright was on trial

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378 The fifth amendment provides: “[N]o person . . . shall be compelled in any criminal case to be a witness against himself . . .” U.S. CONST. amend. V.

379 Cf. Commonwealth v. McClanahan, 155 S.W. 1131, 1133 (Ky. 1913) (holding involuntary confessions are inadmissible); KRS, supra note 24, at § 421.225 (Supp. 1990) (defendant’s failure to testify shall not be commented upon nor create a presumption against him).

380 Jones v. Commonwealth, 71 S.W. 643, 644 (Ky. 1903).

381 71 S.W. 643 (Ky. 1903).

382 See id. at 643.

383 See id. at 643.

384 Id. at 644.


386 660 S.W.2d 658 (Ky. 1983)
for murder and faced a possible death penalty. The case generated substantial publicity. In response, the judge excluded the media from voir dire of prospective jurors. The media sought a writ of prohibition against the judge to compel openness of the voir dire procedure. The Kentucky Court of Appeals denied this request and the media appealed to the Kentucky Supreme Court. At issue before the court was whether the press could be excluded when the accused, charged with a capital offense, requested individual voir dire of veniremen. The court, faced with a public trial/free press dilemma, found that it was constitutionally permissible for the judge to grant limited closure during voir dire. The court ruled that a trial court may bar members of the press "only when necessary for protection" of the defendant's rights and abstained from erecting "a series of hoops for the trial court to jump through on the way to its decision." 

The high court, in Beauchamp v. Cahill, carved out an express exception to the guaranty of a public trial by protecting a child witness from "morbid, prurient, curious and sensation-seeking persons" in the courtroom. The court reasoned that such a limited exception is permitted "in the exercise of reasonable and sound discretion" by a trial judge and is not offensive to section 11 of the Kentucky Constitution.

f. Impartial Jury

Though seldom successful, the most frequently litigated "impartial jury" issues are those relating to the exercise of juror challenges in criminal cases. While Kentucky courts have accorded heightened protection to the array of rights expressly guarantied by section 11, they have not given a liberal interpretation to the "impartial jury" clause. Hicks v. Commonwealth is exemplary. Christopher Lynn Hicks was convicted of first degree wanton endangerment and complicity to second degree arson for the burning of the Club Cabana in Paducah, Kentucky. Hicks alleged

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387 See id. at 660.
388 See id.
389 Id. at 664-65.
390 180 S.W.2d 423 (Ky. 1944).
391 Beauchamp v. Cahill, 180 S.W.2d 423, 424 (Ky. 1944).
392 See id.
393 805 S.W.2d 144 (Ky. Ct. App. 1990).
seven assignments of error, including that the trial judge violated his right to an impartial jury. Specifically, Hicks argued that even after exercising his peremptory challenges to strike jurors that were biased against him, three of the jurors empaneled were prejudiced against him. Hicks asserted that the trial judge erred by not removing those jurors for cause.\(^ {395}\) Although unpersuaded by Hicks' assertion, the court stated unequivocally that in every criminal matter the accused has a constitutional right to be tried by an impartial and unbiased jury. The court observed: "[I]t is vital in a criminal prosecution that any and all doubts as to the competency of a juror be resolved in favor of the defendant."\(^ {396}\) Yet, the court held that Hicks had failed to demonstrate that he was prejudiced by the trial judge's refusal to strike.\(^ {397}\)

\(g.\) Venue

The right to be tried in the county where the crime was committed makes venue an essential element of any criminal charge. In \textit{Parks v. Commonwealth},\(^ {398}\) the court reversed a conviction for malicious shooting and wounding because the commonwealth had failed to prove venue. Specifically, the court found that the evidence adduced by the state showing that the defendant operated the Red Bud Tavern near Peterman Hill, coupled with the defendant's testimony that he lived at the foot of England Hill, four miles from the tavern, and that he had resided in Boyd County for approximately six weeks, was insufficient to show that the offense was committed in that county. The court stated that: "The necessity of proving that the crime for which the accused is being tried was committed within the jurisdiction of the court is not merely a matter of form. It is the constitutional right of the accused. . . ."\(^ {399}\)

However, Kentucky courts have interpreted the venue requirement narrowly when a criminal defendant fails to object timely to a court's transfer of a case to another county. In \textit{Sturgill v. Commonwealth},\(^ {400}\) the trial court transferred the case because it was unable to empanel jurors from the venire that had been sum-

\(^{395}\) See \textit{id.}.
\(^{396}\) \textit{Id.} at 146-47.
\(^{397}\) See \textit{id.} at 147.
\(^{398}\) 156 S.W.2d 468 (Ky. 1941).
\(^{399}\) \textit{Parks v. Commonwealth}, 156 S.W.2d 468, 469 (Ky. 1941).
\(^{400}\) 516 S.W.2d 652 (Ky. 1974).
moned from the county. On appeal, Sturgill argued that the court’s action violated section 11. The appeals court reasoned that the defendant’s failure to object within a reasonable time, despite adequate opportunity to do so, was inexcusable, stating:

Although venue in a criminal action is the subject of constitutional concern under the provisions of Section 11 of the Constitution of Kentucky, it does not rise to the proportions of due process and fundamental fairness in this case. It really does not directly touch the determination of innocence or guilt.

L. Charge of Crime

§ 12. No person, for an indictable offense, shall be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, or by leave of court for oppression or misdemeanor in office.

1. Textual Evolution

The “charge of crime” provision of the Kentucky Bill of Rights was taken directly from the 1790 Pennsylvania Bill of Rights. The Kentucky provision first provided:

That no person shall, for any indictable offence, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger, or, by leave of the court for oppression or misdemeanor in office.

The language was altered in 1799, however, to omit the qualification “or misdemeanor in office.” Although the minutes of the committee that drafted the Kentucky Bill of Rights for the 1799 Constitution are preserved, those records do not indicate why the qualification was then deleted.

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401 Sturgill v. Commonwealth, 516 S.W.2d 652, 654 (Ky. 1974) (noting defendant’s failure to object to change of venue until first day of trial).
402 Id.
403 Ky. Const. § 12.
404 See infra Appendix.
405 Ky. Const. of 1792, art. XII, § 12.
406 See Ky. Const. of 1799, art. XII, § 12.
2. Judicial Interpretation

In 1879, the Kentucky high court determined that betting on an election was neither a crime nor an indictable offense within the meaning of this provision. In that case, Commonwealth v. Avery, the commonwealth instituted a civil action against Samuel Avery to recover $10,000, which Avery won when he bet on the 1875 Louisville mayoral election. A statute authorizing the state to proceed directed that the proceeds of the wager be forfeited to the state. Avery contended that this statutory provision violated then article XIII, section 13 of the Kentucky Constitution. The court rejected Avery’s contention, finding that a forfeiture of the proceeds from Avery’s wager did not constitute criminal prosecution or an indictable offense within the meaning of the Kentucky constitution. The court stated: “[B]etting on an election was never a crime or an indictable offense at common law, nor is the offense, as prescribed by the statute, to be visited with any infamous punishment, and it does not therefore come within the meaning of the 12th and 13th sections of the Constitution. . . .”

M. Prohibition Against Double Jeopardy

§ 13. No person shall, for the same offense, be twice put in jeopardy of his life or limb, nor shall any man’s property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him.

1. Textual Evolution

The Kentucky Bill of Rights historically has focused on protecting the individual from the powers of the state. A constitutional guaranty against double jeopardy advances that purpose and was included in the Kentucky Constitution of 1792. This provision was identical to the double jeopardy clause of the Pennsylvania Con-

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407 77 Ky. (14 Bush) 625 (1879).
408 Commonwealth v. Avery, 77 Ky. (14 Bush) 625, 629 (1879).
409 Compare Ky. Const. of 1850, art. XIII, § 13 with Ky. Const. § 12 (sections are virtually identical).
410 See Avery, 77 Ky. (14 Bush) at 639.
411 Id. at 639-40.
412 Ky. Const. § 13,
stitution of 1790. That clause provided: "No person shall, for the same offence, be twice put in jeopardy of his life or limb."413

Although there have been several revisions to the Kentucky Bill of Rights since 1792, the wording of the double jeopardy clause has remained precisely the same for two hundred years.414 In fact, both Kentucky and Pennsylvania have chosen not to modify the clause since the original drafts, despite changes in other states. In 1865 Georgia added the qualifying phrase, "save on his or her own motion for a new trial after conviction, or in case of mistrial."415 Such a qualifying clause has a dual purpose. First, it seems to prevent a person from appealing a conviction and, in case of reversal, claiming that he or she could not be tried again because of the right against double jeopardy. Second, it seems to prevent a defendant from avoiding retrial after a mistrial caused by the state. Although Kentucky's current constitution does not expressly place such a limitation on a defendant, the courts of Kentucky, through judicial interpretation, have done so.416

