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ACCESS TO ELECTORAL RIGHTS *UNITED STATES OF AMERICA*

Michael Jones-Correa
Diane Wong

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European University Institute, Florence
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Access to Electoral Rights United States of America

Michael Jones-Correa and Diane Wong

1. Introduction

Under the Constitution every adult citizen in the United States is guaranteed access to the ballot, and increasingly legislation passed by Congress has ensured that this right can be put into practice. Thus, the right to vote has been gradually extended to cover formerly disenfranchised groups --- racial minorities, women and young adults. However, access to the ballot is still unevenly granted to felons and ex-felons, racial minorities, and the poor, and voting practices vary substantially across the states. This report covers some of the issues around voter eligibility and voting procedures: who has access to the ballot and how voting is carried out. In practice, the two are intertwined: how voting is carried out has implications for who in practice has access to the ballot.

2. Who Can Vote: Eligibility

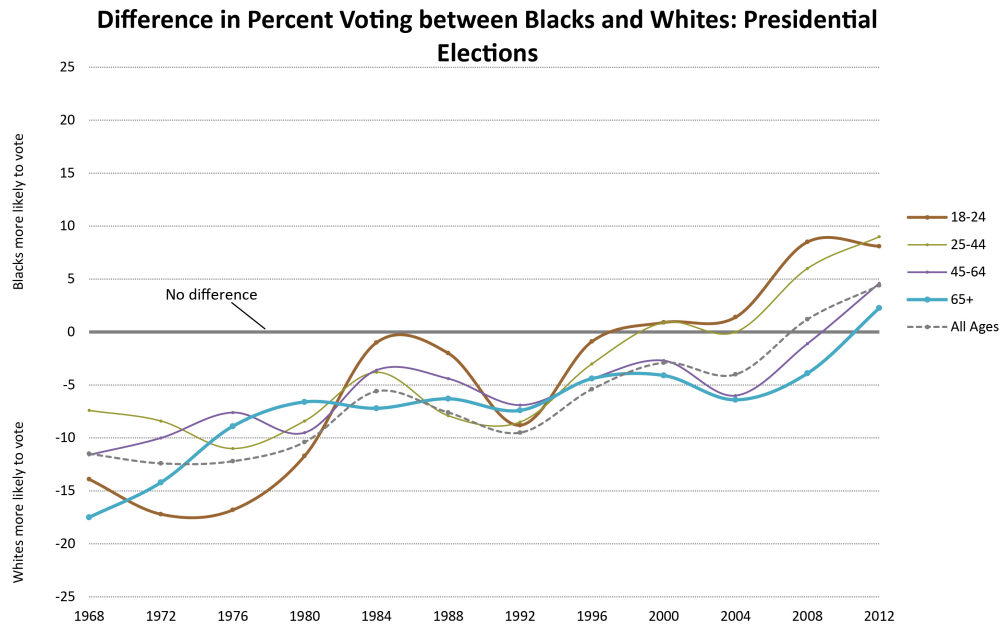
The United States is characterized by a relatively open citizenship regime, but a comparatively restricted voting process. Citizenship can be acquired by naturalization after five years of permanent legal residency, and many acquire citizenship by birth. The Fourteenth Amendment to the Constitution notes that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."¹ Under this relatively open system, individuals acquire citizenship at birth even if their parents are not eligible for citizenship themselves.

¹ See http://www.archives.gov/exhibits/charters/constitution_amendments_11-27.html

With citizenship comes the right to vote in national elections. While citizenship is determined at the national level, voting is less so. For instance, Section 2 of the Fourteenth Amendment to the Constitution says that states cannot deny or abridge "the right to vote at any [federal or state] election [...] to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States [...] except for participation in rebellion, or other crime." The Fifteenth Amendment states that the right of citizens of the United States to vote cannot be abridged by race; the Nineteenth Amendment indicates that the same right cannot be limited by sex; the Twenty-Fourth Amendment says that "the right of citizens of the United States to vote" in federal elections cannot be blocked by a poll tax; and the Twenty-Sixth Amendment protects the voting right of citizens of the United States who are eighteen years of age or older. Each of these amendments to the constitution enables the access of citizens to the ballot.

The actual implementation of the ballot, however, from voter registration, to the design of the ballots, to the placement of voting locations, is left in practice to each of the fifty states in the United States. So while there has developed, with the passage of each of these successive constitutional amendments a single, well-defined US citizenship, voting practices vary substantially state by state, and – within states – county by county. This was particularly evident through the 1960s with the widespread adoption of discriminatory state laws that blocked many African-American citizens from exercising their voting rights. With the passage of the 1965 Voting Rights Act many of these impediments to voting and representation in the states – including onerous registration rules, and skewed political representation through gerrymandered districts, municipal annexations and the adoption of local at-large elections—were removed. Poll taxes— a fee to register to vote, implemented in many states in the American south as another tool to disenfranchise poorer blacks—were struck down by the Supreme Court in 1966.² As a result, African-American voting rates first approached, and have now surpassed, those of white Americans (see “Difference in Percent Voting” Figure below).

