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The Legal Case for Children's Right to Vote in the United States

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Abstract

This article argues that US constitutional law supports the right to vote of children regardless of age. First, it places US law in the context of the legal, philosophical, and social scientific discussion of the issue and recent children's suffrage movements, which suggest that barring the right to vote according to age neglects children's democratic interests, harms societies, and is discriminatory. Second, it considers the further context of US obligations under international law, especially the UDHR, ICCPR, and CRC, in which children's voting is arguably implied as a universal, equal, and fundamental human right. Finally, it considers US constitutional law itself and shows why ageless voting is an issue of the fundamental interests of children as a suspect class in need of special protection against voting discrimination.

Keywords

age – children – democracy – discrimination – suffrage – suspect class – US constitution – voting

1 Introduction

The constitutional right to vote in the United States has remained virtually unchanged since the Twenty-Sixth Amendment was ratified in 1971 guaranteeing suffrage to all citizens 18 years of age and older. This followed three other major voting rights Amendments in US history: the Twenty-Fourth in 1964 prohibiting election poll taxes; the Nineteenth in 1920 prohibiting exclusion by sex; and the Fifteenth in 1870 barring exclusion by race, color, or previous servitude. These Amendments respond to changing historical understandings of suffrage and democracy in their times by protecting the franchise for groups that had previously been assumed or thought legitimate to exclude.

The result of this history is that for a little over fifty years, the only major US group still lawfully denied the franchise (apart from non-citizens and in some states felons) is children and youth under 18. Since the 1970s, however, and particularly in the last two or three decades, this exclusion has come under increasing question from scholars, activists, and children and youth themselves. People under 18 are approximately a quarter of the US population (and a third of the global population). They have become increasingly visible and recognized on the democratic stage as leaders and participants in climate emergency protests, environmental civil suits, gun protection initiatives, Black Lives Matter marches, transgender protections, and much else. Around the world, numerous initiatives have grown up to include the young in formal democratic politics such as city youth councils, government child ombudspersons, special parliamentary consultations incorporating children's voices, child worker unions, and the child and youth parliaments that now exist in over 30 countries. Internationally, twenty-eight countries now have lowered the national voting age to 16, starting in Nicaragua in 1984 and Brazil in 1988, while many more regions and cities, including several cities in the United States, have now lowered the voting age for municipal elections to 16.

This article explores the legal and constitutional issues involved in children's suffrage in the United States in particular and argues that ageless voting is both permissible and required in the US on anti-discrimination grounds. By ageless suffrage we do not just mean lowering the voting age to a particular number, say 16. Rather, we refer to the question of whether any voting age at all

is constitutionally legitimate. In arguing that it is not, we draw on theoretical frameworks and empirical analyses from the fields of political philosophy, law, and childhood studies, as well as both US and international law, to understand the bases for children's current disenfranchisement and the needed political and legal remedies. Our conclusion is that barring suffrage to citizens under 18 in the US is legally discriminatory as well as contravening the government's interest in holding itself accountable to the will of the people. On these bases, we argue, US law should be amended to protect the right to vote for citizens of all ages.

2 Children's Voting in Context

Since law rests in part on larger social beliefs, it is important to understand the movement currently taking place in the US and globally to challenge children's historical exclusion from the franchise. While largely under the public radar, this movement has grown over about a 50-year period to include a wide range of child- and adult-led organizations and diverse disciplinary scholarship (Wall 2022b). It has coalesced, we suggest, around two major arguments, both of which are key to US legal analysis: that denying voting rights to children is morally and legally discriminatory; and that enfranchising children is in the interests of children, adults, societies, and democratic governments.

The global movement generally traces its origins to two books published in the US in the same year by Richard Farson (1974) and John Holt (1974). Both argue that children's universal suffrage is a logical extension of the civil rights movements of their time for women and racial minorities by enabling children's 'liberation' from an oppressive political sphere. As Farson puts it, 'Because they are unable to vote, children do not have significant representation in government processes. They are almost totally ignored by elected representatives' (177). Early arguments also point out that voting is not an entitlement but a fundamental human right and a cornerstone of 'the right to be a citizen' (Franklin 1986, 24). These and other scholars and activists in the late twentieth century claim that, while children's voting is no panacea, their disenfranchisement unjustly excludes them from equal consideration in democratic governance.