2. Judicial Interpretation

The courts of Kentucky generally have been liberal in determining when a person has been placed in double jeopardy. In Williams v. Commonwealth,417 the defendant pleaded not guilty to grand larceny. The commonwealth's attorney, after hearing the evidence, moved to dismiss. The trial court sustained this motion. Subsequently, an identical indictment was returned, except the name of the owner of the stolen property was changed.418 The defendant contended that he had been acquitted of the charge and that he had once been placed in jeopardy.419 Rejecting the defendant's contention, the trial court convicted the defendant and sentenced him to two years in prison. Reversing the judgment of the lower court, the appeals court discussed in detail the meaning of the state constitutional prohibition against double jeopardy. Relying on similar guaranties contained in the Pennsylvania Con-

413 PA. CONST. of 1790, art. IX, § 10; see also infra Appendix.
414 Compare KY. CONST. of 1792, art. XII, § 12 and KY. CONST. of 1799, art. X, § 11 and KY. CONST. of 1850, art. XIII, § 14 with KY. CONST. § 13.
416 See Nichols v. Commonwealth, 657 S.W.2d 932 (Ky. 1983) (holding that a retrial is not precluded by mistrial due to jury's failure to reach consensus).
417 78 Ky. 93 (1879).
418 See Williams v. Commonwealth, 78 Ky. 93, 94 (1879).
419 See id.
stitution, the court reiterated the view of the early American colonies:

A person is in legal jeopardy when he is put upon trial before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance. And a jury is said to be thus charged when they have been empaneled and sworn.420

Adopting this view as the rule in Kentucky, the court further explained that the doctrine of double jeopardy "rests upon the principle that no man shall be put in peril of legal penalties more than once upon the same accusation."421 Quoting from early English documents that "no one can be twice punished for the same crime or misdemeanor," the court explained that the language of Kentucky's double jeopardy provision literally construed, limits the constitutional protection to "jeopardy of life or limb," which, according to a familiar rule of construction, should not be extended to embrace a case where liberty only is at stake. To thus narrow it, however, would leave the legislative power at liberty to authorize, in cases where the punishment is confinement in the penitentiary, a re-trial on the same charge, after the accused is once tried and acquitted or convicted, for there is no other provision of the constitution that can be construed to interdict a re-trial or to sanction the pleas of former conviction and former acquittal.422

The court in Williams determined that the defendant could not be held to answer on a new indictment for the same offense,423 because a contrary determination "would be at war with every sense of justice, subversive of civil government, and contrary to the whole theory of our institutions."424 The court concluded: "There is nothing better settled in the jurisprudence of England or America than that no one can be twice tried for the same offense."425

The scope of the double jeopardy provision in the Kentucky Constitution turns upon the meaning of the term "same offense."

420 Id. at 96.
421 Id. at 98.
422 Id. at 96-97.
423 See id. at 100.
424 Id. at 97.
425 Id.
In *Gaskins v. Commonwealth*, the court reversed a murder conviction, finding that the trial court erred in not sustaining the defendant's demurrer, because he had been acquitted of the same offense in a prior proceeding. The court reasoned:

Having been put upon his trial on charge of murder by a jury sworn to decide the issue between the Commonwealth and himself, defendant was entitled to a decision of that issue, which he could not have been arbitrarily deprived of by the court. On the contrary, there was a decision by the jury, who, after hearing evidence and under instructions of the court, rendered in due form a verdict of not guilty.

The Kentucky court has likewise ruled that the state may not split a single criminal act into separate offenses because a conviction or acquittal on one charge bars a subsequent prosecution for the offense in any of its degrees. In *Arnett v. Commonwealth*, the court interpreted the "same offense" language of section 13 of the current Kentucky Constitution to signify "the same criminal act or omission," not the degree of the criminal act or omission. The court explained that the commonwealth must try the defendant either upon the lower or higher offense into which it may be divisible, admonishing that "it must elect at its peril," because a judgment on the merits to the lesser included offense shall constitute "a bar to any future prosecution for the higher degree.

Kentucky courts have also found that a defendant is protected from a subsequent prosecution for an offense when a trial court erroneously directs an acquittal. Similarly, the court in *Hardy v. Commonwealth* reversed a conviction for unlawful possession of spirituous liquors, finding that if an acquittal of an offense in a police court did not bar a second trial for the same offense in a circuit court, it would result "in a second trial for the same

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426 30 S.W. 1017 (Ky. 1895).
427 See *Gaskins v. Commonwealth*, 30 S.W. 1017, 1017-18 (Ky. 1895).
428 *Id.* at 1018.
429 109 S.W.2d 795 (Ky. 1937).
430 *Arnett v. Commonwealth*, 109 S.W.2d 795, 796 (Ky. 1937).
431 See *id*.
432 *Id.* at 796; see also *Commonwealth v. Gill*, 90 S.W. 605, 606 (Ky. 1906) (holding that a conviction for breach of the peace precluded subsequent prosecution on the same facts for assault and battery).
433 See *Commonwealth v. Little*, 131 S.W. 387 (Ky. 1910).
434 254 S.W. 900 (Ky. 1923).
offense,” which is “prohibited under Section 13 of our Constitution.”\(^{435}\)

Over forty years later, in \textit{Commonwealth v. Mullins},\(^{436}\) the court found that “an accused person has been placed in jeopardy after a jury has returned a verdict of not guilty,” concluding that section 13 of the Kentucky Constitution prohibited retrial of an accused that had been acquitted by a directed verdict.\(^{437}\) Quoting from the United States Supreme Court’s decision in \textit{Green v. United States},\(^{438}\) and echoing the Kentucky Supreme Court’s language in \textit{Williams}, the court denied it an essential principle of criminal law “that the [g]overnment cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous.”\(^{439}\)

Indeed, the high court has gone so far as to hold that an acquittal based on improper grounds bars further prosecution. In \textit{Commonwealth v. Ball},\(^{440}\) the trial court, on motion of the defendant, instructed the jury to find the defendant not guilty. Although the appeals court acknowledged that the trial court erred in the motion because it lacked jurisdiction, it ruled that any acquittal, even one based on improper grounds, was a former jeopardy.\(^{441}\)

Notwithstanding broad decisions like \textit{Williams, Gaskins, Arnett}, and \textit{Ball}, Kentucky courts have refused to find that an accused is placed in double jeopardy when an indictment against him is invalid. In \textit{Mount v. Commonwealth},\(^{442}\) the court ruled that a conviction set aside because of an insufficient indictment does not bar another prosecution for the same offense.\(^{443}\) The court reasoned: “In the established sense of the Constitution, the accused, in such a case, was never ‘in jeopardy,’” and, therefore, the defendant’s demurrer was properly disregarded by the lower court.\(^{444}\)

Likewise, in \textit{Adams v. Commonwealth},\(^{445}\) the defendant’s first conviction for maliciously shooting and wounding with intent to kill was reversed because of an invalid indictment. The court

\(^{435}\) Hardy v. Commonwealth, 254 S.W. 900, 901 (Ky. 1923).

\(^{436}\) 405 S.W.2d 28 (Ky. 1966).

\(^{437}\) See Commonwealth v. Mullins, 405 S.W.2d 28, 29 (Ky. 1966).

\(^{438}\) 355 U.S. 184 (1957).

\(^{439}\) Mullins, 405 S.W.2d at 30.

\(^{440}\) 104 S.W. 325 (Ky. 1907).

\(^{441}\) See Commonwealth v. Ball, 104 S.W. 325, 325-26 (Ky. 1907).

\(^{442}\) 63 Ky. (2 Duv.) 93 (1865).

\(^{443}\) See Mount v. Commonwealth, 63 Ky. (2 Duv.) 93, 94 (1865).

\(^{444}\) Id.

