CHAPTER 7

Civil Rights in the Second Half of the 20th Century

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During the second half of the 20th century, the most significant issues on the American constitutionalism have been related to citizens' rights and especially to the interpretation that the Supreme Court of the United States has made of those rights (Hall, p. 398). Some of those rights –recognized by constitutional amendments or by Supreme Court decisions– are studied in this chapter.

The most frequent reference to the individual rights and liberties guaranteed in the American Constitution is as "civil rights." That term can be found as far back as the 17th century. For example, in the *Charter of Rhode Island and Providence Plantations*, of 1663, the text refers to "the free exercise and enjoyment of all theire civill and religious rights, appertaining to them [the colonists], as our loveing subjects" (Grau 2009, vol. II, p. 16). The Fathers of the nation used that term in the earliest American constitutions, written during the years 1776 to 1778. The first constitution of New Jersey said, "no Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right" (Grau 2009, vol. III, p. 100); the constitution of Pennsylvania said that no person shall "be justly deprived or abridged of any civil right as a citizen" (Grau 2009, vol. III, p. 148); Maryland protected its citizens "in their natural, civil or religious rights" (Grau 2009, vol. III, p. 182); and the constitutions of Vermont written in 1777 and 1786 said that no man shall "be justly deprived or abridged of any civil right, as a citizen" (Grau 2009, vol. III, p. 312, 550). The same in the Southern states: The second constitution of South Carolina, of 1778, for example, had granted to all "Christian protestants in this State, demeaning themselves peaceably and faithfully, shall enjoy equal religious and civil privileges" (Grau 2009, vol. III, p. 358). The *Act for establishing religious freedom* of Virginia, of 1786, said, "that our civil rights have no dependence on our religious opinions" (Grau 2009, vol. III, p. 558). In the *Ordinance for the Government of the Territory of the United States, North-West of the River Ohio*, of 1787, laws and constitutions were enacted for "extending the fundamental principles of civil and religious liberty" (Grau 2009, vol. III, p. 600).

Civil rights are defined as "the individual rights of personal liberty guaranteed by the Bill of Rights and by the 13th, 14th, 15th, and 19th Amendments to the Constitution, as well as by legislation such as the *Voting Rights Act*. Civil rights include especially the right to vote, the right of due process of law and the right of equal protection under the law" (*Black's* Law Dictionary). To these should be added the 26th Amendment and those rights conferred in the Constitution itself, which included the writ of *habeas corpus*, intellectual property rights, the right to a trial by jury, and so on.

The "right to vote" is, thus, considered a civil right. But it is undoubtedly a political right too, defining "the right to participate in the establishment or administration of government, such as the right to vote or the right to hold public office" (*Black's* Law Dictionary). Thus, in the United States the line separating civil and political rights is not clearly defined and often political rights are considered part of the civil rights.

A fundamental right, on the other hand, is "a right derived from natural or fundamental law." Constitutionally, a fundamental right is "a significant component of liberty, encroachments of which are rigorously tested by courts to ascertain the soundness of purported governmental justifications" (*Black's* Law Dictionary). The Supreme Court has considered "fundamental rights" those without which neither liberty nor justice would exist. Through the time, the Court has built a catalog of rights, which are considered "fundamental" in accordance with the previous definition. Among those rights are the rights of citizens to vote, to interstate travel, and certain aspects of personal intimacy, such as the right to marry or exercise birth control. It should be noted that the last three rights do not appear explicitly in the Constitution, the *Bill of Rights* or any of the Amendments.

Other terms that are frequently used overseas, such as "social rights", "cultural rights", or "third-generation rights", are not commonly used in the American constitutional literature or in the opinions of the Supreme Court. On the other hand, the term "civil liberty" defined as "freedom from undue government interference or restrain[t]" is widely employed. "The term usually refers to freedom of speech or religion" says the usual authority, *Black's* Law Dictionary. "Civil liberties" include "economic liberties," which are fundamental to American society and are interpreted as "constitutional rights concerning the ability to enter into and enforce contracts; to pursue a trade or profession; and to acquire, possess, and convey property" (Chemerinsky, p. 605).

Another important concept necessary to a coherent understanding of the American constitutional environment is that the Supreme Court, and by extension any federal court, can neither hear cases involving an abstract concept nor give "advisory opinions," such as the relevance of a particular civil right. The jurisdiction of the federal courts extends exclusively to "cases" and "controversies" (U.S. Const. Art. III, Sec. 2). "Case" and "controversy" have much the same meaning, but the term "case" is used solely for civil claims. These "cases and controversies" cannot be "unripe," meaning that the controversy has not arisen yet or is "moot," which means that the controversy has already been resolved. The parties in the case or controversy must have "standing", or "standing to sue," meaning that they have a "right to make a legal claim or seek judicial enforcement of a duty or right. To have standing in federal court, a plaintiff must show (1) that the challenged conduct has caused the plaintiff actual injury, and (2) that the interest sought to be protected is "within the zone of interest meant to be regulated by the statutory or constitutional guarantee in question" (*Black's* Law Dictionary). What all this means is that the dispute must be actual and real, not faked. (One exception to these requirements was in the case of *Roe v. Wade*, which is studied later in this Chapter. The Supreme Court understood that pregnancies would always come to term before the judicial process could complete. So it heard the case although "Ms. Roe" had already given birth and her case had become "moot.") The corollary of the mentioned Cases and

Controversies Clause is that federal courts have no constitutional power to render "advisory opinions."

Another general observation is that he principle of *stare decisis* does not apply rigidly to the United States Supreme Court in constitutional cases. *Stare decisis* –"to stand by things decided"– is a fundamental principle in *common law* legal systems, used to maintain legal certainty. *Stare decisis* is defined as "the doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points are at issue in subsequent litigation." "Precedent" is "a decided case that furnishes a basis for determining later cases involving similar facts or issues" (*Black's* Law Dictionary). Although not a frequent occurrence, the Supreme Court has reversed previous opinions and it is not obliged to give much explanation of its reasons for doing so.

