

EDWARD B. FOLEY

Moritz College of Law
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Columbus, Ohio 43210

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Current Employment

Moritz College of Law, Ohio State University

Director, *Election Law @ Moritz*, since April 2004, &

Robert M. Duncan/Jones Day Designated Professor of Law, since March 2003

Previously: Professor of Law, 1998-2003 (on leave, 1999-2000); Associate
Professor of Law, 1995-1998; Assistant Professor of Law, 1991-1995

RESEARCH AREAS: Election Law, including vote casting-and-counting rules, provisional voting
and post-election dispute procedures; also campaign finance,
including regulation of 527 groups, and redistricting reform

TEACHING AREAS: Election Law; Constitutional Law; First Amendment; Jurisprudence

Past Employment

State Solicitor, Office of the Ohio Attorney General, 1999-2000

Responsible for State's major appellate and constitutional litigation, including *Simmons-Harris v. Zelman* (Cleveland school voucher case).

Jenner & Block, Washington, D.C., 1989-1991

Associate attorney specializing in First Amendment litigation

United States Supreme Court, 1988-1989

Law clerk to Justice Harry A. Blackmun

Wilmer, Cutler & Pickering, Washington, D.C., 1987-1988

Associate attorney in firm's litigation department

United States Court of Appeals, D.C. Circuit, 1986-1987

Law clerk to Chief Judge Patricia M. Wald

Education

Columbia University School of Law, J.D., 1986

Harlan Fiske Stone Scholar, 1983-86

Robert Noxon Toppan Prize in Constitutional Law, 1985

Class of 1912 Prize in Contracts, 1984

Writing & Research Editor, *Columbia Law Review*, 1985-86

Yale College, B.A., magna cum laude, in History, 1983

Publications

Print:

The Future of Bush v. Gore?, 68 OHIO STATE L.J. ____ (forthcoming 2007)

Election Law and the Roberts Court: an Introduction, 68 OHIO STATE L.J. ____ (forthcoming 2007)

The Analysis and Mitigation of Election Errors: Theory, Practice, Policy, 18 STANFORD L. & POLICY REVIEW 350 (2007)

The Where and When of Voting, 6 ELECTION LAW JOURNAL __ (forthcoming 2007) (a review of John Fortier, ABSENTEE AND EARLY VOTING (2006))

The Legitimacy of Imperfect Elections: Optimality, Not Perfection, Should Be the Goal of Election Administration, in Andrew Rachlin (ed.), MAKING EVERY VOTE COUNT: FEDERAL ELECTION LEGISLATION IN THE STATES 97 (Princeton University 2006)

The Promise and Problems of Provisional Voting, 73 GWU L. Rev. 1193 (2005)

Tax Code Section 527 Groups Not an End-Run Around McCain-Feingold, 72 U.S. LAW WEEK 2403 (2004) [co-authored with Donald Tobin]

The "Major Purpose" Test: Distinguishing Between Election-Focused and Issue-Focused Groups, 31 NORTHERN KENTUCKY L. REV. 341 (2004)

Is Lawrence Still Good Law?, 65 OHIO STATE L.J. 1133 (2004)

Compelling Interests and How Best to Achieve Them: A Response to Bauer, 3 ELECTION LAW JOURNAL 13 (2004).

The Ultimate Line-Drawing Case, BNA MONEY & POLITICS REPORT, September 5, 2003.

"Narrow Tailoring" Is Not the Opposite of Overbreadth: Defending BCRA's Definition of "Electioneering Communications", 2 ELECTION LAW JOURNAL 457 (2003).

"Smith for Congress" and Its Equivalents: An Endorsement Test under Buckley and MCFL, 2 ELECTION LAW JOURNAL 3 (2003)

Learning (and Teaching) from Doing, 5 JOURNAL OF APPELLATE PRACTICE AND PROCESS 107 (2003)

Good Fences Make Good Neighbors: When Free Speech Conflicts with Other Constitutional Rights, COLUMBUS BAR BRIEFS, October 2002, p. 36

Judging Voucher Programs One at a Time, 27 U. DAYTON L. REV. 1 (2001)

Requiem for Hercules, 18 CONSTITUTIONAL COMMENTARY 445 (2001)

The Bicentennial of Calder v. Bull: In Defense of a Democratic Middle Ground, 59 OHIO STATE L. J. 1599 (1998)

Philosophy, the Constitution, and Campaign Finance, 10 STANFORD L. & POL. REV. 23 (1998)

Rodriguez Revisited: Constitutional Theory and School Finance, 32 GEORGIA L. REV. 475 (1998)

Jurisprudence and Theology, 66 FORDHAM L. REV. 2401 (1998)

