1-1-1995

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Recommended Citation
Denise E. Choquette, Reno v. Flores and the Supreme Court's Continuing Trend Toward Narrowing Due Process Rights, 15 B.C. Third World L.J. 115 (1995), http://lawdigitalcommons.bc.edu/twlj/vol15/iss1/6
RENO v. FLORES AND THE SUPREME COURT'S CONTINUING TREND TOWARD NARROWING DUE PROCESS RIGHTS

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I. INTRODUCTION

While the Supreme Court continues to acknowledge the existence of substantive due process rights, it has strictly limited the scope of those rights, in part by defining them as narrowly as possible.1 In a recent case, Reno v. Flores,2 the Court has continued that trend by holding that the Immigration and Naturalization Service's (INS) regulation allowing for the detention of children prior to a determination of their deportability does not implicate the children's liberty right to be free from physical restraint.3 The Flores Court did not simply narrow that right; it eradicated the children's fundamental liberty interest and replaced it with the corollary, non-fundamental right to be released.4 The detention scheme upheld in Flores, while providing for a more efficient system for the INS, harms undocumented immigrant children, a doubly disenfranchised group.5 This case clearly exemplifies the Court's trend toward narrowing substantive due process rights.

Part II of this Note will discuss the particular factual and procedural circumstances of the case Reno v. Flores so that the reader will have a greater appreciation of how far the Court has gone in narrowing substantive due process rights. Part III of this Note discusses the general trend of the Court in the area of substantive due process adjudication, takes the general discussion and applies it to other recent cases which clearly exemplify the Court's narrowing of substantive due process rights and presents some general theories regarding the Court's

* Senior Articles Editor, Boston College Third World Law Journal.
3 Id. at 1447.
4 See id.
5 The alien minor children are considered doubly disenfranchised because they are both minors and non-citizens under the law and do not have any way to defend themselves within the framework of our political system.
policies. Part IV presents an in-depth examination of Justice Scalia’s majority opinion in *Reno v. Flores*, in addition to some discussion of Justice O’Connor’s concurring opinion and Justice Stevens’s dissenting opinion.

II. *Reno v. Flores:* A Case Description

*Reno v. Flores* concerns the arrest and detention of children suspected of being illegal aliens not yet found deportable.6 Jenny Lisette Flores was fifteen years old when she was detained by the Immigration and Naturalization Service on suspicion of being a deportable alien.7 Flores was to remain in detention indefinitely pending her deportation hearing, pursuant to a new INS policy that allowed the release of juvenile aliens only to parents, close relatives, or legal guardians, absent a showing of unusual and compelling circumstances.8 According to the complaint initially filed in this case, the original plaintiffs, including Jenny Lisette Flores, were all from El Salvador.9 Although Flores’s mother was present in the United States, she refused to appear personally to accept physical custody of her daughter because she feared she herself would be taken into custody and deported to El Salvador where a civil war was raging.10 Flores was forced to remain in detention despite the fact that there were other adult members of her family willing to take custody of her.11

According to Judge Fletcher, who wrote the dissent in the first Court of Appeals opinion,12 alien children were being held in detention by the INS for as long as two years in highly inappropriate conditions out of a “professed” concern for their welfare.13 As pointed out by Judge Fletcher, when the case first came before the district court, the only requirement for institutionalizing a child was a determination by an INS agent, not a judge, that there was prima facie evidence of

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10. Id. at 331 (citing First Amended Complaint for Injunctive and Declaratory Relief, and Relief in the Nature of Mandamus, at 11, *Flores* (filed Aug. 1985)).
11. Rose, supra note 9, at 331–32.
12. *Flores v. Meese*, 934 F.2d 991, 1014 (9th Cir. 1990) (Fletcher, J., dissenting).
13. Id. (Fletcher, J., dissenting).
the child's deportability. Upon such a "slender" showing, children were put into detention centers for indeterminate periods of time, deprived of education, recreation, and visitation, commingled with adults of both sexes, and subjected to strip searches with no showing of cause. Only after a suit was brought did the INS agree to modify the conditions of confinement and the treatment of the children during detention. The district court approved a partial settlement whereby the INS agreed to provide education, reasonable visitation rights, and recreation, as well as to cease commingling detained minors with unrelated adult prisoners. Subsequently, without the agreement of the INS, the court ordered the INS to cease strip searching the children unless it had reasonable suspicion to believe they were concealing weapons or contraband.

As Justice Stevens asserts in his dissent, the children detained pursuant to this regulation presented neither a risk of flight nor a threat of harm to themselves or to the community. These children had responsible third parties available to receive and care for them.

A. Procedural Background

Plaintiffs are a class consisting of all persons under the age of eighteen years who have been detained pursuant to 8 U.S.C. § 1252 by the INS's Western Region. Because the children are persons present in the United States, they must be afforded procedural protections in conjunction with any deprivation of liberty. The Fifth Amendment, as well as the Fourteenth Amendment, protects aliens from deprivation of life, liberty, or property without due process of law. Even an alien whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.
Congress has the power to determine what categories of aliens may lawfully reside in the United States and what categories must be deported.\textsuperscript{26} Congress has delegated the duties of administration of the immigration laws to the Attorney General, who oversees the work of the Immigration and Naturalization Service.\textsuperscript{27}

At present, only one relevant statutory provision addresses the release or detention of aliens between the time of their arrest and the determination of deportability or non-deportability. That statute is 8 U.S.C. § 1252(a)(1). It provides:

Pending a determination of deportability . . . [an] alien may upon warrant of the Attorney General, be arrested and taken into custody . . . [A]ny such alien . . . may, in the discretion of the Attorney General and pending such final determination of deportability, (A) be continued in custody; or (B) be released under bond . . . containing such conditions as the Attorney General may prescribe; or (C) be released on conditional parole.\textsuperscript{28}

In 1963, the Attorney General promulgated regulations which implemented this statute. In effect, these provide that aliens, arrested on suspicion of deportability, could be released until further proceedings upon a determination that such release was appropriate, and under conditions determined by the INS.\textsuperscript{29} Upon request, an alien is entitled to a hearing before a disinterested officer to determine eligibility for release.\textsuperscript{30}

In 1984, the Western Region of the INS adopted a separate policy for minors.\textsuperscript{31} That policy provided that minors would be released only to a parent or lawful guardian.\textsuperscript{32} In his memorandum implementing this policy, former Western Region Commissioner Harold Ezell stated that the limits on release were “necessary to assure that the minor’s

\textsuperscript{26} See Fiallo v. Bell, 430 U.S. 787, 792 (1977).
\textsuperscript{27} 8 U.S.C. § 1103 (a) (1970 & Supp. 1994) (granting the Attorney General authority to “establish such regulations . . . as he deems necessary” to administer and enforce the immigration laws).
\textsuperscript{28} 8 U.S.C. § 1252(a)(1).
\textsuperscript{29} 8 C.F.R. § 242.2(c)(2).
\textsuperscript{30} Id.
\textsuperscript{31} Presently, juvenile aliens are detained in three sectors of the INS’s Western Region: Los Angeles, San Diego, and El Centro.
\textsuperscript{32} This policy was articulated in an unpublished memorandum by H. Ezell who was the Western Regional Commissioner at the time. Rose, supra note 9, at 330 (citing H. Ezell, Condition of Bond Release of Unaccompanied Minors (Sept. 6, 1984)).
welfare and safety is maintained and that the agency is protected against possible legal liability.'" The policy also provided for release to other responsible adults "in unusual and extraordinary cases, at the discretion of a District Director or Chief Patrol Agent." The Regional Commissioner did not justify this policy based on problems that had arisen under existing regulations. He neither cited any instances of harm which had befallen children released to unrelated adults, nor made any reference to suits that had been filed against the INS arising out of allegedly improper releases. It remained undisputed throughout the litigation that the blanket detention policy was not necessary to ensure the attendance of children at deportation hearings.

