

# What Is the Value of a Constitutionalized Right to Vote?

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## 8.1 INTRODUCTION

In an era marked by democratic backsliding on the global stage, questions have been raised about the ability of constitutional safeguards to forestall authoritarian retrenchment.<sup>1</sup> Does the constitutional design of elections matter for the sustainability and functioning of democratic governance? This chapter seeks to address one aspect of this larger question by focusing on the right to vote. Given the norm of universal suffrage, the importance of the right to vote is virtually undisputed. What is the value, however, of a *constitutionally enshrined* right to vote? Does it matter whether or not the right to vote is constitutionalized?

It has long been accepted that the protection of constitutional rights is dependent, at least in part, on government enforcement and societal mobilization.<sup>2</sup> As James Madison famously noted in *The Federalist Papers*, liberty-protecting constitutional provisions amount to “parchment barriers” that are often unequal to the “encroaching spirit of power” embodied by the legislature.<sup>3</sup> Constitutional rights provisions do not necessarily translate into actual protections for citizens simply by virtue of being

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<sup>1</sup> Wojciech Sadurski, *Poland's Constitutional Breakdown*. Oxford University Press, 2019; Tom Ginsburg and Aziz Z. Huq, *How to Save A Constitutional Democracy*. University of Chicago Press, 2018; Steven Levitsky and Daniel Ziblatt, *How Democracies Die*. Broadway Books, 2018; Mark A. Graber, Sanford Levinson, and Mark Tushnet, eds., *Constitutional Democracy in Crisis?* Oxford University Press, 2018.

<sup>2</sup> Stephen Holmes and Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes*. W. W. Norton & Company, 1999; Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy and Political Change*. Yale University Press, 1975; Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* University of Chicago Press, 1991; Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. University of Chicago Press, 1998.

<sup>3</sup> The Federalist No. 48, in Clinton Rossiter, ed., *The Federalist Papers*. Mentor, 1999.

included in the constitutional document.<sup>4</sup> Rights-protection is contingent upon the work of public institutions, such as the courts, and more generally upon effective government.<sup>5</sup>

A recent empirical study, while confirming the core insight that constitutional rights do not on their own protect citizens from a government's repressive actions, raises questions, however, about whether judicial independence and democratic accountability mechanisms are the prime causal factors leading to rights-protection.<sup>6</sup> Adam Chilton and Mila Versteeg argue that those rights that are organizational in character (in the sense that there are organizations that are invested in protecting the right) are harder for governments to violate than rights that are individual in character (in the sense that these rights are largely relied upon and defended by individuals).<sup>7</sup> That being said, they note that governments are usually successful when they are "determined to erode the protections provided by certain rights."<sup>8</sup>

In this chapter, I claim that the contingent nature of rights protection is particularly pronounced with respect to the right to vote – and this is the case for two reasons, both of which are tied to the distinctive features of the right to vote *qua* right. First, I suggest, the right to vote is multidimensional: it is composed of constitutional, statutory, regulatory, and jurisprudential elements that interact with one another to collectively produce "the right to vote." Second, the right to vote is a structural right in the sense that it is dependent upon an entire infrastructure of institutions to exist and perform its function. I suggest that these features of the right to vote – its multidimensional and institutional nature – make it uniquely susceptible to being undermined by political forces.

Although the constitutional enshrinement of the right to vote does not on its own protect voting rights, I claim that, as a normative matter, constitutions undoubtedly should recognize the right to vote. In addition to its potential impact on voting rights protection, I suggest that a constitutionally enshrined right to vote is crucially important for its expressive functions. A constitutionalized right to vote expresses a commitment to various democratic values and, in addition, establishes normative baselines regarding universal suffrage, political equality, and democratic representation. In democracies, these expressive functions can indirectly serve to protect voting rights.

<sup>4</sup> David S. Law and Mila Versteeg, "Sham Constitutions," *California Law Review* 101: 863–952, 872, 880 (2013).

<sup>5</sup> Vicki C. Jackson and Yasmin Dawood, "Constitutionalism and a Right to Effective Government: Rights, Institutions, and Values," in *Constitutionalism and a Right to Effective Government?* ed. Vicki C. Jackson and Yasmin Dawood. Cambridge University Press, 2022.

<sup>6</sup> Adam S. Chilton and Mila Versteeg, *How Constitutional Rights Matter*. Oxford University Press, 2020, 7, 49.

<sup>7</sup> *Ibid.*, at 7.