We can infer from all the above that it is not an easy task to determine precisely and specifically which rights are constitutionally protected in the United States. Previous references in our study of the *Bill of Rights* and other Amendments made obvious how insufficient they are to fix a definite outcome. Moreover, any list of rights made today will not be good tomorrow. Freedom of contract was a fundamental right during the *Lochner Era*, but after *West Coast Hotel Co. v. Parrish*, for instance, it was no longer true. In his edition of 1946 of *Leading Constitutional Decisions*, Robert Eugene Cushman said the most relevant civil and political rights of citizenship were; double jeopardy; privacy of personal communications; certain aspects of blacks' voting right; freedom of the press; freedom of expression; freedom from coercion "to be a witness against himself;" "to have the Assistance of Counsel for his defense;" equal services for blacks and whites; and freedom of contract. (Note that *West Coast Hotel Co. v. Parrish* had already been decided in 1937!) Sixty-five years later, in 2012, cases involving civil rights were classified, though not exhaustively, into affirmative action; ballot access; constitutional poverty law; debtors' rights; deportation; desegregation (in schools); disability rights; employment of aliens; employment discrimination; citizenship; permanent residence; welfare benefits; jurisdiction over Native Americans; indigents; juveniles; military personnel; reapportionment; residency requirements; rights of illegitimates; sex discrimination; "sit-in" demonstrations; voting; and so on. To these should be added rights deriving directly from the First Amendment, such as, again not exhaustively, campaign spending; commercial speech; conscientious objectors; establishment of religion; Federal internal security legislation; free exercise of religion; legislative investigation; libel; obscenity... as well as rights related to personal privacy, such as abortion; contraceptives; freedom of information; right to die; and everything pertaining to membership of trade unions and freedom of association. (The lists derived from *The Oyez Project* at Chicago-Kent College of Law: <http://www.oyez.org/issues/Civil%20Rights> [verified Aug. 16th, 2012].)

Above and beyond the above civil rights, there are those conferred by the *Due Process* and *Equal Protection* Clauses of the Fifth and Fourteenth Amendments. The Supreme Court attaches more importance to the *Due Process* Clause than to any other constitutional clause when deciding whether government has illicitly invaded the fundamental rights of citizens. Of medieval English origin, *due process* means, basically, fundamental fairness and justice, and it is closely linked to the concept of the *law of the land* and its fair application in equal measure to everyone.

The Supreme Court recognizes two types of due process: *procedural* (in civil and criminal proceedings), and *substantive* due process. In this second type of due process, the Court first recognizes a given fundamental right (often not elaborated), such as the freedom of contract, and then applies –for example, as in the case of *Lochner*– the concept of *substantive due process* to invalidate those laws limiting the fundamental right. In the

procedural due process, on the other hand, the Court verifies the process used by the government to deprive any citizen "of life, liberty, or property," declaring unconstitutional and void the government's action or law prescribed in the case if "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" (*Snyder v. Massachusetts*, 291 U.S. 97, 105). The Supreme Court has also read into the *Due Process Clause* a prohibition against vague laws, and it has used this as the key to incorporate the Bill of Rights in the state constitutions. Several examples of use of the *Due Process Clause* can be found in the Court opinions included in this Chapter.

The Constitutional Amendments of the Second Half of the 20th Century

From 1951 to 1992, six amendments to the Constitution were ratified, making it the most active period in the constitutional development of the United States since the ratification of the *Bill of Rights*. During that period, the texts of two additional amendments were submitted to the states, but they failed to achieve the "three fourths of the several States" needed for ratification. Of the six amendments ratified, half were about the framing of the government, and the other half about citizens' rights, specifically the right to vote. Of the first group, one amendment limits to two the Presidential terms of a candidate; another describes in complex detail the process for presidential succession; and the third places certain restrains on the salaries of Congresspersons. By the other three amendments, any kind of polling taxes are prohibited (what once was considered a requirement to vote, was now an unjustifiable violation of the same right to vote); citizens of the Capital, Washington D.C. are granted the right to vote in the presidential elections; and the voting age is lowered to 18, being set the same as the recruitment age. Only four of the six amendments are discussed here (but the texts of the other two have been included with the documents of this Chapter).

The two amendments failing to achieve ratification in this period, were the "Equal Rights Amendment," proposed in 1972, making illegal any government discrimination based on a citizen's sex; and the "District of Columbia Voting Rights Amendment," proposed in 1978, giving the residents of Washington, D.C., equal representation in Congress as the rest of the citizens in the nation.

Presidential Tenure: The 22nd Amendment

The original text of the Constitution had no limit to the number of terms a person could serve as President. None of the Presidents, however, served more than two terms, or eight years. That is, until Franklin D. Roosevelt reached the Presidency.

The first President, George Washington, did not seek reelection after his second term. He did not give a clear reason for his decision, but in a republican system of government, without offices for life (except for certain judges), tenure without limits would have turned the Presidency into an "elected monarchy." In his *Farewell Address*, of 1796, Washington made excuse of his age. "[E]very day," he said, "the increasing weight of years admonishes me more and more that the shade of retirement is as necessary to me as it will be welcome." In 1879, an attempt to nominate President Ulysses S. Grant as the Republican candidate for

what would have been his third term, failed. The first President to actually run for a third term was Theodore Roosevelt in 1912, but he was unable to muster enough electoral votes. For one reason or another, none of the 31 Presidents before Franklin D. Roosevelt served more than eight years. Without an explicit limit in the Constitution, the two-term limit had become a generally accepted custom or tradition. But in 1940, that custom changed.

In 1932, Franklin D. Roosevelt, popularly known as "FDR," reached the Presidency in the middle of the Great Depression. As it has been indicated, that was one of the most complex periods of American history. FDR used his Inauguration speech, to announce his *New Deal* plan and, within the first 100 days of taking office, his Administration had pushed for legislation aimed toward an economic recovery. Four years later, FDR was reelected for a second term in a landslide victory, the result of the help of Catholics, union members, intellectuals, and the working class people at large, as well as a little improvement in the economy. For the elections of 1940, and with war in Europe already unleashed, Roosevelt joked at the Democratic Convention that he would have to be drafted to run for a third term. He was nominated by a 9 to 1 majority and won the election in 38 of the 48 states. Four years later, by the time of the elections in 1944, Roosevelt's health was precarious, but still he won the fourth term by a similar massive margin. In April of 1945, after more than twelve years in the Presidency, FDR died of a massive stroke.

The achievements of Roosevelt's administration were unquestionable and his fellow citizens showed him their appreciation in and out of the polls. (He is considered, after Abraham Lincoln, to have been the best President in the history of the United States.) But the twelve continuous years of his Presidency caused a debate in Congress on the wisdom of setting a constitutional limit to the number of Presidential terms. It was not an easy decision, and, as the accompanying text of the Report of the House of Representatives shows, "much discussion has resulted upon this subject. Hence it is the purpose of this ... [proposal] ... to submit this question to the people so they, by and through the recognized processes, may express their views upon this question, and if they shall so elect, they may ... thereby set at rest this problem" [H.R. Rep. No. 17, 80th Cong., 1st Sess. 2 (1947)]. And definitively it was no unanimity in the "views," because it took almost four years to "set at rest this problem" and get the 22nd Amendment ratified.

