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Look Homeward Candidate: Evaluating and Reforming Kentucky's Residency Definition and *Bona Fides* Challenges in Order to Avoid a Potential Crisis in Gubernatorial Elections

*S. Chad Meredith*¹

I. INTRODUCTION

MITT Romney, Mitch Daniels, Bill Richardson, and Haley Barbour all have at least two things in common—they are the governors of their respective states, and if their states defined residency in the same way that Kentucky does, they would not have even been eligible to run for governor in the first place.² The harsh realities of Kentucky's candidate residency requirements hit one particular candidate with full force when he was disqualified from running for lieutenant governor in 2003. Early in 2003, Hunter Bates, a lifelong Kentuckian and former chief of staff for Senator Mitch McConnell, was ruled ineligible to run for lieutenant governor because a state circuit court found that he did not meet the residency requirements for that office. His disqualification threatened to cast a gubernatorial election into doubt by placing the legal status of a gubernatorial slate in question. The next year, in a state senate race, Kentucky's anomalous residency law was coupled with a poorly written statute governing pre-election candidate qualification challenges, causing what some might call a constitutional crisis. That particular controversy pitted the judiciary against the legislature and left a state senate district without representation in the general assembly for over a year.

Kentucky emerged from these two controversies with a dubious definition of residency and an incompletely resolved dispute over which branch of government possesses the authority to decide pre-election qualifications challenges. With that being the state of the law, the commonwealth faces

¹ B.A. 2004, Washington and Lee University; J.D. expected 2007, University of Kentucky College of Law. The author wishes to thank his wife, Rebekah, for her unconditional love and support, which has been particularly invaluable during the rigors of law school. The author would also like to thank Rebecca Jennings and the fine legal professionals at Middleton & Reutlinger for assisting with his research efforts. Without their help, many of the documents referred to herein would have been exceedingly difficult to obtain. Finally, the author would like to thank Professor Lori Ringhand for reading an early draft of this article and making much needed—and much appreciated—suggestions.

² See *infra* notes 129–32 and accompanying text.

the specter of additional, and possibly even more serious, crises in the future. A particularly troublesome scenario is one in which the state is left without a winner in a gubernatorial election and the courts and legislature are left to battle indefinitely over who has jurisdiction to determine the outcome of the election.

This Note examines two issues that have been most problematic in recent years: (1) the rules on residency, and (2) who gets to decide questions of residency at different points in the electoral process. This Note will provide an analysis of these problems, explore possible solutions, and make recommendations as to the most appropriate reforms.

Part II of this Note discusses two recent dilemmas caused by Kentucky election law: *Shain v. Bates* and *Stephenson v. Woodward*. Part III provides a solution to the residency definition problem by explaining that a pure domicile test is the appropriate definition. Part III further examines the way in which the court in *Hunter Bates*' case interpreted residency and concludes not only that the court applied the wrong definition, but also that the case would have turned out differently had the correct definition been used. Part IV addresses the problems with the current candidate qualifications challenge statute and asserts that the Kentucky legislature should rewrite that law using the Mississippi and Indiana statutes as models.

II. FACTUAL BACKGROUND

In early 2003, Congressman Ernie Fletcher and his running mate, Hunter Bates, were leading the pack of Republican candidates in the Kentucky gubernatorial primary.³ Polling showed that Fletcher had strong statewide name recognition and support,⁴ and of the four Republican slates, Fletcher and Bates had raised, by far, the most money. In fact, the February campaign finance reports revealed that Fletcher and Bates had raised nearly \$800,000, while the next highest amount was approximately \$128,000.⁵ From the moment they filed to run, there was a popular perception that Fletcher and Bates were the favored candidates of Senator Mitch McConnell, Kentucky's senior senator and undisputed Republican leader.⁶ The Fletcher-Bates slate appeared to be well on its way to winning the primary nomination in a year that was the Kentucky Republican party's best opportunity in decades to win the offices of governor and lieutenant governor.

³ Al Cross, *Bluegrass Poll; Chandler, Fletcher Lead Primary Races*, COURIER-J. (Louisville), Feb. 18, 2003, at A1 [hereinafter Cross, *Bluegrass Poll*].

⁴ *Id.*

⁵ Kentucky Registry of Election Finance, Online Searchable Database, <http://www.kref.state.ky.us/krefsearch/> (last updated Mar. 13, 2003) (click on "By Election Date" under "Candidate Searches," then enter "5/20/2003" as the date).

⁶ Al Cross, *Rep. Fletcher Enters*, COURIER-J. (Louisville), Dec. 3, 2002, at A1.

But on March 26, a circuit judge in Oldham County threw a wrench in the works of the high-flying duo by declaring Bates ineligible to run for lieutenant governor.⁷ Bates decided to withdraw from the election the following day, stating that he did not want to detract attention from the true issues of the campaign by appealing the ruling and engaging in a high-profile legal battle.⁸

The circuit judge's decision was the result of a motion that had been filed in Oldham Circuit Court on behalf of a University of Louisville student and was later joined by Robert Heleringer, a candidate for lieutenant governor on an opposing slate.⁹ The motion stemmed from speculation that Bates did not satisfy the residency requirements for the office of lieutenant governor.¹⁰ More specifically, the motion contended that Bates' candidacy was a violation of section 72 of the Kentucky Constitution¹¹ because he would not be able to satisfy the requirement of having been a citizen and resident of Kentucky for the requisite six years immediately preceding the election.¹² The claim was predicated on the fact that Bates lived in Northern Virginia from 1995 to 2002 while serving in Washington, D.C. on the staff of Senator Mitch McConnell.¹³ The movants argued that Bates lost his status as a Kentucky resident during that time period because his actual abode was in Virginia. Bates, on the other hand, argued that he retained his status as a Kentucky resident while serving in Washington because he maintained sufficient ties with the commonwealth.¹⁴ The Oldham Circuit Court sided with the movants,¹⁵ ruling that residence refers to inhabitance

7 Shain v. Bates, No. 03-CI-00153, slip op. at 14–18 (Oldham Cir. Ct., Ky. Mar. 26, 2003); Al Cross, *Bates Ruled Ineligible to Run*, COURIER-J. (Louisville), Mar. 27, 2003, at A1 [hereinafter Cross, *Bates Ruled Ineligible*].

8 Al Cross, *Bates Withdraws as Lieutenant Governor Candidate*, COURIER-J. (Louisville), Mar. 28, 2003, at A1.

9 Heleringer, a former state representative, was the running mate of state Rep. Steve Nunn. Cross, *Bluegrass Poll*, *supra* note 3.

10 Al Cross, *Suit Claims Bates Ineligible to be Lieutenant Governor*, COURIER-J. (Louisville), Mar. 12, 2003, at B1 [hereinafter Cross, *Suit Claims Bates Ineligible*].

11 Section 72 reads:

The Governor and the Lieutenant Governor shall be at least thirty years of age, and have been citizens and residents of Kentucky for at least six years next preceding their election. The duties of the Lieutenant Governor shall be prescribed by law, and he shall have such other duties as delegated by the Governor.

KY. CONST. § 72.

12 Cross, *Suit Claims Bates Ineligible*, *supra* note 10.

13 *Id.*

14 Respondent's Memorandum in Opposition to Motion for Relief Under KRS 118.176 at 9, Shain v. Bates, No. 03-CI-00153 (Oldham Cir. Ct., Ky. Mar. 26, 2003).

15 Cross, *Bates Ruled Ineligible*, *supra* note 7; Shain v. Bates, No. 03-CI-00153, slip op. at 14–18 (Oldham Cir. Ct., Ky. Mar. 26, 2003).

and the place of actual abode, not the place of domicile.¹⁶ The circuit judge determined that Bates could not have been a resident of Kentucky for the six previous years because he had been a physical inhabitant of Virginia for five of those years.¹⁷

Bates' disqualification put the Fletcher campaign in a state of flux and led to another lawsuit when a primary opponent attempted to have Fletcher thrown off the ballot on the grounds that he no longer had a full slate.¹⁸ Fletcher eventually won the right to choose another running mate and continue his campaign,¹⁹ but significant damage had already been done to Kentucky election law. The damage came in the form of an interpretation of the term "resident" that—as will be discussed subsequently—is at odds with the traditional definition and also has the undesired effect of discouraging Kentucky's upcoming leaders from seeking valuable learning and developmental experiences outside the commonwealth.

A little over a year and a half after Bates was declared ineligible to run for lieutenant governor, the residency issue surfaced once again in a state senate race in Louisville. At 4:00 P.M. on the eve of the 2004 general election, Virginia Woodward, the Democratic candidate for the thirty-seventh district state senate seat, filed a motion in Jefferson Circuit Court seeking to disqualify her opponent, Republican Dana Seum Stephenson.²⁰ Woodward claimed that Stephenson should be disqualified because she failed to meet the residency requirement for state senate candidates set forth in section 32 of the Kentucky Constitution.²¹ Two days later, after the voting had been completed and Stephenson had received 1,022 votes more than Woodward, a circuit judge issued a temporary injunction preventing the Jefferson County Board of Elections from certifying the results pending a final ruling on Woodward's motion.²² On November 22, the court disqualified Stephenson, finding that she "had failed to meet the six-year residency requirement found in section 32 of the Kentucky Constitution."²³ As it turned out, Stephenson had physically lived in Indiana during a portion of the preceding six years while pursuing a graduate degree at Indiana University Southeast.²⁴ That was the determining factor for the court.²⁵

¹⁶ *Shain*, No. 03-CI-00153, slip op. at 14–18.

