

A Constitutional Crisis:
The Kentucky Court of Appeals Schism,
1824-1826

by

Sarah E. Nudelman

Department of History
Duke University, Durham, NC

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**For my mother,
My greatest mentor and best friend**

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A judicial anarchy ensued and both parties appealed to, the only ultimate arbiter of such a conflict, the people at the polls. Here a great civil battle was to be fought; a battle to which the constitution of Kentucky was the stake, and on the issue of which that fundamental law was either to triumph or to fall, perhaps forever.

- George Robertson¹

¹ George Robertson, *A Biographical Sketch of the Hon. John Boyle: In an Introductory Lecture to the Law Class of Transylvania* (Frankfort: A. G. Hodges, Printer, 1838), 15.

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Key Terms and Concepts

“The People”

These two words—“the people”—captivated eighteenth-century Western thought and empowered the American states to form a national republic in 1787 with the general populace as sovereign. When the Kentucky judicial schism began in the winter of 1825, the parties involved appealed to “the people” for aid. This term had a tangible definition in early nineteenth-century Kentucky. “The people” referred to citizens: White adult males.² This population believed that, and behaved as if, they were sovereign.

Although this criterion is discriminatory by modern standards, in the early 1800s it appeared extremely egalitarian and progressive. Other states enforced property requirements, thereby disqualifying a majority of White men in addition to all Blacks, Native Americans, and females. Women were labeled dependents (treated under the law similarly to children) and slaves were referred to as chattel. In contrast, “the people” constituted an independent populace; a feature essential for a citizenry who had recently declared their freedom from monarchical oppression. In deference to this historical period, this thesis will use the term “the people” in a nineteenth-century context and use “he” to refer to a citizen in general.

The Re-organizing Act

My thesis revolves around a controversial Kentucky law from 1824 entitled “*An Act to Repeal the Law Organizing the Court of Appeals and to Re-organize a Court of Appeals.*” I refer to it as the “Re-organizing Act,” a shorthand description used by many newspapers of the time. However, other scholars and some primary sources use the term the “Reorganization Act” to address it. All three titles refer to the same law.

² Kent. Const. art. II, § 8 in Old Kentuckian [pseud.], *Liberty Saved* (Louisville: William Tanner, 1825), 12.

The Re-organizing Act disbanded the Kentucky Court of Appeals (the highest bench of the state judiciary) and replaced it with a substitute court. But the “dismissed” justices contested the legitimacy of this legislation. As a result, a two-year court schism involving the original Kentucky Court of Appeals and the new one installed by state legislature ensued from 1824-1826.

The Old Court and New Court Parties

Kentucky politicians, lawyers, and citizens alike divided on the basis of their affiliation with one of the two courts. Consequently, the new political groups earned the titles the Old Court Party or New Court Party, respectively. These new names represented and reflected the change in the debate. Specifically, the single-issue parties formed as a direct response to the Re-organizing Act.

Before the judicial crisis, however, political divisions existed in Kentucky based on economic policies. Technically, only one national party existed from 1817-1824: the Democratic-Republicans. In Kentucky, though, a combination of events, including economic decline after the War of 1812, land speculation, land devaluation, and the nationwide Panic of 1819 created two economic-based state factions. In its simplest terms, the groups reflected the state demographics of debtors versus creditors. Kentucky politicians who advocated for relief legislation to alleviate desperate debtors unable to make their payments earned the label Relief men. Alternatively, statesmen against government intervention constituted the Anti-Relief, or Oppositionist, Party. From 1817-1824, the Relief Party held the majority in both houses of the legislature.³ The political

³ Robert Wickliffe, Esq., *An Expose of the Relief System, By Protest and Resolutions, Offered By Robert Wickliffe, Esq. but Refused to be Printed, By a Vote Of the House of Representatives. To Which is Added, the Yeas and Nays on the Motion to Print Said Protest* (Frankfort: J.H. Holeman, Printer for the State, 1824), 26.

makeup shifted after the passage of the Re-organizing Act in December 1824. In 1825, candidates for office ran as either Old Court or New Court men, and at that time the Old Court Party gained the majority in the House.

I purposely avoid interchanging the name Relief for the New Court Party or Anti-Relief for the Old Court Party because I distinguish between the two sets of debates: economic versus constitutionalism. The new labels of Old Court and New Court Parties had a particular significance to the judicial controversy and Kentucky politics in general. They reflected and symbolized a clear shift in the essence of debate. My conclusion diverges from previous scholars, who frame the 1824-1826 court schism within a broader issue of relief.

Additionally, I chose to use the labels “Old Court” and “New Court” parties because this provides the most accurate and objective description. However, during the actual schism some individuals referred to opponents in less neutral terms, such as the “Lawyer Faction” or the “Court Party” (referring to the pro-judicial independence stance) for the Old Court Party and “Judge-breakers” or “Deshaites” (a derogatory reference to Governor Desha) for the New Court Party.⁴

⁴ “Public Opinion,” *Argus of Western America*, April 20, 1825. “To the People of Kentucky.—No. 1,” *The Spirit of '76*, March 10, 1826, 5.

Timeline of Events

1820

December 25: The Kentucky legislature passes an “*Act to Regulate Endorsements on Execution*,” a debtor relief measure, to alleviate financial burdens caused by the Panic of 1819. This particular law grants the right to replevy judgments on contracts for two years. In essence, it extends the grace period for repaying creditors from three months to two years. The law is part of a series of debtor relief sanctions known as “the relief system.”⁵

1823

October 11: The Court of Appeals rules conjointly in *Blair v. Williams* and *Lapsley v. Brashears and Barr, et e converso* that the “*Act to Regulate Endorsements on Execution*” from 1820 violates the United States and Kentucky Constitutions with regard to contract obligations. The judges render the law unconstitutional and therefore void.⁶

November 4: Governor John Adair sends a message to the House of Representatives condemning the Court of Appeals’ decisions in *Blair* and *Lapsley*.

November 5: The House of Representatives Relief Party leader John Rowan proposes resolutions against the Court of Appeals’ rulings.⁷

“Resolved by the Legislature of the Commonwealth of Kentucky. That they do most solemnly protest against the doctrines promulgated in that decision, as ruinous in their practical effects to the good people of this commonwealth, and subversive of their dearest and most invaluable political rights.”⁸

December 4: The minority party leader in the House, George Robertson delivers a speech supporting the Court of Appeals’ ruling and protesting Rowan’s proposed resolutions.⁹

December 10: The House of Representatives passes Rowan’s resolutions condemning the rulings. However, the Senate rejects the resolutions.¹⁰

⁵ *Senate Journal*, 29th Sess., 1820, 250-255. Robertson, *A Biographical Sketch of the Hon. John Boyle: In an Introductory Lecture to the Law Class of Transylvania*, 14.

⁶ *Blair, &c. v. Williams and Lapsley v. Brashears, &c.*, 14 KY 47 (1823), in LexisNexis, http://proxy.lib.duke.edu:2105/us/lnacademic/results/docview/docview.do?docLinkInd=true&risb=21_T9154611372&format=GNBFI&sort=DATE.A.H&startDocNo=1&resultsUrlKey=29_T9154611311&cisb=22_T9154611310&treeMax=true&treeWidth=0&csi=7240&docNo=3 (accessed March 16, 2009).

⁷ A resolution is: “A formal expression of opinion, will, or intent voted by an official body or assembled group.” “Resolution,” Merriam-Webster Online, www.webster.com (accessed on November 17, 2009).

⁸ George Robertson, *Speech from December 4, 1823*, 15.

⁹ George Robertson, *Scrap Book on Law and Politics, Men and Times* (Lexington: A.W. Elder, 1855), 49.

¹⁰ Robertson, *Scrap Book on Law and Politics, Men and Times*, 50. Arndt M. Stickles, *The Critical Court Struggle in Kentucky, 1819-1829* (Bloomington: Graduate Council, Indiana University, 1929), 39.

1824

May: Relief candidate Joseph Desha is elected Governor of Kentucky.¹¹

November 1: First day of session for the state General Assembly.¹²

The General Assembly receives a message from Governor Desha requesting that it “reorganize” the state Court of Appeals.¹³

November 19: The House forms a committee to investigate if there are grounds for impeaching the judges.¹⁴

November 25: John Rowan, on behalf of the House committee, reports that the judges are *not* guilty of misconduct, and therefore the House will not pursue impeachment.

December 9: The justices from the Court of Appeals write the House defending their right to render the contested decisions.¹⁵

December 9: The Senate passes “*An Act to Repeal the Law Organizing the Court of Appeals and to Re-organize a Court of Appeals.*” It will void the original 1792 statute establishing the current Court of Appeals and will create a new Court of Appeals.¹⁶

December 20: The House of Representatives receives the bill from Senate for removal by address of all three justices, John Boyle, William Owsley, and Benjamin Mills. This would require that the legislature find reasonable cause for removal that does not involve misconduct and then the governor would be authorized to replace the individual. The House fails to acquire the necessary two-thirds affirmative vote to pass the bill for removal by address.¹⁷

December 20: Rowan proposes a resolution defending the legislature’s power to remove judges for erred rulings. The resolution includes a thirty-seven page preamble.

The proposed resolution is entitled: “*A Resolution Vindicating the constitutionality of the Replevin Laws, and the right of the Legislature to remove Judges for error of opinion; in reply to the response of the Judges of the Court of Appeals.*”¹⁸

¹¹ Based on the election rules established by the Kentucky Constitution of 1799, it appears that the governor was elected on the first Monday in May. George Morgan Chinn, *Kentucky Settlement and Statehood 1750-1800* (Frankfort: The Kentucky Historical Society, 1975), 574.

¹² *House Journal*, 33rd Sess., November 1, 1824-January 12, 1825, 1.

¹³ *House Journal*, 33rd Sess., 8-12.

¹⁴ Kentucky, General Assembly, House of Representatives, *Report of the committee appointed to enquire the official conduct of the Judges of the court of Appeals*, November 19, 1824.

¹⁵ *House Journal*, 33rd Sess., 311.

¹⁶ Robertson, *Scrap Book on Law and Politics, Men and Times*, 75.

¹⁷ *House Journal*, 33rd Sess., 436.

¹⁸ *House Journal*, 33rd Sess., 439.

December 21: The House of Representatives receives a bill from the Senate entitled “*An Act to Repeal the Law Organizing the Court of Appeals and to Re-organize a Court of Appeals.*” Discussions about possible amendments to the bill continue for the next two days.¹⁹

December 23: House Representative George Robertson delivers a speech to the House against the bill to reorganize the Court of Appeals.²⁰

December 24: The House passes “*An Act to Repeal the Law Organizing the Court of Appeals and to Re-organize a Court of Appeals*” (the Re-organizing Act) and Governor Desha signs it into law.

1825

January 5: George Robertson presents “*An Act to Repeal an Act to Organize the Court of Appeals and to Re-organize a Court of Appeals—and Praying the Legislature to Reconsider the Same at its Present Session.*”²¹

January 8: The legislature passes the preamble and resolution in relation to the decisions of the Court of Appeals (petitioned by John Rowan).²²

January 10: Governor Desha appoints and the Senate confirms William Barry, James Haggin, John Trimble, and Benjamin Patton as justices for the new Court of Appeals (the “New Court”).

January 11: The General Assembly adjourns.

January 27: The former Court of Appeals justices open court to announce the unconstitutionality of the Re-organizing Act.

February 5: The original justices issue a manifesto declaring themselves the only legitimate Court of Appeals.

August 1-3: The annual state election occurs. The Old Court Party gains a majority in the House of Representatives, but in the Senate, the New Court Party retains its advantage.

November: The new Court of Appeals (“New Court”) stops hearing cases.

November 22: House passes a resolution to investigate how to ensure the Old Court of Appeals can conduct its duties without obstacles.

¹⁹ *House Journal*, 33rd Sess., 440.

²⁰ Robertson, *Scrap Book on Law and Politics, Men and Times*, 75.

²¹ *House Journal*, 33rd Sess., 534.

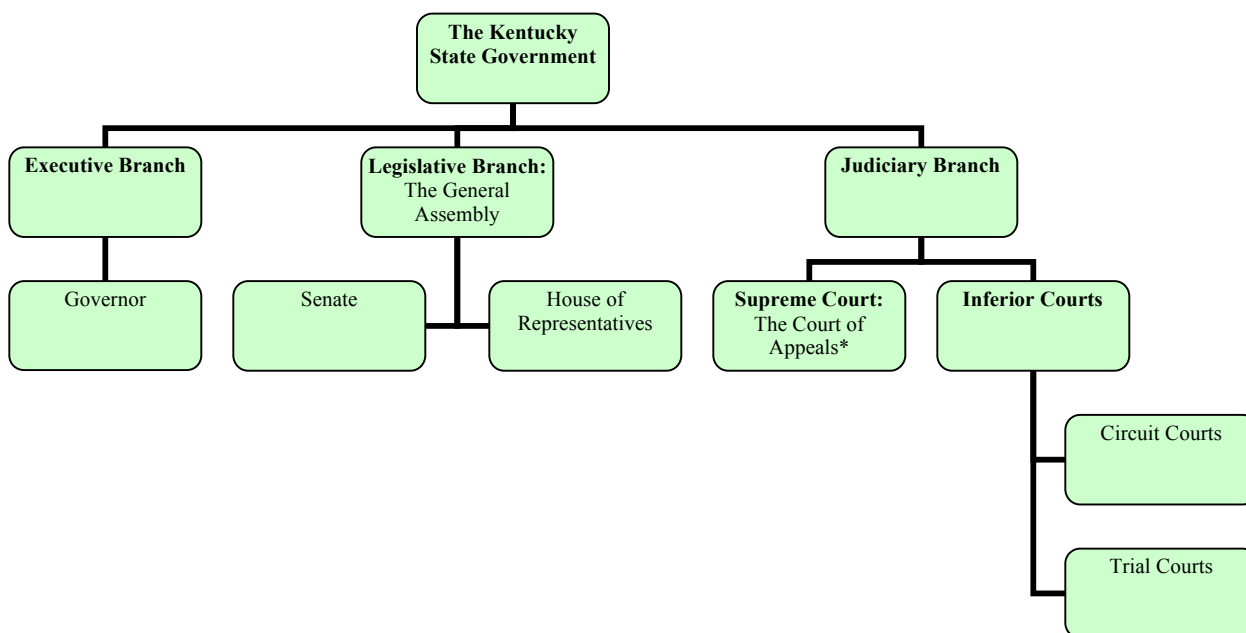
²² *House Journal*, 33rd Sess., 566.

1826

August 6-8: Annual state election. The Old Court Party earns a majority in both houses of the legislature.

December 30: The Kentucky legislature overrides the governor's veto and passes the "*Act to Remove the Unconstitutional Obstructions Which Have Been Thrown in the Way of the Court of Appeals.*" This law successfully repeals the Reorganizing Act and affirms the original Court of Appeals as the true judicial power.

Organizational Chart of the Kentucky State Government²³



*The judicial schism occurred at the state supreme court level, consisting of the original Court of Appeals (Old Court) and the new Court of Appeals (New Court) established in 1824.

²³ Illustration created by author

Introduction

“United We Stand, Divided We Fall”²⁴
-the Motto on the State Seal of Kentucky

Each culture has a genesis story which glorifies its own creation. America’s version describes the revolutionary development of popular rule institutionalized through the written constitution. The heroes, our Founding Fathers, espoused and sanctioned the right of individuals to self-govern within a republican democracy. In this idealized conception, a well-established national government seamlessly takes root. The individual states follow accordingly. The people rule, a stable government forms, and the pursuit of happiness begins.

But historical analysis reveals a more complicated reality. The young states struggled to preserve their fragile republican institutions and overcome obstacles inherent in transforming abstractions into actions. The constitution served as the blueprint for government infrastructure, a nexus of political ideology, and an emblem of popular rule. While it outlined well-conceived guidelines for administering good governance, it by no means provided an instruction manual. Imprecise language allowed reasonable flexibility in the implementation process, but also fostered confusion due to conflicting interpretations. When unanticipated situations arose, people grappled with how to make the constitution correspond with and substantiate their own political philosophies, ideologies, and agendas.

This thesis explores one such incident that occurred in Kentucky in the 1820s. It merits historical inquiry as a case study for understanding how early Americans reconciled discrepancies within the constitution and disparities of political ideology. My

²⁴ Chinn, 503.

topic specifically addresses the state Court of Appeals schism from 1824-1826.²⁵ For two years, dueling judicial bodies, referred to as the Old Court and New Court, contended for the title as the legitimate Court of Appeals. Initially, the controversy developed because of a disagreement over judicial versus legislative authority. Two primary questions stood at issue. First, did the judiciary have the power to rule a legislative act unconstitutional? Second, could the legislature dissolve a component of the judiciary and create its replacement? The people who took part in the debate consulted the state constitution to answer these questions, but the text could be construed to support either side.

Similar scenarios occurred in other states where the legislature attempted to remove justices for “improper” opinions. But, they resolved themselves without provoking a constitutional crisis.²⁶ In contrast, Kentucky’s inter-branch conflict was so severe that newspapers reported and politicians feared the state was on the verge of civil war.²⁷

Despite the obscurity of this historical event and its narrow time frame, studying it offers new insight about the complex and paradoxical relationship between judicial review and popular constitutionalism.²⁸ In my research, I discovered that before the schism, Kentuckians held two different conceptions of popular sovereignty. One

²⁵ Other authors refer to it as the Kentucky Judicial Controversy, the Old Court-New Court Controversy, or the Kentucky Court Struggle.

²⁶ Laura F. Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: The University of North Carolina Press, 2009), 267.

²⁷ Example in Matthew G. Schoenbachler, *Murder and Madness: The Myth of the Kentucky Tragedy* (Lexington: The University Press of Kentucky, 2009), 116.

²⁸ Judicial review is the right of the court to determine if a law or executive action is constitutional. If not, the judiciary can nullify it. Popular constitutionalism, according to Larry Kramer in his book, *The People Themselves: Popular Constitutionalism and Judicial Review*, implies that the people are the ultimate interpreters and enforcers of the constitution. Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford, Oxford University Press, 2004), 8.

involved the living citizens of the day, while the other defined the people as a static force embodied in and articulated by the constitution. Yet, during the actual crisis, both courts, and their endorsing political parties, advocated for a direct form of popular constitutionalism, involving the voting Kentuckian population.

I. Background Information

My thesis differs from previous scholarship regarding the relationship between the court schism and Kentucky's economic situation. I separate the financial issues from the constitutional ones, while other historians describe the judicial crisis as part of a broader debtor relief "war."²⁹ Therefore, I have provided background information on the state economy to contextualize issues about relief legislation that appear in Chapter 1.

After the Revolution, Kentucky (at that point still a territory) experienced a surge of newcomers looking for land. Virginia, which had assumed ownership over the region, encouraged this migration by granting land warrants as compensation to Revolutionary War veterans.³⁰ Hunger for property created an influx of settlers, but left in its wake an economic crisis for these new Kentucky residents. Over-speculation in the 1800s-1810s caused significant depreciation of land value. Since many Kentuckians depended on the profits of their land for income, these citizens experienced substantial economic hardship.³¹

²⁹ Schoenbachler, "The Origins of Jacksonian Politics: Central Kentucky, 1790-1840." (PhD diss., University of Kentucky, 1996), 150, in the Dissertations & Theses: Full Text, <http://proquest.umi.com/pqdweb?index=1&did=742660431&SrchMode=2&sid=1&Fmt=2&VInst=PROD&VType=PQD&RQT=309&VName=PQD&TS=1272116381&clientId=15020> (accessed September 9, 2009).

³⁰ Chinn, 39.

³¹ *Green v. Biddle* 21 U.S. 1. (1823) in Lexis Nexis, http://proxy.lib.duke.edu:2105/us/lnacademic/results/docview/docview.do?docLinkInd=true&risb=21_T91

Concurrently, on a national level, the War of 1812 and its financial ramifications compounded the economic downturn in Kentucky. State rights activists who supported a decentralized government encouraged the formation of state banks, such as the Bank of the Commonwealth of Kentucky. When war broke out with Britain in 1812, the states were forced to finance the expensive military operation. But the Kentucky Bank of the Commonwealth lacked actual cash to continue funding the effort. As a result, it began printing more bank notes; creating inflation and essentially worthless money. As creditors from the east coast began calling in loans causing the Panic of 1819, many Kentuckians lacked the monetary resources to pay their debts.³²

In response, the legislature enacted a series of relief laws beginning in the late 1810s. These ranged from abolishing imprisonment for debt to extending repayment periods. Still, for some debtors the sanctioned measures remained insufficient. As a local newspaper charged, “the poor man, whose means are small, who has no property to pledge, no weighty friends to uphold him, can derive no benefit from a replevy law.”³³ While many legislators responded to these desperate pleas through additional relief legislation, others upheld a noninterventionist attitude, arguing that the natural economic cycle would independently resolve this crisis.³⁴

[73888136&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T9173888139&cisb=22_T9173888138&treeMax=true&treeWidth=0&csi=6443&docNo=1](#) (accessed on November 19, 2009).

