Election Law Behind a Veil of Ignorance

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Second – and more relevant for our purposes – legislatures, in contrast to courts and executive officials, must enact their rules in advance of any particular controversy. A legislative code is enacted behind a veil of ignorance; no one knows (for sure) which rules will benefit which candidates. ¹

Consider the following two recent election law litigation scenarios:

An incumbent senator, after losing her party’s Senatorial primary, decides to run as a write-in candidate. The race is hard-fought, and close, but it appears that her write-in candidacy will be a success. However, her opponent (who won the party’s primary race) challenges many of the write-in ballots that have been cast, on the grounds that they don’t exactly spell the name of the candidate -- who, it turns out, has a notoriously tricky name to spell. The opponent relies on a strict reading of the statute, which seems to require the correct spelling of the candidate’s name. The head of the Division of Elections and, eventually, the state’s supreme courts, opt for a more generous “intent of the voter standard” in reading the ballots. The write-in candidate wins. ²

After working – and living – in Washington D.C. for over a year, the president’s chief-of-staff decides to run for mayor in his home town. Immediately, several interested parties file a lawsuit, alleging that the former chief-of-staff has not been a “resident” of the city of Chicago for long enough and recently enough to qualify as an eligible candidate for mayor. The former chief-of-staff objects, saying that he had lived in Chicago for most of his life, and still owned a house in the area. The lawsuit eventually is decided in his favor, and he goes on to win the mayor’s race in a rout. ³

These cases both testify to why election law and, more specifically, the interpretation of election statutes and regulations is such an exciting field: The “right” interpretation of the statute can have momentous consequences. If the rules for counting write in ballots are read one way, the candidate will lose hundreds or even thousands of votes, and she may lose the election. If they are read the other way, the candidate cruises to a comfortable victory. Or, if the candidate is found not to be a resident, his promising candidacy is nipped in the bud. But if he can run, his chances look good, and his election is virtually guaranteed.

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² Miller v. Tredwell, 245 P.3d 867 (Alaska 2010)
³ Maksym v. Bd. of Election Comm’rs, 950 N.E.2d 1051 (Ill. 2011)
But if these examples testify to the high stakes in interpreting election law statutes and regulations, they likewise attest to the dangers. In a word, the danger is that the interpretations we bring to bear will be inevitably and unacceptably partisan: we will tend to favor that interpretation that will lead to our candidate, or our party, or our side, winning. Election law does not and cannot exist in a partisan vacuum. Interpretations have consequences, and interpreters will be hard pressed not to decide in light of those consequences (or at least seem to). The immediate and harsh reaction to the decision in Bush v. Gore possibly represents the best example of the perils of election law interpretation. It became hard to separate the criticism that the decision was wrong from the criticism that the decision was partisan -- and at times, the two criticisms seemed to meld together: the decision was wrong precisely because it was partisan.

Yet courts are called upon to interpret election law statutes, now it seems with increasing regularity, and they must do so in a way that avoids partisanship. Judges may be put in what seems to be an impossible position: either way they rule, they risk accusations of partisanship, because either way they rule will inevitably have partisan consequences. What is to be done? Recently, Rick Hasen has proposed that judges deciding close election law cases can have recourse to the “democracy canon”: when interpreting an ambiguous statute, judges should interpret that statute in favor of giving the greatest leeway to the voter. In cases of ballot counting, he has argued, this means construing statutes in a way to give effect to the voter’s intent, so that votes aren’t thrown away on technicalities. In cases of candidate eligibility, close cases should be resolved in favor of letting the candidate run -- let the voters decide if the candidate should be elected, not the courts. Hasen’s important article has garnered much in the way of scholarly attention, and in recent popular works, Hasen has suggested that in the two cases sketched above, the democracy canon could have been put to good use; in at least one of the cases, it arguably was used.

While there is much to be said for the use of the democracy canon, it has some limitations. First, the canon tends to give us a one size fits all way of understanding election law statutes. It says: if an election rule is ambiguous, read it in favor of giving greater choice to voters, or to effectuating voter intent. But there may be important differences between types of election law rules. Some of these differences may have to do with the content of the election rules. Other differences, the ones I am chiefly concerned about in this essay, have to do with how the rules were formed. Rules that have been formed in a non-partisan way, even if they are somewhat vague or ambiguous, and even if they may serve to deny voter choice in some instances may have a greater claim to deference than do rules that are partisan in their aim. These rules are presumptively fair between the parties, and ought to be followed, even if the effect of these rules is to limit some voter choice.

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4 See, e.g., the essays collected in BUSH V. GORE: THE QUESTION OF LEGITIMACY (Bruce Ackerman, ed. 2002); Jack M. Balkin, Bush v. Gore and the Boundary Between Law and Politics, 110 YALE L. J. 1407 (2001).
7 Hasen, supra note 5.
8 Hasen, supra note 5.
Second, and relatedly, when the court steps in and alters an election rule, it is not always acting in a democracy-reinforcing way. Hasen’s canon fits into the well-known tradition that courts can intervene, and intervene legitimately, when their decisions open up the political process. But there is another, equally powerful tradition, which says that courts can upset the democratic decision-making process when they intervene and construe statutes in a way not necessarily intended by the legislature. Deciding between which of these two traditions to favor when interpreting statutes means making the kind of distinction I outlined in the previous paragraph. When election law statutes have been drafted in a non-partisan way, the court should respect the outcome of the democratic legislative process. When those rules are not neutral, the case for the court to read the statute in a way which opens the political process to voters becomes stronger – even if this means reading the statute contrary to its possible plain meaning.

This essay points to and defines a narrow class of election law rules, which I call “veil of ignorance rules.” Sometimes, legislatures cannot manipulate election rules to favor their own party or candidate, because they make these rules without knowledge of which rule will in fact help their candidate. Rules about correct spellings of last names, or residency requirements, are like this: when legislatures make the rules about these things, they do not know whether their candidate will have an easy or hard to spell name, or whether their candidate will be a long time resident of the state or city, or will have just moved there.

In the phrase I will use (borrowing from John Rawls) legislatures make these rules “behind a veil of ignorance,” because they are ignorant of whether the rule will benefit their candidate, when he or she actually runs. Veil of ignorance rules are special because they have a presumptive claim to be neutral. That is, the parties, because they can’t know which rule will help them, and will focus on the merits of the rule in making it, rather than on securing any partisan advantage. Such rules ought to be deferred to, even if we may disagree with them on policy grounds.

My essay is divided into three parts. In the first Part, I outline the ways in which laws might be neutral or not neutral. Borrowing from John Rawls and Herbert Weschler, I argue that laws should ideally be neutral in aim, but that it is very difficult to see how they can be neutral in effect. In the election law context, this would mean that legitimate rules would not necessarily aim to favor either party, even though the rules we have in place may often – perhaps even always -- have the effect of helping one party or another.

If Part One examines the meaning of neutrality, Part Two gets down to cases. In particular, I argue that the recent Murkowski and Emanuel cases are examples of regulations that, while they might have had partisan effects, the regulations were not drafted with partisan aims. Indeed, borrowing from John Rawls (and Adrian Vermuele in the legal context), the rules regarding ballot counting in Alaska and residency requirements of the Chicago mayoral race were drafted behind a de facto veil of ignorance. In these circumstances especially, we have little reason to believe that any partisan aim was behind the legislation.

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10 The classic text is JOHN HART ELY, DEMOCRACY AND DISTRUST (1980); more recently, see the work of Samuel Issacharoff and Richard H. Pildes, e.g., Issacharoff & Pildes, Politics as Markets: Partisan Lockups of the Democratic Process, 50 STAN. L. REV. 643 (1998).
11 At one extreme is the work of Robert Bork, e.g. BORK, THE TEMPTING OF AMERICA (1997); but there are milder, and progressive versions as well, see, e.g., Michael McConnell, Review of Active Liberty, 119 HARVARD L. REV. 2387 (2006), & CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (2001).
13 Infra, Part I.
14 Infra, Part II.
In Part Three, I use the conclusions of Part Two in assessing the importance and the relevance of the “democracy canon” in different election law contexts. Hasen relies on the democracy canon in justifying his approach to the Murkowski and the Emanuel cases: let the voter intent standard govern, he says about the Murkowski case, and let Rahm Emanuel run. But in both cases, I suggest that the correct reading of the statute was a much closer call. There are credible arguments that the statutes, plainly read, supported the narrower reading: throw out the misspelled ballots, and keep Emmanuel from running. But even if they did not, and the statutes were ambiguous, there is a good reason not to read them expansively: the statutes were drafted behind a veil of ignorance, and have a good claim to be neutral rules of the game. This in turn moves me to qualify the democracy canon: there are some cases of ambiguous statutes where the canon should not be used, and something like the opposite of the democracy canon should be our guiding principle.