¹⁷ *Id.*

¹⁸ Jack Brammer & Ryan Alessi, *Nunn Campaign Goes to Court—Seeks to Remove Fletcher from Primary*, LEXINGTON HERALD-LEADER, Mar. 29, 2003, at B1.

¹⁹ *Heleringer v. Brown*, 104 S.W.3d 397 (Ky. 2003).

²⁰ *Stephenson v. Woodward*, 182 S.W.3d 162, 164 (Ky. 2005).

²¹ *Id.*

²² *Id.* at 165.

²³ *Id.*

²⁴ *Woodward v. Stephenson*, No. 04-CI-09261, slip op. at 2 (Jefferson Cir. Ct., Ky. Nov. 22, 2004).

²⁵ *Id.*

The residency issue quickly turned out to be a mere sideshow to the much more significant controversy of whether the court actually had authority to disqualify Stephenson. Kentucky Revised Statutes (“KRS”) § 118.176 allows circuit courts to hear challenges to a candidate’s qualifications, like residency, so long as the challenge is filed prior to the general election.²⁶ The state constitution, however, says that the senate has authority to judge contested elections of its members.²⁷ Thus, the question became whether the Jefferson Circuit Court had authority to determine the case because the motion was filed before the election, or whether the senate had that authority because the case had not been adjudicated prior to the election. Stephenson and Senate President David Williams²⁸ argued that the state senate had exclusive jurisdiction over the dispute under the Kentucky Constitution because the dispute was transformed into an election contest once the election was held.²⁹ The court, however, found that it had jurisdiction under KRS § 118.176 because Woodward’s motion had been filed prior to the general election.³⁰ After finding that it had jurisdiction, the court disqualified Stephenson,³¹ thereby, arguably, making Woodward the winner by default.

Stephenson filed an election contest in the Kentucky State Senate on December 7, 2004.³² Woodward was sworn in as a state senator on January 1, 2005, by a state circuit judge, and she took the oath three days later in the state senate chamber with the rest of the senate.³³ Shortly thereafter, a senate committee was empaneled to look into the election contest.³⁴ After a committee investigation and two days of deliberations, Stephenson was sworn in and seated as the senator from the thirty-seventh district.³⁵

²⁶ KRS § 118.176(2) states:

The bona fides of any candidate seeking nomination or election in a primary or general election may be questioned by any qualified voter entitled to vote for such candidate or by an opposing candidate by summary proceedings consisting of a motion before the Circuit Court of the judicial circuit in which the candidate whose bona fides are in question resides.

KY. REV. STAT. ANN. § 118.176(2) (West 2006)

²⁷ KY. CONST. § 38.

²⁸ Senator Williams intervened in his capacity as president of the state senate. *Woodward*, No. 04-CI-09261, slip op. at 1.

²⁹ Respondents’ Brief at 2–4, *Woodward v. Stephenson*, 04-CI-09261 (Jefferson Cir. Ct., Ky. Nov. 11, 2004).

³⁰ *Woodward*, No. 04-CI-09261, slip op. at 6–7.

³¹ *Id.* at 13–14.

³² *Stephenson v. Woodward*, 182 S.W.3d 162, 165 (Ky. 2005).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 166.

Woodward then filed suit in Franklin Circuit Court, and the court enjoined Stephenson from performing any duties as a state senator.³⁶ By this time, the judiciary and legislature were on a collision course with a constitutional crisis clearly in sight. The crisis was finally averted, not because of the Supreme Court of Kentucky decision on the matter, but by Stephenson's choice to resign from the senate on January 3, 2006.³⁷

While the *Bates* and *Stephenson* cases are each very problematic in their own right, they foreshadow an even more serious controversy. After those cases, it seems quite likely that Kentucky's confusing residency definition in conjunction with KRS § 118.176 could create a very serious problem for the commonwealth in which a gubernatorial election would be cast into doubt and left unsettled, just as the senate election was in *Stephenson*. Since the governor and lieutenant governor are elected on a slate,³⁸ a dispute as to the qualifications of one candidate raises questions about the viability of the entire slate.³⁹ Thus, if the residency status of a candidate for governor or lieutenant governor were brought into question in a lawsuit filed on election eve—and the challenged slate received the highest number of votes the following day—the state would be faced with a situation in which two different branches of government would claim the right to determine the winner of the election. The legislature would claim jurisdiction over the dispute under section 90 of the Kentucky Constitution,⁴⁰ and the courts would claim jurisdiction under KRS § 118.176. Such a situation would be remarkably similar to the *Stephenson* case, but it would undoubtedly have much more dire consequences for the Commonwealth of Kentucky.

Such a dispute would have exceptionally undesirable consequences for the state because of the nature of the governor's office. In the *Stephenson* controversy, it was undoubtedly bad for a state senate district to go without representation for over a year, but at least the legislature was still able to operate because there were thirty-seven other senators who could conduct the chamber's business. The executive power, however, is concentrated in the hands of one person—the governor.⁴¹ With a *Stephenson*-like dispute over a gubernatorial election, Kentucky's government could be paralyzed, especially if such a dispute went without a resolution for even a fraction of

³⁶ *Id.*

³⁷ Joseph Gerth & Tom Loftus, *Stephenson Resigns Disputed Seat in Senate*, COURIER-J. (Louisville), Jan. 4, 2006, at A1.

³⁸ KY. CONST. § 70.

³⁹ See *Heleringer v. Brown*, 104 S.W.3d 397, 399–400 (Ky. 2003).

⁴⁰ Section 90 of the Kentucky Constitution gives the legislature exclusive jurisdiction over contested elections for governor and lieutenant governor. In its entirety, it reads: "Contested elections for Governor and Lieutenant Governor shall be determined by both Houses of the General Assembly, according to such regulations as may be established by law." KY. CONST. § 90.

⁴¹ KY. CONST. § 69.

the time it took to resolve the dispute in the *Stephenson* case. Even though the previous governor would continue in office until the certification of a successor,⁴² the functioning of the state government might be negatively affected by a popular perception that the sitting governor is nothing but a powerless figurehead. Perhaps more importantly, any legislative sessions occurring during the interim period would be fruitless without a strong governor with a clear mandate to push a legislative agenda and help shape public opinion.

To avoid this potential debacle, it is necessary to correct the problems that could allow it to happen (i.e., the poor residency definition and the poorly-written candidate qualifications challenge statute). This Note now turns its attention to those issues, examining first the residency definition issue and secondly the statutory issue.

III. A SOLUTION TO THE RESIDENCY DEFINITION PROBLEM

Kentucky has had residency requirements for governor and lieutenant governor candidates since the first state constitution was adopted in 1792.⁴³ Almost all state constitutions and the United States Constitution contain residency requirements for candidates for executive office.⁴⁴ Residency requirements serve the purpose of ensuring that candidates are “exposed to the problems, needs, and desires of the people whom [they are] to govern, and [the requirements] also give[] the people . . . a chance to observe [the candidates] and gain firsthand knowledge about [their] habits and character.”⁴⁵ In other words, residency requirements are intended to be a “means of achieving the goal of having knowledgeable and qualified people in high public office.”⁴⁶

42 Ky. CONST. § 73.

43 Ky. CONST. of 1792, art. II, § 4.

44 See U.S. CONST. art. II, § 1, cl. 4; ALA. CONST. art. V, § 117; ALASKA CONST. art. III, § 2; ARK. CONST. art. VI, § 5; CAL. CONST. art. V, § 2; COLO. CONST. art. IV, § 4; CONN. CONST. art. IV, § 5 & art. VI, § 1; DEL. CONST. art. III, § 6; FLA. CONST. art. IV, § 5; GA. CONST. art. V, § 1, para. IV; HAW. CONST. art. V, § 1; IDAHO CONST. art. IV, § 3; ILL. CONST. art. V, § 3; IND. CONST. art. 5, § 7; IOWA CONST. art. IV, § 6; KY. CONST. § 72; ME. CONST. art. V, pt. 1, § 4; MD. CONST., art. II, § 5; MASS. CONST. pt. 2, ch. II, § 1, art. II; MICH. CONST. art. V, § 22; MINN. CONST. art. V, § 2; MISS. CONST. art. 5, § 117; MO. CONST. art. IV, § 3; MONT. CONST. art. VI, § 3; NEB. CONST. art. IV, § 2; NEV. CONST. art. 5, § 3; N.H. CONST. pt. 2, art. 42; N.J. CONST. art. V, § 1, para. 2; N.M. CONST. art. V, § 3; N.Y. CONST. art. IV, § 2; N.C. CONST. art. III, § 2; N.D. CONST. art. V, § 4; OKLA. CONST. art. VI, § 3 & art. III, § 1; OR. CONST. art. V, § 2; PA. CONST. art. 4, § 5; R.I. CONST. art. II, § 1 & art. III, § 1; S.C. CONST. art. IV, § 2; S.D. CONST. art. IV, § 2; TEX. CONST. art. IV, § 4; UTAH CONST. art. VII, § 3; VT. CONST. ch. II, § 23; VA. CONST. art. V, § 3; WASH. CONST. art. III, § 25 & art. VI, § 1; Wis. CONST. art. V, § 2 & art. III, § 1; WYO. CONST. art. IV, § 2.

45 *Chimento v. Stark*, 353 F. Supp. 1211, 1217 (D.N.H.), *aff'd*, 414 U.S. 802 (1973).

46 *Id.* at 1216 (citing JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 406–07 (W. W. Norton & Co. ed. 1987) (1893)).

