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Election Law Behind a Veil of Ignorance

Chad W. Flanders
Saint Louis University School of Law

ELECTION LAW BEHIND A VEIL OF IGNORANCE

Chad Flanders[*]

Abstract

Election law struggles with the question of neutrality, not only with its possibility—can election rules truly be neutral between parties?—but also with its definition. What does it mean for election laws to be "neutral"? This Article examines one form of election law neutrality, found in what it terms "veil of ignorance rules." Such rules are formed in circumstances where neither party knows which rule will benefit its candidates in future elections.

This Article considers the existence of veil of ignorance rules in two recent election law controversies: the rule that write-in ballots must be spelled correctly (in the Lisa Murkowski Senate race in Alaska), and the rule that a candidate must be a "resident" of the city in which he plans to run for mayor (Rahm Emanuel's candidacy for Mayor of Chicago). Both rules can plausibly lay claim to being formed in conditions where neither party could know, *ex ante*, which rule would benefit its own candidates.

Veil of ignorance rules are interesting in their own right, but they also suggest a possible modification in what Professor Rick Hasen has recently dubbed "the democracy canon." The canon suggests that ambiguous election law rules should be read in a way that maximizes voter enfranchisement and voter choice. But if there are some rules that are neutral, because formed behind a veil of ignorance, they may deserve a type of deference not due to rules that were formed with an eye toward partisan advantage—even if those rules serve to limit voter participation.

Moreover, 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 and voter choice (that is, popular democracy) are not the only hallmarks of democratic legitimacy. Legislative decisions can also be democratic. The democracy canon only upholds one conception of democratic legitimacy. It is not, I conclude, the only one that can or should guide us in deciding close election law cases.

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* Assistant Professor of Law, Saint Louis University School of Law. Ph.D., University of Chicago; J.D., Yale Law School. This Article fulfills some of the promissory notes made in my two *Alaska Law Review* pieces, *Spelling Murkowski: The Next Act, A Reply to Fishkin and Levitt*, 28 ALASKA L. REV. 49 (2011) and *How Do You Spell M-U-R-K-O-W-S-K-I? Part I: The Question of Voter Assistance*, 28 ALASKA L. REV. 1 (2011). Thanks to Christopher Jones and Sam Dickhut for extremely helpful and timely research assistance, and for comments on a previous draft. William Baude, Joshua Douglas, Monica Eppinger, Rick Hasen, James Lindgren, Dan Markel, Efthimi Parasides, and Jeff Redding, and all commented on an early draft; I am very grateful to all of them. All mistakes are my own.

"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]*"*

INTRODUCTION

Consider the following two recent election law litigation scenarios. In the first, 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, arguing that they do not *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 an election statute that seems to require the correct spelling of the write-in candidate's name. The head of the Division of Elections and, eventually, the state's supreme court, opt for a more generous "intent of the voter" standard in reading the

1. Michael McConnell, *Two-and-a-Half-Cheers for* Bush v. Gore, *in* THE VOTE: BUSH, GORE AND THE SUPREME COURT 103 (Cass R. Sunstein & Richard A. Epstein eds., 2001).

ballots. The write-in candidate wins.[2]

In the second scenario, 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 hometown of Chicago. 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, or recently enough, to qualify as an eligible mayoral candidate. The former chief of staff objects, saying that he has lived in Chicago for most of his life and still owns a house in the area. The lawsuit is eventually decided in his favor, and he goes on to win the mayoral 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 election statutes 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 may ultimately lose the election. If the rules are read another 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; indeed, his election is virtually guaranteed.

If these examples testify to the high stakes in interpreting election 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 the interpretation that will lead to victory for our candidate, or our party, or our side. Election law does not, and cannot, exist in a partisan vacuum. Interpretations have consequences, and interpreters will be hard-pressed not to decide, or appear to decide, in light of those consequences. The immediate and harsh academic reaction to the decision in *Bush v. Gore* may offer the best example of the perils of election law interpretation.[4] 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 it now seems that courts are called upon to interpret election statutes with increasing regularity,[5] and they must do so in a way that

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2. *See* Miller v. Treadwell, 245 P.3d 867 (Alaska 2010).

3. *See* Maksym v. Bd. of Election Comm'rs, 950 N.E.2d 1051 (Ill. 2011).

4. *See, e.g.*, BUSH V. GORE: THE QUESTION OF LEGITIMACY (Bruce Ackerman ed., 2002) (containing essays demonstrating the harsh response to *Bush v. Gore* by many legal scholars); Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1407 (2001) ("It is no secret that the Supreme Court's decision in *Bush v. Gore* has shaken the faith of many legal academics in the Supreme Court and in the system of judicial review.").

5. Richard L. Hasen, *The Untimely Death of* Bush v. Gore, 60 STAN. L. REV. 1, 29 (2007) (providing statistics on the rise of election law litigation); *see also* Chad Flanders, *Election Law: Too Big To Fail?*, 56 ST. LOUIS U. L.J. 775 (2012) (discussion of growth of election law on the ground and as a subject of academic study).

avoids partisanship. Judges may be put in what appears to be an impossible position: either way they rule, they risk accusations of partisanship because their decisions will inevitably have partisan consequences. What is to be done? Recently, Professor Richard Hasen has proposed that judges deciding close election law cases should 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.[6] In cases of ballot counting, Hasen has argued, this means construing statutes in a way that gives effect to the voter's intent, so that votes are not thrown away on technicalities.[7] In cases of candidate eligibility, close cases should be resolved in favor of letting the candidate run—let the voters, not the courts, decide whether the candidate should be elected.[8] Professor Hasen's important article has deservedly garnered much in the way of scholarly attention.[9] In other recent popular works, Hasen has suggested that the Democracy Canon could have been put to good use in the two cases sketched above; it is arguable that it was, in fact, used in one case.[10]

While there is much to be said for the Democracy Canon, it has some important limitations. First, the canon tends to give us a one-size-fits-all way of understanding election 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 involve the content of the rules. Other differences—with which this Article is chiefly concerned—involve *how* the rules were formed. Rules that have been formed in a nonpartisan way—even if they are somewhat vague or ambiguous, and even if they might serve to deny voters choice in some instances—may have a greater claim to deference than do rules that are partisan in their aim or origin. Such nonpartisan rules are presumptively fair between the parties, and ought to be followed, even if the effect of these rules may be to limit some voter choice.

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 do so

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6. Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 71 (2009).

7. *Id.* at 83.

8. *Id.* at 84.

9. *See, e.g.*, Christopher S. Elmendorf, *Refining the Democracy Canon*, 95 CORNELL L. REV. 1051 (2010) (discussing the problems with the Democracy Canon); Edward B. Foley, *How Fair Can Be Faster: The Lessons of* Coleman v. Franken, 10 ELECTION L.J. 187 (2011).