\(^{445}\) 92 S.W.2d 7 (Ky. 1936).
expressly held that the defendant’s subsequent conviction on the same charge did not violate the constitution because the defendant was not previously in jeopardy. Similarly, the high court has found that retrying a defendant, after the first trial resulted in a hung jury, does not offend the double jeopardy clause of the Kentucky Constitution.\footnote{See Cornwell v. Commonwealth, 523 S.W.2d 224 (Ky. 1975).}

Similarly, separate civil penalties incurred under two statutes prohibiting the same act do not constitute double jeopardy. In 1831, Elizabeth Gilbert was indicted for “endanger[ing] the security of the aggregate society” by permitting her slave “to go at large and hire herself out” in Madison County.\footnote{See Commonwealth v. Gilbert, 29 Ky. (6 J.J. Marsh.) 184, 184 (1831).} Mrs. Gilbert was ordered to pay a penalty of 10 pounds to Madison County under an 1802 law. She was also indicted and ordered to pay a penalty to the town of Richmond for the same offense, under an act of 1825 that regulated “peculiarly demoralizing and perilous” activities of slaves at large. Mrs. Gilbert claimed that the penalties were unconstitutional under the double jeopardy provision of the Kentucky Constitution. The high court disagreed in \textit{Commonwealth v. Gilbert}.\footnote{29 Ky. (6 J.J. Marsh.) 184, 184 (1831).} The court held that the state legislature possessed the power to inflict more than one civil penalty for the same offense, provided that the penalty did not affect “life or limb.”\footnote{Id. at 188.} The court concluded that the acts of 1802 and 1825 were “perfectly harmonious,” analyzing as follows:

If both penalties should have been inflicted on Mrs. Gilbert, she would have had no cause for complaining that she had been punished twice for the same offence. Even if the offenses had been precisely the same, the legislature had the power to inflict a penalty in behalf of the town, and another penalty in behalf of the county. We know of no constitutional principle which would have forbidden such legislation.\footnote{Id. at 187.}

In addition to the statutory rules of construction, Kentucky courts have relied upon federal constitutional precedent to resolve questions of double jeopardy. Kentucky protections often mirror federal protections. For instance, in \textit{Stamps v. Commonwealth},\footnote{648 S.W.2d 568, 569 (1983).}
the court applied the holding of *Oregon v. Kennedy* to Kentucky's double jeopardy clause. The court held that section 13 does not preclude retrial where the first trial is terminated by manifest necessity, absent prosecutorial or judicial misconduct. Section 13 neither prohibits retrial when the first trial ended in mistrial due to a hung jury, nor when the first conviction was obtained due to invalidity of the original indictment. However, as *Williams, Gaskins*, and *Arnett* illustrate, section 13 does prohibit retrial on a different degree of the same offense following acquittal. And, as *Mullins* indicates, section 13 disallows retrial following acquittal by a directed verdict.

**N. Right of Access to Courts**

§ 14. All courts shall be open and every person, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

1. **Textual Evolution**

Although the framers of the federal constitution gave no expression to the right of access to the courts, the lack of an express textual basis has proved to be no impediment to finding the right implied within the various amendments. These include the provisions permitting petition for redress of grievances in the first amendment, the due process clauses of the fifth and fourteenth amendments, the speedy and public trial guaranties in the sixth amendment, and the privileges and immunities and equal protection clauses of the fourteenth amendment. Kentucky, however, has incorporated an express, distinct right of access in each of its constitutions. This expressly declared right offers the immediate advantage of avoiding debate over its source and the level of protection that it warrants. Its wording, which has remained unchanged over Kentucky's two hundred year constitutional history,

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454 KY. CONST. § 14.
456 See KY. CONST. of 1792, art. XII, § 13; KY. CONST. of 1799, art. X, § 13; KY. CONST. of 1850, art. XIII, § 15; KY. CONST. § 14.
457 Compare KY. CONST. of 1792, art. XII, § 13 and KY. CONST. of 1799, art. X, § 13 and KY. CONST. of 1850, art. XIII, § 15 with KY. CONST. § 14.
was adopted originally from the Pennsylvania Constitution of 1790. The framers of the Kentucky Constitution, however, omitted the last clause of the Pennsylvania provision that provided for lawsuits "against the commonwealth in such manner, in such courts, and in such cases as the legislature may by law direct." Although Pennsylvania retains this provision in the Declaration of Rights of its current constitution, Kentucky has declined to incorporate such an express right of suit into any of its four constitutions.

2. Judicial Interpretation

In Johnson v. Higgins, the court expressed the spirit of section 14 of the Kentucky Bill of Rights. Interpreting the identical provision in article 13, section 15 of the 1850 Kentucky Constitution, the court declared that the Kentucky courts are to be held in an open and public manner, and their proceedings are not to be secret or concealed from public view. . . . They are to administer justice without sale—that is they are not to accept compensation from litigants; . . . They are not to deny any one a fair trial, nor to delay the same, except upon sufficient legal grounds for continuance.

Indeed, Kentucky courts have regarded section 14 as the guardian "against encroachment upon those jural rights which had become well established before the adoption of the Constitution." For example, in Ludwig v. Johnson, the court recognized that a cause of action based on negligence is a "jural right," holding that "a guest statute" was an encroachment on this constitutional right. Also, fifty-four years later, in Hawkins v. Sunmark Industries, Inc., the Kentucky Supreme Court held that the "Fireman's Rule," which protects property owners from liability for

458 See infra Appendix.
459 Pa. Const. of 1790, art. IX, § 11.
461 60 Ky. (3 Met.) 566 (1862).
462 Johnson v. Higgins, 60 Ky. (3 Met.) 566, 570 (1862).
464 49 S.W.2d 347 (Ky. 1932).
465 Ludwig v. Johnson, 49 S.W.2d 347, 350-351 (Ky. 1932) (holding that guest statute abrogates common law rights preserved by Constitution).
466 727 S.W.2d 397 (Ky. 1986).
467 Hawkins v. Sunmark Indus., Inc., 727 S.W.2d 397, 401 (Ky. 1986).
negligently starting a fire, necessitating a fireman’s presence, did not violate section 14. In *Hawkins*, the court reasoned that the "Fireman’s Rule" was a common law rule predating the 1891 Constitution.\(^{468}\)

In one of its most recent pronouncements relating to section 14, the Kentucky Supreme Court ruled that a statute of repose, placing a five year cap on negligence or malpractice actions against health care professionals, violated the "open courts" clause of this provision.\(^{469}\) In *McCollum v. Sisters of Charity*,\(^{470}\) the court held that the clause "prohibit[s] the abolition or diminution of legal remedies for personal injuries and wrongful death, a theme that has appeared in Kentucky’s constitution since 1792."\(^{471}\) Directing its constitutional inquiry to whether the cause of action affected by the statute had become established prior to the adoption of the Kentucky Constitution in 1792, the court found that a medical malpractice action existed long before the first state constitution and that the state legislature lacked "constitutional power to extinguish it."\(^{472}\) The court concluded that the statute was "antithetical to the purpose of the ‘open courts’ provision," quipping that the plaintiff "need not board th[e] bus to Topsy-Turvey Land."\(^{473}\)

Although Kentucky courts have found that section 14 "prohibits the legislature from invading the province of the judiciary,"\(^{474}\) they have not interpreted it as broadly as the history of the provision suggests it might be. The provision has been found to place few limits on the legislative power to restrict resort to the courts. For example, the high court has found that section 14 does not forbid the clerk of a court from collecting filing fees from those that can afford them. In *Harbison v. George*,\(^{475}\) Charles George attempted to file a petition in a circuit court, seeking to recover $256.64 on a note. The circuit clerk refused to file the petition without a $5 payment pursuant to an act of 1928. George brought

\(^{468}\) *See id.* at 399.

\(^{469}\) *See McCollum v. Sisters of Charity*, 799 S.W.2d 15 (Ky. 1990).

\(^{470}\) 799 S.W.2d 15 (Ky. 1990).

\(^{471}\) *Id.* at 18 (citation omitted).

\(^{472}\) *Id.* at 19.

\(^{473}\) *Id.*

\(^{474}\) *See Commonwealth v. Werner*, 280 S.W.2d 214, 216 (Ky. 1955); *see also Kendall v. Beiling*, 175 S.W.2d 489, 491 (Ky. 1943) (stating that legislative enactment may not shorten "the arm of the court").

\(^{475}\) 14 S.W.2d 405 (Ky. 1929).
an action against the clerk, seeking an injunction to compel the clerk to file his petition. The court granted the request.\textsuperscript{476}

On appeal, George argued that the court's judgment should be affirmed because the 1928 act contravened section 14 of the Kentucky Bill of Rights. Before reaching the merits of George's argument, the appellate court explained that the history of the provision dated back to the Magna Charta:

It was then customary for officers to exact fines as the price of administering justice which constituted a species of bribery. They were arbitrary exactions, that went to the officers, and in no way similar to exactions for legitimate expenses of litigation.\textsuperscript{477}

The court further noted that the purpose of section 14 was "to correct such abuses, among others, that induced the barons of England to wrest from King John the Magna Charta. The right thus obtained has been preserved in practically all state Constitutions."\textsuperscript{478} Relying on decisional law of other states, including Arkansas, Indiana, Montana, and North Dakota, that upheld analogous acts as valid under similar constitutional provisions, the court concluded: "Provisions in state statutes for the payment in advance of fees allowed by law, and incurred pending the litigation, do not contravene the rights guarantied by such a constitutional provision."\textsuperscript{479}

The court reached a similar result in \textit{J.B.B. Coal Co. v. Halbert}.\textsuperscript{480} A coal company had filed a petition, alleging that the trial judge's failure to rule on its demurrer to an answer violated section 14. The appeals court disagreed, stating that section 14 cannot be invoked as here attempted, unless it is clearly made to appear that there has been such an unreasonable or arbitrary failure or refusal upon the part of the judge to act as would so unduly delay a trial or such preparation for trial, as to amount to a denial of justice . . . . [N]o such showing has been made in this case. . . .\textsuperscript{481}

\textsuperscript{476} See Harbison v. George, 14 S.W.2d 405, 405 (Ky. 1929).
\textsuperscript{477} \textit{Id.} at 405-06.
\textsuperscript{478} \textit{Id.} at 405-06.
\textsuperscript{479} \textit{Id.} at 406.
\textsuperscript{480} 184 S.W. 1116 (Ky. 1916).
\textsuperscript{481} \textit{J.B.B. Coal Co. v. Halbert}, 184 S.W. 1116, 1121 (Ky. 1916).
O. Power to Suspend Laws

§ 15. No power to suspend laws shall be exercised, unless by the general assembly or its authority.  