² *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966)



Note: The estimates presented here may not be directly comparable to some Census products on voting and registration for two reasons. First, the population considered is the voting age population, rather than the *citizen* voting age population examined in most recent reports. In addition, the graphic shows data for people who reported they were the single race White or the single race Black, regardless of Hispanic origin. Recent reports show voting estimates for the non-Hispanic White population rather than for Whites alone.

Source: Current Population Survey, Voting and Registration Supplements, historical table A-1.

Available: <http://www.census.gov/hhes/www/socdemo/voting/index.html>

The Disabled

Barriers to voting for other groups have gradually been eroded by changes in federal law as well. Access to voters with disabilities was addressed by Congress in The Voting Accessibility for the Elderly and Handicapped Act of 1984, which requires polling places across the United States to be physically accessible to people with disabilities for federal elections.³ Where no accessible location is available to serve as a polling place, a political subdivision must provide an alternate means of casting a ballot on the day of the election. This law also requires states to make available registration and voting aids for disabled and elderly voters, including information by text telephone (also known as TTYs) or similar devices. Title II of the Americans with Disabilities Act, passed by Congress in 1990, requires that polling places, among many other facilities, be accessible to people with disabilities.⁴

³ See <http://codi.tamucc.edu/archives/legislation/voting.access.htm> and <http://www.dol.gov/dol/topic/disability/ada.htm>

⁴ Information and Technical Assistance of the Americans with Disabilities Act. http://www.ada.gov/ada_title_II.htm

Individuals with mental disabilities are nonetheless still often disenfranchised as a result of concerns about their competence to participate in politics. Many states have passed laws that require voters have a certain level of competence in order to vote. Fifteen states and the District of Columbia have laws that have broad bars to voting by individuals who are considered to be “under guardianship” “mentally incompetent” or “mentally incapacitated.” Twenty states have laws that bar voting only if a court has determined that an individual lacks the capacity to vote. Three states have laws that bar voting by individuals who are *non compos mentis*, which is both a legal and medical determination. Eleven states (Colorado, Idaho, Illinois, Indiana, Kansas, Maine, Michigan, New Hampshire, North Carolina, Pennsylvania, and Vermont) have no disability-related restrictions on the right to vote. However, even in where permitted, there have been instances of poll workers or service providers preventing individuals with mental disabilities to vote, providing assistance that disregard the voters own choices, or imposing their own voter competence requirements.⁵ In sum, even while federal law has expanded guaranteed access to potential voters with physical handicaps, many state constitutions still use language that may reflect outdated ways of thinking about individuals with mental disabilities.