<sup>8</sup> *Ibid.*

However, the expressive functions of the right to vote can also, paradoxically, undermine democracy by furnishing autocrats in competitive authoritarian regimes with “democratic cover” while they are undermining the key determinants – competitive elections, rival political parties, freedoms of speech and association – that render voting meaningful. At a more general level, the expressive function of constitutional rights and structures raises questions about the ways in which authoritarian regimes use the mechanisms of democracy, such as voting rights and elections, to create the impression of democratic legitimacy while simultaneously eroding it in practice. However, the existence of democratic structures such as elections and voting, even when heavily manipulated, may nonetheless exert some constraints on elected autocrats, at least in comparison to the absence of such constraints in fully authoritarian regimes. For this reason, the claim that the right to vote ought to be constitutionalized remains normatively appealing, although the overall force of the claim is qualified in light of this paradox.

This chapter is organized in four sections. Section 8.2 introduces the multidimensional nature of the right to vote, while Section 8.3 focuses on the institutional dimension. Section 8.4 explores the claim that a constitutionalized right to vote can directly protect voting rights. Section 8.5 argues that a constitutionally enshrined right to vote is normatively valuable for its expressive function notwithstanding the potential that it will be used as a tool of autocratic entrenchment. The conclusion summarizes the main themes.

## 8.2 THE MULTIDIMENSIONAL RIGHT TO VOTE

The right to vote is multidimensional: it is composed of constitutional, statutory, regulatory, and jurisprudential elements and the interactions among them. In many democracies, the right to vote is constitutionally entrenched. Even when it is constitutionally recognized, the right to vote is also comprised by myriad statutory and regulatory provisions that determine the eligibility and opportunity to vote. Rules that impose citizenship or minimum age requirements on voters, or that require certain forms of voter identification, or that deny the franchise to those convicted of a crime exert an important influence on the contours of the right to vote. These statutory elements of the right to vote can also be described as a “legislative” or “political” component.<sup>9</sup> Statutes are enacted by political bodies to achieve certain political ends; hence a statute is both a legal and a political phenomenon. At times, the formal constitutional strand of the right to vote can be undermined by the statutory elements of the right to vote. This is particularly the case when the rules governing the eligibility and opportunity to vote are crafted to

<sup>9</sup> Grégoire C. N. Webber, *The Negotiable Constitution: On the Limitation of Rights*. Cambridge University Press, 2009; Franita Tolson, “Enforcing the Political Constitution,” *Stanford Law Review Online* 74: 88–99 (2022).

augment or even entrench partisan advantage.<sup>10</sup> Judicial decisions that interpret these constitutional, statutory, and regulatory provisions likewise play a crucial role in delineating voting rights. As such, these various strands – constitutional, statutory, regulatory, and jurisprudential – taken together produce “the right to vote.”

A snapshot view of the right to vote in Canada illustrates the multidimensional nature of the right to vote. In Canada, Section 3 of the Charter of Rights and Freedoms provides that “every citizen of Canada has the right to vote in an election of the members of the House of Commons or of a legislative assembly and to be qualified for membership therein.”<sup>11</sup> In addition to the constitutional text, the right to vote is further specified in the Canada Elections Act,<sup>12</sup> which sets forth a vast array of rules governing federal elections. Most directly, these statutory rules determine the eligibility of voters and the mechanics of voting and vote counting. Provinces and municipalities have their own electoral statutes, which influence the right to vote at the local level. The right to vote is also comprises regulatory rules promulgated by Elections Canada, the electoral management body in charge of federal elections. Finally, the contours and content of the right to vote have also been determined by judicial decisions. The Supreme Court of Canada and lower courts have addressed various topics that bear directly on the right to vote, including voter qualification rules, voter identification requirements, the disenfranchisement of prisoners, residency rules, and the entitlement to vote.<sup>13</sup>

A cursory examination of global trends likewise suggests that many nations have enacted a complex array of rules and regulations that comprise the right to vote. For instance, citizenship is a qualification for registering to vote and for voting in national elections in over 95 percent of countries.<sup>14</sup> The vast majority (87 percent) of countries around the world set their minimum voting age at eighteen years of age.<sup>15</sup> An overwhelming majority of voters around the world are required to present some form of identification in order to vote.<sup>16</sup> As of 2004, approximately 72 percent of democracies impose restrictions on voting for those who have been convicted of a crime.<sup>17</sup> These statistics provide some indication of the complexity of rules that govern the right to vote in numerous countries.

<sup>10</sup> Samuel Issacharoff and Richard H. Pildes, “Politics as Markets: Partisan Lockups of the Democratic Process,” *Stanford Law Review* 50: 643–717 (1998).

<sup>11</sup> Canadian Charter of Rights and Freedoms, s 3, Part I of the Constitution Act, being Schedule B to the Canada Act 1982 (UK), 1982 c 11.

<sup>12</sup> SC 2000 c 9.