10. Richard L. Hasen, *Alaska's Big Spelling Test*, SLATE (Nov. 11, 2010, 6:04 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/11/alaskas_big_spelling _test.html [hereinafter Hasen, *Alaska*]; Richard L. Hasen, *Let Rahm Run!*, SLATE (Jan. 24, 2011, 6:20 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/01/let_rahm_run.html [hereinafter Hasen, *Rahm*].

legitimately, when their decisions uphold the political process.[11] 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.[12] Deciding which of these two traditions to favor when interpreting statutes means making the kind of distinction outlined in the previous paragraph. When election statutes have been drafted in a nonpartisan 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 that opens the political process to voters becomes stronger—even if this means reading the statute contrary to its possible plain meaning.

This Article points to and defines a narrow class of election law rules, which it calls "veil of ignorance rules." Sometimes, legislatures cannot manipulate election rules to favor their own party or candidate because they make these rules without knowing whether the rules will help or harm their party or candidate. Rules about correct spellings of last names, or residency requirements, are of this type: when legislatures make these rules, they do not know whether their candidate will have an easy- or difficult-to-spell name, nor whether their candidate will be a longtime resident of the state or city, or will have just moved there.

In the phrase I will use (borrowing from philosopher 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 actually runs.[13] Veil of ignorance rules are special because they are presumptively neutral—the parties, because they cannot know whether the rule will help them, will focus on the merits of the rule in making it, rather than on securing any partisan advantage. Such rules ought to receive deference, even if courts disagree with them on policy grounds.

This Article is divided into three parts. Part I outlines the ways in which laws might be neutral or not neutral. Borrowing from John Rawls and Herbert Wechsler, it argues that laws should ideally be neutral in aim, but that it is very difficult to see how they can be neutral in effect.[14] In the

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11. The classic text is JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). More recently, Professors Samuel Issacharoff and Richard H. Pildes have taken up the subject. *See, e.g.*, Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

12. At one extreme is the work of law professor and former judge Robert Bork. *See, e.g*, BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990). But there are milder and even progressive versions as well. *See, e.g.*, CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387 (2006) (reviewing STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005)).

13. *See* JOHN RAWLS, A THEORY OF JUSTICE 136–42 (1971).

14. *See infra* Part I.

election law context, this means 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.

While Part I explores the meaning of neutrality, Part II gets down to examining particular cases. In particular, it argues that the recent Murkowski and Emanuel cases are examples of regulations that, while having partisan effects, were not drafted with partisan aims. Indeed, borrowing from John Rawls (and Professor Adrian Vermeule in the legal context), the rules regarding ballot counting in the Alaska senatorial race and residency requirements in the Chicago mayoral race were drafted behind a de facto "veil of ignorance."[15] In these circumstances especially, there is little reason to suspect any partisan aim behind the legislation. Part III uses the conclusions of Part II to assess the importance and the relevance of the "Democracy Canon" in different election law contexts. Hasen relies on the Democracy Canon to justify his approach to the Murkowski and Emanuel cases—regarding Murkowski, let the voter intent standard govern; in the latter case, let Rahm Emanuel run. But in both cases, this Article suggests that the correct reading of the statute was a much closer call. There are credible arguments that the statutes, plainly read, supported a narrower interpretation: throw out the misspelled ballots, and keep Emanuel from running. But even if they did not support this narrower interpretation, 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 being 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. The Democracy Canon, in other words, need not be our "default" setting when it comes to interpreting election law rules.

But this leads me to a final point. To the extent that the rules in the Murkowski and Emanuel 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 repeatedly been contested—some deny that it even exists, while others call it a mere mask for partisan agendas.[16]

15. *See infra* Part II.

16. *See, e.g.*, STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH: AND ITS A GOOD THING, TOO 297 (1994).

Even neutrality might not be truly "neutral." But if neutrality were not a valid and useful concept, we might wonder why it still keeps popping up, when so much time and effort has gone into debunking it. As Professor Andrew Koppelman and others have argued, the idea of neutrality seems to capture something important, and seems to be almost indispensable, even if sometimes elusive.[17] We are drawn to the idea that decisions should be made on an impartial basis, without bias toward one side or interest over another.[18] 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 easy enough to grasp, there is still some difficulty in defining exactly what neutrality is and how the concept should be applied. In thinking about how to characterize neutrality and its importance in the election law context, it is useful to outline two ways we might interpret the concept. First, we might think that a neutral policy is one that is neutral in its *aim*. Second, we might think that a neutral policy is one that is neutral in its *effects*. John Rawls has given an influential exposition of this difference, and I heavily rely on his work here.[19]

Neutrality of *aim* is one that should be familiar to legal scholars, for something very near to it lies at the basis of Herbert Wechsler's influential defense of neutral principles in constitutional law adjudication.[20] Legal decisions, to be principled, cannot rest on the fact that a judge favors a particular result over another—based on the identities of the parties, for example.[21] Courts must instead abstract from particular cases and find a rule that will cover more than one case—in other words, one that is neutral across cases. Thus, in deciding a free speech case, a judge cannot decide that one side should prevail because he favors its particular message—he likes what the communists say, for instance, but not what the abortion protestors say. Rather, courts must seek a neutral standard—one that is not based on the content of the speech, but on other, neutral characteristics (for example, whether the speech creates an imminent risk of lawless action). It may happen that this standard tends to favor one group in the long run, but the *aim* of the standard is to decide cases in a way that favors neither group in the abstract.[22]

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17. Andrew Koppelman, *The Fluidity of Neutrality*, 66 REV. POL. 633, 636 (2004). I have quarreled with Professor Koppelman's use of neutrality in other contexts; in election law, however, the idea is quite useful. *See* Chad Flanders, *Can We Please Stop Talking About Neutrality? Koppelman Between Scalia and Rawls*, PEPP. L. REV. (forthcoming 2012).

18. Koppelman, *supra* note 17.

19. JOHN RAWLS, POLITICAL LIBERALISM 192–94 (1993).

20. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

21. *Id.* at 15.

22. *See generally* Wechsler, *supra* note 20 (arguing that courts deciding constitutional cases should base their decisions on reasoning and analysis that transcend the immediate result).

Rawls says something similar, or at least not opposed to Wechsler, in his articulation of neutrality of aim. In a politically liberal society, Rawls argues, a statute should not aim to favor any one "comprehensive doctrine," or way of looking at the good life.[23] This indeed is what it means for the society to be politically liberal in Rawls's 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, yet this contrast only serves to highlight the essence of neutrality of aim.[24] 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.[25] In this respect, Rawls wants to separate his idea of neutrality of aim from Wechsler's more procedurally oriented notion of neutrality.[26]

But this seems to be 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, once we have established that *these* are the values that we as a society want to uphold, we must adjudicate and legislate these values in a neutral way—one that does not favor any one conception of the good life over another.

And indeed, here Wechsler is not much different. There are certain constitutional values we endorse, Wechsler says, but these values must be applied in a neutral way. Even Wechsler, that is, does not ground his decision making procedure merely in the ideas of consistency, generality, and impartiality.[27] The fact that there are some substantive values in our constitutional order does not make neutrality irrelevant. It just specifies the values *about* which we have to be neutral. 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 Wechsler, as long as our *aim* is neutral, we have satisfied the requirements of neutrality.