Felony Disenfranchisement

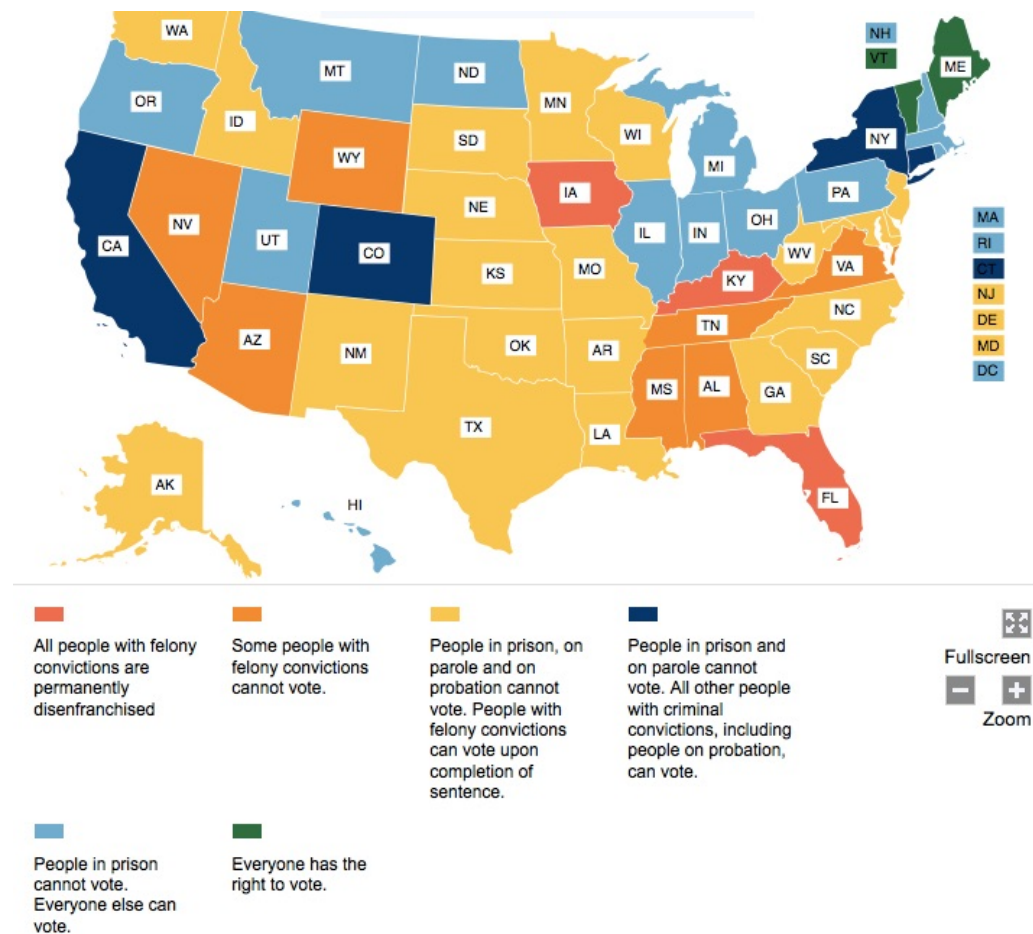
While the general rule has been for the gradual expansion of access to the ballot through the 20th century, there remain exceptions and some populations continue to have uneven access to the ballot across the states. In particular, a patchwork of state laws, varying in severity from state to state, prevents approximately 5.85 million Americans with felony convictions (and in several states simply misdemeanor) from voting.⁶ Some of these individuals are citizens who have been convicted for a crime and are serving a prison sentence;⁷ however, the larger number are people who have served their sentences and have had their voting rights stripped from them as a result of their conviction, in some cases permanently.

⁵ See <http://www.bazelon.org/LinkClick.aspx?fileticket=7Cp83GrVY0%3D&tabid=315>

⁶ American Civil Liberties Union, <https://www.aclu.org/map/state-criminal-re-enfranchisement-laws-map>

⁷ There were more than 1.57 million inmates in federal, state, and county prisons and jails around the US as of December 31, 2013. See: Bureau of Justice Statistics, 2014. <http://www.bjs.gov/content/pub/press/p13pr.cfm>

State Felony Disenfranchisement Laws, 2015



Source: ACLU <https://www.aclu.org/map/state-criminal-re-enfranchisement-laws-map>

The map above (see Map "State Felony Disenfranchisement Laws") illustrates the variation in felony disenfranchisement across the states. Note that in three states – Florida, Iowa and Kentucky—individuals with felony convictions lose their right to vote permanently. In another six other states, some felony convictions result in permanent disenfranchisement, while individuals in twenty states lose their voting privileges while serving a sentence, while on probation or on parole. Even individuals who regain their voting rights after their release or probation are, upon release from prison, more likely to have higher rates of residential instability, adding an additional barrier to their access to the ballot. It is also clear that the loss of these voting rights is skewed, with those losing their voting privileges more likely to be non-white and poorer, given the make up of the incarcerated population in the United States.⁸

⁸ Prison Policy Initiative, "Breaking Down Mass Incarceration in the 2010 Census: State by State Incarceration Rates by Race/Ethnicity," 2014. <http://www.prisonpolicy.org/reports/rates.html>

