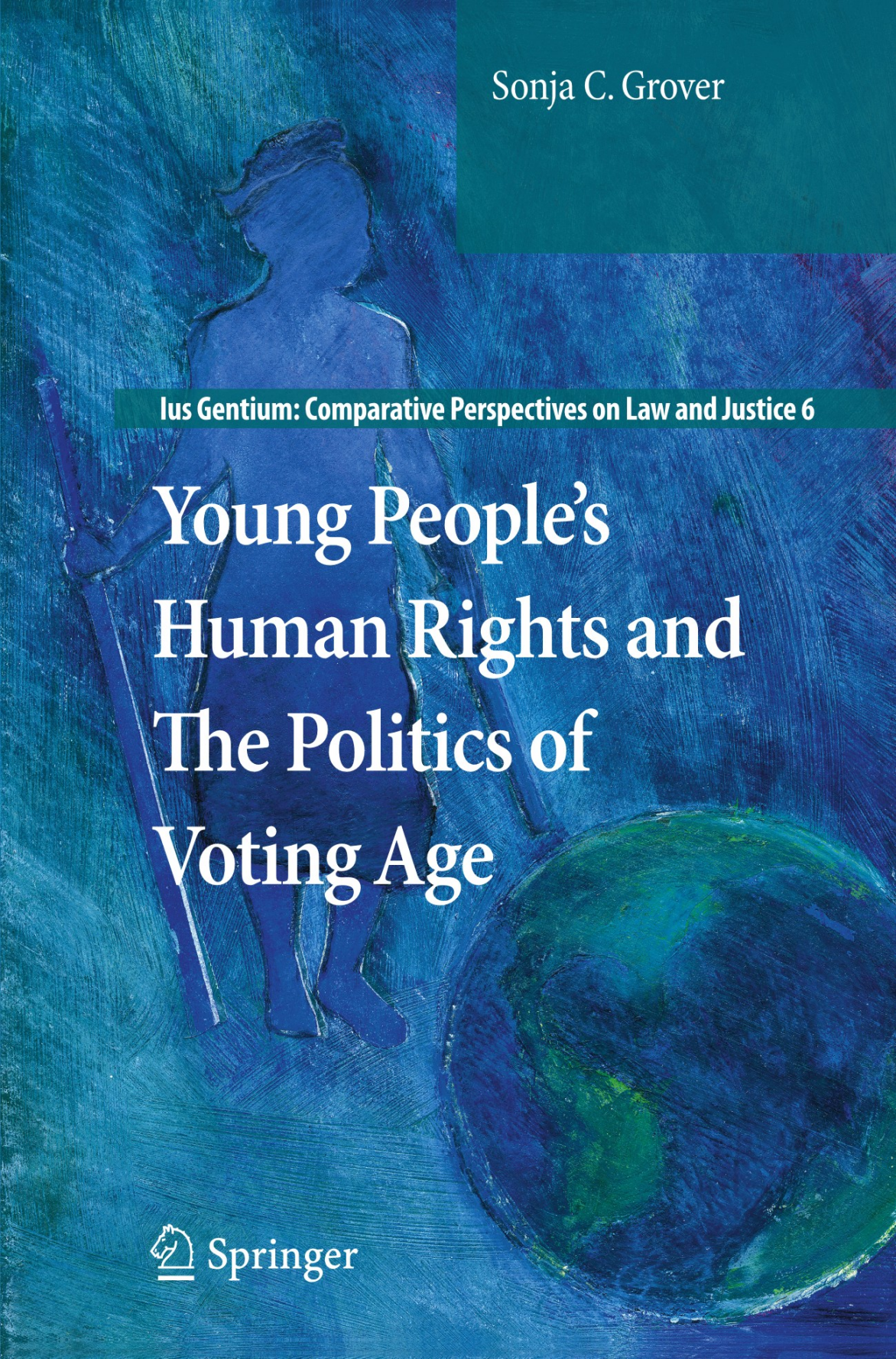
Sonja C. Grover

Ius Gentium: Comparative Perspectives on Law and Justice 6

Young People's Human Rights and The Politics of Voting Age



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YOUNG PEOPLE'S HUMAN RIGHTS AND THE POLITICS OF VOTING AGE

By

SONJA C. GROVER

Springer

Prof. Sonja C. Grover
Lakehead University
Fac. Education
Oliver Road 955
P7B 5E1 Thunder Bay
Ontario
Canada
sonja.grover@lakeheadu.ca

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In loving memory and in honour of my parents, Gina and David Gazan who first taught me that children and youth are worthy of respect, and of my brother Albert Gazan who struggled for the rights of the dispossessed as social worker, psychologist and educator

Preface

In colonial times in Europe and in North America, a select group of youth, of an age not generally regarded as the age of majority, were permitted the right to vote based on their contribution to society in the form of service in the armed forces. In contemporary times, however, voting rights have not been correlated with military service as women, for instance, were ultimately granted the vote in Western nation States at a time when they did not serve in the armed forces and were not subject to conscription. Voting rights came to be conceptualized as a basic human right post-World War II for every *adult* citizen as per Article 21 of the Universal Declaration of Human Rights. In contemporary times, the youth voting rights issue has been, in most Western democratic societies, somewhat trivialized and certainly de-legitimized. This monograph explores why the global youth voting rights movement has not been regarded by most mainstream academics and politicians, or indeed the majority adult population aware of the movement, as a legitimate human rights struggle as opposed to a push for an allegedly arbitrary, invented and illegitimate 'special' right. We will examine to what extent the international youth voting rights movement's lack of substantive progress in most Western States can be explained by fitting the facts of the struggle to a model developed by Clifford Bob. That model concerns the steps necessary for aggrieved groups to achieve recognition and validation of their novel, or allegedly novel, human rights claims such that the chances for improvements in the group's human rights situation are substantially increased. The role of influential national and international human rights gatekeepers (i.e. high profile human rights organizations such as the United Nations, democratic governments, human rights NGOs and the like) in stalemating the youth voting rights struggle will be addressed. We will examine and evaluate some of the key rationales proffered for opposition to lowering of the minimum voting age such as concerns about the alleged potential adverse impact on the overall competency of the electorate and the integrity of the system. Most importantly, we will consider the success of opponents to lowering of the minimum voting age in downgrading the youth voting rights issue from universal

human rights concern to internal State matter involving discretionary local, regional or federal government policy decisions implemented through electoral law. Consideration will be given to abandoning the absolute blanket bar on voting rights for minors and the possibility of an alternative model will be addressed. Proxy voting on behalf of young children, it will be suggested, is antithetical to the notion of the democratic vote as a form of free expression. The nature of the human rights imperative in granting the vote to minors is discussed in terms of the need to upgrade the second class citizenship that minors now 'enjoy' to full citizenship.

Thunder Bay, ON, Canada Sonja C. Grover

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About the Author

Sonja C. Grover, Ph.D., is a Professor with Lakehead University. She has authored over 80 refereed articles primarily on the topic of human rights/children's human rights published in leading international human rights and law journals plus contributed two book chapters for a 2007 edited volume on children's rights in Canada. She has also presented numerous papers at various international conferences on the topic of human rights and vulnerable groups including at UNESCO. Dr. Grover is Associate Editor of the International Journal of Human Rights. She is the single author of several books including *Children's Human Rights: Challenging Global Barriers to the Child Liberation Movement* (Sandstone Academic Press); *The Child's Right to Legal Standing* (Lexis-Nexis); *Prosecuting International Crimes and Human Rights Abuses Committed Against Children: Leading International Court Cases* (Springer) and *The European Court of Human Rights as a Pathway to Impunity for International Crimes* (Springer).

Part I
The Philosophical Context of the Minimum Voting Age Question

Chapter 1
Alternative Philosophical Perspectives on the Origin and Nature of Human Rights

1.1 The Embattled Notion of Universal Human Rights: Introduction

We begin this inquiry by exploring the right to vote as an essential aspect of a citizen's right to *full* integration into a particular State. In that regard, the right to vote is held to be fundamentally grounded on the natural inherent right each person possesses as a human being to belong to a particular society. The right thus exists whether recognized in law or not, and regardless whether, in practice, the individual is prevented for some reason or another from exercising that right as a citizen of the State in question (due, for instance, to legal incapacity to vote related to statutory bars based on chronological age requirements for eligibility to vote; actual mental incapacity compromising the very specific skill set involved in the behaviour of voting etc.). Voting then is a prime manifestation of the basic human rights of free association and free expression. The denial of the vote consequently is the denial of a basic human right. That denial is, furthermore, a vehicle for marginalizing an identifiable group and potentially rendering it relatively powerless. Such marginalization, in turn, is likely to contribute to the group's psychological disengagement from the society.

It is argued that the *intuitive* understanding human beings have of fundamental universal human rights is a function of our inherent capacity to potentially reject the notion of suffering inflicted by the other as just. This is the case though we may, for a multitude of reasons, be unable to prevent or end that suffering, or, due to environmental pressures of various sorts, have come to accept that suffering as our lot in life. One's understanding of human rights is not in any simple sense then simply a function of any political, social, cultural or other context in which one finds oneself. The intuitive understanding that there exist human rights then is integrally linked to the inherent capacity for appreciating one's own human dignity. Put differently, human dignity, in its most basic form, is emergent in the rejection of the acceptability of one's suffering caused by another. The appreciation of human rights and human dignity is the stimulus for acts of resistance against oppression. That resistance has existed

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for time immemorial and ranges from passive resistance (i.e. even just the desire to survive victimization may be regarded as an act of resistance) to overt, active resistance. The struggle for the youth vote by youth is then, at its core, emblematic of the recognition by young people of their human dignity and intrinsic worth as autonomous persons. Such a perspective on human rights as here described is, in recent years, a matter of great contention, and we consider next some of what fuels that controversy.

1.2 The Embattled Notion of Universal Human Rights

The notion of voting rights as inherent, equal and universal is reflected, for instance, in the *Universal Declaration of Human Rights* as follows:

> **Universal Declaration of Human Rights, Article 21:**
>
> (1) *Everyone* has the right to take part in the government of his country, directly or through freely chosen representatives.
> (2) Everyone has the right of equal access to public service in his country.
> (3) 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* (emphasis added) [1].

Of late, however, the notion of inherent universal human rights has been under siege in general, and not just in respect of the exercise of the vote as a basic context-independent intrinsic right. So, too, has the view been treated with increased scepticism in some academic circles that democracy can deliver a better human rights situation for all the people in any particular State than can non-democratic regimes. Undoubtedly, the democratic process is not a guarantee of a better life and the enjoyment of respect for one's human dignity. As to the latter point; consider, for instance, the extraordinarily poor quality of life of the Dalit, or so-called 'untouchables' whose ranks number 160 million Indians and another 90 million outside India. Their abysmal human rights situation continues to this date in India, the world's largest democracy, without significant relief in sight [2]. However, at the same time, the Indian State policy, as a democratic State, is one that officially condemns the caste system which is largely responsible for the Dalit population's tragic situation. There have been some considerable efforts made by India to improve the plight of the Dalit with incontestably considerably less than stellar results. Yet, this author would argue that democratic values and mechanisms are essential to any human rights struggle.

Despite democracy's failings to date in delivering an ideal human rights situation for all persons within the State's jurisdiction, the right to a free vote offers hope for the future where candidates running for office are also democratically selected. The denial of the vote, or of a meaningful vote, (as

in a dictatorial regime where the outcome of the election, if there is one, is a forgone conclusion), is, in effect, an official State denial of one's inherent right as a citizen to full participation in, and integration into society. One's well being and status in that society hence remains under threat as a result.

Regarding the importance of the right to societal participation, consider the situation of the: (a) *stateless de jure* (persons not considered citizens under the laws of any country who may or may not, under international law, depending on the specific circumstances, be considered citizens of the State in which they reside; which State in fact marginalizes them), and (b) the *de facto stateless* (persons who officially have the nationality of the State in which they reside, or from which they have been exiled, but whose citizenship rights are rendered ineffective through various means such as discriminatory mechanisms and persecution, denial of identity papers such as birth certificates etc.). Often it is difficult to distinguish between the two socially constructed categories of stateless populations. The stateless de jure and often also the de facto stateless (i.e. those without identity papers) have no possibility, even a theoretical one, of improving their lot without pressure from the international community on the State in which they have taken asylum or otherwise reside. This given their exclusion from the vote based on lack of nationality, and/or lack of proper identity documentation etc. The marginalization of the stateless who are denied the vote is associated; furthermore, with a greater likelihood of the denial of other basic human rights. For instance, the denial of the vote impacts on the survival and protection rights of the stateless as well as on their societal participation rights in various domains such as education (i.e. see, for example, the *Case of the Yean and Bosico Children v. The Dominican Republic* concerning de facto stateless Haitian-Dominican children denied educational opportunity in the Dominican Republic due to their inability to obtain birth registration documents from the State officials. This denial of identity documents to Haitian-Dominican children in the Dominican Republic occurred despite the children in question having been born in the Dominican Republic, their having Dominican mothers and their having always resided in the Dominican Republic) [3]. Let us consider then some alternative views of the notion of fundamental human rights before we delve deeper into the topic of voting as a basic human right.

1.3 On Whether the Notion of Human Rights is Intrinsically Inter-Subjective

Dembour has provided a useful preliminary classification of various scholarly perspectives on the alleged origin and nature of human rights which she describes as follows: '. . . those I call "natural scholars" conceive of human rights as *given*; "deliberative scholars" [conceive of human rights]

as *agreed*; "protest scholars" [conceive of human rights] as *fought for* and "discourse scholars" [conceive of human rights] as *talked about*' [4]. Dembour makes the unsettling self – revelation, arguably one open to challenge, that:

> While I am ready to accept that human rights have become a fact by being repeatedly invoked in politics, law and common discourse, *I do not believe that they would continue to exist were we to cease to talk about them* (emphasis added) [5].

Dembour's position is clearly antithetical to the notion of human rights as inherent and universal. One can agree that there may be few if any *realized* human rights in a practical sense were we not to talk about them. This since talk tends to stimulate anti-oppression movements; that is, the struggle for the actualization of inherent human rights. In regards to the struggle for human rights, it is important to acknowledge that whether or not one is willing and able to engage in the fight for human rights as an individual, or as part of a collective movement, does not impact on one's intrinsic possession of the quality of human dignity (though it likely will, properly or improperly, depending on one's view, influence others' perceptions of one's degree of dignity). However, this still leaves us with the question that Dembour poses and which she answers in the negative 'would [human rights] exist [as a concept] were we to cease to talk about them'?

Human rights discourse, agreements or human rights struggles are not, on the analysis here, the necessary precondition for the emergence or conceptual construction of human rights. Rather, it is here contended that the *individual* human capacity for intuiting that he or she deserves better than to suffer amounts to an informal but most fundamental appreciation of human rights grounded on a personal sense of human dignity [6]. While persons can be led by their oppressor to believe that they deserve to suffer, yet there are always those who in time rise above such inculcation of false beliefs *with no outside assistance*. Such persons may stimulate an anti-oppression movement, or they may simply succeed in liberating themselves spiritually, or perhaps with some luck even in more concrete ways. Hence, we can reject the contention that the understanding of human rights, or the sense that one has a human rights claim, must originate in, and is dependent upon 'intersubjective confirmation and validation among human beings' [7]. In other words, the notion of human rights *cannot* be reduced to a 'social construction', nor can it be held to be emergent only through 'collective agreements' or 'intersubjective confirmation and validation' among human beings to use Benhabib's terminology. Further, as persons in varied socio-political contexts are capable of automatically understanding the degrading nature of suffering inflicted by others precisely because they intuit the existence of human rights, the emergent *notion* of intrinsic human rights (the idea that one has 'the right to have rights'), is *not* a function of democratic society, or only possible in that political context. Talk of human rights and intersubjective agreements about rights,

however, facilitate the understanding that other human beings also, by virtue of their humanity, have an inherent entitlement not simply to survive but to thrive. In short then there is an empirical basis for holding that human rights are inherent (a 'given' in Dembour's terms) originating in the human capacity for dignity which arises with the insight that life should not be imbued with suffering inflicted by others. That capacity is the well-spring of devotion to the concept of universal human rights in the face of continuing strife, unstable political situations, violence and injustice. The source of that capacity that gives rise to a personal sense of human dignity is a mystery and hence there is no attempt here to explain it. Rather, the point is that it is the inherent potential for appreciating one's own human dignity (i.e. the psychological and visceral understanding that one ought not to suffer at the hands of another) which translates into a tacit understanding of human rights. At some point, that intuitive understanding, when shared with others in perhaps, at first, a very obtuse fashion; initiates a process which, over time, ultimately gives rise to an articulation and conceptual elaboration of various human rights frameworks through talking, protest struggles and finally formal agreements as to the substance of those rights and who possesses them.

1.4 On Whether Appreciating One's 'Right to Have Rights' Requires a Certain Level of Cognitive Competence

Morsink holds the view that the notion of the universality of basic human rights requires that people have the universal power to understand that they have rights (i.e. understand that they have 'the right to have rights') [8]. The current author, however, contends that rights are an inherent aspect of one's humanity and not simply a function of one's capacity for self-reflection and conscious thought. Thus, this author disagrees with Morsink that a reasonable level of cognitive competence is a prerequisite for discovering that one has rights. This may *seem* to be the case given that the indicia for that understanding may vary dramatically as cognitive competence increases. For instance, someone of average or better cognitive competence is likely able to articulate, to some degree, their conception of their own rights and converse with others about basic human rights. In contrast, someone who is greatly cognitively compromised may only manifest, in the most rudimentary way, their understanding of rights. That is, their behaviour may reveal a visceral reaction to their own suffering. That reaction to suffering inflicted by another, even in the most cognitively compromised human being (i.e. severely brain injured person, persons affected by dementia etc.), or developmentally immature (i.e. the youngest among us), is most commonly anger and resistance, to the extent feasible, given the person's physical and situational constraints. Such pure resistance to suffering imposed by the other without the ability

to consciously entertain language concepts, or articulate them can be interpreted as an understanding of rights at its most primitive level. It is an appreciation that things (i.e. one's quality of existence) could be better. It is in recognition of such a universal understanding of rights—demonstrated in a multitude of ways and at various levels of sophistication—that the current author holds that that there is an inherent universal appreciation of fundamental human rights. The current author's view thus differs from that of Morsink who holds that understanding the 'right to have rights' is a universal capacity only for the cognitively competent. This latter view is reflected in the following Morsink quote: 'I argue that every *normally healthy* human individual has the epistemic equipment to *discover* that we all have human rights (emphasis added)' [9]. The implication appears to be in the Morsink quote that persons who are not cognitively competent have no appreciation of rights, which as discussed, the current author would respectfully dispute. However, Morsink's notion of *discovering* that one has rights is an intriguing one and is discussed in what follows.

1.5 On Discovering One's Human Rights

Morsink holds that a distinction must be made between: (a) the *personal capacity* for the *discovery* of human rights (the discovery that each person has a 'right to have rights') as a function of the intrinsic nature of cognitively healthy human beings *versus* (b) 'the later *justification* of this belief *to others* after we have made our [own] discovery [of our basic human rights]' [10]. The current author is in accord with Morsink in rejecting the notion that the *understanding* of the 'right to have rights' requires inter-person agreement or validation.

The fact that certain rights are universal human rights and not context specific is implicit, Morsink points out, in the notion of 'manifestly illegal' acts defined as such based on the 'conscience of humanity.' (Acts that are manifestly illegal are those held to be intrinsically profoundly wrong regardless of the situation in which they occurred) [11]. The concept of 'manifestly illegal acts' is one found formalized in the Rome Statute [12] (the enabling statute of the International Criminal Court) in its references to 'genocide' and 'crimes against humanity.' However, the concept of 'manifestly illegal' acts and the duty not to commit certain crimes that offend the conscience of humanity predates the Rome Statute and was part of customary law and the rules of war prior to the codification of such rules in any military manual or international treaty (i.e. consider the execution in 1474 of Governor Landvogt Peter von Hagenbach for what today we would term 'crimes against humanity' committed under superior orders while he was delegated by Charles, the Duke of Burgundy to run the government of the fortified city of Breisach on the Upper Rhine. His trial for ordering non-German mercenaries to commit the mass murder of male civilians,

and the rape and brutalization of women and children was instigated by the Archduke of Austria after Charles was killed [13]. The fact that the concept of 'manifestly illegal' acts was operative prior to codification is an indicator that humanity is capable of the moral intuition that certain acts are inherently unjust. Our understanding of universal human rights then cannot be simply reduced to human rights law or formalized agreements between State Parties. Indeed, notions such as 'manifestly illegal acts' persisted as meaningful despite the fact that written and unwritten agreements prohibiting such acts continued throughout the millennia to be broken. The Rome Statute is an articulation of more than simply an agreement amongst States Parties to the Statute to submit to the jurisdiction of the International Criminal Court. It is a codification of an inherent tacit understanding possessed by all of humanity that all persons have a right to have rights and to be protected from grave suffering maliciously and intentionally inflicted by others.

Morsink holds that the *Universal Declaration of Human Rights* was in fact addressed to the everyday person (rather than to 'jurists, scholars, international lawyers, diplomats or any other kind of expert') in recognition of the inherent human competence to understand the 'right to have rights' [14]. He explains further that the change in the drafting stage from the title of the Declaration from '*International* Declaration of Human Rights' to '*Universal* Declaration of Human Rights' 'shifted [as intended] the attention from the international delegations that did the proclaiming to the peoples of the world being addressed' [15].

To recap briefly, the view espoused here is that the notion of the human being's 'right to have rights' is an intrinsically available understanding for all persons though that understanding may vary in sophistication depending on cognitive and emotional competence. That understanding of fundamental human rights generally dawns on human beings as a result of their personal experience with suffering imposed by other human beings. Most often, for the cognitively competent at least, the notion of rights is tied up also with the perception that their own suffering is the result of some 'injustice' perpetrated by others. In some cases, an appreciation of rights arises as a result of the human capacity to empathize with others who are suffering especially if due to perceived injustice. The likelihood of perceiving injustice is, furthermore, exponentially increased when persons become aware of grave crimes such as mass atrocities.

The notion articulated here then is that of human beings having an inherent capacity for understanding the 'the right to have rights'. On this perspective, people's understanding of injustice predates legal definitions of the same. This, since human beings intrinsically know suffering when they see it though we may, for various reasons, not be willing to acknowledge it, or may have been manipulated by others not to acknowledge it. Human beings then naturally intuit the notion of injustice given that suffering is inherently categorized as unjust when it is *imposed* rather than

chosen. Of course, there is the possibility that this process can be subverted i.e. as when powerful persons, groups or institutions manage to convince persons to re-categorize their own suffering as a 'blessing in disguise' or as 'chosen' when, objectively speaking, in actuality, it was 'imposed.' As a result, the sufferer has difficulty distinguishing when and when not his or her basic human rights are being denigrated or even, in practice, negated. One thinks, for instance, in this regard of the situation of street people in modern urban centres in the West. They are generally impoverished, often desperate for food, often suffering severe health problems and, not uncommonly, consumed by a substance abuse problem. Social service agencies and members of the social elite often contend that the street life is the preferred choice for the majority of the chronically homeless. In fact, many homeless persons may even ostensibly voice the same view. This given that the chronically homeless are afforded insufficient long-term support for their health and substance abuse problems (where these exist) and housing predicament. It is less psychologically painful for many chronically homeless to maintain a vestige of dignity and suggest that the street for them was a free choice; or at least is so at present. The latter may be the most palatable 'line' or scripted position given that the chronically homeless individual typically has no access to the resources which would be needed to contest the violation of their basic human right to a healthy life and a minimally decent standard of living.

Morsink's explanation of the origin of the understanding of the 'right to have rights' as personal discovery (with which this author largely concurs) accords with the fact that:

> . . . people everywhere have known all along (especially in situations of gross abuse and violation) about inherently existing human rights. The invention of these rights [in the sense of their being expressly articulated, communicated to others and perhaps codified in some form, whether in sophisticated form or exceedingly rudimentary form, in legal or non-legal terms etc.] should not be ascribed to one historical period or one region of the world [16].

To provide historical detail on this point (the fact that people of all historical periods have had a conception of the 'right to have rights') is beyond the scope of this book. The current author will leave demonstration of that point thus to some ambitious expert on the history of humankind.

1.6 Evaluating Various Perspectives on the Origin of the Notion of Human Rights

1.6.1 The Discourse Notion of the Origin of Human Rights

With respect, the flaw in Dembour's position that human rights are but a socially constructed by – product of various 'talk' (legal discourse, everyday discourse etc.) is that she never does explain what gave rise to this

discourse; this 'human rights talk' in the first instance. Further, there is no explanation flowing from the discourse perspective as to why human rights talk appears to be a universal pre-occupation even in the face of dictatorship from the earliest times as reflected in resistance movements stemming from such talk.

1.6.2 The Protest Notion of the Origin of Human Rights

The perspective which views human rights notions and standards as arising out of protesting wrongs [17] has a similar problem to that of the discourse perspective on the origin of human rights. There is no explanation of what gave rise to the protest (the human rights struggle) in the first instance as opposed to a reaction of passive acceptance. That is, what is the basis for persons perceiving the 'wrong' (i.e. the human rights violations) in the first instance? The current author has suggested that persons *intuit* that suffering inflicted by others is a wrong and thus have a primitive *intrinsic* sense of the notion of human rights.

1.6.3 Human Rights Concepts as the Products of Inter-Subjective Agreements

Recall that Dembour uses the term 'deliberative scholars' to refer to those who hold that human rights originate in agreements. The modern forms of those agreements include, for instance, international human rights treaties, international covenants and declarations concerning human rights and the like. The question arises then as to 'what is the basis for understanding that agreements may *not* always give adequate voice to the oppressed given the under-inclusive nature of those agreements?' That is, how can an agreement be considered flawed in recognizing and protecting human rights, as they so often are, if the very origin and acknowledgement of human rights strictly emerges on the basis of those *de-limited* agreements and *restricted* collective understandings and definitions? What is the basis for dissent regarding the agreement, and the dissenters' attribution to the agreement of inadequacies in not going far enough to protect universal human rights? Clearly human beings have a sense of human rights that is not strictly bounded by the corners of extant agreements or even self-interest and the desire for power though those factors, of course, are also at play.

It is the continued suffering of persons that allows human beings to think past the current agreements and elaborate a more sophisticated rights scheme which is more encompassing. Thus, human rights advocates struggle against power elites and others with a vested interest in the status quo when they contribute to the deliberative process that gives rise to rights

agreements. On the view here then everything is *not* relative. Human suffering is universally abhorrent to all those who honour their own intuitive understanding of the inherent human rights of every person irrespective of personal characteristics or socio-cultural or political or other contextual considerations [18]. As this author has argued previously elsewhere, oppressors understand that brute force alone is not sufficient to overcome resistance given the resilience and dignity of human beings. Hence, the attempt to de-humanize the perceived enemy by all manner of propaganda is always *ultimately* a futile attempt to legitimize the eradication of even the perception that the victimized have inherent, fundamental and inviolable human rights [19].

1.7 A Critique of the Post-Modern View of Human Rights as Context-Specific and of the Pre-Disposition to a Non-Interventionist Stance

Dembour suggests that some theorists consider that human rights has become 'the new "religion" in the secular world' and the basis often for unjustified widespread unbridled intervention into the affairs of various global jurisdictions [20]. In contrast, the view here, in opposition to Dembour's post-modern perspective, is that it is in fact colonial not to intervene where the most fundamental human rights are denied. To adopt a relatively strict non-interventionist stance is to accept the *erroneous* presumptions, by implication, that: (a) human rights are a justifiably discretionary grant by the local power elites (regardless of whether these power elites have fashioned a system that perpetuates the suffering of a people or identifiable group(s) within the society), and that (b) it is impossible to discern the 'powerful' from the 'powerless', 'oppressor' from 'victim.' For instance, Dembour suggests that one *cannot* easily identify 'human rights victim, violator and professional' and she endorses the view that this 'triangle' is a *fallacy* [21]. It is here contended that it is unwarranted and wrong to suggest that such distinctions (human rights victim, violator and professional) are most often meaningless or fallacious, and then use that as an argument to suggest that a non-interventionist approach is the appropriate 'moral stance du jour' which all should endorse (i.e. since non-interventionism is allegedly culture-sensitive, respectful, and non-colonial). This author contends, in opposition, that the relatively non-interventionist stance of most post-modern theorists denigrates others by allowing their suffering to continue as accidents of fate determined by the cultural and geographic situational context in which they happen to find themselves.

What *is* true is that the statuses of 'human rights violator', 'victim' or 'professional' (NGO aid worker, human right advocate etc.) are, *in some cases*, potentially interchangeable in that one can hold more than one

status at the same time. For example, it is a fact that a certain small number of U.N. peacekeepers (compared to the numbers deployed) have been responsible for sexual exploitation of children in various States in which they had been sent to protect the local people caught in civil war and other conflicts. Hence, in such an instance, 'peacekeeper' becomes simultaneously 'human rights violator', but it is the latter designation that counts in such a case, and the international community has a responsibility to bring such persons to account for their crimes. Consider also the example of certain child soldiers who may have committed war atrocities. They are simultaneously considered, by some at least, as human rights victim and violator. No international criminal court, however, has sought to prosecute child soldiers recognizing that they are fundamentally human rights victims. Most having been abducted, and forced by their adult captors to kill or be killed, while others have been forced to rely on rebel combat units for their survival having lost their family in the hostilities. Within the rebel combat units the 'child soldier' is typically abused physically and often sexually (i.e. used as human land mine detectors sent ahead of the adults in the unit such that it be the children who are blown up should they inadvertently step on the mine thus saving the lives of their adult 'comrades') [22]. The point here is that where there is great human suffering, we can and must make distinctions between 'human rights victim' and 'human rights violator.' This is required lest we risk losing our very humanity; all the while adroitly and illegitimately rationalizing our inaction in moral terms. Our failure to condemn the imposition of suffering, and/or to do all possible to prevent and end it (even where it exists on a mass scale) is the predictable consequence of not just ill-conceived political self-interest. It is fostered also by a post-modern, cultural relativist paralysis of conscience that too often encourages non-intervention even where it may be warranted. Non-intervention, under some circumstances, can unfortunately amount to a disregard for universal human rights which essentially 'destroys the solidarity of the human family' (the latter eloquent phase is borrowed from Morsink) [23].

1.8 Analysis of the Alan Dershowitz Model of the Origin of Human Rights Notions

The view expressed here is, in part, akin to that of Dershowitz, namely that the origin of the conception of human rights derives from our rejecting the experience of suffering caused by others. The current author's perspective, however, is not identical to that of Dershowitz (who is a 'protest scholar' in Dembour's terms). Dershowitz, as this author understands him, views rights as 'legal constructs' that emerge out of humanity's experience with, and reaction against injustice or 'wrongs' as Dershowitz terms it (i.e. our

experience with and reaction against man-made suffering if you will in the current author's terminology) [24]. Further, he holds that rights are *not* connected in any way with the very nature of human beings. It is on the latter point that the current author disagrees, and argues instead that it is *in the nature of all individual human beings* to potentially understand one or more of the following at some level: (a) that suffering when imposed against one's will is a 'wrong'; or at least something to be resisted; (b) that all persons deserve justice and, (c) that all persons, therefore, have a concomitant inherent right to resist injustice. This is not to say that various circumstantial factors may not militate against the individual's resolve to honour the rights of others such as when there is a serious scarcity of life-sustaining resources available, or even when there is an abundance of accessible resources. It is because the oppressed are potentially capable of intuiting their inherent fundamental human rights, that the powerful who, based on their utilitarian judgments deny a segment of the population justice, remain ever concerned with the possibility of resistance [25]. The youth voting rights movement is here considered to be an example of such resistance to injustice; an injustice operationalized via the blanket age bar against voting for persons under age 18 years which exists in most Western States.

1.9 Challenging the Political Conception of Human Rights

Baynes, Ignatieff, Rawls and others defend a view of human rights conceived as 'international norms aimed at securing the basic conditions of membership or inclusion in a *political* society (emphasis added)' [26]. There are various iterations of this view which is favoured by different academic scholars; each variation having some unique elements. All have in common, however, the notion that human rights are *not* inherent universal 'natural rights' that are apolitical and independent of legal or political recognition possessed based simply on one's humanity, but rather that human rights are political constructions. Baynes suggests, as do many other scholars holding the aforementioned political conception of human rights, that natural human rights, if they exist at all, would only be 'negative rights'; not positive. This since 'positive rights' could allegedly only arise in a political society where the duties of the government toward members of the polity are recognized by agreement. Since many of the rights listed in international human rights instruments involve 'positive rights', the argument of those who oppose the notion of 'natural human rights' is that these are not genuine human rights. However, the current author argues that 'positive rights' are in fact grounded on 'natural rights' i.e. the right to an adequate standard of living (the right to adequate food, housing etc), for example, as articulated in the *Covenant on Economic, Social and Cultural Rights* is tied to the 'negative right' not to have one's survival jeopardized or one's

security of the person infringed in other ways (both of which eventualities are very much more likely when one is destitute).

Baynes suggests that many rights contained in human rights instruments 'only make sense within the context of definite social and political institutions' [27]. One such example Baynes maintains is the *Universal Declaration of Human Rights* [28] guarantee of universal suffrage which only makes sense in the context of society structured with institutions allowing for representative government. Yet, Baynes himself concedes, as he must, that: 'It might be argued that these more concrete "institutional" rights, at least if they are genuine rights, can nonetheless be viewed as a specification of a more natural right – such as the right to life or liberty' [29]. Baynes offers no counter-argument on this point as the current author suspects no 'human rights as political construction' theorist can. Rather, he states in this regard: 'I do not wish to argue that it is impossible to interpret some human rights in this way [positive rights reduced to natural rights].' [30]. Yet, Bayne claims that interpreting positive rights linked to societal institutions as particular expressions of a fundamental natural right:

> . . . is not the most natural way [i.e. uncontrived way] to interpret the rights found in leading human rights documents. And it does not appear to be a plausible strategy for some widely recognized human rights, such as a right to nationality (or membership in a political society) [i.e. see Article 1 of the Universal Declaration of Human Rights] [31].

The right to nationality and to membership in a 'political' society can, contrary to Baynes assertion, in fact be linked to the natural right for survival and autonomy and fee association. It is clear that the stateless and de facto stateless are extremely vulnerable and the violation of their most basic human rights is a matter of great concern and priority for the United Nations High Commission on refugees (as many stateless persons are refugees as well) and other U.N. human rights bodies. Marginalization from society, regardless the basis, compromises one's liberty rights by constraining opportunities and, in many instances, can mean the chances for survival have been compromised (i.e. those marginalized from so-called mainstream society, as in many instances are the Roma peoples of Europe for example, suffer the consequences in terms of poor health and all of its ramifications as well as in a myriad of other ways that amount to infringements of natural inherent fundamental human rights). Thus, basic human rights such as the right to nationality, while associated with political societal arrangements and institutions, are *not*, as the supporters of the political conception of rights would have it, 'special rights' dissociated from 'natural rights' [32].

It is here contended that the narrow political conception of basic human rights potentially leads to: (a) an illegitimate erosion and delimitation of what are considered fundamental, inherent human rights, and to (b) inertia when it comes to protecting those rights; particularly when the

gross human rights violations are occurring outside of one's home State jurisdiction. Baynes, in his review of various theorists who endorse the view of human rights as 'political' conceptions, or constructions, makes reference to their concomitantly favouring a limitation of what are considered fundamental human rights:

> . . . human rights are political in that the type of justification given for them is determined by their political role or function. Since they are norms for the assessment or evaluation of political societies, and possibly, even for justified sanctions on them, *it is important that the norms be ones that it is reasonable for political societies to acknowledge* (emphasis added) [33].

> According to Ignatieff [Michael Ignatieff is a scholar who supports the notion of human rights as 'political conception'], *human rights should . . . not be seen as 'moral trumps' that are above 'politics,' but rather as a continuation of politics by other means . . . they are also thoroughly political themselves* and so not able to bring political disputes to any definitive closure of conclusion (emphasis added) [34].

> On the basis . . . that human rights are a product of political compromise, Ignatieff . . . defends the view that they [human rights] should be *minimal in content* . . . based on what Ignatieff calls a 'minimalist anthropology' (emphasis added) [35].

> Rawls' defense of a *limited set of basic human rights* in the Law of Peoples has been the target of much criticism and confusion . . . (emphasis added) [36].

Put differently, those scholars who endorse a political conception of human rights (as opposed to the notion that fundamental human rights are natural rights), generally advocate that what counts as fundamental human rights is continually up for negotiation and compromise depending on what is considered politically feasible and advantageous for the mutual self-interest of the State parties involved. However, at the same time they argue that the enumerated basic human rights recognized by the international community should be limited. What is most noteworthy about such a political conception of human rights as advocated by individual political theorists and other scholars is that such a view is *not* coming from vulnerable individuals or populations, but from the powerful elite. The latter enjoy the full benefit of their societal status and generally enjoy a full panoply of fundamental human rights which their fellow nationals may or may not enjoy. The upshot of the latter situation is that, *in practice*, the restriction of basic human rights that would ensue due to reliance on a purely political conception of human rights would apply always to the 'other'; not to the particular high profile scholars; diplomats and international delegates to the U.N. etc. endorsing such a view.

It should be understood that politics no doubt enters into the drafting and adoption of international human rights treaties, and that concessions are inevitably made in the interests of adoption and ratification of such instruments. However, this does *not* detract from the fact that fundamental human rights exist independent of such political processes as inherent

and universal intrinsic aspects of our humanity. The notion of fundamental human rights as but political contrivances; a way of doing 'politics by other means', as Ignatieff would have it, (as opposed to the notion that politics enters into the affirmation and implementation processes of what are natural inherent rights, or rights derived from such natural universal rights), creates the dangerous *illusion* that the concept of human rights is meaningless. However, recall, as discussed, that the notion of universal human rights and manifestly illegal acts (due to their inhumanity) existed in mankind's consciousness long before political negotiation of the matter or codification of such concepts (as in the Rome Statute of the International Criminal Court). This points up the fact that fundamental human rights cannot be *reduced* to politics; though politics certainly changes the colour of what States are willing to concede in the way of respecting the basic human rights of those within their jurisdiction and control and those beyond.

It is interesting to note, in the context of this discussion of human rights conceived as political constructions, that the *Universal Declaration of Human Rights* makes specific reference to the fact that fundamental human rights must be accessible *regardless* of the specific social and political context in which the individual finds him or herself:

> **Universal Declaration of Human Rights (UDHR): Article 28.**
> Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized [37].

This author would agree with Baynes that Article 28 of the UDHR can be interpreted as a 'demand for inclusion.' On this reading, however, Article 28 of the UDHR presupposes a 'natural human right', not a view of human rights as a context-dependent 'political conception'. Humans are by nature in need of affiliation for their mental and physical integrity and survival itself. Respect for fundamental human rights is then not just a correlate of full societal inclusion, but a precondition for it, and as such intricately tied to the natural basis of human rights. The notion of fundamental human rights is thus inextricably bound with the universal inherent need for societal inclusion.

Part II
Socio-Cultural Factors and the Minimum Voting Age

Chapter 2
Examples of Contextual Factors in the Youth Struggle for the Vote

2.1 Historical Examples of Voting Rights for Persons Below the Usual Age of Majority for Political Citizenship in their Particular Societies

The contemporary international movement to lower the eligible voting age to below 18 years and grant the vote to youth (for example, persons aged 16 and 17 or perhaps even to persons as young as 14) is often perceived to be a novel struggle for a human right. However, history teaches that this presumption is incorrect. Cultice, in his historical work on the struggle for youth suffrage in America, points out that the issue of 'youth' voting rights was a matter given important consideration in the earliest societies which enjoyed any form of representative government [38]. The specific age at which one was still considered a youth; that is, below the age of majority as far as voting was concerned, and generally also in most other domains, has varied over historical epochs. For example Cultice points out that:

> Under Roman law, the basis of civil law in Europe, a person came of age or reached majority and acquired full civil and legal rights at age 25, *but under certain circumstances was afforded military citizenship status at age 19*. Under English common law men and women came of age at 21, which was regarded as the average age at which a person reached full maturity and discretion. English common law divided the twenty-one years from birth to adulthood into three seven year periods: infancy, childhood and adolescence (emphasis added) [39].

Note the link in early societies between male citizenship rights such as voting and military age (age at which one could join the armed forces voluntarily or be conscripted). Hence, early societies made room for those males who were *below* the age of (legal) majority in most every domain to yet access the vote where certain conditions were met (i.e. the male youth in question had membership in the armed forces). Cultice states that it is believed that 'setting the age of 21 years for voting in the Western world stemmed from the English heritage in requiring that age for knighthood' [40]. Currently, age of voluntary enlistment in the British forces is 16 and one-half with parental consent. Interestingly, there has been a

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strong youth movement directed toward lowering the eligible voting age to 16 in England and in the United Kingdom generally; but attempts at such legislative reforms have to date failed. Happold informs us that for many Germanic tribes of yesteryear, age of majority with all its attendant civil rights such as were available, was the age at which male persons bore arms and that was generally age 15 [41].

There is then no perfect correlation in every case (contemporary or historical) between being eligible for service in the armed forces and having the right to vote, but there is such a trend. Not surprisingly then, the impetus in the United States pre-1971 to lower the eligible voting age from 21 to 18 years was also linked to issues concerning age of service in the armed forces. Hence, it was during the Vietnam War, given that recruiting age for the armed forces was 18, that the voting age was lowered from 21 to 18 years. Cultice reminds us of the epigram of that era, intended no doubt to encapsulate some moral legitimacy for the youth suffrage movement of the time, namely: 'old enough to fight, old enough to vote' [42]. The thinking of the supporters of youth suffrage in the U.S. during the Vietnam War era (where youth, in this instance, is defined as persons 18 and over but under age 21) seemed to be that since youth below the age of majority (specifically males aged 18, 19 and 20) were, in so many cases, making the ultimate sacrifice (risking their lives in the Vietnam War in their country's service), they were *morally* entitled to the vote at age 18 years. Of course, women aged 18 to 20 years would also have to be enfranchised under the proposed electoral reform given the constitutional prohibition against discrimination in the vote based on gender. All that was left was to codify that right in law and, hence, the eligible voting age in the United States of America was lowered from 21 to age 18 years (though this was ultimately accomplished via the 26th Amendment to the U.S. Constitution rather than through non-constitutional statutory law).

2.2 Youth in the 'Developing World': Adult Responsibilities but Still No Right to Vote

Ironically, contemporary times are often regarded (erroneously in so many ways) as a banner epoch in most respects for children's human rights worldwide [43] given, for instance, such developments as the *International Convention on the Rights of the Child* (CRC) [44]. The CRC sets out: (a) State duties owed to persons under age 18—except where age of majority is younger for a particular domain according to the domestic law in a particular State—as well as (b) an express articulation of children's fundamental universal and inherent human rights and freedoms (where the definition of 'child', once more, is dependent on domestic law stipulations regarding age of majority in various domains in that particular nation State). Hence,

children's protection and participation rights under the *Convention on the Rights of the Child* (where the term 'child' is understood to refer ideally, as per Article 1 of the CRC, to a person under age 18) can be defined away under domestic law by the adjustment of the age majority to one younger than 18 [45, 46]. Hence, for example, child brides, below the age of 18 years, *but of age of majority for marriage under domestic law in a particular State*, no matter how young, and no matter the age discrepancy between the spouses, are *not* protected by the *Convention on the Rights of the Child* [47]. In *some* of these instances, the child may even have been sold into sexual bondage by destitute parents who have arranged a 'forced marriage' for a girl child under age 18 years in exchange for payment to the parents. The CRC provides no protection in such instances despite the CRC's inclusion of articles prohibiting sex trafficking (Article 35) and sexual exploitation (Article 34) of children (where 'children' is normally understood, as defined in Article 1 of the CRC, as persons under age 18 years unless age of majority is younger in domestic law regarding the matter at hand) [48].

Note that voting rights are *excluded* from the list of fundamental human rights of children articulated in the *Convention on the Rights of the Child*. This is the case notwithstanding Article 12 of the Convention which deals with children's participation rights, and Article 13 concerning children's right to freedom of expression [49]. Hence, there is little possibility for children to change the domestic laws that adversely affect them given the denial of the vote. This is not to deny the fact, however, that human rights activism instigated by and involving children, at times at great personal sacrifice to the children involved, have, at certain pivotal moments, been instrumental in altering the societal power status quo in various ways (i.e. children contributed in important ways to the anti-apartheid movement in South Africa) [50].

Tragically this is an era in which there is a resurgence of the use of child soldiers in the hundreds of thousands, some as young as nine or ten, in diverse conflicts worldwide [51–53]. This, though the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict bars the compulsory recruitment of children under 18 into the armed forces as well as the use of children under 18 for 'direct' participation in hostilities. So-called 'voluntary' recruitment of children under 18, but over 15, by State forces is still permissible under this CRC Optional Protocol. However, all recruitment and use of children of any age by groups distinct from official State armed forces is barred under this Optional Protocol [54]. Yet, for instance, child soldiers were routinely used in various African State conflicts as in Sierra Leone and the Democratic Republic of the Congo during their contemporary internal and trans-border conflicts. In fact, several high ranking perpetrators of the international crime of recruiting and/or using child soldiers are now being tried before the permanent International Criminal Court in The Hague in regards to

the war crimes of recruitment and deployment of child soldiers for active combat [55]. While there is a movement to lower the minimum voting age to 16 in various African States (i.e. South Africa), to date these voices have not been heard by the power elite. Likewise, child soldiers have been used in the contemporary European conflicts. For instance, during the recent conflict in the Territory of the Former Republic of Yugoslavia, child soldiers were used by paramilitaries and armed opposition groups as well as government forces. Yet, in contemporary times these child soldiers have not been accorded suffrage. Noteworthy then is the fact that in many contexts the link between children (defined in the Convention on the Rights of the Child as persons under 18) sharing one of the heaviest burdens of society (i.e. military service) and having the right to vote, as occurred in previous historical periods, has been severed (no doubt, in part, as their involvement is, in the first instance, a violation of codified international law as well as of the customary rules of war). The child's involvement as warrior in very brutal and protracted conflicts globally [56] is not then the common 'coming of age' marker for the grant of the vote as it typically was in earlier times. Although there are increased rights guarantees for children in international law such as the Convention on the Rights of the Child (i.e. in respect of the right to State protection against various types of abuse and exploitation and State obligations to recognize and affirm varied positive children's provision rights such as the right to adequate health care etc.), suffrage is not considered in most States (Western or non-Western) to be amongst the young person's inherent entitlements.

In this contemporary era of international human rights institutions such as the United Nations, international human rights NGOs and the prevalence of 'rights talk', it is not surprising that Western democratic governments that have used child soldiers in combat are loathe to acknowledge that such has occurred. Generally, democratic States do *not* condone the practice as official State practice. Military dictatorships, of course, are not particularly interested in human rights issues and enlargement of the franchise in any case. The latter States are often in a perpetual state of civil war and martial law with any normal electoral process suspended such that voting rights are, for all practical purposes, non-existent for citizens at any age. Thus young people of aged 16 and 17 years who participate in armed conflict on the side of a sitting government or a rebel group that has taken power are typically not rewarded with the vote.

This is also the epoch of significantly increasing numbers of child-headed households in some parts of the world, but yet these minors, too, are denied suffrage. Minors are more frequently than ever before those who are caring for parents suffering from HIV/AIDS, and for their siblings (such trends are occurring in South Africa for instance). These young people are also frequently already orphaned as a result of the AIDS pandemic and the sole support of the family. In many instances, these young people are being denied the support that would be offered to them were they adults suffering

under the same type of enormous burdens [57]. In addition, in contemporary times, vast numbers of children worldwide contribute millions of dollars to State economies through their labour; often hard and highly hazardous labour, and not uncommonly, do so as forced or bonded labourers [58]. Yet, this 'child labour', so valuable and lucrative for the State, is *not* rewarded with access to voting; though clearly these persons under age 18 years are major participants in the State's economy.

Contributing in significant ways to the society and being granted the vote then are quite imperfectly correlated, to say the least, whenever the rights of persons under age 18 years are involved. Children and youth in extremely dire situations then, though making highly valuable societal contributions, most often have no voice through the vote to advocate for amelioration of their socio-economic status or other living conditions to any degree whatsoever.

Part III
Voting Age Eligibility: Human Rights Issue or Social Policy Matter?

Chapter 3
The Human Rights Imperative and Minimum Voting Age

3.1 The Gatekeeper Model of Recognition of a Human Rights Claim as Legitimate and it's Application to the Youth Voting Rights Struggle: Introduction

We consider next Clifford Bob's gatekeeper model of the emergence and legitimization of 'new' human rights claims [59]. We will explore in much of the remainder of the book the potential relevance of the model to the youth voting rights issue. The model, it will be shown, is quite helpful in thinking about why the issue of youth voting rights continues to be considered by most in the power elite, and by the majority of the general public in most Western democratic societies, as a fringe topic. There appears to be a de-legitimization process at work. In applying the Clifford Bob model to the youth voting rights issue, we seek also to gain some insight into why the struggle for youth voting rights in the democratic States of the West (i.e. a minimum voting age of 16) is regarded by and large as a struggle for a supposed novel, *invented* right for an undeserving 'special interest' group. It is relevant to note, however, that Clifford Bob in his very valuable work on the processes involved in rights recognition by the international community makes no reference, even in the briefest of terms, to the global youth voting rights movement. This despite the fact that: (a) the right at stake is so essential to young peoples' potential for improvement of their overall human rights situation and social status in society (i.e. the youth vote at 16 would provide young people aged 16 and 17 years a more effective advocacy tool for themselves, and potentially also for all those under age 18 years), and (b) the right to vote is generally regarded as amongst the most fundamental of the basic human rights (as reflected, for instance, by its inclusion in the *Universal Declaration of Human Rights* as a right belonging to *every* person). On the very first page of his book, 'The International Struggle for New Human Rights,' Clifford Bob states: 'Children are one example, with their rights developed primarily by adults' [60]. While in large part this may

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be true, in recent years youth aged 14–17 themselves have been prominently active in the struggle for the youth vote (i.e. grant of the vote at age 16 years) as will be discussed.

The Clifford Bob model concerns how persons who claim to be 'repressed, abused, neglected or excluded' have framed their complaints as 'violations of international [human rights] norms' and suggests factors that likely contribute to the failure or success of particular human rights struggles [61]. For instance, according to the model, human rights gatekeepers who resist a shift away from the status quo are a key factor in the failure of many human rights struggles. With the model's human rights gatekeeper notion in mind, in later sections we will consider certain unique legal cases concerning attempts by youth to assert various inherent civil rights and consider how these gatekeepers contributed to the youths' success or failure in these initiatives. The cases involve: (a) *the right to the vote*: we will examine a Canadian case concerning the unsuccessful attempt of two Alberta teens to win the legal right to vote in Albertan municipal and provincial elections; a case that the youths lost and where there was a *denial* of leave to appeal to the Supreme Court of Canada; (b) *the right to make federal political campaign contributions*: we will examine a U.S. Supreme Court case concerning the successful attempt of teen plaintiffs to win the legal right to make contributions to the political campaigns of federal candidates), and (c) *the right of under 18s to file a human rights complaint to a human rights commission relating to age discrimination*: we will consider an Ontario Human Rights Tribunal case which addressed the issue of whether the statutory bar preventing persons *under* 18 years old in Ontario from advancing cases before the Ontario Human Rights Commission (in their own right or via a representative) concerning the prohibited discriminatory ground of age constitutes a failure to provide these young people equal protection and benefit of the law. Each of the aforementioned cases involve claims of fundamental human rights violations relating to age discrimination made by or on behalf of persons under age 18 years.

The Clifford Bob model highlights the fact that human rights claims are *not* automatically considered as such. Using that perspective, we will also explore throughout the remainder of the book whether the grant of voting rights to youth aged 16–17 (with perhaps the possibility under certain conditions for even younger children to access the vote) is akin to an acceptance that individuals in this group have the *inherent* 'right to have rights' (possess the intrinsic right to certain basic universal human rights). This in contrast to youth being considered to be persons entirely reliant on adults conferring at *their* (adult) *discretion* whatever rights and freedoms youth might enjoy in practice; even when it comes to fundamental constitutional rights. We will consider the vote then as a mechanism for agitating on one's

own behalf for further rights (for the 'right to have rights') as opposed to relying on the discretionary judgment of those in power (persons aged over 18 years; adults) to prioritize what is, or is not important in meeting the interests of minors.

In thinking about children's 'participation rights'; the question arises as to whether *The Convention on the Rights of the Child* (CRC), in actuality, fully affirms those rights. That this is the case is disputable given that: (a) the CRC does *not* speak at all to the issue of voting rights for persons of any age under 18 years; and (b) the CRC, at present, provides no mechanism for victimized individual children, or groups of such children belonging to an identifiable class, to bring forward complaints under the *Convention on the Rights of the Child*, or pursuant to the Optional Protocols additional to the Convention. These then represent instances where the United Nations itself is acting as human rights gatekeeper by contributing to: (a) the legitimization of the disenfranchisement of all minors, even those aged 16 and 17 years (i.e. due to the CRC exclusion of suffrage as a right for minors under any conditions), and (b) the disempowerment of minors within the UN children's human rights system itself as a consequence of the denial of opportunity for minors to file individual or group complaints under the CRC or its protocols and so advocate on their own behalf (with or without representatives) before the UN in respect of their human rights concerns.

The plan then is: (a) to examine the Clifford Bob human rights gatekeeper model of how allegedly 'new' human rights are validated by the international community, and, (b) in what follows thereafter to investigate whether the model in this regard 'fits' the youth voting rights struggle. We will investigate in this and later sections some of the basic characteristics of the youth voting rights struggle in Western States and the societal justifications that have been proffered for the denial of the vote to 16 and 17 year olds. A prime objective is to consider whether the youth voting rights movement has, in reality, been successfully articulated as a fundamental human rights struggle, or whether, in contrast, it has simply been reduced to a political policy issue by high profile human rights gatekeepers. An examination will be made of the gate-keeping role of high profile national organizations (for instance, the U.S. National Education Association; the U.S. Civil Liberties Association, the U.K. Electoral Commission) and of international human rights NGOs (such as Amnesty International), international human rights organizations (i.e. the United Nations) in causing the youth voting rights struggle to flounder in the West. All this is with a view to better understanding some of the institutional barriers to date in the enfranchisement of 16- and 17-year-olds and what changes in thinking and practice in respect of human rights gatekeepers would be necessary for the success of the movement.

3.1.1 The Clifford Bob Model on the Process for International Legitimization of 'New' Human Rights Claims

Clifford Bob suggests that if 'human rights gatekeepers' such as prominent NGOs (i.e. Human Rights Watch, The United Nations High Commission on Human Rights, Amnesty International etc.) take up the cause of a so-called novel human right, this is likely to: (a) bring widespread recognition of the right; and (b) increase the chance that States will act to end infringements of the right as well as perhaps take positive steps to facilitate enjoyment of the right for the vulnerable groups in their respective jurisdictions. Clifford Bob contends that there are four steps which mark the progressive evolution of a group's grievance into a widely affirmed internationally recognized human rights claim. That rights claim may be perceived as novel, or one that may long have been articulated but never come fully to life in the imagination of the international community, or in practice, or one that, in contemporary times, has gone into disfavour. Those progressive steps to international validation of a fundamental human rights claim are in Clifford Bob's view as follows:

> First, politicized groups frame long-held grievances as normative [human rights] claims. Second, they place these rights on the international agenda by convincing gatekeepers in major rights organizations to accept them. This is crucial because a handful of NGOs and international organizations hold much sway in certifying new rights. Third, states and international bodies, often under pressure from gatekeepers and aggrieved groups, accept the new norms. Finally, national institutions implement the norms [62].

Let us then apply Clifford Bob's refreshingly straightforward, but highly useful model to the youth struggle for voting rights. This in an attempt to formulate some plausible explanations as to why, in recent years, the youth voting rights issue (i.e. the attempt in Western democratic States to lower the eligible voting age to 16 in all elections from local to national and perhaps grant limited voting rights to 14 and 15 year olds such as the right to vote in municipal elections) has most often faltered. That is, why the struggle for the youth vote at age 16 has been in recent times regarded by the powers that be (namely; State governments, certain high profile international NGOs, international human rights institutions, domestic civil libertarian groups etc.) as an unrealistic prospect and/or a fringe issue not worthy of serious consideration, a 'non-issue' and certainly not a fundamental human rights matter. We begin by considering how the youth rights struggle in recent contemporary times has been formulated or framed. We do so by examining a select (given the space constraints of this monograph), but hopefully representative sample of pronouncements on the issue by: (a) *supporters* (i.e. youth human rights advocates; human rights/constitutional law academics, human rights advocates; and select

politicians who tend to view minors as not simply an extension of the family but as autonomous rights holders), and (b) *opponents* of voting age reform (those politicians, academics, and members of the judiciary and others tending to endorse more conservative family values and/or traditional views regarding the competencies, capacity for moral integrity and appropriate status of minors). The resources culled are mostly materials originating in the U.S., Canada, the United Kingdom and parts of Europe. There is, relative to other interdisciplinary topics, very little published on the issue of youth voting rights. However, we will hopefully gain some considerable insight into the obstacles facing those struggling for the vote at 16 by examining academic, governmental and other publications in the area. This exercise is directed to highlighting the manner in which both the youth voting rights claimants (those struggling for a minimum vote age at 16 years) and their opponents have *implicitly* characterized the youth voting rights issue. That is, we are interested in examining here whether claimants and/or opponents of a minimum voting age of 16 have formulated the youth voting issue as: (a) a social policy issue falling within the discretionary choice of the State government or, in contrast, (b) a fundamental rights issue with international human rights legal and moral imperatives attaching that supersede individual State preferred social policy options. We are especially interested in the next section then in determining whether the youth struggle for the vote in the last number of decades in the West has effectively been articulated as a fundamental human rights question by the youth claimants and their supporters; but not so by opponents of any lowering of the minimum voting age from the current 18 years. It should *not* be assumed, for reasons that will become clear, that the claimants, despite their using 'rights talk,' always successfully frame the issue of lowering of the minimum eligible voting age to 16 as a fundamental human rights matter. The question then becomes how to effectively frame the youth voting struggle as a basic human rights matter; something we will consider throughout the discussion.

3.2 The Devolution of the Youth Voting Age Struggle from 'Human Rights Struggle' to 'Social Policy Issue': The Canadian Example

Clifford Bob contends that framing a grievance as a human rights claim is a 'political choice' and there is 'nothing automatic about it' [63]. In the case of the youth voting rights issue, however, adults had already framed voting as a fundamental democratic human right in both Western State constitutions and international conventions. For instance, the *International Covenant on Civil and Political Rights* (ICCPR) prohibits discrimination in the grant of the fundamental human rights contained therein on the basis of *any* status and guarantees universal suffrage:

Article 2 ICCPR

1. Each State Party to the present Covenant undertakes to *respect and to ensure* to *all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant*, *without distinction of any kind*, *such as* race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status* (emphasis added).

Article 25 ICCPR

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* and shall be held by secret ballot, guaranteeing the *free expression of the will of the electors* . . . (emphasis added). [64].

Hence, that youth would rely on human rights rhetoric in their struggle for enfranchisement at 16 years was something of a foregone conclusion. In this particular respect, the model that Clifford Bob provides regarding the international legitimization of purportedly 'new' human rights does *not* fit the youth voting rights struggle. This is a very unique state of affairs as the Clifford Bob model is a good fit for widely diverse movements in describing: (a) the establishment of newly recognized inherent rights (i.e. the right to clean water), or (b) revival of respect for already recognized inherent rights that have been wrongfully disavowed or disregarded (i.e. the right of children to be protected from child soldiering; a right, as mentioned, long recognized in the customary rules of war). In the case of the youth voting rights movement, we have a situation where the majority of adults in Western democratic States who themselves endorsed and continue to endorse legitimization and internationalization of the notion of voting rights as a universal fundamental human right (as reflected in their support of the *Universal Declaration of Human Rights*, democratic constitutional documents and international human rights treaties such as the ICCPR)—*oppose* youth in their own countries who wish to realize that right for themselves by at least age 16 years. Normally under the Clifford Bob model, as this author understands it, one would expect that once a human right is well entrenched and internationally legitimized by international human rights institutions and advocates—such as is equal universal suffrage for all citizens of a State—the majority of these adults would be supporting inclusion of excluded citizens of the State (i.e. 16 and 17 year olds who seek the vote). In democratic States, entrenched constitutionally guaranteed and internationally recognized universal basic human rights are *not* commonly restricted for an indefinite period through legislated statutory law. There is instead typically a progressive enlargement in practice, and not just in theory, of the 'rights holder' category in respect of such

well-recognized rights. Thus, with respect to voting rights; although 'no country allows all *adults* to vote. . .*the basic trend over the last 200 years has been to remove one barrier after another*, [though] many restrictions remain (emphasis added)' [65]. Blais et al. state that:

> Throughout the 19th and early 20th centuries, the franchise was a lively issue. Whether women and less affluent citizens should be enfranchised was a hotly debated topic. *In contrast, contemporary disqualifications affect numerically smaller groups* like prison inmates or mentally deficient persons . . . (emphasis added). [66]

Yet, when it comes to voting rights for persons under age 18 years, there has *not* been in contemporary times a steady, incremental evolution of a more inclusive enfranchisement. For the most part, the issue has been kept by the powers that be well 'under the radar'; though it involves a very fundamental human right. The topic has not been designated as a State priority issue and, in some jurisdictions; youth voting rights is not even considered, at a minimum, a worthwhile topic for serious consideration. At the same time, it is the case that minimum eligible voting age was lowered from 21 to 18 years in most Western States with age of majority consequently set at 18 years in most legislative domains within these States by the mid 1970s. In addition, a very few have the age of majority for the vote set at 16 in some, but not all elections (i.e. certain German municipalities), while Austria is unique among Western States in establishing a minimum voting age of 16 in 2007 for all elections including federal. There has also been a steadfast opposition in most Western democratic States to any lowering of the eligible voting age to a set point below 18 years. Most States internationally also for that matter have declined to grant the vote at age 16 years.

The ambivalence, in practice, in most Western democracies on the issue of voting rights as a universal, inherent, fundamental human rights entitlement is no more clearly illustrated than in Finland. The Finnish constitution [67] includes an explicit prohibition on age discrimination in the law (where there is no legitimate justifiable reason for that discrimination). The same constitutional provision also specifically refers to the right of children to be treated equally and as individuals (section 6). This is rather unique as Western constitutions generally make no reference to age discrimination in regards to children. At the same time, the Finnish constitution at section 14: (a) affirms that every Finnish citizen of age 18 years and older has a right to vote in national elections and federal referendums; and (b) affirms that every Finnish citizen *and* every foreigner permanently resident in Finland who is 18 years or older has the right to vote in municipal elections and municipal referendums. Hence, even certain non-citizens (those who are permanent residents of Finland and at least 18 years old) have their voting rights *expressly* affirmed in the constitution, while this is not the case for Finnish citizens who are minors, or minors who are not Finnish citizens but who are permanent residents of Finland. Thus, the

Finnish constitution on the one hand prohibits age discrimination in law, while on the other it fails to *explicitly* endorse universal suffrage regardless of age. It is important to appreciate, however, that while the Finnish Constitution explicitly affirms certain rights of enfranchisement only for Finnish citizens and foreign permanent residents of Finland, it does *not* strip those under age 18 years of those rights (a similar issue arises in respect of the 26th Amendment to the U.S. Constitution regarding the right to the vote and age discrimination which will be discussed).