At the same time, Rawls acknowledges the existence of another species of neutrality, one that he ultimately rejects: neutrality of *effect*.[28] Under this conception of neutrality, it is not enough that policies or decisions are made on neutral grounds; the substantive result of those decisions must be neutral.[29] 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

23. RAWLS, *supra* note 19, at 190.
24. *Id.* at 191–94; *see also* CHARLES LARMORE, PATTERNS OF MORAL COMPLEXITY 44 (1987).
25. RAWLS, *supra* note 19, at 191–92.
26. *Id.*
27. *See* Wechsler, *supra* note 20, at 18–19.
28. RAWLS, *supra* note 19, at 193–94.
29. *Id.* at 193.

implicitly, intend that one group be favored.

Rawls says that neutrality of effect is an impossible goal, and so we should not pursue it.[30] As he writes:

> [I]t 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.[31]

Rawls claims this is simply an insight of commonsense political sociology.[32]

So here, at a very rough approximation, we have two ideals of neutrality: one that focuses on the purpose or aim of the law or decision, and one that looks at the effects of the law or decision. But can such ideas of neutrality be applied to election law? This Article argues that they can. It may be easier to see how neutrality of effect might simply be an impossible dream in politics: any rule will have effects that may benefit one party or another.[33] Consider again the Murkowski and Emanuel cases, where deciding either way 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 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 hope for neutrality of effect in election law cases.[34]

But we might still expect that our election law rules and decisions at least *aim* to be neutral.[35] 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. 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

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30. *Id*. *But see* Chad W. Flanders, Rawls and the Claims of Culture (unpublished manuscript) (on file with author).

31. RAWLS, *supra* note 19, at 193.

32. *Id.*

33. *See* Nathan Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 674 (2002); *see also* R. George Wright, *Electoral Lies and the Broader Problems of Strict Scrutiny*, 64 FLA. L. REV. 759 (2012).

34 Although it is possible that some non-neutral effects could be mitigated, as I argue in Flanders, *supra* note 30.

35. I address the deep and difficult question of neutrality between the two major parties and third parties at note 65 in Part II. However, I think there is a tight and highly useful correspondence to be drawn between *neutrality* and *nonpartisanship*, so that neutrality means roughly "neutrality between the two major parties."

might think that the court has an especially important role to play: 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* these agreements, and to not upset them. But do any such rules exist?

II. VEIL OF IGNORANCE RULES IN ELECTION LAW

The previous Part began with the conventional understanding of neutrality, one we find both in Wechsler 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.

A. *Behind a Veil of Ignorance*

This Part will demonstrate how certain election rules can be neutral in aim. I will call these "veil of ignorance rules" for reasons that will shortly become clear. With respect to these rules, there is (or should be) little question whether they are neutral in aim, because the parties crafting the rules could not know whether they would ultimately help them further their own interests. And although this leaves open the possibility that the rules may nonetheless have non-neutral effects, these effects may, in the end, be less harmful than if the rules had been chosen with deliberately partisan aims in mind. So, veil of ignorance rules will both achieve neutrality of aim *and*, possibly, avoid 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 up with the correct principles of justice.[36] Suppose, Rawls had us imagine, that we knew nothing of our personal attributes—we knew nothing about who we actually *were*, not our race, not our sex, not our wealth, nor 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?[37]

Why is such a device necessary? Rawls worried that if we did know what our places in society were, we would be tempted to choose principles that would benefit us, in our concrete circumstances.[38] If we knew that we

36. RAWLS, *supra* note 13, at 136–42.

37. *Id.*

38. *Id.* at 136.

were a certain race, or a certain gender, we might naturally choose principles that would give us an edge. Or suppose we knew what religion we were; in that case, we might imagine a society governed only by members of that religion, or perhaps one that gave special privileges to members of that religion. We might be especially tempted to do this if we thought that our religion was the *true* religion—we might think it obvious that those adherents of the true religion should be given special treatment in society.[39] Placing the veil of ignorance over us forces us to choose principles without the temptation of favoring ourselves, as we actually are.[40] We cannot special plead.

According to Rawls, the veil is a "device of representation."[41] It is not without its normative presuppositions,[42] and as a result, the fact that principles are chosen from behind the veil does 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 would look like—we simply have to imagine what we would choose if we *had* to choose without knowing whether we would benefit from the principles we chose.[43] Such principles would be neutral because they were chosen by (featureless) people who could not—because of the constraints of the veil—*be* non-neutral. These people do not know whether they will be poor or rich, members of the majority or minority religion, Republicans or Democrats, when they remove the veil. Thus, they will choose principles in this vacuum, with the idea that they do not want to live under principles that will harm their interests, no matter where they end up in society.[44] This, Rawls suggests, *forces* them to be neutral—to seek out principles that will be fair to everybody. They will try to be fair to everybody, because if they are not, they may end up being the "somebody" who is specially disadvantaged by the rules.[45]

But the fact remains that the veil is simply a device of representation—in other words, 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, but essentially ineliminable. We need only turn to the issue of partisan gerrymandering to see how this is true; not

39. *Id.* at 139–40.

40. *Id.*

41. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 83 (Erin Kelly ed., 2001).

42 A move for which Rawls has been criticized. *See, e.g.*, ALAN GEWIRTH, REASON AND MORALITY 19–20 (1978).

43. RAWLS, *supra* note 13, at 136–42.

44. *Id.*

45. *Id.*

only do the parties know who they are, they deliberately, and with increasing efficiency, craft the rules to benefit their own party and to harm the other party. Or consider a more controversial example: photo identification laws.[46] 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.[47] It is not hard to imagine (indeed, it is hard *not* to imagine) that the legislators advocating such measures are interested in more than abstractly preventing fraud. Rather, they know—because they know who they are, and what rules will benefit their party—that photo identification requirements will ultimately have non-neutral effects.[48]

So it might seem that the veil of ignorance, while useful in theory, remains less so in practice. Very rarely do we have situations where legislators do 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. *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 we could identify instances where there were de facto veil of ignorance rules? That is, what if we could identify some instances where legislators 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 *them*. The result is that—even though they knew who they were when picking the rules—the rules they chose would be neutral, or at least neutral in aim. Such situations would effectively simulate 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 possibly many situations where

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46. *See, e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (upholding a photo identification law in Indiana against constitutional attack); Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006) (striking down a photo identification law in Missouri as unconstitutional).

47. *See generally* Chad Flanders, *How (and Why) to Think About Voter Fraud*, 41 CREIGHTON L. REV. 93 (2007).

48 Again, the claim here is not that voter fraud measures are *only* motivated by partisan concerns; rather, it is that those partisan concerns are not unwelcome and at a certain level are desired. For a fuller discussion of the voter fraud debate see Flanders, *supra note* 47; *see also* Dan Kahan, *"Ideology In" or "Cultural Cognition Of" Judging: What Difference Does It Make?*, 92 MARQUETTE L. REV. 413, 414–17 (2009).

we can identify de facto veil of ignorance rules.

B. *De Facto Veil of Ignorance Rules*

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.[49] But the question remains whether such situations are ever actually present in the context of election law. Obviously, legislators know to which political party they belong, and which rules will benefit them. We might, however, approximate a veil of ignorance if there were situations where legislators could 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?