Territorial Residents

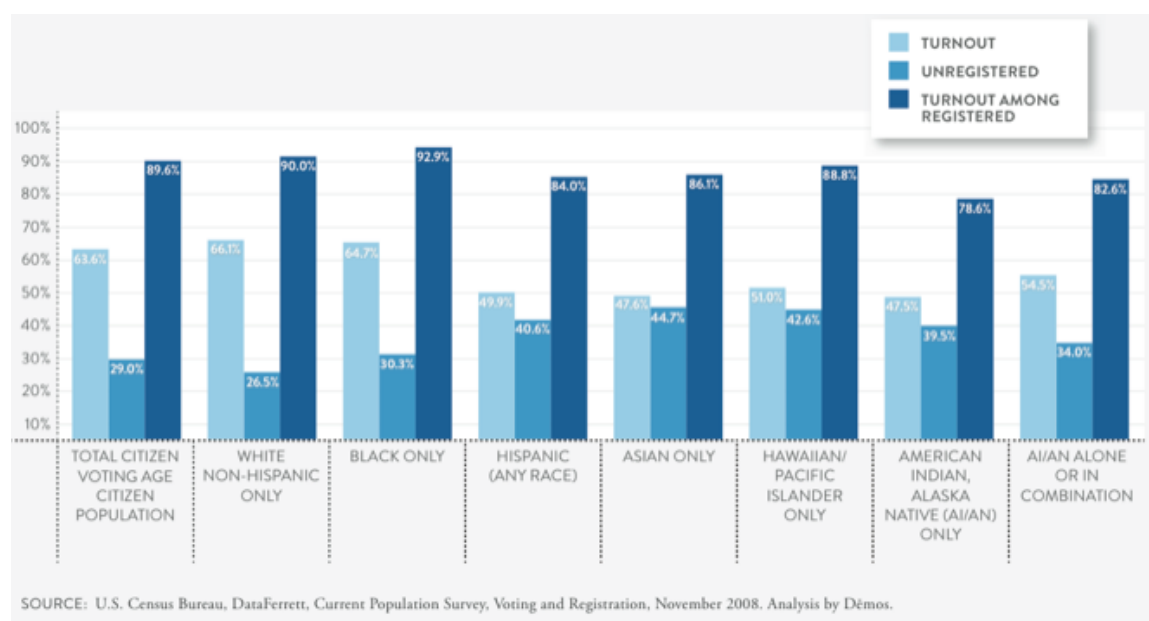
Other citizen groups are left out of the federal election system as well. The 4.1 million residents of Washington DC, Puerto Rico, Guam, Northern Mariana Islands and the United States Virgin Islands are largely citizens but have no formal representation in the federal government, and so are not eligible to vote in federal elections (at most these jurisdictions have non-voting representation in Congress). There have been concerted efforts from residents of these jurisdictions to press for formal representation in the political system, but these have not resulted in any change in the status quo.

Voting Rights of Native Americans

Indigenous Americans have been unevenly incorporated into the electoral process as well. The Snyder Act of 1924 (also known as the Indian Citizenship Act) admitted Native Americans born in the United States to full citizenship. However, even with their inclusion as citizens, many Native Americans were prevented from voting because states retained the authority to decide who had the right to participate in elections. As a result, Native Americans suffered from the same measures that prevented African Americans and other racial and ethnic minorities from voting, including tactics such as poll taxes, literacy tests and intimidation. States only gradually expanded the franchise to Native Americans, with New Mexico being the last state to enfranchise Native Americans in 1962. Even with their coverage under the 1964 Voting Rights Act which, among other things, provided access to the ballot in native languages, Native Americans continue to experience barriers to voting because of a combination of lack of access to polling places on native reservations and strict state voter ID laws. Native American and Alaska Native voting rates are among the lowest of all racial and ethnic groups in the United States (see Figure “Election Turnout”). In the 2008 presidential elections for example, almost 40% of eligible Native American and Alaskan Native citizens were still not registered to vote. In addition, among those who registered their turnout rate was 5 to 14 percentage points lower than that of any other racial and ethnic group.⁹

⁹ <http://www.demos.org/sites/default/files/publications/IHS%20Report-Demos.pdf>

Registration and Turnout among Citizen Voting Aged Population, 2008



Non-Citizen Residents

Non-citizen residents have little to no access to the ballot in the United States. According to the 2010 census figures, nearly 16 percent of the adult population in the U.S. is foreign-born.¹⁰ Among these immigrants, over half, or approximately one out of every twelve adults living in the country at this moment, are residents but not American citizens. The absence of formal mechanisms for political representation for non-citizen residents raises issues about democratic accountability. In the state of California, for instance, there are twelve municipalities in which non-citizens make up more than fifty percent of the adult voting eligible population. Another eighty-five California cities have over one quarter of their adult population that is non-citizen. However, even though non-citizens constitute a majority of the residents in some jurisdictions in California they are barred from participating in local, state, and federal elections. Non-citizen residents own businesses and homes, pay taxes, send their children to public schools, can be drafted into the military and are subject to all laws, but they are left vulnerable in a government system that is unlikely to fully represent them.

¹⁰ See <https://www.census.gov/prod/2012pubs/acs-19.pdf>

While there is no formal prohibition in the Constitution or in federal law against non-citizen voting in local, state or federal elections, access to the ballot for non-citizens is left to the states to decide.¹¹ Until the 1920s at least twenty-two states and territories extended voting rights to non-citizens residents for some period of time. In order to attract immigrant residents, states allowed non-citizens the right to vote after simply declaring their intention of becoming a US citizen, filing "first papers" with a state judge.¹² By the late 1920s, in reaction to both increased immigration and the First World War, all states had repealed these provisions and prohibited non-citizen voting. Today only a handful of municipalities allow limited non-citizen voting in local or school board elections, and there are sanctions for non-citizen voter fraud.¹³

More so today than in the past, electoral engagement in the US is defined by citizenship. Non-citizens in the United States today cannot vote in state or national elections and cannot run for office themselves. They can, however, if they are legal permanent residents, participate in the electoral process in more limited ways by making campaign contributions to candidates for local, state, and national elections, contacting elected representatives and engaging in non-electoral political activities.

