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Joshua A. Douglas

University of Kentucky, joshuadouglas@uky.edu

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INTRODUCTION: THERE MUST BE SOMETHING IN THE WATER—OR THE BOURBON—IN KENTUCKY: VOTING RIGHTS IN THE BLUEGRASS STATE

*Joshua A. Douglas**

Kentucky is best known for three things: horses, bourbon, and basketball. Add positive improvements for the right to vote to the list.

The Bluegrass state has made national news in recent years for its election rules. In 2020, many people in the media and advocacy world pointed to Kentucky as a model for administering an election during the COVID-19 pandemic.² Under a bipartisan agreement between the Democratic Governor and Republican Secretary of State, Kentucky initially postponed the 2020 primary to provide for additional planning time.³ Then it implemented smart rules to ease access to vote-by-mail and made in-person voting safer and more convenient, while still ensuring integrity in the process.⁴ The Secretary of State also led a bipartisan group of legislators on a compromise voter ID law, which is among the mildest of the “stricter” photo ID laws in the country.⁵ In 2021, when many conservative-controlled states were curtailing the right to vote, Kentucky enacted a bipartisan election reform measure that increased early voting, permitted voters to request an absentee ballot online, and made permanent the ability of counties to use vote centers for in-person voting,

* Ashland, Inc.-Spears Distinguished Research Professor of Law, University of Kentucky J. David Rosenberg College of Law. Thanks to Jackson Hurst-Sanders, Holly Couch, and the other members of the *Kentucky Law Journal* for hosting a wonderful symposium. Thanks also to Hayden Hickey and the entire KLJ team for excellent editing.

² See, e.g., Carrie Levine, *Tight Deadline, Savvy Pitch: How One Red State Expanded Access to the Ballot*, CTR. FOR PUB. INTEGRITY (May 11, 2021), <https://publicintegrity.org/politics/elections/ballotboxbarriers/tight-deadline-savvy-pitch-kentucky-expanded-access-election-ballot/> [<https://perma.cc/YJ5K-ZGBA>] (“Kentucky—one of the most restrictive states in the nation on voter access—was suddenly a national model for how to run an election during a pandemic, minor hiccups aside.”).

³ See Daniel Desrochers, *Kentucky’s Primary Election Pushed Back Until June amid COVID-19 Outbreak*, LEXINGTON HERALD-LEADER (Mar. 16, 2020), <https://www.kentucky.com/news/politics-government/article241243426.html> [<https://perma.cc/8DLD-2AWT>].

⁴ *Governor Beshear, Secretary of State Adams Reach Agreement on General Election Procedures*, KENTUCKY.GOV, (Aug. 14, 2020), <https://www.kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=309> [<https://perma.cc/9M94-438X>].

⁵ See Joshua A. Douglas, “*How the Sausage Gets Made*”: *Voter ID and Deliberative Democracy*, 100 NEB. L. REV. 376, 378 (2021).

among other improvements.⁶ The sweet spot was to find measures that satisfied the dual goals of enhanced access for voters and improved election security.

But the state was not immune to partisan manipulation of district lines in the redistricting cycle that commenced with the release of the new Census data in 2021. Republicans controlled a supermajority of both chambers of the state legislature and used their power to enact maps that will likely entrench that supermajority for the following decade.⁷ The Democratic Governor vetoed the state House and congressional maps (while letting the senate map go into effect without his signature), but the legislature easily overrode those vetoes.⁸ Democrats immediately filed suit against the state House and congressional maps in state court; they did not challenge the senate map, even though by most statistical measures it was also an egregious gerrymander.⁹ A judge refused to put the maps on hold before the 2022 election, saying a ruling against the maps would cause too much chaos soon before the election.¹⁰ Predictably, the maps performed as intended: Republicans increased their supermajorities, picking up five new seats in the House to enjoy an 80–20 advantage, increased their majority by one in the Senate to move 31–7 in favor of Republicans, and easily won five of the six congressional seats.¹¹ The state’s sixth congressional district was once relatively close, with Democrat Amy McGrath coming within a few points of knocking off incumbent Republican Andy Barr in 2018, but in 2022 no well-known Democrats ran and the state’s Democratic party denounced the eventual Democratic nominee as espousing views that were contrary to the party’s ideals.¹² The gerrymandered map may have contributed to a feeling

