

THE KENTUCKY CONSTITUTION



We,
the people

of the Commonwealth of Kentucky,

grateful to Almighty God for

the civil, political and religious liberties we enjoy,

and invoking the continuance

of these blessings,

do ordain and establish

this Constitution.

The
Kentucky
Constitution

Text and History

Aaron J. Siletto

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To Sara and Daniel, with love.

—AJS

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Preface

The Reasons for This Casebook

In January 1977, U.S. Supreme Court Justice William Brennan wrote a famous law review article,¹ in which he encouraged litigants and state courts to consider anew their state constitutions as potentially providing broader protections for individual rights than are available under the U.S. Constitution. Justice Brennan wrote his article after the end of the Warren Court (1953–69), which was noted for its expansive reading of the U.S. Constitution. During the Warren years, there was very little reason for a litigant or state court judge to consider his or her own state constitution when arguing or deciding constitutional issues because the liberal U.S. Supreme Court was seemingly in the business of maximizing the reach and scope of the U.S. Constitution. Over time, state constitutions took a backseat to the federal constitution in usage and utility.

But Justice Brennan foresaw the decisions of the more conservative Burger Court (1969–86) as limiting, or even clawing back, some of the expansive interpretations of the Constitution begun under the Warren Court. For him, this was reason enough for litigants and state court judges to reassess that strategy. He therefore encouraged state courts, in a project later referred to as a “New Federalism,” to expand the scope of the civil rights and liberties safeguarded for their citizens under state constitutions.² Once again, litigants and state court judges began looking to and interpreting the unique features of their own state constitutions, which they rediscovered as founts of enhanced individual rights and protections against government overreach.

This rising tide of state constitutionalism continues today. And lest one think it an emphasis point for only the likes of liberal Justice Brennan, conservative jurists also have been giving state constitutions a larger role in the judicial dialogue between the state and federal courts. Notable conservative jurists like Sixth Circuit Judge Jeffrey Sutton have emphasized the role state constitutions play in American Constitutional Law, encouraging litigants and state court judges to seek answers first under their state charters.³

1. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977).

2. For an interesting discussion of the “New Judicial Federalism Movement” and how it developed in Kentucky, see Jennifer DiGiovanni, *Justice Charles M. Leibson and the Revival of State Constitutional Law: A Microcosm of a Movement*, 86 Ky. L.J. 1009 (1998).

3. See JEFFREY S. SUTTON, *51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW* (2018).

For its part, the Supreme Court of Kentucky has stated that it is “often receptive and interested” in arguments of counsel based on the Kentucky Constitution.⁴ In addition, the Conference of Chief Justices adopted a resolution in 2010 stating in part:

WHEREAS, state constitutions contain different structures of government, unique provisions, and substantive provisions or declarations of rights that are often greater than federally guaranteed individual rights and liberties; and

WHEREAS, being a competent and effective lawyer requires an understanding of both the federal Constitution and state constitutional law; NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices encourages all law schools to offer a course on state constitutional law.

The Kentucky Supreme Court’s encouragement to offer state constitutional arguments, of course, presupposes a familiarity with, and knowledge of, its text. Yet, for many years, none of Kentucky’s three law schools offered a course in Kentucky constitutional law. As a result, Kentucky lawyers have had to learn about the Kentucky Constitution as they go about their practice, usually in a piecemeal fashion, and usually for the first time in response to a motion or argument by opposing counsel. But for the most part, unless and until confronted with such a motion or argument, most Kentucky lawyers have labored under the apparent misperception that our state charter says no more than its federal counterpart. For the litigator, as Judge Sutton has observed, making only a federal constitutional argument when there also is an available state constitutional argument is the equivalent of a basketball player attempting only one of two available free throws with the game on the line.⁵

To help fill this gap in the legal education offered in the Commonwealth, the author (and others) proposed a course in Kentucky constitutional law at the Brandeis School of Law at the University of Louisville. The administration agreed and invited the author to teach the course in the spring of 2019. That act indirectly set the publication of this book in motion.

It did not take long for the author to realize that there was not a casebook or other text on the market suitable for use in a law school course on Kentucky constitutional law. This book was therefore born of necessity. Its principal aim is to present in a systematic way the most important cases that have interpreted the Kentucky Constitution.

Many lawyers avoid state constitutional issues because finding the relevant language in a document as long and complex as the Kentucky Constitution may be a chore. Because so few lawyers have been trained to deal with constitutions that give the text a status at least equal to that of the interpretive case law, many lawyers find that the analytic method for dealing with state constitutions is counterintuitive. Because of the relative scarcity of knowledge about the Commonwealth’s Constitution among the practicing bar, at least when compared to knowledge the average law school graduate has about the U.S. Constitution, the author hopes this book may be of equal value as a

4. *Crutcher v. Commonwealth*, 500 S.W.3d 811, 815 (Ky. 2016).