1. Textual Evolution

The guaranty against arbitrary and unauthorized suspension of laws was in the original Kentucky Bill of Rights. This clause provided: “That no power of suspending laws shall be exercised, unless by the legislature or its authority.” Although no minutes of the drafting committee survive to prove its purpose, the provision seems to be a safeguard against capricious exercise of authority by the judicial branch. The wording of the provision mirrored the guaranty in the Pennsylvania Bill of Rights of 1790 with minor stylistic changes.

2. Judicial Interpretation

According to the Kentucky high court, this constitutional provision applies to valid administrative orders that have the same legal force as statutes. In Gering v. Brown Hotel Corp., an employee instituted an action against her employer to recover the difference between her actual wages and those prescribed by a minimum wage order of the state Commissioner of Labor. The order, issued on June 6, 1962, was to become effective on August 1, 1962. During the interim period, several employers filed a petition for review of the order. The circuit court issued an injunction, staying enforcement of the wage order pending the final determination of its validity. The employers contended that the injunction postponed the effective date of the wage order from August 1, 1962 until February 14, 1964, when the court’s decision became final. Agreeing with the employers, the circuit court granted summary judgment. Reversing the judgment of the circuit court,

482 KY. CONST. § 15.
483 KY. CONST. of 1792, art. XII, § 14.
484 PA. CONST. of 1790, art. IX, § 12; see also infra Appendix.
486 376 S.W.2d 332 (Ky. 1965).
487 See id. at 333-34.
488 See id. at 334.
489 See id.
490 Id.
the appeals court found the employer's contention devoid of merit, characterizing it as "demonstrably untenable," and held that suspension of the minimum wage order did not change its effective date. The court reasoned that a stay "simply delays the day of reckoning" without extinguishing "obligations to comply from the effective date of the order." Applying section 15 of the Kentucky Constitution to the administrative order, the court explained: "[T]he judicial branch has power and authority to stay temporarily the enforcement of such order pending judicial review of its validity, which is a form of suspension. But it is only because this provisional relief does not alter the ultimate effectiveness of the order that is constitutionally valid." The court expressly cautioned that if a court should purport to change the effective date of a valid administrative order, "it would certainly be suspending the law in violation of section 15 of the Kentucky Constitution."

P. Habeas Corpus

§ 16. All prisoners shall be bailable by sufficient securities, unless for capital offenses when the proof is evident or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended unless when, in case of rebellion or invasion, the public safety may require it.

1. Textual Evolution

The writ of habeas corpus provides one method of testing the legality of a particular detention. The first habeas corpus provision in the Kentucky Constitution was included in article XII, section 16 of the 1792 version and provided: "[T]he privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it." This provision was identical to the habeas corpus guaranty contained in the Pennsylvania Constitution of 1790 and, like Pennsylvania's

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491 Id.
492 See id. at 337.
493 Id.
494 Id. (emphasis in original) (citation omitted).
495 Id. at 337.
496 Ky. Const. § 16.
497 Ky. Const. of 1792, art. XII, § 16.
498 See infra Appendix.
present habeas corpus provision,\textsuperscript{499} has not been broadened or modified in two hundred years.\textsuperscript{500}

2. Judicial Interpretation

Despite the frequent use of the writ of habeas corpus, the constitutional provision guarantying that right has seldom been invoked.\textsuperscript{501} Indeed, the Kentucky appellate courts have not issued reported decisions directly confronting that provision. However, the courts of Kentucky have, on occasion, addressed the significance of this "hallowed article of liberty," and, citing directly to English law, explained that the guaranty "is today exactly what it was in the beginning . . . the prevention of unjust vexation by reiterated commitments for the same offense."\textsuperscript{502}

In \textit{Young v. Russell},\textsuperscript{503} the court stated the rule as follows: when a judicial inquiry has been made "upon the solemn writ of habeas corpus, into the legality of the detention and has resulted in a discharge,"\textsuperscript{504} the judgment, "whether erroneous or not, and being in favor of personal liberty is final and conclusive and not subject to appeal or writ of error."\textsuperscript{505}

In \textit{Duke v. Smith},\textsuperscript{506} the court explained that the habeas corpus provision guaranties to an individual "the right at any time to resort to habeas corpus, if the petition sets forth legal justification for the issuance of the writ, the burden devolves upon the Commonwealth to prove facts showing the petitioner's detention without bond to be reasonable and lawful according to the standard prescribed."\textsuperscript{507}

Q. Cruel Punishment

§ 17. Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishment inflicted.\textsuperscript{508}

\textsuperscript{499} PA. Const. art. I, § 14.


\textsuperscript{501} The only case interpreting section 16 is Baker v. Smith, 477 S.W.2d 149 (Ky. 1971). This case held that "prisoners," in the section, includes persons held pending trial on charge of crime.

\textsuperscript{502} Young v. Russell, 332 S.W.2d 629, 632 (Ky. 1960).

\textsuperscript{503} 332 S.W.2d 629 (Ky. 1960).

\textsuperscript{504} \textit{Id.} at 632.

\textsuperscript{505} \textit{Id.} at 631 (quoting CHURCH, \textit{THE WRIT OF HABEAS CORPUS} 520 (1886)).

\textsuperscript{506} 253 S.W.2d 242 (Ky. 1952).

\textsuperscript{507} Duke v. Smith, 253 S.W.2d 242, 244 (Ky. 1952).

\textsuperscript{508} Ky. Const. § 17.
1. Textual Evolution

The guaranty against cruel punishment, which is textually similar to the eighth amendment prohibition against cruel and unusual punishment in the United States Constitution, was incorporated into the Kentucky Constitution of 1792 and provided: "That excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." Except for minor grammatical alterations, this provision has been neither broadened nor changed in two hundred years.

2. Judicial Interpretation

The federal protection against cruel or unusual punishment appears in the eighth amendment. In capital cases, the eighth amendment requires an individualized sentencing determination that takes into account the character and record of the individual offender and the circumstances of the particular offense. In non-capital cases, individualized sentencing reflects an enlightened policy rather than a constitutional imperative. Because most claims of cruel and unusual punishment are waged on eighth amendment grounds, it is no surprise that only a few decisions expressly address the nature of Kentucky's constitutional protection. In Skaggs v. Commonwealth, the Kentucky Supreme Court upheld the imposition of the death penalty with respect to a defendant convicted of murdering an elderly couple, finding the Kentucky death penalty statute constitutional. In support of its finding, the court stated that there had been no showing that the statute was "arbitrary, discriminatory or freakishly applied."

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509 See infra note 514.
510 Ky. Const. of 1792, art. XII, § 15.
512 See infra note 514.
514 The eighth amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend VIII. The eighth amendment's prohibition against cruel and unusual punishment is applicable to the states through the fourteenth amendment. See Robinson v. California, 370 U.S. 660, 666 (1962).
515 556 S.W.2d 672 (Ky. 1985), cert. denied, 476 U.S. 1130 (1986).
517 Id.
In 1985, the court of appeals was presented with a constitutional challenge to a state statute on the ground that the phrase in the statute, "cruel punishment," was unconstitutionally vague. Finding it "ironic" that the challenge was based on the "very term" used in both the Kentucky and United States Constitutions, the court, in \textit{Cutrer v. Commonwealth},\footnote{697 S.W.2d 156 (Ky. Ct. App. 1985) (construing KRS, \textit{supra} note 24, at §§ 508.110, 508.120 (1990)).} rejected the challenge. The court explained: "Our courts experience no difficulty in determining what constitutes cruel punishment within the strictures of Section 17. . . . Cruel punishment is punishment which shocks the general conscience and violates the principles of fundamental fairness. Outside the criminal arena, our cases define 'cruel' as 'heartless and unfeeling.'"\footnote{Cutrer v. Commonwealth, 697 S.W.2d 156, 158 (Ky. Ct. App. 1985) (citations omitted).}

Moreover, according to Kentucky's highest court, the provision prohibiting cruel punishment was intended to forbid inhumane conduct, such as quartering.\footnote{See \textit{Hill v. Commonwealth}, 264 S.W. 1045, 1045 (Ky. 1924).} In \textit{Hill v. Commonwealth},\footnote{264 S.W. 1045 (Ky. 1924).} the defendant was convicted of assault and battery of a woman and was sentenced to six months in jail and $500. He argued that this punishment violated the cruel punishment provision of the state constitution. The court disagreed, holding that the sentence was reasonable and not unconstitutional.\footnote{See \textit{id.} at 1046.}