⁶ H.B. 574, 2021 Gen. Assemb., Reg. Sess., 197 (Ky. 2021); see Nick Corasaniti, *Why Kentucky Just Became the Only Red State to Expand Voting Rights*, N.Y. TIMES (Apr. 7, 2021), <https://www.nytimes.com/2021/04/07/us/politics/kentucky-voting-law.html> [<https://perma.cc/L46V-E7DE>].

⁷ See, e.g., Ryland Barton, *Republican Redistricting Plans Pass Ky. Legislature, Head to Beshear*, LOUISVILLE PUB. MEDIA (Jan. 8, 2022), <https://www.lpm.org/news/2022-01-08/republican-redistricting-plans-pass-ky-legislature-head-to-beshear> [<https://perma.cc/Q7QT-HGVX>] (“Republicans will have an even easier time getting elected in Kentucky under new political maps for the legislature and Congress passed by lawmakers on Saturday.”).

⁸ See Ryland Barton, *Beshear Vetoes GOP Redistricting Maps, Citing ‘Political Gerrymandering,’* LOUISVILLE PUB. MEDIA (Jan. 20, 2022), <https://www.lpm.org/news/2022-01-20/beshear-vetoes-gop-redistricting-maps-citing-political-gerrymandering> [<https://perma.cc/7UJ5-7Y4J>]; Joe Regusa, *Lawsuit Filed as Lawmakers Override Vetoes of Redistricting Bills*, SPECTRUM NEWS 1 (Jan. 21, 2022), <https://spectrumnews1.com/ky/louisville/news/2022/01/21/lawmakers-override-vetoes-of-redistricting-bills> [<https://perma.cc/2FJ7-UFHG>].

⁹ Kentucky Final State Senate Plan, PLANSORE, <https://planscore.org/plan.html?20220112T180210.548403175Z> [<https://perma.cc/V9N5-3E9G>] (showing an extreme pro-Republican gerrymander).

¹⁰ Order at 9, *Graham v. Adams* (2022) (No. 22-CI-00047).

¹¹ See Joe Sonka, *How the Kentucky GOP Expanded its Supermajorities in the State Legislature*, LOUISVILLE COURIER J. (Nov. 9, 2022), <https://www.courier-journal.com/story/news/politics/2022/11/09/kentucky-general-election-republicans-expand-supermajority/69511120007/> [<https://perma.cc/2XY3-R3H7>]; see also Kentucky Election Results 2022, WASH. POST (last updated Nov. 29, 2022), <https://www.washingtonpost.com/election-results/2022/kentucky/> [<https://perma.cc/EN9J-M85Y>].

¹² ALISON LUNDERGAN GRIMES, SECRETARY OF STATE, NOVEMBER 6, 2018 GENERAL ELECTION RESULTS, COMMONWEALTH OF KENTUCKY 9, <https://elect.ky.gov/results/2010-2019/Documents/2018GeneralElectionCertified.pdf> [<https://perma.cc/HK98-LRLK>]; Ryland Barton, *Kentucky Democratic Party, Beshear Won’t Back Congressional Nominee Geoff Young*,

among more mainstream potential Democratic candidates that a campaign was not worth it. Thus, the effects of gerrymandering go beyond election results and impact the recruitment of viable candidates as well.¹³

