MR. EMANUEL RETURNS FROM WASHINGTON: DURATIONAL RESIDENCE REQUIREMENTS AND ELECTION LITIGATION

In the heat of the 2011 Chicago mayoral campaign, an appellate court in Illinois ordered the name of front-runner Rahm Emanuel, a former congressman and White House Chief of Staff, stricken from the ballot based on its determination that Emanuel had not been a Chicago resident for the one year preceding election day. The election was thrown into turmoil less than a month before voters were to go to the polls to elect the successor to the long-serving Mayor Richard M. Daley. The decision ignited a firestorm of condemnation that was fueled in part by a vigorous and visceral dissenting opinion as well as the appellate court's decision to not certify an appeal. Two days later, the Illinois Supreme Court ended the uproar by reversing the appellate court in *Maksym v. Board of Election Commissioners*,[1] turning the campaign's focus back to the candidates but issuing a legally questionable opinion in the process.

The case of Rahm Emanuel is one of the most high profile examples of candidates who face removal from the ballot based on durational residence requirements, laws specifying that candidates must have been residents of the electoral unit for a length of time before their election. In an era of increasing mobility, durational residence requirements can prove particularly onerous for potential candidates wishing to return "home" in order to run for political office. Moreover, as the story of *Maksym* amply illustrates, durational residence challenges force courts to resolve a tension between the rule of law and a preference for voter choice in a politically charged atmosphere within a much shorter timeframe than appellate courts traditionally are given to consider difficult questions. By requiring courts to make such difficult choices so quickly, durational residence requirements risk the legitimacy of courts on an issue that arguably should be resolved by the electorate itself.

Part I of this note discusses durational residence requirements, focusing on the elements of durational residence and the policies that animate them. Part II discusses *Maksym v. Board of Election Commissioners*, the Rahm Emanuel residence case, analyzing and critiquing the opinions of both the appellate court and state supreme court. Part III examines lessons that can be drawn from *Maksym*, and in particular the difficulties this class of cases poses for courts, the impulse of courts to resolve legal questions in the

1. 950 N.E.2d 1051 (Ill. 2011).

interest of promoting voter choice, and ways in which a court confronted with a similar issue in the future could deal with it.

I. AN OVERVIEW OF DURATIONAL RESIDENCE REQUIREMENTS

Durational residence requirements are neither new nor unique. The Constitution has a durational residence requirement for the President,[2] as well as durational national citizenship requirements for Congressmen.[3] Many states impose some form of durational residence requirement for at least some elected state officials, including governors,[4] legislators,[5] judges,[6] and mayors.[7] The proliferation of state requirements results in several different interpretations of what constitutes residence, which is again substantially confused by the interchangeable use of the terms "residence" and "domicile" in some jurisdictions. It is impossible to articulate a single definition of residence that applies universally.

Durational residence requirements can serve several legitimate purposes. They give voters and candidates the opportunity to become familiar with one another. Voters may be interested in knowing "the candidate's ability, character, personality, and reputation,"[8] or "the . . . experience[] and views of the individuals who seek to represent them."[9] Voters have an interest in "apprais[ing] those who seek to be candidates for a key . . . office that touches important events and relationships of their lives and of the community in which they live. There are innumerable qualities and qualifications that are relevant."[10]

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2. Only those who have "been fourteen Years a Resident within the United States" are eligible to be President. U.S. CONST. art. II, § 1, cl. 5. The author is aware of no case that interprets the constitutional meaning of "Resident."

3. Representatives must have "been seven Years a Citizen of the United States." U.S. CONST. art. I, § 2, cl. 2. Senators must have "been nine Years a Citizen of the United States." U.S. CONST. art. I, § 3, cl. 3.

4. *E.g.*, KY. CONST. § 72; MO. CONST. art. IV, § 3; N.Y. CONST. art. IV, § 2; OR. CONST. at. V, § 2.

5. *E.g.*, KY. CONST. § 32; MO. CONST. art. III, §§ 4, 6; N.Y. CONST. art. III, § 7; OR. CONST. art. IV, § 8(1).

6. *E.g.*, KY. CONST. § 122; MO. CONST. art. V, § 21.

7. *E.g.*, KY. REV. STAT. § 83A.040(1); MO. REV. STAT. § 77.230.

8. Hatcher v. Bell, 521 S.W.2d 799, 803–04 (Tenn. 1974) (upholding five-year residence requirement for an elected circuit judge against equal protection challenge); *see also* Mobley v. Armstrong, 978 S.W.2d 307, 310 (Ky. 1998) ("The [durational residence] requirement also enables the people of the district to gain knowledge about the candidate's abilities and character."); State *ex rel.* Brown v. Summit Cnty. Bd. of Elections, 545 N.E.2d 1256, 1259 (Ohio 1989) (quoting *Hatcher* with approval).

9. Cox v. Barber, 568 S.E.2d 478, 481 (Ga. 2002) (upholding one-year residence requirement for state commission).

10. Hadnott v. Amos, 320 F. Supp. 107, 120 (M.D. Ala. 1970) (upholding durational residence

Durational residence requirements may also "ensure that governmental officials are sufficiently connected to their constituents to serve them with sensitivity and understanding."[11] They act to assure the electorate that "their elected representatives will have at least a minimum amount of ties to the community."[12] Further, "[r]equiring candidates to live in a district for a reasonable period of time before the election encourages them to become familiar with the problems, needs, and concerns of the people they seek to represent."[13] This affords candidates "the opportunity to know the customs and the mores of the people."[14] Durational residence requirements also guard against "precinct shopping," the practice of candidates changing residences in order to find favorable electoral districts.[15]

There is no single definition of "residence" for election purposes. Each state possesses the power to set voter and candidate qualifications consistently with the Constitution,[16] and, as a consequence, each state can define and interpret its durational residence requirements differently. However, three related concepts are frequently used to determine a candidate's residence: domicile, habitation, and the existence of a physical dwelling place.

The first concept that often informs the definition of residence is *domicile*. Unlike the other two concepts, domicile has a settled legal meaning, one that is usually consistent from jurisdiction to jurisdiction. At birth, one acquires a domicile of origin, generally that of one of his or her parents.[17] Under certain circumstances thereafter, such as a change of domicile by the parents of a minor, one's domicile can change by

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requirements for judicial candidates).

11. Lewis v. Gibbons, 80 S.W.3d 461, 466 (Mo. 2002) (en banc).

12. *Cox*, 568 S.E.2d at 481.

13. *Id.*; *see also Mobley*, 978 S.W.2d at 310 ("The state has an interest in ensuring that a judge is familiar with the problems and needs of the people in his district.").

14. Hatcher v. Bell, 521 S.W.2d 799, 804 (Tenn. 1974).

15. Farnsworth v. Jones, 441 S.E.2d 597, 602 (N.C. Ct. App. 1994) ("The [durational residence] requirement was designed to deter abuses of the election process, such as precinct shopping, and to ensure that elected officials sincerely represent the residents of a particular district.").

16. *See, e.g.*, Bullock v. Carter, 405 U.S. 134, 140–41 (1972) ("Although we have emphasized on numerous occasions the breadth of power enjoyed by the States in determining voter qualifications and the manner of elections, this power must be exercised in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment."). The constitutional limits on voter qualifications are more stringent than the limits on candidate qualifications. *Compare* Chimento v. Stark, 353 F. Supp. 1211 (D.N.H. 1973) (three-judge panel) (upholding seven-year durational residence requirement for state governor), *summarily aff'd*, 414 U.S. 802 (1973), *with* Dunn v. Blumstein, 405 U.S. 330 (1972) (invalidating one-year state durational residence requirement and three-month county durational residence requirement).

17. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 14 (1971); Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 48 (1989).

operation of law.[18] Upon attaining adulthood, one can acquire a new domicile of choice through a union of physical presence in a new location and an intention to make that place one's home.[19] Once established, a domicile continues until superseded by a new one,[20] and a person has one and only one domicile at any given time.[21]

Domicile measures the place a person subjectively but reasonably considers to be "home," irrespective of whether he or she actually lives there. It is "a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere."[22] Because one's extant domicile can under most circumstances only be changed through a person's intention to acquire a new domicile, a person never intending to make a permanent home elsewhere never loses his or her original domicile, in spite of absence from a jurisdiction that can stretch for years at a time. Domicile thus reflects a person's psychological connection with their home jurisdiction, a belief that such place is "home." Moreover, the rules governing domicile ensure that this belief is reasonable by prohibiting people from acquiring new domiciles of choice from afar and preventing maintenance of an old domicile where a person intends to make a home in a new location.

Domicile can be analogized to state citizenship.[23] It is meant to reflect a permanent home, thereby excluding transient foreigners who live in a locality temporarily but intend to return to their own homes, such as students and persons on temporary work assignment. A durational residence requirement that incorporates domicile thus ensures that voters have a permanent relationship with their locality.

