DISFAVORED CANDIDATES AND THE DEMOCRACY CANON

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"Democracy" is a chameleon-like word, used almost everywhere and meaning almost anything. Chad Flanders's thoughtful article in part disciplines the meaning of "democracy" when it draws an important distinction between *popular* democracy and *legislative* democracy when interpreting election statutes and evaluating the applicability of the Democracy Canon.[1] Indeed, in statutory interpretation, we often justify canons by democratic values, particularly the accountability of the representatives who promulgate those statutes.[2]

When the legislature enacts a law neutral in aim (or "behind a veil of ignorance"), Flanders argues, those rules should be read strictly, "in accord with what is a reasonable plain-meaning interpretation of them."[3] Assuming we have found a neutral law (admittedly, not an easy proposition),[4] Flanders's point is most salient given that the laws he highlights—Alaska's write-in statute and Illinois's residency statute—are expressly designed to channel *candidates* into preferred ballot positions, or to limit the pool of eligible *candidates*.

One might read too much into this candidate-voter distinction, but the dichotomy is too obvious in these examples not to make it explicit. And it is in these examples that Flanders's clarification does its best work. The proposal brings precision to the Democracy Canon and gives the legislature the opportunity to have its neutral, candidate-specific legislation apply. Once we have moved from voter rights to candidate eligibility, Flanders's valuable modification gives the legislature the proper deference owed.

Rick Hasen acknowledges that "structural barriers to voting"—that is, laws primarily affecting *voters*—have been the focus of Equal Protection litigation.[5] Indeed, these are precisely the areas that Flanders identifies as "an imperfect, or only partial, veil": photo identification laws, polling place hours, and voter access issues.[6] In those instances, perhaps the Democracy Canon has its best claim: when an eligible

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1. Chad Flanders, *Election Law Behind a Veil of Ignorance*, 64 FLA. L. REV. 1369, 1401 (2012).

2. William Eskridge, *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 578–79 (2013).

3. Flanders, *supra* note 1, at 1402.

4. *See* Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. ST. L.J. 1237, 1266–67 (2012) (describing states' often partisan efforts to change the rules of appointing electors to the Electoral College and the high level of uncertainty as to whether the changes in rules would yield the expected partisan results).

5. *See* Rick Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 98 (2009).

6. Flanders, *supra* note 1, at 1382.

voter's ability to cast a valid ballot is in question, courts should interpret the statute in favor of the voter.[7]

But, again, it is in laws directed toward candidates, not voters, where Flanders's proposal carries the greatest weight. Consider a term limits statute. It prevents candidates who have served a certain number of years from appearing on the ballot or winning election. And it is, effectively, a limitation on voters. It prevents voters in the future from voting for someone who has served a number of years or terms of office.

Should the Democracy Canon prevail when a court is interpreting a term limits statute, it effectively undermines the very purpose of that statute. The term limits statute prevents voters from voting on certain disfavored candidates; the Democracy Canon invites the voters to act as the final arbiters if the term limits statute is in question.[8]

We recognize that reasonable qualifications for candidates or limitations on ballot access are usually legitimate, even if debatable. Term limits for President[9] and for many state offices[10] exist with little controversy. These rules—and rules like them enacted by state legislatures or by popular vote in the states—are deliberately written to constrain future voters' behavior and channel them toward a limited pool of candidates.

Indeed, Illinois's residency statute has eminently defensible policy concerns—it prefers candidates who have been residents for a period of time over more recent residents.[11] The federal Constitution has basic citizenship and residency restrictions for all elected offices, which were extensively defended at the Founding.[12]

So why would a court construe a statute—and perhaps not even an ambiguous statute—to allow a candidate who probably flunks a plain reading of the statute's residency requirement to appear on the ballot? As Flanders aptly notes, one cannot tell in advance which candidate—much less which party, or party faction—would benefit from this rule. Given a rule both neutral in aim and legitimate in scope, it seems

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7. Hasen, *supra* note 5, at 76 (citing Owens v. State ex rel. Jennett, 64 Tex. 500, 1885 WL 7221, at *7 (1885) (specifically discussing the rights of the citizen exercising the right to vote)).

8. Flanders, *supra* note 1, at 1388–89.

9. U.S. CONST. amend. XXII.

10. *See generally The Term Limited States*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/legislatures-elections/legisdata/chart-of-term-limits-states.aspx (last visited Apr. 8, 2013).

11. Flanders, *supra* note 1, at 1396.

12. *See, e.g.*, U.S. CONST. art. I, § 2, cl. 2 (qualifications for members of the House); U.S. CONST. art. I, § 3, cl. 3 (Senate); U.S. CONST. art. II, § 1, cl. 5 (President); *see also* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1473 (discussion basis for Natural-Born Citizen Clause).

counterproductive to construe the statute in the tortuous fashion that the Democracy Canon ordinarily demands.

And Alaska prefers candidates whose names appear on the ballot over those whose names are written in. Its onerous write-on provisions reflect a preference for candidates who win primaries for registered parties. And it is certainly a defensible position, as the Supreme Court has rejected the proposition that the Constitution demands recognition of write-in candidates.[13]

Admittedly, one could argue that how one administers write-in votes at the polling place could be interpreted as a "structural barrier to voting." But the Court has framed write-in disputes as primarily disputes about candidate ballot access, and as long as there is adequate ballot access—and here, Lisa Murkowski certainly had a fair opportunity in a primary election—there is little constitutional problem.[14] If a candidate fails to get on the ballot in the means preferred by the state, then the candidate—and, later, the voter—is simply out of luck.

States can disfavor candidates who fail legitimate qualifications or reasonable ballot access rules. And those rules are often neutral in aim. In those circumstances, Flanders brings an important modification to the Democracy Canon so that it does not undermine legislative democracy.

13. *Burdick v. Takushi*, 504 U.S. 428, 441–42 (1992).
14. *Id.* at 438–39.