Soon after the 2022 election, a Kentucky trial court issued a seventy-two page opinion rejecting the Kentucky Democrats’ challenge to the state House and congressional maps, while setting up the issues for an appeal.¹⁴ The court held that the state House and congressional maps were clear partisan gerrymanders. For example, with respect to the House map, the court wrote that based on its review of the expert testimony, “it is abundantly clear that [the map] is a partisan gerrymander.”¹⁵ On the congressional map, the court concluded that “it is clear from the record that . . . [the map] is a partisan gerrymander aimed at diluting the Democratic vote share by creating an uncompact First District based on rationale that was not applied across all districts.”¹⁶ But the court rejected the plaintiffs’ legal claims, finding that Kentucky Supreme Court precedent precluded a holding that the maps are unconstitutional.¹⁷ The Kentucky Constitution, the court said, does not “expressly prohibit partisan gerrymandering,” at least based on the court’s understanding of previous Kentucky Supreme Court rulings.¹⁸ State supreme courts in other states, however, have construed similar state constitutional provisions—requiring elections to be “free” and “equal”—as prohibiting egregious gerrymanders, giving the plaintiffs strong arguments on appeal.¹⁹ The Kentucky case is winding its way through the appeals process; the Kentucky Supreme Court was set to hear the dispute in summer 2023 just as this symposium issue went to print.

The juxtaposition of these two storylines—positive improvements on voting rights alongside egregious partisan gerrymandering—makes Kentucky an ideal place to host a symposium on the 2020 redistricting cycle. And wow, did the *Kentucky Law Journal* deliver! Over a jam-packed day of formal presentations and informal conversations, academics, lawyers, journalists, students, and the Kentucky Secretary of State engaged in a robust exploration of recent redistricting battles and Kentucky’s place in the nationwide narrative. Although participants did not necessarily coalesce

WEKU NPR (May 20, 2022), <https://www.weku.org/politics/2022-05-20/kentucky-democratic-party-beshear-wont-back-congressional-nominee-geoff-young> [<https://perma.cc/EA34-ATND>].

¹³ See Nicholas O. Stephanopoulos & Christopher Warshaw, *The Impact of Partisan Gerrymandering on Political Parties*, 45 LEGIS. STUD. Q. 609, 611 (2020) (finding that “partisan disadvantage in districting indeed impedes numerous party functions,” and specifically that “[c]andidates are . . . less likely to contest districts when their party is handicapped by a districting plan [and that] [c]andidates who do choose to run are more likely to have weak resumes.”); see also *Gill v. Whitford*, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring) (“Members of the ‘disfavored party’ in the State, deprived of their natural political strength by a partisan gerrymander, may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office . . .”).

¹⁴ Opinion and Order at 70–71, *Graham v. Adams* (2022) (No. 22-CI-00047).

¹⁵ *Id.* at 40.

¹⁶ *Id.* at 43–44.

¹⁷ *Id.* at 44–50.

¹⁸ *Id.* at 44.

¹⁹ See *In re 2021 Redistricting Cases Matanuska-Susitna Borough*, 528 P.3d 40 (Alaska 2023); *Harper v. Hall*, 868 S.E.2d 499, 509–11 (N.C. 2022), *overruled by Harper v. Hall*, No. 413PA21-2, 2023 N.C. LEXIS 366 (Apr. 28, 2023); *League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 (Pa. 2018); see also Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 101 (2014) (discussing the broader protection for voting rights within state constitutions).

around a golden nugget solution to the problem of gerrymandering, the conversation reveals once again that Kentucky is at the forefront of innovative discussions on how to improve our democracy for the better.

The morning began with a historical perspective, featuring Professor Anthony Gaughan's exploration of the 1946 case of *Colgrove v. Green*, in which the Supreme Court, per Justice Felix Frankfurter, initially said that the judiciary "ought not to enter this political thicket."²⁰ As Professor Gaughan writes for this symposium issue, four "ghosts" of *Colgrove v. Green* are still with us today.²¹ He highlights how *Colgrove* involved last-minute election rule challenges, multiple opinions from the justices, the perpetuation of outdated election laws, and the rejection of judicially manageable standards—and how those same features can explain much of today's election law jurisprudence.²²

