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

8.1 Human Rights and Electoral Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> In a host of circumstances, minors are routinely barred from activities in which adults would have a constitutional right to engage. The most obvious and relevant example is voting. The Twenty-Sixth Amendment provides that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age . . ." That constitutional provision distinguishes on its face between minors and adults, and it unmistakably implies that persons less than 18 years old may be denied the right to vote on the basis of age. In fact, "[n]o State has lowered its voting age below 18." . . . *The unquestioned validity of that age-based distinction is especially significant in view of the fundamental nature of the right to vote.* . . . [the] right to vote is "a fundamental political right, because preservative of

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

per se that was the real basis for exclusion of minors from various forms of political participation based on 'background legal principles that are unchallenged' (i.e. the distinction in the law between adults and minors that permits infringements of the constitutional rights of minors in various domains). That distinction, as applied to the vote is, however, one that the current author has sought here to scrutinize while challenging the *blanket, absolute* bar on minors exercising their right to suffrage.

The supporters of the *Bipartisan Campaign Reform Act* (BCRA) restriction on minors making federal campaign contributions essentially held then that minors should be restricted from making those financial contributions—just as they are restricted from the vote—precisely because of their legal status as minors. Thus, supporters of BCRA s. 318 held that minors should not be allowed to make federal campaign contributions based on *who they are* as defined by society (i.e. persons holding the legal status of 'minor'). The restriction under the BCRA thus would apply even for the minors legally emancipated from their parents (minors held in law to be competent to make decisions independently from their parents from whom, often as not, they are estranged). So, too, the age-based restriction in the vote applies equally to legally emancipated minors such they also are denied this form of free expression of political preferences and free association with political candidates and a political party. This then indicates that such restrictions are *not g*enuinely concerned with autonomy issues. Such a blanket absolute bar on minor's participation in certain forms of political activity cannot thus be rationalized by reference to alleged concern over adult manipulation of the minor's political acts and preferences.

Somehow, the fact that minors are legally under the authority of certain adults (unless emancipated) with respect to certain issues (i.e. parents make key decisions regarding their children's health, basic education etc.) is fallaciously transformed into the notion that minors would *necessarily* be subject, in most instances, to manipulation in regards to their vote or political campaign contributions or many other forms of political participation. However, if age is not a good proxy for maturity (as the supporters of age-based restrictions in *McConnell* concede), then it is likely not a good proxy for lack of autonomy for minors interested in voting, or in making political campaign contributions either (these minors being comprised mostly of 16- and 17-year-olds but also sometimes 14- and 15-year-olds). Furthermore, manipulation of the minor to serve as a conduit for funnelling campaign funds actually contributed by others is illegal in the U.S. and, hence, the analogy with the legal authority of parents or guardians over children breaks down in such a case. When it comes to the vote, of course, it is a secret ballot so that there would be a safeguard already built into the system regarding potential attempted manipulation of the minors' votes by adults who have legal control over the minors. Of relevance here is the fact that Western democracies have long since abandoned the former presumption of a lack of autonomy of poor people, or citizens who

do not own property, and its use as a reason for *their* exclusion from the vote. Such a non-rebuttable presumption of lack of autonomy in voting in the case of 16- and 17-year-olds is no more legitimate than the same presumption in regards to the vote for the destitute who are so dependent on the State for social assistance, or the working poor quite reliant on a particular low paying employer. It appears that minors aged 16 and 17 years, in effect, are, in many ways, simply classed as 'second class citizens' when it comes to participation rights generally and political participation rights in particular all of which rights are supposed to be constitutionally protected.

It is important in considering age-based restrictions on minors' basic rights to distinguish between the 'protection rights' of the minor and the minor's 'participation rights'. Age-based restrictions on minors that serve to offer them protection from abuse and/or exploitation (i.e. the restriction on minors entering into contracts, etc.) are not a justification for violation of the minor's constitutionally-protected political or other participation rights (i.e. the right to the vote or to make *autonomous* federal campaign contributions) where the restriction cannot be shown to be in the minor's best interest. Supporters of denying minors—even 16- and 17-year-olds certain inherent political participation rights—generally mix the two together (protection rights and participation rights) when stating their position:

> In light of the longstanding general restrictions on the ability of minors to enter into contracts, to dispose of property, and to vote . . . a law targeting solely at transfers of money does not significantly burden any right that minors have traditionally been understood to possess [438].

Note that in the quote immediately above (from the amicus brief filed in *McConnell* for those *opposing* the motion to strike down the *Bipartisan Campaign Reform Act* ban on minors' ability to make federal campaign contributions), the age-based restrictions on minors entering into contracts and disposing of property are both mentioned. However, the two aforementioned age-based restrictions are based on society's desire to safeguard minors from exploitation. Such restrictions are thus in place to implement the 'protection rights' of minors. Nonetheless, the age-based restriction on the vote (a 'participation right', not a protection right) is mixed in with examples of the aforementioned protection focused age-based restrictions in the McConnell amicus brief (submitted to the Court on behalf of those who wished to continue to restrict minors from making federal campaign contributions). Indeed, in the same amicus brief, the following statement appears:

> It is . . . well-established that . . . the First Amendment rights of minors [i.e. to free expression and free association] are not co-extensive with those of adults. In *Prince v Massachusetts*, 321 U.S. 158 (1944), for example, this Court [the Supreme Court of the United States] upheld the conviction of an adult who had allowed her minor ward to sell religious tracts on a public street in violation of a Massachusetts child labour statute [439].