In the public sphere, this early period coincides with two major developments. First, starting in the 1990s, children themselves, as well as the occasional adult, start agitating publicly for eliminating all voting ages. US 16-year-old Vita Wallace (1991) argues that it is 'discriminatory' and hence 'unconstitutional' to ban any child from voting, and that 'children of all ages must be given the same

power to elect their representatives that adults have, or they will continue to be unfairly treated' (439). In Germany, the child-led activist organization KinderRÄchTsZÄnker (KRÄTZÄ) sues for all children's rights to vote in 1995-96 and 1998 in district and federal courts, insisting that, 'Everyone concerned by decisions must have the chance to influence them. People under 18 years still lack this opportunity' (1997). Another German group called Foundation for the Rights of Future Generations (2022) is founded in 1997 by young people in part to fight for 'rights to vote from birth,' a mission it continues to this day. In the US, the National Youth Rights Association (NYRA) is formed by children and youth to advance various rights including children's rights to vote, a goal it pursues to this day. And second, the first national laws emerge that break the barrier of adult-only suffrage by lowering voting ages to 16. Starting with Nicaragua in 1984 and Brazil in 1988, a national voting age of 16 is now the law in 21 countries, including also Austria, Argentina, Scotland, Ecuador, and most recently Wales (including in some countries like Croatia, Hungary, and Indonesia under certain conditions such as employment or marriage). The voting age is also 16 in many regions and cities, such as all local elections in Germany and as of this writing six US cities (NYRA 2023).

Since the 2000s, both scholarship and activism have diversified significantly. Much of the scholarship focuses on social justice. For example, political philosophers have framed children's suffrage in terms of political and economic equality. Stefan Olsson argues that children's votes are needed so that 'the people who really are deciding on the laws, the elected officials, do not forget to consider all interests equally' (2008, 74). Benjamin Kiesewetter claims that 'the right to vote is grounded in a fundamental claim of human beings to equal participation and, therefore, can be denied only for severe and cogent reasons' (2009, 252). Others show that children's suffrage would help reduce their high rates of poverty in both the short term (Peterson 1992, van Parijs 1999) and the long term (Campiglio 1997, Vaithianathan and Sbai 2013). The argument is also made that ageless suffrage would 'make politicians accountable to the real complexities of children's lives' (Wall 2022a, 139; Wall and Dar 2011) and help to overcome existing epistemic biases favoring adult viewpoints and so 'promote intergenerational justice' (Hinze 2020, 173). Maura Priest argues that children's voting would advance children's rights overall, since voting 'is a basic condition of the fundamental rights of persons who all have an equal say in shaping the laws by which they are governed' (2016, 231). And the US political scientist Michael Cummings makes the point that being disenfranchised in the formative years of life lies at the root of adult civic disengagement, loss of social capital, and vulnerability to authoritarianism (2020, 288).

Another key point pursued across a variety of academic disciplines is the question of children's voting competence, perhaps the major cultural and purported legal reason for their disenfranchisement. The US political scientist Claudio López-Guerra argues that the 'franchise capacity' fully includes children if properly understood as 'the ability to experience the benefits of enfranchisement and the harms of disenfranchisement' (2014, 6; see also 2012). Nicholas Munn shows that 'the accepted standard for capacity for political participation is minimal, and many of those excluded [from voting] in virtue of their age could in fact satisfy the standard if they were subject to the same restrictions as adults' (2018, 613-614). Some demonstrate that voting competence is too complex to be defined according to any simple age (Cook 2013, Umbers 2018). And Joanne Lau suggests that, on competence grounds, 'we ought either to disenfranchise the elderly, if we do not enfranchise children, or enfranchise children of an age group that has the same proportion of capacity as the elderly' (2012, 873).

Legal scholarship, as we see in greater detail below, has reframed these arguments in terms of voter discrimination. The US legal scholar Samantha Godwin uses anti-discrimination law, for example, to argue that children's suffrage 'is necessitated by a rigorously consistent application of the established equal protection jurisprudence' (2011, 301). Sonja Grover argues for a voting model that enables the child's ownership of their vote upon their independent desire and interest (2011, 69). Canadian legal scholar Cheryl Milne suggests that the Canadian *Charter* provides children a constitutional right to suffrage based on universal equality before the law (2022). The Australian legal expert Robert Ludbrook claims that '[i]f our political leadership and our political and social policies are to truly reflect the views of all sections of our community, young people should have the opportunity to be part of that process' (1995, 27). Irish legal scholar Aoife Daly frames CRC Article 12 in relation to Article 2's guarantee against discrimination to suggest that, at present, 'we fail to permit children the right to political influence, and we fail ourselves by imposing a lack of diversity on the civil processes in which we engage' (2012, 290). And the well-known UK children's rights scholar Michael Freeman argues that denying children the vote is denying them a core feature of citizenship itself and that on that analysis one could argue for votes for all children though likely only older children will wish to exercise the vote (2020, pp. 400-401).

Public discourse on children's suffrage has likewise grown significantly in the last two decades. This wide and varied global conversation is summarized at the Children's Voting Colloquium, an international organization of child and adult activists and scholars with the mission 'to abolish a minimum voting age

across the world' (2023). The public movement for ageless voting (as opposed to votes at 16) includes, for example, child- and youth-led groups such as the US organization National Youth Rights Association (NYRA) and the Association for Children's Suffrage, and groups elsewhere such as the Foundation for the Rights of Future Generations (FRFG) and We Want the Vote, this last of which launches official complaints against children's voting discrimination in 2015 to the German Federal Constitutional Court and in 2018 to the UN Committee on the Rights of the Child. It also includes adult-led advocacy groups such as the US-based Children's Voting Colloquium and the Freechild Institute, and elsewhere Amnesty International UK's Children's Human Rights Network (Walton 2019), the international NGO Children's Rights International Network (CRIN), the National Large Families Association (Italy), the Children's Voice Association (Finland), and more.