The second concept is *habitation*, which denotes the location where a person can be said to actually live on a day-to-day basis. It requires only "an intention to live in a place for the time being."[24] This place could be virtually anything: a house, an apartment, a hotel room, a mobile home, or even automobile. Habitation thus reflects where a person actually lives, not where their home is. A college student living in a dormitory, for

18. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 21–23 & cmt. (1971).

19. *Id.* §§ 15–18; *Mississippi Band of Choctaw Indians*, 490 U.S. at 48.

20. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 19 (1971).

21. *Id.* § 11(2).

22. BLACK'S LAW DICTIONARY 558 (9th ed. 2009) (defining domicile).

23. Indeed, in the case of diversity jurisdiction, domicile is the equivalent of state citizenship under federal law. *E.g.*, Williamson v. Osenton, 232 U.S. 619, 624 (1914).

24. Perri v. Kisselbach, 167 A.2d 377, 379 (N.J. 1961). *Perri* refers to this concept as "residence," but since the purpose of this portion of the Note would be frustrated by so denoting it, I have chosen a different term.

example, would inhabit the town where the dormitory is physically located, despite being domiciled elsewhere.

The third concept is that of a *dwelling place* or a physical living space—a house, condominium, apartment, or other living quarters that one can or does call home.[25] In the context of a candidate residence requirement, this usually means that the candidate must maintain some form of residential space—for example, an owned home or rented apartment—within the jurisdiction. Unlike domicile, it is possible for a person to have more than one dwelling place.[26] Further, a dwelling is different from domicile in that it is focused on where a person is able to live—including dwellings used infrequently, if at all—rather than where he or she considers to be the permanent and fixed home.[27]

These three concepts are used in varying combinations by courts to test for residence within the differing meanings of state election codes. In some states, residence and domicile are equivalent (the *pure domicile test*),[28] and so a candidate domiciled for the requisite period meets the durational residence requirement.[29] Other states have more stringent requirements. Under the *actual residence test*, a candidate need not only be domiciled within the election jurisdiction for the requisite period, but must also maintain habitation there.[30] Other jurisdictions vary the mix.

II. *MAKSYM V. BOARD OF ELECTION COMMISSIONERS*: THE RAHM EMANUEL CASE

A. Durational Residence Requirements in Illinois

Illinois has required durational residence for public officials since the Illinois Constitution of 1818.[31] Durational residence requirements have

25. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 12 (1971) (using the phrase "place where a person dwells" to define the concept of home).

26. *See, e.g.*, Lawrence v. Sullivan, 205 S.W.3d 168, 170 (Ark. Ct. App. 2005) ("[A] person can have several residences at one time . . . .").

27. *See* Dietz v. City of Medora, 333 N.W.2d 702, 704 (N.D. 1983) (distinguishing between a candidate's "actual residence" (dwellings) and "legal residence" (domicile)).

28. *See* S. Chad Meredith, Note, *Look Homeward Candidate: Evaluating and Reforming Kentucky's Residency Definition and* Bona Fides *Challenges in Order to Avoid a Potential Crisis in Gubernatorial Elections*, 95 KY. L.J. 211, 218 (2007).

29. *See, e.g.*, Farnsworth v. Jones, 441 S.E.2d 597, 601–02 (N.C. Ct. App. 1994); Hatcher v. Bell, 521 S.W.2d 799, 803–04 (Tenn. 1974).

30. *E.g.*, Mobley v. Armstrong, 978 S.W.2d 307, 310–11 (Ky. 1998); Chachas v. Miller, 83 P.3d 827, 829–31 (Nev. 2004).

31. ILL. CONST. of 1818, art. II, § 3 (one-year durational residence requirement for legislators); *id.* art. III, § 3 (two-year durational residence requirement for governor); *id.* art. III, § 13 (two-year

been maintained for constitutional offices ever since.[32] In addition to constitutional requirements, Illinois statutory law contains additional durational residence requirements. Pertinent to a discussion of the Emanuel case is the statutory durational residence requirement for municipal officers. The office of mayor has historically required that the mayor be a qualified elector,[33] which in turn required that a person be a resident of his or her voting district during the thirty days preceding the election.[34] As of 2011, the Illinois Municipal Code imposed a one-year durational residence requirement for mayors.[35] Under a succession of statutes dating back to the nineteenth century, "permanent abode" has been "necessary to constitute a residence" for the purposes of voter qualification.[36] The Illinois courts interpret this statute to mean that "residence" and "permanent abode" are synonymous terms.[37]

The earliest Illinois Supreme Court case involving the durational residence requirement was *Smith v. People ex rel. Frisbie*,[38] which involved a challenge to the eligibility of a recently elected local judge under the constitutional durational residence requirement. Prior to ascending the bench, the judge—then a lawyer—had rented out his Illinois home and moved to Tennessee as an "experiment."[39] He declined to sell his Illinois law books before moving and refused to vote in Tennessee elections upon arrival, so as to maintain his Illinois citizenship.[40] Finding Tennessee not to his liking after two months, he soon returned to Illinois.[41] Holding that residence can be lost only "by a union of intention and acts,"

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durational residence requirement for lieutenant governor).

32. *See* ILL. CONST. art. IV, § 2(c) (two-year durational residence requirement for legislators); *id.* art. V, § 3, (three-year durational residence requirement for governor, lieutenant governor, attorney general, secretary of state, comptroller, and treasurer); *see also* ILL. CONST. of 1870, art. IV, § 3 (two-year durational residence requirement for legislators); *id.* art. V, § 5 (five-year durational residence requirement for governor and lieutenant governor); *id.* art. VI, § 3 (five-year durational residence requirement for supreme court judges).

33. *See* ILL. REV. STAT. ch. 24, § 14 (1897).

34. *See id.* ch. 46, § 65.

35. 65 ILL. COMP. STAT. ANN. § 5/3.1-10-5(a) (West 2012).

36. *Compare* ILL. REV. STAT. ch. 46, § 66 (1897), *with* 10 ILL. COMP. STAT. ANN. § 5/3-2(a) (West 2010) (both using the same quoted language).

37. *E.g.*, Bullman v. Cooper, 200 N.E. 173, 177 (Ill. 1936) (citing Johnson v. People, 94 Ill. 505 (1880)). *Johnson* relied on *Spragins v. Houghton*, 3 Ill. (1 Scam.) 377 (1840), which laid down a rule that "[e]very man is a resident who has taken up his permanent abode in the State." *Id.* at 416. It is worth noting that *Spragins* embraced the notion that residence and domicile are different things. *See id.* (citing Brown v. Keene, 33 U.S. (8 Pet.) 112 (1834) for the proposition that "the word 'resident' does not mean a citizen").

38. 44 Ill. 16 (1867).

39. *Id.* at 24.

40. *Id.*

41. *Id.*

the test ordinarily used for domicile, the court found that the judge had never ceased to be an Illinois resident.[42]

Twelve years later, the court had occasion to address the statutory question for the first time in *Dale v. Irwin*.[43] In litigation over the results of a very close election for a town judgeship, the eligibility of several voters came into question, including students of a local college.[44] In resolving which students were eligible, the court was required to decipher the meaning of the statutory command that "a permanent abode is necessary to constitute a residence."[45] It determined that "a permanent abode, in the sense of the statute, means nothing more than a domcil, a home, which the party is at liberty to leave, as interest or whim may dictate, but without any present intention to change it."[46] Students who were subject to local taxation, jury duty, and militia service were unquestionably residents of the town, as were students who were "free from parental control" and had "no other [home] to which to return in case of sickness or domestic affliction."[47] Students "who have nothing to attach them to the town in which the college is situate [*sic*]," on the other hand, could not be considered residents.[48] The court rejected an argument that students who had been subject to a local "road tax" (actually a labor requirement) were eligible voters because all town inhabitants—as distinguished from residents—were subject to the road tax.[49]

Although the *Dale* court explicitly equated "permanent abode" with "domicile," and even spoke the language of domicile by referring to an absence of "any present intention to change" residence,[50] it was not called on to determine whether a physical dwelling space was an element of residence in Illinois. With all of the students presumably using local housing stock while at school, whether these students were residents of the town turned on whether they were domiciled there or elsewhere. Similar cases involving college students thereafter consistently applied *Dale*, distinguishing between students who return to their parents' home during

42. *Id.* at 25. A dissenting judge would have upheld the challenge because he believed that the judge had been a Tennessee resident during his time there. *Id.* (Breese, J., dissenting).

43. 78 Ill. 170 (1875).

44. *Id.* at 181.

45. *Id.* (citing 46 ILL. REV. STAT. § 66, at 460 (1874)).

46. *Id.* at 181–82.

47. *Id.* at 182.

