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The Evolution of Kentucky's Constitutions: A Comparison of The Original and Second Constitutions¹

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Timing is everything, especially to a developing state. This paper highlights the changes that time required Kentucky to make in order to gain her statehood and then ensure that she would continue to prosper as time passed. Kentucky gained a lot of wisdom during her first fifty-eight years ranging from how to elect our Governor to whom this state should remain loyal to – a question that in 1792 was quite conflicted. Reviewing the two documents that began shaping Kentucky into the state she is now is just one of the ways to appreciate this beautiful and unique Commonwealth. This study is set to compare the first and second constitutions of Kentucky. This examination will place the analysis of these constitutions in the historical context of early America and the founding of Kentucky, as well as the English Common Law tradition that is foundational. This study will also evaluate the significant changes and consistencies as well as the politics of change between the two constitutions.

BACKGROUND OF KENTUCKY HISTORY

In 1792 Kentucky broke away from the state of Virginia and formed its first constitution in order to gain statehood. When approved by the U. S. Congress, Kentucky then became 15th state in the expansion of America. However, what most people do not consider is that Kentucky really had to strive to join the Union; for Kentucky had too many close ties with Virginia to make disengagement an easy task. The most rigorous challenge proved to be the people of Kentucky themselves, for they could not decide the appropriate way to leave Virginia. The populists preferred a separation through Congress – or since that was now impossible, an “unconditional” separation without the consent of Virginia – that would put them in control of the district and enable them to redistribute the land granted by Virginia. The establishments, on the other hand, wanted a “constitutional” separation through Virginia that would

¹ This paper, which won the Abdu Rifai Award at the 2015 KPSA, was sponsored by Dr. Michael Hail.

leave them in power to prevent a partisan redistribution of land.² So what Kentucky really struggled with was land and not the idea of joining the Union.

Kentucky's first Constitutional Convention was held in Danville, Kentucky due to the convenience of the location (for Virginians) from 1784 to 1792. The first constitution was an eighteen-page document carefully crafted and developed to become Kentucky's first constitution.³ Isaac Shelby was elected Kentucky's first Governor and it was no surprise. On May 17, 1792 it was completed and then Kentucky became the 15th state on the first of June.⁴ Electing Isaac Shelby before Kentucky was a state is just one example of the eagerness Kentuckians had for independence. In examining Kentucky's first constitution one can easily see that Virginia and Great Britain heavily influenced the document.⁵ Though interestingly enough, at this time Kentucky was filled with people who were not born inside the state – there were multiple influences ranging from the other 14 states to European countries. But as for Britain's influence, there is only one person who has the sole power (the King of England), and with America the Bill of Rights is discussed in great detail.⁶ This ultimately meant that she was going to have numerous ties to numerous bodies – Virginia who is the mother state, Great Britain, and America. This seems like too many ties for a new state to have, to whom does Kentucky remain completely loyal? One will observe that through each constitution Kentucky has adopted and the changes that come with time, she has always remained devoted to the United States Bill of Rights and the thought of personal freedom that America offers. This loyalty has been proven strong over the years as one will see throughout this paper, for she quickly severed the ties that were holding her back from maturing.

KENTUCKY'S FIRST CONSTITUTION, 1792

Drafted by George Nicholas and mostly adapted from the Pennsylvania constitution of 1790, and with influence from the U.S. Bill of Rights, Kentucky's first constitution proved to be very unique. In Article VIII, Section 7 Kentucky shows its adherence to Virginia for it is stated that the compact with the state of Virginia, subject to such alterations as may be made therein, agreeably to the mode prescribed by the said compact, shall be considered as

² Watlington, Patricia. *The Partisan Spirit: Kentucky Politics, 1779-1792*. New York: Atheneum, 1972.

³ Kleber, John E. *The Kentucky Encyclopedia*. The University Press of Kentucky, 1992.

⁴ Harrison, Lowell H. *Kentucky's Governors*. Lexington: University Press of Kentucky, 2004.

⁵ Wood, Gordon. *The Creation of the American Republic 1776-1787*. New York: W.W. Norton & Co., 1969.