After Professor Gaughan explained *Colgrove's* relevance to today's election law jurisprudence, Professor Wilfred Codrington offered a careful response to this history—and what it means for modern election law—which he also expounded upon in this symposium issue.²³ During the event itself, Professor Codrington offered some skepticism on whether there are viable judicial solutions to the problems that the ghosts of *Colgrove* present: "I hope there are ghostbusters on the Court, but I fear we will go into 2030 all covered in ectoplasm," he quipped.²⁴ Next, Professor Ruth Greenwood—who litigated the *Rucho* case, in which the Supreme Court essentially harkened back to *Colgrove* by removing federal courts from hearing claims of partisan gerrymandering²⁵—offered her thoughts on Professor Gaughan's piece. Professor Greenwood noted that the Court has always been partisan and that it is a fallacy to pretend otherwise. Further, Professor Greenwood explained that a failure to grasp complex mathematical or statistical formulas on partisan gerrymandering should not preclude judges from crafting a judicially manageable standard to root out the worst abuses. As she put it, "If I'm a judge and someone is before me for speeding, I don't need to know how the radar [that calculated their speed] works. Experts can teach me. The same goes with partisan gerrymandering. Political science experts can assist judges."²⁶ Chris Crumrine, who is earning his PhD in political science from the University of Kentucky, spoke next, asking a pertinent question: "Who will be the ghostbusters?"²⁷ It won't be the political parties given their entrenched interests, Crumrine said, meaning that we still need a judicial solution to the problem of partisan gerrymandering. Professor Gaughan then concluded the panel by acknowledging the need for practical responses to the ghosts of *Colgrove* and the ways they continue to spook our elections. Professor Gaughan highlighted how the Court eventually overturned *Colgrove* by entering the political

²⁰ *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

²¹ Anthony J. Gaughan, *Redistricting in the Political Thicket: The Ghosts of Colgrove v. Green*, 111 KY. L.J. 589 (2023).

²² See *id.* at 631–650.

²³ Wilfred U. Codrington III, *The Phantasm of Principle: A Response to Anthony Gaughan*, 111 KY. L.J. 651 (2023).

²⁴ Symposium, *Drawing the Lines: Redistricting After the 2020 Census*, 111 KY. L.J. (2023).

²⁵ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491, 2508 (2019).

²⁶ Symposium, *Drawing the Lines: Redistricting After the 2020 Census*, 111 KY. L.J. (2023).

²⁷ *Id.*

thicket in *Baker v. Carr*.²⁸ The Court had recognized the need for the federal judiciary to fix the representational problems of districts with unequal populations, which the political branches had refused to address. Though it may be a stretch, perhaps this history, along with public pressure, could help to influence a conservative Court to rethink its current approach and instead promote a fairer democracy, in the same way that *Baker* had rebuked the hands-off view of *Colgrove*.

The next panel featured people not typically at a law journal symposium: journalists. The *Kentucky Law Journal* editors smartly recognized that a conversation about partisan gerrymandering is incomplete without bringing in individuals who convey vital information about the topic to the general public. Dave Daley of FairVote moderated a compelling discussion between national and Kentucky-based journalists, including Jen Fifield from *VoteBeat*, Sam Levine from the *Guardian*, Grace Panetta from *The 19th*, Austin Horn from the *Lexington Herald Leader*, and Joe Sonka from the *Louisville Courier Journal*. Daley asked the journalists if they had a “glass half full or glass half empty” perspective on the latest redistricting cycle.²⁹ Most of the journalists were quite pessimistic given the extreme partisan gerrymandering both nationally and in Kentucky, though Fifield noted that at least the process in many places was more transparent. But that same transparency wasn’t present in Kentucky, as Horn and Sonka explained, given that there was virtually no time for public commentary between when the Republican-controlled legislature revealed the new lines and when the maps went before the legislature for a vote. The journalists agreed, however, that independent redistricting commissions worked well in the places that used them. The panel also covered the incumbent-protection nature of the newest maps, the impact of gerrymandering on other issues such as reproductive rights, and the need for journalists to make these issues come alive for their readers. That final point resonated with the law students in attendance: one role of a lawyer is to help translate complex legal issues to a lay audience, and the more tangible and specific the explanation, the better.