48. *Id.* The court believed that most students would fall into this category: "As a general fact, . . . undergraduates of colleges are no more identified with residents of the town in which they are pursuing their studies, than the merest strangers . . . ." *Id.*

49. *Id.* at 183.

50. *Id.* at 182.

school breaks and "in case of sickness or affliction," and those who had no such connection to another place and therefore could be considered residents of the college town.[51] *Dale* thus stands for the proposition that domicile is an element of residence within the meaning of the Illinois election statutes.

The first case to draw a distinction between domicile and residence in the context of Illinois election law was *Dorsey v. Brigham*,[52] a post-election contest of a school board election in Livingston County.[53] One of the issues in *Dorsey* was the eligibility of a voter, Mrs. Greenstone, whose husband had moved from Chicago before the cut-off date for durational residence, but who herself had only moved after the cut-off date.[54] Under the operation of then-existing law, Mrs. Greenstone's domicile was identical to her husband's, and indeed had changed to Livingston County when her husband had moved.[55] This did not end the court's inquiry because residence and domicile were not always the same.[56] Instead, the court sought to determine when Mrs. Greenstone had acquired a permanent abode in Livingston County.[57] Citing a legal dictionary, the court defined "abode" as "the place where a person dwells," which could not logically be a place where a person had never been.[58] As Mrs. Greenstone had not been to Livingston County before the cutoff date, she could not have resided there for the statutory period, and therefore was not an eligible voter.[59] Thus, despite possessing a Livingston County domicile throughout the statutory period, Mrs. Greenstone was held to have resided elsewhere until she physically relocated.

In *Pope v. Board of Election Commissioners*[60] and *Park v. Hood*,[61] the Illinois Supreme Court further elaborated on the difference between domicile and residence. *Pope* involved a lawyer who practiced in East St. Louis.[62] For many years, the lawyer and his wife lived in East St. Louis

51. Anderson v. Pifer, 146 N.E. 171, 173 (Ill. 1924); *see also* Welch v. Shumway, 83 N.E. 549, 562–63 (Ill. 1907); People *ex rel.* Madigan v. Baumgartner, 823 N.E.2d 1144, 1150 (Ill. App. 2005).

52. 52 N.E. 303 (Ill. 1898); *see also Welch*, 83 N.E. at 558–59 (Ill. 1907) (recognizing the shift from *Dale*'s rule of domicile to *Dorsey*'s observation that domicile and residence were not synonymous).

53. *Dorsey*, 52 N.E. at 304.

54. *Id.* at 307–08.

55. *Id.*

56. *Id.*

57. *Id.* at 307 (citing 46 REV. STAT. ILL. § 66 (year unknown)).

58. *Id.*

59. *Id.* at 307–08.

60. 18 N.E.2d 214 (Ill. 1938).

61. 27 N.E.2d 838 (Ill. 1940).

62. *Pope*, 18 N.E.2d at 215.

but left for warmer climes during the winter on account of the wife's health.[63] Due to repeated thefts during these winter absences, the lawyer and his wife shuttered their home, had their belongings stored, and took to living in hotels on month-to-month leases across the river in St. Louis during the summer months.[64] The lawyer continued to vote in East St. Louis but changed his voter registration address to his law office.[65] When his office moved, the county election board denied the lawyer's attempt to change his registration to the new office, so he sued in county court to compel the board to accept his new registration.[66] Finding that he was not a resident of the precinct in East St. Louis where his office was located, the county court denied his petition.[67]

On appeal, the Illinois Supreme Court held that the election board had properly denied the lawyer's registration.[68] It rejected the lawyer's argument that he was entitled to vote in East St. Louis by virtue of his domicile because "it is elemental that domicile and residence are not synonymous."[69] Instead, drawing on definitions from a variety of sources, the court determined that "[a] real and not an imaginary abode occupied as [a] home or dwelling is essential to satisfy the residence requirements of the law."[70] As the lawyer lacked a "place of residence . . . which he ever occupied as an abode or to which he intend[ed] to return and occupy as a dwelling" in the precinct for which he wished to register, he was not eligible to register to vote there.[71]

Two years later, the importance of a physical dwelling space was again emphasized in *Park v. Hood*.[72] After an election in Frederick Township produced a one-vote margin of victory, the eligibility of several voters who lived outside of the township was challenged.[73] In sorting out which voters were eligible, the court repeatedly relied on the availability of a physical dwelling within the township.[74] Those who owned dwellings in the township and intended to return to those dwellings at some point in the

63. *Id.*
64. *Id.*
65. *Id.* It is implied in the opinion, but not expressly stated, that his law office was located in a voting precinct different from his shuttered home.
66. *Id.*
67. *Id.*
68. *Id.* at 217.
69. *Id.* (citing 1 BENJAMIN W. POPE, LEGAL DEFINITIONS 405 (1919)).
70. *Id.* at 216.
71. *Id.* at 217.
72. 27 N.E.2d 838 (Ill. 1940).
73. *Id.* at 840–41.
74. The court looked to the two now-familiar residence statutes. *See Park*, 27 N.E.2d at 842 (citing 46 ILL. REV. STAT. §§ 65–66 (1939)).

future were eligible; those who merely intended to return to the township without owning a physical dwelling were not.[75] *Park* thus appeared to hold that one must have a physical dwelling available in a locality in order to be considered a resident of that locality.

Between *Park* and *Maksym*, the Illinois Supreme Court dealt with residence challenges on multiple occasions, further clarifying that "a voter must show a place of residence . . . which he has not abandoned but occupies as an abode, or to which he intends to return."[76] Faced with varying facts, the Supreme Court of Illinois repeatedly held that residence was not established or had been lost. A man who had permitted adult children and their families to occupy his Illinois home while he himself moved to new homes in Missouri lost his residence in Illinois.[77] A couple living in Indiana who had been deeded an Illinois farm lacked a permanent abode at the farm.[78] A woman separated from her Illinois-resident husband but registered to vote in Indiana could not vote in Illinois, though domiciled there by operation of law.[79] A voter who had previously lived at a farm that she still owned could not vote based on that farm because she had made a new home elsewhere.[80] A voter who had moved to Indiana (and testified that his home was there) but intended to return to his former home in Illinois should he lose his job lost his Illinois residence.[81] A

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75. When referring to those who were held to reside in the jurisdiction, the court strongly emphasized the availability of a dwelling place: "Mabel Adkinson not only made arrangements to live in Frederick, if circumstances permitted, but through the hospitality of her brother she and her small children did actually occupy his home from time to time." *Id.* Similarly, when discussing persons who were not eligible to vote, the court noted their lack of a physical dwelling to which they could conceivably return:

> [N]ot one of the six voters challenged by the appellee had an actual place of abode of any kind or description in Frederick township on the day of the election. It is true that some of these persons expressed an intention of returning to Frederick. The fact remains that on April 4, 1939, even though they hoped to be able to again establish a residence in Frederick, they had no place of residence there to which they could return.

Id. at 842–43. The court's determinations thus turned on the availability of a physical dwelling, as opposed to habitation; a person need not have actually lived in the jurisdiction in order to be a resident, but he or she was required to have "enjoyed the right to occupy the property on April 4, 1939." *Id.* at 842.

76. Coffey v. Bd. of Election Comm'rs, 31 N.E.2d 588, 589 (Ill. 1940).

77. *Id.* at 589–90. This holding seems particularly relevant in light of the factual situation in *Maksym* because Rahm Emanuel permitted others to occupy his Chicago home while he lived in Washington, D.C.

78. Clark v. Quick, 36 N.E.2d 563, 567 (Ill. 1941).

79. *Id.* at 567–68. The Court apparently relied on the old common law rule that a wife's domicile was the same as her husband by operation of law, even if they had separated. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 19, Comment A (1971).

80. *Id.* at 568.

81. *Id.*

married couple were not entitled to vote based on the location of the the wife's relative's house, though they intended to claim the town as their "home" despite inhabiting Terre Haute, Indiana.[82] Another married couple were not residents of a town in which they had never lived.[83] A "wandering farm hand" lacked any permanent abode.[84] A transient worker was not eligible to vote based on a farm in which he held an unspecified interest and which was leased to another person, in spite of an arrangement permitting the worker to lodge there whenever he desired.[85] Finally, a married couple had not lost their right to vote in the county where they kept their home, despite their two-month long absence from the county (and their dwelling) while the husband took a temporary job elsewhere.[86]

Before the Illinois Supreme Court returned to the issue of what could constitute residence for election purposes, the state intermediate appellate courts addressed the issue several times. These cases involved voters or candidates who owned or rented multiple physical dwellings in different localities,[87] and they all contain statements to the effect that a person's residence is determined by looking at his or her intent.[88] This is because Illinois law only recognizes one residence for election purposes, so a person's intention controls where his or her "permanent residence" is in situations where a candidate has multiple physical dwellings.[89] These cases did not hold that intent alone controls residence; there was simply no dispute over whether the challenged voters or candidate had a physical dwelling in the electoral district.