<sup>13</sup> For a discussion of these decisions, see Yasmin Dawood, “Democratic Rights,” in *The Oxford Handbook of the Canadian Constitution* ed. Peter Oliver, Patrick Macklem and Nathalie Des Rosiers. Oxford University Press, 2017, 717–735.

<sup>14</sup> ACE Electoral Knowledge Network, “Comparative Data,” <http://aceproject.org/epic-en>.

<sup>15</sup> Ibid.

<sup>16</sup> Rodney Smith, *Multiple Voting and Voter Identification: A Research Report Prepared for the New South Wales Electoral Commission*. New South Wales Electoral Commission, 2014, 48.

<sup>17</sup> Louis Massicotte, André Blais, and Antoine Yoshinaka, *Establishing the Rules of the Game: Election Laws in Democracies*. University of Toronto Press, 2004, 32.

The complexity of the rules comprising the right to vote is also evident in the United States. While the US Constitution includes many provisions concerning voting and political participation, it does not contain an affirmative right to vote. The “most explicit protections of the franchise . . . are phrased almost entirely in the negative – that is, they simply prohibit particular forms of disenfranchisement.”<sup>18</sup> In addition to these constitutional provisions, there are countless statutory and regulatory rules governing the right to vote – a complexity that is amplified by the fact that individual states determine the qualifications for voting. Electoral regulations are likewise developed and applied at the state level. Every aspect of the right to vote is heavily specified by rules and regulations, including, for instance, the layout of a ballot, the methods for counting votes, the eligibility of voters, and the location of polling places. Court decisions, at both the federal and state levels, further specify the content and contours of the right to vote.<sup>19</sup>

The example of voter suppression in the United States illustrates not only how the right to vote is composed of various components but also how the statutory and jurisprudential strands of the right to vote can undermine the constitutional guarantee. The right to vote has had a long and turbulent history marked by racial discrimination and exclusion.<sup>20</sup> After the passage of the Fifteenth Amendment,<sup>21</sup> states turned to facially nondiscriminatory disenfranchising tactics – including poll taxes, literacy tests, character tests, property and residency requirements, secret ballots, all-white primaries, and voter registration rules – to prevent African Americans from voting.<sup>22</sup> Grandfather clauses waived such requirements for low-income and illiterate white voters. The Voting Rights Act of 1965, which prohibits racial discrimination in voting, was enacted to enforce the voting rights guaranteed by the Fifteenth Amendment of the US Constitution.<sup>23</sup>

<sup>18</sup> Pamela S. Karlan, “The Reconstruction of Voting Rights,” in *Race, Reform, and Regulation of the Electoral Process: Recurring Puzzles in American Democracy* ed. Guy-Uriel E. Charles, Heather K. Gerken and Michael S. Kang. Cambridge University Press, 2011, 37.

<sup>19</sup> Richard Pildes argues, for instance, that the Supreme Court has engaged in the “constitutionalization” of various issues concerning elections and the institutions of democratic governance. See Richard H. Pildes, “Forward: The Constitutionalization of Democratic Politics,” *Harvard Law Review* 118: 1–116, 6 (2004).

<sup>20</sup> Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States*. Basic Books, 2000.

<sup>21</sup> The Fifteenth Amendment provides that the “right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.”

<sup>22</sup> Morgan J. Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880–1910*. Yale University Press, 1974, 52–56.

<sup>23</sup> The Fifteenth Amendment provides: “The rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude,” US Constitution.

Although the US Supreme Court was generally protective of voting rights after the advent of the civil rights era,<sup>24</sup> in recent years, the conservative majority of the Court has undermined voting rights. In the wake of the Court's decision in *Shelby County v. Holder*,<sup>25</sup> which effectively dismantled the preclearance process under the Voting Rights Act, states have passed a number of statutes that imposed new restrictions on the eligibility and opportunity to vote. These restrictions, which include stringent voter identification laws and complex registration requirements, amount to a new form of vote denial.<sup>26</sup> Given the confluence of racial identity and partisan affiliation in the United States, laws governing the eligibility and opportunity to vote are often designed to depress minority voting in order to achieve a certain partisan outcome.<sup>27</sup> In a recent case, *Brnovich v Democratic National Committee*,<sup>28</sup> the conservative majority of the Supreme Court considerably weakened another provision (section 2) of the Voting Rights Act, which prohibits voting regulations that have a disproportionate impact on minority voters. The Court announced a new approach to section 2 vote denial claims, which makes it arguably more difficult for plaintiff voters to prevail against voting restrictions.<sup>29</sup>

### 8.3 INSTITUTIONS AND THE RIGHT TO VOTE

A related point is that the right to vote has an institutional dimension. The right to vote is a "structural right" because its existence depends upon on an entire infrastructure of political institutions.<sup>30</sup> Structural rights are individual rights that take into account the broader institutional framework within which rights are defined, held, and exercised. Structural rights theory holds that the participation of individuals is key (hence the emphasis on rights) but that individuals participate within an institutional framework that is constituted by relations of power (hence the emphasis on structure). Rights do not exist in a vacuum but are instead exercised within a particular political, institutional, and societal context. While structural rights theory

<sup>24</sup> John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*. Harvard University Press, 1980.

