

# Post-Voting Litigation

**Edward B. Foley**  
**Director, Election Law @ Moritz**  
**Robert M. Duncan/JonesDay Designated Professor**  
**Moritz College of Law, The Ohio State University**  
**<http://moritzlaw.osu.edu/electionlaw>**

# Introduction & Outline

- General Principles
- Procedural & Threshold Matters
- Election Contests: Types of Cases
  - Extra Votes
  - Missing Votes
  - Other Problems
- The Need for Speed
- Concluding Observations

# Sources

- Steven F. Huefner, *Remedying Election Wrongs*, 44 Harv. J. Leg. 265 (2007).
- Edward B. Foley, *The Analysis and Mitigation of Electoral Errors*, 18 Stan. L. & Policy Rev. 350 (2007).
- <http://moritzlaw.osu.edu/electionlaw>

# General Principles

- Post-voting lawsuit: worst kind
  - “Vote harvesting”: candidates know how many they need to win.
  - No pre-election ignorance on who benefits from different interpretations of law.
  - Need for speed: no luxury of leisurely pace.
  - Hard but needed for courts to appear neutral.
- Need for, but lack of, clear statutes.
- Facts matter more than doctrine.

# Law, Facts, Equity & Impartiality

- Statutes control where applicable, but ...
- Statutes often leave gaps or unclear.
- Vague constitutional principles (“equal protection”) can overrule statutes.
- Judicial doctrine: too unspecific to dictate.
  - “Uphold election unless unlawful votes included and/or lawful votes excluded are enough to cast outcome in doubt”.
  - Cliché true: devil *is* in details.

# Judicial Discretion & Fairness

- Courts have wide latitude to do “justice”.
- Judicial intervention depends on nature of election and severity of problems.
  - Statewide or local race? Importance: Governor or city auditor?
  - Margin of victory is obviously critical.
  - Problems technical or integrity-undermining, isolated or widespread?
- Risk of courts appearing partisan.

# Procedural & Threshold Matters

- Contests & other kinds of suits.
  - All suits seek to overturn election results.
  - Contests are usual vehicle under statutes.
  - Sometimes parties try other means:  
mandamus, quo warranto, injunctive relief.
- Some courts prohibit alternative suits:  
*Mackey v. Blackwell* (Ohio 2005).
- Other courts permit alternatives.



# Special Statutes on Contests

- Some states consign contests to state's legislature, at least for some races.
- Some special rules about federal races:
  - Congress has last word, but permits state procedures as preliminary matter.
  - Some states treat federal races differently.
  - Ohio: no state-court contest for federal races.
- Sometimes special rules for primaries.



# Equitable Estoppel & Laches

- Should issue have been raised before?
- Some problems don't occur until voting:
  - Polling place shut-downs.
  - Counting errors.
- Some problems undiscoverable before:  
absentee ballot fraud.
- Ineligibility of registered voters?
  - Most courts permit contest, but should they?
  - *Marre v. Reed* (Mo. 1989); 4-3 split on issue.

# Mandatory-directory Distinction

- Unhelpful terminology; simple concept:
  - Breach of “mandatory” rule requires remedy
  - Breach of “directory” rule does not.
- “Directory” rules: technical procedures, breaches do not undermine integrity.
- Does not depend on “shall” in statute.
- Essentially a remedial principle of equity: don’t disenfranchise voters unnecessarily.
- Warning: breeds administrative laxity.

# Contests: All About Remedy

- Will election stand? If not, what?
- Subtract unlawful ballots, add missing lawful ballots, and declare (new) winner.
- Void election and order new one.
- Void election, create vacancy, leave to statutory rules for filling vacancy.
- Void unlawful ballots, order counting of lawful ballots, remand for further action.

# New Election: Whole or Partial?

- Whole new election is generally favored
- Some courts will order new election only in affected precinct b/c of economy.
- In at-large elections (city council), only whole new race will avoid bullet voting.
- Some courts: void all votes from precinct; uphold election if result unchanged.
- Remedy may depend on particular taint.