B. The Challenge to Rahm Emanuel's Candidacy

In 2010, Richard M. Daley, the longtime mayor of Chicago, announced that he would not stand again for election in 2011.[90] In anticipation of the

82. *Id.* Unfortunately, it is difficult to elaborate on this holding because it is not clear what facts would have supported their claim that the relative's home was their own. There is nothing in the opinion to suggest that this couple intended to leave their own dwelling in Indiana.

83. *Id.*

84. *Id.* at 568–69.

85. *Id.* at 569.

86. Tuthill v. Rendleman, 56 N.E.2d 375, 385–86 (Ill. 1944).

87. *See, e.g.*, People *ex rel.* Madigan v. Baumgartner, 823 N.E.2d 1144 (Ill. App. Ct. 2005); Walsh v. Cnty. Officers Electoral Bd., 642 N.E.2d 843 (Ill. App. Ct. 1994); Dillavou v. Cnty. Officers Electoral Bd., 632 N.E.2d 1127 (Ill. App. Ct. 1994).

88. *Id.* at 1150; *Walsh*, 642 N.E.2d at 846; *Dillavou*, 632 N.E.2d at 1131.

89. *See Baumgartner*, 823 N.E.2d at 1151.

90. Douglas Belkin & Laura Meckler, *Chicago Mayor Daley Won't Run for Re-Election*, WALL ST. J., Sept. 8, 2010, http://online.wsj.com/article/SB10001424052748704358904575477924256165914.html.

first seriously contested mayoral election in Chicago since 1989,[91] twenty candidates filed to appear on the ballot.[92] One of these candidates was Rahm Emanuel, a former representative of a Chicago district in the House of Representatives and the Chief of Staff for President Obama.[93] Emanuel resigned his White House position and returned to Chicago in order to campaign for mayor.[94]

Emanuel, who was born in Chicago, had owned a home in the city since 1998.[95] He was elected to Congress in 2002, representing a Chicago district.[96] He resigned his seat in early 2009 to join President Obama's staff.[97] Between his resignation and May 2009, Emanuel lived in an apartment in Washington,[98] but his family remained in Chicago.[99] In June of that year, Emanuel's family joined him in Washington, where they took out a lease on a house that would last through June 2011.[100] At the same time, Emanuel rented his Chicago home to another family, with that lease also running through June 2011.[101] While Emanuel's family moved most of their everyday living items from the Chicago house to the Washington house, they left some of their property in the Chicago home.[102] The Emanuel family lived in Washington until October 1, 2010, when

91. In his re-election campaigns, Daley garnered 70.7 percent of the vote in 1991, 60.1 percent in 1995, 68.9 percent in 1999, 78.5 percent in 2003, and 71 percent in 2007. *Richard M. Daley's 22 Years as Mayor*, CHI. TRIB., Apr. 30, 2011, http://articles.chicagotribune.com/2011-04-30/news/ct-met-daley-timeline-special-section20110430_1_45th-mayor-daley-pledges-richard-m-daley/1. As it turned out, Emanuel was also a popular choice among voters: he earned 55 percent of the vote against five other remaining candidates on election day. *See* Monica Davey & Emma Graves Fitzsimmons, *Emanuel Triumphs in Chicago Mayoral Race*, N.Y. TIMES, Feb. 22, 2011, http://www.nytimes.com/2011/02/23/us/chicago-mayor-election.html.

92. Abdon M. Pallasch, *20 File to Run for Chicago Mayor*, SOUTHTOWN STAR, Nov. 23, 2010, http://southtownstar.suntimes.com/news/2672142-418/filed-candidates-emanuel-monday-mayor.html.

93. Davey & Fitzsimmons, *supra* note 91.

94. *Id.*

95. Maksym v. Bd. of Election Comm'rs, 950 N.E.2d 1051, 1053 (Ill. 2011) [hereinafter *Maksym II*]. He purchased the house upon returning to Chicago after serving as an advisor to President Clinton. *See About the Mayor*, CITY CHI., http://www.cityofchicago.org/city/en/depts/mayor/supp_info/about_the_mayor.html (last visited Mar. 14, 2013) (noting that Rahm Emanuel served in the Clinton White House until 1998).

96. *See Rahm Emanuel: Key Dates in the White House Chief of Staff's Career*, AP.ORG, http://hosted.ap.org/specials/interactives/wdc/rahm_timeline/index.html (last visited Mar. 14, 2013).

97. *Id.*

98. *Maksym II*, 950 N.E.2d at 1053.

99. *Id.*

100. *Id.*

101. *Id.* at 1054.

102. *Id.* at 1053–54. This property included "televisions, a piano, and a bed, as well as several personal possessions such as family heirlooms and books." *Id.* at 1054.

Emanuel resigned his position as Chief of Staff and moved to an apartment in Chicago to run for mayor.[103]

On November 26, a pair of Chicago residents filed a challenge to Emanuel's candidacy. Among other things, they alleged that Emanuel had lost his Chicago residency during his time as Chief of Staff and therefore could not meet the one-year residency requirement.[104] With the election scheduled for February 22, 2011, the challenge wound its way through the legal system quickly. The Board of Election Commissioners of the City of Chicago ruled on December 23, 2010, that Emanuel was eligible.[105] The challengers petitioned for judicial review in state court, where the trial-level court affirmed the election board.[106] The challengers then appealed to the Illinois Court of Appeals.[107]

The challenge to Emanuel's eligibility was grounded in the provisions of two related Illinois statutes: the Municipal Code and the Election Code.[108] Under the Municipal Code, "[a] person is not eligible for an elective municipal office unless that person is a qualified elector of the municipality and has resided in the municipality at least one year next preceding the election."[109] Under section 5/3-1 of the Election Code, a qualified elector includes "[e]very person . . . who has resided in this State and in the election district 30 days next preceding any election therein."[110] The Election Code further defines residency in another section: "A permanent abode is necessary to constitute a residence within the meaning of Section 3-1. No elector . . . shall be deemed to have lost his or her

103. *Id.*

104. *See* Kristen Mack, *Rahm Emanuel's Residency Challenged in Race for Mayor*, CHI. TRIB., Nov. 26, 2010, http://articles.chicagotribune.com/2010-11-26/news/ct-met-rahm-residency-challenge-20101126_1_residency-rules-ballot-challenge-lawyer-burt-odelson. The challengers in the court case were Walter P. Maksym, Jr., an attorney, and Thomas L. McMahon, a retired police officer. *Id.* The challengers, as well as several others, objected to Emanuel's candidacy on four grounds: (1) signatures on Emanuel's nominating papers were photocopies, not originals; (2) Emanuel did not make a timely financial disclosure, (3) Emanuel owed a debt to Chicago for not purchasing a vehicle sticker while supposedly a resident of the city though living in Washington; and (4) Emanuel failed to meet the durational residency requirement. *See* Report of the Hearing Officer at 11–24, Wohaldo v. Emanuel, No. 11-EB-MUN-1 (Chicago Bd. of Election Comm'rs Dec. 22, 2010), *available at* http://www.chicagoelections.com/dm/general/document_3224.PDF.

105. *See* Findings and Decision at 3–4, Maksym v. Emanuel, No. 11-EB-MUN-010 (Chicago Bd. of Election Comm'rs Dec. 23, 2011).

106. Maksym v. Bd. of Election Comm'rs, No. 2010COEL020, 2011 WL 222521 (Cir. Ct. Ill. Cook Cnty. Jan. 4, 2011).

107. Maksym v. Bd. of Election Comm'rs, 942 N.E.2d 739 (Ill. App. Ct. 2011) [hereinafter *Maksym I*].

108. *Id.* at 742–45.

109. 65 ILL. COMP. STAT. ANN. § 5/3.1-10-5(a) (West 2006).

110. 10 ILL. COMP. STAT. § 5/3-1 (West 2010).

residence in any precinct or election district in this State by reason of his or her absence on business of the United States . . . ."[111]

The objectors contended that Emanuel had lost his permanent abode by renting his Chicago home.[112] The appellate court never reached that question. Instead, in a two-to-one decision, it held that Emanuel had lost his residence under the Election Code because he had inhabited Washington during part of the relevant one year time period, and that there were no statutory exceptions that could save his candidacy.[113]

The first step in the majority's analysis was to determine what "reside in" meant in the context of the Municipal Code.[114] It noted that the Board of Elections had applied the same test for residency as used in determining voter qualifications, an approach consistent with prior appellate decisions.[115] However, the majority found that no Illinois Supreme Court opinion had addressed whether the two codes used the same definition of "reside," and that the only Illinois Supreme Court case addressing residency in the context of candidate eligibility, as opposed to voter eligibility, had been implicitly overruled.[116] Having disposed of what was seemingly controlling precedent, the majority found that the meaning of "reside" in the Municipal Code was open to interpretation.[117] The majority then endeavored to construe the statute.[118]

The majority stated that the Municipal Code requires that a candidate meet two qualifications: he or she must be a qualified elector, and he or she must have "resided in" the municipality for at least one year.[119] It

111. *Id.* § 5/3-2(a).