<sup>25</sup> 570 U.S. 529 (2013).

<sup>26</sup> Daniel P. Tokaji, "The New Vote Denial: Where Election Reform Meets the Voting Rights Act," *South Carolina Law Review* 57: 689–733, 709 (2006).

<sup>27</sup> Keith G. Bentele and Erin E. O'Brien, "Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies," *Perspectives on Politics* 11: 1088–1116, 1103 (2013); Samuel Issacharoff, "Ballot Bedlam," *Duke Law Journal* 64: 1363–1410, 1370 (2015); Richard L. Hasen, "Race or Party? How Courts Should Think About Republican Efforts To Make It Harder to Vote in North Carolina and Elsewhere," *Harvard Law Review Forum* 127: 58–75, 63–64 (2014).

<sup>28</sup> 141 S. Ct. 2321 (2021).

<sup>29</sup> Yasmin Dawood, "The Right to Vote: Baselines and Defaults," *Stanford Law Review Online* 74: 37–54 (2022).

<sup>30</sup> Yasmin Dawood, "Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review," *University of Toronto Law Journal* 62: 499–561 (2012).

can be applied to many kinds of rights, it has particular salience for democratic rights.

For instance, the right to vote, while held by individuals, presupposes the existence of a wide array of institutions and actors, including elections, candidates, political parties, constituencies, candidates, legislatures, and so forth. By contrast, other individual rights, such as the right to liberty, necessarily inhere in individuals and are not dependent for their exercise upon the existence of a prior institutional framework. To be sure, and as described in Section 8.2, every right requires institutions in order to be enforced. However, the right to vote cannot even be conceived of as a right in the absence of an entire system of institutions. In addition, the right to vote is dependent upon effective democratic governance to provide not only voting but also the associated institutions and processes, in particular free and fair elections, that render such a right meaningful.<sup>31</sup> In this way, the right to vote confounds the usual distinctions between negative rights and positive rights; indeed, it comprises and combines elements of both.<sup>32</sup> Along with a properly functioning set of institutions, the right to vote is also dependent to a large degree on effective electoral administration.<sup>33</sup> As a caveat, the notion of a structural right is conceptual; it captures something relevant about the institutionalized nature of the right to vote but it does not imply that the holder of the right to vote is necessarily entitled to all the relevant institutions.

The political and institutional mechanisms by which votes are translated into power also have an impact on whether the right to vote is meaningful. The aggregation of votes,<sup>34</sup> the formation of electoral districts, and the influence of partisanship on electoral rules,<sup>35</sup> for example, can have an effect on how and whether votes count. Broader electoral rules – such as those affecting campaign finance – can undermine the relative power of citizens' votes. In the United States, for example, campaign finance rules have accentuated the disproportionate political influence of the wealthy. Political campaigns are largely funded by the so-called donor class, a wealthy and powerful minority.<sup>36</sup> Empirical research has shown that

<sup>31</sup> Yasmin Dawood, "Effective Government and the Two Faces of Constitutionalism," in *Constitutionalism and a Right to Effective Government?* ed. Vicki C. Jackson and Yasmin Dawood. Cambridge University Press, 2022.

<sup>32</sup> Karlan, "The Reconstruction of Voting Rights," 37–39.

<sup>33</sup> Mark Tushnet, *The New Fourth Branch: Institutions for Protecting Constitutional Democracy*. Cambridge University Press, 2021, 123–157.

<sup>34</sup> Heather K. Gerken, "Understanding the Right to an Undiluted Vote," *Harvard Law Review* 114: 1663–1743 (2001).

<sup>35</sup> Michael S. Kang, "Gerrymandering and the Norm against Government Partisanship," *Michigan Law Review* 116: 351–419 (2017).