Implementation of this policy sparked concern in a number of quarters because the policy resulted in the governmental detention of a large number of children who posed no apparent risk to the

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33 Flores v. Meese, 942 F.2d 1352, 1355 (9th Cir. 1991) (citing unpublished memorandum).
34 Id.
35 Id.
36 Id.
37 Id.
38 The regulation, which was codified during the course of the litigation at 8 C.F.R. 242.24, allows release to a broader category of adults than did the Western Region's policy. The regulation provides in relevant part:

Detention and Release of Juveniles.
(a) Juveniles. A juvenile is defined as an alien under the age of eighteen (18) years.
(b) Release. Juveniles for whom bond has been posted, for whom parole has been authorized, or who have been ordered released on recognizance, shall be released pursuant to the following guidelines:
(1) Juveniles shall be released, in order of preference, to: (i) A parent; (ii) legal guardian; or (iii) adult relative (brother, sister, aunt, uncle, grandparent) who are not presently in INS detention; unless a determination is made that the detention of such juvenile is required to secure or to ensure the juvenile's safety or that of others.
(4) In unusual and compelling circumstances and in the discretion of the district director or chief patrol agent, a juvenile may be released to an adult, other than those identified in paragraph (b)(1) of this section, who executes an agreement to care for the juvenile's well-being and to ensure the juvenile's presence at all future proceedings before the INS or an immigration judge.
(d) Detention. In the case of a juvenile for whom detention is determined to be necessary, for such interim period of time as is required to locate suitable placement for the juvenile, whether such placement is under paragraph (b) or (c) of this section, the juvenile may be temporarily held by INS authorities or placed in any INS detention facility having separate accommodations for juveniles.

39 Various individuals and groups were among those who reacted adversely to the new policy. These include church groups, Amnesty International, Lawyers' Committee for Human Rights, International Human Rights Law Group, and Defense for Children International. Flores v. Meese, 942 F.2d 1352, 1355 (9th Cir. 1991).
community and whose presence at their respective hearings could be ensured by responsible individuals. Rather than pointing to a specific issue regarding the administration of immigration laws affecting juveniles, the INS relied broadly on the "dramatic increase in the number of juvenile aliens" found unaccompanied by a parent.

In promulgating the regulation, the INS recognized that the principal factor bearing on release or detention is the likelihood of appearance at future proceedings. It also recognized that the policy of preventing release to responsible adults was not related to the risk of flight issue or administration of any provision of the immigration laws. Its principal justification for the detention rule was the theory that unless the INS was able to do a comprehensive "home study" of the proposed custodian, the child's own interests would be better served by detention. In response to comments suggesting that release to responsible adults should be permitted on a regular basis, the INS stated that it did not have the resources or expertise necessary to make a determination, in each case, whether release to the adult in question would be in the child's best interests.

The plaintiffs, including named plaintiff Jenny Flores, filed their action on July 11, 1985, challenging the Western Region's policy regarding the release of minors then in effect. Their complaint raised seven claims, the first two challenging the Western Region's release policy on constitutional, statutory, and international law grounds, and the final five challenging the conditions of the juvenile's detention. These plaintiffs, who do not pose a risk of flight or harm to the community and have responsible third parties available to receive them, were being detained only because no adult relative or legal guardian was available to take custody of them.

40 Id.
41 Id. (citing 53 Fed. Reg. 17,449 (May 17, 1988)).
42 Id. at 1356.
43 Id.
44 Id. (citing 53 Fed. Reg. at 17,449). It is interesting to note that there is no mention of a comprehensive study of the gross negligence and abuse in these detention centers. See Reno v. Flores, 113 S. Ct. 1439, 1447-48 (1993). The Court continually notes the existence of the Juvenile Care Agreement, and the fact that if the conditions fall below those specified in the Juvenile Care Agreement then there is recourse in the federal courts. Id. at 1456 (O'Connor, J., concurring).
45 Flores, 942 F.2d at 1386.
46 Id. at 1357.
47 Id.
48 Justice Stevens makes much of this point in his dissent and he cites to the petitioners' oral arguments and to their briefs. Flores, 113 S. Ct. at 1457-58 (Stevens, J., dissenting).
Just a week after the regulation took effect, in an unpublished order, the district court granted summary judgment to respondents and invalidated the regulatory scheme in three important respects.\footnote{Id. at 1445 (citing Flores v. Meese, No. CV 85-4544-RJK (Px) (C.D. Cal., May 25, 1988), App. to Pet. for Cert. 146a).} First, the court ordered the INS to release "any minor otherwise eligible for release . . . to his parents, guardian, custodian, conservator, or other responsible adult party."\footnote{Id. (emphasis added).} Second, the order dispensed with the regulation's requirement that unrelated custodians formally agree to care for the juvenile, in addition to ensuring his or her attendance at future proceedings.\footnote{Id.} Finally, the district court rewrote the related INS regulations regarding initial determinations of prima facie deportability and release conditions. The court decreed that an immigration judge hearing on probable cause and release restrictions should be provided "forthwith" after arrest, whether or not the juvenile requests it.\footnote{Id. (citing App. to Pet. for Cert. 146a).}

A divided panel of the Court of Appeals reversed.\footnote{Flores v. Meese, 934 F.2d 991, 1013 (9th Cir. 1990).} The Ninth Circuit voted to rehear the case and selected an eleven-judge en banc court. That court vacated the panel opinion and affirmed the district court order "in all respects."\footnote{Flores v. Meese, 942 F.2d 1352, 1365 (9th Cir. 1991).}

In 1992, the Supreme Court agreed to hear the case.\footnote{Reno v. Flores, 112 S. Ct. 1291 (1992).} Respondents made three principal attacks on the INS regulation.\footnote{For full text of the regulation, see supra note 38.} First, they asserted that because alien juveniles suspected of being deportable have a "fundamental" right to be "free from physical restraint," it is a denial of substantive due process to detain them.\footnote{Reno v. Flores, 113 S. Ct. 1439, 1446 (1993).} Further, the INS cannot prove that it is pursuing an important governmental interest in a manner narrowly tailored to minimize this restraint on liberty.\footnote{Id.} Second, respondents argued that the regulation violates their procedural due process rights because it does not require the INS to determine with regard to each individually detained juvenile who lacks an appropriate custodian, whether his or her best interests lie in remaining in INS custody or in release to "some other responsible adult."\footnote{Id.} Finally, the respondents contended that even if the INS regulation