This public discourse also involves numerous individuals giving speeches and writing op-eds (Children's Voting Colloquium, 2023). For example, the 10-year-old Kid Governor of Oklahoma, Charlotte Anderson, has given several speeches arguing for eliminating all voting ages in her state and nationally. The German educator Mike Weimann, who had been a founder of KRÄTZÄ above, publishes a short book, *Suffrage for Children: A Polemic* (2002). And opinion pieces arguing for ageless suffrage have appeared in the US in the *New York Times*, the *Washington Post*, *Forbes*, *New Republic*, *Vox.com*, *PBS Storyboard*, and elsewhere, and internationally in *The Guardian*, *BBC Radio 4*, and many other venues.

This nascent children's suffrage movement may not have risen yet to wide public consciousness, but it has gained a great deal of steam. It is driven by two basic ideas. On the one hand, the common view that children are not yet competent to vote appears to many unjust and discriminatory. It assumes a binary opposition between child and adult abilities that does not hold up in reality, subjects children to an undue double standard, and vastly underestimates the political capacities and voices that children in fact often possess. On the other hand, children's suffrage appears to many not only not harmful but likely to ensure significant benefits to children, adults, societies, and democracies. It would place children's lives and concerns at the center rather than periphery of policy considerations, give adults who live or work with children greater policy support and protection, and ensure that democratic politics looks at all the pixels on the screen instead of just two thirds of them.

3 International Voting Rights Law

The question we take up in the remainder of this article is whether these scholarly and activist arguments can be translated into US law. We start in

this section with international law, which provides something of an instructive legal context for US law, even if not a direct influence. The US is signatory to many international legal frameworks governing political and other rights, such as the 1948 Universal Declaration of Human Rights (UDHR) and the 1966 International Covenant on Civil and Political Rights (ICCPR). And even though the US is the lone state not to have ratified the 1989 Convention on the Rights of the Child (CRC) (though it is a signatory), the CRC remains internationally the central UN document governing the rights of children and so needs to be taken seriously in any discussion of children's rights. We suggest here that these international instruments, as well as UN committee work advancing them, lay out a strong, if largely unrecognized, case for the legal justifiability of all children's suffrage on the basis of non-discrimination in the fundamental human right to freedom of expression.

The UDHR was enacted at a time, 1948, when its original 48 state signatories all had minimum voting ages of at least 21 and some denied voting rights to women and/or ethnic minorities. The US, one of those signatories, at the time had a voting age of 21 and placed restrictions on race through state-level Jim Crow voting laws that were not banned until the Twenty-Fourth Amendment in 1964. Nevertheless, the UDHR officially declares the following in Article 21:

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. ...
2. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

The term 'everyone' here is not qualified. On the contrary, it is clearly meant to guarantee that no 'human' is excluded. Likewise, the concept of 'universal and equal suffrage' drives home the point that no one is to be excluded and everyone is to be included equally regardless of any status. The claim is being made that only universal and equal suffrage can legitimate a government's exercise of authority.

While the term 'universal and equal' is today generally interpreted to mean only adults, and to be targeted at the particular inclusion of women and ethnic minorities, the fact that signatories over time have violated even this usual assumption suggests that these terms need more careful scrutiny. There are only two UDHR articles that claim to apply only to certain ages: Article 16 guaranteeing 'men and women of full age' the right to marry and have families; and Article 26 guaranteeing the right to free education 'at least in the elementary and fundamental stages.' Article 21 on suffrage could have made similar age qualifications but does not. The aspiration for universal suffrage makes no provision for considerations of age.

In addition, Articles 1 and 2 of the UDHR explicitly underline the universality of the rights contained within it, as the first word in the declaration, 'Universal,' would suggest. Article 1 states that 'All human beings are born free and equal in dignity and rights,' explicitly linking human rights to the entire lifespan from birth. Article 2 insists that 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, ... birth or other status.' The list of distinctions explicitly mentioned in Article 2 that cannot be applied are not exhaustive but illustrative, and the guarantee ends with 'or other status' to indicate that a status not explicitly listed (for example, age) cannot bar one from equal enjoyment of the rights and freedoms of the UDHR. The intent is clearly to uphold the basic human rights of every human.

Even if not in the minds of its drafters, both the letter and the spirit of the UDHR definitively argue, then, for children's full and equal inclusion in suffrage. The UDHR is not meant to anticipate all fundamental human rights issues, only to provide a general framework for advancing them. Its framers did not anticipate LGBTQ rights, elderly rights, immigrant rights, climate justice rights, or many other rights either. But the justification for children's right to vote in free and fair elections could not be clearer. Everyone has the right to participate in voting for their governments because this is the basis of democratic governments' authority and because every human being deserves to be treated with equal basic dignity without distinction.

