CORE
Metadata, citation and similar papers at core.ac.uk
Provided by Seton Hall University Libraries

Seton Hall University
eRepository @ Seton Hall

Law School Student Scholarship | Seton Hall Law

5-1-2014

Don't Be So Negative: The Case for Positive Constitutional Voting Rights Post-Shelby County and Beyond

Lucas William Morgan

Follow this and additional works at: https://scholarship.shu.edu/student_scholarship

Recommended Citation
Morgan, Lucas William, "Don't Be So Negative: The Case for Positive Constitutional Voting Rights Post-Shelby County and Beyond" (2014). *Law School Student Scholarship*. 540.
https://scholarship.shu.edu/student_scholarship/540

TABLE OF CONTENTS

Don't be so Negative: The Case for Positive Constitutional Voting Rights Post-*Shelby County* and Beyond

INTRODUCTION

Among the numerous rights that citizens of the United States ("US") possess, few hold as high a rank as the right to vote. President Ronald Reagan proclaimed that voting is the "crown jewel" of American liberties.[1] President Lyndon Johnson exclaimed that voting "is the most powerful instrument ever devised by man for breaking down injustice."[2] The US Supreme Court has declared that voting "is the essence of a democratic society."[3] Voting has been declared a fundamental right in the US because it is believed that the right to vote is preservative of all other rights.[4] Stepping beyond the borders of the US, the right to vote has been declared a "well-established norm of international law."[5]

With such soaring rhetoric used to describe the right to vote in the US, many are surprised to learn that other countries throughout the world provide stronger constitutional protections for voting rights than the US Constitution does.[6] This fact is often surprising and at times disturbing to US citizens. This reality stems from the long held belief that the US Constitution does not confer upon its citizens positive or affirmative entitlements to government services, but rather "is a charter of negative liberties" restraining the government from action.[7] The reasons for this approach to interpreting the Constitution have been debated and

---

[1] President Ronald Reagan, Remarks on Signing the Voting Rights Act Amendments of 1982 (June 29, 1982).
[2] President Lyndon Johnson, Remarks on Signing the Voting Rights Act (August 6, 1965).
[3] *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).
[4] *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).
[5] Alexander Kirshner, *The International Status of the Right to Vote*, DEMOCRACY COALITION PROJECT, http://www.demcoalition.org/pdf/International_Status_of_the_Right_to_Vote.pdf.
[6] Some have gone so far as to say that the US actually does not actually have a constitutional right to vote while others operate somewhere in the middle. Regardless of the position one takes, it is clear that the US Constitution does not provide an explicit right to vote. Rather the voting rights protected by the US Constitution have been developed through a series of amendments and also broad interpretations of these amendments.
[7] Erwin Chemerinsky, Constitutional Law Principles and Policies, 565 (Vicky Been et al. eds., 4th ed. 2011); *see also DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 195-196 (1989).

contemplated throughout history. But the purpose of this article is not to argue for an overall approach to drafting a constitution, i.e. positive versus negative rights, but rather is to argue that regardless of the overall constitutional structure chosen by a country, the right to vote as a singular right should be defined in a country's constitution as an affirmative, positive right.

To show the necessity and benefits of defining the right to vote in such a manner, I have chosen a comparative approach, selecting countries who define their right to vote negatively, statutorily and positively. Specifically, I have chosen four countries: the United States, India, Canada and South Africa. As a means of showing the distinctions between the different approaches I focus on cases in which the right to vote was challenged as it relates to prisoners' voting rights.[8] This selection was chosen with the premise that countries that protect prisoners' voting rights would have a strong constitutional right to vote and those who do not would have an equally less protective constitutional right to vote. The cases selected all involved a similar fact pattern: A prisoner or group of prisoners was deprived of their right to vote while in prison and as a result challenged the law disenfranchising them under their country's constitution and took the challenge to their country's highest court.

Part I of this article briefly discusses the distinction between positive rights and negative rights. Part II will explore prisoners' voting rights in the US. Part III begins the comparative analysis and explores prisoners' voting rights in three other countries: India, Canada and South Africa. Part IV follows the comparative analysis and revisits the distinctions between positive and negative rights and asks: what difference does it make? Finally, Part V briefly discusses the

[8] One word of caution: this is not an article arguing for or against prisoner disenfranchisement – rather, these cases were selected as a lens through which one could view how strongly a country protects its right to vote and the correlation between the constitutional methods used to express the right. The benefit of using prisoners' voting rights cases is that the cases provide almost identical laws applied to identical fact patterns across numerous countries dealing with a similar right. The result is to see exactly how a country's highest court analyzes an infringement on the right to vote.

relevance of voting rights today and proposes that the right to vote is unique in a democracy and thus should be defined specifically in a constitution as an affirmative right regardless of the overall structure of a country's constitution.

I. POSITIVE RIGHTS AND NEGATIVE RIGHTS DEFINED

Put simply, positive rights require the government to do something and negative rights prevent the government from doing certain things.[9] If it is true that the US Constitution is a charter of negative liberties rather than positive rights, why was this choice made and what were the competing alternatives? Certainly the founding fathers had a reason for drafting the Constitution in such a manner and history shows that the choice was not made casually. Many reasons have been put forth explaining the choice. Judge Richard Posner of the Seventh Circuit explained the choice made by the founding fathers succinctly in the case of *Jackson v. City of Joliet:*

> The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services. Of course, even in the laissez-faire era only anarchists thought the state should not provide the type of protective services at issue in this case. But no one thought federal constitutional guarantees or federal tort remedies necessary to prod the states to provide the services that everyone wanted provided.[10]

This quote from Judge Posner explains that the reason the founding fathers chose a negative constitutional structure over the positive alternative was because the concern was never that the government would not provide necessary services but rather that the government would attempt to do too much. Although this approach certainly has merit it also can have unanticipated consequences. As *Jackson* will later show and also the cases involving prisoners'

---

[9] Susan Bandesna, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2279 (1990).
[10] *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983).

voting rights, the structure that was thought to protect citizens from government can also at times be harmful. It can be used by the government to take away citizens' rights and also allow the government to claim no obligation to engage in certain activities.