The text of the Amendment expressly excluded, from the eight-year rule, the President-in-office when the Amendment was proposed. He was President Harry S. Truman, who in 1952 tried to run for a third term, but having failed to get enough supporters, pulled out of the candidacy race at the beginning of the campaign.

> Harry S. Truman (1884-1972) was an American politician, 33rd President of the United States. He was born in Missouri, into a humble farming family, and had just a basic education and held menial jobs until enlisting in the Missouri National Guard in 1905, where he served for six years. Truman reenlisted in 1917 when the Unites States entered the World War I conflict, fighting in France as an artillery captain. After returning from France, Truman opened a haberdashery shop and joined the Democratic Party. In 1922 his business went bankrupt, but the same year he was elected county commissioner. In 1933 he was appointed Missouri's director for the Federal Re-Employment program of the *New Deal*, and the next year was elected U.S. Senator for Missouri. In the Presidential elections of 1944, Truman was chosen as Vice-President on the Democratic ticket. When Roosevelt died in April of 1945, Truman became President of the United States. A few weeks later war ended in the European theater, but bloody fighting continued in the Pacific. Truman ordered the dropping of two atomic bombs over Japan in August of 1945, causing Japan's

unconditional surrender. During the Presidential campaign of 1948, Truman issued an Executive Order, racially integrating the U.S. Armed Forces and imposing a requirement that "there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin." Against all odds, Truman won that election. The United Nations and the North Atlantic Treaty Organization were established during President Truman's tenure, and he approved the Marshall Plan. Once his Presidency ended, and without any personal estate, Truman was left without any income and almost in poverty. In 1958, Congress passed the *Former Presidents Act*, offering a $25,000 yearly pension to each former president.

The Amendment has been repeatedly criticized because the President is left in a *lame duck* situation toward the end of his second term, lacking effective power when he cannot be reelected. However, all attempts to repeal the amendment have failed so far. One of the alternatives under consideration has been to modify the Amendment to limit it to serve no more than two continuous terms. Nevertheless, the limit in duration of the President's office is a fundamental characteristic of a republican system, going back to the Revolutionary period. Today, everything points both toward maintaining the two-term limit for the Presidency and imposing a similar restriction for the leadership positions of both Houses of Congress.

Poll Taxes: The 24th Amendment

The right to vote had been linked to the ownership of land property since the earliest time, and to that ownership was tied the obligation to pay taxes. Most of the first state constitutions required a citizen to pay a tax to be allowed to vote for the election of representatives. In South Carolina, in 1776, the constitution established in its Sec. XI that "persons having property, which, according to the rate of the last preceding tax, is taxable at the sums mentioned in the election act, shall be entitled to vote" (Grau 2009, vol. III, p. 58). In Chap. II, Sec. 6, of Pennsylvania's constitution, "[e]very freemen of the full age of twenty-one years, having resided in this state for the space of one whole year next before the day of election for representatives, and paid public taxes during that time, shall enjoy the right of an elector" (Grau 2009, vol. III, p. 152). In Sections 8 & 9 of the constitution of North Carolina is stated "[t]hat all freemen of the age of twenty-one years, who have been inhabitants of any County within this State twelve months immediately preceding the day of any election, and shall have paid public taxes, shall be entitled to vote for members of the House of Commons for the county in which he resides;" and "[t]hat all persons possessed of a freehold in any Town in this State, having a right of representation, and also all freemen who have been inhabitants of any such town twelve mouths next before and at the day of election, and shall have paid public taxes, shall be entitled to vote for a member to represent such Town in the House of Commons (Grau 2009, vol. III, p. 230). In Georgia, "Every male white inhabitant, of the age of twenty-one years, and possessed, in his own right, of ten pounds value, and liable to pay tax in this State, or being of any mechanic trade, and who shall have been a resident six months in this State, shall have a right to vote at all elections for Representatives, or any other officers herein agreed to be chosen by the people at large" (Grau 2009, vol. III, p. 600). In the State of New York, Section VII of its constitution stated that "every male inhabitant of full age, who shall have personally resided within one of the counties of this state for six months immediately preceding the day of election, shall, at such election, be entitled to vote

for representatives of the said county in assembly; if, during the time aforesaid, he shall have been a freeholder, possessing a freehold of the value of twenty pounds, within the said county, or have rented a tenement therein of the yearly value of forty shillings, and been rated and actually paid taxes to this state" (Grau 2009, vol. III, p. 284). And in New Hampshire, in 1784, "[e]very male inhabitant of each town and parish with town privileges in the several counties in this state, of twenty-one years of age and upwards, paying for himself a poll tax, shall have a right [...] to vote in the town or parish wherein he dwells, for the senators in the county" (Grau 2009, vol. III, p. 518).

In the other state constitutions, even if they had no express mention of the taxes, suffrage was a consequence of the ownership of land property and, consequently, of paying taxes. In Massachusetts, for example, the Declaration of Rights guaranteed, in its Section IX, that "[a]ll elections ought to be free, and every inhabitant of the state having the proper qualifications, ha[d] equal right to elect, and be elected into office" (Grau 2009, vol. III, p. 506), but in 1780 the "qualifications" to elect a senator were to be a "male inhabitant of twenty-one years of age and upwards, having a freehold estate within the Commonwealth, of the annual income of three pounds, or any estate of the value of sixty pounds" (Grau 2009, vol. III, p. 406); and the members of the House of Representatives were elected by "[e]very male person, being twenty-one years of age, and resident in any particular town in this Commonwealth for the space of one year next preceding, having a freehold estate within the same town, of the annual income of three pounds, or any estate of the value of sixty pounds" (Grau 2009, vol. III, p. 414).

Nevertheless, even prior to the Constitution of 1787 it was already acknowledged as an undemocratic approach to demand the payment of taxes for exercising the right to vote. Thus, the Declaration of Rights of Maryland, of 1776, recognized in its Section 13 "[t]hat the levying taxes by the poll is grievous and oppressive, and ought to be abolished" (Grau 2009, vol. III, p. 178). The rejection of poll taxes grew from the first years of the Republic right up to the Civil War, with most of the qualifications requiring the payment of taxes being eliminated. But that situation changed after the Civil War and the Reconstruction Amendments, first in the Southern states, but later on extending to some of the Northern and Western states.