But this leads to a final point. To the extent that the rules in the Murkowski and Emmanuel cases were neutral, upsetting them means upsetting a prior, legitimate, democratic decision. Voter participation (that is, popular democracy) is not the only hallmark of democratic decision-making. Legislative decisions can also be democratic. The democracy canon only upholds one conception of democratic legitimacy. It is not the only one that should guide us in deciding close election law cases.

I. Varieties of Neutrality in Political Theory and Election Law

The very idea of neutrality has been repeatedly contested. It has been denied to even exist, or if it does exist, to be merely a mask for a partisan agenda.\textsuperscript{15} Even neutrality might not be truly “neutral.” But nonetheless, we might say of neutrality, if it hadn’t been refuted so many times, then we would wonder if indeed it were dead. For, as Andrew Koppelman among others has argued, the idea of neutrality seems to capture something important, and seems to be almost indispensable even if sometimes elusive.\textsuperscript{16} We are drawn to the idea that decisions should be made on an impartial basis, without bias towards one side or interest over another.\textsuperscript{17} That is the bare idea of neutrality, and it is hard to gainsay that there is at least something there. This is why we keep coming back to neutrality.

But if the bare idea of neutrality is graspable enough, there is still some difficulty in specifying exactly what neutrality is, and how the concept should be applied. In thinking about how to characterize neutrality, it will be useful to outline two ways we might interpret the concept, which will be useful in characterizing neutrality’s importance in the election law context. First, we might think that a neutral policy is one that is neutral in its \textit{aim}. Second, we might think that a neutral policy is one that is neutral in its \textit{effects}. John Rawls has recently given an influential exposition of this difference, and I rely on his work here.\textsuperscript{18}

Neutrality of \textit{aim} is one that should be familiar to legal scholars, for something very near to it lies at the basis of Herbert Weschler’s influential defense of neutral principles in

\textsuperscript{15} See, e.g., STANLEY FISH, THERE’S NO SUCH THING AS FREE SPEECH (1994).
\textsuperscript{16} Andrew Koppelman, \textit{The Fluidity of Neutrality}, 66 REV. POLITICS. 633 (2004). I have quarreled with Koppelman’s use of neutrality in other contexts; in election law, however, the idea is quite useful. See Flanders, \textit{Can We Please Stop Talking About Neutrality? Koppelman Between Scalia and Rawls}, PEPPERDINE L. REV. (forthcoming 2012).
\textsuperscript{17} Id.
\textsuperscript{18} JOHN RAWLS, POLITICAL LIBERALISM (2 ed. 2005).
constitutional law adjudication. Legal decisions, to be principled, cannot rely on the fact that a judge favors a particular result over another, say, based on the identities of the parties. We instead have to abstract from particular cases, and find a rule that will cover more than one case: one, we might say, that is neutral across cases. Thus, in deciding a free speech case, we cannot base our decision that one side should win because we favor their particular message -- we like what the communists say, for instance, but not the abortion protestors. Rather, we have to seek out a neutral standard that will not be based on the content of the speech, but on some other, neutral characteristics: whether, for example, the speech creates an imminent risk of lawless action. It may happen that this standard tends to favor one group over the long run, but the aim of the standard will be to decide cases in a way that in the abstract favors neither group.

Rawls says something similar, or at least not opposed to Weschler in his articulation of neutrality of aim. In a politically liberal society, Rawls argues, the statue should not aim to favor an one “comprehensive doctrine,” or way of looking at the good life. This indeed, is what it means for the society to be politically liberal in Rawls sense of the term: it does not give preference to one ideal of life’s goals over another. Rawls does distinguish between neutrality of aim, and what he calls procedural justice, but this contrast only serves to highlight the essence of neutrality of aim. Rawls says that his theory of justice is not procedurally neutral, because the values justice represents are more than simply the values of consistency, generality, and impartiality. In this respect, Rawls wants to separate his idea of neutrality of aim from Weschler’s more procedurally oriented notion of neutrality.

But this seems to me a distinction that ultimately does not make that much of a difference. Justice will require that certain values be satisfied, and not merely that some procedures be followed. We protect people’s right to free speech, or their right to a basic minimum income. Still, when we have established that these are the values that we as a society want to uphold, we must adjudicate these values, and legislate about them, in a neutral way -- one that does not favor any one conception of the good life over the other.

And indeed, here Weschler is not much different. There are certain constitutional values we endorse Weschler says, but these values must be applied in a neutral way (even Weschler, that is, does not rest his decision procedure merely on the ideas of consistency, generality, and impartiality). The fact that there are some substantive values in our constitutional order does not make neutrality irrelevant. It just specifies the values we have to be neutral about. Once we say, for instance, that free speech is a value, we are obliged to decide free speech cases on a neutral basis. And for Rawls and Weschler, as long as our aim is neutral -- we do not favor one party based on his or her identity or conception of the good -- we have satisfied the requirements of neutrality.

At the same time, Rawls does acknowledge the existence of another species of neutrality, but it is one that he rejects: neutrality of effect. Neutrality of effect says that it is not enough that policies or decisions be made on neutral grounds, but that substantively the result of those

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20 Id.
21 Id.
22 POLITICAL LIBERALISM, supra note 18.
23 Id. See also CHARLES LARMORE, PATTERNS OF MORAL COMPLEXITY 44 (1987).
24 POLITICAL LIBERALISM, supra note 18.
25 POLITICAL LIBERALISM, supra note 18.
26 Wechsler, supra note 19
27 POLITICAL LIBERALISM, supra note 18.
decisions is neutral. On the Rawlsian account, then, neutrality of effect would mean that no policy could in fact benefit one group over another, even if the principle that was used to ground the policy did not explicitly or implicitly intend that one group be favored.

Rawls says that neutrality of effect is an impossible goal, and so we should not pursue it. As he writes, “it is surely impossible for the basic structure of a just constitutional regime not to have important effects and influences as to which comprehensive doctrines endure and gain adherence over time; and it is futile to try to counteract these effects and influences, or even to ascertain for political purposes how deep and pervasive they are.”

Rawls claims this is simply an insight of commonsense political sociology. So here, at a very rough approximation, we have two ideals of neutrality: one that focuses on the purpose or the aim of the law or the decision (neutrality of aim), and one which looks at the effects of the law or decision. But can such ideas of neutrality have an application to election law? I think they can. It may be easier to see how neutrality of effect may simply be an impossible dream in politics: any rule will have effects that may benefit one party or another. Consider again how in the Murkowski and Emmanuel cases, deciding one way or another would be to the benefit of one candidate and to the detriment of the other. There was simply no way to decide that would not result in one party or another benefiting, and the other hurting. Even if the court had decided not to intervene, leaving the status quo in both cases would have benefited one party, and hurt the other. There is no escape from non-neutrality of effect in election law cases, at least.

But we might still hope that our election law rules and decisions should at least aim to be neutral. That is, our rules in election law should not be such that they deliberately set out to stack the deck in favor of one party or one candidate. That seems a reasonable goal to hope for. But we might also wonder whether it can ever be achieved. Won’t parties always try to manipulate the process to their own advantage? Of course they will, and in these cases, we might think that the court has an especially important role to play: they should strike down those laws that are made with deliberate partisan intent, that serve to rig the game in favor of one party, not just as a matter of accidental effect, but as a matter of deliberate partisan policy.

This is true, but all the same, we should not ignore the possibility that in some cases, there will be election rules that are truly neutral in aim. If these exist, then we might think that the court’s role should be to preserve those agreements, and not upset them. But do any such rules exist?

II. Veil of Ignorance Rules in Election Law

A. Behind a Veil of Ignorance

28 POLITICAL LIBERALISM, supra note 18.
29 POLITICAL LIBERALISM, supra note 18. But see Chad W. Flanders, Rawls and the Claims of Culture (unpublished manuscript) (on file with author).
30 POLITICAL LIBERALISM, supra note 18.
31 POLITICAL LIBERALISM, supra note 18.
33 I address the deep and difficult question of neutrality between the two major parties and third parties in Part II. As is clear from the above exposition, I think there is a tight and highly useful correspondence to be drawn between neutrality and nonpartisan, so that neutrality means roughly “neutral between the two major parties.”
The previous section began with a conventional understanding of neutrality, one we find both in Wescher and in Rawls: neutrality is neutrality of aim, and not neutrality of result. The point of neutrality, in other words, is not that all policies or judicial decisions have neutral effects – this would be impossible – but that they have a neutral purpose, or at least a neutral enough purpose. Such neutrality is what we should expect of our legislatures and our judges.