Under this provision, Kentucky courts tend to defer to the legislative judgments establishing adequate punishment for a criminal offense. In \textit{McElwain v. Commonwealth},\footnote{159 S.W.2d 11 (Ky. 1942).} the court upheld the conviction of John McElwain for malicious shooting and wounding with intent to kill, which provided for twenty-one years of imprisonment.\footnote{See \textit{McElwain v. Commonwealth}, 159 S.W.2d 11, 12 (Ky. 1942).} Unpersuaded by McElwain's contention that his punishment was excessive, in contravention of section 17, the court observed that McElwain had made a murderous and unprovoked assault on the victim (the victim miraculously escaped, but sustained crippling injuries). The court found that the verdict was within proper limits for such an offense, as established by the state legislature. The court concluded that the legislature possessed the discretion to determine what constituted "adequate punishment."\footnote{\textit{Id.} at 12.}
In *Praete v. Commonwealth*, the court upheld a criminal statute punishing minors for drunk driving. The statute provided that a person under eighteen convicted of drunk driving shall have his or her license revoked until reaching age eighteen, or for twelve months, whichever is longer. The statute was challenged as unconstitutional for contravening the prohibition against cruel punishment. The court reasoned that the penalty did "not shock the conscience" and was neither "greatly disproportionate to the offense, nor... beyond what is necessary to achieve the legislative intent."  

**R. Imprisonment for Debt**

§ 18. The person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison after delivering up his estate for the benefit of his creditors in such manner as shall be prescribed by law.

1. **Textual Evolution**

The prohibition against imprisonment for debt appears to derive from article IX, section 16 of Pennsylvania’s 1790 Constitution. The language of section 18 in the Kentucky Constitution can be traced directly to the Kentucky Constitution of 1792. This provision has remained unaltered through each of the four Kentucky Constitutions.

2. **Judicial Interpretation**

In *Rebhan v. Fuhrman*, the court expressly ruled that imprisonment of an individual for failure to comply with a court contempt order, until that order is obeyed, does not violate the state constitution’s prohibition of imprisonment for debt.

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528 Id. at 603.
529 Ky. Const. § 18.
530 See infra Appendix.
531 See Ky. Const. of 1792, art. XII, § 17.
533 50 S.W. 976 (Ky. 1899).
534 See *Rebhan v. Fuhrman*, 50 S.W. 976, 977 (Ky. 1899).
Stinson v. Stinson addressed section 18 of the current Kentucky Constitution in the context of a husband that had been jailed for contempt for failing to pay alimony to his ex-wife. In Stinson, the appellate court carefully distinguished between imprisonment for the actual debt and imprisonment for failure to obey the court, finding that the latter did not violate the Kentucky Constitution. The court's finding in Stinson comports with Kentucky's historical recognition that alimony or maintenance from one spouse to another is not a debt within the meaning of section 18 of the Kentucky Constitution.

In Blanton v. Commonwealth, a statute which imposed criminal liability on a contractor for the failure to pay for labor and materials from sums received from an owner was held permissible under section 18 if the contractor possessed actual knowledge of the amount due and owing, and a legal obligation to pay from those proceeds received. The court explained that if the statute imposed criminal liability upon a contractor acting in good faith for a breach of contract, "the statute probably would violate section 18 of the Kentucky Constitution which restricts imprisonment for debt. A penal statute which is no more than a debt collecting statute is unconstitutional."

In Patterson v. Commonwealth, the defendant was convicted of violating Kentucky's "cold check" statute. The statute provided that a crime of theft by deception is committed if a person issues or passes a worthless check and fails "to make good within ten (10) days after receiving notice of that refusal." On appeal, the defendant presented "a case of first impression in Kentucky" to the court of appeals, contending that his conviction was tantamount to imprisonment for a debt, a violation of section 18 of the Kentucky Constitution.

535 223 S.W.2d 727 (Ky. 1949).
536 See Stinson v. Stinson, 223 S.W.2d 727, 728-29 (Ky. 1949).
537 See Rudd v. Rudd, 214 S.W. 791 (Ky. 1919) (holding that imprisonment for contempt for disobedience of a court order to pay over money to an ex-spouse not imprisonment for a debt).
538 562 S.W.2d 90 (Ky. Ct. App. 1978).
540 Id. at 94. See also Burnam v. Commonwealth, 15 S.W.2d 256 (Ky. 1929); Ward v. Commonwealth, 15 S.W.2d 276 (Ky. 1929).
543 Id. at 911.
Unpersuaded by the defendant's contention, the court affirmed the conviction, reasoning that "the worthless check statute does not punish one for a debt but rather for a fraudulent act. Since intent to defraud is an essential element, it is not in violation of Section 18 of the Kentucky Constitution prohibiting imprisonment for debt."544 Additionally, in Farmer v. Cassinelli,545 the court held that section 18 was not violated by a state law that imposed liability on an individual that sold mortgaged property without the written consent of the mortgagees.546

S. Ex Post Facto, or Law Impairing Contracts Forbidden

§ 19. No ex post facto law, nor any law impairing the obligation of contracts, shall be enacted.547

1. Textual Evolution

The guaranty against ex post facto laws, which prevents the legislature from imposing new burdens on existing rights, was in the Kentucky Constitution of 1792.548 The provision, identical to Section 17 of Pennsylvania's 1790 Constitution, simply stated that "no ex post facto law, or any law impairing contracts, shall be made."549 Its language in section 19 of the current constitution is virtually the same as that appearing in article 13, section 7 of the 1850 constitution,550 except that the second clause now provides that no law "shall be enacted" to impair "the obligation of contracts."551 The 1850 changes seem to be stylistic rather than substantive.

2. Judicial Interpretation

Kentucky courts historically have concluded that the ex post facto provision of Section 19 applied only to criminal statutes altering the accused's situation to his disadvantage and to laws

544 Id. at 912.
545 303 S.W.2d 555 (Ky. 1957).
546 See Farmer v. Cassinelli, 303 S.W.2d 555, 557 (Ky. 1957).
547 KY. CONST. § 19.
548 See KY. Const. of 1792, art. XII, § 18.
549 Id.; see also infra Appendix.
550 KY. Const. of 1850, art. XIII, § 20.
551 Compare id. with KY. Const. § 19.
inflicting punishments or penalties.\textsuperscript{552} As early as 1866, however, Kentucky had held that an act cannot be retroactive so as to make one civilly responsible for an act that, when done, did not give rise to liability. In \textit{O’Donoghue v. Akin},\textsuperscript{553} the court refused to sustain an act applied retroactively that made a person civilly responsible for the killing of another. When the murder was committed, under the existing law the actor was not civilly liable.\textsuperscript{554} In support of its holding, the court reasoned that such a law “partakes of the obnoxious spirit of all ex post facto legislation in authorizing vindictive damages, not merely compensatory, but highly punitive.”\textsuperscript{555}

Some statutes, however, may be retroactively applied. In \textit{Thornton v. McGrath},\textsuperscript{556} the court sustained a law that authorized suits confirming prior sales of land for the benefit of infants. The court explained that while retrospective legislation “may often be impolitic and unjust” it is not necessarily unconstitutional.\textsuperscript{557} The court upheld the law, explaining that although it did not agree with the enactment of \textit{retroactive} laws, such laws were not prohibited under the ex post facto provision of the state constitution.\textsuperscript{558}

Similarly, in \textit{Johnson v. Laffoon},\textsuperscript{559} the court upheld a law that gave the governor power to remove an appointed commissioner at will against an ex post facto challenge. The court reasoned that the officer held the post from its inception subject to removal as prescribed by law.\textsuperscript{560}

Statutes that regulate procedure fall outside the ex post facto provision’s scope. The high court has held that modification of parole procedure,\textsuperscript{561} and revocation of a defendant’s probation

\textsuperscript{552} See Thornton v. McGrath, 62 Ky. (1 Duv.) 349 (1864); Henderson & Nashville R.R. v. Dickerson, 56 Ky. (17 B. Mon.) 173 (1856); Fisher v. Cockerill, 21 Ky. (5 T.B. Mon.) 129 (1827).

\textsuperscript{553} 63 Ky. (2 Duv.) 478 (1866).

\textsuperscript{554} See O’Donoghue v. Akin, 63 Ky. (2 Duv.) 478, 478-79 (1866) (Legislation that is applied retroactively may be constitutional if it simply “regulates remedies for existing rights and wrongs, or aids or confirms rights,” but personal or proprietary rights cannot be injuriously affected by such legislation.).

\textsuperscript{555} Id. at 480.

\textsuperscript{556} 62 Ky. (1 Duv.) 349 (1864).

\textsuperscript{557} Thornton v. McGrath, 62 Ky. (1 Duv.) 349, 354-55 (1864). An ex post facto law imposes criminal liability upon an act legal at the time of undertaking. Retrospective legislation is unconstitutional only when it divests a vested right.