Though the value of residency requirements has never been questioned, the exact meaning of “residency” is often puzzling. A few courts have held that “residency” refers to the place of actual abode,⁴⁷ while many others—applying the pure domicile test—have held that it refers to the place of domicile, meaning a person’s true and fixed home to which they intend to return when they have been absent.⁴⁸ Though the court in *Bates* applied the actual abode test, the pure domicile test is the appropriate residency definition under Kentucky law.

While the actual abode test merely defines residency in terms of where a person lives (i.e., where he or she sleeps, receives his or her mail, etc.), the pure domicile test examines the totality of the circumstances and asks whether the state of candidacy is the place to which the candidate intends to return when he or she has been absent.⁴⁹ The pure domicile test is a broader definition of residency because, unlike the actual abode test, it allows individuals to be residents of a state without actually abiding in the state. The intent of the pure domicile theory is to ensure “that a candidate is sufficiently familiar with the state without placing undue limitations on the voters’ right to select the candidate of their choice.”⁵⁰ Thus, as will be elaborated upon below, the pure domicile test does more to further the goals of residency requirements than does a definition of residency that merely asks where a person sleeps.⁵¹ Not only is it preferable from a policy standpoint, but an analysis of section 72 and similar constitutional provisions also demonstrates that it is the correct definition from a legal standpoint.

A. The Pure Domicile Test of Residency is the Correct Approach Under Kentucky Law

1. Textual Analysis of Section 72 from a Comparative and Historical Standpoint Supports the Pure Domicile Test.—Kentucky did not originally adopt a pure domicile definition of residency. The commonwealth’s first constitution, adopted in 1792, called for an eligible candidate to have been “a citizen and inhabitant in this State at least two years next before his election, unless he shall have been absent on the public business of the United States or of this State.”⁵² It is significant that the constitution referred to residents “in” Kentucky, rather than residents “of” Kentucky and that it specifically

47 *See, e.g.*, *Shain v. Bates*, No. 03-CI-00153, slip op. at 14–18 (Oldham Cir. Ct., Ky. Mar. 26, 2003).

48 *See, e.g.*, *State Election Bd. v. Bayh*, 521 N.E.2d 1313, 1317 (Ind. 1988) (quoting *Bd. of Med. Registration & Examination v. Turner*, 168 N.E.2d 193, 196 (Ind. 1960)).

49 *See id.*

50 *Id.* at 1316.

51 *See id.*

52 KY. CONST. of 1792, art. II, § 4.

denoted the situations in which eligible candidates were allowed to have been absent from the state during the two-year period. Those provisions indicate that the framers of the first constitution contemplated that the ordinary definition of “residents” should only include those people who actually reside in the commonwealth. The exception for Kentuckians who had been outside the state on state or national business, however, indicates that the framers recognized that the definition of residency should not always be so limited. The exception also suggests that there was a presumption under the first constitution that anyone living outside the commonwealth was not a resident of Kentucky. Otherwise, there would have been no need to provide a special exception for those who were outside the state because of service to the commonwealth or the nation.

By the time Kentucky adopted its fourth and current constitution in 1891, the notion that a resident need not actually inhabit the state continuously had been extended.⁵³ The 1891 constitution simply calls for the governor and lieutenant governor to have been “residents of Kentucky for at least six years next preceding their election,”⁵⁴ rather than residents “in” the state, as the constitution of 1792 required.⁵⁵ It also deleted the special exemption for those serving outside the state on behalf of Kentucky or the nation. By eliminating that exemption, the 1891 constitution seems to have ended the presumption that people living outside the state could not be residents. Otherwise, without the special exception for time spent serving official business outside the commonwealth, it would be almost impossible for United States representatives and senators to run for governor under the current constitution given that the rigors of their congressional duties essentially demand that they live in Washington, D.C. The 1891 constitution intended to adopt a more expansive definition of residency—one that includes people who do not actually abide within the commonwealth. When viewed in light of the experiences of other states, it appears that this more expansive definition is in fact the pure domicile test.

The first Indiana constitution—the Indiana Constitution of 1816—was almost identical to Kentucky’s first constitution in requiring that the governor “reside in” the state unless the governor had to be out of the state on government business.⁵⁶ Like Kentucky’s fourth constitution, Indiana’s second constitution, adopted in 1851, also replaced “reside in” with the phrase “resident of,”⁵⁷ and omitted the exception for out-of-state government service.⁵⁸ The Supreme Court of Indiana found “that by eliminating

53 KY. CONST. § 72.

54 *Id.*

55 KY. CONST. of 1792, art. II, § 4.

56 *See Bayh*, 521 N.E.2d at 1316.

57 *Id.*

58 *Id.*

the out-of-state government service exclusion but adopting 'resident of' instead of 'resided in' language, the 1851 constitution embraced a pure domicile theory.⁵⁹ If Indiana, with its nearly identical constitutional history, has found the change in language from the first to the second constitution to mean that the state adopted a pure domicile theory, then it would be logical for the same conclusion to be drawn in Kentucky. Kentucky's residency requirements for the offices of governor and lieutenant governor have a constitutional definition that calls for the pure domicile test, but unlike Indiana, Kentucky courts have applied an actual abode test.

The experience of the state of Missouri also suggests that Kentucky should apply a pure domicile test to questions of residency in the context of gubernatorial slates. Missouri has constitutional residency requirements similar to those of Kentucky's section 72. Sections three and ten of article IV of the Missouri Constitution require candidates for governor and lieutenant governor to have been residents of Missouri for the ten years preceding the election.⁶⁰ In a 1972 case involving current Senator Christopher "Kit" Bond's campaign for governor, the Supreme Court of Missouri applied a pure domicile test to determine whether Bond was qualified to run for governor.⁶¹ Despite the fact that Bond's actual abode had been outside the state of Missouri for most of the ten years immediately prior to the election,⁶² the court found that he had been a resident of Missouri for that entire period.

The Supreme Court of Missouri held that the state constitution "does not mean and require actual, physical presence, continuous and uninterrupted for ten years."⁶³ Instead, the word "residence" was found to mean "domicile" under the Missouri Constitution.⁶⁴ The court further added that:

A person can have but one domicile, which when once established, continues until he renounces it and takes up another in its stead. In order to effectuate a change it is necessary that there shall be actual personal presence in the new place and also the present intention to remain there, either

59 *Id.*

60 MO. CONST. art. IV, §§ 3, 10. Section three prescribes the qualifications for the office of governor, and section ten provides that the same qualifications for the office of governor shall apply to the office of lieutenant governor. *Id.*

61 *State ex rel. King v. Walsh*, 484 S.W.2d 641 (Mo. 1972).

62 *Id.* at 642. Bond lived in Charlottesville, Virginia while attending law school at the University of Virginia from 1960 to 1963; he lived in New York City during the summer of 1961 and in Atlanta, Georgia, during the summer of 1962; he lived in Atlanta, Georgia, from 1963 to 1964 while clerking for the chief judge of the U.S. Court of Appeals for the Fifth Circuit; and he lived in Washington, D.C., from 1964 to 1967 while working for a Washington law firm.

63 *Id.* at 644.

64 *Id.*

permanently or for an indefinite time, without any fixed or certain purpose to return to the former place of abode.⁶⁵

Since there is virtually no difference between Kentucky's residency requirements and Missouri's, other than the number of years required, the Missouri Supreme Court's interpretation of residency should provide guidance to Kentucky decisionmakers. The fact that both Missouri and Indiana use the pure domicile test should make it even more appealing to Kentucky courts.

When the textual evolution of section 72 is analyzed and compared to the interpretations given to similar constitutional provisions from other states, it seems that the pure domicile definition of residency is the correct constitutional standard for judging the qualifications of a candidate for governor or lieutenant governor. This conclusion is further supported by Kentucky case law interpreting similar provisions in the Kentucky Constitution.

2. Interpreting Section 72 in Light of Case Law Pertaining to Similar Provisions in the Kentucky Constitution also Indicates that the Pure Domicile Test is the Correct Definition of Residency.—While Kentucky appellate courts have never interpreted the residency requirements found in section 72 of the constitution, they have interpreted similar requirements found in other sections.⁶⁶ The residency requirement found in section 145 of the Kentucky Constitution, which establishes the qualifications of voters, has always been interpreted under a pure domicile theory. In construing that section in *Elam v. Maggard*,⁶⁷ Kentucky's highest court found that "the word 'reside,' as used in section 145, has always been construed by this Court to be equivalent to 'legal domicile,' as distinguished from the place of actual abode."⁶⁸ In elaborating on the concept of domicile, the court noted that:

In law, every person has a domicile. In some instances it may be different from his actual abode. Until he has changed it (which is a combination of act and intention), it continues to be his domicile in law. Where one has had an actual domicile, and departs from it temporarily, intending to return, it will remain his legal domicile for all purposes.⁶⁹

65 *Id.* at 645 (quoting *In re Toler's Estate*, 325 S.W.2d 755, 759 (Mo. 1959)).

66 *See, e.g.*, *Everman v. Thomas*, 197 S.W.2d 58 (Ky. 1946); *Elam v. Maggard*, 178 S.W. 1065 (Ky. 1915).

67 *Elam*, 178 S.W. at 1065.

68 *Id.*

69 *Id.* (quoting *Erwin v. Benton*, 87 S.W. 291, 294 (Ky. 1905)).