Public Debate and Campaign Finance, 30 CONNECTICUT L. REV. 817 (1998)

The Elusive Quest for Global Justice, 66 FORDHAM L. REV. 249 (1997)

School Funding: What Next?, OHIO STATE LAW RECORD 4 (Summer 1997)

Interpretation and Philosophy: Dworkin's Constitution, 14 CONSTITUTIONAL COMMENTARY 151 (1997)

The Regulation of Private Schools, 25 CAPITAL L. REV. 819 (1996)

Social Justice and Child Poverty, 57 OHIO STATE L. J. 485 (1996)

Equal Dollars Per Voter: A Constitutional Principle of Campaign Finance, 94 COLUMBIA LAW REVIEW 1204 (1994)

Political Liberalism and Establishment Clause Jurisprudence, 43 CASE WESTERN RESERVE LAW REVIEW 963 (1993)

Tillich and Camus, Talking Politics, 92 COLUMBIA LAW REVIEW 954 (1992)

Electronic:

“FREE & FAIR” COMMENTARY, available at <http://moritzlaw.osu.edu/electionlaw/freefair/>:

- *Auditing a State's Laws for Resolving Election Contests* (5/8/07)
- *Running Elections in Cuyahoga County Next Year* (4/10/07)
- *A Bipartisan Way to Settle a Disputed Presidential Election in Ohio?* (2/14/07) (to be reprinted in Summer 2007 issue of COLUMBUS BAR LAWYERS QUARTERLY)
- *The Nation's Interest in Ohio's New Secretary of State* (2/13/07)
- *Designing the Democracy Index* (1/16/07)
- *Election Reform's Top Priority: Changing the Electoral College Calendar* (12/19/06) co-

authored with Seven F. Huefner)

- *Happy Birthday, Bush v. Gore* (12/12/06)
- *Timing is Everything* (12/5/06)
- *OH-15: Legal Issues in Recount* (11/28/06)
- *Redistricting Reform: Back on the Agenda* (11/22/06) (co-authored with Bradley A. Smith; reprinted from COLUMBUS DISPATCH (11/18/2006))
- *OH-15: 500 Provisional Ballots Invalidated* (11/22/06)
- *Local Blackouts on the Electoral Grid* (11/14/06)
- *Montana: Recount and Contest Laws* (11/8/06)
- *Ohio: Wednesday Morning, 3:00am* (11/8/06)
- *Be Thankful If It's All Over By Thanksgiving* (11/7/06)
- *The Adversarial Legal System at Work* (11/6/06)
- *Transparency Promotes Trust* (11/5/06)
- *Serious Issues Surface in Maryland* (11/2/06)
- *Appellate Opinion in ID Case: No Pre-Voting Remedy Needed* (10/31/06)
- *Ohio's ID Rules in the Appeals Court: What Next?* (10/28/06)
- *Two Details of TRO in Ohio ID Case* (10/27/06)
- *TRO in Ohio Voter ID Case: Initial Thoughts* (10/27/06)
- *ID Disparities & Post-Voting Review of Provisional or Absentee Ballots* (10/25/06) [reprinted in DAYTON DAILY NEWS (11/1/06) as *New Rules Needn't Lead to Lost Votes*]
- *Late Delivery of Registration Forms* (10/23/06)
- *Absentee Ballots in Close Elections: Will They Provide Grounds for a Contest?* (10/23/06)
- *Purcell v. Gonzales: Implications* (10/20/06)
- *Supreme Court ID Opinion: Preliminary Analysis* (10/20/06)
- *ID Equities?* (10/16/06)
- *The Arizona Voter ID case in the Supreme Court: What's Next?* (10/16/06)
- *How to Identify a Successful Election* (10/10/06)
- *Will the Election System Function Properly This Year?* (9/5/06)
- *Election Law at the High Court: Big Cases Leave Little Footprints* (8/18/06)
- *Ohio is not Mexico, but ...* (7/25/06)
- *Justice Kennedy Deserves Praise, Parts I & II* (6/29/06 & 7/3/06)
- *First Impressions of the Partisan Gerrymandering Portion of the Texas Case* (6/28/06)
- *The Importance of Randall's Indecisiveness* (6/27/2006)
- *Online Voter Registration is the Answer* (6/13/2006)
- *A Way to Rescue Redistricting Reform* (6/6/2006)
- *Is Bipartisan Redistricting Reform Achievable?* (5/19/2006)
- *Electoral Laments in Major and Minor Keys* (5/9/2006)
- *A Review of the Transcript in the Texas Redistricting Case* (4/4/2006)
- *Will the Expansion of Absentee Voting Yield an Increase in Abuse?* (3/28/2006)
- *Incrementalist Election Law?* (3/7/2006)
- *A Guide to the District-Specific Claims in the Texas Oral Argument* (3/2/2006)
- *Politics and Race a Messy Mix in Argument on Texas Case* (3/1/2006)
- *Further Thoughts on the Vermont Oral Argument* (2/28/2006)