³² Stickles, 16.

³³ *Western Monitor*, May 30, 1820 in Matthew G. Schoenbachler, “The Origins of Jacksonian Politics: Central Kentucky, 1790-1840,” 153.

Replevy or replevin means the recovery by a person of goods or chattels claimed to be wrongfully taken or detained upon the person’s giving security to try the matter in court and return the goods if defeated in the action or on his promise to test the matter in court and give the goods up again if defeated. Jean L. McKechnie, ed., “Replevin” and “Replevy,” *Webster’s New Twentieth Century Dictionary of the English Language Unabridged*, 2nd Ed. Cleveland: The World Publishing Company, 1960.

³⁴ Schoenbachler, “The Origins of Jacksonian Politics: Central Kentucky, 1790-1840,” 157.

Consequently, two political factions developed: those in favor of government aid, known as the “Relief Party,” and those against it, called the “Anti-Relief Party” or “Oppositionists.” The Relief Party retained the majority from 1817 through 1824.³⁵ On December 25, 1820, it passed a debtor relief law entitled “*An Act to Regulate Endorsements on Execution.*” The constitutionality of this legislation went before the Kentucky Court of Appeals in November 1823.³⁶ The results of that ruling sparked the topic of this thesis: the Kentucky judicial crisis.

II. Historiography

Few scholars have written on this topic. Arndt Stickles presents the only complete account. In his book, *The Critical Court Struggle in Kentucky, 1819-1829* (published in 1929), Stickles provides a thorough chronology of events explaining the economic, social, and political factors involved. Unfortunately, he sometimes presents factual discrepancies or uses imprecise language. Stickles concludes that “the people” (through the legislature) resolved the crisis.³⁷

My thesis contends that Kentuckians perceived “the people” held the power to end the controversy and that their votes directly affected policy. But I propose that the New Court justices ultimately stopped the schism. They voluntarily disbanded in deference to the people’s wishes.

Matthew Schoenbachler and Frank Mathias also studied the court schism. Both authors assume it was merely a facet of a larger single-issue debate on economic relief. Additionally, they identify the New Court Party as a precursor to Jacksonian Democracy

³⁵ Wickliffe, 26.

³⁶ *Blair v. Williams* and *Lapsley v. Brashear* (1823).

³⁷ Stickles, 117.

and Populism, respectively.³⁸ In Schoenbachler's most recent book *Murder and Madness: The Myth of the Kentucky Tragedy* (published 2009), he introduces the Old Court-New Court Controversy to contextualize the murder of New Court politician Solomon Sharp. Schoenbachler changes his position from his previous work and now suggests the judicial controversy involved a separate type of politics centered on constitutional issues.³⁹ His latest interpretation supports the conclusion I came to independently based on analysis of the primary documents.

My thesis contends that while having been spurred on by a debtor relief issue, the crisis evolved into an independent debate regarding American ideals of democratic governance, through examining, interpreting, and reaffirming the state and US constitutions. My work analyzes the actual constitutional issues and political philosophy professed. To this extent, it contributes to broader legal and political scholarship. Specifically, it addresses the role popular constitutionalism served to resolve the Kentucky court crisis.

Larry Kramer's book *The People Themselves: Popular Constitutionalism and Judicial Review* characterizes "the people" as a dynamic body actively overseeing its government infrastructure and engaged in interpreting the constitution. My thesis offers additional evidence for Kramer's argument about popular constitutionalism. But, my analysis provides an example Kramer does not articulate: judicial review sanctioned by popular constitutionalism.

³⁸ Jacksonian Democracy is the term referred to politics under Jackson and his successors, which promoted equal participation in government and expanded voting to include all White males, rather than property owners. Populism was a political movement that advocated for ordinary people's need over that of the elites. Frank F. Mathias, "The Relief and Court Struggle: Half Way House to Populism." *Register of the Kentucky Historical Society* (1973): 154. Schoenbachler, Abstract of Dissertation in "The Origins of Jacksonian Politics: Central Kentucky, 1790-1840."

³⁹ Schoenbachler, *Murder and Madness: The Myth of the Kentucky Tragedy*, 103.

III. Analysis of Sources

My thesis makes extensive use of primary sources, including Kentucky newspapers, pamphlets, political speeches, legislative journals, statutes, and court cases.⁴⁰ The limited scholarship about the schism enabled me to study the topic without preconceptions, but has challenged me to discover, distill, and contextualize material with minimal guidance.

Local newspapers proved to be an excellent resource because they reported on events as well as published editorials. This served a dual function: to learn about the relevant occurrences and ascertain what arguments, phrases, and information political activists valued. The newspapers reflected cultural norms, while simultaneously shaping the course of events by how they presented or omitted information. Amos Kendall, the state printer in 1824 and editor of the *Argus of Western America* (*Argus*), calculated that there were twenty-five newspapers in Kentucky by the spring of 1824. I focused on four, the *Argus of Western America*, *Kentucky Reporter*, *The Spirit of '76*, and *The Patriot*. These newspapers were prominent during the crisis, offered varying political viewpoints, and were accessible to me as a researcher nearly 200 years later.

The *Argus* and *Kentucky Reporter* circulated before the schism unfolded.⁴¹ Prior to this crisis, they published copies of recent state and federal legislation, official court rulings, and synopses on foreign affairs.⁴² During the court crisis, they presented opinion pieces on the judicial controversy highlighting their own political viewpoints. The

⁴⁰ The speeches were often found in pamphlet form or in the newspapers. These were predominately speeches made on the floor of the General Assembly.

⁴¹ The *Kentucky Reporter* was formed in 1807, and the *Argus* was in publication by at least 1820. Thomas D. Clark, *A History of Kentucky* (New York: Prentice-Hall, Inc, 1927), 345.

⁴² Copies were usually printed a few weeks after the law was enacted. *Argus of Western America*, February 16, 1825 and April 20, 1825.

Frankfort-based *Argus* sided with the New Court Party (understandably given that the majority party that created the New Court appointed Kendall as the state printer). The *Kentucky Reporter* from Lexington, on the other hand, skewed its information to favor the Old Court Party. The *Reporter* selectively chose to publish speeches by conservative leaders, including Robert Wickliffe and Chilton Allen. Additionally, it resorted to inflammatory name-calling to disparage the New Court Party.⁴³

Newspapers during the early nineteenth-century typically had a political bent. Many were formed to endorse a specific candidate or counteract another newspaper.⁴⁴ In fact, both *The Spirit of '76* and *The Patriot* were established in early 1826 as a direct consequence of the schism. On February 22, 1826, William Tanner published *The Patriot's* inaugural issue.⁴⁵ Although it advocated for a New Court Party agenda (like the *Argus*), *The Patriot* advanced a minority opinion within the party: compromise. During the 1825 legislative session, some New Court politicians had begun proposing various compromises between the courts. In addition to issues of policy, the two pro-New Court papers differed significantly because the *Patriot* wrote exclusively on the court schism.

Less than two weeks after the *Patriot* formed, John Marshall printed the first series of *The Spirit of '76*, a conservative paper endorsing the Old Court Party.⁴⁶ The *Spirit* professed that, “We will, Fellow Citizens, discuss this constitutional question, and endeavour [*sic*] to free your minds from the delusion and misrepresentation and

⁴³ *Kentucky Reporter* in Schoenbachler, “The Origins of Jacksonian Politics: Central Kentucky, 1790-1840,” 199.

⁴⁴ Herndon J. Evans, *The Newspaper Press in Kentucky* (Lexington: The University Press of Kentucky, 1976), 9.

⁴⁵ *The Patriot*, March 20, 1826, 58.

⁴⁶ *The Patriot*, March 20, 1826, 63. The *Patriot* mentions the *Spirit of '76* became a “public newspaper,” the wording of which leaves some ambiguity about whether it was a private paper before. However, the only copies of the *Spirit of '76* begin on March 10, 1826 suggesting that by public the *Patriot* just meant circulating newspaper. Stickles, 98.

sophistry.”⁴⁷ The *Spirit* initially stated it was responding to the biased coverage by *Argus*, but its main focus was attacking the compromise that the *Patriot* endorsed.⁴⁸ For the next five months, the *Spirit* and *Patriot* battled to win the favor of Kentuckians and persuade their constituents to vote for the paper’s chosen party. Both newspapers stopped publishing shortly before the pivotal August election. *The Patriot* printed its final issue on July 31, 1826 and *The Spirit* ended on August 4, 1826.⁴⁹ The polls opened on August 6.

As blatant campaign literature, *The Patriot* and *The Spirit of '76* provide a rich source on political theories, party tactics, and prevailing ideology. They illustrate what political activists professed, which may or may not conform to reality. Pamphlets distributed by both parties are subject to the same criticism. All these sources have strong biases, since their objective was to sway public opinion.

Legislation, speeches, and writings by political leaders involved in the Old Court-New Court controversy served as another major source. These men shaped the content and direction of the crisis through their actions and eloquent articulation of political theory. In this capacity, they were both statesmen as well as political thinkers.

Their passionate insight stemmed from an intimate knowledge about the founding of their government and constitution. Kentucky achieved statehood in 1792, and ratified a revised version of its constitution in 1799.⁵⁰ This second constitutional convention occurred only twenty-five years before the court crisis—and within many of the key Old

⁴⁷ *The Spirit of '76*, March 10, 1826, 3.

⁴⁸ *The Spirit of '76*, March 10, 1826, 4.

⁴⁹ Stickles, 98. *The Spirit of '76* resumed printing in December 1826, an appropriate time since in December the legislature drafted and passed a law to repeal the Re-organizing Act.

⁵⁰ Kentucky, General Assembly, Legislative Research Commission, *Text of the Kentucky Constitutions of 1792, 1799 and 1850*. Frankfort: 1965.

Court and New Court leaders' lifetimes. Constitutional issues, therefore, were very near and dear to them. Legislative supremacy (similar to the British Parliament), pseudo-aristocratic rule (by the merchant and creditor class), or anarchy appeared as viable and frightening threats, especially since the Revolutionary War remained a recent memory.⁵¹

IV. Purpose of Thesis and Chapter Synopses

On its most basic level, this thesis aims to answer why the Kentucky court schism occurred and how it was resolved. In addressing these two questions, the thesis explains the constitutional dimensions behind the cause and solution. Namely, different interpretations of the state constitution led some individuals to believe the legislature had the right to disband the Court of Appeals, while others upheld it did not. Consequently, two separate courts (the original Court of Appeals and the one established by the legislature) declared themselves the legitimate judicial body. At this juncture, politicians presented their arguments to the sovereign—the Kentucky citizens themselves—who would determine the ultimate verdict. This thesis illustrates that political leaders facilitated popular constitutionalism. It contributes to scholarship in this field by providing a unique scenario when all the branches of government directly appealed to the people's constitutional powers simultaneously.

My thesis presents the events of the schism in a sequential fashion, but at times steps out of this chronology to delve into the political theories and ideologies underlying actual facts and events. This approach allows me to present, analyze, and contextualize the arguments holistically. As a result, this thesis provides an original study on political

⁵¹ Kramer, 54.

ideology, and specifically the role of the constitution, in early American history that had a real rather than just theoretical application.

Chapter 1 explains why the schism occurred through an analytical narrative. It first identifies the trigger of the controversy: two cases that went before the Court of Appeals in 1823. The remainder of the chapter chronicles the steps the legislative body took over the following year to remove the justices for their “erred” decision, culminating with the Re-organizing Act. During the two legislative sessions, constitutional arguments proposed by those condoning the justices as well as condemning them surfaced within legislation and political speeches. This chapter analyzes those arguments to understand the ideological issues underpinning the government officials’ actions. In doing so, Chapter 1 demonstrates the fundamental shift in the debate to constitutional matters.

Chapter 2 diverges from the chronological narrative in order to delve into the specific constitutional arguments circulated to the public by the two political parties, the Old Court and New Court parties, during the two-year court schism from 1825-1826. Issues are presented thematically to study the different conceptions of republican government. The chapter describes and analyzes the parties’ competing notions about republicanism, popular sovereignty, the written constitution, separation of powers, and judicial review. It answers why constitutional arguments became the focal point of the electoral campaigns.

Chapter 3 returns to the narrative in order to explain how the judicial schism ended. The chapter analyzes the results of the annual elections, which served as a forum for “the people” to express its will. It then examines steps taken by the state legislature and the two contending courts to resolve the crisis. The chapter demonstrates that all

parties involved deferred to “the people” for guidance. It concludes by describing the 1826 law that repealed the Re-organizing Act, thereby ending the schism and clarifying the scope of judicial jurisdiction.

Chapter 1

The Verdict is in, and the Court is Out

“No popular controversy, waged without bloodshed, was ever more absorbing or acrimonious than that which raged, like a hurricane, over Kentucky for about three years succeeding the promulgation of those judicial decisions.”⁵²

-George Robertson’s *Scrap Book on Law and Politics, Men and Times* (1855)

I. The Immediate Crisis

In the wee hours between night and daybreak of Christmas 1824, instead of being asleep in bed anticipating the holiday festivities, Kentucky legislators stood in a state of agitation as they cast the vote to reorganize the Court of Appeals.⁵³ Fifty-four yeas and forty-three nays; it was a simple majority, but Governor Joseph Desha (who had been illegally present on General Assembly floor) eagerly signed the bill into law only moments later.⁵⁴ What became known as the “Re-organizing Act” disbanded the highest court of the state judiciary, the Court of Appeals, and replaced its three justices with four new ones. Yet upon notice of the original court’s dissolution, the “former” justices refused to resign, claiming the act contradicted the state constitution. Tensions escalated as politicians, newspapers, and laymen divided in accordance with their allegiance to either the original court or the legislature. With two sets of justices presiding as the “official” Court of Appeals, Kentuckians coined the titles of “Old Court” and “New

⁵² Robertson, *Scrap Book on Law and Politics, Men and Times*, 50.

⁵³ *House Journal*, 33rd Sess., 436. See Appendix 3 for full act.

The *House Journal* and Matthew Schoenbachler state it was decided on December 25, 1824, although Robertson’s *Scrap Book on Law and Politics, Men and Times* states that it was December 23.

⁵⁴ Lewis Collins, *Collins’ Historical Sketches of Kentucky: History of Kentucky* (Louisville: Richard H. Collins, 1877), 882. Lewis Collins was a judge during the mid-1800s and a historian on his lifetime. Matthew Schoenbachler, “The Origins of Jacksonian Politics: Central Kentucky, 1790-1840,” 198. *Kentucky Reporter*, August 29, 1825, states it was 54 to 44.

Court” to refer to the competing powers.⁵⁵ Thus began the Old Court-New Court Controversy, a struggle that pitted legislative superiority against judicial independence.

Why did the state legislature pursue this brash and unprecedented action? For two interdependent reasons: to defend a partisan agenda and assert legislative authority. For the past three years, the Relief Party dominated the state government. The party had gained widespread popularity by introducing legislation to assist those in debt during the severe depression following the nationwide Panic of 1819.⁵⁶ But in 1823, two court cases, *Blair v. Williams* and *Lapsley v. Brashears and Barr, et e converse*, called into question the constitutionality of one such relief measure, an 1820 law entitled “*An Act to Regulate Endorsements on Execution.*” This particular legislation extended the time to replevy (or repossess) from three months to two years.⁵⁷ The constitutions of Kentucky and United States forbid any laws that “impaired” contracts. Applying this criterion to the law at issue, the Kentucky Court of Appeals had to determine if the modification to the original repayment schedule constituted a breach of contract. Justice Mills wrote the opinion in *Blair*:

The main question [...] is, does the law of this state, passed on the 25th day of December, in the year 1820, or rather, that part of it which subjects the creditor to a stay of two years, on the debtor giving bond and security, [...] violate the tenth section of the first article of the constitution of the United States, which declares that “no state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.”⁵⁸

On October 11, the court ruled in both cases that the law violated the state and federal constitutions because it retroactively altered the established terms between debtor

⁵⁵ Mathias, 172. Robertson, *Scrap Book on Law and Politics, Men and Times*, 91.

⁵⁶ Stickles, 20.

⁵⁷ Replevy or replevin means the recovery by a person of goods or chattels claimed to be wrongfully taken or detained upon the person’s giving security to try the matter in court and return the goods if defeated in the action or on his promise to test the matter in court and give the goods up again if defeated.

⁵⁸ *Blair v. Williams* and *Lapsley v. Brashears* (1823). See *Appendix 4* for more information about case.

and creditor. The cases reaffirmed each other's verdict: "The present law is unconstitutional, and cannot be sustained."⁵⁹ The relief act was rendered null and void.

This ruling infuriated the Relief Party and their constituents. Most Kentuckians associated with the debtor class.⁶⁰ Since 1817, they had elected a Relief Party majority in order to advocate for and implement legislative aid, including postponements on payments or executions. The court's rulings threatened to eliminate the very measures the citizens demanded. One Relief advocate commented:

The first emotion felt by us on hearing of these opinions was astonishment; the next was alarm. We were *astonished*, because we could never bring our minds to believe that the Judges of our Court of Appeals would adopt principles so repugnant to the opinions of nine tenths of the bar, to the common sense of nineteen twentieths of the people, to the practice of every state in the Union and to the legislation and adjudications of every government, despotic as well as free, in the four quarters of this globe. We were *alarmed*, because, if the principles advanced in these opinions are resisted, the country will be filled with altercation and ill blood, and if they are acquiesced in, will strip the state Legislature of an essential power throw our code of law into inextricable confusion and go further towards, prostrating the constitutional sovereignty of the state than all the assumptions of the federal judiciary put together.⁶¹

Relief proponents viewed the ruling as against the people—the majority of Kentuckians who wanted relief—and popular rule embodied by the legislature.

The verdict was "anti-popular" as well as unpopular.⁶² The Court of Appeals had nullified the debtor relief law by citing the federal and state constitutions. In doing so, the judges tacitly utilized judicial review, the power of the court to interpret the constitution and determine if legislative and executive action abides by it. Although interpreting statutes (and by extension the constitution) was acceptable in the early 19th

⁵⁹ *Blair v. Williams* and *Lapsley v. Brashears* (1823).

⁶⁰ Stickles, 20.

⁶¹ "Momentous Decision," *Argus of Western America*, October 15, 1823.

⁶² Judicial review is anti-popular in the sense that it allows the judiciary, a nonelected body, to overrule decisions made by "the people" through the legislature.

century, the power to nullify legislation remained contested.⁶³ Many Kentuckians were appalled that the judiciary tried to rise above the legislature.

I admit that there are many errors for which the Judge cannot be held responsible [...] But when the law is admitted, the intention of the Legislature understood, and the Judge undertakes to annul the law, it is not an ordinary exercise of judicial power, but an assertion of the highest prerogative known to the constitution. [...] He rises to the character of the statesman.⁶⁴

This was particularly disconcerting because the judges were not elected by “the people.” Judicial review augmented the justices’ power, but lacked a mechanism for “the people” to hold the judges accountable. To compound matters, the judges had referenced in their decision the federal constitution to nullify a state law. The state adamantly opposed national control.⁶⁵ In fact, Kentucky was one of only two states that managed to resist abiding by the Supreme Court’s decision in *McCulloch v. Maryland* (1819), which explicitly ruled that the US Constitution, as the supreme law of the land, trumped ordinary statutes.⁶⁶ With the Court of Appeals’ seemingly gross overstep of power, many Kentuckians demanded legislative action.⁶⁷

II. “Judicial Review:” The 1823 Legislature’s Reaction to *Lapsley and Blair*

When the state legislature began its yearly session on November 3, 1823, discussion immediately turned to reprimanding the “faulty” ruling. The following day, Governor John Adair, a Relief Party politician in office since 1820, addressed the

⁶³ Sylvia Snowiss, *Judicial Review and the Law of the Constitution* (New Haven: Yale University Press, 1990), 51.

⁶⁴ “Dinner to Maj. W. T. Barry on the 24th of January,” *Argus of Western America*, May 12, 1824.

⁶⁵ Lawrence M. Friedman, *History of American Law*, 3rd ed. (New York: A Touchstone Book Published by Simon & Schuster, 2005), 152.

⁶⁶ The other resistant state was Georgia. Kramer, 154-155.

⁶⁷ “To John L. Hickman, Esq, Senator; Wm Garrard, Josiah Holt, and Chas. Lander, Esq’s. Representatives, all from the County of Bourbon,” *Argus of Western America*, October 29, 1823.