In *Everman v. Thomas*,⁷⁰ the court reinforced the domicile theory approach to the determination of residency. After repeating much of the language from the *Elam* case, *Everman* points out that "a temporary abode for purposes of business, pleasure, or otherwise does not result in the loss of residence."⁷¹ The court then went on to apply the same multi-factored analysis used in *Elam*, looking first at the factual situation surrounding the voter's domicile (e.g., where the voter was actually living, how long he or she had been there, the reasons behind his or her decision to abide in that place, his or her connections with the purported place of residence, etc.) and then looking at the voter's intentions (i.e., whether he or she actually intended for the absence from the place of his or her purported residence to be temporary).⁷² In other words, in determining residency under section 145, Kentucky courts have consistently based their decisions not on the voter's actual place of abode,⁷³ but rather on the voter's domicile, which is defined as "the place where a person has his true, fixed, permanent home and principal establishment, and to which place he has, whenever he is absent, the intention of returning."⁷⁴

There are a number of reasons why Kentucky courts should adopt the same definition of residency under section 72 as they have under section 145. For example, if Kentucky has interpreted the seemingly narrow "reside in" language of section 145 in light of the broader pure domicile test, then the more open concept of residency represented by the "resident of" language in section 72 should certainly be interpreted using the pure domicile test instead of a more restrictive test that focuses on the place of actual abode.⁷⁵ In addition, the plain language of the *Elam* opinion says that the definition of residency provided by the court applies "for all purposes,"⁷⁶

70 *Everman*, 197 S.W.2d at 58.

71 *Id.* at 66 (citing 18 AM. JUR. *Elections* §§ 58-59 (1938)).

72 See *Elam*, 178 S.W. at 1065; *Everman*, 197 S.W.2d at 63-69.

73 While it is true that actual abode is a factor in determining the place of domicile, it is certainly not the determining factor. See *State ex rel. King v. Walsh*, 484 S.W.2d 641, 644 (Mo. 1972) (stating that "residence is largely a matter of intention, to be determined not only from the utterances of the person whose residence is in issue but also from his acts and in the light of all the facts and circumstances of the case"). Actual abode is more important to the domicile inquiry when a person claims to have established a new domicile, as opposed to a situation in which a person claims to have retained their original domicile. To establish a new domicile, a person must both actually abide in the new place, and must have an intention to make that place their permanent domicile and abandon their original domicile. To retain their original domicile, however, a person must merely demonstrate—based on the totality of the circumstances—that he or she never intended to abandon the original domicile. See *id.* at 645 n.4 (explaining the differences between claiming to establish a new domicile and claiming retention of the original domicile).

74 *State Election Bd. v. Bayh*, 521 N.E.2d 1313, 1317 (Ind. 1988) (quoting *Bd. of Med. Registration & Examination v. Turner*, 168 N.E.2d 193, 196 (Ind. 1960)).

75 See *supra* notes 47-48.

76 *Elam*, 178 S.W. at 1065.

and not just for determining voter qualifications. Kentucky decisions interpreting similar provisions of the state constitution, therefore, provide additional proof that the pure domicile test is the correct definition of residency.

*B. The Pure Domicile Test is Also the Correct Definition
in Light of Policy Considerations.*

Not only is the pure domicile definition legally sound, it also makes for sound policy. As previously mentioned, the goal of residency requirements is to ensure that candidates are familiar with the issues facing the state and that voters are familiar with the character and merits of the candidates.⁷⁷ As the Supreme Court of Indiana noted in the *Bayh* case, “[u]sing traditional legal notions of domicile as a way of determining a candidate’s status as ‘a resident of the State’ furthers [those] purposes.”⁷⁸ While a definition focusing on actual abode might also further these goals to some degree, it is not the optimal solution because it is too restrictive. Not only does the domiciliary concept advance these goals, but it does so “without placing undue limitations on the voters’ right to select the candidate of their choice.”⁷⁹ In addition, the pure domicile definition should be used in Kentucky because our system of government “works best on the basis of maximum rather than minimum participation in democracy.”⁸⁰ Accordingly, residency requirements should be interpreted as broadly as possible so as to effectuate, rather than prohibit, candidacy.

A domiciliary definition of residency would also do more to assuage Kentucky’s much-lamented brain drain.⁸¹ It is certainly in the commonwealth’s best interest to make it more convenient for skilled persons like Hunter Bates to return and play a significant role in the public affairs of the state. People like Bates gain invaluable experience during their temporary absences from the state, and it is senseless to prevent Kentucky from benefiting from that experience. We live in a relatively flat world in which people frequently move from place to place gaining education, experience, and expertise, but without actually changing their state of domicile. It is undoubtedly in Kentucky’s best interest for its citizens to get the best of what the world has to offer and bring that knowledge and experience back to the commonwealth. Kentucky should encourage those people to use their expertise for the public benefit of the state. To that end, it does not

⁷⁷ See *supra* notes 43–46 and accompanying text.

⁷⁸ *Bayh*, 521 N.E.2d at 1316.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See, e.g., KY. LONG-TERM POLICY RESEARCH CTR., POLICY NOTES: KENTUCKY’S BRAIN DRAIN UNPLUGGED, (2001), http://www.kltprc.net/policynotes/Chpt_3.htm.

make sense for Kentucky law to make it more difficult for such people to hold public office.

It is also nonsensical for Kentucky to discourage its citizens from serving in the United States government or military. Under the current state of the law, Kentuckians who are required to live outside the state for a period of time while on government or military service are not eligible to run for governor or lieutenant governor upon their return to the state. Surely Kentucky's law was never intended to have such an unpatriotic effect. It is not fair to preclude the candidacy of a public servant or soldier simply because he or she is required to live outside the state while serving our country.

Thus, the pure domicile test is the most appropriate definition for residency in light of both legal and policy considerations. Consequently, the Commonwealth of Kentucky would be best served if the courts would abandon the "actual abode" definition and recognize the pure domicile test. If the courts will not do that, however, the people of the commonwealth should effectuate that change by encouraging legislators to rewrite section 72 of the Kentucky Constitution. The best way to frame the language so as to avoid the current problems is to require candidates for governor and lieutenant governor to be citizens of the United States and residents of Kentucky and to explicitly define residency in terms of the pure domicile test. Such an amendment would give independent and operative meanings to the words "citizen" and "resident" and would leave absolutely no room for anything other than a pure domicile definition.⁸² In the alternative, if the courts refuse to recognize that the pure domicile definition is the true constitutional definition of residency and the citizens of Kentucky are not persuaded to amend the constitution so as to explicitly adopt a pure domicile definition of residency, the policy objectives of the pure domicile approach could be partially fulfilled by amending the constitution to reinstate the out-of-state government service exception that existed under the first state constitution.⁸³ Nevertheless, taking that measure is the minimum that should be done given that the pure domicile approach clearly goes the furthest in satisfying the relevant policy concerns and is also the most appropriate method of defining residency in terms of pure legal analysis.

C. How the Bates Court Interpreted the Residency Requirement

Though a pure domicile test appears to be the appropriate approach to evaluating residency under section 72, the *Bates* court employed an entirely different approach. Placing particular emphasis on the reasoning from

⁸² See *infra* notes 93–97 and accompanying text.

⁸³ See *supra* note 52 and accompanying text.

the cases of *Noble v. Meagher*⁸⁴ and *Mobley v. Armstrong*,⁸⁵ and specifically stating that *Mobley* was “precisely on point,”⁸⁶ the Oldham Circuit Court applied a test that focused on actual residence instead of domicile.⁸⁷ In *Mobley*, the residency of a candidate for district judgeship was brought into question.⁸⁸ The *Mobley* court followed the guidance of *Noble*,⁸⁹ which said that “[t]he proper statutory standard to determine the residence of a non-partisan judicial candidate is set out in KRS § 118.015(7), which states that the word ‘residence’ used in reference to a candidate shall mean actual residence of the candidate without regard to the residence of the spouse of the candidate.”⁹⁰ The *Mobley* case further defined residence as “an abode where someone actually lives.”⁹¹

Aside from the *Mobley-Noble* line of cases, the Oldham Circuit Court also relied on the logic of the case of *Ravenel v. Dekle*⁹² from South Carolina.⁹³ In that case, the Supreme Court of South Carolina found that because the state constitution requires an eligible candidate for governor to have been both a resident *and* citizen of the state for five years,⁹⁴ it must be the case that the term “resident” refers to the actual place of abode, rather than the candidate’s domicile.⁹⁵ The court said that to find otherwise would render the term “citizen” useless, which would violate the fundamental principle that “effect should be given to every part and every word of a constitution.”⁹⁶ Specifically, the court reasoned:

If the framers of the particular constitutional provision meant to require nothing more than a domicile they could have stopped after using the word “citizen” and omitted the words “and resident”. “Resident”, in the domiciliary sense is embodied within the term “citizen”. It follows therefore that if the words “and resident” be construed as meaning anything other than a requirement of actual physical residence such language would be surplusage.⁹⁷

84 *Noble v. Meagher*, 686 S.W.2d 458 (Ky. 1985).

85 *Mobley v. Armstrong*, 978 S.W.2d 307 (Ky. 1998).

86 *Shain v. Bates*, No. 03-CI-00153, slip op. at 15 (Oldham Cir. Ct., Ky. Mar. 26, 2003).

87 *Id.* at 14, 18.

88 *Mobley*, 978 S.W.2d at 308.

89 *Id.* at 310.

90 *Noble v. Meagher*, 686 S.W.2d 458, 462 (Ky. 1985).

91 *Mobley*, 978 S.W.2d at 310.

92 *Ravenel v. Dekle*, 218 S.E.2d 521, 527 (S.C. 1975).

93 *Shain v. Bates*, No. 03-CI-00153, slip op. at 10 (Oldham Cir. Ct., Ky. Mar. 26, 2003).