The ICCPR, a treaty which the US ratified in 1992, was in part developed as a response to the fact that the UDHR, as a declaration, is not legally enforceable. The ICCPR focuses on civil and political rights. Affirming in its preamble 'that these rights derive from the inherent dignity of the human person,' the ICCPR upholds the universal right of citizens to vote in Article 25:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage.

The 'distinctions' in ICCPR Article 2 mentioned here are almost identical to those in the UDHR: 'such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' Again, age is not explicitly excluded. Indeed, it can be argued to fall under 'other status.' Daly et. al show that ICCPR Article 2 is often interpreted in other contexts to include age (Daly, Thorbin, and Leviner 2022). Claire Breen argues that

the similar anti-discrimination language in CRC (discussed below) necessarily includes age in 'other status' because it references child-adult disparities (Breen 2019). But even the simple meaning of the text itself makes it clear that age should be included. The right to vote is provided here to 'every citizen,' not just 'every adult citizen.' Since child citizens are citizens, they are included explicitly. What is more, this reasoning is consistent with the idea that the right to vote should be 'universal and equal' in order to ensure that civil and political rights reflect 'the inherent dignity of the human person,' not just of adult human persons. Finally, the right to vote is to be protected here 'without unreasonable restrictions.' As the larger literature above makes clear, being a child is not in itself a reasonable restriction on the franchise. Article 25 assumes, then, that without the right to vote children's fundamental human rights are abrogated.

Unlike in ICCPR Article 25, the ICCPR does in other provisions carve out exceptions for children when it deems appropriate. These are entirely limited to children's rights in courts. Article 10 asserts that, in judicial processes, 'accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.' And Article 14 states that courts and tribunals must make their decisions public except in certain cases including where 'the interest of juvenile persons' would necessitate otherwise. One could perhaps argue that ICCPR Article 24 carves out childhood as a *general* exception. It states that 'every child shall have ... the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.' This exception would not seem to apply, however, to voting, which can hardly be argued, as a fundamental right and freedom, to constitute an act that a child needs protection against. On the contrary, the political philosophical literature above would suggest that it is *not* having the right to vote that children most need protection from. If voting should be universal and equal, its denial is a harm to a child's basic human dignity and well-being. In the larger context of the ICCPR, Article 24 supports children's inclusion in Article 25, not their exclusion.

Of course, the main international agreement on children's rights is the CRC. While the US is the sole country in the world not to have ratified it, it is a signatory and did play a significant role in its drafting. What is more, the CRC has been referenced as an international norm in US child rights disputes such as around its detention of child immigrants (Cumming-Bruce 2018, Lanard 2018). The CRC has been criticized for its being a discriminatory document, inasmuch as it distinguishes a separate category of 'child' human rights, and imposes global northern concepts of childhood on the majority world (Imoh and Okyere 2020). One result is that the CRC does not explicitly spell out any

children's rights to direct participation in politics, despite many children throughout the world playing integral political roles. That said, the CRC does contain civil rights to social freedoms and protections that could be said to be politically relevant to the issue of child suffrage, as (we show shortly) the CRC's Committee on the Rights of the Child has begun to acknowledge.

In terms of the CRC itself, the most directly relevant rights to voting are Articles 12 and 13 guaranteeing children's rights to participation and freedom of expression. These, as we can see, are somewhat ambivalent. Article 12 affirms the right to direct or indirect participation in decision-making on matters affecting the child, but only under certain limitations:

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

Article 12 limits children's freedom of expression in the form of participation in decision-making to instances where the child, as judged by adults, 'is capable of forming' their views and where the child's 'age and maturity' is held to warrant the assigning of some level of weighting to their views in relation to adult decision-making. Such limitations would be intolerable if applied to adults. At the same time, the right of children to express their views freely is applied to 'all matters affecting the child.' All matters clearly includes political matters, as political matters certainly affect children's lives. It is therefore plausible to extend Article 12 into an argument for children's suffrage, especially if, as the larger discussion above contends, children's capabilities and maturity are not legitimate moral or legal reasons to exclude them from the vote. What is more, if CRC article 12 is read alongside ICCPR article 25, we find that the former places more potential stringent limits on children's potential suffrage than the latter does on existing adult suffrage, the latter barring any 'unreasonable restrictions' at all, including capability.

CRC Article 13, while less discussed, provides arguably a stronger justification for child suffrage, and it is noteworthy that it is presented separately from Article 12. It states the following:

The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; or (b) For the protection

of national security or of public order (ordre public), or of public health or morals.

Article 13 is usually interpreted to refer to children's use of media. The phrase left out in the above ellipse refers to free expression 'either orally, in writing or in print, in the form of art, or through any other media of the child's choice.' However, this list is again illustrative and not exhaustive. Even 'media' is just one aspect here of 'expression.' The freedom to 'impart information and ideas of all kinds' clearly includes political expression. Alongside demonstrations, marches, statements, opinion pieces, and the like, voting too is a form of free expression designed to impart ideas. If so, then Article 13 strongly protects children's rights to vote by insisting that their freedom of expression only be subject to necessary 'certain restrictions.' These restrictions are limited in the same ways as in other international agreements, that is, to respecting the rights of others and protecting public order. Children's voting can in no way be interpreted to fall under such necessary uncontested limitations.