The Fourteenth Amendment, which extended the right to vote to African-Americans, was not favorably received in the Southern States. Since 1868, when the Amendment was adopted, many subterfuges were used to prevent blacks from exercising their right to vote. Among these was, firstly, to require voters a level of literacy that most African-Americans could not have and had no means of achieving; secondly, a process was introduced prior to the election date to “evaluate” the qualifications of the electors to vote, but African Americans were not called for evaluation, so these voters were rejected at the booths for failing to meet the "previous requirement;" thirdly, primaries "for whites only" were organized to express a preference over the Party candidates, but then participation in the primary was a prerequisite for voting in the general election; fourth, but not last, the crude and plain use of force against the blacks the dared to show up at the voting booths.

Another kind of obstacle attempted to prevent blacks –and other minorities– from voting was to pass special taxes, which revenues were directed to very legitimate ends, such as, for example, the improvement of the schools facilities, and that were collected not at the town treasury and during the fiscal year, but right at the booths and at the time of exercising the voting right.

Contrary to ordinary taxes, these "poll taxes" were not compulsory but payable only if the individual wanted to exercise his or her right to vote. In spite of all "reconstructioning"

efforts, the black population was the economically weakest, and these poll taxes –often no more than one dollar– represented an amount most of them were unable to afford. Furthermore, in many districts, sophistries such as the "grandfather clause" exempted from paying such poll taxes those people whose fathers or grandfathers had voted before a given date. That date was always chosen carefully to be prior to the ratification of the Fifteenth Amendment, when African-Americans were not allowed to vote.

By 1902, all the eleven states of the former Confederacy had passed some kind of poll tax, which legality was often questioned. President Franklin D. Roosevelt tried to abolish such taxes through federal legislation, but placed against the opposition of the Southern members of his own Democratic Party, he was forced to withdraw it. To make things worse, in *Breedlove v. Suttles, tax collector*, of 1937, the Supreme Court of the United States recognized the constitutional validity of such poll taxes. In 1939, the House of Representatives prepared a *Bill* to void poll taxes in Federal elections; but the Senate filibustered it. The same situation happened again in 1946. In 1948, President Harry S. Truman organized the Civil Rights Committee, which reached the conclusion that the best way to abolish all poll taxes was through an amendment to the Constitution. During the 1950's, however, anti-communist priorities pushed all activities related to civil rights into the background, including the eradication of poll taxes. Finally, President John F. Kennedy sought to avoid new filibusters in the Senate and pushed for an amendment declaring any poll tax to be unconstitutional.

> John F. Kennedy (1917-1963) was an American politician and 35th President of the United States. He was born in Massachusetts, to an Irish-Catholic family, and in 1940 graduated cum laude from Harvard University. In 1941 he joined the Navy and, when Japan declared war on the United States, Kennedy was promoted to Lieutenant and assigned to the Pacific theater, commanding a patrol torpedo boat, and winning a medal for heroism. In 1946, Kennedy was elected U.S. Representative for Massachusetts, and in 1952 U.S. Senator for the same state. In 1960 he won the Presidential election against Richard Nixon. In his brief term, popularly known as *Camelot*, Kennedy pushed for legislation in favor of civil rights; established the volunteer program Peace Corps; started the American space program; sent the first American troops to Vietnam; authorized the ill-fated *Bay of Pigs* invasion; and dealt with the Cuban Missile Crises among many other activities. John F. Kennedy was assassinated in Dallas, Texas, in 1963, while campaigning for his reelection.

In 1962, Congress submitted to the states the 24th Amendment for their ratification, which was achieved in 1964, thereby abolishing any kind of poll tax in Federal elections. At the time of enactment, the States of Alabama, Arkansas, Mississippi, Texas, and Virginia, had some kind of poll tax legislation on their codes.

Even after the adoption of the 24th Amendment, the states continued to invent ways of preventing African-Americans and other minorities from voting. For example, Virginia required the voter to obtain a "resident's certificate" six months in advance of the elections. This administrative process proved to be more expensive and inconvenient than the former "$1 poll tax for the schools."

In *Harman et al. v. Forssenius et al.*, of 1965, the Supreme Court unanimously decided that "[f]or federal elections, the poll tax [was] abolished absolutely as a prerequisite to voting, and no equivalent or milder substitute may be imposed. Any material requirement imposed upon the federal voter solely because of his refusal to waive the constitutional

immunity subverts the effectiveness of the Twenty-fourth Amendment and must fall under its ban" (380 U.S. 528, 542). But since the text specifically stated that the Amendment applied to the elections "for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress," many states continued to demand poll taxes for state and local elections. In 1966, the Supreme Court ruled, in *Harper v. Virginia Board of Elections*, that any poll tax, either in Federal or in state or local elections, was unconstitutional because it violated, not the 24th Amendment, but the *Equal Protection Clause* of the Fourteenth Amendment.

All these Amendments and Supreme Court opinions do not mean the problems in the electoral process are totally resolved, as the 2000 Presidential election proved. Many votes in this election, paradoxically of African-Americans and other minorities mainly, were discarded due to problems caused by the complex design of the ballots. In other states, the electoral censuses had many errors in the spelling of names, addresses, Code Ids, etc., of voters, even though the information was taken directly from the files of the Motor Vehicle Administrations, which, paradoxically too, had no errors when processing traffic violations. Any discrepancy between the electoral census list and the voter identity document –normally a driving license issued by the same MVA!– results in the disallowance of the vote. This is a problem that gets solved within minutes by issuing an "exception vote" at the polling station itself. But these "exception votes" are not counted but in the case of a tied vote. Although improbable, this approach could change the final result and, in any case, it alters the statistics and distorts the published percentages.

Voting Age: The 26th Amendment

In 1968, the involvement of the United States in the Vietnam War reached half a million troops, and to that date it had sustained more than 36.000 deaths. Many of these casualties were part of the regular draft that since 1942 had been fixed at the age of 18 years.

During WWII, many citizens were in favor of reducing the minimum age of voters to 18 years. The slogan "Old enough to fight, old enough to vote" became popular. Student protests grew during the Vietnam War, putting pressure on the President and Congress to lower the minimum age to vote from 21 to 18 years. In spite of knowing its questionable constitutionality, President Richard Nixon signed a law that set the voting age at 18 years for every kind of election, both federal and state. As expected, Oregon and Texas challenged in court the constitutionality of the law. When the case *Oregon v. Mitchell*, of 1970, reached the Supreme Court, this found for Oregon, ruling that Congress could set voting requirements in federal elections, but it did not have the power to set the voting age for state elections.