94 S.C. CONST. art. IV, § 2.

95 *Ravenel*, 218 S.E.2d at 527.

96 *Id.* (quoting 16 AM. JUR. 2d *Constitutional Law* § 67 (1998)).

97 *Id.*

Echoing that logic, the Oldham circuit judge found that an approach focusing on the candidate's actual abode must be used because each word in the constitution "should be given an independent and operative meaning,"⁹⁸ and the use of the domicile approach to residency would render the word "citizen" in section 72 superfluous.⁹⁹

D. *Second Guessing the Bates Result*

While the use of the actual abode test in the *Bates* decision may seem correct at first blush because of the *Mobley-Noble* line of cases and the *Ravenel* case, it is actually inapposite because reliance on those cases is misplaced. The holdings of *Mobley* and *Noble* should not be applied to cases interpreting section 72 of the Kentucky Constitution because those cases define residency based entirely on KRS § 118.015(7).¹⁰⁰ Reliance on KRS § 118.015(7) in evaluating the residency requirements of section 72 is wrong for a number of reasons. First, the residency requirements found in section 72 are constitutional requirements. As such, the terms and provisions contained within the section must be defined and interpreted according to constitutional precepts, and they cannot be altered, elaborated upon, or modified in any way by ordinary legislation, such as KRS § 118.015(7).¹⁰¹ As discussed previously,¹⁰² the language "resident of" in section 72 has an existing constitutional meaning that requires the application of the pure domicile test, and that definition cannot be altered by ordinary legislation. In the words of both *Noble* and *Mobley*, KRS § 118.015(7) is a mere "statutory standard."¹⁰³ The definition of residency under section 72, however, is a constitutional standard, and it is axiomatic that constitutional provisions cannot be changed by statutes. Thus, the section 72 definition cannot be elaborated upon or altered by a statutory provision.

In addition, KRS § 118.015(7) should not be used to interpret section 72 because the application of KRS § 118.015(7) is limited in application, by its very terms, to chapter 118 of the Kentucky Revised Statutes.¹⁰⁴ As a result, it does not seem that KRS § 118.015(7) was intended to provide guidance for interpreting section 72 of the Kentucky Constitution. Furthermore, chapter 118 is exclusively about the conduct of elections, which means that it has no logical connection to interpreting candidate qualifications under

98 *Shain*, No. 03-CI-00153, slip op. at 10.

99 *Id.* at 13.

100 *Mobley v. Armstrong*, 978 S.W.2d 307, 310 (Ky. 1998); *Noble v. Meagher*, 686 S.W.2d 458, 462 (Ky. 1985).

101 *See, e.g., Marbury v. Madison*, 5 U.S. 137 (1803).

102 *See supra* notes 52-65 and accompanying text.

103 *Mobley*, 978 S.W.2d at 310; *Noble*, 686 S.W.2d at 462.

104 KY. REV. STAT. ANN. § 118.015 (West 2006).

section 72 of the constitution. Therefore, it is altogether inappropriate to read KRS § 118.015(7) as the definition of residency under section 72.

Reliance on the reasoning in the *Ravenel* decision is also inappropriate because it is not logically sound. The logic behind *Ravenel* is that the words “citizen” and “resident” can only have independent, operative meanings if “resident” is given an actual abode definition rather than a pure domicile definition. Thus, the *Ravenel* logic assumes that the words “citizen” and “resident” in section 72 have the same meaning under a pure domicile definition of residency. That logic is a non-sequitur. The words “citizen” and “resident” can be given independent, operative meanings under the pure domicile test because there is a distinct difference between a citizen and a resident. The Fourteenth Amendment of the United States Constitution defines a citizen of a state as a person who is born or naturalized in the United States and is also resident of the state.¹⁰⁵ Thus, to qualify as a citizen of Kentucky, one must be born in the United States or be a naturalized United States citizen and must also be a resident of Kentucky.¹⁰⁶ Since residency is merely a component part of state citizenship, it is clear that residency itself cannot mean the same thing as citizenship. One can easily imagine a scenario in which an individual can be considered a resident under the pure domicile test, yet fail to be a citizen. Such a result would happen, for example, if an alien moved to Kentucky and indisputably established the commonwealth as his domicile (i.e., his permanent home to which he intended to return after temporary absences) but did not acquire United States citizenship. In that case, the alien would be a resident of Kentucky, but would not be a citizen of the state because he would not have been born or naturalized in the United States¹⁰⁷ Therefore, under the wording of section 72,¹⁰⁸ it does not necessarily follow that one who has met the necessary requirements to be considered a resident of Kentucky under

¹⁰⁵ U.S. CONST. amend. XIV. Similarly, the United States Supreme Court has said that “In order to be a citizen of a State within the meaning of the diversity statute, a natural person must both be a citizen of the United States *and* be domiciled within the State.” *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 828 (1989) (citing *Robertson v. Cease*, 97 U.S. 646, 649 (1878); *Brown v. Keene*, 33 U.S. (8 Pet.) 112, 115 (1834)). While not speaking to the exact same issue, the quote tends to illustrate the general difference between citizenship and domiciliary residence.

¹⁰⁶ Using a pure domicile definition of residency, this means that to be a citizen of Kentucky, one must be born or naturalized in the United States and must have established Kentucky as his true and permanent home to which he intends to return when he has been absent.

¹⁰⁷ See U.S. CONST. amend. XIV.

¹⁰⁸ “The Governor and Lieutenant Governor shall be at least thirty years of age, and have been citizens and residents of Kentucky for at least six years next preceding their election. The duties of the Lieutenant Governor shall be prescribed by law, and he shall have such other duties as delegated by the Governor.” KY. CONST. §72.

the pure domicile test has also met the necessary requirements of state citizenship.

Because it is possible for a person to be a resident of Kentucky without being a citizen of Kentucky, the word "citizen" in section 72 can be given an independent and operative meaning if the domiciliary approach to residence is adopted. As such, the reasoning found in *Ravenel* seems flawed. It appears even more flawed considering that of all the states that require governors and lieutenant governors to be both citizens and residents of the state, only the courts of South Carolina, Maryland, and now Kentucky, have ruled that residency must be defined as the place of actual abode in order to give meaning to the "citizen" language.¹⁰⁹ In any event, the *Ravenel* logic should not be followed in defining residency under section 72, and residency under that section should not be defined according to the place of actual abode. If actual abode is not the appropriate definition, then the correct definition must necessarily be the pure domicile test.

E. The Pure Domicile Test Applied to the Bates Facts

Had the pure domicile test been applied in the *Bates* case, Hunter Bates' candidacy certainly would not have been prohibited. In fact, the circuit judge found that Bates had maintained Kentucky as his legal domicile during the entire period of his physical absence from the state.¹¹⁰ The judge was entirely correct in that regard because all of the facts clearly indicate that Kentucky was Bates' true, fixed, permanent home and principal establishment to which he intended to return after temporary absences.¹¹¹ For example, Bates was born and raised in Kentucky, went to college in Kentucky, clerked for a federal judge in Kentucky following law school, had always voted in Kentucky, has owned real estate in Kentucky for most of his adult life, and has remained an active member of the Kentucky Bar Association since beginning his professional career.¹¹²

Not only was Bates closely tied to Kentucky before temporarily leaving the state, but his absence was also inextricably linked to Kentucky. During the time Bates lived in the Washington, D.C. area, he spent the vast majority of his time serving the Commonwealth of Kentucky on the staff of Senator Mitch McConnell, eventually rising to the rank of chief of staff.¹¹³ His

¹⁰⁹ *State Election Bd. v. Bayh*, 521 N.E.2d 1313, 1316 (Ind. 1988) (citing *Ravenel v. Dekle*, 218 S.E.2d 521, 527 (S.C. 1975); *Sec'y of State v. McGucken*, 222 A.2d 693, 695-96 (Md. 1966)).

¹¹⁰ *Shain v. Bates*, No. 03-CI-00153, slip op. at 14-16 (Oldham Cir. Ct., Ky. Mar. 26, 2003).

¹¹¹ *Id.* at 13-17.

¹¹² Memorandum of Respondent at 9, *Shain v. Bates*, No. 03-CI-00153 (Oldham Cir. Ct., Ky. Mar. 26, 2003).

¹¹³ *Id.* at 6.

work in Senator McConnell's office required him to be intimately familiar with the issues facing Kentucky and required him to make frequent trips to the commonwealth.¹¹⁴ Furthermore, all accounts indicate that Bates' absence from Kentucky was intended to be merely temporary. When Bates first went to work for Senator McConnell, it was on the understanding that his "commitment was for a two-year session of Congress."¹¹⁵ After that period though, Senator McConnell became the chairman of the Senate Rules Committee. As a result, he asked Bates to stay on as chief counsel to the rules committee and "delay his return [to Kentucky] until the last year of [McConnell's] Senate term, 2002."¹¹⁶

In 2002, Bates fulfilled his intention to return to Kentucky permanently and took on the task of managing Senator McConnell's re-election campaign—a job that undoubtedly required an exceedingly high level of familiarity with the state. That job, and the other positions that he held over the previous seven years, were high profile posts that easily allowed the people of Kentucky to become familiar with his character and merits. In short, Bates' candidacy should have been allowed because Kentucky was clearly his domicile. At the very least, his superior knowledge of the state and the fact that the state's citizens had the opportunity to become familiar with him demonstrate that his candidacy would have fulfilled the spirit of the residency requirements.