In this section, I want to show how certain election law rules can be neutral in aim. I will call these rules “veil of ignorance rules” for reasons which will shortly become clear. In the case of these rules, there is little (or should be little) question whether they are neutral in aim, because the parties crafting the rules will not know what rules will help them further their own interests. And although this leaves it open that the rules may nonetheless have non-neutral effects, these effects are less harmful than if they had been chosen with deliberately partisan aims in mind. So veil of ignorance rules will avoid both neutrality of aim and, possibly, the dangers of non-neutral effects.

What then characterizes these rules? The device of the “veil of ignorance” was presented in Rawls’s A Theory of Justice, as a way of thinking about how to come of with the correct principles of justice.\textsuperscript{34} Suppose, Rawls had us imagine, that we knew nothing of our attributes -- we knew nothing of who we actually were, not our race, our sex, our wealth, even our beliefs about what things were worth having in life. Without any of that knowledge, what principles could we all agree upon to govern our lives together?\textsuperscript{35}

Why is such a device necessary? Rawls worried that if we did know what our place in society was, then we would be tempted to choose principles that would benefit us, in our concrete circumstances.\textsuperscript{36} If we were a certain race, or a certain gender, we might naturally choose principles that would end up giving us an edge. Or suppose we knew what our religion would be. In that case, we might imagine a society governed only by members of that religion, or perhaps that would give special privileges to members of that religion only, and no others. We might be especially tempted to do this if we thought that our religion was the true religion: we might think that of course those adherents of the true religion should be given special places in society.\textsuperscript{37} What putting the veil of ignorance over us as we choose principles does is to force us to choose without the temptation of favoring us as we actually are.\textsuperscript{38}

As Rawls calls it, the veil is a “device of representation.”\textsuperscript{39} It is not without its normative presuppositions, and as a result, the fact that principles will be chosen from behind the veil will not suffice, by itself, to justify those principles. But what Rawls wants to model is a certain conception of neutrality in choosing the principles of justice, and in this capacity, the metaphor of the veil works wonderfully. We do not have to imagine abstractly what neutral principles will look like -- we simply have to imagine what we would choose if we \textit{had} to choose without knowing whether we would benefit from the principles we chose. Those principles would be neutral, because they would be chosen by -- featureless -- people who could not, because of the constraints of the veil, be non-neutral. They do not know whether they will be poor or rich when they remove the veil. They do not know whether they will be members of the majority or minority religion. They do not know if they will be Republicans or Democrats. So they will

\textsuperscript{34} Rawls, A Theory of Justice (1971).
\textsuperscript{35} \textit{Id.} at 136-142.
\textsuperscript{36} \textit{Id}.
\textsuperscript{37} \textit{Id}.
\textsuperscript{38} \textit{Id}.
\textsuperscript{39} \textit{Id}.
choose principles in light of this non-knowledge, with the idea that they do not want to live under principles that will harm their interests no matter what position they end up in society. This, Rawls suggests, forces them to be neutral -- forces them to seek out principles that will be fair to everybody.\textsuperscript{40} They will try to be fair to everybody, because if they do not, they may end up being the ‘somebody’ who is specially disadvantaged by the rules.\textsuperscript{41}

But the fact remains that the veil is simply a device of representation. It is, to put it another way, a thought experiment. How realistic is it that when we choose actual laws, we will be choosing behind a veil of ignorance? The question seems especially pressing when we turn to election law where, partisanship is not only ubiquitous, it seems ineliminable. We need only turn to the issue of partisan gerrymandering to see how this is so. Not only do the parties know who they are, they deliberately, and with increasing efficiency, craft the rules to benefit their party, and to harm the other party. Or consider a more controversial example, that of photo identification laws.\textsuperscript{42} For the most part, requiring photo identification to vote tends to hurt Democratic voters more: it is harder for the poor, and the elderly, to obtain that identification, and they tend to vote Democratic. It is not hard to imagine (indeed, it is hard \textit{not} to imagine) that those legislators advocating such measures are merely interested in abstractly preventing fraud. Rather, they know -- because they know who they are, and what rules will benefit their party -- that photo identification requirements will have non-neutral effects.

So it might seem that the veil of ignorance, while a useful idea in theory, remains less useful in practice. Very rarely do we have situations where legislators will not know who they are and what rules will benefit them and their party. Of course, we could ask them to legislate as if behind a veil of ignorance -- and indeed, this is the point of the thought experiment in Rawls’s original incarnation. \textit{We} know where we are, now, but we are to imagine that we do not know our position in society, the better to make sure the principles we do choose are suitably neutral.

But what if there were instances we could identify where there were \textit{de facto} veil of ignorance rules? What, that is, if we could identify some circumstances where legislatures were actually working in circumstances where they could not say whether the rules they chose would in fact benefit their party or their candidacy? Such rules would fit the categorization of veil of ignorance rules, and they would require no effort of the imagination. The people would be acting behind a veil in the sense that they would not know whether the laws they selected would end up benefiting \textit{them}. The result is that -- even though they knew who they are when picking the rules -- the rules they chose would be neutral, at least neutral with regard to aim. Such situations would effectively mimic what Rawls was after in designing the veil of ignorance thought experiment.

But are there such situations in election law? At first blush, it would seem not, because most of the time legislators will be aware of the effect of the rules they choose, and will choose accordingly. But this impression turns out to be incorrect. In fact, there are many situations where we can identify \textit{de facto} veil of ignorance rules.

B. \textit{De Facto} Veil of Ignorance Rules

\textsuperscript{40} \textit{Id.}
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} See, e.g., Crawford v. Marion County Election Board, 553 U.S. 181 (2008); Weinschenk v. State, 203 S.W.3d 201 (Mo. 2010).
Again, what we are interested in is the following: according to Rawls, one way of modeling neutrality of aim is to imagine the parties (here we are not talking about political parties, but just about persons) choosing principles as if they were behind a veil of ignorance, where they are deprived of information that would tempt them to make biased choices, choices that would benefit them to the exclusion of others. But we wondered whether such situations would be present very often in election law. Obviously, legislators know which political party they belong to, and which rules will benefit them. But we might, however, approximate a veil of ignorance if there were situations where legislators would not know the effects of the rules they were drafting. So this is our question: Are there situations where legislators drafting rules for elections are in fact unaware of whether the rules they select will benefit them?

I think there are, and I want to examine two recent examples of them in depth. But first I want to illustrate more what I mean by a de facto veil of ignorance rule by an somewhat less perfect example. It will help us get a firm grasp on the necessary conditions that have to be in place for there to be veil rules.

Consider, then, a legislature that has to decide the rules for deciding when polls should close on election day. First of all, there has to be some rule for when polls close. They cannot be open all year long. There has to be a time when they open, and a time when they close (although mail in ballots present a complication, which I will turn to shortly). So rulemaking in this situation is unavoidable. Neutrality cannot mean simply not setting a closing time at all; this is not an option. Second, it is not obvious which way a later or earlier closing time will cut in the election. That is, it is hard to know whether, if the polls close at 6:00 P.M. rather than 8:00 P.M., this will benefit one party or the other. So the legislators drafting the rule are more or less in a state of ignorance as to which way they should frame the rule, so that it will benefit them. This mirrors the situation those behind Rawls’s veil of ignorance are in: they, too, do not know which rule will benefit them. However, in the present case -- of choosing poll closing times -- this is not because we ask legislators to imagine that they are not a member of any party, but simply because even though they know they are Republicans or Democrats, they will not know, in advance, how to make a rule that will benefit them.

But some might think that this is an imperfect example, and I agree. For one, it might seem that the legislators will know what rule will benefit what party. Again, for reasons much like the photo identification case (discussed above), we might think that later poll hours would benefit Democratic voters, who may not be able to take time off of work, or who might have to take extraordinary means to get to the polling place. It might be no coincidence that when, in St. Louis, a judge allowed a polling place to close later, it was the Republicans who challenged the change, and the Democrats who supported it. So here we have an example of an imperfect, or only partial, veil.