Kentucky Secretary of State Michael Adams was the star of the day, offering the keynote address to a rapt noontime audience. As the named defendant in the Kentucky redistricting lawsuit, Secretary Adams made a bold proclamation: he doesn’t oppose partisan gerrymandering. “It’s lawmaking,” he said.³⁰ Adams noted that we generally trust legislators to engage in policymaking on all sorts of issues and wondered why we should approach redistricting any differently. As I suggested to him during our Q&A, however, redistricting is certainly different because, in this specific area, politicians are most self-interested to draw district lines in ways that will explicitly help themselves and their political parties stay in power. Or, as Justice Kagan more eloquently put it in her dissent in *Rucho*, the Supreme Court’s 2019 partisan gerrymandering case, “[t]he politicians who benefit from partisan gerrymandering are unlikely to change partisan gerrymandering. And because those politicians maintain themselves in office through partisan gerrymandering, the

²⁸ *Baker v. Carr*, 369 U.S. 186, 237 (1962); Symposium, *Drawing the Lines: Redistricting After the 2020 Census*, 111 KY. L.J. (2023).

²⁹ Symposium, *Drawing the Lines: Redistricting After the 2020 Census*, 111 KY. L.J. (2023).

³⁰ *Id.*

chances for legislative reform are slight.”³¹ Secretary Adams did, however, agree on some first principles of redistricting that he thinks legislators ought to follow: equal population among districts, racial equality (a “moral imperative,” Secretary Adams said),³² and adherence to traditional redistricting principles of compactness, contiguity, and keeping political subdivisions together. These criteria all seem uncontroversial and are generally already part of redistricting law.³³ But they fail to recognize a key problem: legislators can follow all of these rules and still gerrymander the heck out of a map to achieve an unfair partisan result.³⁴ At least Secretary Adams opened the door to further conversations on compromise solutions. He also offered additional suggestions for Kentucky election law improvements: re-enfranchise those convicted of felonies through a state constitutional amendment, move the voter registration deadline closer to Election Day instead of the current twenty-nine day deadline, increase the use and number of Vote Centers as polling places, prevent frivolous recounts that use up the capacity of county clerks while they are preparing for the next election, and improve civic literacy through specific initiatives. These ideas are all smart, reasonable measures that should garner bipartisan support. Through these initiatives, Kentucky could continue to be a leader on election law reform, even if it hasn’t found a way out of the political morass of extreme partisan gerrymandering.

The afternoon featured two more panels. The first involved the lawyers in the Kentucky redistricting case, which offered attendees a unique perspective on ongoing litigation from both sides—all before the trial court had ruled on the merits of the dispute. Casey Hinkle, a lawyer who represents the Kentucky Democratic Party, highlighted how the trial was really a battle of experts. Judge Wingate’s opinion confirms this point, in which he strongly credited the plaintiffs’ experts in declaring the maps to be partisan gerrymanders, albeit not ones that, in his view, the Kentucky Constitution forbids.³⁵ Victor Maddox, the state’s Deputy Attorney General, discussed the history of redistricting litigation in Kentucky, noting that he had lost a case in a previous cycle against a Democratic gerrymander and claiming that the Republicans in the current legislature had simply followed the same basic rules as the Democrats had in that prior case.³⁶ Essentially: what’s good for the goose is good for the gander. Corey Shapiro of the ACLU then offered a broader perspective from a practitioner who is not directly involved in the litigation, noting his frustration with courts in other states holding new maps invalid but still allowing them to go into effect for the 2022 election.³⁷

³¹ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2524 (2019) (Kagan, J., dissenting).

³² Symposium, *Drawing the Lines: Redistricting After the 2020 Census*, 111 KY. L.J. (2023).

³³ See, e.g., Hisam Sabouni & Cameron Shelton, *State Legislative Redistricting: The Effectiveness of Traditional Districting Principles in the 2010 Wave*, 20 ELECTION L.J. 198, 198 (2021) (identifying five common traditional redistricting principles: “compactness, maintaining the core of the district, respect for natural geography, respect for political subdivisions such as counties, and respect for communities of interest”); *Where are the lines drawn?*, ALL ABOUT REDISTRICTING, <https://redistricting.ils.edu/redistricting-101/where-are-the-lines-drawn/> [<https://perma.cc/U5UY-FT63>].