One might argue (erroneously) that this apparent inconsistency is not problematic in that the Finnish Constitution states that age discrimination is prohibited only where there is no acceptable reason for that discrimination. It might be presumed that there is an acceptable reason for exclusion of, for example, 16- and 17-year-olds from the vote (this being the group mentioned as it is primarily this age group actively seeking the vote internationally). The prime allegedly acceptable reason for exclusion of minors from the vote might be a *presumed* lack of competence for the vote amongst *all* minors regardless of specific age. However, a political competency standard for the vote is *not* being applied at all in Western democratic States in regards to the general adult population (nor is this the case in regards to any voting standard regarding autonomy, income, literacy, civic engagement or the like). Hence, any such alleged acceptable reason for age discrimination in the vote is itself being applied in a discriminatory manner based on age. This is a point we will discuss in some considerable detail in later sections.

One may take issue with the contention of Blais e al. that contemporary disqualifications from the vote typically affect numerically smaller groups than was the case in the past (i.e. the implication then being that the exclusion of youth from the vote in Western States in contemporary times directly affects but a relatively small population group). Consider, for example, that excluding those aged 14 and over from the vote in the United States impacts on the rights of many millions of young people in that country:

> . . . the number of *high school-age children (age 14 to 17)* increased, from 16.1 million and 5.7 percent of the total [U.S.] population in 2000 to 16.9 million, or 5.6 percent of the total [U.S.] population, in 2008 (emphasis added) [68].

Given the fundamental nature of the human right at stake in the youth struggle for the vote one would likely expect, under the Clifford Bob model, that international human rights organizations/institutions and international human rights advocates would offer vigorous support for youth acquisition of the vote. Instead, these latter entities, as we shall see, either take no position on the issue of the vote at 16 years, or support the status quo. Equally damaging to the future potential success of the youth voting rights movement is the reframing of the issue by opponents as something other than a fundamental human rights issue:

1. Opponents of a minimum voting age of 16 years in Western democratic States have successfully (and erroneously) transformed the youth voting rights issue from a human rights issue to a *social policy issue* (the latter being something within the purview of government's discretionary choice). This has been accomplished given that these opponents are comprised of the majority of adults in the populations of Western democratic States some of whom hold high political office and other influential positions with associated significant power and high social status;
2. Opponents of a minimum voting age of 16 years have successfully (but erroneously) argued that the age restriction of 18 years and older for the vote is a *non-discriminatory standard qualification* for the vote; *universally applicable* to all citizens under the particular State's jurisdiction;
3. Opponents of a minimum voting age of 16 years have successfully (but erroneously) argued that the age qualification of 18 years for the vote is *not* akin to previous voting qualifications found subsequently by the courts to be unconstitutional violations of a fundamental human right (i.e. those previous voting qualifications included, for instance, being male, having an acceptably high economic status, being literate as allegedly accurately assessed by a test regarding political knowledge or by some other 'voting test', being a free man; that is, not being a bonded labourer or in some sort of forced servitude or slavery.

Note that the youth voting rights claimants themselves, despite their using rights rhetoric, have essentially 'played the game' by their opponents' rules. This the youth rights claimants have done by arguing points that are *irrelevant* from a human rights perspective (i.e. by arguing that youth aged 16–17 are sufficiently mature, responsible, rational, autonomous, and civically engaged to be capable of casting an independent, free and informed vote).

Thus, there has been a 'devolution' of the youth voting rights issue (from human rights matter to State government social policy preference) as will become evident in what follows. Let us begin with an example of the endorsement by the powerful in society of a 'social policy' characterization of the youth voting rights issue. That example comes to us courtesy of the Supreme Court of Canada (SCC) ruling in *Sauvé* [69] The judgment in that case discusses age restrictions on the vote but was in fact a ruling on the constitutional claim to the vote advanced by persons disenfranchised due to having been sentenced in a criminal matter to incarceration in a penitentiary for two or more years. The inmate claimants held their disenfranchisement to be unconstitutional arguing that: (a) it violated their right to the vote under s. 3 of the *Canadian Charter of Rights and Freedoms* [70] which guarantees universal suffrage to all Canadian citizens,

and (b) their right under s. 15(1) of the Charter to be protected against discrimination in respect of voting rights. Further, the latter claimants held that there was no justification in a free and democratic society for their disenfranchisement (i.e. no section 1 Canadian Charter justification). The Court ruled as unconstitutional the disenfranchisement of these penitentiary inmates. The judgment provides highly instructive pronouncements on: (a) the nature of the human right implicated in any restriction of the vote, and on (b) whether restriction of the vote is likely to foster societal integration of disenfranchised persons or respect for the electoral process and the rule of law. Further, the judgment is one of the very few that address the issue of the age restriction on the vote. How the Supreme Court of Canada in its *Sauvé* judgment completely dissected the fundamental human rights claim from the disenfranchisement of youth issue (unjustifiably on this author's view) provides great insight into the key strategy of opponents of the vote at age 16. Hence, we will examine those portions of the *Sauvé* judgment that have relevance to the youth voting rights issue in some detail in what follows. Much of what the SCC in *Sauvé* had to say in support of enfranchisement for inmates serving two or more years in penitentiary is applicable also to non-incarcerated and incarcerated youth seeking the vote at 16 years. Yet, the Court manages to hold contradictory, mutually exclusive positions on enfranchisement depending on the identity of the citizen rights holder being considered i.e. youth under age 18 years versus adult penitentiary inmates serving two or more years (in Canada, persons under 18 years are normally dealt with in a juvenile court and detention system. There have been, however, some exceptions in which juveniles have been incarcerated in the same facility with adult offenders and Canada has given no assurance to the UN that this practice will be completely eliminated in the country. Hence, in limited instances, it may be the case that a minor is serving a sentence in a Canadian penitentiary where adults are also housed. For this, Canada has been roundly criticized by the U.N. Committee on the Rights of the Child which monitors the *Convention on the Rights of the Child* which instrument Canada has ratified).

3.3 The Supreme Court of Canada's Downgrading of the Youth Human Rights Struggle for the Vote to a Social Policy Issue

[**Author's Note**: All quotes in the immediately following are from the Supreme Court of Canada decision in *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 S.C.R. 519. Internal references are omitted from those quotes.]

3.3.1 Acknowledgement by the Supreme Court of Canada in Sauvé of the Fundamental Nature of the Right in Question (Voting Rights)

The Supreme Court of Canada (SCC) acknowledges that voting rights are fundamental to democracy so that any infringement is discriminatory and requires, *not* deference, but close judicial scrutiny of the government-proffered justification to ensure that the violation is constitutional:

> . . . *The right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside. Limits on it require not deference, but careful examination*. This is not a matter of substituting the Court's philosophical preference for that of the legislature, but of ensuring that the legislature's proffered justification is supported by logic and common sense (emphasis added) . . . [71]

Yet, when it comes to the disenfranchisement of Canadian young people under 18 years old—even 16 and 17 year olds—the SCC *does* defer to government.

3.3.2 The SCC Denial—When the Rights Holders Are Young People Under 18 Years—that Age Restrictions on the Vote Need to be Justified by the Government as Compatible with the Values of a Free and Democratic State

The *Canadian Charter of Rights and Freedoms* guarantees universal suffrage to every Canadian citizen bar none. Therefore, *from a constitutional rights perspective,* under 18s also have the right to vote:

> *Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly* and to be qualified for membership therein (emphasis added) [72].

The Canadian Charter requires that government justify any restriction in the grant of rights and freedoms and meet the section one requirement for constitutionality of such infringements i.e. the infringement must be for a compelling legitimate reason in the view of the court, relevant to the governmental legitimate objectives, no more of a disadvantage or burden to those whose rights are infringed than absolutely necessary to achieve the governmental objectives, and above all consistent with the values of a free and democratic society.

> The *Charter* distinguishes between two separate issues: whether a right has been infringed, and whether the limitation is justified [where justification refers to whether the limitation of rights meets the s. 1 *Canadian Charter of Rights and Freedoms* test for constitutionality] (emphasis added) . . . [73]

The Supreme Court of Canada (SCC) in *Sauvé*, however, treats the age restriction on voting rights as non-discriminatory. This is the Court's position on the matter despite the fact that Canadian citizens under the minimum eligible voting age of 18 years (as per electoral statutory law) are *constitutionally guaranteed* the right to vote (as per the Canadian Charter). Hence, according to the SCC, in regards to the age restriction on the vote, there is no need for the Court to proceed to the next level of analysis. That next level of analysis would require the government to persuade the Court that the age restriction on the vote is justifiable in a free and democratic State as per the requirements of section one of the Canadian Charter:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law *as can be demonstrably justified in a free and democratic society* (emphasis added) [74].

The Supreme Court of Canada (SCC) in *Sauvé* describes the age restriction on the vote as reflecting but a *standard qualification for the vote*; a component of Canada's 'legitimate voting regulations' that is applicable to all citizens and, on that basis, allegedly non-discriminatory. The specific phraseology that the SCC employs in this regard characterizes the government's imposition of the age restriction on the vote as simply the government 'regulating a modality of the universal franchise' (see the *Sauvé* judgment excerpt below) such that all citizens under 18 years are not eligible to vote, but can access the constitutional guarantee of universal suffrage when they reach age of majority for the vote. With respect, one can justifiably contend that this is a bit of deft, though not very convincing, mental and semantic gymnastics on the part of the SCC justices who decided *Sauvé.* Afterall, the universal suffrage guarantee for every Canadian citizen as articulated in s. 3 of the Canadian Charter is by definition non-exclusionary in respect of all Canadian citizens regardless of age or any other personal attribute or status.

One might legitimately query then what part of 'universal' in the Canadian Charter s. 3 'universal suffrage' guarantee is unclear to the SCC justices who decided *Sauvé* and why. That is, why was the constitutionally guaranteed right to the vote for *under* 18s considered by the Court in *Sauvé* to be legitimately inoperative. The answer seems to be the fact that age is not a fixed immutable trait. That alleged justification for an age-based restriction on the vote is to be discussed here in a later section and will be shown to be deeply flawed.

The SCC then in *Sauvé* makes mention of its affirmation of the age-based restriction on the vote notwithstanding the fact that the Court, in the same case, also held that: (a) to deprive someone of the right to vote is to render them 'deprived of the most basic of their constitutional rights'; and that (b) to legislate a deprivation of the right to vote 'is not the lawmakers' decision to make' since '[T]he Charter makes this decision for us by guaranteeing

the right of 'every citizen' to vote.' (see excerpt below from the *Sauvé* judgment). Despite the Supreme Court of Canada's affirmation of the Canadian Charter's universal suffrage guarantee then, the Court, at the same time in *Sauvé*, had no compunction about endorsing the age restriction on the vote based on just that discretionary decision-making of lawmakers which the Court rejects as legitimate in restricting the vote for any other Canadian citizen; including penitentiary inmates:

> The government's vague appeal to 'civic responsibility' is unhelpful, as is the attempt to lump inmate disenfranchisement together with *legitimate voting regulations* in support of the government's position. The analogy between youth voting restrictions and inmate disenfranchisement breaks down because the type of judgment Parliament is making in the two scenarios is very different. *In the first case, Parliament is making a decision based on the experiential situation of all citizens when they are young. It is not saying that the excluded class is unworthy to vote, but regulating a modality of the universal franchise*. In the second case, the government is making a decision that some people, whatever their abilities, are not morally worthy to vote – that they do not 'deserve' to be considered members of the community and hence may be deprived of *the most basic of their constitutional rights*. *But this is not the lawmakers' decision to make. The Charter makes this decision for us by guaranteeing the right of* 'every citizen' *to vote* . . . . (emphasis added). [75]

Implicit in the disenfranchisement of some (i.e. minors) is acceptance of the notion that the disenfranchised can be governed by others not of their choosing according to laws and policies in which they had no voice (i.e. having been denied the opportunity, for instance, to vote for or against particular candidates who endorsed or would likely endorse those laws and policies now impacting the lives of the disenfranchised). There would appear to be no basis for the Supreme Court of Canada's suggestion in *Sauvé* that disenfranchising young people is any less stigmatizing than it is for adult penitentiary inmates. In both cases, to be disenfranchised is to be denied a Charter-guaranteed universal right to access a significant vehicle for full societal participation. Denial of the right to vote is a ticket to marginalization. The disenfranchised Canadian citizen is, hence, rendered a second-class citizen and not considered as fully a member of society as are those who have the vote. This marginalization of the disenfranchised inevitably is associated also with a devaluing of the person. Recall that the lowering of the vote below the typical age of majority has been, in bygone eras, associated with recognition of the person's particular worth to society. Hence, as previously mentioned, young people below the age of majority have, in certain historical periods and societies, been granted the vote in recognition of their military service which has elevated their *perceived* moral worth. It is evident then that assessments of the moral worth of an age-defined class of persons (i.e. persons under the age of 18, persons over the age of 18, persons of an eligible age for military service, persons not eligible for military service on account of age etc) is one of the key causal factors in the grant or denial of the vote. Enfranchisement

or disenfranchisement can further respectively either raise or lower the perceived societal value of the class of persons involved. We will shortly consider the lowering of the minimum voting age from 21 to 18 years in the United States during the Vietnam era, and the role of the enhanced perceived moral worthiness of young people 18 and over but under age 21 years in the enfranchisement of this group.

3.3.3 The Supreme Court of Canada's Holding that the Government's General Social and Political Philosophy is an Unconstitutional Basis for Denial of the Vote to Canadian Citizens with the Exception of Canadians Under Age 18 Years

Since the Supreme Court of Canada (SCC) characterizes the age restrictions on the vote as non-discriminatory differential treatment (i.e. framing the exclusion of minors from the vote instead as but a 'regulating of a modality of the universal franchise' which is not an affront to their human dignity), the Court, in effect, held in *Sauvé* that the age restrictions on the vote are constitutional based solely on the government's unfettered prerogative to make social policy and political choices (i.e. in the area of electoral law). In the view of the SCC then no further justification is required to meet the constitutional threshold when it comes to the voting age restrictions. The SCC thus, in essence, held in *Sauvé* that setting the minimum voting age at 18 years is purely a governmental policy choice legitimately considered as within the discretionary power of the government. This effectively gave the *illusion* of transforming a fundamental human rights issue (the youth voting rights issue) into a social policy question on which the Court must defer to the presumed wisdom of the legislature in making the choice that it did. Note that disenfranchisement of penitentiary inmates—in contrast to the denial of the vote to those under age 18 years—was considered by the SCC, in the first instance, to be discriminatory. Given this, the Court held the government would have to provide a *demonstrably* justified reason for the restriction on the vote in the case of penitentiary inmates which was compatible with the values of a free and democratic society as per s. 1 of the Canadian Charter. The SCC then went on to hold that a mere statement of political and social philosophy was insufficient to render the violation of the Charter universal suffrage guarantee for penitentiary inmates constitutional under s.1 of the Charter:

> *At the s. 1 stage, the government argues that denying the right to vote to penitentiary inmates is a matter of social and political philosophy, requiring deference. Again, I cannot agree. This Court has repeatedly held that the* 'general claim that the infringement of a right is justified under s. 1' *does not warrant deference to Parliament* . . . Section 1 [of the Canadian Charter of Rights and Freedoms] does *not* create a presumption of constitutionality for limits on rights; rather, it *requires the state to justify such limitations* (emphasis added) [76].

While the *federal government of Canada* conceded in *Sauvé* that disenfranchisement of penitentiary inmates was a violation of their right to the vote under s. 3 of the Canadian Charter, the *government* maintained (erroneously) that there was a s. 1 Charter justification which rendered the violation constitutional. That justification was vaguely articulated in terms of the government's general social and political philosophy. That social and philosophical perspective included, for example, the presumption, among others, that penitentiary inmates voting would demean the electoral system, and that it would undermine respect for the rule of law. However, the Supreme Court of Canada held that the test for the constitutionality of a rights infringement under s. 1 of the Charter is *not* met by reliance on general statements of social and political philosophy such as proffered by the government in the penitentiary inmate voting rights matter. Yet, general social and political philosophy perspectives also underlie the denial of the vote to Canadian citizens aged under age 18 years regardless of whether or not they are developmentally capable of understanding what voting means and interested in voting (we will consider issues surrounding the right to vote for those under age 16 years in a later section as well. That is, the voting rights issue as pertaining to those young people under 16 years; some of whom are *as individuals* developmentally incapable of understanding the voting process, or of autonomously casting their own vote).

The Supreme Court of Canada in *Sauvé* then held that collective societal concerns (i.e. about upholding the rule of law, maintaining the integrity of and respect for the electoral system etc.) cannot automatically serve as an allegedly constitutional basis for denying an individual citizen his or her voting rights (thus rendering the violation non-discriminatory and in no need of a s. 1 Charter justification). Hence, all such restrictions, including disenfranchisement of penitentiary inmates, must meet the s.1 Canadian Charter test as justified and compatible with the values of a free and democratic society. Further, the Court maintained that the need to justify any restriction in voting rights under s. 1 of the Charter (as consistent with democratic values) is reflected in the fact that voting rights *cannot* be overridden via use of the Charter's notwithstanding clause which allows for violation of certain specified equality rights under certain conditions:

> The framers of the *Charter* signaled the special importance of this right not only by its broad, untrammeled language, but by *exempting it from legislative override under s. 33's notwithstanding clause. I conclude that s. 3 [s. 3 of the Charter stipulating democratic rights including the right to vote] must be construed as it reads, and its ambit should not be limited by countervailing collective concerns, as the government appears to argue. These concerns are for the government to raise under s. 1 in justifying the limits it has imposed on the right* (emphasis added) [77].

When it came to penitentiary inmates then, the Supreme Court of Canada (SCC) in *Sauvé* held that collective (societal) concerns leading to restriction of the vote, even if legitimate, cannot change the fact that denial

of the vote to these individual adult claimants amounts to discrimination (i.e. considering that the Canadian Charter contains a universal suffrage guarantee and the exclusion is an affront to the human dignity of those citizens). Any restriction of voting rights for penitentiary inmates must thus be considered as *ipso facto* discriminatory according to the Court in *Sauvé*. These restrictions then require that the government provide justifications that are constitutional (i.e. the government's justifications for excluding penitentiary inmates from the vote must be compatible with democratic values, the objectives the government hopes to achieve with the voting rights restrictions must be pressing and achievable in this way, and voting rights restrictions must be a reasonable and not a disproportionate infringement of rights for the achievement of the alleged important societal goals). As discussed above, the SCC in *Sauvé* did *not* accept general statements of social and political philosophy as sufficient justification under s. 1 of the Canadian Charter for restrictions on the right to vote when it came to penitentiary inmates. In the case, of *age restrictions* on voting rights, however, the Court held that these were *not* discriminatory in the first instance, but rather reflected 'standard qualifications' for the vote (i.e. constitutional, non-discriminatory differential treatment). Thus, according to the SCC in *Sauvé*, the age restrictions on the vote required *no* s. 1 Charter justification. These age restrictions on the vote, therefore, could, in the view of the Court, be based solely on discretionary governmental philosophical and political perspectives and preferences and be presumed constitutional without judicial scrutiny. Thus, the Supreme Court of Canada's analysis in *Sauvé* holds that: (a) the government's choice regarding what is the appropriate legal age of majority for the vote does *not* involve violation of a fundamental human right and, therefore, (b) the disenfranchisement of minors does *not* require further justification as to the constitutionality issue.

That the age restrictions on the vote are merely a 'standard qualification' rather than a human rights infringement was then the SCC position in *Sauvé*. The Court took the latter position even though the age restrictions on voting are based on much the same collective societal concerns as were operative for the penitentiary inmate voting matter (i.e. maintaining the integrity of the electoral system, and upholding respect for the rule of law etc.). Note also that penitentiary inmates are disproportionately less rational, less emotionally well balanced, less educated and less civically engaged than the general population [78]. However, this, too, was *not* viewed by the SCC in *Sauvé* as a barrier to *their* enfranchisement. In contrast, such negative and, in many cases, suspect attributions to *all* young people under age 18 years are commonly relied upon by government to justify age restrictions on the vote without interference from the courts. Yet, only in regards to the disenfranchisement of penitentiary inmates did the Supreme Court of Canada hold that the voting restrictions were both discriminatory and unconstitutional when justified only with reference to broad social and

political objectives and philosophy. Not so for the disenfranchisement of young people under the age of majority for the vote.

3.3.4 The s. 3 Canadian Charter Guarantee of Universal Suffrage as Shielded from Suspension under the Notwithstanding Clause (s. 33 of the Charter)

The SCC in *Sauvé* notes, as previously mentioned, that: 'The framers of the *Charter* signaled the special importance of this right [to the vote] not only by its broad, untrammeled language, but by *exempting it from legislative override under s. 33's notwithstanding clause*' [79]. That is, neither the provincial governments, nor the federal government can by referendum suspend voting rights for a period of five years as they can under the Canadian Charter in regards to certain other Charter rights. Yet, one might legitimately argue that Canadian youth under age 18 years in being restricted from the vote are in fact living under the burden of what amounts to a de facto *unconstitutional* imposition of the s. 33 Charter notwithstanding clause in respect of the right to vote. The age restriction on the vote for Canadians under age 18 years is unconstitutional under the Canadian Charter for several reasons: (a) the Canadian Charter does not contemplate a restriction on the vote for Canadian citizens based on age; (b) the restriction is not permissible using the s. 33 Canadian Charter notwithstanding clause (which allows, under specific conditions, for violations of the equality guarantee pertaining to certain designated Charter rights), and c) the violation of the equality guarantee with respect to universal suffrage (as provided for under s. 3 and s. 15(1) of the Canadian Charter) has been instituted without the requisite Charter-mandated legal process for imposition of such a rights infringement (i.e. government demonstrating a s. 1 Charter justification acceptable to the Courts) and for an indefinite period.

Sauvé demonstrates that the same legal standard is *not* being applied by the Supreme Court of Canada (SCC) in deciding the constitutionality of age restrictions on the right to vote as compared to restrictions on the vote (now rejected) based on other personal characteristics (i.e. penitentiary inmate, gender, property ownership etc). This is the case no doubt also in most other Western courts. For instance, one could just as well hold that the denial of the vote to Canadian penitentiary inmates simply constitutes 'regulating a modality of the universal franchise' and is, hence, non-discriminatory (as the Court held was the case in regards to the issue of age restrictions on the vote). The same could be said also in regards to, for instance, the gender restrictions and property ownership requirements for the vote of yesteryear. As we shall discover, exclusion from the vote renders minors second-class citizens considered, in practice, to be of lesser societal worth just as surely as this was the case for disenfranchised Canadian penitentiary inmates.

It appears that the Supreme Court of Canada's erroneous presumption in *Sauvé* that age-based restrictions on the vote are but a standard qualification and not a rights infringement would auger against 16 and 17 year olds, for instance, receiving equal benefit of the law in the judicial hearing and analysis of a constitutional challenge to the age restrictions on the vote in electoral law. The Supreme Court of Canada's refusal to hear the constitutional challenge of two 17-year-old Albertans to Alberta's provincial electoral law (restricting the vote in municipal and provincial elections to those 18 years and older) [67] would seem to suggest that this is indeed the case.

The contention here then is that the struggle for the right to vote at age 16 or 17 years (or younger for that matter) is an issue that implicates a fundamental human rights matter and raises significant constitutional issues; not one simply concerning competing social or political policy and philosophy. This conclusion is in fact consistent with the Supreme Court of Canada's (SCC) rejection in *Sauvé* of the voting rights issue as just a matter of social and political policies within the discretion of the government to which the courts must defer:

> The core democratic rights of Canadians do ***not*** fall within a 'range of acceptable alternatives' among which Parliament may pick and choose at its discretion. ***Deference may be appropriate on a decision involving competing social and political policies. It is not appropriate, however, on a decision to limit fundamental rights.*** *This case* [involving disenfranchisement of penitentiary inmates] is ***not merely a competition between competing social philosophies. It represents a conflict between the right of citizens to vote – one of the most fundamental rights guaranteed by the Charter – and Parliament's denial of that right.*** Public debate on an issue does not transform it into a matter of 'social philosophy', shielding it from full judicial scrutiny. It is for the courts, unaffected by the shifting winds of public opinion and electoral interests, to safeguard the right to vote guaranteed by s. 3 of the *Charter*(emphasis added) [80].

It is contended thus that the Courts *cannot* legitimately take a sideline position choosing to defer to governmental discretion on the matter of the youth vote at age 16 or 17 years. Yet this is, in effect, precisely what did occur when the Supreme Court of Canada declined to hear the Alberta teen voting rights case concerning a constitutional challenge to the age restrictions in Alberta's electoral law. No reasons were given for declining to hear the case as is the normal practice for the Court. However, presumably the decision was based on the erroneous presumption that, when it comes *exclusively* to the question of age-based restrictions on the vote, the issue is one of competing social and political policies (where the court can defer to the government's discretionary position), rather than a fundamental human rights dispute. The Supreme Court of Canada in regards to exclusion of citizens from the vote on any basis other than age would hold (as *Sauvé* reveals) that the matter is one concerning the limitation placed by the State on a basic human right and, hence, one deserving of careful judicial scrutiny [81].

3.4 Disenfranchisement of Citizens under Age 18 Years—the 'Taking Away' of a Pre-existing Inherent Fundamental Human Right and an Ongoing Human Rights Violation

It is important to understand the deeper meaning of the fact that voting rights are constitutionally guaranteed for *every* Canadian citizen without age or any other restrictions (as is the case for voting rights in all other Western constitutional democracies in respect of their citizens save a few that impose extra requirements such as residency requirements etc.). One such key implication is that the refusal to permit voting at any age below 18 years is, in reality, a disenfranchisement—a taking away of a *pre-existing* human right affirmed in international human rights law and domestic constitutional law—as opposed to a refusal to enfranchise. This point is most often lost due to the style of the discourse used in discussing the youth voting rights issue. For instance, we speak of *granting* the vote at age 16 years, lowering the minimum eligible voting age to *permit or allow* voting at age 16; to provide enfranchisement, enlarging the category of eligible voters to include 16 and 17 year olds in the electoral process (the vote) etc. This discourse, however, refers exclusively to *electoral statutory law* and *not* to international human rights law regarding the right to vote or to domestic democratic constitutional law that incorporates *no age restrictions* with respect to the voting rights guarantee. Nonetheless, those considering the youth voting rights question tend to forget that should we revise the electoral laws to include some, or all citizens under age 18 years as eligible voters, we would have simply affirmed the *pre-existing* constitutional and fundamental human right to vote of this group as recognized in domestic constitutional law and international human rights law. We would *not* have granted a 'new right' or a 'special right' or an '*invented* new basic human right'.

Recall now the previous discussion on the right to vote as a 'natural right' based on one's humanity, and one's inherent right to participate *fully* in society through exercising the right of free speech and free association (the latter liberty rights then underpinning the right to vote). The grant of universal suffrage in Western *constitutions*, at least for all citizens, would appear to be based on an implicit acknowledgement of voting rights as grounded on these natural liberty rights. By the same token, denial of the vote to some or all citizens under age 18 years is an *ongoing fundamental human rights violation*, and not a failure to provide a new or 'special right' constitutionally (though the legal right to the vote for minors of a certain age would be new as incorporated in reformed *electoral* law). Opponents of the vote at age 16 years have cleverly, but incorrectly characterized the issue as one of: (a) only whether to grant a 'new' *legal* right in electoral law (i.e. enfranchisement of a new identifiable group; namely citizens aged 16 years and over but under 18 years) and (b) insofar as minors are

concerned; a political and social policy question rather than a constitutional matter concerning a basic inherent human right (i.e. those minors being considered by opponents of lowering the minimum voting age not to be part of that humanity inherently eligible for universal suffrage; that positive right not to be infringed without a demonstrably reasonable justification). Hence, the opponents of the minimum voting age being lowered to age 16 years have erroneously, but successfully, transformed the voting age question in the public consciousness *from* a fundamental human rights issue *to* a social and political policy matter within the purview of the government's discretionary decision-making.

The reality is that the voting age rights issue concerns *abandoning disenfranchisement* of some or all citizens under age 18 years. That is, it involves a demand to end an ongoing fundamental human rights violation of an affirmed inherent human right under constitutional and international human rights law. This is *not* at all the same as enfranchisement in the sense of establishing a new right. The youth voting rights 'problem', framed as one involving the struggle to end an ongoing State infringement of an inherent fundamental human right, is a much different one then than the problem of the State's positive obligation to grant a supposed 'new right' as a revision of its traditional socio-political policy choice (i.e. the right to vote starting at age 16 years granted based on the government's discretionary preference as embodied in the electoral statutory law).

The *Sauvé* penitentiary inmate right to vote case was framed by the Supreme Court of Canada (SCC) as a case of disenfranchisement in the sense of the *taking away* of a pre-existing, inherent and fundamental human right to universal suffrage. Of course, at some point prior to conviction and incarceration, these inmates had the vote subsequent to reaching the age of majority for the vote. Others who reached age of majority while still incarcerated, however, and who had never in the past exercised the vote, were also considered disenfranchised by the Court in *Sauvé* (i.e. based on the constitutional guarantee of universal suffrage which the Court acknowledged also applied to penitentiary inmates). The SCC in *Sauvé* thus transformed the issue of penitentiary inmates gaining the vote *from* a governmental policy choice *to* a fundamental human rights issue while, in the same judgment, the Court did the reverse with respect to the youth voting age question (i.e. transformed what is, in reality, a fundamental human rights issue—concerning the citizen's *inherent* right to the vote—into a social and political policy matter regarding how the government chooses to set qualifications for the vote in electoral law). At the level of analysis involving constitutional and international human rights law, both with respect to penitentiary inmates and minors, the voting rights issue concerns unjustified *disenfranchisement* (i.e. denial of the inherent fundamental right to suffrage) *not* a novel enfranchisement issue. The grant of a new legal right of 16- and 17-year-olds to the vote *in electoral law* would in fact then simply represent actualization, in practice, of the

enfranchisement that this group already enjoys under most democratic constitutional law (and certainly under international human rights law).

It should be appreciated that it is generally not too difficult, depending on the appropriate circumstances being present; to proceed from the notion of having *lost* a *pre-existing* right to the notion of a potential unjust human rights violation as did the Supreme Court of Canada (SCC) in *Sauvé* in respect of the penitentiary inmates' right to the vote. This is especially the case where the right was previously actually exercised by the currently excluded group (as was the case for those inmates in the penitentiary who were incarcerated sometime after turning 18 years old and *then* lost their right to vote in Canadian elections). In fact, the SCC in *Sauvé* (as evidenced by the previous excerpts from the judgment) waxed poetic with flowery references to democratic values and ideals in respect of the vote in holding that the disenfranchisement of penitentiary inmates was *not* just a statutory electoral law policy matter (as the government claimed), but one concerning constitutional and fundamental human rights imperatives.

It is much more difficult to reason from the *presumed* absence of a right (i.e. the *alleged* absence from the outset of the human and constitutional right to vote for under 18s) to the notion of the positive obligation of the State to grant a *purportedly* 'new' right i.e. the vote at age 16 years. Arguing the need to end disenfranchisement of minors (the need to end an ongoing human rights violation—a negative right) is a much easier burden. Opponents of the vote at any age under 18 years tend to argue their position *as if* under 18s being *unable to exercise* their inherent right to the vote (i.e. due to domestic statutory electoral law) is equivalent to their having no *inherent* voting rights as human rights (i.e. under constitutional and international human rights law). This then changes the nature of the debate in precisely the manner the opponents of the youth vote at age 16 years desire. That is, those supporting lowering the voting age to 16 years, are (as a result of these false characterizations of the youth voting rights issue as a social and political policy matter) put in the position of having to argue and/or demonstrate the societal benefits to the electoral reform they propose. In making those arguments supporters are unwittingly complicit in transforming the youth voting rights struggle from a perceived universal human rights struggle into a local domestic political and social policy debate. Even if there were no direct or indirect potential benefits to democratic society of setting the minimum voting age at 16 years (which this author will later show is not the case), this would not detract from the fact that denial of the vote to under 18s is a fundamental human rights violation (given the right to universal suffrage incorporated in constitutional and international human rights law and the underlying natural basis of this right).

The opponents of lowering the minimum voting age to 16 years have thus deftly succeeded in promulgating the minimum voting age question as one concerning competing social and political perspectives and expectations

rather than one involving an ongoing fundamental human rights infringement. That is, the legislature, the courts, many prominent academics and the general public in the Western democracies, for the most part, conceive of the voting age question as a social policy concern not a human rights matter. As a result, the government in actual fact is *not* pressed to meet its obligation not to infringe a fundamental human right (i.e. the right to vote) *irrespective of the age of the citizens involved.* Thus, despite the fact that the word 'rights' or 'human rights' may punctuate the debate in reference to the struggle for 'enfranchisement' of youth at age 16 years in Western democratic States, the debate has not been, in actual fact, effectively formulated as a human rights issue. Enfranchisement of youth at age 16 years *in practice*, for instance, has not been conceived as it should be as ending the ongoing violation of a pre-existing inherent basic universal human right as opposed to simply the grant of a new 'legal right' as defined in electoral law.

3.5 The Right to Vote as an Indicia of Moral Worth: The Example of Suffrage Movements for Women and Felons and Lessons Regarding the Youth Voting Rights Struggle

3.5.1 The Exclusionary Aspects of Various Voting Rights Movements and the Implications for the Perceived Moral Worth of the Citizen

Consider that the women's 'suffrage' movement and the movement to gain the right to the vote for felons (the latter still ongoing in some jurisdictions) both have relied on human rights rhetoric. That is, both movements were premised on the notion that these populations had been 'disenfranchised' *at age of majority* for the vote. The term 'disenfranchisement' here is used to refer to both those who have lost their right to vote and those who never had the opportunity to enjoy the vote *despite being of age of majority and a citizen* due to unconstitutional alleged disqualifying characteristics incorporated into electoral law in certain Western jurisdictions (i.e. relating to criminal convictions, being under a guardianship order , being female etc.). The women, of course, were not afforded the opportunity to cast a vote in yesteryear even when they had reached age of majority for the vote; the felons, in contrast, most often had enjoyed that opportunity if they had reached age of majority for the vote prior to conviction, and then lost it due to their criminality (or, in some instances, may never have had the opportunity to exercise the vote even as male citizens if their conviction pre-dated their reaching age of majority). The aforementioned voting rights movements with their focus on ineligibility to vote (due respectively to gender or criminal history or both) despite being of age of majority for the vote,

in reality both relied to a degree on an exclusionary definition of voting rights which undermines the universal inherent aspect of the right. That is, these movements involved fighting for the right of every citizen to vote *at age of majority*. A non-exclusionary human rights position would be to argue that both women and felons possess the right to vote even below age of majority. Hence, women did *not* struggle for the voting rights of persons under the age of majority (males and females); that is the right of every citizen to the vote. This though women's rights and children's human rights issues are most often inextricably intertwined. Human rights violations affecting women more often than not also significantly impact their children for whom they are still generally the primary caregiver. Likewise advancements in children's human rights (such as girls going to school) can have beneficial implications for the family as a whole and also elevate the status of all females in the community regardless of their age. Thus, previous human rights movements in Western democratic States concerning the vote (i.e. the women's suffrage movement, the voting rights movement of African-Americans in the U.S., the movement to enfranchise felons in Canada which was successful etc.) have generally all taken, as a given, that the vote should be granted only at age of majority for the vote. In doing so, these civil rights movements thus erroneously contributed in an important psychological way to a devaluing of the worth of the minor as a full citizen. That is, the perception was that if these fervent believers in the right to vote as an inherent, basic human right could exclude minors; then surely it must be true that the segment of the citizenry under the age of majority for the vote must not be entitled to the vote on moral and other justifiable grounds.

Note that the youth voting rights movement can also be considered exclusionary to the extent that non-citizen youth who are tied to a particular country (i.e. as immigrants, refugees, long-time residents; perhaps stateless long-time residents whose family has been in the country for generations etc.) have *not* been to date identified as a part of the group struggling for the right to vote at 16 or 17 years old (or at least not in any marked visible way). This is the case since the youth voting rights movement also generally pre-supposes, in the first instance, a right to vote premised on citizenship, and not based on ties to the country manifest in terms of immigration or refugee status or residency. Of course, one could argue that many non-citizens, depending on the extent of their ties to the country in question, are also stakeholders and, as such, should have the opportunity to further their interests through the vote.

The suffragettes argued that since they met all the same qualifications for the vote (i.e. age, citizenship) as did the men, they should be granted the vote given that they were of equal worth as human beings compared to men. So, too, in the Canadian penitentiary voting rights case *Sauvé*, the Supreme Court of Canada held that the government was *not* entitled to regard the inmates as being of lesser moral worth, and, therefore, justifiably

disenfranchised (even though at age of majority and a citizen eligible for the vote on that basis).

When it comes to youth struggling for the vote at age 16 years in Western democracies, opponents again have created a barrier; this time a minimum voting age of 18 years. The minimum voting age is an unjustified purported constitutional entrance qualification to a polity which these young people actually *already* have a right to participate in fully (i.e. through the vote among other vehicles as per international human rights and domestic constitutional law, and according to notions of inherent, universal, natural human rights). The set age of majority for the vote, applicable to all citizens, is then a *purported* bright line demarcating the polity from the non-polity in principle as well as practice. However, that line in fact translates into but an *arbitrary statutorily created* bar to any potential for fully exercising an inherent human right to free speech and free association (through the vehicle of the vote) as far as all citizens under age 18 years are concerned. It is also an undermining of the inherent right to self-governance as an autonomous human being for persons under age 18 years expressed in the form of electing one's own representatives. The end result is the fashioning of a social category of *second class citizens.*

3.5.2 Opponents to the Vote at 16 and Their Refusal to Acknowledge the Impact of an Age-Based Exclusion in the Vote on the Perceived Moral Worth of 16- and 17-Year-Olds as Citizens

The situation of young people struggling for the vote at age 16 years is *not*, however, parallel to that of the struggle for women's suffrage or suffrage for penitentiary inmates in Canada. In the latter two cases, the public, the scholarly community and the courts came to accept that it was a violation of the basic human rights of women and penitentiary inmates to deny them the vote (at age of majority) as it fallaciously reinforced the societal notion that they were members of a class of less worthy human beings. In contrast, opponents of lowering of the minimum voting age to 16 years (including the judiciary in some cases) do *not* yet concede that the denial of the vote to those aged 16 years and over but under 18 years sends the social message that young people in this category are unworthy to vote:

> . . . Parliament is making a decision based on the experiential situation of all citizens when they are young. *It is not saying that the excluded class [persons under the age of majority for the vote] is unworthy to vote*, but [rather] regulating a modality of the universal franchise (emphasis added) [82].

The opponents of the vote at age 16 years thus do *not* acknowledge that the denial of the vote to those aged 16 years and over but under 18 years

lessens their *perceived* societal or moral worth. This is the opponents' position even though the reality is that devaluing of the members of a group excluded from the vote is intrinsic to disenfranchisement. The fact that the discriminatory bar (age of 18 years or more as a voting qualification based on stereotypical views of the excluded citizens; namely persons aged 16 and over but under 18 years) is made a transparent, official positive qualification for the vote does *not* eliminate the devaluing of those disenfranchised on account of age. Opponents of the lowering of the voting age to 16 years have much to gain from the denial that excluding this group is tantamount to a devaluing of their worth and human dignity. Such a strategy is one of the keys to creating the illusion that fundamental human rights are not even at issue in the minimum voting age dispute. A similar tact was used by opponents of women's suffrage and suffrage for the poor in the United States. In the latter instances, opponents of the grant of voting rights to members of these groups also argued that there was no denial of the excluded group members' equal worth. Rather, they maintained that the denial was based solely and entirely on quite different factors:

> . . . *nearly all political thinkers have explicitly justified the political exclusion of persons on the basis of [alleged] insufficient fitness, whereas few if any explicit assertions of fundamental inequality can be found* . . . the claim that men and women . . . are naturally unequal was long pervasive, but it was a claim of unequal aptitude for political participation, not of unequal moral worth . . . In some accounts, the sexes were supposed to perform different yet equally valuable tasks . . . *the inferiority of women [it was held] stemmed from their presumed political unfitness, not from their sex [gender], which was only a feature that allegedly signaled their fitness [gender was considered an indicia of or a proxy for their fitness as a person for the vote*] (emphasis added) [83].

In the case of Africans forcibly brought to the U.S. as slaves, however, there was the claim *initially* that they were being denied the vote, the right to property etc. due to their alleged lesser worth as human beings. In fact, in the Supreme Court of United States 1857 decision in *Dred Scott v Sandford*, African-Americans were held by the Court to be the property of the slave-owner and non-citizens of the United States whether or not they were emancipated in a U.S. State to which they fled where slavery was prohibited [84] In the latter instance then the 'masters' (i.e. Caucasian men with voting rights) had little compunction about casting the 'denial of the vote to slaves' issue in terms of a human rights matter. This given the extent of marginalization of the group excluded from the vote and the state of absolute oppression under which they (the African-American slaves) labored. The powers that be of the time did not contemplate that casting the issue in terms of a human rights matter would foster any meaningful measure of resistance given the excluded group's subjugated state due to the application of force by those in power. In later years, during contemporary times, and before the 1965 U.S. federal Voting Rights Act, this claim that African-Americans were excluded from the vote due to their alleged lesser worth

as human beings gave way to the equally fallacious but narrow claim of purported political unfitness. The alleged justification for disenfranchisement based on the purported lack of 'political fitness' for the vote of the excluded group is, however, but a sanitized version of the 'inequality as human beings' claim originally used to attempt to justify the denial of the vote to the group in question.

Whether the vote is denied to 'children' (defined generally under the *Convention on the Rights of the Child* as persons under age 18 years except where domestic law stipulates a different age boundary between adult and child) [85] or to women, the poor or to former slaves, or whatever other category of persons, 'ambiguity stems from making an expected consequence of the rule [rule expressing the statutorily-defined qualification for the vote] part of the rule itself' [86]That is, here *young* age is being used implicitly as a hypothetical marker or proxy for 'political incompetence' and the alleged *presumed* adverse social consequence which would ensue for society should child citizens (even citizens aged 16 and 17 years and older but under 18 years) be given the vote. The personal quality or qualities which are purportedly missing in citizens of this age that would lead to this presumed, anticipated adverse social consequence if under 18s of any age were granted the vote, as Guerra notes, is not made explicit [87]. For instance, there is no specification of a voting qualification stipulating that only the rational citizen, capable of an independent vote who has sufficient civic responsibility and engagement and political sophistication is eligible for the vote. Further, there is no indication that only adults with the aforementioned qualities are in fact accessing the vote. *Hence, we are left with an exclusion from the vote that appears based in and of itself solely on* ***who*** *the excluded citizen is*—a citizen falling into a particular age range (having an age under 18 years) apart from any other consideration. Perceptions of the moral worth of minors thus become more negative as a result. There is no indication whatsoever as to whether or not, in reality, the voting qualification of having an age of 18 years or more (current age of majority for the vote in most Western democratic States and most States globally) is being used as a proxy for anything meaningful or relevant to the vote and for maintaining the integrity of the electoral system.

3.6 Voting Rights and the Issue of Personal Autonomy

The question of personal autonomy is inextricably bound up with the issue of the right to vote and this has historically been the case:

> For many political writers of the 18th and 19th centuries, the poor were considered unfit to participate in politics *because they lacked independence* . . . Montesquieu argued that all citizens 'should have the right to vote except those whose estate is so humble that they are deemed to have no will of their own.' . . . These authors did not regard the poor as mentally incapable of developing their own political

> views. The specific concern was different: in a situation of economic dependence, a destitute individual could be deliberately and effectively coerced to vote for the alternative favored by those upon whom he is financially dependent . . . As Benjamin Constant put it: "The property holders are the masters of his existence, since they may refuse him work. *Only he who possesses the necessary revenue to subsist independently of any external will can exercise the right of citizenship* [the right to vote]. (emphasis added) [88]

Lopez-Guerra points out that the solution is to prevent such coercion, rather than to exclude the vulnerable group from the vote [89]. The same can be said about excluding youth from the vote based on the presumption that they will not cast an independent vote. Are youth aged 16 years and over but under 18 years any more susceptible to coercion in their vote *given the secret ballot* than are adult employees working for minimum wage or less? There is, in fact, little that can be done regarding undue influence on the vote other than, for instance, public education campaigns on the need for a free vote. As most minors aged under 18 years are still attending school, such a civics basic regarding the need for integrity of the electoral process could be taught at school as part of a civics education curriculum. Consider that youth aged 16 and older but under age 18 years are most often still almost entirely financially dependent on their parents for all significant expenses. Should they thus be denied the vote on the basis of a *presumed* lack of independence in the vote? What of youth who are legally emancipated from their parents at age 16 or 17 years and living independently on social assistance (more commonly allotted to adults), or with financial assistance from a governmental child welfare agency while attending school? What of youth emancipated from parents supporting themselves entirely with minimum wage positions as do so many adults and paying taxes? Should they be granted the vote regardless how meager their existence since they are no longer dependent on parents, and they are supporting themselves? Afterall, adults in the modern day in the same low socio-economic bracket are *not* barred from accessing the vote? The reality is that *emancipated minors* aged 16 and older but under age 18 years in Western democracies even though legally considered adults in many ways (i.e. no longer subject to parental control) are also denied the vote based on age *even if self-supporting*. Hence, these exceptions prove the point that excluding citizens aged 16 years and older but under 18 years from the vote is ***not*** in actuality based on presumptions about their lack of independence. Blanket bars on the vote (i.e. based on age) belie the fact that the rationalizations proffered for the exclusion are in fact disingenuous.

The right to vote is an exercise, in principle, of *self-governance* by the polity through the mechanism of self-selected representatives (though individual minority voices may, at times, appear to have little impact on the ultimate electoral outcome). However, *the principle* of the vote as a vehicle for self-governance by a polity of autonomous, independent and free persons may appear to conflict with traditional notions of the child (persons

under the age of majority). Children/youth are *not* traditionally considered as fully autonomous persons free from the governance of others in personal decision-making (with the exception of legally emancipated minors). They are, afterall, governed in large part by parents. They are managed in terms of their ability to fully exercise their right to free expression and free association by these legal guardians and by school officials acting as delegates of the parents or other legal guardian acting *in loco parentis*. There is then a tension between traditional notions of the child as non-autonomous, and the idea of the inherent right to the vote without age restrictions. Kant supported the idea of excluding women and children from the vote based on their alleged lack of autonomy/independence (i.e. he held that since they could not own property; they were not their own masters) [90].

Modern conceptions of persons younger than age 18 years under international human rights law, however, view minors as autonomous rights holders in important ways. That is, persons under age 18 years are considered under international human rights law such as the *Convention on the Rights of the Child* (CRC)(Article 12) [91] as having the right to fully express their personal views, and as being a person in their own right with an inherent human right to participate in decision-making that directly affects them (with their views accorded weight consistent with the age and maturity of the child expressing those views). On the latter view, children and youth have full personhood; though parents also have a right under the CRC to care for and guide their children; including in respect of parental religious and other beliefs (presumably in a non-oppressive fashion). An affirmative answer to the question 'are persons aged 16 and 17 years autonomous enough to cast a free and independent vote', as previously explained, would still *not* likely garner the right to vote for this age group (as evidenced by the fact that legally emancipated minors below the general age of majority cannot exercise the right to vote though they are as self-sufficient as many adults). The question of personal autonomy is thus, in practice, irrelevant with respect to the grant of the vote to any minor developmentally capable of casting a vote on whatever basis he or she chooses (i.e. as are most persons aged 16 years and older). That is, the blanket bar on minors voting, given its lack of individuation, is *not* screening for level of personal autonomy in any meaningful way. Nor is such screening occurring with respect to the adult voter based on age. Nevertheless, the personal autonomy issue *is* a critical one in considering whether it is, or is not legitimate to have an adult proxy voting for infants and very young children (and possibly for youth below the age of majority for the vote); the proxy thus exercising these young persons' right to universal suffrage on their behalf. Let us consider then in more detail the issue of personal autonomy and age of the potential voter.

There is, of course, some validity in the notion that some minors may be more susceptible to coercion in the vote despite the secret ballot; especially the very young. By the same token, segments of the very

elderly population may also be susceptible to coercion due to age-related brain pathology impacting cognitive processing, financial dependence and other factors. The question then becomes how does a society ensure the basic universal human right of suffrage while yet taking into account the personal autonomy issue as it relates to age of the voter. The problem is not beyond resolution, but the reality is that any burdens placed on the very elderly to demonstrate their personal autonomy in voting would not be socially acceptable in a democratic State. Such burdens would represent a novel restriction on the vote for the very elderly where none previously existed. Such a regressive move, no matter how well reasoned or intentioned, would not be deemed 'politically correct.' It would, furthermore, run counter to the increasingly more inclusive category of those eligible to vote that has marked historical trends in voting rights.

What follows is an example of a voting model that is more inclusive than the current commonly used 'democratic' model which incorporates a blanket bar prohibiting any citizen under age 18 years from voting. The model to be discussed incorporates universal suffrage while finessing the issue of age-related problems in personal autonomy that may affect the very young voter. The model is offered here purely as an illustration of the fact that blanket bars denying the vote to any category of citizen can be avoided while still considering the issue of personal autonomy which is so central to being able to cast a free vote. Afterall, a vote that is not freely made is not in essence one's own vote and truly undermines the integrity of the democratic electoral system. Yet, the model to be discussed, though more inclusive in that it abandons the statutory age-related blanket absolute bar to the vote for persons under age 18 years is still fundamentally unfair. This in that: (a) the burdens it imposes on persons of a certain age under 18 years are *not* also likely to be imposed on those adults who are, scientifically speaking, also more likely to have compromised personal autonomy (the very elderly) than the general adult population (though one might argue that a presumption of personal autonomy in the vote is more likely to be correct as applied to the elderly than when applied to persons under age 14 years though that is still an undetermined empirical question), and (b) the age boundaries in the model, while reasonably based on what is known about personal autonomy and developmental process in the young, are yet arbitrary to an extent, and may not be applicable in every particular individual case. Yet, the model to be discussed is closer to the notion of universal suffrage than is the voting rights framework which characterizes most Western democratic States (i.e. the latter being a voting model with a set age of 18 years for enfranchisement and a blanket absolute bar against voting by anyone under that arbitrary age of majority for the vote). The model is offered here then simply to stimulate discussion for it is certain that someone who is more clever than this author can devise a more equitable approach. Of course, there remains always the tricky and crucial

problem of how to stimulate the political will to implement a more equitable and inclusive voting rights model that respects the right to universal suffrage of the young.

3.7 A More Proportional Response to the Question of Age Considerations and the Vote: A Model Which Does Not Incorporate an Absolute Bar on Voting for Under 18s

3.7.1 Introduction

The model that follows, in principle, provides for the *possibility* of universal suffrage for all citizens of a State independent of age. The model is thus an example (offered here for discussion purposes only) of a more proportionate response to any claimed legitimate societal objective in using age criteria in regards to access to the vote. The model is a more proportionate (less restrictive) alternative to the current system in that it incorporates no *absolute* bar on the right to vote for any citizen based on age. However, at the same time, the developmental limitations of infants and younger children are acknowledged and addressed in that a significant burden is placed on any citizen under the age of 14 years wishing to vote (i.e. under 14s must meet a judicial test for autonomy; that is, persuade a judge in an interview of their capability to cast a free and independent vote). The under 14s need not demonstrate then that they will vote rationally or wisely or in their own best interest or with any level of political sophistication. They must only convince the judge through a personal interview that their vote will be their own. Of course, the judge may, on occasion, get it wrong and that would then result in a fundamental human rights violation. One might argue, and justifiably so, that the model in requiring those under age 14 to demonstrate that their vote would be genuinely their own, is unfair and undemocratic in that particular respect. This, in that no such requirement (to demonstrate capacity for an independent vote) is placed on those aged 14 years and over under the model just as it is not a requirement under modern democratic constitutions for each citizen of age of majority to prove his or her personal autonomy to demonstrate eligibility to vote. (However, in some jurisdictions, those adults under a partial or full guardianship order are excluded from the vote likely due, in part at least, to concerns over their ability to cast a free and independent vote). With the model's foregoing burden in accessing the vote relating to age (the need for the under 14s to demonstrate that they can cast an independent vote), it is unlikely that a significant proportion of the population under age 14 years would both express a desire to vote *and* be able to meet the judicial test for competence in casting an autonomous vote. Yet, the possibility of citizens under age 14 years voting in their own right is contemplated by the model. The model, for reasons to be discussed, does *not* entertain the

notion of official proxy voting (i.e. even for the very young; with parents, legal guardians or any other legal representative of the infant or child acting as the proxy).

3.7.2 Voting Rights for Youth Aged 14 Years and Older but Under 18 Years

It is generally agreed that infants and even very young children are generally not interested in voting or developmentally capable of understanding what a vote is, or of casting a vote in their own capacity. The issue of whether their vote should be cast by a proxy is something we will consider shortly. The current model provides that citizens aged 16 years and older but under 18 years *automatically* have the vote in their own right such that all citizens 16 and up would have their names on the list of eligible voters as a matter of course. Further, the model stipulates that those aged 14 and 15 years who wish to vote should be permitted to do so upon expressing their desire to exercise their right to vote to the appropriate officials well in advance of the polling dates. The mechanisms for having the wish of any 14- or 15-year-old to vote duly recorded and honoured would, of course, need to be easily, effectively and freely accessible to this group such that, at their request, their names would be added to the list of registered potential eligible voters. The alleged level of socio-emotional and cognitive maturity, rationality and political sophistication of youth (aged 14 years and older but under 18 years) eligible to exercise the vote then is, on this model, considered irrelevant (as it currently is, in practice, in respect of the adult's right to exercise the vote).

There is, of course, an element of arbitrariness in: (a) selecting age 16 years as the minimum age for *automatic* inclusion on the registered eligible voters' list, and (b) age 14 years and older but under 16 years as the age at which youth may become eligible to vote simply upon their request to the appropriate officials to have their name added to the registered eligible voters' list. The age of 16 years on this model as the minimum age for automatic inclusion on the voter registration list is not based on any mystical insights or some airtight logic. Rather, it is simply based on the rationale that: (a) the global movement for youth voting rights has centered on youth age 16 years and older but under age 18 years gaining the vote, (b) this international youth voting rights movement is driven, in large part, by the 16- and 17-year-olds themselves (often with the support of adult advocates), though some younger youth around 14 and 15 years old have also been involved, and (c) youth 14 years and older but under 18 years are presumed to be capable of casting a free vote given the secret ballot; a minimal fitness criteria. Note, however, that under this model there is no absolute bar (relating to any presumption) against those under 14 years voting as will be discussed shortly.

Youth in this age group—14 years and older but under 18 years; especially 16- and 17-year-olds—then have tended to be the ones most likely to express an interest in exercising the right to vote, and in advocating for the same. In respect of the voting age question, the central question is whether youth are to have a voice through the ballot in elections from local to federal to any extent. If those 16 years and older but under 18 years are automatically granted the vote in all elections from municipal to federal (with those 14 years and older but under 16 years also able to access the vote without undue burden), this population of youth is likely to become a de facto symbolic force representing all persons under 18 in the State in which they vote. While by no means an ideal solution to the problem of young people's disenfranchisement, the automatic grant of the vote to citizens aged 16 and 17 years, and to those 14 and 15 year olds expressing the desire to vote, *is* a vehicle for the grant of political power to the young which is likely to benefit persons under age 18 years generally. That is, of course, if the 14- to 17-year-old voter chooses to champion the interests of all young people under age 18 years in the State through their vote. The older youth (14 and older but under 18 years) then could conceivably, if they chose to do so, indirectly act as unofficial voting proxy for the younger members of the society (whether citizen or non-citizen aged under 14 years) voting so as to further the interests of all minors in the society.

No doubt some adult manipulation of young people's vote is a possibility for some 16- and 17-year-olds, and the presumably smaller number of 14- and 15-year-olds granted the vote under this model if they wish. However, certain safeguards—admittedly not fail proof—can be built into the basic education system to encourage some reasonably sophisticated knowledge of the electoral system and an understanding of the solemnity of the exercise of the vote as well as the importance of an independent vote. Further, public information campaigns educating youth about the electoral system and the responsible exercise of the vote are also a realistic possibility as an adjunct to this model. (We will examine the role of the schools in relation to the political education of the young and the potential grant of voting rights to youth in a later section). In any case, adults, too, it must be acknowledged, are often unwittingly subject to at least *some* manipulation of their vote in various ways (such as through political propaganda which may or may not be accurate and which is disseminated through diverse mass media, the influence of *their* parents' and relevant ethnic or other community's political persuasions and the like), and this does not disqualify *them* from the vote. Hence, the spectre of the voter being manipulated by various influences to an extent (but not coerced) is not a sufficient rationale for excluding all youth under age 18 years from the vote. Youth aged 14 years and older but under 18 years would appear to be potentially capable of exercising their vote as reasonably autonomous persons just as are adults (persons over 18 years); especially if these youth are exposed to relevant civic education in school which encourages the responsible and free

exercise of the vote. In any case, there is no non-discriminatory basis for excluding minors (even 16- and 17-year-olds) from the vote on the basis of alleged concerns regarding their personal autonomy when many adult voters are compromised in their personal autonomy and yet are not disenfranchised (i.e. many elderly voters suffer dementia to varying degrees and the rates of dementia are increasing significantly in North America).

3.7.3 Voting Rights for Persons under Age 14 Years

With respect to young people under age 14 years, there are, considering what is known from child and youth developmental studies, objectively speaking, more likely to be cognitive and socio-emotional developmental limitations present for this younger group that are more significant than in an older group of youth. These developmental factors then are more likely to affect the potential for the authentic exercise of the vote (i.e. where an 'authentic' vote is here considered to be one freely and purposively cast based on some reasoning regardless how well or ill-informed or how rudimentary or relevant). For instance, there is more likely to be an issue in regard to whether the vote is in fact free and not coerced (though the vote may properly be influenced by a myriad of factors as are all votes including those cast by adults). Problems may also arise in respect of whether the vote is a meaningful one for the child. The young child under age 14 years is less likely to have developed any conception—realistic or otherwise—of what their vote in any particular election may mean for society and for them personally.

There would appear to be no non-arbitrary solution to the problem of reconciling age limitations on the *automatic* right to exercise the vote and universal suffrage as a fundamental human right. The model under discussion, however, does *not* bar any person from the exercise of the vote based on age *per se*, and in that sense is more inclusive than the current approach. Rather, the model sets out a burden correlated with age of the voter for those under 14 years in the exercise of voting rights. Under this model, the *automatic* right to vote is denied to citizens under 14 years on the ground of there being an unacceptably high risk of the vote not being a product of their own free expression. If a minor under age 14 years can persuade a judge who is specifically tasked and trained to assess such cases, that he or she (the minor) has determined on his or her own how he or she wishes to vote, then the minor under age 14 years, on this model, will be permitted to vote The mechanism for access to such a judicial hearing/interview under this model would be free and accessible in practice as well as child-friendly in all respects (i.e. the child would *not* need an adult intermediary to act as 'next friend' in making such application; counsel for the child would be freely provided through the courts, and court assistants would be available to assist the child in completing the application for such

a voting rights hearing. Further, the hearing would have present only the judge, court reporter and relevant counsel and any other party with a direct interest such as the child's advocate). In other words, those children under 14 years who can successfully ***rebut*** the presumption (before a judge to that judge's satisfaction, through a simple interview at a hearing) that their vote is not their own, would be permitted to vote under the scheme suggested. Some standardized general criteria as to how such interviews are conducted would be developed, though the judge's interview would also be tailored to the individual case to some extent. The possibility of an appeal would also be available such that, at every stage, it would be necessary for the judicial decision to be issued with reasons.

We can look to other North American contexts, albeit far removed from the voting age eligibility controversy, for examples of systems in place involving young people attempting to *rebut*, before a judge, societal presumptions regarding their *alleged* inability to make autonomous fully voluntary decisions on a significant matter. This in order that the young person be potentially permitted to lawfully exercise certain constitutional rights and make particular major decisions that affect their personal lives. One such scenario in which youth are permitted to access the courts to challenge a *rebuttable societal presumption* exists in the context of abortion matters. Female youth in the United States are provided a venue for *potentially* exercising their constitutional privacy rights and accessing an abortion *without* parental consent in U.S. jurisdictions where parental consent for abortion is required by law. The young person who resides in a U.S. jurisdiction requiring parental consent where a minor seeks an abortion may present her case on her own behalf to a judge (i.e. without an adult intermediary acting as 'next friend', and with court-appointed counsel where the child is indigent). That is, in some U.S. States, minors are able to bypass the need for parental consent for an abortion in those particular States by successfully convincing a judge, via answering questions and making any other relevant submissions in a manner satisfactory to the judge, that her decision to abort is an informed, autonomous and completely voluntary one (and of course not prejudicial to her health in any way). In these cases, however, the judge is required by statutory law also to determine (based on the child's testimonial evidence and any relevant documentary information as well as all other available evidence before the court) whether, even if the child appears immature, and the abortion decision *not* duly considered, the abortion is nonetheless in the child's best interest.[92] If these tests are met (successful demonstration that the decision is a mature, autonomous voluntary and informed one by the child ***or*** voluntary and in the child's best interest, *whether or not the decision is informed and based on mature reasoning*), the judge will grant legal authorization for the youth to access the abortion procedure without parental consent.

In the voting age eligibility context, in contrast, whether: (a) the particular minor under age 14 years would be able to cast a vote in his or her own

'best interest' (i.e. vote for a candidate likely to advance the child's interests), and whether (b) the particular minor under 14 years is able to cast a vote based on 'informed' and 'mature' reasoning are *not* appropriate considerations on the model being discussed. The right to universal suffrage is *not* premised on such qualifications and these eligibility criteria are *not* applied to citizens over the age of majority exercising the vote. Suffrage in a democratic State, however, by definition, implies an autonomous vote. Thus, the qualification of being able to cast a free vote appears to be more legitimate than are other considerations. However, there is still the problem that: (a) no burden in proving such a qualification is imposed on those 18 years and over under the current system, and (b) any eligibility qualification for the vote imposes a restriction on voting rights of the citizen that is not countenanced by the notion of universal suffrage for *every* citizen of the State (polity). In any case, the main point here is that mechanisms other than an absolute bar on voting rights for those under the age of majority for the vote (whether that age is set at 18 or lower) are possible in addressing concerns related to the developmental capabilities of the child (i.e. the ability of the minor to cast a free vote).