<sup>36</sup> Spencer Overton, "The Donor Class: Campaign Finance, Democracy, and Participation," *University of Pennsylvania Law Review* 153: 73–118 (2004); Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress – and a Plan to Stop It*. Twelve, 2011.

elected representatives are more responsive to the preferences of the affluent rather than those of most citizens,<sup>37</sup> which has distorted policymaking in Congress.<sup>38</sup>

A meaningful right to vote is also arguably dependent on more diffuse sociological factors, such as the availability of informed voting. While social media has provided citizens with new venues for expression and information-gathering, it has also flooded public discourse with disinformation and fake news. Social media produces echo chambers, exacerbates polarization, and creates bias.<sup>39</sup> Individual actors and foreign governments have used social media to influence elections by targeting citizens with fake news.<sup>40</sup>

#### 8.4 CONSTITUTIONALIZING THE RIGHT TO VOTE

To summarize thus far: the right to vote is comprised of multiple strands – constitutional, statutory, regulatory, jurisprudential – and is inextricably embedded in an institutional framework. Two implications emerge from these observations. First, the “right to vote” is heavily specified by rules and regulations that determine not only its outer boundaries but also its internal content. It is also unintelligible as a right in the absence of an array of institutions and processes. These two features of the right to vote distinguish it, I suggest, from other kinds of rights, such as the freedom of speech. To be sure, the difference is one of degree, not kind: while other constitutional rights, such as the freedom of speech, are determined to some extent by laws and judgments and are exercised within an institutional context, they are, in comparison to the right to vote, relatively less dependent on legislative and judicial specification and relatively less dependent on institutional mechanisms for their realization.<sup>41</sup> The second implication stems from the first, namely, that the multidimensional and institutional features of the right to vote impose certain constraints on how effectively a bare constitutional right to vote can protect voting rights.

That being said, does the constitutional backstop of a right to vote make a difference? There is no question that constitutional structures matter, but it has proven to be difficult to reach a consensus about which structures matter and why. For instance, there are long-standing debates about whether presidential or

<sup>37</sup> Larry Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age*. Russell Sage Foundation, 2008; Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America*. Russell Sage Foundation, 2012.

<sup>38</sup> Lessig, *Republic, Lost*; Nicholas Stephanopoulos, “Aligning Campaign Finance Law,” *Virginia Law Review* 101: 1425–1500 (2015).

<sup>39</sup> Cass R. Sunstein, *#Republic: Divided Democracy in the Age of Social Media*. Princeton University Press, 2017.

<sup>40</sup> Yasmin Dawood, “Combatting Foreign Election Interference: Canada’s Electoral Ecosystem Approach to Disinformation and Cyber Threats,” *Election Law Journal* 20: 10–31 (2021).

<sup>41</sup> One caveat is that these distinctions are likely to be more evident in stable democracies as compared to competitive authoritarian or fully authoritarian regimes.



parliamentary systems are more stable,<sup>42</sup> whether the variation is a function of institutional factors other than regime type and the separation of powers,<sup>43</sup> or whether economic or cultural factors matter more than institutional ones.<sup>44</sup> Leaving aside questions of regime stability, institutional features, such as presidential or prime ministerial selection devices, may matter a great deal for other sorts of issues, such as the kind of democratic politics that results.<sup>45</sup> Or it may be the case that in other circumstances it is not possible to draw valid inferences from institutional rules alone.<sup>46</sup> A constitution may not even mention key institutional features, such as political parties, which have proven to be indispensable to politics.<sup>47</sup> And finally, constitutions may provide the legal framework for democracy,<sup>48</sup> at varying degrees of success,<sup>49</sup> but they may be fully compatible with competitive authoritarian regimes and fully authoritarian regimes.<sup>50</sup>

Another way to approach this issue is to ask whether the *absence* of an affirmative right to vote, for instance in the US Constitution, makes a difference to the protection of voting rights. It is possible that a generalized and affirmative right to vote in the US Constitution would have made it easier for legislators to enact proving rights legislation, or alternatively, would have furnished courts with greater tools to strike down legislation that undermined voting rights. It may be the case, however, that the protection of voting rights is more dependent on non-constitutional factors, such as statutory rules, political forces, and legal norms, which buttress the right to vote. For instance, the existence of compulsory voting in

<sup>42</sup> Juan J. Linz, "The Perils of Presidentialism," *Journal of Democracy* 1: 51–69, 63 (1990); Donald L. Horowitz, "Comparing Democratic Systems," *Journal of Democracy* 1: 73–79 (1990).

<sup>43</sup> Jose A. Cheibub, *Presidentialism, Parliamentarism, and Democracy*. Cambridge University Press, 2007; Robert Elgie, "From Linz to Tsebelis: Three Waves of Presidential / Parliamentary Studies?," *Democratization* 21: 106–122, 107 (2005); Jose A. Cheibub and Fernando Limongi, "Democratic Institutions and Regime Survival: Parliamentary and Presidential Democracies Reconsidered," *Annual Review of Political Science* 5: 151–179 (2002).

<sup>44</sup> Seymour M. Lipset, "The Centrality of Political Culture," *Journal of Democracy* 1: 80–83 (1990).

