

# SPELLING MURKOWSKI: THE NEXT ACT

## A REPLY TO FISHKIN AND LEVITT

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*State v. Alaska Democratic Party*,<sup>1</sup> the Alaska Supreme Court case that is the focus of this symposium, is in many ways a quintessentially “minimalist” opinion.<sup>2</sup> It dealt closely with the facts of the case before it, and left many larger issues undecided. It did not try to catalogue exhaustively the many reasons why voters might need assistance in voting, or to distinguish those reasons that were legitimate and those that were not. Instead, it was deliberately vague on those conditions or circumstances which might lead voters to ask for and receive assistance. Further, the court did not even approach a general definition of “assistance,” or indicate what types of assistance might be generally permissible under the Division of Election’s broad statutory mandate to “assist the voter.” It merely allowed the use of a list of write-in candidates when “tailored to address a voter’s request for specific assistance,”<sup>3</sup> leaving relatively vague what that “tailoring” would need to look like. Even the ultimate grounds of the decision were narrow. Although the court referenced its previous cases “regarding the importance of facilitating voter intent,”<sup>4</sup> the court did not seem to rely on any special canons or presumptions in its opinion. Instead, it treated the case as a relatively straightforward one of a statute trumping a regulation.

My original Article tried to set out the issues the court was faced with in the Murkowski litigation, and to offer a preliminary defense of the particular conclusions it reached. I think the court reached the right

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1. *State, Div. of Elections v. Alaska Democratic Party*, No S-14054, slip. op. (Alaska Oct. 29, 2010).

2. *See generally*, CASS SUNSTEIN, ONE CASE AT A TIME (1999).

3. *Id.* at 6.

4. *Id.* at 3.

conclusions, and given the need for a quick decision, it not only did not need to reach any broader conclusions about voter assistance, it probably could not have. But legal academics operate under no similar time constraints, and indeed they have an obligation to explore the larger, theoretical implications of judicial decisions: to be sure, today's court may say  $x$ , but what implications does this have for future cases  $y$  and  $z$ ? Some questions raised in my article were subsequently dealt with by the court's decision in *Miller v. Treadwell*,<sup>5</sup> where the court again took the side of assisting the voter, this time *after* the election, by counting ballots that did not perfectly spell Murkowki's name. But that decision in many ways raises still further questions.

Both Joey Fishkin's and Justin Levitt's responses deal precisely—and thoughtfully—with the deeper questions raised by the Murkowski litigation. They both wonder, in various ways, what the right way to think about voter assistance should be. But they approach the issue from very different angles. Fishkin focuses on the state's obligation to assist voters: to what extent, and in what ways, is the *state* obligated to help voters vote? Levitt approaches the question of voter assistance from nearly the opposite angle: what responsibilities do *voters* have in making sure that their vote counts, and when are they properly considered “at fault” when their vote is cast incorrectly? In my brief response, I want to raise a few questions of my own about Fishkin's and Levitt's analysis of the right to vote.

## I. IS VOTING A POSITIVE RIGHT?

Fishkin takes the modest holding of the Alaska Supreme Court in the first Murkowski case as disclosing a deep and important truth about the right to vote: assistance in voting is not just an occasional thing, reserved to certain people at certain times; rather we *all* need help in voting from the beginning. The right to vote requires the state to actually set up institutions that enable people to vote. Without these institutions, there would be no vote. “The state must set up polling places, train workers, buy machines, print ballots,”<sup>6</sup> he writes. For this reason, Fishkin characterizes the right to vote as a positive right.

I am reluctant to go so far as to characterize, with Fishkin, the right to vote as an “unambiguously positive right,”<sup>7</sup> at least without some

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5. 245 P.3d 867 (Alaska 2010). I address the *Miller* decision briefly at the conclusion of this essay.

6. Joey Fishkin, *Voting as a Positive Right: A Reply to Flanders*, 28 ALASKA L. REV. 31 (2011).

7. *Id.* at 106.

further argument. I think of voting as an ambiguously positive right, in the following way. It is true that the right to vote has certain institutional preconditions—there must be, as he says, polls and poll workers—but once these preconditions are met, the right to vote looks more like a negative right, a right not to be excluded from the franchise for arbitrary reasons.<sup>8</sup> And indeed, as Fishkin recounts, this is the way the right to vote has historically been characterized.<sup>9</sup>

Consider the familiar story:<sup>10</sup> We have the franchise available on the state and federal levels, but women, or blacks, or the poor are arbitrarily excluded or barriers are put up in the way of their right to vote. In order to fully realize the right to vote for *all*, we must eliminate these barriers to voting. This is a matter not of giving assistance (positive) but of eliminating arbitrary barriers to the right to vote (negative). Or, if we still want to capture the nature of the institutional preconditions to the right to vote, we might put the right to vote as a right to *equal access* to the franchise.<sup>11</sup> Equal access is not an across the board entitlement to have state assistance in all respects, to make sure that voters vote. It is just the right against arbitrary and unjust barriers being put up in the way of voting, that prevent access to the ballot.