The intention of the model under discussion is to ensure, to the extent feasible, that the vote of a minor aged less than 14 years, if cast, would in reality likely be his or her own i.e. a manifestation of his or her own *free expression*. Thus, the test for grant of the vote to a minor under 14 (the ability to rebut the presumption of lack of personal autonomy) is, in actuality, an effort to preserve *the minor's* right to his or her *own* vote. The latter does constitute differential treatment of those below age 14 years compared to those over age 14 based on certain developmental realities that are much more likely to apply to under 14s than to those over age 14 years (i.e. higher suggestibility and vulnerability to manipulation for the younger group). The distinction is no doubt then, at least to some degree, discriminatory as it does involve, in the first instance at least, an age-based group distinction. However, since society is likely not at all ready at present for the abolition of all age-related distinctions in ease of access to the vote, this approach is something of a compromise. The important point is that the distinction does *not* amount to an outright denial of universal suffrage to all citizens under 14 years old since the system allows for the grant of voting rights to persons under age 14 years on a case-by-case basis if they meet the requisite test (ability to rebut the presumption of lack of personal autonomy in their potential vote). Hence, there is *no* absolute bar on voting for those under age 14 years (such a bar being based on stereotypical presumptions about 14 year olds *as a group* which are then automatically extrapolated to every individual member of this age group).

Presumably, it is most often the case that children who are unable to express a desire to vote, given their developmental limitations, have parents, other legal guardians or other adults who are interested in voting for candidates who will act in the best interests of those young children as well as for families. The likelihood of such voting and the potential for

it having an impact on government policy advancing children's interests is appreciably greater in societies where children are valued highly such that their interests in all or most relevant domains become a political priority in practice and not just in theory. Clearly, this is not the case in all Western democracies in every respect as evidenced, for instance, by the comparatively high infant mortality rate in the United States relative to other Western States; especially among African-Americans (indicating a devaluing of these children who themselves have no political power) [93]. Likewise, children of particular ethnic groups may be shamelessly devalued in society at large such that their interests suffer relative to children that belong to the majority ethnic culture. Such an example is found in the comparatively poorer health status of indigenous children compared to non-indigenous children in Western States such as Canada [94] and the United States as well as various European countries (i.e. note the abysmal overall health status of Roma children across Europe due to discriminatory factors often promoted, or at least actively and intentionally tolerated by the various States over decades). [95] Clearly, candidates voted into office by the majority are not sufficiently prioritizing the interests and rights of minors.

Of special concern, likewise, are minors who are in government care as permanent wards of the State in that they have no parental lobby voting en bloc in advancing their interests through the parents' own votes. Thus, the unique problems and needs faced by minors in care are often not adequately addressed by Western democratic governments. In contrast, parents with infants, young children and/or youth living with them tend through their votes (cast in their own behalf) to favour candidates who endorse educational, health, daycare and other child-relevant polices that the parents feel are in the best interests of their children and the family. Of course, not all parents vote and not all cast their own votes in the best interests of their children.

There is no satisfying solution philosophically to the plight of the infant or young child developmentally incapable of exercising his or her inherent right to universal suffrage. It is essential thus that human rights advocates and parents work to improve the status of children in society through: (a) legislative reform; eliminating laws and policies adverse to children's interests, (b) public educational campaigns promoting young children's interests as well as (c) input into government policy by advocates for child and youth interests such that children and youth become more highly valued and this is then reflected in government policy and government prioritizing of child and youth issues. Such was the result, for instance, in Sweden where child advocates managed to effect elimination of corporal punishment of children as lawful and massive public education campaigns were launched on the issue regarding the notion of corporal punishment of a child as a form of abuse [96]. Let us turn now to the notion of parents or other legal guardians voting on behalf of the minors in their charge such that the parent has

plural votes (i.e. one vote for him or herself, and some extra apportionment of votes to allow for proxy voting on behalf of his or her children)

3.7.4 The Proxy Voting Notion

In 2003, in Germany, there was a legislative proposal for electoral reform supported by the then opposition Green Party and Social Democratic Party of Germany. The proposal was that parents (or presumably also other legal guardians of minors in Germany) should be permitted to vote on behalf of their children not of voting age (eligible voting age at the time was 18 years in Germany). The German proposal suggested: (a) an automatic right to a proxy vote by a parent on behalf of their children who were under age 18 years, and that (b) children over age 12 years have the right to rescind the parent's ability to cast a proxy vote by formally informing the State that he or she (the minor) did not wish to have his or her parent vote on his or her behalf any longer. The German proposal also recommended that if the parental proxy voting system turned out to pose too many practical difficulties in its implementation, that the alternative adopted be lowering the minimum voting age from 18 years to 16 for elections 'where wider issues were at stake' and 14 years for local elections. The drafters of the proposal envisioned that parents would discuss with their children, even with elementary school-age children, at least particular political issues that directly affect children and do so in terms the children would hopefully comprehend. The practical issue concerning how the vote on behalf of children would be cast if in a two-parent household each parent had opposing political affiliations and views was not resolved (though solutions on this could conceivably be worked out in the household i.e. parents could alternate in voting on behalf of the child though this, too, might conceivably be problematic). The legislative bill for such proposed voting rights reform in Germany was introduced in the German parliament in 2003 but did *not* pass.

The introductory remarks to the 2003 German voting reform bill are of special relevance to our discussion here and, in part, read as follows:

> If it is written in the constitution that all power goes to the people, then children must also be given the right to vote . . . [It is] unjust that every fifth German is excluded from voting in elections . . . *We can only secure the future of our society, when the concept of* ***the family*** *is given the chance to influence politics* (emphasis added) [97].

The authors of the 2003 German voting rights reform bill noted that its passage would result in the addition, at that time, of an estimated 13.8 million voters (via proxy voting by parents on behalf of their children under age 18 years) in a society which, as in other Western democracies, had a gross underrepresentation of young voters participating in the vote in the

age bracket 18–30 years [98]. The emphasis in the aforementioned 2003 German proposal on the influence of the *family* on politics, as opposed to the potential influence of minors *per* se exercising the right to participate in the electoral process through a proxy, is of note. It may be that more democratic political parties, such as the Green Party, envisioned that larger families are likely to be in the lower socio-economic group and, hence, more likely to have democratic political party preferences. If this be the case, then, in actuality, the party's preference for permitting adult parental proxy voting on behalf of citizens under age 18 years may have been a strategy for recruiting more *adult voters* to their party who would cast their own and extra ballots on behalf of their children in the party candidates' favor. It is of special interest in this regard that this proxy voting system was considered the first preference; with lowering the voting age to 16 but a backup plan if the proxy voting system proved unworkable. One would think that if the concern was implementing universal suffrage, then lowering the voting age to 16 years (or lower) would have been the *first* preference (combined with proxy voting for children developmentally incapable of voting).

3.7.5 Philosophical Problems with the Notion of a Proxy Vote on Behalf of Minors

On first impression, it would seem necessary, if one accepts the notion of voting rights as a basic human rights entitlement, that there be a grant of the vote to the very young through proxy voting by the parents or other legal guardians acting on their behalf. The very young, on the previous model discussed, would refer to infants and children under age 14 years who have expressed no interest in voting in their own right and who make no application to State officials in this regard. These are those minors most likely, from an objective perspective, and based on their *individual* characteristics, to be developmentally incapable, as a function of their age, of exercising their right to vote on their own. The issue of whether there ought to be proxy voting by parents on behalf of their children too young to express a desire to vote in their own right and/or incapable of doing so is highly complex. One troubling difficulty with notion of proxy voting on behalf of infants and younger children is that there is no guarantee that the proxies can imagine how the minors would vote had the minors possessed the interest and developmental capacity to do so. Further, there is no guarantee that the proxies would vote for candidates likely to act in the best interests of persons under age 18 years rather than according to their own self-interest.

It might be suggested that parents and legal guardians quite commonly act on behalf of their children; for instance, in regards to decision-making concerning educational and health decisions directly concerning

the children. In those instances also we cannot, in actuality, assume necessarily that the parent or legal guardian is always acting in the child's best interests, or even with the intent to act in the child's best interests; though this is the operative societal presumption. There is, however, a more fundamental difficulty with the proxy voting notion and it is a philosophical one. Consider that exercising the right to vote is a form of *free expression* which is highly personal and of necessity, therefore, must be carried out by the self and not a proxy. That is unless the adult proxy is taking effective direction from the minor on whose behalf he or she is exercising the vote which normally would not be the case in at least a huge segment of the cases involving proxy voting for minors. In the case of the developmentally immature child or infant, he or she is unable to provide such instruction. If any minors are capable of directing their adult proxy as to how they wish the vote to be cast on their behalf, they would likely be in a position to vote on their own behalf if legally permissible. Hence, the alternative of lowering the voting age would seem more just than proxy voting in those instances. To use an analogy which perhaps goes at least some way in explaining the problem, consider the dilemma faced by counsel in representing children and youth in a civil judicial process such as an adoption or custody hearing, or perhaps a lawsuit brought by the young person or being defended by the child or youth. If the young person (minor) is capable of providing instruction to counsel, then the lawyer is potentially faced with an ethical dilemma. Counsel can try to explain to his or her young client what counsel considers to be in the client's best interest and feasible in the circumstance and make representations to the court in that respect. However the minor may *not* agree with counsel regarding what counsel thinks is in the child's best interest. What then is the role of counsel as proxy for the minor in this circumstance where the minor is instructing counsel to take a position counsel considers will ultimately adversely affect the child? If the child client declines to follow legal advice, must counsel yet follow the client's instruction even if the consequences of doing so are not in the young persons' best interest. The American and Canadian Bar Associations (ABA and CBA respectively) Codes of Ethics in fact mandate that, in such instances, counsel is to act as per the child's instruction and *not* in accord with counsel's assessment of the child's best interest where there is a conflict between the two [99]. In other words the ABA and the CBA require that counsel act as a *genuine proxy* for their young clients; that is, standing in the stead of the client and expressing the client's preferences. (Some counsel have recused themselves when these disputes between child client and counsel have arisen as to the best course of action or suggested to the court that a separate counsel acting as *guardian ad litem* be appointed whose only concern is the child's 'best interest'). A genuine proxy thus must give voice to the child's preferred choice, and the latter may not always accord with the child's best interests. The same would be true for an adult voting as a proxy on behalf of the child.

To continue with the analogy then; where the child is developmentally incapable of giving instructions to his or her legal representative, counsel is *not* giving voice to the child's *expressed* wishes, but rather in point of fact acting as a *guardian ad item* to protect the independent interests of the young person. Counsel, at that point, then is no longer in effect operating as a proxy for the client. The guardian ad litem role for the child's legal representative (where the child is incapable of instructing counsel) makes sense in the judicial context where the court itself must ensure the proper administration of justice. The Court itself in fact operates on the principle of *parens patriae* looking out for the vulnerable (such as minors) and protecting their legal rights when parties are in dispute. The latter requires that all parties understand the process adequately as well as which of their rights and interests are in jeopardy and what their options are. The Western judicial system has long operated with the principle that those who are developmentally incapable due to age (or incapable due to cognitive incapacity unrelated to age) to adequately participate in the judicial process should have a 'guardian at law' appointed to safeguard their legal interests. This 'guardian of best interests' type principle poses an intractable problem, however, in the context of voting. This in that the legal guardian (or parent) *cannot* justifiably assume a *parens patriae* role as a proxy in the voting context looking out foremost for the child's best interest. This is the case since a free and autonomous vote assumes the right to vote (objectively speaking) for or against one's own alleged interests. The parent voting for their child as a proxy thus cannot assume that the young person—were he or she cognitively mature—would necessarily (based on objective criteria) vote in his or her (the young person's) own best interest since this may simply not be the case (as with many adults who, objectively speaking, unwittingly vote against their own short and/or long-term best interests in their candidate selection).

Further, if the parent or legal guardian votes for candidates who significantly undermine the child's best interests, unlike decision-making by guardians that seriously undermines the child's interests in other domains such as health, the State cannot intervene. For one thing, the proxy vote is by secret ballot so that the State has no way of knowing whether intervention is called for in this instance. In addition, State intervention in such a scenario as described is not feasible since voting in a democratic State must be an autonomous private matter unencumbered by State intervention of any sort. The State could not, in any case, legitimately appoint someone to take over the parental role and that appointee vote on behalf of the child in accord with the child's 'best interests.' The vote in the 'best interests of the child' is *not* then the marker for a legitimate genuine proxy vote. This is the case as we have no idea how the child would have voted on his or her own behalf had the child been developmentally capable of doing so. The impossibility of a proxy voting system for the very young (i.e. who cannot instruct the proxy how they wish the vote to be cast) thus becomes apparent in that

such a system is, in fact, antithetical to the notion of an autonomous vote as a form of free expression in a democratic State. The proxy voter for children in the care of the government would have to be an agent of the State which is in itself problematic as it runs counter to democratic notions of the vote as a private matter which does not involve agents of the State. Also highly problematic is the case of children who are citizens, but who have parents (their natural proxy so to speak) who are non-citizens and themselves ineligible to vote due to non-citizenship [100].

It is here suggested that the possibility of voting through an adult proxy for the infant and very young child who is incapable of expressing an interest in voting or instructing a proxy is an issue which should be considered to be quite distinct from the question of: (a) whether older youth under age 18 years (i.e. 16- and 17-year-olds and conceivably also 14- and 15-year-olds) should be eligible to vote in their own right, and (b) whether there should be the potential also of the grant of voting rights to those *individual* minors under 14 years who wish to vote, and who can demonstrate to a judge that their vote will likely be autonomous and voluntary. It is here contended then that arguments against proxy voting by parents, or difficulties in resolving the question do *not* serve to undermine or mitigate the strength of the arguments in favour of the grant of the vote to older minors who wish to vote in their own name (that is, vote independently without a proxy).

It is important to note that minors have an inherent right to the vote which must be acknowledged even if they are unable, for whatever reason, to exercise it. Proxy voting may not be a solution to the fact that the very young generally have developmental limitations which would interfere with their ability to cast a vote on their own behalf even if legally permissible. Actualizing this inherent right to the vote of the minor with serious developmental limitations may simply not be possible. This given the intrinsic tension between voting as an autonomous personal form of free expression and the proxy's inability to demonstrate that he or she is voting as the child would had he or she (the child) been developmentally capable of doing so. That is, the proxy's vote remains in point of fact that of the proxy and *not* of the child; except in the speculative imagination of the proxy and the latter situation is simply not adequate in a democratic electoral system.

Part IV
A Victory for the Vote at 16 in Austria Goes Largely Ignored in Other States

Chapter 4
Austria and the Vote at 16

4.1 'Are We There Yet?': The 2007 Lowering of the Minimum Voting Age to 16 in Austria Cast as a Political Policy Choice and Not an Affirmation of an Inherent Fundamental Human Right

Austria is the first European country to constitutionally permit voting at age sixteen years for all elections:

> . . . any person with Austrian citizenship who has reached the age of 16 has the right to take part in nation-wide elections, in particular in elections to the European and the Austrian Parliament as well as in Presidential elections, and in national referenda ... *As to provincial and local elections, the federal law refers in principle to the responsibility of the provincial parliaments, however, it is stated in the Federal Constitution that the provincial regulations must not be more restrictive than the federal ones, and the local ones not more restrictive than the provincial ones* (emphasis added) [101].

Note that the 2007 constitutional change in Austria regarding the minimum voting age potentially allows for voting below age 16 years at the provincial and local level depending on the policy choice of the provinces. The Austrian provincial governments have the power to regulate electoral law within their provincial jurisdictions as long as the regulations are consistent with constitutional requirements, while the federal government regulates the electoral rules for the Federal Parliamentary and European Parliamentary elections:

> . . . according to [Austrian] federal constitutional law provinces may determine the age of the vote *below* but not above 16 years, while local authorities may determine the age of the vote *below* but not above the age determined for provincial elections. *This means that with a view to the local and provincial levels, the present electoral law is in principle open to extending the right to vote to persons who are even younger than 16* (emphasis added) [102].

Wintersberger reports that as of January 2007: (a) five out of nine provinces in Austria had lowered the minimum voting age to 16 years, and (b) overall participation rates for youth aged 16–18 was 61% in the

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initial local and provincial elections that were held after institution of the new electoral law [103]. What is striking is the profound lack of reaction to this momentous human rights development from the rest of Europe and from the democracies of North America. The deafening silence to this democratic development is most likely due to the fact that this change to electoral law in Austria is conceptualized by other States as nothing more than an internal political policy choice with no lessons for the international community. Indeed, in what follows it will become apparent that this is the formulation that was also assigned to the lowering of the minimum voting age in Austria itself. The point here is that as long as the issue of eligible voting age is cast as a discretionary social policy matter of concern only to the sovereign State involved (as opposed to a fundamental human rights matter), there will be little impetus to lower the minimum voting age to 16 years globally as a matter of principle. This inevitably slows progress toward achievement of a new international voting age status quo of 16 years which would at least affirm that suffrage need not be correlated with age of majority in all other domains (i.e. eligible age for election). A voting age of 16 years internationally would, hence, constitute something of a psychological breakthrough and implicitly raise anew the thorny question of universal suffrage. On this point it is important to understand, as previously discussed, that Austrian municipalities and provinces are free constitutionally, in fact, to set minimum voting age even below 16 years consistent with the notion of universal suffrage.

It is relevant to note that Austrian youth were, by all accounts, instrumental in the achievement of this Austrian electoral reform. That is 'the Austrian Federal Youth Representative Council . . ., an umbrella structure comprising some 40 Austrian youth organizations, the political parties' youth organizations included' made major contributions to the campaign to lower the minimum voting age as did the European initiative 'the Young Rights Action Plan' [104].

Wintersberger maintains that the Austrian move in 2007 to lower the minimum voting age from 18 to 16 years in local, provincial and federal elections:

> . . . is not to be interpreted as a generous gift to young persons between 16 and 18 years, but as a first response of adult society to an existing and disturbing democracy problem caused by the exclusion of minors from political articulation and by the consequent imbalance of generational distribution of political power [105].

The proposal to lower the voting age to 16 in Austria (with the possibility of even lower voting ages at the provincial and local level elections) came as part of a coalition agreement between the two major Austrian parties: the Social Democrats and the Conservatives and was presented in January 2007. These two parties had been asked by Austria's Federal President to form a coalition after the 2006 election left the country with no victor holding the majority of seats. Only a coalition between the two major parties could resolve the dilemma:

> *The [Austrian] national elections of October 2006 resulted in a stalemate situation*. With 68 seats for the Social Democrats, 66 for the Conservatives, 21 for the Greens, 21 for the right Freedom Party and 7 for the right Future Alliance Austria . . . during the electoral campaign the expectations of both sides were dominated by the vision of either a 'right' or a 'left' majority. In the end, both options turned out to be unfeasible, because the right Freedom Party had expressed a preference for staying in [the] opposition [in Parliament], while the Greens had excluded to join any coalition together with one of the right parties. Therefore, mathematically any feasible solution had to comprise the two bigger parties (emphasis added) [106].

Hence, the stalemate outcome of the 2006 federal election in Austria may have been the stimulus for constitutional change regarding the minimum voting age in that country. Reducing the voting age to 16 years would allow, after all, for an additional large pool of voters in future years. With the increase in the pool of eligible voters, there would presumably be a significant reduction in the likelihood of stalemate as the outcome of any future federal election (or of any future local or provincial election for that matter). Thus, the parties could once again vie for a clear majority rather than resorting to a coalition between certain parties to form that majority and all the political policy compromises that are ultimately required to form the coalition and to make it work effectively (especially where the coalition members are highly divergent in their respective political positions on the issues of the day). It would appear then that the inclusion of the youth vote at age 16 years in Austria through lowering the voting age to 16, may have had less to do with respect for universal suffrage as a fundamental human right, and more to do with political necessity in a democratic State (given the population demographics and problems around building preferred party coalitions as well as the desire of each political party for a clear majority in their own right).

Consistent with this interpretation (of why the two major party coalition that comprised the government after the 2006 federal election lowered the eligible voting age to 16) is what appears to have been a likely trade-off between the two parties in terms of which new voters ought to be included, and the likely party affiliations of these new voters. Note that the coalition along with proposing a constitutional change to lower the minimum voting age to 16 years, also introduced the possibility of a postal vote which would assist those who were out of the jurisdiction when the vote was being held within some locale in Austria. Wintersberger hypothesizes that:

> *Recent electoral reform [in Austria; namely lowering the voting age to 16] was based on a simple deal between the two competing [major political] parties by which both of them could get a comparative advantage simultaneously leaving an advantage also to the political competitor; . . . a bargain over [the] vote 16+ versus [the] postal vote* between the *Social Democrats* expecting stronger support from young voters [the 16+ vote], and the *Conservatives* expecting stronger support from geographically mobile voters [the postal vote] (emphasis added). [107]

Indeed, the 2007 leader of the Conservative party appears to have conceded that the party's agreement to the vote 16+ initiative was motivated by the need for change given the party's loss in the 2006 election (thus revealing primarily, or perhaps even exclusively political rather than human rights considerations in his party's support for the lowering of the minimum voting age to 16 years) [108].

Wintersberger suggests that it is of no consequence that political dealing; a trade-off between the two major parties, appears to have been the stimulus for the lowering of the minimum voting age to 16 in Austria for federal elections; with even lower voting minimums possible at the provincial and local levels (i.e. the Social Democrats hoping to gain the majority of votes from the 16 and 17 year olds, and the Conservatives the majority of the postal vote):

> The assessment of the reform depends primarily on the changes it brought about. If we agree that both parts, vote 16+ and the postal vote are positive steps in the development of the democratic system, *it does not matter so much which were the motives of the actors in the decision making process* (emphasis added). [109]

The current author respectfully disagrees with Wintersberger's contention that the reasons for lowering the vote to 16 + in Austria (or in any jurisdiction) are largely irrelevant. When the lowering of the minimum voting age is perceived both within the State and outside the State as a simple maneuver for political advantage (i.e. to facilitate support for a certain political party), the move is *not* perceived by the general public as a human rights victory. Such a change then when not perceived as based on moral principle (i.e. respect for the inherent fundamental human right to suffrage) does not further the international human rights struggle for the youth vote at 16 years. This is precisely what occurred in the wake of Austria's 2007 lowering of the voting age to 16 in federal elections (with the potential for even lower voting ages at the provincial and local levels). What happened in the rest of Europe and in North America following the lowering of the minimum voting age to 16 in Austria? For the most part nothing much flowed from these changes in Austria to other democratic jurisdictions; not even more intense consideration of a lowering of the minimum voting age for all elections in those other States. That is, there was no lowering of the minimum voting age to 16 for *all* public elections for the entire country (as opposed to in particular provinces or regions or in crown dependencies) in any other Europe state, or elsewhere in the democratic world that was stimulated by the Austrian 2007 example. (The Swiss Canton of Glarus had lowered the voting age to 16 in 2007 for cantonal and local elections, the self-governing British crown dependencies all had reduced the minimum voting age to 16 years prior to 2008: the Isle of Mann in July 2006; Jersey in July, 2007 and Guernsey in December 2007. Bosnia, Serbia and Montenegro permit voting at 16 years if the voter is employed and there is voting at 16 in select German States known as Lander for both State and

municipal elections). This state of affairs then is consistent with the Clifford Bob model regarding the importance of transforming the public perception of the complaint (exclusion of minors from the vote) *from* grievance *to* human rights claim if there is to be success in the human rights struggle on a particular issue (i.e. success being, at a minimum, lowering of the eligible voting age to 16 for all elections across Europe and North America for a start).

Success depends on the claimant group gaining the support of powerful allies (i.e. often national and international human rights NGOs, advocates etc.) regarding the urgent need to ameliorate the group's disadvantaged state (the disadvantage arising from discrimination and exclusion) which in turn depends on whether the issue is effectively characterized as a fundamental human rights concern. It should be noted in this regard that even where the minimum voting age is lowered, as in Austria, it is adults who ultimately have the greater impact in shaping the public perception about whether or not the electoral reform is grounded on fundamental human rights principles or instead on purely political considerations (i.e. regarding the attempt to ameliorate poor voting turnout by increasing the pool of likely eligible voters).

When the vote was lowered in the U.S. from 21 years to 18 years during the Vietnam era, the change was more closely based on moral principle though *not* on the need to respect the fundamental right to universal suffrage. That is, the lowering of the U.S. minimum voting age in 1971 from 21 to 18 years was based on the notion that young people who could die defending their country in battle (i.e. in the Vietnam War, are entitled, on moral grounds, to voting rights). Accordingly, other democratic countries followed suit and also lowered their minimum voting age to 18 years. However, as the matter of youth voting rights in the U.S. was not actually framed by the political power elite on the whole as a basic human rights issue; the struggle in recent years to lower the U.S. minimum voting age from 18 years to 16 years has floundered. So, too, the 16+ vote subsequent to the Austrian 2007 electoral reform, not having been, for the most part, categorized/perceived by the politicians or the public as a step toward recognition of a fundamental inherent universal human right (as opposed to simply a discretionary political choice), has not stimulated tangible progress in the youth voting rights struggle in other Western democratic States.

Part V
Rationalizing of the Violation of U.K. Youth's Inherent Right to Suffrage

Chapter 5
The U.K. Example of Resistance to the Vote at 16: The U.K. Electoral Commission and Select U.K. Social Scientists

5.1 The U.K. Electoral Commission's Under-Cutting of the Youth Voting Rights Issue as a Fundamental Human Rights Matter

There has been a concerted effort in the United Kingdom in recent years by youth advocates, youth themselves and select politicians to lower the minimum voting age from 18 years to 16 years for all elections. This effort came close to success under the Labor Party's rule with Tony Blair as Prime Minister. At that time, a cross-party group of MPs, in response to the 'Vote at 16 Campaign', tabled the motion below in Chambers:

> . . . this House welcomes the formation of the 'Vote at 16 Campaigns,' a coalition of charities, political experts, young people and organizations representing them, who have come together in the belief that *lowering the voting age would improve the quality of politics in the United Kingdom through involving more citizens in the debate* . . . helping to reconnect many young people, who otherwise would not vote, with the politicians who seek to represent them and further believes that it [a minimum voting age of 16 years] would be logical in view of the introduction of citizenship education into the national curriculum up to the age of 16 . . . and calls upon the government to legislate to lower the voting age for all public elections (emphasis added) [110].

What is striking in the context of this discussion about the aforementioned motion (tabled by the U.K. politicians regarding lowering the U.K. minimum voting age to 16) is the rationale proffered for the motion. That rationale was articulated as the anticipated benefit in terms of 'improving the quality of politics in the United Kingdom through involving more citizens' [111]. That is, there was an expectation that there would be greater involvement of the citizenry and higher turnout at the polls with the addition of new voters. The justification for the proposed electoral reform was *not* framed in terms of a move toward the affirmation of the inherent right to universal suffrage. The bill proposing the right to vote at age 16 years in the U.K. did not pass the House.

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It is noteworthy that the 2003 U.K. Electoral Commission (an independent body set up by the U.K. Parliament) advised the U.K. government of the time to postpone for several years the lowering of the voting age from 18 to 16 years, while at the same time endorsing the position that the eligible age for elected office be lowered from 21 to 18 years. It appears that both the party in power in the U.K. at the time, and the 2003 U.K. Electoral Commission, viewed the young voter aged 16 and over but under 18 years as something of a 'wild card'. That is, as an unpredictable entity that ought not to hold the potential power to sway an election, for instance, where the results were close. While anyone 18–21 years running for elected office could be defeated through the vote, granting the vote to 16-year-olds meant that a new group of voters, 16 and 17 year olds, could potentially have considerable political power in an election depending on the unique circumstances of the election.

Certainly it has been the case that the youth vote is not always as predictable as some might assume. For instance, in the 2008 Austrian election in which voters aged 16 and 17 participated for the first time in a federal election, they appeared to vote in a direction that was largely unanticipated. According to GfK exit polling of 600 first time voters aged 16–19 years, 44% voted for the right wing party –the FPO which took a very anti-foreigner stance in the campaign [112]. Both of the major parties had lost considerable support, and neither alone could hold a majority forcing another coalition government. Voter turnout in the 2008 election, with the addition for the first time of voters aged 16 and 17 years, was "77.2% (based on valid votes) . . . a marginal increase compared to 2006 when it reached . . . 77.1% [in 2006 minimum eligible voting age was still 18 years] [113]".

In the U.K., it appears that the ruling party under then Prime Minister Tony Blair, and the government's advisory 2003 Electoral Commission, in actuality, were not willing to provide youth the potential political power-given the right electoral circumstances—to bring the government down.

The 2003 U.K. Electoral Commission deflected completely from the fundamental human rights issue involved in the voting rights question as it pertained to youth. Instead, the Electoral Commission actually suggested that other vehicles for public participation were preferable as far as youth (minors) were concerned; even older youth aged 16 and 17 years, and stated:

> *Elections are not a very precise way of finding out public opinion on specific issues, so giving young people [aged 16 and 17 years] the right to vote and stand in them may not be the answer to making sure young people's voices are heard*. When decisions are being taken on particular policies it is becoming more common to involve young people as part of the consultation process . . . for example, [the] central government produces [a] 'youth version' of some consultation papers (emphasis added) [114].

One cannot imagine it being an acceptable proposition for the public that U.K. citizens aged 18 years and over be denied the vote on the rationale provided by the 2003 U.K. Electoral Commission for the denial of the vote to 16- and 17-year-olds. That is, one would be hard pressed to anticipate that anyone would find acceptable the notion that 'consultation' is a more robust form of public participation than the vote, and that the former is an adequate substitute for the latter for all citizens (even adults). Such a strategy as adopted by the 2003 U.K. Electoral Commission in justifying its advice not to lower the eligible voting age in the United Kingdom to 16 years, infantilizes older youth aged 16 and 17 years. Also importantly, this tact attempts to justify denial of a fundamental human right on an alleged 'best interest' basis. Young people have in democratic Western societies also had other basic human rights violated by adults on the *alleged* best interest contention i.e. their security of the person compromised due to legally sanctioned assault by the parent or a parental delegate or school teacher who allegedly carried out the administration of force (corporal punishment) within constitutional limits and in the child's best interest for 'corrective purposes' [115, 116]. There is a global movement striving to end the use of corporal punishment against minors and rejecting the best interest rationale in that context [117]. So, too, this author would maintain does the best interest rationale for denial of the vote at 16 years need to be abandoned. The denial of fundamental human rights is, by definition, and, in practice, *not* in the best interest of the affected group as a group, nor in the best interest of the individual members of the group. The denial of the vote to 16- and 17-year-olds in the U.K. persisting to the date of writing, moreover, is a denial in the face of overwhelming demand for such an electoral reform from young people themselves as noted by the U.K. Electoral Reform Society (which founded the Vote 16 Coalition):

> In 2006, the … Children and Young People's Assembly of Wales found that 80% of young people in Wales favored a voting age of 16. The Electoral Commission's original public consultation on the voting age in 2004 found that 72% of respondents favoured a voting age of 16—the consultation attracted huge participation, including nearly 8,000 young people [118].

The U.K. Electoral Reform Society is one of the advocacy groups that on first impression may seem to formulate the vote 16 issue as a human rights issue:

> Despite this clear and consistent majority demand for a lower voting age, *it must be remembered that voting is a right of the citizen*. No other age group or other demographic (e.g. gender, ethnicity, class etc.) is required to demonstrate majority support among their peers in order to have the right to vote. *The case for lowering the voting age is made on the basis that 16 and 17 year olds are capable of voting, and it is on this basis that change should be made* (emphasis added) [119].

In fact, however, the U.K. Electoral Reform Society's formulation of the voting rights issue as related to eligible voting age is not strictly in terms of

basic human rights. The U.K. Electoral Reform Society contends that the vote at 16 should be granted based on the fact that 16- and 17-year-olds are capable of voting (i.e. they receive citizenship education at school and are involved in civics engagement projects). All the while, however, the U.K. Electoral Reform Society negates, or at least disregards the possibility than any particular citizen under age 16 years might also be capable of voting. This amounts to denial of the inherent right to universal suffrage—the fundamental human right of all citizens to participate in their society (the issue also has risen as to whether citizenship itself as a qualification for the vote ought to be dropped for those who reside in the State and therefore participate in the life of the community [120]. However, that topic is beyond the scope of this monograph). Further, the U.K. Electoral Reform Society's focus on the capability of 16- and 17-year-olds to vote inadvertently shifts the 16+ voting issue *from* human rights issue *to* political policy issue (i.e. competency is not a prerequisite for enjoyment of human rights entitlements). Hence, the 'cognitive maturity' of the potential 16- and 17-year-old voters, their interest in voting and such erroneously becomes the focus of the debate on minimum voting age; none of which go to the central issue of suffrage as an inherent universal human right.

The Electoral Reform Society, though it states that: 'Voting is a citizen's right and a civic action' [121], undermines this human rights perspective in other ways as well. This it does by, at the same time, holding that the legitimacy of the right to vote ought to be assessed by comparing the age expectations for comparable civic rights and responsibilities:

> The purchase of alcohol or cigarettes, for example, cannot seriously be held to be a civic act. *Being taxed, joining the armed forces, receiving benefits, starting a family and leaving home are within the realm of the citizen. It is against these civic rights and responsibilities that the voting age must be measured and* ***the most appropriate age*** *chosen. These rights, responsibilities and decisions fall more heavily now on 16, not 18* (emphasis added) [122].

To speak of choosing the 'most appropriate age' for eligibility for the vote based on consideration of the age at which minors participate in other acts of citizenship is to disengage, unwittingly (as in the case of the U.K. Electoral Reform Society; a youth voting rights advocacy group) from the notion of suffrage as the fundamental human right of every citizen. Fundamental human rights are inherent and universal, and not a function of the grant of various legal rights in other domains, neither are they age restricted. However, the reliance by the U.K. Electoral Reform Society on a rationale for the vote at 16 linked to what other acts of citizenship are permissible at 16 years in the U.K., undercuts this human rights principle. Note that the enumerated acts of citizenship that the U.K. Electoral Reform Society lists in the above quote includes both natural rights (i.e. the right to family) and socially constructed rights and duties (i.e. paying taxes; joining the armed forces etc.). The perspective adopted by the U.K. Electoral Reform Society on the voting age question is thus closer

to viewing voting rights as arbitrary political conceptions determined by majority consensus rather than as natural rights based on one's humanity. Hence, the Society's position does not take account of the human rights infringement involved in any absolute age-based bar to the vote (i.e. under 16s legislatively excluded from the vote by a blanket impenetrable legislated bar). Such a political conception of a basic human right (such as the right of suffrage) in actual fact reduces that right to nothing more than a political policy preference (i.e. the legal right to vote at a certain age deemed the 'appropriate age' by legislators acting as representatives of the public).

It is of interest that certain of the examples of other acts of citizenship permissible in the U.K. at 16 that are cited by the U.K. Electoral Reform Society in its report [123] to justify voting age rights at 16, have also been the focus of human rights struggles. However, the Electoral Reform Society is referring to these examples only as instances where government has chosen the eligible age at 16 years as a political policy choice and the Society is suggesting that allegedly the same discretionary choice can legitimately be made in regards to minimum voting age (i.e. a set minimum voting age at 16 years and a statutory bar on voting by anyone under 16 years regardless of his or her political/voting competency level or any other circumstance). For instance, one of the 'commensurate' examples cited was the age of voluntary recruitment into the U.K. armed forces which is 16 years. However, age of recruitment into the armed forces, and age of armed service personnel participating in hostilities, has been formally transformed through international treaty from a matter of concern only to the individual sovereign State to a human rights concern in which the international community has a vital interest (as evidenced, for instance, by the adoption by the United Nations of the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* (CRC OPAC) [124]. However, the United Kingdom has steadfastly kept the issue of minors recruited into the armed forces, in certain select but critical ways, a political matter rather than one strictly involving inherent fundamental human rights. Thus, the U.K., while having ratified the CRC OPAC 24 June, 2003, nonetheless stopped well short of offering to U.K. 16 and 17 year olds all the protections that the Optional Protocol on children's involvement in armed conflict is supposed to provide. More specifically, the United Kingdom as UNICEF reports "accompanied its ratification [of the CRC OPAC] with a declaration reserving the UK's right to deploy under-18s where there is a 'genuine military need' and where 'by reason of the nature and urgency of the situation it is not practicable to withdraw such persons before deployment" [125]. UNICEF has expressed its concern that due to the Declaration, the United Kingdom may continue to recruit and use under 18s in direct hostilities [126]. The UK has the lowest voluntary recruitment age of all the States in the European Union and it is estimated that there are 6000–8000 under 18's currently serving in the UK armed forces

in 2009 [127]. The issue is an ongoing one, and the U.K. is still recalcitrant as of 2009 insofar as its refusal to withdraw its interpretive declaration regarding Article 1 of the CRC OPAC which Article protects under 18s from direct involvement in hostilities as participants in the State's armed forces. This is evident from the 2009 excerpt below involving questioning of the government in the Commons:

> **Exchange From the Commons Hansard on Children (under 18s) Serving in the U.K. Armed Forces as of 2009:**
>
> **Mrs. Riordan**: To ask the Secretary of State for Defence what plans he has to review the operation of the interpretative declaration on article 1 of the Optional Protocol to the UN Convention on the Rights of the Child on the Involvement of Children in Armed Conflict for the purposes of (a) taking steps to ensure that children are not exposed to the risk of taking direct part in hostilities and (b) monitoring Government compliance with the spirit of the Optional Protocol.
>
> **Bill Rammell**: There are no plans to review the operation of the interpretative declaration on article 1 of the Optional Protocol to the UN Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. Government policy is that Service Personnel under the age of 18 are not *routinely* deployed on operations outside the UK. The exception to this is where the operation does not involve personnel becoming engaged in or exposed to hostilities, such as disaster relief.
>
> **The MOD**: [Ministry of Defense] believes that its policies on under 18s are robust and compliant with national and international law. We remain fully committed to meeting our obligations under the United Nations Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (emphasis added) [128].

The above example illustrates the hazards in making an argument for a minimum voting age of 16 years based on the State's selection of age 16 for other rights and responsibilities. Many of those other examples of age of majority at 16 are *not* fully consistent with fundamental human rights considerations as opposed to the State's interest and political concerns (as is the case with the United Kingdom on the issue of under 18s serving in its armed forces).

The U.K. Electoral Reform Society (ERS) (which founded the Vote 16+ campaign in the United Kingdom) also unwittingly undercuts the youth voting rights movement as a human rights struggle due the 'spin" it gives to the right of suffrage. That 'spin' or interpretation has embedded in it various qualifiers which are in fact quite antithetical to the notion of suffrage as an inherent fundamental universal human right. For instance, the U.K. Electoral Reform Society states on the topic of suffrage:

> The principle of *universal suffrage* is that anyone who is *capable of exercising a vote* and *haven't transgressed the rules of society* should be able to do so. 16 and 17 year olds are capable of voting (emphasis added) [129].

In fact, however, the principle of universal suffrage does *not* encompass the notion of 'capabilities' or that of having been a 'good citizen' (i.e. never having 'transgressed the rules of society'). The right to vote conceived as

a basic human right is instead grounded on the notion of an inherent universal right of suffrage. Once again, the UK Electoral Reform Society has relied on a political conception of voting rights (despite its rights rhetoric at other points in the report) which is inconsistent with the concept of suffrage as a fundamental human right, and therefore not workable. This author is, however, very much in agreement with the UK Electoral Reform Society's rejection of the notion, promulgated by the 2003 U.K. Electoral Commission, that while waiting for electoral reform, other forms of civic engagement can substitute for voting in the age 16- and 17-year-old group:

> *Voting is the fundamental right and act of a citizen, and not a substitute but a basis for all other forms of influence and participation*. To continue to deny them the vote would be to refute the principle of universal suffrage (emphasis added) [130].

Like the current author, the UK Electoral Reform Society finds that democracy education (civics education) for 16- and 17-year-olds, and opportunities at times to play a consultative role in public policy making, are not sufficient to fulfill society's human rights obligations to this population of citizens in regards to their political rights:

> Denying them the defining right of a citizen while simultaneously telling them they are a citizen and are expected to act like one sends a confusing and negative message. *It signals to young people and to the rest of society that young people's views are not valid and that they are not 'real citizens'* (emphasis added) [131].

We will consider in a later section school democracy/civic education programs including school students participating in mock federal election voting during actual voting periods for persons of age of majority. It is an open question as to whether such 'simulated' societal engagement via school civic programs in fact fosters disengagement from the political process rather then the reverse (as students aged 16 and 17 may feel demoralized by being treated as if they were considered unworthy of the 'real' vote). If that were the case, this then would contribute further to the traditionally low voter turnout in western democratic States among 18–24 year olds. Note that by arguing that lowering the voting age to 16 may enhance voter turnout; not just for 16- and 17-year-olds, but for the 18–24 year age bracket overall (this group potentially having learned early to make voting a life habit), the U.K. Electoral Reform Society once again diverts attention away from the issue of the inherent right to suffrage (independent of political considerations such as likely voter turnout). Since how the lowering of the minimum voting age 16 years would in actuality affect voter turnout for 18–24 year olds is largely a matter of speculation, the U.K. Electoral Reform Society found itself having to answer the issue of a possible *decrease* of voter turnout due to the inclusion of 16- and 17-year-old voters:

> . . . our research shows that there would be no negative consequences to lowering the voting age. If 16-18 year olds were enfranchised but none of them voted, overall

> turnout would fall by less than 2%. If they were to turnout at the same rate as 18-24 year olds, overall turnout would drop by less than one percentage point, which may well disappear in rounding to the nearest whole number and is much smaller than variations between
>
> elections that occur for other reasons … At worse, then, lowering the voting age can only have a neutral effect on overall turnout, but is likely to have a positive effect [132].

Note that the U.K Electoral Commission had claimed in a 2004 report that: (a) lowering the voting age to 16 years in the United Kingdom would cause a lowering of voter turnout, in the short-term at least, as youth were expected to vote at a lower rate than older voters based on available data, and (b) there was no clear evidence that enfranchising 16-year-olds would lead to their increasing their voting participation over time [133]. Chan and Clayton maintain that: (a) the issue of voter turnout should be addressed via changing the behaviour of politicians and their relationship to the electorate and not by changes to the electorate and, (b) as long as young people vote 'competently' it matters not if their turn out is low [134].

The current author would also argue that voter turnout projections based on various set minimum eligible voting ages is *not* the appropriate rationale for the selection of a particular minimum age for the right to vote. This since the right to vote is grounded on the principle of universal suffrage which is entirely unrelated to issues of actual or predicted voter turnout. Universal suffrage is an imperative regardless of what actual voter turnout is predicted or materializes for various age groups.

5.2 Opposition from U.K. Social Scientists to Lowering the Voting Age to 16 in the United Kingdom

Social scientists can have an enormous impact on governmental policy choices by providing allegedly neutral 'scientific' rationales for those choices. This then makes the governmental choices appear rational and somewhat apolitical; allegedly based solely, or for the most part at least, on societal best interest considerations. The paper by Chan and Clayton 'Should the voting age be lowered to 16? Normative and empirical considerations '[135] is an example of social science research that can be used to attempt to rationalize governmental policy choices; sometimes these choices being the government's preferred option in the first instance independent of the research. Let us examine this influential work then to gain some insight into how social scientists shape the public debate on the voting rights issue as it pertains to youth (we will consider other examples as well shortly). The Chan and Clayton paper raises, in an especially clear and systematic way, some of the key points of contention in the voting age debate and it is therefore useful to consider the paper in some detail.

The first few lines of the Chan and Clayton paper, whether intentionally or not, serve to frame the minimum voting age question as something other than a fundamental human rights issue:

> The questions of whether there should be a minimum voting age and, if so, at what age it should be set are significant *political issues*, because having the vote is widely recognized as one of the most important *legal rights* within a democracy (emphasis added) [136].

The voting age issue is, hence, characterized in the Chan and Clayton paper from the outset as a purely political concern related to statutorily based laws. There is no mention in the paper of *universal* suffrage as an *inherent* fundamental human right (as opposed to a statutorily defined legal right), though there is a reference to the *potential* that the exclusion of a certain group from the vote may be a form of political discrimination:

> In the absence of some compelling argument, the exclusion of a particular section of the population from the franchise is standardly taken to be a serious violation of *political equality* (emphasis added) [137].

The Chan and Clayton paper argues *against* lowering of the minimum voting age in the U.K. to 16 years based on considerations relating to what the authors term 'political maturity for democracy,' and its alleged relationship to chronological age [138]. We will get to the latter point in a moment, but first it is necessary to point out how the authors of the paper in question have set up the argument to make it appear that their conclusion is purely scientific and value neutral. This is accomplished via Chan and Clayton: (a) making reference to a survey commissioned by the U.K. Electoral Commission in 2004 which found that a majority of Britons prefer keeping the minimum voting age in the U.K. at 18 years, and (b) these researchers holding that the minimum voting age question should *not* be determined *ipso facto* based on the majority preference of the population as a whole without further justification, and simply because the choice represents the majority preference:

> Even if the overwhelming majority are appalled by the prospect of sixteen-year-olds having the vote, *this cannot in itself* be even a *pro tanto* reason against lowering the voting age. The democratic conception is one in which every member of the political community is viewed as having equal status and in which political institutions and practices embody that principle . . . Significantly, electoral matters concerning the size and shape of the franchise are among the most important conditions of the legitimation of majoritarian procedures, and so cannot legitimately be determined by the will of the majority. It follows that the appeal to majoritarian choice must be rejected [139].

Yet, the Chan and Clayton empirical study is heavily entangled with majoritarian preferences regarding the 'appropriate' minimum voting age. This is the case in that the authors set themselves the task of discovering an alleged empirical basis for what they hold is the majoritarian preference—a

minimum voting age of eighteen years. They do so, as mentioned, by considering the issue of 'political maturity' as it relates to chronological age holding, as does the U.K. Electoral Commission, that 'political maturity' is at the heart of the question of what should be the minimum voting age: 'The [UK] Electoral Commission *rightly* regards *maturity* as the fundamental issue in determining the appropriate age of electoral majority (emphasis added) '[140]. However, majoritarian preferences—empirically supported or not—cannot be the legitimate deciding factor in setting a minimum voting age if universal suffrage is conceptualized as an inherent basic human right.

Further, if it were argued that: (a) there must be, or there is an empirically based rationale for determining voting age eligibility, and (b) this rationale derives from the alleged correlation between chronological age and 'political maturity' (however the latter is defined), then this strategy for determining voter eligibility, to be fair, would have to apply also at the upper end of the age continuum. That is, we would need to assess whether the very elderly, for instance, retain their 'political maturity' given that the incidence of brain pathology increases significantly in very advanced age, and voter participation during that stage of life also shows a significant decline. One might argue that here we are deciding who should acquire the vote, not who should retain it. However, if chronological age is to be used as a proxy for 'political maturity', and suffrage is considered an inherent fundamental human right, then, in fact, we are deciding in principle who will retain the right to vote as a natural right in *both* instances (for the young under age 18 years and, for instance, the very old where there is a higher risk of 'political immaturity'). It is remarkable that there have in fact been instances where the right to vote has been granted to a certain age group only later to be retracted *strictly based on age*. The latter is precisely what occurred in Iran when the voting age, which had been 15 years, was raised to 18 years in 2006 with subsequent attempts by the ruling party to lower the voting age once again to 15 years failing [141].

It is interesting that Chan and Clayton use the term 'political maturity' as opposed to 'political competence' as doing so plays unconsciously on our assumption that adults are more 'mature' (given their developmental status) and, hence, likely to be also more 'politically mature' at any age relative to younger persons. This diverts attention away from the fact that both young age and old age, at some point, are likely inversely correlated with 'political competence', or in Chan and Clayton's alternate terminology 'political maturity'. Chronological age is, in the electoral context, *in practice*, considered as an alleged proxy for 'political competence', or 'political maturity' if you will, *only* for the very young (i.e. under 18s), and not for the very old (i.e. the over 70s or over 80s). Thus, we cannot claim, contrary to the contention of the U.K. Electoral Commission, that the exclusion of

youth from the vote is genuinely based on concern for the political maturity/competence of the electorate [142]. Yet, this is precisely what Chan and Clayton maintain:

> Some argue that if the enjoyment of voting rights ought to vary with political maturity, then society should exclude individuals from the franchise on the basis of competence rather than [chronological] age … *An age-based franchise, it is said, arbitrarily discriminates against young people who possess the capacities, motivation and understanding that are relevant to the act of voting to a higher degree than some older people do. We should reject this argument. It is a mistake to assume that the discrimination we make in law or policy should always be guided by what is fundamentally important.* Suppose that age is not a fundamental consideration in judging qualifying conditions for the vote. Nevertheless, age might be a valuable *proxy* for what is fundamental. The distribution of capacities that we decide are fundamental might be correlated with age, albeit imperfectly. Consequently, age-based discrimination might be an effective way of tracking those capacities that are fundamentally important (emphasis added) [143].

It is difficult to rationalize, however, contrary to Chan and Clayton's contention, the idea that society should rely on an alleged proxy for political maturity/competence (that proxy being chronological age), rather than testing 'the real thing' directly (testing political competence). One reason for the reliance on an alleged proxy for political maturity/competence (chronological age); might be to avoid generalizing the issue of political competence to those already eligible to vote (those who have reached the age of majority for the vote). That is, reliance on chronological age itself (the proxy) allows for the arbitrary setting of specific age parameters (a minimum voting age of 18 years), thus *automatically* relieving those over age 18 years from scrutiny as to *their* level of political maturity/competence (and automatically excluding those under age 18 years from the vote based on a non-rebuttable presumption of lack of 'political maturity'). However, such a reason for relying on an alleged proxy for political maturity/competence, as opposed to testing for the same directly, is fundamentally unfair. There is, afterall, no more justification for automatically excluding 16- and 17-year-olds from the vote based on their alleged political immaturity/incompetence than there is in withdrawing, on the same basis, the right to vote from all of the very elderly in the population (i.e. instituting an age bar to the right to vote for the very elderly). The current author would not argue in support of an age-based rationale for group exclusion from the vote in either case. The only difference is one of what we have come to regard as socially acceptable (i.e. exclusion of under 18s from the vote is considered socially acceptable based on alleged competency issues, but not so exclusion of the very elderly based on the same concerns).

Chan and Clayton give no explanation or justification for why 'age-based discrimination' is allegedly 'an effective way of tracking those capacities that are fundamentally important' to the vote when it comes to the under 18s, but not for those in any other age group where there is reason to believe

that there may be significant competency issues (i.e. in the very elderly age group). This would suggest that the discrimination directed at 16- and 17-year-olds in regard to the right to vote is *not* based on the presumed societal interest in ensuring that voters have the requisite fundamental qualities for competent and socially responsible voting.

Chan and Clayton also raise an argument intended to counteract the allegation that excluding 16- and 17-year-olds from the vote simply based on their age is unjust. These authors thus reject what they term the 'anti-ageist principle' which holds it to be morally unsound to exclude a 16- or 17-year-old from the vote on account of age when an older person may have no more political competence. They articulate their position on this point as follows:

> . . . our concern is to exclude incompetents . . . *we have good reasons of justice to prevent the incompetent from voting*, since their votes might impact negatively, not merely on themselves, but on the legal rights and duties that apply to others. *Following the anti-ageist principle might inhibit our pursuit of justice, all things considered* (emphasis added) [144].

The issue is, however, in the context of this discussion, not one of whether there is any justification for excluding incompetents from the vote. Rather, the issue is why the efforts in that regard are directed exclusively toward only one age group. If there are 'good reasons of justice to prevent incompetents from voting' as Chan and Clayton suggest, would this not be the case in respect of voters across various age brackets, and not just for those under 18 years? Further, if 'political maturity' is the issue, but the right of every citizen to the vote in principle remains intact, then why have Chan and Clayton not addressed the possibility of a competent adult voting as a proxy for the allegedly politically immature citizen below the age of majority for the vote? Remarkably, Chan and Clayton have managed to verbally finesse exclusion from the vote for 16- and 17-year-olds *from* fundamental human rights violation (i.e. given the right to universal suffrage recognized in international human rights law) *to alleged* element in the 'pursuit of justice.' This would *not* be the first time, however, that the denial of fundamental human rights to children and youth has been framed as consistent with justice (i.e. the legitimization of corporal punishment in Western domestic statutory law). Interestingly (and consistent with the hypothesis above as to why there is a preference for using an alleged proxy for political competence rather than measuring political competence directly), Chan and Clayton maintain that political competency tests administered on a case-by-case basis, *even if these tests could be adequately designed*, would be *inadvisable*. Their rationale again somewhat astounding given the context:

> *Those who are denied the franchise on grounds of incompetence might suffer a loss of self-esteem* that would impact detrimentally on various aspects of their lives. *Such problems are avoided by an age-based rule rather than competence-based rule*. Ideally then we should adopt an age-based rule that sets the voting

> age at a point at which a sufficient proportion of citizens above that age are politically competent. So, *age-based voting entitlements can be both efficient and just* (emphasis added) [145].

Recall that Chan and Clayton argue that age is a valid proxy for political maturity or competence. It is unclear why (as Chan and Clayton appear to hold in the quote above) having young people aged 16 and 17 years old suffer a loss of self-esteem based on society's *non-rebuttable presumption* of their political incompetence (i.e. especially in those cases where in fact they are politically competent) is any less objectionable than such a result due to a 'competence-based rule' for acquiring and exercising the vote (i.e. a political competency test). Respectfully, it seems to the current author that Chan and Clayton have not at all made out the case that an age-based rule for the voting entitlement is just; though no doubt it is quite efficient. Again, it would instead appear that the 'age-based rule' is preferred to the 'competency-based rule' for deciding the right to vote as that is the status quo, and this approach removes the threat of disenfranchisement based on lack of political competency/maturity for those at or over the current age of majority for the vote.

Another contentious issue regarding voting age considered by Chan and Clayton might be labelled the 'slippery slope' hypothesis which the latter authors seem to endorse:

> Suppose we grant the normative premise that eighteen-year-olds should have the vote. Suppose we grant, in addition, that there is only an insignificant difference in competence between sixteen and eighteen-year-olds. Still, we might resist the conclusion that sixteen-year-olds ought to be enfranchised. The argument is weak, because, for all we know, we could use the same argument repeatedly until we have enfranchised six-year-olds which would be absurd. . . . *we ought to identify a suitable stopping point so that we can achieve the benefits of enfranchising those who would enhance our democracy, without jeopardizing that good by continuing incrementally to extend the franchise* (emphasis added) [146].

There is no doubt that an 'age-based rule' for the voting entitlement is arbitrary; especially if one endorses the notion of universal suffrage as an inherent human right. Chan and Clayton's failure to discuss proxy voting by an adult on behalf of the younger child citizen as a potential option for affirming universal suffrage may have impacted the complexion of their argument. That is, had Chan and Clayton considered proxy voting by adults for so-called politically incompetent young citizens *under 16 years*, might this have made a minimum voting age at 16 years more palatable in their view? One could argue in response to Chan and Clayton's 'slippery slope' objection to the lowering of the voting age to 16 years that the exact same argument works also in reverse. That is, if 16 years is not as acceptable an age for the vote as is age 18 (since being 18 years is allegedly correlated with a somewhat higher level of political maturity or competence); then why not 20 or 21 years as the appropriate voting age (i.e. when political maturity would presumably be incrementally even a bit higher than at age

18 years). This incremental elevation could then continue repeatedly on this basis until, for instance, the minimum voting age was set at 66 'which would be absurd.' Hence, the Chan and Clayton admonition that 'we ought to identify a suitable stopping point so that we can achieve the benefits of enfranchising those who would enhance our democracy, without jeopardizing that good . . .' [147] provides no guidance whatsoever as to whether the age of voting entitlement should stay at 18 years, be raised or be lowered.

Chan and Clayton respond in opposition also to a number of other arguments in favour of lowering the voting age to 16 years in the U.K. For instance, they argue that because youth is a temporary characteristic, violating the right to suffrage for that period of someone's life is not as wrongful as if the violation was permanent. No rationale is provided as to why treating citizens who are 16 and 17 years old as less worthy than citizens 18 and over by denying them the vote is not in itself unacceptably harmful regardless of the time frame in which that harm is inflicted [148]. (We will return below to the topic of whether the fact that youth is not an immutable human characteristic such as is ethnic origin or colour should make any difference in considering whether to grant the vote). Chan and Clayton also hold that there is not necessarily a need to have consistency in the age at which various legal rights are affirmed (i.e. the right to have sex is set at age 16 years in the U.K. but the franchise denied at 16). They maintain that the former may have more to do with the lack of the State's ability to restrain the activity among 16-year-olds while the franchise can be successfully restricted from 16-year-olds [149]. The latter seems a very weak counter-argument indeed against lowering of the voting age to 16; amounting essentially to the position that we should bar voting at age 16 because we as adults can do so effectively.

The rest of the Chan and Clayton paper attempts to provide empirical support for the notion that 16- and 17-year-olds are less politically mature than are older persons. Their study is open to methodological critiques such as the fact that the study data, even if credible, reflects the current state of political maturity of a group (16- ad 17-year-olds) that is excluded from the vote and politically marginalized in most every way. One might expect that the grant of the vote may enhance civic engagement, as well as political interest and knowledge among 16- and 17-year-olds. Chan and Clayton counter that their results (if we, for the sake of argument accept them as valid) are due to the fact '. . . that the teenager's brain is still under development' [150]. These researchers quote Dawkins and Cornwell who stated that 'the brain just isn't ready to vote at 16' [151]. It is entirely unclear *on the Chan and Clayton model* why voting by the neurologically impaired adult (i.e. the brain injured individual, the elder who has suffered mini-strokes and is cognitively impaired to an extent as a result but may not be diagnosed etc.) is acceptable, but voting by 16- and 17-year-olds with allegedly immature brains is not. It is relevant to note in this context that

voting at age 16 years is now the norm in Austria, and has been at certain levels of election in other jurisdictions in Europe as well as previously discussed, all without any doomsday scenario developing for democracy in those regions. That is, there is no evidence that voting by 16- and 17-year-olds in these latter jurisdictions has led to an undermining of the electoral system.

It is noteworthy that Chan and Clayton report that, according to their review of the literature, '... while older people [in the U.K.] generally lost interest in politics during the 1990's, teenagers actually became more interested in politics and more partisan over the same period' [152]. Yet, such factors do not detract from these academics' resistance to the vote at 16 in the U.K. To what do we attribute the loss in interest in politics amongst older people in the 1990s and the increase in interest among 16- and 17-year-olds? *Following the Chan and Clayton logic*, are we to assume that older people regressed neurologically during that period, and hence became less politically mature and less civically engaged? Such unfounded hypotheses point up the fact that so, too, recourse to overgeneralizations about brain function in 16- and 17-year-olds without consideration of learning opportunities and social/environmental context would appear to be quite speculative and irrelevant to the issue of universal suffrage. Further, Chan and Clayton provide no convincing justification for why we ought not raise the voting age to some point above age 18 years given that these researchers interpret the data to suggest 'a competence gap [in political maturity] between young people in their early to mid 20s and older groups, and not just between 16- and 17-year-olds and older citizens' [153]. They rely on: (a) 'the need to stop somewhere' argument previously discussed which, as has been shown, neither supports nor negates the validity of a voting age of 16, or 18 years for that matter, and (b) the loss of self-respect that would ensue if someone were stripped of their legal right to vote due to assessed political immaturity [154]. There is little if any consideration in the Chan and Clayton paper of the adverse larger societal consequences of denying the vote to 16- and 17-year-olds who may have pro-social justice and democratic ideals that are quashed by their statutorily imposed exclusion from political life.

Notwithstanding any of the foregoing, however, suffrage as the fundamental human right of every citizen is not conditional on political maturity in any case. That is, every citizen has the right of full participation regardless of his or her political maturity as previously discussed. Thus, the current author holds, contrary to the claims of Chan and Clayton, that even if the *absolute* level of political competence of 16- and 17-year-olds as a group could be determined; this would be irrelevant to the question of the proper voting age. This is not to say, however, that the State should not make efforts to enhance the level of political engagement and knowledge in the general population as a vehicle for strengthening representative democracy. Thus, this author contends for the reasons discussed, that we

can confidently reject Chan and Clayton's propositions that their normative considerations and empirical data provide a prima facie case against lowering the voting age to 16, or that more refined data on so-called absolute levels of political maturity in that age group might provide a definitive case against the vote at 16.

Let us turn now to a consideration of the pre-1971 struggle to reduce the minimum voting age from 21 to 18 years in the United States in the hopes of learning valuable lessons along the way also regarding the current vote at 16 movement; its nature and chances for success. U.S. Congressional debate on the issue of lowering the voting age from 21 to 18 serves as a case example of what type of rhetoric was used by the rights claimants and their supporters, and why the opponents of 18 years as the minimum voting age failed in resisting this electoral reform. As we shall see, the congressional opponents to lowering the minimum eligible voting age to 18 years did *not* fail because fundamental human rights considerations won the day, but rather due to entirely different reasons.

Part VI
The 26th Amendment to the U.S. Constitution and Eligible Voting Age

Chapter 6
The 26th Amendment to the U.S. Constitution: Does it Really Make Age Discrimination in the Vote Against Under 18s Constitutional? The Broader Lessons

6.1 The Pre-1971 Movement to Lower the U.S. Minimum Voting Age From 21 Years to 18 Years: Lessons for the Contemporary Struggle for a Minimum Voting Age of 16 Years

6.1.1 Recognizing the Potential Power of the Youth Vote

A valuable source of information on the debates in the U.S. Congress during the Vietnam War era in the 1960s regarding lowering of the voting age from 21 years to 18 years is the 2008 doctoral dissertation of Jenny Diamond Cheng on the 26th amendment to the U.S. Constitution [155]. Cheng points out that the debate about lowering the minimum voting age to 18 years in the U.S. had actually already been initiated through congressional proposals in the 1940s and was intermittently debated in Congress thereafter in response to the hundreds of such proposals that were introduced in Congress prior to 1971. She cites Congressional documents on the issue dating from 1942–1970. We will draw, in part, upon that information to consider how the arguments for and against lowering the voting age were framed at that time and consider the implications, if any, for the current debate about lowering the voting age to 16 years. Of particular note for our purposes is Cheng's following comment:

> Passed in 1971 after the most rapid ratification process in American history, the Twenty-sixth Amendment lowered the minimum voting age in state and federal elections from twenty-one to eighteen. *The voting age amendment garnered very little academic interest at the time, and the scholarly silence over the subsequent decades has been deafening. Very few commentators have devoted any serious attention to the subject* . . . (emphasis added) [156].