<sup>45</sup> Stephen Gardbaum and Richard H. Pildes, "Populism and Institutional Design: Methods of Selecting Candidates for Chief Executive," *New York University Law Review* 93: 647–708 (2018).

<sup>46</sup> Thomas H. Hammond and Christopher K. Butler, "Some Complex Answers to the Simple Question 'Do Institutions Matter?': Policy Choice and Policy Change in Presidential and Parliamentary Systems," *Journal of Theoretical Politics* 15: 145–200 (2003).

<sup>47</sup> Daryl J. Levinson and Richard H. Pildes, "Separation of Parties, Not Powers," *Harvard Law Review* 119: 2311–2386 (2006).

<sup>48</sup> Cass R. Sunstein, *Designing Democracy: What Constitutions Do*. Oxford University Press, 2001.

<sup>49</sup> Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)*. Oxford University Press, 2006.

<sup>50</sup> Tom Ginsburg and Alberto Simpser, "Introduction: Constitutions in Authoritarian Regimes," in *Constitutions in Authoritarian Regimes* ed. Tom Ginsburg and Alberto Simpser. Cambridge University Press, 2014; Mark Tushnet, "Authoritarian Constitutionalism," *Cornell Law Review* 100: 391–461 (2015).

Australia<sup>51</sup> suggests that non-constitutional rules can play an important role in safeguarding the right to vote. Indeed, in democracies without written constitutions, the franchise is protected by statute, as in the United Kingdom. International legal norms may also serve as a safeguard for the right to vote. For example, Article 25 of the International Convention on Civil and Political Rights provides every citizen with the right and the opportunity to “vote and be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.”<sup>52</sup> Broader cultural and social norms around the right to vote may provide important safeguards for voting even if formal franchise rights are weakly protected. In sum, contextual factors and the non-constitutional elements of the right to vote must be considered when evaluating the impact of the formal constitutional guarantee of the franchise in any given jurisdiction.

Given this complexity, it may be more useful to conceive of a constitutionalized right to vote as part of the “minimum core,” which is defined by Rosalind Dixon and David Landau as those institutions and rights that are required to preserve competitive democracy.<sup>53</sup> This minimum core can be used to assess and compare the performance of different constitutions. On this view, it may be less important to disaggregate the individual effect of each component of competitive elections and more important to focus instead on the extent to which constitutional structures, taken as a whole, protect democracy.<sup>54</sup> While I am in favor of minimalist approaches to democracy,<sup>55</sup> I think that even the most minimalist version of competitive democracy is actually fairly “thick” with respect to the complex interplay of rules, processes, and institutions that are inevitably at stake. In this chapter, I have defended, as a conceptual matter, a thicker multidimensional conception of the right to vote, which emphasizes the myriad details that underlie the seemingly

<sup>51</sup> For a discussion of how compulsory voting transforms the right to vote from a formal right to an instantiated one that is exercised, see Lisa Hill, “Compulsory Voting and the Promotion of Human Rights in Australia,” *Australian Journal of Human Rights* 23: 188–202 (2017).

<sup>52</sup> For a discussion of the international legal standards and norms respecting voting and democratic participation, see Tom Ginsburg, *Democracies and International Law*. Cambridge University Press, 2021, 21–22.

<sup>53</sup> Rosalind Dixon and David Landau, “Competitive Democracy and the Constitutional Minimum Core,” in *Assessing Constitutional Performance* ed. Tom Ginsburg and Aziz Z. Huq. Cambridge University Press, 2016, 276.

<sup>54</sup> *Ibid.*, at 277.

<sup>55</sup> Schumpeter defined democracy as “that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle got the people’s vote.” Joseph A. Schumpeter, *Capitalism, Socialism and Democracy*. Harper & Row, 1950, 269. An alternative minimalist conception describes democracy as a system of government that allows for the peaceful transfer of power. Adam Przeworski, “Minimalist Conception of Democracy: A Defense,” in *Democracy’s Value* ed. Ian Shapiro and Casiano Hacker-Cordón. Cambridge University Press, 1999, 45.

simple act of casting a ballot. This thicker conception, I suggest, would still fall under minimalist conceptions of democracy.

### 8.5 THE EXPRESSIVE FUNCTIONS OF A CONSTITUTIONALIZED RIGHT TO VOTE

The multidimensional and institutional features of the right to vote have the potential to impose significant constraints on voting rights. While the constitutional enshrinement of the right to vote can have a protective impact on voting rights, it provides no guarantee that it will do so. That being said, a constitution should protect the right to vote. I claim that a constitutionally enshrined right to vote is normatively valuable inasmuch for its expressive functions as it is for its direct impact on voting rights.