- *Majority of Court Skeptical of Vermont Campaign Finance Law* (2/28/2006)
- *Precedent and the Constitutional Law of Elections* (2/24/2006)
- *Doubleheader Tests the Court's Impartiality* (2/14/2006)
- *The Remand in WRTL* (2/7/2006)
- *The Roberts Court and Precedent: An Early Test in the Context of Campaign Finance* (1/17/2006)
- *Will Election Law Become Clearer This Year?* (1/3/2006)
- *The Federalism Defect in the Prosecution of Tom DeLay* (11/29/2005) [reprinted from ROLL CALL (11/28/2005)]
- *Future Redistricting Reform Must Learn from This Year's Mistakes* (11/15/05)
- *The Ten Most Urgent Election Reforms* (11/8/05)
- *How to Avoid an Electoral Katrina* (11/7/05)
[reprinted from THE PRESS-ENTERPRISE (Riverside, CA) (11/6/05)]
- *If Not Issue 4, Then What?* (11/1/05) [reprinted from DAYTON DAILY NEWS; also published in CLEVELAND PLAIN-DEALER (11/4/05)]
- *Issue 3 Is a Big Mistake* (11/1/04)
- *New & Old Arguments for Campaign Finance: Will Any Convince the Court?* (10/18/05)
- *The Significance of Wisconsin Right to Life v. FEC* (10/13/05)
- *Federal Courts Should Not Run State Elections* (10/4/05)
- *The Need for a Fair Referee* (9/24/05) [reprinted from COLUMBUS DISPATCH]
- *How to Hire a Fair Election Umpire* (9/13/05)
- *Is There a Middle Ground in the Voter ID Debate?* (9/6/05)
- *What Should the New Justice Do about Campaign Finance?* (7/19/05)
- *Fact-Specific Election Law* (7/5/05)
- *Refusing to Unseat a Governor Despite a Flawed Election* (6/7/05)
- *The People and their Constitution* (5/24/05)
- *The Filibuster and Democracy* (5/17/05)
- *The Provisional Ballots of Unregistered Voters* (4/5/05)
- *Verifying Voter Registration Lists, Parts 1 & 2* (3/22 & 3/29/05)
- *When to Redo an Election?* (1/25/05)
- *Minimizing the Need for Provisional Ballots: A Reform Worth Wishing For* (12/21/04)
- *How to Achieve Maximum Disclosure of "Electioneering Communications"* (12/15/04)
- *Investing in Politicians to Boost Corporate Profits* (12/7/04)
- *When Should a Presidential Election Be Over?* (11/17/04)
- *Election 2004 in Ohio: Some Unanswered Questions* (11/10/04)
- *Voting Machines Per Capita: a Bush v. Gore Issue?* (11/05/04)
- *Justice Stevens' Words of Hope – and Caution* (11/02/05)
- *The Nine in a Pickle* (10/28/04) [reprinted from N.Y. Sun]
- *A Comparison of Ohio and Michigan Cases on Provisional Voting* (10/15/04)
- *HAVA's History Sheds Light on Provisional Voting Dispute* (10/5/04)
- *Blackwell's Mixed Record So Far* (10/5/04)
- *Let the Sunshine In* (9/28/04)
- *Lying to Win* (9/21/04)
- *Election Law 5-to-4* (7/6/04)

- *The Missed Opportunity of Vieth* (6/22/04)
- *The Necessity of Law for Democracy* (6/15/04)

E-BOOK ON ELECTION LAW (general editor and contributor), available at <http://moritzlaw.osu.edu/electionlaw/toc.html>

Government Testimony

U.S. Elections Assistance Commission, Presentation of Provisional Voting Report, May 22-23, 2006 (draft report presented September 6, 2005)

Ohio House of Representatives Rules Committee, Hearing on Redistricting Reform, May 17, 2006

U.S. House of Representatives Committee on Administration, Hearing on 2004 Election and the Implementation of HAVA, March 21, 2005

U.S. Election Assistance Commission, Hearing on Provisional Voting, Columbus, February 23, 2005

Ohio Senate Rules Committee, Hearing on Campaign Finance Legislation, December 14, 2004

Ohio House of Representatives State Government Committee, Hearing on Campaign Finance, December 14, 2004