112. *See Maksym II*, 950 N.E.2d 1051, 1069 (Ill. 2011) (Freeman, J., and Burke, J., concurring) (arguing that question raised by objectors was whether "a person lose[s] his permanent abode if the abode is rented during the relevant residency period").

113. *Maksym I*, 942 N.E.2d at 749–51.

114. *Id.* at 743.

115. *Id.* at 743–44.

116. *Id.* at 744 (comparing Smith v. People *ex rel.* Frisbie, 44 Ill. 16 (1867) (equating "residence" with domicile) with Pope v. Bd. of Election Comm'rs, 18 N.E.2d 214 (Ill. 1938) (holding that a permanent abode is necessary for "residence")). The Municipal Code may supply the answer that the majority sought from case law: "The general election law applies to the scheduling, manner of conducting, voting at, and contesting of municipal elections." 65 ILL. COMP. STAT. ANN. § 5/3.1-10-10 (West 2006). This section would provide strong support for the proposition that the Municipal Code incorporates the Election Code's definition of "reside in." Curiously, the parties appear to have failed to bring this section to the court's attention; it is not discussed in the majority opinion or the dissent. Further, the majority explicitly rejected a line of intermediate court decisions treating "reside in" as having the same meaning in both the Municipal and Election Codes. *See Maksym I*, 942 N.E.2d at 743–44.

117. *Id.* at 745.

118. *Id.* at 745–51.

119. *Id.* at 747 (citing 65 ILL. COMP. STAT. § 5/3.1-10-5(a) (West 2008)).

determined that Emanuel was a qualified elector under an exception in the Election Code for voters absent on the "business of the United States," and declined to address whether he was a resident of Chicago under the Election Code.[120] It next considered whether Emanuel had resided in Chicago under the Municipal Code.

Because the one-year durational residency requirement was stated separately from the requirement that a candidate be a qualified elector, the majority inferred that the Municipal Code's definition of "reside" was different from the Election Code's.[121] It found further support in an amendment to the Municipal Code, which provided that a soldier who "is a resident of a municipality" then "resides anywhere outside of the municipality" while on active duty, and then "is again a resident of the municipality" immediately after coming off of active duty, will be deemed to have met the durational residency requirement of the Municipal Code.[122] A floor speech by the sponsoring state senator indicated that the amendment was precipitated by a soldier returning home from Iraq who discovered that he was unable to run for office.[123] From this, the majority concluded that in order to "reside" in a municipality under the Municipal Code, a candidate must inhabit that municipality during the relevant time period; otherwise, it explained, the returning soldier amendment would have no effect because a returning soldier would have "legal voting residence" in Illinois.[124] After finding that Emanuel had lived in Washington, and that the "business of the United States" exception applied only to electors, not candidates, the court disqualified Emanuel.[125]

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120. *Id.* (citing 10 ILL. COMP. STAT. ANN. §§ 5/3-1, 3-2 (West 2008)).

121. *Id.* at 748. The majority did not consider what seems a more obvious explanation. The Election Code's durational residency requirement for electors involves a shorter time frame and different geographical unit than the Municipal Code's durational residency requirement for candidates, which makes it necessary for the Municipal Code to explicitly state the durational residency requirement, even if "reside in" means the same thing in both statutes.

122. *Id.* (quoting 65 ILL. COMP. STAT. § 5/3.1-10-5(d) (West 2008)).

123. *Id.* at 749 (quoting 95th Gen. Assem., Senate Proceedings, Mar. 29, 2007, at 13 (Statements of Senator Luechtefeld)).

124. *Id.* at 749–50. The majority assumed, without explanation, that the returning soldier whose plight had motivated the amendment to the Municipal Code had maintained "legal voting residence" but was nevertheless lawfully precluded from running for office. This is not an unreasonable assumption to make, but it ignores other possibilities: the anecdotal soldier may have lacked a permanent abode in his hometown, the soldier's application for candidacy may have been improperly rejected, or the soldier may have read the Municipal Code and concluded on his own that he could not run.

125. *Id.* at 750–51. In concluding that the "business of the United States" exception applied only to electors, the majority again relied on the returning soldier amendment, reasoning that a returning soldier would have been absent on the business of the United States, and so the amendment must assume that the Election Code's exception does not apply to the Municipal Code.

The dissenting justice argued that *Smith v. People ex rel. Frisbie* governed the dispute.[126] Because Emanuel retained a clear intent to return to Chicago, she would have held that he did not abandon his Chicago residency while living in Washington.[127] She accused the majority of creating "a new and undefined standard for determining candidate residency requirements despite the plethora of clear, relevant and well-established precedent that has been used by our circuit courts and election boards for decades."[128] Characterizing the requirement that a candidate must inhabit the electoral jurisdiction as "a figment of the majority's imagination" that it had "conjured out of thin air,"[129] she lamented that the rule was "unfair to the candidate, voters, and those of us who are charged with applying the law."[130]

The appellate court's decision created practical problems. Before the Illinois Supreme Court could step in, the Chicago Board of Elections were faced with printing ballots without Emanuel's name, though the board chairman stated that adjustments could be made if the appellate court's decision was reversed.[131] There was also concern that early voters would not know whether Emanuel would ultimately be declared eligible to stand for election.[132] At the request of Emanuel, the Illinois Supreme Court swiftly accepted the case on appeal and stayed the appellate court's order to leave Emanuel off the ballot.[133] It reversed the appellate court only two days later.[134]

The majority opinion in the Illinois Supreme Court made clear at the outset how it felt about the appellate decision: "Before proceeding to the merits, we wish to emphasize that, until just a few days ago, the governing law on this question had been settled in this State for going on 150 years."[135] It briefly examined the modern appellate-level decisions that had focused on whether a candidate had intended to abandon an old residence

126. *Id.* at 754–55 (Lampkin, J., dissenting).

127. *Id.* at 752–53 (Lampkin, J., dissenting). The dissent's reasoning is largely the same as the Illinois Supreme Court's, which is discussed *infra*, Part II.B.3.

128. *Maksym I*, 942 N.E.2d at 754 (Lampkin, J., dissenting).

129. *Id.* at 757–58 (Lampkin, J., dissenting).

130. *Id.* at 758 (Lampkin, J., dissenting).

131. *See* Hal Dardick, *Ballot Turmoil Hits at Bad Time; Emanuel's Name Won't Appear for Early Vote and Absentee Tallies*, CHI. TRIB., Jan. 25, 2011, at C9.

132. *See id.*

133. Maksym v. Bd. of Election Comm'rs, 942 N.E.2d 450 (Ill. 2011) (order staying appellate court's order). The supreme court's order was issued the day after the appellate court's decision was rendered.

134. *Maksym II*, 950 N.E.2d 1051, 1066 (Ill. 2011).

135. *Id.* at 1057.

for a new one, then concluded that *Smith v. People ex rel. Frisbie* had remained settled law until the appellate court decision just a few days before.[136]

The court found that *Smith* controlled the case.[137] The court noted that the language of the constitutional provision in *Smith* was virtually identical to the modern durational residency requirement.[138] It affirmed *Smith*'s holding that residency is established by a combination of physical presence and intent to make a place one's permanent home, which can then only be lost by abandonment.[139] Applying the canon of statutory construction that a word with a settled legal meaning will be deemed to have that meaning, unless the legislature evinces a contrary intent, the court determined that the words "reside in" used in section 3.1-10-5(a) of the Municipal Code incorporated the definition of "residence" found in *Smith*.[140] The majority thought that *Smith*, which had held that a state judge was an Illinois resident despite renting out his home and leaving the

136. *Id.* at 1058 (citing People *ex rel.* Madigan v. Baumgartner, 823 N.E.2d 1144 (Ill. App. Ct. 2005); Walsh v. Cnty. Officers Electoral Bd., 642 N.E.2d 843 (Ill. App. Ct. 1994); Dillavou v. Cnty. Officers Electoral Bd., 632 N.E.2d 1127 (Ill. App. Ct. 1994)). As explained *supra*, notes 87–89 and accompanying text, these cases focus on intent because they feature two possible dwelling spaces. The question originally presented in *Maksym* was whether Emanuel had lost his Chicago abode by leasing out his house. *See Maksym II*, 950 N.E.2d at 1069 (Freeman, J., and Burke, J., concurring).