General Assembly about the matter in his annual gubernatorial note setting the legislative agenda for the term.⁶⁸ Adair accused the court of deciding incorrectly and mandated an investigation. His allegations served as a catalyst for both the legislature and judiciary to define and defend their interpretations on how popular sovereignty is enforced and the parameters of judicial jurisdiction. The answers manifested through two means: a battle of rhetoric and another of policy.

House Relief leader John Rowan immediately offered his perspective against the court. On the third day of session, November 5, he proposed a set of resolutions that condemned the Court of Appeals' ruling as "ruinous in their practical effects to the good people of this commonwealth, and subversive of their dearest and most invaluable political rights."⁶⁹ The resolutions proclaimed that the replevin law did not violate the constitution, and the *legislature*, rather than the judiciary, had the power to decide this.⁷⁰

[...] It is the bounden duty of the legislature, in vindication of the rights of the people, and the great principles upon which those rights depend to withhold the agency of the ministerial officers of the government, from assisting in the practical propagation of the erroneous doctrine of that decision, at least until an opportunity afforded to the people of exploring the new theory of obligation, which it attempts to establish.⁷¹

The resolutions stated that the legislature, as the mouthpiece of the people, held the authority to intervene in judicial decision-making whenever it believed a ruling

⁶⁸ The Kentucky legislature usually began its session in late October or early November and ended the session in late December or early January. For this time period, the legislature had been out of session since December 1822. Kentucky Department for Libraries and Archives, "Kentucky Governor's: 1792-1824," http://www.kdla.ky.gov/resources/KYGovernors_pg1.htm (accessed April 3 2010).

⁶⁹ See *Appendix 2* for John Rowan's Preamble and Resolutions of 1823.

"A formal expression of opinion, will, or intent voted by an official body or assembled group." Resolutions do not have the force of a law, although Kentucky's state resolutions are printed at the end of the Kentucky Acts for legislative session. "Resolution," Merriam-Webster Dictionary, www.webster.com.

⁷⁰ Recall the law in question was the "*Act to Regulate Endorsements on Execution*." A replevin law is a law having to do with replevying, or repaying money or returning.

⁷¹ Robertson, *Speech of the Hon. George Robertson, Delivered in committee of the whole in the Legislature of Kentucky on the fourth day of December, 1823, on a long preamble concluding with the following resolutions in relation to the court of Appeals for their late decision against the two years replevin and endorsement laws of this state*, 15.

contradicted truth or undermined the administration of justice.⁷² This broad allowance granted the General Assembly significant power to oversee its “subservient” branch, the judiciary. Rowan reasoned that this safeguarded popular rule, since it created a check on the unelected branch of government by the people’s closest representatives, the legislature, until the general populace could determine the accuracy of the judges’ ruling. Rowan never specified how “the people” could decide, but many House members agreed with his logic and supported the resolutions.

The minority party cautioned against such a rash and unfounded course of action. On December 4, 1823, George Robertson, a leader among conservatives, urged his colleagues to delay passing the resolution. Robertson feared that hasty attempts to move the resolutions into law would prevent essential deliberation about the merits of their content.⁷³ He structured his argument to answer two questions: 1) Was the Court of Appeals’ ruling accurate? and 2) “Even if it should be believed to be wrong, are the resolutions proper and in consonance with the theory and fundamental principles of the government?”⁷⁴ In his opinion, the judiciary had ruled correctly. But by introducing his second question, Robertson shifted the focal point of debate. Discussion moved away from a question of accuracy and towards the effects on republican government.

He begged fellow representatives to consider the implications of attacking the judiciary branch’s authority and independence. While his opponent John Rowan professed the responsibility of the legislature to supervise the judiciary, Robertson described the problems as follows:

⁷² Robertson, *Speech*, 15.

⁷³ Robertson, *Speech*, 16.

⁷⁴ Robertson, *Speech*, 17.

If a bare majority can eventually effect the downfall of the Judiciary, by censuring their conduct and degrading them in the estimation of the people; or by reversing or suspending their decisions, the constitutional equilibrium is gone, and that beautiful theory which supposes that there are three departments of power, each moving in its appropriate orbit, free from any dependence on, or responsibility to the others, except as provided by the constitution, *is an illusion*.⁷⁵

Robertson eloquently articulated the need for separation of powers—the essence, in his opinion, of republican government. For him, Rowan’s proposed resolutions expanded legislative jurisdiction beyond its designated sphere. The fundamental elements of Robertson’s appeal were rooted in arguments dating to the US Constitutional Convention in 1787 and Kentucky’s constitutional conventions in 1792 and 1799 (which had occurred during his lifetime). His speech referenced republican icons Thomas Jefferson and James Madison, who warned against legislative supremacy.⁷⁶ ““An elective despotism [...],” Jefferson adamantly contended, ““Is not the government which we fought for.””⁷⁷ The negative consequences of the 1823 resolutions appeared clear: tyranny by the majority with the facade of a three-branch government.⁷⁸

Robertson further professed that the judiciary was an equal representative of the people, a brazen thought by early nineteenth-century standards. He explained, “If the legislature are the people, because they represent them in one attribute of their power; the judges are as much the people when they represent them in another attribute of sovereignty.”⁷⁹ His argument was predicated on the notion that the constitution embodied the will of the people, and therefore the branches delineated in this founding text each represented “the people.” According to Robertson, the constitution purposely

⁷⁵ Robertson, *Speech*, 29.

⁷⁶ Robertson, *Speech*, 32.

⁷⁷ Robertson, *Speech*, 20.

⁷⁸ Robertson, *Speech*, 29.

⁷⁹ Robertson, *Speech*, 19.

made each branch autonomous and equal to prevent judges from feeling pressured to obey the legislature instead of following the truth.

Hence the wisdom of the convention [...] to render the Judiciary as independent of the Legislature as would enable it to decide all cases according to its honest convictions of right and duty, without consulting or fearing the popular branch of government.⁸⁰

In this framework, the branches could check and balance one another. This ensured that if the legislature passed unconstitutional laws, the judiciary could annul them. Using an ontological argument, Robertson asserted that, “The court does not repeal the law, it is repealed already by the people in their constitution—*it never was law.*” Consequently, the court merely relayed the fact.⁸¹ Despite Mr. Robertson’s didactic speech, the House passed the resolutions on December 10, 1823.⁸² However, they failed in the Senate.

By analyzing the messages of opposing party leaders Rowan and Robertson, subtle, but critical, differences concerning the definition of a republic emerge. In the early 19th century, every American was an avid republican, meaning he believed in a democratic government, in which the people reigned as sovereign without a monarch or privileged aristocracy.⁸³ Yet, Kentucky’s current politics revealed two distinct philosophies about popular constitutionalism.⁸⁴ One incorporated an active sovereign composed of present-day citizens, while the other referenced the fundamental will of “the people” embodied in the state constitution written 40 years earlier. The particular

⁸⁰ Robertson, *Speech*, 23.

⁸¹ Robertson, *Speech*, 21.

⁸² Robertson, *Scrap Book on Law and Politics, Men and Times*, 50.

⁸³ Harry L. Watson, *Liberty and Power: The Politics of Jacksonian America* (New York: The Noonday Press, 1990), 43.

⁸⁴ Popular constitutionalism is a government with a written constitution, in which the people are sovereign. Larry Kramer coined this phrase in his book, *The People Themselves: Popular Constitutionalism and Judicial Review*. Kramer implies that in popular constitutionalism the people are the ultimate interpreters and enforcers of the constitution. Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review*, (Oxford, Oxford University Press, 2004) 8.

conception of “the people” to which an individual subscribed shaped his ideas about government power. In the first theory, the legislature was superior to the other branches, since it most closely mirrored the contemporary populace (due to the body’s size and dependence on annual elections). The second theory honored a dissemination of power shared equally among the three branches as set by the state constitution, the voice of “the people.”

While the General Assembly struggled with this philosophical debate, pro-Relief legislators pushed for tangible consequences to reprimand the “erred” court rulings. Heeding Governor Adair’s recommendation, the House of Representatives formed a committee to investigate the decisions in *Lapsley* and *Blair*. However, the members found no evidence of corruption. They concluded, “If they [the justices] have erred, it is but a fair inference, that it was the result of mistake.”⁸⁵ While this assessment instilled doubt about the quality of judgment rendered, it refrained from reprimanding the actual justices. This contrasted with Rowan’s harsher resolutions that classified the rulings as “subversive” to the public.

Instead, the House contemplated how to include citizens in the judicial decision-making process. Representatives suggested amending the constitution to include an elective judiciary. Establishing an elective judiciary would expand popular rule by creating a direct means for “the people” to regulate the courts and determine the accuracy of decisions. To implement this proposed amendment, the legislature would have to call a constitutional convention. Although the House passed the bill in November, the Senate

⁸⁵ *Report Of the Select Committee of the House of Representatives of the State of Kentucky on so much of the Governor’s Message of the 4th November, 1823, as relates to certain decisions of the Court of Appeals and of the Supreme Court of the United States* in Robertson, *Scrap Book on Law and Politics, Men and Times*, 14.

rejected it.⁸⁶ The legislature adjourned on January 8, 1824 without any material change to the status quo.

III. The Rise of Joseph Desha

The upcoming election in August 1824 offered the Relief Party a means to fortify their powerbase in order to pursue their agenda against the judges and maintain replevy-based debtor relief. Kentucky held elections each August for the entire state House of Representatives as well as a quarter of the Senate.⁸⁷ Additionally, every four years, citizens elected a new governor. In 1824, Joseph Desha ran for governor under the Relief Party banner. Desha, an adamant supporter of the Relief cause, had served as a general in the War of 1812 and a legislator in the Kentucky General Assembly as well as the US Congress. Desha actually ran for governor in the previous 1820 election, but came in third place losing to the other Relief candidate, John Adair. In 1824 Desha ran against lesser known opponents: Christopher Tompkins, the primary Anti-Relief candidate, and William Russell. Kentuckians elected Desha by a large margin, with 839 votes over the second place candidate, Tompkins.⁸⁸ Likewise, Governor Desha's political party gained a significant majority in both houses. Institutionally, the stage was set for change.

The legislature reconvened on November 1, 1824 armed with a stalwart, pro-Relief governor and impassioned partisans incited by the unresolved contentions. In his

⁸⁶ Mathias, 168. Stickles, 40.

⁸⁷ Article II, Sections 1 (house terms), 8 (senate terms), 10 (staggered elections of senators). Kent. Const. art. II, § 1, 8, 10 in Dippel, Horst, "Constitutions of the World Online-US KY-1799-08-17," http://www.modern-constitutions.de/nbu.php?page_id=02a1b5a86ff139471c0b1c57f23ac196&show_doc=US-KY-1799-08-17-en&viewmode=pages&position=2 (accessed January 25, 2010).

The Spirit of '76, March 10, 1826, 4.

⁸⁸ Lowell H. Harrison, "Desha, Joseph," in John E. Kleber, Editor in Chief, *The Kentucky Encyclopedia*. (Lexington: The University Press of Kentucky, 1992), 264.

new capacity as governor, Joseph Desha wrote the two houses an introductory address about important issues for the present session. Desha framed his concern about the state Court of Appeals by denouncing the expanding federal government and emphasizing the need to safeguard state power, the basis of American liberty, in his opinion.⁸⁹ He persuasively linked the protection of states' rights with the need for citizen activism. The governor criticized the technical language and complex legal issues in the *Blair* and *Lapsley* cases that prevented the common man from assessing the rulings' merit.⁹⁰

Yet Desha's definition of "states' rights" presumed an unequal distribution of power between the three branches of state government. With loaded words, the governor declared, "It is of the highest importance that each department of our government should move in the orbit which the constitution has assigned to it, without infringing the rights or powers of either of its co-departments."⁹¹ By this he implied that the Court of Appeals had overstepped its adjudicating capacity and entered the legislating realm when it invalidated the 1820 statute. Desha believed that the power to destroy a law was equal to the power to make one. The judiciary could merely rule on law, not nullify it. He requested the House of Representatives to investigate the decision of the Court of Appeals. The governor vouched, "I have only to promise my hearty co-operation in any measure calculated to rectify the error and restore that harmony which is so desirable between the departments of government."⁹² The "harmony" he envisioned consisted of a

⁸⁹ *House Journal*, 33rd Sess., 12.

⁹⁰ *House Journal*, 33rd Sess., 9.

⁹¹ *House Journal*, 33rd Sess., 14.

⁹² *House Journal*, 33rd Sess., 15.

judiciary subservient to the legislature. Desha encouraged the legislature to remove the problematic judges.⁹³

Whether out of respect or manipulation, the General Assembly utilized the Kentucky Constitution to justify obeying the governor's request. Under Desha's order, both houses formed committees to investigate the court's action. Article 4, Section 3 of the state constitution read that judges could be removed by either impeachment or address by the governor. Impeachment, the more conventional method, had clearer guidelines. A judge could be impeached for any unlawfulness during office, ranging from corruption to felonious acts. In contrast, removal by address only applied in situations not involving unlawful behavior when two-thirds of both houses found reasonable cause. John Rowan explained that reasonable cause existed if a judge did something "so incompatible with his official duty" as to merit forced resignation.⁹⁴

With these two options available, Relief legislators tried impeachment first. A joint committee of six, including John Rowan (the Relief Party leader) and Robert Wickliffe (the Anti-Relief Party leader), evaluated whether there were sufficient grounds. Despite Rowan's presence, the committee (like the year before) declared there was no support for the charge, and found the judges innocent of bias and corruption.

The remainder of the report addressed whether the Court of Appeals had the right to deliberate on and annul laws enacted by the General Assembly. The committee ascertained that the constitution permitted the justices to do so.⁹⁵ Both the Kentucky and

⁹³ *House Journal*, 33rd Sess., 12.

⁹⁴ Kentucky, General Assembly, Preamble and Resolution, *Vindicating the constitutionality of the Replevin Laws, and the right of the Legislature to remove Judges for error of opinion; in reply to the response of the Judges of the Court of Appeals*, December 20, 1824 (Frankfort [?]: s.n., 1825), 3.

⁹⁵ *Report Of the Select Committee of the House of Representatives of the State of Kentucky on so much of the Governor's Message of the 4th November, 1823, as relates to certain decisions of the Court of Appeals*

US Constitutions specified a delineation of power among the three branches that authorized the courts to decide on judicial matters.⁹⁶ According to the committee report, this included ruling on the constitutionality of laws. The report cited Article 6, Sections 2 and 3 of the US Constitution, which stated, “this constitution and the laws of the United States [...] shall be the supreme law of the land; and the judges in every state shall be bound thereby.”⁹⁷ The committee reaffirmed that the judiciary represented the people as much as the legislature did, since both were components of the constitution, the document constructed by “the people” to outline their democratic republic.⁹⁸

Noteworthy, the committee employed language and arguments similar to Robertson’s speech the previous year. This repetition is particularly significant because the House had a pro-Relief majority. The congruency reflects the committee’s respect for and agreement with the merits of Robertson’s conclusions.

IV. Entering Unprecedented Territory

When impeachment failed, the determined partisans turned their attention to other options. The Senate proposed a resolution to remove the justices individually by address, which quickly passed. The bill was sent to the House for a consensus. But impatient to oust the judges before the session ended, Senator Jereboam Beauchamp proposed a

and of the Supreme Court of the United States in Robertson, *Scrap Book on Law and Politics, Men and Times*, 7.

⁹⁶ *Committee Report*, in Robertson, *Scrap Book on Law and Politics, Men and Times*, 10.

⁹⁷ *Report Of the Select Committee of the House of Representatives of the State of Kentucky on so much of the Governor’s Message of the 4th November, 1823, as relates to certain decisions of the Court of Appeals and of the Supreme Court of the United States* in Robertson, *Scrap Book on Law and Politics, Men and Times*, 10.

⁹⁸ Kentucky, General Assembly, *Report of the Select Committee of the House of Representatives of the State of Kentucky, on that Part of the Governor’s message which Relates to the Judiciary (presented by T. Montgomery, Chairman)*, 1824, 7.

separate bill to disband the current Court of Appeals.⁹⁹ Entitled “*An Act to Repeal the Law Organizing the Court of Appeals and to Re-organize a Court of Appeals*,” the legislation intended to dissolve the entire bench by repealing the law that created the court and then forming a replacement Court of Appeals.

Beauchamp and his colleagues justified this “Re-organizing Act” as part of their constitutionally-sanctioned power to legislate. According to their logic, they were merely repealing one of the legislature’s own statutes: “*An Act Establishing the Court of Appeals*” from 1792. The first legislature passed this law shortly after the ratification of the Kentucky Constitution.¹⁰⁰ The title itself provided strong support that the legislature established the judicial system. However, this conclusion would become a pivotal point of contention in the next few years.

On December 9, the Senate approved Beauchamp’s Re-organizing Act. Twenty-two voted for and 16 against it. This occurred 11 days before the House voted on the earlier Senate bill concerning removal by address.¹⁰¹ Thus, the Senate passed two bills to remove the judges essentially simultaneously.

Concurrently in the House, Representative Rowan sponsored his own resolution defending the legislative power to remove justices based on principles of democratic political theory. On December 20, Rowan proposed “*Vindicating the Constitutionality of*

⁹⁹ Jereboam Beauchamp was a career politician serving in the Kentucky Senate for two decades on behalf of Washington County, in central region of the state. Schoenbachler, *Murder and Madness: The Myth of the Kentucky Tragedy*, 118. *Senate Journal*, 33rd Sess., 212. Robertson, *Scrap Book on Law and Politics, Men and Times*, 75.

¹⁰⁰ “Letter VIII to John J. Crittenden, Esq. *Precedents and Authority to Prove that Our Court of Appeals is Not Created by the Constitution*,” *Argus of Western America*, Wednesday, May, 17, 1826. Chinn, 495. Ambiguity in what document established the judiciary, because the original Kentucky Constitution established that “as to matters of law and of equity, was vested in a court of appeals, or supreme court.” Chinn, 572-573. Penny M. Miller, *Kentucky Politics and Government: Do We Stand United?* (Lincoln: University of Nebraska Press, 1994), 151.

¹⁰¹ Stickles, 47.

the Replevin Laws, and the Right of the Legislature to Remove Judges for Error of Opinion; In Reply to the Response of the Judges of the Court of Appeals.” Its message was similar to his previous, unsuccessful, 1823 resolutions, although this one served as a direct response to a letter written by the appellate justices. On December 9, the justices had informed the legislature that there were no grounds for their impeachment.¹⁰² In reply, Rowan included an over thirty-page preamble inundated with doctrine to substantiate why the judges could and should be removed for their “erred” decision.

While Rowan never disputed the justices’ defense against impeachment, he emphasized that the current protocol for dismissing justices was too restrictive to ensure good governance. His opponents, both legislators and jurists, had argued that the constitution intentionally specified only two means for removal.¹⁰³ Yet, Rowan’s preamble explained that this limitation obstructed justice; “[...] For mere *error* of judicial decision, however gross or flagrant, there is no remedy.”¹⁰⁴ Instead, Rowan claimed that the legislature’s power to remove justices extended beyond this narrow confine. After all, he believed judicial protocol was “prescribed by the constitution and the Legislature.”¹⁰⁵ This hierarchy set the legislature as an equal authority to the constitution, with the judiciary subservient to both. Rowan contended: “The legislative power is derived from the people through the social compact; [...] the constitution does not originate the legislative power, but pre-supposes its existence, and prescribes the mode by which it shall be exercised.”¹⁰⁶ His philosophy reflected the sentiments of French philosopher Jean-Jacques Rousseau—who coined the term social contract.

¹⁰² Preamble and Resolution, *Vindicating*, 1.

¹⁰³ *The Spirit of '76*, March 10, 1826, 14.

¹⁰⁴ Preamble and Resolution, *Vindicating*, 1-2.

¹⁰⁵ Preamble and Resolution, *Vindicating*, 32.

¹⁰⁶ Preamble and Resolution, *Vindicating*, 9.

Rowan suggested the legislature possessed direct ties to “the people” that predated the written constitution. His version of legislative superiority undercut arguments from opponents that stressed the judiciary’s relationship to “the people” via the constitution.

Rowan concluded the thirty-seven-page document by emphasizing the imperative need for “the people” to be involved in the administration of their government, including the adjudication process. The citizenry cannot “have a less zealous interest in the maintenance of the constitution, than the three Judges. They cannot, we think, be decently said not [to] possess intelligence enough to comprehend its import, nor virtue enough to regard its obligation.”¹⁰⁷ In these double negative terms, Rowan insinuated that Kentuckians fervently wanted to protect their constitution, and the free government it established. This belief coincided with a general American anxiety about the fragility of their young democracy.¹⁰⁸ Rowan feared that the unrepresentative, and thus unresponsive, judicial branch thwarted necessary popular oversight: “The people are told they are a set of idiots; that they have no right to enquire if the law which the Judge has declared to be unconstitutional, is really so,”¹⁰⁹ because the judges’ opinions reign unquestioned. Instead, Rowan claimed that the judicial power to find a law unconstitutional was limited to situations “*obviously* and *palpably* in conflict with the constitution,” in which “the people” recognized this inconsistency.¹¹⁰ Although vague about how to apprise and implement this, Rowan’s sentiments suggested he believed “the people” could control the judiciary via the legislature.