Federal Election Commission, Hearing on Political Committee Status, April 14, 2004

U.S. Senate Rules Committee, Hearing on 527 Organizations, March 10, 2004

Vermont Senate Committee on Government Operations, Public Financing of Elections, January 29, 1997

Presentations

Panelist, "State-to-State Comparison of Procedures for Redressing Electoral Error," Conference on Democracy, Stanford Law School, Palo Alto, April 6-7, 2007

The Future of Bush v. Gore and its Relevance to Election Administrators, Winter Conference of Ohio Association of Election Officials (January 24, 2007)

Confusion is the Culprit: Voter ID in 2006, AEI-Brookings Project on Election Reform, November 28, 2006

The 2006 Elections: Are We Ready?, AEI-Brookings Project on Election Reform, Sept. 22, 2006

Summary of Current Election Law Research, AEI-Brookings Project on Election Reform, May 23, 2006

“Optimality, not Perfection, Should Be the Goal of Election Administration,” Woodrow Wilson School at Princeton University, April 7 (2006)—oral presentation of *Beyond the Symbolic Suffrage?*, paper for “Making Every Vote Count: a Colloquium on Election Reform” (available at http://region.princeton.edu/pub_detail_32.html)

“Choosing a Supreme Court Justice” (with Alan Michaels), OSU Winter College, February 25 (2006)

Panelist, “Justice O’Connor’s Legacy,” Federalist Society of Columbus, October 4 (2005)

Participant, Conference on “Independent Election Administration: Who Draws the Lines? Who Counts the Votes?,” Moritz College of Law, September 9-10 (2005)

“Replacing Justice O’Connor: the Future of the Supreme Court and Constitutional Law,” Community Leaders Forum, Unitarian Church of Columbus, August 24 (2005)

Speaker and Conference Participant, *Next Steps on Election Reform*, sponsored by League of Women Voters Education Fund and McCormick Tribune Foundation, Chantilly, Virginia, March 3-4 (2005)

“Provisional Voting and the Verification of Voter Registration,” National Conference of State Legislatures Fall Forum, Savannah, December 9 (2004)

“The Promises and Problems of Provisional Voting,” Symposium on Law and Democracy, George Washington University, November 15 (2004)

“Constitutionally Creative Ways to Deter Deliberatively False Campaign Speech: Incentives for Counterspeech,” Federalist Society Annual National Convention, November 12 (2004)

“Regulating False Campaign Advertising: Ways to Facilitate Counterspeech,” Moritz College of Law, October 11 (2004)

“The Problem of False Campaign Advertising: the Need for an Unofficial Umpire,” League of Women Voters of Metropolitan Columbus, Annual Meeting (featured speaker), September 22 (2004)

“The Regulation of 527 Groups,” Panel Discussion on Developments in Campaign Finance Law, Moritz College of Law, September 15 (2004)

“U.S. Supreme Court: Annual Review,” Ohio State Bar Association (3-hour CLE), Cleveland and Columbus, December (2003)

“Recent Developments in the U.S. Supreme Court’s,” Columbus City Attorney Office CLE,

October 29 (2003)

“*Stare Decisis* in Constitutional Law,” Georgetown Discussion Group on Constitutional Law, October 26 (2003)

“Ohio Judicial Elections,” ABA Council of Chief Judges, Boston, October 9 (2003)

“*Stare Decisis* in the U.S. Supreme Court,” Annual Meeting of Ohio Court of Appeals Judges, September 10 (2003)

“Judges Should Not Be Elected,” Franklin Inn of Court, September 11 (2002)

“Defining the Limits of the First Amendment: Three Cases from Last Year and One Currently under Review,” Moritz College of Law, February 26 (2002)

“The School Voucher Case,” Franklin Inn of Court, February 14 (2002)

“The Supreme Court: Past, Present, and Future,” Preble County (Ohio) Community Improvement Corporation, January 31 (2002)

“U.S. Supreme Court: Annual Review,” Ohio State Bar Association CLE, December 13 (Cleveland) and December 18 (Columbus) (2001)

“Judging Voucher Programs One at a Time,” University of Dayton Law School, October 17 (2001)

“First Monday in October: Supreme Court Review and Look Ahead,” Columbus Bar Association CLE (with Alan Michaels), September 26 (2001)

“Towards a Scholarship of Persuasion,” Moritz College of Law, August 1 (2001)

“Federalism and *Stare Decisis*,” National Association of Attorneys General Annual Summer Meeting (Burlington, Vermont), June 22 (2001)

“Democracy-Defining Constitutionalism,” Faculty Workshops at OSU and University of Dayton (Spring 1998)