> Richard M. Nixon (1913-1994) was an American politician and 37th President of the United States. Born in California, into a poor, strict Quaker family, he attended Duke University School of Law through a scholarship, graduating in 1937 third in his class. After the Pearl Harbor attack, Nixon joined the Navy, reaching the rank of Lieutenant Commander. In 1946, Nixon was elected U.S. Representative for California and in 1950 U.S. Senator for that state. In 1952 he was appointed Vice-President on the Republican ticket of Eisenhower, remaining in that office during Eisenhower's two terms. In the 1960 Presidential election, Nixon was defeated by John F. Kennedy; but he won the Presidency in 1968, after the withdrawal of President Johnson as a

candidate and the assassination of Robert F. Kennedy. Reelected in 1972, Nixon resigned the Presidency in 1974, in the midst of the Watergate scandal and the threat of impeachment. A few months later, his successor, President Gerald Ford, granted him a general pardon for any federal crimes or misdemeanors that Nixon could have committed. Initially condemned to a political wilderness, by 1975 Nixon was again in public life, granting interviews and giving speeches, which activities continued until 1991, a few years before his death. During his Presidency, Nixon negotiated a cease-fire with North Vietnam, ending the Vietnam War; he initiated diplomatic relations with the Popular Republic of China; he signed the first antiballistic missile treaty with the USSR; he established the Environmental Protection Agency; he pushed forward civil rights legislation; he enforced school desegregation in Southern states; he furthered cancer research; and he initiated the war on drugs, among many other accomplishments.

By the next year, Congress had approved the final text of this amendment and sent it to the legislatures of the states for its ratification. Within a brief one hundred days, the Amendment had been ratified and adopted. President Nixon signed it three days later. The 26th Amendment partially overruled the Supreme Court decision in *Oregon v. Mitchell*, and modified Sec. 2 of the Fourteenth Amendment.

Congress Salaries: The 27th Amendment

A curious anecdote of this Amendment is that it was one of the amendments originally proposed when the *Bill of Rights* was approved, back in 1789. In the original proposal sent to the states, the amendment was second in a list of twelve. The ultimate goal of this Amendment is to remind legislators that they are exclusively the administrators of the public treasury, not its owners.

Back when the *Bill of Rights* was ratified in 1791, this Amendment was rejected by five states –New Jersey, New Hampshire, New York, Pennsylvania, and Rhode Island– of the fourteen then in the Union, what thereby made its ratification impossible. Contrary to recent Amendments (after the 18th), the original text of the amendment did not include any clause limiting the time needed to reach the "three-fourths of the states" requirement for its ratification.

In 1873, almost one hundred years after the Amendment had first been originally proposed, the House of Representatives had passed a law, sarcastically dubbed the *Salary Grab Act*, by which, the salaries of the President and Supreme Court Justices were doubled and the salaries of all members of Congress were raised by 50 percent, all of them retrospectively. Shortly afterward, in protest against what was perceived as an abuse of power, and recognizing that there was no possible way to repeal the Federal *Act*, the Ohio General Assembly decided to ratify the forgotten Amendment.

Again the Amendment was dormant until 1978 when, for similar reasons to those of 1873, Congresspersons having raised their own salaries, this time by 30 percent, Wyoming legislature ratified the Amendment, becoming the 8th state to do so.

In spite these isolated efforts, the Amendment remained forgotten and with little chances to achieve the additional 30 ratifications needed to be adopted. But in 1982, Gregory Watson, a student in the University of Texas, started a postal campaign to the legislatures of the states that had not ratified the Amendment. He urged them to ratify it in order to avoid the abuses that were currently taking place in Congress. Its members had raised their salaries well above the cost-of-living index, retroactively and with no more control than the improbable Presidential veto.

Over the course of ten years, the Amendment achieved the required number of ratifications for adoption and, in 1992, two hundred years after originally proposed, it became the 27th, and for now, last, Amendment to the Constitution.

The controversy did not end with the belated ratifications from the states. Title 1 of the Code of Laws of the United States (also known as *United States Code*, or *USC*) had been modified shortly beforehand. It now assigned to the Archivist of the United States (the chief official overseeing the operation of the National Archives and Records Administration) the task of certifying the state ratifications of all constitutional amendments. Fulfilling strictly his legal assignment, the Archivist published the adoption of the 27th Amendment without previously notifying Congress, and this caused irate protests from some of its most important and relevant members. They complained that tradition demanded that the legislators, as direct representatives of the People, be notified first.

The Supreme Court opinions on Civil Rights

During the second half of the 20th century, the Supreme Court of the United States was even more diligent than Congress in its consideration of civil rights issues. In a very large number of Court opinions, new rights were recognized, old rights became ratified, and proper enforcement was demanded of the states. It is not feasible within these pages to make an exhaustive study of all the Supreme Court opinions of the period. The five cases we explore below give an outline of the work of the court in matters of universal interest.

After 1954, with the arrival of Chief Justice Earl Warren and the decision *Brown v. Board of Education*, the Court took a very proactive attitude toward the recognition of many civil rights. This is in remarkable contrast to the decision made ten years previously, when the Court had issued one of its most infamous decisions in *Korematsu v. United States*, of 1944. Then it had affirmed the sentence of an inferior court convicting an American citizen, of Japanese ancestry, who, in defiance of an Executive Order, remained in his home and did not voluntarily report to an internment camp, as people of Japanese origin had been required to do during World War II. The most positive side of the *Korematsu* decision in 1944 was that it applied the *strict scrutiny standard* to racial discrimination by government, although the Court failed in its intentions by contradicting its own position.

In addition to *Brown v. Board of Education*, the Court decisions described here include one case on the rights of detainees and the requirements on police interrogation; two cases on the right of a woman to abort, showing the original position of the Court and its subsequent evolution; and finally one case on the rights of illegal immigrants.

Ending Racial Discrimination: *Brown v. Board of Education*

From the foregoing discussion of Amendments and Supreme Court opinions, we can show that the path to racial equality, or, at the very least, the elimination of racial segregation in the United States, has been long and tortuous. After decisions such as *Dred Scott* or *Plessy*, the real condition of black citizens, and generally of any ”Non-Caucasian," was one of great inferiority, socially, politically, and even legally, as compared to white citizens. Finally, in 1954, the attitude of the Justices of the Supreme Court, from their lofty position on the bench, changed to the point of declaring that such situations were radically unacceptable.