¹⁰⁷ Preamble and Resolution, *Vindicating*, 33.

¹⁰⁸ Kramer, 5.

¹⁰⁹ Preamble and Resolution, *Vindicating*, 33.

¹¹⁰ Preamble and Resolution, *Vindicating*, 4.

To counter Rowan, the opposition—Anti-Relief partisans—criticized the philosophical nature of the preamble and resolutions. House Representatives Squire Turner and Robert Taylor declared in protest:

The question, acted upon to-day, appears then to be entirely abstract. There is no judge on trial, for it to act on. Its only tendency is to proclaim to the world that the Legislature have the constitutional power to remove a judge from office [...] We were elected to this body to legislate *practically* for the community—not to frame a code of political faith for the observance of our constituents.¹¹¹

The two men importantly noted the divergence from policy to philosophy and sophism. Their censure, however, minimized the fact that ideology motivated legislators to pursue particular policies.

Ironically for Turner and Taylor, in the midst of discussing Rowan's resolution, the Re-organizing Act passed on December 24, 1824—a law with immediate consequences not just an expression of political theory.¹¹² The House of Representatives approved the bill 54 to 43. That same night, Governor Desha signed it into law. It was now official: the legislature (with the assistance of the executive branch) had disbanded the original Court of Appeals.

V. Immediate Reactions to the Re-organizing Act

The enactment of the Re-organizing Act fundamentally changed Kentucky politics. First and foremost, it shifted the focus of debate away from evaluating the accuracy of the judges' ruling in the 1823 debtor relief cases and towards questioning the constitutionality of one branch of government dissolving a main component of another branch. On January 5, 1825, less than two weeks after the Re-organizing Act passed,

¹¹¹ *House Journal*, 33rd Sess., 494.

¹¹² On December 20, removal by address failed to yield the necessary two-thirds majority vote. The Re-organizing Act only required a majority and attained the required numbers.

state representative George Robertson submitted a protest signed by 48 legislators which condemned the new law and requested an investigation into its validity.¹¹³ The manifesto summarized the essence of what would become the Old Court Party:

We consider this unparalleled act, as an attempt, by the majority of the legislature to consolidate their power and perpetuate their supremacy over the rights of the minority and the constitution, by destroying the independence and purity and impartiality of the judiciary.¹¹⁴

Robertson and fellow protesters were appalled that the Re-organizing Act passed, when in their minds the legislation undermined judicial independence and manipulatively changed the rules for removing judges. While both impeachment and removal by address required a two-thirds majority, a regular statute, such as the Re-organizing Act, could pass by a simple majority.¹¹⁵

Under the advice of Senator Beauchamp, the author of the Re-organizing Act, House majority leader John Rowan refused to acknowledge the minority party's complaint and forbade recording it in the session journal.¹¹⁶ Beauchamp had warned Rowan about the manifesto explaining, "It is the devil, and if you don't kick it out of your House, it will blow us all sky-high."¹¹⁷ Instead, the House passed Rowan's resolution "*Vindicating the Constitutionality of the Replevin Laws, and the Right of the Legislature to Remove Judges for Error of Opinion*" three days later.

Proponents of the Re-organizing Act and Rowan's resolution quickly translated words into action by selecting four men to preside as the new Court of Appeals. On

¹¹³ Most, but not all, of the statesmen who had voted against the legislation signed the protest. Robertson, *Scrap Book on Law and Politics, Men and Times*, 91. Schoenbachler, *Murder and Madness: The Myth of the Kentucky Tragedy*, 107. *House Journal*, 33rd Sess., 534.

¹¹⁴ Robertson, *Scrap Book on Law and Politics, Men and Times*, 93.

¹¹⁵ Cincinnatus [pseud.], "Cincinnatus- No. III," *The Spirit of '76*, March 27, 1826, 37.

¹¹⁶ Robertson, *Scrap Book on Law and Politics, Men and Times*, 91. However, third parties published the protest in newspapers to inform the people of the Old Court Party's platform. Stickles, 65.

¹¹⁷ Robertson, *Scrap Book on Law and Politics, Men and Times*, 91.

January 10, 1825, Governor Desha appointed and the Senate confirmed James Haggin, John Trimble, and Benjamin Patton as the three associate justices. Unfortunately, Patton died a few weeks after his appointment, so Rezin Davidge was selected to replace him. For Chief Justice, Governor Desha chose his Secretary of State, William Barry.¹¹⁸ Barry's appointment was particularly satisfying since he had a vested interest in ejecting the former justices. Barry was the attorney for Walter Brashears, the debtor in the court case *Lapsley v. Brashears*, which provoked the initial power struggle between the legislature and judiciary.¹¹⁹

Having established the "New Court" and blocking dissent from the minority opposition, the majority in the legislature strategically ended session the next day. The General Assembly adjourned with an unprecedented law in effect, a philosophically-based resolution supporting it, and a new set of justices inaugurated. A political crisis loomed ahead, since by this point the judges from the original Court of Appeals had not issued any response. As customary, the General Assembly would not resume until the following fall, but during this ten-month legislative recess Kentucky's politics took an even more drastic turn.¹²⁰

VI. The Schism

Defying the Re-organizing Act, "former" Justices John Boyle, William Owsley and Benjamin Mills met in Frankfort on January 27 to hold court. Yet, once court opened, the justices announced they would suspend official business until October to

¹¹⁸ Stickles, 60-61. *House Journal*, 33rd Sess., 8 says that Barry was Desha's Secretary of State.

¹¹⁹ *Blair v. Williams and Lapsley v. Brashears* (1823).

¹²⁰ G. Glenn Clift, *Bibliography of the House and Senate Journals, Commonwealth of Kentucky, 1792-1966* (Frankfort: Kentucky Historical Society, 1967), n.p.

avoid further confusion.¹²¹ This conservative tactic meant the judges would delay actually ruling on cases until after the annual election in August—in effect, waiting to learn the people’s reaction to the Re-organizing Act. Nevertheless, by convening in January and planning an official term in October, the judges’ unspoken message was obvious: they remained the legitimate Court of Appeals.

To reinforce this position, Justices Boyle, Mills, and Owsley issued a manifesto on February 5, asserting that they were the only Kentucky Court of Appeals. They referenced the same section of state constitution as their legislative foes to substantiate an opposing view: that the legislature did *not* have the power to determine judicial issues or dissolve the highest state court. The judges referred to Article 1 of the Kentucky Constitution concerning separation of powers between the three branches. Quoting Section 2, that “No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others,” the justices proclaimed that Rowan’s bill illegitimately granted the legislature the power to adjudicate. Additionally, Article 4, Section 1 stated, “Judicial power [...] shall be vested in one Supreme Court, which shall be styled the Court of Appeals, and in such inferior courts as the General Assembly may, from time to time, erect and establish.”¹²² Since the text did not explicitly demarcate the legislature’s relationship to the Court of Appeals, the justices interpreted such an omission to mean reorganization of Kentucky’s highest court was prohibited. Yet, in deference and supplication to the citizenry (the political

¹²¹ Stickles, 66.

¹²² Kentucky, General Assembly, Legislative Research Commission, *Text of the Kentucky Constitutions of 1792, 1799 and 1850*, Frankfort: 1965. See *Appendix 1*.

sovereign), the judges ended their proclamation by demanding the general populace to decide the constitutionality of the Re-organizing Act.¹²³

Meantime, the New Court justices commenced their own judicial functions. On February 3, 1825, they took their oaths of office. During the ceremony, they appointed Francis P. Blair as their Clerk of Court.¹²⁴ Blair had previously served as the Franklin County Circuit Court Clerk.¹²⁵ However, he received the appointment as a form of political patronage, since Blair was an adamant supporter of Governor Desha, who selected the members of the New Court. Later that month, the New Court moved the former Court of Appeals' furniture into the Senate chamber to begin hearing cases.¹²⁶ The location was an appropriate choice given that the Senate initiated the Re-organizing Act that created this new judicial body. By statute and accoutrements, the new Court of Appeals asserted it was now the true judiciary.

When the New Court justices attempted to retrieve the official court records from the Old Court, the resistance they received demonstrated that their legitimacy was still a matter of contention. The New Court wanted to record its decisions alongside established precedent. When the justices requested the court files, the Old Court's clerk, Achilles Sneed, refused to relinquish them. Depending on one's political stance, Sneed's irreverence was either an act of insubordination or justifiable condemnation. The New Court of Appeals held Sneed in contempt of court and issued a 10 pound fine. No

¹²³ "For the Argus, The Court Party Against the People. No V," *Argus of Western America*, May 11, 1825. "For the Argus, Letter VIII. Reflections upon the second address of the late Judges to the people, and upon their late meeting and proceedings in Frankfort" and "For the Argus, The Court Party Against the People. No IV," *Argus*, April 20, 1825. Schoenbachler, *Murder and Madness: The Myth of the Kentucky Tragedy*, 108. Collins, 882. Stickles, 66.

There is some conflicting data as to whether the court stated it would reconvene in April or October. Since I had access to a historical newspaper that mentioned October, that date is listed.

¹²⁴ Schoenbachler, *Murder and Madness: The Myth of the Kentucky Tragedy*, 109.

¹²⁵ The county where Frankfort the capital is located.

¹²⁶ Stickles, 62.

evidence indicates that Sneed ever paid it.¹²⁷ Finally, the State Attorney General Solomon Sharp authorized the New Court clerk Blair to retrieve the documents from Sneed's possession. However, when Blair broke into his nemesis' office and stole the court records, the illegal seizure immediately caused a scandal.¹²⁸ Ironically, what was meant to legitimize the New Court exposed the true crisis at hand: neither Court of Appeals held the definitive power.

VII. "Popular" Involvement

With the legislature out of session, Kentucky confronted an institutional crisis without any governmental means to resolve it. The General Assembly would not resume session until November. In the interim, the two Courts of Appeals each rendered judgments as the self-proclaimed highest tribunal. From a practical as well as ideological standpoint, the responsibility to decide which court was legitimate rested upon the Kentucky citizens, collectively embodying "the people." The political culture identified this body, "the people," as sovereign. As such, "the people" could and should solve the crisis as the ultimate arbiter. Charged with this weighty task, the citizens learned the issues in contention and drew their own conclusions.

Two interrelated crises lay before "the people:" a constitutionally-derived schism as well as an existential crisis of ideology. First, two Court of Appeals existed when the constitution demanded solely one. Regardless of which court an individual sided with, all agreed two sets of justices were unacceptable. House Representative George Robertson had foreseen in 1823 how the series of governmental events could propel the

¹²⁷ Stickles, 69.

¹²⁸ Schoenbachler, *Murder and Madness: The Myth of the Kentucky Tragedy*, 122.

state into civil war. “Shall Kentucky set the first example of rebellion? [...] Such it was, against the constitution and against the settled principles of constitutional liberty.”¹²⁹ As Robertson articulated, conceptions about the constitution—and thus good governance—underpinned the concrete manifestation of the crisis.

The polarizing nature of the controversy and the potential for public disorder necessitated that “the people” take a side. As one newspaper writer reasoned, “No good citizen can now be neutral. Each should act as if his country’s fate were suspended on the issue of his single efforts. [...] your party or mine MUST SINK, TO RISE NO MORE.”¹³⁰ The charged language aptly expressed the urgency and severity of situation.

The citizens’ decision depended upon their answer to whether the legislature had the authority to pass the Re-organizing Act. Those who believed the judiciary could be dissolved and reestablished through legislation became known as the New Court Party because the Re-organizing Act created the *new* Court of Appeals. Alternatively, those who opposed this action upheld that the original Court of Appeals, the “Old Court,” remained the legitimate tribunal and formed a party accordingly.¹³¹

The development of these single-issue parties illustrated the importance of the constitutional issues at stake. Before the Re-organizing Act passed, economic policy dominated Kentucky politics and as such dictated political factions.¹³² However, the

¹²⁹ Robertson, *Speech*, 33.

¹³⁰ “A Plebian,” “To Josepha Desha, Governor Elect of Kentucky. No. II,” *The Spirit of '76*, March 24, 1826, 40.

¹³¹ The groups were labeled “parties” since an early nineteenth-century definition of faction was: “[...] a number of citizens, whether amounting to a majority or minority of the whole, who are united, and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.” “Publius,” *The Spirit of '76*, 77.

¹³² During this time, there was only one national political party, the Democratic-Republicans, but the states developed factions and local parties.

magnitude of the new legislation and its aftermath resulted in a new political makeup and focus.

At the core of this inter-branch crisis lay ambiguities about the designated functions of each branch as outlined by the state constitution, as well as broader, ideological questions due to conflicting definitions of representative democracy. The Kentucky constitution, serving as both an administrative framework and compilation of political theories, held the answers, albeit in cryptic language.

Chapter 2

The Re-organizing Act under Attack: The Constitutional Arguments of 1825-1826

“[...] It is not MEN but weighty constitutional PRINCIPLE
which divides and distracts the country.”¹³³

-Message from the Old Court to the Senate,
November 21, 1825

I. A New Focus

The judicial crisis fundamentally changed the issue and essence of debate. As *The Spirit of '76*, a newspaper established specifically to campaign for the Old Court Party, noted:

Whether the obligation of a contract consists or not, in the remedy to enforce it, is now a question of small importance. The props of the government have been shaken. The venerable principles of the revolution, are bending under the weight of accumulated innovations.¹³⁴

Contracts, the primary contention in the Court of Appeals' controversial rulings in *Blair v. Williams* and *Lapsley v. Brashears* (1823), no longer held relevance; eclipsed by larger, more fundamental issues. The Kentucky Constitution—the written affirmation of the sovereign will and the founding document on its republican government—was in crisis. Conflicting interpretations about what powers it did or did not sanction had culminated with an impasse: the court schism. Starting in early 1825, political activists brought the constitutional questions into the public forum. State representatives, justices, and the governors had introduced these key principles and arguments during the 1823 and 1824 business sessions, but confined the debate among statesmen.

Now, the Old Court and New Court parties publicized the issues to the citizens in order to garner civic support. As one writer under the alias “Lafayette” explained, “[...]”

¹³³ “Message from the Old Court to the Senate” in *Kentucky Reporter*, January 16, 1826.

¹³⁴ “To the People of Kentucky. Letter 1,” *The Spirit of '76*, April 14, 1826, 87.

it is only necessary to present to the public mind the various aspects of the controversy; the acuteness, intelligence, and independence of the community will do the rest.”¹³⁵

Trusting in the competency of their constituents, party strategists printed and distributed excerpts from the Kentucky and US Constitutions, relevant legislative speeches, editorials on the recent series of events, and philosophical analyses on republican government. Collectively, these facts and opinions generated a comprehensive review on constitutionalism.¹³⁶ They provided Kentuckians with the essential knowledge and resources to render a decision on the Re-organizing Act.

The primary question to “the people” was whether the Re-organizing Act was constitutional or not. The answer would determine which Court of Appeals was the true judicial body; thereby resolving the controversy. Thus, the Old Court and New Court Parties utilized newspapers, pamphlets, and stump speeches to inform and influence the public about the controversial law.¹³⁷

By including the people in the constitutional debate, the two parties implicitly adhered to popular constitutionalism. Their version recognized both the Kentucky Constitution *and* the voting population as the will of “the people.” This explains why political activists addressed their arguments to “fellow citizens” as well as why constitutional arguments became central to the debate.¹³⁸ However, when party members

¹³⁵ Lafayette [pseud.], *Lafayette, To the People*, No. 1, 11.

¹³⁶ American constitutionalism is a theory of a government in which the people rule as dictated by their constitution. Christian G. Fritz, *American Sovereigns: The People and America's Constitutional Tradition before the Civil War* (Cambridge: Cambridge University Press, 2008), 15.

¹³⁷ Stump speeches were a way for politicians to make speeches to the general public, at venues such as courthouses, taverns, or on the streets. Schoenbachler, *Murder and Madness*, 115. Documentation on these speeches is extremely sparse (with a couple of short references in newspapers), which prevents discussion on their substance or effect. For instance, *The Spirit of '76* mentioned Senator John Pope delivered a speech in Harrodsburg, Kentucky. *The Spirit of '76*, April 28, 1826, 129.

¹³⁸ Articles and pamphlets often began with an address to fellow citizens. See *The Spirit of '76*, March 10, 1826 for example.

mentioned the popular will in their arguments, the definition sometimes included only one of the two forms. Consequently, arguments switched between a theoretical versus a literal conception of “the people.”

As partisans espoused and expanded upon their viewpoints, the arguments they presented formed a nexus of persuasive rhetoric and revealed a compilation of political theories. Differing conceptions about and interpretations of the constitution and as well as governance lay deeply embedded in these theories. Ultimately “the people” had to determine which principles, doctrines, and interpretations they agreed with and defend that form of government accordingly. Because the arguments in 1825 and 1826 repeated and built upon one another, this chapter will analyze the campaign thematically rather than chronologically.

II. “We the People:” Republicanism and Popular Sovereignty

“The freemen of Kentucky have learned from their earliest infancy that they have equal rights with all their public servants to think for themselves, and express their sentiments upon all questions of policy, and upon constitutional principles.”¹³⁹
 –signed “Shelby,”
 April 7, 1826

Kentucky’s constitutional debate occurred within a republican culture that accepted “the people” as the ultimate source of authority. During the early 19th century, everyone identified himself as a republican, meaning he supported self-governance by “the people” through a representative governmental infrastructure. Republicanism connoted empowerment of the masses and freedom from arbitrary or elite rule.¹⁴⁰

In this environment, many Old Court and New Court political activists employed pennames that symbolized their allegiance to republicanism. Authors assumed the names

¹³⁹ Shelby [pseud.], “The Compromise,” *The Spirit of ’76*, April 7, 1826, 70.

¹⁴⁰ Watson, 43.

of heroes from the Roman republic, American Revolution, and Kentucky's favorite sons. The purpose was two-fold: to characterize themselves as true republicans fighting an arbitrary power and to relate their current governmental crisis with the perils of other republics.¹⁴¹ As a sign of solidarity, many writers adopted as pseudonyms the names of Roman leaders from the most powerful empire in history.

For instance, a columnist of *The Spirit of '76* who criticized the constitutionality of the Re-organizing Act and the immoral behavior of its proponents took the symbolic penname "Cincinnatus." Lucius Quinctius Cincinnatus, the fifth-century Roman military leader, stood for self-sacrifice, duty to country, and modesty. The populace called him in from the countryside to defeat the Aequi and Volscian enemies threatening Rome. Once Cincinnatus conquered the foe, he returned to his quiet life, renouncing the political power and prestige offered to him. Early Americans revered his humble virtue and heroism. They associated their Revolutionary icon, George Washington with Cincinnatus since the President retired to Mt. Vernon after two terms. The title "Cincinnatus" connected the newspaper article to noble Roman and Revolutionary ideals, with the intention of bolstering its credibility and championing its position with "the people."

For Kentuckians in the mid-1820s, "the people" had a literal definition. It referred to citizens: a specific group of men with the privilege to vote. The state constitution clarified, that "every free male citizen, (negroes, mulattoes, and Indians excepted)" who was 21 or older could vote.¹⁴² Suffrage enabled the citizens to unite under the common voice of the majority. Individuals joined together as the collective overseer of government. The pervasive ideology on popular sovereignty claimed this

¹⁴¹ One branch—the legislature or the judiciary, depending on one's viewpoint—*arbitrarily* had overstepped its circumscribed power.

¹⁴² Kent. Const. art. II, § 8 in *Old Kentuckian* [pseud.], 12.

entity constituted a higher source of reason and intellect than merely the sum of everyone's wishes.¹⁴³

Cultural norms dictated that these citizens understood the tenets of republican government and actively participated in state affairs. As Patrick Darby, the editor of the Old Court newspaper *The Spirit of '76*, wrote, "It is not sufficient that a people should be attached to freedom. In order that it endure, the people must understand the principles of their government."¹⁴⁴ Citizens were knowledgeable about the basic elements of law and consciously separated constitutional matters from partisan politics.¹⁴⁵ As such, they functioned as a legitimate source to interpret and comment on constitutional as well as political issues.¹⁴⁶

"The people" exerted their political influence by casting their ballots. Kentuckians voted on the entire House of Representatives each August. Additionally, citizens elected a quarter of the Senate every year.¹⁴⁷ The annual elections allowed the general populace, as the state sovereign, to respond promptly to new laws and other legislative action from the previous session. Frequent voting also ensured the statesmen's actions reflected the people's wishes. The government officers functioned as "[...] the representatives of the people, [...] the servants as well as guardians of their civil and political liberties, and whose bounden duty it is to watch over their interests and

¹⁴³ Kramer, 112.