A fascinating Alaska case from the 1990s helps make this distinction clear. During the 1994 election in Alaska, the North Slope Borough provided voters who could show that they voted in the election vouchers that would pay for the gas they (supposedly) spent in getting to the polls.<sup>12</sup> The Borough attempted to justify the program by saying that the expense of transportation to polling places might deter residents from voting. As the opinion explained, “The Borough’s limited road system makes it difficult for residents in remote areas to reach voting facilities. In some cases, snow-mobile or all-terrain vehicles are the only available means of transportation.”<sup>13</sup> Fuel, the court continued, is “especially expensive in the Borough.”<sup>14</sup>

The question the Alaska Supreme Court faced in *Danserau v. Ulmer* was whether such a scheme violated state and federal law on inducing

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8. The right to marry might also be construed along similar lines. The state supports the institution, but once it has set up the institution, it cannot deny access to it arbitrarily. See Nelson Tebbe and Deborah A. Widiss, *Equal Access and the Right To Marry*, 158 U. PENN. L. REV. 1375 (2010).

9. Fishkin, *supra* note 6, at 35.

10. For a longer version of this story, see Chad Flanders, *How to Think About Voter Fraud (And Why)*, 41 CREIGHTON L. REV. 93, 110–111 (2009).

11. I take this term from Tebbe and Widiss, *supra* note 8.

12. *Danserau v. Ulber*, 903 P.3d 555 (Alaska 1995). There was some question whether voters were getting *over-reimbursed* for the cost of their gas.

13. *Id.* at 562.

14. *Id.*

voters to vote for a certain candidate by pecuniary means (it held that it did not).<sup>15</sup> But my purpose in raising the example is to make a narrower point: I do not think that we would think that such a scheme was *mandatory* in order to fulfill the Borough residents' right to vote. Rather, we might think it simply a *nice thing* that the Borough might permissibly do for its residents. Why do we think this? It is because the Borough is not preventing voters from voting by not giving them gas vouchers. No one's right to vote is violated because gas is expensive, even prohibitively expensive. But imagine if the state put up actual roadblocks preventing Borough residents from getting to the polls; *this* presumably would be an obvious violation of the right to vote.<sup>16</sup>

The question then becomes in the Murkowski litigation whether assisting voters in spelling "Murkowski" is more like giving Borough residents gas, or more like removing roadblocks that prevent them from voting. This is a trickier question than it first appears. Once we depart from the easy cases (the outright exclusion of blacks and women from voting) it becomes harder to define exactly what equal access does require. Fishkin clearly wants to emphasize the blurriness of the line between removing hindrances to the right to vote and positive assistance, and he is right to do so. Still, I think we might draw at least some distinctions.

The disability cases, which the Alaska Supreme Court highlighted in its opinion,<sup>17</sup> seem the easiest to categorize. If a person could not remember Murkowski's name because of a stroke or other disability, and needed assistance in spelling her name correctly, then this seems more like providing equality of access to the disabled voter. It is on par with providing the blind voter assistance in voting. If we did not allow the blind voter assistance then it is not a case of merely not assisting the blind voter — we are instead putting up an obstacle to that voter. We are trying to create a system in which all voters are on a level playing field, and the state has the obligation to level the field so that disability does not matter. Helping the blind voter is not giving the blind voter a gas voucher; it is removing a roadblock.

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15. *Id.* at 572.

16. But what if the state refused to set up polling places that were anywhere near the North Slope? This would again suggest that the state was putting up road blocks, not merely refusing to assist voters. As I say later, the fact that there are close cases does not mean that there is no line to draw, and that all assistance is on a par.

17. *State v. Alaska Democratic Party*, at 4–5.

But when we move away from disability cases (and those like it<sup>18</sup>), the idea that we are removing roadblocks becomes harder to sustain. Those who cannot spell Murkowski's name not due to any disability, but simply because of forgetfulness or laziness or indifference seem not to be asking that a roadblock be removed, but are asking that they be given *extra* help, help that other voters are not receiving. They have equal access, but they want more than equal access—they want to be treated *speciallly* and not equally.<sup>19</sup> It is here that I want to say that if they fail to remember Murkowski's name, then it may be their fault and they should suffer the consequences. It may be a hard line to draw, and courts or legislatures may not want to draw it (we do not want poll workers guessing as to who has forgotten due to disability and who has forgotten due to laziness)—but this does not mean that there *isn't* a line there.