And indeed, the more we expand the possibilities for polling place openings and closings, then less it may seem that we can get a neutral rule anyplace in the area. What about mailing in ballots up to two weeks before the election? Or about early voting? These measures might be thought to favor Democrats, for reasons similar to the ones discussed above about registration requirements: those who do not have the ability to take time off, or who have to arrange for transportation, will have a harder time voting, the more restrictive the times and opportunities for voting become. Again, then, it seems hard to find a case where the situation

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43 Thanks to Kirsten Nussbaumer for suggesting this example. For an actual case closely resembling these facts see State ex rel. Bush-Cheney 2000, Inc. v. Baker, 34 S.W.3d 410 (Mo. Ct. App., 2000).
44 Id.
will truly mimic a veil of ignorance. Worse, it seems that the more election cycles there are, the more information legislators will get about the effects of rules: they will know, if they didn’t know this time, what types of rules will most favor their side.

But if the class of veil of ignorance situations is small, it is not non-existent, and indeed, two high profile election law disputes provided nearly perfect examples.45

1. Correct Spelling on Write-In Ballots

Consider, first, the situation that election rules that faced Lisa Murkowski, who recently won re-election as Senator from Alaska. Murkowski initially was thought to be a shoo-in as the Republican candidate for the Senate seat she was holding.46 But this was before anti-incumbent sentiment swelled, and Alaska Republicans -- fueled by money and energy from the Tea Party movement -- backed outsider candidate Joe Miller. Miller ended up winning the primary, and Murkowski decided to run as a write in candidate. All of the sudden, Alaska’s Division of Elections was called upon to regulate a relatively rare event -- and to apply rules that were made many years before, and probably without much deep thought: the rules governing write in candidates, both before and after the ballots were cast.

The first question they faced was to what extent election officials could aid voters who might have trouble spelling a candidate’s name correctly on the ballot.47 Could the Division of Elections post a list of write in candidates at the polling places, in order to assist voters? Could poll work workers supply a list of eligible write in candidates to those who asked? Or, to take the most salient case, could they simply tell a voter how to spell “Murkowski”? The regulations on the books seemed to suggest that there was very little room for poll workers to help voters spell a candidate’s name correctly: the governing regulation simply and flatly prohibited poll workers from giving any “information” about write in candidates, other than mechanical information about how to actually cast a write in vote.48

We might pause here and note that these questions would have to be made in the middle of a campaign. There was no sitting on the sidelines for the director of the Division of the Elections, and any decision she made would have obvious partisan effects. If she decided to stick with the default rule, which would limit any assistance to voters seeking to write in the name of a candidate, this would obviously benefit Miller -- his name was on the ballot, because he won the primary. But if the director decided instead to more expansively allow assistance to write in voters (which is what she ultimately did) this would serve to benefit Murkowski. Most write in voters would be seeking help for her name to be spelled (although the field did become crowded, very few, if any, of the candidates were serious competitors, especially as compared to Murkowski). In short, there was no decision the director could make that would not have

45 These examples are ideal because they show how veils might be naturally occurring. It is a separate question about whether we ought to deliberately structure institutions to more closely resemble the choice situation Rawls describes. I am grateful to Adam Cox for pointing this out to me. See his important article, Designing Redistricting Institutions, 5 ELECTION L. J. 412 (2006).

47 Id.
48 Id.
partisan effects. No matter the interpretation, one side would benefit and the other side would be hurt.

The correct resolution of this part of the Murkowski litigation was difficult, and I have written on it elsewhere.\(^4^9\) In fact, there were conflicting rules at play -- the regulation of the Division of Elections seemed to suggest a hard line on assisting voters, but a broader statute governing elections seemed to compel a more generous role for poll workers.\(^5^0\) In this case, the existing rules did not point to one clear outcome, although in the end, the Alaska Supreme Court decided that the statute should govern.\(^5^1\)

What I want to focus on here, instead, is the litigation that occurred after the election was over, about how and whether to count ballots that had not correctly spelled “Murkowski.” Should those ballots be counted? Unlike the pre-election litigation, the standard here seemed to be rather clear, and unambiguous: only the correctly spelled ballots could be counted.\(^5^2\) There seemed to be little wiggle room for an intent of the voter standard to win out, where, for instance, a voter for “Lisa Mulkowski” would be counted, because clearly the voter would probably be intending to vote for Murkowski. The statute read, simply, that the name of the candidate had to be spelled in the same way as it was on his or her official declaration of candidacy.\(^5^3\) No exceptions.

I will get into the question of how this statute should be best interpreted later in this essay.\(^5^4\) But my concern here is now about the character of the rule. We should note two things. First of all, in the question of how to count write in ballots, we have a situation where there clearly has to be some rule. Will this ballot count, or won’t it? There is no room to stand back and not decide. And of course, given the context, one decision will favor one party and one decision will favor the other party. There is no possible rule that will be neutral in its effects. If we go for a lax rule about reading ballots, this helps Murkowski. If we read the statute strictly, this benefits the Miller campaign. A rule has to be set, and whatever rule is set will have effects that cannot be neutral.

But this leads me to the second point I want to emphasize about the rule Alaska had about counting write in ballots. It does seem that the rule was truly made under conditions of ignorance about which rule would benefit what party. That is to say, the regulation about counting write in ballots seems to have been produced behind a de facto veil of ignorance. By this I mean several things. The legislators who made the rule, to the extent they were thinking about a close race with a write in candidate involved at all, would not know which way a strict rule or a lax rule would cut. For imagine what would have to be the case for them to have some knowledge that would sway them either way. Is there any reason to think, ex ante, that members of a certain party will be more likely to have a hard name to spell than any other party? So for reasons of indifference or the relevant knowledge not being available, the rule that was fashioned was done in a way that truly was neutral in aim. The rule, that is, was made without regard to which party might benefit from the rule being this way or that way.\(^5^5\)

\(^{4^9}\) Id.
\(^{5^0}\) Id.
\(^{5^1}\) Id.
\(^{5^2}\) Id.
\(^{5^3}\) Id.
\(^{5^4}\) Infra, Part B.1.
\(^{5^5}\) But might the rules regarding write-in ballots be neutral toward third parties (or candidates not on the ballot) in general? I am not so sure, or at least this is not the level at which I want to analyze the question of neutrality.
2. Residency Requirements

Now consider a second example of a rule that was most likely designed under conditions that resemble a *de facto* veil of ignorance. In the recent mayoral elections in Chicago, it became a point of controversy whether Rahm Emanuel was indeed a resident of Chicago. The controversy initially seemed bizarre: Emanuel had lived in Chicago for many years, and had even been represented a suburb of Chicago in the House of Representatives. More generally, Emanuel had long been a player in Chicago politics. It was hard to imagine Emanuel somehow not being a resident of Chicago. Finally, the reason for Emanuel’s absence from Chicago for some time prior to the mayoral race was one of the most innocuous imaginable: he was in Washington D.C., working in the Obama administration as the chief of staff. Emanuel was not off trying to do politics in some other place, or working at a high paying job in another state or another county. Rather, he was serving his own country.

Yet Emanuel’s absence to be Obama’s chief of staff made the residency requirement an issue. Had he not been living in Chicago for a year prior to the election for mayor, and this seemed to trigger a bar against his running for mayor. His case wound its way through various administrative agencies, to Illinois district court, and eventually wound up in the Illinois Supreme Court, where the court ruled -- albeit on rather narrow grounds -- that Emanuel could run as mayoral candidate. The debate surrounding the case was, predictably raucous: it was the first election in which Mayor Daley was no longer a candidate, and Chicago politics not being bean-bag, everyone was keenly aware that the outcome of the decision would crucially effect the race. If Emanuel could run as a candidate, he would almost surely win. Again, as in many

It may be that the fact that third parties have a harder time winning elections, and this may be because of some structural features about them being able to run for office in the first place. The rules that govern *this* aspect of the political process may not, in fact, be neutral. They may make it harder for parties outside of the major two parties to get on the ballot, and avoid having to run write-in candidacies.

However, if we focus just on the question of correct spelling versus intent of the voter, I am not sure that the rule here ex ante favors any particular type of candidate, whether Republican, Democratic, Libertarian, Green, or what have you. There is no reason to believe there is *any* correlation between a hard to spell name and ideological affiliation. So the rule regarding the spelling on write in ballots is still, I conclude, neutral.

This does not mean that there may not be a larger, structural unfairness to the fact that third party candidates might be limited to write in candidacies. On this larger unfairness, see my *Deliberative Dilemmas: A Critique of Deliberation Day from the Perspective of Election Law*, 23 J. LAW & POL. 147 (2007). But the point is, within the context of the choice between correct spelling and intent of the voter, there is no obvious way in which either rule stacks the deck in favor of a particular party or cause or ideology.

