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MORE ON VEILS: REPLY TO LEVITT AND MUELLER

Chad Flanders•

I thank Justin Levitt and Derek Mueller for their thoughtful replies to my article, which have helped me (at least) to understand my own position better. I also thank the *Florida Law Review* for giving me the opportunity to briefly respond to them. I can't (and probably couldn't) give detailed or persuasive answers to their questions; instead, I want to flag some issues that they bring up, and which deserve fuller consideration than I was able to give in my article.

1. *Veils, Thick and Thin*. Levitt makes an excellent point almost incidentally in his reply to my piece, which I want to leap on and exploit: the "veil of ignorance" isn't necessarily fixed to one level of "thickness" or "thinness." If we think that there are *more things* we should put "behind the veil of ignorance" (have a "thicker veil," as Levitt's title commends) then there is nothing in principle about my approach that says that, no, we cannot, or that political party affiliation is the *only thing* that we can put behind the veil. In this way, then, the veil is a generic modeling device, a way to think about the concept of neutrality when it comes to election rules and possibly other rules as well. But I hasten to add that "thicker" is not always better. Whether we want to put more things behind the veil will usually depend on two things (1) whether it is feasible to do so (that is, whether we can imagine many situations in which parties will be ignorant in ways that the veil requires) and (2) whether it is desirable (that is, whether think more things should be excluded from consideration when deliberating about election rules).¹

2. *The advantages of incumbency*. Levitt in particular, says that we should make the veil "thicker" with regards to incumbency. I tried to address this problem in my original article but I ended up mostly punting on it.² My "veil" focuses on the effect of partisanship in designing rules for elections: distrust those rules that were made when the people making them *knew* or even *intended* that they would favor one party (namely, their own) over the other. But Levitt asks about another self-dealing problem, and perhaps a more serious one. What about rules that favor the *people in power* over *newcomers*?

Certainly these are rules that are self-dealing in a similar way to that rule that favor *our party* can be self-dealing. Levitt cites my own

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1. I apply these two grounds to testing whether we should put "incumbency" behind a veil of ignorance in the next section.

2. Chad Flanders, *Election Law Behind a Veil of Ignorance*, 64 FL. L. REV. 1369, 1385 n. 65 (2012) [hereinafter *Veil*].

example of Alaska's rules for write-in ballots as an example of a possible incumbent-favoring rule. The rules may not favor one party over another (why think that one party will usually have harder-to-spell names?), but it might well favor the dominant two parties, that is, the parties already in power.³ Why not make the veil thicker, and put "incumbency" behind the veil as well?

I have two relatively untutored reactions to this. The first is about feasibility. If we were suspicious about rules that were passed intended to favor those in power, we'd have to be suspicious about nearly *all* rules governing elections. As Justice Scalia has written, the first instinct of power is to retain power,⁴ and so *most* things that legislatures do regarding their own power will be about (a) increasing it, (b) holding on to it, and (c) not losing it. Are most or all election laws presumptively non-neutral?

Nor I am sure we know what rules *really do* favor those in power, and this may be the more important point. Sometimes rules have unintended consequences, and those rules that incumbents pass to help themselves end up hurting them. So do we make a presumption against all rules that favor incumbents, or only those rules that actually help them, and how do we tell which ones those are? More to the point, how do *judges* tell this? (Consider: is there an obviously right answer as to whether campaign finance restrictions help incumbents or not?) By contrast, I suspect we can usually tell when rules are intended to help a particular party and when they will actually help that party.

The second reaction I have is about the desirability of a thicker, anti-incumbency "veil." Unlike partisanship, pro-incumbency rules might have something to say in their favor. That is, I think having some legislators be "entrenched" isn't necessarily a bad thing.⁵ Incumbency can bring expertise, experience, seniority, etc. A rotating coterie of young legislators may not be what we want. In short, I think we might have more to worry about with *excessive partisanship* in election law⁶ rather than *excessive incumbency* (although the two phenomena are probably not unrelated).

3. Interestingly, as Levitt notes, Lisa Murkowski was the incumbent in the Alaska case: and so the rules about write-in candidates had the chance to end up *hurting* her. But such a case (in incumbent running as a write-in) is surely the outlier.

4. *McConnell v. Fed. Elect'n Comm.*, 540 U.S. 93, 263 (2003) (Scalia, J., concurring and dissenting) ("The first instinct of power is the retention of power . . .").

5. For an elaboration of this point of view, see Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 667 (2002) (discussing advantages of "insider self-dealing").

6. For a book length examination of the problems of partisanship in election law, see RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* (2012).