Furthermore, evidence in commentary by committees monitoring international human rights treaties shows that freedom of expression is considered under international human rights law to encompass the right to vote. For example, the Committee monitoring the ICCPR in its General Comment 34 states under point 4: 'The freedoms of opinion and expression form a basis for the full enjoyment of a wide range of other human rights. For instance, freedom of expression is integral to the enjoyment of the rights to freedom of assembly and association, and the exercise of the right to vote.' That the CRC does not have a separate explicit article on the child's right to vote is likely part of its framers' larger strategic decision to leave out rights to political participation, not to mention the unlikelihood of suffrage occurring to them in the first place. But the fact that there is no separate CRC article on children's voting rights does not in itself negate the inclusion of such a right under CRC article 13 and as implied in light of larger international voting rights law.

Such a reading of Articles 12 and 13 is further supported by the CRC's larger general principles articulated in Articles 2 and 3. Article 3 asserts that 'the best interests of the child shall be a primary consideration,' and a plausible case can be made that voting has the potential to significantly advance children's best interests. Even more strongly, however, Article 2 claims that 'States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind.' While this non-discrimination principle is typically interpreted in terms of differences *among* children, such as of gender or race, as we saw

in the discussion of ICCPR above, Aoife Daly and other legal scholars have argued that it can and should also include differences *between* children and adults (Daly, Thorbin, and Leviner 2022). If, as we have argued, CRC covers the right to vote, then its non-discrimination principle in article 2 should cover non-discrimination around voting age. The denial of the right to vote could be said to constitute one of the primary means by which children are discriminated against as children, the age of 18 being an almost universal line of exclusion regardless of the actual capacity or desire of children to vote. CRC Article 2 in this way underlines the need to interpret CRC Articles 12 and 13 to include all manner of lawful democratic forms of freedoms of expression, and especially voting.

The UN Committee on the Rights of the Child (the Committee), charged with implementing the CRC in each country, has increasingly extended children's rights under Articles 12 and 13 into the political domain. As Daniella Zlotnik Raz and Shulamit Almog demonstrate, 'the CRC Committee's perspective on political participation has evolved through the years, and this is also the case in relation to voting' (Zlotnik Raz and Almog 2023; see also Zlotnik 2017). Earlier Committee comments simply recognized that the CRC does not explicitly mention the right to vote. However, in recent years they have increasingly commented on the rights of children to such freedoms as political protest, being heard by politicians, having their views taken into account in legislation, having opportunities for political consultation, and the right to vote for 16-year-olds. For example, its 2018 comment on the implementation in Germany of the CRC Optional Protocol on a Communication Procedure (OP3), the Committee claimed that the exclusion of 16-year-olds from voting is a violation of their CRC right to freedom of expression (*D.C. v. Germany*, par 3.2-3.4), consistent with the argument made here that CRC Article 13 encompasses the child's right to suffrage.

The three most important international legal frameworks relevant to our discussion can, then, be argued to support, indeed to require, children's right to vote. All point in the same direction. They frame children's right to vote as part of what is required to uphold universal and equal human dignity. Suffrage in general should be afforded as a right to freedom of expression without unreasonable distinction or discrimination. And no international agreement links voting rights to any particular age; that is, nowhere in international law is children's suffrage actually prohibited. The preponderance of evidence is that international law does not oppose but, on the contrary, supports the protection of children's right to vote.

4 Children's Right to Vote in US Law

With these historical, intellectual, and international contexts in mind, what then can be said about the legitimacy of denying children under 18 the right to vote in US law? Both the larger scholarship and international law support the notion, we have argued, that denying children the right to vote is discriminatory. It violates a basic human right that should not be denied simply because of a person's age. In US law, discrimination must concern what is known as a 'fundamental interest,' which elevates the group in question to a suspect class in need of the court's strict scrutiny of its vulnerable situation. We argue here that children's suffrage does concern a fundamental interest of children and therefore demands constitutional protection against age discrimination.

It has been fifty years since *Dunn v Blumstein* (1972), in which a US Supreme Court majority held that (i) voting rights are a fundamental interest such that their derogation must be subjected to strict scrutiny by the Courts (the limitation must connect to and serve a substantial and compelling government interest), and (ii) the US government entity limiting voting rights must carry the burden to justify the infringement. US child citizens remain the largest group to lack access to the vote since the minimum age was lowered from 21 to 18 one year prior to the ruling in *Dunn v Blumstein*. The question arises whether voting rights are a 'fundamental interest' for children too and whether the government can justify their infringement on grounds of age.

First it is important to recognize that the Twenty-Sixth Amendment to the United States Constitution does *not* strip voting rights from persons under 18 years of age, but rather guarantees them to those 18 and over who hold US citizenship. It states in full the following:

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age. *Section 2.* The Congress shall have power to enforce this article by appropriate legislation.

Legal Information Institute, Cornell University Law School, n.d.