This leads me to a final, theoretical point: there are levels of neutrality in election law. The level I am most interested in is rules that are neutral as between the two major parties, or in a word, *nonpartisan* rules. There is a higher level of neutrality, which is neutrality as between *all parties* (Green, Libertarian, etc.). (There might be a still higher level, e.g., neutrality between all candidates.) A rule which is neutral at one level might not be neutral at another. Indeed, this seems to be the case with the rule about write in ballots. Parties that don’t make the ballot are disadvantaged, clearly. But it is not obvious that the fact of write in ballots would tend to disadvantage one of the two major parties more than another. For more on levels of neutrality, see Koppelman, *supra* note 16. If one thinks, as I do, that rules that entrench the major parties are in some respects inevitable, and not necessarily bad, the observations of Justice Breyer in his *Vieth* dissent are instructive. *See Vieth v. Jubelirer*, 541 U.S. 267 (2004) (American districting favors two party system; two party system enables electoral accountability).

57 Id.
58 *Maksym*, 950 N.E.2d at 1066.
election law cases, the decision of the court would be strongly outcome determinative: if it ruled one way, Emanuel is the winner; if it ruled the other way, the race is all of the sudden wide open, and it’s anybody’s guess who the new front-runner would be.

The merits of the decision do not much concern me here, although I will revisit them in the third part of my paper, when they again become relevant in trying to determine the role of courts in election law cases. Rather, what I want to instead look at is the character of the rule at issue in the Emanuel case. The rule was about requirements for residency: how long does someone have to actually have resided in a particular area in order to run as a candidate for an office in that area? The reasons for longer or shorter residency requirements are rather familiar, as indeed are those for having residency requirements in the first place. We want a person who is seeking to represent a particular area, and govern in that area’s interests, to actually have a feel for that area, to know the people, and to a greater or lesser extent embody its character. We do not think -- not yet, anyway -- that representation and governing are simply a matter of disinterested expertise. We want someone who feels like us, and who can act for us in a way that we recognize as familiar. If our mayor is going to be a son of a bitch, we want him to be our son of a bitch. Of course, we do not want to make residency requirements absurdly demanding. We do not want to limit running for office in a particular area only to those, say, who have been born there or who have lived twenty years there. We do not want to restrict the pool of candidates too narrowly, and miss some good candidates who have some connection to the area, but not necessarily a long-standing one.

Moreover, and this is important for analysis, none of these reasons for or against residency requirements really tip in the direction of any party or even of one type of candidate. It would be hard to say in any election, that the person who has lived longest in the district would be a Republican or a Democrat candidate, so that steep residency requirements would tilt in one partisan way or another. Or if they did, the effect would probably be slight, and rather unpredictable. To put it another way, it is hard to see a coalition from one party could mobilize in favor of stronger or weaker residency requirements in general, absent knowing that one candidate would benefit from those requirements. The reasons that could be marshaled on either side are such that they don’t obviously advertise their partisan leanings: they seem to be neutral reasons.

And this is a long way around to make the simple conclusion that it seems that residency requirement rules are made under a de facto veil of ignorance. The major parties cannot know ahead of time whether the rule that they choose will benefit the candidate of their party or another party. The rules that were drafted to govern the mayoral race of 2011 were not made -- there is absolutely no reason to believe -- in order to disadvantage the likely Democratic front-runner, and thereby make possible the victory of another Democratic candidate or even a Republican. Rather, they were made with a concern for the neutral reasons proffered on either side. We may disagree with the line drawn by the legislature in this instance, but that disagreement will rest on reasons of substance. It is only when we lift the veil that our disagreements take on more than a substantive cast.

Now, I should again emphasize that I am not getting to the merits of the Emanuel litigation -- at least, not yet. The case was extremely complicated, and tough to decide. It involved issues not merely of legislative intent, but of deference to the ruling of the Board of Elections. But I do want to emphasize, at least initially, that we have here the drafting of rules that seem to be done with true neutrality of aim. This still leaves the question of why neutrality of aim in this context should matter, and if so, how. Does neutral of aim mean that the laws
should get a free pass from courts? Perhaps not entirely, but I do think that it entitles them to greater deference. My argument for that conclusion will be made in the next Part.

III. Limiting the Reach of the Democracy Canon

A. The Democracy Canon: A Very Brief Introduction.

In an important and path-breaking article, Rick Hasen has developed an analysis and an argument for the use of what he calls the “Democracy Canon” of statutory interpretation. In several shorter pieces, as well as numerous blog-postings, Hasen has applied the democracy canon to several recent election law cases -- including the Murkowski and Emanuel litigation. The democracy canon, Hasen alleges with some force, has been neglected in discussions of statutory interpretation. But at the same time, Hasen shows that the democracy canon has been repeatedly used in election law cases, especially state law cases. It has been used to decide cases in a way that is hoped to be roughly non-partisan, and fair.

What then is the democracy canon? Briefly, it is a rule of statutory interpretation that says when there is an ambiguous statute, courts should interpret it in a way that gives the greatest ability for (roughly) voters to vote and candidates to run. Take for an example the first round of the Murkowski litigation, where the question was to what extent poll workers could aid voters in spelling Murkowski’s name. While this case seemed to be decided on relatively straightforward statutory grounds, it could also have been decided using the democracy canon: it was arguably ambiguous what “assisting” voters consisted in, but it seemed clear that the way that would allow for the greatest effectuation of voter intent would be one in which poll workers were allowed to assist voters in writing in the name “Murkowski.” The democracy canon thus would counsel a broad reading of the word “assist.”

The canon can also be used in cases involving candidate eligibility to run for office. Consider a simple, recent example: a candidate who had served part of a term, but who wanted to run for a full term in the upcoming election. The question raised was whether, in understanding the term limits statute, did part of a term could as having served a previous term? If it did, then the candidate could not run, because the statute limited service to only one term in office. The statute in that case was ambiguous, but the court, relying explicitly on the democracy canon, said that the candidate should be able to run, to give voters the ultimate say on whether the candidate should be able to represent them. The candidate, a Mr. Mjos, ultimately lost.

Here we get to the underlying justification for the democracy canon: the best solution for close cases in election law is to leave it to the will of the voters. This may mean either positively aiding them -- as in the early Murkowski litigation -- or it simply may be removing barriers to candidate entry. Democracy says that the people rule, and if statutes can be read in a way that lets the people make the choices, by having their votes heard, and by letting them chose the candidates, then this is the rule we should prefer. This way, the people, and not the courts, and not the legislature are given the final say in an election.

60 Hasen Rahm, supra note 8; Hasen Alaska, supra note 8.
61 Hasen, supra note 57, at 75-83.
63 Municipality of Anchorage v Mjos, 179 P.3d 941 (Ak., 2008).
Moreover, and this is an advantage Hasen touts, the democracy canon also has a plausible claim to neutrality in the deciding of cases. As I’ve been emphasizing, a key problem in judicial intervention in election law cases is that it will usually be the case that the court ruling one way will favor a particular party over the other. This creates the risk that the court will be perceived as deciding in a partisan way -- as in Bush v. Gore, which still lingers over the court, and exists as a challenge to its legitimacy. But the democracy canon offers a way out of this bind. It gives the court grounds for its decision that clearly rest not on favoritism to one party or the other, but on a preference for democracy, or having the voters decide. The court is able to present itself as a defender of the people’s right to vote and to select candidates, and not as a defender of one party’s rights over the other. The winner in the early Murkowski case was the voter, so too in the Mjos litigation. The voter was given a choice whether to elect Mjos or not. That choice was not taken away from voters.

B. The Canon: Some Initial Skepticism about Applications

Chris Elmendorf in a wide-ranging and provocative article has challenged Hasen’s claim that the democracy canon is indeed non-partisan, and neutral. He argues that the democracy canon takes sides on dispute issues of voter and candidate responsibility, and the sides it takes are of a recognizably partisan cast. Allowing voters to vote when they have not accurately followed registration guidelines, or forgiving voter ignorance, or candidate unpreparedness, tend to be liberal positions, and will tend to favor the Democratic party’s candidates. I am not unsympathetic to this worry and I will be addressing it in one version in this section, although glancingly, and in another version in the next (in more depth). But this will not be my main concern what follows. Rather, I want to look closely at Hasen’s popular writings that invoke the democracy canon in particular election contests, and see whether they are rightly seen as cases which involve ambiguous statutes and the need for the democracy canon. And I want to advance the argument that in some cases -- including the Murkowski and the Emanuel litigation -- the democracy canon might be anti-democratic. But first, let us review the cases.