II. TAKING AWAY A FELON'S RIGHT TO VOTE IN THE UNITED STATES

Under the US Constitution, states may disenfranchise both felons and ex-felons.[11] Although the US Supreme Court has declared that inmates who are awaiting trial must be provided with either an absentee ballot or other alternatives to voting, this does nothing for the inmate who has been convicted.[12] With the understanding that the US historically has been a very pro-democracy and pro-voting country it is important to understand the legal analysis that the US Supreme Court engages in when they determine that the US Constitution *does not* guarantee a person's right to vote when they have been convicted of a felony.

a. *McDonald v. Board of Election Commissioners*

In *McDonald v. Board of Election Commissioners*, the Supreme Court held that the State of Illinois's absentee voting statutes, which provided that absentee ballots be provided to those medically unable to go to the polls, did not deny equal protection to those who were charged with an offense and held awaiting trial.[13] In *McDonald*, a group of un-sentenced inmates brought suit against the State of Illinois challenging a law that allowed absentee ballots only for those who had a disability or would be outside their county of residence on Election Day.[14] The practical effect of the law prevented inmates who were awaiting trial form being able to vote.[15]

The inmates argued that since fundamental voting rights were involved there should be a lesser presumption in favor of upholding the law than would normally accompany a challenge to

---

[11] *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974).
[12] *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974); *see also* Chemerinskey, *supra* note 7, at 901.
[13] *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 810-811 (1969)
[14] *McDonald*, 394 U.S. at 803-804.
[15] *Id.* at 803.

state legislation.[16] In upholding the law the Court explained that the states have long been held to have wide latitude in determining how voting is exercised.[17] The Court then decided what standard of review was required for examining the state law.[18] Although it appeared at first that the Court would apply strict scrutiny, the Court explained that despite the traditional habit of more exacting scrutiny for laws aimed at restraining the right to vote, such exacting scrutiny was unnecessary for two reasons.[19] The Court found that because the distinctions made under the law were not made on wealth or race, strict scrutiny was not required.[20] Surprisingly, the Court also held that the law did not act to deny the right to vote but rather, denied an absentee ballot.[21]

Based upon these two conclusions the Court held that strict scrutiny was unnecessary and instead applied "the more traditional standards for evaluating . . . equal protection claims" or rational basis review.[22] Thus, the laws would "be set aside only if no grounds c[ould] be conceived to justify them."[23] The Court stated that there was nothing to show that the pretrial inmates were entirely prohibited from voting.[24] "Constitutional safeguards are not thereby offended simply because some prisoners . . . find voting more convenient than" those prisoners challenging the law. [25]

b. *O'Brien v. Skinner*

In *Obrien v. Skinner*, another group of inmates challenged a New York state law that prohibited voting for those who were confined either awaiting trial or being held pursuant to a

---

[16] *Id.* at 806.
[17] *Id.* at 807.
[18] *Id.*
[19] *Id.*
[20] *McDonald*, 394 U.S. at 808.
[21] *Id.*
[22] *Id.*
[23] *Id.* at 809.
[24] *Id.*
[25] *Id.* at 810.

misdemeanor conviction.[26] The inmates who challenged the law had attempted to "establish a mobile voters' registration unit in the county jail in compliance with a mobile registration procedure which had been employed in some county jails in New York State."[27] The inmates request was denied and as a result they requested to be transported to a polling place or else provided absentee ballots.[28] These requests were also denied.[29] In denying the requests, the election authorities stated that they were under no obligation to enable the inmates to vote and that the inmates did not qualify for absentee ballots under the state law.[30]

In analyzing the inmates' requests, the Supreme Court first noted that other than being physically unable to get to the polling locations, the inmates were not disqualified from voting in any other way.[31] The Court further noted that the law in question had a paradoxical effect where an inmate who was incarcerated in a county other than the one of their primary residency could apply for and receive an absentee ballot.[32] These inmates were deemed unavoidably absent from their county and thus qualified for an absentee ballot.[33] On the other hand, inmates who were confined in their county of primary residency were denied absentee ballots because they were considered present for the purposes of voting and thus did not qualify for absentee ballots.[34]

The Court held that the law was not constitutional because it discriminated between categories of qualified voters in wholly arbitrary ways.[35] The Court distinguished *McDonald*, explaining that in *McDonald*, the record did not show that inmates were absolutely barred from

---

[26] *O'Brien v. Skinner*, 414 U.S. 524, 525 (1974).
[27] *O'Brien*, 414 U.S. at 525.
[28] *Id.* at 525.
[29] *Id.* at 527.
[30] *Id.* at 527.
[31] *Id.* at 528.
[32] *Id.* at 528-529.
[33] *O'Brien*, 414 U.S. at 529.
[34] *Id.*
[35] *Id.* at 530.

voting and the Court's holding rested on essentially a lack of proof.[36] By contrast, the inmates in *O'Brien* were a category that was entirely precluded from voting and there was no failure of proof – the inmates were able to show that if they were imprisoned in their county of residency awaiting trial or serving a misdemeanor sentence they would not be accommodated at all.[37] As a result of the complete bar to voting for this class of inmates, the Court struck down the law as violating equal protection[38]

Taken together, *McDonald* and *O'Brien* appear to stand for the proposition that states may not entirely prohibit non-felons from voting while awaiting trial or serving misdemeanor sentences.[39] This will often be a matter of proof. As *McDonald* shows, sometimes the practical effect of a law will not be deemed to equate to a complete bar and the law could be upheld. States do not necessarily have to provide absentee ballots, but where they refuse, an alternative means of voting must be supplied.[40] However, these minimal safeguards do not apply at all to convicted felons.

c. *Richardson v. Ramirez*

In *Richardson v. Ramirez* the Supreme Court held that denying convicted felons the right to vote does not violate equal protection in the US. In *Richardson*, three felons who had served their sentence and were no longer in prison "filed a petition for a writ of mandate in the Supreme Court of California to compel California county election officials to register them as voters."[41] The statute disenfranchised all "persons convicted of an 'infamous crime.'"[42] The three individuals argued that the California statute in question "denied them the right to equal

---

[36] *Id.* at 529.
[37] *Id.* at 530.
[38] *Id.* at 531.
[39] Chemerinsky, *supra* note 7, at 901.
[40] *See McDonald*, 394 U.S. at 810-811; *O'Brien*, 414 U.S. at 530-531.
[41] *Richardson v. Ramirez*, 418 U.S. 24, 55-56 (1974).
[42] *Richardson*, 418 U.S. at 26.

protection of the laws under the Federal Constitution."[43] Specifically, they argued (1) that the state was required to show a compelling interest to disenfranchise the felons and this could no longer be shown in regard to ex-felons and (2) that because there was such a lack of uniformity in the application of such laws throughout California, there was a denial of due process.[44] The California Supreme Court held that the statute was a denial of equal protection under the Constitution "as applied to all ex-felons whose terms of incarceration and parole have expired" and never reached the question of due process.[45]