³⁴ See Sabouni & Shelton, *supra* note 33, at 199.

³⁵ Opinion and Order at 39–44, *Graham v. Adams* (2022) (No. 22-CI-00047).

³⁶ See *Jensen v. Kentucky State Bd. of Elections*, 959 S.W.2d 771, 776 (Ky. 1997), as amended (May 29, 1997), as modified (Sept. 4, 1997); Symposium, *Drawing the Lines: Redistricting After the 2020 Census*, 111 KY. L.J. (2023).

³⁷ Symposium, *Drawing the Lines: Redistricting After the 2020 Census*, 111 KY. L.J. (2023).

The day ended with perhaps the most radical panel, on Professor Ned Foley's proposal for "self-districting." American democracy could avoid the messy redistricting battles that occur every decade, he suggested, by letting people simply choose which "district" to be in, whether based on geography, affinity group, or something else. "Let's just stop having the government do the redistricting," he proclaimed.³⁸ He has graced these pages of the *Kentucky Law Journal* with a fuller exploration of how self-districting would work.³⁹ Professor Doug Spencer, offering the initial response, summed up what many in the audience were probably thinking: "Wow, what a bizarre idea! This is crazy! I love it!"⁴⁰ Professor Spencer applauded Professor Foley for thinking about truly radical ways to fix the system, which otherwise feels impossible. "You never can get reform or creative thinking if you're not willing to say things out loud and start thinking and challenging a system."⁴¹ On the merits, Professor Spencer noted that self-districting "pushes us toward a thicker form of democracy, where voters are thought of as part of their community."⁴² He expounded upon these ideas in a response for this symposium issue.⁴³ Professor Nick Stephanopoulos offered an analogy to both German and New Zealand practices in support of Professor Foley's proposal. Professor Carolyn Shapiro, while pointing out some potential logistical and legal hurdles with the concept, also noted that adopting self-districting would require us to think more fully about what it means to have a representative democracy.

That sentiment, from Professor Shapiro, also encapsulates this entire discussion. What kinds of rules should we adopt to create a properly functioning democracy, where all valid voters have easy access to the ballot and a majority of votes translates to a majority of seats in a representative body? The conversation revealed that Kentucky has offered a shining example of a so-called "red" state moving in a positive direction, though the state still has a way to go to have a truly model election system. The Elections Performance Index, a nonpartisan measure of the strength of a state's election apparatus, ranked Kentucky at #32 for the 2020 election, up from #41 in 2018 and #43 in 2016.⁴⁴ Obviously, something is working in the Bluegrass state. But as this symposium on redistricting demonstrated, it's not enough. Other states can look to Kentucky as a model for trending in a positive way on voting rights, even if the project is not yet complete and more reforms are sorely needed, but Kentucky must look to other states for how to improve its redistricting process.

If the *Kentucky Law Journal* symposium on redistricting taught us anything, it's that Kentucky remains an important place for these conversations. Any event that includes lawyers on opposite sides of a case, strong willed scholars, a plethora of journalists, and the state's chief election official has the potential to become enmeshed in intractable squabbles given the high stakes of the issues. That's not the Kentucky way. The student editors did a phenomenal job of organizing the event,

³⁸ *Id.*

³⁹ Edward B. Foley, *Self-Districting: The Ultimate Antidote to Gerrymandering*, 111 KY. L.J. 693 (2023).

⁴⁰ Symposium, *Drawing the Lines: Redistricting After the 2020 Census*, 111 KY. L.J. (2023).

⁴¹ *Id.*

⁴² *Id.*

⁴³ Douglas M. Spencer, *Redistricting's Ultimate Antidote*, 111 KY. L.J. 719 (2023).

⁴⁴ ELECTIONS PERFORMANCE INDEX, <https://elections.mit.edu/#/data/rank> [<https://perma.cc/7VU3-B62Y>].

running everything smoothly and efficiently. Students served as moderators for three of the panels, prompting the participants with engaging questions. The Kentucky students served as a model for how law students and future lawyers will be key players in the continuing efforts to sustain our democracy.

For that, we should all raise a glass.