¹⁴⁴ *The Spirit of '76*, March 10, 1826, 3. *The Patriot*, March 13, 1826, 41. As a caveat, while these papers were in circulation, people knew who wrote them. However, the authors' use of pseudonyms and anonymity renders it difficult for a modern researcher to determine authorship. I have extrapolated information from references to specific individuals made during the feuding newspaper's critique.

¹⁴⁵ Friedman, 237. Kramer, 31.

¹⁴⁶ Kramer, 31.

¹⁴⁷ Senators served four-year terms with staggered reelection. Kentucky Constitution, Article II, Sections 1 (house terms), 8 (senate terms), 10 (staggered elections of senators). Dippel, Horst, "Constitutions of the World Online-US-KY-1799-08-17," http://www.modern-constitutions.de/nbu.php?page_id=02a1b5a86ff139471c0b1c57f23ac196&show_doc=US-KY-1799-08-17-en&viewmode=pages&position=2 (accessed January 25, 2010). *The Spirit of '76*, March 10, 1826, 4.

privileges.”¹⁴⁸ This power dynamics allowed “the people” to impact politics directly. Moreover, it created an expectation that “the people” had that given authority.

Specifically, Kentuckians had the power to decide the constitutionality of the Re-organizing Act, an honor and duty that reflected the new focus on popular constitutionalism. Popular constitutionalism, or the people’s power to decide constitutional issues, had various definitions and applications. By the 1800s, popular constitutionalism involved an interaction between the leaders in power and “the people,” in which political leaders educated the masses about the tenets of republican government. In return, “the people” rendered their decisions concerning the actions of government officials.¹⁴⁹ A general consensus developed in Kentucky:

All parties concurred in the submission of the question to the people, and all acknowledge their competency to settle the matter referred to them, *and all* promised obedience to the public will, when it should be ascertained.¹⁵⁰

Because of this universal deference to and esteem of “the people,” politicians in articles, fliers, and speeches focused on rational arguments grounded in constitutional text.

¹⁴⁸ “Remarks of Mr. Joyes of Jefferson county in the House of Representatives, in favor of the Convention Bill,” *Argus of Western America*, December 3, 1823.

¹⁴⁹ Kramer, 112-113.

¹⁵⁰ *The Spirit of '76*, 14.

III. Reading between the Lines: Appeals to Kentucky's Written Constitution

“The great political question which is now agitated, and which distracts our once prosperous Commonwealth, renders it peculiarly necessary that the people should diligently examine their constitution, and compare its provisions with the principles recognized in the reorganizing act of the legislature.”¹⁵¹

- *The Spirit of '76*,
March 10, 1826

Both the Old Court and New Court Parties defended their positions by referencing the Kentucky Constitution, the accepted will of “the people.” In the early 19th century, Americans uniformly agreed that the constitution articulated the voice of the popular sovereign.¹⁵² As the blueprint for government rule, the constitution outlined the functions and jurisdiction of each branch. It was an objective source of authority; thereby giving credibility to their otherwise partisan stances. Consequently, it provided an effective and substantive resource to discern whether the Kentucky Court of Appeals (with regard to its rulings in *Lapsley* and *Blair*) and the General Assembly (with regard to passing the Reorganizing Act) had acted correctly. Both parties implicitly accepted that to be deemed “constitutional” served as the appropriate measure for evaluating what was correct: a reasonable assumption given the universal deference to the constitution and its role as the highest form of law. As such, the constitution created a shared vocabulary and set parameters for debate. This common denominator facilitated discussion (and eventually resolution) between the factions. Conversely, without the constitution as a unifying factor, the schism could have continued with two courts presiding (as a fractured government) by merely ignoring the other’s existence.

¹⁵¹ *The Spirit of '76*, March 10, 1826, 13.

¹⁵² Fritz, 2. However disagreements ensued as to whether the written constitution was the only expression of the people’s will.

Ambiguities and contradictions inherent within the text of the constitution enabled the same reference to substantiate opposing viewpoints. The Old Court Party cited Article IV, Section 3, concerning judicial tenure, to illustrate the unconstitutionality of the Re-organizing Act. The section provided only two means to dismiss justices: impeachment and removal by address. For the past two years, the General Assembly failed at both routes.¹⁵³ By enacting the 1824 law, the legislature, according to Old Court proponents, purposely circumvented the constitutional procedure to remove justices and thus disregarded the will of the people. Addressing his fellow citizens, one advocate using the penname “One of the People” urged them to, “[...] rescue it [the constitution] from those who have proved themselves traitors to your interest and to your sovereignty, to their promises and your instructions.”¹⁵⁴ By “instructions,” the Old Court Party meant exclusively impeachment and removal by address; *not* removal of justices by ordinary statute (such as the Re-organizing Act).

Rather than discuss the constitutional mechanisms to remove individual judges, New Court activists framed their defense of the Re-organizing Act by citing the General Assembly’s exclusive power to craft, enact, and suspend laws.¹⁵⁵ Article 10, Section 14 of the Kentucky Constitution authorized the legislature alone the “power of suspending laws.”¹⁵⁶ This line of reasoning served as a compound argument both to justify the right of the legislature to pass the contested act and to prove the judiciary had infringed on legislative jurisdiction.¹⁵⁷

¹⁵³ Kentucky, General Assembly, Legislative Research Commission, *Text of the Kentucky Constitutions of 1792, 1799 and 1850* (Frankfort: 1965).

¹⁵⁴ “One of the People” [pseud.], “A Sharp Shooter of ’76,” *The Spirit of ’76*, March 10, 1826.

¹⁵⁵ Old Kentuckian [pseud.], 1.

¹⁵⁶ “That no power of suspending laws shall be exercised, unless by the legislature or its authority.” Kent. Const. art. X, § 14.

¹⁵⁷ This will be discussed in Section 2 on the Separation of Powers.

The law alluded to was “*An Act Establishing the Court of Appeals*” from 1792.¹⁵⁸ According to the pro-New Court newspaper *Argus of Western America (Argus)*, “[...] there was no judiciary and could be none, until the legislature complied with the directions of the constitution in establishing it.”¹⁵⁹ Accordingly, the legislation, *not* the constitution, established the Court of Appeals. As such, the General Assembly had the authority to *disestablish* the bench and create a replacement. The full title of the Re-organizing Act, “*An Act to Repeal the Law Organizing the Court of Appeals and to Re-organize a Court of Appeals,*” contained embedded within it a constitutional defense for evicting the judges. In fact, the editor of the *Argus*, Amos Kendall suggested that a precedent for the Re-organizing Act existed. In 1796, the legislature passed a second establishment law that slightly altered the court’s jurisdiction and procedures.¹⁶⁰

Yet, the Kentucky Constitution could be interpreted either to support or dispute the issue of establishing the Court of Appeals. Article IV (“Concerning the Judicial Department”), Section 1 read:

The judicial power of this Commonwealth, both as to matters of law and equity, shall be vested in one Supreme Court, which shall be styled the Court of Appeals, and in such inferior courts as the General Assembly may, from time to time, erect and establish.¹⁶¹

New Court advocates claimed the state constitution identified what types of courts would exist, but required the legislature to create them. John Rowan, the House leader had

¹⁵⁸ “Letter VIII. to John J. Crittenden, Esq. *Precedents and Authority to prove that our Court of Appeals is not created by the constitution,*” *Argus of Western America*, May, 17, 1826.

¹⁵⁹ “Letter VIII. to John J. Crittenden, Esq. *Precedents and Authority to prove that our Court of Appeals is not created by the constitution,*” *Argus of Western America*, May, 17, 1826.

¹⁶⁰ “Letter VIII. to John J. Crittenden, Esq. *Precedents and Authority to prove that our Court of Appeals is not created by the constitution,*” *Argus of Western America*, May, 17, 1826.

¹⁶¹ Kentucky, General Assembly, Legislative Research Commission, *Text of the Kentucky Constitutions of 1792, 1799 and 1850.*

explained this difference in a speech he gave to the General Assembly in 1824. In 1825, it was published for the public. Rowan challenged:

Who are to be vested with the judicial power, and when or where, and how shall they exercise it? None of these matters are designated in the constitution, in relation to the supreme court, more than the inferior courts.¹⁶²

He suggested since the Kentucky Constitution lacked details for judicial protocol, the legislature must devise them; hence, “establish” the Court of Appeals.

New Court activist and editor Amos Kendall reinforced Rowan’s argument. He addressed the state constitutional delegates’ intent to establish a Court of Appeals through legislation. Kendall explained:

If the court of appeals was established by the constitution, how happened it that the *very men* who had aided in it as members of the convention, in three months afterwards, as members of the Legislature, passed an act with the intent to establish that very court?¹⁶³

Kendall suggested that because many of the delegates from the state constitutional convention also became legislators who passed the “*Act Establishing the Court of Appeals*,” the constitutional convention intended for the legislature to create the courts.

His rhetorical question probed at a critical subtext to the Old Court-New Court controversy: how to ascertain the people’s will. Although both parties agreed that the constitution represented popular will, Kendall asked Kentuckians to think about who designed that Kentucky Constitution. His answer was living men—many who subsequently joined the first General Assembly—designed it.

The Old Court Party responded (although never directly at Amos Kendall) with an ontological argument. The Court of Appeals *existed* once the constitution acknowledged

¹⁶² John Rowan, *Abstract of the Speech of Mr. Rowan, Upon the Bill to Reorganize the Court of Appeals* (Louisville: William Tanner, Pr., 1825), 9.

¹⁶³ “Letter VIII. to John J. Crittenden, Esq. Precedents and Authority to prove that our Court of Appeals is not created by the constitution,” *Argus of Western America*, May, 17, 1826.

it. Old Court partisans rationalized that because the constitution explicitly mentioned the Court of Appeals as the supreme state tribunal, the founding document established that court.¹⁶⁴ However, the Old Court Party did not address the 1792 or 1796 laws. Instead, the Old Court Party contended that the language of the constitution was clear. The constitution, *not* legislation, created the Court of Appeals. Consequently, the highest bench of the judiciary branch could not be dissolved by a regular piece of legislation.

With each party asserting its allegiance to the constitution, the people would have to decide which interpretation was legitimate. The Old Court Party appealed to the people by associating the constitution with stability and continuity, which—according to its view—the Re-Organizing Act threatened. Self-titled the “Friends of the Constitution,” this party identified its mission as preserving the constitution and a stable form of government. Shortly after the 1825 Election, the Old Court Party publicized in the *Kentucky Reporter*, a Lexington-based newspaper, “We contend for nothing but an organised [*sic*] government, which the constitution *prescribes* and *guarantees*; —not for *old* Judges nor *new* Judges,—but for CONSTITUTIONAL JUDGES and CONSTITUTIONAL LAWS.¹⁶⁵ The intended message was to separate the Old Court Party’s stance from mere political pettiness in order to strengthen their claims (and ostensibly transform the debate to an objective inquiry about the constitution). The New Court Party responded with a similar declaration: “They [the Old Court Party] are not, as they would have us believe the sole advocates of the constitution.”¹⁶⁶ Both political groups associated themselves with the constitution, and by extension, “the people.”

¹⁶⁴ “One of the People” [pseud.], “A Sharp Shooter of ’76,” *The Spirit of ’76*, March 10, 1826, 12.

¹⁶⁵ *Kentucky Reporter*, October 24, 1825.

¹⁶⁶ *The Patriot*, March 27, 1826, 74.

However, contention revolved around who best embodied and protected constitutional ideals.

IV. “Separate But Equal”?: The Separation of Powers Principle

“That the security of the citizen depends upon a division of power, is a principle upon which all the American Republics are based.”¹⁶⁷

- Senator John Pope,
April 3, 1826

Although the Kentucky Constitution distributed power among the branches of government, the Old Court and New Court parties clashed on how they conceptualized the distribution between the legislature and judiciary. Article 1, Section 1 of the Kentucky Constitution outlined the roles of the three governing branches, the legislature, executive, and judiciary. The second section restricted members of each to the confines of their delegated power; none could transcend into another department’s jurisdiction.¹⁶⁸ Yet the constitution remained silent as to whether this division of power meant each branch was autonomous and equal.

According to the Old Court Party, the Re-organizing Act contradicted separation of powers, but exactly how was debatable within the party. Some contested the legislation on the grounds that it allowed the General Assembly to dissolve the highest unit of the judiciary. By implication, the legislature trumped the judiciary’s independence as a separate branch. Old Court activists believed this contradicted the Kentucky Constitution. The Old Court newspaper *The Spirit of '76* encouraged citizens to read the constitution; “It is in this constitution, that you not only find your own rights

¹⁶⁷ John Pope, “To the People of Kentucky.—No. 1,” *The Patriot*, April 3, 1826, 94.

¹⁶⁸ See *Appendix I*. Kentucky, General Assembly, Legislative Research Commission, *Text of the Kentucky Constitutions of 1792, 1799 and 1850* (Frankfort: 1965).

declared—but you also find, the rights and powers of your rulers, prescribed, or defined. [...] It binds each, and all, in their proper sphere.”¹⁶⁹

That same paper described two Old Court viewpoints that recognized necessary forms of judicial deference. *The Spirit of '76*, in describing its mission, stated, “We advocate for the cause of the people, and of the people’s constitution, of freedom and of free government; of a judiciary independent, but responsible.”¹⁷⁰ The caveat “responsible” qualified the extent of judicial power. It was intended to quell fears about an unbridled government power. In the early 19th century, many Americans equated judicial independence with judicial supremacy, a situation granting an unelected (and thus unrepresentative) body with decision-making power.¹⁷¹ Many citizens worried about the potential for abuse. The “Old Kentuckian” articulated this in *Liberty Saved*: “Had the judges the power of judging the laws, nothing could be law but their will.”¹⁷² As a result, even some Old Court advocates, such as “Cincinnatus,” conceded that the judiciary was subservient to the legislature.

The true position held by the party [...] is that the judges are DEPENDENT on the senate and house of representatives, being the two branches of the legislature, chosen directly by the people and by the constitution vested with power by concurring majorities, on an address of *two thirds*—or an equal proportion of the senate, in case of impeachments.¹⁷³

“Cincinnatus” acknowledged the judiciary held an inferior status, but objected to the Re-organizing Act because it unfairly evicted the justices.

The New Court Party defended the Re-organizing Act by emphasizing that the governing branches purposely were unequal. The legislature remained superior because

¹⁶⁹ *The Spirit of '76*, March 17, 1286, 18.

¹⁷⁰ *The Spirit of '76*, March 10, 1826, 3.

¹⁷¹ Kramer, 125.

¹⁷² Old Kentuckian [pseud.], 1.

¹⁷³ *The Spirit of '76*, April 7, 1826, 68.

it singularly represented “the people,” the ultimate source of power. The citizens elected members to the General Assembly directly and annually. This created the closest governmental tie to “the people.” A New Court advocate “Jefferson” (possibly the alias for the New Court of Appeals Clerk Francis Blair) articulated this point in the *Argus*: “The people can only act through the Legislature [...] To deny to the legislature the right to pass a law, is to deny it to the people; to deny to the Legislature the right to remove a judge, is to deny it to the people.”¹⁷⁴ “Jefferson” linked popular sovereignty directly to the legislature; thereby sanctifying any legislative action as the will of “the people.”

Old Court partisans disputed this exclusionary premise by claiming that the constitution as a whole represented “the people.” “Cincinnatus” explained, “The representatives of the people are not the people any more than the agent is the principle, or the servant is the master.”¹⁷⁵ By this, he severed the New Court Party’s alleged exclusionary bond between the General Assembly and the populace. Instead, “Cincinnatus” proposed that, “The three departments of the government, are each the agents of the people, and responsible” to this sovereign.¹⁷⁶ The Kentucky Constitution constructed a three-branch government. Since it represented the will of “the people,” each branch inherently represented that will too. Old Court advocates argued the judiciary was an equal to the legislature in this role. *The Spirit of ’76* professed:

[...] The court of appeals is the head of one of the three great departments, or depositories of the power of government; as the governor is of another; and that no more can the government exist without the constitutional existence of this head, than it can without the constitutional existence of the governor.¹⁷⁷

¹⁷⁴ Stickles, 66. “For the Argus, Jefferson to the People,” *Argus of Western America*, May 11, 1825.

¹⁷⁵ Cincinnatus [pseud.], “Cincinnatus- No. III,” *The Spirit of ’76*, March 24, 1826, 37.

¹⁷⁶ *Ibid.*

¹⁷⁷ *The Spirit of ’76*, April 7, 1826, 65.

Accordingly, the constitution, and thus “the people,” recognized the necessity of an independent judiciary.

More radical New Court men responded that the legislature preceded the written constitution. Recall House majority leader and New Court proponent John Rowan had articulated this theory in his *Preamble and Resolutions* adopted by the legislature on January 8, 1824. New Court newspapers circulated this preamble during the 1825 campaigns. It remains unclear if Rowan echoed sentiments made by the people at large, or if his profound words influenced his fellow Kentuckians. The argument actually dated back to the colonial period, a time in which a body of people existed before they established a constitution and independent government. Regardless of how people received the information, at least one known pamphlet, “Liberty Saved,” also believed that the legislature predated the constitution. By this logic, the Kentucky Constitution did not create the government or its branches. Instead, it merely transcribed the roles of each department.¹⁷⁸

Old Court partisans responded with the reverse logic: the constitution alone dictated the powers of the legislature. According to *The Spirit of '76*:

The constitution is the solemn declared will of the people, prescribing the rule of government to themselves and the legislature. A legislative act is the declared will of men who have no power, except from the people under the constitution; and their acts no sanction, except from their conformity with the constitution.¹⁷⁹

This viewpoint had its own extremism because it eliminated “the people” as a separate and distinct entity from the constitution. Consequently, it denied the mixed form of popular constitutionalism typically espoused by both parties.

¹⁷⁸ Old Kentuckian [pseud.], 1.

¹⁷⁹ *The Spirit of '76*, April 7, 1826, 66.

V. Judicial Review

While discussing the separation of powers, debate turned to address the scope of each branch and the implicit question of judicial review.¹⁸⁰ The term judicial review never entered the rhetoric of either party. But, the 1823 Court of Appeals cases that precipitated the controversy dealt exactly with this issue. Recall, that in November 1823, the court nullified the 1820 replevin law claiming it contradicted the state and federal constitutions. Subsequently, the legislature tried to reverse the decision and reprimand the justices because the majority of statesmen believed the power to void legislation went beyond the judiciary's designated power. The Re-organizing Act served the legislature's objective. Consequently, during the 1825 and 1826 campaigns about the constitutionality of the Re-organizing Act, the issue of judicial review resurfaced.

Many Old Court articles framed their argument as a defense of judiciary independence from legislative encroachment (a separation of powers argument), rather than an endorsement of judicial review. Yet, "Cincinnatus" argued that the court had this power through the people themselves:

[...] that the courts, and in the last resort, the court of appeals, have the right (it should be undoubted and undisputed,) to declare and pronounce every act, contrary to the constitution, *utterly null and void*. Remember, also, that the court, in doing this, acts as your agent, with whom your constitution has entrusted its judicial powers.¹⁸¹

Neither constitution explicitly authorized judicial review. Nevertheless, by the turn of the 19th century, society generally accepted the court's power to decide the constitutionality of cases as part of its duties to "the people."¹⁸² Additionally, the US Supreme Court and

¹⁸⁰ Judicial review is the right of the court to interpret the constitution and rule actions by other government offices unconstitutional.

¹⁸¹ Cincinnatus [pseud.], "Cincinnatus- No. III," *The Spirit of '76*, March 24, 1826, 34-35.

¹⁸² Kramer, 105.

other justices throughout the country had begun to assert their right to interpret the constitution as well as nullify unconstitutional laws.¹⁸³ The Supreme Court case *Marbury v. Madison* (1803) set the precedent for judicial review and nullification.¹⁸⁴ Despite this historical feat, the federal government continued to bear minimal influence over state actions, especially in resistant regions. Kentucky asserted its state's rights and local rule, so references to the *Marbury* decision never surfaced in the court schism debate.¹⁸⁵ Nevertheless, the Old Court Party's conception of an independent judiciary with the power to check the other branches of government mirrored the sentiments in *Marbury*.

The opposition remained divided over whether the judiciary had any power to decide on the constitutionality of laws. Governor Desha and Representative John Rowan adhered to the more mainstream of the New Court Party's stances: "[...] The power of the court to declare any law unconstitutional and void, which is *obviously* and *palpably* so."¹⁸⁶ "The people" would determine this (the insinuation was through their votes). This policy meant that nullifying a law must occur outside of the court's ruling.