On review of the California decision, the Supreme Court noted that the argument that was being made by the state relied upon Section 2 of the Fourteenth Amendment which discussed the denial of voting to persons who participated "in rebellion, or other crime[s]."[46] Justice Rehnquist, writing for the majority, recounted the minimal legislative history that was available regarding Section 2 of the Fourteenth Amendment.[47] Despite being limited, the majority found the language of Section 2 combined with the history that was available regarding the drafting of the relevant section to be highly persuasive in finding that a state could, in compliance with the mandates of the Fourteenth Amendment, deny ex-felons the right to vote.[48]

The court concluded "that the understanding of those who adopted the Fourteenth Amendment . . . and [] the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, [was] of controlling significance in distinguishing such laws from those other limitations on the franchise which have been held invalid under the Equal

---

[43] *Id.* at 27.
[44] *Id.* at 33.
[45] *Id.* at 33-34.
[46] *Id.* at 41-42.
[47] *Id.* at 43-55.
[48] *Richardson*, 418 U.S. at 54-55.

Protection Clause."[49] The Court ultimately held that based upon the language of Section 2 of the Fourteenth Amendment the Supreme Court of California erred in holding that the state could not deny ex-felons the right to vote.[50]

It is noteworthy that in the opinion, Justice Rehnquist never discusses the standard of review. Rather, without ever getting into strict scrutiny analysis, which would seem to be the appropriate standard for reviewing the denial of a fundamental right, the majority relies solely upon the legislative history of the Fourteenth Amendment to find that a state can deny, even ex-felons, the right to vote.[51] This is important for two reasons. First, in a discussion of the debate between positive rights and negative rights, one of the key factors regarding negative rights is the other safeguards in place when a fundamental right is defined negatively in the Constitution. For example, one may argue that in the US, positive rights are unnecessary because in the US, courts review the denial of a fundamental right under strict scrutiny, which has been said to be "strict in theory, fatal in fact."[52] This exacting standard of scrutiny would seem to be sufficient for protecting fundamental rights. However, *Richardson* highlights the problem with negative rights and the standard of review approach to dealing with the abridgment of fundamental rights.

Having a right defined negatively, implies that there are limits, which makes it much easier for courts to justify taking away the right. Furthermore, as *Richardson* reveals, if the Supreme Court is willing to so easily sidestep the appropriate standard of review in dealing with fundamental rights, then tiered review is no protection at all and makes negative rights all the more susceptible to abridgment. If strict scrutiny is truly going to protect negative rights then it must be consistently employed and not casually sidestepped. If one accepts that negative rights

---

[49] *Id.* at 54.
[50] *Id.* at 56.
[51] *Id.* at 43-56.
[52] Adam Winkler, *Fatal in Theory and Strict in Fact*, 59 VAND. L. REV. 798-799 (2006).

do come with inherent flaws regarding the right to vote, the next logical question then becomes what is the best alternative. There are two logical alternatives which are discussed in turn: (1) defining the right statutorily or (2) as a positive, affirmative right.

III. PRISONER DISENFRANCHISEMENT: A COMPARATIVE ANALYSIS

In debating the alternatives to negative rights for defining the right to vote in a constitution, the two other most commonly discussed alternatives are a statutory right and a positive or affirmative right. While both have their unique strengths and weaknesses generally speaking, every country may find their own justifications for choosing one form over the other. This next section looks at the right to vote in India which is provided by statute and then looks at two countries that provide the right to vote, along with the bulk of their other rights positively – Canada and South Africa.

a. India and the Right to Vote

The primary structure of India's Constitution is positive in nature.[53] It confers a variety of rights upon its citizens including the positive right to free speech and expression, peaceable assembly, freedom of movement, and free education to children from the age of six to fourteen.[54] Despite conferring such a wide variety of affirmative rights upon its citizens, India's Constitution is silent regarding the right to vote.[55] The reason for this is because the right to vote in India "has been held to be a statutory right and not a common law right" and is conferred only by statute.[56] "It is pure and simple a statutory right."[57]

---

[53] *See* INDIA CONST., Jan. 26, 1950, Part III-IV, art. 14-51.
[54] *Id.* at Part III, art. 19-22, 29-31.
[55] *See* INDIA CONST., Jan. 26, 1950.
[56] *Pradhan v. Union of India & Ors*, (1997) S.C.R., at 4 (India).
[57] *Id.*

In *Pradhan v. Union Of India & Ors*, the relevant law prevented a person from voting in any election if he or she was confined in a prison or otherwise in legal custody of the police.[58] Because India's Constitution is silent on the right to vote, the law was challenged as violating Articles 14 and 21 of the Indian Constitution.[59] Articles 14 and 21 provide to Indian Citizens the right to equality and due process respectively.[60] The Court stated that "the challenge to the constitutional validity of [the law was] based primarily on Article 14" and rejected the Article 21 due process claim.[61]

In challenging the law, the petitioner prisoners argued specifically that the law that denied the right to vote to people in police custody was significantly over broad because it denied people the right to vote who were being detained for any reason whatsoever no matter how trivial the offense.[62] In reviewing the petitioner's challenge to the law the Court employed its standard of review for a denial of any right under Article 14. In India, a reasonable classification is permitted when it "has a rational nexus with the object of classification."[63] The Court's analysis primarily focused on whether or not the classification was reasonable.[64]

The Court said that the aim of the laws that prevented persons with criminal backgrounds from voting was to prevent the criminalization of politics and to maintain the integrity of elections.[65] The Court accepted these objectives and opined that these goals must be welcomed and upheld as furthering the asserted purpose.[66] After the Court acknowledged that the purpose had a rational nexus with the object of the classification, the Court explained that the amount of

---

[58] *Id.* at 1-2.
[59] *Id.* at 2.
[60] INDIA CONST., Jan. 26, 1950, Part III-IV, art. 14 and 21.
[61] *Pradhan*, (1997) S.C.R., at 4-5 (India).
[62] *Id.* at 3.
[63] *Id.* at 2-3.
[64] *Id.* at 4-5
[65] *Id.*
[66] *Pradhan*, (1997) S.C.R., at 3 (India).

discretion available to the legislature in instituting a classification depends upon the context in which the enactment exists.[67] The Court said that the criminalization of politics was "the bane of society and negation of democracy."[68] The Court found that the law so far should be upheld as rationally connected to its aims and that it was enacted in an appropriate context.