\textsuperscript{558} Id. at 401.

\textsuperscript{559} 77 S.W.2d 345 (Ky. 1935).

\textsuperscript{560} See Johnson v. Laffoon, 77 S.W.2d 345, 350 (Ky. 1935).

\textsuperscript{561} See Morris v. Wingo, 428 S.W.2d 715 (Ky. 1968).
where it did not increase the sentence for his conviction, do not violate the rule against ex post facto laws.\textsuperscript{562} Moreover, if a statute deprives an accused of a substantive right held under prior law, the new law is void as an ex post facto law. In \textit{Commonwealth v. Brown},\textsuperscript{563} the defendant argued that the abolishment of a law after he committed a criminal act enabled the commonwealth to convict him based upon less evidence than previously required.\textsuperscript{564} The previous law prohibited a conviction based on the testimony of an accomplice, unless such testimony was corroborated by other evidence tending to connect the defendant with the commission of the offense.\textsuperscript{565} The Kentucky Supreme Court held that ex post facto laws include laws that alter rules of evidence. The court stated: "It matters not that the retroactive reduction in the quantum of proof results from the exercise of the judicial rulemaking power rather than from an enactment of a legislative body."\textsuperscript{566}

More recently, in \textit{Commonwealth v. Reneer},\textsuperscript{567} the Kentucky Supreme Court drew a fine line between procedure and substance. In \textit{Reneer}, the court distinguished \textit{Brown} finding that application of a truth-in-sentencing statute to a defendant, who had allegedly committed an offense before the statute’s effective date, did not violate the prohibition of ex post facto laws.\textsuperscript{568} Likewise, in \textit{Commonwealth v. Ball},\textsuperscript{569} the court, in construing section 19, held that a conviction for driving under the influence of alcohol received prior to the enactment of a statute penalizing multiple like offenders could be used in determining whether the person convicted was a multiple offender.\textsuperscript{570} The court further ruled that the statute could be given retroactive effect since it did not create a new offense but merely imposed different penalties on the same criminal act, dependent on the status of the offender.\textsuperscript{571}

\textsuperscript{563} 619 S.W.2d 699 (Ky. 1981).
\textsuperscript{565} See \textit{id}.
\textsuperscript{566} \textit{Id}.
\textsuperscript{567} 734 S.W.2d 794 (Ky. 1987).
\textsuperscript{568} See \textit{Commonwealth v. Reneer}, 734 S.W.2d 794, 798 (Ky. 1987).
\textsuperscript{569} 691 S.W.2d 207 (Ky. 1985).
\textsuperscript{570} See \textit{Commonwealth v. Ball}, 691 S.W.2d 207, 209-10 (Ky. 1985).
\textsuperscript{571} See \textit{id} at 210; see also \textit{Ratliff v. Commonwealth}, 719 S.W.2d 445 (1986) (holding that the use of a pre-sentencing enhancement conviction for driving under the influence for sentencing enhancement was not an ex post facto application of the law).
T. Prohibition Against Bills of Attainder

§ 20. No person shall be attainted of treason or felony by the general assembly, and no attainder shall work corruption of blood, nor, except during the life of the offender, forfeiture of estate to the Commonwealth.\footnote{572}{Ky. Const. § 20.}

1. Textual Evolution

Traditionally, bills of attainder were legislative acts imposing punishment on specific individuals. Kentucky's bill of attainder provision prohibits the state legislature from assuming judicial functions and conducting trials.\footnote{573}{Cf. Black's Law Dictionary 165 (6th ed. 1990).} Consequently, the provision procribes any legislative act that applies either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial.\footnote{574}{Cf. id.}

The prohibition against bills of attainder was announced first in Kentucky by article XII, section 20 of the 1792 Kentucky Bill of Rights and stated simply, "[t]hat no attainder shall work corruption of blood, nor, except during the life of the offender, forfeiture of estate to the commonwealth."\footnote{575}{Ky. Const. of 1792, art. XII, § 20.} Adopted from article IX, section 19 of the 1790 Pennsylvania Bill of Rights, the wording of the Kentucky provision was changed in 1890 when the phrase "No person shall be attainted for treason or felony by the general assembly" was added to extend the provision's coverage.\footnote{576}{Ky. Const. of 1890, art. XIII, §§ 21, 22; see also infra Appendix.}

2. Judicial Interpretation

Kentucky courts have interpreted this provision infrequently. The high court construed section 20 narrowly in \textit{Arciero v. Hager}.\footnote{577}{397 S.W.2d 50 (Ky. 1965).} The issue in that case was whether a Kentucky statute that provided for no legal relationship between an adopted child and its birth parents with respect to personal or property rights violated the prohibition against bills of attainder.\footnote{578}{See Anciero v. Hager, 397 S.W.2d 50, 53 (Ky. 1965).} The court held that the
statute did not fall within purview of the attainder section because bills of attainder refer "only to punishment for crime."\textsuperscript{579}

\textbf{U. Descent in Cases of Suicide}

\S 21. The estate of such persons as shall destroy their own lives shall descend or vest as in cases of natural death; and if any person shall be killed by casualty, there shall be no forfeiture by reason thereof.\textsuperscript{580}

\textit{1. Textual Evolution}

Section 21 derives from article IX, section 19 of the 1790 Pennsylvania Constitution.\textsuperscript{581} This section was incorporated into the Kentucky Constitution in 1792 and has remained unchanged.\textsuperscript{582}

\textit{2. Judicial Interpretation}

Section 21 has not been construed in published decisions.

\textbf{V. Quartering of Soldiers}

\S 22. No standing army shall, in time of peace, be maintained without the consent of the general assembly; and the military shall, in all cases and at all times, be in strict subordination to the civil power; nor shall any soldier, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, except in a manner prescribed by law.\textsuperscript{583}

\textit{1. Textual Evolution}

Textually similar to its federal counterpart in the third amendment of the United States Constitution,\textsuperscript{584} the Kentucky draftsmen of the 1792 Constitution included this provision in article XII,

\begin{flushright}
\textsuperscript{579} Id.  \\
\textsuperscript{580} KY. CONST. \S 21.  \\
\textsuperscript{581} \textit{See infra} Appendix.  \\
\textsuperscript{582} \textit{Compare} KY. CONST. of 1792, art. XII, \S 21 and KY. CONST. of 1799, art. X, \S 21 and KY. CONST. of 1850, art. XIII, \S 23 \textit{with} KY. CONST. of 1890 bill of rights, \S 21.  \\
\textsuperscript{583} KY. CONST. \S 22.  \\
\textsuperscript{584} The third amendment states "No soldier shall in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III.
\end{flushright}
sections 24 and 25,\textsuperscript{585} which were later combined into one provision.\textsuperscript{586} The language of this provision was taken directly from sections 22 and 23 of the 1790 Pennsylvania Bill of Rights\textsuperscript{587} and has remained the same throughout Kentucky’s constitutional history.\textsuperscript{588}

2. Judicial Interpretation

Section 22 has not been construed in published decisions.

W. Prohibition of Nobility; Term of Years

§ 23. The general assembly shall not grant any title of nobility or hereditary distinction, nor create any office, the appointment of which shall be for a longer time than a term of years.\textsuperscript{589}

1. Textual Evolution

Reflecting a concern for the inequalities of status flowing from lineage, the Kentucky statesmen, like their forefathers that framed the Declaration of Independence in 1776, determined that in Kentucky there should be no titles or privileges of Dukes, Earls, or other classes of nobility. To assure equality of political and legal rights in Kentucky, the 1792 Constitution stated “[t]hat the legislature shall not grant any title of nobility or hereditary distinction, nor create any office the appointment to which shall be for a longer term than during good behavior.”\textsuperscript{590} Sharing their concerns with the framers of the Pennsylvania Constitution, the Kentucky draftsmen borrowed the language of this guaranty from article 9, section 24 of the Pennsylvania Constitution of 1790, with the minor grammatical change from “appointment to which” to “appointment of which.”\textsuperscript{591}

Although the import of the provision has remained the same, the drafters of the 1850 Kentucky Constitution rewrote the last

\textsuperscript{585} Ky. Const. of 1792, art. XII, §§ 24, 25.
\textsuperscript{586} Compare id. with Ky. Const. § 22.
\textsuperscript{587} See infra Appendix.
\textsuperscript{589} Ky. Const. § 23.
\textsuperscript{590} Ky. Const. of 1792, art. XII, § 26.
\textsuperscript{591} Compare Ky. Const. § 23 with Pa. Const. of 1790, art. IX, § 24.
clause, changing the phrase "during good behavior," to "term of years."