The Old Court Party reprimanded this approach, which appeared subjectively to determine what decisions were rendered correctly. An Old Court Party article in *The Spirit of '76* attacked Governor Desha's stance: "You admit that it is the duty of the judges to decide on the constitutionality of the acts of the legislature. What crime then have they committed? Did they decide wrong?"¹⁸⁷ In this one-way conversation, Desha could not respond, but his address to the legislature in 1824 indicated that it was exactly because they decided wrong, they must be punished.

¹⁸³ *Blair v. Williams* and *Lapsley v. Brashears* (1823).

¹⁸⁴ Snowiss, 110.

¹⁸⁵ Kramer, 152.

¹⁸⁶ Preamble and Resolutions of 1823 in *Argus of Western America*, February 18, 1824.

¹⁸⁷ "A Plebian," "To Joseph Desha. No. V," *The Spirit of '76*, April 14, 1826, 91.

Other more radical New Court activists professed that the judiciary lacked the authority to nullify legislation because such power undermined the legislature's own jurisdiction. According to Article 10, Section 14 of the state constitution, "[...] no power of suspending laws shall be exercised, unless by the legislature or its authority." Therefore, if the judiciary ruled a case unconstitutional, and consequently null and void, as it did in *Lapsley* and *Blair*, the decision contradicted the constitution by allowing the judiciary to suspend a law. Article 4 of the Kentucky Constitution, "Concerning the Judiciary Department," specified that the courts decided on "matters of law and equity."¹⁸⁸ This New Court faction interpreted Article 4 as using "law" to signify only ordinary statutes. In this framework, the court was limited to deciding if parties had abided by the tenets of the law. It could not rule on whether a piece of legislation was constitutional.

VI. Significance of Ideology

The Old Court and New Court campaigns served an immediate goal: influence voters to resolve the schism in their favor. In the process, each party provided an extensive analysis about how it understood Kentucky's republican form of government. The debates among campaign literature revealed differing conceptions about the jurisdiction of each branch and their relationship with "the people." Yet, one unifying factor emerged: an appeal to the people themselves to understand the constitutional arguments and vote accordingly.

¹⁸⁸ See Appendix 1.

Chapter 3

In the Court of Public Opinion: Implementing Popular Constitutionalism

“Once in every year, commencing on the first Monday in August,
we march forward to the polls as sovereign Kentucky freemen,
and speak the word in our own native majesty as such [...] *Then*
is the day of political redemption to the people of Kentucky!”¹⁸⁹

-“Kentuckian,” *The Spirit of '76*,
Friday before the 1826 Election

I. Election Results and their Consequences

The three-day election for the legislature commenced on August 1, 1825 filled with hope and anxiety. For the past ten months, newspaper editors, state politicians, and citizens had argued over the constitutionality of the Re-organizing Act in an attempt to settle the judicial controversy. Finally the ballots would reveal the people’s verdict. As Judge Lewis Collins observed, “The usual frenzy of Kentucky politics was compounded by both the proximate issue of the court battle and deeper antipathies that had been bred and nursed in the previous six or seven years.”¹⁹⁰ People feared the heated atmosphere could quickly degenerate into mayhem and violence. Yet, when the polls closed on the third day, no blood had been shed.¹⁹¹

Although impossible to ascertain why each individual voted the way he did, prior to the election both parties agreed that the results would indicate the people’s opinion on the Re-organizing Act. Since Kentuckians annually selected the entire House of Representatives, elections essentially functioned as referenda on recent legislation.¹⁹² As

¹⁸⁹ *The Spirit of '76*, August 4, 1826, 348.

¹⁹⁰ Lewis Collins was a judge during the mid-1800s and a historian on his lifetime. He was referring to relief politics dating from the Panic of 1819. Collins, 882.

¹⁹¹ Stickles, 77.

¹⁹² Schoenbachler, *Murder and Madness: The Myth of the Kentucky Tragedy*, 112. Again, this may or not have been the reality, but it was what people espoused.

“Philo-Patrick Henry” wrote in the *Argus*, “What is the object of frequent elections? Is it not to secure responsibility and correct abuses? When suspending or relieving power shall be abused, the people will correct the abuse.”¹⁹³ With this sentiment, the Re-organizing Act, as the major law passed in the last year, came before the people’s vote. Accordingly, votes for the New Court Party signaled an endorsement for the legislation. Alternatively, replacing New Court Party members with Old Court candidates conveyed the message that “the people” found the law unconstitutional and supported the original court as the true judicial power. Out of the 100 House representatives elected in 1825, the people chose 62 Old Court partisans and only 38 New Court men.¹⁹⁴ This overwhelming Old Court majority ostensibly reflected disapproval of the Re-organizing Act.

Nevertheless, interpretations on the election returns differed based on party allegiance. New Court publications and spokesmen rationalized their loss while still maintaining “the people” held the power to decide on the Re-organizing Act. They espoused that citizens had been confused or manipulated, resulting in inadvertently miscasting their vote.¹⁹⁵ In response to these charges, the Old Court Party stated:

For notwithstanding the slanders from the *Argus*, on the people; it is believed that they understood the APPEAL which had been made to them; and that they voted according to their sentiments, and principles, for the constitutional court.¹⁹⁶

Based on this conclusion, other pro-Old Court newspapers like the *Nile’s Register* reported with jubilation, “So it is put down as absolutely certain, that the ‘new court’ will

¹⁹³ Philo-Patrick Henry, “For the *Argus*, No. III,” *Argus of Western America*, April 14, 1824.

¹⁹⁴ *Kentucky Reporter*, August 15, 1825.

¹⁹⁵ “To the Freeman of Kentucky. Fellow-Citizens,” Message written by Old Court Party published in *Kentucky Reporter*, January 2, 1826.

¹⁹⁶ The *Argus* was the primary New Court newspaper, which the state printer Amos Kendall published. *The Spirit of ’76*, March 10, 1826, 5.

be abolished and the ‘old’ one restored to all its former powers.”¹⁹⁷ However, this excited prediction ignored the election returns for the Senate.

Unlike the ultra-democratic voting procedures for the House of Representatives, citizens elected only a quarter of the Senate annually. In 1825, nine out of the 38 positions were open. Of the 29 senators completing their terms, 17 allied themselves with the New Court and 12 with the Old Court.¹⁹⁸ The nine seats up for election could have shifted the balance of power in the Senate. Instead, constituents selected only five Old Court senators, thereby maintaining the New Court Party majority at 21 to 17.¹⁹⁹ With the split General Assembly, resolution remained an uncertain prospect.

To offset the divided political power, residents of Christian, Trigg, and Todd counties attempted to convince their senator who had not been up for reelection to use the results from the House as a guide for his own political stance.²⁰⁰ Two weeks after the election, local citizens met to deliberate that matter and appointed a lay committee to draft their resolution. Their resolution demanded Senator Young Ewing “consider the vote for representatives in his senatorial district, as a *sufficient instruction* as to the [un]constitutionality of the law reorganizing the Court of Appeals.”²⁰¹ The grassroots committee hoped this initiative would facilitate repealing the Re-organizing Act. This form of action, known as instruction, functioned as an acceptable means for citizens to direct their civil servants.²⁰²

¹⁹⁷ Niles’ Register article in *Kentucky Reporter*, September 26, 1825.

¹⁹⁸ Stickles, 90.

¹⁹⁹ Stickles, 82.

²⁰⁰ Although there is no documentation to the citizens’ official party allegiance, their philosophy suggests they were Old Court Party supporters.

²⁰¹ *Kentucky Reporter*, September 27, 1825.

²⁰² Fritz, 18.

But beyond party politics, the resolution questioned the scope and application of voting as an expression of popular will. Kentuckians universally agreed “the people” must determine the constitutionality of the Re-organizing Act and that this sovereign communicated its decision through a majority vote. Ewing’s constituents suggested that senators completing their second, third, or fourth term of office utilize the election results from the House of Representatives to gauge how to best represent their electorates. Senator Ewing, a New Court proponent and the former chairman of the committee that sponsored the Re-organizing Act, denied the request.²⁰³ He claimed the suggested action would drastically alter the current government structure.²⁰⁴ Thus, while the lay resolution exemplified attempts to define and expand forms of popular rule, Ewing’s refusal to comply demonstrated that politicians were not obligated to heed input from the masses.

To complicate matters, both parties, after the fact, accused the other of illicit electioneering tactics. Rumors spread that cronies of Solomon Sharp, a candidate for the House, brought inmates from the Frankfort prison to vote in the county’s election. Other sources claimed that in the same county of Franklin 200 extra ballots were counted beyond the number of legal voters.²⁰⁵ The Old Court newspaper *The Spirit of '76* even implicated the New Court Party of corrupting the vote; “Let every man who reads this article, ask *himself*, whether [when] he gave his vote at the last election, *he* was drunk, duped or bribed.”²⁰⁶ This alleged misconduct, ranging from bribery to impaired judgment, undermined the public education efforts that called upon citizens to understand

²⁰³ The constituents regarded the election in the House as an opinion by the people on the constitutionality of the Re-organizing Act.

²⁰⁴ *Kentucky Reporter*, September 27, 1825.

²⁰⁵ Stickles, 81.

²⁰⁶ Germanicus [pseud.], “The Compromise,” *The Spirit of '76*, March 17, 1826, 29.

the constitution's mandates, reason intelligently, and perform their civic duty. However, in the same edition of *The Spirit of '76*, "Germanicus" reported:

The people of Kentucky love their constitution too dearly, and regard with too filial affection the holy heritage of *constitutional liberty*, which their fathers left them as a precious legacy, ever to be duped, bribed, or cheated out of it; and they will hold in utter abhorrence, those men, who insinuate, that the elections of republican Kentucky are governed by wealth, and the suffrages of her citizens secured by bribes.²⁰⁷

The mixed messages and slanderous allegations distorted the reality of the situation.

II. Action or Inaction: The Justices, Legislators, and Governor

With the election over, the Old Court of Appeals justices had a pressing decision: to resume holding court or remain "on recess." Earlier in February, Chief Justice Boyle chose to end the Old Court's hearings prematurely and wait until after the election to preside over more cases. This cautious strategy allowed the Old Court to sustain its title as the true Court of Appeals, while prudently deferring to the people's opinion on the schism. Although the August election yielded an Old Court majority in the House, the legislature would not start session until November leaving the court in a precarious position if it rendered judgments before the General Assembly repealed the Re-organizing Act.

At noon on October 3, the Old Court justices boldly entered the Representatives Chamber to begin court.²⁰⁸ According to the *Kentucky Reporter*, the judges, "Instructed by your votes, and by their own sense of duty, [the Old Court] will continue without

²⁰⁷ Germanicus was the name of the last republican of the Roman Empire. Germanicus [pseud.], "The Compromise," *The Spirit of '76*, March 17, 1826, 29.

²⁰⁸ *Kentucky Reporter*, October 10, 1825.

longer suspension, to do your business.”²⁰⁹ Within a few days of resuming court, the clerk already had filed 48 records.²¹⁰ This large volume vindicated the justices by proving many attorneys and defendants still recognized them as the true Court of Appeals. Likewise, lower courts overwhelmingly continued to obey the Old Court’s mandates.²¹¹ Less than a week into adjudicating, however, Chief Justice Boyle ordered a month recess until Friday, November 11. He also set this date as an ultimatum for the New Court’s Clerk of Court, Francis Blair, to relinquish the court papers he notoriously confiscated that past winter.²¹² Boyle aptly chose Friday, November 11 because the legislature planned to return for session that preceding Monday; thereby giving the Old Court a needed ally and authority against its rival court.

When the General Assembly reconvened on November 7, Old Court leaders in the House immediately began to craft the bill they had been selected for office to do: repeal the Re-organizing Act. A drafted version, colloquially referred to as the “Judiciary Bill,” explicitly affirmed that the original Court of Appeals remained the only legitimate body:

And the [Old Court] judges thereof, having neither resigned or been removed from office by either of the modes recognized and provided by the constitution, are still in office, and should be considered and respected by all the functionaries of the government.²¹³

On November 14, just one week into session, the Judiciary Bill passed in the House (58 in favor and 37 against). The Senate voted on November 23. The result: 19 for and 19 against. Recall 21 senators identified themselves as New Court men, while only 17 with

²⁰⁹ This was published in January, but referencing what was happening in the fall of 1825. *Kentucky Reporter*, January 2, 1826.

²¹⁰ *Kentucky Reporter*, October 17, 1825.

²¹¹ Collins, 882.

²¹² *Kentucky Reporter*, October 17, 1825.

Blair broke through a window to get into the Old Court chambers and take the coveted court records. Schoenbachler, *Murder and Madness: The Myth of the Kentucky Tragedy*, 111.

²¹³ *National Intelligencer*, November 24, 1825 in Stickles, 90.

the Old Court. Lieutenant Governor Robert McAfee cast the tie breaker. The bill was rejected.²¹⁴

Constitutional protocol sanctioned the lieutenant governor's authority. Yet, Editor Thomas Smith of the *Kentucky Reporter* exclaimed that it was unprecedented for an individual to deny "the people" their right to repeal an act, especially one "which they have by an immense majority solemnly declared to be unconstitutional and inexpedient."²¹⁵ Ironically, the plethora of campaign literature that employed charged terms like "tyranny," "dictator," and "supremacy" to describe the judiciary or legislature (depending on party views) never suspected the outcome would rest on the singular action of one legislator.

With the bill to repeal the Re-organizing Act defeated, political negotiations shifted towards compromise. The Old Court Party, as the current House majority, offered two possibilities. First, it suggested adding to the original Court of Appeals an additional judge, selected by Governor Desha. This court would preside as the only Court of Appeals as if the Re-organizing Act never existed. Anti-Relief members had advised this very form of compromise in 1824 to preempt the Re-organizing Act. They had endorsed this because it increased the number of justices but required "no *sacrifice of principle*."²¹⁶ But by 1825, the Re-organizing Act, now law, could not be revoked by simply ignoring it.

Alternatively, on November 25, Old Court Representative Martin P. Marshall proposed a more extreme measure. Marshall advocated that Governor Desha, Lieutenant Governor McAfee, the New Court justices, and the entire Senate resign so that the people

²¹⁴ *Kentucky Reporter*, November 28, 1825.

²¹⁵ *Kentucky Reporter*, November 28, 1825.

²¹⁶ *The Spirit of '76*, March 17, 1826, 28.

could reelect these positions.²¹⁷ While completely unprecedented and presumptively partisan driven, the suggestion actually reflected a similar logic to the constituents who wrote Senator Ewing. Marshall's highly democratic plan would alter the government infrastructure but ensure that all officials served at the public's discretion. His resolution passed the House, but failed in the Senate (17 yeas to 20 nays).²¹⁸ Both "compromises" lacked any real concession on the Old Court's side; rather they thinly veiled their intent to disband the New Court.

Meantime Senator John Pope tried to revive the essence of the repeal bill by offering a more balanced, bipartisan initiative that he hoped would appease both factions. On December 11, he modified a recent suggestion from the House entitled a "*Bill to Remove the Unconstitutional Obstructions which have been Thrown in the Way of the Court of Appeals*" into what he labeled "*A Bill Concerning the Court of Appeals*." It included adding a fourth judge to the bench. Pope's bill lost; 17 to 21.²¹⁹ Five days later, he proposed another piece of legislation calling for a brand new Court of Appeals temporarily consisting of three members from each of current courts.²²⁰ With this bill, Pope, who had affiliated with the Old Court Party, attempted to reach out to New Court Party members.²²¹ He optimistically explained, "'The foregoing propositions are made with a view of pointing out the several practicable means of restoring tranquility to the country.'"²²² However, the New Court Party splintered between those interested in

²¹⁷ *Kentucky Reporter*, November 28, 1825.

²¹⁸ Stickles, 93.

²¹⁹ While this is the same number as Old Court and New Court senators, in actuality some Old Court senators, such as Robert Wickliffe, voted against Pope's bill presumably because it conceded a compromise. *Senate Journal*, 35th Sess., 60-61.

²²⁰ *Kentucky Reporter*, December 19, 1825 and January 2, 1826. "Shelby," "Call of the Legislature," *The Spirit of '76*, March 17, 1826, 25.

²²¹ *The Patriot*, March 27, 1826, 77. *Lafayette, To the People*, No. 1, 10.

²²² *The Spirit of '76*, March 10, 1826, 5.

compromise versus others adamantly against it. Old Court advocates criticized the amendment because it perpetuated judicial subordination to the legislature by placing the powers to nominate and appoint judges solely in the hands of the General Assembly.²²³ Like its predecessor, the second bill never passed.

Nevertheless, Senator Pope continued his crusade for compromise by turning to the masses at large. He published the second proposal in the *Kentucky Gazette*, a New Court-leaning newspaper.²²⁴ Pope explained, “As that measure [...] is likely to be a subject of discussion in the ensuing campaign, I owe it to myself and the people to speak and to speak fully.”²²⁵ Pope outlined his plan and its merits for the public in a series of articles in *The Patriot* (the New Court newspaper which endorsed compromise). He even requested that Governor Desha call a special summer session to devise a compromise between the courts, but Desha refused.²²⁶

Compromise failed because these statesmen were voted to represent “the people” at different moments in time. Between the Elections of 1824 and 1825, the citizenry changed its agenda. The New Court newspaper *The Patriot* summarized the dilemma:

The Governor, Lieutenant Governor and the Senators said, “we were elected to maintain the laws and to get rid of the old judges. You of the house of representatives, were elected to repeal the law and to displace the new judges.”²²⁷

In actuality, this segment continued by advocating for a solution congruent with Senator Pope’s compromise. But more importantly, the newspaper article exposed the paralysis of Kentucky’s government. According to the same edition of *The Patriot*, “The public

²²³ Granting the legislature the sole power to nominate and appoint judges contradicted the text of the constitution and augmented legislative domination. *The Spirit of '76*, March 10, 1826, 5-6.

²²⁴ *The Patriot*, March 27, 1826, 79.

²²⁵ *The Patriot*, March 27, 1826, 78.

²²⁶ Shelby [pseud.], “Call of the Legislature,” *The Spirit of '76*, March 17, 1826, 25.

²²⁷ *The Patriot*, March 27, 1826, 68.

opinion avowed repeatedly [...] the rights of their legislature, and denounced the decision of the judges. But because the community are dissatisfied with the ‘new court,’ & the law by which it is established [...],” the citizenry now side with the Old Court.²²⁸ “The people” initially voted for Governor Desha and many of the New Court senators fulfilling their terms to promote debtor relief. In doing so, these statesmen planned to reprimand the justices for their unfavorable ruling on debt legislation. Their service to “the people” conflicted with the new House majority mandate to repeal the Re-organizing Act.

Governor Desha sent mixed signals regarding compromise. He hinted at compromising with the legislature, but simultaneously spoke of taking military action against the Old Court. On the first day of session, Desha wrote a message to the General Assembly explaining the current state of affairs and outlining the local and national issues he wanted addressed. He acknowledged the election results and specified that if the legislature issued a law to create an entirely new Court of Appeals, he would appoint an equal number of men from the contending factions.²²⁹ In the meantime, Desha promised to reprimand any Old Court justice who disobeyed the Re-organizing Act.²³⁰ In this tense environment, rumors circulated that Desha would activate the militia if they held court. Aware of this situation, the self-acclaimed “legitimate” justices vowed to continue their duty as arbiters, “[...] unless overcome by the governor’s army.”²³¹

The constitutional, philosophical crisis was escalating into an acute state of emergency. Would might triumph over right? *Kentucky Reporter* warned, “If the people of this country should ever permit their Governors or Presidents to settle constitutional

²²⁸ *The Patriot*, March 27, 1826, 68.

²²⁹ *Kentucky Reporter*, December 5, 1825. Stickles, 92-93.

²³⁰ Stickles, 89.

²³¹ *Kentucky Reporter*, January 2, 1826.

law with the sword, their liberties will very soon be crushed by the iron grasp of some military despot.”²³² Exercising force appeared anti-republican. On the other hand, the state constitution sanctioned the governor to execute laws. Desha could justify force to prevent the Old Court from defying the Re-organizing Act. As a New Court man under the alias “A Spectator,” explained:

These men [the Old Court judges] have no longer any jurisdiction, yet we are informed that they sit daily in mock majesty and with counterfeit solemnity, hear motions, grant writs of error with supersedeas, decide causes and pronounce opinions. Thereby deciding the most important rights of individuals without a shadow of authority by law for doing so. Nay, they are absolutely forbidden by law from the exercise of such power.²³³

Although Governor Desha might be able to defend military engagement by characterizing the Old Court justices as frauds or insurgents, in reality the judicial controversy was too politicized for him to convincingly persuade the public.