Finally, and most importantly, the Court discussed the history of voting rights in India.[69] "[T]he nature of the right to vote has been held to be a statutory right and not a common law right."[70] Based upon prior cases it is clear that voting rights in India are "a creature of statute or special law and must be subject to the limitations imposed by it."[71] Furthermore, the Court entirely rejected the notion that the Fundamental Rights Articles of the Indian Constitution had any relevance on a right created by statute.[72] Voting in India "is a special right and can only be exercised on the conditions laid down by the statute [and the] Fundamental Rights [Articles have] no bearing on a right like this created by statute."[73] The Court concluded:

> In view of the settled law on the point, it must be held that the right to vote is subject to the limitation imposed by the statute which can be exercised only in the manner provided by the statute; and that the challenge to any provision of the statue prescribing the nature of the right to elect cannot be made with reference to a fundamental right in the Constitution. The very basis of [the] challenge to the validity of [the law] is, therefore, not available and this petition must fail. Consequently, this petition is dismissed.[74]

Based upon the fact that the fatal flaw to this challenge in India was the fact that the right to vote was nowhere contained in the Constitution and thus not subject to constitutional safeguards, it is clear that a country who wants to protect its citizens' right to vote should not

---

[67] *Id.*
[68] *Id.*
[69] *Id.* at 4.
[70] *Id.*
[71] *Id.*
[72] *Pradhan*, (1997) S.C.R., at 4-5 (India).
[73] *Id.* at 5.
[74] *Id.* at 5.

prefer conferring the right statutorily through the legislative process. Although some may argue that other countries may protect a statutory right to vote more than the Supreme Court of India did, with the history of legislative deference throughout the world, and most certainly in the United States, there is no justification for gambling on such an important right by leaving it to a legislature. The result that is almost certain to follow is that when a legislature confers a right, a legislature may take it away and the courts will not intervene.

b. Canada and the Right to Vote

The Canadian Charter of Rights and Freedoms is primarily a constitution of positive rights.[75] For example, the Charter outlines in detail a list of "Fundamental Freedoms" including freedom of conscience and religion, thought, belief, opinion, expression, freedom of the press, peaceable assembly and association.[76] In addition to these fundamental rights, Canadians are also entitled to a substantial number of other rights also defined affirmatively such as language rights, educational rights, equality rights and legal rights.[77] The right to vote in Canada can be found in the Canadian Charter under "Democratic Rights."[78]

Concerning the right to vote in Canada, the Charter states that "[e]very citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."[79] "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as *can be demonstrably justified in a free and democratic society.*"[80] This is

---

[75] *See* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 *being* Schedule B to the Canada Act, 1982 (U.K.).
[76] *Id.* at Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 2 (U.K.).
[77] *Id.* at c. 16-23 (U.K.).
[78] *Id.* at c. 3 (U.K.).
[79] *Id.*
[80] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 *being* Schedule B to the Canada Act, 1982 c. 3-5 (U.K.) (emphasis added).

the only standard of review available for courts to employ in Canada in evaluating an infringement of a right. Thus, anytime there is an attempt to infringe upon the rights contained in the Charter, the government will have a heavy burden to overcome.

In *Sauve v. Canada*, the task of overcoming this burden was highlighted when a law that denied the right to vote to "[e]very person who is imprisoned in a correctional institution serving a sentence of two years or more" was challenged by Richard Sauve.[81] The law was passed following a prior Canadian Supreme Court ruling that struck down a similar law that denied the right to every person imprisoned in a correctional institution regardless of the length of the sentence.[82]

In analyzing the law, Chief Justice McLachlin began by emphasizing the importance of voting rights in Canada. "The right of every citizen to vote, guaranteed by . . . the Canadian Charter of Rights and Freedoms, lies at the heart of Canadian democracy."[83] The Canadian Supreme Court engaged in a twofold analysis. The Court asked (1) whether the challenged law infringed upon a right of the citizens and (2) if it did infringe upon a right, whether the infringement could be demonstrably justified in a free and democratic society.[84] If it could not be justified the law would be struck down and if it could, the law would be sustained. In determining whether or not the law can be demonstrably justified in a free and democratic society the court asks whether the infringing law "achieves a constitutionally valid purpose or objective, and [whether] the chosen means are reasonable and demonstrably justified."[85]

> This two-part inquiry – the legitimacy of the objective and the proportionality of the means – ensures that a reviewing court examine rigorously all aspects of justification. Throughout the justification process, the government bears the

[81] *Sauve v. Canada*, 3 [2002] S.C.R. 519, para. 3-7.
[82] *Sauve v. Canada*, 7 O.R. (3d) (C.A.) aka "Sauve No. I"
[83] *Sauve*, 3 S.C.R. at 519, para. 9.
[84] *Id.* at 519, para. 7.
[85] *Id.*

> burden of proving a valid objective and showing that the rights violation is warranted – that is, that it is rationally connected, causes minimal impairment, and is proportionate to the benefit achieved.[86]

For the purposes of the argument, the Government conceded that the law infringed upon the guaranteed right of all citizens to vote.[87] Thus, the Court focused their entire analysis on whether or not the law was rational and could be justified.[88] The Court defined and explained the right to vote in Canada.[89] It is important to note the significance the Court placed on the language used in the Canadian Charter to define the right to vote. For example, in explaining the paramount importance of individual voting rights in Canada, the Court explained that the framers of the Charter indicated the unique importance of voting by using *broad, untrammeled language*.[90] The Court explained that because the right was defined so clearly there could be no presumption in favor of the constitutionality of a law proscribing the right.[91] "This Court has repeatedly held that the 'general claim that the infringement of a right is justified . . . does not warrant deference to Parliament . . . rather, it requires the state to justify such limitations."[92]

The government argued that denying inmates the right to vote was simply a matter of social and political philosophy and thus it was fully appropriate for the legislature to enact laws that reflected the majority opinion on the issue.[93] In addition to declining to show any deference to the legislature on the issue, the Court also proclaimed that the rights contained in the Canadian Charter "are not a matter of privilege or merit, but a function of membership in the Canadian polity that cannot be lightly cast aside."[94] "It is for the courts, unaffected by the shifting winds