1. Murkowski

Let’s begin with the controversy already introduced in Part II, between Lisa Murkowski and Joe Miller. Phase two of that controversy -- phase one was about the extent to which voters could be assisted in spelling the name of a write in candidate -- was about whether voters who did not spell Lisa Murkowski’s name exactly would have their votes counted. The Alaska Supreme Court, after litigation by Miller’s campaign, ruled that the standard should be the intent of the voter, rather than the (stricter) standard possibly implied by the relevant statute, viz., that only the correctly spelled write in ballot should count. I think this is a controversial result; although I have argued that the court’s decision in phase one of the litigation was correct, I am less sure about their conclusion in Part II. Indeed, I think that the considerations brought to

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64 McConnell, supra note 1.
65 Christopher S. Elmendorf, Refining the Democracy Canon, 95 CORNELL L. REV. 1051 (2010).
66 Id.
67 Treadwell, 245 P.3d at 869.
68 Flanders, supra note 44.
bear in Part II about the law at issue in phase two of the litigation being made behind a veil of ignorance gives us a strong (but not perhaps conclusive) reason to reject the court’s conclusion.

But before I get to the substance of that debate, it is perhaps worth pausing to consider the possibility that the court needn’t have decided the correct reading of the statute -- liberal or conservative at all. By the time the Miller challenge had made it to the Alaska Supreme Court, it was clear that even if he won every ballot challenge, he would still not have enough votes to beat Murkowski.69 Miller’s lawsuit trying to get his standard for reading the ballots accepted by the court and the division of elections was moot: there was no way that the outcome of the litigation could change anything. The court was certainly within its rights to simply call the matter moot, and move on.

The supreme court did not take up the mootness issue, but the superior court did, finding that although Miller’s lawsuit was technically moot, the public interest exception to the mootness doctrine applied.70 The issue, the court reasoned, was capable of review and the continued application of the mootness doctrine might cause the issue to repeatedly circumvent review.71 Finally, the issue was of great public importance.72 These are important considerations, although of course in the end a determination of mootness is as much a policy decision as it is a pure question of law. All of the factors listed by the supreme court are judgment calls, and matters of degree, not simple black and white formulas.73 And there certainly was a case for not calling Miller lawsuit moot, and it has to do with reasons that I began the essay with: in many election law contests that are brought before the courts, it is very hard for the courts to remain above the fray. Any decision they make could potentially have effects on the outcome of an election.

But with an election case that is actually moot -- that is, where the decision by the court will not determine the winner or loser of an election -- there may be a stronger case for the court to go ahead and decide the issue. In the Miller-Murkowski situation, nothing really hung on the court’s decision, except for the correct legal determination. The court, given the facts as they had unrolled previously, was free to rule without the pressure that their decision would decide who won or who lose. Mootness, in that situation, is actually a blessing, and an invitation to rule, not a distinctive to do so. Mootness means that the case can be decided in a largely apolitical vacuum, to an extent such a thing is ever possible in law, let alone election law. And of course the superior court was right that an important legal question was in play (whether it is an issue that would repeatedly come up is another, and more dubious, claim). But there is a further reason in the election law context to rule on an issue when it was moot, in addition to it being an important legal issue: because nothing rides on the outcome, the court is freed, at least somewhat, from the risk of seeming to be a political court.

This does not mean, however, that the court should be free to make the wrong decision, of course! A decision to rule on a case that could be moot shifts the pressure from leaving an issue undecided -- and so capable of being revisited or changed by other actors, such as the legislature -- to reaching the correct result in the case. There are risks to action, just as there are risks to inaction, as illustrated by the public interest exception. And so to see if the court ruled correctly, we need to look at its decision closely.

70 Id.
71 Id.
72 Id.
73 Treadwell, 245 P.3d. at 869-70.
The issue in the Alaska case was the proper interpretation of the statute regulating write in ballots. The language at issue was a little confusing, although ultimately, I think rather straightforward: “A vote for a write-in candidate … shall be counted if the oval is filled in for that candidate and if the name, as it appears on the write-in declaration of candidacy, of the candidate or the last name of the candidate is written in the space provided.” Miller favored a reading of the statute that required that the name on the ballot be spelled exactly as it had appeared on the write-in declaration of candidacy. At the very least, the last name had to be spelled correctly. Of course, Lisa Murkowski’s name is not the easiest to spell, so there were ballots that spelled it wrong. There were also ballots that had information in addition to Lisa Murkowski (such as “Lisa Murkowski, Republican”) which Miller also thought to challenge.

This is at least a plausible reading of the statute. It is also plausible -- and I think likely -- that the statute like many statutes is simply a badly written statute. The best way of reading the statute, which is to say, the most accurate, might have the result that it will disenfranchise some voters who spell Murkowski nearly correct, that is, whose intent we could discern. And if the statute were strictly read, this would doubtless be the result (Miller’s argument that some voters may have deliberately misspelled Murkowski as a way of protesting seems to me specious).

Nor is the result in this case entirely absurd, even though it might have disagreeable results. There is a need for precision and finality in elections, and that is secured by having a hard and fast rule about what votes to count. We can say, ex ante, that those ballots that are not clearly marked, or those names that are not correctly spelled, will not count. We then simply throw out the ballots that do not fit these criterion and tally the remaining ballots. Having a vague and uncertain standard leads inevitably -- as we have seen time and time again -- to protracted squabbling and litigation. No one has the right to cast a vote come what may, if they miss deadlines, or fail to follow the rules, etc. And many rules, even though they are not perfect or the ones we might ideally wish for, have sufficient rationales. Such was the case, I think, with the statute in play in phase two of the Murkowski litigation.

The Alaska Supreme Court did not however, take this view. It began its analysis not with a discussion of principles of statutory interpretation, but with a several page discussion of what after Hasen has called the democracy canon. Citing numerous cases, the court emphasized its traditional commitment to enfranchising voters, and to giving effect, when possible, to voter intent. The right to vote is fundamental, the court said, and should not be taken away due to “mere mistake.” This starting point is significant: it shows, I think, that the court has in a way already decided to take the side of the voter as against the statute.

But there are at least two problems with the court’s stance here. The first is a simple point of statutory construction. The democracy canon, like all canons, is an aid to statutory construction, it is not a substitute for it. As such, it is usually the case that an initial threshold showing that the statute is ambiguous must be made. A court cannot read a criminal statute according to the rule of lenity if the statute in question is clear, and clearly harsh. It cannot say: the statute is too harsh, so we must make it less so by applying the rule of lenity. So too, a court
cannot say that a statute disenfranchises voters must be made more generous by use of the democracy canon. Again, the canon is a tool to help understand the statute, not rewrite it. The court’s failure to take any steps to show that the statute is ambiguous is revealing. It seems to leapfrog over the possibility that the statute is clear in its meaning. The court, instead, focuses on the bad result of the statute. But some statutes will simply have bad results, and it is not the case that the court can rewrite those statutes by using a larger principle of enfranchisement.

There is a second problem. In the cases quoted by the court, the claim that mere mistake should not lead to the disenfranchisement of the voter refers to a mistake on the part of the government, not a mistake on the part of the voter. In the case of misspelling someone’s name on the ballot, that mistake lies with the voter, not with the government; it is not the case that the vote is not counted through no fault of the voter’s own. Of course, we certainly can imagine a statute which forgives such mistakes. But such was not the case with the Alaska statute. And I concede that there is still an issue about what the best policy is with regard to voter mistake, and whether it is fair to have the consequence of disenfranchisement rest on such a small thing: a mistake in spelling when the voter’s intent was clear. It might seem harsh or wrong to say that the voter is to blame for this, and that he should suffer the loss of his franchise. But this is a policy issue, not one that can be corrected by judicial interpretation. So even if the statute was ambiguous, it is still an open question whether the democracy canon helps. The democracy canon says in this instance, don’t disenfranchise because of a mistake by the government. In the misspelled ballots, there was no mistake by the government.