When the session closed on December 23, 1825, Kentucky legislators showed little progress in resolving their state crisis. During this time of urgency, the General Assembly met for only 45 days; the shortest session ever in Kentucky.²³⁴ Likely, after the “Judiciary Bill” and compromises failed, the statesmen deemed another election necessary for any further policy change. Laymen felt frustrated by the state of affairs. As one letter to the editor lamented, “The Legislature has done nothing [...] All hopes of being freed from our Judicial embarrassments have vanished.”²³⁵ Although no legislation passed to resolve the schism, the two Courts of Appeals’ behavior following the August 1825 Election shaped the trajectory of the constitutional crisis.

²³² *Kentucky Reporter*, December 26, 1825.

²³³ A Spectator [pseud.], “Judicial Supremacy” *The Patriot*, April 10, 1826, 112.

²³⁴ *Kentucky Reporter*, December 26, 1825. It was the shortest session since the legislature was established in 1792.

²³⁵ “Extract from Letter from Editor,” *Kentucky Reporter*, December 19, 1825.

III. Analyzing the Two Courts

The responses by the separate Courts of Appeals to the question of voluntary resignation foreshadowed their ultimate fates. In November 1825, the Senate’s Judiciary Committee attempted to circumvent repealing the Re-organizing Act by requesting both sets of justices to resign.²³⁶ On November 21, 1825, the Old Court justices wrote back, “[...] if we now retire can the doubts be dispelled which hang with gloom around the decisions [*sic*] of a Court standing on a legislative base?”²³⁷ In this post-election message, the justices understood the magnitude of their position. Here was a chance to define and defend the power of the judiciary as well as the American form of a constitutional government. Their letter emphasized that the legislature had transgressed from the sanctioned means of removing judges—a crime they thought disregarded the state constitution and the American system of governmental checks and balances.

The Old Court repeated its commitment to advance principles not men.²³⁸ It claimed to remain in office purely to safeguard the integrity of the judiciary as an independent and critical branch of government. Defending their actions, the Old Court justices explained:

We continued in office [...] Impressed with a perfect conviction of these truths, and of the importance of the principles involved in them, to the liberty and happiness of the country, however painful and irksome the task might be, of continuing in our places, we did not consider ourselves at liberty to abandon them.²³⁹

²³⁶ *Kentucky Reporter*, January 16, 1826. Stickles, 94.

²³⁷ Message from the Old Court to the Senate dated November 21, 1825 in *Kentucky Reporter*, October 17 1825.

²³⁸ *Kentucky Reporter*, January 16, 1826.

²³⁹ Message from the Old Court to the Senate dated November 21, 1825 in *Kentucky Reporter*, January 16, 1826. *Senate Journal*, 35th Sess., 61.

Empowered by this self-professed sense of higher duty, the three original justices vowed to continue hearing appellate cases without compensation, since their salaries had been revoked that past January.²⁴⁰ The Old Court concluded that, “Under the sanction of the constitution—the people, and their immediate representatives, we have resumed the full exercise of our judicial functions by proceeding to render judgments, and decrees in causes depending before us, and shall continue to do so.”²⁴¹ The original court continued to rule on cases throughout 1825. In total, the bench heard 274 cases, the largest volume ever for a three-month breath of time.²⁴²

The New Court justices responded with deference to the General Assembly; emphasizing their willingness to follow legislative initiatives although never explicitly agreeing to resign. Writing to the Senate shortly after it prevented the repeal of the Reorganizing Act (which would have eliminated the New Court of Appeals), the New Court justices confessed their reluctance even to join the bench. “We accepted our offices with hesitation,” the justices noted because, “[...] many of our respectable fellow citizens opposed the change in the system which placed us on the bench.”²⁴³ This statement implied they were cognizant of popular opinion from the onset of the crisis. They closed their letter, “[W]e are ready to do any thing in our power to arrest the progress of the evil [...] The good feelings and best interests of society alike invite to conciliation.”²⁴⁴ The New Court submissively promised to comply with any legislative proposal to restore peace and order in Kentucky.²⁴⁵

²⁴⁰ *Kentucky Reporter*, January 2, 1826.

²⁴¹ Message from the Old Court to the Senate dated November 21, 1825 in *Kentucky Reporter*, January 16, 1826.

²⁴² Stickles, 95.

²⁴³ *Kentucky Reporter*, January 30, 1826.

²⁴⁴ *Kentucky Reporter*, January 30, 1826. Stickles, 95.

²⁴⁵ *Kentucky Reporter*, January 30, 1826.

The Re-organizing Act, endowing the New Court with complete judicial authority, still stood, but the New Court justices voluntarily limited their own power. In November, the New Court permanently stopped deciding cases, although it scheduled its next meeting for March.²⁴⁶ Around this time, the House passed a resolution to stop paying the New Court judges their salaries.²⁴⁷ Though this had no real effect since it was not a law, the resolution implicitly attacked the judges' legitimacy as government officials. Then, in late December (close to when the legislature adjourned), New Court Justices John Trimble and Rezin Davidge resigned. Their motives remain unknown, but interestingly Trimble ran as a state representative under the New Court Party the following year. With no adjudicating power and two out of four justices gone, the New Court receded; becoming but a hollow symbol for the party. Governor Desha, desperate to revive the court he created, rushed to nominate F.W.S Grayson and Robert P. Henry to fill the vacancies. The Senate confirmed them, but it is unclear whether these men accepted the appointments.²⁴⁸

Although the New Court justices stopped hearing cases in November when the legislature convened, their Clerk of Court Francis Blair refused to turn over the court records to the adjudicating Old Court. Blair was a dogged activist for the New Court Party, who wrote persuasive political literature in newspapers and pamphlets under the alias of the republican icon "Jefferson." As such, Blair had a vested interest in not conceding anything to the Old Court, a body he believed no longer existed. Despite

²⁴⁶ Stickles, 95.

²⁴⁷ *Kentucky Reporter*, December 5, 1825. Stickles, 93.

²⁴⁸ *Kentucky Reporter*, December 26, 1825.

According to Stickles, three candidates for the judicial post ignored or declined the Governor's nomination. In April 1826, John T. Johnson was appointed. But by this point the new Court was no longer hearing cases. Stickles, 108.

writing the US Secretary of State Henry Clay after the “unexpected” election returns, “I am ready to surrender,”²⁴⁹ when the time came to act upon this, Blair refused to surrender anything—including the court records he had stolen the previous winter—until the law warranted it.²⁵⁰ Instead he locked the documents in his office, appalled that the House Committee on Courts of Justice would try “to enquire into his official conduct.”²⁵¹

The stakes escalated rapidly as the power struggle between Blair and the Old Court-dominated House of Representatives threatened to turn violent. On November 22, the House passed a resolution to investigate how to ensure the Old Court of Appeals could conduct its judicial duties unimpeded. As a result of this investigation, the House issued a resolution allowing the justices to hear cases and condoning them to take any appropriate measures to retrieve the court papers from Blair.²⁵² The Old Court ordered Blair to relinquish the papers or be held in contempt of court. But, according to the *Kentucky Reporter*, Blair told the governor “he intended to use force in the defence [*sic*] of his possession of said papers.” Taking his comment seriously, officials searched Blair’s home, where they uncovered loaded muskets.²⁵³ On Wednesday, December 14, the House passed another resolution: citizens could not aid or shelter Blair or associates “in resisting or attempting to resist, the Sergeant of the Court of Appeals, in the execution of the order or process of said court, and all other attempts to excite commotion in the country, or to disturb the public peace and harmony.”²⁵⁴ Speaker of the House George

²⁴⁹ Schoenbachler, *Murder and Madness: The Myth of the Kentucky Tragedy*, 117.

²⁵⁰ Stickles, 91.

²⁵¹ Letter received by the Committee of Courts of Justice on November 29, 1825 in *Kentucky Reporter*, December 5, 1825.

²⁵² Although the resolutions did not have the force of law, the House of Representatives expected Francis Blair to comply. *Kentucky Reporter*, December 5, 1825.

Noteworthy, this is exactly why the Old Court recessed until after the legislature reconvened.

²⁵³ *Kentucky Reporter*, December 26, 1825.

²⁵⁴ *Kentucky Reporter*, December 26, 1825.

Robertson prevented actual gunfire by convincing the Sergeant at Arms Richard Taylor not to enter Blair's home.²⁵⁵ Yet, the incident marked the blurring of the boundary between personal conviction to party ideology and lawlessness.

Despite Blair's indignation, the court schism remained more of an ideological crisis than practical one. While the term "court schism" accurately illustrates the division of the judiciary system into dual Court of Appeals, in actuality the two bodies rarely held court at the same time. After the abolition of the original court in December 1824, the Old Court only held session long enough to pronounce the law unconstitutional and reaffirm themselves as the true Kentucky Court of Appeals. They refrained from their primary function—ruling on cases—until after the election. In their November message to the Senate they explained their reservation:

But aware that if the people [...] should submit to the act of last session, it would be in vain for us to struggle against it, we determined to suspend, in some degree, the discharge of our official duties, and appeal to the public, and wait their decision.²⁵⁶

Conversely, the New Court adjudicated throughout 1825 until the legislature reconvened in November. In the post-election climate, the New Court refrained from any ostentatious displays of authority although they still claimed to be the Court of Appeals under law.

The shift by both sets of judges paralleled popular opinion and demonstrated an adherence to the people's wishes. When the Re-organizing Act first was enacted by "the people," via the legislature, the New Court controlled appellate hearings. Then, after the election revealed the majority's disapproval of the act (at least at the House level), the

²⁵⁵ Recall, Robertson was a leader of the Old Court Party. Stickles, 91-92. Robertson, *Scrap Book on Law and Politics, Men and Times*, 96.

²⁵⁶ Message from the Old Court to the Senate dated November 21, 1825 in *Kentucky Reporter*, January 16, 1826.

Old Court resumed its judicial functions in full force. Consequently, both benches looked to the people for guidance and as a result did not render decisions at the same time.

IV. The Election of 1826

Kentuckians saw the 1826 state election as a crucial opportunity to end the judicial crisis and allow government to function unobstructed. As the *Kentucky Reporter* exclaimed to the citizens, “It again devolves upon you, in the formation of the next senate, to secure the triumph of your principles and the constitution of your state.”²⁵⁷ This August, the stakes were higher. The 1825 legislative session’s stalemate demonstrated the need for a majority in both houses. Citizens wanted to end “the present embarrassment and disgrace of this state” now entering its second year.²⁵⁸ Worse, gossip spread attributing recent murders to the political controversy. Most notably, on November 6, 1825, the night before the legislature began its session, Solomon Sharp, a recently elected New Court House Representative, was found dead.²⁵⁹ A masked man, later identified as Jereboam Beauchamp, had knocked on Sharp’s door and murdered the politician.²⁶⁰ Immediately, suspicions of a political assassination filled pro-New Court newspapers.²⁶¹ It appeared too convenient that Sharp was killed 12 hours before he would compete for Speaker of the House against the Old Court Party powerhouse George Robertson. Although Beauchamp eventually claimed full responsibility, editorials on the

²⁵⁷ *Kentucky Reporter*, December 26, 1825.

²⁵⁸ Cincinnatus [pseud.], “Cincinnatus- No. III,” *The Spirit of '76*, March 24, 1826, 35.

²⁵⁹ Stickles, 88.

²⁶⁰ Schoenbachler, *Murder and Madness: The Myth of the Kentucky Tragedy*, 133.

²⁶¹ *The Patriot*, March 27, 1826, 65. *The Spirit of '76*, March 17, 1826, 17.

murder and subsequent trial were woven throughout the 1826 campaign literature—including the crucial final issue of *The Spirit of '76* before the election.²⁶²

Alternatively, the pro-Old Court newspaper *The Spirit of '76* correlated the general spike in murders to the breakdown of institutional law and order due to the Reorganizing Act and its aftermath. In March 1826, the paper informed readers: “Murder upon murder is heard of. Every man takes the vengeance of his wrongs, into his own hands. Law no longer governs. In such a state of society, there is every thing to alarm the friends of peace and of free government.”²⁶³ *The Kentucky Reporter*, relaying an Old Court Party message from shortly after the election, urged:

There is no necessity for precipitancy or violence. We ought to lay aside all selfishness and all vindictive party feeling, and mutually endeavor to promote harmony and good fellowship,—and inculcate submission to the constitution and obedience to the will of the people.²⁶⁴

With a defective political infrastructure unable to counteract the increase in violent crime, arguments for upholding the constitution, the source of law and order, became more imperative.

Concurrently, the Old Court Party increasingly blamed the institutional breakdown and surge in lawlessness on Governor Joseph Desha. Under the alias “A Plebian,” an anonymous writer published in *The Spirit of '76* a letter complaining about the current state of affairs: the “constitution disregarded; their [the people’s] laws powerless; their lives and their property insecure; themselves driven to the verge of civil war.” The “Plebian” added, “travelers [were] murdered for their money, and no

²⁶² Patrick Henry Darby, “Kentuckian—No. III,” *The Spirit of '76*, August 4, 1826, 350.

²⁶³ *The Spirit of '76*, March 17, 1826, 17.

²⁶⁴ *Kentucky Reporter*, October 24, 1825.

punishment inflicted; citizens murdered weekly, and no murderer hung.”²⁶⁵ The reference to killing travelers was a personal attack on Governor Desha. On December 20, 1824 (four days before the Re-organizing Act passed), a grand jury indicted Desha’s son Isaac for stealing from and murdering a man traveling through Kentucky named Francis Baker.²⁶⁶ Two separate juries found the younger Desha guilty of murder in January 1825.²⁶⁷ He avoided his punishment, the death sentence, through a gubernatorial pardon by his father.²⁶⁸ During the early 19th century, Americans valued civic virtue—putting the common good before one’s own interest—as a necessary element of republicanism.²⁶⁹ The governor’s blatant nepotism and association with criminal behavior tarnished his reputation and reflected poorly on the New Court Party.

The 1826 Election also differed from the year before because the Old Court needed only three seats to swing the Senate to an Old Court Party majority. Ten senate positions were open for election.²⁷⁰ Since seven of the ten incumbents were New Court advocates, the Old Court Party felt confident it could capture at least three of these seats to acquire political dominance.²⁷¹ The polls opened on Monday, August 8, 1826. When they closed Wednesday, the votes yielded an Old Court victory in both houses. Five Old Court senators and five New Court senators joined the senate; creating a new political

²⁶⁵ “A Plebian,” “To Joseph Desha, Governor Elect of Kentucky. No. II,” *The Spirit of '76*, March 24, 1826, 38.

²⁶⁶ Defendant, Isaac B. Desha, *A Statement of the Trial of Isaac B. Desha; Indicted for the Murder of Francis Baker before the Hon. George Shannon* (Lexington, KY: T.T. Bradford, 1825), 3-4.

²⁶⁷ There were two separate verdicts because Governor Desha asked for a retrial.

²⁶⁸ Defendant, Isaac B. Desha, 1. Stickles, 99.

²⁶⁹ Noteworthy, Governor Desha nominated William Barry as the Chief Justice for the New Court of Appeals one week before Barry represented Desha’s son in the murder trial held on January 17-18, 1825. See “The Governor’s Son—Again,” *The Spirit of '76*, June 16, 1826, 240 for an example of the prominence of the Desha murder in the 1826 campaigns.

²⁷⁰ *Kentucky Reporter*, December 26, 1825.

²⁷¹ Stickles, 100.

makeup of 22 Old Court advocates to 16 New Court. The number of Old Court politicians in the House actually decreased by six, but the party retained its advantage.²⁷²

With a definitive majority in place, even some New Court advocates proposed immediate resolution. The New Court leaning newspaper *Kentucky Gazette* urged Governor Desha to call a special session on October 1 for the legislature to end the judicial crisis. Desha ignored the suggestion. The legislature did not reconvene until December 4.²⁷³

V. Ending the Schism

Once the General Assembly started its session, both houses promptly began to draft separate bills to repeal the Re-organizing Act. On December 9, the Senate's committee presented to the entire body the "*Act to Remove the Unconstitutional Obstructions Which Have Been Thrown in the Way of the Court of Appeals.*"²⁷⁴ It included a long preamble mimicking John Rowan's style in his 1824 *Preamble and Resolutions* that justified the legislature's power to disband the original court. The 1826 repeal bill, in contrast, explicitly stated that the Kentucky Constitution had established the Court of Appeals, meaning it could not be dissolved by an ordinary statute.

The preamble identified what legislative action from the past two years was constitutional or not. It specified that judges could only be removed by impeachment or address. With regard to the Re-organizing Act and a subsequent law that eliminated the original justices' salaries, the repeal bill determined that:

²⁷² Stickles, 102.

²⁷³ *Ibid.*

²⁷⁴ *Ibid.* See Appendix 5 for full act.

[...] The above recited acts have been decided by the good people of this Commonwealth, at two successive elections, to be dangerous violations of the Constitution, and subversive of the long tried principles upon which experience has demonstrated that the security of life, liberty, and property depend; and the present Legislature concur most solemnly with the people, in the belief of the unconstitutionality and evil tendency of said acts.²⁷⁵

Framing the repeal legislation within the language of popular will fortified its correctness and glorified “the people” as the state’s savior. The bill concluded by affirming that the Old Court justices all along remained the only “rightful and constitutional Judges.”²⁷⁶ The wording simplified the contested status of the court for the past two years.

On December 13, the repeal bill passed in the Senate; 22 to 16.²⁷⁷ The numbers corresponded exactly to the partisan divisions following the recent election. The Senate immediately sent the bill to the House of Representatives for approval. Although the House had begun constructing its own repeal act, it immediately refocused its attention to the Senate’s version. Three days later, the House accepted the bill by a seven-person margin.²⁷⁸

Despite the legislature’s joint approval, Governor Desha refused to sign the bill into law. Instead, Desha left the pending law unsigned. However, the legislature passed the “*Act to Remove the Unconstitutional Obstructions Which Have Been Thrown in the Way of the Court of Appeals*” over his *de facto* veto.²⁷⁹ By law, the New Court no longer existed and the Old Court resumed its title as *the* Kentucky Court of Appeals. But the question remained: would the New Court justices refute the constitutionality of the repeal law as their rival court had with the Re-organizing Act?

²⁷⁵ Kentucky, General Assembly, “Act to Remove the Unconstitutional Obstructions Which Have Been Thrown in the Way of the Court of Appeals,” *Acts Passed at the First Session of the Thirty Fifth General Assembly, for the Commonwealth of Kentucky*, 1827.

²⁷⁶ *Ibid.*

²⁷⁷ Stickles, 103.

²⁷⁸ 55 yeas to 42 nays. *Ibid.*

²⁷⁹ Stickles, 105. Friedman, 85.

As the past two years exemplified, successfully implementing a law depended on whether people believed in and abided by it. The abolished bench chose to disband without protest. Their response to the Senate's request for resignation the year before foreshadowed this conscious decision. In that letter, the New Court justices lamented:

It is painful indeed, to witness the novel and afflicting spectacle of two sets of men claiming to be Judges of the Court of Appeals under a government whose constitution knows but one such tribunal. [...] On our part, we are ready to do any thing [...] which may tend to the restoration of peace and harmony.²⁸⁰

Thus, with the enactment of the Re-organizing Act, the justices stepped down from office. In one sense, the New Court justices followed their own political principle: judicial deference to the legislature. More importantly, their decision showed reverence to “the people” themselves. On January 1, 1827, only two days after the repeal act passed, New Court Clerk of Court, Francis Blair, previously unresponsive to the Old Court, now obediently returned the coveted court papers.²⁸¹ This gesture served both a practical function by providing the reestablished Court of Appeals with the official records as well as a symbolic metaphor of the New Court's surrender.

The Election of 1826 achieved its purpose to end the court crisis, and in the process augmented judicial independence. The General Assembly held session only long enough to repeal the Re-organizing Act and confirm its acceptance by all parties. The legislature adjourned on January 25, 1827 with the “*Act to Remove the Unconstitutional Obstructions Which Have Been Thrown in the Way of the Court of Appeals*”

²⁸⁰ Kentucky, General Assembly, *Report of a Committee of the Senate of Kentucky, on the Subject of the Court of Appeals*, December 10, 1825, 13.

²⁸¹ Stickles, 109.

uncontested.²⁸² The new legislation vindicated the original Court of Appeals and by default sustained the justices' appeals to judicial review (from the 1823 rulings).

Resolution occurred because all parties deferred to the Kentucky citizenry. The combination of legislative response and judicial deference to “the people” created a unique form of popular constitutionalism that entrusted in and empowered “the people” themselves. Their votes truly mattered. Through the election polls—not violence, dictatorship, or outside force—Kentucky solved its crisis and returned to a stable form of government.