---

[86] *Id.*
[87] *Id.* at 519, para. 6.
[88] *Id.*
[89] *Sauve*, 3 S.C.R. at 519, para. 9-11.
[90] *Id.* at 519, para. 11 (emphasis added).
[91] *Id.* at 519, para. 12.
[92] *Id.*
[93] *Id.*
[94] *Id.*

of public opinion and electoral interests, to safeguard the right to vote."[95] After outlining the principles of judicial review of fundamental rights under the Charter, the Court concluded "that the government's stated objectives of promoting civic responsibility, respect for the law and imposing appropriate punishment, while problematically vague, [were] capable in principle of justifying limitations on Charter rights."[96] Despite accepting the government's stated objectives as legitimate, the Court then held that the government failed to establish proportionality of the law because there was a lack of a rational connection between denying inmates the right to vote and the identified goals.[97]

Under Canada's proportionality and rationality analysis, the government is required to show the denial of a right will further the objectives put forth.[98] The denial of the right cannot be denied any further than is necessary and the benefits of denying the right must outweigh the negative impacts.[99] The first question the court asked under the proportionality review was whether denying inmates the right to vote increased respect for the law.[100] The government advanced three theories on this point: (1) taking away the right to vote sent an educative message about the importance of the right to vote, (2) allowing inmates to vote was demeaning to the political system, and (3) that this was a legitimate and reasonable punishment for committing a crime.[101]

The Court in turn rejected all three of the government's theories. First, the Court replied, this "message is more likely to harm than to help respect for the law."[102] Second, the idea that

---

[95] *Sauve*, 3 S.C.R. at 519, para. 12.
[96] *Id.* at 519, para. 19.
[97] *Id.*
[98] *Id.* at 519, para. 20.
[99] *Id.*
[100] *Id.* at 519, para. 22.
[101] *Sauve*, 3 S.C.R. at 519, para. 29.
[102] *Id.* at 519, para. 30.

allowing those who disobey the law to vote would demean the political system is an ancient and obsolete belief.[103] "Denial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy and the Charter."[104] Finally, the Court rejected the government's third argument. The Court stated, that when the government's final argument was stripped of all its rhetoric it amounted to a new tool in the arsenal of punishments – denial of constitutional rights.[105] The Court then convincingly explained that accepting this argument from the government would be tantamount to accepting the argument that prisoners are not protected by the Canadian Charter.[106] The government certainly could not pass a law denying the right of prisoners to be free from cruel and unusual punishment, the freedom of religion, or freedom of expression.[107] The Court then asked rhetorically why the right to vote was any different.[108] The Court concluded by holding that the law could not be justified in a free and democratic society.[109]

Although the Court's analysis was certainly exhaustive and thorough in *Sauve*, it is important to take special note of the role that positive rights played in the Court's analysis. One of the government's arguments rejected by the Court was that the law helped create a sense of "civic responsibility."[110] In support of this argument, the government attempted to justify the law by analogizing the law with laws that prevented youth from voting.[111] The Court replied that this analogy was inaccurate because in the instance of youth voting rights, the government is not saying that the class who is denied the right is unworthy of voting, but rather they are making a

---

[103] *Id.* at 519, para. 43.
[104] *Id.* at 519, para. 44.
[105] *Id.* at 519, para. 45-46.
[106] *Id.* at 519, para. 46.
[107] *Sauve*, 3 S.C.R. at 519, para. 47.
[108] *Id.* at 519, para. 51-53.
[109] *Id.* at 519, para. 62.
[110] *Id.* at 519, para. 19 and 37.
[111] *Id.* at 519, para. 37.

decision based on the life experience of the citizen.[112] In the case of prisoners' voting rights being denied, there is a moral judgment being made which cannot be tolerated under the Charter.[113] The Court pronounced that this was not the lawmakers' decision to make.[114] "The Charter makes this decision for us by guaranteeing the right of 'every citizen' to vote and by *expressly* placing prisoners under the protective umbrella of the Charter through constitutional limits on punishment."[115] Thus, the prisoners are protected just like any other citizen, "and short of a constitutional amendment, lawmakers cannot change this."[116]

It is clear that in Canada not only is the source of the right (i.e. a constitution versus a statutory right) extremely important, but also the language used to express it. Thus it is clear that in at least one country, defining the right to vote in a specific, affirmative manner affords more protection to the individual citizen than a statutory or negative constitutional right, even if that citizen is a felon or ex-felon.

c. South Africa and the Right to Vote

The South African Constitution has been widely regarded as the model of a positive rights constitution. It certainly contains a long list of affirmative rights including some rights that stand out as unique in comparison to other constitutions.[117] For example, the South African Constitution, in addition to providing traditional rights such as freedom of religion, expression, belief and association, also provides for the rights of trade, occupation, profession, healthcare, food, water and access to government information.[118] The political rights that are possessed by South African citizens are also substantial. In South Africa, "Every adult citizen has the right to

---

[112] *Sauve*, 3 S.C.R. at 519, para. 37.
[113] *Id.*
[114] *Id.*
[115] *Id.* (emphasis added).
[116] *Id.*
[117] *See* S. AFR. CONST., 1997.
[118] *Id.*

vote in elections for any legislative body established in terms of the Constitution, and to do so in secret."[119] South Africa's Constitution provides that voting and a national common voters' roll is one of the foremost values on which the country was founded.[120] This language makes clear that voting rights in South Africa are considered to be of the utmost importance.

In *August and Another v. Electoral Commission and Others*, the Court dealt specifically with a law denying prisoners' their voting rights.[121] The relevant law denied the right to vote to all prisoners who were convicted of a crime that resulted in detention in prison without the option for a fine and also from any prisoner who committed murder, robbery, and rape or attempted any of these crimes.[122]

Two prisoners, one serving a sentence for fraud and the other un-sentenced awaiting trial also on fraud charges, "sought an undertaking from the [Election] Commission that [they] would be able to take part in the elections."[123] The Commission responded by stating that they would not oppose the application of the voters to vote in any election and in fact would take measures to enable the prisoners to vote.[124] The decision of the Commission was then challenged in court and the Transvaal High Court delivered an opinion explaining that the Commission should not undertake the efforts to enable the prisoners to vote.[125] The Transvaal Court relied upon what they referred to as the "insurmountable logistical, financial and administrative difficulties" in striking down the prisoners' request for voting accommodations.[126] The Court further reasoned that because the prisoners' logistical difficulties in voting were of their own making, special