That conclusion seems all the more appropriate in light of the experiences of other states. Bates' case is similar to the *Bayh* case from Indiana and the *Bond* case from Missouri. The *Bayh* case concerned Evan Bayh, the current junior senator from Indiana. In 1988, he was pursuing the governor's office in that state.¹¹⁷ His candidacy was brought into question on the grounds that he had not been a resident of Indiana for the requisite five year period preceding the election.¹¹⁸ The Supreme Court of Indiana found that Bayh—who had lived in Washington, D.C., from 1982–1984 while working for a private law firm there—had maintained his Indiana residency despite the fact that his actual abode was outside the state for a significant portion of the five-year period.¹¹⁹

Bond's case arose in the midst of his campaign for governor of Missouri in 1972.¹²⁰ Bond had also spent significant time living outside the state in which he was running for office. He spent practically the entire decade before his candidacy abiding in Virginia, New York, Georgia, and Washington,

114 *Id.* at 7.

115 *Id.*

116 *Id.* at 8.

117 *See* State Election Bd. v. Bayh, 521 N.E.2d 1313, 1314 (Ind. 1988).

118 *See id.*

119 *See id.* at 1318.

120 State *ex rel.* King v. Walsh, 484 S.W.2d 641 (Mo. 1972).

D.C., but not Missouri.¹²¹ Like Bayh, he too was found to have fulfilled the residency requirements of his state.¹²²

In some ways, Bates' case was stronger than both Bayh's and Bond's. For instance, Bates spent the vast majority of his time in Washington working for a Kentucky senator,¹²³ while Bayh and Bond spent their time in Washington working for private law firms;¹²⁴ Bates clerked for a federal judge in Kentucky after graduating from law school,¹²⁵ while Bond clerked for a federal judge in Georgia;¹²⁶ and Bates was admitted to the bar in Kentucky,¹²⁷ while Bond was not admitted to the Missouri Bar.¹²⁸ Thus, in those ways, it seems that Bates maintained stronger ties with his native state than did Bayh or Bond. In that light, there is no good reason why Bates should have been disqualified when Bayh and Bond were not.

Bates' disqualification seems even more anomalous when considered alongside the situations of several other public servants who have been elected after periods of temporary absence from their home states. In 2002, for example, Mitt Romney was elected governor of Massachusetts after having lived—and owned a home—in Utah for the three previous years while serving as the head of the 2002 Winter Olympics Organizing Committee.¹²⁹ In addition, Mitch Daniels was elected governor of Indiana in 2004 after having served in Washington, D.C., from 2001 to 2003 as President Bush's director of the Office of Management and Budget;¹³⁰ Haley Barbour was elected governor of Mississippi in 2003 despite having lived in the Washington, D.C., area for most of the previous two decades;¹³¹ Bill Richardson was elected governor of New Mexico in 2002 despite having been absent from the state for the previous five years while serving as the United States ambassador to the United Nations and then as secretary of energy.¹³² It is quite common for people to run for, and win, executive offices in states in which they would not qualify as residents if their residency

121 *Id.* at 641.

122 *Id.* at 644.

123 *Shain v. Bates*, No. 03-CI-00153, slip op. at 3 (Oldham Cir. Ct., Ky. Mar. 26, 2003).

124 *Bayh*, 521 N.E.2d at 1315; *King*, 484 S.W.2d at 642–44.

125 *Shain*, No. 03-CI-00153, slip op. at 2.

126 *King*, 484 S.W.2d at 643.

127 *Shain*, No. 03-CI-00153, slip op. at 6.

128 *King*, 484 S.W.2d at 642.

129 Stephanie Ebbert, *Romney Stays on Ballot: Democrats Lose a Unanimous Vote*, BOSTON GLOBE, June 26, 2002, at A1.

130 State of Ind., Official Indiana Governor's Website, <http://www.in.gov/gov/bio/index.html> (last visited Sept. 10, 2006).

131 Scott M. Larson, *Barbour Says He Can Get Things Done*, HATTIESBURG AM., Feb. 18, 2003, at 2A.

132 State of N.M., Official New Mexico Governor's Website, <http://www/governor.nm.us/governor.php> (last visited Sept. 10, 2006).

were determined according to an actual abode test rather than a pure domicile test. Most states—including Kentucky, it seems, until at least 1979—have recognized the benefits of a pure domicile test, and it would be best for Kentucky to do so once again.

Having come to a conclusion about the correct definition of residency, it is now prudent to examine the problems concerning which branch of government gets to decide issues of residency at different stages in the electoral process. A solid definition of residency will do little to prevent future uncertainty and clashes between branches without a solution to the problem of jurisdiction over residency disputes.

IV. THE KRS § 118.176 PROBLEM AND ITS SOLUTION

KRS § 118.176(2) currently allows the *bona fides* of any candidate to be challenged by a motion in circuit court at “any time prior to the general election.”¹³³ This provision undoubtedly fulfills the beneficial function of providing the electorate with a method of challenging the eligibility of candidates with questionable qualifications. Unfortunately, its utility is overshadowed by one major flaw. The problem with KRS § 118.176(2) is that it does not establish a clear line between the point at which the judiciary’s jurisdiction over *bona fides* challenges ends and the legislature’s jurisdiction over election contests begins.¹³⁴ The problem most obviously manifests itself in situations like the one presented in the *Stephenson* case, where the *bona fides* challenge is filed the day before the general election and decided by the court at some time subsequent to the closing of the polls.¹³⁵ If such a scenario were to occur with regard to a gubernatorial election, it would be unclear as to whether the judiciary would have jurisdiction by virtue

133 KY. REV. STAT. ANN. § 118.176(2) (West 2006). In its entirety, subsection (2) reads:

The bona fides of any candidate seeking nomination or election in a primary or general election may be questioned by any qualified voter entitled to vote for such candidate or by an opposing candidate by summary proceedings consisting of a motion before the Circuit Court of the judicial circuit in which the candidate whose bona fides is questioned resides. An action regarding the bona fides of any candidate seeking nomination or election in a primary or general election may be commenced at any time prior to the general election. The motion shall be tried summarily and without delay. Proof may be heard orally, and upon motion of either party shall be officially reported. If the Circuit Judge of the circuit in which the proceeding is filed is disqualified or absent from the county or is himself a candidate, the proceeding may be presented to, heard and determined by the Circuit Judge of any adjoining judicial circuit.

KY. REV. STAT. ANN. § 118.176(2) (West 2006).

134 See *supra* notes 26–36.

135 See *id.*

of the fact that the challenge was filed pursuant to KRS § 118.176 prior to the start of the election, or whether the legislature would have jurisdiction under section 90 of the Kentucky Constitution by virtue of the fact that the dispute had been transformed into an election contest when the polls closed.¹³⁶

To prevent such an undesirable controversy, it is necessary to amend either KRS § 118.176 or section 90 of the Kentucky Constitution so that it will not be possible for those types of situations to arise. If one of those two sections must be changed, the statute—rather than the constitutional provision—should be changed. Amending section 90 is not the optimal solution because it is much more practical and convenient to rewrite KRS § 118.176.¹³⁷ In addition, given that the substance of section 90 has been a

¹³⁶ The *Stephenson* case does not definitively resolve this controversy because it applies to state senators, which are covered by different constitutional provisions than the governor and lieutenant governor. Plus, even if that case were held to apply to gubernatorial elections, it would not truly resolve anything because the legislature could ignore the court and attempt to decide the dispute for itself. That would quite simply result in warfare between the courts and the legislature. While Dana Stephenson chose to respect the decision of the Supreme Court of Kentucky, there is nothing other than feelings of personal integrity and honor to dictate such a result. It is quite possible for a less honorable candidate to plunge the state into a severe constitutional crisis by pressing ahead and taking his or her case to the legislature against the command of the supreme court. This should be changed so that we no longer have to rely on the character and integrity of candidates to avoid such crises.

¹³⁷ In order to replace the current KRS § 118.176 with new wording, the legislature would merely have to follow the routine requirements for enacting any other piece of legislation—which essentially entails a majority vote in favor of the final form of the bill in both houses of the legislature followed by presentment to the governor for his approval. *See* KY. CONST. §§ 46, 56. Amending section 90 of the Kentucky Constitution, on the other hand, would require a more difficult and complicated procedure. Section 256 of the Kentucky Constitution provides the mechanism for amending the state constitution. In its entirety, it reads:

Amendments to this Constitution may be proposed in either House of the General Assembly at a regular session, and if such amendment or amendments shall be agreed to by three-fifths of all the members elected to each House, such proposed amendment or amendments, with the yeas and nays of the members of each House taken thereon, shall be entered in full in their respective journals. Then such proposed amendment or amendments shall be submitted to the voters of the State for their ratification or rejection at the next general election for members of the House of Representatives, the vote to be taken thereon in such manner as the General Assembly may provide, and to be certified by the officers of election to the Secretary of State in such manner as shall be provided by law, which vote shall be compared and certified by the same board authorized by law to compare the polls and give certificates of election to officers for the State at large. If it shall appear that a majority of the votes cast for and against an amendment at said election was for the amendment, then the same shall become a part of the Constitution of this Commonwealth, and shall be so proclaimed by the Governor, and published in such manner as the General Assembly may direct. Said

part of the Kentucky Constitution for over 200 years,¹³⁸ and KRS § 118.176 has only been on the books in its present form since 2001,¹³⁹ there seems to be some wisdom in the notion that section 90 should be retained and any changes should be made to KRS § 118.176. Furthermore, the state constitution is the supreme authority within the realm of state law.¹⁴⁰ Thus, if change needs to be made, the statutory provision should be changed rather than the constitutional provision.