Mr. Oliver L. Brown and another thirteen parents, all of them black citizens, filed in the Federal District Court a class action suit against the Board of Education of the City of Topeka, Kansas, demanding an end to the policy of racial segregation in the "separate but equal" elementary schools of the city. Such policy, for example, forced Mr. Brown's daughter, of eight years of age, to walk six blocks to her school bus stop and then to ride one mile to her segregated black school, while a school designated for white-only children was just seven blocks from her house.

The plaintiffs argued that the state laws requiring racial segregation, in this case in public schools, but equally in restaurants, public transportation, theaters, or even in the drinking fountains on the street, deprived them of equal rights. They claimed that, even in those circumstances where conditions in black and white schools were the same –what was already doubtful–, they were deprived of the *Equal Protection* guaranteed by the Fourteenth Amendment. Using *Plessy v. Ferguson* as the precedent, the inferior courts found for the Board of Education. But when the case reached the Supreme Court, the decision was unanimously in favor of the Plaintiffs.

The Court asked itself: "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive children of a minority group of equal educational opportunities? We believe that it does," the Court categorically affirmed. It "conclude[d] that, in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we [the Court] hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

In spite of the categorical language in the decision, the desegregation of schools did not happen instantly. Furthermore, understanding the difficult task ahead, the Court left to the discretion of the executive powers of the states the decision of the specific measures that each state had to take to carry out the ruling. Many Southern states tried all kinds of evasions to keep their public schools segregated. So the Supreme Court was called upon to decide several subsequent cases, declaring unconstitutional many subterfuges employed by the states to avoid desegregation. In 1964, in the case *Griffin v. County School Board of Prince Edward County* –commonly known as *Brown II*– the Court declared unconstitutional the policy of closing all public schools in the county and handling vouchers to the students, both white and black, to pay for private schooling. At the time, all private schools in Prince Edward County were segregated, and since these were not constitutionally required to desegregate, they could turn down any black student trying to register. The Court unanimously ordered the School Board to reopen the public schools.

The County School Board of New Kent County set up a "freedom of choice desegregation plan" that allowed parents to choose freely the school they wanted their own children to attend. The result of the plan was that the majority of white parents sent their children to white schools, and black parents did much the same, sending their children to black schools. Thus, a *de facto* segregation remained. In *Green v. County School Board of New Kent County*, of 1968, the Supreme Court held that the "freedom of choice desegregation plan" did not comply with *Brown v. Board of Education* and was, therefore, unconstitutional. The Court ordered the county to find different means to integrate its schools.

The school system of the Charlotte-Mecklenburg County, in North Carolina, was highly segregated simply because of the distribution of schools in areas populated by the white and the black citizens. Since most white students lived in predominantly white neighborhoods and black students lived in black neighborhoods, the schools in each area were accordingly predominantly white or black. In 1965, James E. Swann and other black parents filed suit in federal court asking for the school system to be desegregated. One of the plans proposed to balance the number of black and white students in a given school was "busing." It meant transporting the children by bus to a school outside their residential area as a means of achieving racial balance in a particular school, regardless of the existence of another school closer to the residence of the students. In *Swann v. Charlotte-Mecklenburg County Board of Education*, of 1971, the Court unanimously held that "busing" was constitutionally sound in pursuance of racial balance, even if the imbalance was solely the result of the proximity of the students' homes to a particular school. By moving students to different schools, students would be "properly" integrated and thereby would receive equal educational opportunities. (Intriguingly, Mecklenburg County was the first American community to declare, in 1775, that "Great Britain, was an enemy to this country –to America– and to the inherent and inalienable rights of man" and declared independence from the mother nation.)

Rights of Detainees & Police Duties: *Miranda v. Arizona*

In *Miranda v. Arizona*, of 1966, the Supreme Court recognized that the police violated the Fifth, Sixth and Fourteenth Amendments by interrogating detainees without previously notifying them of their constitutional rights, which allowed them to remain silent and to have their attorneys present during their interrogation.

Ernesto Miranda was convicted of rape and kidnapping on the basis of his own-signed confession after two hours of police interrogation, during which he had not been told of his rights. In a 5-to-4 decision, the Court ruled "that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation [...] As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right" (384 U.S. 436, 471-472). The Court even specifies that "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease," and "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the

attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent" (384 U.S. 436, 473-474).

Because these stipulations had not been followed during the interrogation of Miranda, the Court reversed the previous conviction. He was retried in 1967 and, using this time the testimony of witnesses and other evidence and without using the confession, the prosecution achieved a conviction of 20-to-30 years imprisonment.

As a consequence of this Supreme Court decision, the police are required to inform arrested persons of their rights by what is called the "*Miranda warning*." The decision does not spell out the precise terms of the warning and every state can regulate its own one. A typical *Miranda warning* could say: "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney, and to have him or her present during your questioning. If you cannot afford an attorney, one will be provided for you by the government." In many districts, the detainee is asked to sign a document acknowledging that he had been read his rights.

Although the Miranda doctrine has been in force since 1966, the Supreme Court has been refining its requirements in subsequent decisions. To have a confession suppressed for a violation of the Miranda doctrine, there must be six circumstances:

1. – Evidence must have been gathered.
2. – The evidence must be testimonial. Evidence such as fingerprints, DNA, hair, and dental impressions, are physical evidence and not a confession; thus no warning is needed to gather them.
3. – The confession must have been obtained while the suspect was in custody.
4. – The confession was obtained during interrogation.
5. – Government officials carried out the interrogation.
6. – The prosecution must introduce the confession in the course of a criminal trial.

Without the concurrence of all these circumstances, the confession must be thrown out and not used in a criminal court unless the prosecution can prove that the suspect had been duly informed of his or her rights and he or she renounced the rights.

After just five years in jail (of the 20-to-30 years to which he had been sentenced) Ernesto Miranda was paroled in 1972. He made some money autographing police officers' "Miranda cards" with the text of the warning. He was stabbed to death in a bar on 1976.

The Right to Abort: *Roe v. Wade* and *Planned Parenthood v. Casey*

One of the most famous and universally cited decisions of the Supreme Court of the United States is *Roe v. Wade*. The precedent granting a woman the right to terminate a pregnancy in certain circumstances is, at least in the United States, one of the most controversial Court decisions and subjected to continuous risk of being overturned. The topic of abortion raises extreme public reaction and, in this case, the Supreme Court was confronting the right to privacy of women versus the reserved powers of the states. The particular issue was to determine whether the state laws prohibiting or regulating abortion procedures violated the constitutional right of a woman to her privacy or her freedom to decide a particular outcome in family or marriage matters.