---

[119] *Id.*
[120] *Id.*
[121] *August and Another v. Electoral Commission and Others*, 1999 SA 1 (CC) at 1 para. 1 (S. Afr.).
[122] *August*, 1999 SA 1 (CC) at 2 para. 2 (S. Afr.).
[123] *Id.* at 1-5.
[124] *Id.* at 6 para. 7-8.
[125] *Id.*
[126] *Id.* at 7 para. 8.

accommodations enabling them to vote were unnecessary.[127] "[S]pecial measures to accommodate voters should be reserved for those voters 'whose predicament was not of their own making.'"[128]

The prisoners then appealed the decision of the Transvaal Court to the Constitutional Court of South Africa.[129] The prisoners' sought "an order declaring that they and all prisoners [were] entitled to register as voters on the national common voters' roll and to vote in the forthcoming general elections, and requiring the respondents to make all necessary arrangements to enable them and all prisoners to do so."[130] Interestingly, the prisoners argued that not only did the South African Constitution require that they be allowed to vote; they also argued that the Election Commission was affirmatively obligated "to create conditions enabling them to vote . . . and make the necessary arrangements for these rights to be realized."[131]

The Constitutional Court noted in their opinion that the right to vote, by design, imposes upon the legislature and the executive affirmative obligations.[132] For example, election dates must be set, secret ballots and machinery must be established, and officials must manage the elections on Election Day.[133] The Court said that in addition to these affirmative obligations, the right to vote in South Africa certainly imposes on the Election Commission, which was created to carry-out these affirmative duties, the responsibility "to take reasonable steps to ensure that eligible voters are registered."[134] The Court then transitioned from explaining the requirements imposed on the Commission to recounting the significance of voting rights in South Africa.[135]

---

[127] *Id.*
[128] *August*, 1999 SA 1 (CC) at 7 para. 8.
[129] *Id.* at 7 para. 9.
[130] *Id.* at 7-8 para. 10.
[131] *Id.* at 8 para. 11.
[132] *Id.* at 22 para. 16.
[133] *Id.*
[134] *August*, 1999 SA 1 (CC) at 22-23 para. 16.
[135] *Id.* at 23 para. 17.

"Universal adult suffrage on a common voters roll is one of the foundational values of our entire constitutional order."[136] The Court stated that voting rights were essential to acquiring rights and for effective citizenship.[137] Furthermore, the Court explained that voting rights say that everybody counts and are also a badge of dignity.[138] "In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity."[139]

In reviewing the Court's opinion in *August*, it is important to note the complete lack of deference to the legislature. The Court went out if its way to note that when dealing with the right to vote, "the franchise must be interpreted in favor of enfranchisement rather than disenfranchisement."[140] The Court also contrasted the right to vote with other rights that are inherently restricted by incarceration.[141] For example, the Court said that prisoners "no longer have freedom of movement and have no choice regarding the place of imprisonment." In addition, "contact with the outside world is limited" and prisoners "must submit to the discipline of prison life and to the rules and regulations which prescribe how they must conduct themselves and how they are to be treated while in prison."[142] So it is clear that the Court in South Africa acknowledges and accepts that there is a denial of important rights by the very fact of one's incarceration however, this will not justify a complete denial of all constitutional rights in South

---

[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *August*, 1999 SA 1 (CC) at 23 para. 17.
[141] *Id.* at 24 para. 18.
[142] *Id.*

Africa. "Nevertheless, there is a substantial residue of basic rights which [prisoners] may not be denied; and if they are denied them, then they are entitled to legal redress."[143]

The Court acknowledged that "the idea that murderers, rapists and armed robbers should be entitled to vote will offend many people" however "the task of this Court is to ensure that fundamental rights and democratic processes are protected."[144] The Court concluded by leaving open the possibility that the right to vote could potentially be taken away from certain categories of criminals however, to do so the law must be drawn very narrowly and only strike at a very specific class of criminals and the law must also serve a legitimate purpose.[145]

IV. CONCLUSION: POSITIVE AND NEGATIVE RIGHTS – WHAT DIFFERENCE DOES IT MAKE?

It is clear that the language used to express citizens' voting rights is important and does make a difference when the right is challenged. The right of citizens to participate in the political processes of their respective country can be established by a variety of methods, means, and language. The purpose of this article is to show that these choices matter, and once the choice is made it is often hard to correct any flaws or weaknesses that are later realized in the choice.

Returning to *Jackson*, seventeen year old Jerry Ross and sixteen year old Sandra Jackson, who was six months pregnant, were involved in a serious car accident.[146] A City of Joliet police officer arrived at the scene of the accident and made no attempts to determine whether anyone was in the car or rescue either of the passengers.[147] Rather, as the car began to burn, the police officer called the fire department and directed traffic around the scene of the accident.[148] The

---

[143] *Id.*
[144] *Id.* at 31 para. 31 – 33 para. 33.
[145] *Id.* 32 para. 32-33
[146] *Jackson*, 715 F.2d at 1201-1202.
[147] *Id.*
[148] *Id.* at 1202.

fire department arrived, put out the fire and only then realized that Ross and Jackson were still in the car.[149] Jackson was taken to the hospital where she was pronounced dead along with her fetus while Ross was left in the vehicle.[150] He was later removed by a tow-truck driver and pronounced dead.[151]

The families of Ross and Jackson sued the City of Joliet, alleging that they could have been saved if the police officer had aided Ross and Jackson, or at least called an ambulance immediately.[152] Judge Posner suggested that if there was a claim to be brought it was "under the Fourteenth Amendment's due process clause."[153] Judge Posner explained there were two possible theories under the Fourteenth Amendment by which a claim could be brought: (1) that the deceased were entitled to some level of positive rights under the Constitution or (2) that the negligent acts of the personnel of the City of Joliet constituted a deprivation of life without due process of law.[154]

Judge Posner rejected both possibilities.[155] Specifically, in regard to the first argument, Judge Posner dismissed it simply by stating "that the Constitution is a charter of negative rather than positive liberties."[156] "It is enough to note that, as currently understood, the concept of liberty in the Fourteenth Amendment does not include a right to basic services, whether competently provided or otherwise."[157] Judge Posner rejected the due process claim explaining that only an intentional tort would suffice to successfully bring the claim.[158]

---

[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Jackson*, 715 F.2d at 1203.
[154] *Id.* at 1203-1204.
[155] *Id.* at 1206
[156] *Id.* at 1203.
[157] *Id.* at 1204.
[158] *Id.*

This case, combined with the voting rights cases from the US, Canada and South Africa illustrates the impact that a positive right can have as opposed to a negative right. There are strong arguments against positive rights and in favor of the negative rights approach. Two arguments that are common in opposing positive rights are (1) the "floodgates" argument and (2) the "slippery slope" argument.[159]

The floodgates theory suggests that if cases such as *Jackson* are successfully brought, many others will arise.[160] Courts then will be engaged in the process of evaluating and determining how governments should do their jobs.[161] However, in opposing this argument, one can look to the doctrine of sovereign immunity. If positive rights are allowed, doctrines such as sovereign immunity would still survive and the courts would be focused on whether the branches of government are "transgressing the rights of individuals."