3. How People Vote: The Process of Voting

To vote in the United States eligible citizens must first register to vote. This process is voluntary and not automatic: an individual must seek out his or her state's voter registration form at the appropriate offices, fill it out, and return it to the authorities ahead of the deadline to register to vote. Voter registration deadlines across the fifty US states vary, with one state having no voter registration at all, but with most states requiring voter registration up to a month in advance of the date of the elections.¹⁴ The fact that voter registration is not automatic and must be completed well in advance of the election results a lower pool of eligible voters compared to other OECD countries (see Figure "Voting and Registration in Presidential Elections," below).¹⁵ Over the last several election cycles only about 75% of the voting age population is registered to vote, and approximately only 60% turn out to actually cast their ballot in the presidential elections.

¹¹ Title 18, Part 1, Chapter 29 U.S.C. Section 611 "Voting by Aliens" United States Congress. <http://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-prelim-title18-section611>

¹² Ron Hayduk, *Voting for All: Restoring Immigrant Voting Rights in the US*. New York: Routledge (2006). Jamie Raskin, " [Legal Aliens, Local Citizens: The Historical Constitutional, and Theoretical Meanings of Alien Suffrage](#)," *Pennsylvania Law Review*, 1993.

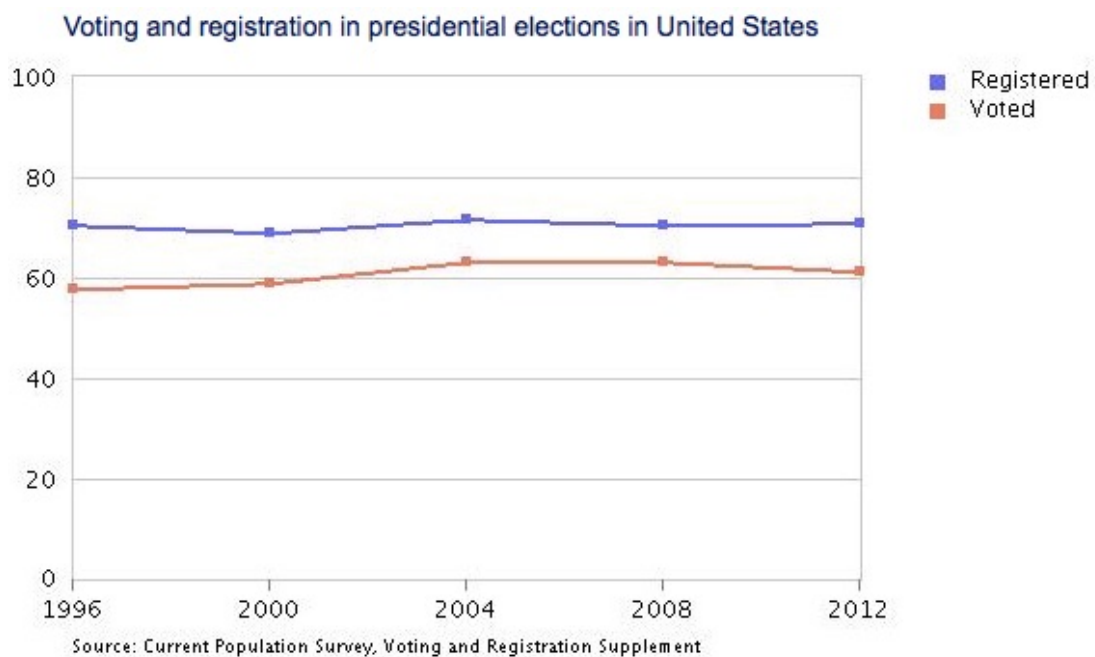
¹³ Title 18, Part 1, Chapter 29 U.S.C. Section 611 "Voting by Aliens" United States Congress. <http://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-prelim-title18-section611>

¹⁴ <http://www.rockthevote.com/get-informed/elections/voter-registration-deadlines.html>

¹⁵ http://thedataweb.rm.census.gov/TheDataWeb_HotReport2/voting/voting.html

Not only is voter registration limited by cutoff requirements, but the information on the registration materials must also match the voter's current address, and the voter must go to the correct polling place to cast his or her ballot. If the voter's address and/or polling place do not match the records on file, then the voter cannot cast a regular ballot and must instead cast a provisional ballot, which may or may not be counted.

In a highly mobile society like the US, in which 12 percent or more of the population moves each year,¹⁶ a significant number of people fall off the voter rolls every election cycle and have to re-register to vote. These voter registration requirements, and the fact that it is up to the individual to rectify any discrepancies between residence and voting place, means that every election cycle a significant number of people find themselves unable to vote or to have their ballot counted.