"Jane Roe" –a fictitious name used in the legal proceedings to protect the actual identity of Norma L. McCorvey, a resident of Texas– decided to interrupt her pregnancy. But Texas legislation in 1969 made it a crime to "procure an abortion," with only few exceptions "for the purpose of saving the life of the mother" (410 U.S. 113, 117-118), or cases of rape or incest. Unable to get an abortion either legally or illegally, Ms. McCorvey challenged the constitutionality of the Texas anti-abortion laws, alleging these laws violated the right to individual liberty protected by the Fourteenth Amendment and the right to privacy included in the *Bill of Rights*. (*Wade*, in this case, was Henry Wade the Dallas County District Attorney, representing the State of Texas.)

In a 7-to-2 decision, the Supreme Court resolved in 1973 that the legitimate right to privacy under the *due process* clause of the Fourteenth Amendment extended to a woman's decision to have an abortion. But her right to privacy had to be balanced against the state's legitimate interests to protect the life of the unborn or, in the words of the Court's opinion, the "potentiality of human life" (410 U.S. 113, 164), and the woman's health. According to the Court, these legitimate state interests increased as the pregnancy progressed.

The Constitution does not explicitly mention any right to privacy. In a line of decisions, however, going back to 1891, the Court had recognized that a right to personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. The Supreme Court found the roots of that right in the First, Fourth, Fifth, and Ninth Amendments, and in the *penumbras* (rights guaranteed by implication) of the *Bill of Rights*, or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment. Only personal rights that can be deemed "fundamental," or "implicit in the concept of ordered liberty," are included in this guarantee of personal privacy. The right to privacy has some extension to activities relating to marriage, procreation, contraception, family relationships, childrearing, and education (410 U.S. 113, 152-153).

The Court considered that the fundamental right to privacy could only be limited when the legitimate interest of the state was *compelling*, such as when the life of the fetus is viable out of the womb. As soon as the child's life is viable outside the womb, a constitutional protection arises for the new human being that is superior to the right to privacy of the mother.

To balance in a practical way the right to privacy of the woman with the legitimate interest of the state, the Court decided in the first instance to consider the nine months of pregnancy in three trimesters, but then the Court adjusted its approach to the consideration of a viable fetus, "that is, potentially able to live outside the mother's womb, albeit with artificial aid" (410 U.S. 113, 161). In the first three months, when the abortion procedure is considered to be safer than bearing the child, the state could not interfere and the decision to abort was left to the mother and her physician. Prior to the viability of the fetus, the state has the freedom to intervene if it becomes necessary to protect the health of the mother. After the fetus reaches viability, the state can "regulate" –that is, "prohibit"– abortion, provided that due consideration is given to any consequent health risk to the mother. Additionally, the Court held that, in the absence of a compelling interest of the state, the physician had a right to practice medicine freely. On the other hand, the Court did reject the existence of an inalienable "right to life" of the fetus.

As indicated previously, the decision in *Roe v. Wade* has always been controversial and found opposition from many conservative fronts. Many states enacted laws regulating those aspects of abortion considered out of the right to privacy, such as parental consent in the case of minors attempting to get an abortion, spousal notification or mutual consent, waiting periods before an abortion, and other similar measures.

In 1988 and 1989, the State of Pennsylvania modified its laws on abortion, adding five new requirements that had to be checked before carrying on an abortion procedure:

1. – "[T]hat a woman seeking an abortion [had to] give her informed consent prior to the procedure, and [...] she [had to] be provided with certain information at least 24 hours before the abortion is performed;"
2. – "the informed consent of one parent for a minor to obtain an abortion, but provides a judicial bypass procedure;"
3. – "that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband;"
4. – "a 'medical emergency' that will excuse compliance with the foregoing requirements;" and
5. – "impos[ing] certain reporting requirements on facilities providing abortion services."

Five abortion clinics, a physician representing himself, and a class of doctors who provide abortion services, brought a suit in the District Court, seeking a declaratory judgment that each of the provisions was unconstitutional on face value, as well as injunctive relief to stop Pennsylvania in its intentions to hinder abortions. The District Court held all the provisions unconstitutional and permanently enjoined their enforcement. The Court of Appeals affirmed in part and reversed in part, striking down the requirement that a husband be notified, but upholding the others.

The case, termed *Planned Parenthood of Southeastern Pennsylvania, et al. v. Robert P. Casey, et al.* (where "Planned Parenthood of Southeastern Pennsylvania" was the name of one of the abortion clinics, and Robert P. Casey was then the Governor of Pennsylvania), reached the floor of the Supreme Court in 1992, on a *writ of certiorari*. The plaintiffs alleged that the new law imposed "substantial obstacles to the woman's effective right to elect the [abortion] procedure" (505 U.S. 833, 834). The defendant, the State of Pennsylvania, and President George H. W. Bush's Administration as *amicus curiae*, urged the Court to overturn *Roe v. Wade*, alleging it had been wrongly decided. The composition of the Court had changed substantially since *Roe*. A majority of liberal Justices then had changed to a much conservative majority now. In 1992, eight of the nine Justices had been appointed by Republican presidents. Initially, five Justices were for the overturning the original finding, but finally Justice Antony Kennedy switched sides, and the Court issued a "plurality opinion" (that is, without a majority in all the issues), written jointly by three of the Justices, and with a divided judgment on the whole. The Court declared the law that required spousal notification prior to obtaining an abortion, unconstitutional under the Fourteenth Amendment because it created an undue burden on married women seeking an abortion. The other requirements –for parental consent for minors, informed consent, and 24-hour waiting period– were not considered an "undue burthen" or a "substantial obstacle," but rather constitutionally valid requirements. Certain aspects of *Roe* were, nevertheless, modified.

The plurality opinion changed the formula used in *Roe* to weigh in favor of the woman's interest in obtaining an abortion against the State's interest in the life of the fetus. In 1973, the medical science considered viable a 28-week fetus, while by 1992, fetuses of 22 or 23 weeks survived regularly. The plurality opinion recognized viability as the point at which the state interest in the life of the fetus outweighs the rights of the woman, and the states could ban abortion entirely "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother" (505 U.S. 833, 837).