US states are thus prohibited from establishing voting ages above the age of 18. But they are also constitutionally free to lower the voting age in their state to below 18.

The reason for children's continued exclusion from suffrage in the United States can be found in their general *de facto* second-class citizenship. The latter is reflected in various domains in legislation from municipal to state and

federal law. For instance, unlike adults, children can be denied the right to bodily integrity. There is no legislative bar at the US state or federal level on corporal punishment of the child by school authorities and parents. Nor is there, for instance, a legislative bar against state legislatures interfering with the US child's right to be educated about historical truths regarding racism in America, as Florida's new laws restricting what can be taught on the topic reveals. This latter case is also an instance of the state's interference with the child's basic right to freedom of expression, as this right includes access to full and accurate information. What is more, children cannot be said to have equal rights to freedom of expression and voting since they gain these when they become adults. Such a view undercuts the child's voting right as a universal and inherent basic human right.

US discrimination law is grounded in the Fourteenth Amendment of the US Constitution, which guarantees equal protection of the law to all persons under US jurisdiction:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

US Library of Congress, n.d.

The key provision here incorporates the notion that all persons have the right to "equal protection" of the law. This has been interpreted to mean that US law must be applied without discrimination. Voting law, then, which is governed by US statutory election law, can be argued to require the constitutional right to equal protection regarding the First Amendment right to freedom of expression. The fact that the US Constitution does not explicitly enumerate US child citizens' right to vote should not be taken as evidence of the absence of such a right, for as the Ninth Amendment instructs us: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'

The purported legal basis for excluding children from equal protection against discrimination is that childhood does not constitute a 'suspect class' in need of such intervention. A federal district court pointed out in *Juliana v. United States* (2018), a child-led class action suit against the government for failing to address climate change, that childhood is not a suspect or quasi-suspect class. Rather, as the court states, 'No cases have ever held, and we decline to hold, that children are a suspect class.' (*Juliana v. United States*, p. 34). The rationale that the Juliana federal district court provides for sidestepping

whether children are a suspect class, and justifying allegedly not declaring them so even if they were to meet all necessary criteria for the same, is remarkably as follows:

Holding that 'posterity' or even just minor children are a suspect class would hamstring governmental decision-making, potentially foreclosing even run-of-the-mill decisions such as prioritizing construction of a new senior center over construction of a new playground or allocating state money to veterans' healthcare rather than to the public schools. Applying strict scrutiny to every governmental decision that treats young people differently than others is unworkable and unsupported by precedent.

Juliana v. United, p. 34, emphasis added

This remarkable justification essentially means that children's claims against discrimination due to their being children carry less weight than the unfettered operation of government and business procedures, a justification that would be intolerable to other such groups and clearly flies in the face of the purpose of anti-discrimination law. For example, such a rationale for denying suspect class status to persons with disabilities, on the contention that to do so is just too complicated in terms of practical effect on government decision-making, would largely foreclose judicial avenues for rectifying systemic historical and ongoing statutory barriers to the enjoyment of constitutional rights by persons with disabilities. The above rationale the district court offers then for denying recognition of children as a suspect class in any discrimination context, including the denial of the vote, could apply for a myriad of well-established *other* suspect (protected) classes and is not viable. Indeed, one could 'flip the script' and argue that holding that senior citizens are a suspect class in certain contexts would hamstring governmental decision-making, potentially foreclosing even run-of-the-mill decisions that positively impact children.

Part of the claim made in *Juliana* that children cannot be considered a suspect class is that this view stands on precedent. And, indeed, such is the case. For example, the same claim to children's non-suspect status supports the reasoning in the 5th Circuit Court in ruling in *Cunningham v Beavers* that children do not have anti-discrimination rights against excessive disciplinary force. Further, the *Juliana* court held that, 'Even if plaintiffs' suspect-class argument were not foreclosed by precedent, the Court would not be persuaded to break new ground in this area' (*Juliana*, p. 34). *Juliana* suggests that childhood, according to US courts to date, is not to be treated as a suspect class in any context.

The result is that US law does not consider children's claims against discrimination to demand judicial 'strict scrutiny.' There is no state obligation to examine whether children *as a class* suffer discrimination in the realization of their fundamental rights, even in contexts where such inequitable treatment may not be in their best interests. This means that, even if voting is considered to be an inherent fundamental right, suffrage can still be denied to children in law as *ipso facto* non-discriminatory justified differential treatment. Children in US law are not considered to suffer from discrimination as children given the exceptions carved out in various statutes regarding children as a class. Such a position is, however, untenable. The very fact that children are automatically denied the vote because they are children is what makes it an issue of discrimination in the first place, and one without an uncontested legal rationale. Just because precedent has not treated children as a suspect class does not mean either that it was correct in previous cases or that they cannot be so treated in the case of the right to vote. On the contrary, the denial of voting rights simply because of one's age is a clear case of a suspect historically disadvantaged and vulnerable class subjected to legalized discrimination.