¹⁶ Census Reports National Mover Rate Increases, 2012.

https://www.census.gov/newsroom/releases/archives/mobility_of_the_population/cb12-240.html

Some of these issues have been addressed through the National Voter Registration Act, passed in the 1993 and dubbed the "Motor Voter" Act, which required that federal and state governmental offices like the DMV offices where people go to renew their drivers' licenses, also have registration forms available.¹⁷ The availability of voter registration forms lowers the barriers for individuals to register or re-register to vote after moving, for instance. The Real ID Act of 2005 required for the first time that each state establish a state-level database of registered voters, instead of allowing registration records to be maintained solely at the country level, with little cross-referencing across jurisdictions.¹⁸ The Act established procedures for the counting of provisional ballots—ballots cast by individuals whose voter registration was uncertain, who might not have their required identification with them when they cast their vote, or who might have been voting in the wrong precinct.¹⁹ In the past many of these provisional ballots were simply discarded, as it was assumed they would rarely determine the outcome of an election.

The United States has always allowed a considerable degree of variation in voting practices at the state and local level, but this variation seems to be on the increase. For example, differences in state voting practices had been muted by the 1965 Voting Rights Act, which required southern states to get approval from the Department of Justice for changes to their voting procedures. The 2013 Supreme Court decision striking down Section 4 of the Voting Rights Act allowed these states, however, once again to change their election laws without federal approval.²⁰

Voter Identification

While not required under the Constitution or by federal law, all states require an individual to be a U.S. citizen in order to vote in state or federal elections. Each state requires its residents to provide some form of identification, with the identification requirements varying across the states (see Map "State Voter Identification Laws," below).

¹⁷ National Voter Registration Act 1993 <http://www.justice.gov/crt/about/vot/>

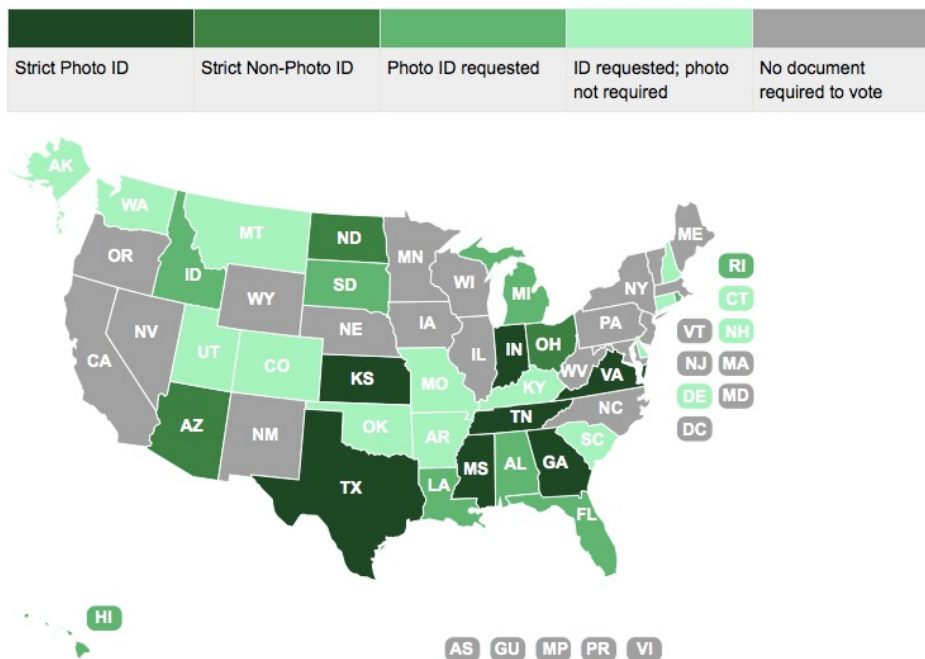
¹⁸ Implementation of State Voter Registration Databases, United States Election Assistance Commission, 2014 http://www.eac.gov/research/other_reports.aspx

¹⁹ On provisional balloting procedures see: http://www.eac.gov/research/provisional_voting_challenges_and_solutions.aspx

²⁰ Shelby County v Holder (2013) <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCUQFjAB&url=http%3A%2F%2Fwww.law.cornell.edu%2Fsupremecourt%2Ftext%2F12-96&ei=cO6HVd7UHDsVyATX3JGoBg&usq=AFQjCNFatMvj6lTXIZwXukrS5zX7cdTBcg&sig2=DPy1vCB9ll1d8fp8zOUbbw&bvm=bv.96339352,d.aWw>

In the states with the fewest requirements (in gray on the map), residents only need to have their signature verified. Other states permit residents to provide either picture ID or non-picture ID, including utility bills (states in light green on the map). In three states, residents are required to present picture ID (pictured in gray-green on the map). If the resident is unable to provide the required pictured ID, the individual may still vote if they sign an affidavit attesting to their ID. Finally, in the most restrictive states, individuals must present a government-issued photo ID and individuals unable to produce the required ID are not allowed to use an affidavit to attest to their ID and subsequently cannot vote (states pictures in green and dark green on the map). Regardless of a state's ID requirements, the 2002 Help America Vote Act (HAVA) mandates that first-time voters who register by mail must provide ID either at the time of registration or the first time the newly-registered individual votes in-person.

