AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 10: The Reagan Era – Individual Rights/Due Process

**Reno v. Flores, 507 U.S. 292** (1993)

*As the rate of undocumented immigrants entering the United States from the southern border increased, the government was faced with a growing problem of what to do with the unaccompanied minors in that group. Most of the unaccompanied minors were teenage boys, but a substantial number were teenage girls or pre-teens. Most adults found inside the United States simply chose to voluntarily depart the country, but the United States was unwilling to give juveniles the same option and as a result they faced a lengthier and more complicated process of detention and deportation. The Western Regional Office of the Immigration and Naturalization Service finally adopted a formal policy for handling such minors, which created a default that they would be held in institutional facilities.*

*In 1985, Jenny Lisette Flores, an unaccompanied teenage girl from El Salvador, was arrested at the border and taken to an immigration detention facility. The Center for Human Rights and Constitutional Law filed a class action suit on behalf of her and similarly situated minors arguing that the conditions of her detention were unconstitutional. After a series of negotiations, the government modified its policies to improve its detention facilities, adopt uniform detention policies for minors found at the border and minors found inside the United States, expanded the options for releasing juveniles into the custody of a responsible adult, and quickly moved minors out of INS detention facilities into contracted juvenile facilities. The suit was continued against that policy, which was further revised by a district court judge and those revisions were affirmed by the circuit court. The government appealed to the U.S. Supreme Court, which in a 7-2 decision reversed the lower courts and upheld the INS policy as consistent with constitutional due process requirements. In particular, unaccompanied juvenile aliens did not have a constitutional right to be released to the custody of any willing adult or to an automatic hearing by an immigration judge. The government subsequently entered into a consent agreement in which minors would be placed in the “least restrictive” environment possible.*

JUSTICE SCALIA delivered the opinion of the Court.

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Congress has given the Attorney General broad discretion to determine whether, and on what terms, an alien arrested on suspicion of being deportable should be released pending the deportation hearing. The Board of Immigration Appeals has stated that "[a]n alien generally . . . should not be detained or required to post bond except on a finding that he is a threat to the national security . . . or that he is a poor bail risk." In the case of arrested alien *juveniles,* however, the INS cannot simply send them off into the night on bond or recognizance. The parties to the present suit agree that the Service must assure itself that someone will care for those minors pending resolution of their deportation proceedings. That is easily done when the juvenile's parents have also been detained and the family can be released together; it becomes complicated when the juvenile is arrested alone, *i. e.,* unaccompanied by a parent, guardian, or other related adult. This problem is a serious one, since the INS arrests thousands of alien juveniles each year (more than 8,500 in 1990 alone)—as many as 70% of them unaccompanied. . . .

. . . . In 1984, responding to the increased flow of unaccompanied juvenile aliens into California, the INS Western Regional Office adopted a policy of limiting the release of detained minors to "`a parent or lawful guardian,'" except in "`unusual and extraordinary cases,'" when the juvenile could be released to "`a responsible individual who agrees to provide care and be responsible for the welfare and well being of the child.'`"

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Respondents' "substantive due process" claim relies upon our line of cases which interprets the Fifth and Fourteenth Amendments' guarantee of "due process of law" to include a substantive component, which forbids the government to infringe certain "fundamental" liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. *Collins v. Harker Heights* (1992) . . . the right at issue is 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.

If there exists a fundamental right to be released into what respondents inaccurately call a "non-custodial setting," we see no reason why it would apply only in the context of government custody incidentally acquired in the course of law enforcement. . . . We are unaware, however, that any court—aside from the courts below—has ever held that a child has a constitutional 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 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.'" *United States v. Salerno* (1987). Where a juvenile has no available parent, close relative, or legal guardian, where the government does not intend to punish the child, and where the conditions of governmental custody are decent and humane, such custody surely does not violate the Constitution. It is rationally connected to a governmental interest in "preserving and promoting the welfare of the child," and is not punitive since it is not excessive in relation to that valid purpose.