It appears that social science academics in North America and Europe, by and large, have been major contributors to the marginalization of the topic of minimum voting age. As Cheng notes, major historical works

S.C. Grover, *Young People's Human Rights and The Politics of Voting Age*, Ius Gentium: Comparative Perspectives on Law and Justice 6,
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covering the relevant time period make only cursory reference to the 26th amendment, and in the United States from 1971 to 2008, there was only one book published devoted entirely to the issue of youth voting rights in the United States [157]; a book by Wendell W. Cultice titled *Youth's battle for the ballot: A history of voting age in America* [158]. This may be in part due to the fact that the notion of children's participation rights, of which voting rights for youth would be a prime example, is a relatively new concept on the international human rights scene. Indeed, it is often said that Article 12 of the *Convention on the Rights of the Child* dealing with children's participation rights in regards to administrative and judicial hearings and in other settings (but not voting rights), as well as the articles dealing with children's civil rights (free expression and free association) [159], are amongst the most novel and controversial in the Convention. The aforementioned rights, it will be noted, fall into the category of "positive rights" which regard the child (person under age 18 years) as subject of his or her rights; and as an individual with autonomy and agency. This is in contrast to other rights articulated in the Convention which concern protection rights and the right to provision of essential services and contemplate the young person more as a recipient of the *parens patriae* considerations of the State (the *parens patriae* stance referring to the State's concern to protect the vulnerable from human rights violations and provide for their needs).

Interestingly, Cheng herself does *not* seem to locate the pre-1971 U.S. struggle to reduce the minimum voting age from 21 to 18 years squarely in the domain of major 'human rights'/civil rights struggles. She appears to regard the ultimately successful struggle for the 18-year-old vote in the U.S. as superseded by the U.S. civil rights movement of the time for equal protection and benefit of the law regardless of skin colour:

> While, as I explain in this dissertation, eighteen-year-old voting was inextricably linked with some of the most important phenomena of the 1960s-including the Vietnam War, the explosion of higher education, the antiwar protests, and the civil rights movement–*the voting age issue itself was generally a second-order matter. Historians of the era, too, have focused their attentions on the more dramatic and arguably far reaching events of the 1960s* (emphasis added) [160].

Cheng thus implies, incorrectly on the current author's view, that the invigorated movement of the late 1960s to lower the U.S. minimum voting age to 18 was *not* itself a major civil rights movement with far reaching long-term implications. Those implications included the potential at least for high participation of young people 18-, 19-, and 20-years-old in the vote and, as a consequence, a positive shift in their relative power status in the society through the vote. The election of Barack Obama and his being the preferred candidate of younger voters also in the 18–20 year age group is a testament to the potential power of this age group as part of an age-based voting bloc. For instance, a Gallup Daily Tracking Poll October 1–20, 2008 *prior to the vote* indicated that in the 18–29 year old

group, Obama was the preferred candidate for 62% of these potential voters, while McCain was the preferred candidate for 34% of this age group [161]. This lead for Obama, furthermore, was reported by Gallup as being much larger in this younger age category of 18–29 than in any other age category and representative of the sizable preferences for the democratic candidate amongst these young voters also in the previous presidential election in which George W. Bush was elected [162]. The Centre for Information and Research on Civic Learning and Engagement (CIRCLE) (Tufts University) estimated *based on exit polls* that 23 million Americans under age 30 (18–29 year olds) voted in the 2008 presidential election; an increase of 11% from the 2000 presidential election in this age group [163]. Younger voters aged 18–29 years made up 18% of the electorate in the 2008 U.S. presidential election; more than those in the 65 year and older category who made up 16% of the electorate [164]. Furthermore, 54.5% of Americans aged 18–29 voted in the 2008 presidential election [165]. More than two thirds (68%) of this age group (18–29 year olds) in the 2008 national exit polling reported that they had voted for the Obama/Biden ticket in the presidential election. CIRCLE comments that:

> One of the most striking characteristics of this [Presidential] election was young people's united support for Barack Obama, which seemed to cross racial and partisan lines. For example, just thirty-three percent of young white voters self-identified as 'Democrat', yet 54% [of young white voters self-identifying as Democrats] voted for the Democratic candidate. Similar trends were seen with African-Americans and Latinos; a significant number of youth identified as Republicans yet voted for Barack Obama, the Democratic presidential candidate [166].

Significantly, in the 2008 election, 64% of the 18–24 year olds who voted were first time voters compared to only 11% of all 2008 voters in the presidential election being first time voters [167]. In the U.S. in 2008 then, according to the latest census of the time, young persons 18–29 comprised 21% of the voting-eligible population and 18% of the actual voters in the 2008 U.S. presidential election [168]. Were the minimum voting age in the U.S. to be lowered to 16 years, and 16 and 17-year-olds to join the voting fray, this could likely bring in many more youth votes and substantially increase further the voting bloc potential of the youth vote i.e. the 16–29 year old voting group especially given the tendency to relatively high levels of consistency in the Democratic leanings of this group and agreement on a number of key issues at least in the U.S. if trends were to hold [169]. As it was, the overwhelming support for Obama among the younger voters aged 18–29, and the increase in voter turnout for this age group in the 2008 U.S. presidential election, meant that key States were more easily won by the Democratic presidential candidate:

> [The youth vote] is turning states that [Obama] would've lost or barely won into more comfortable margins . . . not only are they voting in higher numbers, they're voting more Democratic [170].

There is some evidence from a Harris Interactive Youth Centre of Excellence Youth Query Survey that engagement of youth with the 2008 American presidential election extended also to those below age 18 years. Seven out of ten youths 8–17 years old reported following the news coverage on the 2008 presidential election very or somewhat closely, and eight in ten in this age group reported they planned to vote when they reached age of majority for voting (sampling was of 1064 young people aged 8–17 who answered the survey questions online between September 17–22, 2008) [171]. There is a possibility regarding the aforementioned Harris results of: (a) some extraneous factors entering in to inappropriately influence the young people's responses given that the survey was online, and (b) some degree of response bias present in the survey responses (participants responding in the way they think will put them in a favorable light even if the survey is anonymous). Yet, there appear to be clear trends in the Harris data suggesting that there was very high interest among youth 8–18 years in the 2008 presidential election. This is not surprising given the general excitement in the general U.S. public surrounding the election and the novelty of having the first African—American presidential candidate and eventually having Obama as *the* Democratic representative to run against McCain.

6.2 Lessons to be Learned from The U.S. Congressional Debates on Lowering the U.S. Voting Age from 21 to 18 Years

6.2.1 On Immutable Characteristics and Whether the Denial of the Vote to Under 18s Constitutes Age Discrimination

According to Cheng [172], the arguments for the lowering of the voting age in the U.S. from 21 to 18 years as reflected in U.S Congressional debates on the topic during the Vietnam War era and prior were varied and complex. However, the point of interest that the current author wishes to stress is that the prime rationales for lowering of the minimum voting age were all based on more of a utilitarian perspective as opposed to justifications based on presumptions about inherent universal human rights in and of themselves. For instance, as previously mentioned, there was a familiar reference to service in the United State's armed forces (i.e. the daft during the Vietnam War era was applicable to males 18 years and older) as a rationale for lowering the eligible voting age from 21 to 18 years. Ensuring continued loyalty to the State, given the enormous sacrifice of the 18 to 20-year-olds also serving militarily, and the potential for resentment in this regard amongst some in the ranks (especially given the unpopularity

of the Vietnam War), would require granting this age group (18–20 year olds) more societal power. A key vehicle for doing so, the vote, would thus necessitate lowering the minimum voting age to 18 years. Other utilitarian rationales included the idea that lowering the minimum voting age would result in a more engaged citizenry [173] which would be, of course, good for the State as it implicitly bespeaks also loyalty to the nation. Advocates for a voting eligibility age of 18 years also made reference to the presumed, on average, higher political sophistication and educational attainment of young people aged 18–20 of that generation compared to what was the case for this age group in yesteryear [174]. The latter, too, is a utilitarian perspective in that it assumes that the younger voter in the age group 18–20 years has something valuable to contribute to the political process as a whole and, therefore, should have the vote. The latter rationale then does *not* speak to the issue of voting as an inherent, universal democratic human rights entitlement independent of i.e. military service, general level of civic engagement, or political competence.

Some politicians may have recognized as well that the younger voter, perceived as a person who in general is more likely to endorse liberal views, would likely be more prone to vote Democratic than Republican (as studies of the youth vote involving 18–24 year olds in U.S. elections have born out as was discussed here previously). Many politicians then may have supported, or objected to a minimum voting age of 18 years on that basis (i.e. using a utilitarian rationale relating to the anticipated impact the vote at 18 would have on the prospects for success of the party-Democratic or Republican-with which the particular politician was affiliated). However, this may not have been the primary or only concern for all politicians considering the issue of lowering the U.S. minimum voting age from 21 to 18. Some may have considered factors that cross party lines; such as whether 18-year-olds were mature enough to handle the awesome power of the vote and use their discretion in casting the vote wisely. Some politicians may have concluded (correctly or incorrectly) that 18-year-olds conscripted into the armed forces and, for instance, shooting at the enemy under order etc. required little, if any, discretionary judgment. Others may have considered that the fact that these young people were subject to the draft and serving in the armed services should be the deciding factor justifying the vote at age 18. That is, that their service in the armed forces superseded any consideration of which political party was most likely to benefit from the votes of 18- to 20-year-olds. No doubt there were innumerable other rationales at the time (pre-1971); articulated and non-articulated, for supporting or objecting to a new U.S. minimum voting age of 18 years:

> Over time, [the proposal for] eighteen-year-old voting had become more closely identified with the Democratic Party, although [some] support came from both sides of the aisle, and Southern Democrats continued to consistently oppose the idea [175].

Cheng speculates that it was in large part because *age discrimination* regarding the vote was [and is] still considered constitutionally acceptable in the U.S., though the minimum age had been lowered to 18 years by means of the 26th Amendment, that 'constitutional lawyers have rarely sought to . . . use it [the 26th Amendment] as the basis for other rights [attainment for 18-year-olds] . . .' [176]. We will consider very shortly whether the distinction based on age in the right to vote amounts to unconstitutional age discrimination regardless where that minimum voting age is set. However, there are a few additional points to highlight by way of background first regarding the pre-1971 U.S. Congressional debates on lowering the U.S. minimum voting age from 21 to 18 years.

Some U.S. Congressmen and others during the Vietnam War era in the U.S. argued that it was *unfair* to impose the draft (compulsory service in the armed forces for all males 18 and older) on persons who did not have the vote [177]. This could be regarded as a type of discrimination argument (where the discrimination referenced is in the form of restriction of the vote based on age, and the comparator groups are those comprised of members of the armed forces 18–20 who did not have the vote *versus* those members 21 years and over who did). That is, inequitable treatment of under 18s compared to over 18s though both had served, or were serving their country in the armed services. Hence, one segment of the armed forces, those 18–20 years old was conceived as disadvantaged in terms of *not* receiving a certain benefit; namely the vote; while the other segment, those members of the armed forces 21 years and over, received that benefit). Those who did *not* view this as discriminatory would likely have taken the position that: (a) not all differential treatment of persons is necessarily discriminatory i.e. where the differential treatment is for the benefit of the person treated differently than others in the same group, and/or based on their actual individual characteristics and not on a group stereotype (i.e. special needs students receiving individualized learning programs while non-special needs students follow a regular more standardized learning program), (b) the differential treatment in the voting context is justified (i.e. 18 to 20 year olds are allegedly not cognitively and politically sophisticated enough to be granted the vote; an alleged non-stereotypical attribute of this age group etc; and (c) unlike discrimination relating to the denial of suffrage based on race and/or gender; age is *not* an 'immutable' characteristic; that is, age is not an unchanging inherent characteristic of the person. That is, all those U.S. citizens ineligible to vote due to age would in the normal course one day attain the then U.S. minimum eligible voting age of 21 years.

Cheng notes on the issue of immutable characteristics (i.e. race, gender etc.) and age discrimination regarding the vote that:

> The politicians who debated whether excluding eighteen to twenty-one year-olds [sic: twenty year olds] from the franchise amounted to unconstitutional discrimination disagreed about the extent to which legal distinctions between children and adults were or were not like distinctions based on race or gender. [178].

Let us consider then whether denial of the vote based on age is unconstitutionally discriminatory. That is, whether a bar on suffrage for those below a certain minimum eligible voting age is identical to discrimination based on immutable characteristics such as race or gender. If age-based voting restrictions are similar in nature to such bars based on immutable characteristics then, at least under some circumstances, the former would violate domestic constitutional and international human rights treaty guarantees of basic human rights (i.e. equality under the law and equal benefit of the law). This would be the case notwithstanding whether or not the State, or even the international community was yet prepared to acknowledge this fact.

The issue of whether age is a valid bar to voting rights is formulated in a myriad of ways. One of the key formulations is to pose the question in terms of whether or not persons of a certain young age have sufficient maturity and political sophistication to vote deliberatively and responsibly where age is used as a proxy for competence. The issue of age as a proxy for alleged competence to vote was previously discussed in the context of the Chan and Clayton paper [179]. However, our interest at this point in the discussion is the view that setting a minimum eligible voting age does *not* constitute discrimination since those ineligible to vote based on age will eventually acquire that right once they reach the age of majority for exercise of the vote:

> Comparisons are sometimes drawn between the political emancipation of women and slaves and lowering the voting age. Arguments in favour of votes for women offered in previous centuries, for example, are sometimes cited as relevant to the voting age debate. However, many comparisons of this kind are unconvincing because sex [gender] and race are permanent features of people's lives while, in the normal course of life, everyone enjoys childhood, youth and adulthood. *Because they affect everyone, ageist restrictions are not obviously as wrongful as restrictions based on race or sex [gender]* (emphasis added) [180].

> . . . Parliament [in excluding under 18s from access to the right to the vote] is making a decision based on the experiential situation of all citizens when they are young. It is not saying that the excluded class is unworthy to vote, but regulating a modality of the universal franchise . . . (emphasis added) [181].

There are several facts that demonstrate the fatal laws in the position (i.e. as espoused by Chan and Clayton and others) that the denial of the vote based on age is non-discriminatory and constitutional (or at least is not objectionable) since the restriction is temporary. As the restriction is temporary, proponents of keeping the voting age at 18 years, as is the current status quo in most Western democratic States, argue that the exclusion of 16- and 17-year-olds from the vote does not reflect a lack of respect for the young i.e. a lack of respect in particular for those *individuals* aged 16 and 17 years who may be as mature and rational as some, or most adult voters. We consider next then whether age-based restrictions on the vote constitute age discrimination in the first instance, and, if so, whether that discrimination is legally supportable (i.e. since it is temporary, related to a

desire to maintain the integrity of the electoral system by ensuring voters are politically competent etc.).

6.2.2 On Why the Absolute Bar Against Under 18s Voting is Unconstitutionally Discriminatory

Let us consider then the issue of whether an age-based restriction on the vote constitutes differential treatment amounting to discrimination, and if so, whether such discrimination is constitutional and justified, or lacking in demonstrable justification and, hence, unconstitutional:

1. *Stereotyping of Youth as Less Capable/Irrational*: The current absolute bar on voting below age 18 is discriminatory precisely because it is an *absolute* bar and hence based on stereotypes (i.e. about maturity etc) applied to each individual member of this age group. In this respect, the discrimination involved is akin to discrimination based on race and gender which is also grounded on negative generalized stereotypes. Such stereotypes are an affront to the human dignity of the individual.

Justice Lefsrud of the Alberta Court of Queen's Bench (Canada), in a case involving older teens under age 18 seeking to vote in municipal and provincial elections in Alberta, found that the exclusion of 16- and 17-year-olds from the vote is discriminatory. Justice Lefsrud held that the blanket age bar against voting for under 18s is fundamentally linked to a *devaluing* of youth and their views. He concluded that a reasonable person with average cognitive competence who is prevented from voting due to age would perceive such exclusion as a devaluing of their worth as persons:

> *. . . the reasoning behind the [age-based voting] restriction, [is] that minors are unable to make rational and informed decisions and therefore cannot be entrusted with the franchise . . . The message is explicit that minors are less capable and less worthy of recognition* . . . I find that a reasonable person, in the circumstances similar to those of the Applicants [two Canadian 17-year-olds challenging the statutory ban on 16 and 17 year olds voting in municipal and provincial elections in Alberta, Canada] . . . would conclude that the age distinction [in grant of the vote] promotes the view that they [16 and 17-year-olds] are less capable or worthy of recognition as members of Canadian society (emphasis added) [182].

It is here contended that 'rationality' cannot be considered a genuine prerequisite for grant of the vote (as is the case also for any alleged component of political competence). Suffice it to say simply that the irrelevance of rationality or political competence generally as a criterion for deciding who should vote in a democracy is evidenced by the fact that persons of eligible voting age (i.e. 18 years or over in most Western States) often vote irrationally. That is, those of eligible voting age often vote, objectively speaking, against their own best interests and yet, democracy survives or if

defeated, re-emerges in time. The lack of rationality in voting or in political competence of any segment of the *adult* electorate, hence, has not been considered as a reason for disqualifying these adults from the vote.

As to the issue of diagnosed mental disability and the vote, the picture in Western democracies is mixed. For instance, exclusion of adult persons with a diagnosed mental disability from the vote was deemed unconstitutional by the Federal Court in Canada in 1988. At the same time, diagnosed mental disability (due to psychiatric disability and/or intellectual impairment) and/or being under guardianship disqualifies one from the vote in some Western jurisdictions (i.e. the majority of U.S. States). In fact, many persons with a diagnosed mental disability are quite capable of the vote. One wonders then to what extent their blanket exclusion from the vote in some jurisdictions is based on over-generalized archaic notions about cognitive impairment and psychiatric disability, and the longstanding marginalization of and prejudice against these segments of the general population.

The specific issue of concern for our purposes is, however, whether age is, in reality, being used as a proxy for mental competence as is the claim by those who support the current absolute bar against voting by minors, and, hence, also resist lowering of the minimum voting age from 18 to 16 years. The answer to that question appears to be that age is *not* in fact being used in this fashion when it comes to the vote. For instance, age is not being used as a presumptive tool to screen out undiagnosed potentially demented elderly persons (the elderly being at higher risk of dementia due to advanced age), and those of very advanced age, as a group, are not excluded from the vote in any Western nation State on account of age. Hence, it is tenuous at best to presume that a compelling societal concern regarding an alleged lack of rationality or mature and informed political reasoning, or mental competence is, in actuality, the reason behind the bar on 16- and 17-year-olds voting in Canada, or in the other Western States where such a bar exists. If there were a compelling societal concern with mental (political) competence, and a firm belief that age is a good proxy for such competence; then one would expect age to be used also at the upper end of the age continuum as an exclusionary criterion when it comes to the vote (i.e. to screen out the very elderly who are at significantly higher risk of suffering impaired cognition than is the case for younger persons).

Further, consider that in more contemporary times, at least in Western democratic States, a demonstration of political competence or rationality (on some sort of qualifying test or interview or any other measure) has not been implemented to determine voter eligibility for persons of any age. One might recall on the latter point the U.S. pre-1965 voting requirement of being politically literate as an alleged proxy for voting competence (though the alleged correlation is surely suspect). The purported political literacy test was used—among other measures—to exclude African-Americans from the vote. The tests administered to African-Americans contained questions

many of which most of the general U.S. population would not have been able to answer (i.e. 'Name one area of authority over state militia reserved exclusively to the [U.S.] states?' [183]. It should be recalled also that the American constitution did *not* contemplate any such precondition as a political literacy test for exercising the right to vote, but instead guaranteed to all its citizens the rights and privileges of citizenship.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States* . . . [14th Amendment] (emphasis added) [184].

The 15th Amendment to the United States constitution ratified in 1870 in the post-civil war period in the U.S., furthermore, prohibited laws which were designed to exclude persons from the vote based on colour, ethnic origin or previous condition of slavery:

> . . . [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 (emphasis added) [185].

The political literacy tests for voter eligibility were finally suspended in 1965 after the passage of a Voting Rights Act that incorporated the language of the 15th Amendment [186].

Note that Caucasian voters in the Southern U.S. states that imposed the so-called literacy tests to determine voter eligibility were given some rudimentary questions and registered regardless of their political literacy level [187]. Thus, at the time the literacy/political/civics knowledge test was allegedly being used to screen all potential voters, it was *not* in reality being used in that manner. There was then, in actuality, no implementation of the test as a purported legitimate measure of the alleged prerequisite qualifications (i.e. political sophistication/competence, or rationality) for accessing the right to vote. If the test administered by the States had in reality been considered a legitimate and vital mechanism for selecting an informed, mature and responsible electorate, the test would have been equitably applied and fairly administered to all regardless of colour, ancestry, age etc. (or at a minimum used to screen all potential adult voters aged 21 and over, the U.S. minimum voting age at the time). Instead, it was used by the southern States in the U.S. exclusively for discriminatory purposes to exclude African-Americans from the vote. Similarly, it is here suggested, age is being used as an alleged proxy for political competence in a discriminatory fashion to exclude minors from the vote and not to secure a competent electorate (i.e. hence age as a proxy for political competence is not applied at the upper end of the age spectrum to exclude politically incompetent citizens of advanced age).

There has always been a tension between the notion of democracy as necessitating universal suffrage for all citizens of the State and discriminatory election laws that obviously conflict with the ideals articulated in democratic constitutions, international human rights declarations and international human rights treaties etc. Ironically, there is a general awareness of the fact that the election laws in Western States are fundamentally inconsistent in certain respects with the foundational notion of democracy; based as it is on equality under the law with respect to the right to vote for all citizens under a particular State's jurisdiction (i.e. universal suffrage). Yet, we carry on as if this were not the case; as if in a 'folie à trois' if you will (a blind eye being turned to this fact by the government, the courts and the people). What is exceedingly detrimental to the fabric of democracy is that huge segments of the citizenry be excluded from the vote (whether based on age, ethnicity or some other status) since there are consequences to pay for such marginalization in terms of the potential for 'alienation of affection' from the State, its values and interests:

> The nature of the interest affected is an important contextual factor to consider . . . *Restricting minors from voting is clearly likely to inhibit their sense that Canadian society is democratic* ***as far as they are concerned*** (emphasis added) [188].
>
> Depriving . . . individuals of their sense of collective identity and membership in the community is unlikely to instill a sense of responsibility and community identity, while the right to participate in voting helps teach democratic values and social responsibility [189].

2. *Young People Suffer the Consequences of Any Adverse Decisions Made by Representatives Seated Without Their Consent*: The fact that being a youth (below age 18 years) is a temporary state does *not* eliminate the wrongful or discriminatory nature of the *absolute* bar against voting below age 18 years. This is the case, in part, since these young people will often have to live with the consequences of decisions made by others of voting age for years after the election; sometimes even after they themselves have reached voting age:

> . . . decisions made in elections have impact far beyond the day or year in which the election takes place. Representatives chosen in elections make decisions on their electorate's behalf for several years, and the decisions made in those years have effects for may years, even decades, to come [190].

At the same time, their vote for certain representatives, had they been permitted to vote at age 16 years, for instance, might have made a difference to the outcome on particular issues (i.e. if youth aged 16–17 years had been permitted to vote and did so as a bloc at the seminal moment; perhaps their voting with the same preferences as other younger voters 18–29 years could have made a difference in regards to government policy choices; see the above discussion concerning the youth vote in the 2008 U.S. presidential election as an example of the potential impact of the youth

vote). Hence, the argument *cannot* be made that the minimum voting age does not disadvantage young persons under age 18, nor place undue burdens upon them, on the reasoning that they, too, will one day have the vote (when they reach age of majority). The citizens in question (the under 18s) must live with any adverse consequences for their group of any particular decision made by elected officials that no segment of their group (i.e. 16- and 17-year-olds) put in place. Thus, youth under 18 years must live with the impact of decision-making by persons whom they did not elect and who they might successfully have kept out of office had they been able to access the vote. One can argue then that there is a disproportionately higher adverse psychological consequence for those who must suffer policy and legislative decisions they consider not in their best interest when these are the handiwork of 'representatives' they had no chance of defeating at the polls (by removing them from office or preventing their election in the first instance through the ballot box).

3. *Being Denied the Vote Based on Age is a Discriminatory Denial of Equal Benefit of the Constitutional Equality Guarantee Which is Not Remedied by the Fact that the Disadvantage Will Eventually Be Removed When the Subject of the Discrimination Reaches the Age of Majority for the Vote:* Justice Lefsrud makes the further point that to suggest that restricting the vote to persons age 18 and over is *non-discriminatory* (as did the Canadian federal government in the Fitzgerald case) would produce the nonsensical result that age as a prohibited unconstitutional ground of discrimination in relation to voting occurs only with a bar against people voting on the basis that they are *too old* (an under-inclusive definition of age):

> The argument that s. 15(1) [the equality guarantee of the *Canadian Charter of Rights and Freedoms*] is not engaged because the Applicants are only temporarily restricted from voting cannot be accepted. *To accept this argument [that the minimum voting age is non-discriminatory] would reduce the enumerated ground of age [age as a prohibited ground of discrimination] to protecting only those who are discriminated against on the basis that they are too old* . . . (emphasis added) [191].

6.2.3 The Constitutional Right to Vote Versus Age Discrimination in Access to the Vote

Let us consider the implication of the constitutional equality guarantee on the right to vote (i.e. the prohibition against discrimination on various grounds; equal benefit of the law etc.). Clearly, any *constitutional* non-discrimination provision such as that relating to age must be inclusive

and include all those along a continuum. To use an analogy, the constitutional protection against discrimination (in the grant of constitutional rights and freedoms) based on colour does *not* apply only to persons of a darker black or other skin colour, but to all regardless of the specifics of their skin pigmentation. In the same way, the Canadian Charter and other democratic constitutional instruments prohibiting age discrimination (i.e. regarding voting) apply to both those over and under age 18 years. Hence, the bar against under 18s voting is discriminatory, for instance, under the section 15(1) *Canadian Charter of Rights and Freedoms* equality guarantee and infringes the section 3 Canadian Charter rights of 'every citizen of Canada' to vote. In any case, as discussed, there is no evidence that the exclusion from the vote of 16- and 17-years-olds in particular is grounded on the desire for competent voters or related to an actual incompetence for the vote in this age group which exceeds, for instance, that in the population of elderly persons who are permitted to vote. Further, the discriminatory infringement appears to be unconstitutionally impermissible (i.e. under s. 1 of the Canadian Charter which permits limitations of Charter rights and freedoms which are prescribed by law and *demonstrably* justified in Canada's democratic and free society and under similar principles in other democratic constitutions). That is, the exclusion from the vote of 16- and 17-years-olds (or of the younger group), as discussed, is *not* in fact based on their alleged level of political maturity, extent of civic engagement, degree of rationality etc. These were found to be but illusory rationales for exclusion of minors from the vote. There is in fact no concern with selecting out only politically sophisticated voters. That is, ill-informed, irrational and mentally disabled adults are quite free to vote in Canada, and at least some, or all of the aforementioned groups are permitted to do so in all other Western democratic States as well. *Thus, age in fact is not being used as a proxy for anything when it comes to restricting access to the vote. Minors are being excluded from the vote simply because they are minors.* Given that an age-based restriction in the vote is, in actuality, *not* correlated to any other consideration, even if it potentially could be (i.e. regarding what is in the best interest of society), there can be no constitutional justification for such an exclusion from the franchise on account solely of age.

Justice Lefsrud, in the Canadian teen voting case [192], rejected the argument that the age restriction on voting is non-discriminatory and does not result in violation of the constitutional guarantee of equality under the law and equal benefit of the law. The fact that the bar relating to age is temporary (as the individual in the normal course will reach age of majority) does *not* eliminate the fact that: (a) the age distinction regarding the right to vote is inconsistent with the s. 15 (1) *Canadian Charter of Rights and Freedom* equality guarantee, and (b) the age restriction, as it does infringe the equality guarantee, needs some sort of independent

justification in order to be constitutional. That justification must be framed to demonstrate why the age restriction on voting is acceptable in a democratic and free society; that is, demonstrate that it is consistent with democratic values. That alleged justification for the minimum voting age requirement is generally framed in terms of young persons under age 18 years (even those 17 years and 364 days old) being of presumed lesser maturity and being allegedly less capable of informed political choice and reasoning.

It bears repeating that age is *not* in fact being used as a proxy for maturity when it comes to the voting rights issue. This is borne out by the fact that older citizens who may, in select instances, be suffering from undiagnosed dementia or other forms of age-related cognitive impairment (not a rare phenomenon in Western States given the prevalence of Alzheimer's and other dementia-related conditions) are *not* routinely barred from the vote on that basis (i.e. due to any significant deficits in rational reasoning and impaired judgment). Hence, it appears that the age-based statutory bar in most Western States on persons under 18 years voting is *unconstitutionally* discriminatory and *not* clearly related to any attempt to ensure a rational, cognitively competent voter. If age were, in reality, being used as a kind of proxy for competence (i.e. political and cognitive competence as well as a mature sense of responsibility regarding voting), the discriminatory age restrictions would have an upper limit as well (i.e. those over a certain very advanced age would be barred from the vote on the same rationale as the restrictions for the under 18 group). This given that the very elderly are more likely to suffer from dementia than the younger population according to the scientific evidence (i.e. the affected elderly individuals are impaired with respect to just those dimensions that are supposedly screened for via the minimum voting age of 18 years or over; rationality, political reasoning ability etc.).

While, Justice Lefsrud does not address this issue, it is entirely unclear why an age restriction on voting for under 18s (who are presumed in Justice Lefsrud's view to be less informed and rational (less cognitively competent) than say 18–70 year olds, should not also apply to the more elderly (those of say of over 70 years) who are more likely to suffer cognitive impairments compared to the younger elderly (aged 60–70 years) according to scientific gerontology studies [193], and perhaps also more likely to be politically incompetent compared to many 16- and 17-year-olds. The absence of an upper age limit on the vote is thus entirely inconsistent with the alleged rationale for voting age restrictions; namely as a purported selection or screening mechanism to better ensure the electorate is comprised of informed rational voters, and to exclude those more likely to be less cognitively and politically competent. The distinction in voting rights based on age *applied only to those under age 18* hence appears to be undemocratic and unconstitutional.

6.2.4 On Whether the Canadian Charter of Rights and Freedoms and the U.S. Constitution Provide Protection Against Age-Based Discrimination in Voting Only for Those Aged 18 Years and Older

It will be recalled that Justice Lefsrud makes the point (in the *Fitzgerald* Alberta teen voting case [194]) that to argue that the bar against voting for under 18s is non-discriminatory would be to argue that the Canadian Charter constitutional protection (under the s. 15 equality guarantee) against age-based discrimination (i.e. in voting) applies only as a protection for those adjudged to be too old to vote. Now, consider that the Supreme Court of Canada in another case, *Sauvé* [195], held that a precedent for an *under-inclusive* prohibition on age discrimination in relation to the vote exists in the 26th Amendment to the U.S. Constitution. (The Sauvé case dealt with the disenfranchisement of persons in penitentiary with sentences of 2 years or more which restriction the Supreme Court of Canada struck down as unconstitutional) That is, in *Sauvé*, the Supreme Court of Canada-erroneously on the view here-contended that the 26th Amendment to the U.S. Constitution prohibits age-based discrimination regarding voting rights *only for those 18 years old and over* (thus implying that age discrimination in respect of voting rights is permissible per the 26th Amendment against those under the age of 18 years):

> . . . Other constraints on the legislature's ability to control the franchise include . . . the Twenty-Sixth Amendment [to the U.S. Constitution], which ***disallows denial "on account of age" greater than 18 years*** (emphasis added) [196].

The 26th Amendment to the Constitution reads as follows:

> **Section 1: 26th Amendment to the U.S. Constitution:**
> *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 (emphasis added) [197].

With respect, this author argues that the Supreme Court of Canada in *Sauvé* erred in its claim that the U.S. Constitution equality guarantee only applies in respect of voting for U.S. citizens aged 18 years and over. The argument here is that the Constitution of the United States guarantees universal suffrage *without any age restriction* to all U.S. citizens (notwithstanding the 26th Amendment reference to the prohibition on discrimination in voting for U.S. citizens 18 years and older). This is evidenced by the following:

1. *The 26th Amendment to the U.S. Constitution does not endorse age discrimination in voting against persons under age 18 years*: The

fact that the 26th Amendment stipulates an express prohibition against aged-based discrimination in voting rights for U.S. citizens 18 years and over does *not* at all imply that discrimination in respect of voting rights against persons *under* age 18 years is constitutional. It merely affirms a right of non-discrimination in the vote for U.S. citizens 18 and over and is silent on the issue in regards to those citizens under age 18. This is evidenced by the fact, for example, that there is *no* federal constitutional barrier to the U.S. federal and state governments setting a minimum voting age of less than 18 years (i.e. 16 years) in federal and state electoral law respectively. This is clear also from the wording of the 9th Amendment to the U.S. Constitution which is key and states:

> The listing of specific rights in the Constitution *does not deny* or disparage other rights retained by the people (emphasis added) [198].

Hence, applying the logic of the 9th Amendment to the voting age issue leads us to the conclusion that the listing of the right of protection against discrimination in the vote for those U.S. citizens 18 years and over (incorporated in the 26th Amendment) 'does not deny or disparage other rights retained by the people' i.e. the right of U.S. citizens *under* age 18 years to universal suffrage. Every U.S. citizen is constitutionally guaranteed the vote (as will be explained in more detail momentarily).

The 26th Amendment is itself then *silent* on the issue of whether age restrictions in the vote may be imposed on U.S. citizens under age 18 years strictly on account of age. Note that the 26th Amendment to the U.S. Constitution was intended to force compliance by the States with the lowering of the voting age from 21 years to 18 years in federal electoral law (that change was effected with an addition to the 1965 federal Voting Rights Act but was held by the U.S. Supreme Court to apply only in respect of federal elections). Hence, the intent in the drafting of the 26th Amendment was to ensure that those aged 18, 19 and 20 years and older, but under 21 years, not be discriminated against in the vote via the State electoral laws (i.e. by any State trying to maintain the long-standing traditional U.S. minimum voting age of 21 years in state elections). This would explain the specific age reference in the 26th Amendment.

Thus, the 26th Amendment does *not* expressly or implicitly authorize discrimination in the vote against U.S. citizens under age 18 years. When considering the specific text of the 26th Amendment; note also that the amendment was intended to ensure, based on a moral imperative, that young people aged 18 years and over, but under 21 years had access to the vote at all electoral levels. This since the age of eligibility for the draft in the U.S. during the Vietnam War was 18 years which meant that 18-, 19-, and 20-year-olds were also at risk of paying the ultimate sacrifice in Vietnam. The amendment's wording: 'The right of citizens of the United States, who are 18 years of age or older, to vote shall not be denied or abridged . . .'

thus was directed to ensuring access to the vote, both at the State and federal level, for young people at risk of the draft (conscription). The intent of the framers of the 26th Amendment to the U.S. Constitution then was *not* then to constitutionalize age discrimination in the vote against U.S. citizens under age 18 years.

The 26th Amendment is thus *not* inconsistent with the universal suffrage guarantees in the U.S. Constitution contained in other Amendments since it is silent as to the issue of age discrimination in voting against under 18s. With respect then, the interpretation of the 26th Amendment to the U.S. Constitution as an endorsement of age-based restriction in the vote for those under age 18 years (as espoused by the majority of the Supreme Court of Canada in *Sauvé*) is incorrect.

2. *Universal suffrage is guaranteed for all U.S. citizens under the U.S. constitution free speech/freedom of expression guarantee (Article 1 of the U.S. constitution):* The First Amendment to the U.S. Constitution, which includes a guarantee of free speech ('Congress may not . . . restrict free speech . . .') [199], may be held to encompass, among other free expression rights, the right to vote. This in that *voting is a form of free speech par excellence*. Voting is a prime vehicle for the people 'speaking' to their government (i.e. freely expressing through the vote their views on the soundness of government and opposition policy/legislative positions). Voting is a manifestation of the free expression of *political opinion*. As such, voting goes to the heart of the type of speech content the First Amendment free speech guarantee was intended in particular to protect. The First Amendment contains no age restriction.
3. *Universal suffrage is guaranteed for all U.S. citizens under the U.S. constitution's equality guarantee (Article 4 and the 14th Amendment)*: The 14th Amendment accords equal rights with no age restriction to *all* U.S. citizens and provides a definition of U.S. citizen as a person born or naturalized in the U.S. and subject to its jurisdiction. Hence, the constitutional right (privilege) of voting deriving from U.S. citizenship is *not* age restricted and cannot be restricted by the States (see the 14th Amendment cited below) or by the Federal government (see Article 4 of the U.S. Constitution cited below):

14th Amendment to the U.S. Constitution-Citizenship Rights (Ratified 1868):
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall make or enforce any law which shall abridge the privileges . . . of citizens of the United States*. (emphasis added) [200].

Article 4, section 2 of the U.S. Constitution
The Citizens of each State shall be entitled to all Privileges . . . of Citizens in the several States (emphasis added) [201].

4. *The U.S. Constitution makes reference to the guarantee of universal suffrage:* The first part of the 15th Amendment to the U.S. Constitution affirms the right of *all* US. citizens to the vote and *stipulates no age restriction* as it refers to: 'The right of *citizens* of the United States [*all persons* born or naturalized in the United States regardless of age, and subject to the jurisdiction thereof as per the definition of citizen in the 14th Amendment] to vote . . .' Hence, the first part of the 15th Amendment affirming the voting rights of *all* U.S. citizens (i.e. regardless of age) is as significant as the prohibition against discrimination in voting based on 'race, color, or previous condition of servitude' specified in the latter part of the clause.

15th Amendment to the U.S. Constitution (Ratified 1870):
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 (emphasis added) [where U.S. citizen is defined as all persons born or naturalized in the United States, and subject to the jurisdiction thereof as per the definition of citizen in the 14th Amendment] [202].

The reference in the 26th Amendment to: 'The right of citizens of the United States, *who are eighteen years of age or older*, to vote . . .' [203] then does *not* negate: (a) the *universal suffrage* guarantee *independent of age* implicitly incorporated in the Article 4 [204] and 14th Amendment [205] equality guarantee (guaranteeing all U.S. citizens (regardless of age) equal access to their constitutional entitlements), nor (b) the universal suffrage constitutional guarantee embodied also in the wording of the first part of the 15th [206] and 19th Amendments [207] which both refer to the right of *all* U.S. citizens to the vote *(The right of citizens of the United States to vote . . .)*. That is, the first part of the 15th and 19th Amendments by their wording *The right of citizens of the United States to vote . . .* affirm universal suffrage, while the wording in the latter part of each provision simply *reinforces* the point that specific voting restrictions which were operative at the time were in fact unconstitutional (restrictions based on ethnic origin/colour and gender respectively).

Similarly, the text of the 26th Amendment [208] merely *emphasizes* that voting rights extend to those 18 and older but under 21 years (as well as to those 21 years and over) as discussed previously. This *highlighting* of the fact that denial of the vote to 18-, 19-, and 20-year-olds was unconstitutional was necessary since the minimum voting age of 21 years was still operative at the time according to *State* election law in several U.S. States. The 26th Amendment, as explained, was stimulated by the fact that the federal electoral law had already been changed to allow for voting at age 18 years, but that alone was not enough to force compliance by the States in incorporating a new minimum voting age of 18 years in the State electoral laws. It should be noted; however, that the change in federal election law allowing the vote at age 18 (and following the ratification of the 26th

Amendment; the same change in State electoral law), in actuality merely gave effect to the fact that 18-year-old U.S. citizens had always been constitutionally entitled to the vote (as was and is the case for all U.S. citizens of any age). Technically then the 26th Amendment did *not* constitutionally confer voting rights on 18-year-old U.S. citizens for the first time; though this is the most common misinterpretation of the amendment. Rather, the 26th Amendment simply highlights a prohibited ground of discrimination; an unconstitutional barrier to the exercise of the vote for U.S. citizens of a certain age (those 18 years and over; and in particular those 18 and over but under 21 who previously had been barred from the vote for many generations under both State and federal electoral law). Ratification of the 26th Amendment meant that those 18 and over but under 21 years would also be permitted under State and federal *statutory* election law to vote; though they had always, in truth, had that *constitutional* right (i.e. as evidenced by the fact, as was discussed, that: (a) Article 4, and the 14th, 15th and 19th Amendments to the U.S. Constitution all refer explicitly or implicitly to a right to the vote for all U.S. citizens that is free from any age-based restriction, and (b) there had been no *constitutional* barrier to lowering the minimum voting age to below 21 years at any point in U.S. history).

The U.S. *statutory election laws* (at the State and federal level) regulating the vote were and are, however, impermissibly under-inclusive from a constitutional point of view insofar as they incorporate age restrictions that absolutely bar persons of a certain age from the vote (just as former statutory U.S. election law was unconstitutional in setting up colour, ethnic origin, political literacy, female gender, lack of property ownership and enslavement as barriers to the vote).

It is important to recognize that that there has never been a constitutional article or Amendment to the U.S. Constitution that mentions an *age restriction* regarding the right to vote (i.e. an article or amendment setting an absolute blanket age of majority for the vote; a minimum voting age of 18 or 21 years, for instance, with no exceptions for any individuals below that age). The 26th Amendment does *not* assign voting rights exclusively to U.S. citizens age 18 years and over. Nor does the 26th Amendment confer suffrage on 18-, 19-, and 20-year-olds for the first time. Rather, the 26th Amendment simply stipulates that age-based discriminatory barriers to the voting rights of U.S. citizens 18 and over are unconstitutional. A similar point was made by the United States Supreme Court in regards to the 15th Amendment [209] which deals with discrimination based on colour, 'race' or previous servitude (and the same point is equally applicable to the 19th Amendment [210] dealing with gender discrimination as a barrier to exercising the vote). In *United States v Reese*, the Supreme Court held that:

> *The Fifteenth Amendment does not confer the right of suffrage upon anyone. It prevents the states, or the United States, however, from giving preference, in this*

> *particular, to one citizen of the United States over another* on account of race, color, or previous condition of servitude (emphasis added) [211].

The United States v Reese majority ruling is flawed in holding that the prohibition against discrimination in the vote based on 'race' (in the 15th Amendment) was a 'new' constitutional right; and that discrimination in the vote based on age was/is constitutional: The *United States v Reese* judgement states that the 15th Amendment does *not* confer voting rights on anyone (i.e. it does not confer suffrage on persons of African-American descent regardless of whether or not they had been previously in servitude). Further, the U.S. Supreme Court majority opinion in *Reese* held that prior to the enactment of the 15th Amendment, there was no constitutional protection against discrimination in voting rights based on color, ethnic origin or prior servitude, and that the 15th Amendment created a *new constitutional* right:

> ***It was as much within the power of a State to exclude citizens of the United States from voting on account of race, and colour, as it was on account of age**, property, or education. **Now it is not**.* If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment, there was no constitutional guaranty against this discrimination: now there is. *It follows that the amendment has invested the citizens of the United States with a **new constitutional right** which is within the protecting power of Congress. **That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude.*** This, under the express provisions of the second section of the amendment, Congress may enforce by 'appropriate legislation' (emphasis added) [212].

Note the reference in the above quote from the *Reese* Supreme Court decision (1875) also to age-based discrimination by the States in the grant of the vote as *allegedly* constitutionally permissible (a notion we are here examining with a skeptical view).

The U.S. Supreme Court in *Reese* does not indicate from whence came the suffrage rights of African-Americans *in the first instance* if not from the U.S. Constitution itself. That is, the Court does not acknowledge that the 14th Amendment (ratified 1868), which pre-dated the Reese decision, in fact confers the right of suffrage in State elections as a right of citizenship on African-Americans equally as well as on all other American citizens. The Court simply alludes to a right not to be discriminated against in the State electoral law based on 'race, color, or previous condition of servitude' if the citizen has all other requisite qualifications for the vote. The right of non-discrimination in the vote, however, presupposes a fundamental underlying right of suffrage at the outset. It is here contended (in opposition to *Reese*) that the suffrage rights of African-Americans were *unconstitutionally* violated *prior to* the enactment of the 15th Amendment (contrary to the claims of the majority U.S. Supreme Court opinion in *Reese* which referred to a 'new' constitutional right conferred by the 15th Amendment).

The denial of the vote based on ethnic origin, colour and prior or current enslavement was thus always open to constitutional challenge based on the equality guarantee embodied in the U.S. Constitution as articulated in Article 4 and in the 14th Amendment which guarantees all constitutional rights and privileges equally to every U.S. citizen. That equality guarantee was applicable to African-Americans who were forcibly brought to the U.S. as they were naturalized U.S. citizens; while their descendants born in the U.S. were U.S. citizens by birth. So, too, the U.S. constitution's equality guarantee was, and is applicable to minors in respect of their right to the vote. Hence, should the vote be granted at 16 at all electoral levels in the U.S., for instance, as per possible future changes in electoral laws, this would merely affirm this age-defined group's pre-existing constitutional right to universal suffrage.

More on the equality guarantees of the U.S. Constitution: The equality guarantee of Article 4 and of the 14th Amendment to the U.S. Constitution then confer to every U.S. citizen the same entitlements (basic rights). Note that, 'The 14th Amendment was a correction to the Dred Scott case (1857) in which the U.S. Supreme Court (USSC) held that no persons of African-American descent could ever claim [U.S.] citizenship.' [213]. The U.S. Supreme Court in *Reese*, to a degree, took a similar tact as it did in Dred Scott, presumably since Article 4 of the U.S. Constitution in fact already guaranteed the vote to African-Americans as U.S. citizens at the Federal level (that is, the USSC in *Reese* referred to the right to non-discrimination in the vote for African-Americans in State elections as per the 15th Amendment to the U.S. Constitution, but did not affirm their pre-existing constitutional right to vote in *State* elections notwithstanding any restrictions in State electoral law). The 14th Amendment reinforced this constitutional right to the vote by making it clear that the right to vote for African-Americans could *not* be subverted at the State level through discriminatory State electoral law or practices.

The equality principle with respect to the vote is applicable also with respect to discrimination against 16- and 17-year-old voters. Hence an age-based barrier to the vote for a resident U.S. citizen, for instance, is an unconstitutional violation of the equality guarantee of Article 4 of the U.S. Constitution and of the 14th Amendment to the Constitution. That equality guarantee embodies reference to fundamental human rights in a democratic society and affirms the human dignity of all citizens such that violations must be legitimate and consistent with democratic values. The U.S. Supreme Court in *Reese*, in contrast, held that the State could legislate *any* qualifications it wished in regards to the grant of the vote (i.e. a minimum voting age of 21) as long as the qualification was applied equally to all in a non-discriminatory manner. That is, for instance, if the citizen was of a requisite age and met all other qualifications (i.e. at that time, this would include being male), he would have to be permitted to vote. The equality guarantee, however, does *not* simply mandate equal application of electoral

law, for instance, but disallows any mechanism which degrades the dignity of the person. Hence, incorporating the discriminatory rule into the electoral law i.e. making a certain age a voting qualification and making that the standard qualification for all citizens (as opposed to having a qualification that is applied in a discriminatory fashion such as a political literacy test that is not fairly administered to African-Americans versus Caucasians) would also be unconstitutional.

6.2.5 Unconstitutional Barriers to the Vote Incorporated in Electoral Law as Purported 'Standard Qualifications' for the Franchise

The U.S. Supreme Court (USSC) in *Reese* [214] seems to hold that as long as: (a) the discriminatory barrier to the vote is explicitly incorporated as a qualification in the statutory election law, and (b) it is applied to all; then the restriction on the vote is permissible and constitutional. This is the case, according to the USSC in *Reese*, despite the fact that: (a) the voting qualification (whatever it may be) stipulated in electoral law excludes U.S. citizens from the vote and (b) even when that purported qualification is based on a characteristic over which the prospective voter has no control i.e. their current age; colour etc. Hence, on the fallacious reasoning of the U.S. Supreme Court in *Reese* had 'race, colour or prior condition of servitude' been explicitly incorporated into State election law, this would have been constitutional as long as all those meeting the qualifications were treated equitably (i.e. if State election law stipulated voting qualifications as including being Caucasian, and never having been in a position of servitude, on the Reese analysis, this would be constitutional as long as all white U.S. citizens meeting these criteria were permitted to vote). This approach clearly violates the equality guarantee (i.e. Article 4 and the 14th Amendment of the U.S. Constitution) which requires that State and federal laws accord *all* U.S. citizens their full constitutional entitlements (thus demonstrating respect for the human dignity and the equal worth of *all* U.S. citizens). Thus making 'age' a voting qualification violates the U.S. constitution equality guarantee just as surely as does making a certain colour or gender a voting qualification. (Note that whether citizenship and/or residency should be qualifications for the vote is an ongoing contentious topic among political scientists). Likewise, it is the case that age-based barriers to the vote, also directly or indirectly, violate the U.S. constitutional equality guarantee in respect of other fundamental rights entitlements guaranteed in the constitution (i.e. free speech, liberty rights, right to free association). The individual States, in fact, never had, nor do they now have, the power to exclude *citizens of the United States* from voting on account of age (or any other discriminatory ground) whether in regards to an age category above or below age 18 years. Of course, such unconstitutional discriminatory

practices persist in the U.S. as in most other Western democracies absent a successful constitutional challenge through the Courts and, hence, create the *illusion* that: (a) all is well with the status quo, and (b) the individual States are acting within their power in excluding certain classes of persons from the vote (i.e. citizens under age 18 years). It is noteworthy; hence, that the Supreme Court of Canada in the Fitzgerald teen voting case (involving two 17-year-olds challenging the age restriction which prevented their voting in public elections) declined to hear the case despite its obvious importance to a significant segment of the Canadian population (youth aged 16 and 17 attempting to access the vote) and for society generally. This author would contend that the case was declined as it was treated as a policy issue for government. Yet, there can be no constitutionally valid justification for a blanket bar against 16 and 17 year olds voting since the restriction violates the s. 15 (1) equality guarantee of the Canadian Charter of Rights and Freedoms and the universal suffrage guarantee articulated in s. 3 of the *Canadian Charter of Rights and Freedoms* [215]. Even if the court held that 16 and 17 year olds would be incompetent voters, this in fact would be irrelevant and would not provide a constitutional justification for their exclusion from the vote given the fact that, as explained, political incompetence is not a factor precluding an adult from voting.

6.2.6 More Commentary on the 26th Amendment to the U.S. Constitution Regarding Voting Rights

As the 26th Amendment to the U.S. Constitution is so often mischaracterized as conferring voting rights on 18-years-olds and prohibiting discrimination based on age in regards to voting rights *only* for those 18 and over, it is useful to recap some of the main points in regards to the amendment covered here:

1. The 26th Amendment does not confer suffrage on 18-year-olds, but rather sets out the right of all persons 18 and over not to be subjected to age discrimination in accessing the vote, while being *silent* on this point in regards to persons under age 18 years. Note that 'constitutional silence' on a particular form of discrimination in accessing a constitutional entitlement does *not* translate to lack of constitutional protection in that regard. This was noted in the Canadian Supreme Court of Canada case *Vriend v Alberta* with respect to discrimination relating to sexual orientation [216]. The equality guarantee in both the Canadian Charter and the U.S. Constitution ensures equal entitlement to fundamental rights such as the vote regardless of whether or not a specific ground of discrimination is listed as an example of a prohibited unconstitutional barrier to that entitlement. The grounds listed are but indicia of prohibited grounds. As the Supreme Court of Canada noted in *Vriend*, the

constitutional equality guarantee is triggered whenever a legislative act makes a distinction that denies a fundamental right to a particular group and undermines their human dignity as a result.

2. Rather than any U.S. constitutional article and/or amendment establishing a minimum voting age, there is instead: (a) specific reference to the grant of the vote to *all* U.S. citizens under the jurisdiction of the U.S. as per the first part of the 15th and 19th Amendments; (b) a guarantee of free expression of political thought, opinion and choice (voting being the quintessential example of this form of free speech) as per Article 1; and (c) a guarantee of basic constitutional rights to all U.S. citizens which neither the State nor the Federal government may breach as per the U.S. Constitution Article 4 and the 14th Amendment.

   Hence, it is an illusion to interpret the 26th Amendment as one establishing 18 years as a minimum voting age, as opposed to simply a constitutional provision prohibiting age-based discrimination in voting for those 18 years and above (while remaining silent as to age-based voting discrimination affecting persons under age 18 year).

3. Although, for instance, only 'colour, race, and previous condition of servitude' are expressly mentioned/listed in the 15th Amendment as prohibited grounds of discrimination in the vote, the 9th Amendment makes it clear that the listing of rights in this way does *not* negate or disparage any other right that U.S. citizens may have by virtue of their citizenship (i.e. the right of all U.S. citizens to universal suffrage regardless of age as per Article 4 and the 14th Amendment which guarantees all constitutional rights to every U.S. citizen).

6.2.7 Ethnic, Color and Gender Discrimination in the Vote: Are They Analogous to Age-Based Restrictions on the Franchise?

It has been argued here that the 26th Amendment to the U.S. Constitution did *not* confer voting rights on 18-, 19-, and 20-year-olds as those rights were *already* embodied in the U.S. Constitution as they are for those citizens under age 18 years as well (universal suffrage being the norm for all Western democratic constitutions). By way of useful comparison regarding this point let us consider the struggle for the voting rights of African-Americans and women who are under U.S. jurisdiction. Before we consider that comparison, however, recall that we have already dealt with the fact that although age is not an immutable characteristic, but rather changes over time; this is *not* a disqualifier for the right of minors to the vote. It is sometimes argued that as age is not an immutable characteristic, the situation of minors with respect to their exclusion from the vote is not at all similar to that of women or African-Americans and *their* struggle

for the vote. This as gender and ethnicity are immutable characteristics of the person. Let us consider gender however. Gender itself is no longer an immutable characteristic for every individual given the advent of sex change operations. Yet, we do not deny the vote on this basis at any point in the individual's physical and psychological transformation as they move from one gender to a new legally recognized and socially perceived opposite gender (though no new constitutional amendment has been added in Canada or the U.S., for instance, to deal with this new reality). New scientific understandings of gender identity, furthermore, have led to the insight that there are inter-sexed individuals who have mixed genders at the physical level, and who may or may not identify with one or the other gender exclusively, and who may sometimes even have a mixed genetic gender profile as well. Hence, lack of immutability of the characteristic upon which the exclusion from the vote is based (i.e. age) is a fallacious rationale for denial of the vote to minors. Let us now move from the previous example (of a non-immutable characteristic and the right to the vote) to consider the parallels between the barriers to youth voting rights and those that blocked the right to the vote for African-Americans who had previously been in servitude.

Note that slavery had been abolished via the 13th Amendment ratified in 1865 (5 years *prior* to the 15th Amendment):

> **13th Amendment to the U.S. Constitution, Section 1 (ratified 1865):**
> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction [217].

The 13th Amendment (ratified 1865) thus affirmed that prior slaves were, from then on, regular U.S. citizens and, by implication, that they had all the *constitutional* rights entitlements of any U.S. citizen. (Slavery-previous to the 13th Amendment-had been abolished by proclamation of President Abe Lincoln in 1863 only in designated U.S. States and in parts of various U.S. States) [218]. Hence, the 15th Amendment, ratified later (1870) in the immediate U.S. post-civil war years, simply served to emphasize that all constitutional rights-*including voting*-were to be accorded to prior slaves (that right not to be infringed by any law created and enforced by the federal government or by the individual State governments). Thus, the prohibition against infringement of voting rights based on 'race, color, or previous condition of servitude' in the 15th Amendment is a response to certain historical facts in the U.S. experience relating to the bringing of Africans as slaves to America and the legacy in terms of persistent voting discrimination against this group at the State level. In fact, the voting rights of African-Americans were *already* guaranteed under the U.S. Constitution prior to the 15th Amendment and implicitly affirmed via the 13th Amendment as well as under the U.S. Constitution's Article 4 and the 14th Amendment to the Constitution.

It should be noted that African slaves were not considered to be U.S. citizens in the late 1800s in the pre-civil war United States of America. Indeed, a United States Supreme Court (USSC) decision in 1857 known as *Dred Scott* held that: (a) African slaves and their dependents were allegedly not U.S. citizens, whether subsequently emancipated or not, since the founding fathers of the country had purportedly not envisioned African slaves as part of the citizenry of the United States, or considered them persons worthy of the rights accorded the white man, and (b) as alleged non-citizens, the African slaves and their dependents were not entitled to the rights normally accorded U.S. citizens under the Constitution [219]. As alleged non-U.S. citizens thus the African slaves, according to the U.S.S.C in *Dred Scott*, would not have been considered entitled to the voting entitlement under Article 4 of the U.S. Constitution that accords equal entitlements to all citizens in America. However, of course, Article 4 makes no reference to African-Americans as non-citizens nor is there any such exclusion anywhere in the U.S. Constitution while the 14th Amendment refuted the proposition of non-citizenship.

Arguably, one could contend that children, too, in the United States, as with slaves, had traditionally been regarded as in a state of servitude in that they also were considered, in effect, as property of the male head of the household in the early 1800s. This is reflected in the fact, for instance, that it was not until 1873 that any case concerning cruelty to children had been brought before a U.S. court and that U.S. child protection agencies evolved. Prior to that date, the male head of household could, for all intents and purposes, do mostly as he wished with his children who were, in practice, considered essentially as chattel [220]. The 13th Amendment might then be considered applicable to children as well; affirming their constitutional rights (including universal suffrage) as free and autonomous persons. Though the drafters may not have intended this at the time; the notion of constitutional instruments as 'living documents' would allow for this broader interpretation.

If the list of prohibited infringements of voting rights were in actuality restricted to 'race, color, or previous condition of servitude' *only*; then the first part of the 15th Amendment would have to be interpreted as something other than a universal right. If that were intended, however, the 15th Amendment then would have had to have been articulated as something other than: 'The right of *citizens* of the United States to vote…' [221] (where 'citizens' is an all-encompassing inclusive category as defined under the 14th Amendment as '*All persons* born or naturalized in the United States, and subject to the jurisdiction thereof') [222]. Likewise, if it were correct to say that *prohibitions* against age-based voting discrimination do *not* include age-based discrimination in voting against persons under age 18, then the right of citizens to vote articulated in the 15th and 19th Amendments would have been put, for instance, as: 'The right of *citizens* of the United States *of age of majority* 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' (or gender). Instead, the text of both the 15th and 19th Amendments begins with an affirmation of universal suffrage for all U.S. citizens (irrespective of age).

Note then that the wording in the first part of the 15th and 19th Amendments is identical: 'The right of citizens of the United States to vote . . .' Thus, both the 15th and 19th Amendments to the U.S. Constitution start with the affirmation of the right of all U.S. citizens to the vote (universal suffrage), and then emphasize that this right may not be abridged, in particular, on the grounds listed in the specific Amendment (though this does *not* imply that the grounds listed are the only such prohibited grounds of discrimination in grant of the vote as evidenced by the affirmation of universal suffrage also incorporated into these Amendments). A general entitlement to all constitutional rights as a U.S. citizen (including the right to vote) was already established, in any case, as discussed, under the privileges and immunities clause of the 14th Amendment and Article 4 of the U.S. Constitution which predate the 15th and 19th Amendments. *It is for the reason that universal suffrage was already established in the U.S. Constitution that the 15th and 19th Amendments could even reference "The right of citizens of the United States to vote" as a general entitlement of all citizens.* Thus, the pre-existing constitutional guarantee of voting rights for U.S. slaves (and prior slaves) and women, both groups being U.S. citizens, were simply explicitly re-affirmed via additional Amendments that were added to *highlight* and reinforce this constitutional entitlement for these categories of persons (the 15th and 19th Amendments respectively).

6.2.8 Misinterpretation of the Wording of the 26th Amendment to the U.S. Constitution on the Issue of Age Discrimination in the Vote

The fact that the 26th Amendment does *not* set a minimum voting age of 18 years is evident in that it would then contradict the *universal suffrage* entitlement incorporated in: (a) the equality clause of the 14th Amendment, and Article 4 of the Constitution, and (b) the reference made to the right of all U.S. citizens to suffrage in the first part of the 15th and 19th Amendments. The 26th Amendment was intended to stress that there existed a more inclusive voting rights entitlement than was being implemented at the time under State electoral laws that specified age 21 years as the minimum eligible voting age. It was *not* intended to restrict the entitlement to universal suffrage established by implication, for instance, under Article 4 and the 14th Amendment. However, the 26th Amendment's wording is misleading creating the erroneous impression that 18 is the

constitutionally set minimum voting age. The 26th Amendment must, however, given the presumed internal consistency of the U.S. Constitution, be interpreted as being consistent with Article 4, the 14th, 15th and 19th Amendments all of which affirm 'The right of citizens of the United States to vote . . .'; that is, universal suffrage. This is the case though the specific wording of the 26th Amendment serves to highlight the prohibition against age-based discrimination in the vote as applied to 18-, 19-, and 20-year-olds (and in regards to those 21 years and over).

It is worthwhile to note that no article of the U.S. Constitution, nor amendment thereto, sets out a *constitutionally based* minimum voting age, or sets a revised minimum voting age. The 26th Amendment does *not* revise the minimum voting age from 21 to 18 years as no constitutional article or amendment set age 21 years as the minimum voting age in the first instance. Rather, the 26th Amendment only references a prohibition against discrimination for a certain group—18- to 20-year olds and older-while remaining silent on the issue of voting rights for the under 18s.

6.3 A Few Additional Comments Regarding the Alberta Teen Voting Rights Case

Let us return briefly to consideration of the Alberta teen voting rights case. Despite the fact that Justice Lesfrud in that case found that barring under 18s (in this case 17-year-olds barred from the vote in municipal and provincial elections in Alberta, Canada) was discriminatory, he still found that this discrimination was constitutional. Predictably, the Justice relied on the notion which holds great cultural sway in Western States that persons *at any age under 18 years* are not politically sophisticated enough, mature or rational enough to vote:

> . . . the voting restrictions are rationally connected to the legislator's goal of ensuring, as much as possible, *that voters are sufficiently mature to cast a rational and informed vote* (emphasis added) [223].
>
> Common sense and inferential reasoning, which must be used when matters cannot be proved with empirical precision . . . dictate that an age-based voting restriction is necessary. It is clear that some restriction is necessary since newborns and young children clearly do not have sufficient maturity to cast a rational and informed vote . . . [224]
>
> *Common sense dictates that setting the restriction at age 18 does not go further than necessary* to *achieve the legislative objective* [i.e. a rational and informed electorate]. In general, *18 year olds* as a group have completed high school and are starting to make their own life decisions . . . it makes sense that they take on the responsibility of voting at the same time as they take on a greater responsibility for the direction of their own lives (emphasis added) [225].
>
> I am aware that age 18 does not coincide for every individual with graduation from high school . . . *.any age restriction will be imperfect in its application* . . . no

> other age relates more closely to this relevant changing point in an individual's life. As such, I am satisfied that 18 is the appropriate age at which to draw the line (emphasis added) [226].

Strikingly, Justice Lefsrud points out some critical chinks in the reasoning allegedly justifying the minimum voting age of 18 years. He notes that there is in fact no empirical evidence that setting the voting age at 18 years has led to a more rational and informed electorate than would otherwise be the case and, *at best*, we can only *speculate* that 'there is a good chance' that this is the case:

> . . . it is impossible to measure the salutary effects that actually result from the voting restrictions, since the restrictions have always been in place . . . *In any case, evaluating whether these voting restrictions have resulted in a rational and informed electorate is impossible. The only salutary effect one can point to is that there is a good chance that all those who are casting votes have sufficient maturity to cast a rational and informed vote.* (emphasis added) [227].