\footnote{Id. at 1445 (citing Flores v. Meese, No. CV 85-4544-RJK (Px) (C.D. Cal., May 25, 1988), App. to Pet. for Cert. 146a).}
infringes no constitutional rights, it exceeds the Attorney General’s authority under 8 U.S.C. § 1252(a)(1).60

Whereas the Supreme Court continues to acknowledge the existence of substantive due process rights, it has strictly limited the scope of those rights, in part by defining them as narrowly as possible.61 The Court continued the trend in this case by finding that the INS’s detention of alien children did not implicate the children’s substantive due process right to freedom from physical restraint.62 The Court found that the right at stake was the right to be released to an unrelated adult and upheld the detention regulation under a mere rationality review.63 Arguably, had the Court determined that a fundamental right was at stake, they would have applied “strict scrutiny” to the regulation and may have deemed it unconstitutional.64

III. Substantive Due Process Adjudication

One powerful constitutional strategy to protect persons from governmental regulation is to identify important personal freedoms and

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60 Id. The focus of this Note is on the respondents’ constitutional claims. The Court only reached the constitutional issues because they determined that the statutory arguments failed.

Id. The majority opinion does discuss the respondents’ arguments regarding the Attorney General’s statutory authority under 8 U.S.C. § 1252(a)(1). Respondents argue that the promulgation of the regulation was motivated purely by “administrative convenience.” Id. at 1452. Justice Scalia concludes that because the regulation involves no deprivation of a “fundamental” right, it only has to be rationally related to the INS’s stated policy reasons [welfare of the child]. Id. Further, the INS was not compelled to look at other more expensive means of advancing its declared goals. See id. Respondents also argue that the INS regulation violates the statute because it relies on a “blanket” presumption of the unsuitability of custodians other than parents, close relatives, and guardians. Id. at 1453. They contend the Attorney General’s exercise of discretion under § 1252 (a)(1) requires “some level of individualized determination.” Id. (citing INS v. National Center for Immigrants' Rights (NCIR), 112 S. Ct. 551, 558-59 (1991) (upholding INS regulation imposing conditions upon release)).

Justice Scalia thought it was sufficient that in the case of each detained alien juvenile, the INS make certain individual determinations, such as: Is there a reason to believe the alien is deportable? Is the alien under 18 years of age? Does the alien have an available adult relative or legal guardian? Id. at 1453. In Scalia’s view, the particularization and individualization need go no further than asking those types of questions. Id. Lastly, respondents claim that the regulation is an abuse of discretion because it permits the INS to hold the juvenile indefinitely. Id. Scalia notes that this is not the case because the period of custody is inherently limited by the pending deportation hearing, which must be concluded with “reasonable dispatch” to avoid habeas corpus. Id. at 1453-54 (citing 8 U.S.C. § 1252(a)(1)). It is expected that the juvenile aliens will remain in custody only 30 days. Id. at 1454 (emphasis added).

61 Note, supra note 8, at 174; see infra notes 66-77, and accompanying text.


63 See id. at 1447-48.

declare them "rights" with which the government may not interfere, even if the government seems to have a good reason for doing so.\textsuperscript{65} The Supreme Court's occasional willingness to recognize constitutional rights not clearly tied to constitutional language or history is the most controversial aspect of the Court's performance.\textsuperscript{66} Historically, the vehicle for doing this has been the Due Process Clause of the Fourteenth Amendment.\textsuperscript{67} The Due Process Clause generates rights to administrative procedures, judicial review of administrative decisions, judicial procedures, and judicial remedies.\textsuperscript{68} The most familiar function of the Due Process Clause is to provide a guarantee of fair procedure in connection with any deprivation of life, liberty, or property by a state.\textsuperscript{69} In addition, the substantive component protects individual liberty against "certain government actions regardless of the fairness of the procedures used to implement them."\textsuperscript{70}

There is great confusion about the current state of the due process doctrine.\textsuperscript{71} Frequently, courts approach the substantive due process doctrine with wariness.\textsuperscript{72} In addition, the Supreme Court's recurrent efforts to shape due process law to promote policy ends has reduced doctrinal integrity.\textsuperscript{73}

In its most common form, substantive due process doctrine reflects the simple but far-reaching principle that government actions cannot be arbitrary.\textsuperscript{74} One view is that government officials must act on public-spirited rather than self-interested or disagreeable motivations, and there must be a "rational" or "reasonable" relationship between the government's ends and its means.\textsuperscript{75} Given the potentially sweeping implications of a prohibition against governmental arbitrariness...

\textsuperscript{65} DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 381 (1993).
\textsuperscript{66} Id. at 382.
\textsuperscript{67} "... [N]or shall any State deprive any person of life, liberty, or property, without due process of law ... " U.S. Const. amend. XIV.
\textsuperscript{68} Fallon, supra note 64, at 309.
\textsuperscript{69} U.S. Const. amend. XIV.
\textsuperscript{70} Daniels v. Williams, 474 U.S. 327, 331 (1986).
\textsuperscript{71} See Collins v. City of Harker Heights, 112 S. Ct. 1061, 1068 (1992); Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977) ("[s]ubstantive due process has at times been a treacherous field for this Court").
\textsuperscript{72} Fallon, supra note 64, at 309 (citing Cynthia R. Farina, Conceiving Due Process, 3 YALE J. L. & FEMINISM 189, 189 (1991) (noting "turmoil, contradiction, and instability" lying beneath surface of due process doctrine)).
\textsuperscript{73} See id.
\textsuperscript{74} Id. at 310. This principle is also embodied in the Equal Protection Clause which states "nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.
\textsuperscript{75} Fallon, supra note 64, at 310.
ness and the tainted history of substantive due process adjudication, the Supreme Court has developed a variety of avoidance strategies. As a general matter, the Court has always been reluctant to expand the concept of substantive due process because "guideposts for responsible decision-making in this uncharted area are scarce and open-ended." Under current law, there is uncertainty about which governmental decisions are subject to substantive due process claims and what constitutional standards should apply.

Substantive due process is considered the most controversial category in constitutional law. Since the celebrated case of *Roe v. Wade*, all substantive due process cases that have reached the Supreme Court have involved challenges to the constitutionality of legislation. The Court, attempting to limit both the appearance and the danger of unrestrained judicial power, has often tried to make substantive due process jurisprudence fit into a simple, two-tiered framework. Within this model, government intrusion on "fundamental" rights is subject to "strict scrutiny," a test sometimes formulated to inquire whether a burden is necessary to promote a "compelling state interest." By contrast, infringements of non-fundamental liberty and property interests are scrutinized only to ensure that the infringements are "rationally related to legitimate government purposes."

In terms of substantive due process adjudication, the guideposts that the Supreme Court does provide are "scarce and open-ended." Accordingly, judges have virtually unmitigated power to overturn the substantive judgments made by legislatures.