5. SUTTON, *supra* note 3, at 7.

reference for the practitioner as it may be as a casebook for a law student. More broadly, the author hopes this book also will have value for the non-lawyers of the Commonwealth who are interested in learning more about our state constitution, the structure of our government, and our individual rights and liberties.

This Casebook's Method

Five principles underlie this book's methodology. First and foremost is that the text of the Kentucky Constitution is the primary aid for its proper interpretation. Unlike most constitutional law textbooks that law schools have utilized over the years, in which the focus is primarily upon U.S. Supreme Court decisions to explain constitutional principles and design, this book instead uses the text of the Kentucky Constitution itself as its point of departure. If, as The Great Chief Justice, John Marshall, once famously said in another context, "we must never forget, that it is a constitution we are expounding,"⁶ it is imperative that a student of the Constitution must first be familiar with the text to be explained. Because of the primacy of the text, the Kentucky Constitution is presented at the front of this book.

The second principle is that the reader can understand the Kentucky Constitution better by comparing it with the U.S. Constitution. In some instances, the Supreme Court of Kentucky has interpreted sections of the Kentucky Constitution to be coterminous with the interpretation the Supreme Court of the United States has afforded comparable provisions in the U.S. Constitution. In other instances, the Supreme Court of Kentucky has interpreted Kentucky's charter to afford greater protections for individual liberty—or to place greater restrictions on governmental action—than is the case under the federal charter. Understanding the similarities, but also the philosophical and interpretive differences, between the documents is helpful for shedding light on the Kentucky Constitution's meaning. The notes following the cases in this book therefore will often use a compare-and-contrast approach, with federal constitutional doctrines generally understood by lawyers and upper-level law students alike as a point of departure.

Third, some basic knowledge of Kentucky constitutional law is a benefit to every practitioner in the Commonwealth. The Kentucky Constitution reads like a legislative code, especially when compared to our Nation's charter. This means that the Constitution touches almost every area of legal practice. Whether a lawyer's practice involves real estate or commercial transactions, criminal law, municipal law, or even personal injury and tort law, the Kentucky Constitution has something to say about it. It is hoped, therefore, that the reader will find this book to be a helpful resource, regardless of his or her area of practice.⁷

6. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

7. That said, there is not enough space available in a book of this type to provide a detailed analysis of every part of the Kentucky Constitution. No effort is made in these pages to provide a comprehensive study of the Constitution's treatment of such areas as local (county and city) government, taxation, or corporations. Each of these subjects could provide a basis for a stand-alone book or law school course.

The fourth principle is that a thorough understanding of the separation of powers is an essential key to understanding the Kentucky Constitution's meaning. In fact, some of the best known—and most important—cases in Kentucky constitutional law involve either interbranch conflicts or disputes between officials in the same branch of the government. And as will be fleshed out in further detail, most of the provisions in the Kentucky Constitution involve the separation of powers in some form or fashion—*e.g.*, by separating powers between the branches, by creating exceptions to default separation of powers rules, or by cabining a branch's discretion in the use of its powers. For these reasons, about half of the book is focused on some aspect of the separation of powers and those powers vested in each branch of government.

Finally, as of the date of this writing, notwithstanding the author's contention above that an understanding of Kentucky constitutional law is important to any area of legal practice in the Commonwealth, it is no longer specifically tested on the Kentucky bar examination.⁸ Because it is not a "bar course," it is not necessary that Kentucky constitutional law be taught (as U.S. constitutional law is often taught in the law schools) as a set of black-letter rules to be memorized for later recounting on the bar exam. Rather, due both to the number of formal amendments to the document and to the shifting meanings afforded the document over time by the Commonwealth's high court, the current answer to any question of Kentucky constitutional law may not be the "right" answer for long. It is therefore important to ask the question often, "Did the Court get it right?" Many of the questions following the cases in this book will consider this question, highlighting tensions between various lines of cases and between the cases and the Constitution's text.

This book admittedly rides the wave of a recent resurgence in interest among lawyers around the country in state constitutional law. But unlike most books on state constitutional law, it does not attempt to present a 50-state survey of the field. Its focus is exclusively on the Kentucky Constitution, and therefore is intended for use by the law students and lawyers of Kentucky. Our Commonwealth's charter is exceptional in many respects. If this book better familiarizes the reader with the text and structure of the glorious Kentucky Constitution, it will have been a success.

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Louisville, Kentucky
November 2022

8. See SCR 2.080 (adopting the Uniform Bar Examination for admission to the Kentucky bar).

A Note on Editing

The cases in this book have been edited for length and content. In the text of the cases, an ellipsis shown as three points (...) represents an omission made by the court in its original opinion. An ellipsis shown as three asterisks (* * *) delineates an omission from the opinion made by this book's author.