In *Prince v Massachusetts* [440], however, the issue was clearly the child's protection interests. The Court's decision was *not* based on a notion that minors have restricted First Amendment participation rights (i.e. simply because they are minors or for any other reason). Here the child's First Amendment right to free expression of religious views was implicated; presuming, for the sake of argument, that the child endorsed the religious perspective in the literature she was handing out, but this matter did not enter into the case. That it is the protection matter that was the basis for the decision is evident from the fact that: (a) the decision of the Court to uphold the child custodian's conviction was based on the Massachusetts child labour statute specifications regarding the requirements for a minor working lawfully, and (b) the fact that the child handing out the religious literature on the street was a nine-year-old girl created a situation that violated the State child labour statute. The evidence noted by the Court included the fact that the custodian of the child had been warned by the school attendance officer not to continue allowing the girl child to work on the streets selling religious literature, thus implying that the child had missed school sessions as a result of this activity. Interestingly, the Massachusetts statute, at the time, contained a gender bias in that the statute permitted boys 12 years and over, but only girls 18 years and over doing any trade on the streets.

> No boy under twelve and no girl under eighteen shall sell, expose or offer for sale any newspapers, magazines, periodicals or any other articles of merchandise of any description, or exercise the trade of bootblack or scavenger, or any other trade, in any street or public place [441].

Clearly the intent was *not* to suggest in the statute that males had more extensive First Amendment rights than did girls when it came to handing out religious reading material on the street. Rather, the gender considerations were likely based on notions concerning males as wage earners (such that young boys engaged in earning a wage at a very young age fit in with the accepted stereotypical gender role norms of the time). Hence, the State afforded boys aged 12 and over the right to sell religious and other reading materials on the street, or conduct other trades on the street while securing the protection interests of boys under age 12. The focus with girls, however, was on protection interests even for those aged 12–17 years. The State's intervention in the aforementioned case to protect the child's right to be free of labor and to attend school regularly—upheld as constitutional by the Court in *Prince v Massachusetts*—thus fell into the category of secular concerns and was not at all motivated by the desire to infringe the child's First Amendment rights:

> On one side is the obviously earnest claim for freedom of conscience and religious practice [First Amendment rights]. With it is allied the parent's claim to authority in her own household and in the rearing of her children. The parent's conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element

> of religious conviction enters. *Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end, made here in a manner conceded valid if only secular things were involved* (emphasis added) [442].

Such statutes were intended then to place constraints on child labour so as to prevent the exploitation of children for labour and the consequent aborted education the minor would receive. It is here contended then that *Prince v Massachusetts* does *not* stand (contrary to the claim of the aforementioned amici in *McConnell*) for the proposition that the First Amendment rights of minors (whether involving religious freedom of expression, or political free speech via the vote etc.) are not coextensive with those of adults. *Indeed, the U.S. Supreme Court in Prince v Massachusetts affirmed the First Amendment rights of minors*:

> ***The rights of children to exercise their religion***, and of parents to give them religious training and to encourage them in the practice of religious belief, ***as against preponderant sentiment and assertion of state power voicing it, have had recognition here***, most recently in *West Virginia State Board of Education v. Barnette* . . . (emphasis added). . . Our ruling does not extend beyond the facts the case presents. We neither lay the foundation 'for any (that is, every) state intervention in the . . . participation of children in religion' which may be done 'in the name of their health and welfare' nor give warrant for 'every limitation on their religious '. . . activities .'.(emphasis added) [443].

Returning then to the McConnell case, the Court noted in that case that there was scant evidence of exploitation of minors with regard to their making of federal campaign contributions (i.e. little evidence that parents were using their children as conduits for the parent's additional federal campaign contributions such that parents were able to exceed the federal guidelines for the amount that any one person could contribute). That this was the case was in fact well known for some time to Congress and State governments. We may properly conclude then that the age-based restriction incorporated into the *Bipartisan Campaign Reform Act* (on minors making federal campaign contributions) was *not* based on society's concern with children's protection rights, nor on the need to maintain the integrity of the electoral system. Rather, it was based on a simple desire to restrict minors from exercising this significant form of political free expression simply because they were minors. In the same way, there is every reason to believe, as previously discussed, that minors aged 16- and 17-years-old most often will make autonomous choices if granted the opportunity to exercise their inherent right to suffrage. Hence, the restriction on the ability of 16- and 17-year-olds to vote does not appear to be based on a genuine or actual concern with the minors' protection interests, nor indeed on the need to maintain the integrity of the electoral system. Instead the age-based restriction against 16 and 17 year olds in the vote would seem to be a legally and morally insupportable infringement of minors' ability to participate in society as persons in their own right and as full citizens.