Such evidence would be irrelevant in any case since it is not clear that the exclusion of 16- and 17-year-olds from the vote is the least restrictive way to ensure a competent electorate, or whether it is simply based on a discriminatory attitude toward citizens in this age group that assigns them a perceived status that is something less than full citizenship. (Note that infringements on basic human rights, in order to be constitutional, must not only be in the service of legitimate societal objectives, but also the least restrictive reasonably feasible).

Justice Lefsrud's statement immediately above that: '. . . it is impossible to measure the salutary effects that actually result from the voting restrictions, since the restrictions have always been in place . . .' is not entirely correct. This in that in Canada, as in the United States, the voting age was lowered from 21 to 18 years (as also was the case in other Western democratic States). Hence, we can assess whether the integrity of the electoral system has suffered as a result. That history also provides some instruction on the issue regarding the possible effects of lowering the vote age now from 18 to 16 years thus allowing 16- and 17-year-olds to vote. Lowering the voting age to 18 from 21 years did *not* lead to a democratic crisis, nor produce an electorate distinguishable from that prior to the lowering of the voting age in terms of the perceived level of informed, responsible voting. The question then arises as to whether there is an appreciable difference between 18- and 16-year-olds that would make further lowering of the minimum voting age from age 18 years nonviable in some way given the nature and purpose of the vote in a democracy. There is, in fact, no evidence to suggest that 16- and 17-year-olds would vote in an appreciably less or more responsible fashion than currently do 18-year-olds once they actually had the vote. This would especially be the case, furthermore, if appropriate civics education were to be offered in the high schools regarding the electoral process and citizen responsibilities in that regard. Absent

such evidence, the issue of why not the vote at 16 is fundamentally framed, as Justice Lefsrud has done in the Fitzgerald teen voting case, as a matter of 'drawing the line somewhere' in order that we not get caught up in an anticipated repeated *lowering* of the minimum voting age beyond what is allegedly reasonable. However, in discussing the Chan and Clayton paper [228] previously, we have already noted that the same argument could be applied regarding the minimum voting age of 18 years (i.e. why not a minimum voting age of 21 years when 21-year-old voters are allegedly somewhat more informed and politically sophisticated than are 18-year-olds and so on; until before too long we have set very advanced ages for the minimum voting age where political competence has been compromised by the brain diseases that are more often associated with old age).

Justice Lefsrud, while rejecting the viability and democratic justification for lowering the minimum voting age to 16 years, nevertheless concedes that some under age 18 years who would have been capable of casting a rational and informed vote have been denied that opportunity given the minimum eligible voting age of 18:

> There are clear deleterious effects resulting from the [age-based] voting restrictions. Some individuals under the age of 18, who are sufficiently mature to cast a rational vote and who are interested in voting, are denied the right to vote . . . . *While it is a serious infringement to deny individuals the right to vote when they are sufficiently mature to case a rational and informed vote . . . it is the necessary result of the only reasonable effective means to ensure that there is a good chance that all those who are casting votes are sufficiently mature. Maintaining the integrity of the electoral system is sufficiently important to justify the infringement* (emphasis added) [229].

Justice Lefsrud's rationale for ruling against the Alberta 17-year-old teens in their effort to access the vote hardly seems compelling. Rarely in a democratic State do the courts (such as did Justice Lefsrud's Court) offer judicial justifications for government infringement of fundamental equality rights based on *speculative* benefits to society. Yet, Justice Lefsrud held that though the fundamental equality rights of youth were being violated by the setting of the minimum voting age at 18 years, this was justified and constitutional on the prognostication that *there is a good chance* that it will benefit society (i.e. by *in theory* increasing the likelihood that enfranchisement is guaranteed, *for the most part*, only to those who are 'sufficiently mature'). There is of course, in addition, the thorny, perplexing and critical issue of just what constitutes the indicia of voters with 'sufficient maturity.' Further, Justice Lefsrud then of the Alberta Court of Queen's Bench maintained that the denial of the vote to 16 and 17-year-olds was 'the only reasonable effective means' available to help weed out the immature voter; an effort directed to 'maintaining the integrity of the electoral system.' [230] Interestingly, the Supreme Court of Canada in *Sauvé* [231] had ruled years earlier to the Fitzgerald teen voting rights case, (*Sauvé* concerning the grant of the vote to penitentiary inmates serving sentences of

two years or more), that the integrity of the electoral system suffers when significant chunks of the citizenry are excluded from the vote. The Sauvé ruling was that the denial of the vote to Canadian citizens serving two or more years in penitentiary could *not* be found constitutional under s. 1 the Canadian Charter as a justifiable infringement of a basic right in a free and democratic society:

> Denial of the right to vote to penitentiary inmates undermines the legitimacy of government, the effectiveness of government, and the rule of law. *It curtails the personal rights of the citizen to political expression and participation in the political life of his or her country. It countermands the message that everyone is equally worthy and entitled to respect under the law—that everybody counts* . . . It is more likely to erode respect for the rule of law than to enhance it . . . The government's plea of no demonstrated harm to penitentiary inmates rings hollow when *what is at stake is the denial of the fundamental right of* ***every*** *citizen to vote*. ***When basic political rights are denied, proof of additional harm is not required*** . . . (emphasis added) [232].

> . . . ***The silenced messages cannot be retrieved, and the prospect of someday participating in the political system is cold comfort to those whose rights are denied in the present.*** (emphasis added) [233].

There is no discussion in the Lefsud decision of why the integrity of the electoral system is supposedly strengthened via exclusion of 16- and 17-year-olds from the vote, while it is allegedly weakened (according to the Supreme Court of Canada in *Sauvé*) by the exclusion of penitentiary inmates; a significant proportion of whom are something less than socially mature, politically informed or well educated. Note in the quote from the Supreme Court of Canada in *Sauvé*, that the Court holds that the deprivation of basic political rights such as the right to the vote is considered a significant harm in and of itself such that 'proof of additional harm is not required' (i.e. to establish an illegitimate violation of constitutional rights). This is presumably the case since denial of the vote means *effective* exclusion from society in a fundamental way. The view of the right to vote as foundational to Canadian democracy is reflected in the fact that: (a) every Canadian citizen is guaranteed that right under s. 3 of the *Canadian Charter of Rights and Freedoms,* and (b) the right to vote cannot be suspended by provincial referendum as can various other constitutional rights; most notably the right to be protected from all discriminatory legislation (under the equality guarantee embodied in s.15 (1) of the Canadian Charter). Also of great interest for our purposes is the fact that the Supreme Court of Canada (SCC) in *Sauvé* rejects the argument that a restriction on a citizen's right to vote is somehow made acceptable, in part, based on the fact that it is, for whatever reason, temporary: 'The silenced messages cannot be retrieved, and the prospect of someday participating in the political system is cold comfort to those whose rights are denied in the present.' While the SCC was referring in *Sauvé* to the fact that once having served

their time in penitentiary, these ex-felons would regain their right to suffrage; the point is applicable also to age-based restrictions on the vote. The temporary nature of the exclusion from the vote on account of age does *not* legitimize in any way such a profound violation of fundamental human rights.

The argument here, in contrast to Justice Lefsrud's reasoning, is that that denial of the vote to 16- and 17-year-olds on account of age also *undermines* the integrity of the electoral system and the legitimacy of government. Furthermore the exclusion has little, if anything, to do with attempts to select politically mature or competent voters. This since, as previously discussed, age is not in fact being used as a proxy for political maturity. If age were being so used, we would exclude the very elderly (i.e. 75 years and older) from the vote on the basis that irrational or incompetent voters are more likely in this age group given the higher incidence of dementia and other brain pathology in this population of persons relative to younger persons. Rather, in most every Western democratic State, young people under age 18 years are being discriminated against in regards to the vote on a basis that is not being equitably applied to all citizens. We turn next to the notion of minors as a minority group and the implications of conceptualizing the youth voting rights movement as a human rights struggle as opposed to an initiative directed at changing a governmental discretionary political policy choice regarding minimum voting age.

Part VII
Barriers Coming From Unlikely Sources to Youth's Struggle to Access the Basic Human Right to Suffrage

Chapter 7
The Youth Vote as a Human Right and Resistance from High Profile International and National Human Rights Gatekeepers

7.1 Children as a Minority Group: Reframing the Youth Voting Issue as a Human Rights Struggle

7.1.1 HIV/AIDS Affected Children and Youth and the Implications for Understanding the Youth Vote as a Basic Human Right

Wintersberger makes the point that new sociologies of the child address the issue of 'childhood as a permanent category in any society and . . . children as a population group' and states that: 'In this frame it also makes sense to address children as a minority group' [234]. This is to suggest that 'children' (minors) as a group (though they may not always be a minority in terms of the percentage they comprise of the total population in a society), are distinguished, in large part, by the group's unique characteristics and vulnerabilities just as are groups we traditionally regard as minorities. A useful definition of minority group, for the purposes of this discussion, is as follows:

> . . . *any group of people who because of their physical or cultural characteristics are singled out from others in the society in which they live for differential and unequal treatment,* [based on negative stereotypes, lack of respect for their human dignity and which places them at a disadvantage] and who therefore regard themselves as objects of collective discrimination. The existence of the minority in the society implies the existence of a dominant group with higher social status and greater privileges. Minority status carries with it the exclusion from full participation in the life of the society (emphasis added) [235].

The characterization of children (minors) as a minority group as described above (referring here to the *Convention on the Rights of the Child* definition of children as persons under age 18 years), appears quite a propos in consideration of their exclusion from the vote. The denial of the vote to 16- and 17-year-olds could be considered somewhat of a departure from societal efforts to take initiatives to foster protection of the especially

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vulnerable (since youth then have no opportunity to advocate for their own and other minors' interests through the vote). Note that there is an increasing recognition by the international human rights courts of societal obligations to protect highly vulnerable groups [236]. Indeed:

> Because human rights are legal rights, albeit of constitutional nature, the state's assistance in circumstances of personal vulnerability is not claimed as a charity but as a right to which the individual is entitled by law [237].

Lack of political power is correlated with a higher risk for also suffering other human rights infringements. Exclusion from the vote is thus a most effective vehicle for marginalization of the minority more generally.

A poignant and relevant example of: (a) why young persons under age 18 should be considered a vulnerable minority (according to the definition above), and of (b) the importance of their right to the vote at some set age below the general age of majority is to be found in the context of the HIV/AIDS pandemic issue. Chingore points out that there has been a high rate of mortality from HIV/AIDS in the 20–49 year age bracket in sub-Saharan Africa thus significantly diminishing the pool of eligible voters [238]. Children in sub-Saharan Africa often become the heads of households as their parents or guardians are ill with HIV/AIDS or have already succumbed to the disease. In fact, the number of such 'child-headed households' is rapidly growing in this region where the minimum voting age is 18 years [239]. Chingore further reports that governments in the region are failing to adequately protect the basic rights of both children affected by HIV/AIDS (i.e. such as those now heading households after being orphaned due to the disease), and those themselves infected [240]. She argues that the situation is ripe for a justified lowering of the minimum voting age:

> *In these circumstances there is a strong case for considering enfranchising children to vote* . . . Since political and civil rights most often *precede* economic, social and cultural counterparts, it is justified to treat civil and political rights as a springboard towards socio-economic change where these are easier to obtain, as an alternative enforcement approach to improve the fortunes of these rights. *It therefore becomes a democratic imperative to enfranchise all citizens, notwithstanding the fact that this would foster positive, issue-based voting and representation* (emphasis added) [241].

> *African countries should consider reducing the voting age to at least 16 years of age for two reasons*. First, individuals under the age of eighteen make up a significant percentage of the population and if democracy is based on the will of the people it is important to realise that a significant number of those 'people' have no regular say in the decision of who will govern them. Secondly, many children affected by HIV/AIDS are taking on adult roles and responsibilities and should therefore enjoy the right to vote (emphasis added) [242].

Chingore, while accepting the notion of the alleged *political* immaturity of under 18s as a purportedly valid basis for excluding the young from the vote, instead offers alternative grounds for granting the vote at 16 in South

Africa. First, she suggests that the fact that many HIV/AIDS affected children are assuming all duties as heads-of-households; demonstrates their sufficient maturity overall. Secondly, she maintains that as not all young people, for any variety of reasons, have access to those who can act on their behalf in their best interests (including the fact that some have lost parents to HIV/AIDS and have no other adult to look out for them), lowering the minimum voting age is justified:

> *Children are endangered by a theory that presumes they are completely cared for . . . The right to vote entitles the otherwise disenfranchised to engage in the discussion of how their needs should be met*. The less power a segment of the population has, the more it needs rights or entitlements to protect it from the larger group. Given the unique circumstances caused by HIV/AIDS [;] southern African children need to be considered both as individuals and as members of various communities in order to meet their needs. *Voting is the mechanism for resolving competing needs in a democracy*. That tool is [currently] not available to children [in South Africa] (emphasis added) [243].

> In some cases [,] children need to be counted in the vote both to get their issues on the agenda and to have their perspectives on those issues heard [;] especially where despite the magnitude of the issues that affect them [;] politicians are not addressing their needs appropriately as with the particular environment created by the devastating effects of HIV/AIDS in southern Africa [244].

Chingore is arguing then that children in those parts of Africa ravaged by HIV/AIDS are in a special circumstance that provides a legitimate rationale for lowering of the minimum voting age to 16 years. While this is no doubt true, marginalized and vulnerable minors exist in most every jurisdiction even absent the HIV/AIDS crisis. Hence, lowering of the minimum voting age to 16 years (i.e. to allow these minors to effectively advocate for their own interests through the vote; especially given that many may have no adult advocates in their perusal lives) is a viable rationale for the vote at 16 in any case.

Chingore refers to the 26th Amendment to the U.S. Constitution as an instance in which voting age was lowered for utilitarian reasons relating to a unique circumstance in the country at the time:

> Lowering the voting age because of a special circumstance has been legitimately done in other parts of the world. [In] 1971 the United States ratified the 26th Amendment to the Constitution – granting the right to vote to 18–20 year olds as a result of the Vietnam War when youths were sent to fight without the right to vote [245].

It has been argued here in detail previously that, in fact, the 26th Amendment to the U.S. Constitution did *not* grant voting rights to 18- to 20-year-olds (contrary to Chingore's suggestion). Rather, as discussed here earlier, the 26th Amendment simply affirmed the inherent right to suffrage that this group possessed from the outset, and which was *already* affirmed in the U.S. Constitution. The current author suggests that an over-reliance

on utilitarian arguments for lowering of the minimum voting age (i.e. lowering the minimum voting age as a vehicle for realignment of the power balance in response to a current socio-political condition in the country such as the high loss of eligible voters in the 20–49 year age bracket due to HIV/AIDS, lowering the voting age from 21 to 18 in the U.S. to ensure that youth not become alienated given that 18 was the age of conscription etc.) detracts from the recognition of universal suffrage as a fundamental inherent human right. While such utilitarian rationales for lowering the minimum voting age are very compelling, they are, from a philosophical point of view, *not* necessary to justify a minimum voting age of 16 years. Further, the fact that the vote would afford youth an effective opportunity to advocate on their own behalf is also not a necessary aspect of their right to the vote. This is the case in that citizens are free to vote against their own interests, and many unwittingly do just that.

Note that despite the numbers of youth who are now heads-of-households in South Africa, politicians in the region have been largely unresponsive to the African youth movement for the vote at 16 years. This fact, along with others, illustrates that denial of the vote to 16- and 17-year-olds is, in part, importantly based on an infantilization of this age group that is irrationally based. It must be emphasized here again that while we speak of *granting* the right to vote at age 16; this is a reference exclusively to reform of electoral statutory law. In fact, the denial of the vote to 16- and 17-years-olds represents a stripping of the natural *pre-existing fundamental human right* of 16- and 17-year-olds to the vote (affirmed *also* as a legal right in democratic constitutions and international human rights treaties).

7.2 The Role of International Organizations and Institutions in Stalemating the Youth Voting Rights Movement: An Example

High profile international human rights organizations and institutions and other bodies influential on the international human rights scene have, for the most part, not been particularly helpful to the youth voting rights movement. For instance, though HIV/AIDS has adversely impacted governance (given the fact that it afflicts persons most often in their early adult years), activists dealing with HIV/AIDS as a human rights issue have generally *not* commented on the youth voting rights issue. This despite the fact that youth voting rights as an issue in South Africa is intricately tied up with the HIV/AIDS crisis in the ways that have been explained here in the previous section. Youde points out that:

> . . . instead of predicating their actions simply on public health grounds, advocates for people living with HIV/AIDS . . . increasingly argue that education programs and treatment access are matters of human rights. For example, UNAIDS declares '***The***

> ***risk of HIV infection and its impact feeds on violations of human rights, including discrimination*** against women and marginalized groups . . . *Over the past decade the critical need for strengthening human rights to effectively respond to the epidemic and deal with its effects has become evermore clear* (emphasis added) [246].

Thus, HIV/AIDS activists highlight the fact that human rights violations (such as being forced to live in extreme poverty, lack of access to adequate health care and to medicines, lack of adequate nutrition etc. where the government could do better) bolster the HIV/AIDS epidemic. Though these activists and human rights institutions do *not* address the issue of the youth vote at 16, the fact is that the denial of the vote also puts children and youth affected by HIV/AIDS at greater risk of themselves contracting the disease, succumbing to the disease, being unable to care for affected parents and siblings etc. The denial of the vote to 16- and 17-year-olds, it is here maintained, is one of those key human rights violations then upon which 'the HIV infection feeds' (to use the UNAIDS terminology in the quote immediately above). HIV/AIDS affected youth who are heads-of-households and who are denied the vote (thus eliminating a prime vehicle for having their needs and interests more adequately served) are, to a large extent, effectively ostracized from the society as a result. Youde notes that the International Federation of Red Cross and Red Crescent Societies 'specifically advocates human rights as a cornerstone of its AIDS prevention program' [247]. Yet, none of these international high profile human rights organizations have acknowledged the youth vote at 16 as one available highly effective mechanism for empowering youth in the fight against HIV/AIDS (including in respect of prevention), and in support of their efforts to manage a family life where parents and /or siblings are affected by the disease or have died as a consequence of HIV/AIDS. Clearly, addressing the youth struggle for the vote at 16 in the context of the HIV/AIDS pandemic elucidates the profound human rights dimension of that struggle.

The struggle for the vote at 16 is, in reality, highly compatible with the latest approach to human rights activism regarding HIV/AIDS. That approach is broad and focuses, according to Youde, on the need to reduce poverty and social inequity in combating the pandemic along with education efforts and other measures [248]. Should 16- and 17-year-olds have the vote, they would be in a position to add to the political pressure on government representatives to take action on the issues of poverty and social inequity; both conditions under which young people suffer in disproportionately high numbers; especially if from an HIV/AIDS affected household.

Youde notes that HIV/AIDS activists were able to buttress their human rights campaign by referencing international human rights declarations and human rights treaties [249]. In the same way then reference to *universal suffrage*, for instance, in the *International Covenant on Civil and Political Rights* [250] is relevant to framing the vote at 16 as a key component in

the human rights campaign directed to: (a) preventing HIV/AIDS and better managing the impact of the disease, and (b) preventing further spread (i.e. the grant of the vote at 16, for instance, enhances the chances for addressing the urgent interests and needs of children and youth directly or indirectly affected by HIV/AIDS; hence helping to mitigate the spread of the disease). The vote would allow youth under age 18 years to press government officials to address HIV/AIDS affected youths' issues regarding marginalization and poverty, aborted education, medical needs etc. arising or exacerbated either due to having contracted the disease themselves or because parents or other caretakers are affected. While NGOs such as 'Partners in Health' argue that: 'HIV transmission and human rights abuses are social processes . . . embedded . . . in . . . inequalitarian social structures' [251], these NGOs have, to date, declined to consider the youth vote at 16 issue also in this light. This disregard by human rights NGOs of the vote at 16 movement is occurring even in regions such as South Africa where so many minors are heads-of-households taking on full adult responsibilities as a consequence of their immediate families having been devastated by the disease. In short, the fundamental human rights issue of the vote at 16 is importantly related to the possibilities for better prevention of HIV/AIDS and management of the impacts and potential spread of the HIV/AIDS. The youth voting rights issues is then not a fringe, esoteric concern, but rather inseparable from other profound human rights challenges with which we must deal such as those posed by the HIV/AIDS crisis and the various adverse human rights situations that contribute to the exacerbation of the pandemic.

While we are on the topic of voting and youth taking on adult responsibilities, let us digress briefly from our consideration of the youth vote in the context of the HIV/AIDS crisis. This, to take note of the argument sometimes raised against lowering the minimum voting age that this would allegedly necessitate that young people also be permitted to take on certain other so-called 'adult' responsibilities for which they are not ready; such as military service. This author would counter, however, that the vote at 16 years simply allows a vehicle for the young to have their interests and needs considered seriously by politicians. As discussed, this may be especially important for those young people who do not have, for whatever reason, parents or others in their circle looking out for their best interests. In this way, the young may also have an appreciable impact in shaping public policy as the full citizens that they are. It is not possible, however, that the youth vote would lead to changes in public and social policy that the overwhelming number of voters hold are not in young people's or society's best interest. The grant of the vote, hence, has checks and balances built in. Therefore, it does *not* follow from the grant of the vote to 16- and 17-year-olds that this group of citizens must take on all adult responsibilities (i.e. providing military service etc).

Furthermore, the grant of the vote to 16- and 17-year-olds, as has been explained, is *not* properly based on any presumed 'qualification' pertaining to adequate maturity that this age group allegedly possesses (which would then logically also justify the automatic grant of the right to engage in all other lawful 'adult' activities). As discussed, we apply no requisite standard of being politically informed or competent to adults in grant of the vote. Further, we do not strip the right to vote from those adult citizens who can no longer fulfil the adult 'mature' responsibilities that they did in the past (i.e. the elderly who can no longer earn an income) [252]. Hence, political maturity, or the competence to take on typically adult responsibilities, are *not* in theory or practice correlates of, or preconditions for the right to vote. Rather, the grant of the vote to 16- and 17-year-olds is legitimately based simply on the fact that these youth are full members of the society in question, and able to cast a vote on their own. (The age of 16 years is, of course, quite arbitrary as the minimum voting age as previously discussed. However, lowering the voting age to 16 may potentially give all persons under age 18 years something at least more akin to their own political voice should 16 and 17 year olds consider the issues of the young generally when they case their ballots. This is especially important in that the parents of young people most in need (the poor and marginalized), even if one assumes these parents generally act in their children's best interests, tend to be those who are the *least* likely to vote and thus cannot be a voice for their children through the vote) [253].

Granting the vote to 16- and 17-year-olds based on their inherent basic right to the vote, and in order that they have the opportunity to advocate for themselves through the vote, thus appears quite sensible. There does not appear to be any necessary correlation between grant of the vote at 16 and youth having to take on a range of so-called adult activities that place the young person at risk, or which create unrealistic burdens for them. Democracy, afterall, is founded on the notion that all citizens should have the opportunity to have their concerns registered and the vote is the most effective vehicle for doing so.

Returning now to our previous discussion, it is interesting and relevant to note that certain high profile international NGOs such as 'Amnesty International' and 'Human Rights Watch', as well as the 'World Health Organization', were in fact initially resistant to linking HIV/AIDS to contextual human rights abuses such as discrimination, poverty etc. in their public education campaigns and governmental lobbying efforts for solutions [254]. While this is clearly not generally the case today, vestiges of this original stance—the refusal to consider the HIV/AIDS issue in a broader human rights context linked to other human rights issues—are still evident. Vestiges of the old attitude are still manifest in the refusal of these same NGOs and other international human rights institutions and organizations to acknowledge the link between the spread of HIV/AIDS, inadequate care,

treatment and social services for those affected directly or indirectly on the one hand, and the denial of the vote at 16 on the other. This is the situation despite the increasing numbers of youth below age 18 years significantly shouldering the burden of the nation in dealing with the ramifications of the HIV/AIDS pandemic and/or suffering with the disease themselves.

Recall also that Nelson Mandela in 1994 had, in fact, suggested lowering the voting age in South Africa to 14 years in recognition and appreciation of the significant contribution of youth to the anti-apartheid movement [255]. His proposal was defeated by his ANC party majority. Hence, it does not appear that in most global regions youths' significant contributions to society holds any sway with those in a position to lower the minimum voting age or, in most instances, with the general public either. Clearly, the denial of the vote to 16- and 17-year-olds has little, if anything, to do with level of youth civic engagement in a general sense.

Now consider Brazil; a country that has also framed the HIV/AIDS issue as a human rights question. However, in the instance of Brazil, the 1988 Brazilian democratic constitution lowered the voting age to 16 thus allowing 16- and 17-year-olds to vote on a voluntary basis. With compulsory voting between ages 18 and 70 years in Brazil, and voluntary voting of 16- and 17-year-olds, voter turnout is very high ('in 1994 young voters aged 16 and 17 totaled 2,132,190 making up 2.2 percent of the electorate') [256]. Brazil provides free anti-retroviral drugs for those affected by HIV/AIDS. Furthermore, health is listed as a fundamental human right in the Brazilian Constitution such that the government has a positive duty to the people to take steps to try and ensure its people good health and proper treatment when they are afflicted (i.e. with HIV/AIDS or other diseases or health conditions etc.).

The tremendous success deriving from treating health issues such as HIV/AIDS as a human rights matter in Brazil—impacting as it did also the government's response post-1988 to the HIV/AIDS crisis—likely was significantly impacted also by the fact that 16- and 17-year-olds could vote. The youth vote would have added to the public pressure, for example, for free HIV/AIDS treatment. This in that young people aged 16 and 17 years old also have felt the profound consequences of the HIV/AIDS epidemic; either as direct or indirect victims of the disease, and the ballot box also gave them a voice regarding the problem and possible solutions.

The HIV/AIDS crisis, properly contextualized as *not* just a health issue, but also as a fundamental human rights issue (as it now is by international human rights organizations and many, if not most, national human rights organizations), teaches that civil and political human rights matters cannot be divorced from other social issues. Yet, most democratic societies in the West and elsewhere continue to address child and youth health, education, and other 'protection' and 'provision' issues pertaining to young people as if these were separate and apart from the issue of the youth vote as a basic human right.

7.3 Opposition from Human Rights Organizations Including the United Nations, High Profile NGOs and Individual States to the Youth Voting Rights Struggle

It is important, for the purposes of this analysis of the youth voting rights issue, that it be understood that, to date, international human rights organizations have generally *not* addressed the issue of a minimum voting age. When pressed, the typical response is as follows:

> *To a question about voting age, he* [the then Deputy Executive Director of UNICEF] *said that UNICEF* [substitute for UNICEF here the name of any international high profile human rights organization] *had not taken any position on that issue. While voting age should be determined strictly by national legislation*, he believed that by the age of 18 people were mature enough to vote. With better education and introduction of modern technology, children were increasingly better informed about current events. In fact, many young children were better informed about the political situation in their countries than their parents (emphasis added) [257].

Note that the youth voting age issue is framed by UNICEF, the premiere international human rights organization dedicated to the human rights issues of young people, and an organ of the United Nations, (via its representative in the quote above) as a strictly political one. The UNICEF 2002 Deputy Executive Director stated that voting age should be determined strictly by national legislation. In saying this, the UNICEF representative has taken the youth voting rights issue out of the realm of international human rights concern and placed it squarely into the category of political matter (i.e. to be addressed exclusively as an internal matter by the sovereign State as the State sees fit). UNICEF *is* thus taking a stance on the issue (despite UNICEF protestations to the contrary); namely, the position that: (a) there need not necessarily be an internationally set minimum voting age (such that the democratic entitlement to the vote as a basic human right will not be determined simply by how one fares in the game of geographic Russian roulette), and that (b) the issue of the youth right to the vote is allegedly not a basic human rights concern which falls also within the purview of UNICEF's mandate. This is a very disheartening situation in that, as we have discussed, minimum voting age impacts significantly on the larger human rights situation for persons under age 18 years. Politicians need not, and generally do not take young people's issues—even significant human rights issues—as seriously when these young people have no vote (and especially if they also have no adult advocates). Stalemating by international human rights organizations on the youth voting rights issue has contributed in important ways to a lack of success in most Western and non-Western States, to date, in lowering the voting age to 16 years. This is just as the Clifford Bob model concerning what makes for a successful human rights movement would predict.

Indeed, the United Nations itself has not only failed to support youth trying to gain access to their inherent basic right to the vote, but has, in fact, taken a stance (not well acknowledged) against them. All of this is generally not discussed and the United Nations (as well as UNICEF) has not publicly been challenged on this issue (something this monograph hopes to rectify). The United Nations opposition to lowering of the voting age in any State where youth call for the vote at 16 is evidenced, for instance, in U.N. General Comment Number 25 on the *International Covenant on Civil and Political Rights* (CCPR) Article 25 [258]. The U.N. General Comment begins (at points 1 and 3) by affirming the right to universal suffrage embodied in Article 25 of the CCPR:

> 1. *Article 25 of the Covenant recognizes and protects* ***the right of every citizen*** to take part in the conduct of public affairs, the right *to vote and . . . Whatever form of constitution or government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary* ***to ensure that citizens*** *have an effective opportunity to enjoy the rights it protects. Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant* (emphasis added) [259].

> 3. In contrast with other rights and freedoms recognized by the Covenant (which are ensured to all individuals within the territory and subject to the jurisdiction of the State), ***article 25 protects the rights of "every citizen"***. . . ***No distinctions are permitted between citizens in the enjoyment of these rights*** on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth ***or other status*** (emphasis added) [260].

However, later in the same UN General Comment (at point 4 and 10), the previous affirmation of universal suffrage as a basic human right of *every citizen*, regardless of the form of State government in place, is negated via a limitation that this right to enfranchisement allegedly pertains only to 'every *adult citizen*':

> 4. Any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria. For example, it may be reasonable to require a higher age for election or appointment to particular offices than for exercising *the right to vote,* which *should be available to every* ***adult*** *citizen*. . .The exercise of these rights by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable. For example, established mental incapacity may be a ground for denying a person the right to vote or to hold office (emphasis added) [261].

> 10. *The right to vote at elections and referenda must be established by law and may be subject only to reasonable restrictions, such as setting a minimum age limit for the right to vote. It is unreasonable* to restrict the right to vote on the ground of physical disability or *to impose literacy, educational or property requirements*. Party membership should not be a condition of eligibility to vote, nor a ground of disqualification (emphasis added) [262].

The United Nations General Comment 25 on the CCPR Article 25 thus is fundamentally inconsistent with respect to the rights of enfranchisement.

On the one hand, General Comment 25 on the CCPR affirms universal suffrage for *every* citizen (subject only to objective, reasonable limitations) (see point one and three above of U.N. General Comment 25), and on the other, it affirms the right to vote only for every *adult* citizen (subject to objective and reasonable limitations) (see point 4 above of the General Comment 25). Hence, the foundational right to universal suffrage for *every* citizen *irrespective of age* affirmed at point 1 of the General Comment ('Article 25 of the Covenant recognizes and protects the right of *every citizen* to . . . vote . . .'), and reinforced at point 3 ('In contrast with other rights and freedoms recognized by the Covenant which are ensured to all individuals within the territory and subject to the jurisdiction of the State, Article *25 protects the rights of 'every citizen.*"), has morphed in the General Comment at point 4 into a universal right only for every *adult* citizen. Hence, the text of the General Comment 25 on the CCPR at point 4 essentially endorses a *prohibition* on unconstitutional discrimination in the vote *only in regards to adult citizens*; much as did the Supreme Court of Canada in the Sauvé case [263] previously discussed. This clearly is contrary to the notion of the right to the vote of every citizen guaranteed as foundational in the CCPR (Article 25(b), see below), the *Universal Declaration of Human Rights* and Western democratic constitutions.

To be *internally* consistent (i.e. with point four), point one of the U.N. General Comment 25 on the CCPR (Article 25) would have had to, in the first instance, have affirmed the right of universal suffrage of *only* every *adult* citizen (subject only to objective, reasonable limitations). However, this would have created a contradiction between the General Comment 25 on the CCPR and the *International Covenant on Civil and Political Rights* Article 25(b) which affirms such rights to *every* citizen (without unreasonable limitations or discriminatory, group-based distinctions):

> *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*** *and shall be held by secret ballot,* ***guaranteeing the free expression of the will of the electors*** . . . (emphasis added) [264].

Affirming the right to vote only for *every adult* citizen at point one of UN General Comment 25 on the CCPR would, however, have made it that much more apparent that the U.N. Committee monitoring the CCPR was taking a position in opposition to universal suffrage as articulated in Article 25(b) of the CCPR. That, however, would be a 'politically incorrect' stance, and is one which the committee strains to communicate it eschews when interpreting Article 25 of the CCPR (The Committee states at point 3 of

its General Comment for instance, as mentioned: "In contrast with other rights and freedoms recognized by the Covenant (which are ensured to all individuals within the territory and subject to the jurisdiction of the State), *article 25 [of the CCPR] protects the rights of every citizen*)". There is reference, furthermore, at point 3 of the General Comment to the fact that no distinctions can be made amongst citizens in the enjoyment of these [CCPR] rights [such as the right to vote] on the basis of 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth *or other status*.' Nowhere, in the U.N. General Comment on Article 25 of the CCPR is there any explanation as to why 'age' is not included as an example of an impermissible basis for a distinction in the right to vote under the listing of impermissible distinctions which is made at point 3 of the General Comment 25 and which includes the category 'any other status.'

There is reference in General Comment 25 at point 10 to 'setting a minimum age limit for the right to vote' as an allegedly reasonable limitation. There is simply a presumption then it appears (by the U.N. Committee in drafting the General Comment on CCPR Article 25 concerning the right to vote and other democratic rights) that the status of being below the age of legal majority for the vote (regardless of which age range that covers in a particular State at a specific point in time in the framing and re-framing of the country's electoral rules) is not a distinction barred per the universal suffrage guarantee to every citizen under Article 25(b) of the CCPR. However, this is questionable in part in that Article 25(b) could have been crafted by the framers of the CCPR to refer to a right of suffrage only for adult citizens (just as does the UN committee at point 4 of its General Comment on CCPR Article 25). However, this did *not* occur and, hence, it is erroneous to take it for granted (as does the U.N. Committee monitoring the CCPR) that the age restriction in the vote is acceptable under CCPR Article 25(b). This is especially the case also in that *the age-based distinction in the vote is applied in a discriminatory fashion in Western democratic countries* to citizens legally classed as 'children' (age of legal majority generally is 18 years and higher in Western countries), but *not* applied to citizens legally classed as 'adults' (i.e. there is no exclusion from the vote for citizens over age 70 years who suffer higher rates of dementia than those younger in age).

Note also that at point 10 of the U.N. General Comment 25, literacy tests (presumably this includes also political literacy tests such as were used in the pre-1965 period in some southern States in the U.S.), and educational requirements are classed as 'unreasonable limitations' on the vote amongst others. This is the case though the political literacy tests have purportedly been used as attempts to measure political maturity or competence for the vote with educational achievement also being considered a proxy for such competence. Thus, the U.N. Committee monitoring the

CCPR appears: (a) willing to accept one flawed proxy for political competence (age; even where the age-based restriction *as currently applied* excludes 16- and 17-year-olds from the vote who sometimes are equally or better informed politically than some adult voters, and though the age restriction on the vote is inapplicable to many incompetent adult voters, for instance, of advanced age), and (b) unwilling to accept other proxies for voting competence that may exclude many adults from the vote (i.e. a certain required level of educational achievement which likely correlates positively with general knowledge including political knowledge to some degree etc. but will exclude competent adult voters who may even be well-informed politically though they have lower educational achievement due to lack of opportunity or other reasons. The literacy and educational qualifications criteria for the vote would presumably be applied only to adult citizens with minors excluded at the outset based on age alone). Hence, age as an equally imperfect proxy for political maturity and voting competence—considered as it is an 'unreasonable limitation' on the vote for the elderly—cannot be considered a 'reasonable limitation' under Article 25(b) of the CCPR as applied to minors; particularly in regards to the exclusion from the vote of 16- and 17-year-olds.

The upshot of all this is that the United Nations essentially takes a stance in opposition to the notion of the right to vote as an inherent, universal fundamental human right *insofar as minors, even those aged 16- and 17-years-old, are concerned*. This in that, for instance, General Comment 25 on the CCPR deftly *a priori* sabotages at point 4 the enfranchisement rights of all young people below the State age of majority for the vote. The Committee thus apparently considers it a *foregone conclusion* that the blanket and absolute age-based restriction, as applied to minors, is a reasonable limitation regardless, for instance, of the specific set minimum age for the vote in a particular State, or any other factor such as the *individual* political competency level of minors. The foregoing position (age discrimination in the vote; *but only for minors*) is then espoused by the U.N. committee monitoring the CCPR while simultaneously purporting—at point 1 and 3 of General Comment 25 on the CCPR—to reaffirm the right of *every* citizen to universal suffrage.

There is an urgent need for international human rights organizations such as UNICEF; the United Nations human rights committees such as that monitoring the CCPR; and NGOS such as Amnesty International to support an international minimum voting age that is set below the State general age of majority. The suggestion here is that the minimum voting age be set at 16 years for the reasons discussed previously. Such an international minimum voting age that would be inclusive of at least a segment of the population not legally regarded as adults is required in that without any truly effective political power; young people under age 18 years are particularly susceptible to human rights abuses in any number of areas.

That problem (exclusion from the vote and the associated vulnerability to human rights abuse) is further exacerbated when the young people involved are marginalized for other reasons as well; such as due to their being street children, internally displaced persons, parentless, or members of an ethnic minority that has been historically discriminated against such as the Roma etc. Were an international minimum voting age of 16 stipulated in an international convention (legally binding on the State Parties to the convention), this would *not* be the first time that high profile international human rights bodies and groups have supported an international minimum age in regards to certain rights and responsibilities. For instance, UNICEF supports an international minimum age for marriage of 18 years [265] while UNICEF, Amnesty International and Human Rights Watch, amongst most if not all other international human rights NGOs, support an international minimum age for conscription into the State's armed forces of 18 as stipulated in the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* [266].

In regards to the potential success of a movement for an international minimum voting age of 16 years, it should be noted that international human rights bodies and NGOs have most often professed being neutral on the issue. This is clearly not the case as evidenced by the previously discussed examples (i.e. UNICEF, and the UN committee monitoring the CCPR). Rather, most if not all international human rights organizations and international human rights NGOs have been obstructionist by refusing to designate the minimum voting age issue (the struggle for the vote at 16 years) as a fundamental human rights issue rather than a purely political one. It is time then (if the youth struggle for the vote at 16 is ultimately to achieve success, or at least be adjudged fairly as to its merits) that: (a) these high profile international human rights gatekeepers be publicly 'outed' on this point (their resistance to regarding the youth vote at 16 as a fundamental human rights concern); and (b) their rationales for an alleged neutral, or for an opposing stance be subjected to close scrutiny (as has been the attempt here).

The failure to set international legal standards regarding age for access to, or protection of certain basic human rights has devastating effects on the human rights situation for young people. This is no less the case with respect to the denial of the franchise to 16- and 17-year-olds. The denial of the vote makes young people more vulnerable and dependent on the good graces and charity of lawmakers in regards to their issues. One such example concerns the issue of protection of minors from corporal punishment. Recently, the Supreme Court of Canada, the highest court in Canada; a modern democratic State, held that assault of children aged 2 years to 12 years was constitutional if carried out within certain parameters as to: a) 'reasonable force' (i.e. no blows to the minor's face or head, no use of instruments, no permanent injuries), (b) the intent of 'correction' and (c) implementation of the assault by parents or delegates

of the parent with the exception of teachers [267–269]. Granting youth aged 16 the vote, would offer additional hope of change in the laws permitting corporal punishment of minors given these older youths' contribution to political pressure through the vote in this direction. While we are discussing this example, note that longstanding bans on corporal punishment of minors may not automatically or quickly give rise to progress in other areas of human rights for youth such as the youth vote at 16 (i.e. Sweden has banned corporal punishment of minors for decades but has a minimum voting age of 18, while Austria banned corporal punishment of minors years before granting the vote to 16-year-olds in 2007) [270]. At the same time, the reverse is also true. A voting age of 16 is not an automatic guarantee of other human rights protections for minors where the majority of voters may still oppose those protections i.e. Cuba and Brazil grant the vote to 16-year-olds, yet corporal punishment of minors in those States at home and at school is still lawful under certain conditions [271]. Yet, enfranchisement tends to be one component in the gradual move towards greater human rights protection in general for the vulnerable groups in question.

An example of the adverse human rights consequences of failing to set an international minimum age is provided by the failure of the United Nations to set a specific minimum age for marriage. For instance, rather than setting a universal minimum age for marriage, the 1964 *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* leaves this matter to individual States Parties to the Convention:

> Article 2
>
> *States Parties* to the present Convention *shall take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age,* except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses (emphasis added) [272].

There is a great necessity to set a universal minimum age for marriage at an age where the potential spouse is more likely to be able to give free and informed consent and more probably able to take steps to protect him or herself if need be (though, of course, forced marriage victims are not restricted to those below the age of 18 years). The negative consequences of child marriage for millions of mostly girl children entered into early marriage globally have been well documented by UNICEF and other NGOs. For instance, early marriage (defined as marriage before age 18 years) is linked to: (a) a host of substantially increased risk for health problems including higher risk of HIV/AIDS, of premature pregnancy and associated medical complications, greater susceptibility to domestic violence, birth complications as well as to (b) a higher risk of an aborted education. These are but a few of the prime negative outcomes which are more likely for child brides [273]. Carol Bellamy, in March, 2001 then Executive Director of

UNICEF, referred to the fact that there has been difficulty in prodding the international community into regarding child marriage as a human rights violation:

> It [child marriage] violates their rights to personal freedom and growth. *Yet until now there has been virtually no attempt to examine child marriage as a human rights violation in and of itself.* This is another step in a growing movement to end the silent despair of millions of children, especially girls, who are being shuttered away in lives often full of misery and pain (emphasis added) [274].

Carol Bellamy was referring to the report by UNICEF's Innocenti Centre 'Early marriage: Child spouses' [275] in which UNICEF clearly situated the child marriage issue in a human rights context and was courageous enough to specify age 18 as the proposed universal minimum age for marriage. To date, however, there is still no universal minimum age for marriage set in any international human rights treaty as State Parties too often have refused to cooperate in setting such a minimum that would better ensure the health, safety and basic education of girls in particular. States Parties then are major opponents of a universal minimum marriage age, as are many national and international human rights organizations and advocates that take a non-compromising unqualified cultural relativist stance on the issue. The latter positions are taken then at the expense of the psychological and physical well-being of millions of girls; especially those in developing countries. In the same way, opponents of a national or international minimum age for the vote of 16 years (States in particular), have erroneously, but successfully for the most part, extracted the voting age issue from the human rights context relegating it instead to a political bone of contention only.

Note that the *Convention on the Rights of the Child* (CRC) allows for national origin discrimination with respect to which populations of persons under age 18 years in which countries (States Parties to the Convention) will or will not be protected by some or all of the rights that are embodied in the CRC including participation rights. This in that Article 1 of the Convention allows individual States to define, under national legislation, any age under age 18 years as 'adulthood' with respect to any legal domain [276] i.e. certain States Parties consider children under the age of 18 years of legal marriageable age with the minimum eligible age for marriage varying greatly between States Parties to the CRC (thus exposing the child to the potential associated risks of early marriage). The latter exclusion then of vulnerable persons under the age of 18 years from certain of the rights guarantees of the CRC, depending on what is their home State, is in fact *not* inconsistent with Article 1 of the *Convention on the Rights of the Child* despite the violation of one or more fundamental human rights entailed by that exclusion. Likewise, most Western democratic States have set the *minimum voting age* at 18 years thus prohibiting even older minors from a most effective form of political participation.

Recall also that Article 12 of the CRC which deals with children's (persons under age 18) participation rights, does *not* explicitly refer to the vote though the right to vote is a most foundational human right. It is debatable whether the right to vote can be inferred from Article 12 of the CRC. Further, no universal minimum ages are set in the CRC either for the vote, or for other participation rights (i.e. such as a universal minimum age at which a child might have independent legal standing in a civil judicial proceeding etc.). In short then international human rights bodies such as the United Nations, certain high profile human rights NGOs and various States Parties have obstructed the framing of the minimum voting age question as a basic human rights issue, and rejected the notion of an international minimum voting age. This failure to frame the minimum voting age question as a human rights issue has erroneously legitimized the failure to set a universal minimum voting age through international human rights treaties. This then has led also to lack of State accountability in democratic Western countries for exclusion of even older youth from the political process despite, in many instances, the poor human rights situation of young people in the State in question (i.e. the severely disadvantaged state of Roma minors in several European States, and of large percentages of indigenous children and youth in Canada and the U.S. etc.). In such situations especially, that youth should have a voice through the vote is imperative in order to increase the chances for advancing their broader human rights. Indeed, the General Assembly of the United Nations in a resolution of 17 December, 1991 highlighted the importance of the right to the vote:

> [The resolution] Underscores the significance of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, [incorporating universal suffrage for all citizens] which establish that the authority to govern shall be based on the will of the people, as expressed in periodic and genuine elections . . . [which are] *a necessary and indispensible element of sustained efforts to protect the rights and interests of the governed* and [on] . . . the right to participate in the political system based on common and equal citizenship and *universal franchise* . . . essential for the exercise of the principle of periodic and *genuine* elections (emphasis added) [277].

Hence, 'The [U.N.] General Assembly considers the right to participate in government via elections as essential for the realisation of other human rights' [278]. Yet, at the same time, age discrimination in the vote *as applied to minors*, even when it involves excluding older youth, is on the whole endorsed by the international human rights community, including the U.N., and 16- and 17-year-olds are, as a consequence, generally denied their right to access universal suffrage.

There is still a prevalent attitude which rejects the notion of minors, even older youth, as being entitled to meaningful and effective self-advocacy i.e. through the vote, or through the courts (with standing in their own right rather than through an adult 'next friend' who will file the case in the latter's name with the minor relegated to the status of 'interested party' but without

full party status [279] etc.). The assumption is that the parents or other legal guardians, or failing that the State, will assuredly act in the minor's 'best interests' thus obviating the need for the child's autonomous political or legal participation rights (sadly an unrealistic perspective).

Note in regards to the participation rights of minors set out in international law, that while Article 12 of the *Convention on the Rights of the Child* at least makes a nod to the participation rights of young people under age 18 years, the actual provision in the Convention in that regard is quite weak in that: (a) it establishes no clear incontrovertible specific right of a minor at a particular set age to advance his or her own interests either through the courts as a party *with independent legal standing*, or in an election through an autonomous vote, or even a vote via an adult proxy casting the ballot on the minor's behalf; (b) it defers to national law with respect to the age at which the child may be heard and other procedural rules for the same in administrative or judicial or other types of proceedings (it defers to the State with regard to at what age the child is considered able to formulate and express his or her own views as stipulated in national law such that children below that age may not have an automatic legal right to address the court directly and/or through a representative); and (c) it provides for complete discretion to be exercised by State authorities as to the weight, *if any*, to be assigned to the minor's expressed views in various settings (including judicial settings) on matters directly concerning and affecting the minor:

> States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely on all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child [280].

This assessment regarding weight, if any, to be assigned the child's views, is then dependent, as per Article 12 of the *Convention on the Rights of the Child* (CRC), on the minor's age and alleged level of maturity with no clarity as to the criteria to be used in determining the child's maturity in regard to his or her ability to proffer an opinion to the court on a vital issue impacting, or potentially impacting the minor's life (such as regarding a parental custody issue, protective custody in a foster placement matter, viability of placement in a locked psychiatric facility etc.). What is suggested here then is that Article 12 of the *Convention on the Rights of the Child* (CRC) [281], while an advance in promoting children's participation rights in international law, even if enforced, is not without serious weaknesses and cannot be considered a substitute for the youth vote at 16 years. The potential power of the vote at 16 cannot be underestimated in terms of the chances for youth impact on social policy and an increased regard in society for youth as full citizens. Yet, some scholars who rightly lament the exclusionary aspects of participatory rights *in practice* in representative democracies (in relation to political participation), have erroneously

touted CRC rights under Article 12 as providing expansive participation rights to persons under age 18 years:

> Whilst the right to vote and to participate in public affairs are exclusionary as they are limited to citizens, other participatory rights are not restricted to a particular group . . . *Children's rights are restricted to children, but within that group are non-discriminatory* (emphasis added) [282].

In fact, the non-discrimination article of the *Convention on the Rights of the Child* (Article 2) still allows for discrimination depending on in which nation State the minor happens to find him or herself. That is, if the minor (person under age 18 years) is *not* considered a child *according to national law* for a certain purpose i.e. eligibility for marriage, or engaging in a hard labour job etc., then Article 2 of the CRC affords the minor no protection as a child in that State (thus resulting in national origin discrimination in regards to which minors benefit from the CRC even amongst States Parties to the Convention). As previously explained, Article 1 of the CRC provides for complete deference to the individual State Parties to the CRC with regard to who is or is not considered a child under national law in respect of various matters: 'For the purposes of the present Convention, a child means every human being below the age of 18 years *unless under the law applicable to the child, majority is attained earlier*' [283]. Hence, it may be, for instance, that young children or youths of a certain socio-economic and ethnic class more often find themselves in difficulty (i.e. in an early marriage, or hazardous labour job, or incarcerated as opposed to being channelled in a diversion program if in trouble with the authorities etc.); but this *systemic discrimination* persists for the child, and recourse to the *Convention on the Rights of the Child* is to no avail as they are classed under national law as adults for these purposes [284]. These same young people, even if 16 or 17, furthermore, in almost all instances, have no vote and, hence, little hope of changing the law to improve their human rights situation by exerting political pressure at the polls (nor do they generally have autonomous access to the courts, or the right of self-representation, or the right to sue unless the courts are willing to appoint a guardian-at-law to pursue the matter on behalf of the child or youth which is not always the case).

Note also that not only is the *Convention on the Rights of the Child* (CRC) guarantee of participation rights per Article 12, in may respects, quite weak and narrow, the Convention currently provides no mechanism for communications from individual child complainants, or groups of child complainants, (where child refers to person under age 18 years) regarding violations of their human rights entitlements under the Convention. At present, the extent of implementation of the Convention standards is monitored by the 'Committee on the Rights of the Child' only via periodic State reports, and 'shadow reports' (submitted by U.N. recognized national

and international human rights NGOs that keep track of the actual state of affairs for minors in the State). The Committee makes recommendations as to what needs to change to bring each State into better compliance with their obligations as a State Party to the CRC.

7.4 More on Barriers to the Youth Vote

This author is agreed with Secker [285] that political rights as currently formulated in Western democratic electoral statutory law are exclusionary in many resects (for instance, they generally exclude youth ages 16 and 17 years from the vote as well as non-citizens even if permanent residents of the State). Secker maintains, further, that political democratic participatory rights, by their very nature, are more exclusionary than are other forms of societal participation. While that may be true, there is certainly the possibility of enhancing inclusion in the political process. The focus in this monograph has been on the need to expand political participation rights to be more inclusive of the young through the grant of the vote at 16 years. This then would provide for a construction of political participation rights in electoral law that is more consistent with the human rights based conception of these rights found in democratic constitutions and international human rights law (i.e. universal suffrage as a fundamental human right).

It would appear that adults may be somewhat fearful that the vote at 16 could conceivably usurp, to some extent, adults' political power and dominant social status. There is then a tendency to erroneously consider that the human rights of the minor with respect to the vote are but part and parcel of the suffrage rights of the parent. This then creates the illusion that: (a) young citizens under age 18 years have no *autonomous* inherent right to the vote, and that (b) citizens under age 18 years do not need access to the vote since their parents or legal guardians will vote in their children's best interests on their behalf when the parent casts his or her own vote. Parents do not, of course, for whatever reason, vote in their children's best interests in all instances, and, further, not all minors have parents or other familial legal guardians who could vote on their behalf in any case.

The stalemating of the youth voting rights struggle is reminiscent, in certain respects, of certain other stalled human rights struggles involving minors. For instance, the contemporary rights struggle involving children born of wartime rape is a situation in which the children's fundamental human rights and interests are, to date, also considered by the international human rights community to be subsumed under those of the parent (here specifically the mother). Just as with the exclusion of minors aged 16 and 17 from the vote, high profile human rights gatekeepers (national and international human rights groups and institutions) have prevented

acknowledgement of the *autonomous* human rights of the child of wartime rape:

> Currently there is no recognition in the international children's human rights regime that children born of wartime rape constitute a specific protected category [286].

Carpenter describes the difficulty in having children of war recognized as a vulnerable group in and of themselves entitled to special human rights protections as such. She recounts that some human rights groups who were focused on gender-based violence issues wished the focus to be on the female rape survivors most of whom were adults (but some of whom were, of course, children themselves) to the exclusion of considering babies born of rape as needing to be a special protected group under international human rights law. For instance, UNICEF's Bosnian office failed to release a 2004 report on babies born of wartime rape in the recent Bosnian-Serbian conflict in response to local women's groups that criticized the report as too focused on the babies to the exclusion of the women rape survivors [287]. This thus led to a framing of the issue of children born of wartime rape in the context of sexual violence against women as opposed to in terms of child protection. This was the case despite the fact that these children are, based on what is known in regards to the outcomes for these children globally, 'at risk of infanticide, abandonment, abuse, neglect, discrimination and social exclusion in both conflict and post conflict settings specifically as a result of their biological origins' [288]:

> Yet, despite media and donor concern for children of wartime rape, awareness of their particular vulnerabilities by GBV [gender based violence] specialists, and the presence of a few small organizations lobbying specifically for their rights, *major organizations in the growing advocacy network around "children and armed conflict"—what Bob [Clifford Bob] would define as "gatekeepers" for this issue area—have not adopted these children as a category of concern* (emphasis added) [289].

> *. . . UNICEF concluded by late 2005 that the children's needs should be addressed in the context of programming for the mothers* and that the subject of "children born of war" should be subsumed *not* under UNICEF's child protection mandate but under its emerging work in the area of gender-base violence (emphasis added) [290].

Of course, both categories of victims—the mothers and their babies born of wartime rape—need to have their urgent needs met. Both are highly vulnerable groups entitled, under international human rights and humanitarian law, to special protection and service. Yet, the *autonomous* human rights entitlements of the babies of wartime rape as separate human beings from the mothers are not being duly considered. To a large extent, their issues both as babies born of wartime rape, and at various later stages of their lives, are largely being ignored by the international human rights regime. Such is the case also with the significant, but decidedly

less tragic issue of voting rights for youth. Youth human rights entitlements in regard to suffrage are largely considered a 'non-issue' as their interests are allegedly properly subsumed under the grant of the vote to the adults in their lives (i.e. the parents or other legal guardians). Both examples of largely nonissues in the international human rights regime then involve: (a) firstly, high profile human rights gatekeepers such as UNICEF and others declining to acknowledge the *autonomous* inherent human rights entitlements and victimization of a particular group of minors (i.e. 16- and 17-year-olds denied the vote), and (b) secondly, the failure of these human rights entities to advocate for the autonomous children's human rights entitlements at issue separate and apart from those of the parent.

7.5 The Youth Vote at 16 as a Basic Human Right Versus a 'Special Right'

While the international human rights community has conceded that suffrage is a universal inherent right for all citizens, there is a global consensus (including amongst States Parties to international conventions guaranteeing certain universal civil and political rights), that exclusion from the vote on account of *young* age is legitimate [291].

> In many jurisdictions, the franchise is limited to those over age 18 . . . *and it is not generally or necessarily regarded as a derogation of liberal principles . . . However, there is nothing entailed in either the definition or practice of democracy that requires the electorate to make good choices about who should govern them and what their policies should be.* It is enough that they do the choosing . . . .So why then do we exclude those under the age of 18 from political participation? *If there is nothing entailed in democracy that implies that the electorate must meet some standard of competency to vote, then why exclude the very people who are to be on the receiving end of . . . policies that are being decided now?* (emphasis added) [292].

Notwithstanding the current almost universal minimum voting age of 18 years, there is debate about the issue, and there are a few cracks in the exclusionary wall (i.e. Austria has now lowered the voting age to 16 years for all elections as discussed, certain European States have the vote at 16 for local and/or regional elections and other States are considering lowering the minimum voting age). Interestingly, the political proponents of lowering the voting age have generally been social democratic type parties; presumably since they have the notion (correct or not in any particular instance) that younger voters will be more supportive of their parties:

> In Germany, 6 of the 16 states have, in the past seven years, actually lowered the active voting age for local elections to 16 . . . *There is a clear political dimension to lowering the voting age.* All six German states mentioned . . . were governed at the time of the change by coalitions of Social Democrats . . . and Greens . . . *In*

> *most European countries, the issue has found some support from progressive left-wing and liberal parties*. The Social Democrat leaders in France . . . and the Netherlands . . . endorsed the idea of lowering the voting age at some point in their 2002 election campaigns, although the issue did not make it into the formal party programs. In Flanders [Belgium] the liberal VLD . . ., the green . . . and the progressive splinter Spirit support the change. *The supporters of voting at 16 are mainly found among left-wing, green, and liberal parties, which in Europe have a relatively young electorate* (emphasis added) [293].

Both supporters and opponents of the vote at 16 who are politicians and/or other party faithful are, in part, apparently motivated by the desire to control the electoral outcome. The left is keen to recruit these young potential voters they perceive as partial to the left, and the right is equally keen to exclude them as they are considered more likely to shun more right-leaning parties. However, it should be noted that there is no apparent consistent trend in elections where 16-year-olds have voted that would suggest that this group as a whole generally favours extreme left or extreme right-wing parties [294].

When it comes to the demand for the vote at 16 years, the struggle is generally classed by more right-leaning politicians and other opponents as a demand for a 'new right' (as opposed to a call for access to the pre-existing inherent right to universal suffrage). The vote at 16 is, hence, often mischaracterized by opponents as but an ill-conceived addition to the alleged ever growing pantheon of rights demands by so-called 'special interest' groups. Further, somehow when youth demand the vote at 16, the issue is most often designated as a 'children's rights' issue and, as such, distinct from an issue concerning an inherent universal right belonging to all persons as human beings. Relevant to this point as an example is a paper in which Bentley argues that children have both: (a) derogable rights as children that are *not* necessarily universal, but rather can be culture-specific, and (b) non-derogable rights as human beings that are universal [295]. Bentley classes the right to vote for any segment of the population under age 18 years as belonging to the 'derogable' category of rights. She then goes on to say that while she feels children should more often be regarded as agents and rights holders, she does 'not want to suggest that everyone should have a vote from birth *or that children* [this would include 16- and 17-year-olds under the *Convention on the Rights of the Child* (CRC) definition of child] should be treated as political actors' [296]. She hence backs away from favouring the grant of the vote, for instance, at 16 years and suggests instead only that '. . . the political views of adolescents, at least, should be taken into consideration as *future* members of the electorate (emphasis added)' [297].

Once adults class the franchise as a 'derogable' right *as far as minors are concerned*; entirely dependent on the socio-political context in which the minor is situated, as does Bentley (as opposed to a universal, inherent right), it is not a distant step to a complete denial of the franchise to minors

including youth aged 16 and 17 years (which Bentley does not oppose). Indeed, one might legitimately maintain that 'children's rights' terminology when used to refer to allegedly derogable rights (as opposed to referencing universal inherent human rights which minors as a group also possess) is a fallacious underpinning for arguments in favour of excluding youth from the vote. The current author has argued, in opposition to Bentley, that:

> . . . children's non-derogable or inherent universal human rights are not transformed into derogable children's rights, simply because they have age-specific realisations at various points. *Nor are they transformed into arbitrary derogable rights because they may not be actualised in specific socio-political and cultural contexts*(emphasis added) [298].

The right to suffrage is in fact a *non*-derogable universal right for minors as it is for adults (as implicitly acknowledged in international human rights treaties and democratic constitutions). This is the case though youth of 16 and 17 years have been unjustifiably excluded simply based on *young* age (i.e. a discriminatory application of the age criterion to but one end of the age continuum).

7.6 Examples of High Profile National Organizations and Their Contribution to De-legitimizing the Contemporary Youth Voting Rights Struggle

In what follows immediately below, we consider the role of national organizations one would have expected might have been staunch allies in Western youth's struggle for the vote at 16 years; namely national education associations and civil liberties organizations. It is not possible of course, given space limitations, to review all such organizations' performance in all the Western democratic nations in respect of the youth voting rights issue. Therefore, our discussion will focus, for convenience sake, on the U.S. National Education Association and the U.S. Civil Liberties Association approach to the youth voting rights issue as two high profile cases in point. Nothing in what follows is to be taken as a negation of the valuable contribution that these organizations make to U.S. society in various respects. The discussion is rather restricted to the fact that while both of these prominent and respected organizations were in the forefront of the voting rights movement in other historical periods, they have instead contributed in the period post the 26th Amendment to the U.S. Constitution (which *explicitly* prohibited age discrimination in the vote for persons 18 years and over), to stalemating of the youth struggle for the vote at 16. By this is meant that these organizations have helped shape the societal perception that youth aged 16- and 17-years-old are not cognitively, socio-emotionally and/or politically mature enough to cast a real ballot that actually counts in a U.S. municipal, State or federal election.

The National Education Association has endorsed civics education programs which, in some instances, also involve young people in a 'virtual' vote (mock vote) while, at the same time, failing to support the vote at 16 human rights struggle. While worthwhile in and of themselves, such civics education and simulated voting initiatives should not to be regarded as a legitimate remedy for the demands of youth aged 16- and 17-years-old to their constitutional and fundamental human right to the actual vote. Nor are these initiatives to be regarded as simply a reflection of these organizations taking a neutral stance on the issue of lowering the minimum voting age to 16 years. (The America Civil Liberties Union (ACLU) likewise has not endorsed the youth vote at 16 in any public or school education campaigns on voting rights).

The fact that both these organizations (the NEA and ACLU) were prominent players in the effort to lower the U.S. minimum voting age from 21 to 18 years during the Vietnam era, and that they have offered nothing but deafening silence on the issue of lowering the voting age now to 16 years, sends an unmistakeable message. That message serves to contribute to the *perceived* de-legitimization of the current youth voting rights struggle. Let us turn then to some evidence on just how these two high profile organizations have, over the decades, responded to the struggle of American citizens who are youth to lower the U.S. minimum voting age.