To provide the full context in which the cases were decided, this book's author has left most of the opinions' discussion of the facts and background of the cases intact. In editing the opinions, most of the omissions from the text have been made in the discussion of any legal issues not relevant to the constitutional issues involved.

For the sake of clarity and readability, when a footnote has been omitted from the text of an opinion, the remaining footnotes in that opinion have been renumbered to eliminate any gaps in numbering.

Finally, to keep the formatting of the opinions consistent in this text, case citations within the opinions have been italicized, even if the citations were underlined in the original opinions.

Acknowledgments

This book would not have been possible without the encouragement and assistance of several people, for whom a word of thanks hardly seems sufficient.

The Kentucky constitutional law course I have taught at the Brandeis School of Law, and therefore this book, would not have happened without J. David Niehaus. We first met as colleagues at the Louisville Metro Public Defender's office. When, at first, I was apprehensive about teaching a law school course in 2019, David (who previously had taught criminal procedure at Brandeis Law) offered to co-teach it with me and show me the ropes. His input into case selection for, and his thoughts about the essential topics to be covered in, the course were instrumental in providing the bedrock on which the course, and thus this book, is built. David also donated a lot of time reading and providing invaluable feedback on several early drafts of this book, for which I am ever grateful. The Kentucky bar will long remember David as counsel for the petitioner in *Batson v. Kentucky*, 476 U.S. 79 (1986), but I am happy to call him a mentor and friend.

Also instrumental in bringing this book to fruition was Brett R. Nolan. Brett and I worked together at the Office of the Kentucky Attorney General—I in the Office of Civil and Environmental Law and he in the Solicitor General's Office. Brett has a wealth of knowledge about the Kentucky Constitution, and our discussions about it have been incredibly helpful to me, proving I am never too old to learn more about the subject. He was kind enough to review this book in draft form and provide helpful feedback. I am a better lawyer for our discussions about the subject of this book, and this book is all the better for Brett's input.

My former Brandeis Law student, Robert E. Ranney, provided helpful research assistance for the essay on Kentucky equal protection standards, when he probably should have been studying for the bar exam instead. Robert, you have my thanks and appreciation.

Thanks also to Professor Luke Milligan at Brandeis Law for his support of the law school's Ordered Liberty Program generally and my teaching Kentucky constitutional law in particular.

Though not a lawyer, this book might not have happened—or, at least, not *when* it happened—without Brandon Tosti. Brandon and I are old college friends, and he definitely is the encourager and optimist in our group. Just when this book started to feel like the proverbial boulder I was pushing uphill, Brandon succeeded in publishing his own book in 2021. Brandon led by example, showed me it could be done even while

juggling the responsibilities of work and family, and provided endless encouragement to me as I completed this project. Thank you, brother!

I would like to thank Kelly Stephens, the Clerk of the Supreme Court of Kentucky, for assisting me in obtaining permission to use the photographs of the several Justices' portraits that appear in this book, from the Court, which owns the portraits, and the artists who created them. Thank you to Justices Scott and Venters for permission to use their likenesses, and to artists John Michael Carter and Stephen Sawyer for permission to reproduce their impressive artwork. And I also would like to thank Greg Woosley, general counsel for the Legislative Research Commission, who facilitated me obtaining the LRC's permission to include a photograph of the Kenton plaque in this book.

I would be remiss if I did not also acknowledge the confidence placed in me by the team at Carolina Academic Press. Everyone at CAP has been wonderful to work with, and this book is a reality thanks to them.

Finally, and most importantly, I owe a huge debt of thanks to my beloved wife, Sara. You are a supporter and encourager extraordinaire. Thank you for never complaining about becoming an "author's widow" as I worked long hours on this project, and for uplifting and cheering me on throughout the process. You believed in me and never doubted; you leaven me. I love you more than words can say.

About the Author

AARON J. SILLETTO is an Assistant Attorney General in the Office of the Kentucky Attorney General and an Adjunct Professor at the University of Louisville Brandeis School of Law, where he has taught a course in Kentucky constitutional law since 2019. In two decades of practicing law as a member of the Kentucky bar, Aaron has litigated both civil and criminal cases in the state and federal trial and appellate courts, often involving issues of state constitutional law. He has presented on trial practice and the Kentucky Constitution at seminars and continuing legal education courses, and he is the recipient of numerous accolades from his peers including selection to *Kentucky Super Lawyers*, a “Top Lawyer” rating from *Louisville Magazine*, inclusion in *The Best Lawyers in America*, and an AV Preeminent rating from Martindale Hubbell. Aaron lives in Louisville, Kentucky, with his wife and son.

