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

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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.