2. Judicial Interpretation

In 1903, Kentucky's high court invalidated a legislative act that failed to limit the time during which members of a private police and detective agency could exercise their powers to arrest and imprison. In Swincher v. Commonwealth, the court held that since the act failed to require moral character, citizenship of the United States, or allegiance to either the nation or the state of Kentucky, "the Legislature could not constitutionally grant such extraordinary powers to private citizens." Noting that the failure to limit "exclusive privileges" is likely to create a "position for life," the court applied section 23 of the Kentucky Constitution expressly, which "prohibits the legislature from creating any office, the appointment of which shall be for a longer time than a term of years.

The court in Neumeyer v. Krakel went so far as to express doubt concerning whether a statute providing that a city policeman could not be removed during good behavior violated section 23. The court subsequently found, in City of Louisville v. Ross, that such a law did not offend the Kentucky Constitution.

The courts of Kentucky have invoked section 23 sparingly, refusing to apply it to "offices held at the pleasure of the appointing power." In Kratzer v. Commonwealth, a search of Kratzer's Grocery uncovered a gallon of moonshine. The police then charged Lawrence Kratzer with possession of intoxicating liquor. Kratzer challenged the search on the ground that the affidavit supporting the search warrant was made before an examiner who was not authorized to administer an oath. Kratzer contended that the examiner's term could not exceed that of the office of the

593 See Swincher v. Commonwealth, 72 S.W. 306 (Ky. 1903).
594 72 S.W. 306, 306 (Ky. 1903).
595 Id. at 307.
596 Id.
597 Id.
598 62 S.W. 518 (Ky. 1901).
599 129 S.W. 101 (Ky. 1910).
600 See Kratzer v. Commonwealth, 15 S.W.2d 473, 475 (Ky. 1929).
601 15 S.W.2d 473 (Ky. 1929).
602 See id. at 474.
appointing power without violating section 23 of the Kentucky Constitution.\textsuperscript{603} On appeal, the court ruled that the appointment of an examiner, who holds office at the pleasure of the court, does not offend section 23. The court explained that because the examiner was removable at the discretion of the court, "there [was] no fixed time during which he may claim the office as a matter of right, and therefore no term for a period longer than four years."\textsuperscript{604}

Relying on Kratzer, the high court found in City of Owensboro v. Hazel,\textsuperscript{605} that a municipal ordinance providing that a city manager holds office at the discretion of the mayor and the board of commissioners did not violate section 23.\textsuperscript{606}

The court has also refused to apply section 23 to enjoin enforcement of a statute authorizing the appointment of city personnel by university trustees and the board of education.\textsuperscript{607} In Kerr v. City of Louisville,\textsuperscript{608} Robert Kerr instituted an action against the City of Louisville, its mayor, the board of education, the University of Louisville, and University trustees, to enjoin and restrain enforcement of a legislative act that authorized the appointment of city personnel by the school's board of trustees and the city's board of education, rather than "local authorities."\textsuperscript{609}

The court reasoned that section 23 must be read in conjunction with section 160 of the Kentucky Constitution, which provides specifically for the terms of office and the manner of election and appointment of municipal officers.\textsuperscript{610} Noting that section 160 further provides that the "terms of office shall be four years, and until their successors shall be qualified," the court concluded that it was not the intent of the framers of the Kentucky Constitution to limit the appointment of municipal officers to a term of years.\textsuperscript{611} Rather, the court reasoned that the matter was left to the legislature and local municipalities, "to create minor municipal offices and to appoint officers to them who may hold either during good behavior or the pleasure of the appointing power, as the law may direct."\textsuperscript{612}

\begin{footnotes}
\item[603] See id.
\item[604] Id. at 475; see also City of Lexington v. Rennick, 49 S.W. 787 (Ky. 1899) (police officer held office at pleasure of appointing powers).
\item[605] 17 S.W.2d 1031 (Ky. 1929).
\item[606] See City of Owensboro v. Hazel, 17 S.W.2d 1031, 1034 (Ky. 1929).
\item[607] See Kerr v. City of Louisville, 111 S.W.2d 1046 (Ky. 1938).
\item[608] 111 S.W.2d 1046 (Ky. 1938).
\item[609] See id. at 1047-49.
\item[610] See id. at 1051.
\item[611] See id.
\item[612] Id. at 1051.
\end{footnotes}
X. Right to Emigrate

§ 24. Emigration from the state shall not be prohibited.613

1. Textual Evolution

The right to emigrate from Kentucky was included in the Kentucky Constitution of 1792, which provided: "That emigration from the State shall not be prohibited."614 This provision was adopted verbatim from article IX, section 25 of the 1790 Pennsylvania Bill of Rights.615

Emigration denotes movement from the state, but the draftsmen particularly intended to guaranty migration into the state, or "immigration," to promote expansion of the Commonwealth and its economy.616 Additionally, a large majority of the 1791 convention delegates favored the protection of slavery;617 therefore, this provision protected the rights of migrants to bring slaves into Kentucky for their own use.618 This assisted Kentucky estate holders who were seeking to accumulate and increase their holdings. This provision has remained unchanged through the present constitution.619

2. Judicial Interpretation

Section 24 has not been construed in published decisions.

Y. Prohibition Against Involuntary Servitude

§ 25. Slavery and involuntary servitude in this state are forbidden, except as a punishment for crime, whereof the party shall have been duly convicted.620
1. Textual Evolution

Like its federal counterpart, section 25 of the Kentucky Constitution was drafted in the aftermath of the Civil War. The text is strikingly similar in wording to the thirteenth amendment.\textsuperscript{621} Both the thirteenth amendment and section 25 memorialized the changes in the country's political and social structure and reflect the post-war struggle involving the rights of freed slaves.

Specifically, section 25 prohibited "slavery" and "involuntary servitude" throughout the state of Kentucky and applied to all persons subject to its jurisdiction. It proscribed such practices not only by the state government, but by all private individuals as well.

2. Judicial Interpretation

In \textit{Jefferson County Teachers Association v. Board of Education},\textsuperscript{622} the circuit court enjoined the county's school teachers from participating in a strike.\textsuperscript{623} On appeal, the teachers asserted that the issuance of the injunction constituted a denial of their right to strike and, therefore, imposed a condition of "involuntary servitude" on them.\textsuperscript{624} Citing to decisions of California, New Jersey, and Florida, the Kentucky appeals court ruled that the injunction did not offend section 25. The court stated: "[A]n injunction of the kind before us does not compel performance of personal service against the will of the employee because he can terminate his contract if he so desires."\textsuperscript{625}

Z. Preservation of Individual Liberties

§ 26. To guard against transgressions of the high powers which we have delegated, we declare that everything in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void.\textsuperscript{626}

\textsuperscript{621} The thirteenth amendment states in pertinent part: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST., amend. XIII.
\textsuperscript{622} 463 S.W.2d 627.
\textsuperscript{623} See id. at 628.
\textsuperscript{624} See id. at 630.
\textsuperscript{625} Id.
\textsuperscript{626} KY. CONST. § 26.
1. Textual Evolution

To ensure that governmental powers not encroach on the individual liberties guarantied by the Kentucky Bill of Rights, the drafters, like their federal counterparts, restricted the power of the state government, expressly building a sphere of protection around individual rights. The original constitution stated: "To guard against the high powers which have been delegated, we declare that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate; and that all laws contrary thereto, or contrary to this constitution, shall be void." 627

Except for the insertion of the words "transgressions of," this guaranty has remained unchanged to the present. 628

2. Judicial Interpretation

Section 26 recognizes the Kentucky Bill of Rights as the "supreme law of the Commonwealth." 629 As early as 1874, Kentucky courts had asserted the protective thrust of section 26, refusing to recognize "implied exceptions to the bill of rights." 630 In Commonwealth v. Jones, 631 the court characterized this provision as a "solemn declaration" and pronounced that this provision "is never to be lost sight of, and more especially in cases involving the personal rights of the citizen is it entitled to high consideration." 632 In Jones, the court invoked section 26 in ruling that provisions of the state constitution providing for deprivation of the right to hold public office do not necessarily "cut through the general provisions, nor is the punishment prescribed, whether it be criminal or political, an exception to the bill of rights." 633

Thirty-six years later, in Columbia Trust Co. v. Lincoln Institute, 634 the court ruled that an act, which made the right to operate an industrial school conditional upon public election, violated section 26. Likewise, in Fischer v. Grieb, 635 the court continued to

627 KY. CONST. of 1792, art. XII, § 26.
628 Compare KY. CONST. of 1790, art. XII, § 28 and KY. CONST. of 1799, art. X, § 28 and KY. CONST. of 1850, art. XIII, § 30 with KY. CONST. § 26.
629 See Gatewood, 403 S.W.2d at 718.
630 Commonwealth v. Jones, 73 Ky. (10 Bush) 725, 746 (1874).
631 73 Ky. (10 Bush) 725 (1874).
632 Id. at 747.
633 Id. at 746.
634 129 S.W.2d 113 (Ky. 1910).
635 133 S.W.2d 1139.
invoke the protection of section 26, finding a legislative classification excluding farmers engaged in a nonfarming business from obtaining a "farmers truck" license to be without a reasonable basis and unconstitutional.