This Article argues that there are such situations, and it will 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 through a somewhat less perfect example. It will help us get a firm grasp on the necessary conditions that must be in place for there to be veil rules.

Consider, then, a legislature tasked with creating the rules for deciding when polls should close on election day.[50] First of all, there has to be *some* rule for when polls close. They cannot be open all year long, running 24 hours, 7 days a week. There has to be a time when they open, and a time when they close (although the existence of mail-in ballots presents an obvious complication, to which this Article will turn shortly). So, rulemaking in this situation is unavoidable; neutrality cannot mean simply not setting a closing time at all. 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 closing the polls at 6:00 p.m. rather than 8:00 p.m. will benefit one party or another.[51] So the legislators drafting the rule are more or less in a state of ignorance as to which way they should frame the rule in order to benefit themselves. This mirrors the situation in which those behind Rawls's veil of ignorance find themselves. They, too, do not know which rule will benefit them. However, in the case of choosing poll closing times, this is not because we ask legislators to *imagine* that they are not a member of any party; it is simply because, even though they know they are Republicans or Democrats, they do not know, in advance, how to make a

49. RAWLS, *supra* note 13, at 136–42.

50. Thanks to Kirsten Nussbaumer for suggesting this example. For an actual case closely resembling these facts, see Missouri *ex rel.* Bush-Cheney 2000, Inc. v. Baker, 34 S.W.3d 410, 411–12 (Mo. Ct. App. 2000).

51. *See, e.g.*, Cleland v. Porter, 74 Ill. 76, 79 (1874).

rule that will benefit them.

But some might think that this is an imperfect example, and I would 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 measures 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.[52] So here we have an example of an imperfect, or only partial, veil.[53]

Indeed, the more we expand the possibilities for polling place openings and closings, the less it may seem that we can get a neutral rule at all. What about mailing in ballots up to two weeks before the election? Or early voting? These measures might seem to favor Democrats, for reasons similar to the ones discussed above concerning 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 will truly simulate 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 next time, if they did not 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 nonexistent, and indeed, two high-profile election law disputes provide nearly perfect examples.[54]

1. Correct Spelling on Write-In Ballots

Consider first the situation of Lisa Murkowski, who was recently reelected as Senator from Alaska, and the election rules she faced.[55]

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52. *See Baker*, 34 S.W.3d at 411.

53. *See also* Griffin v. Roupas, 385 F.3d 1128 (7th Cir. 2004) (challenge by working mothers to closing times of polling places in Illinois).

54. Maksym v. Bd. of Election Comm'rs, 950 N.E.2d 1051, 1066 (Ill. 2011); Miller v. Treadwell, 245 P.3d 867, 869 (Alaska 2010). These examples are ideal because they show how veils might be *naturally occurring*. It is a separate question whether we ought to deliberately structure institutions to more closely resemble the choice situation Rawls describes. I am grateful to Professor Adam Cox for pointing this out to me. See his important article, *Designing Redistricting Institutions*, 5 ELECTION L.J. 412 (2006) (arguing that discussion about redistricting reform has been too narrowly focused and suggesting additional mechanisms that could achieve such reform). The trouble, as always, is how to get veil of ignorance rules that are not de facto enacted into law, given the powerful motivations legislators have to make rules that favor their own party. This, again, shows the importance of veil rules that just *happen*, rather than rules that have to be created.

55. *See* Chad W. Flanders, *How Do You Spell M-U-R-K-O-W-S-K-I? Part I: The Question of*

Murkowski was initially considered a shoo-in to be the Republican candidate for the Senate seat she already held. 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 won the primary, and Murkowski decided to run as a write-in candidate. Suddenly, 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 the Division faced was to what extent election officials could aid voters who might have trouble spelling a candidate's name correctly on the ballot.[56] Could the Division of Elections post a list of write-in candidates at the polling places in order to assist voters? Could poll 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.[57]

We might pause here to note that these questions *had* to be answered in the middle of a campaign. The director of the Division of the Elections could not sit on the sidelines, 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, it would obviously benefit Miller—his name was on the ballot, because he won the primary. But if the director decided instead to allow more assistance to write-in voters (which is what she ultimately did), it would benefit Murkowski. Most write-in voters would be seeking help to spell *her* name; although the field did become crowded, very few, if any, of the candidates were serious competitors, especially compared to Murkowski. In essence, there was no decision that would not have had non-neutral effects. No matter the interpretation, one side would benefit, and the other would suffer.

The correct resolution of this part of the Murkowski litigation was difficult, and has been written on elsewhere.[58] In fact, there were *conflicting* rules at play. The regulation by the Division of Elections seemed to suggest a hard line on assisting voters, but a broader statute governing elections

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Voter Assistance, 28 ALASKA L. REV. 1, 4–9 (2011).

56. *Id.* at 6–8.

57. *Id.* at 7.

58. *See generally id.*; *see also* Chad Flanders, *Spelling Murkowski: The Next Act, Reply to Fishkin and Levitt*, 28 ALASKA L. REV. 49 (2011).

seemed to compel a more generous role for poll workers.[59] In this case, the existing rules did not point to one clear outcome, despite the fact that, in the end, the Alaska Supreme Court decided that the statute should govern.[60]

What this Article will now address is the litigation that occurred *after* the election was over, about how and whether to count ballots that had not correctly spelled "Murkowski." The question became whether those ballots should be counted. Unlike the preelection litigation, the standard here seemed rather clear. Only the correctly spelled ballots could be counted.[61] There seemed to be little wiggle room to allow for an intent of the voter standard, under which, for instance, a vote for "Lisa Mulkowski" would be counted, because the voter most likely intended 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.[62] No exceptions.

This Article will later address how this statute should be best interpreted.[63] The concern here is about the character of the rule. We should note two things. First of all, regarding 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 will it not count? There is no room to stand back and not decide. And of course, given the context, one decision will favor one party, while a different decision will favor the other party. There is no possible rule that will be neutral in its effects. If we choose a lax rule for 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 to the second important point about the rule Alaska had for counting write-in ballots. It does seem that the rule was truly made under conditions of ignorance about which party would benefit. 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, the Article means several things. The legislators who made the rule, to the extent that they were thinking about a close race with a write-in candidate involved at all, would not know which way a strict or lax rule would cut. 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 difficult name to spell than any other party? So, due to indifference or because the relevant knowledge was unavailable, the rule that was fashioned was done so in a way that

59. *Id.* at 7–8.
60. *Id.* at 8.
61. *Id.* at 25–26.
62. *Id.*
63. *See infra* Subsection III.B.1.

truly was *neutral in aim*.[64] The rule, that is, was made without regard to which party might benefit from the rule being this way or that way.[65]

2. Residency Requirements

Now we will consider a second example of a rule that was most likely designed under conditions that resembled a de facto veil of ignorance. In the recent mayoral election in Chicago, it became a point of controversy whether Rahm Emanuel was indeed a resident of Chicago.[66] The controversy initially seemed bizarre. Emanuel had lived in Chicago for many years, and had even represented a suburb of Chicago in the United

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64. In the Murkowski case, this needs to be refined even further, because in part the Murkowski litigation was based on an intra-party dispute: the Tea Party Republican candidate (Miller) and the candidate of the Republican establishment (Murkowski). In a way, however, this helps my point. Because we do not know the effects of the rules when we make them, we do not know which party they will help, *and even which faction within a party they will help, either*. So these rules are not only not partisan, they are even neutral with regard to various ideologies *within* a party. I am grateful to James Lindgren for pressing me on this point.