Having determined that KRS § 118.176 should be retooled, the much more important question becomes how exactly it should be written. To answer that question, it is necessary to understand the statute's background.

A. *The Story Behind KRS § 118.176*

KRS § 118.176 has existed in one form or another since 1974, having taken its present form in 2001.¹⁴¹ Prior to 2001, the statute only permitted the courts to hear *bona fides* challenges up until the primary election.¹⁴² The general assembly amended the law in 2001 in response to the outcome of *Legate v. Stone*.¹⁴³ That case concerned the democratic primary for the office of councilperson in the city of Madisonville, Kentucky.¹⁴⁴ Legate and Stone were both candidates for the democratic nomination.¹⁴⁵ On the day of the primary, however, it was discovered that Legate was actually a registered

amendments shall not be submitted at an election which occurs less than ninety days from the final passage of such proposed amendment or amendments. Not more than four amendments shall be voted upon at any one time. If two or more amendments shall be submitted at the same time, they shall be submitted in such manner that the electors shall vote for or against each of such amendments separately, but an amendment may relate to a single subject or to related subject matters and may amend or modify as many articles and as many sections of the Constitution as may be necessary and appropriate in order to accomplish the objectives of the amendment. The approval of the Governor shall not be necessary to any bill, order, resolution or vote of the General Assembly, proposing an amendment or amendments to this Constitution

Ky. CONST. § 256

138 Ky. CONST. of 1799, art. III, § 27.

139 See *Stephenson v. Woodward*, 182 S.W.3d 162, 172 (Ky. 2005) (noting that the statute was most recently amended in 2001).

140 16 C.J.S. *Constitutional Law* § 7 (2005) (citing *Burling v. Chandler*, 804 A.2d 471 (N.H. 2002)).

141 See *Stephenson*, 182 S.W.3d at 172.

142 See *id.*

143 *Id.*; see also *id.* at 172 n.5 (“The opinion of the Court of Appeals in this matter [*Legate v. Stone*] was not designated for publication. It may be referenced by its case number, 2000-CA-01724-I.”).

144 *Id.*

145 *Id.*

republican.¹⁴⁶ Legate won the primary, and then Stone filed a challenge to disqualify him pursuant to KRS § 118.176.¹⁴⁷ The circuit court ruled in Stone's favor, but the Court of Appeals "reversed with directions to dismiss the action, concluding that KRS § 118.176 motions filed after the primary election are untimely."¹⁴⁸ The Kentucky Supreme Court then denied discretionary review, and Madisonville democrats were stuck with a republican on their ticket.¹⁴⁹

When the general assembly met in 2001, it set out to amend KRS § 118.176 in order to prevent the Madisonville embarrassment from happening again.¹⁵⁰ The initial proposal would have allowed *bona fides* challenges to be filed in court before or after the primary or general election.¹⁵¹ The version that originally became law, the current statute, only allows challenges to be filed in court before the general election.¹⁵² Comments made by representatives during a session of the House Committee on Elections, Constitutional Amendments, and Intergovernmental Affairs show that the final version of the bill did not give the courts jurisdiction over *bona fides* challenges filed after the general election because "after an election, 'candidates' are no longer 'candidates' and therefore cannot be the subject of KRS § 118.176 actions."¹⁵³

In light of the legislative history, it seems that the general assembly intended the judiciary's jurisdiction over candidate *bona fides* challenges to evaporate after the general election. If the courts exercise jurisdiction after the general election, the case cannot properly be termed a candidate *bona fides* challenge because there simply are no candidates anymore once the general election has taken place.¹⁵⁴ Considering that the state constitution gives the legislature exclusive jurisdiction over such disputes after the general election, it is unlikely that the legislature would have written a statute that also allows the courts to exercise jurisdiction after the general election. Nevertheless, the Supreme Court of Kentucky held in *Stephenson* that KRS § 118.176 provides the courts with jurisdiction after the general election so long as the challenge is filed before the election.¹⁵⁵ As previously mentioned, this creates tension with the legislature's constitutional endowment of the authority to decide election contests. Because an attempt to overturn

146 *Id.*

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.* at 172-73.

151 *Id.* (citing Ky. H.J. REG. SESS. 160-61 (2001)).

152 *Id.* at 173.

153 *Id.*

154 *Id.* at 186-87 (Roach, J., dissenting) (quoting *Stephenson v. Woodward*, No. 2005-SC-0096-TG, 2005 WL 629002, at *7-8 (Ky. Mar. 17, 2005) (Keller, J., dissenting)).

155 *Id.* at 168.

Stephenson v. Woodward could take years and would require the state to suffer through another crisis like the one in that case, the most practical way to avoid the tension is to simply rewrite KRS § 118.176. Thus, the question now becomes how to rewrite the statute.

B. A Proposed Alternative to the Current Form of KRS § 118.176

A rewritten KRS § 118.176 must find a way to balance several competing interests. On one hand, it must provide a way to prevent a *Stephenson*-like situation in which both the judiciary and legislature claim jurisdiction because the action is filed in court immediately before the general election and then decided afterward. There must also be some way to ensure that candidates are not able to delay challenging their opponents' qualifications until late in the campaign season. When a candidate is disqualified close to the date of the general election, it is normally too late for another candidate to step in and run a meaningful campaign. Late disqualifications are also contrary to the public interest because they have the potential to harm our two-party system by effectively leaving one party out of the general election.¹⁵⁶ Finally, a rewritten KRS § 118.176 must also protect the public's interest in guaranteeing that only qualified candidates appear on the ballot. Thus, the most desirable scheme for pre-election *bona fides* challenges is one that draws a definite boundary between the judiciary's jurisdiction over pre-election *bona fides* challenges and the legislature's jurisdiction over election contests while maximizing the electorate's opportunity to challenge unqualified candidates and also making certain that the voters will have a true choice at the polls.

1. Maximizing the Electorate's Opportunity to Challenge Unqualified Candidates While Also Ensuring that Voters Have a True Choice at the Polls.—As the residents of Madisonville, Kentucky learned in 2000,¹⁵⁷ it is desirable to give voters a sufficient opportunity to ensure that only qualified candidates appear on the ballot at the general election. The clear lesson from the Madisonville case is that voters should be allowed to challenge the *bona fides* of a candidate after the primary election. This makes sense for a couple of reasons. First, the issue of the candidate's qualifications simply may not arise prior to the primary election, as was the case in Madisonville. In that situation, it seems unfair to saddle the electorate with an unqualified candidate

¹⁵⁶ See *N.J. Democratic Party, Inc. v. Samson*, 814 A.2d 1028, 1034–35 (N.J. 2002) (noting that it is in the public interest to preserve the two-party system by submitting to the electorate a ballot bearing the names of candidates of both major parties); see also *Davis v. Bandemer*, 478 U.S. 109, 144–45 (1986) (O'Connor, J., concurring) (“There can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government.”).

¹⁵⁷ See *supra* notes 143–49.

when there are at least five months left until the general election, which would certainly seem to be enough time to have the candidate disqualified and have a replacement candidate selected.

Second, the issue of standing poses serious problems to the electorate and the election process if *bona fides* challenges are not allowed after the primary. Kentucky's highest court has held that a voter has standing to maintain a pre-primary challenge of a candidate's qualifications if the voter "is qualified to vote for the nomination in issue."¹⁵⁸ Thus, a registered democrat would not have standing to challenge a republican primary contender, and vice versa. While it may seem unlikely, it is possible that members of one party could collude to ensure the victory of an unqualified candidate in the primary, thereby placing that candidate in a position in which the candidate's qualifications can no longer be challenged. For example, one party could recruit a wildly popular individual with no ties to the state to run for governor, and after that person wins the primary, no one from the opposing party would ever be able to challenge his or her candidacy.

It may seem unfair for unqualified candidates to win primaries, but the greatest potential inequity is found in the potential for those candidates to also win the general election. In some parts of the state, one party has such a tremendous advantage in registration numbers¹⁵⁹ that an unqualified candidate from the majority party could win the general election even after the candidate's ineligibility comes to light. At that point, the only method of redressing that injustice would be for the losing candidate to contest the election.¹⁶⁰ There is no reason why the election should have to conclude before the unqualified candidate can be challenged. Such a system is entirely inefficient. It can only lead to uncertainty on the part of the voters and higher costs for the state if the initial election is held invalid and another election is required. Thus, there should certainly be some method for voters to challenge candidates' qualifications after the primary and before the general election.

While it is sound policy to allow *bona fides* challenges to be made after the primary election, it may not be such a good idea to allow those challenges to be made up until the general election. Not only does this policy allow for conflicts between the judiciary and legislature, like in the *Stephenson* situation, but it also raises the possibility that a candidate could be disqualified so close to the general election that a replacement candidate could not be fielded in time to make a meaningful campaign. As a result, the voters in such a scenario would be deprived of the opportunity to have

158 *Fletcher v. Wilson*, 495 S.W.2d 787, 794 (Ky. 1973).

159 In Breathitt County in 2006, for example, there are 9,821 registered democrats and only 627 registered republicans, and in Leslie County, there are 978 democrats and 8,173 republicans. Commonwealth of Ky. State Bd. of Elections, Voter Registration Statistics Report (2006), <http://elect.ky.gov/stats/regstat.htm>.

160 See KY. CONST. §§ 38, 90; KY. REV. STAT. ANN. § 120.155 (West 2006).

a choice between candidates. In addition, the two-party system, which is a hallmark of American politics, would be damaged because the public would likely be without the chance to choose between two major party candidates. Even if the party of the disqualified candidate were to put a replacement candidate on the ballot, it is conceivable that voters might feel that, in practical effect, they have no true choice since the appearance of the substitute candidate has occurred too late for them to evaluate the new candidate's positions. In short, there has to be some way to guarantee that candidates are not disqualified late in the game.

