YOU’RE GONNA NEED A THICKER VEIL

Justin Levitt*

In his latest piece,1 Professor Chad Flanders again adds to our understanding of the central problem of election law: the hunt for means to distinguish electoral rules that are “fair” from those that are not. Legislators and administrators have the presumptive democratic legitimacy to create policy on our behalf. And yet the misdirected use of that power, intentionally or unintentionally, creates unusual danger in the electoral realm. Much ink has been spilled attempting to develop workable judicial approaches that leave the good and limit the bad.

Flanders’s contribution here is a proposal for statutory construction. He suggests that courts might well increase democratic legitimacy by favoring restrictive construction of electoral regulations developed “in conditions where neither party could know, ex ante, which rule would benefit its own candidates.”2 In contrast, statutes might be permissively construed, or struck down entirely, if they were not developed behind the “veil of ignorance.”3

There is much to commend Flanders’s instinct to treat regulation differently based on whether lopsided benefit to the regulators is apparent. My first thought is a friendly amendment: potential pathologies of incumbency require a substantially thicker veil than Flanders contemplates.

Flanders’s proposal is focused on partisan advantage.4 But the final math of Rs and Ds is not the only—or, perhaps, even primary—relevant metric for electoral regulation. Even if incumbents do not know whether a particular rule will likely benefit Democrats or Republicans, they may still know that it benefits incumbent candidates or privileges existing voters (who comprise the electorate yielding the current incumbents). Even without obvious partisan effects, such a rule may still do democratic damage.

Consider a statute prohibiting anyone who did not vote in 2012 from casting a ballot for the next 50 years. The particular partisan leanings of newer generations of excluded voters may not be apparent. But the veil

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2. *Id.* at 1369.

3. *See id.* at 1369, 1373, 1377–78.

4. I do not mean to disparage the importance of a deeper understanding of partisan advantage, even if it is not the most important metric for understanding election laws. Indeed, some of my own recent work investigates, in more detail, Flanders’s useful distinction between partisan effect and partisan intent. *See id.* at 1374; Justin Levitt, *The Partisanship Spectrum* ## (Name of Sponsoring Organization, Working Paper No. #, year) (on file with author).
of partisan ignorance would not keep incumbents from recognizing that they prefer their current electorate to the vicissitudes of an uncertain future.

The Constitution likely prevents extreme examples like the above. But the stark example is designed to question whether an absence of known partisan effect is really the most appropriate lodestar. Lesser rules—for example, notarization in quadruplicate of any new registration form—might be designed with similar aims, and without provoking constitutional invalidation. Likewise, laws working to the detriment of insurgent candidates may be approved by Republicans and Democrats alike, but are neither “neutral” nor “ignorant” because of that fact.

One of Flanders’s primary examples in this piece may well be such a partisan-neutral but incumbent-friendly law: Alaska’s statute requiring precision in the articulation of a write-in preference. I agree that the partisan repercussions of such a statute are not likely predictable. However, it is quite predictable that, Senator Lisa Murkowski’s unusual candidacy aside, incumbents will generally benefit more from any incremental restriction on votes for serious write-in candidates. A veil may shroud the precise partisan impact of Alaska’s law, but it does not obscure the law’s likely incumbent-friendly consequences. Without a normative defense of incumbent-entrenching regulation, it is not clear why the veil should screen only partisanship.

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My second reaction to the piece is more fundamental, concerning not the extent of the veil, but its utility as a canon of statutory construction. Most such canons— theoretically—operate only in the event of ambiguity. And accordingly, Flanders seems to believe that clear text should govern. This cuts both ways for the veil: a clear rule developed behind the veil of ignorance must be followed despite unwanted impact, but so must a clear rule not developed behind the veil of ignorance.

However, if the veil rule operates only in the event of ambiguity, it is difficult to understand why a more restrictive construction is better than a more permissive one. Rick Hasen’s Democracy Canon, a primary foil throughout the piece, is a substantive canon: when in doubt, construe ambiguous text in a manner favoring the franchise. In contrast, Flanders’s veil has no inherent substantive content. When it doubt, it seems to say, follow the wishes of the legislature acting behind a veil of

5. In a footnote, Flanders acknowledges—and then largely ducks—the related question about laws working to the predictable detriment of minor parties. See Flanders, supra note 1, at 1385 n.65.

6. Id. at 1393.

The trouble is that when statutes are ambiguous, discerning the legislative intent is precisely the problem. There is no ex ante reason to assume that a “strict” construction best effectuates real legislative intent.

Underlying Flanders’s dichotomy between restrictive and permissive interpretations, however, may be a more nuanced second-order approach. Consider a reconstructed “veil” rule, expanding on the suggestion in the paper. Faced with ambiguous text, a court should best attempt to effectuate the real purposes of an enacting legislature operating behind a robust veil of ignorance. For ambiguous text crafted by legislatures not operating behind a robust veil, however, courts should not feel constrained to look primarily to real legislative intent (which might be tainted by anticipated partisan or incumbent-ignorance. The trouble is that when statutes are ambiguous, discerning the legislative intent is precisely the problem. There is no ex ante reason to assume that a “strict” construction best effectuates real legislative intent.

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entrenching aims), but should instead indulge more substantive tools like the Democracy Canon. That is, a reconstructed veil rule might offer instructions to courts operating in the presence of ambiguity about when they should operate as purposivists, and when it might be appropriate to depart from purposivist statutory interpretation to favor other normative goals.

The reading above amounts to an interpretive rule guiding the circumstances for deploying another interpretive rule: a canon concerning the use of canons. To be clear, I don’t know whether Professor Flanders would support such a structure or not; I am not even sure whether I would support such a thing. There are interesting questions surrounding the propriety and utility of such rules, stretching to the heart of the normative foundations behind interpretive principles, far beyond the scope of this short response. But the simple fact that Flanders’s veil rule provides inspiration for such questions is reason enough to be indebted for his latest piece.

10. I hope to develop these questions further. See Justin Levitt, Second-Order Statutory Interpretation ## (Name of Sponsoring Organization, Working Paper No. #, year) (on file with author).