CONCLUSION

Interpreting the Kentucky Bill of Rights in the Next Century

As Kentuckians enter the third century of their Bill of Rights, the legal community should pay heightened attention to the rich history embodied in that document. For the past two decades, state courts throughout the nation have looked increasingly to their own constitutions to establish the individual liberties enjoyed by their citizens.\textsuperscript{636} In part, this emphasis on "New Federalism" has been brought about by the increased conservatism of the United States Supreme Court, which has diminished its activity in the area of individual rights at the federal level, often in the name of returning power to the states.\textsuperscript{637} Largely, however, the increased emphasis on independent state constitutional analysis has resulted from the state courts' recognition of the value of such documents in a federal system. Each state constitution reflects a unique heritage. Many of the leading colonies' constitutions (including the first Pennsylvania Constitution, which ultimately influenced that of Kentucky) were drafted in the midst of the American Revolution, a full decade before the United States Constitution was born.\textsuperscript{638} Indeed, the Kentucky Bill of Rights has been shaped and molded carefully by the Kentucky courts over the past 200 years, reflecting Kentucky's


\textsuperscript{638} See W. Adams, supra note 22; Gormley, State Constitutions and Criminal Procedure: A Primer for the 21st Century, 67 Or. L. Rev. 689, 690-91 (1988).
commitment to its own constitution long before state constitutional law came into vogue on a national scale.\textsuperscript{639}

Recent decisions of the Kentucky Supreme Court, including \textit{See v. Commonwealth}\textsuperscript{640} and \textit{Rose v. Council for Better Education}\textsuperscript{641} demonstrate that the present Kentucky Supreme Court has invoked the Kentucky Constitution aggressively to resolve some of the most difficult issues facing the state today. As Kentucky prepares to celebrate the bicentennial of its first constitutional convention, in the year 1991, it must continue to forge its own unique constitutional identity. An identity that Kentuckians, for good reason, continue to don with a sense of vigor and pride.

\textsuperscript{639} See Brennan, \textit{supra} note 636, at 495: 
of late . . . more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased. This is surely an important and highly significant development for our constitutional jurisprudence and for our concept of federalism.

\textit{Id.}\textsuperscript{640} 746 S.W.2d 401 (Ky. 1988).

\textsuperscript{641} 790 S.W.2d 186 (Ky. 1989).
APPENDIX

KENTUCKY BILL OF RIGHTS OF 1792

(Bold type indicates virtually identical provision to corollary section in the 1970 Pennsylvania Bill of Rights, which is referred to parenthetically)

1. That the general, great, and essential principles of liberty and free government may be recognized and established, WE DECLARE that all men when they form a social compact, are equal, and that no man or set of men are entitled to exclusive separate public emoluments or privileges from the community, but in consideration of public services.

2. THAT ALL POWER IS INHERENT IN THE PEOPLE, AND ALL FREE GOVERNMENTS ARE FOUNDED ON THEIR AUTHORITY, AND INSTITUTED FOR THEIR PEACE, SAFETY, AND HAPPINESS. FOR THE ADVANCEMENT OF THOSE ENDS, THEY HAVE AT ALL TIMES AN UNALIENABLE AND INDEFEASIBLE RIGHT TO ALTER, REFORM, OR ABOLISH THEIR GOVERNMENT, IN SUCH MANNER AS THEY MAY THINK PROPER. (See Pa. Const. of 1790, art. IX, § 2.)

3. THAT ALL MEN HAVE A NATURAL AND INDEFEASIBLE RIGHT TO WORSHIP ALMIGHTY GOD ACCORDING TO THE DICTATES OF THEIR OWN CONSCIENCES; THAT NO MAN CAN OF RIGHT BE COMPELLED TO ATTEND, ERECT, OR SUPPORT ANY PLACE OF WORSHIP, OR TO MAINTAIN ANY MINISTRY AGAINST HIS CONSENT; THAT NO HUMAN AUTHORITY CAN, IN ANY CASE WHATEVER, CONTROL OR INTERFERE WITH THE RIGHTS OF CONSCIENCE; AND THAT NO PREFERENCE SHALL EVER BE GIVEN BY LAW TO ANY RELIGIOUS SOCIETIES OR MODES OF WORSHIP. (See Pa. Const. of 1790, art. IX, § 3.)

4. That the civil rights, privileges, or capacities of any citizen shall in nowise be diminished or enlarged on account of his religion.

5. THAT ALL ELECTIONS SHALL BE FREE AND EQUAL. (See Pa. Const. of 1790, art. IX, § 5.)

6. THAT TRIAL BY JURY SHALL BE AS HERETOFORE, AND THE RIGHT THEREOF REMAIN INVOLATE. (See Pa. Const. of 1790, art. IX, § 6.)

7. THAT PRINTING-PRESSES SHALL BE FREE TO EVERY PERSON WHO UNDERTAKES TO EXAMINE THE PROCEEDINGS OF THE LEGISLATURE OR ANY BRANCH OF GOVERNMENT; AND NO LAW SHALL EVER BE MADE TO RESTRAIN THE RIGHT THEREOF; THE FREE COMMUNICATION OF THOUGHTS AND OPINIONS IS ONE OF THE INVALUABLE RIGHTS OF MAN, AND EVERY CITIZEN MAY FREELY SPEAK, WRITE, AND PRINT ON ANY
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subject, being responsible for the abuse of that liberty. (See Pa. Const. of 1790, art. IX, § 7.)

8. In prosecutions for the publications of papers, investigating the official conduct of officers or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have a right to determine the law and the facts under the direction of the court as in other cases. (See Pa. Const. of 1790, art. IX, § 7.)

9. That the people shall be secure in their persons, houses, papers, and possessions from unreasonable searches and seizures; and that no warrant to search any place or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation. (See Pa. Const. of 1790, art. IX, § 7.)

10. That in all criminal prosecutions, the accused hath a right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; that he can not be compelled to give evidence against himself, nor can he be deprived of his life, liberty, or property, unless by the judgement of his peers, or the law of the land. (See Pa. Const. of 1790, art. IX, § 9.)

11. That no person shall, for any indictable offence, be proceeded against criminally by information; except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger, or by leave of the court for oppression or misdemeanor in office. (See Pa. Const. of 1790, art. IX, § 10.)

12. No person shall, for the same offence, be twice put in jeopardy of his life or limb; nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him. (See Pa. Const. of 1790, art. IX, § 10.)

13. That all courts shall be open, and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by the due course of law; and right and justice administered, without sale, denial, or delay. (See Pa. Const. of 1790, art. IX, § 11.)
14. That no power of suspending laws shall be exercised, unless by the Legislature or its authority. (See Pa. Const. of 1790, art. IX, § 12.)

15. That excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted. (See Pa. Const. of 1790, art. IX, § 13.)

16. That all prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it. (See Pa. Const. of 1790, art. IX, § 14.)

17. That the person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison after delivering up his estate for the benefit of his creditors, in such manner as shall be prescribed by law. (See Pa. Const. of 1790, art. IX, § 16.)

18. That no ex post facto law, nor any law impairing contracts, shall be made. (See Pa. Const. of 1790, art. IX, § 17.)

19. That no person shall be attainted of treason or felony by the Legislature. (See Pa. Const. of 1790, art. IX, § 18.)

20. That no attainder shall work corruption of blood, nor except during the life of the offender, forfeiture of estate to the Commonwealth. (See Pa. Const. of 1790, art. IX, § 19.)

21. The estates of such persons as shall destroy their own lives, shall descend or vest as in case of natural death, and if any person shall be killed by casualty, there shall be no forfeiture by reason thereof. (See Pa. Const. of 1790, art. IX, § 19.)

22. That the citizens have a right, in a peaceable manner, to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances or other proper purposes, by petition, address, or remonstrance. (See Pa. Const. of 1790, art. IX, § 20.)

23. The rights of the citizens to bear arms in defence of themselves and the state shall not be questioned. (See Pa. Const. of 1790, art. IX, § 21.)

24. That no standing army shall, in time of peace, be kept up without the consent of the Legislature; and the military shall, in all cases and at all times, be in strict subordination to the civil power. (See Pa. Const. of 1790, art. IX, § 22.)
25. That no soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law. (See Pa. Const. of 1790, art. IX, § 23.)

26. That the Legislature shall not grant any title of nobility or hereditary distinction, nor create any office the appointment of which shall be for a longer time than during good behavior. (See Pa. Const. of 1790, art. IX, § 24.)

27. That emigration from the state shall not be prohibited. (See Pa. Const. of 1790, art. IX, § 25.)

28. To guard against transgressions of the high powers which we have delegated, WE DECLARE that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate; and that all laws contrary thereto, or contrary to this Constitution, shall be void. (See Pa. Const. of 1790, art. IX, § 26.)