65. But might the rules regarding write-in ballots be biased against *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. It may be the case that third parties have a harder time winning elections, and this may be because of some structural features about their 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 more difficult 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.L. & POL. 147, 153–55 (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, for example, neutrality between all candidates.) A rule that 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 do not make the ballot are clearly disadvantaged. 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 generally Koppelman, *supra* note 17. 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 Stephen Breyer in his *Vieth* dissent are instructive. *See* Vieth v. Jubelirer, 541 U.S. 267, 357 (2004) (Breyer, J., dissenting) (stating that American districting favors a two-party system and that two-party system enables electoral accountability).

66. *See* Chad W. Flanders, *When Is a Home Not a Home*?, MO. L. WKLY. 21 (Feb. 14, 2011).

States House of Representatives.[67] More generally, Emanuel had long been a player in Chicago politics. It was hard to imagine Emanuel somehow not being a resident of Chicago. And the reason for Emanuel's absence from Chicago for some time prior to the mayoral race was among 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 win elections in some other place, or working at a high-paying job in another state or another city. Rather, he was serving his country.

Yet Emanuel's absence made the residency requirement an issue. He had not been living in Chicago for a year prior to the election, and this seemed to trigger a bar against his running for mayor. His case wound its way through various administrative agencies, then to Illinois district court, and eventually to the Illinois Supreme Court, which ruled—albeit on rather narrow grounds—that Emanuel could run as a mayoral candidate.[68] The debate surrounding the case was predictably raucous. It was the first election in which Mayor Richard M. Daley was no longer a candidate, and Chicago politics not being bean-bag, everyone was keenly aware that the decision would crucially affect the race. If Emanuel could run as a candidate, he would almost surely win. Again, as in many election law cases, the decision of the court would be strongly outcome-determinative. If it ruled one way, Emanuel would be the winner. If it ruled the other way, the race would, all of a sudden, be wide open, and the identity of the new front-runner would be anyone's guess.

The merits of the decision are not the main concern in this Subsection, although this Article will revisit them later, as they become relevant in trying to determine the role of courts in election law cases.[69] Rather, the focus here is on the *character* of the rule at issue in the Emanuel case. The rule was about requirements for residency. How long does someone actually have to reside in a particular area in order to run as a candidate for an office there? The reasons for longer or shorter residency requirements are familiar, as are those for having residency requirements in the first place. We want a candidate who is seeking to represent a particular area and to govern in that area's interests, someone who has a feel for that area, knows the people, and to an extent embodies its character. We do not think—not yet, anyway—that representation and governing are simply a matter of disinterested expertise. We want someone who thinks like us, and can act on our behalf in a familiar way. Quite frankly, if our mayor is going to be a scoundrel, we want him to be *our* scoundrel. Of course, this is not to say that residency requirements should be absurdly demanding. We do not want to limit running for office in a particular area only to those, say, who were born there or who have lived there for twenty years. We do not

67. *Id.*

68. Maksym v. Bd. of Election Comm'rs, 950 N.E.2d 1051, 1066 (Ill. 2011).

69. *See infra* Section III.B.

want to restrict the pool of candidates too narrowly, and miss qualified candidates who have some connection to the area, but not necessarily a long-standing one.

Moreover, none of these reasons for, or against, residency requirements really tip in the direction of any party or even one type of candidate. It would be hard to say in any election that the person who has lived longest in the district is more likely a Republican or a Democratic candidate, and that steep residency requirements would tilt one partisan way or another. If they did, the effect would probably be slight, and rather unpredictable. To put it another way, it is hard to imagine a coalition from one party that 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 do not obviously advertise their partisan leanings. They seem to be neutral reasons.

All of this is essentially the long way around to reach a simple conclusion. 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. There is no reason to believe that the rules governing the mayoral race of 2011 were drafted in order to disadvantage the likely Democratic front-runner, thereby making victory possible for another Democratic candidate, or even a Republican.[70] 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.

Remember that this discussion is not about 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 also of deference to the ruling of the Board of Elections.[71] But it should be emphasized, at least initially, that this is an example of rules drafted 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 neutrality of aim mean that the laws should get a free pass from courts? Perhaps not entirely, but it does entitle them to greater deference. The argument for *that* conclusion will be made in the next Part.

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70. *See, e.g.*, Maksym v. Bd. Of Election Comm'rs, 950 N.E.2d 1051, 1063 (Ill. 2011).
71. *See id.* at 1064.

III. LIMITING THE REACH OF THE DEMOCRACY CANON

In an important and ground-breaking article, Professor Hasen developed both an analysis and an argument for the use of what he calls the "Democracy Canon" of statutory interpretation.[72] 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 litigations.[73] 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 repeatedly been used in election law cases, especially state law cases.[74] It has been used to decide cases in a way that is hoped to be roughly nonpartisan, and fair.

A. *The Democracy Canon: A Very Brief Introduction*

What then is the Democracy Canon? Briefly, it is a rule of statutory interpretation suggesting that, when presented with an ambiguous statute, courts should interpret it to allow the greatest ability for voters to vote and candidates to run.[75] 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.[76] While it seemed that this case was decided on relatively straightforward statutory grounds, it could also have been decided using the Democracy Canon. It was arguably ambiguous what "assisting" voters meant, but it seemed clear that the way to allow for the greatest effectuation of voter intent was to permit poll workers to help voters spell the name "Murkowski." The Democracy Canon thus would require a broad reading of the word "assist."

The canon is also useful in cases involving candidate eligibility to run for office. Consider a simple, recent example: a candidate who had served part of a term, followed by two full terms, who wanted to run for a third full term in the upcoming election.[77] The question raised was whether, in understanding the term limits statute, which limited officeholders to three consecutive terms, part of a "term" counted as having served a previous "term."[78] If it did, then the candidate could not run, because he would have

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72. Hasen, *supra* note 6, at 71 . The Democracy Canon is not listed in William Eskridge's list of canons of statutory construction in WILLIAM ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, app'x. 3 (1994) ("The Rehnquist Court's Canons of Statutory Construction").

73. *See* Hasen, *Rahm*, *supra* note 10; Hasen, *Alaska*, *supra* note 10.

74. *See* Hasen, *supra* note 6, at 75–83.

75. *See id.* (describing the history of the Democracy Canon and its role in both state and federal courts).

76. Order at 2, Alaska, Div. of Elections v. Alaska Democratic Party, No. S-14054 (Alaska Oct. 29, 2010).

77. Municipality of Anchorage v. Mjos, 179 P.3d 941, 942–43 (Alaska 2008).

78. *Id.* at 943.

served three terms.[79] 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, in order to give voters the ultimate say on whether the candidate should be able to represent them.[80]

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)[81] or simply removing barriers to candidate entry. Democracy means that the people rule, and if statutes can be read in a way that *lets* the people make the choices—by having their votes counted, and by letting them choose the candidates—then this is the reading we should prefer. This way, the people—not the courts, and not the legislature—are given the final say in an election.