Furthermore, the floodgates theory has little place in the discussion of voting rights. This is for two reasons. First, elections in the US already place affirmative obligations on government entities. As the South African Supreme Court explained in rejecting the attempts to disenfranchise prisoners in *August*, election dates must be set, secret ballots and machinery must be established, and officials must manage the elections on Election Day.[162] This occurs in the US as well. Except for the fact that based on current interpretations of voting rights in the US, the government is not required to do these things, it is clear that the US is very capable of handling elections in the US. Second, the right to vote is a fundamental right. It seems that where a right is fundamental it would be reasonable to expect a increased burden on the government to see that the right is not only protected from abridgment but also realized by the

[159] Bandesna, *supra* note 9, at 2326.
[160] *Id.* at 2326-2330.
[161] *Id.* at 2327.
[162] *August*, 1999 SA 1 (CC) at 22 para. 16.

citizens. So while the floodgates argument may hold weight in a discussion of the best *overall* structure for a constitution it is less persuasive when it comes to the discussion of voting rights.

The "Slippery Slope" argument posits that once a constitution allows the "government to do anything but leave [citizens] alone, [they] will end with it coercing [them] to obey its idea of freedom."[163] "In the constitutional realm, the argument is that once [it is held] that due process requires the government to perform a statutorily mandated duty to protect a known individual from threatened harm, [citizens] will next be forcing cities to create police and fire departments and will ultimately be guaranteeing every person a living wage and enough to eat."[164] Again, just as the floodgates argument, this argument has merit regarding the overall structure of a constitution. The argument carries less weight however when discussing a single fundamental right, such as voting. By requiring the government to facilitate voting, by affirmative obligations, citizens are guaranteed that the government will always have to provide the one right that operates as a check on its power: voting. This can prevent the "parade of horribles" that those who argue against positive rights, claim will follow if positive rights are realized.

Although there are other arguments against positive constitutional rights, these two arguments provide an accurate portrayal of the essence of most of arguments. They all tend to focus on the issue of the logical stopping point when a constitution does provide positive rights. The major flaw in this argument is that it proceeds as if positive constitutional rights are an all or nothing proposition. The reality is that it is possible to provide some rights affirmatively and others negatively. Furthermore, some rights, such as the right to vote, are so essential to a democracy that they should hold a unique position within a constitution, meaning that even if the overall structure of the constitution is negative, the right to vote should still always be a positive

[163] Bandesna, *supra* note 9, at 2330-2332.
[164] *Id.*

right. Accordingly, arguments that create the impression that positive rights will lead to unsustainable government obligations should be accorded less weight in regards to the right to vote.

V. CONSTITUTIONAL VOTING RIGHTS TODAY AND RECOMMENDATIONS GOING FORWARD

a. Domestically

The US Supreme Court recently struck down the core of the landmark 1965 Voting Rights Act (the Act), legislation that was aimed at stopping "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution."[165] In striking down the most significant parts of the Act, the Court noted that while voting discrimination still exists, the conditions which justified the Act in 1965 no longer exist today.[166] The Court also stated that the Act "imposes substantial federalism costs and differentiates between the States, despite our historic tradition that all states enjoy equal sovereignty."[167] The Court concluded the opinion by opining that their decision "in no way affects the permanent, nationwide ban on racial discrimination in voting" however the protections created by the 1965 Voting Rights Act's coverage formula could no longer be justified.[168]

In the wake of the Supreme Court's decision in *Shelby County*, it is essential to look at the safeguards that are in place to protect a citizen's right to vote in the US. One of the likely results of *Shelby County* is that there will be many more attempts to disenfranchise voters in the US. There already have been noteworthy attempts by states to interfere with the voting rights of Americans by passing laws requiring voter identification and other requirements, under the guise

---

[165] *Shelby County, Ala. v. Holder*, 133 S. Ct. 2612, 2618 (2013).
[166] *Shelby County*, 133 S. Ct. at 2618-2619.
[167] *Id.* at 2621 (internal quotation marks omitted).
[168] *Id.* at 2631.

of preventing fraud in elections.[169] However, many of these laws are aimed more at voter suppression rather than the prevention of fraud in elections.

Although the full force of the Supreme Court's decision in *Shelby County* has yet to be realized, it is clear that the decision, at a minimum will give states more leeway in handling elections. In the US, states have always had "broad powers to determine the conditions under which the right of suffrage may be exercised."[170] Prior to *Shelby County*, the Supreme Court upheld voter identification laws in Indiana[171] and in Arizona.[172] Other attempts have also been made to do the same in states such as Pennsylvania, Florida and South Carolina.[173] While the laws in Pennsylvania, Florida and South Carolina were never successfully implemented, they were all introduced prior to the *Shelby County* decision and thus it stands to be seen whether renewed attempts would be successful. It seems under the Court's renewed embrace of federalism over individual voting rights, deference to these laws will once again become a hurdle for those whose rights are threatened by state election laws.