Furthermore, denying children the right to vote cannot be upheld on the basis of a balancing of competing interests. The assumption here is that children's interests/rights must be balanced against the weightier integrity of the voting system. This is the case when one considers that eliminating minimum voting age eligibility poses no more theoretical threat to the integrity of the US election system than does permitting senior US citizens voting at old age who have not been declared mentally competent to do so through a detailed formal individual assessment. In both instances, the issue of voting competence (a notion to date upon which there is no consensus regarding definition or criteria) is unresolved. In fact, as discussed previously, voting competence is not a proper eligibility criterion for suffrage in the first place, given that the right to vote is an inherent fundamental right under US and international law.

There is, in addition, arguably an *implicit* constitutionally guaranteed basic human right to the vote for US child citizens based on the US Constitution's democratic underpinnings. Citing *Franchise Tax Board of California v Hyatt* 139 S. Ct. 1485, 1498-1499 (2019), *Juliana v. United States* holds that '[t]here are many ... constitutional doctrines that are not spelled out in the Constitution' but are nonetheless enforceable as 'historically rooted principle[s] embedded in the text and structure of the Constitution' (p. 41). We have argued above that the inherent right to vote for all US citizens is just such an implicit US constitutional principle. In this regard, recall also that there is no US constitutional bar to the vote based on age stipulated in the 26th Amendment nor articulated in any other US constitutional provision. As a result, suffrage can legitimately be

extended to any group, including children, if shown to constitute a fundamental right of US citizens.

Overall, then, US constitutional law and Supreme Court caselaw affirm that voting rights are a fundamental interest to be afforded all citizens without discrimination. Since children are barred from voting simply because of their age, and not for any other reason, children must be considered a suspect class whose denial of such a fundamental right is discriminatory and unjust. This view fits with US obligations under international human rights law such as the ICCPR which demands the treatment of voting rights as a universal basic human right for all citizens. As the academic literature and children's suffrage movements make clear, no exceptional reasons compatible with democratic values exist for the age bar to the vote. As a result, US law has every reason to protect children's non-discrimination in voting rights as a fundamental interest of great significance both to children and to democracy.

5 Conclusion

Suffrage has gradually expanded over US history for various reasons. The underlying argument in each case has come down to constitutionally guaranteed non-discrimination around fundamental human rights. As we have shown, similar rationales are now being applied in the academic literature and international law to the right to vote of children. It is patently undemocratic to exclude children from the franchise simply because they are children. Children deserve voting rights because the usual argument against their competence is both unfounded and non-relevant, and because children's voting would advance the interests of children, adults, societies, and democracies. But they also deserve voting rights because lacking them is a violation of international and US law. US law in particular should be read, we have argued, to uphold children's constitutional rights to non-discrimination around fundamental rights to freedom of expression. In effect, minimum voting ages articulated in electoral statute are unconstitutional because they violate minors' human rights to have a say in democratic matters that may impact their lives. What is more, states themselves have a government interest in being subjected to election by all instead of only a section of their citizens.

As necessary steps to achieving a more democratic process in the United States, and full citizenship in a practical sense also for US child citizens, we would as a consequence advocate at the least the following steps: (i) that the United States finally ratify the Convention on the Rights of the Child, which guarantees persons under age 18 free expression rights that properly can

be held to include the right to vote; ii) a constitutional Amendment, or an amended 26th Amendment, articulating the right to the vote without age discrimination for every US citizen, thus mirroring in this regard the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights provisions regarding voting rights; and (iii) the consequent abolition by US states of all minimum voting ages as unconstitutional. We also urge the Committee on the Rights of the Child to issue a General Comment on children's rights to vote as a fundamental and inherent right of citizens and as encompassed by children's free expression rights stipulated in Articles 12 and 13 of the Convention on the Rights of the Child.

References

- Breen, Claire, 'The Ageing of Article 2(1): The child's right to be free from age-based discrimination' in M. Skivenes and K. H. Søvig (eds.), *Child Rights and International Discrimination Law: Implementing Article 2 of the United Nations Convention on the Rights of the Child* (Routledge, New York, 2019).
- Children's Voting Colloquium, 2023, <https://www.childrenvoting.org>.
- Convention on the Rights of the Child (CRC). Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, Article 29 (entry into force 2 September 1990).
- Cook, Phillip, "Against a Minimum Voting Age," *Critical Review of International Social and Political Philosophy* (2013) 16.3.
- Cumming-Bruce, Nick, "Taking Migrant Children From Parents Is Illegal, U.N. Tells U.S." *New York Times*, June 5, 2018.
- Daly, Aoife, 'Free and Fair Elections for Some? The Potential for Voting Rights for Under 18s,' in Keane and McDermott (eds.), *The Challenge of Human Rights: Past, Present and Future* (Elgar, 2012).
- Daly, Aoife, Rebecca Thorbin, and Pernilla Leviner, 'The UN Convention on the Rights of the Child, Article 2 and Discrimination on the Basis of Childhood: The CRC Paradox?' *Nordic Journal of International Law* (2022) 91(3):419–452.
- D.C. v. Germany (Communication 60/2018), CRC/C/83/D/60/2018 (04.02.2020): <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsqOMKbj6dUrOPnaxW%2fBzVTcK8hNlmlDs3UnX1FF2lhh5f7L78or8EbTWITcEGsmG4tCOhLuSrCcupiOlNZ%2fqSRmvGNTqKubjVXBccWy2%2bjOXoecHsjRs%2fzIqr%2bVdUVw%3d%3d>.
- Dunn v Blumstein 405 US 330 (1972).
- Freeman, Michael, *A Magna Carta for Children? Rethinking Children's Rights* (Cambridge: Cambridge University Press, 2020).