I should not overstate my point here. The court may well have been right in its conclusion. The statute, when pressed, could be found to contain ambiguity. And the democracy canon might be broader than simply dealing with cases of government mistakes in tabulating votes. Both of these things might be true. But the court’s decision in phase two of Murkowski strikes me as eminently contestable, which is what worries me. The court stepped into a controversy that was, technically, moot, and gave a very broad reading of the election law statute, one that seems to conflict with a straightforward reading of the statute. My sense is that the court not only appeared, but was, non-neutral. Its non-neutrality might be on the side of the voter, and not of any party; that certainly seems plausible. In some cases, such non-neutrality might be warranted, in order to correct what might be a bias inherent in the legislation. But as I will go on to argue, such non-neutrality is especially not welcome here, where the rule is one that has been made behind a veil of ignorance.

2. Emmanuel

The Alaska Supreme Court seemed clear in its preference for the principle of voter franchisement over the wording of the statute. It did not pause to consider whether the statute might have a plain reading, and not an ambiguous one, and it did not consider if the democracy canon should be read differently in cases where the fault lay with the voter and not the state. The court’s decision in the Emmanuel litigation is harder, and closer, for a variety of reasons, not all pertinent to the themes of this paper. The decision involved an initial question of deference to


the election board’s finding that Emmanuel was indeed a resident of Chicago. There was also an extended debate in the two courts that heard the Emmanuel matter over the correct reading of Illinois caselaw on the definition of “residency.” I want to largely abstract from these questions, and so what I say about the Emmanuel case will be a little more tentative, less sure. Nonetheless I want to conclude with a point similar to the one I made about Murkowski, above. The statute in question may be susceptible to a plain meaning interpretation, even though that plain meaning might be one that we, on policy grounds, could reject. We should not be too quick to revise the statute in light of a substantive disagreement with the content of the statute.

So let us start simply with the text of the statute at issue -- a point which, revealingly, the Illinois Supreme Court does not get to until page 11 of their opinion. The text reads:

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 or appointment.

The issue -- to revisit one of the factual scenarios we began with -- was whether Rahm Emmanuel, who had left Chicago to live in Washington D.C. as Barack Obama’s chief of staff was still a “resident” of Chicago. He had retained a house in Chicago, which he had rented out, and he said he intended to move back after serving in D.C., but could have said to have been residing in Chicago for the time he was gone? The question, in short, was whether “reside” meant to physically reside, or merely have property and the intention to reside.

The Illinois Supreme Court interpreted the statute as saying that while it might require physical presence of some time to establish residency, it was not the case that after establishing residence, one had to be physically present. It was enough that one had no intention of abandoning one’s residence in the city: that was all intent to reside amounted to. The court further buttressed its analysis by questioning if physical presence was the standard for residency then this would lead to all sorts of odd results. Would a person who traveled regularly to Florida each winter for a month lose his status as “resident”? Where would we draw the line?

But it is not clear that such questions are easily avoided on the other side of the ledger: if someone can remain a resident so long as he “intends” to return, what are the limits of such intentions? Could a person be gone from the city for ten years, always meaning to return, but never quite being able to, and still be a “resident”? Here the policy reasons for such a requirement come to the fore. Obviously, cities and states have an interest in candidates who actually are from the area, and have lived in the area recently. A person who can be a resident merely by owning property in the area and having a vague intention to return -- at some time, at some point -- would not necessarily be a good candidate. It is not crazy to think that this is sound policy, or at least non-laughable. And the idea that something like regular physical presence -- which could include vacations -- is an impossible standard to define seems far-fetched. Moreover, a claim made by the supreme court -- that making residency physical

84 Maksym v. Bd. of Election Comm’rs, 950 N.E.2d 1051, 1053 (Ill. 2011)
85 Id., at 1053-67.
86 Id., at 1059-61
87 Id., at 1059.
88 Id., at 1065.
89 Id., at 1061.
90 Id.
91 Id., at 1066.
residency for candidates would create an asymmetry between voters and candidates, is not
dispositive, either. We can imagine reasons why we would want to have candidates who know
something about the area and its people; we might have a lower standards for voter familiarity.
Voters aren’t going to govern, candidates are, and governance requires familiarity with people
and places of a type that takes time to acquire. Carpet bagging candidates might be worse than
carpet bagging voters. Or at least a legislature could think so.

But the policy reasons are secondary to the main point I want to make, which is that the
statute as it is written, admits of a rather plain reading, and it is not that residency is required
merely by a domicile and an intent to return. The plain reading is that the candidate must have a
home in the city, and actually live in it. The plain reading is certainly not absurd, given them
policy reasons above. And the statute certainly supports it: a candidate is not eligible unless he
or she “has resided” in the municipality at last one year next proceeding the election. Certainly
the ordinary and not legal meaning of the sentence encourages the idea that the person actually
live in the place where she seeks to hold elective office. Of course, ordinary and legal meaning
are not the same, and this is why the Illinois Supreme Court spent most of its opinion talking
about the established legal meaning of residency. But even here, as the special concurrence
points out, the caselaw was not at all clear, and it was possible to find support for the meaning
that the circuit court gave “residency,” i.e., actual physical residency. There is at least a
colorable argument that the definition of residency could have gone either way, and that the
plainer reading of the statute is to give “residency” a meaning that means actual physical
residency.

The Illinois Supreme Court, in overturning the circuit court’s decision, did not rely on the
democracy canon. But in an editorial published before the court’s decision, Hasen said that the
court clearly could have used the canon in reaching its conclusion. Hasen strongly disagreed
with the circuit court, saying that if the decision were to stand, the biggest losers would be the
voters of Chicago. In his op-ed Hasen rehearsed the arguments that the Illinois Supreme Court
would later adopt: that making residency physical residency is “overly stingy,” that making the
residency requirement physical residency would create an asymmetry between candidates and
voters, and that the circuit court’s reading of precedent was wrong. But even if these
arguments aren’t decisive, Hasen seems to suggest that a larger principle should govern: let the
voters decide if Emmanuel doesn’t have the experience or the familiarity, that he’s a
carpetbagger. Give them the choice of candidates; don’t take this away from them. The question
of residency is a technicality, Hasen concludes, and the voters should not be denied their choice
of candidate based on a technicality.

This is the argument from the democracy canon, and even if it isn’t explicit in the court’s
opinion, something like it might nonetheless have been motivating the stance it took -- at the
very least, this is something we can infer Hasen would endorse. We shouldn’t let something like
a residency requirement, certainly not one of ambiguous meaning, stop a candidate from running.
Politics certainly played a part, as well (Emmanuel is a huge figure in both national and local
politics, and did later win the mayoral election). But the decision might thought to be neutral
and democratic as well. The voters were given the last say, and not the court. Democracy won.

92Id., at 1066-67.
93Hasen Rahm, supra note 8.
94Hasen Rahm, supra note 8.
95Hasen Rahm, supra note 8.
96Hasen Rahm, supra note 8.
C. The Democracy Canon: An Internal Critique

In the previous sections, I have tried to make the argument that the case for using the democracy canon in the Murkowski and the Emmanuel cases, just as a matter of reading the relevant texts correctly, is a tough call. There is at least a plausible case that the statutes and regulations at issue were in fact not ambiguous. This is not, of course, the same as saying that the policies behind the relatively straightforward readings of the texts were good: in fact, there is reason to think that they were not. But this is not reason enough to simply re-read the statutes in favor of a policy we would prefer. The threshold test for using the democracy canon – indeed, any canon of interpretation – requires that the statute in question be ambiguous. That’s why we resort to aids in interpretation, after all. If the statute is not ambiguous, and merely reflects a bad policy, then the canon never comes into play; at least, it shouldn’t.

I think there is a case to be made (and I tried to make it) that in both the Murkowski and Emmanuel cases, principle trumped proper statutory interpretation -- the principle embodied in Hasen’s democracy canon. But what if this is incorrect? What if it simply is the case that the regulations were ambiguous, that reasonable people could disagree about their meaning? Would there be a reason not to use the democracy canon to act as a tie-breaker? This is clearly the direction that Hasen wants to go in. But I think there are reasons to refrain from using the democracy canon, at least in certain circumstances. Those circumstances, I think, apply here.

1. Neutrality, again

The democracy canon comes in clearly on the side of one value, and to that extent, it can be considered to be non-neutral. It says: the laws that regulate the election frustrate, to varying degrees, the expression of the will of the voter. In the Murkowski case, the frustration occurred when there were ballots that could not be counted because the voter did not follow the rules in spelling Murkowski’s name correctly. The court ruled that the better course would be to allow when the voter intent was clear, the ballot could be counted. In the Emmanuel case, allowing the voter to express his or her will took a someone different path: it was not about discerning the will of the voter for this candidate, but letting the voter have a choice of candidate. If Emmanuel could not run, this would mean that voters could not choose Emmanuel; their will could not be expressed in terms of a vote for this candidate. So in both cases, the court is backing a certain type of democratic value. Let the will of the voters control, either in allowing ballots to be counted, or by allowing a fuller range of choices than they otherwise would have had.