With such sly attempts to interfere with voting rights, it is essential that Americans always stay alert to attempts to disenfranchise some classes of voters and also the constitutional protections afforded those who are potentially affected. Although voting is a fundamental right in the US, it is clear that the US Constitution is not as protective of voting rights as some other constitutions throughout the world. Realistically, an amendment in the US declaring voting to be a positive right is unlikely. However, it is still a worthy endeavor to explore the positive alternative to the negative right as a means of understanding the strengths and weaknesses of

---

[169] Jeffrey Toobin, *A New Right to Vote?*, THE NEW YORKER, Oct. 29, 2012, at 1.
[170] *Carrington v. Rash*, 380 U.S. 89, 91 (1965).
[171] *See Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008).
[172] *See Purcell v. Gonzalez*, 549 U.S. 1 (2006).
[173] Toobin, *supra* note 166, at 1.

both so that one is well equipped to engage in the legal battles that can protect citizens' voting rights.

b. Internationally

Much can be gained by evaluating the constitutional protections afforded a citizen via their respective constitution. The relevance today internationally is that countries in their constitutional infancy should reevaluate the status of the right to vote under their constitution. Where it is believed necessary to strengthen the right to vote, attempts to amend the constitution should be made sooner than later. The longer a country waits to amend a constitution, the more challenging the already onerous process is. In addition, countries that have yet to formulate their constitution would be well advised to provide for strong constitutional protections for the right to vote. Countries such as Egypt, who may very well be in the midst of a constitutional moment, would be well advised to adopt strong protections for voting rights because they are preservative of other fundamental rights and also are an effective check on government.[174]

In looking at the choices that a country has when making a decision regarding a constitution and the right to vote the three most important choices that must be made are (1) whether to confer the right primarily by a constitution or statutorily; (2) once the first choice has been made whether to opt for a positive right or negative right, and finally (3) whether to utilize specific or generalized language in articulating the right.

c. Constitutional Rights or Statutory Rights?

Pradhan, clearly reveals the dangers that arise when a country chooses to confer important rights via the legislative process as opposed to a constitution. Although many argue that this is a more efficient way of handling the conferring of rights, the case demonstrates how

[174] David Kirkpatrick and Kareem Fahim, *Egypt Islamists Expect Approval of Constitution*, N.Y. TIMES, December 15, 2012, at World 1.

little deference is given to the citizens claims and how much deference is given to the legislature. When dealing with statutory rights in India, all that is needed for the government to take away the right from a citizen is a classification that has a rational nexus with the object of the classification. This highly deferential standard is an analogue to rational basis review in the US. Thus, as was highlighted by *Pradhan*, citizens should not get too comfortable with their statutory rights because those rights which are provided by a legislature can just as easily be taken away by a legislature.

In contrast to statutory rights are constitutional rights, which were the subject of the cases discussed in the US, Canada and South Africa. It is evident from the language used in discussing the constitutional rights of these countries that any attempts to take away the right to vote in these countries will have a much higher hurdle to overcome than one would in India. In the US, one must meet strict scrutiny when dealing with a fundamental right by showing that the government has a compelling interest and that the means of achieving this is narrowly tailored.[175] In Canada, the law must be demonstrably justified in a free and democratic society.[176] In South Africa the law must be one of general application and reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[177] These three standards are all much less deferential to the government and place a more onerous burden on the government to justify infringing the right.

Based upon the review the case law from India and by comparison with the US, Canada and South Africa, the answer to the question of which method of providing rights is more protective of the rights given and thus more desirable is that a constitution is preferable due to its ability to provide greater protection. Constitutions are almost always more protective because

[175] *Grutter v. Bollinger*, 539 U.S. 306, 326-327 (2003).
[176] *Sauve v. Canada*, 3 [2002] S.C.R. 519
[177] *August*, 1999 SA 1 (CC) at 3 para. 3-4.

they demand a more stringent standard of review to legal challenges and they are harder to change than statutory rights. What then is the preferred structure of a constitution? Positive, which is the structure of the constitutions of Canada and South Africa, or negative as is the case in the US. This is discussed below.

d. Positive or Negative Rights?

Once it has been determined that a constitution is the preferred method of conferring rights to a country's citizenry, the next question is what constitutional structure should the country choose? The two most commonly adhered to forms are positive and negative. As previously mentioned, it is fairly easy to conclude that constitutions are more protective of rights than statutory laws. But which is more protective of rights when it comes to competing constitutional structures? The negative model, as exemplified by the US Constitution, can be protective but suffers from one main flaw – the nature of the negative model only says what government cannot do which inherently implies that some things can be done by the government to the citizens' rights. By contrast, the positive model, as exemplified by Canada and South Africa starts from the premise that the right is absolute.

Although standards of review are present in the Canadian and South African constitutions, it is much harder to take away constitutional rights in these countries because they are clearly articulated in an affirmative way. All that is necessary in these countries is the existence of the right in the constitution and the full force of constitutional protection is in place. By contrast, under the US negative model, a whole series of questions will be asked before it is determined what standard of review will be applied, i.e. rational basis, intermediate, or strict scrutiny. Questions such as is there a suspect class, is this a fundamental right and what is the purpose of the law? Furthermore, one of the flaws in the ad hoc creation of standards of review

in the US is that the US Supreme Court has at times completely sidestepped any standard of review as occurred in *Richardson*. This is much more difficult to do under the positive rights model, especially when there is only one standard of review clearly articulated in the constitution itself.

If one accepts that certain rights, such as the right to vote, should receive greater protections from abridgment, then the best choice for accomplishing this goal is by choosing a positive rights constitutional structure either as a whole or for the specific rights deemed most fundamental by the country. This takes much of the "guesswork" out of the review of the laws at issue and avoids questions such as what the drafters intended and also the problems of disagreement on what privileges the right articulated actually provides. Put simply, telling someone what they have is much easier than telling someone only what cannot be done to them.

e. Specific or Generalized Language?

Since there is ample evidence in place to support the conclusion that constitutions should be preferred over statutory rights and that positive constitutional structures should be preferred over negative ones at least regarding the right to vote, the final question to be asked is whether the rights identified in the constitution should be articulated by very clear and specific language or more general language allowing for judicial flexibility when interpreting the right.

When it comes to the language chosen to articulate a voting right, clear specific language is the better alternative. There is one caveat to this. If clear specific language is chosen, the draftees of the constitution must have the foresight to draft the relevant rights in a manner that does not later yearn for more. Assuming this can be done, a very clear and specific articulation of a particular right in a constitution can protect against narrow interpretational approaches to lessening a right. Vague and general language is a swinging door. This design can allow a court

to interpret a law broadly and liberally which can make up for any inadequacies in the drafting of the constitution. This same feature can also result in courts interpreting language very narrowly which could result in the exact same language lessening a citizen's right. A country should not gamble with generalized language because this could lead to courts justifying restrictions of rights by judicial interpretation.

Regardless of the overall constitutional structure (positive, negative, specific language versus general) chosen by a country, the right to vote in any democracy should receive disproportionate treatment in how the right is expressed and the process by which potential limitations on the right are analyzed by the country's highest court. The right should receive the greatest protections that a Constitution can provide. This is not to say that the right to vote should be absolute. However, when restricting such a paramount right, the one who seeks to take it away should have a heavy task in front of them. Such an approach is the only approach that is consistent with countries who proclaim the superior nature of democracy and voting.