## II. BLAMING THE VOTER?

But this brings us squarely to the question which Levitt raises in his contribution to the symposium, which deals with the issue of voter fault. When voters fail to follow instructions to the letter, are we right to blame them and let them face the consequences?<sup>20</sup> Suppose, to take the Murkowski litigation as an example, a voter has been able to receive assistance in spelling Murkowski's name but fails to ask for it, and ends up misspelling Murkowski's name. Should the same voter be able to appeal, post-election, to a liberal standard in counting write-in ballots?

On the one hand, we might think that this voter is getting two bites at the apple. He gets one try to cast a valid write-in ballot on his own (but with assistance available from poll-workers), and if he fails, he gets a second try, this time relying on the mercy of the ballot-counters to correct his mistake. On the other hand, we may wonder what purpose it serves to punish the voter for his mistake even if he bears some (or all) of the responsibility for that mistake. Does the punishment of throwing out his vote match the severity of his crime, which is at worst laziness? If the voter intent is manifest in the ballot he's cast, we might conclude that there is little reason why we should ignore that intent, when such a weighty interest—the right to vote—hangs in the balance.

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18. Including, especially, those involving language barriers. *See id.* at 5 & n.10.

19. For a similar worry in the case of photo identification laws, see Flanders, *supra* note 10, at 142–45.

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

The problem is that elections need governing rules, and sometimes voters will fail to follow those rules. It would be practically impossible to have an *ad hoc* ruling every time a voter failed to follow one of the rules in an election, to see whether the violation was severe enough to warrant the disenfranchisement of the voter.<sup>21</sup> This need for rules that sometimes may not be observed is the perhaps darker side of Fishkin's point that the state must set up election institutions. As the Alaska Supreme Court has recognized "election laws will inevitably burden the right to vote."<sup>22</sup> Some voters will fail to carry those burdens, and the result will be that their votes will not be counted, and rightfully so.

For example, the Alaska court held in *Cissna v. Stout* that a voter who sent in his absentee ballot a day after the election could not have his vote counted in the election.<sup>23</sup> We can stipulate (as the court did) that the day-late ballot was perfectly clear about the voter's intent and even that the voter made a good-faith effort to be on time.<sup>24</sup> Still, the statutory language was straightforward and unambiguous in setting out a deadline, and the vote did not count.<sup>25</sup>

The language of voter *fault* may be too heavy to use in this context, and here I think Levitt is on to something. But when we consider cases like the forgetful absentee voter, I am moved in the direction of saying that sometimes voter error will have the consequence of voter disenfranchisement, and saying the voter is at "fault" is indeed proper. It is not as if we have set out to *punish* the voter. However, failure to follow the rules in some contexts will inevitably require disenfranchisement. This is the upshot of having rules. If the language of fault seems too fraught, we might instead think of voter "mistake" – but the consequence of either phrasing is the same: the voter at fault, or the voter who makes a mistake, will not have his vote counted.

But what mistakes should carry with them the penalty of a lost vote, and which mistakes should be forgiven and characterized as "mere mistakes" that should not disenfranchise voters?<sup>26</sup> We can set out clear cases on either side, with one side being occupied by the absent minded-absentee voter, and the other side being occupied by instances where

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21. Although some Alaska Supreme Court cases have this feel; see the dizzying number of challenges considered in *Fischer v. Stout*, 741 P.2d 217 (Alaska 1987).

22. *Sonneman v. State*, 969 P.2d 632 (Alaska 1998).

23. 931 P.2d 363 (Alaska 1996).

24. *Id.* at 370 (voter made "good faith effort to vote").

25. ALASKA STAT. §§15.20.203, 15.20.081(e) (2010).

26. See *Egdmon v. State*, Office of the Lieutenant Governor, Division of Elections, 152 P.3d 1154, 1157 (Alaska 2007) (the "voter should not be disenfranchised because of mere mistake, but [the voter's] intention should prevail").

*official* fault causes a ballot's not being tallied. The Alaska Supreme Court has made clear that when an election official's error results in a vote being not counted, this should not stand<sup>27</sup>—although even here apparently there are limits.<sup>28</sup>

Where does this leave the voter who misspells Murkowski even though assistance was available to him at the time he voted? There is a clear sense in which the voter is at fault—we cannot blame election officials for not *positively* inquiring of each voter whether he or she needs assistance. But not all voter faults should be treated equally. A stray ballot mark where the voter's intent is otherwise clear seems forgivable.<sup>29</sup> Indeed, "fault" in this context seems less about assigning individual blame than about assessing what the consequences would be of widespread tolerance of the particular failing. As the court said in *Cissna*, there are good public policy reasons (especially an interest the finality of election results<sup>30</sup>) to not let people mail in their absentee ballots any old time of their choosing.