137. *Id.* at 1059 (citing Smith v. People *ex rel.* Frisbie, 44 Ill. 16 (1867)). For *Smith*'s factual background, see *supra* notes 38–42 and accompanying text.

138. *Id.*; *see also* 65 ILL. COMP. STAT. ANN. § 5/3.1-10-5(a) (West 2006).

139. *Maksym II*, 950 N.E.2d at 1060. This test, of course, is the test for domicile, as pointed out by the concurrence. *Id.* at 1068–69 (Freeman, J., and Burke, J., concurring). The appellate court, in discussing *Smith*, had also noted that "although the supreme court's discussion in *Smith* was based nominally on principles of 'residence,' it appears from its analysis that it actually applied concepts of domicile." *Maksym I*, 942 N.E.2d 739, 744 (Ill. App. Ct. 2011). The Illinois Supreme Court somewhat pithily characterized the appellate court as concluding "that *Smith* is not binding because this court did not know what it was talking about when it wrote it." *Maksym II*, 950 N.E.2d at 1059. In fact, the appellate court thought that *Smith* had been implicitly overruled in other supreme court cases. *See Maksym I*, 942 N.E.2d at 744 ("Since *Smith* was decided, however, our supreme court has explained unequivocally that 'it is elemental that domicile and residence are not synonymous.'") (quoting Pope v. Bd. of Election Comm'rs, 18 N.E.2d 214, 217 (Ill. 1938)).

140. *Maksym II*, 950 N.E.2d at 1061. Evidence of such a contrary intent can be found in 65 ILL. COMP. STAT. ANN. § 5/3-2(a) (West 2006), the statute providing that "[a] permanent abode is necessary to constitute a residence." In finding that *Smith* is still good law, the supreme court did not appear to consider the possibility that section 5/3-2 had changed the definition of "residence" under Illinois law. Instead, the court seemed to think that because "residence" and "permanent abode" had been held to be synonymous, the definition of "permanent abode" must be the same as the definition of "residence," as articulated in *Smith*. *See Maksym II*, 950 N.E.2d at 1061–62 (citing *Pope*, 18 N.E.2d 214). The majority also criticized the appellate court for assigning different definitions of "reside in" to the Municipal Code and the Election Code. *Id.* at 1062. The court pointed out that the candidate eligibility provision of the Municipal Code explicitly incorporated the voter eligibility provisions of the Electoral Code, so it would create an inconsistency within the Municipal Code itself to interpret "reside in" to mean different things for voter eligibility and candidate eligibility. *See id.*

state, refuted the objectors' argument that Emanuel lacked a permanent abode as a matter of law.[141] The court upheld the Board's factual finding that Emanuel had not abandoned his Chicago residence, and was thus a resident of Chicago.[142]

Two concurring justices believed that the majority wrongly equated residency with domicile.[143] Arguing that prior Illinois Supreme Court cases had "each define[d] residence in terms of domicile *plus* a permanent abode," the concurrence felt that the majority had implicitly overruled its precedent.[144] The concurrence's own analysis of Emanuel's residence consisted of only one paragraph at the conclusion of the opinion.[145] It argued that *Park v. Hood* "called into question" *Smith*'s holding by requiring permanent abode for residence.[146] However, it regarded the issue of whether rental of a home caused it to be lost as a permanent abode as an open question.[147] Citing a policy favoring ballot access, the concurring justices would have resolved the case in favor of allowing Emanuel on the ballot.[148]

The Illinois Supreme Court's decision was warmly received by the same newspapers that had criticized the appellate court's ruling days before. The *Chicago Tribune* was happy to be able to "focus on the mayoral candidates' actual qualifications for office," agreeing with Emanuel that "'[w]hat the Supreme Court decided today is that voters will make [the] decision.'"[149] The *Chicago Sun-Times* praised the decision as "a victory for the voters, who deserve the right to decide for themselves who their next mayor will be."[150] Emanuel went on to win the election easily, avoiding a runoff by winning a majority on the first ballot.[151]

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141. *Id.* at 1066.

142. *Id.*

143. "The majority today now makes clear that residency for all purposes is the equivalent of domicile." *Id.* at 1067 (Freeman, J., and Burke, J., concurring) (citing *Pope*, 18 N.E.2d 214; Park v. Hood, 27 N.E.2d 838 (Ill. 1940); Clark v. Quick, 36 N.E.2d 563 (Ill. 1941)).

144. *Id.* "The majority, therefore, should overrule those portions of *Pope*, *Park*, and *Clark* which hold to the contrary." *Id.* Strangely, the concurrence never cites to section 5/3-2(a) of the Election Code, which is the source of the permanent abode requirement in those cases. The supreme court would presumably be without power to "overrule" the permanent abode requirement because it was a legislative enactment whose validity was unchallenged.

145. *See id.* at 1069.

146. *Id.*; *see also supra* notes 74–75 and accompanying text.

147. *Maksym II*, 950 N.E.2d at 1069 (Freeman, J., and Burke, J., concurring).

148. *Id.*

149. Editorial, *And Now, the Election*, CHI. TRIB., Jan. 28, 2011, at C20 (quoting Rahm Emanuel).

150. Editorial, *Emanuel Ruling a Victory for Democracy*, CHI. SUN-TIMES, Jan. 28, 2011, at 29 (characterizing the decision as "[c]ommon sense and the law [having] a meeting of the minds").

151. John Chase & Rick Pearson, *Mayor Emanuel; Presidential Advisor Avoids Runoff with 55%*, CHI. TRIB., Feb. 23, 2011, at C1.

III. PROBLEMS ILLUSTRATED BY *MAKSYM*

Maksym is a marvelous case study in the various dangers posed to courts by durational residence requirements, and not just because of the widely divergent opinions or the mistakes in reasoning that arguably resulted from the expedited timeframe under which the Illinois Supreme Court was forced to issue its decision. The episode provoked a significant response from the Chicago media and was a topic of civic discourse throughout the city, and elsewhere. Of course, this is not an uncommon feature of election law decisions involving candidates for public office; as part and parcel of the campaign story, media exposure and commentary is a given. However, the intense media coverage surrounding *Maksym* is particularly notable because it triggered a debate not just about the motivations of the judges involved in deciding the case at each level (which many did call into question), but about the wisdom of durational residence requirements at all, particularly those that would be enforced by, in the case of Illinois, an elected judiciary.[152] *Maksym* thus generated instantaneous commentary by non-lawyers and non-academics about the very legitimacy of courts, an effect quite similar to what was seen in the aftermath of *Bush v. Gore*.[153]

This part of the Note discusses three specific but interrelated problems on display during the course of the Rahm Emanuel case. The first problem is the inherent tension between protecting voter choice and promoting the rule of law when interpreting and enforcing a candidate qualification rule. The second problem is the strain that candidate qualification litigation puts on courts by requiring rapid decisions in areas of law that may be complex and worthy of additional time for judges to study. These two problems have to do with difficulties faced by courts in resolving the legal issue. The third problem is the risk posed to judicial legitimacy by the existence of the two previously-identified problems, as well as by the unavoidable necessity of making a decision that at least some voters will assume was motivated by extralegal considerations.

A. The Question of Voter Choice

A candidate qualification restriction is something of a philosophical curiosity because it would seem that the purpose of a popular election is to permit a majority (or, in some cases, a plurality) of voters to select a

152. *See* ILL. CONST. ART. VI, § 12.
153. 531 U.S. 98 (2000).

candidate whom they believe is the most qualified individual interested in a particular office. Theoretically, candidate qualifications are unnecessary because voters can judge for themselves the best candidate, affording appropriate weight to any fact that could be the subject of a candidate qualification law—and a durational residence requirement can block the most popular candidate.[154] A world in which no qualifications are placed on candidates for political office seems unlikely; however, the notion that voters should be permitted to judge the merits of candidates themselves is reflected in the democracy canon, a rule of statutory construction that favors ballot access in order to enable greater voter choice.[155]

On the other hand, if we assume that legislative institutions function as intended, then the existence of the candidate restriction is itself an exercise of popular will. Whether a candidate qualification is contained in a constitution or a statute, it is a judgment made by the people's representatives and alterable (though perhaps with some difficulty) by those representatives. A durational residence requirement could be justified as being necessary to prevent some voters from being placed into a situation where they have to hold their nose to vote for a carpetbagger candidate who is a better match for their political views over an ideologically incompatible opponent. Particularly where there is no reason to think that a candidate qualification restriction will favor one faction over the other in the long-term,[156] there is merit in respecting the wishes of the people, as articulated through the legislative process.