Moreover—and this is an advantage Hasen touts—the Democracy Canon also has a plausible claim to *neutrality* in deciding cases.[82] As this Article emphasizes, a key problem with judicial intervention in election law cases is that the deciding court usually favors one 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*,[83] which still lingers over the Supreme Court, and exists as a challenge to its legitimacy.[84] 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.[85] The court is able to present itself as a defender of the people's right to vote and to select candidates, not a defender of one party's rights over the other. The winner in the early Murkowski case was the voter;[86] likewise in the term-limits litigation described above. In those instances, the voters were given a choice whether to elect the candidate or not.[87] That choice was not taken away from them by the court.

B. *The Canon: Some Initial Skepticism about Applications*

Professor Christopher Elmendorf, in a wide-ranging and provocative article, has challenged Hasen's claim that the Democracy Canon is indeed nonpartisan and neutral.[88] Elmendorf argues that the Democracy Canon

79. *Id.* at 942–43.
80. *Id.* at 943 n.1.
81. Hasen, *Alaska*, *supra* note 10.
82. *See* Hasen, *supra* note 6, at 77.
83. 531 U.S. 98 (2000).
84. *See* McConnell, *supra* note 1, at 103–04; *see also* ACKERMAN, *supra* note 4.
85. *Mjos*, 179 P.3d at 943 n.1.
86. *See* Miller v. Treadwell, 245 P.3d 867, 869 (Alaska 2010).
87. *See id.*
88. *See* Christopher S. Elmendorf, *Refining the Democracy Canon*, 95 CORNELL L. REV. 1051 (2010) (discussing the problems with the Democracy Canon).

takes sides on disputed issues of voter and candidate responsibility—and that the sides it takes are of a recognizably partisan cast.[89] 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 tend to favor Democratic candidates.

I am not unsympathetic to Elmendorf's concern. It will be addressed briefly later in this Section, and more thoroughly in the next.[90] But this will not be the main concern in what immediately follows. Rather, this Section will look closely at Hasen's popular writings that invoke the Democracy Canon in particular election contests and to test whether these are cases where the Canon *should* be used—that is, cases where the statute is genuinely ambiguous, and courts are in need of an interpretive crutch. It will also argue that in some cases—including the Murkowski and the Emanuel litigations—the Democracy Canon might be antidemocratic. But first, let us review the cases.

1. Murkowski

Let's begin with the controversy between Senator Lisa Murkowski and Joe Miller. Aside from the extent to which voters could be assisted in spelling the name of a write-in candidate,[91] a major component of that controversy was whether voters who did not spell Lisa Murkowski's name *exactly* would have their votes counted.[92] 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—that only the correctly spelled write-in ballot should count.[93] This is a controversial result; although I have previously argued that the court's decision to allow assistance with spelling was correct, I am less sure about its decision to count incorrectly spelled ballots.[94] Indeed, the considerations brought to bear about the law at issue having been made behind a veil of ignorance give us a strong (but perhaps not conclusive) reason to reject the court's conclusion.

But before turning to the substance of that debate, it is perhaps worth pausing to consider the possibility that the court need not have decided the correct reading of the statute liberal or conservative at all. By the time Miller's case 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

89. *Id.* at 1053–54.

90. *See infra* Part III.

91. *Miller*, 245 P.3d at 876.

92. *Id.* at 869.

93. *Id.*

94. *See* Flanders, *supra* note 55, at 28 (concluding that "the Alaska Supreme Court probably reached the correct result in *State, Division of Elections v. Alaska Democratic Party*"); *cf.* Flanders, *Next Act*, *supra* note 58.

to beat Murkowski.[95] Miller's attempt to convince the court and the Division of Elections to accept his standard for reading the ballots was bootless. 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 past it.

Alaska's 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.[96] 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.[97] Finally, the issue was of great public importance,[98] 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.[99] And there certainly was a case for not calling Miller's lawsuit moot, having to do with reasons with which this Article began. 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 unfolded previously, was free to rule without the pressure that their decision would decide who won or who lost. Mootness, in that situation, is actually a blessing, and an invitation to rule, not a disincentive to do so. Mootness means that the case can be decided in a largely apolitical vacuum, to the 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 at 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 is moot, in addition to its being an important legal issue: because nothing rides on the outcome, the court is freed (at least somewhat) from the risk of appearing to be a political court.

This does not mean, however, that the court should be free to make the *wrong* decision. A decision to rule on a case that could be moot shifts the

95. Miller v. Campbell, No. 1JU-10-1007-CI, 2010 WL 5072024, at *13 (Alaska Super. Ct. Dec. 10, 2010).

96. *Id.*

97. *Id*.

98. *Id*. at *13–14.

99. *See* Miller v. Treadwell, 245 P.3d 867, 869–70 (Alaska 2010).

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.

The issue in the Murkowski case was the proper interpretation of the statute regulating write-in ballots.[100] The language at issue was a little confusing, although ultimately 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.[101]

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.[102] At the very least, Miller argued, the *last* name had to be spelled correctly.[103] Of course, Lisa Murkowski's name is not the easiest to spell, so there were ballots that spelled it wrong.[104] There were also ballots that had information in *addition* to Lisa Murkowski (such as "Lisa Murkowski, Republican"), which Miller also sought to challenge.[105]

This is at least a plausible reading of the statute. It is also plausible—likely, even—that the statue, like many statutes, is simply a poorly drafted one. But we note that the result of Miller's plausible reading is that some voters would be disenfranchised, namely, those whose intent was clearly to vote for Murkowski but who nonetheless got her name wrong on the write-in ballot. (Miller's argument that some voters may have deliberately misspelled Murkowski as a way of protesting seems specious.)[106]

Nor is the result in this case entirely absurd, even though it might have disagreeable consequences. There is a need for precision and finality in elections, and that is secured by having a hard and fast rule about which 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

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100. *Id.* at 874–77.

101. ALASKA STAT. § 15.15.360(a)(11) (2010).

102. *Miller*, 245 P.3d at 869–70.

103. *Id.*

104. *Id.* at 872.

105. *Id.*; *see also* Sean Cockerham, *98% of Write-In Votes Go to Murkowski*, ALASKA DAILY NEWS (Nov. 10, 2010), *available at* http://www.adn.com/2010/11/10/1548282/senator-leading-as-write-ins-counted.html (listing Miller's challenges to write-in ballots).