Under traditional doctrine, legislation affecting non-fundamental liberty and property rights need only have a "rational basis" to escape

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78 Fallon, *supra* note 64, at 312.
79 See *id.* at 314.
80 410 U.S. 113 (1973).
82 Fallon, *supra* note 64, at 314.
invalidation.\textsuperscript{87} The "rational basis test" reflects the principle that legislation must seek to promote legitimate public purposes, not merely benefit one group over another, and that the government must pursue its ends by reasonable means.\textsuperscript{88} For the most part, the rational basis test is not demanding.\textsuperscript{89} There is a strong tendency on the part of the judiciary to review with deference all government actions that affect rights not protected by the Constitution.\textsuperscript{90} Under the apparent leadership of Chief Justice Rehnquist and Justice Scalia, the Supreme Court has also given increased deference to governmental actions that have infringed upon what the Court has come to call "non-fundamental" rights.\textsuperscript{91}

In addition to Congressional legislation, the Court reviews agency interpretations of law with similar deference.\textsuperscript{92} The Court reverses the agency's decision only if the agency's actions have no rational basis.\textsuperscript{93} The rationale behind this deference is that agencies deal in complex and narrow fields, and are better able to evaluate and weigh the competing policy interests in that field than is a generalist federal court. Therefore, pursuant to the Court's decision in \emph{Chevron, U.S.A., Inc. v. NRDC},\textsuperscript{94} it is an agency's exercise of its expert judgment—in a sufficiently authoritative manner—that warrants judicial deference.

The difficulty in analyzing substantive due process under the two-tiered process is demonstrated by the Supreme Court's creation of a mid-level tier.\textsuperscript{95} This tier rests somewhere between "strict scrutiny" and "rational basis" and has been applied to cases involving claims to avoid


\textsuperscript{88} Fallon, \textit{supra} note 64, at 315–16 (citing cases). The rational basis test is applied equally in substantive due process and equal protection cases.

\textsuperscript{89} Id. at 316 (citing cases).

\textsuperscript{90} Note, \textit{supra} note 86, at 211.


\textsuperscript{92} The Honorable Antonin Scalia, \textit{Judicial Deference to Administrative Interpretations of Law}, 1989 DUKE L.J. 511, 511 (1989). In \emph{Chevron U.S.A., Inc. v. NRDC}, Justice Stevens, for an unanimous court, adopted an analytical approach that deals with the problem of judicial deference to agency interpretations of law. 467 U.S. 837, 842–43 (1984). The first question is whether Congress has directly spoken on the issue. If the intent of Congress is clear, that is the end of the matter. \textit{Id.} at 842. If the intent is not clear, the question remains whether the agency's answer is based on a permissible construction of the statute. \textit{Id.} at 843 (footnotes omitted).

\textsuperscript{93} Scalia, \textit{supra} note 92, at 513 (citing Pititto Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (2d Cir. 1976), \textit{aff'd} sub nom. Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977)).

\textsuperscript{94} 467 U.S. 837, 865 (1984).

confinement to mental institutions,\textsuperscript{96} to be permitted to travel,\textsuperscript{97} to resist unwanted administration of antipsychotic drugs,\textsuperscript{98} and to receive care and treatment while subject to governmental custody other than criminal incarceration.\textsuperscript{99} If judicial scrutiny is to reflect "tiered" assessments of the fundamentality of interests, those implicated in these cases should probably be recognized as occupying an intermediate category, subject to something less than "strict scrutiny" but more than "rational basis" review.\textsuperscript{100} This third tier has sometimes been called "somewhat heightened review."\textsuperscript{101}

In determining what constitute "fundamental" rights, the Supreme Court has adopted an ad hoc or "intuitions" approach.\textsuperscript{102} Presuming the constitutionality of government action, the Supreme Court will hold rules and legislation invalid as a matter of substantive due process only when it would be contrary to clear precedent,\textsuperscript{103} or if the government has behaved in a way that can be shown to be wrong by direct appeal to some moral intuition.\textsuperscript{104}

In terms of judicial precedent, the Court will attempt to identify the principles that best explain its past decisions and apply those principles consistently.\textsuperscript{105} Often there will be more than one account of the legally controlling principles; therefore, the Court will take into

\textsuperscript{97} Zemel v. Rusk, 381 U.S. 1, 14 (1965).
\textsuperscript{100} Fallon, \textit{supra} note 64, at 317. Since the Court has not adhered to its "two-tiered" approach, it should introduce a middle tier of scrutiny into its formal substantive due process framework. \textit{See id.}
\textsuperscript{101} Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 441 (1985). This third tier has been applied in the equal protection context to cases involving classifications based on alienage, illegal residency, illegitimacy, gender, age, and mental retardation. \textit{Id.} at 451-52 (Stevens, J., concurring).
\textsuperscript{102} Fallon, \textit{supra} note 64, at 320 (citing John Rawls, \textit{A THEORY OF JUSTICE}, 34-40 (1971)).
\textsuperscript{103} For a more detailed discussion regarding the role of precedent and doctrine, see Charles Fried, \textit{Commentary: Constitutional Doctrine}, 107 HARV. L. REV. 1140, 1141-42 (1994). In his commentary on constitutional law, Professor Fried distinguishes between precedent and doctrine. \textit{Id.} He asserts that if a court cites to a previous case as controlling and offers an explanation on why the prior decision justifies the result, the explanation is at least "the germ of a doctrine." \textit{Id.} According to Professor Fried, doctrine consists of the rules and principles of constitutional law. \textit{Id.} at 1140.
\textsuperscript{104} \textit{See} Daniels v. Williams, 474 U.S. 327, 331 (1986); Rochin v. California, 342 U.S. 165, 172 (1952).
\textsuperscript{105} Fried, \textit{supra} note 103, at 1141-42.
account the rationale that best accords with their moral intuitions or those principles that they perceive society at large to share. In these cases, the Court generally renders judgments of unconstitutionality only when it finds that the government has behaved in a way that can be shown to be "conscience-shocking" or "arbitrary." Fair treatment by the Court of its own precedents is an indispensable condition for judicial integrity.

How the Court initially frames the issue is of paramount importance in substantive due process cases. The Court increasingly has limited the federal concept of "liberty" to specific constitutional guarantees and to the Roe v. Wade right to privacy, and perhaps to the framers' understanding of liberty as "freedom from physical restraint." A. Current Trend of the Court

In recent cases, under the apparent leadership of Chief Justice Rehnquist and Justice Scalia, the Court has strictly limited the scope of substantive due process rights. Justice Scalia is an originalist and has expounded his theory of originalism in several opinions. Specifically, when he discusses unenumerated fundamental rights derived from the Due Process Clause, Scalia argues against the expansion of recognized substantive due process rights.