The *Makysm* majority did not overtly apply the democracy canon, but arguably departed from its own precedent in a way that furthered the policy goals of increased voter choice.[157] The majority instead cast its holding as a straightforward application of law that "had been settled . . . for going on 150 years."[158] The concurrence, meanwhile, invoked a corrolary to the democracy canon to resolve the question of whether a rented-out home could constitute a permanent abode in favor of ballot

154. *E.g.*, Lawrence v. City of Issaquah, 524 P.2d 1347 (Wash. 1974) (rejecting constitutional challenge by a winning candidate who was blocked from taking office by a one-year residence requirement).

155. *See* Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 76 (2009).

156. *See* Chad Flanders, *Election Law Behind a Veil of Ignorance*, 64 FLA. L. REV. 1369, 1378–87 (2012).

157. *See* Hasen, *supra* note 155, at 92–96 (describing the democracy canon as a substantive rule rather than an interpretive rule); *see also infra* Part III.B.

158. *Maksym II*, 950 N.E.2d 1051, 1057 (Ill. 2011).

access, its establishment in prior Illinois case law making its invocation more legitimate.[159]

In contrast, the majority in the appellate court was assailed—both by the dissenting judge and in the press—for "disenfranchis[ing]" those voters who favored Emanuel's candidacy.[160] Though this criticism was leveled after the fact, it would be difficult to believe that the judges in the majority were unaware that their result was contrary to the principles underlying the democracy canon. For those who do not doubt the honest motivations of the Illinois Appellate Court majority,[161] the decision of that court struck the balance in the other direction, favoring what it believed was required by the statute over the substantive consequence of restricting ballot access for one candidate.

Whether or not the democracy canon is desirable,[162] its purposes seem sufficiently obvious that any court required to decide whether to keep a candidate on the ballot could be forced to choose between applying the law as the court sees it and rendering a decision in order to further a democratic policy of ballot access. While the necessity of making difficult decisions should not in and of itself preclude judicial consideration of such questions,[163] it is an unfortunate result of any election litigation pitting a legal barrier against a candidate's ability to access the ballot, a theme running throughout the Emanuel challenge.

B. The Difficulty of Rapid Decision-Making

The *Maksym* decision demonstrates another common feature of election litigation: the necessity that a court make a decision expeditiously.[164] When the Illinois Supreme Court took up *Maksym*, the

159. *Id.* at 1069 (Freeman, J., and Burke, J., concurring) ("[A] candidate's access to the ballot is favored by law.") (citing McGuire v. Nogaj, 496 N.E.2d 1037 (Ill. App. Ct. 1986)).

160. *Maksym I*, 942 N.E.2d 739, 758 (Ill. 2011) (Lampkin, J., dissenting); Editorial, *Rahm Ruling a Disservice to Voters*, CHI. SUN-TIMES, Jan. 25, 2011, at 21 (quoting the dissent) [hereinafter *Rahm Ruling*].

161. *See, e.g.*, *Maksym II*, 950 N.E.2d at 1067 (Freeman, J., and Burke, J., concurring) ("That court did the best it could without the benefit of a supreme court opinion which clarified the standards.").

162. *See* Hasen, *supra* note, at 106–13 (responding to the argument that the availability of the democracy canon increases the flexibility of judges to make outcome-determinative decisions in election law cases).

163. A point made in the *Bush v. Gore per curiam* opinion: "When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the . . . issues the judicial system has been forced to confront." 531 U.S. 98, 111 (2000).

164. *See id.* (reviewing a decision made only three days prior); *id.* at 100–02 (describing the cramped procedural history of the case).

election was less than a month away[165]—close enough in time that election officials felt that they could not afford to wait to print ballots pending the court's decision.[166] Moreover, both early voting and absentee voting were soon to be underway, so the lack of a final decision on Emanuel's status meant that voters interested in casting ballots for him could not be certain that their vote would count.[167]

Courts facing time-sensitive election litigation may lack the "time for reflection, study, or debate" necessary to resolve difficult legal issues.[168] The *Maksym* court lacked that time, a factor that arguably impaired its analysis.[169] Although the majority spends a good deal of space picking apart the misguided decision of the appellate court,[170] it includes only brief analysis of almost a century and a half of precedent,[171] analysis that does little to illuminate the challengers' argument that the Illinois durational residence law required candidates (and voters) to maintain a physical dwelling in the election jurisdiction.

This lack of analysis is regrettable. For the reasons discussed in Part II, it is difficult to square *Maksym* with those cases under which the existence of a dwelling within the jurisdiction was determinative.[172] It is possible that the court assumed that the portions of *Park* and *Pope* apparently requiring candidates and voters to have access to a physical dwelling were satisfied by even a rented-out home. But if that was the case, the court should have said so. It seems likely that this light analysis was a function of the necessity of quickly reversing a damaging lower court decision, always a risk in election litigation because it is impractical to simply stay the election until the court has had ample time to consider its decision.

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165. *Maksym II*, 950 N.E.2d at 1053.

166. Dardick, *supra* note 131 (describing how ballots were soon to be printed despite the pendency of the case in the Illinois Supreme Court).

167. *See id*.

168. *See* Michael Herz, *The Supreme Court in Real Time: Haste, Waste, and* Bush v. Gore, 35 AKRON L. REV. 185, 190 (2002).

169. *Cf. id.* at 191 n.32 (noting that the Supreme Court's decision in *Citizens to Preserve Overton Park v. Volpe* is thought to "contain[] several universally acknowledged blunders," and acknowledging the argument that those blunders were the result of an expedited hearing schedule) (citing Peter L. Strauss, *Revisiting* Overton Park*: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251, 1265–66 & n.45 (1992)).

170. *See Maksym II*, 950 N.E.2d at 1062–64.

171. *See id.* at 1058 (one paragraph); *id.* at 1060–61 (two paragraphs).

172. *See supra* notes 60–75 and accompanying text.

C. The Risk of Institutional Damage to Courts

On their own, these two problems are concerning. However, the internal difficulties faced by courts asked to determine the meaning of a durational residence requirement are augmented by the external threat posed to the courts by the appearance of making a decision based on partisan political considerations. The tension between the rule of law and voter choice inherently places a court's legitimacy into question because it pits the democratic process against its result. No matter who wins the case, the court must rule against one democratic principle or the other, opening it to criticism for undermining democratic choice. The short timeframes, which risk poorly reasoned decisions, exacerbate this problem by making it more difficult for the court to persuasively justify a correct decision and by increasing the likelihood of making an incorrect one. The court thus becomes a participant in the election as opposed to a neutral arbiter.[173]

On top of the delegitimizing impact of the previously identified problems, the fact that the court knows how its decision will affect a particular candidate and his or her rivals means that the court is open to charges of political bias no matter what decision it delivers. The criticism surrounding *Maksym*—and in particular the response to the appellate court's decision to knock Emanuel off the ballot—are illustrative.

The appellate court's decision drew swift and negative responses from Chicago's two major newspapers. "With startling arrogance and audaciously twisted reasoning, two appellate judges ignored more than 100 years of legal precedent, invented a new definition of 'residency' and ordered Rahm Emanuel off the . . . mayoral ballot," raged the *Chicago Tribune*.[174] The *Chicago Sun-Times* wrote a more subdued response to the court's decision, supporting the dissenting justice's point that "[s]triking Rahm Emanuel's name from the ballot for mayor of Chicago unfairly 'disenfranchises . . . every voter in Chicago who would consider voting for him.'"[175]

The language in both newspapers attacks not merely the legal basis of the appellate decision, but also its legitimacy. The *Chicago Tribune*'s editorial in particular, by referring to "twisted reasoning" and the ignoring

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173. *See* Herz, *supra* note 168, at 186.

174. Editorial, *Judicial Arrogance*, CHI. TRIB., Jan. 25, 2011, at C14 [hereinafter *Judicial Arrogance*].

175. *Rahm Ruling*, *supra* note 160 (quoting *Maksym I*, 942 N.E.2d 739, 758 (Ill. App. Ct. 2011) (omissions in original)).

of precedent, walked the path of implication right to the edge of an outright charge of intentional disregard for the law.[176] Though the *Chicago Sun-Times* editorial used less inflammatory language, it too called into question the legitimacy of the appellate court's decision by suggesting that potential Emanuel voters had not merely been denied one choice, but had been disenfranchised—that is, lost their right to vote entirely.[177]

Though reinforcing the norm of democratic choice, the Illinois Supreme Court's decision was likewise open to criticism. The concurrence criticized the majority and the appellate court dissenter for being unnecessarily harsh on the appellate majority.[178] The concurring justices believed that the dissenting appellate judge had "accused the majority of basing its decision on something other than the law" and that "[t]he tone taken by the majority today, and the refusal to acknowledge conflicting case law, unfairly perpetuates that notion."[179] This, the concurrence argued, "cross[ed] the line": "Inflammatory accusations serve only to damage the integrity of the judiciary and lessen the trust which the public places in judicial opinions."[180] The incendiary rhetoric on display in the opinions from *Maksym* has also been noted by commentators.[181]

An additional problem existed because Illinois judges are elected in partisan elections, prompting further concerns about the ability of the courts to impartially decide the dispute.[182] Moreover, one justice on the Illinois Supreme Court, Anne Burke, was married to Chicago alderman Ed Burke, a prominent supporter of one of Emanuel's rivals.[183]

The Illinois courts appear to have emerged relatively unscathed, but episodes such as the Rahm Emanuel residence challenge chip away at the perceived legitimacy of judicial decisions. This generation of controversial litigation is an unavoidable byproduct of election law, but given the risk that such litigation will damage courts' legitimacy, it would be preferable

176. *See Judicial Arrogance*, *supra* note 174.