Legal rules have an expressive dimension.<sup>56</sup> The constitutional right to vote expresses and symbolizes the values of political equality, respect, and belonging. As Judith Shklar observed, the right to vote is a “certificate of full membership in society” that “confers, and in some ways, defines, full citizenship.”<sup>57</sup> Those who are denied the vote “feel dishonored, not just powerless.”<sup>58</sup> Individuals who are excluded from the franchise are, according to Charles Beitz, “socially dead” as they are “not publicly recognized as persons at all.”<sup>59</sup> Not only does the right to vote confer belonging and dignity, it is also closely connected to the principle of equality.<sup>60</sup> The right to vote is a “minimal condition of political equality”;<sup>61</sup> it is also, crucially, a public expression of that civic equality.<sup>62</sup> In the United States, the right to vote has long been connected to the principle of racial equality but in recent years it has also been understood through the lens of universalist principles of equal voting, which apply regardless of race.<sup>63</sup> To be sure, the expressive value of a

<sup>56</sup> Cass R. Sunstein, “On the Expressive Function of Law,” *University of Pennsylvania Law Review* 144: 2021 (1996); Elizabeth S. Anderson and Richard H. Pildes, “Expressive Theories of Law: A General Restatement,” *University of Pennsylvania Law Review* 148: 1503–1575 (2000).

<sup>57</sup> Judith Shklar, *American Citizenship: The Quest for Inclusion*. Harvard University Press, 1991, 2, 27.

<sup>58</sup> *Ibid.*, at 3.

<sup>59</sup> Charles R. Beitz, *Political Equality: An Essay in Democratic Theory*. Princeton University Press, 1989, 109.

<sup>60</sup> Joseph Fishkin, “Equal Citizenship and the Individual Right to Vote,” *Indiana Law Journal* 86: 1289–1360, 1333 (2011).

<sup>61</sup> Iris Marion Young, *Inclusion and Democracy*. Oxford University Press, 2000, 6.

<sup>62</sup> Amy Gutmann, “Responding to Racial Injustice,” in *Color Conscious: The Political Morality of Race* ed. Anthony K. Appiah and Amy Gutmann. Princeton University Press, 1996, 156.

<sup>63</sup> Guy-Uriel E. Charles and Luis E. Fuentes-Rohwer, “Slouching towards Universality: A Brief History of Race, Voting, and Political Participation,” *Howard Law Journal* 62: 809–853 (2019); Samuel Issacharoff, “Voter Welfare: An Emerging Rule of Reason in Voting Rights Cases,” *Indiana Law Journal* 92: 299–325 (2016).

constitutionally enshrined right to vote may change depending on the wording of the guarantee and the culture and history of the relevant jurisdiction.

In addition to expressing certain values, the right to vote also expresses and thereby establishes normative baselines concerning universal suffrage, political equality, and democratic representation. It is a fundamental normative commitment of a democracy that all citizens should have the right to vote.<sup>64</sup> The right to vote is viewed as a preservative right because it enables the protection of all other rights through the mechanisms of political participation, democratic representation, and accountable government.<sup>65</sup> These normative baselines of universal suffrage and political equality can set an outer limit for subconstitutional regulation. That is, the expressive value of the right to vote lies in serving as an outer boundary – at least in theory – for statutory and judicial restrictions on the right to vote. While these restrictions may undermine the right to vote, the existence of the normative baseline of universal suffrage would make it costly as a reputational matter to eradicate the constitutional protection altogether. A more general observation is that the aspirational dimension of constitutions and constitutional rights<sup>66</sup> can have a real-world impact on politics. The effect of aspirational constitutions may be subtle in that they help to thwart decay.<sup>67</sup> Or they may, as in the case of the right to vote, serve as a rallying point to mobilize citizens and bring about progressive political change.

To be sure, there are empirical difficulties associated with the claim that a constitutionally enshrined right to vote establishes a normative baseline of universal suffrage that can serve as an outer boundary for subconstitutional regulation. One challenge with assessing this claim is that it would be difficult to disentangle the effect of the constitutional dimension of the right to vote from the effects of its other aspects in a manner that would produce a definitive conclusion. Another complication is that legislatures and courts can undermine voting rights while still protecting universal suffrage. Even though all citizens may nominally have the right to vote, a state can enact voting rules that place considerable restrictions on the eligibility and opportunity to vote. It may be difficult to ascertain the extent to which the normative signal of constitutionally endorsed universal suffrage is constraining legislatures and courts.

A more significant challenge is that a constitutionally enshrined right to vote can also, paradoxically, undermine democracy. The electoral route to competitive

<sup>64</sup> Dennis F. Thompson, *Just Elections: Creating a Fair Electoral Process in the United States*. Chicago University Press, 2002, 4.