In Michael H. v. Gerald D., the Court clearly demonstrated its tendency toward narrowing substantive due process rights. In this case, the plaintiff argued that his due process rights were violated

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107 Daniels, 474 U.S. at 331 ("[t]he Due Process Clause ... was 'intended to secure the individual from arbitrary exercise of the powers of government.'"); Rochin, 342 U.S. at 172 (police pumping of the stomach of a criminal suspect to obtain evidence violated the Due Process Clause because it "shocked the conscience.").
110 Monaghan, supra note 108, at 424.
111 United States v. Carlton, 114 S. Ct. 2018, 2043-44 (1994) (Scalia, J., concurring). In Carlton, Justice Scalia went so far to say that he thought substantive due process was more like an "oxymoron" than a constitutional right. Id.
112 David B. Anders, Note, Justice Harlan and Black Revisited: The Emerging Dispute Between Justice O'Connor and Justice Scalia Over Unenumerated Fundamental Rights, 61 FORDHAM L. REV. 895, 896-97 (1993). An originalist is someone who believes that the Constitution protects only those rights specifically enumerated in the text of the Constitution or those rights that the Framers intended to protect. Id. at 897.
113 Id. at 898; Michael H. v. Gerald D., 491 U.S. 110, 128 n.6 (1989).
114 Michael H., 491 U.S. at 128 n.6.
because he was denied a relationship with his biological child who was conceived while her mother was married to another man. Justice Scalia, who authored the plurality opinion, set out his theory of the proper approach to fundamental rights adjudication: "[i]n an attempt to limit and guide the interpretation of the [due process clause], we have insisted not merely that the interest denominated as a ‘liberty’ be ‘fundamental’ (a concept that, in isolation is hard to objectify), but also that it be an interest traditionally protected by our society." Justice Scalia’s quest to explain the parameters of our fundamental rights does not end with the identification of a tradition of protection. Arguably, any general tradition might protect a multitude of asserted liberty interests, and such a method would lead to the proliferation of rights. To limit the proliferation, Justice Scalia utilizes a notion of “levels of generality.” He argues that in selecting the level of generality at which to define a liberty interest, the Court should “refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”

The level of generality at which the Supreme Court defines liberty interests is important as it—in conjunction with the Court’s definition of tradition—wholly determines whether the due process clause protects an asserted liberty interest. In the Michael H. case, this narrow reading of tradition by Scalia led him to conclude that Michael and his biological daughter Victoria did not have a constitutionally protected parent-child relationship. If Scalia’s plurality opinion had defined the scope of due process liberty as protecting established relationships between a father and his child, then Michael’s due process claim could have prevailed.

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115 The plaintiff in this case claimed that his due process rights were violated by the presumption created by CAL. EVID. CODE ANN. § 621 (West Supp. 1989) that a child born to a married woman living with her husband is presumed to be a child of the marriage. Id. at 113. The plaintiff had sought to establish his paternity of the child born to the wife of another, but the Court denied his claim because the presumption created by § 621 can only be rebutted by the husband or wife. Id.

116 Id. at 122.


118 Id.

119 Michael H., 491 U.S. at 128 n.6.

120 Id. at 127–28 n.6.

121 Spitko, supra note 117, at 1338.

122 491 U.S. at 130–31.

123 See Spitko, supra note 117, at 1339.
Another example of the Court narrowly defining what constitutes a liberty interest can be found in *Bowers v. Hardwick*.\(^{124}\) In this case, the Court framed the decisive issue as whether the Constitution protected "a fundamental right to engage in homosexual sodomy."\(^{125}\) The dissent, as well as numerous commentators, argued that the case's actual underlying concern was "the fundamental interest all individuals have in controlling the nature of their intimate associations with others."\(^{126}\) Arguably, this is a different issue than the one considered by the Court. Had this been the decisive issue, the Court may have recognized the plaintiff's due process claim.\(^{127}\) In the past, the Court recognized that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."\(^{128}\) *Bowers v. Hardwick* fits better under a "right to privacy" analysis than a "right to commit homosexual sodomy" analysis. But the Court, because of its perceived view of the "traditions" of our society,\(^{129}\) was unwilling to take a more expansive view of its authority to discover new fundamental rights in the due process clause.\(^{130}\)

This narrowing trend of the Court fits well with Justice Scalia's views regarding judicial review. He is primarily concerned with "judicial activism" undermining the legitimacy of the Court,\(^{131}\) and has urged the adoption of his approach to fundamental rights adjudication as a means to avoid arbitrary decision-making by jurists.\(^{132}\) Justice Scalia's desire to limit substantive due process rights is clearly demonstrated in the case *Reno v. Flores*, which was decided in the 1992–93 term.

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\(^{124}\) 478 U.S. 186 (1986).

\(^{125}\) Id. at 191.

\(^{126}\) Id. at 206 (Blackmun, J., dissenting). The majority and the dissent argue over how abstractly to describe the right at issue. Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1066 (1990). The majority describes the right narrowly, the dissent broadly. Id. These characterizations are the "starting points" for the analysis. Id. Because the majority and the dissent ask different questions, they come up with different answers. Id.

\(^{127}\) See *Roe v. Wade*, 410 U.S. 113, 155 (1973) (recognizing a woman's right to privacy in the determination of whether or not to abort a fetus); *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965) (citing *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) ("right to privacy, no less important than any other right carefully and particularly reserved to the people")).

\(^{128}\) *Griswold*, 381 U.S. at 484.

\(^{129}\) The Court cited the ancient roots of proscriptions against sodomy and listed all of the states that had statutes against sodomy still in effect. *Bowers*, 478 U.S. at 192.

\(^{130}\) See *Bowers*, 478 U.S. at 194.

\(^{131}\) Spitzko, *supra* note 117, at 1343.

\(^{132}\) See *Michael H. v. Gerald D.*, 491 U.S. 110, 128 n.6 (1989). In Scalia's plurality opinion he
B. Justice Scalia's Majority Opinion

Respondents' substantive due process claim relied on the Court's line of cases which interprets the Fifth and Fourteenth Amendments' guarantee of "due process of law." According to these cases, due process includes a substantive component forbidding the government from infringing on certain "fundamental" liberty interests, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. In keeping with the general narrowing trend, the Court in *Flores* declined to find that a "fundamental" right was in question.

Justice Scalia, consistent with his originalist approach, diminished the respondents' substantive due process claim. He stated that the "freedom from physical restraint" invoked by the respondents was not at issue in this case. Instead, he reasoned that the right at issue was the "alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution." Scalia further observed that the children were not being restrained "in the sense of shackles, chains, or barred cells ..." and that "juveniles, unlike adults, are always in some form of custody." Scalia narrowly defined the right at issue so as to assure that the conclusion that he was looking for would naturally follow. In particular he stated that "the Court does not recognize a child's constitutional

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also quotes Justice White's dissenting opinion in the case *Moore v. City of East Cleveland*, in which he states, "[t]he Judiciary, including [the Supreme Court], is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution." *Id.* at 122 (citing 431 U.S. 494, 544 (1977) (White, J., dissenting)).


134 *Reno v. Flores*, 113 S. Ct. 1439, 1447 (1993). According to Justice Stevens in his dissent, the Court glosses over the history of the litigation. *Id.* at 1459 (Stevens, J., dissenting). He feels that the history "speaks mountains about the bona fides of the Government's asserted justification for its regulation. *Id.* at 1459 (Stevens, J., dissenting).