⁶ Kleber, John E. *The Kentucky Encyclopedia*. The University Press of Kentucky, 1992.

part of this Constitution.⁷ In continuity with the colonial powers of Governor under Great Britain, only the Governor had sole executive power – there is no one else sharing the responsibility in 1792. The supreme executive power of this Commonwealth shall be vested in a Governor.⁸ The use of the word “supreme” is the key word showing loyalty to English Common Law and constitutional tradition.

It is now important to note that the ratio for Representatives to Senators is 1 to 4 in this document, and in Article XII, Section 23 the right to bear arms has been enumerated, instead of being combined with another right showing its importance to the state of Kentucky. This is another place where Kentucky proves her allegiance to the United States as well. The age limit also varies from the first to second constitution – the Governor is required to be at least thirty years of age, while in the second constitution the Governor must be at least thirty-five years of age. Residency requirements for the candidates also increased from one constitution to the next, going from two years to six years. An intriguing form of the constitution is the increase in the age limit because Isaac Shelby was forty-two when he became the first Governor, and James Garrard was forty-seven when he became our second Governor. Neither of these men were close to thirty years of age, so why was the age limit increased by five years in 1799? Shelby and Garrard were not the young and ambitious men that would require a need for age limits to be increased; nonetheless, Kentucky would need men of maturity and respectability that the age provision would ensure.

Most importantly though, is the rarity of the selection of Governor. This special constitution has stated that the Governor is to be selected by the Kentucky Electoral College – an election technique completely unique to Kentucky. The goal was to elect our Governor the same way we elected our President – another tie to the American constitution. Unfortunately, this uncommon idea proved to be an issue in 1796 when the Kentucky Electoral College failed to give any of the four candidates for Governor a majority vote, and instead of declaring the recipient of the plurality of votes the winner, conducted a second ballot between the two highest vote getters.⁹ Resulting in the candidate who was originally in second place winning the Gubernatorial election the second time around. This caused such a controversy it became a political issue that a movement for a new constitution resulted. With this being said, this is the main reason why the first constitution only lasted seven years, and only two years after the 1796 Gubernatorial election. This decision caused quite a stir throughout the state and brought the Kentucky Electoral College to

⁷ *The First Constitution of Kentucky, 1792*.

⁸ *The First Constitution of Kentucky, 1792*.

⁹ Clinger, James C. and Michael W. Hail. *Kentucky Government, Politics, and Public Policy*. Lexington: University Press of Kentucky, 2013.

an end with respect to Gubernatorial elections. After this election, it took Kentuckians a little over two years to gather up another constitutional convention and adopt their new constitution.

COMPARISON OF KENTUCKY CONSTITUTIONS

FIRST CONSTITUTION

House elected by citizens to 2 year terms and Senate elected by electors to 4 year terms

Governor elected by electoral college

Governor appoints all constitutional offices with the advice and consent of the KY Senate

No Lieutenant Governor, Speaker of the KY Senate replaces the Governor

Governor can call of special session of the General Assembly and he can adjourn it

Governor has veto power, and a 2/3 vote of both houses is required to over-ride his veto

House can impeach executive, trial by Senate and 2/3 for conviction

Tax and Spending action must be initiated in the House and annual public budget and expenditure report must be published

Article XII provided a bill of rights

Amendments can be done only by convention, and then, either after annual consecutive votes of the citizens, or a 2/3 vote of both House and Senate

Appointed executive branch offices of Secretary of State, State Treasurer, and Attorney General.

SECOND CONSTITUTION

House elected by citizens to 2 year terms and Senate elected by citizens to 4 year terms

Governor directly elected by the citizens

Governor appoints all constitutional offices with the advice and consent of the KY Senate

Lieutenant Governor is elected as is Governor to 4 tear term by citizens

Governor can call of special session of the General Assembly and he can adjourn it

Governor has veto power, and a majority vote of both houses is required to over-ride his veto

House can impeach executive, trial by Senate and 2/3 for conviction

Tax and Spending action must be initiated in the House and annual public budget and expenditure report must be published

Article X provided a bill of rights

Amendments can be done only by convention, and then, either after annual consecutive votes of the citizens

Appointed executive branch offices of Secretary of State, State Treasurer, and Attorney General.