<sup>65</sup> The right to vote is a “fundamental political right, because preservative of all rights.” *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

<sup>66</sup> Chilton and Versteeg, *How Constitutional Rights Matter*, 20.

<sup>67</sup> Zachary Elkins, Tom Ginsburg and James Melton, “Time and Constitutional Efficacy,” in *Assessing Constitutional Performance* ed. Tom Ginsburg and Aziz Z. Huq. Cambridge University Press, 2016, 260.

authoritarianism is a well-documented avenue to democratic backsliding.<sup>68</sup> Once the autocrat is elected to office, the right to vote and associated constitutional rights and structures provide “democratic cover” to autocrats, furnishing them with democratic legitimacy as they strip out democratic safeguards. Competitive authoritarian regimes retain the trappings of an electoral system, including the right to vote, while going to considerable lengths to manipulate the election to entrench themselves in power.<sup>69</sup> Thus, they “practice authoritarianism behind the institutional facades of representative democracy.”<sup>70</sup> Although they hold regular multiparty elections with universal suffrage, they deploy a range of manipulative strategies to win elections, including prosecuting candidates, banning parties, intimidating voters, harassing journalists, and forging election results.<sup>71</sup> Political parties and candidates in opposition face significant hurdles.<sup>72</sup> Constitutional rules and entities, including the courts, are subverted to entrench the autocrat in power.<sup>73</sup> Private entities, such as the media, are likewise co-opted to support the regime.<sup>74</sup> Rather than providing for accountability and the possibility of new leadership, elections are designed to entrench the incumbent autocrats.

Autocrats hope that these periodic elections provide a “semblance of democratic legitimacy” for both domestic and foreign actors.<sup>75</sup> The expressive function of the right to vote and elections confers democratic legitimacy on autocrats even as they ensure their continued grip on power by undermining democracy. At the same time, the existence of even nominally competitive elections may incentivize autocrats to be somewhat more attentive to the needs of the people, at least in comparison to the leaders of fully authoritarian regimes. A formal recognition of a universal right of suffrage in the constitution could increase the costs for autocrats who might otherwise be tempted to eradicate elections. For this reason, a constitutionalized right to vote is normatively appealing notwithstanding its paradoxical nature.

<sup>68</sup> These regimes are defined as “civilian regimes in which formal democratic institutions exist and are widely viewed as the primary means of gaining power, but in which incumbents’ abuse of the state places them at a significant advantage vis-à-vis their opponents.” Steven Levitsky and Lucan Way, *Competitive Authoritarianism: Hybrid Regimes After the Cold War*. Cambridge University Press, 2010, 5.

<sup>69</sup> Andreas Schedler, *The Politics of Uncertainty: Sustaining and Subverting Electoral Authoritarianism*. Oxford University Press, 2013, 2.

<sup>70</sup> *Ibid.*, at 1.

<sup>71</sup> *Ibid.*

<sup>72</sup> Levitsky and Ziblatt, *How Democracies Die*, 1–10, 97–109.

<sup>73</sup> David Landau, “Abusive Constitutionalism,” *University of California Davis Law Review* 47: 189–260, 191 (2013); Kim Scheppele, “Autocratic Legalism,” *University of Chicago Law Review* 85: 545–583, 557 (2018); Ginsburg and Huq, *How to Save a Constitutional Democracy*, 23.

<sup>74</sup> Ginsburg and Huq, *How to Save A Constitutional Democracy*, 108–109.

<sup>75</sup> Andreas Schedler, “Elections without Democracy: The Menu of Manipulation,” *Journal of Democracy* 13: 36–50, 36–37 (2002).

## 8.6 CONCLUSION

In this chapter, I have claimed that while a constitutionally enshrined right to vote can help to strengthen voting rights in practice, it does not on its own provide a guarantee that the right to vote will be meaningful. The right to vote is both multidimensional and institutional, which suggests that the sub-constitutional components of the right make a far greater difference to the reality of voting than the bare fact that the right is constitutionalized. That being said, I have argued that, as a normative matter, constitutions should recognize the right to vote. A constitutionalized right to vote plays a crucial expressive function by promoting democratic values and establishing normative baselines concerning representation, universal suffrage, and political equality. These values and baselines can indirectly protect voting rights in a democracy.

However, the expressive function of constitutional rights and structures can, paradoxically, undermine democracy by providing autocrats in competitive authoritarian regimes with democratic cover while they are undermining constitutional safeguards. That being said, the reality of elections and voting, even when heavily manipulated, may exert some beneficial constraints on elected autocrats. For this reason, the claim that the right to vote ought to be constitutionalized is normatively justifiable.