135 *Flores*, 113 S. Ct. at 1447.

136 *Id.*

137 *Id.*

138 *Id.*

139 *Id.*

140 *Id.* (citing *Schall v. Martin*, 467 U.S. 253, 265 (1984)).

141 See *id.*
right not to be placed in a decent and humane custodial institution if there is available a responsible person unwilling to become the child’s legal guardian but willing to undertake temporary legal custody.”

The manner in which Scalia chose to define the liberty interest is indicative of the outcome he was striving to achieve. He states further that “the mere novelty of such a claim is reason enough to doubt that ‘substantive due process’ sustains it; the alleged right certainly cannot be considered ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental.’”

By framing the issue to avoid the “fundamental right” question, Scalia was able to conclude that the detention scheme was rationally connected to a governmental interest in preserving and promoting the child’s welfare and was not excessive in relation to that valid purpose. Because the detention regulation did not implicate a “fundamental right,” the children’s due process did not require narrow tailoring to “minimize the denial of release into private custody.” The impairment of this lesser interest demands no more than a “reasonable fit” between governmental purpose and the means chosen to advance that purpose. This leaves ample room for the INS to decide that administrative factors such as lack of child-placement expertise justify using one means rather than another. In other words, according to Scalia, there is no need to consider whether private placement is better when institutional placement is “good enough.” Had the Court applied “strict scrutiny,” “good enough” would not have justified the INS regulation.

Although Scalia does not doubt the constitutionality of institutional custody of juveniles, he distinguishes between the institutional custody of alien juveniles and citizen juveniles. Consistent with his deference to Congress, he notes that the regulation of aliens has been

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142 Id.
143 See id.
145 Id. at 1448.
146 Id.
147 Id. at 1448–49.
148 Id. at 1449.
149 Id.
150 Id. at 1456–57 (Stevens, J., dissenting).
151 See id. at 1449. Scalia states that Congress regularly makes rules that would be unacceptable if applied to citizens. Id.
committed to the political branch and that over no other subject is the legislative power of Congress more complete.\textsuperscript{152}

The \textit{Flores} Court did more than simply continue the Court's narrowing trend in the area of substantive due process rights. Justice Scalia's characterization of the issue at stake in \textit{Flores} as the right to be released to unrelated adults, rather than a right to physical liberty, replaced the negative liberty right not to be detained with its corollary affirmative right to be released once detained.\textsuperscript{153} Perhaps the most shocking aspect of the \textit{Flores} case is that this inversion took place in the realm of physical liberty, the essence of the Due Process Clause.\textsuperscript{154}

The Court has held that the government's regulatory interest can outweigh an individual's liberty interest in the appropriate circumstances.\textsuperscript{155} For example, there is no absolute constitutional barrier to detention of potentially dangerous resident aliens pending deportation hearings.\textsuperscript{156} Nor is there a constitutional barrier to the detention of mentally unstable individuals who present a danger to the public\textsuperscript{157} and dangerous defendants who become incompetent to stand trial.\textsuperscript{158}

In the area of juvenile justice, the Court has approved post-arrest, pre-trial detention only for juveniles deemed to pose a continuing danger to the community.\textsuperscript{159} In \textit{Schall v. Martin}, the Court upheld the New York Family Court Act which authorizes pretrial detention of an accused juvenile delinquent based on a finding that there is a "serious risk" that the child "may before the return date commit an act which if committed by an adult would constitute a crime."\textsuperscript{160} What distinguishes \textit{Flores} from \textit{Schall} is the fact that the alien juveniles who are detained pose no risk to the community, nor is there a risk of flight.\textsuperscript{161} Moreover, in \textit{Schall}, there is a determination made on an individual basis as to whether or not the juvenile delinquent is likely to commit a crime, whereas in \textit{Flores}, there are no individual hearings.\textsuperscript{162}

Justice Scalia's jurisprudence reflects a belief that narrowing the definition of substantive due process rights is necessary to prevent

\textsuperscript{152}Id. (citing Fiallo v. Bell, 430 U.S. 787, 792 (1977) (quoting Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909))).

\textsuperscript{153}Note, supra note 8, at 180.

\textsuperscript{154}Id.


\textsuperscript{156}Carlson v. Landon, 342 U.S. 524, 537–42 (1952).

\textsuperscript{157}Addington v. Texas, 441 U.S. 418 (1979).


\textsuperscript{160}Id. at 255.

\textsuperscript{161}Id. at 1457–58 (1993) (Stevens, J., dissenting).

\textsuperscript{162}Id. at 1453.
subjective decision-making on the part of the judiciary. But analyzing his reasoning in the *Flores* case leads to the conclusion that he himself participates in subjective decision-making. This conclusion is supported by the fact that freedom from physical restraint has long been considered the core of the Due Process Clause. Without much regard for this fact, Justice Scalia minimizes the children’s liberty interest.

The Court specifically noted in *United States v. Salerno* that it recognized the importance and fundamental nature of a right to liberty. Because of his own views regarding how the Court should address substantive due process adjudication, Scalia ignored the liberty interests of the children, arguably the heart of the case, and created instead his own version of their “fundamental rights.”

In its most common form, substantive due process doctrine reflects the simple proposition that government cannot be arbitrary and that government officials must act with public-spirited rather than self-interested motives. In this case, for the sake of administrative ease, the government—the INS—is allowed to virtually ignore the alien juveniles’ fundamental interest in being free from physical restraint. Although Justice Scalia and Justice Rehnquist support deference to decisions by the legislature and by governmental agencies, it would have been appropriate in this case for the Court to have considered

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164 Justice Scalia in his opinions has repeatedly asserted that the Due Process Clause guarantees no substantive rights. *United States v. Carlton*, 114 S. Ct. 2018, 2041–42 (1994) (Scalia, J., concurring). This is based on his own views regarding how to interpret the Constitution and as such is a subjective opinion not based on legal precedent because, in the past, the Court has recognized unenumerated substantive due process rights. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 500–06 (1977) (recognizing constitutionally protected relationship between grandparent and grandchild); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing right to marital privacy).

165 See *Flores*, 113 S. Ct. at 1447.

166 *United States v. Salerno*, 481 U.S. 740, 751 (1987). Chief Justice Rehnquist noted in *Salerno* that “[i]n our society, liberty is the norm, and detention the carefully limited exception.” Id. at 755.

167 See *Flores*, 113 S. Ct. at 1447. One commentator refers to this type of Supreme Court decision-making as “[i]f we apply my rules, I win.” Rodney J. Blackman, *supra* note 76, at 523. This stratagem is not complicated. The Justice writing the Court’s opinion decides to set up the legal problem so that the conclusion logically follows from the premise(s). *Id.* The Justice simply chooses a particular premise, rather than some equally (or more) applicable premise, because the Justice knows that the conclusion he desires will follow from his chosen premise. *Id.* This is exactly what Scalia has done in the *Flores* case. In fact, he considered only information that he considered relevant and abstracted away information that other jurists might consider essential. Note, *supra* note 8, at 183.