State Voter Identification Laws, 2015



Proponents of proof of citizenship and voter ID requirements justify these policies on the grounds that they reduce the potential for voter impersonation; however, the available evidence indicates that voter impersonation occurs rarely, if at all.²¹ Moreover, the burdens of voter ID requirements discourage all voters, but have a disproportionate effect on those who either do not have the required form of identification. Similar to the effects of felony disenfranchisement laws, these potential voters tend to be drawn disproportionately from historically disenfranchised groups like the poor, racial and ethnic minorities and the elderly. For example, a 2006 nationwide survey concluded that voting-age citizens earning less than \$35,000 in annual income were more than twice as likely to lack government-issued ID as those earning more than \$35,000. The same 2006 study found that African-Americans are more than three times as likely as whites to lack a government-issued photo ID, with one in four African-Americans owning no such ID.²²

In addition to mandatory photo identification procedures, in recent years some states have purged voter lists, shortened periods for registration and early voting and taken other measures that make the voting process more onerous.²³ Again, these measures disproportionately impact access by underrepresented segments of the population, including the elderly, racial and ethnic minorities, low-income, disabled, and immigrant groups.²⁴

Mail-In Balloting

Despite the emphasis on voter identification, voting in the US need not be in person. Every state allows for voters to cast absentee ballots, in some cases with an "excuse" for why an absentee ballot is needed (12 states), but increasingly states allow "no excuse" absentee balloting (33 states),²⁵ essentially creating a system of mail balloting running in parallel to the votes cast in person on election day. Three states have voting only by mail: Oregon, Washington and Colorado. Oregon introduced mail balloting in 2000, with Washington following in 2011 and Colorado soon after in 2013. Arizona, California, Hawaii and Montana allow "permanent absentee voting" – allowing individual voters to opt in to mail in ballots.²⁶ (see Map above, "Early and Absentee Voting, 2012"). The mail balloting option is increasingly popular among voters: in the November 2012 Presidential election, 31 percent of all ballots were cast early; of these, 55 percent were sent in by mail.²⁷

²¹ See Fatma Marouf, "The Hunt for Noncitizen Voters," *Stanford Law Review* 65 (2012), 66-73.

²² "Citizens without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification," Brennan Center for Justice, New York University Law School, 2006. <http://www.brennancenter.org/analysis/citizens-without-proof>. See also: *Common Cause/Georgia League of Women v. Billups* 439 F. Supp.2d 1294 (N.D. Ga. 2006).

²³ See <http://www.brennancenter.org/analysis/election-2012-voting-laws-roundup>

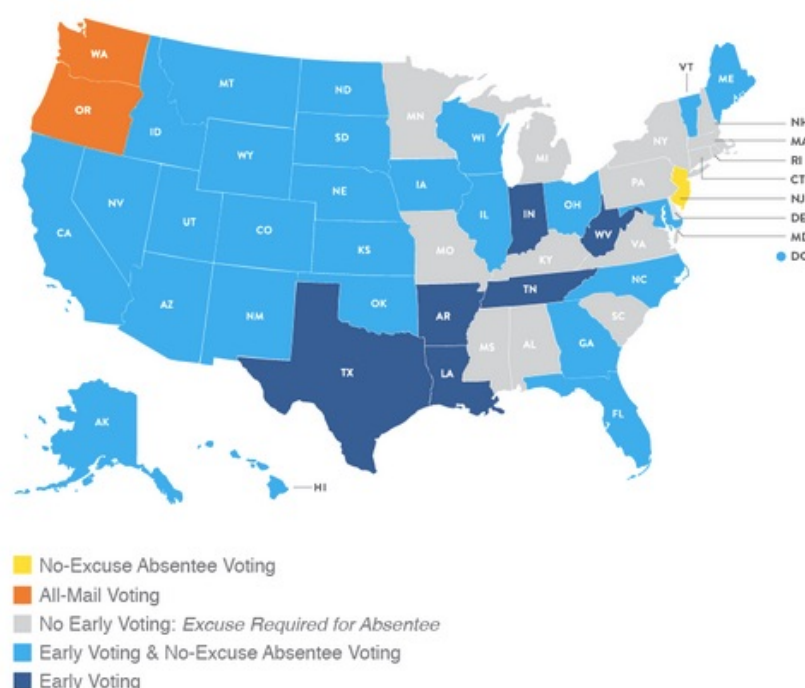
²⁴ Asian American Justice Center, Statement of Terry M. Ao for Forum on State Voter Law "Excluded from Democracy: The Impact of Recent State Voting Law Changes," November, 2011.