The case for intervening on the side of democracy is strongest, I think, when there is reason to believe that the regulations restricting the franchise, or more broadly, frustrating the intent of the voter, are deliberate, and deliberately partisan. It is a fact of election law (and of life) that there have to be rules to regulate the process; there cannot be an absence of rules. There has to be an order to the process, a way of discerning the intent of the voters; otherwise we do not have an election, we have simply a large, possibly inarticulate grunt. There have to be qualifications for voting, such as age restrictions. And there have to be time limitation on voting. The list of required and indispensable rules could go on. Will formation is not a ruleless affair. The rules are not merely restrictions on expressions of the will of the voters, they are in fact..
constitutive of it. Will formation is inevitably rule-bound. Without rules, there simply is no will of the people.

Nor is it the case that failure to follow the rules, resulting in the vote of a voter not counting, or a candidate not being able to run, is a moral failing on the part of the voter or even the election administrator. It may simply be an unfortunate event. People will make mistakes in elections. There will be errors in tabulation by election administrators, inevitably; and not every error should equally be counted as a matter of disenfranchisement. Further, people will miss deadlines or fail to follow the rules. These are not moralfailings. We might speak of the fault of the voter, or blaming the voter. These are perhaps unfortunate turns of phrase. It is probably better to say that there are rules, and sometimes the effect of not following those rules will be that your vote doesn’t count. A restriction on the franchise is not a morally bad thing per se.

There have to be rules, and rules will sometimes fail to be followed, and their will be consequences.

It becomes a morally bad thing when we have reason to believe that it was intentional. If a party stacks the deck against one group of people or another (usually of the other party), or even worse, if an individual administrator intentionally and unfairly quashes the vote of a qualified voter, then we have reason to be wary. Take the case of stacked rules. It is true that some rules regarding photo identification will pass constitutional muster. But there is still the question about how to best interpret these laws. If there is an ambiguity as to how those laws should be enforced against voters, it may be best and proper to use the democracy canon: to rule that every ambiguity should be read in favor of voter enfranchisement. After all, the legislature had the chance – if it really wanted to – to make the rules clear, and clearly against members of a party or some other group. Moreover, their intent was in fact non-neutral in doing so. They wanted to restrict the vote so that their party would have an advantage. Here the democracy canon can be brought in to tip the balance in the other direction. It is a non-neutral move to counteract a previous, non-neutral move on the part of the legislature. Both moves are non-neutral in aim, and the effect is to cancel them out.

But the case for reading a statute strongly in accord with the democracy canon becomes substantially weaker when the rules in place are neutral, that is to say, if they are neutral in aim. In cases like this, the court is coming in and upsetting the neutral rules of the game in favor of another aim. In making this point, I do not mean to make Hasen’s point that there is a good to leaving some rules undisturbed, that is, for not changing the rules in the middle of the game. This indeed could be argued. But this is a point that applies to neutral and non-neutral rules alike. There might be non-neutral rules in place and the argument that changing them in the middle of the game would be bad still works. By contrast, the point I am making now is that there is a problem with upsetting rules that are neutral, and this is what the court does when it uses the democracy canon to read an ambiguous statute to facilitate voter intent.

The laws in effect in both the Murkowski and Emmanuel elections were neutral in precisely this way, and so in using the democracy canon, the courts were sinning against neutrality. Because the rules for counting ballots (Murkowski) or for residency requirements

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98 There remains the possibility that a rule originally passed behind the veil of ignorance will have obvious partisan advantages over time. In that case, failure to change the rule to make it more neutral will be in fact a partisan act. I suspect that the rules in both the Murkowski and Emmanuel cases are not like this, i.e., they are not rules that will disclose their partisanship over time.
(Emmanuel) were made behind a veil of ignorance, they couldn’t help be neutral in aim, in the way I have described, above. They could not have been made in a way to secure partisan advantage, because the legislature could not tell in advance which way certain rules would cut. But they had to make rules nonetheless, and so they set the guidelines in a certain way. Again, the rules may not be the best rules; they might not even be the most efficient rules. All I am alleging now is that they were at least neutral rules, without the taint of partisan advantage. As such, by ruling on the ground of the democracy canon, the court was not countering a non-neutral statute with a non-neutral reading. Rather, it was ruling against a neutral statute.

2. From Neutrality to Democracy

But why should we care about neutrality? It might be thought that if there are bad rules, and the statute is ambiguous, then the balance should still favor the reading of the statute that allows more voters to vote. Even if it is not-neutral, it is wrong to fetishize neutrality: peoples’ votes are not being counted, or the candidate they favor is not being allowed to run, all in favor of preserving a rule, that while, not deliberately designed to restrict the choice of voters, still has that effect. Why not substitute a better reading? Neutrality can seem at best an empty and formal value, of little worth in the face of disenfranchised voters.

Except that in this case, preserving neutrality serves to further democracy. For there is more than one conception of democracy; indeed, there are several. But for our purposes, we need only canvass two. On the one hand, there is the idea of popular democracy, which is what the democracy canon promotes. By removing restrictions on voter choice, and restrictions on the full showing of voter intent, the democracy canon allows the popular will to be heard. But on the other hand, there is something that we might call legislative democracy. On this picture, democracy is mediated through the acts of a legislature, whom the people have elected to serve them. The two conceptions of democracy are not reducible to one another. Legislators may enact laws that do not fit exactly with what the people would choose, say, if the measure were put to a popular vote. Legislative democracy is still a form of democracy nonetheless, because the legislators were put there by the people, to make decisions on behalf of the people. Further, at the limit, legislatures are still kept in check by elections, where the people can assess how well they’ve done on behalf of the people.

By rejecting neutral rules passed by legislatures, the court in the Murkowski and Emmanuel cases arguably sinned not merely against neutrality, but against legislative democracy. It upset the will of the people as expressed in the acts of the legislature in favor of a hypothesized people, who would vote in the next election. So when the court uses the democracy canon, it does not unambiguously support democracy – at least when the rule in question is one that is neutral, one that we can see did not have the intent of limiting democracy.99 The framework established by the rules in the Murkowski and Emmanuel cases, then, was not merely a neutral one; it has fair claim to being called a democratic one. We elected the legislature to make rules regulating elections, and they did so. When the court upsets these legislative decisions in favor of greater popular democracy, they upset the decisions made democratically by the legislature.

And the democratic costs are not merely in one direction. By ruling on the democracy canon, the court does not only frustrate a previous legislative determination. It also prevents

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future democratic action, at least potentially. By construing the statute expansively, the court may prevent democratic change of the statute, in a way that would allow greater expression to voter intent. If the conclusion of the Emmanuel litigation had been that Emmanuel could not have run, the response surely would have been to change the residency rule to make it clearer, so that someone in Emmanuel’s position could run in the future. Of course, this may make us suspect that the new rule is not neutral. But the legislature cannot predict what effects the new rule will have in the future; it may benefit Emmanuel this time around, but next time around, it may allow a Republican candidate to run, when otherwise he or she would have been prevented from running. Such is the nature of rules that are made in conditions which approximate a veil of ignorance: they can have unintended effects, because we cannot know with certain how different rules will benefit various parties.

So I hazard the following modification to the democracy canon: in cases where rules are made behind a veil of ignorance, the presumption should be to read those rules strictly, that is to say, in accord with what is a reasonable plain-meaning interpretation of them. We should not go out of our way to read those rules in a way that upholds a version of popular democracy, at the expense of the values of legislative democracy. The democracy canon is best when we think that the legislature might have deliberately tried to go against popular democracy. In those cases, we can counter a non-neutral rule with a non-neutral interpretation of that rule. But when the rule is neutral, we are placing a certain version of democracy over another one. Better to let the problem with the statute – if there is a problem – be solved through the democratic process, and not by means of judicial fiat.

Conclusion

The Democracy Canon is a valuable tool of statutory construction, and Hasen has done important work in reviving it. Still, it has its limits, which require us to not so much reject the canon as to be more careful in when we apply it. It does not fit all circumstances. In particular, it does not fit well those circumstances where election rules have been drafted in a neutral way, as if behind a veil of ignorance. Those rules, while not perfect, deserve a greater measure of deference: we should not reinterpret them simply because they are bad rules. Indeed, when we do so, we go against not just neutrality, but also democracy.