168 Fallon, *supra* note 64, at 310.

169 See *Flores*, 113 S. Ct. at 1447.

170 Scalia, *supra* note 92, at 511.
more seriously the regulations' justifications, given the government's articulated motivations.\textsuperscript{171} Class legislation in the past has been subjected to "strict scrutiny."\textsuperscript{172} Because the INS regulation gives blanket approval for the detention of all alien juveniles who do not have a parent, close relative, or legal guardian available to take custody of them, this regulation should be subjected to strict scrutiny as well.\textsuperscript{173} In \textit{Salerno}, Chief Justice Rehnquist notes "[i]n our society, liberty is the norm, and detention the carefully limited exception."\textsuperscript{174} The majority in \textit{Flores} goes to great lengths to deny liberty to children whose only possible offense is their alienage.\textsuperscript{175}

C. \textit{Concurring Opinion}

Justice O'Connor does not take as narrow a view of the juvenile aliens' "liberty" interests in the \textit{Flores} case as Justice Scalia.\textsuperscript{176} Justice O'Connor wrote a concurring opinion which Justice Souter joined.\textsuperscript{177} In her view, the children \textit{did} have a constitutionally protected interest in freedom from institutional confinement.\textsuperscript{178} Justice O'Connor concurs with the majority, however, because in her view the challenged regulation complies with the requirements of due process.\textsuperscript{179} She states, "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."\textsuperscript{180} Justice O'Connor asserts that freedom from physical restraint means more than freedom from handcuffs, straitjackets, or detention cells.\textsuperscript{181} A person's core liberty interest is also implicated when she is confined in a prison, a mental hospital, or some other form of custodial institution.\textsuperscript{182}

Justice O'Connor views the central issue as whether a governmental decision implicating a squarely protected liberty interest comports with substantive and procedural due process.\textsuperscript{183} In her assessment, the

\textsuperscript{171} See \textit{Flores}, 113 S. Ct. at 1443-44.
\textsuperscript{172} Strict scrutiny of racial classifications as a standard of review was formalized by the Supreme Court in \textit{Korematsu v. United States}, 323 U.S. 214, 216 (1944).
\textsuperscript{173} \textit{See id.}
\textsuperscript{175} \textit{Flores v. Meese}, F.2d 991, 1014 (1990) (Fletcher, J., dissenting).
\textsuperscript{176} \textit{Reno v. Flores}, 113 S. Ct. 1439, 1454. (O'Connor, J., concurring).
\textsuperscript{177} \textit{Id.} (O'Connor, J., concurring).
\textsuperscript{178} \textit{Id.} (O'Connor, J., concurring).
\textsuperscript{179} \textit{Id.} (O'Connor, J., concurring).
\textsuperscript{181} \textit{Flores}, 113 S. Ct. at 1454 (O'Connor, J., concurring).
\textsuperscript{182} \textit{Id.} (O'Connor, J., concurring).
\textsuperscript{183} \textit{Id.} at 1456 (O'Connor, J., concurring).
absence of available parents, close relatives, or legal guardians to care for respondents, when combined with the Juvenile Care Agreement, explains why the INS program survives heightened, substantive due process scrutiny. She accordingly asserts that it is rationally connected to a governmental interest in "preserving and promoting the welfare of the child."

Justice O'Connor seems to place too much emphasis on the Juvenile Care Agreement without even considering the reason that the "Agreement" was necessary in the first place. The complete absence of evidence justifying the policy change initially, and the conditions in which the children were being detained, are reasons enough to question the motives of the government in implementing this policy. The stated policy reason was that detention was necessary to insure the minors' safety and well-being, but this could not be true given the fact that the Juvenile Care Agreement was negotiated after the implementation of the policy change. How could a reasonable person believe that the detention of these children in deplorable conditions was in their best interests? Had Justice O'Connor given further thought to the true policy reasons behind the change, she might have concluded that even the absence of parents, close relatives, or legal guardians was not sufficient justification for the detention of the children.

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184 After the commencement of the lawsuit, the INS agreed to modify the conditions of confinement and the treatment of the children during detention. Flores v. Meese, 934 F.2d 991, 1014 (9th Cir. 1991) (Fletcher, J., dissenting). This included providing education, reasonable visitation rights, and recreation. Id. It also provided that the INS cease commingling detained minors with unrelated adults. Id. In addition, without the agreement of the INS, the court ordered the INS to stop subjecting the minors to strip searches. Flores v. Meese, 681 F. Supp. 665, 666 (C.D. Cal. 1988).

185 Flores, 113 S. Ct. at 1456 (O'Connor, J., concurring).

186 Id. (O'Connor, J., concurring). Justice O'Connor specifically notes that the regulation does not violate substantive due process because the conditions of government custody are decent and humane and because a parent, close relative, or legal guardian was not available. Id.

187 See id. (O'Connor, J., concurring). Judge Fletcher, in her dissent in Flores v. Meese, detailed the conditions under which these children were living. 934 F.2d 991, 1014 (1990). According to Judge Fletcher, the children were being held by INS for as long as two years in highly inappropriate conditions out of concern for their welfare. Id. When the case first came before the court, the only requirement for detention was a determination by an INS agent—not a judge—that there was prima facie evidence of the child's deportability. Id. Upon such a showing, the children were put into "detention centers" for indeterminate periods of time, deprived of education, recreation, and visitation, commingled with adults of both sexes and subjected to strip searches with no showing of cause. Id.

188 Flores, 113 S. Ct. at 1460 (Stevens, J., dissenting). As Justice Stevens notes, if the deplorable conditions prevailed when the litigation began, we must assume that the Western Regional Commissioner was familiar with them when he adopted his "allegedly benevolent" policy. Id. at 1460 n.10.

189 Id. at 1460 (Stevens, J., dissenting).
D. Justice Stevens's Dissent

In Justice Stevens's view, the majority opinion in the Flores case virtually obliterates the juvenile aliens' substantive due process rights. In Justice Stevens's view, the majority opinion in the Flores case virtually obliterates the juvenile aliens' substantive due process rights. He begins his dissent with a scathing criticism of the Court's majority opinion. As long as the conditions of detention are "good enough," the INS is justified in "declining to expend administrative effort and resources to minimize . . . detention." In his view, an agency's interest in minimizing administrative costs is a patently inadequate justification for the detention of harmless children even when the conditions of detention are "good enough." Justice Stevens notes that the INS made no comment at all about the uniform body of professional opinion that recognizes the harmful consequences of detention of juveniles.