²⁵ National Conference of State Legislatures, <http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>

²⁶ United States Election Assistance Commission. http://www.eac.gov/research/other_reports.aspx

²⁷ Barry Burden and Brian Gaines, "Administration of Absentee Ballot Programs," Paper prepared for the Presidential Commission on Election Administration, July 15, 2013. <http://webcache.googleusercontent.com/search?q=cache:9zSS9Hd5xYUJ:https://www.supportthevoter.gov/files/2013/08/Brian-Gaines-Absentee-White-Paper-Burden-and-Gaines.pdf+&cd=9&hl=en&ct=clnk&gl=us>

Early and Absentee Voting, 2012²⁸



Non-Resident Citizen Voting

Just as US residents may be able to vote via mail, the approximately 6 million American citizens who reside overseas²⁹ are also able to cast absentee ballots in federal elections under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) of 1986.³⁰ This law was passed only after years of lobbying to allow citizens abroad—in particular, military personnel serving overseas—the right to have their votes count in federal elections. In order for overseas citizens to participate in federal elections, each state requires non-residents to complete an absentee ballot application. Individuals have to request and submit a Federal Post Card Application (FPCA) every year to local election officials in the state of legal voting residence. Depending on the procedures of each state, overseas citizens can receive the ballot by email, fax, or electronically.³¹ Individuals who serve in the military have special voting rights and have the choice of requesting a mail-in absentee ballot or applying to register through special programs for military and overseas voters. For example, UOCAVA requires states to allow for expedited registration and voting by military personnel and certain other citizens overseas.³²

²⁸ <http://www.demos.org/publication/millions-polls-early-voting>

²⁹ <http://www.migrationpolicy.org/article/counting-uncountable-overseas-americans>

³⁰ [Uniformed and Overseas Citizens Absentee Voting Act](#)

³¹ US Department of State, Bureau of Consular Affairs.

<http://travel.state.gov/content/passports/english/abroad/legal-matters/benefits/voting.html>

³² Those covered by the UOCAVA include members of the United States Uninform Services and merchant marines, their family members, and American citizens residing outside the United States.

The Federal Voting Assistance Program administers the federal responsibilities of the UOCAVA and has been recently supplemented by the Military and Overseas Voter Empowerment Act to assist overseas voters. However, since the government does not track how many Americans leave the United States and live abroad it is difficult to estimate how many citizens actually live overseas. It is even more difficult to calculate the levels of voter registration and turnout for American citizens abroad. The Federal Voting Assistance Program (FVAP) estimates about 4.5 to 6.5 million overseas citizens living outside the United States and its five territories. According to a 2012 election report, states transmitted 876,362 ballots to UOCAVA with 51.7 percent going to uninformed services members and 44.4 percent to civilian citizens living overseas.³³

4. Conclusion

This report briefly outlines some of the practices around citizenship, access to voting and voting procedures currently in place in the United States. Two things should be self-evidently clear upon reading this report. First, while citizenship as a whole is defined by the Constitution, and access to the ballot has been increasingly delineated through Congressional action, there is still considerable variation in how access to the ballot is put into practice by each of the fifty states in the United States, with this variation on the increase. Second, procedures for voting are not necessarily separate from the question of who has access to the ballot. How someone is allowed to vote—registering in advance, presenting an ID to cast a ballot, etc.—is more likely to pose greater barriers for some citizens than for others, and those for whom they pose the most barriers are often belong to groups which have historically been disenfranchised – racial and ethnic minorities, the poor and recent arrivals. The exclusion—whether by design or in practice—of substantial categories of long-term citizen and non-citizen residents continues to raise questions about democratic representativeness and legitimacy.

Federal Voting Assistance Program <http://www.fvap.gov/> See also: http://www.eac.gov/testing_and_certification/eacs_work_with_military_and_overseas_voting.aspx

³³ United States Election Assistance Commission, Uniformed and Overseas Absentee Voting Act. Survey Findings, July 2013.

<http://webcache.googleusercontent.com/search?q=cache:Fz6BjppAPg0J:https://www.supportthevoter.gov/files/2013/08/CRS-Report-on-UOCAVA.pdf+&cd=4&hl=en&ct=clnk&gl=us>