106. *Id.* at 869; *see also Miller: We Can Assume All Poor Spellers Support Me*, TPM (Nov. 9, 2010), *available at* http://talkingpointsmemo.com/archives/2010/11/miller_poor_spellers_all_support_me.php ("But Miller's lawyer has *another* argument. Namely, that ballots with mispellings [sic] of Murkowski's name should be interpreted not as votes *for* her but rather as protest votes *against* her.").

can then simply throw out the ballots that do not fit these criteria 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 he misses a deadline, or fails to follow the rules, etc. And many rules, even though they are not perfect or the ones for which we might ideally wish, have sufficient rationales. Such was the case with the statute at play in this part of the Murkowski litigation.[107]

The Alaska Supreme Court did not, however, take this view.[108] It began its analysis not with a discussion of principles of statutory interpretation, but rather with a several-page discussion of the principles underlying the Democracy Canon.[109] Citing numerous cases, the court emphasized its traditional commitment to enfranchising voters and to giving effect, when possible, to voter intent.[110] The right to vote is fundamental, the court said, and should not be taken away due to "mere mistake."[111] This starting point is significant. It shows that the court had, in a way, already decided to take the side of the voter in interpreting the statute.[112]

But there are at least two problems with the court's stance. The first is a simple point of statutory construction. The Democracy Canon, like all canons, is an *aid* to statutory construction, not a substitute for it. As such, 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 that 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 was ambiguous is revealing. It seemed to leapfrog over the possibility that the statute was *clear* in its meaning. The court, instead, focused on the bad result of the statute.[113] But some statues will simply have bad results, and it is not the case that the

107. ALASKA STAT. § 15.15.360(a)(11) (2010). *See also* Flanders, *Next Act*, *supra* note 58.

108. *Miller*, 245 P.3d at 869.

109. *Id*. at 868–69. The court did not explicitly use the phrase "the Democracy Canon."

110. *Id*. at 869.

111. *Id.*

112 In correspondence, Rick Hasen has emphasized that the Alaska court had traditionally used the "Democracy Canon" and for it to *not* use it in this case would be to depart from this precedent (precedent of which the legislature had notice). This is a fair point, but I am not sure I am convinced. First, this assumes that the legislature knew that the statute it was drafting *might not* be clear, and that if it was not clear, it could rely on the court to read it democratically rather than strictly. Second, although the Alaska Courts have decided cases using versions of the Democracy Canon in the past, it is not clear that it was obvious that the court would *always* use the canon, so much so that the legislature could reasonably rely on the court to use it in every instance.

113. *Id.*

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.[114] 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. Of course, we certainly can imagine a statute that forgives such mistakes.[115] But such was not the case with the Alaska statute. Concededly, 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 is 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.[116] 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 case of 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. When pressed, one could find ambiguity in the statute.[117] 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 to count misspelled ballots seems eminently contestable, which is most worrisome. The court stepped into a controversy that was, technically, moot, and gave a very broad reading of the election statute, one that seems to conflict with a straightforward reading of the statute. My sense is that the court not only appeared to be, but was in fact, non-neutral. Its non-neutrality might be on the side of the voter, and not of any particular party; that certainly seems plausible. In some cases, such non-neutrality might be warranted, in order to correct a bias inherent in the legislation. But such non-neutrality is *especially* unwelcome here, where the rule is one that has been made behind a veil of

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114. *Id.* (citing Carr v. Thomas, 586 P.2d 622 (Alaska 1978); Edgmon v. State, Office of Lieutenant Governor, Div. of Elections, 152 P.3d 1154 (Alaska 2007)); *see also* State of Alaska, Div. of Elections v. Alaska Democratic Party, Case No. S-14054 (Alaska Oct. 29, 2010). Ed Foley has also recently pointed to this distinction, in the context of the Al Franken–Norm Coleman election dispute. Edward B. Foley, *How Fair Can Be Faster: The Lessons of* Coleman v. Franken, 10 ELECTION L.J. 187, 219–22 (2011). I thank Rick Hasen for the reference.

115. *See id.* at 870–71 (citing 42 U.S.C. § 1973ff–2(c)(3) (2006)).

116 *But see* Justin Levitt, *Fault and the Murkowski Voter: A Reply to Flanders*, 28 ALASKA L. REV. 41 (2011).

117. *Id.* at 869.

ignorance.[118]

2. Emanuel

The Alaska Supreme Court seemed clear in its preference for the principle of voter enfranchisement over the wording of the statute.[119] It did not pause to consider whether the statute might have a plain meaning, rather than an ambiguous one, and it did not consider whether the Democracy Canon should be read differently in cases where the fault lay with the *voter*, rather than with the state. The court's decision in the Emanuel litigation is harder, and closer, for a variety of reasons (not all of which are pertinent to the themes of this Article). The decision involved an initial question of deference to the Election Board's finding that Emanuel was indeed a resident of Chicago.[120] There was also an extended debate in the two courts that heard the Emanuel matter over the correct reading (and continued relevance) of Illinois case law on the definition of "residency."[121] This Subsection will largely abstract from these questions, so what it says about the Emanuel case will be a little more tentative. Nonetheless, it will conclude with a point similar to the one made about the Murkowski case. The statute in question may be susceptible to a plain-meaning interpretation, even though that plain meaning might be one that we could reject on policy grounds. 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 that, revealingly, the Illinois Supreme Court does not get to until the ninth page of its opinion.[122] The statute 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 . . . ."[123]

The issue—to revisit one of the factual scenarios with which we began—was whether Rahm Emanuel, who had left Chicago to live in Washington, D.C., to work as President Barack Obama's chief of staff, was still a "resident" of Chicago.[124] He had retained a house in Chicago, which he had rented out, and he said he intended to move back to Chicago after serving in D.C.; but could it be said that he had been *residing* in Chicago

118 At the very least, we have competing presumptions: one that favors the voter, and another that favors laws that are passed behind a veil of ignorance.

119. *Id.*

120. Maksym v. Bd. of Election Comm'rs, 950 N.E.2d 1051, 1053 (Ill. 2011).

121. *Id.* at 1054–57.

122. *Id.* at 1059–60 (quoting 65 ILL. COMP. STAT. 5/3.1–10–5(a) (West 2008)).

123. *Id.*

124. *Id.* at 1053–54.

for the time he was gone?[125] The question, in short, was whether "reside" meant physically to be present, or merely to have property and the intention to reside.[126]

The Illinois Supreme Court interpreted the statute to mean that physical presence of some time was required to *establish* residency, but it was not the case that after establishing residency, one had to be physically present.[127] It was enough that one had no intention of abandoning one's residence in the city; that was all "intent" to reside meant.[128] The court further buttressed its analysis by questioning whether, if physical presence were the standard for residency, it would lead to all sorts of odd results.[129] Would a person who traveled regularly to Florida each winter for a month lose his status as "resident"?[130] Where would we draw the line?

But it is unclear 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 intending? Could a person be gone from the city for ten years, always meaning to return but never quite being able to do so, 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 recently lived there. A person who can be a resident merely by owning property in the area and having a vague intention to return—at some point in the future—would not necessarily be a good candidate. It is not crazy to think that this is sound policy, or at least not laughable. And the idea that something like *regular* physical presence—which could include vacations—is an impossible standard to define seems far-fetched. Finally, a claim made by the Illinois Supreme Court—that interpreting residency to mean physical presence for candidates would create an asymmetry between voters and candidates[131]—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 lower standards for voter familiarity. Voters are not going to govern, candidates are, and governance requires familiarity with people and places of a type that takes time to acquire. Carpetbagging candidates might be worse than carpetbagging voters. Or at least a legislature could think so.