Justice Stevens agrees with Justice O'Connor that respondents "have a constitutionally protected interest in freedom from institutional confinement . . . [that] lies within the core of the Due Process Clause." He notes that the Court said as much last term in the case of Foucha v. Louisiana. He disagrees with Justice O'Connor's contention that the Court does not hold otherwise. Because the children at issue are being confined in government-operated or government-selected institutions, their liberty has been curtailed. Yet, the Court defines that right as merely "the alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-

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190 See id. at 1460–61 (Stevens, J., dissenting).
191 Justice Blackmun joined Justice Stevens's dissenting opinion. Id. at 1486.
192 Id. at 1456 (Stevens, J., dissenting) (quoting Flores, 113 S. Ct. at 1449, 1452–53).
193 Id. at 1456 (Stevens, J., dissenting). In fact, Justice Stevens states that at the time the Western Region adopted its new policy, the conditions of confinement were "deplorable." Id. at 1460 (quoting Reply Brief for Petitioner at 3). When discussing the possible motives of the INS in instituting its new policy, Justice Stevens notes that when the undocumented parents came to pick up their children, they were immediately arrested and deportation proceedings were instituted against them. It is possible that the true motivation of detaining the children was more related to enforcement proceeding than to the "best interest" of the children. See id. at 1461.
194 Id. at 1462 n.19 (Stevens, J., dissenting) (citing the Department of Justice's own Standards for the Administration of Juvenile Justice that describe "the harsh impact that even brief detention may have on a juvenile, especially when he/she is placed in a secure facility, and the corresponding need to assure as quickly as possible that such detention is necessary." United States Dept. of Justice, Standards for the Administration of Juvenile Justice, 299, 304 (1980)).
195 Id. at 1467 (Stevens, J., dissenting).
196 112 S. Ct. 1780, 1785 (1992) ("[F]reedom from bodily restraint has always been at the core of liberty protected by the Due Process Clause from arbitrary government action").
197 Flores, 113 S. Ct. at 1467. (Stevens, J., dissenting).
able custodian rather than a government-operated or government-selected child-care institution.\textsuperscript{198}

In Justice Stevens's view, the Court's analysis is simply wrong.\textsuperscript{199} The right at stake is not the right of detained juveniles to be released to one particular custodian rather than another, but the right not to be detained in the first place.\textsuperscript{200} He argues that it is the government's burden to prove that detention is necessary, and not the individual's burden to prove that release is justified.\textsuperscript{201} Justice Stevens called the narrow reading of the right in question "the linchpin in the Court's analysis."\textsuperscript{202} This narrow reading contradicted the constitutional principle that it is the government's burden to show the necessity of detention.\textsuperscript{203} Central to his contention that this is a constitutional premise is the Court's holding in the cases \textit{United States v. Salerno} and \textit{Foucha v. Louisiana}.\textsuperscript{204}

In \textit{Salerno}, the Court conceded that it was the "general rule" that the government not detain a person prior to a judgment of guilt in a criminal trial.\textsuperscript{205} They noted, though, a number of exceptions to that general rule.\textsuperscript{206} However, even in the exceptional cases, the government has the burden of showing that the detention is necessary for either public safety reasons or for regulatory reasons such as risk of flight.\textsuperscript{207} The Court explains that it recognizes an individual's strong interest in liberty and that it does not intend, by its holding, to minimize the importance and fundamental nature of this right.\textsuperscript{208} \textit{Salerno} can easily be distinguished from \textit{Flores}, because the defendant in \textit{Salerno} was provided with greater procedural guarantees.\textsuperscript{209} In

\begin{thebibliography}{99}
\bibitem{198} Id. (Stevens, J., dissenting) (citing \textit{Flores}, 113 S. Ct. at 1447).
\bibitem{199} Id. at 1468 (Stevens, J., dissenting).
\bibitem{200} Id. (Stevens, J., dissenting).
\bibitem{201} Id. (Stevens, J., dissenting).
\bibitem{202} Id. at 1470 (Stevens, J., dissenting).
\bibitem{203} Foucha v. Louisiana, 112 S. Ct. 1780, 1786 (1992) (finding due process violation when individual who is detained on grounds of dangerousness is denied right to adversary hearing in "which State must prove by clear and convincing evidence that he is demonstrably dangerous to the community"); \textit{United States v. Salerno}, 481 U.S. 739, 742 (1987) (finding no due process violation when detention is necessary to prevent flight or danger to community).
\bibitem{204} 481 U.S. 739 (1987) (involving pre-trial detention); 112 S. Ct. 1780 (1992) (involving commitment to mental institution).
\bibitem{205} \textit{Salerno}, 481 U.S. at 754 ("[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.").
\bibitem{206} Id.
\bibitem{207} Id. The Court upheld the detention prior to trial of the defendant in the \textit{Salerno} case because it viewed the detention imposed by the Bail Reform Act as regulatory in nature, and that the defendants posed a significant risk to society. \textit{Id.} at 747–48.
\bibitem{208} Id. at 750.
\bibitem{209} Id. at 742 (the arrestee may request the presence of counsel at the detention hearing, he

Flores, the INS was not obligated to hold individual hearings for each minor, whereas in Salerno, the State had the burden of showing by clear and convincing evidence that each defendant posed a continuing risk to society.210

Although Foucha did not involve the issue of pre-trial detention, the Court noted that in certain narrow circumstances persons who pose a danger to others or to the community may be subject to limited confinement.211 In Foucha, the State failed to show by clear and convincing evidence that the defendant was mentally ill and dangerous.212 Again, the distinguishing factor between Foucha and Flores is the lack of procedural safeguards provided to the alien children.213

Justice Stevens concluded that the INS does have a legitimate interest in the safety of the alien children, but that the detention scheme was not “narrowly tailored” to serve that interest because it relied on a blanket presumption that children’s interests would be better served in the government’s custody.214 At the very least, Justice Stevens argues, pursuant to the Court’s previous decisions,215 the government should decide on “an individual basis” whether governmental custody is best for the child’s welfare.216

IV. Conclusion

By defining rights narrowly and protecting only those rights that have been historically recognized, the Court particularly disadvantages minority groups. The Flores Court’s narrowing of the asserted right to be free from physical restraint provides a chilling example of this trend. The Flores Court focused on the particular distinguishing attributes of the detainees that would allow the justices to conclude that a fundamental liberty interest was not implicated. They did not acknowledge the abundance of precedent that held against detention prior to

may testify and present witnesses on his or her behalf, as well as proffer evidence, and he may cross-examine other witnesses appearing at the hearing).

212 Id.
214 Id. at 1468–69 (Stevens, J., dissenting).
216 Flores, 113 S. Ct. at 1469 n.30. It is interesting to note that Justice Stevens, in a footnote, observes that the Court in its majority opinion did not make reference to the infamous case Korematsu v. United States, in which the Court upheld a blanket exclusion from particular “military areas” of all persons of Japanese ancestry without a determination as to whether any particular individual actually posed a threat to the United States. 329 U.S. 214 (1944).
adjudication, except for instances in which the detainees pose a risk to the community. By focusing on attributes that distinguish groups rather than focusing on the common traits among groups, the Court will continue to deny protection to "new" rights simply because they have not historically been protected. Thus, the Court ensures continued denial of protection to historically marginalized groups. As a result of Flores, children as young as five years of age, with responsible adults available to care for them, are still being confined under prison-like conditions in INS camps and lock-up facilities.