

***America Votes! Challenges to Modern Election Law and Voting Rights* (ABA Section of State & Local Government Law 2020)**

Free, fair and open elections are the key to a successful democracy, and lawyers can be important advocates in ensuring the voting process is equitable for all. The 4th Edition of *America Votes! Challenges to Modern Election Law and Voting Rights* (ABA Section of State and Local Government Law 2020) drives home the message that there are many substantive steps that legal professionals and concerned citizens can take to help ensure a fair and equitable voting system.

The fourth edition of *America Votes! Challenges to Modern Election Law and Voting Rights* (ABA Section of State & Local Government Law 2020) was released for distribution by the American Bar Association eleven months before the 2020 Presidential Election. Co-edited by Ben Griffith and Jack Young, this publication provides a fresh perspective on the hottest issues confronting our Nation's electoral system. Griffith is principal of Griffith Law Firm in Oxford, Mississippi, and adjunct professor of Election Law at the University of Mississippi School of Law. Young is senior counsel at SandlerReiff in Washington, D.C., and an adjunct professor of International and Comparative Law at William & Mary Law School.

Five-part Organization: It is organized into five parts: Voter Qualification and Participation, The Voting Process, Voting Rights Litigation, Redistricting, and Audits and Recounts, and consists of 21 chapters written by a total of 32 authors, who comprise a host of leading experts in this field of law — lawyers, legal scholars, political media strategists, nonprofit leaders, mathematicians and cybersecurity professionals — who offer their perspectives and research on new and recurring issues that affect the nation's electoral process.

2020 Political Landscape: With all eyes on the presidential campaign and November election, the 4th Edition covers the 2020 political landscape and gives insight on issues from the 2016 election. It lays out how U.S. democracy is threatened from many sides.

The 4th Edition examines the fact-challenged basis for voter ID laws; cybersecurity issues that impact the election process; hyper-partisan voter qualification issues; the shift in challenges to gerrymandering from federal courts to state courts; election recounts and contests; and the ongoing struggle to include language-minority voters, millennial voters and Native Americans in the electoral process.

The Face of Democracy: Just as the voting landscape in America has been greatly impacted by election laws, the very face of democracy has been changed through partisan manipulation of electoral boundaries, enactment of legislative barriers that stand in the way of minority voters seeking to register to vote and maintenance of a system that is predominantly administered at the state and local level.

Cybersecurity Threats: Responding to cybersecurity threats to our electoral infrastructure, which chapter 9 in our book addresses, is paramount. There must be a coordinated response at the federal, state and local level to potential intrusions into the electoral system. Intrusions in the run-up to the 2016 election came from both domestic and foreign sources and revealed significant exposures of sensitive personally identifiable information, voter registration data, internal email communications and a host of electoral data.

Participation and Access: Full participation in and access to the electoral system for every qualified voter is still more of a dream than a reality. Many of the voter suppression tactics that have been foisted on an unsuspecting public need to be eliminated. They come in the form of stringent “exact match” voter registration requirements in some jurisdictions, severely constricted requirements for voter ID and reduced opportunities for early voting. Also, some state legislatures have refused to embrace same-day registration, vote-by-mail and less restrictive forms of absentee voting — all measures that are designed to improve voter access and participation.

Voter ID Laws: Many jurisdictions are hobbled with partisan solutions through highly restrictive voter identification laws based on specious claims of massive voter fraud. Georgia and Texas are among the states with the most restrictive forms of voter ID. These issues are forming a perfect storm through which our democratic electoral system must navigate in November.

Among the above issues addressed in the 4th Edition of *America Votes!* additional and related issues of access and participation in voting have a combined effect on all aspects of the electoral process. This is without a doubt a formula for a bitterly fought and historically significant presidential election in 2020. Those issues include:

- **Partisan and racial gerrymandering**, carried out to target African Americans “with almost surgical precision,” as noted by the 4th Circuit Court of Appeals in the 2017 *North Carolina NAACP v. McCrory* decision;
- **The role of dark money** – funds raised to influence elections by nonprofit organizations that are not required to disclose the identities of their donors. Tremendous amounts of money were injected into the political process following the *Citizens United v. FEC* decision in 2010, which resulted in shutting out candidates with less financial means and fundraising ability.
- **The virtual gutting of the Voting Rights Act’s** preclearance provision in *Shelby County v. Holder* in 2013, thoroughly examined in chapter 17, opened the door for jurisdictions to implement election laws and regulations that infringed on minority voting rights and created barriers to voter access;

- **The closing of the federal courthouse doors** to partisan gerrymandering claims, spurred by the Supreme Court's 2019 decision in *Rucho v. Common Cause/Benisek v. Lamone*, which provided the framework to further minimize and marginalize the minority vote.
- **Overstated claims of voting fraud:** The claims are imagined. The truth is that in-person voter fraud, the kind of fraud that voter identification is designed to catch, is very rare. The greater threat is from:
 - **Poorly designed ballots that confuse voters**, as we saw in Florida during the 2000 presidential election with George W. Bush and Al Gore and again in the state's 2018 hotly contested Senate race between Rick Scott and Bill Nelson.
 - **Machine failures and hacking**, revealed by evidence of Russian operatives' attempts in 2016 to hack into U.S. voting systems and successfully gaining access to an Illinois voter registration database and some election officials' computers in Florida.
 - **Failure of voters to turn out**, due to apathy as well as effective efforts to marginalize minority voters through voter suppression tactics.
 - **The need to beef up security in our voting process:** Cybersecurity in our nation's electoral process has ramped up significantly since the 2016 election, but much remains to be done. In 2018, the Department of Homeland Security declared U.S. election infrastructure "critical infrastructure," which made the federal government partially responsible for it. Congress appropriated \$380 million for states to improve cybersecurity and replace vulnerable voting machines, but this was only enough to begin improvements to our electoral system for the 2020 election. Some states have deployed malware detection systems and other protective technologies and system reviews, and others have enlisted cyber services coordinators to work with local governments. With additional billions in funding for election security through the recently enacted \$2 trillion stimulus legislation, much needed funding may be available for training, awareness and consistent prioritizing of resources for cyber protection throughout the electoral process. Training to detect cyberattacks and external threats to the integrity of election machinery is essential, as is the ability of election officials to monitor, detect and prevent cyber intrusions.
- **Vote by Mail:** With the possibility that the country will still be dealing with the coronavirus pandemic in the Fall, enabling legislation at the state level will likely be an indispensable part of implementing mail-in balloting for the 2020 election, coupled with buy-in from a president who has already declared his opposition to it. Transitioning to all-mail elections so quickly will put extreme demands on election officials and require substantial retooling of the voting process and a large public education effort to avoid higher rates of invalidated ballots. A number of states already conduct their elections by mail. Colorado, Oregon and Washington have used voting by mail, and

Hawaii and Utah will conduct the elections this year entirely by mail. California, Nebraska and North Dakota permit counties to conduct elections entirely by mail. And Georgia, Iowa, Nevada and West Virginia have announced that they will send applications for an absentee ballot to every registered voter for the rescheduled primaries for the spring and summer.

Conclusion: Lawyers can and should consider as part of their professional obligation to become an advocate for honest, open and fair elections. They can serve as poll workers, volunteer as election advisers on Election Day, and assist with training of local election managers and administrative officials. They can do all this through formal programs and outreach at the local, state and federal levels, and use methods highlighted on the Vote Your Voice website, sponsored by the ABA Standing Committee on Election Law, and through the Lawyer As Citizen initiative. The issues discussed and constructive analysis of the political and electoral landscape of America as set forth in this 4th Edition of *America Votes!* help provide the backbone for that advocacy.