But the policy reasons are secondary to the main point here, which is that the statute, as written, admits of a rather plain reading, and it is *not* that residency is established merely by a domicile and intent to return. The

125. *Id.*
126. *Id.* at 1054–55.
127. *Id.* at 1064.
128. *Id.*
129. *Id.* at 1063.
130. *Id.*
131. *See id.* at 1063–64.

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 the policy reasons outlined above. And the statute certainly supports it; a candidate is not eligible unless he "*has resided*" in the municipality at least one year next preceding the election.[132] Certainly the ordinary, rather than legal, meaning of the sentence suggests the requirement that the person actually live in the place where he seeks to hold elective office. Of course, ordinary and legal meanings 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.[133] But even here, as the special concurrence points out, the case law was not at all clear, and it was possible to find support for the meaning that the circuit court gave to "residency," that is, actual physical presence.[134] 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 would have been to interpret "residency" to mean actual physical presence.[135]

The Illinois Supreme Court, in overturning the circuit court's decision,[136] did not rely on the Democracy Canon. But in an editorial published before the court's decision, Hasen wrote that the court clearly could have used the canon in reaching its conclusion.[137] Hasen strongly disagreed with the circuit court, writing that if the decision were to stand, the biggest losers would be the voters of Chicago.[138] In his op-ed, Hasen rehearsed the arguments that the Illinois Supreme Court would later adopt: that interpreting residency to mean physical presence is "overly stingy," that it would create an asymmetry between candidates and voters, and that the circuit court's reading of precedent was wrong.[139] But even if these arguments are not decisive, Hasen seemed to suggest that a larger principle should govern: let the voters decide whether Emanuel does not have the experience or the familiarity, that he is a "carpetbagger."[140] Give *them* the choice of candidates; do not take this away from them. The question of residency is a technicality, Hasen concluded, and the voters should not be denied their choice of candidate based on a technicality.[141]

This is the argument from the Democracy Canon, and even if it is not 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

132. *Id.* at 1059–60.
133. *Id.* at 1060–64.
134. *Id.* at 1066–67.
135. *Id.*
136. *Id.* at 1066.
137. Hasen, *Rahm*, *supra* note 10.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*

can infer Hasen would endorse. We should not let something like a residency requirement, certainly not one of ambiguous meaning, stop a candidate from running. Politics certainly played a part as well (Emanuel is an imposing figure in both national and local politics and ultimately did win the mayoral election.). But the decision may also be thought of as neutral and democratic as well. The voters, and not the court, were given the last say. Democracy won.

C. *The Democracy Canon: An Internal Critique*

In the previous Sections, this Article argued that the case for using the Democracy Canon in the Murkowski and Emanuel cases, just as a matter of reading the relevant texts correctly, is a tough call.[142] 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 reread 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 is 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 should not.

There is a case to be made (and this Article has tried to make it) that in both the Murkowski and Emanuel 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 tiebreaker? This is clearly the direction that Hasen wants to go; that is, he would like the Democracy Canon to be the default position. But there are reasons to refrain from using the Democracy Canon, at least in certain circumstances. Those circumstances apply here.

1. Neutrality, Again

The Democracy Canon comes down clearly on the side of one value, and to that extent it can be considered 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 about spelling Murkowski's name correctly.[143] The court ruled that the better course would be to allow a ballot to be counted when voter intent

142. *See supra* Subsections III.B.1–2.

143. Miller v. Treadwell, 245 P.3d 867, 869–70 (Alaska 2010).

was clear. In the Emanuel case, allowing the voter to express his will took a somewhat different path. It was not about discerning the will of the voter for *this* candidate, but letting the voter have a choice of candidate.[144] If Emanuel could not run, it would mean that voters could not choose Emanuel; their will could not be expressed in terms of a vote for *this* candidate. So in both cases, the courts were backing a certain type of democratic value. Let the will of the voter 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 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 to discern 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 limitations 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.[145] 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—and the resulting refusal to count a voter's ballot or to allow a candidate 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 inevitably be errors in tabulation by election administrators;[146] 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 moral failings. We might speak of the fault of the voter, or of 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 a vote does not 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 there 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

144. Maksym v. Bd. of Election Comm'rs, 950 N.E.2d 1051, 1063–64 (Ill. 2011).

145. *See* Robert Post, *Between Democracy and Community: The Legal Constitution of Social Form*, *in* DEMOCRATIC COMMUNITY NOMOS XXXV 169–70 (John W. Chapman & Ian Shapiro eds., 1993).

146. *See* Flanders, *How (and Why) To Think About Voter Fraud*, *supra* note 47.

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 best to 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.[147]

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, when 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, 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 holds. 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 Emanuel elections were neutral in precisely this way, so in using the Democracy Canon, the courts were sinning against neutrality.[148] Because the rules for counting ballots (Murkowski) or for residency requirements (Emanuel) were made behind a veil of ignorance,[149] they could not help but be neutral in aim, in the way 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

147. 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 in fact be a partisan act. I suspect that the rules in both the Murkowski and Emanuel cases are *not* like this, that is, they are not rules that will reveal their partisanship over time.

148. *See supra* Subsections III.B.1–2.

149. *See supra* Subsections III.B.1–2.

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 a reading of the statute that allows more voters to vote. Even if the rule is non-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 consider 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. On the other hand, there is something that we might call *legislative* democracy, or the idea that 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 each other. 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, nonetheless, is still a form of democracy, because the legislators were put in place by the people to make decisions on their behalf. Further, at the limit, legislatures are still kept in check by elections, where the people can assess how well they have done on behalf of the people.

By rejecting neutral rules passed by legislatures, the courts in the Murkowski and Emanuel cases arguably sinned not merely against neutrality, but against legislative democracy. They 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 a court uses the Democracy Canon, it does not unambiguously support democracy—at least not when the rule in question is one that is neutral, one that we can see did not have the intent of limiting democracy.[150] The

150. *Cf.* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 203 (2008) (invalidating neutral law "'frustrates the intent of the elected representatives of the people'" (quoting Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329 (2006))).

framework established by the rules in the Murkowski and Emanuel 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 not only frustrates a previous legislative determination. It also prevents *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 of voter intent. If the conclusion of the Emanuel litigation had been that Emanuel could not run, the response surely would have been to change the residency rule to make it clearer, so that someone in Emanuel'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 Emanuel this time around, but next time, it may allow a Republican candidate to run, when otherwise he would have been prevented. Such is the nature of rules that are made in conditions that approximate a veil of ignorance. They can have unintended effects because we cannot know with certainty 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 appropriate 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 prioritizing a certain version of democracy above another. Better to let the problem with the statute—if there is a problem—be solved through the democratic process, and not by judicial fiat.

CONCLUSION

The Democracy Canon is a valuable tool of statutory construction, and Hasen has done important work in drawing attention to it. Still, it has its limits, which require us not so much to reject the canon as to be more careful about when we apply it. It does not fit all circumstances. In particular, it does not fit well with 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; courts

should not reinterpret them simply because they are bad rules. Indeed, when they do so, they go against not just neutrality, but also democracy.