I think to decide on the value of placing the burden on the voter to spell Murkowski correctly, we need to dwell more on two factors that Levitt considers only briefly: the cost of counting mistaken write-in ballots, not just in the Murkowski election, but in future elections, and also the language of the statute indicating how write-in ballots should be cast, if they are to be counted.<sup>31</sup> Both of these factors move us away from focusing on the fault of the *individual* voter, and more on the costs of allowing voter error to be excused, and on the rules of the game as the legislature has set them up. If the costs are high and the rules are clear and fair, then we may simply have to let the consequences of the mistake lie with the voter. If the costs are low and the rules are ambiguous, the case for excusing the voter becomes stronger.

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27. See, e.g., *Willis v. Thomas*, 600 P.2d 1079, 1087 (Alaska 1979) (errors "solely on the part of election officials" will not invalidate ballots). *Carr v. Thomas*, was also a case that involved election official error (which is why it may be misleading to cite it in cases where there is at least some fault on behalf of the voter, such as in the Murkowski cases). 586 P.2d 622 (1978).

28. In *Finkelstein v. Stout*, the Alaska Supreme Court invalidated thirty-two absentee ballots that were cast illegally, but due to official error. 774 P.2d 786, 792 (Alaska 1989). The court held that in some cases, where "the vote violates provisions deigned to insure the integrity of the electoral process," the state has an interest in rejecting the vote regardless of the source of the vote's illegality. *Id.*

29. See *Edgmon*, 152 P.3d at 1157.

30. Indeed, in *Cissna* the candidate had lost the election by one vote. It seems right that in that case an absentee ballot filed *after* election day should be thrown out. *Cissna*, 931 P.2d at 364.

31. See Levitt, *supra* note 20, at 44, 49.

In *Miller v. Treadwell*, the Alaska Supreme Court ruled in favor of liberally construing the statute regarding write-in ballots, so that if the voter intent was discernable from the ballot, the vote should count.<sup>32</sup> I am not sure this is the correct decision, although I cannot defend my suspicion here. Levitt brackets in his article the question of whether there were “valid reasons” for strictly construing the statute.<sup>33</sup> Those reasons might have been the statute itself and the clarity of its language,<sup>34</sup> and the absence of any evidence of bad legislative intent in requiring voters to spell correctly and exactly the name of the candidate.<sup>35</sup> The conclusion in *Miller* seems at the end of the day defensible; at the same time, it strikes me as a much closer call than the decision in the first Murkowski case.<sup>36</sup>

But the *Miller* decision did bring to a close the first round of the Murkowski write-in affair. It is now the legislature’s turn to revisit the statutes implicated in the litigation. This seems appropriate: the reasons I listed above—concerns with the cost of a certain rule, and the clarity or vagueness of the rule itself—are properly legislative concerns. With the first act over, it is now time for the Legislature (advised by the Division of Elections) to take center stage in the next act.<sup>37</sup>

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32. *Miller*, slip op. at 4.

33. Levitt, *supra* note 20, at 50.

34. The Alaska Supreme Court has adopted a “clear statement rule” regarding statutes that potentially disenfranchise voters. See *Carr v. Thomas*, 586 P.2d at 626-27 (voters not morally at fault cannot be deprived of a right to vote unless the legislature has clearly said so). But presumably—as with the case of the absentee ballot rule in *Cissna*—the clear statement can simply be the rule set down by the legislature in the first place. It need not be the case that the legislature has to *both* lay down a clear rule and say (in a separate sentence) that it really means it.

35. I expand on this later point in an unpublished article, *Veil of Ignorance Rules in Election Law* (2010) (unpublished manuscript) (draft on file with author).

36. A final point: even if all contested write-in votes were to have been thrown out, *Miller* still would have lost. This raises the question of whether the Alaska Supreme Court might have properly avoided reaching the issues of statutory interpretation at all.

37. The Lt. Governor released a report in early April 2011 recommending that the standard for write-in ballots should be voter intent. Several bills are currently pending in the Alaska legislature that would institute changes to counting write-in ballots. See Report Recommends Changes to State Election Laws, JUNEAU EMPIRE, Apr. 2, 2011, <http://juneauempire.com/state/2011-04-02/report-recommends-changes-state-election-laws>.