7.6.1 The U.S. National Education Association and the Youth Voting Rights Struggle

Cheng points out that throughout the 1950s and 1960s, there was a contingent, though not large, of youth activists in the United States lobbying for a lowering of the U.S. minimum voting age from 21 to 18 years. She explains that the movement became more organized when it banded together with the National Association for the Advancement of Coloured People, the National Education Association, and the South Christian Leadership Conference which together became known as the 'Youth Franchise Coalition' [299]. Cheng also informs us that representatives from the Youth Franchise Coalition often testified before U.S. Congressional committees arguing for a lowering of the vote from 21 years to 18 years [300]. Hence, the National Education Association (NEA) was one of the prominent groups that no doubt was a significant contributor, along with others, to the success of the youth voting rights movement of the time manifest in the passage of the 26th Amendment. What is also significant is that by 1968, proponents of lowering the U.S. minimum voting age to 18 years (including then the NEA) no longer relied on the fact that young men in the U.S. could be conscripted into the armed forces at age 18 years as a rationale for the lowering of the voting age to 18 years That argument previously having been made on the contention that such a sacrifice should

be acknowledged with the grant of the vote and because service in the armed forces represented a high level of civic engagement and adult responsibility taking. However, the latter argument posed many logical problems that weakened its strength and coherence (i.e. 18-year-old women were not eligible to be drafted into the U.S. armed forces, the qualities necessary for armed combat and compliance to commander orders in a combat situation were not the same as those required for a reflective, deliberative and autonomous vote, and most of the youth who appeared before Congress arguing for the lowering of the U.S. minimum voting age to 18 years were themselves not conscripted into the armed forces, nor would they be for various reasons including deferrals due to education, their serving in the Reserves or due to their medical problems) [301]. Thus, representatives of the Youth Franchise Coalition, and other proponents of the vote at 18 years in the late 1960's early 1970s, turned to other rationales to support their position. These included the contention, supported by empirical evidence, that 18-year-olds of the time were more worldly and politically knowledgeable than past generations at that age due to higher standards of education compared to that available in bygone decades, longer periods of schooling, higher literacy rates and due to their exposure to high quality information through mass media. The argument was succinctly put by Stephen Young, Senator from Ohio during the government debates on the vote at 18 when he stated on 24 July, 1969:

> The real reason 18-year-olds are entitled to the vote is that a youngster of today upon graduation from high school has attained a better education and is better informed than a college graduate of 30 or 40 years ago [302].

The same argument had been articulated forcefully also as early as 1954 by Senator William Langer and others:

> How many voters 50 years ago had gone through high school? How many of them had an opportunity to come to Washington to see and interview their Representatives and Senators in Washington? How many of them had access to radios, televisions and daily newspapers and periodicals, which today keep American voters alerted to political developments, not only in the United States, but also throughout the world? Never in this history of man have the young people been as well prepared to exercise the franchise as they are today [303].

Of course, Senator Langer's contention would be even more strongly supported today given the advent of the internet and 24-h-television and internet news coverage. Others, such as Representative Richard McCarthy, in Congressional debates on lowering the voting age to 18 years, specifically mentioned in 1967, as an arguable basis for the grant of the vote at 18 years, that a U.S. high school education provided good civics education:

> Our 18-, 19-, and 20-year olds are better educated than any citizens of their age have ever been before. *History and social studies courses offered in high school today are finer and have deeper scope than ever before, and youths graduating from high school possess a strong knowledge of political and historical affairs* (emphasis added) [304].

Still others held that contemporary youth were more competent to vote than many adults at the time [305].

What is most relevant in the context of this discussion is *not* whether these claims regarding the purported high standard of U.S. education were correct at the time they were made, or even whether a good education provides a proper rationale for lowering of the minimum voting age. Rather, the point of interest here is that while young people's opportunities for a higher standard of education was being used as a rationale to argue for a lowering of the minimum voting age to 18 years in the 1950s through to the early 1970s era (a rationale that gained extra support in the late 1960s and early 1970s), today the relatively high standard of education (compared to earlier decades) and which includes civics education, and often mock voting lessons and exercises, is simply being used as a substitute for the real thing. That is arguments regarding the alleged high standard of U.S. basic education generally, and high school education in particular, is not being advanced as a rationale for lowering of the minimum voting age (now to 16 years). Further, the National Education Association has *not* played a role in the contemporary struggle to lower the minimum voting age to 16 years by, for instance, advocating for the same before Congress and via national public education campaigns. It is also noteworthy that the NEA has routinely supported democratic candidates over the decades, and that the Democratic Party itself has generally *not* championed the lowering of the minimum voting age to 16 years by making it part of the Party platform, for instance, (though there have been select democratic candidates that have endorsed the idea) [306].

One is naturally led to ask why the National Education Association (NEA) would support lowering the U.S. minimum voting age from 21 to 18 years pre-1971 (i.e. on the basis that young people of age 18 years had a superior education relative to generations of yesteryear in the U.S. and were politically knowledgeable enough to gain the vote, and were morally entitled to the vote), but not publicly support lowering the minimum age to 16 years on the same basis (especially since 24 h television news coverage, the internet, twitter and other such developments have greatly increased the political knowledge and engagement of young people in political movements aimed at affecting social policy such as a global climate change strategy). Of course, we cannot know for certain the reasons for this inconsistency. It may be that the general empathy for American young men serving and sacrificing during the Vietnam War motivated NEA members to endorse the lowering of the minimum voting age to 18 years. Another factor may have been the hope that the voices of 18-, 19-, and 20-year-olds at the ballot box might help end the involvement of the U.S. in the Vietnam War (which involvement came over the years not to be widely supported by large segments of the American public).

The current lack of any obvious public support from the American National Education Association (NEA) for lowering the U.S. minimum

voting age from 18 to 16 years may relate, in part at least, to the fact that 16-year-olds are still normally in high school; while most 18-year-olds have generally already graduated from high school. It is an open question whether or not teachers are keen to have senior high school students aged 16 and 17 years old (their direct clients in a sense) have the power of the vote; especially if these young people might vote en bloc with certain issues in mind (i.e. such as education-relate issues). Afterall, that vote, in combination with others, could ultimately impact school policy, accountability measures adopted by government regarding school level and teacher level performance and the like etc. Ironically, but perhaps not surprisingly then, civics education in the U.S. has included mock votes and learning about American struggles for enfranchisement by African-Americans, indigenous persons of the U.S. and women but, for the most part, assiduously avoided the topic of lowering the U.S. minimum voting age to 16 years. Nor has the issue of the vote at 16 been generally discussed in school civics resources and classes as a pressing matter of fundamental human rights (the same is likely true in the schools of most Western democratic States). Let us examine briefly then one notable U.S. civics education initiative in the schools; namely Kids Voting USA.

7.6.2 Kids Voting USA: A Civics Education Initiative

Kids Voting USA is a major player in the civics education initiative in the U.S. Their programming, as described on the official website, includes the following:

> Kids Voting USA helps students learn first-hand what voting is all about. *Students participate in an authentic voting experience with a ballot that replicates the adult ballot.* Some students go to official polling sites to cast a Kids Voting ballot – right alongside the adults. Some replicate the polling site at their school, vote early or absentee, and some cast ballots online (emphasis added) [307].

In 2008, 1.8 million school children and youth cast ballots in mock elections that were organized by community-based affiliates of Kids Voting USA. in conjunction with school and elected officials [308]. The objective of the Kids Voting USA initiative is described by the organization as 'working to secure the future of democracy by preparing young people to be educated, engaged voters' [309]. The organization contends that:

> This "real life" practice dispels the mysteries of the voting process and reinforces the knowledge and skills gained through Kids Voting classroom activities [310].

The Kids Voting USA organization further maintains that having the school children and youth experience 'an authentic voting experience' [311] is likely to encourage engagement with the vote when these young people reach the age of majority and are eligible for the 'real vote' under electoral law. It is difficult, however, to see how this can be fully achieved

when youth aged 16 and 17 years old are excluded from the vote and adults (i.e. civics education teachers and elected officials) are *not* prepared (for the most part at least) to make this a central theme for vigorous discussion (this information perhaps then leading to lawful civil protest action, lobbying efforts by teachers and students together for the vote at 16 etc.). Can this education then be considered truly authentic given the lack of focus and emphasis on the issue of the vote at 16 years as a central human and democratic rights issue? (The Kids Voting USA classroom lessons on universal suffrage do include, for example, having the students work out a timeline of the grant of the vote in the U.S. to various previously excluded groups, and one of the questions asked in that activity lesson plan is whether any other groups should be granted the vote). Note that the discussion here is in no way intended to suggest that the Kids Voting USA may not be a truly valuable program in many respects. Rather, the issue is why such initiatives have not seriously addressed the matter of the vote at 16 in their materials.

Is it the case that young people learning about their own fundamental human rights, at least in regards to the vote, is somewhat of a taboo topic in the schools? Are parents and teachers in North America concerned that such discussion of youth voting rights may significantly undermine teacher and parental authority over young people not yet of age of majority and generally still legally not emancipated from parents? In this regard, note that Howe and Covell report that in the recent past *certain* family values organizations, parent organizations and more conservative politicians have objected to school children and youth learning about their human rights (i.e. via instruction on the *Convention on the Rights of the Child*). This would seem to support the notion that these groups are often concerned generally about what they perceive as a possible erosion of their authority as a function of young people learning about their basic human rights (which would include then also learning about the basic right of universal suffrage) [312].

Howe and Covell reference a UNICEF global study on children ranking for themselves, after receiving some education on the *Convention on the Rights of the Child*, what they thought were high priority fundamental rights for themselves. These authors comment on the outcome that:

> When educated about the rights of the child, children do *not* become overly demanding and self-centered, giving priority to individual freedom, or the right to self-determination. Most often children are concerned about social rights related to family (emphasis added) [313].

One might argue (as does the current author) that the lack of social activism among more North American 16- and 17-year-olds for the vote at 16 years is a reflection, in part, of a lack of authenticity in civics education programs i.e. a failure to educate youth about their inherent right to the franchise in any meaningful and powerful way; if at all. The question arises as to how one genuinely educates for democracy when the education

initiative is directed to a group that is absolutely barred from the vote. It would seem that the civics education North American youth aged 16 and 17 years (and those younger) are receiving includes the implicit message sent by their exclusion from the vote. For the older youth aged 16 and 17 years in particular (this age group being that spearheading the vote at 16 movement) that message seems to be one of their possessing only a second class citizenship (which is an affront to their human dignity). That second class citizenship due to exclusion from the vote is premised on presumptions (i.e. about their level of maturity, political knowledge, level of civic engagement etc.) based on stereotypical notions about *all* youth aged 16 and 17 years. Yet, similar negative presumptions are not applied to those at or above the age of majority for the vote; even for those who would fail to meet minimal acceptable voting competency standards on the aforementioned criteria. Hence, there is a strong civics education movement both in North America and Europe where 16 and 17 year olds are yet excluded from the vote thus creating a contradiction in the extreme. This contradiction arising from the fact that:

> . . . political participation [which includes voting] represented one of the rights and responsibilities that maintained the legal bond between a citizen and a State. *In most jurisdictions, the rights to vote*, to be elected and to stand for office *were what most clearly distinguished a citizen from an alien. Restrictions on these rights . . . were, therefore, not only discriminatory, but undermined the meaning of citizenship itself* (emphasis added) [314].

Youth in North America and in many other Western democratic States are thus receiving citizenship education in school when all the while their citizenship status is being severely undermined by denial of the vote. Provision of a 'substitute' in civics education class, for even for 16 and 17 year olds, of a mock vote is, of course, not a remedy for this state of affairs nor is it intended to be. Further, the denial of young people's fundamental human right in regards to universal suffrage is not being adequately and thoroughly addressed in North American civics education classes. This though there is great merit in the view that:

> Citizenship should be taken to mean not only legal membership in a state but also a sense of membership. Citizens are people who not only belong to a state but also feel that they belong. *For citizens to be able to feel they belong . . . it is important for them to have rights* ***and to know that they have rights*** (emphasis added) [315].

What has been argued here previously is that age is not in reality being used as a proxy for alleged level of maturity and political knowledge, civic engagement and responsibility to ensure an informed reflective electorate (i.e. we do not concern ourselves with the issue for those of eligible voting age; we reject any possibility of adults voting on behalf of young persons capable of expressing their political preferences and of understanding the

meaning of an election and the vote and interested in the electoral process, we reject the notion of disenfranchising politically incompetent adult voters of any age above age of majority etc). Stereotypical attributions of political immaturity to 16- and 17-year-olds as a group then cannot serve as a legitimate rationale for their exclusion from the vote on account of young age. In any case, even if age were an accurate proxy for the desired qualities in an electorate, and was being used as such, that strategy would produce results that were not proportional to the desired legitimate objective of having a responsible, informed electorate. This in that reliance on a minimum voting age of say 18 years excludes many persons who meet the alleged requisite qualifications of political maturity, responsibility etc. but are yet deprived of the fundamental human right to vote. The use of *young* age as a discriminatory exclusion criterion for voting (i.e. the use of a minimum voting age but no maximum voting age) translates to an unjust blanket bar to the vote for the entire population of minors since they cannot meet that age criterion. There are alternatives available i.e. recall the alternative voting model offered for discussion purposes described previously that included no blanket or absolute bar on the vote based on age or any other criterion.

As has been noted in international human rights case law [316], as well as domestic constitutional law, discrimination must not only serve a pressing vital legitimate societal objective consistent with democratic ideals, but the method employed must be proportionate to achieving the valid societal objective and not be overly restrictive (it must pose the least restrictive burden on the group that is disadvantaged by the discrimination amongst the available alternative strategies). The exclusion of 16- and 17-year-olds from the vote fails on both counts since: (i) age is *not* in reality being used as a proxy for political competence in order that society can ensure an informed responsible electorate, and (ii) the blanket exclusion of 16- and 17-year-olds as a group—thus excluding some in this age group who are competent for the vote—is not proportionate to any alleged legitimate democratic objective given the fundamental nature of the human and legal right being denied.

7.6.3 The American Civil Liberties Union and the U.S. Youth Voting Rights Struggle

The American Civil Liberties Union was one of the prominent national organizations that argued for the vote at age 18 in both State and federal U.S. elections in a seminal U.S. Supreme Court case which addressed that issue amongst others; namely *Oregon v Mitchell* (argued 19 October, 1970 and decided 21 December, 1970) [317]. In *Oregon v Mitchell*, the Attorneys General of the States of Oregon, Texas, Arizona, and Idaho raised a constitutional challenge to various stipulations in the 1970 amendments to the

federal Voting Rights Act [318]. Those provisions under challenge included the requirement to lower the voting age from 21 years to 18 years in federal, *and* state elections. The State plaintiffs argued that the right to regulate State elections rested with the States. The majority opinion of the U.S. Supreme Court in *Oregon v Mitchell* was that—barring any constitutional amendment—Congress did *not* have the power to lower the voting age to 18 years for State and local elections as only the State could set voting qualifications in this regard, but Congress did have the power to do so with respect to federal elections. Given that this result would have created great confusion at the State level with 18-year-olds perhaps being able to vote in some States and not others (the latter where the minimum voting age was still set at 21 years), while all 18-years-olds would be able to vote in federal elections, Congress resolved to address the matter through a constitutional amendment. The 26th amendment to the U.S. Constitution (which stipulated that noone 18 years or above could be denied the vote by the individual States or the federal government on account of age) thus was a response to the potential inconsistencies in voting age requirements that would have been possible under the *Oregon v Mitchell* ruling. (Note that there is nothing in the 26th Amendment prohibiting the individual States from the lowering the voting age to an age *below* age 18 years in State and local elections or the U.S. Congress from lowering the voting age to an age below 18 years in federal elections).

What is of interest for our purposes here, however, is that the American Civil Liberties Union (ACLU) has been silent in response to the youth demand in contemporary times to lower the U.S. minimum voting age from 18 to 16 years. This is in contrast to its vigorous advocacy, for example, for the voting rights of felons who have been disenfranchised due to their criminal involvement and for other disenfranchised groups [319]. The ACLU then is yet another example of a high profile national human rights organization that has not publicly endorsed the youth human rights struggle for the vote at 16. The lack of support from these high profile gatekeepers is, as the Clifford Bob model suggests, a factor in de-legitimization in the public consciousness of the vote at 16 human rights movement.

Part VIII
Re-Examining Alleged Rationales for the Bar Against the Vote for Under 18s

Chapter 8
Unconstitutional Age-Based Discrimination in the Vote Applied on Account of Young Age

8.1 Human Rights and Electoral Law

8.1.1 Electoral Law as an Institutionalized Cultural Norm That De-legitimizes Youth's Human Rights Claim for Suffrage

Electoral law which sets age 18 years as the minimum voting age, implicitly denies universal suffrage as a natural right, and instead situates political power exclusively in the hands of the designated group that has not been excluded from the vote by statutory law. The electoral law as a consequence: (a) becomes not just a legal norm, but also a cultural norm that is widely and erroneously accepted as being empirically based (allegedly keyed to the actual developmental characteristics of all youth of a particular age group i.e. their presumed political competency level) and (b) serves to de-legitimize youth's human rights claim to the vote. In Western democracies, the public manages to tolerate the incongruence between international human rights law which affirms universal suffrage, constitutional law that generally affirms the vote for all citizens, and electoral law which sets out further qualifications for the vote aside from citizenship such as a minimum voting age (Note that a handful of States in fact permit noncitizens to vote if they meet certain other requirements such as a residency requirement or holding the legal status of permanent resident) [320]. What is of note is that once a qualification for the vote, such as the minimum voting age of 18 years, becomes codified in statutory law, it tends to become part of the intractable cultural norm, is taken as a given, and is exceedingly difficult to change. The following comment by Stammers makes a similar point more broadly:

> Social movements construct claims for human rights as part of their challenge to the status quo. To the extent that social movements succeed in facilitating change, new relations and structures of power will then typically become institutionalized and culturally sedimented within a transformed social order [321].

S.C. Grover, *Young People's Human Rights and The Politics of Voting Age*,
Ius Gentium: Comparative Perspectives on Law and Justice 6,
DOI 10.1007/978-90-481-8963-2_8, © Springer Science+Business Media B.V. 2011

Using Stammers perspective then one might consider that once the human rights struggle for the vote at 18 years had succeeded in Western democratic States, the exclusion of all those under 18 years from the vote became 'culturally sedimented' such that the minimum voting age of 18 from then on was erroneously considered to be intrinsically legitimate. A social movement is thus required to challenge this perceived intrinsic validity of the minimum voting age of 18 years. This author is in accord with Stammers that:

> . . . the use of rights discourses seeks to challenge the way in which relations and structures of power are embedded in everyday life . . . by morally validating the identities and perspectives of those oppressed by the existing relations and structures of power. *In this way, the use of rights discourse seeks to create an outlook which challenges dominant ideas of "common sense" and could be said to be seeking to be counter-hegemonic in respect of such power* (emphasis added) [322].

Applying the above analysis to the issue of minimum voting age then, the struggle for the youth vote at 16 may be viewed as a social movement attempting to reorder the status quo power structure using human rights discourse. The movement aims to challenge the 'common sense' presumption du jour that 18 years is the appropriate minimum voting age. Note that prior to 1971 in the U.S., 21 years was considered for decades to be the most sensible minimum voting age (as it was in many other States). This despite the fact that four American States had had no difficulties relying on minimum voting ages below 21 years in their jurisdictions (i.e. Georgia with a minimum voting age requirement of 18 since 1943, Kentucky with a minimum voting age of 18 years since 1955, Alaska with a voting age of 19 and Hawaii with a minimum voting age of 20 since the latter two entered into the union of States in 1959) [323].

It was recognized, at the time, in regards to the movement to lower the voting age from 21 years to 18 in the U.S., that this shift in minimum voting age might mean a potential significant political empowerment of this previously excluded group. This possibility was alluded to by Senator Ted Kennedy in his comments below:

> There could, of course, be an important political dimension to 18 year-old voting . . . enfranchisement of 18 year-olds would add approximately ten million persons to the voting age population in the United States. It would increase the eligible electorate in the nation by slightly more than 8%. *If there were a dominance of anyone [sic], political party among this large new voting population, or among sub-groups within it, there might be an electoral advantage for that party or its candidates. As a result, 18 year-old voting would become a major partisan issue, and would probably not carry in the immediate future* (emphasis added). [324]

Senator Kennedy also in his aforementioned 1970 remarks (on minimum voting age) predicted that if the 18- to 20-year-old new voters turned out to be a voting bloc for a particular party, or its candidates, then the electoral laws might be changed once more at the State level to exclude them. This

clearly would have amounted to a questionable artificial manipulation of the democratic process in the hopes of affecting electoral outcome in a particular direction. One might legitimately query whether, by the same token, the exclusion of 16- and 17-year-olds from the vote in most Western nations is based on the same fear i.e. the fear that these younger voters would vote by overwhelming majority for the more liberal or Democratic Party candidates thus affording that party a significant advantage. Kennedy went on in the aforementioned remarks before the Senate subcommittee to suggest that he felt 'the risk' of en bloc voting for a particular party by 18 to 20 year old voters was 'extremely small' as these youth were like their elders of 'all political persuasions' [325]. In the end, the U.S. minimum voting age was, of course, lowered from 21 years to 18 years via constitutional amendment that was rapidly ratified by the States (the States being keen to avoid the difficulties and potential complexities in electoral law which might develop given the U.S. Supreme Court decision in *Oregon v Mitchell*).

Part of the difficulty the movement for the vote at 16 is facing, as has been here explained, is that the powers that be have obstructed efforts to frame the issue in human rights terms in the first instance. This difficulty is not, however, without any precedent as, for example, the struggle to lower the minimum voting age in the U.S. from 21 years to 18 years illustrates. The latter struggle was also initially fraught with political and sociological debates about the feasibility and merit of the proposition; largely or completely uninformed by human rights considerations. However, in that case high profile national leaders and organizations (including human rights organizations and advocates) ultimately rallied to the cause and came to frame the issue, at least in part, as one involving a fundamental democratic right. For instance, Senator Edward M. Kennedy in the following remarks made in 1970 (before the U.S. Senate subcommittee considering lowering the U.S. minimum voting age from 21 to 18 years) makes reference to voting as a constitutional and basic political right:

> The right to vote is the fundamental political right in our Constitutional system. *It is the cornerstone of all our* ***basic rights***. It guarantees that our democracy will be government of the people and by the people, not just for the people. By securing the right to vote, we help to ensure . . . that our government 'may be a government of laws, and not of men (emphasis added)" [326].

The youth voting rights debate in the halls of power (specifically, the question of what is the appropriate minimum age for the vote) has always, in reality, been primarily focused on politics and considerations of what was presumed to be in the best interest of various political parties (as opposed to being about voting as a basic human right and the definitive marker of full citizenship). Thus, the U.S. congressional debates about a U.S. minimum voting age of 18 often centred on potential voter turnout for 18- to 20-years-olds and its likely impact on electoral outcome, level of civic engagement of youth 18 to 20, whether youth in this age group would

gravitate to more extreme parties etc. and the like. Next we consider further the constitutional basis of youth voting rights.

8.2 Lessons from the Dissenting Justices in *Oregon v Mitchell* on the Constitutional Basis for Youth Voting Rights

It will be recalled that the U.S. Supreme Court case *Oregon v Mitchell* [327] dealt, in part, with amendments to the federal Voting Rights Act which instituted a prohibition against discrimination in the vote on account of age *respecting citizens aged 18 years and over*. This prohibition was held by Congress to be necessary to ensure enforcement by the individual U.S. States of the Equal Protection Clause in section one of the 14th Amendment to the U.S. Constitution. That equal protection clause ensures equal protection and benefit of the laws to all citizens within each State's jurisdiction respectively. The State may only violate this provision if the State has a compelling, legitimate interest which can only be achieved by the violation, and that violation is not overly restrictive in light of the objective to be achieved. Thus, the State must not be motivated by the desire to discriminate and exclude a class of persons from some privilege or benefit per se, but rather by some non-discriminatory, justified objective. Recall that the Equal Protection Clause reads as follows:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States* . . . [The franchise may be considered one of those central "privileges" of citizenship] [328].

Recall that in *Oregon v Mitchell*, the majority ruled that while Congress could regulate age qualifications for voting in *federal* elections (to ensure they were compatible with the Equal Protection Clause of the 14th Amendment), it could *not* do so in regards to the State age qualifications for the vote. We will here, however, focus on the partially dissenting view of Justice Brennan in the case to discover what his opinion teaches in general on the issue of age restrictions on the vote. Justice Brennan held that the issue in the case as regards to the age-based restriction on voting rights was *not* whether the U.S. Congress could regulate State and local elections, or set voter qualifications in regards to these elections, nor whether Congress could set a national minimum voting age for all States. Rather, he maintained that the issue for the U.S. Supreme Court in *Oregon v Mitchell* was instead whether Congress could, through certain of the 1970 Amendments to the federal Voting Rights Act, ensure that the voting rights of citizens 18 and over but under 21 years were not abridged due to age:

> Every State in the Union has conceded by statute that citizens 21 years of age and over are capable of intelligent and responsible exercise of the right to vote. *The single, narrow question presented by these cases is whether Congress was empowered to conclude, as it did, that citizens 18 to 21 years of age are not substantially less able* [to vote].
>
> *We believe there is serious question whether a statute granting the franchise to citizens 21 and over while denying it to those between the ages of 18 and 21 could, in any event, withstand present scrutiny under the Equal Protection Clause*. We would uphold § 302 [of the Voting Rights Amendments prohibiting age discrimination in the vote against citizens 18 years and over] as a valid exercise of congressional power under . . . the Fourteenth Amendment. [329]

Justice Brennan went on, in his dissenting opinion, to comment that:

> *. . . the right to vote has long been recognized as a 'fundamental political right, because preservative of all rights'*. . . Any unjustified discrimination in determining who may participate in political affairs . . . undermines the legitimacy of representative government (emphasis added) [330].

Justice Brennan stressed that when an exclusion of a class of citizens from the vote faced a constitutional challenge under the Equal Protection Clause of the 14th Amendment, it was *not* sufficient that the Court consider whether the exclusion furthered a 'permissible State interest.' This was so in that the standard was much higher for such a restriction on a citizen's fundamental constitutional right; namely whether the exclusion furthered a permissible *and* compelling State interest in the least restrictive way possible [331]. The States argued that the exclusion of 18- to 20-years-olds (as well as younger citizens) from the vote was in the interest of securing a mature and responsible electorate. Justice Brennan contended that the Court must ensure that the exclusion of the 18- to 20-year-olds from the vote was indeed rationally connected to a legitimate objective; namely ensuring an intelligent and responsible electorate (the Court being in agreement that ensuring a responsible electorate was a legitimate State interest), and that the exclusion was *not* simply a vehicle for manipulating the actual electoral result:

> In the present cases, the States justify exclusion of 18- to 21-year-olds from the voting rolls solely on the basis of the States' interests in promoting intelligent and responsible exercise of the franchise . . . There is no reason to question the legitimacy and importance of these interests. *But standards of intelligence and responsibility, however defined, may permissibly be applied only to the means whereby a prospective voter determines how to exercise his choice, and not to the actual choice itself. Were it otherwise, such standards could all too easily serve as mere epithets designed to cloak the exclusion of a class of voters simply because of the way they might vote . . . Such a state purpose is, of course, constitutionally impermissible. . . We must, therefore, examine with particular care the asserted connection between age limitations and the admittedly laudable state purpose to further intelligent and responsible voting* (emphasis added) [332].

Let us consider further Justice Brennan's admonition that it is 'constitutionally impermissible' that the age limitations on the vote be directed to

excluding citizens because of the way they are likely to vote. In this regard, consider that there is some empirical evidence, as previously discussed, that young voters generally (regardless of Western democratic State) are less inclined to support conservative parties, and more inclined to favour social democratic parties. This was certainly borne out in the 2008 U.S. Presidential election where the vast majority of young voters aged 18 years to 29 voted for Obama. Hence, the Supreme Court of the United States in *Oregon v Mitchell* in 1970 was rightfully cautious in considering whether the exclusion pre-1971 in the United States of 18- to 20-year-olds from the vote was in fact motivated by concern over how they would vote, or instead by some legitimate societal interest. The question the Court set itself in *Oregon v Mitchell* then was whether there was any rational basis for excluding 18- to 20-year-olds from the vote based on the purported rationale the States advanced:

> Every State in the Union has concluded for itself that citizens 21 years of age and over are capable of responsible and intelligent voting. *Accepting this judgment, there remains the question whether citizens 18 to 21 years of age may fairly be said to be less able* (emphasis added) [333].

If the same voting rights standard is not applied to all citizens in the attempt to achieve the same alleged legitimate objective (an intelligent responsible electorate), then the exclusion of a particular age group from the vote is clearly an indefensible violation of constitutional and international human rights law. Justice Brennan in the aforementioned case maintained that there was no evidence presented by the States that 18- to 20-year-olds would likely vote in a less responsible and intelligent way than do those 21 years and above:

> No State seeking to uphold its denial of the franchise to 18-year-olds has adduced anything beyond the mere difference in age [334].

Indeed, in *Oregon v Mitchell,* there was no hard evidence presented to the Court by opponents of lowering the voting age to 18 on the alleged lack of political competence of 18- to 20-year-olds to exercise the vote responsibly. However, there was evidence advanced by proponents of the vote at 18 derived from the long experience in the four U.S. States that had a minimum voting age below age 21 years; two of them with a voting eligibility age of 18 years:

> . . . more important is the uniform experience of those States – Georgia since 1943, and Kentucky since 1955 – that have permitted 18-year-olds to vote . . . We have not been directed to a word of testimony or other evidence that would indicate either that 18-year-olds in those States have voted any less intelligently and responsibly than their elders, or that there is any reasonable ground for belief that 18-year-olds in other States are less able than those in Georgia and Kentucky. On the other hand, every person who spoke to the issue in either the House or Senate was agreed that 18-year-olds . . . in both States were at least as interested, able, and responsible in voting as were their elders.

> *In short, we are faced with an admitted restriction upon the franchise, supported only by bare assertions and long practice* (emphasis added) [335].

> Every elected Representative from those States who spoke to the issue agreed that, as Senator Talmadge stated, 'young people [in these States] have made the sophisticated decisions and have assumed the mature responsibilities of voting. Their performance has exceeded the greatest hopes and expectations.

> In sum, Congress had ample evidence upon which it could have based the conclusion that exclusion of citizens 18 to 21 years of age from the franchise is wholly unnecessary to promote any legitimate interest the States may have in assuring intelligent and responsible voting . . . *If discrimination is unnecessary to promote any legitimate state interest, it is plainly unconstitutional under the Equal Protection Clause, and Congress has ample power to forbid it under § 5 of the Fourteenth Amendment* (emphasis added) [336].

In this monograph, the assertion has been that even if 16- and 17-year-olds were likely to be less or as responsible and competent in regards to voting (supposing we could assess such factors accurately) as are those 18 years old (or older), this would be irrelevant to the issue of their exclusion from the vote. This is the case in that the same standard (intelligent and responsible voting) is *not* applied to citizens 18 years and older to determine voter eligibility. Hence, the age-based limitation on the vote is unconstitutionally discriminatory directed as it is only against those of young age (for instance we have no maximum voting age to exclude incompetent older voters). Further, it is apparent then that any societal interest in achieving 'responsible' and 'intelligent' voting is *not* the underlying factor for the exclusion of 16- and 17-year-olds from the vote in Western democratic States. It is noteworthy; nevertheless, that there have been States that have shorter and longer term experience with the vote at age 16 (for example, the Isle of Man, Jersey, Austria, Brazil (voluntary vote at 16), the Seychelles), and there has been no evidence adduced that this has in any way created electoral problems or de-legitimized the electoral process in the opinion of the general public.

In *Oregon v Mitchell*, the federal government submitted that 18- to 20-year-olds were competent to vote at the local, State and federal level and should no longer be excluded from the vote. The States, in contrast, maintained that this age group (18- to 20-year-olds) was not competent for the vote at the local and State levels (the electoral levels over which the States had jurisdiction). The issue then for Justice Brennan was whether the States had run afoul of the Equal Protection Clause of the 14th Amendment by excluding 18- to 20-year-olds from the vote in local and State elections. In his view, the 14th Amendment set out a standard in respect of all statutory powers of the State—including legislation pertaining to voter qualifications—which demanded equal protection and benefit of the law for all citizens. Justice Brennan and three other partially dissenting justices in the case held thus that Congress was authorized constitutionally to set a more inclusive national voting age which permitted the vote at 18 years for

all elections (though States would be free to make the State voter qualifications even more inclusive by lowering the minimum voting age even further (i.e. below 18 years) if they wished to do so). In this, Justice Brennan then dissented from the majority opinion which held that Congress could *not* constitutionally interfere with the States' setting of voter qualifications in local and State elections.

There are, it is contended here, profound implications that can be deduced from the fact that the States ultimately quickly ratified the 26th Amendment shortly after *Oregon v Mitchell* [337] was decided. While it may be true that the States wished to avoid the electoral complications that would arise if they maintained the State minimum voting age of 21 years (with the exception of the specific four previously mentioned States that already had minimum voting ages ranging from 18 to 20 years) compared to the voting age in federal elections of 18 years, this is not the whole story. We must consider that in ratifying the 26th Amendment (thus agreeing to permit voting by 18- to 20-year-olds in local and State elections), if we were to accept the States' arguments in *Oregon v Mitchell*, the States were now vetting the grant of the vote to allegedly incompetent voters. It hardly seems reasonable to assume that the States were willing, for the sake simply of reducing electoral complications, to permit the inclusion of citizens (those aged 18–20) they viewed as incompetent for the vote. (Those electoral complications would have arisen due to the diverse age requirements for the vote that would have been possible across States and for various levels of elections from local to federal given the *Oregon v Mitchell* ruling that exempted States from federal regulation which set the minimum voting age at 18 years). It seems rather more plausible that the tide of public opinion had shifted as regards the vote at 18 years as a result of the social movement supported by high profile national organizations and selected politicians in favour of lowering the minimum voting age to 18. The exclusion of 18- to 20-year-olds from the vote came thus to be viewed by the general public at the time of *Oregon v Mitchell* as a profound injustice. The States then had no viable politically popular alternative but to follow the federal lead, and did so by urging and ratifying a constitutional amendment (the 26th) which set the national voting age at *no higher* than 18 years for all elections at the federal, State and local level.

Justice Brennan's analysis of the facts in *Oregon v Mitchell* reveals (perhaps unintentionally) that the exclusion of 18- to 20-year-olds from the vote was *not* genuinely based on a concern for having an intelligent and responsible electorate. Had it been so, there would have been some consistent hard evidence upon which the States were relying to suggest that 18-year-old voters were less responsible than 21-year-old voters (i.e. in the several U.S. States that had a voting age below 21 already). Further, there would have been State initiatives in place to help increase the likelihood that only those aged those 21 years and over who were competent to vote in an intelligent and responsible way (whatever that might mean) were in fact eligible

to vote. Clearly, this was not the case. Hence, one might logically infer that the exclusion of 18- to 20-year-olds from the vote was, in reality, based on the desire to maintain the power status quo. Perhaps there was a fear that voters aged 18–20 might wield some unseemly significant political power as a voting bloc in combination with other younger voters aged 21 and over but under 30 say (as suggested by Edward Kennedy [338] was in fact not inconceivable and a concern of opponents of the vote at 18).

It may be that our socially constructed notions of 16- and 17-year-olds as incompetent to vote are as misguided as were such notions in regards to 18- to 20-year-olds. Notwithstanding that possibility, however, as has here been stressed, the exclusion is not in reality based on any concern for ensuring competent voters (i.e. ensuring that citizens who vote will do so with a reflective, independent mind in a responsible manner for the general good). Indeed, some empirical data taken from polling voters in the U.S. seems to suggest that a great many adult voters (aged 18 years and over) are quite irrational when it comes to the basis for their vote (i.e. casting their ballot in the absence of a sound understanding of economic policy issues, their government or basic economic concepts) [339].

8.3 The Impact of Electoral Law on the Interests and Rights of Young People

It is often assumed that Western democracies generally prioritize the rights and interests of children and youth. However, this would *not* appear to be the case for undoubtedly a number of interrelated reasons. The exclusion of under 18s from the vote may be one contributor to this state of affairs. Consider, for example, that though seniors may not consistently vote as a homogeneous voting bloc without *any* regard for the interests of the young, it seems safe to say that matters affecting those under the age of majority are likely to be of considerably less concern to seniors than those that directly affect their own age group. This then is likely reflected in the seniors' vote. This has tremendous impact upon the welfare of young people in that seniors make up a significant percentage of the voting public in Western democracies. Hinrichs provides some useful comparative data which reveals some intergenerational gaps in social justice which, along with other factors, makes the minimum voting age issue a matter of concern:

> . . . in six out of fifteen traditional OECD countries for which comparable data are available, relative poverty (less than 50% of median adjusted disposable income) of the population below age 18 exceeds that of those above age 65 (Canada, Germany, Italy, the Netherlands, U.K. and USA). Moreover, in eleven out of these fifteen countries an opposite development in economic well-being occurred between the mid-1980s and mid-1990s: either there was a smaller increase in the poverty rates of the elderly than among minors (or a decline was larger for the first group), or

> poverty of children and adolescents rose while it fell for the elderly population. The countries where this divergent development took place are Austria, Canada, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Sweden, and the U.K. [340].

Along with these trends is the fact that the population is aging in these Western democratic countries, and the political strength of the elderly is thus ever increasing [341] (especially as older voters tend to have higher turnout than younger voters along most of the age continuum). There is thus, as Hinrichs notes, a problem with inter-generational inequity. The issue arises then as to whether those under the age of majority might fare better in society than they currently do if there were a less restrictive age-based criterion for voting eligibility, and perhaps also proxy voting on behalf of the very young. Hinrichs points out that:

> *The history of suffrage is one of extension with (young) age as the only remaining [universal] criterion for exclusion.* Literacy, land ownership, respectability, paying taxes (sometimes a special poll tax), or not being dependent on poor relief, diminished with requirements for the right to vote of adult *men* . . .. Today, apart from alien residents, minors are the only group of citizens with limited political rights [342].

Hinrichs, however, refers to an apparent paradox that arises in relation to the issue of whether there is a need to extend suffrage to some or all of those currently excluded on account of age:

> . . . if there is a majority in favor of children's voting rights then there is also a majority in favor of the aspired policy changes advantageous for children and for realizing notions of intergenerational justice. Hence, a change in electoral law is unnecessary [343].

This apparent paradox, it is here suggested, is an illusion (otherwise the same argument could just as well be used to justify disenfranchisement of a certain age group, such as seniors, on the contention that the general populace supports policy changes that favour this group in any case). The illusory paradox rather speaks to the fact that adults have difficulty conceiving of a youth electorate (persons of any age below the current age of majority for the vote) deciding autonomously, through their vote, whether certain policies are or are not in their best interests. Having the vote, furthermore, is symbolic of full citizenship and one's right to recognition and respect, and, hence, is justifiable on that basis in itself. The current author is thus in accord with the view that:

> . . . constitutional reform has to be justified on nonconsequentialist grounds. At best, outcome-related justifications may be used as auxiliary or supplementary arguments in political discourse but cannot replace principled reasons in favor of or against a change in the rules of the political game [344].

Hinrichs attempts to resolve the aforementioned alleged paradox by suggesting that enfranchising the young (i.e. via an adult proxy who could cast a ballot on the young person's behalf) would ensure that should any future

majority of the electorate not favour child-friendly and family-friendly policies; families and young people would have some greater level of built-in constitutional protection through the vote [345]. The issue arises, however, as to whether parents could be trusted to vote in their children's best interests, or whether they would simply 'add one (or further) votes in favor of the party they choose for themselves' [346]. (The current author has here previously raised also additional foundational issues with regard to the proxy vote). Hinrichs notes that proxy voting is unlikely to become a reality (indeed it has actually been long debated in several States and rejected) as it would lead to a potential redistribution of power with families that have traditionally had low income and more children gaining significantly in political clout [347]. However, we are still left with the problem that:

> . . . as long as citizens ('the people') are divided into those entitled to vote and others not yet having the right to vote, the elected representatives are first and foremost the representatives of the electorate and not of the people considered too young to vote. *Since the time frame of these two generations differs, qua mandate of the voters, the long-term (future) interests of the non-voting generation are put last as against the short-term interests of the generation entitled to vote* (emphasis added) [348].

It is interesting to note that the climate change issue may be one instance where the inter-generational concerns coalesce as both the future interests of the non-voting generations in particular (protecting the environment in the long term) and the short-term interests of voters and non-voters alike (over-reliance on foreign oil and its impact on the domestic economy and State vulnerability) are both tied into the climate change issue.

Hinrichs considers only proxy voting in regards to the enfranchisement of minors' question. By not discussing lowering of the minimum voting age as a possibility, he implicitly discounts the importance of this approach to the problem of the lack of effective democratic representation for minors. Granted that lowering the minimum voting age does not resolve the issue of a lack of universal suffrage, it does yet offer minors a genuine political voice which hopefully, through the vote of 16- and 17-year-olds, will speak to the issue of minors of every age. Further, there is the possibility of removing the absolute bar in the vote for minors below the minimum voting age of 16 by use of a *rebuttable* presumption of voting incompetency for that group as previously discussed.

Hinrichs reviews arguments against enfranchisement of minors that, according to their proponents, suggest that there is no democratic deficit created in denying under 18 s the vote. However, all of the arguments he discusses relate to proxy voting, and *not* to lowering the minimum voting age below age 18; say to 16 years (i.e. the arguments concern: (a) the risk that permitting proxy voting might simply create plural voting for the parent such that the parent is casting *their* vote more than once which is anti-democratic, (b) the fact that voting is a personal inalienable right that cannot be exercised by anyone except the actual rights holder; and (c) the

risk of unequal distribution of political power depending on the size of the family—number of children in the immediate family—thus violating the 'one man, one vote principle') [349].

A prime argument that is frequently advanced against lowering the minimum voting age, as has been mentioned, has to do with the claim that there is no undue disadvantage in this regard in that everyone, in the normal course of events, will reach age of majority for the vote one day. The data reviewed by Hinrichs [350], however, speak to a significant disadvantage to youth of not having a political voice through the vote. This as the issues of the young are de-prioritized and their general welfare is thus compromised to a greater extent than is the case for those with more political power i.e. the elderly. This problem is then *not* resolved by a deferred enfranchisement (postponed realization of the inherent right to the vote) on account of young age despite being interested in, and able to cast a ballot (i.e. at age 16).

We consider next a Canadian human rights case which concerns, in part, *age discrimination* against a group of disabled minors. The case highlights the fact that age restrictions in the exercise of fundamental rights may be suspect from a constitutional perspective though they are generally regarded as natural and legitimate limitations on the rights of minors.

8.4 Human Rights and Discrimination on Account of Young Age: Lessons from an Ontario Human Rights Tribunal Case

The human rights case to be discussed is a case from Ontario, Canada; *Arzem v Ontario (Minister of Community and Social Services)* [351]. The case addresses the issue of whether there is an absence of unconstitutional age discrimination despite the age restrictions on a right given that all will generally reach the age one day when that right may be enjoyed (as some argue for the same reason that there is no unconstitutional age discrimination in respect of the age-based exclusion of potential voters under age 18 years). The case is one decided by the Ontario Human Rights Tribunal (OHRT) and concerns age discrimination in relation to special needs program funding. The funding for a particular type of special programming for autistic children was available, at the time, only for children up to age 6 years old. There was, however, another element of age discrimination involved namely; no complaint could be made to the Ontario Human Rights Commission relating to the prohibited discriminatory ground of age if the discrimination pertained to someone *under* age 18 years.

> By the definition of age in the *Code* [definition of 'age' in the Ontario Human Rights Code], all children, from birth to 17 years and 364 days-regardless of their 'psychological capabilities' , whether they are under parental control, financially

> self-supporting, or gainfully employed –are denied access to the human rights justice system [Ontario Human Rights Commission] under sections…. because of [young] age [352].

The OHRT held that: (a) there is a *constitutional* requirement that minors under age 18 years also be permitted to file human rights complaints (i.e. through their representatives) based on the prohibited (discriminatory) ground of age, and that (b) the possibility of making a human rights complaint based on age discrimination *cannot* be restricted to persons 18 and older (contrary to the Ontario Human Rights Code as it was then written). In this instance, the OHRT decided that the fact that there are examples in society in which age discrimination functions to *protect* minors (i.e. the fact that minors cannot enter into contracts) does *not* in any way justify denying them equal protection and benefit of the law in regards to the ability to file a human rights complaint based on age discrimination [353]. The Commission held that the age restriction in the access to the Ontario Human Rights Commission (with respect to age discrimination complaints) is an unjustified disadvantage to persons under age 18 years. This is the case in that the barrier to under 18 s filing age discrimination complaints to the Ontario Human Rights Commission (a barrier which persists to this date as the Ontario Human Rights Code was not changed to allow for such complaints from minors despite the OHRT decision in *Arzem*) contradicts the very foundational purpose of the human rights system i.e. to provide easier access to a system of justice for remedying discrimination complaints than would normally be available through the courts (the Ontario Human Rights Commission service is a free service). Similarly, the current author would maintain that denying under 18 s access to the vote contradicts the notion of a foundational principle of the democratic electoral system; namely universal suffrage for all citizens. In any case, there would appear to be no legitimate societal objective involved in the exclusion in any case. This in that, as discussed, age as a purported proxy for competency is not being equitably applied in that i.e. the elderly are not subject to the same standard as a basis for possible exclusion from the vote. Furthermore, there is no evidence that providing this right (the right to vote i.e. at age 16 or 17) would necessitate denying children certain legal protections based on age in other domains (i.e. with respect to contacts), or eliminate other age appropriate qualifications as determined by the legislature and as supported by the majority of voters.

Hinrichs review of social welfare data (previously discussed) indicating that minors fare worse than do older generations suggests that the denial of the vote to 16- and 17-year-olds is not in the best interests of minors, and ultimately therefore not in the best interest of society. There is a need for a greater priority to be placed on child and youth social welfare needs (while not forsaking the needs of the elderly) and the youth vote at age 16 would assist in this regard. Based on social welfare data for children and

youth relative to the elderly (i.e. with respect to levels of poverty), we can rightfully reject the notion that exclusion of all under 18 s from the vote is in any way in society's best short or long-term interest or in the interest of the young (the latter contention generally articulated on the fallacious twin propositions that society excludes minors from the vote due to a concern with ensuring competent voters who will vote for the 'general good,' and that age of the prospective voter is both a relatively accurate proxy for voter competency and is being used as such).

The following statement from the Ontario Human Rights Tribunal (OHRT) decision in *Arzem* would appear to be equally applicable to the voting age question:

> The exclusionary definition of age . . . [age defined as 18 years and over in the Ontario Human Rights Code as pertains to age discrimination complaints] does *not* prevent the violation of the essential human dignity interests of the children [persons under age 18 years]. *It prevents them from gaining access to redress, and . . . perpetuates economic, political and social prejudice. [against the young who are perceived as less than full citizens*](emphasis added) [354].

So, too, the age-based restriction on voting rights for minors who are developmentally capable of casting a ballot (irrespective of how rational or informed their vote might be), and potentially interested in doing so (i.e. 14-, 15-, 16- and 17-year-olds; with the highest interest level in suffrage apparently in the 16- to 17-year-old group) serves to: (a) reinforce disadvantages that young people suffer in respect of their various other rights (economic, social, cultural etc.); (b) undermine respect for their human dignity in society at large, and (c) perpetuate a lack of acknowledgement of their status as full citizens.

8.5 The Absence of a Compelling State Interest in Excluding 16- and 17-Year Olds from the Vote

There appears to be no constitutional or compelling societal interest argument that seems to fit the age-based exclusion of young citizens aged 16 and 17 years from the vote any more so than would be the case for exclusion of the elderly or very elderly from the vote. In this regard, consider the following statement by Justice Stewart in the early 1970s U.S. Supreme Court case of *Oregon v Mitchell* [355] which, as discussed, addressed the issue of lowering the minimum U.S. voting age for local and State elections as well as federal elections from 21 to 18 years:

> . . . to test the power to establish an age qualification by the "compelling interest" standard is really to deny a State any choice at all, because *no State could demonstrate a "compelling interest" in drawing the line with respect to age at one point, rather than another*. Obviously, the power to establish an age qualification

> must carry with it the power to choose 21 as a reasonable voting age, as the vast majority of the States have done (emphasis added) [356].

Note that Justice Steward sided with the majority (and against the four dissenting justices) in *Oregon v Mitchell* in holding that Congress did *not* have the power to infringe on State decisions regarding minimum voting age in local and State elections notwithstanding the equal protection clause of the 14th Amendment to the U.S. Constitution (we have already considered the opposing view in the case offered by one of the four partially dissenting justices, Justice Brennan). Justice Stewart objected to the notion that there would be an unconstitutional violation of the Equality Clause if citizens were excluded from the vote on account of young age on *less* than a 'compelling [State] interest.' He held rather that the standard of 'compelling interest' was an impossible one to reach in regards to any age-based restriction on the vote as 'no State could demonstrate a 'compelling interest' in drawing the line with respect to age at one point, rather than another' [357]. (Presumably Justice Stewart, in the aforementioned quote, was referring to an age-based exclusion of certain segments of the population interested in voting and developmentally capable of casting a ballot independent of whether all in that group would do so competently).

The current author concurs that no minimum voting age of 18 years, for instance, rather than 16 years, can be justified in terms of a 'compelling State interest' (i.e. relating, for instance, to the need for a politically competent and responsible electorate for the reasons here previously detailed at some length). However, Justice Stewart's observation regarding the *absence* of a compelling interest for excluding citizens from the vote based on a particular minimum voting age is an argument in *favor* of extending suffrage to younger potential voters, and *not* one for maintaining the status quo contrary to what he suggests. (The issue of very young children being enfranchised is problematic, but as here previously discussed, there are alternatives to the absolute bar against their voting also which could be applied on a case-by-case basis). With respect, Justice Stewart seems to be erroneously suggesting that a definitive line has to be drawn somewhere relating to age restrictions on the vote, and that therefore it is allegedly constitutional to accept wherever the States places that line *even absent a compelling State interest* regarding the specific voting age minimum chosen.

Indeed, there would seem to be instead a compelling societal interest in extending the vote in a democratic State, and that is to counteract the effects of discrimination, marginalization and their correlates (i.e. socioeconomic disadvantage) as they affect a certain segment of the citizenry. Justice Stewart, in fact, seems to concur on this point (at least as far as restrictions on the vote other than those that are age-based are concerned) as evidenced by his commentary on the *Morgan* case. In *Morgan*, the U.S. Supreme Court upheld a statute passed by Congress which extended

the vote to Puerto Ricans in an effort to combat the adverse effects of discrimination upon this group:

> In Morgan, the Court considered the power of Congress to enact a statute whose principal effect was to *enfranchise Puerto Ricans who had moved to New York after receiving their education in Spanish language Puerto Rican schools and who were denied the right to vote in New York because they were unable to read or write English*. The Court upheld the statute on two grounds: that *Congress could conclude that enhancing the political power of the Puerto Rican community by conferring the right to vote was an appropriate means of remedying discriminatory treatment in public services*, and that Congress *could conclude that the New York statute [requiring English fluency as a voter qualification] was tainted by the impermissible purpose of denying the right to vote to Puerto Ricans, an undoubted invidious discrimination under the Equal Protection Clause.* Both of these decisional grounds were far-reaching. *The Court's opinion made clear that Congress could impose on the States a remedy for the denial of equal protection* . . . and that it could override state laws on the ground that they were in fact, used as instruments of invidious discrimination (emphasis added). . .[358]

However, Justice Stewart would not apply this logic—the need to extend suffrage to the marginalized to combat the effects of discrimination and its adverse social and economic impacts—to the case of youth. That is, he did not consider that Congress could ensure suffrage for 18-year-olds so as to improve their socio-economic status and relieve them of some of the discrimination they suffer being thought of as something less than full citizens with all the fundamental human rights that implies. (Voting here considered a fundamental inherent civil right and not, in reality, a conferred right based on the government's discretionary grant; except in respect of the possibility for exercising the right). Yet, children and youth are generally in a disadvantaged position in terms of general social welfare compared to the elderly as the data reviewed by Hinrichs illustrates [359] and, if part of a single parent family, may often find themselves living well below the poverty line. The U.S. child poverty rate, for instance, was found to be the second highest in an international comparison of 23 countries in the mid to late 1990s; while Canada's was sixth highest [360]. Hence, child poverty is a significant problem in these modern democratic States which could, in part, be lessened by the grant of the vote at 16 such that youth from poor families might have some more effective influence on government and encourage their elected representatives to better attend to the needs of poor families. Hence, there would appear to be no basis for the suggestion that excluding a certain age group from the vote (i.e. 18–20 year olds excluded from voting in U.S. local and State elections pre 1971) is not an unconstitutional burden placed on this group in respect of a fundamental civil right. Yet, this is precisely the claim of the majority in *Oregon v Mitchell*:

> The state laws [setting the minimum voting age of 21 years and which, hence, excluded 18 to 20 year olds from the vote as well as those younger] that it [the

> 1970 Amendments to the federal Voting Rights Act] invalidates do ***not*** invidiously discriminate against any discrete and insular minority (emphasis added) [361].

Of course youth under age 21 years (what would have been the relevant comparator group for consideration in *Oregon v Mitchell*) *is* a distinct and insular group like a minority regarded as second class citizens, and paying the price in various ways for holding that attributed status; especially if those citizens are part of low income families. There seem to be ample reasons in fact, as here previously discussed, to conclude that: (a) the alleged rationale for the age-based exclusion of 16- to 17-year-olds from the vote relating to trying to ensure a competent electorate is disingenuous (i.e. age is not an accurate proxy for political competence when dealing with a group that has individual members of widely varying competencies; age is not being so used when it comes to the elderly who have an increased likelihood of competency problems in regards to voting issues, but who are not restricted from the vote based on old age; and there is no use of competent proxies acting on behalf of minors in casting a vote); (b) there are no compelling societal interests identifiable that are served by the exclusion of 16- to 17-year-olds from the vote; and (c) the exclusion of 16- to 17-year-olds from the vote contributes to their second class citizenship status and a neglect of their rights and interests as compared to that of much older adult citizens (seniors) (who have an ever increasing political voice given the aging of the population in Western States, and the higher voter turnout for the latter age group compared the youngest age category of eligible voters below 30 years). Hence, it seems quite correct to maintain that the age-based exclusion of 16- and 17-year-olds from the vote is indeed at its root an invidious form of direct discrimination against this age-defined citizen group.

8.6 Age-Based Restrictions on the Vote as an Invidious Form of Direct Discrimination

Breen notes that 'non-discrimination and equality legislation does not extend, on the whole, to protecting the rights of the child' [362], while, at the same time, non-discrimination and equality in respect of basic human rights are guaranteed in international human rights treaties. We previously considered an instance of inequity in regards to the Ontario Human Rights Code lack of protection for persons under age 18 years in regards to age discrimination complaints. Let us here then explore in some more depth the difficulties with the rationale for the absolute age restriction which denies persons under age of majority (i.e. usually 18 in Western democratic States) the protection of equality legislation insofar as age discrimination is concerned.

Breen explains that 'direct discrimination' occurs where 'there is inconsistent treatment as between the complainant and a similarly-situated person' [363]. However, in respect of minors, she states that: 'Courts would be unlikely to regard an adult as a similarly-situated person and consequently the comparator would have to be another child' [364]. However, such a position leads to a *forgone conclusion* that whatever age discrimination complaint a minor raises is invalid. Such a situation is legally impermissible in that conclusions are to *follow* from the evidence and not from *a priori* assumptions about the case. Furthermore, the current author would hold that there are important instances in which adults *are* the appropriate comparator group, and *are* similarly-situated to minors. One such instance is that involving the minimum voting age issue. When there is an absolute bar against citizen minors voting due to *young* age, they suffer direct discrimination. This is the case in that adults who are similarly-situated in that they are citizens and their group also includes incompetent voters (i.e. especially amongst those in the very senior range who suffer higher rates of cognitive impairment due to advanced age than do younger people) suffer no age-based restriction on the franchise (i.e. a maximum voting age or case-by-case screening for voting competence etc.). The current author then would hold that the absence of equality protection for minors regarding age discrimination is both legally and morally insupportable.

Breen further explains that: '... indirect discrimination—in terms of age—covers instances of apparent equal treatment which impacts more heavily on people of a certain age' [365]. In regards to proving indirect discrimination relating to age, Breen suggests that:

> the difficulty lies in the need to find a fixed comparator group, which is more difficult in terms of age because it may be difficult to identify a specific age category or limit of [sic] [or] quantify the [necessary] degree of difference between comparators in terms of age-6 days or 6 months. The difficulty in finding a fixed comparator group has led to age-based distinctions as a basis for legitimate differentiation, in spite of the apparent arbitrariness of such an approach which is contrary to the philosophy underpinning equality and non-discrimination, a philosophy which forms the cornerstone of international human rights law [366].

One may properly contest, however, it is here suggested, the notion that age-based distinctions in the law which deprive a certain age group of *particular basic human rights* are legitimate in all instances (in practice if not in principle) due to the difficulty of finding a fixed age comparator group. Consider the minimum voting age question for instance. It is possible to make age differentiations while still not imposing an absolute bar on the vote based on age as previously explained. Hence, there is no insurmountable problem of no fixed comparator group. It is simply unacceptable from a legal and moral point of view to place minors at risk due to inequality in the law regarding their basic human rights. Another example will highlight this point (that being an instance involving discrimination as applied

to differentiate between groups of minors on account of age). In Canada, as explained, corporal punishment of the child by parents or other legal guardians (or by their delegates) is permissible within certain constraints. Although the law itself does not contain such a qualifier (the Canadian Criminal Code does *not* specify what age range of minors may be subjected to corporal punishment), the Supreme Court of Canada has held that corporal punishment is unconstitutional if used on children under age 2 years or over age 12 years [367] and this will serve then as a guideline in interpreting the law. These age distinctions were made by the Court on the presumption that the former cannot learn from corporal punishment, and the latter age group (those aged over 12 years but under age 18 years) would suffer an affront to their human dignity as a result. Such age distinctions are in themselves an affront to the human dignity of minors aged between 2 years and 12 years and place their security of the person at risk. There is no compelling societal interest in permitting age discrimination in the law in respect of security of the person rights due to corporal punishment.

The point has often been made that 'age discrimination [unlike gender and race discrimination] does not define a fixed delineated group' [368]. Breen states that because of this, it is the case that it is assumed that: 'From the point of view of equality and non-discrimination, the effect of such differentiation may be said to be lessened because it affects all members of society and only at particular points in their lives' [369]. For instance, the U.K. Electoral Commission also suggests erroneously that age discrimination in the vote is not an egregious human rights violation as, unlike the bars in the vote relating to gender or race which were intended to be permanent, 'a statutory minimum age merely imposes a wait-albeit that some find that wait undesirable and feel it unjustified' [370]. Justice Bastarche of the Supreme Court of Canada in *Gosselin v Quebec (Attorney General)*, however, points out that the temporary nature of the age restriction in access to a basic right does *not* detract from the fact that the individuals affected are being penalized due to a personal characteristic over which they have no control; just as is the case with respect to such restrictions based on gender or race:

> . . . the fact remains that, while one's age is constantly changing, it is a personal characteristic that at any given moment one can do nothing to alter. Accordingly, *age falls squarely within the concern of the equality provision that people not be penalised for characteristics they either cannot change or should not be asked to change* [371].

Justice Bastarch's view was in opposition to that of the majority position as reflected in the words of Chief Justice McLachlin in the same case who stated:

> Unlike race, religion or gender, age is not strongly associated with discrimination and arbitrary denial of privilege. This does not mean that examples of age

> discrimination do not exist. But age-based distinctions are a common and necessary way of ordering our society. They do not automatically evoke a context of pre-existing disadvantage suggesting discrimination and marginalization under this first contextual factor, in the way that other [Canadian Charter] enumerated or analogous grounds might [372].

With respect, it seems to the current author that Justice McLachlin is in error in making the claim that minors do not suffer pre-existing disadvantage. Children, just as women and persons of colour, have been considered as property in the past (and in some States this is still the case). Children worldwide, furthermore, continue to suffer gross human rights abuses given their vulnerable state as children. In Western countries, children continue to make up a large percentage of those living below the poverty line and of the homeless. Certain Western States continue to have high rates of infant mortality and child abuse and children's fundamental human rights is compromised in other ways as well (via the use of corporal punishment). Unaccompanied minors continue to be discriminated against as asylum seekers and minors make up a large percentage of the world's refugees and internally displaced persons. Minors belonging to particular indigenous groups and ethnic minorities continue to face persecution, discrimination and its correlates in terms of poor health, inadequate education and the like in many Western democratic States as elsewhere [373, 374]. Thus, it would appear that ordering society along age distinctions in some respects (i.e. setting a statutory minimum school leaving age, a minimum age for driving a vehicle etc.) is an inadequate justification, if one at all, for age-based discrimination in fundamental human rights that, if granted, would likely significantly improve the human rights situation for minors (i.e. the grant of the vote at 16).

Breen points out the following difficulties with the Justice McLachlin perspective regarding age discrimination which largely invalidates the position she espoused on behalf of the majority in the aforementioned case. First, such group-based discrimination misleadingly obscures the discrimination against the individual member of the group [375] (i.e. thus diminishing the *perceived* severity of the consequences for the individual of the rights denial simply because the disadvantage also accrues to every member of the age-defined group). The second difficulty is that:

> *. . . although the differentiation [based on age] is only temporary, the effect of such differentiation is, nonetheless, total for that period* . . . a societal group continues to be treated differently [i.e. minors are denied certain inherent basic rights] even if the individual members of the group [defined by age] do not remain constant (emphasis added) [376].

Furthermore, as Justice L'Heureux Dube pointed out in the *Gosselin v Quebec (Attorney General)* case previously mentioned, age distinctions in respect of access to fundamental human rights are often founded on, and reinforce erroneous negative stereotypes of members of the marginalized

group as 'less worthy of recognition or value as a human being or as a member of . . .society' [377]. As discussed, this appears to be very much the case in respect of the age-based restriction in the vote in respect of older adolescents in particular (i.e. who have, *in practice*, given the electoral law age-based restrictions on the vote, been characterized as less capable than *all* adult voters, less deserving of the vote than are *all* adults; less able to vote responsibly than is the case for *all* adult voters etc. and when, in fact, no voting competency requirements are generally being imposed on adults, and certainly no age-related competency requirement say, for instance, in respect of elderly voters). It is striking then that it is the case that neither the courts in most Western democratic countries, nor high-profile national, or international human rights gatekeepers have been willing to take seriously the human rights claim relating to the demand for the vote by older teens (aged 16- or 17-years-old). Indeed, enfranchisement of older minors as a means of self-advocacy is not even a consideration for high-profile human rights bodies concerned with children's issues such as the U.N. Committee on the Rights of the Child. Rather, the Committee on the Rights of the Child defers to the State as to political decisions regarding restricting 'minors' (however defined in terms of specific age range) from the vote (i.e. defers to the State's discretion as to where the line is drawn). This is reflected in the Committee's almost off-hand acceptance of the denial of the basic human right of suffrage due to young age (i.e. where 'young' is defined as any age below the age of majority for the vote):

> **Article 12: the child's right to express his or her views freely in "all matters affecting the child", those views being given due weight**.
> *This principle, which highlights the role of the child as an active participant in the promotion, protection and monitoring of his or her rights*, applies equally to all measures adopted by States to implement the Convention.
>
> Opening government decision-making processes to children is a positive challenge which the Committee finds States are increasingly responding to. *Given that few States as yet have reduced the voting age below 18, there is all the more reason to ensure respect for the views of unenfranchised children in Government and parliament*. If consultation is to be meaningful, documents as well as processes need to be made accessible. But appearing to "listen" to children is relatively unchallenging; giving due weight to their views requires real change. Listening to children should not be seen as an end in itself, but rather as a means by which States make their interactions with children and their actions on behalf of children ever more sensitive to the implementation of children's rights (emphasis added) [378].