On the other hand, four Justices "concluded that a woman's decision to abort her unborn child is not a constitutionally protected 'liberty' because (1) the Constitution says

absolutely nothing about it, and (2) the long-standing traditions of American society have permitted it to be legally proscribed" (505 U.S. 833, 841).

The Rights of Unauthorized Immigrants: *Plyler v. Doe*

The unauthorized immigration has long been an issue in the United States, and particularly in those states along the border with Mexico. The Government of the Unites States represented by the U.S. Department of Homeland Security does not use such terms as "illegal" or even "undocumented" immigrants, but it rather names them "unauthorized resident immigrants." People in this category are defined as "all foreign-born non-citizens who are not legal residents [because they...] either entered the United States without inspection or were admitted temporarily and stayed past the date they were required to leave." Since the 1970's, the number of immigrants that have been entering the United States by irregular ways, i.e., without proper authorization, has been increasing steadily to reach almost 12 million, believed to be living within the borders by the year 2011. (Michael Hoefer, Nancy Rytina, and Bryan Baker, "Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011," *Population Estimates*, March 2012, U.S. Department of Homeland Security, Office on Immigration Statistics, [<http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf>, verified August, 21st, 2012].)

In May, 1975, the Texas Legislature withheld from local school districts any state funds for the education of children who were not "legally admitted" into the United States, allowing local school districts to charge them $1,000 yearly tuition, or even to deny them enrollment in their public schools.

A number of lawsuits were filed in both state and federal courts against different Texas School Boards by the affected families. The cases reached the Supreme Court of the United States on appeal, and were decided as a class action under the full title of *James Plyler, Superintendent, Tyler Independent School District, et al. v. John Doe, et al.* Plyler appealed to the U.S. Supreme Court against an injunction of the inferior courts barring the state, and particularly the Tyler School Board, from denying free public schooling to the undocumented immigrant children. The respondents appeared in the docket as *John Doe*, to protect them against raids from the Immigration and Naturalization Service, given their irregular status.

To the Court, the questions to be considered were, firstly, whether the Fourteenth Amendment's Equal Protection clause applied to school-age children who have not been "legally admitted" into the United States, and, secondly, whether that same clause required the State of Texas and the Tyler Independent School District to provide to school-age children, who have not been "legally admitted" into the United States, a free public education on an equal basis with children who were legally residing in the state.

The appellants argued that the Equal Protection clause did not protect the children and alleged that the children were not "persons" within the state's jurisdiction, but individuals unlawfully living in the state and subject to deportation; that there was a "substantial state interest," which justified an exception to the equal protection clause, because Texas spent an estimated 62 million per year on these children, moneys that could better be spent on legally resident children; that free public education for undocumented

children will encourage the continued influx of undocumented immigrants into Texas; that undocumented children place "special burdens" on the Texas education system, such as the hiring of additional bilingual teachers. Additionally, the state alleged that the U.S. Supreme court had earlier held that a free public education was not a "fundamental right" under the Constitution.

To the respondents, the Equal Protection clause definitively protected the undocumented children, and they rejected the allegation that the U.S. Supreme Court had previously ruled that free public education was not a fundamental right. They said that the Equal Protection provided in the Fourteenth Amendment applied to both citizens and to "any person," including aliens; that the children in this case were "persons" living within the jurisdiction of the state of Texas and subject to its laws; that the discrimination against the undocumented children was not justified by any "substantial state interest" since they represented just 1% of the school population in Texas, and the state funds to educate these children would not reduce the quality of schooling of the rest of the children. Furthermore, undocumented immigrants came to Texas seeking jobs, not educational benefits for their children; and the bilingual education and related special needs were mainly for legally resident pupils. They also claimed that, although education was not to be a "fundamental right" under the Constitution, the Equal Protection clause of the Fourteenth Amendment required that when a state established a public school system (as in Texas), no child living in that state could be denied equal access to that schooling.

The respondents added that children should not be penalized for the illegal acts of their parents coming into the United States without proper authorization; and that failure to educate undocumented children would eventually lead to higher social costs from unemployment, welfare services, and crime. Denying a proper education to the children would keep them forever in the lowest socio-economic class.

In its opinion, by 5 votes to 4, the Court decided that, first, "[w]hatever his status under the immigration laws, an alien is surely a "person" in any ordinary sense of that term," and that "[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments" (457 U.S. 202, 210). "The Equal Protection Clause," the Court continued, "directs that 'all persons similarly circumstanced shall be treated alike.' [...] But so too, '[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.' [...] In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose" (457 U.S. 202, 216). The legitimate public purpose was not demonstrated to be clearly behind the classification of legal and illegal resident children.

The Court then took a position removing the possibility of the sins of the parents resulting in the punishment of children. "The children who are plaintiffs in these cases are special members of this underclass [of undocumented residents]. [... A] State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct [...]; but the children who are plaintiffs in these cases 'can affect neither their parents' conduct nor their own status.' [... L]egislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice. (457 U.S. 202, 219-220)

As the Court had held earlier, "[p]ublic education is not a "right" granted to individuals by the Constitution [...] but the 'American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance.' [...] We have

recognized 'the public schools as a most vital civic institution for the preservation of a democratic system of government,' [...] and as the primary vehicle for transmitting 'the values on which our society rests'" (457 U.S. 202, 221).

Then, the Court made its most powerful statement in this opinion: "By denying these [undocumented] children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation" (457 U.S. 202, 223).

The Court sided with the respondents on the basis that the laws of Texas will not achieve any "preservation of the state's limited resources for the education of its lawful residents". Moreover, it will not "protect itself from an influx of illegal immigrants. [...] To the contrary, the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc. [...] The dominant incentive for illegal entry into the State of Texas is the availability of employment; few if any illegal immigrants come to this country, or presumably to the State of Texas, in order to avail themselves of a free education. [... T]he record in no way supports the claim that exclusion of undocumented children is likely to improve the overall quality of education in the State" (457 U.S. 202, 228).

Lastly, the Court refuted the appellants' argument that "undocumented children [...] because their unlawful presence within the United States renders them less likely than other children to remain within the boundaries of the State, and to put their education to productive social or political use within the State. [...] The State has no assurance that any child, citizen or not, will employ the education provided by the State within the confines of the State's borders. In any event, the record is clear that many of the undocumented children disabled by this classification will remain in this country indefinitely, and that some will become lawful residents or citizens of the United States" (457 U.S. 202, 229-230).

The Court ruled that "if the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here. Accordingly, the judgment of the Court of Appeals in each of these cases is *Affirmed*" (457 U.S. 202, 230).