- Godwin, Samantha, "Children's Oppression, Rights, and Liberation," *Interdisciplinary Law Review* (2011) 247.
- Grover, Sonja, *Young People's Human Rights and the Politics of Voting Age* (New York: Springer Publishing, 2011).
- Imoh, Afua Twum-Danso, and Samuel Okyere, "Towards a More Holistic Understanding of Child Participation: Foregrounding the Experiences of Children in Ghana and Nigeria," *Children and Youth Services Review* (2020):112: 1–7.
- International Covenant on Civil and Political Rights (ICCPR) Adopted 16 December 1966 By General Assembly resolution 2200A (XXI), Entry into force: 23 March 1976 <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> (accessed September 4, 2022).
- Juliana v. United States*, 339 F. Supp. 3d 1062 (D. Or. 2018) Decided Oct 15, 2018 (Case No. 6:15-cv-01517-AA, United States District Court for the District of Oregon, Eugene Division *Juliana v. United States* 947 F.3d 1159 (9th Cir. 2020).
- Lanard, Noah, 'UN Human Rights Chief: Family Separations Forced by Trump Administration Are Child Abuse,' *Mother Jones*, June 18, 2018.
- Legal Information Institute Cornell University Law School <https://www.law.cornell.edu/constitution/amendmentxxvi> (accessed September 4, 2022).
- López-Guerra, Claudio, *Democracy and Disenfranchisement: The Morality of Electoral Exclusions* (New York: Oxford University Press, 2014).
- Ludbrook, Robert, "Should Children Have the Right to Vote?" *National Children's and Youth Law Centre Discussion Paper*, University of New South Wales, December 1995.
- Olsson, Stefan 'Children's Suffrage: A Critique of the Importance of Voters' Knowledge for the Well-Being of Democracy,' *International Journal of Children's Rights* 16 (2008): 55–76 (74).
- Munn, Nicholas John, "Against the Political Exclusion of the Incapable," *Journal of Applied Philosophy* 35(3), 2018:601–616.
- NYRA (National Youth Rights Association), 'Voting Age Status Report,' accessed March 2023 at <https://www.youthrights.org/issues/voting-age/voting-age-status-report/>.
- Priest, Maura, "Why Children Should Be Allowed to Vote," *Public Affairs Quarterly* (2016) 30(3):215–238.
- Umbers, Lachlan Montgomery, "Enfranchising the Youth," *Critical Review of International Social and Political Philosophy*, 2018:1–24.
- Universal Declaration of Human Rights (UDHR) proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A) <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (accessed September 4, 2022).
- US Library of Congress, Fourteenth Amendment <https://constitution.congress.gov/browse/amendment-14/#:~:text=No%20State%20shall%20make%20or,equal%20protection%20of%20the%20laws> (accessed September 4, 2022).

- US Constitution, Ninth Amendment, <https://constitution.congress.gov/constitution/amendment-9/#:~:text=The%20enumeration%20in%20the%20Constitution,other%20retained%20by%20the%20people.> (Accessed October 11, 2022).
- Wall, John, *Give Children the Vote: On Democratizing Democracy* (New York: Bloomsbury, 2022a).
- Wall, John, 'Introduction.' In John Wall, ed., *Exploring Children's Suffrage: Interdisciplinary Perspectives on Ageless Voting* (Palgrave Macmillan, 2022b).
- Wall, John and Anandini Dar, 'Children's Political Representation: The Right to Make a Difference,' *International Journal of Children's Rights* 19.4 (December 2011), pp. 595–612.
- Walton, Katherine, 'Votes for Children: The Case for Universal Suffrage,' *Amnesty International UK*, accessed January 2020 at <https://www.amnesty.uk>.
- Weimann, Mike, *Suffrage for Children: A Polemic*, trans. Sebastian Barajas and Mike Weimann, Common Threads Playwork, forthcoming 2023 [German original *Wahlrecht für Kinder: Eine Streitschrift* (Beltz 2002)].
- Zlotnik, Daniella, 'The Future of Adolescents' Right to Vote and Political Participation.' Blog in *leidenlawblog*, accessed September 2022 at https://www.academia.edu/73531949/Blog_The_Future_of_Adolescents_Right_to_Vote_and_Political_Participation, from July 3, 2017.
- Zlotnik Raz, Daniella, and Shulamit Almog, "Are We There Yet?" Conceptualizing Political Rights and Interpreting a Right to Vote in the CRC.' Forthcoming 2023.