It is entirely unclear how the minor can truly be 'an active participant in the promotion, protection and monitoring of his or her rights' as envisioned under Article 12 of the *Convention on the Rights of the Child*, and be accorded proper respect for his or her freedom of expression, when minors who are interested in the vote and capable of casting a ballot (regardless of how informed the vote may be) are denied the vote.

Next we consider a particularly compelling example which illustrates that the age-based restriction on adolescents voting would seem not to be

so much based on concerns over competency as on maintaining the power status quo. That example involves minors (teens) being considered competent enough to choose to make autonomous federal political campaign contributions, but not to vote.

8.7 If You're a Minor; We'll Take Your Federal Political Campaign Contribution but Not Your Vote: Selective Constitutional Rights to Freedom of Expression and Association

While 16- and 17-year-olds are barred from the vote in most every Western democracy, and have no civil right in this regard according to statutory electoral law, they are ironically increasingly being encouraged to contribute to political campaigns and to participate in various social justice causes (as sometimes are also minors younger than 16 years). We may rightfully query then why teens are considered competent to make their own decisions about campaigning for particular political candidates and political parties in local, regional (State or provincial) or federal elections, and in making monetary contributions to political campaigns, but yet, as minors, excluded from the vote. It would appear that the concern, as mentioned, is not with 16- and 17-year-olds' political competence, but rather with their likely voting preferences, and the possibility that these new voters would vote en bloc, to a degree at least, to elect their preferred candidates. This may be the basis then for the angst in granting the vote at 16 in most Western democratic States.

One striking example of the willingness to afford youth under age 18 years political freedom in a most significant way, but yet quite short of granting the vote, is provided by the U.S. Supreme Court decision in *McConnell (United States Senator) v Federal Election Commission* (hereafter *McConnell*) [379]. What is especially noteworthy is that while the U.S. Supreme Court in *Oregon v Mitchell* [380], as we have seen, had no compunction about upholding as constitutional pre-1971 State electoral law that incorporated an age-based exclusion from the vote (i.e. for 18- to 20-year-olds), in *McConnell*, the same Court found *unconstitutional* an age-based exclusion relating to the right of youth (age 17 years and younger) to contribute financially to federal political campaigns

The McConnell case concerned a 2002 U.S. federal law titled the *Bipartisan Campaign Reform Act* (BCRA) [381] implemented under President George W. Bush. The BCRA barred U.S. citizens 17 years and under from contributing financially to U.S. federal political campaigns. The intent of the statute overall was to prevent the wealthy from undue influence in the election of candidates that would favour the former's businesses and interests even if against the public interest. More specifically,

the particular provision of the BCRA that excluded U.S. citizens 17 years and under from making federal campaign contributions was intended to ensure that wealthy parents did not use their children as a vehicle for their own contributions to federal campaigns (i.e. such that the parent could exceed the federally set federal campaign contribution guidelines using the children as a conduit for the contribution).

A constitutional challenge to this exclusion (of citizens 17 years and younger from the federal campaign contribution scheme) was filed by a group of un-emancipated minors who were represented in the case both by an adult 'next friend' and counsel. One of these minors was Emily Echols, a 14-year-old girl from the U.S. State of Georgia who wished to contribute one hundred dollars to the campaign of a State Senate candidate. Prior to the 2002 BCRA, youth aged 17 years and younger were permitted to make financial contributions to federal political campaigns in their own name within the same federal contribution guidelines as applied to persons of age of majority. Remarkably, the federal government in *McConnell* [382] took the position that since citizens 17 years and younger could not vote, the prohibition on their contributing monies to a federal political campaign (allegedly) did not violate their civil rights. Thus, the U.S. federal government, at the time, appeared to maintain that restriction of the political participation rights of minors in general (for instance, a bar on their making federal campaign contributions) was, by definition, constitutional. This was allegedly held to be the case given the absolute bar on the minor's right to vote; a bar that had not been struck down as unconstitutional. Furthermore, the government maintained that there was an allegedly compelling and legitimate State objective in prohibiting *all* minors, regardless of their circumstances, from making federal financial campaign contributions (which objective could not be achieved in some alternative manner):

> Appellees Emily Echols, et al., have moved for summary affirmance of the three-judge district court's holding in this case that Section 318 [denying minors the right to make federal campaign contributions] is unconstitutional. That motion should be denied. ***In light of minors' sharply reduced rights of political participation*** *and control over property, and the government's compelling interest in preventing circumvention of valid existing limits on adult campaign contributions, Section 318 [of the Bipartisan Campaign Reform Act] is constitutional* (emphasis added) [383].

> In a host of circumstances, minors are routinely barred from activities in which adults would have a constitutional right to engage. The most obvious and relevant example is voting. The Twenty-Sixth Amendment provides that "[t]he 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 . . ." That constitutional provision distinguishes on its face between minors and adults, and it unmistakably implies that persons less than 18 years old may be denied the right to vote on the basis of age. In fact, "[n]o State has lowered its voting age below 18." . . . *The unquestioned validity of that age-based distinction is especially significant in view of the fundamental nature of the right to vote.* . . . [the] right to vote is "a fundamental political right, because preservative of

all rights")..."the right of suffrage is a fundamental matter in a free and democratic society") (emphasis added) [384].

This author has here previously challenged the contention (here made by the Appellants in *McConnell*) that the 26th Amendment to the United States Constitution in fact permits discrimination against citizens under age 18 years in the vote. Rather, it will be recalled that this author has argued that: (a) the 26th Amendment is silent on the issue of discrimination against under 18 s in the right to the vote, while, at the same time, (b) the 26th Amendment highlights a prohibition against age-based discrimination in the vote for citizens 18 years and older. Recall also that the Ninth Amendment to the U.S. Constitution protects against infringement of natural basic human rights that may not be specifically and expressly articulated in the Constitution ('The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people') [385]. One such right would be the right of U.S. citizens under age 18 years not to be discriminated against in the vote due to age. The text of the 26th Amendment with its explicit reference to no discrimination in the vote against citizens 18 years and older is simply a reflection of the fact that the States, in the wake of the Supreme Court decision in *Oregon v Mitchell*, had urged a constitutional Amendment that would set the national voting age for local, State and federal elections at 18 years. This does *not* imply, however, that age discrimination in the vote against citizens *below* age 18 years was incorporated into a constitutional amendment i.e. that citizens under age 18 years were barred from the vote by constitutional amendment (as the Appellants in *McConnell* suggest is the case with the 26th Amendment). This is evidenced by the fact, for example, that the minimum State voting age under electoral law could conceivably shift downwards again in future, though not upwards, notwithstanding the 26th Amendment.

If age discrimination against citizens under 18 years were indeed incorporated into the 26th Amendment, this would have created an impossible situation constitutionally (i.e. a previous constitutional amendment (the 26th), allegedly permitting age discrimination in the vote against under 18 s, would have to be *overridden* somehow in order to allow the States to *expand* the right of suffrage to a new group under age 18 previously below the age of majority for the vote). However, the constitutional amendments are written so as to *affirm or extend fundamental rights*, not to restrict them, and the same is true for the 26th Amendment. The U.S. Constitution, like all constitutions is a 'living document', and an expansion of rights is possible given interpretations which shift in response to new social understandings about rights and freedoms and more inclusive values. The erroneous interpretation that the Appellants in *McConnell* give of the 26th Amendment (as a supposed endorsement of age discrimination in the vote against citizens aged under 18 years) would instead require a fixed interpretation which would not allow for the expansion of rights

under statutory law. The Constitution, however, is not the fossilized legal instrument that such an approach to constitutional interpretation would suggest. Indeed, were it so, the reference to the voting age of 21 years for males in section 2 of the 14th Amendment (the then current minimum voting age of males; the only gender eligible at the time for the vote) would have made the 26th Amendment reference to no age discrimination in the vote for citizens 18 and older impossible (the age of majority having already been constitutionally fixed at 21 years):

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. *But when the right to vote at any election* for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, *is denied to any of the* ***male*** *inhabitants of such State,* ***being twenty-one years of age****, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens* ***twenty-one years of age*** *in such State* (emphasis added) [386].

However, the 26th Amendment did *not* invalidate the 14th (section 2). Rather, neither in the 14th nor the 26th Amendments is there a restriction on the right of suffrage for citizens below any designated age of majority for the vote.

Note the reference in the previous quote from *McConnell* to the alleged '*unquestioned validity* of that [alleged] age-based distinction [in the right to vote incorporated into the 26th Amendment according to the Appellants] between minors [aged 18 years and younger] and adults' [387]. This monograph challenges the distinction made in the right to vote between *minors* (in particular those aged 16 and 17 years) and *adults* (aged 18 years and over). However, these age demarcations have not, over the decades, been as stable as the Appellants in *McConnell* suggested when they stressed to the Court that no State in the U.S. had a voting age less than 18 years in the decades immediately before the ratification of the 26th Amendment [388]. Note, however, that there have in fact been historical periods when the vote in the United States was extended in certain States to citizens that we today class as minors (persons aged 16- and 17-years-old). This occurred, for instance, during the American colonial period when 16- and 17-year-olds males, along with their older male counterparts, assumed all adult responsibilities. Thus, it is the case that precisely where the age-based restriction on the vote was set (i.e. the minimum voting age) varied over historical epochs in the United States, and also across different individual U.S. States. Cultice reports, for example, that in 1619 the first legislative assembly of America in Jamestown, Virginia 'in accordance with the political . . . practices of later colonial governments, . . . conferred the right to vote on males 17 years of age' [389] who were also expected to serve in the militia.

The plaintiffs in McConnell held that the prohibition on U.S. citizens 17 years and younger (minors) making financial contributions to federal political campaigns within the federal guidelines: (a) infringed their First Amendment constitutional right to freedom of speech (the campaign contributions being a form of political speech or expression), as well as their constitutional right to freedom of association (the federal campaign contributions being a mechanism for identification/association with a particular political party and federal election candidate) and (b) was overly restrictive as there were less exclusionary ways to ensure that parents did not use their children as a way to exceed federal campaign contribution guidelines in respect of their own contributions.

In his court submission, the representative for the plaintiffs in *McConnell* challenged the *Bipartisan Campaign Reform Act* restriction on federal campaign contributions by persons 17 years and under and pointed out that his clients were quite engaged in politics though they were below the age of majority for the vote (i.e. below 18 years old):

> These Appellees are seriously interested in government, politics, and campaigning. They demonstrate that interest by participating in campaigns as volunteers, assembling signs, distributing literature, walking precincts, even travelling great distances to campaign door-to-door for candidates they support. *In doing so, they have shown their commitment to using their rights to freedom of association and expression to effect political changes in accord with their beliefs and opinions*. . .. *For . . . each of these young citizens contributing [their own] money to candidates and to the committees of political parties are forms of expressions of support for those candidates and committees. Moreover, by making such contributions of money, they have already associated with those selected candidates and committees of political parties.* ***The minors Appellees plan to, and intend to, exercise their rights of political association and expression by making candidate and committee contributions , during their minority, [while they are under age 18 years], into the future.*** But for the enactment of s. 318 [of the Bipartisan Campaign Reform Act] and its ban on political contributions by them, they would be free to do so (emphasis added) [390].

The Supreme Court of the United States held in *McConnell* that the *Bipartisan Campaign Reform Act* (BCRA) blanket exclusion of citizens 17 years and under from making U.S. federal campaign contributions was indeed unconstitutional and over-inclusive (i.e. that is: (a) it would exclude citizens who were minors from making financial contributions to federal political campaigns where these minors were *not* being used by parents to subvert the federal campaign contribution guidelines, and (b) there were *less* restrictive ways to ensure that parents did not use their children as conduits for what was, in reality, their own federal campaign contribution):

> *BCRA §318–which forbids individuals "17 years old or younger" to make contributions to candidates and political parties . . . violates the First Amendment rights of minors. . . Because limitations on an individual's political contributions impinge on the freedoms of expression and association*. . . the Court applies heightened scrutiny to such a limitation, asking whether it is justified by a "sufficiently important interest" and "closely drawn" to avoid unnecessary abridgment

> of the First Amendment . . .. The Government offers scant evidence for its assertion that §318 protects against corruption by conduit—i.e., donations by parents through their minor children to circumvent contribution limits applicable to the parents. Absent a more convincing case of the claimed evil, this interest is simply too attenuated for §318 to withstand heightened scrutiny . . .. Even assuming, *arguendo*, the Government advances an important interest, the provision is overinclusive . . . (emphasis added) [391].

It is entirely inconsistent that the U.S. Supreme Court held in *Oregon v Mitchell* [392] that the then State minimum voting age of 21 years in most U.S. States (which deprived citizens under age 21 years in those States of the vote) was constitutional, while then finding in *McConnell* [393] that depriving minors 17 years and younger of the right to make federal political campaign contributions is unconstitutional. Afterall, voting is the première form of free speech and also a way of demonstrating alliance with a party and/or candidate (an act of free association). These then are the very civil rights that the Court in *McConnell* sought to protect by ruling unconstitutional the *Bipartisan Campaign Reform Act* (BCRA) provision (section 318) relating to the restriction on minors making any federal campaign contributions.

Note that in both cases-voting and making federal political campaign contributions-there is an impact (of whatever degree) upon *other* citizens as a consequence of these acts undertaken by the individual (i.e. in terms of impacting political outcome). In regard to the latter point, recall that some have argued *against* proxy voting on behalf of minors on the basis that this would affect other citizens and the child involved in the *same* way. (This is in contrast to proxy situations where parents or other legal guardians act on behalf of minors with regard to decisions in other areas i.e. health, education etc. which generally only affect the child involved directly as a consequence of the proxy choice) [394]. However, clearly, at times, democratic States are prepared to allow minors to make political choices that affect other citizens (for example make financial contributions to federal political campaigns). Hence, one can question whether denial of the vote to minors aged 16 and 17 (whether a denial of their autonomous direct vote or their vote via a proxy) is more about excluding them absolutely from the vote, than any other consideration.

It is also noteworthy that the bar against federal political campaign contributions by minors was instituted through the 2002 *Bipartisan Campaign Reform Act* (BCRA) even though there were already in place protections against persons making or accepting federal campaign contributions in the name of another person (i.e. the U.S. Federal Election Campaign Act of 1971) [395]. Further, the States had also already instituted various procedures to prevent parents from making federal campaign contributions through their children: i.e. 'counting contributions by minors against the total permitted for a parent of [the] family unit, imposing a lower cap on contributions by minors, and prohibiting contributions by very young

children' [396]. Hence, it would seem that as with the vote—insofar as the exclusion of minors from the political process and the infringement by the State of their free expression of political preferences is concerned resulting from the bar against minors making federal campaign contributions—there was no compelling State interest involved i.e. there were *less* restrictive means *already* in place for preventing the wealthy from usurping the federal electoral process by using their children as conduits for their own federal campaign contributions. Rather, it would appear that the restriction on minors in contributing financially to federal campaigns was unconstitutionally grounded by the desire to preserve the power status quo in respect of civil rights relating to the political process *in all its forms*; that is reserve those rights for adults citizens alone (persons 18 years and over). This is evidenced also by the fact that the BCRA prohibited even the most nominal contributions to federal political campaigns by citizens 17 years and younger; contributions that could not possibly have curried political favor in future from successful candidates or from their political party.

8.8 Lessons on Unconstitutional Age-Based Restrictions on Freedom of Expression (i.e. Political Expression or 'Political Speech') from *McConnell (United States Senator) v Federal Election Commission* et al. and Their Applicability to the Vote at 16 Question

That aspect of the U.S. Supreme Court case *McConnell (United States Senator) v Federal Election Commission* et al., (i.e. *McConnell*) [397] in which we are interested here concerns the prohibition against citizens 17 years and younger making federal campaign contributions (a prohibition found to be unconstitutional by the Court). However, the case also provides important lessons on the vote at 16 issue. Below are excerpted lines from the oral argument of Mr. Sekulow, the minor Appellees' representative in *McConnell*, which illustrate some of those lessons.

Consider then that the prohibition on the federal campaign contributions by minors incorporated into the *Bipartisan Campaign Reform Act* (BCRA) [398] was a blanket one and, hence, over-inclusive (applying to all minors irrespective of whether there was any evidence whatsoever that their contribution was actually a conduit for a parental financial contribution to the federal campaign):

> The court below unanimously concluded that section 318 [of the BCRA], the prohibition of contributions [to federal political campaigns] by minors is unconstitutional. The statute suffers from three constitutional defects. First, section 318 is a ban, not simply a limitation . . . . *In fact, the government concedes that this statute is an absolute ban and they also concede that, in fact, the ban burdens more speech than [does] a limitation* (emphasis added) [399].

Recall that the age-based restriction on voting rights is also a *complete ban* on minors' exercise of a fundamental civil right; namely voting; rather than simply a limitation of some degree. That is, the prohibition on minors voting, for instance, is *not* applied on a case-by-case basis to exclude only those minors who are truly incompetent to vote and hence the restriction is over-inclusive. Further, are we to presume that the State has a legitimate compelling interest which it wishes to protect via the exclusion of *only* politically incompetent *minors* from the vote; as opposed to also politically incompetent *adults*? That does not seem plausible. In any case, political competency cannot currently be accurately assessed, nor is there agreement on how it should be assessed, nor, more importantly, has the State shown any willingness in contemporary times to utilize any such alleged assessment. That reluctance is likely due, in part at least, to the fact that were an assessment of political competency for the vote available (particularly if accurate) it would, in a democracy naturally have to be applied across age categories. That would then mean possible disenfranchisement of persons who previously had the vote and that would not be politically feasible. Further, past history with such attempts at measuring political competency has shown that such assessments are highly vulnerable to discriminatory application. Yet, *alleged* level of voting competency is currently mysteriously divined based on age; an equally legally insupportable situation (i.e. age as a proxy for political competence is highly imperfect, and moreover, being applied in a discriminatory manner at only one end of the age continuum; namely to young people; minors). Let us turn now to a look at the questioning of the appellants' counsel by the justices in *McConnell* to glean some of the additional implicit lessons offered on the youth voting rights issue.

Mr. Sekulow (the complainants' representative) was questioned by the Supreme Court Justices in *McConnell* as to whether an absolute ban on minors making federal campaign contributions might be constitutional if the cut-off were set at some age perhaps considerably younger than the age of 17 years that was set by the *Bipartisan Campaign Reform Act* (BCRA) (under the BCRA, only persons 18 years and older could make federal campaign contributions):

> **[Author's Note: The portions in square brackets were added for clarification in the excerpted lines below from the oral argument and questioning]**
> **Justice Ginsburg**: "Mr. Sekulow, could you have a ban at any age? Is it [for] 17 year olds that ban is questionable? But say that Congress drew the line at 8 or 10."
> **Mr. Sekulow**: "Certainly that would be more closely drawn, Justice . . ."
> **Justice Ginsburg**: "Would that be constitutional?"
> **Mr. Sekulow**: "I think so. The issue would be could an 8 year-old make the voluntary decision to make a contribution. I think it would be a closer case. This is an absolute ban, though [prohibiting *all* minors from making federal campaign contributions]. This is the exact opposite of that situation. . . [where only a segment of the minors would be excluded]"

> **Justice Ginsburg**: "I'm posing an absolute ban on [campaign] contributions by [citizens] 10 and under."
> **Mr. Sekulow:** "I think that would be the same argument. At a minimum. . .they have to establish that the ban was justified by at least [being] closely drawn to the concern. [evidence would need to be presented that most children 10 and under cannot make a voluntary decision on their own regarding campaign contributions]. . .."
> **Justice Ginsburg:** "I just want to be clear on what your answer is. I thought you said that there would be a line, a bright, clear line that could be drawn at some age, only not 17."
> **Mr. Sekulow:** "All legislation is line drawing. Here—"
> **Justice Breyer:** "What's the answer? An 8 year-old? Nobody under the age of eight can give a contribution, period, end of the matter, that's it, that's the law, constitutional or not."
> **Chief Justice Rehnquist:** "In a sense, the problem diminishes with the age. There aren't a great number of 8 year olds making contributions' [to federal political campaigns]."
> **Mr. Sekulow:** "That's exactly correct, Mr. Chief Justice . . . But here again, as the government concedes, this is an absolute ban for 17 and under. It [the government] is not worrying about **just** two year olds or four year olds (emphasis added) [400].

The current author would suggest that the identical issue arises in regards to the vote in that citizens are being excluded from a fundamental right due to an absolute ban based on age without a compelling societal interest. There is an absolute ban on all minors voting in most Western democratic States which results in excluding even older minors of 16 and 17 years from the vote. At the same time, there is no dispute amongst any of the parties that some minors are being excluded from the vote who would make more competent voters than some older citizens. The governments of these Western nations that have set 18 as the minimum voting age have not demonstrated that exclusion of 16- and 17-year-olds from the vote has led to a more autonomous, intelligent, politically mature, or informed electorate than would otherwise be the case. There is no evidence, for instance, that in those Western democratic States (Austria) or Western municipalities or territories (i.e. certain areas in Germany and Switzerland and the Isle of Man) that have the vote at 16; that the integrity of the electoral system has been compromised. Note also that in 2003, there were 11 States in the United States that allowed voting in the electoral primaries at age 17 years as long as the minor turned 18 years by the time of the next election [401]. The latter fact illustrates that these U.S. States had confidence in the competence of the 17-year-olds to exercise the vote intelligently and responsibly notwithstanding the absolute ban on minors (citizens under age 18 years) voting in State public elections other than the primaries.

It is here suggested that the *absolute ban on political expression of minors via the vote* is, in actuality, specifically directed at older minors who might in fact exercise the right were it available. The government argument that an absolute ban on minors' political expression via the vote

(or via political campaign contributions) is necessary; otherwise it would extend these rights even to politically incompetent young children (thus making a mockery of the applicable statutes, and of the electoral system) is in fact a 'red herring'. This is the case since younger minors (under age 14 years) are normally not interested in voting, nor in making political campaign contributions, nor cognizant of the full meaning of these acts. In fact, this interest is much more likely in respect of 16- and 17-year-olds and, to some extent, for 14- and 15-year-olds than it is for younger minors under 14 years old. Consider again then the statement of the minor plaintiffs' counsel in *McConnell* below (excerpted from his oral argument in the McConnell case concerning the constitutional challenge to the absolute ban on minors making federal campaign contributions):

> . . . this is an absolute ban for 17 and under. It [the government] is not worrying about ***just*** two year olds or four year olds (emphasis added) [402].

With respect, Counsel Sekulow misses the implications of a deceptively self-evident point here. That is, it is most likely that it is specifically *only* the older minors that the government is 'worrying about.' This is the case in that the government is concerned only with minors who are of an age and developmental status where they might actually wish to exercise their individual constitutional right to freedom of expression (regarding political speech) and freedom of association (i.e. affiliating with particular political candidates and party) (as did the minor plaintiffs in Mc Connell). Thus, it is suggested that though the ban under the *Bipartisan Campaign Reform Act* prohibited all U.S. citizens under age 18 years from contributing to federal political campaigns, there was operative, in practice, *a targeting of older minors for exclusion* (from the right to make federal campaign contributions). So, too, it is here contended, the absolute ban on minors voting actually is, for all intents and purposes, focused on barring 16- and 17-year-olds from the vote precisely because *they* are the ones mostly likely aspiring to exercise the vote (as the Vote 16 global campaigns and those analogous would suggest). This targeting for exclusion of 16- and 17-year-olds from the vote, occurring as it does without a demonstrable compelling societal interest, is unconstitutionally discriminatory [403]. The implicit targeting of older minors for exclusion from the vote via the absolute ban on voting for minors (that is, the exclusion of those most likely to wish to exercise their inherent right to suffrage; 16- and 17-year-olds) arguably constitutes *direct discrimination* (for the reasons explained previously) against a delimited group defined by an age criterion. However, this age-based targeting for a restriction on voting rights of likely voters (namely 16- and 17-year-olds) is hidden behind the smokescreen of: (a) the general ban against *all* minors voting from birth to 18 years less a day, and (b) an *inoperative* alleged use of age as a proxy for voting competence used to screen the electorate.

The States' claim to be using age as a proxy for political competence in deciding entitlement to the vote creates the *illusion* of a facially neutral age-based rule for selecting eligible voters from amongst the available citizen potential pool of voters. As explained, however, the rule is being used in a discriminatory manner in that it is applied only in regards to the young and not the old (i.e. age as a proxy for political competence is not being applied to the elderly who are known, as a group, to suffer higher than average rates of significant cognitive impairments compared to younger populations). Thus, the alleged neutral rule has a disproportionate impact on potential voters aged 16- and 17-years-old (i.e. screening out both the politically incompetent and competent potential voter from amongst those minors of the age group most likely to vote if given the chance), while creating no burden whatsoever on the elderly (screening out neither incompetent nor competent older voters). This differential treatment would not be occurring if age were indeed being used as a proxy for competence for the vote. The fact that these 16- and 17-year-olds will one day reach age of majority for the vote does not in any way negate or justify their discriminatory exclusion earlier on (especially given the absence of a compelling legitimate societal interest for the *blanket absolute bar* against minors voting).

The State, in implementing a blanket bar against minors voting, *in effect*, is communicating to society at large that minors *as a group* (including 16- and 17-year-olds) are allegedly invariably politically incompetent and certainly less competent for the vote than are *all* adults, even the very elderly. The State's case in excluding minors (especially 16- and 17-year-olds) from meaningful political participation (i.e. excluding them from the vote) is not sustainable. In this regard, consider also that the blanket bar on the vote for minors as a barrier to this form of political free expression and association, for all practical purposes, in reality, is intended to target the older teen group and *not* young children (those most likely to wish to vote). Under these circumstances, the prohibition against minors voting is quite invidious. Invidious, in large part, since the real target of the bar is hidden, as mentioned, behind the smokescreen of the absolute ban (i.e. the prohibition against *all* minors voting; even young children who are highly unlikely to seek the vote) with an illusory supposed rationale in terms of political competency considerations. Hence, a 'politically correct,' but inapplicable justification is offered by the State for the denial of the vote to 16- and 17-year-olds (i.e. namely the desire to ensure a competent electorate). Conversely, it would be 'politically incorrect' for governments in democratic States to be transparent about the fact that they were motivated in any way to exclude likely potential voters (i.e. specifically minors aged 16- and 17-years-old) for reasons other than competency (i.e. the actual concerns being instead, for example, fears about how these 16- and 17-year-olds might vote, about the anxiety of the elderly—a significant political force—that the issues of older adults retain their very high

priority in government policy; something that might be compromised, to a degree, if minors had access to the vote etc). Yet, on the evidence, these alternative explanations for exclusion of 16 and 17-year-olds from the vote in Western democratic States would seem much more plausible than is the current justification proffered by government framed as it is around the alleged desire to ensure a competent electorate.

8.9 Inter-generational Injustice and the Exclusion of 16- and 17-year-olds from the Vote

The fear has been expressed in many Western democratic States that with the aging of the electorate, and the fact that voter turnout is higher for older voters along most of the age continuum, that the elderly 'may use it [their electoral strength] in an excessive manner to benefit their unavoidably short-term self-interest' [404]. This fear has been expressed in fact by some opponents to lowering the minimum voting age below 18 years and not just the proponents. Van Parijs makes the point, based on evidence we will consider shortly, that the inordinate political strength of the elderly in Western States may inexorably lead to inter-generational injustice [405] (the current author would add that this may occur even if unwittingly on the part of the elderly as they attempt to meet their own undoubtedly pressing needs).

It would seem that lowering the voting age to 16 years may be helpful in providing a counterbalance to this likelihood. Young people are likely to become more engaged in voting and in advocating for their interests through the vote if the value of democratic political participation is introduced in a meaningful way before they are considerably alienated from the process. Being excluded from the vote at age 16 and 17 and becoming aware of one's second-class citizenship and lack of political power precisely at a time when young people are primed for engagement with the larger society induces a kind of learned helplessness. That learned helplessness manifests itself, in part, in a lack of interest in the electoral process even when having reached age of majority. For instance, there is wide consensus that low voter turnout in the U.S. (such as is the pattern also in other Western democratic States) is concentrated in the youngest eligible voters [406]. As Campbell notes, this is surprising as these younger voters (in the U.S. for example) are generally more educated than were previous generations of their peers, and higher education level is normally positively correlated with a higher probability of voting [407]. Campbell points out that:

> It is not just that young people vote less than their elders [in the United States]. . . it is that young people today vote at lower rates than young people in the past. In 1964, the turnout rate of voters eighteen to twenty-four was 16 points lower than for voters aged sixty-five and over. In 2000, that gap widened to over 35 points, a change attributed entirely to a drop among the young [408].

These large disparities between age groups in voter turnout in the U.S. remain despite the improvement in voter turnout, especially amongst the younger eligible voters, during the 2008 election of U.S. President Barack Obama which was of such historic significance. There is a consensus among political scientists that 'in the long run the policy agenda may only poorly represent the segments of the population that vote the least' [409]. Campbell points out that Social Security and other such issues of major concern to the elderly have such extraordinarily high priority in U.S. politics precisely because seniors have such high voter turnout and make their voices heard politically in a number of ways [410]. Indeed, 'old age pensions and medical care for the retired absorb a share of the Gross National Product (GNP) that rises rapidly' [411]. Simply increasing voter turnout overall, according to many political scientists, will not change the voter profile [412]. Hence, increased voter turnout will not necessarily further the interests of young people, especially those under the age of majority if the basic profile of the voting population remains as it is currently with voter turnout much higher amongst the older group (65 years plus) than those in the youngest voting age category (i.e. 18- to 29-year-olds). Consider the following in this regard:

> The age of the median elector – the person who is exactly in the middle when people entitled to vote are ranked from the oldest to the youngest – has kept rising steadily and is expected to keep rising. *In a typical West European country such as Belgium, the age of the median elector was about 41 in 1980. It has now become 45 and is expected to rise to 56 by 2050* (emphasis added) [413].

Some have suggested that there is prima facie evidence that seniors appear not to be as concerned with the interests of the young as one might hope; in part because 'geographic and social mobility loosens the ties between generations;' [414] and partly due to their prioritizing concerns over their own interests as do most voters. For instance, U.S. data reveals a negative correlation between age and attitude to expenditure on education [415]. Such data are, of course, open to interpretation, but it seems reasonable to assume that the significantly greater representation of seniors as opposed to young people at the polls has a significant impact on whose interests politicians assign relatively heavier weight. Also of importance in regard to the comparatively less attention that youth issues receive from politicians is the fact that:

> the proportion of households currently without dependent children and the proportion of people who are and will remain childless keep increasing [416].

The objective then must be to engage young people in the vote so as to have a more representative democracy more responsive to the needs and interests of all age groups; including the youngest amongst us. Lowering the voting age to 16 years, combined with authentic, meaningful civics education in the schools which also encourages youth to vote, is a step in

that direction. However, political scientists most often do not even mention lowering of the minimum voting age to 16 years as a partial and viable solution to both the issue of low voter turnout and the current skewed voter demographic in most Western democratic States. Notwithstanding such utilitarian arguments in favor of the vote at 16, however, is the argument that: (a) suffrage is a universal fundamental human right; and (b) there is no compelling legitimate societal interest in denying the vote to 16- and 17-year-olds who now globally have begun in earnest to demand the vote. It is striking indeed that disenfranchisement of the elderly is morally repugnant to most (as it should be if one values democratic ideals), but disenfranchisement of teens is considered socially acceptable. Perhaps this is the case, in large part, since we have erroneously come to treat electoral law *as it pertains to minors* as if it were constitutional law and, hence, something to be accepted uncritically (i.e. in terms of the rationales proffered by government for the exclusion of teens, even 16- and 17-year-olds, from the vote). This author would suggest that disenfranchisement of 16- and 17-years-olds who are internationally demanding the vote is as unconscionable as disenfranchising the elderly. Neither the alleged self-interest of seniors or its arguable impact on their voting strategy, nor the disproportionately greater influence of seniors over politicians, nor the higher incidence in seniors and the elderly of cognitive impairment have been used as rationales to deny *this* age-defined group the vote, nor should this be the case. Neither then should the alleged self-interested concerns of 16- and 17-year-olds, or their alleged political competency deficits be a rationale for *their* exclusion from enfranchisement.

Note that the reference here to '*dis*enfranchisement' of youth is an acknowledgement of the fact that there is a denial of the vote to minors despite society's recognition of the inherent universal right to suffrage (that universal right, independent of age, being incorporated into the enumerated rights expressly articulated in democratic constitutions and international human rights treaties). The *dis*enfranchisement of youth is made virtually invisible, however, since minors are robbed of this birthright from the start; making it seem thus as if the absence of suffrage for minors is in synchrony with the natural order of things and, hence, not in fact a denial of a basic right.

8.10 Universal Suffrage, Free Expression and Freedom of Association *versus* Age-Based Voter Qualifications

What then of universal suffrage? Should a line be drawn based on age barring some or all minors from the vote? The transcript from *McConnell* reveals that the issue arose in the context of the discussion regarding political free expression:

> **Justice Breyer**: . . . once . . . you've agreed that at some age, it's reasonable to draw a line [regarding who may lawfully make federal campaign contributions]. And once you're down that road, you have to deal with the obvious question that the Constitution draws a line at 18 years old to vote. And afterall, it was thought you needed a constitutional amendment to get that result [417].

This author has argued previously here at length that in fact the 26th Amendment to the U.S. Constitution did *not* draw at a line at 18 thus granting suffrage for the first time to 18- to 20-year-olds since that right was *already* present, for instance, in the 14th Amendment Equal Protection Clause ('No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.') [418]. Indeed, Justice Brenan in *Oregon v Mitchell* [419] points out that the Equal Amendment Clause of the 14th Amendment actually started out referring specifically to political rights before the language was broadened to include all the rights of a citizen, and the newer version of the text of the Equal Protection Clause was accepted by the framers of the Constitution. One version of the original language of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution read as follows:

> Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States, in every State, ***the same political rights*** and privileges (emphasis added) [420].

Hence, the primacy of political rights as one of the key defining features of citizenship was fully appreciated by the framers of the 14th Amendment to the U.S. Constitution and that right was constitutionally extended to all citizens of the United States.

It will be recalled that a lengthy analysis was made here previously suggesting that the 26th Amendment to the U.S. Constitution merely highlighted a prohibition on age discrimination against 18- to 20-year-olds in the vote, while remaining silent on the issue of age discrimination in the vote with respect to the under 18s. (This view then is opposite to Justice Breyer's suggestion that a constitutional amendment was necessary for minors aged 18–20 to obtain the vote in the early 1970s). Universal suffrage, constitutionally guaranteed as it is, in fact does *not* permit the drawing of any blanket absolute lines with respect to the possibility for more inclusive access to rights and freedoms under electoral law (for instance, the rights of political expression and free association through the vote for those aged 16 and 17 years). Further, drawing a line to ban those unlikely to ever try to exercise the right (i.e. young children) is a meaningless exercise. Hence, the question must be why exclude those who are 16- to 17-year-old from the vote (the segment of the minor population most likely to wish to exercise the franchise). As we have discovered, there does not appear to be a consistent or logically sound response to that question; especially when one considers, as Justice Beyer concedes in *McConnell* that: "*There are many*

17 year olds who would be excellent voters and there are many older people who are terrible [voters]. . .” [421].

In *McConnell*, as explained, the minor plaintiffs raised a constitutional challenge to the absolute ban under the *Bipartisan Campaign Reform Act* (BCRA) [422] on federal campaign contributions made by citizens aged 17 years and under (minors). However, when the issue of minimum voting age was raised by Justice Breyer in *McConnell* during questioning of minor plaintiff's counsel as an example of line drawing based on age (presumably as an allegedly acceptable instance of such line drawing); counsel for the minor plaintiffs did *not* take the opportunity to suggest that the vote, too, is a form of free expression (that happens to involve political speech content). As suffrage for minors is a form of free expression, absent any compelling legal societal interest for denial of the vote to this age group, the enfranchisement of minors is also constitutionally protected by the First Amendment rights to free speech and free association. Hence, the same freedom of expression and association argument that minors plaintiffs' counsel raised in *McConnell* with regard to the right of minors to make federal campaign contributions was applicable also to the issue of enfranchisement of minors (i.e. 16- and 17-year-olds who are most likely to desire the vote). This was especially the case as counsel of the minor plaintiffs (and the Court also) held that many older teens are capable of independent and voluntary political decision-making. Notwithstanding the foregoing, however, both counsel for the minor plaintiffs in *Mc Connell*, and the Court appeared to take it as a given that the vote should be denied to *all* minors (citizens below age 18 years). Consider the following exchange in *Mc Connell* where the Justices question counsel for the minor plaintiffs and the issue of free speech (i.e. the free expression constitutional guarantee) is raised:

> **Justice Breyer**: “. . . what's wrong with Congress saying well, we think the problem's about the same when you give money to a candidate as when you vote for a candidate [i.e. age-related concerns regarding young people's vulnerability to manipulation, competence to decide on their own etc.]
>
> **Mr. Sekulow:** Two things are wrong with that proposition. First, the First Amendment rights of free speech and association are not somehow contingent upon exercise of the right to vote under the 26th [the 26th Amendment prohibits age discrimination against citizens 18 years and older].
>
> . . . and a perfect example of that would be prior to the passage of the 19th Amendment, [to the U.S. Constitution] women were denied the vote in the United States but they certainly could still exercise the right of speech and association to obtain the right of suffrage. And I think it would be exactly the same argument [with respect to not restricting minors from the First Amendment right to make federal campaign contributions based on the denial of the right to vote]. [423]

The above exchange also points up the fact that the age-based restriction on the right of even 16- and 17-year-olds to the vote (a form of free

speech) may too often be used as a fallacious justification for the restriction of minors' rights of free speech and free association in other respects (where there are also no compelling legitimate State interests in upholding the restriction). For instance, under the *Bipartisan Campaign Reform Act* (BCRA), minors lost the right under statutory law to make federal political campaign contributions (a provision that was ultimately struck down by the U.S. Supreme Court in *McConnell* as unconstitutional). The thinking underlying the BCRA restriction on minors making federal campaign contributions was, in part, that such an infringement of these young citizens' First Amendment rights was legitimate given their exclusion also from the vote and the interference with their free expression and free association rights in that context.

Another example of the violation of the free speech rights of minors is the absolute bar in most Western States, in most circumstances, against any minor, even those 16- and 17-years-old, filing a court petition in their own name (i.e. instead of having to have an adult file the case on the minor's behalf such that the minor has no full party status or independent legal standing). The virtual blanket absolute bar in Western democracies on the right of any minor to make a petition to the civil court in his or her own name in an effort to explain his or her complaint and obtain redress for harms claimed (i.e. file a pleading; to use old English) is also a violation of a very vital form of free speech. The *blanke*t age-based bar in regards to access to the courts for minors without a "next friend" adult intermediary suffers from the same constitutional defects as does the blanket age-based bar regarding denial of the vote to *all* minors [424].

The Sekulow oral argument in *McConnell* also points up that 'administrative convenience in enforcement is . . . not a [constitutional] basis for curtailing speech or associational rights' [425]. So, too, the *blanket* age-based restriction on *all* minors with respect to their free expression and free association through the vote, (even if one were to accept the claim there is a competency issue regarding *some* or even most minors' potential exercise of the vote) cannot be justified on the basis of administrative convenience.

Another aspect of the Sekulow argument in the McConnell federal campaign contribution case which is relevant to the voting rights issue as well is the notion of *rebuttable presumption*. Recall, that this notion was here previously introduced, for discussion purposes, in regards to potential voting rights for particular individual citizens under age 14 years. The notion of a rebuttable presumption in this context means the abandonment of an absolute blanket age-based restriction on suffrage. We previously considered younger citizens aged under 14 years being provided the opportunity before a judge to attempt to *rebut* the presumption that their vote will not be their own and, if successful, being allowed to vote (while older minors would not operate under such a presumption and would have an automatic right to the vote with a minor additional burden, as previously explained,

placed on 14- and 15-year-olds of needing to notify the appropriate government officials that they wish to vote so that their names can be added to the voter registration list).

Sekulow in the *McConnell* case makes reference (in his argument on behalf of his minor clients) to the fact that the U.S. Federal Election Commission (FEC) did *not* request an absolute ban on minors (citizens under age 18 years) making federal campaign contributions. Rather, the FEC had requested that a *rebuttable presumption* be incorporated into the *Bipartisan Campaign Reform Act* [426] regarding the ability of minors 15 years and under to independently and voluntarily contribute financially to federal political campaigns. Hence, what was envisioned by the FEC was providing an opportunity for minors 15 years and under to attempt to rebut the presumption that in making federal campaign contributions they would be, in reality, manipulated by parents or other adults into being conduits for campaign contributions by the adults who had influence and/or control over them:

> The FEC in all of its recommendations [i.e. regarding how to prevent corruption and maintain the integrity of the Federal electoral system in the U.S.] never asked for an absolute ban on considerations [i.e. financial contributions] by minors to be put in place. ***They had a presumption issue for those that were 15, 14 and 13, under 15*** *…* ***but that was a request for a presumption which was rebuttable, rebuttable under voluntariness,*** *rebuttable if in fact it [the campaign contribution] was from funds controlled by the minor and it wasn't a gift directed by the parent [i.e. financial gift to the campaign in actual fact by the parent through the child]* (emphasis added) [427].

Such rebuttable presumptions, while certainly not perfect by any means, are at least more consistent with upholding constitutional rights than are age-based absolute blanket restrictions affecting minors' ability to exercise their fundamental rights of free expression and association (where there is no compelling legitimate State interest in the blanket absolute restriction as with the vote). Further, the rebuttable presumption approach avoids the inevitable exclusion of minors who possess the desirable qualification (i.e. ability to cast an autonomous vote). The Supreme Court of the United States in the McConnell case thus affirmed the First Amendment rights of minors in making federal political campaign contributions as there was no compelling societal interest in the infringement of those rights. What has been suggested here is that there is, likewise, no compelling societal interest when it comes to exclusion of youth aged 16 and 17 years from the vote as: (a) the competency rationale fails for the reasons discussed previously, and (b) if young people aged 16 and 17 years are deemed autonomous enough from parents to participate in various forms of political participation such as, for instance, making contributions voluntarily on their own initiative to a certain political campaigns (i.e. as the Supreme Court of the United States decided in *McConnell* was the case), then they must be autonomous enough also to qualify for the vote.

Note that in *McConnell* there was no consideration whatsoever given to the possibility of revising the *Bipartisan Campaign Reform Act* (BCRA) [428] to allow parents to make federal campaign contributions on behalf of their minor children (given the BCRA then existing ban on minors making federal campaign contributions). This was the case presumably in that the giving of a federal campaign contribution was viewed as a deeply personal act of free expression of political views. Hence, allowing such proxy contributions on behalf of minors would allow for the possibility of unlawfully using the minor as a conduit for the adult's expression of his or her own political preferences as expressed through financial support for certain candidates or parties (regardless whether the federal guidelines concerning contribution amounts per person were followed). Rather, the only solution that the Court found was to *affirm minors'* right, under the First Amendment, to make such federal campaign contributions in their own name. It is suggested here likewise that proxy voting for minors under 16 years is not conceptually, constitutionally or morally viable for a similar reason (i.e. proxy voting does not ensure that the vote is truly a manifestation of the minor's personal free expression).

It is interesting to note, however, that the notion of proxy voting is, in fact, not a novel contemporary one. Rather, it is the case that implementation of proxy voting in various iterations has a long history dating back at least to the late 1800s. At one time, a form of proxy voting was tried briefly in Tunisia and Morocco where each father of four or more children was given an extra vote [429]. The fact that the notion of proxy voting has been debated for generations suggests that many societies have long placed a value on the notion of universal suffrage; but have struggled to come up with a politically and philosophically viable strategy for its implementation. It would appear that granting the vote to 16- and 17-year-olds is a viable option especially in contemporary times. The denial of the vote at 16 years based on the alleged political incompetence of 16- and 17-year-olds relative to those 18 years and older is an inoperative and unjustified rationale for the reasons discussed at great length in the foregoing. Furthermore, the fact that young people traditionally have low voter turnout compared to older voters is also not a reason to deny them the vote. Instead, it is a call to action to encourage them to vote, for instance, through civics education initiatives and public education campaigns and inspiring candidates. 'Rock the Vote' [430] is one such public education campaign directed to the young voter in particular which was quite successful in contributing to the significant increase in young eligible voters participating in the 2008 U.S. Presidential election. Certainly, the Obama campaign for the 2008 U.S. Presidential election demonstrates that young people can be motivated to vote. There is no reason to believe that the same would not be true for 16- and 17-year-olds who are excited by candidate(s) they can better relate to. Compulsory voting is one of many options that, at least, is a remedy

tied to the problem, while eliminating potential voters (older minors) is hardly a solution to the shrinking of the total eligible voting population that actually votes in Western democracies (with the number of voters in the youngest age group of eligible voters decreasing significantly over the last few decades).

8.11 Disenfranchisement of Minors Fallaciously Used as a Rationale for the Denial to Older Adolescents of Other Constitutionally-Protected Participation Rights

There are many examples of the fact that there is recognition by government in Western democratic States that at 16 years old, citizens are capable of thoughtful and voluntary political action. For instance, as was discussed in the previous section, the U.S. Federal Election Commission suggested that for minors aged 16 and 17 years, the reasonable assumption could be made that they were capable of acting independently from their parents in regards to the political participation activity of making federal campaign contributions. The Supreme Court of the United States in fact upheld the right of minors to do so barring any demonstrable evidence that their contribution was, in reality, made on behalf of parents or some other person (s). Senator McConnell and others objected in McConnell [431] to 16- and 17-year-olds being given the right to make federal campaign contributions, and presumably, for similar reasons, would have opposed any lowering of the minimum voting age from the current 18 years. However, even these opponents of adolescents being afforded greater freedom of political expression in certain areas conceded that minors are capable of various forms of political participation (i.e. volunteering for political campaigns, speaking and writing on behalf of political candidates, etc.) to which they raised no objection:

> As Senator McCain emphasized [in arguing *in opposition to the* constitutional challenge to the ban against minors making federal campaign contributions] "Section 318 [of the Bipartisan Campaign Reform Act] leaves minors free to volunteer on campaigns and express their views through speaking and writing…" Minors may also contribute to candidates for state office (subject to applicable state laws) and to non-party political committees. Section 318 prohibits minors from employing only a single mode of political expression-namely, "the undifferentiated symbolic act of contributing…to a federal candidate or political party. *Section 318's ban on contributions to specific candidates for whom minors cannot legally vote thus leaves open numerous avenues for minors to impact the underlying issues that may be affected by the election* (emphasis added) [432].

Note that the supporters of the *Bipartisan Campaign Reform Act* (BCRA) ban on minors making *federal* campaign contributions had no problem with it being permissible for minors to make financial campaign contributions to *State* political campaigns (as evidenced in the quote

directly above). This was, however, in all likelihood not a vindication on their part of the constitutional rights of minors, but rather a display by federal representatives of deference to what they saw as within the purview of States rights (i.e. holding that States should have unbridled authority either to allow or disallow minors making contributions to candidates for State elections or to their *non-party* political committees).

The question, for our purposes, is 'why exclude 16- and 17-year-olds from the vote when one is willing to allow these young people (who are below the age of majority) the right to contribute to the electoral process in other ways (i.e. speaking out on behalf of candidates, door-to-door canvassing on behalf of a candidate, making financial contributions to support candidates for State office etc.)?' Could it be that the secret ballot leaves too much uncertainty as to how a young person will ultimately vote such that legislators do not feel comfortable in extending the vote to 16- and 17-year-olds? Afterall, the young person contributing to a campaign by speaking to voters is generally monitored in some fashion and can be shut out if he or she does not follow the script the party has set out. It is ironic then that wherever the rights of the minor to political participation are *denied* (i.e. the restriction barring minors from the vote etc.); the spectre of adult manipulation in regards to *that* activity (imposition of the adult's political preferences on the minor) is raised as a prime rationale, while no such concern is raised in regards to those political activities in which the minor *is* permitted to participate. Yet, the risks for adult manipulation of the minor are in fact identical in both types of cases. Indeed, in *McConnell* those who supported an absolute bar against minors making federal campaign contributions pointed to the age-based restriction in voting as a supposed indicia of the alleged susceptibility of *all* minors under age 18 years to adult manipulation of the minor's acts of political free expression:

> . . . Congress's judgment [to bar minors from making federal campaign contributions] is further supported by restrictions on the franchise itself. While individuals who are unable to vote may nonetheless have a significant interest in associating themselves with a particular candidate, *Congress may recognize their disability from voting as a factor in identifying minors as a class of persons who are particularly susceptible to misuse as conduits for campaign funds [actually contributed by adults*](emphasis added) [433].

The age-based restriction of the right to vote thus imperils the civil rights of minors in general; as if one unconstitutional violation of the basic rights of the minor justifies another:

> *In light of the longstanding general restrictions on the ability of minors to . . . vote* . . . a law targeted solely at transfers of money [BCRA section 318] does not significantly burden any right that minors have traditionally been understood to possess. [434]

It is clear from the quote immediately above that the restriction on minors with respect to any civil right (i.e. the right to make federal

campaign contributions) is often allegedly justified by the exclusion of minors from the vote. This line of illogic implicitly rests on the fallacious assumption that minors have no underlying fundamental rights of free expression and free association which prohibit their being excluded from any form of lawful political participation (absent any demonstrable, compelling, and legitimate societal interest which requires violation of their First Amendment rights using the least restrictive alternative). Strangely, in *McConnell* the supporters of the absolute ban on minors' making federal campaign contributions argued the over-inclusivity of *other* age-based bars against minors *as a defence* for the deficits in the *Bipartisan Campaign Reform Act* (BCRA) prohibition against minors making the federal campaign contributions:

> *The line between adulthood and minority is routinely used to determine eligibility for the exercise even of fundamental rights. . .without the need or opportunity for individualized inquiry into a minor's qualifications*. Indeed, section 318 [of the Bipartisan Campaign Reform Act] is if anything *more* closely tailored to the relevant governmental interest than are many other age classifications . . . of *unquestioned* validity [i.e. the age-based restriction on the vote] (emphasis added) [435].

The over-inclusivity of many age-based classifications as they affect minors, however, is a reason to re-examine these as to whether they require and allow for a more 'individualized inquiry into a particular minor's qualifications' for the activity from which the minor is barred. For instance, the restriction on minors serving on juries may need re-visiting. It may be that particular minors are suitably qualified for jury service which issue can be assessed on an individualized basis through the routine pre-trial voir dire that is already generally part of jury selection. In cases involving juvenile defendants or minors who are civil litigants; having one or two younger persons, even if they are minors aged 16- or 17-year-old, on the jury may be relevant if we are to have cases judged by a more representative group of so-called peers. Yet, in *McConnel*l the supporters of the *Bipartisan Campaign Reform Act* restriction on minors making federal campaign contributions argued essentially that adding one more over-inclusive age-based classification which prevented minors from exercising their fundamental constitutional rights was inconsequential. Further, even of more concern was their argument that:

> Age is at best a rough proxy for maturity or judgment, but status as a minor is (as a result of background legal principles that are unchallenged here) a highly accurate standard for identifying those persons who are legally subject to the direction of others [436].

The quote from *McConnell* [437] (immediately above) indicates that supporters of *Bipartisan Campaign Reform Act* (BCRA) section 318 conceded that: (a) age is, at best, a 'rough' proxy for maturity, or [competent] judgment, and that, therefore, (b) it was in fact (legal) 'status as a minor'

per se that was the real basis for exclusion of minors from various forms of political participation based on 'background legal principles that are unchallenged' (i.e. the distinction in the law between adults and minors that permits infringements of the constitutional rights of minors in various domains). That distinction, as applied to the vote is, however, one that the current author has sought here to scrutinize while challenging the *blanket, absolute* bar on minors exercising their right to suffrage.

The supporters of the *Bipartisan Campaign Reform Act* (BCRA) restriction on minors making federal campaign contributions essentially held then that minors should be restricted from making those financial contributions—just as they are restricted from the vote—precisely because of their legal status as minors. Thus, supporters of BCRA s. 318 held that minors should not be allowed to make federal campaign contributions based on *who they are* as defined by society (i.e. persons holding the legal status of 'minor'). The restriction under the BCRA thus would apply even for the minors legally emancipated from their parents (minors held in law to be competent to make decisions independently from their parents from whom, often as not, they are estranged). So, too, the age-based restriction in the vote applies equally to legally emancipated minors such they also are denied this form of free expression of political preferences and free association with political candidates and a political party. This then indicates that such restrictions are *not g*enuinely concerned with autonomy issues. Such a blanket absolute bar on minor's participation in certain forms of political activity cannot thus be rationalized by reference to alleged concern over adult manipulation of the minor's political acts and preferences.

Somehow, the fact that minors are legally under the authority of certain adults (unless emancipated) with respect to certain issues (i.e. parents make key decisions regarding their children's health, basic education etc.) is fallaciously transformed into the notion that minors would *necessarily* be subject, in most instances, to manipulation in regards to their vote or political campaign contributions or many other forms of political participation. However, if age is not a good proxy for maturity (as the supporters of age-based restrictions in *McConnell* concede), then it is likely not a good proxy for lack of autonomy for minors interested in voting, or in making political campaign contributions either (these minors being comprised mostly of 16- and 17-year-olds but also sometimes 14- and 15-year-olds). Furthermore, manipulation of the minor to serve as a conduit for funnelling campaign funds actually contributed by others is illegal in the U.S. and, hence, the analogy with the legal authority of parents or guardians over children breaks down in such a case. When it comes to the vote, of course, it is a secret ballot so that there would be a safeguard already built into the system regarding potential attempted manipulation of the minors' votes by adults who have legal control over the minors. Of relevance here is the fact that Western democracies have long since abandoned the former presumption of a lack of autonomy of poor people, or citizens who

do not own property, and its use as a reason for *their* exclusion from the vote. Such a non-rebuttable presumption of lack of autonomy in voting in the case of 16- and 17-year-olds is no more legitimate than the same presumption in regards to the vote for the destitute who are so dependent on the State for social assistance, or the working poor quite reliant on a particular low paying employer. It appears that minors aged 16 and 17 years, in effect, are, in many ways, simply classed as 'second class citizens' when it comes to participation rights generally and political participation rights in particular all of which rights are supposed to be constitutionally protected.

It is important in considering age-based restrictions on minors' basic rights to distinguish between the 'protection rights' of the minor and the minor's 'participation rights'. Age-based restrictions on minors that serve to offer them protection from abuse and/or exploitation (i.e. the restriction on minors entering into contracts, etc.) are not a justification for violation of the minor's constitutionally-protected political or other participation rights (i.e. the right to the vote or to make *autonomous* federal campaign contributions) where the restriction cannot be shown to be in the minor's best interest. Supporters of denying minors—even 16- and 17-year-olds certain inherent political participation rights—generally mix the two together (protection rights and participation rights) when stating their position:

> In light of the longstanding general restrictions on the ability of minors to enter into contracts, to dispose of property, and to vote . . . a law targeting solely at transfers of money does not significantly burden any right that minors have traditionally been understood to possess [438].

Note that in the quote immediately above (from the amicus brief filed in *McConnell* for those *opposing* the motion to strike down the *Bipartisan Campaign Reform Act* ban on minors' ability to make federal campaign contributions), the age-based restrictions on minors entering into contracts and disposing of property are both mentioned. However, the two aforementioned age-based restrictions are based on society's desire to safeguard minors from exploitation. Such restrictions are thus in place to implement the 'protection rights' of minors. Nonetheless, the age-based restriction on the vote (a 'participation right', not a protection right) is mixed in with examples of the aforementioned protection focused age-based restrictions in the McConnell amicus brief (submitted to the Court on behalf of those who wished to continue to restrict minors from making federal campaign contributions). Indeed, in the same amicus brief, the following statement appears:

> It is . . . well-established that . . . the First Amendment rights of minors [i.e. to free expression and free association] are not co-extensive with those of adults. In *Prince v Massachusetts*, 321 U.S. 158 (1944), for example, this Court [the Supreme Court of the United States] upheld the conviction of an adult who had allowed her minor ward to sell religious tracts on a public street in violation of a Massachusetts child labour statute [439].

In *Prince v Massachusetts* [440], however, the issue was clearly the child's protection interests. The Court's decision was *not* based on a notion that minors have restricted First Amendment participation rights (i.e. simply because they are minors or for any other reason). Here the child's First Amendment right to free expression of religious views was implicated; presuming, for the sake of argument, that the child endorsed the religious perspective in the literature she was handing out, but this matter did not enter into the case. That it is the protection matter that was the basis for the decision is evident from the fact that: (a) the decision of the Court to uphold the child custodian's conviction was based on the Massachusetts child labour statute specifications regarding the requirements for a minor working lawfully, and (b) the fact that the child handing out the religious literature on the street was a nine-year-old girl created a situation that violated the State child labour statute. The evidence noted by the Court included the fact that the custodian of the child had been warned by the school attendance officer not to continue allowing the girl child to work on the streets selling religious literature, thus implying that the child had missed school sessions as a result of this activity. Interestingly, the Massachusetts statute, at the time, contained a gender bias in that the statute permitted boys 12 years and over, but only girls 18 years and over doing any trade on the streets.

> No boy under twelve and no girl under eighteen shall sell, expose or offer for sale any newspapers, magazines, periodicals or any other articles of merchandise of any description, or exercise the trade of bootblack or scavenger, or any other trade, in any street or public place [441].

Clearly the intent was *not* to suggest in the statute that males had more extensive First Amendment rights than did girls when it came to handing out religious reading material on the street. Rather, the gender considerations were likely based on notions concerning males as wage earners (such that young boys engaged in earning a wage at a very young age fit in with the accepted stereotypical gender role norms of the time). Hence, the State afforded boys aged 12 and over the right to sell religious and other reading materials on the street, or conduct other trades on the street while securing the protection interests of boys under age 12. The focus with girls, however, was on protection interests even for those aged 12–17 years. The State's intervention in the aforementioned case to protect the child's right to be free of labor and to attend school regularly—upheld as constitutional by the Court in *Prince v Massachusetts*—thus fell into the category of secular concerns and was not at all motivated by the desire to infringe the child's First Amendment rights:

> On one side is the obviously earnest claim for freedom of conscience and religious practice [First Amendment rights]. With it is allied the parent's claim to authority in her own household and in the rearing of her children. The parent's conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element

> of religious conviction enters. *Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end, made here in a manner conceded valid if only secular things were involved* (emphasis added) [442].

Such statutes were intended then to place constraints on child labour so as to prevent the exploitation of children for labour and the consequent aborted education the minor would receive. It is here contended then that *Prince v Massachusetts* does *not* stand (contrary to the claim of the aforementioned amici in *McConnell*) for the proposition that the First Amendment rights of minors (whether involving religious freedom of expression, or political free speech via the vote etc.) are not coextensive with those of adults. *Indeed, the U.S. Supreme Court in Prince v Massachusetts affirmed the First Amendment rights of minors*:

> ***The rights of children to exercise their religion***, and of parents to give them religious training and to encourage them in the practice of religious belief, ***as against preponderant sentiment and assertion of state power voicing it, have had recognition here***, most recently in *West Virginia State Board of Education v. Barnette* . . . (emphasis added). . . Our ruling does not extend beyond the facts the case presents. We neither lay the foundation 'for any (that is, every) state intervention in the . . . participation of children in religion' which may be done 'in the name of their health and welfare' nor give warrant for 'every limitation on their religious '. . . activities .'.(emphasis added) [443].

Returning then to the McConnell case, the Court noted in that case that there was scant evidence of exploitation of minors with regard to their making of federal campaign contributions (i.e. little evidence that parents were using their children as conduits for the parent's additional federal campaign contributions such that parents were able to exceed the federal guidelines for the amount that any one person could contribute). That this was the case was in fact well known for some time to Congress and State governments. We may properly conclude then that the age-based restriction incorporated into the *Bipartisan Campaign Reform Act* (on minors making federal campaign contributions) was *not* based on society's concern with children's protection rights, nor on the need to maintain the integrity of the electoral system. Rather, it was based on a simple desire to restrict minors from exercising this significant form of political free expression simply because they were minors. In the same way, there is every reason to believe, as previously discussed, that minors aged 16- and 17-years-old most often will make autonomous choices if granted the opportunity to exercise their inherent right to suffrage. Hence, the restriction on the ability of 16- and 17-year-olds to vote does not appear to be based on a genuine or actual concern with the minors' protection interests, nor indeed on the need to maintain the integrity of the electoral system. Instead the age-based restriction against 16 and 17 year olds in the vote would seem to be a legally and morally insupportable infringement of minors' ability to participate in society as persons in their own right and as full citizens.

Part IX
Voting Age Eligibility and the Societal Marginalization of Under 18s

Chapter 9
Minors' Perspectives on Their Citizenship Status

9.1 Minors' Perceptions of Being Second-Class Citizens Due to Their Exclusion from the Vote

Next we will examine some of the intriguing social science findings regarding minor's understanding of civil rights, citizenship and the vote. What we will discover is that minors, even very young children of eight or 9 years, are often keenly aware of their second-class citizenship and exclusion from the political process in general and not just in regards to the vote. We will consider the potential implications of these findings for civics education and human rights education in the schools; as well as the implicit lessons for the struggle for the vote at 16.

The prominent social scientists Helwig and Turiel, in commenting on the empirical literature regarding minors' understanding specifically of *civil rights*, concluded that adolescents have a grasp of the notion of the universality and fundamental nature of the right of free expression:

> *Young adolescents (13-year-olds) do possess concepts of freedom of speech … that are not solely based on authority, power, or legal rules*. In response to direct [verbal] probes about features of rights such as their universality and independence from legal rules, *adolescents at all ages conceptualized freedom of speech … as universal moral rights that should apply everywhere*. Hypothetical laws placing general restrictions on free speech … were judged wrong in all countries [by the adolescent study participants drawn from various countries]. Adolescent reasoning was found to be more sophisticated than revealed by prior studies looking exclusively at reasoning in moral dilemmas [the Kohlberg type studies on moral reasoning](emphasis added) [444].

Further, these researchers found, through their review of this social science empirical literature on young people's grasp of the meaning and intent of civil rights, that adolescents have a good understanding of the range of legitimate objectives served by, for instance, the exercise of free speech (of which the vote is one example):

> Freedom of speech was justified [by the adolescents taking part in various social science studies] with reference to the different aims and goals served by this right,

S.C. Grover, *Young People's Human Rights and The Politics of Voting Age*,
Ius Gentium: Comparative Perspectives on Law and Justice 6,
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> including [the] … democratic – moral functions of political representation and voice (e.g. helping minority voices to be heard and represented in a democratic political order [445].