²⁸² Clift, n.p.

Epilogue

The 1826 law that repealed the Re-organizing Act ended the schism *de jure*, but it was the New Court justices who actually stopped the cycle of controversy.²⁸³ Once the legislature passed the “*Act to Remove the Unconstitutional Obstructions Which Have Been Thrown in the Way of the Court of Appeals*” on December 30, 1826, the New Court judges relinquished their positions without protest. Their action accorded with their message from the year before. At that time, the New Court justices wrote the Senate that they were ready to abide by the wishes of “the people.”²⁸⁴ Therefore, when the 1826 election results overwhelming endorsed their rival, the New Court conceded.

After the court schism ended, the single-issue political parties melded into the larger national ones. New Court Party members campaigned for Andrew Jackson, the presidential candidate in 1828, who espoused states’ rights and greater participation by the “common man.”²⁸⁵ Old Court partisans supported their Kentucky comrade, Henry Clay, and the National Republicans.²⁸⁶ Turning attention and energy to national politics diverted scrutiny away from Kentucky’s recent internal unrest.

Jackson’s presidential win provided an outlet for former New Court men to implement their agendas on a national scale. Amos Kendall (the editor of the pro-new Court newspaper *Argus of Western America*) as well as Francis Blair (the former New Court Clerk of Court) assumed influential positions within Jackson’s administration. Kendall served as the Postmaster General, while Blair became editor of the national

²⁸³ *De jure*, meaning by law, is often used in contrast to *de facto*, which refers to cultural norms that impact how something in society actually functions.

²⁸⁴ *Kentucky Reporter*, January 30, 1826.

²⁸⁵ Collins, 883.

²⁸⁶ Stickles, 112. Noteworthy, Clay, serving as the US Secretary of State, supported the Old Court, but tried to remain detached from the controversy. Stickles, 111.

Globe newspaper, which promulgated party literature for Jackson.²⁸⁷ Although the New Court Party lost the Kentucky court schism, its advocates influenced national policy with regard to limiting the power of the federal government, discontinuing the Second Bank of the United States, and granting suffrage to more Americans.

In Kentucky state politics, the Old Court Party (or National Republicans) won the 1828 governorship, but the legislature remained divided. Former Chief Justice of the New Court William Barry ran for governor, but lost to Thomas Metcalfe.²⁸⁸ That year, Justices Owsley and Mills, both from the original Court of Appeals, resigned.²⁸⁹ The new governor appointed Joseph R. Underwood and George Robertson (the former Old Court Party leader) to the bench. In 1829, Robertson was promoted to Chief Justice.²⁹⁰ It was once more an “Old Court” court—this time consisting of the partisan activists rather than the original justices.

Ironically or appropriately, depending on one’s perspective, the Kentucky Court of Appeals revisited the legitimacy of the “New Court” with Robertson as Chief Justice. In 1829, the presiding Court of Appeals ruled in the case *Hilreth’s Heirs v. McIntire’s Devisee* that the New Court’s decisions were void, by concluding that the New Court never held legal status. Consequently, no New Court decision could be cited as precedent.²⁹¹ Chief Justice Robertson, the former Old Court Party leader who had so

²⁸⁷ Stickles, 112.

²⁸⁸ Stickles, 113.

²⁸⁹ Stickles, 37. Chief Justice Boyle had left in 1826 (before the court schism ended) to take a position as a federal judge. Governor Desha then nominated George Bibb to the Old Court, which is ironic because that court technically did not exist according to Desha’s signature on the Re-organizing Act.

²⁹⁰ Stickles, 114.

²⁹¹ *Ibid.*

adamantly argued against enacting the Re-organizing Act in 1824, rendered the decision.²⁹²

²⁹² Stickles, 114.

Conclusion

“Is our government established on a permanent basis, or is it all a mistake? Is it, as we have always thought, that the true form and principles of our government are defined in the constitution, or is it all a mistake?”²⁹³

- *The Spirit of '76*,
August 4, 1826

Over two tumultuous years, Kentucky underwent a political crisis and existential revelation. After the schism, the judiciary branch resumed its previous makeup and the original Court of Appeals regained its position as the sole tribunal. Yet, it returned as a stronger body; fortified by the support of “the people” and the power of judicial review.

The court crisis brought to the forefront two questions. First, did the judiciary have the power to rule a law unconstitutional? Second, was the Re-organizing Act constitutional? In other words, did the legislature have the authority to dissolve the Court of Appeals through an ordinary statute? Underpinning both of these lay the fundamental question—what actions did the constitution sanction for officials of the various branches of government? The politicians debating these issues, initially among themselves and eventually with the people at large, recognized their role as civil *servants* to their sovereign, “the people.” Consequently, they looked to the Kentucky Constitution, the written social compact, to determine the people’s wishes.

In answering the constitutional questions at issue, Kentuckians articulated and refined their political theories on government. The political philosophies discussed among statesmen in the General Assembly chamber and publicized to the citizens in newsprint exposed culturally ingrained as well as innovative notions about republican government. However, the institutional crisis necessitated that a legitimate court be

²⁹³ Patrick Henry Darby, “Kentuckian—No. III,” *The Spirit of '76*, August 4, 1826, 347. Darby addressed this to all Kentuckians, native or “adopted,” in the last publication of the *Spirit of '76* before the election on August 6.

determined in order to prevent a permanent breakdown of society; thus, transcending an otherwise theoretical debate into a pragmatic one with practical application.

House Representatives John Rowan (for the New Court) and George Robertson (for the Old Court), in particular, offered sophisticated, eloquent, and persuasive arguments that fit into a genealogy of liberal political thought. The language and sentiments employed mirrored treatises on government by Enlightened *philosophes*. Jean-Jacques Rousseau described a social contract (what Americans conceived as the constitution) among the people themselves and with their government as well as the notion of popular will. Additionally, Montesquieu promoted separation of powers. Kentucky politicians also quoted the ideas of Thomas Jefferson, James Madison, and other forefathers from the Revolution.²⁹⁴ But while Rousseau and Montesquieu wrote hypothetical scenarios about proper governance and the Revolutionary republican icons constructed their idealized government, Kentuckians in the 1820s utilized political philosophy to understand, clarify, and salvage their jeopardized form of government.

Kentucky never degenerated into a state of chaos or civil war because the political leadership emphasized the constitutional dimension of the controversy. The constitution served as a stabilizing factor, a source of objective authority, and a common dominator between the contending parties. At its core, the controversy was a struggle to discern the constitution's message and methods. This lofty quest elevated the arguments beyond just partisanship or emotions. The political parties thwarted civil war, whether consciously or unconsciously, by appealing to the citizens' rationality and demanding them to solve the constitutional crisis as a collective body interested in the common good. This approach allowed for some degree of mitigation among the courts, legislature, and

²⁹⁴ Shelby [pseud.], "Legislative Supremacy," *The Spirit of '76*, 40.

populace. Newspapers and pamphlets, despite sometimes employing inflammatory language, concentrated on presenting logical and constructive arguments to “the people.”

Before the schism erupted, two separate conceptions existed to define “the people.” The more conservative theory claimed that the constitution alone embodied “the people.” In contrast, the opposing viewpoint asserted that the current Kentucky population constituted “the people.” This conceptual discrepancy explains why the legislature passed the Re-organizing Act. Recall, the legislative majority in 1823 argued that the 1820 debtor relief law declared unconstitutional by the (Old) Court of Appeals could not actually be so because “the people,”—that is, contemporary Kentuckians—supported it. The court countered by insisting the constitution, not the politicians of the legislature, represented “the people,” and therefore laws that contradicted the constitution (namely, its contract clause) must be void.

Yet, during the actual crisis, both the Old Court and the New Court parties adopted the same stance about who represented “the people:” the constitution *and* the voting population. Consequently, the dual courts and their respective political parties appealed to the Kentucky Constitution plus the power of the people at large. The written text articulated and defended the framework of their political system, but the general populace was necessary to implement action. Contending parties disseminated to the public objective resources, such as excerpts from the constitution, relevant legislation, and court rulings, in addition to constitutional arguments. Politicians trusted the citizens with the power, responsibility, and intelligence to decide which court was legitimate. In this unconventional manner, both liberals and conservatives participated in

popular constitutionalism; affirming that early nineteenth-century Kentuckians believed the voters were the actual source of authority.

“The people” ultimately concluded that the Re-organizing Act was unconstitutional rendering the original court legitimate. By supporting the judicial cause, the citizens ironically sided with the unelected government body over their direct representatives (the legislature), and consequently increased the power of the judiciary. The law repealing the Re-organizing Act in 1826 established that the legislature could not change the composition of the judicial branch through legislation. In making this distinction, the new act clarified the power relationship between the legislature and the judiciary. It granted the judiciary greater independence from the General Assembly and implicitly reaffirmed the judiciary’s power to judicial review. “The people,” through the repeal act, solidified their form of governmental checks and balances.

The Kentucky court schism fits into a broader history on the evolution of judicial review, providing critical insight about the complex and paradoxical means to achieve it. In 1823, when the Kentucky Court of Appeals ruled the debtor relief law unconstitutional and void, the justices tacitly conducted judicial review. While lighter forms of judicial review allowing justices to interpret the constitution were generally accepted, judicial nullification—annulling a law—was not. In fact, the Kentucky legislature and governor attacked this brazen exertion of power; hence the Re-organizing Act. Yet, the Old Court defended itself against the Re-organizing Act by once again employing judicial review. The justices asserted that the act itself contradicted the state constitution. Whereas other judges may have submitted to the legislature (traditionally the stronger branch of government), the Old Court judges stood firm on their convictions maintaining it was

unconstitutional for one branch of government (the legislature) to eliminate an entire body of another branch (the judiciary).

But a critical difference distinguished this situation from other types of judicial review. In Kentucky, the judges asked the citizenry directly to support their cause. “The people” ultimately vouched for the Old Court by electing their partisan champions into power. The subsequent repeal law implicitly sanctioned judicial review by discrediting the legislature’s authority to restrain it. Thus, as result of the schism, the judiciary earned the right to interpret the constitution as well as nullify laws it found unconstitutional. In doing so, this augmented the power of the judiciary, especially since neither components of judicial review were explicitly outlined in the constitution. This establishment of judicial review is particularly interesting because Kentucky cherished egalitarian principles and states’ rights, whereas judicial review (which increases the jurisdiction of the courts) is by nature a conservative, anti-popular, power.²⁹⁵

In all stages of the Kentucky court schism, from its inception, climax, and resolution, understanding and evaluating the constitution lay at the heart of the issue. In this respect, Kentuckians accomplished an extraordinary feat. They reconciled their internal crisis without allowing it to digress into warfare or anarchy. In the process, the citizens reevaluated the core values of their political ideology, the result of which was a clearer, more cogent conception of their republican government. The events in Kentucky illustrate the process by which American republics—that is, the states—developed into the strongholds of government. They achieved this not at the moment of creation, as the American myth of genesis has it, but in the contentious decades afterwards. It was

²⁹⁵ Anti-popular in the sense of separating itself from the people’s control.

through debate—and sometimes even crisis—that these early governments solidified their ideologies and institutions.

Appendix 1

Sections from the Second Constitution of Kentucky (1799)

This constitution was in effect during the Old Court-New Court Controversy

ARTICLE I.

Concerning the Distribution of the Powers of the Government.

Section 1. The powers of government of the State of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to-wit: those which are legislative to one; those which are executive to another; and those which are judiciary to another.

Section 2. No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

ARTICLE IV.

Concerning the Judicial Department.

Section 1. The judicial power of this Commonwealth, both as to matters of law and equity, shall be vested in one Supreme Court, which shall be styled the Court of Appeals, and in such inferior courts as the General Assembly may, from time to time, erect and establish.

Section 3. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior; but for any reasonable cause, which shall not be sufficient ground for impeachment, the Governor shall remove any of them, on the address of two-thirds of each House of the General Assembly: *Provided, however,* That the cause or causes for which such a removal may be required shall be stated at length in such address, and on the journal of each House. They shall, at stated times, receive for their services an adequate compensation, to be fixed by law.

Appendix 2

John Rowan's Resolutions of 1823:

Resolutions in Relation to the Court of Appeals. For their Late Decision against the Two Years Replevin and Endorsement Laws of this State.

“Resolved by the Legislature of the Commonwealth of Kentucky. That they do most solemnly protest against the doctrines promulgated in that decision, as ruinous in their practical effects to the good people of this commonwealth, and subversive of their dearest and most invaluable political rights.”

“And it is hereby further resolved by the authority aforesaid, That if the decision should not, by the court, be reviewed, or reversed [...] the legislature cannot, ought not, and will not, furnish any facilities for this enforcement—on the contrary, that it is the bounden duty of the legislature, in vindication of the rights of the people, and the great principles upon which those rights depend to withhold the agency of the ministerial officers of the government, from assisting in the practical propagation of the erroneous doctrine of that decision, at least until an opportunity afforded to the people of exploring the new theory of obligation, which it attempts to establish.”

“Resolved further by the authority aforesaid, That any effort which the legislature may feel it a duty to make for the *contravention* of the erroneous doctrine of that decision, ought not to interfere with, or obstruct the administration of justice according to the existing laws which, whether they were or were not expedient, are believed to be constitutional and valid; and which should when it shall be thought expedient to do so, be repealed by the *Legislature*, and not by the Appellate Court.”²⁹⁶

Appendix 3

Sections from “Act to repeal the law organizing the Court of Appeals and to re-organize a Court of Appeals” (1824)

1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, That the act entitled an act establishing the court of Appeals, approved June 23th [*sic*], 1792, also another act, entitled an act establishing the Court of Appeals, approved December 19th, 1796, and every act or part of any act or acts for amending said two acts or either of them, or for regulating the Court of Appeals, or concerning the Court of Appeals, or for giving or allowing any salary or compensation to the Chief Justice of Kentucky or any Judge or Justice of the Court of Appeals, or for increasing any salary or compensation to the Chief Justice or any Judge or Justice of the Court of Appeals shall be and the same is hereby repealed.

3. The Governor of the Commonwealth of Kentucky shall nominate, and, by and with the advice and consent of the Senate, appoint a chief justice of the State of Kentucky; a second associate justice of the Court of Appeals; a third associate justice of the Court of Appeals; and a fourth associate justice of the Court of Appeals; who shall, by virtue of their office and commissions, be the justices and judges of the said Supreme Court; and the said Court of Appeals shall be constituted and held by and consist of the said Chief Justice and Associate Justices.

6. The Court of Appeals or a majority of the Justices thereof, in vacation, shall appoint the clerk of said court, who, before he enters upon the duties of his said office, shall take the oath or affirmation prescribed by the constitution to all officers; and shall give bond to the Governor of the Commonwealth of Kentucky, in the penalty of twenty thousand dollars, with security, approved by a majority of the Justices of said court, conditioned for the faithful discharge of the duties and seasonably to record the decrees, judgments, orders and decisions of the said court; which bond, when approved by a majority of the Justices of said court, shall be recorded in the Court of Appeals. It shall not become void upon the first recovery, but may be put in suit, from time to time, at the costs and charges of any person aggrieved by breach of the condition, until the whole penalty shall be recovered.

16. The said supreme court shall not have or take jurisdiction to delay, supersede, hear, determine, affirm or reverse any order, sentence, judgment or decision, or proceeding of any inferior court, of any judge or of any justices or justices of the peace, touching or

²⁹⁶ Robertson, *Speech*, 15.

concerning any of the subjects following: for treason, murder or felony; for any crime punishable by confinement in the penitentiary; for any corporeal punishment; for any contempt to either house of the General Assembly, or to any inferior court or judge or justice; nor in any case prosecuted under the act respecting riots, routs and unlawful assemblies; nor under the act for punishing the disturbance of religious societies; nor to any judgment of a county court, affirming or reversing the judgment of a justice of the peace; nor to any judgment of any court in granting or refusing a continuance of any case or in granting or refusing a new trial, because the verdict was contrary to the evidence; nor to any case where the value in controversy is of less value than twenty dollars, exclusive of costs. In all other cases, the said Court of Appeals shall have jurisdiction to revise, correct, reverse or affirm the sentences, decisions, judgments or decrees of all the courts of this commonwealth, inferior to the said supreme court.

Appendix 4

Information concerning *Blair v. Williams* and *Lapsley v. Brasehears and Barr*

The three justices, John Boyle, William Owsley, and Benjamin Mills, comprising this appellate court heard *Blair* on October 11, 1823 in conjunction with a similar case, *Lapsley v. Brasehears and Barr, et e converso* about the constitutionality of the Christmas Bill. Both cases reaffirmed each other's verdict: "The present law is unconstitutional, and cannot be sustained."²⁹⁷ The ruling contended that the debtor-relief law of December 25, 1820 violated the constitutions of the United State and Kentucky with regard to contracts thereby rendering it null and void.²⁹⁸ In the courtroom that day were four counselors, Robert Wickliffe, John Rowan, James Haggin, William Barry, who would assume pivotal roles in the impending inter-branch government power struggle and court schism. Wickliffe would become the spokesperson for the Old Court Party. John Rowan would devise the Re-organizing Act and his colleagues, Haggin and Barry would become two of the New Court justices. But standing before the Court of Appeals on October 11, 1823, Wickliffe argued to nullify the replevin bond which prevented his client, the plaintiff William Lapsley, from reacquiring assets from debtors. On the opposing side, Rowan, Haggin, and Barry presented arguments about the constitutionality of the postponement law on behalf of defendants Walter Brasehears and Robert R. Barr.²⁹⁹ Interestingly, all four attorneys were concurrently legislators in the state General Assembly and leaders of the two political factions, the Relief Party and Anti-Relief Party, respectively. The Court of Appeals' decision ignited immediate protest by Relief advocates who claimed that the court had overstepped its designated role in attempt to curtail the legislature's power.

²⁹⁷ *Blair v. Williams* (1823).

²⁹⁸ The court was specifically concerned with the US Constitution's provision that "prohibits any state from passing any 'law impairing the obligation of contracts.'" *Report of the Select Committee of the House of Representatives of the State of Kentucky, on that Part of the Governor's message which Relates to the Judiciary (presented by T. Montgomery, Chairman)* (Harrodsburg: H. Miller, 1824), 6.

²⁹⁹ *Blair v. Williams* (1823).

Appendix 5

“Act to Remove the Unconstitutional Obstructions Which Have Been Thrown in the Way of the Court of Appeals.”

Whereas, the Court of Appeals of Kentucky was created by the Constitution of the State, and the Judges thereof hold their offices during good behavior, and cannot be removed therefrom [*sic*] in any other mode than by impeachment or address. And whereas, the Legislature attempted to abolish the Constitutional Court, and erect on its ruins, by two acts of Assembly, the one of which was entitled, ‘an act to repeal the law organizing the Court of Appeals, and to re-organize a Court of Appeals,’ which was approved on twenty-fourth December, one thousand eight hundred and twenty-four, and the other of which was entitled, ‘an act to regulate the salaries of the Judges of the Court of Appeals, and for other purposes,’ which was approved on the sixth of January, one thousand eight hundred and twenty-five. And whereas, the above recited acts have been decided by the good people of this Commonwealth, at two successive elections, to be dangerous violations of the Constitution, and subversive of the long tried principles upon which experience has demonstrated that the security of life, liberty, and property depend; and the present Legislature concur most solemnly with the people, in the belief of the unconstitutionality and evil tendency of said acts. And whereas, the Judges of the Court of Appeals in office at the time of the passage of the said recited acts, did, by virtue of the Constitution, remain in office, the said recited acts notwithstanding; and John Boyle, then Chief Justice of the said Court, having since vacated his office, William Owsley and Benjamin Mills are now rightful and constitutional Judges of said Court, neither of whom having resigned or been removed be either of the aforesaid modes: Therefore,

Sec. 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky,* That the said recited acts be, and the same are hereby repealed, and declared null and void; and every law which was repealed, or changed, or intended to be repealed by said recited acts, is hereby revived, re-enacted and declared to be in full force, and to have in all respects the same effect and operation as if said recited acts had not passed. *Provided,* that nothing herein contained shall be construed to vacate the office of Sergeant of the Court of Appeals.

Passed both Houses on the 30th December, 1826—the Governor’s objections notwithstanding.”³⁰⁰

³⁰⁰ Kentucky, General Assembly, “Act to Remove the Unconstitutional Obstructions Which Have Been Thrown in the Way of the Court of Appeals,” *Acts Passed at the First Session of the Thirty Fifth General Assembly, for the Commonwealth of Kentucky*, 1827.

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³⁰¹ The source I used was in pamphlet form and undated. This is also available in George Robertson, *Scrap Book on Law and Politics, Men and Times* (Lexington: A.W. Elder, 1855), 49-74.

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