Although respondents generally argue for the categorical right of private placement discussed above, at some points they assert a somewhat more limited constitutional right: the right to an individualized hearing on whether private placement would be in the child's "best interests"—followed by private placement if the answer is in the affirmative. It seems to us, however, that if institutional custody (despite the availability of responsible private custodians) is not unconstitutional in itself, it does not become so simply because it is shown to be less desirable than some other arrangement for the particular child. "The best interests of the child," a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody. But it is not traditionally the sole criterion—much less the sole *constitutional* criterion—for other, less narrowly channeled judgments involving children, where their interests conflict in varying degrees with the interests of others. . . .

"The best interests of the child" is likewise not an absolute and exclusive constitutional criterion for the government's exercise of the custodial responsibilities that it undertakes, which must be reconciled with many other responsibilities. Thus, child-care institutions operated by the State in the exercise of its *parens patriae* authority, are not constitutionally required to be funded at such a level as to provide the *best* schooling or the *best* health care available; nor does the Constitution require them to substitute, wherever possible, private nonadoptive custody for institutional care. And the same principle applies, we think, to the governmental responsibility at issue here, that of retaining or transferring custody over a child who has come within the Federal Government's control, when the parents or guardians of that child are nonexistent or unavailable. Minimum standards must be met, and the child's fundamental rights must not be impaired; but the decision to go beyond those requirements—to give one or another of the child's additional interests priority over other concerns that compete for public funds and administrative attention—is a policy judgment rather than a constitutional imperative.

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If we harbored any doubts as to the constitutionality of institutional custody over unaccompanied juveniles, they would surely be eliminated as to those juveniles (concededly the overwhelming majority of all involved here) who are aliens. "For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government." *Mathews v. Diaz* (1976). "`[O]ver no conceivable subject is the legislative power of Congress more complete.'" Thus, "in the exercise of its broad power over immigration and naturalization, `Congress regularly makes rules that would be unacceptable if applied to citizens.'" . . .

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We turn now from the claim that the INS cannot deprive respondents of their asserted liberty interest *at all,* to the "procedural due process" claim that the Service cannot do so on the basis of the procedures it provides. It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings. *The Japanese Immigrant Case* (1903). . . .

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The District Court and the en banc Court of Appeals concluded that the INS procedures are faulty because they do not provide for *automatic* review by an immigration judge of the initial deportability and custody determinations. We disagree. At least insofar as this facial challenge is concerned, due process is satisfied by giving the detained alien juveniles the *right* to a hearing before an immigration judge. . . .

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*Reversed*.

JUSTICE O’CONNOR, with whom JUSTICE SOUTER joins, concurring.

I join the Court's opinion and write separately simply to clarify that in my view these children have a constitutionally protected interest in freedom from institutional confinement. That interest lies within the core of the Due Process Clause, and the Court today does not hold otherwise. Rather, we reverse the decision of the Court of Appeals because the INS program challenged here, on its face, complies with the requirements of due process.

"Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha* v. *Louisiana* (1992). "Freedom from bodily restraint" means more than freedom from handcuffs, straitjackets, or detention cells. 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, even if the conditions of confinement are liberal. This is clear beyond cavil, at least where adults are concerned. "In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the `deprivation of liberty' triggering the protections of the Due Process Clause . . . ." . . .

Children, too, have a core liberty interest in remaining free from institutional confinement. In this respect, a child's constitutional "[f]reedom from bodily restraint" is no narrower than an adult's. Beginning with *In re Gault* (1967), we consistently have rejected the assertion that "a child, unlike an adult, has a right `not to liberty but to custody.'" *Gault* held that a child in delinquency proceedings must be provided various procedural due process protections (notice of charges, right to counsel, right of confrontation and cross-examination, privilege against self-incrimination) when those proceedings may result in the child's institutional confinement. . . .

It may seem odd that institutional placement as such, even where conditions are decent and humane and where the child has no less authority to make personal choices than she would have in a family setting, nonetheless implicates the Due Process Clause. The answer, I think, is this. Institutionalization is a decisive and unusual event. "The consequences of an erroneous commitment decision are more tragic where children are involved. [C]hildhood is a particularly vulnerable time of life and children erroneously institutionalized during their formative years may bear the scars for the rest of their lives." Just as it is true that "[i]n our society liberty [for adults] is the norm, and detention prior to trial or without trial is the carefully limited exception," so too, in our society, children normally grow up in families, not in governmental institutions. To be sure, government's failure to take custody of a child whose family is unable to care for her may also effect harm. But the purpose of heightened scrutiny is not to prevent government from placing children in an institutional setting, where necessary. Rather, judicial review ensures that government acts in this sensitive area with the requisite care.