3. *Metacanons*. Levitt suggests that the veil in my paper has no substantive content, and that it amounts, at best, to a canon about how to use a canon (namely, the "democracy canon"). This may be right and may sound rather modest, perhaps *too* modest.⁸ But Levitt's insight here might be expanded to a more general question about the use of interpretive canons: can there be rules about how to apply rules of interpretation?⁹ Or do they collapse into simply specifying (even modifying) the original rule? If it's the latter case, then there really aren't any metacanons, just different canons, in which case I have not proposed a metacanon, but only a revised democracy canon. There are deep questions here which may quickly lead us into the swamp of philosophical debates about following a rule.¹⁰

Let me gently step over that swamp, and simply say this about the democracy canons and perhaps metacanons more generally. When you have a canon, there can be a temptation to use that canon, whether this is the democracy canon, the rule of lenity, etc., etc., even when the statute is only possibly ambiguous. My piece is mainly a caution not to *overuse* the democracy canon, to not try to find ambiguity when we can find plain meaning just as easily.¹¹

After all, some ambiguities are deeper, and more problematic than other ambiguities. I think if you stare hard enough and long enough, most statutes can look ambiguous (this is what we often try to do as teachers: why can't we read the statute *this* way? Or that way? Or both ways at once?¹²). So my article may just serve as a caution to judges

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

8. As I elaborate in my response to Mueller, I do mean to defend a different kind of democracy (legislative or second-order democracy) than the kind the democracy canon is chiefly concerned with (participatory or popular democracy). Further, the veil of ignorance device itself is meant to represent a kind of neutrality that we should aspire to in election law; this is a substantive ideal as well.

9. See WILLIAM ESKRIDGE JR. & JOHN FEREJOHN, *THE REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 468 (2010) (discussion of some so-called "metacanons").

10. See generally, SAUL KRIPKE, *WITTGENSTEIN: ON RULES & PRIVATE LANGUAGE* ch. 2 (1982) (so-called "paradox of rule-following," involving the problem of following a rule when there are no rules about *how* to follow the rule).

11. I give another example of this when discussing Mueller's reply, below.

12. Levitt gives a virtuoso example of this in his reply. See Justin Levitt, *You're Gonna Need a Thicker Veil*, 65 Fla. L. Rev. F. I, 3 n.10 ("If a name 'appears' on the declaration of candidacy in printed Times New Roman font, does a write-in vote count when the name is written on the ballot in cursive? In blue ink? In all caps? In 'Last Name, First Name' order?").

Levitt also objects to my reading of the relevant statutes in the Emmanuel case, citing a statute about the rules governing residency for electors. *Id.* But there may be good reasons for having stricter residency requirements for candidates than voters. See Flanders, *Veil*, at 1396 ("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

and scholars: don't rush to use the democracy canon. It's not a one-size fits all remedy for election law cases. Sometimes it can be useful, and should be used, but other times we have pretty good reasons *not* to use it, and to try harder to figure out the "plain meaning."

4. *Term Limits and Democracy*. Mueller's reply¹³ focuses on term limits, and gives me a chance to revisit one of my favorite cases, a short Alaska opinion decided a few years ago, *Municipality of Anchorage v. Mjos*.¹⁴ In that case, Mjos had served half of a previous office holder's term and another two full terms. The question the case raised was, did a term limit statute that prevented someone from running for office after he had served "three consecutive terms" mean that Mjos couldn't run again? Mjos had served *part of a term* and a *two full terms*, but the statute didn't distinguish between the partial and full terms: it just said "consecutive terms."

In making its decision, the court employed (what else?) the democracy canon. Because it was ambiguous what "three consecutive terms" meant, the court said that Mjos should be allowed to run, to give (the court elaborated) the final decision to the voters as to whether Mjos deserved another term. "Statutes dealing with the right of voters to choose public officials and the right of citizens to aspire to and hold public office," the Alaska court quoted, "should receive a liberal construction in favor of assuring the right to exercise freedom of choice in selecting public officials and also the right to aspire to and hold public office."¹⁵ The term limit statute was found not to apply, and Mjos got a chance to run for another "term."

What Mueller helps us see is that "democracy" isn't just on one side of the ledger in cases like *Mjos*. It is not a matter between upholding the term limits *as against* the will of the people. This paints the term limits measure as something antithetical to the will of the people, but this is not the case *because the popular vote at elections is not the only way the will of the people can be expressed*. What's more, people can have preferences not just about actually voting, but also about what constraints voting should operate under. They might want to limit their choices in some cases.¹⁶ Mueller's reply helps us see the significance of an early line in the facts of *Mjos*, which we might otherwise disregard: "This term limit provision was added to the Municipal Charter *by popular vote* in 1990."¹⁷

voters. Or at least a legislature could think so.").

13. *Disfavored Candidates and the Democracy Canon* (manuscript).

14. 179P.3d941 (Alaska2008).

15. *Id.* at 943n. 1 (quoting 63C AMJUR2d *Public Officers and Employees* § 53 (1997)).

16. In other cases, the people might *not* want limit their choices. They might think (as I suggested in my response to Levitt *in ji-a*) that people should be able to hold multiple terms.

17. *Mjos*, 179 P.3d at 942 (emphasis added).

In short, voters have preferences, but they can also have preferences about how to exercise those preferences. So long as the limits on those preferences (such as term limits) are also arrived at by a recognizably democratic process, then we shouldn't reach for the democracy canon; that is, we should try to find ambiguity where there isn't any, or where we can reasonably find that there isn't. Here again, *Mjos* is an object lesson: the court relied on the democracy canon to find the term limit statute didn't apply, even though it conceded that interpreting the statute to apply was "logical and more consistent with established principles of statutory interpretation."¹⁸

This leads me back to one of the major conclusions of my original article. Maximizing voter choice, whether by letting more people run or by increasing participation, isn't the only value in cases like *Mjos*. Even more interestingly, it is not even the only *democratic* value.

18. *Id.* at 943.