Discussant, “The Clean Money Option: Public Financing of Election Campaigns,” Brennan Center for Justice, January 21 (1997)

“Fairness and Campaign Finance,” Council on Government Ethics Laws Annual Meeting, Philadelphia, December 11 (1996)

“Intergenerational Trusteeship: A New Conception of Democracy,” Georgetown University School of Law, December 9-10 (1995)

- “An Education in Political Philosophy,” University of Michigan School of Law, March 10 (1995)
- “The Education of Philosopher-Citizens,” Case Western Reserve University School of Law, January 26 (1995)
- “Population Growth and Global Justice,” Mershon World Affairs Seminar, The Ohio State University, December 6 (1994)
- “Towards a Just Constitution for the World,” Columbia University School of Law, October 3 (1994)
- “World Federalism and American Federalism,” Georgetown University School of Law, Washington, D.C., December 3-4 (1993)
- “School Choice and the Establishment Clause,” Ohio Northern University College of Law, Ada, Ohio, October 7 (1993)
- “The Regulation of Curriculum in Parochial Schools,” Ohio Legal Theory Workshop, March 18 (1993)
- “The Religion Clauses and the Culture Wars,” Association of American Law Schools Section on Law and Religion, San Francisco, January 9 (1993)
- “Civil Disobedience by Judges and Other Officials,” The Ohio State University College of Law, December 6 (1992)
- “Rawlsian Liberalism and Establishment Clause Jurisprudence,” Case Western Reserve University School of Law, Cleveland, November 13-14 (1992)
- “*Lee v. Weisman* and the Idea of the Secular State,” Ohio Northern University School of Law, Ada, Ohio, February 27 (1992)

Public Service

- Member, ABA Task Force on Redistricting Reform, 2006-present
- Member, Working Group on Non-partisan Election Administration, American University Center for Democracy and Election Management. 2006-present
- Supervisor of legal research and analysis, Eagleton-Moritz Project on Provisional Voting and Voter Identification Issues, under contract with U.S. Election Assistance Commission, 2005-2006
- Member, Working Group on State Implementation of Election Reform, The Century Foundation, 2005 (final report at <http://www.reformelections.org/publications.asp?pubid=542>)

Member, Advisory Committee, Board of Elections of Franklin County, Ohio, 2005

Member, Disclosure Working Group, *Judicial Impartiality: Next Steps* (sponsored by Chief Justice Thomas Moyer, Ohio Supreme Court, League of Women Voters, et al.), 2003-2004

Consultant, on behalf of Senator John McCain *et al.*, Intervenor-Defendants, in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003); 251 F.Supp.2d 156 (2003)

Counsel of Record, on behalf of Arizona *et al.*, as *amici curiae*, in *Moore v. Chamber of Commerce*, No. 02-305 (U.S. S.Ct.); 288 F.3d 187 (5th Cir. 2002)

Lead Counsel, on behalf of Appellants in *Common Cause/Ohio et al. v. Ohio Elections Commission*, 150 Ohio App.3d 31, 779 N.E.2d 766 (Ohio Court of Appeals, Franklin County) (2002); also lead counsel in proceedings before Ohio Election Commission

Counsel, *Amicus curiae* brief on behalf of Brennan Center for Justice, et al., *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002)

Counsel, *Amicus curiae* brief on behalf of OSU College of Law professors, *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002)

Member, National Advisory Board, Public Campaign, Washington, D.C., 1997-1998

Member, Advisory Board, National Voting Rights Institute, 1996-1998

Member, Working Group on Campaign Finance Litigation, The Twentieth Century Fund, 1997-1998

Member, Committee on Pre-Law Education, American Bar Association, 1993-1998

Member, State Governing Board, Common Cause of Ohio, 1993-1998

Counsel, *Amicus Curiae* Citizens for Educational Freedom et al., *Simmons-Harris v. Goff*, Ohio Court of Appeals, 10th District (October 28, 1996) (Cleveland school vouchers case)

Counsel, *Amicus Curiae* Institute for Democracy in Education, *DeRolph v. Ohio*, Ohio Supreme Court (March 11, 1996) (statewide school funding case)

Director, Ohio Legal Theory Workshop, 1993-95

Adviser, Governor's Commission on Educational Choice, State of Ohio, 1992-93

Professional Recognition

Recipient (on behalf of *Election Law @ Moritz*), Ohio State Bar Foundation Research Award,
November 4, 2005

“Lawdragon 500: Leading Lawyers in America,” *Lawdragon* Magazine (October 2005)

Recipient, Liberty Bell Award, Columbus Bar Association, February 25, 2005

[May 15, 2007]