. . . . [C]ombined with the Juvenile Care Agreement, the fact that the normal forms of custody have faltered explains why the INS program facially challenged here survives heightened, substantive due process scrutiny. "Where a juvenile has no available parent, close relative, or legal guardian, where the government does not intend to punish the child, and where the conditions of governmental custody are decent and humane, such custody surely does not violate the Constitution. It is rationally connected to a governmental interest in `preserving and promoting the welfare of the child,' and is not punitive since it is not excessive in relation to that valid purpose." . . .

JUSTICE STEVENS, with whom BLACKMUN joins, dissenting.

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[T]he Attorney General is not authorized, in my view, to rely on a presumption regarding the suitability of potential custodians as a substitute for determining whether there is, in fact, any reason that a *particular* juvenile should be detained. Just as a "purpose to injure could not be imputed generally to all aliens," the unsuitability of certain unrelated adults cannot be imputed generally to all adults so as to lengthen the detention to which these children are subjected. The particular circumstances facing these juveniles are too diverse, and the right to be free from government detention too precious, to permit the INS to base the crucial determinations regarding detention upon a mere presumption regarding "appropriate custodians." I do not believe that Congress intended to authorize such a policy.

. . . . The detention of juveniles on the basis of a general presumption as to the suitability of particular custodians without an individualized determination as to whether that presumption bears any relationship at all to the facts of a particular case implicates an interest at the very core of the Due Process Clause, the constitutionally protected interest in freedom from bodily restraint. . . . Legislative grants of discretionary authority should be construed to avoid constitutional issues and harsh consequences that were almost certainly not contemplated or intended by Congress. . . .

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In my view, the only "novelty" in this case is the Court's analysis. The right at stake in this case 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. "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." It is the government's burden to prove that detention is necessary, not the individual's burden to prove that release is justified. And, as Justice O'Connor explains, that burden is not easily met, for when government action infringes on this most fundamental of rights, we have scrutinized such conduct to ensure that the detention serves both "legitimate and compelling" interests, and, in addition, is implemented in a manner that is "carefully limited" and "narrowly focused."

On its face, the INS' regulation at issue in this case cannot withstand such scrutiny. The United States no doubt has a substantial and legitimate interest in protecting the welfare of juveniles that come into its custody. *Schall* v. *Martin* (1984). However, a blanket rule that simply *presumes* that detention is more appropriate than release to responsible adults is not narrowly focused on serving that interest. Categorical distinctions between cousins and uncles, or between relatives and godparents or other responsible persons, are much too blunt instruments to justify wholesale deprivations of liberty. Due process demands more, far more. If the Government is going to detain juveniles in order to protect their welfare, due process requires that it demonstrate, *on an individual basis,* that detention in fact serves that interest. . . .

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The linchpin in the Court's analysis, of course, is its narrow reading of the right at stake in this case. By characterizing it as some insubstantial and nonfundamental right to be released to an unrelated adult, the Court is able to escape the clear holding of our cases that "administrative convenience" is a thoroughly inadequate basis for the deprivation of core constitutional rights. . . . As explained above, however, the right at issue in this case is not the right to be released to an unrelated adult; it is the right to be free from Government confinement that is the very essence of the liberty protected by the Due Process Clause. It is a right that cannot be defeated by a claim of a lack of expertise or a lack of resources. . . .

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. . . . These juveniles do not want to be committed to institutions that the INS and the Court believe are "good enough" for aliens simply because they conform to standards that are adequate for the incarceration of juvenile delinquents. They want the same kind of liberty that the Constitution guarantees similarly situated citizens. And as I read our precedents, the omission of any provision for individualized consideration of the best interests of the juvenile in a rule authorizing an indefinite period of detention of presumptively innocent and harmless children denies them precisely that liberty.