To maximize the opportunity of voters to challenge unqualified candidates while minimizing the potential for voters to be left without a true choice and one party to be left without a candidate, it seems that *bona fides* challenges should be allowed after the primary but not up to the date of the general election, as the current form of KRS § 118.176 allows. In that regard, Mississippi's post-primary candidate qualifications statute¹⁶¹ provides a good model for a rewritten KRS § 118.176. Section 23-15-963 of the Mississippi Code allows any person to "contest the qualifications of . . . a candidate for any office elected at a general election . . . [by filing] a petition specifically setting forth the grounds of the challenge not later than thirty-one (31) days after the date of the first primary election . . ." ¹⁶² The statute also provides for an expedited appeals process.¹⁶³

161 MISS. CODE ANN. § 23-15-963 (West 2006). Mississippi also has a pre-primary candidate qualifications statute. See MISS. CODE ANN. § 23-15-961 (West 2006). Just as the general election challenge statute does not allow challenges up to the time of the general election, section 23-15-961 does not allow challenges up to the time of the primary election. There is no reason for Kentucky to adopt similar limitations on pre-primary challenges because the risks inherent in challenges coming after the primary and before the general election are not present in pre-primary challenges. Namely, pre-primary challenges leave no danger that the electorate will be left without a true choice in the general election, nor do they give rise to a risk that one of the major parties might be left without a candidate in the general election. As a result, this Note takes the position that Kentucky should maintain the current state of its law insofar as it allows *bona fides* challenges up to and through the primary election, but should limit these post-primary challenges along the same lines that Mississippi has limited them in section 23-15-963.

162 MISS. CODE ANN. § 23-15-963(1) (West 2006). Subsection (1) contemplates that such challenges will be initially filed with and heard by an election commission. See MISS. CODE ANN. §§ 23-15-359, 23-15-963(1) (West 2006). KRS § 118.176 allows challenges to be filed and heard in circuit court. As the Kentucky circuit courts appear well-equipped to handle these types of disputes, there does not appear to be any reason why Kentucky should create election commissions to hear these challenges like Mississippi has. After all, Mississippi allows the decision of an election commission to be appealed to a circuit court for a *de novo* hearing, so it stands to reason that if Kentucky followed Mississippi's plan, most cases would end up receiving a *de novo* hearing in circuit court anyway. See MISS. CODE ANN. § 23-15-963(4), (5) (West 2006). Thus, Kentucky should continue to give circuit courts original jurisdiction over *bona fides* challenges.

163 MISS. CODE ANN. § 23-15-963(4)-(6) (West 2006).

Mississippi's approach appears to successfully balance the voters' interests in guaranteeing that only qualified candidates are on the ballot and in having a true choice between candidates and the partisan political system's interest in the appearance of candidates from both major parties on the ballot. Given the public's wide-ranging access to information today, it seems highly unlikely that an unqualified candidate would be able to escape detection for more than thirty-one days. Thus, the thirty-one day limit seems reasonable. Moreover, because Kentucky's primary election is held on the first Tuesday after the third Monday in May,¹⁶⁴ the thirty-one day period and the expedited appeals process would likely allow a final decision to be rendered by the end of summer, which is the beginning of campaign season. As a result, a replacement candidate could be selected in time to run a meaningful campaign, thus giving voters a legitimate choice and ensuring that neither political party is foreclosed from offering a candidate in the election.

The Mississippi approach provides a good solution to the problem of maximizing the electorate's opportunity to challenge unqualified candidates while also ensuring that voters have a true choice at the polls. It does not, however, provide a certain solution to what is perhaps the biggest problem with the current wording of KRS § 118.176 (i.e., the potential for situations in which a *bona fides* challenge is filed, but not decided, prior to the general election, thereby leading both the judiciary and legislature to claim jurisdiction over the dispute).¹⁶⁵ Even though the issue was addressed in *Stephenson*, that case might not prevent the issue from being raised again if a similar situation ever were to present itself in a gubernatorial election. Because there is much more at stake in a gubernatorial election than in a state senate election, it is conceivable that one of the parties involved would seek to distinguish the case from *Stephenson* and vociferously litigate the issue again. It is even possible that a party might simply ignore *Stephenson* and pursue an appeal with the legislature.¹⁶⁶ The manner in which the dispute could arise is unimportant though. What is important is the fact that it could happen at all and thereby pit the legislature against the judiciary and place the commonwealth in an uncertain political position once again. Those undesirable outcomes can be avoided, however, if KRS § 118.176 is rewritten so as to draw a definite boundary between the judiciary's juris-

164 KY. REV. STAT. ANN. § 118.025 (West 2006).

165 There is no certain solution here because it would still be possible for both the legislature and the judiciary to simultaneously claim authority to decide such a controversy. That could happen, for example, if the state supreme court hears the final appeal before the general election but fails to decide the case before the election. In that case, the legislature might claim that a post-election decision by the court is not valid because the court's authority to decide the case was destroyed upon the occurrence of the election by virtue of the fact that there are no longer any "candidates" after the election.

166 See *supra* note 136.

diction over pre-election challenges and the legislature's jurisdiction over election contests.

2. *Drawing a Definite Boundary between the Judiciary's Jurisdiction Over Pre-election Bona Fides Challenges and the Legislature's Jurisdiction Over Election Contests.*—The current version of KRS § 118.176 allows *bona fides* challenges to be filed at any time before the general election, but it does not require them to be adjudicated before the election. Therein lies the problem. Without a provision that terminates the court's jurisdiction prior to the general election, there will always be a possibility, however remote, that the judiciary and legislature will clash over simultaneous claims to jurisdiction over the same *bona fides* dispute. Preventative measures should be taken to preclude such an occurrence because, as previously mentioned, it would be much less burdensome to rewrite the law than to suffer through another *Stephenson*-like controversy.

The manner in which the state of Indiana deals with this issue is a simple, common-sense approach that could work well for Kentucky. Section 3-8-8-7(a) of the Indiana Code provides that at noon thirty days before the election, regardless of the status of a *bona fides* challenge, the court's jurisdiction over the dispute evaporates, the challenged candidate may not be removed from the ballot, and any votes cast for that candidate must be counted.¹⁶⁷ Thus, in Indiana, a *bona fides* challenge to a gubernatorial candidate would be terminated if it did not reach a final resolution within thirty days of the general election.¹⁶⁸ In that event, the questions concerning that candidate's qualifications could only be raised again in an election contest, over which the state legislature has exclusive jurisdiction under the Indiana Constitution,¹⁶⁹ just like the Kentucky Constitution.¹⁷⁰ Indiana's law erects a clear boundary between the jurisdiction of the courts and the legislature. A clear boundary in that regard is exactly what Kentucky needs. If the commonwealth were to adopt a similar provision terminating the courts' jurisdiction at some point prior to the general election, there is no way that both the courts and legislature could ever again simultaneously claim jurisdiction over a candidate qualifications dispute. In addition, adopting that kind of provision would also promote the interests of giving voters a legitimate choice between two candidates and of giving both major parties meaningful candidates in elections by preventing candidates from being disqualified so close to the general election that a replacement cannot be selected in time to make a difference.

167 IND. CODE ANN. § 3-8-8-7(a) (West 2006).

168 *Id.*

169 IND. CONST. art. 5, § 6.

170 KY. CONST. § 90.

V. CONCLUSION

In light of the current state of Kentucky election law and the recent disputes revolving around Hunter Bates and Dana Seum Stephenson, it seems likely that Kentucky has not seen the end of controversies involving candidate qualifications. A particularly undesirable type of dispute that looms on the horizon is one in which the residency qualifications of a gubernatorial slate are challenged on election eve, thereby putting the legislature and judiciary in conflict once again and potentially leaving the commonwealth for an extended period of time without any official who has a clear mandate to govern the state. To prevent this situation from occurring, Kentucky courts should clarify and reform the state's definition of residency by adopting a pure domicile test, and the legislature should rewrite KRS § 118.176.

A pure domicile approach to residency is appropriate for a number of reasons. The history of section 90 of the Kentucky Constitution, the interpretation of similar provisions in the state constitution, and the experiences of other states all counsel in favor of that approach. It is also apt from a policy standpoint because we live in a "flat world" with an increasingly transitory society. In our contemporary society, people often move from one place to another in order to gain experience and expertise, but they often do not abandon their home state during their absence. That reality should be recognized, and as a matter of policy, we should encourage Kentuckians who seek opportunities outside the state to return and share their expertise with the people of the commonwealth. It is time for Kentucky to adopt a commonsense definition of residency that is both consistent with the past and with the realities of the future.

In rewriting KRS § 118.176, the general assembly should seek to prevent clashes between the courts and legislature while at the same time balancing the electorate's interest in challenging unqualified candidates with the electorate's other interest in having a true choice between candidates and the interest of our two-party political system in ensuring that one of the major parties is not left out of an election. To achieve those objectives, Kentucky should adopt a hybrid of the approaches used by Mississippi and Indiana. Such an approach would scale back the period of time in which a candidate's qualifications can be challenged before the general election and set a clear pre-election line at which the courts' jurisdiction over *bona fides* challenges evaporates. Establishing a definite boundary between the courts' and the legislature's jurisdictions is the only way to absolutely prevent another clash between those two branches of government over the authority to decide disputes concerning candidates' qualifications.