Whether children and adolescents are willing to hold, in a particular study, that certain civil rights should take precedence over specific social conventions or legal rules depends on the particular (hypothetical or non-hypothetical) situation the study participants are asked to judge, and also on the particulars of the methodology used to gather their responses. Nonetheless, Helwig and Turiel contend, based on their review of the relevant empirical social science literature, that there is sufficient evidence to conclude that by adolescence, minors in Western and non-Western States have a good grasp of the concept of 'civil liberties' and 'rights' as 'natural rights' (independent of the particular political system they happen to find themselves in) [446].

While minors appear to consider participation through free speech (of which the vote is a variant) as a natural right, they are, at the same time, highly cognizant of their exclusion from the exercise of the vote as one of the most meaningful political participation activities. This is evident from certain of the findings of an international study on minors' understanding of their rights and responsibilities as citizens [447]. The international study referred to was conducted on behalf of the 'Childwatch International Citizenship Study Group' and used the same research protocol in each of the six countries where the study was conducted. That qualitative research methodology involved focus group discussions and various exercises with the minors (i.e. imagining what rights minors should have in a hypothetical land etc.). A sample of 8- to 9-year-olds and another sample of 14- to 15-year-olds were participants in *each* country. The intent was to investigate how the children experienced their citizenship and what the notion of citizenship meant from their perspective. In addition, there were surveys of parents and teachers conducted to investigate *their* perspectives on children's citizenship, and the rights and responsibilities of minors as citizens.

In the New Zealand study, when minors were asked what types of rights they thought the young should have in a hypothetical country; the right to have a say was a predominant theme. Mostly older children (aged 14–15 years) also raised the issue of the vote in this regard; a representative quote is:

> … each house should have a voting paper and children get to vote. *High school, students especially should vote* (emphasis added) [448].

In the Palestinian study, the researchers concluded that:

> … Palestinian children regard adults as citizens-especially since adults carry passports, *can vote*, go to work … [Palestinian children] view themselves as *incomplete citizens* insofar as they cannot do what adults are allowed and capable of doing (emphasis added) [449].

In the South African Study, older children (aged 14–15 years), not uncommonly, viewed voting rights as one of the signature indicia of both citizenship and of adulthood from which they are excluded:

> [The researchers commented that for some participants] … citizenship related to the right to vote and coming of age at 18 or 21 years old-that is the age when one can do what adults do [450].

In Norway, children even at a young age (8–9 years) at times expressed the notion that they are citizens in their own right, and as such should have the opportunity to participate in collective decision making [451]. A representative quote from the 8- to 9-year-old group in the Norwegian study in response to the question of *what it means to be a good citizen* is as follows:

> To decide things that are right for other people as well, not just things that are right for yourself [452].

Some of the older Norwegian study participants argued that they should have the vote at 16. Others felt that this right should be afforded such that those interested in voting and knowledgeable about politics could take advantage of the opportunity at age 16:

> [The right to vote should start at 16] because when you are 16 you are really quite an adult [453].

Still others were concerned that children's votes might be manipulated by adults. A sample quote on this point is as follows:

> They [adults] understand more. And it could be like … if children had the right to vote … then parents could use their kids, and ask them to vote for what they want [454].

The fact that 14- and 15-year-olds raised the issue of voter autonomy (in regards to minors voting) is itself a positive sign. It suggests that they may not be so easily susceptible to the possibility of manipulation of their vote even at this age; especially given their awareness of the secret ballot.

The researchers in the Norwegian study suggested that their findings indicated that though Norway is considered a leader in children's rights, the children themselves were actually quite ambivalent when it came to seeing themselves as participants in society including as political actors. There was no consensus in any of the age groups as to what the age should be for age of majority in general, or for the vote (i.e. some thought age of majority should be 16; others thought the voting age in federal elections should be 18 years while that for local elections should be lower etc.) [455]. The Norwegian researchers attributed their findings in this regard, in large part, to the fact that 'the extent of their [the children's] empowered participation [in Norway] is often limited, and children's position as political actors is unclear' [456]. The current author would suggest that very mixed messages are sent on the issue of the participation rights of minors in most

Western democratic States (for instance, children are permitted to provide some input into some decision-making at school and in the community, but denied the vote at 16 such that all minors are excluded from a most fundamental form of political participation and one of the prime markers of full citizenship).

In Brazil, where there is the vote at 16 years though voluntary (mandatory voting exists in Brazil for citizens aged 18–70 years), children and adolescents even at age 14 and 15 years still felt disempowered. It would seem significant that it is not compulsory for 16- and 17-year-olds to vote in Brazil, while it is compulsory for those 18–70 years old. If one presumes that the government wishes, through its grant of the vote at 16, to convey that 16- and 17-year-olds are full citizens the message seems mixed. The fact that voting at 16- and 17-years-old is *not* compulsory in Brazil; in a context where there is compulsory voting (for those 18 to 70) would seem to devalue the importance of the votes of 16- and 17-year-olds in the public perception. (The fact that those over 70 in Brazil are not subject to the compulsory voting requirement may be premised, in part, on the fact that there is a higher incidence of mental and physical health issues that exist in this population. These health-related matters could interfere with individuals of this age group readily getting to the polling stations and perhaps might, for some, interfere with their capacity to vote competently once there. It may also be that the sentiment is that persons of this age group have already fulfilled their citizenship obligations in relation to their having voted consistently for decades).

There is still a significant problem of racial and socio-economic discrimination and poverty in Brazil which seems overwhelming and may leave the young people unsure of how they can contribute to change in any significant way. The Brazilian researchers in the International Childwatch study on children's understandings of citizenship commented that:

> *There was a general sense that the children and adolescents felt that they did not know how to claim their rights or demand that they be fulfilled.* Some mentioned the right to vote as a responsibility of the citizen to choose a representative who will make the necessary changes in society. However, most children seemed sceptical [sic] and did not believe that politicians would be able to solve social problems. *Many children believed that nothing depended on them and that their participation was not important in the process of transforming reality* (emphasis added) [457].

The fact that children and adolescents in Brazil often held the belief that they were impotent to make significant contributions to positive social change or to claim their human rights is problematic. This finding would seem to suggest that young people must be encouraged by teachers and community leaders as well as family to be participants and political actors in various ways in Brazil as elsewhere. When children are disempowered

in their daily lives by crushing poverty and discrimination, a learned helplessness often occurs that may translate into an alienation from politics and the electoral process generally. Significantly improving voter turnout, and achieving high voter turnout amongst the youngest voters in any nation State, requires hope for change amongst the youth. That hope is more likely where there is a certain minimum adequate level of perceived social justice and equity in the society rather than great disparities in well-being between various segments of the population. Civics education must be directed to basic human rights issues inclusive of 'children's human rights' and not just focused on the philosophical abstractions connected to democracy and the technical aspects of democratic electoral systems. This is an essential element if young people are to: (a) consider voting as a part of meaningful citizen action directed to holding governments accountable and achieving needed policy change, and (b) make voting a lifelong pattern of their citizenship activity i.e. starting at age 16 years. On this point, it is noteworthy that in the International Education Association study on students' understanding of, and beliefs about citizenship, only 55% of 14-year-olds in 24 countries (90,000 students in all of this age in the international sample) reported on a standardized assessment instrument that they had learned in school about the importance of voting [458]. Clearly, civics education, as currently formulated in most schools in democratic States, is not consistently directed to facilitating young people viewing suffrage as a fundamental human right (or unequivocally also *their* inherent basic right) as well as a central duty of citizenship.

Australian 14-year-old students (participating in an international qualitative study on citizenship carried out in 28 counties and conducted under the auspices of the International Education Association) were found *not* to readily endorse citizenship action such as peaceful protests and other forms of lawful civic engagement: Rather, they believe that a good citizen 'votes and shows respect for government representatives' [459]. Note that *voting is compulsory in Australia* and this may have importantly impacted on the students' regarding voting as a citizen's responsibility. Further, in the same study, '. . . barely half of the cohort [of 14-year-olds in the Australian sample] agreed that they have learnt about the *importance* of voting in school, and almost half disagree' [460] despite Australia's national civics education program initiative in the schools dating from 1997 [461].

What is most relevant for our purposes here is one of the key conclusions drawn from the international Childwatch study on children's understanding of citizenship as a concept, and their experience of citizenship in their daily lives. That conclusion, based on discussion with both younger children and 14- to 15-year-olds in various countries is that children perceive themselves as excluded from the political process in its many forms:

> Across all counties . . . all children were . . . continually looking for authentic opportunities to engage, participate, and contribute as citizens. It was also the case that despite constantly seeking such occasions, children were not inundated with

> opportunities for authentic participation. *Their insights into the nature of rights, responsibilities and citizenship revealed an interpretation from the perspective of exclusion, rather than from direct experience* (emphasis added) [462].

One significant aspect contributing to the minors' perception of their exclusion from the political process is the reality that 16- and 17-year-olds are excluded from the vote in most Western and non-Western democratic States i.e. no members of this age-defined group (minors) can participate in one of the quintessential operations/processes of democracy. Instead, students are allowed to participate in simulated political activities (i.e. mock votes held at school as part of civics education), or sometimes have a consultative role in certain low level local decision-making (i.e. city planning regarding the location of parks and child-friendly urban planning, or child-relevant social policy etc.), or, on occasion, may be allowed to speak at international forums (i.e. the Special Session on children held by the United Nations). However, the vote at 16 is generally not vetted and adopted as a fundamental human rights issue by either national or international high profile human rights advocates, organizations or institutions. Neither, is there a general endorsement of the vote at 16 by most social scientists; even those whose area is citizenship studies and politics.

One of the key conclusions of the International Childwatch study on children's understanding and experience of citizenship (which study involved two sample cohorts; 8- to 9-year-olds and a second comprised of 14- to 15-year-olds across various countries) was that new pedagogies should be developed (i.e. in the area of citizenship education) '... placing a greater value on children as active social and political citizens' [463]. However, there was no mention in the international citizenship study conclusions of the struggle for the vote at 16 being waged by significant numbers of youth internationally, and how this might, or should impact the design and focus of civics education from elementary to secondary school.

It is ironic that citizenship education designed and controlled exclusively by adults, as it generally is, has the potential to contribute to the power status quo with respect to the vote (though this need not be the case). That is, civics education, *as currently practiced* in most Western democratic States, may serve to be one factor helping to demobilize many youth from joining the struggle for the vote at 16. This being the case since 16- and 17-year-old students are implicitly generally taught in their civics education classes, under the current system, to blindly accept the current institutionalized practices of democracy with respect to the vote; including the minimum voting age of 18 years which exists in most States. Along with acceptance of the minimum voting age of 18 years comes the lesson from adults, and subsequent internalization by students, of the notion that their role as minors, whether 16 or 17 or younger, is to participate politically only in child-designated, socially endorsed political activities and not in the 'real' vote (the vote being designated an adult political activity by definition

and par excellence). Thus, it is not surprising that the conclusions to the very valuable international Childwatch study on children's understanding of citizenship and their lived experience of the same included the following words (which must be somewhat reassuring to those adults who oppose the vote at 16):

> *Our findings suggest that children . . . do not expect that adults will support them in their role as citizen children* . . . They do, however, want to be listened to and taken seriously. The children in this study are not ..pursuing the . . . extension of adult rights . . . of citizenship [i.e. the vote], but rather seeking recognition that ***their*** *citizenship practices* constitute an understanding of children as citizens-*albeit in newer ways*. (emphasis added) [464].

The current author would suggest, however, that authentic citizenship education curriculum and teaching activities; especially for high school students aged approximately 14–17 years must include, amongst many other things, serious discussion of: (a) the issue of the vote at 16 years; (b) the human rights implications of the age-based denial of the vote; (c) the purported justifications for the age-based exclusion of minors from the vote and the critiques (pro and con) of those justifications, and (d) discussion regarding the international struggle for the vote at 16. It is time that adults, in actuality, genuinely supported minors in their role as citizens (a status they hold from the start if born or naturalized as a citizen rather than one they must 'grow into'). To accomplish this will require something other than educating students, especially high school students, to accept the exclusion of all minors (even 16- and 17-year-olds) from the vote as based on distinctions that supposedly have *unquestioned validity* (to use the wording of the proponents of blanket, absolute age-based restrictions on certain political free expression and association in the McConnell case previously discussed). In fact, the alleged constitutionality of the absolute exclusion of *all* minors from the vote, even 16- and 17-year-olds who wish to vote, has never been adequately tested through the courts. That is, governments have not been required to meet the burden of demonstrating an acceptable justification for why an *inferred* competency standard—using age as an *alleged* proxy for voting competence—is applied only to the young and not also to the old (for instance, to the elderly who may have compromised voting competency due to the cognitive impediments that are more often associated with old age). Yet, the prospect in most democratic Western States for such an authentic approach to civics education occurring any time soon seems in doubt. This is the case since, as researchers of the Childwatch citizenship study note:

> Children's subordinate status and exclusion from social and political processes is situated in an absence of discourses about children's citizenship which are evident in layers of . . . habitus. *Across the countries in this study, there was a wide recognition of young people as citizens, yet in limited, mainly passive ways* (emphasis added). [465].

The virtual absence of, or limited discussion in international school civics education curricula of the minimum voting age controversy, and of the struggle for the vote at 16, is a reflection of the misguided view of most adults that minors; even those aged 16 and 17 years: (a) have no inherent human rights entitlement to the vote and rather that their exclusion is a natural one, and (b) have only a limited role to play in political process, if any, and then only in regards to relatively inconsequential citizenship activities. However, as Olsson, arguing for the suffrage of minors, so eloquently and aptly puts it:

> . . . *voting is a method to distribute power. It is a way to guarantee that the people who really are deciding on the laws, the elected officials, do not forget to consider all interests equally*. Children . . . can be counted as members of the demos whose interests are no less important than those of their adult counterparts (emphasis added) [466].

The current author would argue for an automatic entitlement to the vote for 16- and 17-year-olds, and for 14- and 15-year-olds an entitlement on demand (having, unlike Olsson, as previously discussed in more detail, rejected the notion of proxy voting on behalf of children under 14 years as viable or consistent with the notion of voting as a deeply personal form of free expression/free speech. Rather, alternatives were discussed here previously in regards to the suffrage rights of minors under 14 years regarding a *rebuttable* presumption of lack of autonomy in the vote).

Civics education then, it is respectfully suggested, must address among other things: (a) the issue of suffrage as *a basic human rights entitlement for all citizens* barring any legitimate societal interest in an infringement of this right. (Including also inquiry into controversies about whether the right to suffrage belongs to all *persons*; even non-citizens resident in the State); and (b) the controversies surrounding the youth vote. This is required if education is to genuinely meet the international human rights standards with respect to the right to education as set out in Article 29 of the *Convention on the Rights of the Child* (CRC) (which instrument all the Western democracies have ratified save the United States which is, to date, only a signatory). The aforementioned CRC article dealing with the right to education includes the following provision:

> Article 29
> States Parties agree that the education of the child shall be directed to:
> (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
> (d) The preparation of the child for responsible life in a free society . . . [467].

It is difficult to see how sidestepping serious discussion of the vote at 16 issue in schools, or the topic of children's suffrage as a human rights issue more generally, is consistent with the Article 29 *Convention on the Rights of the Child* requirement that: (a) children be informed of their own and others' fundamental human rights and learn to respect these, and (b) that children be adequately educated for responsible democratic citizenship.

Part X
Unequal Treatment in Accessing the Inherent Right to Suffrage

Chapter 10
Two Different Standards for Enfranchisement: A 'Rights Standard' for Adults and a Supposed 'Competency Qualification Standard' for Minors

10.1 'Rights—Contingent' versus 'Qualifications—Contingent' (i.e. Competency–Contingent)Suffrage

When it comes to age-based exclusion from suffrage, almost all Western democratic countries and most countries globally use 18 years as the demarcation point. This is the case even though it is well understood that it is only an unsupported presumption of convenience that *all* of those 18 years and above, based on their age, by definition, possess the mental competence, political sophistication, rationality, emotional maturity and sense of civic responsibility to exercise the vote in a manner consistent with being a good citizen and competent voter. Few doubt that the presumption in fact does *not* square with the reality. On this point, there is some available data suggesting that the number of incompetent eligible voters (those at or above the age of majority for the vote) can be quite high; at least in some Western democratic States. For instance, there is some evidence that in the U.S., 52% of the electorate may not know the answer to various basic questions about politics [468]; while other studies have shown that as high as 32% may not be able to answer any fundamental questions about foreign policy [469]; and as many as 25% of the electorate actually may unwittingly vote for candidates whose opinions they do not share [470]. Given the age-based exclusion of minors from the vote in most nation States, it is, however, only *all* those *below* 18 years that are generally considered, in theory at least, ipso facto to be incompetent for the vote.

Because the age-related presumption about adequate voter competence *automatically* works *in favor* of all those 18 years and above (i.e. it is *intrinsic* to the notion age of majority for the vote and, hence, individuals in the 18 and over age group need not actually demonstrate *individual* voter competency), those citizens 18 years and older have, in fact, achieved suffrage *as of right* based simply on age. This is especially clear since not many in society seriously consider that *all* those 18 years and above are, as a function of their age, in reality, naturally and necessarily imbued

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with the characteristics of a competent voter (i.e. being rational, reflective, informed, deliberative, capable of an autonomous vote etc.; or whatever else society considers relevant). In Western democratic States, suffrage has been extended to previously denied groups (i.e. women, African-Americans, the poor, the illiterate, non-property owners) in affirmation of the vote as an *inherent* right *for those citizens aged 18 years and older* rather than a qualification-contingent right (i.e. one dependent on the group's overall voter competency) for these or any other voter-eligible group (i.e. male citizens aged 18 years or older etc.).

However, with regard to those below 18 years, there is, *in practice*, a requirement for competency of *every member* of the group in the vote coupled with a *non-rebuttable presumption* of *lack* of voter competence for: (a) the group as a whole and for (b) the individual members. The inherent right to suffrage, hence, is denied to this segment of the citizenry based solely on age using, as a smokescreen, a rationale couched in terms of voter competency (a smokescreen since the competency requirement is only directed at the young—citizens under age 18 years— and there is no chance to rebut the a priori presumption of voter incompetence). To put the matter in other terms, *the grant of the vote to citizens 18 years and over is 'rights-contingent'; while the denial of the vote to those under 18 years is strictly qualifications contingent (i.e. related to a non-rebuttable presumption of alleged mental and emotional incompetency for the vote*).

What makes it apparent that the exclusion of minors from the vote is really about a *denial of the entitlement to rights—contingent suffrage* (i.e. denial of the inherent fundamental right to participate politically in making decisions that affect one's own interests), rather than about genuine concerns regarding voter competency, is the fact that minors are not permitted any vehicle for demonstrating their potential voting competency. If there were a genuine concern for voter competency, then all potential voters (i.e. those citizens expressing a desire to vote), regardless of age, would be required and permitted to demonstrate that competency under fair conditions (or, absent an accurate way to assess competency, no potential voters would be barred on speculative presumptions in this regard *based solely on age* given the sizeable percentage of incompetent voters at or above age of majority for the vote in many, if not all nation States). This illustrates then that most Western democratic societies, as well as most non-Western societies, are not in reality genuinely interested in, or concerned with whether some or most 16- and 17-year-olds, for instance, are competent for the vote. Rather, society operates on the discriminatory presumption that all under age 18 must be competent in order for 16- and 17-year-olds to be granted the vote. Since this will inevitably not be the case, the *non-rebuttable presumption* of voter incompetency for all citizens under age 18 years prevails (the same competency standard, as was discussed above, is not applied to those 18 years and over). *The age of 18 years is then, in actuality, (a) the marker for when society is willing to affirm the universal inherent right*

to suffrage (i.e. the rights-based contingent vote being afforded to those aged 18 years and over), rather than, as erroneously commonly assumed, (b) a marker for when society has determined that the electorate will be competent for the vote (since it is evident that society is prepared to include many incompetent voters aged 18 years and over and exclude many competent voters aged under 18 years).

The history of the 26th Amendment to the U.S. Constitution elucidates the 'rights-based' versus 'qualifications-based' (competency-based) suffrage distinction. A 'rights-based' entitlement to the vote is currently accorded to those 18 years and over, while 'qualification-contingent' suffrage is applied to those under 18 years olds to deny them the vote (previously 'rights–contingent' enfranchisement was accorded to those 21 years and over, while 'qualifications-contingent' suffrage was applied to those under 21 years as a basis for their exclusion from the vote). The history of the 26th Amendment demonstrates the shift from thinking that all 18-, 19-, and 20-year-olds were incompetent for the vote, to the presumption underlying contemporary electoral law that they are all to be presumed competent for enfranchisement (while all those under 18 years, in practice, are to be presumed incompetent for the vote for all intents and purposes). Before we consider the history of the 26th Amendment relevant to the age-correlated implicit distinction in electoral law between rights vs. qualifications contingent (competency-contingent) suffrage, there are a couple of preliminary points to highlight.

Firstly, it should be noted that presumptions about competency for the vote (the qualifications approach to suffrage) have been more about tactics for excluding citizens than about any genuine concern for competency as should be evident from the previous discussion. Those excluded in previous generations (or still excluded in some jurisdictions) from the vote based on presumptions about competency for the vote (i.e. competency here being used in a broad sense to refer to mental competency, loyalty to the State, socio-emotional competency, political sophistication etc.) include: (a) citizens considered undesirable, and allegedly justifiably marginalized (for instance, those with a significant criminal history), and/or (b) citizens otherwise considered unsuited to political power given their societal role or lower status (women, African – Americans, slaves, former slaves, the poor, non-citizens, those with a diagnosed psychiatric disorder etc.) with the possibility that, in some instances, the excluded group might be considered as comprised of 'undesirables' who are also allegedly innately unsuited to political power.

Secondly, it should be noted that in fact the minimum age of 21 years in bygone days for the vote in the U.S., and in many European States, was not so much based on competency considerations, but rather on the fact that by this age males were required to serve in the armed forces, or at least considered to be subject to such service if called upon. The thinking was, it will be recalled, that males of an age when they could be conscripted or

join the armed forces voluntarily had earned their right to vote. Hence, the exclusion from the vote for 18- to 20-year-old males in the U.S. in the 1960s and 1970s, for instance, though there was conscription at age 18 for males during the Vietnam War, was inconsistent with the rationale underlying the minimum voting age of 21 in past generations (i.e. the fact that males of conscription age historically had the vote in Western democratic States based on their civic service in this regard).

As Cheng describes, the debate in the U.S. pre 1971 about whether the minimum voting age should be lowered from 21 to 18 years was couched originally in terms of the fact that 18- to 20-year-old males could be drafted into the Vietnam War. The arguments for lowering the U.S. voting age to 18 years included the fact that: (a) 18- to 20-year-olds had earned the right to the vote through their sacrifice or potential sacrifice for the country in war and their demonstrated loyalty to the nation; (b) 18- to 20-year-olds, since they could be drafted for the war, should have the right to choose the representatives making decisions about the war, and about whether the draft and the war should continue, and (c) since 18- to 20-year-olds were considered competent to serve militarily; they could be considered competent for the vote as well in terms of intelligence and temperament [471]. Recall that this line of argument had some conceptual and factual difficulties in that: (a) most young people clamoring for the vote at 18 had *not* served in the armed forces in Vietnam and many were not likely to be subject to the draft for various reasons (i.e. deferral due to education, medical reasons etc.), (b) women of any age were *not* subject to the draft, and (c) the competencies required for combat are not necessarily akin to those required for the vote [472].

The obvious factual and conceptual flaws in linking the minimum voting age to eligibility for the draft led advocates of the vote at 18 instead to arguments for lowering the minimum voting age focused on:

1. *The alleged competency for the vote of 18- to 20-year-olds*: the notion that youth of the day were as or more competent for the vote than were many of their elders (given their higher quality and longer educational experience, and their exposure to mass media, including television, which was presumed to have heightened their awareness of political issues nationally and globally). The latter argument was a common one in the 1950s up to the mid-1960s according to Cheng [473]. That argument essentially promoted a 'qualifications-contingent' basis for extending the vote;
2. *The notion that the vote would provide a pro-social vehicle for political dissent*: This line of argument was likely raised, as Cheng explains, in large part in consideration of the vigorous student/youth protests of the late 1960s against the Vietnam War; those protests having steadily intensified since the inception of the war;

3. *The idea that granting the vote at age 18 years would better ensure that voting would likely become a lifelong habit* as it needs to be to ensure an adequately representative democracy [474].

Note that the last two aforementioned arguments that were advanced in favor of lowering the U.S. minimum voting age to 18 years: (a) have nothing to do with the issue of competency for the vote but rather relate to other utilitarian concerns of society and (b) could have been used to justify lowering the vote even below age 18 years. But to return to the issue of 'qualifications-contingent' suffrage, it would have been apparent, as Cheng notes, that such a focus on the alleged new found competency for the vote amongst 18- to 20-year-olds in the 1960s and early 1970s would likely forestall any attempt to lower the voting age even further (to an age below 18 years):

> . . . *by emphasizing voter qualifications, advocates of eighteen-year-old voting made it clear that they were not in any way seeking to lower the voting age beneath eighteen*. Despite the fact that the other arguments for the eighteen-year-old voting [channeling political dissent and increasing the engagement of young people with society by involving them in the electoral process] could also be used for enfranchising children younger than eighteen, proponents had absolutely no interest in more radical change (emphasis added) [475].

> . . . *qualified – voter arguments also served to justify – and clearly demonstrate – the fact that Congressional advocates [for the vote at 18], at least, had no intention of exploring the more radical potential embedded in some of their favorite arguments for eighteen-year-old-voting* . . . Some of their claims about. . . . . reciprocity and representation [having the right to vote for representatives who will make decisions that will profoundly affect one's interests and having the right to vote, given one's civic obligations such as paying taxes on income which also applied to children], for example, led down uncomfortable logical paths. . . . . [and]. . . . . would open the door to lowering the minimum voting age far below eighteen, if not abolishing it altogether (emphasis added) [476].

The current author would suggest, however, that the focus on presumed voting-relevant competency as a basis for eligibility for the vote at 18 in the U.S. was but an illusion (i.e. there was no effort to weed out, through disenfranchisement, those amongst the older voters less competent, and, in many instances, incompetent compared to the 18- to 20-year-old voters of the day; there was no effort to grant the vote only to those individuals 18–20 years old who were *in fact* educated and politically aware etc.). Rather, *in practice*, the assumption was simply made, given the lowering of the minimum voting age to 18, that all 18- to 20-year-olds were competent for the vote. Hence, the electoral law was drafted with the express knowledge that lowering the vote to 18 would allow some or many incompetents aged 18–20 years to vote; just as the previous minimum voting age of 21 years allowed some or many incompetents aged 21 years and older to vote, and in neither case was this considered a problem.

That young people in the U.S. did *not* achieve the vote at 18 years due to their enhanced educational qualifications and greater voter competency compared to previous generations is also evident from another striking historical fact. As Cheng describes, during the 1960s, Congressional liberals and some U.S. federal courts were concerned that political literacy tests were being used in the South for voter registration purposes with the express intent of discriminating against African-Americans and denying them the vote [477]. As previously here explained, the tests were not applied in the same manner and with the same content to Caucasians and to African Americans. In any case:

> The Voting Rights Act of 1965 suspended literacy tests in most of the [U.S.] Deep South, and the renewal act of 1970 [to renew the 1965 Voting Rights Act]—the same bill to which the eighteen-old-voting was attached—suspended such tests nationwide for another five years [478].

The point of interest for our purposes is, however, that those who supported the lowering of the minimum voting age from 21 to 18 years in the U.S.; often also supported the abolition of the political literacy tests (that is, without offering any substitute voter competency assessment that might be reasonably accurate and could be fairly administered to any potential voter). Cheng makes the point that:

> At first glance, this antipathy towards literacy tests [from Congressional liberals] seems inconsistent with advocates' [for the vote at 18] repeated insistence that young people's superior education qualified them to vote. However, there is virtually no evidence in the [record of the] Congressional debates that there was actually any tension between these two issues. Presumably, this is because the literacy test issue was really about race, not literacy; those in Congress and on the Court who opposed literacy tests were not so much troubled by the notion that voters should have to be literate [as a proxy for competence] as they were by the way that many Southern states blatantly misused these tests in order to prevent African-Americans from voting [479].

In the same way, the current author has argued (for the reasons previously discussed in detail) that the alleged reliance on age as a proxy for voter competence is but an illusion. The age-based restriction in the vote in respect of 16- and 17-year-olds who are now demanding the vote, is *not* about voter competency, but about direct discrimination against a segment of the citizenry, and about a fundamental human rights violation against a designated group that happens to be defined by age. Just as with political literacy tests, the standard is not being equally applied (i.e. age is not being used as a proxy for voter competence with senior voters or at least elderly voters who are more likely to suffer moderate to severe cognitive impairments that could interfere with voter competency than are younger voters).

There is in Western democratic States, a continuing general reluctance amongst legislators, politicians and amongst social scientists who oppose lowering the minimum voting age, to frame the minimum voting age issue

in terms of a human rights issue. This allegedly, in large part, for fear of the 'slippery slope' [i.e. an even further lowering of the minimum voting age, or the abolition of a minimum voting age altogether as a result of framing the voting age issue as a human rights concern]. This purported fear of the 'slippery slope' was evident also during the Congressional debates on lowering of the U.S. minimum voting age from 21 to 18 years:

> . . . legislators' frequent assertion that the current voting age [then 21 years] amounted to discrimination against, eighteen-, nineteen-, and twenty-year-old Americans also had the potential to raise unsettling questions. . . . . However, as opponents. . . . . noted, this theory could be a slippery slope: if it was now discrimination to deny eighteen-year-olds the vote, presumably later it could be considered discrimination to disenfranchise seventeen-year-olds, or even twelve-year-olds. 'This pattern of thinking,' Representative George Andrews [Democrat from Alabama] declared in 1970, 'could lead to the abandonment of all age restrictions [on the vote]' [480].

> . . . even those members of Congress who most fervently advocated eighteen-year-old voting strongly resisted any suggestion of extending the franchise to Americans under the age of eighteen, much less abolishing it entirely [481].

However, there are potential solutions to the slippery slope dilemma that are feasible (though certainly not perfect) and less discriminatory than an absolute age-based exclusion from the vote (i.e. a minimum voting age of 16 years with the vote granted automatically at 16, the vote granted to 14- and 15-year-olds on demand, and the vote for under 14s based on a *rebuttable presumption* of incompetence relating to lack of autonomy). Such approaches to the minimum eligible voting age issue are at least more just than is an absolute age-based bar on the vote for citizens below a certain minimum age. In any case, having an *absolute* minimum voting age based upon presumptions concerning voter competency makes no sense in a democratic State (i.e. is inconsistent with the democratic value of equity) in view of the *absence* of a *maximum* voting age based on presumptions concerning the voter competency of elderly voters. Equity would demand, at the very least, both a minimum and a maximum eligible voting age if voter competency is truly the issue. Furthermore, setting a minimum voting age, allegedly based on voter competency, is consistent with the possibility of an *upward* 'slippery slope' since raising the minimum age even further would presumably improve the average competency level of the total voting population that much more. Note that both at the upper end (the very elderly), and lower end of the age continuum (very young children), one is likely to reach a point where there is little or no interest in voting and there are genuine age-related issues with competency in general including voting competency. It would appear that the reluctance to frame the minimum voting age issue in human rights terms, and the resistance to lowering the minimum voting age to any age under 18 years (i.e. the vote at 16), has more to do with the desire to maintain the political power status quo for adults vis-à-vis minors than with genuine concerns over voter competency.

Part XI
Recognizing the Vote at 16 Movement as a Fundamental Human Rights Struggle

Chapter 11
Concluding Comments

Lopez-Guerra in his 2008 dissertation on democratic enfranchisement makes the following statement:

> The proper composition of the electorate continues to be a disputed *political* issue in many counties. Of course, it is no longer an era-defining problem, as when economic, gender-based, and ethnic barriers prevented significant portions of society from acquiring the right to vote (emphasis added) [482].

The argument in this monograph, however, has been that the youth struggle for the vote at 16 years *is* in fact an era-defining problem (amongst others). The youth global movement for the vote at age 16 years must, for the sake of transparency in the democratic state, be accurately framed as the fundamental human rights struggle that it is. Such a re-conceptualization is, furthermore, essential if the movement is to achieve its objective. Opponents must not be given free reign to erroneously relegate the minimum voting age issue to the category of disparate localized dispute over discretionary governmental electoral policy choices pertaining to *so-called* 'voting qualifications.' One must agree with Lopez-Guerra that: 'With some artistry, all sorts of exclusions [from the vote] can be defended as democratic' [483]. Erroneously so defended; one might add. The absolute exclusion of all citizens under age 18 years from the vote as an accepted social convention in most every Western democracy must not be permitted to be one of those absolute bars incorrectly defended as consistent with democratic values. It is time for acknowledgement that the alleged justification for excluding *all* young people under age 18 years from the electorate (i.e. alleged lack of voter competence which may adversely affect the legal rights of others) is a 'qualification standard' *not* in fact being relied upon, and certainly not one that is being equitably applied to all citizens (i.e. incompetent older persons are *not* being excluded from the vote; and in some States, such as Canada, the mentally disabled whether competent to vote or not, are enfranchised etc.). Hence, the *blanket absolute* age-based restriction on the vote is in fact an undemocratic and unconstitutional infringement of the right to universal suffrage; an infringement based on the *purported* application of age as a proxy for political maturity.

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Therefore, with respect, we can confidently challenge the Lopez-Guerra erroneous contention that the exclusion of young citizens from the vote on the basis of *changeable* characteristics does *not* rest on fundamental inequality (i.e. the contention that exclusion of citizens under 18 years from the vote based on age is due to their alleged immaturity or lack of political knowledge and competence; a deficit likely to be remedied with maturation and life experience as a function of age) [484]. Rather, this exclusion *is*, in fact, a manifestation of inequality in respect of access to the most basic right of universal suffrage given that a voter competency standard, as was previously discussed, is *not* being applied to citizens over age 18 years (adults) (i.e. a standard relating to political maturity etc). This blanket age-based exclusion of minors from the vote, furthermore, is being implemented despite the fact that:

> None of the standard theoretical defenses of democracy . . . provides a reason for excluding children [from the vote] that would not at the same time be applicable to some proportion of adults [485].

Indeed, consider the misguided argument that is so often made that being a minor is but a temporary state and that therefore the absolute age-based restriction in the vote for those under age 18 years is a 'peculiarly equalitarian form of discrimination' [486] (i.e. in that most, in the normal course of life, will suffer that discrimination due to young age only temporarily, and then be granted suffrage once reaching age of majority). Aside from the other arguments that have already been made here against this proposition, consider that an analogous argument of sorts could be made in respect of the elderly. The similar argument in regards to the elderly (whose voter competence is more likely to be compromised for age-related reasons than is the case for younger adults) is that disenfranchisement in the very advanced stage of life will be but for a relatively short time (given lifespan expectations), and is for a relatively short period when compared to their years of enfranchisement over their entire lifespan. Of course, the latter is not a socially or legally acceptable justification for exclusion from the vote since: (a) one is entitled to one's inherent fundamental human rights at every stage of life; and (b) citizens have a right to protect their own interests as part of the polity at every stage of life to the extent they are able *if given the fair opportunity.*

Competency issues for the elderly thus are *not* considered sufficient justification for their disenfranchisement despite the comparatively short period of their life, during the very elder years, when that disenfranchisement would be in effect. The short-lived denial of the vote for youth is also then *not* an acceptable rationale for their disenfranchisement. One can think of voting rules in some countries that are equitably applied to the oldest and the youngest eligible voters i.e. in Brazil, as previously mentioned, there is voluntary voting for 16- and 17-year-olds as well as for those over 70 with compulsory voting for those aged 18–70 years (i.e. whether this is

the case because these groups—the oldest and the youngest potential eligible voters—are both considered the least competent by legislators in Brazil is an open question).

The pent up idealism of many youth can find no better outlet than the democratic vote as a vehicle for effecting social change that enhances respect for fundamental human rights. If democratic societies wish to instill democratic values in their youth, then youth must be given the opportunity to participate in the electoral process through the vote at some age below the general age of majority. The grant of the vote at age 16 years (perhaps with the possibility of accessing the vote even younger under the right conditions as previously discussed) is both a reasonable and, most importantly, democratic response to the international demand for realization of this fundamental human right by 16- and 17-year-olds. Anything less translates to the democratic nations in question having 'failed to put [their] ideals wholly into practice' as once complained Josephine Schain in regards to denial of suffrage to women [487]. Youth aged 16 and 17 years old are, afterall: (a) affected by the policy decisions of representatives elected by those who are enfranchised, often for many years, and (b) for the most part, developmentally capable of at least understanding what an election is and of casting a ballot for or against their personal interests just as are persons at or above the age of majority for the vote (especially if they receive some instruction in school about the electoral process and the vote). There is then some urgency in also asserting the moral and legal right to the vote of at least 16- and 17-year-olds since they are the ones most likely to exercise the vote if given the opportunity.

Of course, the grant of the vote to 16- and 17-year-olds would assign them potential significant power in any close election. All the more important then to instill in 16- and 17-year-olds respect for fundamental human rights such that candidates elected with their help will be those most likely to both effectively represent democratic ideals and make them a reality through government polices and legislative initiatives. However, even if we are uncertain about the utilitarian value to society of granting the vote to 16- and 17-year-olds in terms of whether or not they will help elect the most morally just and effective leaders, their right to the vote is unassailable as an inherent right to free expression and societal participation. In relation to this point, recall that some political theorists even argue that, in any case, 'voting behavior is *expressive* rather than *instrumental*; namely . . . voting does not amount to choosing under the belief that we can affect the result [i.e. since the impact of a single vote, if not part of a bloc vote, is negligible], but merely to expressing support for one of the alternatives . . .' [488].

Granting the right to vote to 16- and 17-year-olds has the benefit of enlarging the scope of concrete visible signs of the State's commitment to democratic ideals, such as an inclusive, equitable society, hence strengthening democracy as a result. On this analysis, disenfranchisement of youth

harms not only those excluded who are demoralized and alienated as a result of such marginalization, but the society as a whole, by eroding confidence in society's commitment to its touted democratic foundations. This author is then in accord with John Stuart Mill's statement that: 'It is a personal injustice to withhold from anyone, unless for the prevention of greater evils, the ordinary privilege of having his voice reckoned in the disposal of affairs in which he has the same interest as other people' [489]. What is clear from this monograph, it is hoped, is that, in fact, the exclusion in most Western democracies of 16- and 17-year-olds from the vote is *not* at all directed to the 'prevention of greater evils' (that greater evil, according to those who oppose lowering the minimum voting age below 18 years, supposedly being the anticipated adverse societal consequence of a presumed increase in alleged incompetent voters). The evidence for the most part, however, indicates, as been discussed here, a general lack of concern in Western democracies for the competency of the electorate (i.e. the competency level of the population of eligible adult voters). Hence, the exclusion of 16- and 17-year-olds from the vote is a fundamental human rights abuse which appears rather to be a function of the uncomplicated desire of those advantaged by the current system (with its absolute bar against all minors' voting) to maintain the political power status quo.

What then should be the role, if any, of voter competency in determining the make-up of the electorate? The judicial cases to be discussed next stand, among other things, for the proposition that alleged political competency concerns cannot be the basis in a democratic society for disproportionately excluding a certain identifiable group of citizens from such a fundamental right as the vote. Let us now turn to just a few such case examples:

1. The Supreme Court of the United States (USSC) has held constitutional, Congressional extension of the vote, in certain instances, to those with an incomplete basic education and/or poor or non-existent English literacy. This being the case in instances where Congress determined that literacy or other requirements were actually being used as an invidious form of discrimination against a targeted group of American citizens, or where such voter requirements had such a discriminatory effect on an identifiable group of citizens. In *South Carolina v Katzenbach*, the USSC upheld that section of the 1965 Voting Rights Act that prohibited denial of the vote to any person, otherwise eligible to vote, because the individual declined to comply with a literacy test of any type or other voting test [490] .
2. Political literacy tests for deciding eligibility for the vote, when they placed an undue burden on a certain identifiable group (i.e. citizens of a certain ethnic origin) due to the test design, or the manner of application of the tests, were held to be unconstitutional in the USSC case of *Louisiana v United States* [491].

3. In the 1966 case *Katzenbach v Morgan* [492], the USSC upheld that part of the 1965 U.S. Federal Voting Rights Act that extended the vote to Puerto Ricans living in the U.S.: (a) who had completed *at least* the *sixth grade* in a public or accredited private school in the U.S. territory of the Commonwealth of Puerto Rico where the school's language of instruction was *Spanish*, and (b) who were *not* fluent in writing or reading English. This part of the Voting Rights Act thus barred implementation of a then New York State English literacy requirement for the vote. The Court found, in the aforementioned case, that Congress had acted constitutionally, and had *not* exceeded its powers stepping into State jurisdictional matters when it extended the vote to this identifiable group.

It was argued at the time of the *Katzenbach v Morgan* decision that the rationale for the judgment applied equally well to the voting age question. This being the case, according to proponents of lowering the voting age from 21 to 18 years, since the United States Supreme Court decision in *Katzenbach v Morgan* was grounded on the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. Edward Kennedy, during the 1970 Congressional debates on lowering the voting age from 21 to 18 years, put the matter thus:

> Congress could reasonably find that the reduction of the voting age to 18 is necessary in order to eliminate a very real discrimination that exists against the nation's youth in the public services they receive [493].

> Just as Congress has the power to find that an English literacy test discriminates against Spanish-speaking Americans [in the vote], so Congress has the power to . . . find [unconstitutional] discrimination in the fact that young Americans [18-, 19-, and 20-year-olds due to the minimum voting age of 21] . . . are denied the right to vote, the most basic right of all [494] .

The current author has also previously here argued the applicability of the U.S. 14th Amendment's equal protection clause to the voting age question. (The same argument would apply regarding the unconstitutionality of a blanket, absolute bar against minors' voting, it is contended, based on the equal protection of the law provisions in the constitutions of other democratic States). While we are on the subject of the 14th Amendment to the U.S. Constitution, there is another important point to take note of as the 14th Amendment relates to the 26th Amendment to the U.S. Constitution. (Note that constitutions are to be interpreted as an interrelated whole in order to better grasp the proper meaning of any particular provision and the intent of the framers). The 26th Amendment is often misconstrued in this author's respectful view, as previously discussed, as only prohibiting discrimination in the vote on account of age for citizens 18 years and older. However, as the Supreme Court of the U.S. noted in *Katzenbach*

v Morgan, the 14th Amendment's equal protection clause prohibits discrimination also in the vote. The 14th and 26th Amendment, it is clear then, must be considered together. In doing so, it becomes evident that the 14th Amendment cannot reasonably be said to be applicable in interpreting the 26th Amendment to the U.S. Constitution *only* in regards to citizens 18 years and older, thus permitting discrimination in the vote for those under age 18 years. That is, the Equal Protection Clause of the 14th Amendment does *not* operate selectively to remove a certain category of discrimination (whether age discrimination in the vote as here, or ethnic discrimination, or some other type) for only *a segment* of the citizens so affected; thus in effect affirming discrimination against another segment of the same identifiable larger group from whence the segments derive (i.e. discrimination in the vote against citizens *under* age 18 years left intact, while the same discrimination in respect of those 18 and *over* is rendered unconstitutional). Holding that the Equal Protection Clause of the 14th Amendment to the U.S. Constitution ensures that *only* those 18 years and above are not discriminated against in the vote on account of age, as per the 26th Amendment, would mean that the 14th Amendment affirmed discrimination in the vote against those under age 18 years which makes for a *non-viable* constitutional interpretation i.e. an Equal Protection Clause that, in part, affirms inequality.

Recall also that we have discovered that competency rationales, while proffered, are in fact, as the evidence demonstrates, disingenuous in respect of disenfranchisement of under 18s on account of age i.e. there is no concerted effort to exclude all incompetent adult voters (i.e. those with undiagnosed dementia or other serious cognitive impairment etc.). English illiteracy and/or lack of basic education has *not* been held to be a constitutional barrier to enfranchisement of otherwise eligible adults in the U.S. or Canada, for instance, though it can in some cases be a barrier to voter competency where no accommodations are made. (Of course, not all illiterate or uneducated voters are incompetent, and certain accommodations can be made; such as putting pictures of the candidates on the ballot to assist those who cannot read the names). Once again then it appears that the exclusion of under 18s from the vote has more to do with their legal status as minors per se rather than with any genuine concerns about competency; at least in regards to 16- and 17-year-olds or those younger who have the minimal developmental capacity required to cast a ballot. The equality provisions incorporated in democratic constitutions do *not* contemplate such differential application of an alleged voter competency standard (i.e. with its disproportionate adverse impact on an identifiable group of citizens defined by age who are, as a consequence, excluded from the vote).

The claim was made by George Andrews during the 1970 U.S. Congressional debates on lowering the minimum voting age in the U.S. from 21 to 18 years (and by some others), that thinking about the voting age question in terms of the Equal Protection Clause of the 14th Amendment

would inevitably lead to abandonment of all age-based restrictions on the vote:

> If 18-year-olds are denied equal protection of the laws, simply by not having the vote, what about 17-year-olds and younger? This pattern of thinking could lead to abandonment of all age restrictions, as a denial of the amendment's [14th Amendment's] equal protection clause [495].

> [W]hat is the 'discrimination' which Congress would seek to eliminate? Unless voting is to be done from the crib, the minimum age line must be drawn somewhere; can it really be said that to deny 20-, 19-, and 18 year olds [the vote] is 'discrimination,' while to deny 17-year-olds [the vote] is sound legislative judgment? [496]

Perhaps in response to these 'slippery slope' arguments advanced *in opposition* to reliance on the 14th Amendment's Equal Protection Clause as a rationale for lowering the voting age to 18, proponents of the vote at 18 tended (in the 1970 Congressional debates) still to combine the flawed competency arguments with the powerful Equal Protection Clause constitutional argument. By combining the competency argument with the Equal Protection Clause argument, the proponents of the vote at 18, perhaps unwittingly, contributed to undermining a view of 18, 19 and 20-year-olds as an identifiable minority group that was being unjustifiably discriminated against in the vote simply on account of their age. Political competency was actually, however, irrelevant in the vote at 18 debate since, as has been here discussed, age was *not*, in reality, being used as a proxy for political competency, but rather as an invidious basis for disenfranchisement of 18, 19 and 20-year-olds as minors.

Furthermore, the combining of the competency and the 14th Amendment Equal Protection Clause arguments by proponents of the vote at age 18, erroneously made it seem as if the Equal Protection Clause, in order to be applicable to the voting age question, would required that the competency level of 18, 19 and 20-year-olds for the vote be the same as, or better than that of 'adults' (then defined as persons 21 years and older) which the proponents argued was in fact the case. However, where a facially neutral voter qualification (one that affects everyone) impacts a certain identifiable group (age-defined or in some other manner) in a disproportionate manner placing a heavier burden on that group than on others (disadvantaging that group more), it is unconstitutionally discriminatory. For instance, consider the requirement for fluency in writing and reading English as a condition of the vote in the State of New York in the 1960s; a qualification then applicable to *all* New York citizens. The Court found in *Katzenbach v Morgan* that Congress was acting constitutionally when it sought to defeat such a voter requirement. This being the case since the literacy voter requirement systemically tended to exclude from the vote those several hundred thousand Americans of Puerto Rican origin living in New York State who were not fluent in English. In such instances, other constitutional methods of achieving society's alleged compelling interest (i.e.

voter competency) must be used, but the unconstitutionally discriminatory approach must be abandoned in the interim. Similarly, then, it is here suggested, age was being used as an alleged proxy for political competence, and as a rationale for the minimum U.S. voting age of 21 years pre-1971 (as it is currently in respect of the minimum voting age of 18). This placed an undue burden (disadvantage) on 18–20-year-olds (and those younger in fact) as compared to the elderly; the latter having an increased rate of competency difficulties compared to the general population, but suffering no burden (disadvantage) due to age in respect of their ability to access the vote. The full implication of the decision in *Katzenbach v Morgan* becomes clear then when one considers the following quote from the decision:

> Though the States have power to fix voting qualifications, they cannot do so contrary to the Fourteenth Amendment [the Equal Protection Clause] . . .. [497]

The argument in this monograph has been, for the reasons explained, that to deny the vote using an absolute, blanket minimum voting age is to apply an unconstitutional, discriminatory standard that violates the equality guarantees of democratic constitutions. This is because age is *allegedly* being used as a proxy for political competence, but it is being applied in this way only in regards to the young (i.e. those under age 18 years). Thus, the voting eligibility requirement, *in effect*, is that every member of the age-defined excluded group (the under 18s) be politically competent in order for minors to achieve the vote. This discriminatory application then amounts to excluding the young because of their legal status as minors and not due to a competency standard applied equitably to all (i.e. to those over and under the age of majority for the vote).

In response to 'slippery slope' arguments against lowering the minimum voting age from 18 to 16 years one might ask: 'In regard to what basic human rights issue, other than the minimum voting age, are legislative bodies in democratic States reluctant to apply an equal protection provision so as to remove unconstitutionally-based discrimination from all citizens so victimized?' (i.e. remove age discrimination in the vote for those above 18 years *and* those younger). The protection against age discrimination in the vote only for those *above* age of majority is unique in this respect, and that exception has no *constitutional* justification as previously explained. It would appear that the equal protection clause of democratic constitutions does indeed render discrimination in the vote on account of age unconstitutional at *any age*: if (a) there is no societal compelling interest (i.e. such as maintaining the integrity of the electoral system), (b) there is an interest, but it can be achieved through less restrictive means, or the means chosen does not demonstrably ensure that the societal interest is achieved (excluding voters under 18 years does not affect the large numbers of adult incompetent voters who continue to vote and theoretically undermine the electoral system to some degree) and/or (c) the discrimination is the consequence of an inequitable standard, or one not equitably applied to all

who find themselves in the same circumstance (i.e. the mentally incompetent amongst the elderly voting population who suffer dementia but are not under guardianship and are *not* disenfranchised).

To date, voter competency has *not* been that fair standard equitably applied to all potential voters; though it has been the prime *alleged* basis for excluding 16 and 17-year-olds and those younger from the vote. Hence, the argument in this book has been that respect for human rights demands the lowering of the voting age. This author has argued for the vote at 16 (automatic inclusion on the voter registration list) with the vote available on application at 14 and 15 years old, and a rebuttable presumption of incompetency (lack of autonomy) operative for those under 14. We have also previously considered that the 'slippery slope' argument works in reverse as well i.e. if 18-year-olds are more likely to be competent voters than 16-year-olds (more rational, less prone to extreme views, more civically engaged etc) then 25-year-olds should be even more competent voters than 18-year-olds and so on. The 'slippery slope thesis thus is deeply flawed as an argument for maintaining the *absolute blanket* bar on voting for under 18s.

At the same time, a *rebuttable presumption* of lack of autonomy in the vote in regards to younger children i.e. those under 14 *may* be reasonable and constitutional given the level of control that parents exert over younger children in general. However, this, too, is problematic as, for instance, in Canada being under a guardianship order is *not* a bar to an adult voting. One could thus argue that at least some such adult persons are as vulnerable to manipulation of their vote as are young children under age fourteen. On such an analysis, the rebuttable presumption approach in respect of minimal autonomy would need to be instituted in regards to these special groups of adults also (i.e. those under a full guardianship order which puts them in the child-like position of having another adult manage control over all their financial, and legal affairs etc.), or any others where there is hard evidence for a reasonably grounded concern regarding their ability to cast an independent vote to some minimal standard. Such a broader approach would be required if we are to stay true to the principle of equity and non-discrimination in the vote; though such a burden placed on those who already have the franchise is most likely never to materialize. Of course, all this poses problems also in terms of accuracy of, and appropriate vehicles for assessment of the required minimal level of voter autonomy with respect to i.e. young children under age 14 years. In any case, a *rebuttable presumption* regarding presumed lack of the minimal level of requisite autonomy in the vote could be legitimized perhaps in terms of the 'one citizen, one vote' principle which, to date, is the norm in all democratic States. Again, there is no completely non-arbitrary way to select that age at which the rebuttable presumption would operate, but our scientific knowledge of the developmental trajectories of children in terms of independent behaviors provides some rough guidance. The failsafe is, in theory at least,

the rebuttable nature of the presumption. However, as the burden would likely not be imposed in every State on any adults i.e. those legally declared incompetent, the system would not be entirely free of age discrimination (there may, of course, be some 14–17-year-olds who are easily manipulated by parents in their vote and this, too, then means that an element of age discrimination will persist when one imposes a rebuttable presumption of lack of autonomy only for *under* 14s).

Inclusion in the vote of at least a segment of the population below the general age of majority; namely 16 and 17-year-olds, would be symbolic of the acceptance of young people in general as part of the polity. This is essential not only for the symbolic significance of the message a minimum voting age of 16 years sends respecting the worth of persons under 18 as full citizens, but also in that:

> . . . in the absence of its natural defenders, the interest of the excluded is always in danger of being overlooked; and, when looked at, is seen with very different eyes from those of the persons whom it directly concerns [498].

The cautionary note sounded in the above text from John Stuart Mill, written so many generations ago, we have discovered, was prescient. A striking example of young people not having their pressing vital needs and interests attended to, *as a consequence in large part of their exclusion from the vote*, and despite carrying awesome adult responsibilities on their youthful shoulders, comes from South Africa. These young people include, for instance, children in South Africa left to struggle with the ramifications of the HIV/AIDS epidemic without the resources they require now as themselves heads of households. In a similar vein, it is striking that in suggesting solutions to human rights violations against young people (such as violence against minors, including extreme forms of corporal punishment of minors by parents and other caretakers), international human rights bodies have *not* suggested a lowering of the voting age minimum as part of the solution [499] (i.e. affording youth the opportunity to support candidates who advocate social policy and legislative initiatives in the interests of minors such as the repeal of laws that permit assault of minors by parents and other caretakers etc.). Political empowerment is an essential component in the struggle to improve the overall human rights situation of a vulnerable group, and this is the case also for those under age 18 years. While there is no non-arbitrary solution regarding any set minimum voting age below the general age of majority (combined or not with proxy voting for those below that set age), we cannot claim democracy is ours and turn away from the issue. There are, as discussed, alternatives to the absolute bar against even minors of 16 and 17 years voting; alternatives that are still sensitive to developmental issues as they relate to young children and the vote.

For the reasons discussed in this book, this author suggests that lowering the minimum voting age to 16 years is a human rights imperative grounded on constitutional and international human rights law. The issue

of the minimum voting age must no longer be masqueraded as one falling within the purview of discretionary government socio-political policy making. Exclusion of 16 and 17-year-olds from the vote must not continue to be regarded as a politically correct 'given', or an acceptable normative social convention, based as it is on *false* pretensions regarding alleged concern about the competency of the electorate should these young people be enfranchised. Olsson (who argues in favor of enfranchisement for minors) comments on this fallacious ready acceptance of the disenfranchisement of minors as natural:

> That children should not have the right to vote is something that most people think of as self-evident. It is [supposedly] so obvious that almost none of the prominent democratic theorists have given it any serious consideration. It is a non-issue [500].

As we have seen, competency of the electorate in Western States is *not* high on the priority list of concerns for those responsible for maintaining the current minimum voting age of 18 years. There has been no effort to screen out potentially incompetent voters of age of majority for the vote (i.e. the politically uninformed, the elderly suffering undiagnosed dementia; the civically unengaged, the irrational, the highly emotionally labile, the overly self-interested etc.) Where jurisdictions have put in place restrictions on the vote for those of age of majority (i.e. disenfranchisement of felons): (a) none of these have been near universal as is the case for the age-based restriction on the vote (save for citizenship), and (b) none, except the age-based restriction on the vote, have escaped sustained and vigorous challenge from high profile human rights advocates, academics and human rights organizations in contrast to the case with the minimum voting age of 18 years. That we are, in reality, screening for undesirable voter characteristics when we exclude 16 and 17-year-olds from the vote based on a blanket, absolute bar disenfranchising all minors is pure illusion, or perhaps delusion, since we do *not* apply such standards to their elders. Hence, the argument (such as that made by Olsson) that the electoral system would *not* be compromised by the inclusion of say 16 and 17-year-olds, even *if* they were, hypothetically speaking, all incompetent voters [501], though interesting from a utilitarian perspective, and perhaps correct, is irrelevant for our purposes here (in addition to being beyond the intended scope of this book). The point in this monograph has rather been to show that the minimum voting age is, in principle and in practice, primarily a matter of oppression, and particularly so as it affects those minors most likely to wish to exercise the vote; 16 and 17-year-olds. The *absolute* bar against all minors of any age voting (as opposed to, for instance, a rebuttable presumption regarding lack of autonomy for the young children and the automatic right to the vote for 16 and 17-year-olds); despite the ready acknowledgement by politicians that: (a) age is but a crude proxy for competence and many incompetent adult voters retain the vote, while (b) many

competent 16 and 17-year-olds potential voters are excluded; speaks to this issue of oppression. The catch-22 artifice in which young people find themselves entangled in respect of the minimum voting age question was nicely summarized during Congressional debates in 1969 by Representative Lee Hamilton in addressing the issue of lowering the U.S. minimum voting age from 21 to 18 years:

> *Those opposed to lowering the voting [age] seek proof positive that youth will handle their franchise intelligently even before having the opportunity to vote*. The same impossible demand was made in opposition to female sufferage [sic] 50 years ago and equal voting rights for Negroes only 3 years ago. Recognizing the error of these previous judgments, proponents [for female and African-American suffrage respectively] insisted, meant further expanding the franchise (emphasis added) [502].

Wherever the vote at 16 has been tried (at the local, regional and/or State level), the sky has not fallen (i.e. Austria, Germany, Switzerland, Isle of Man, Jersey, Slovenia, Brazil) have all implemented the vote at 16 at one electoral level or another or all). It is the absence of all potential voters below the general age of majority that creates yet another more marginalized and alienated group. Further, it is exclusion of 16 and 17-year-olds from the vote rather than their potential inclusion that serves to corrode commitment to democratic ideals and undermine the integrity of the democratic electoral system.

The time is hence ripe, and without question long overdue; for scholars, national and international human rights activists, and human rights institutions and organizations to endorse and affirm the legitimate international human rights struggle of 16 and 17-year-olds for the vote. Civics education and human rights education in the schools, in this time of the *Convention on the Rights of the Child*, should properly be expected to affirm children as rights-holders and the issue of universal suffrage (and the youth vote in particular) must no longer be adroitly avoided in these education programs. Children (persons under age 18) must learn at school that advocating for their rights in peaceful ways is an essential part of good citizenship. The U.K., Scotland, and Australia appear to be just a few of the countries on the cusp of a possible lowering of the voting age to 16 years in the near future. This author can but hope that this monograph, should it receive any attention, might offer some small additional encouragement in that direction.

However, what is the incentive to lower the minimum voting age in democratic States to below 18 years? Cheng comments on the fact that the 26th Amendment to the U.S. Constitution (which led to the lowering of the U.S. federal and State minimum voting age from 21 to 18 years in electoral law) became a reality in large part as politicians were: (a) concerned about escalating student protest against the Vietnam War, and (b) hoped that the grant of the vote to 18–20-year-olds would help placate the

protesters and provide an alternative venue for their dissent. She then suggests that no such compelling incentive is available today in the U.S. for politicians to further lower the minimum voting age (i.e. from 18 years to 16 or 17 years). She states:

> . . . there are some important differences between the voting debates [in the U.S.] of yesteryear and those of today. . . . during the late 1960s, federal legislators' worries about the seemingly –unstoppable and ever-escalating campus demonstrations of the late 1960s [against the Vietnam War] drove them to finally consider an issue that had been a minor political concern since World War II [the minimum voting age issue]. Absent a similar galvanizing series of events, it is frankly difficult to imagine that sixteen-or seventeen-year old voting will find such momentum. The analogies to woman and African-American suffrage that were so popular in the debates leading up to the Twenty –Sixth Amendment also seem to have fallen off the table [503].

The question then more generally is, 'what is the push that will provide enough momentum to lead to a lowering of the minimum voting age below 18 years in Western democratic States in current times' (i.e. to the vote at 16)? This author would suggest that that push must come from a reframing of the vote at 16 issue as a fundamental human rights concern rather than a socio-political policy issue. There is something of an awakening about the rights entitlements of minors afoot in contemporary times and, exploited properly (as is justifiable), this may provide the momentum for the vote at 16 internationally. There has, for instance, been progress made in respect of minors' human rights issues in certain areas where one would have not so long ago expected no movement whatsoever (i.e. such as near universal ratification by U.N. members of the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* [504]. While child soldiers are still being used by many rebel groups internationally, and perhaps to a somewhat lesser extent by certain governments, there has been some considerable cooperation to end the practice of recruiting children as child soldiers by government and an international effort to prosecute those government and non-government perpetrators who recruit and use persons under 18 years old in combat). When it comes to the vote in Western democratic States, of course, governments have considerable control over the issue given the peaceful background context, and can feasibly lower the minimum voting age from the current 18 years. Yet, the vote at 16 issue is too often stalled; classified strictly as a policy matter rather than a human rights imperative. The governmental debate then is focused on whether the anticipated utilitarian benefits to society as a whole of lowering the voting age to 16 would justify the shift and the government having to potentially suffer political backlash from some segments [505].

The concern with fundamental human rights issues internationally (i.e. the establishment of two permanent international human rights courts, the

creation of a permanent international criminal court to prosecute international crimes involving grave human rights abuses, the proliferation of international human rights treaties etc) creates a promising human rights context for reconsideration of the minimum voting age question in Western democracies. That is, if that issue is framed appropriately in human rights terms and not sidetracked by the smokescreen of alleged voter competency considerations held to justify the exclusion of even 16- and 17-year-olds from the vote. Indeed, Cheng notes, in a similar vein, that the movement to lower the voting age in the U.S. from 21 to 18 years, through the mid to late 1960s benefitted from the 'rights consciousness of the time,' and from arguments constructing 18- to 20-year-olds as a distinct discriminated against group in regards to voting rights [506]. Further, some (i.e. the American Bar Association) have attributed a good part of the success in lowering the U.S. minimum voting age from 21 to 18 years to the peaceful protests and letter campaigns by college students (opposed to the Vietnam war) who advocated for the vote at 18 [507]. While youth aged 16 and 17 years old have attempted to advocate internationally for the vote at 16, they have received little or no help in this initiative from high-profile national or international human rights gatekeepers.

It is apparent that the *absolute* bar against minors voting-even those aged 16 and 17 years—is a barrier to the full realization of young people's human rights in every domain, not only in regards to their civil and political rights. The exclusion from the vote puts at risk whatever rights guarantees young people currently enjoy. This is not surprising in that:

> . . . it is precisely . . . when the human is divorced from citizenship . . . that rights are lost [508].

The above quote was made in reference to refugees and stateless persons. However, the proposition applies no less to minors deprived of membership in the polity due to the minimum voting age and, as a consequence, deprived of full citizenship and adequate regard for their rights as human beings. There is a need for the human rights struggle for the vote at 16 to become more visible and intense, and this is more likely with the endorsement of, to use Clifford Bob's terminology, 'high profile human rights gatekeepers' [509] The arguments for that endorsement, it is hoped, have gained at least some in greater clarity and legitimacy through this monograph.

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