KENTUCKY'S SECOND CONSTITUTION, 1799

After the 1796 gubernatorial controversy, it was concluded that there was a need for a new constitution to resolve some of the kinks that were in the first one. The next Constitutional Convention was held in 1797 and 1798, meeting for just twenty-seven days in the summer of 1799.¹⁰ During this period it was decided that a new position needed to be created, the Kentucky Electoral College needed to be replaced and Kentucky needed to have a more efficient and fair election system. There were to be new age limits specifically for the Governor. Interestingly enough, one will come to notice that most of the changes from the first constitution to the second constitution mainly happen in the executive branch – a unitary sovereignty in the executive like the King of England verses a divisible executive like the American model. The constitution of 1799, however, retained the major features of the original document. Its principal change, reflecting an interest in greater democratic control, was the abolition of the Kentucky Electoral College in favor of direct election, by voice vote, of the Governors and Senators. It created the office of Lieutenant Governor. More power was given to local governments, and the counties became the most significant agencies of the government, responsible for taxation, regulation of business, and patronage. Freed blacks lost the franchise they had since 1792.¹¹ Our second constitution is when we are introduced to the position of Lieutenant Governor. The Lieutenant Governor is to be elected for four years the same way as the Governor, and will now be the Speaker of the Senate; the Lieutenant Governor shall also act as the Governor during an impeachment, death, or when the Governor is absent from the state.¹² The creation of Lieutenant Governor is a further development reflecting republican influence and fragmenting executive power from that inherited from Great Britain. Having a Governor and a Lieutenant Governor is a mirror image of the President and Vice President, and no longer a reflection of the British constitutional system. The Bill of Rights is still included in this constitution as well as the House and Senate elections, which also remained unchanged. Impeachment of the Executive still belongs to the House with a trial by the Senate and 2/3 for conviction. The seat of government is also changed in the second constitution, moving from Danville to Frankfort where the seat has remained. This change shows a break from Virginia since Danville was chosen for the convenience of Virginians'. The need for our third constitution arose from a battle between the two major political parties, the Democrats and the Whigs. The Whigs controlled the governorship, and held the majority in

¹⁰ Clinger, James C. and Michael W. Hail. *Kentucky Government, Politics, and Public Policy*. Lexington: University Press of Kentucky, 2013.

¹¹ Kleber, John E. *The Kentucky Encyclopedia*. Lexington: University Press of Kentucky, 1992.

¹² *The Second Constitution of Kentucky, 1799*.

legislature allowing them to dominate Kentucky through every aspect. The result of the Whig domination was an outcry from Democrats insisting on a new constitution to prevent this from happening again.

CONCLUSION

This study considers the history, and then looks comparatively at the first and second constitutions. Further, this study identifies the major changes and consistencies that occur. The significant finding is that the changes were mainly to the executive branch and they were to result in the weakening of the executive branch, and specifically the office of the Governor. The consistency in these constitutions is found in the separation of powers, institutional design, and the Kentucky Bill of Rights.

The comparison of these two constitutions is particularly helpful in allowing one to see just how special Kentucky is. Electing the Governor using Kentucky's Electoral College is just one of the interesting approaches taken and then changed for the future of this state. It is also not common for a constitution to make a five-year change on a gubernatorial age limit, but it is a change Kentucky made to ensure that the Governor was to remain a respectable and politically viable position. After all, it has been said, "the second most powerful man in the United States, after the President of the United States, is the Governor of Kentucky."¹³ To fully understand this quote you must carefully examine Kentucky's constitutions and history; and there is no better place to begin than a comparison of Kentucky's first and second constitutions to see how gubernatorial power in Kentucky is exceptional. The executive branch underwent the most change over time, allowing for the title of the second most powerful position in the United States to add to Kentucky's uniqueness.

¹³ Clinger, James C. and Michael W. Hail. *Kentucky Government, Politics, and Public Policy*. Lexington: University Press of Kentucky, 2013.

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