177. *See Rahm Ruling*, *supra* note 160

178. *See Maksym II*, 950 N.E.2d at 1067–68 (Freeman, J., and Burke, J., concurring). The concurrence argued that the Illinois Supreme Court's own caselaw contained "conflicting pronouncements on the question of residency," so it was unfair to criticize the appellate court for not following *Smith*. *Id.* at 1067.

179. *Id.* at 1067–68.

180. *Id.* at 1068. The concurrence also noted that the *Chicago Tribune* and the *Chicago Sun-Times* had picked up on the dissenting judge's insinuations of bias, and had also heavily criticized the appellate decision. *Id.*; *see also supra* notes 174–75 and accompanying text.

181. *See* Joshua A. Douglas, *Election Law and Civil Discourse: The Promise of ADR*, 27 OHIO ST. J. ON DISP. RESOL. 291, 294–96 (2012); Robert E. Shapiro, *Is "Sanity" Enough?*, 37 LITIG. 57 (2011).

182. *See* Rick Pearson & David Kidwell, *Specter of Politics Hangs Over Ruling; Justices Who Will Decide Emanuel's Ballot Fate All Have Strong Party Ties*, CHI. TRIB., Jan. 27, 2011, at C1.

183. *Id.*

to avoid placing the fate of elections in courts when it is not strictly necessary to do so.

IV. CONCLUSIONS

Having identified several problems with durational residence requirements on display in the Emanuel case, the question becomes what, if anything, can be done in an effort to ameliorate those problems.

The elimination of durational residence requirements would be one way to solve the problems they pose for courts. Despite the rational relation of durational residence requirements to legitimate state interests,[184] these interests are not terribly strong in light of the electorate's ability to examine, on a case-by-case basis, the political qualifications of a particular candidate. There is no durational residence requirement for federal congressional elections, only a requirement that senators and representatives be inhabitants of the state at the time of their election.[185] Consequently, the length of a candidate's residence has been a campaign issue in senate elections involving Robert F. Kennedy and Hillary Clinton in New York,[186] and Alan Keyes in Illinois.[187] Presumably, the voters in those elections were aware of the controversy surrounding the candidates' short terms of residence, but evaluated that fact along with other relevant factors and voted accordingly. The harms that would come from eliminating durational residence requirements—essentially, the likelihood of a serious candidacy by a candidate insufficiently connected with the electorate—are balanced by the fact that it is that same electorate which will ultimately pass judgment through the election itself.

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184. *See* Chimento v. Stark, 353 F. Supp. 1211, 1218–19 (D.N.H. 1973) (three-judge panel) (Campbell, J., concurring), *summarily aff'd*, 414 U.S. 802 (1973).

185. U.S. CONST. art. I, § 2, cl. 2; *id.* § 3, cl. 3. The Constitution does impose a durational national citizenship requirement. *See supra* note 3.

186. Kennedy won election to the Senate from New York in 1964 despite not even being a qualified New York voter. Adam Nagourney, *In a Kennedy's Legacy, Lessons and Pitfalls for Hillary Clinton; Carpetbagger Issue Has Echoes of '64, But Differences Could Prove Crucial*, N.Y. TIMES, Sept. 10, 2000, http://www.nytimes.com/2000/09/10/nyregion/kennedy-s-legacy-lessons-pitfalls-for-hillary-clinton-carpetbagger-issue-has.html?pagewanted=all. Clinton faced accusations of carpetbagging when she ran for the senate from New York in 2000. *Id.* She won anyway. *See* JEFF TRANDAHL, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 7, 2000, at 43 (2001), *available at* http://clerk.house.gov/member_info/electionInfo/2000election.pdf.

187. *See, e.g.*, Rick Pearson, *Keyes, State GOP Gearing Up Blame Campaign*, CHI. TRIB., Sept. 5, 2004, at C6 (referencing the carpetbagger controversy that occurred during Alan Keyes's 2004 Senate campaign against Barack Obama).

Nevertheless, as it seems unlikely that durational residence requirements will disappear anytime soon, there are ways in which legislators can alter or clarify local requirements in order to protect courts from difficult situations. The first and most important step that a state legislature could take would be to clarify precisely what is meant by the statutory term "residence." Illinois is not the only state in which "the only thing that is well established . . . is the confusion that has existed on this subject."[188] All of the concerns discussed in Part III are implicated when the meaning of the residence requirement is unclear. A lack of clarity introduces the tension between the democracy canon and the rule of law by not specifying a straightforward rule which courts should apply to specific cases, and makes it difficult for any court to determine the precise meaning of ancient and arcane cases within the short timeframes necessitated by election litigation. Unclear law also opens a court's decision—whatever it may be—to the criticism that, because the law could have been interpreted differently, the judge's partisan political preferences must have played a role in their decision. Clarification of the law—even if that clarification would, in its operation, cut against the policy of promoting voter choice—would avoid these problems. Clarification would also promote predictability, something of importance to both candidates and voters.

Some potential paths that a state could take are mentioned briefly in Part I. The pure domicile test, which would require only durational domicile, has been proposed as the ideal test because it serves the goals of durational residence requirements, permits potential candidates to gain knowledge and experience outside of their home jurisdiction, and tends not to be overly restrictive, thus serving the policy of voter choice.[189]

The problem with the pure domicile test is that it relies on an intent element, which is a fact-intensive inquiry.[190] Consequently, virtually any candidate who had spent serious time in a different election jurisdiction for work, study, or similar obligations would be open to arguments that he or she had abandoned their domicile. This opens the door to courts or election boards (whose factual determinations may be reviewed only deferentially),[191] to manipulate factual findings or analyses in order to

188. *Maksym II*, 950 N.E.2d 1051, 1067 (Freeman, J., and Burke, J., concurring).

189. *E.g.*, Meredith, *supra* note 28, at 223–24.

190. *See generally* 39 AM. JUR. *Proof of Facts 2d* 587, §§ 9–28 (1984) (describing a variety of ways in which domicile can be proven or disproven).

191. *E.g. Maksym II*, 950 N.E.2d at 1064 (applying "clearly erroneous" standard to election board's factual determinations).

achieve favorable results. Even if a court does not do this, the fact that it has the opportunity to manipulate factual findings creates a risk that aggrieved candidates and their supporters would believe the decision is illegitimate.

Some of these concerns would be greatly reduced through the use of bright-line rules that would enhance predictability with very little cost to the policies animating the domicile test's focus on intent. For example, a rule where maintained voter registration was conclusive on a person's intent not to abandon a former domicile would make it easy for persons wishing to retain their legal connection with their "home" jurisdiction, while at the same time protecting that jurisdiction from the candidacies of those who had been politically active elsewhere.

Other potential rules could focus on a physical dwelling. An easy rule would be to simply require that the candidate own or lease residential property within the election district during the statutory period. This rule sacrifices a close fit to the purposes of residence requirements in the interest of clarity: it permits foreigners to purchase residence through the mere rental of an apartment, while excluding persons who have temporarily left home intending to soon return but lacking the financial resources to maintain a residence.

Alternatively, a state could require candidates to have actually inhabited the election jurisdiction for a certain period of the time in the past. Such a rule would exclude potential candidates who lack a previous connection to the election district, while at the same time including former inhabitants who wish to return home and run for office. A dwelling requirement, durational or not, could be used to ensure that the candidate maintains a present connection to the jurisdiction, whether or not he or she lived there.

Creative legislators or lawyers could come up with a variety of different ideas that could serve the purposes of durational residence requirements without subjecting courts to the difficult decisions that they are often forced to make under existing laws. The choice of any of these options would, however, be preferable in a jurisdiction where uncertainty prevails. Ambiguous residence rules lead to difficult questions for courts, fail to afford courts ample time to wade through those difficult questions, and ultimately undercut the legitimacy of any decision that those courts might make. Illinois is lucky that the *Maksym* court allowed Rahm Emanuel on the ballot. Had the challengers prevailed, it could have torpedoed the political credibility of the state courts, even if that decision

were reached through legal reasoning and analysis as opposed to partisan political preference. State legislatures should take steps to protect their courts from the risks posed by unclear durational residence requirements.

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