SUPREME COURT OF THE UNITED STATES

No. 91–905

JANET RENO, ATTORNEY GENERAL, ET AL., PETITIONERS *v.* JENNY LISETTE FLORES ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[March 23, 1993]

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*, 504 U. S. ___, ___ (1992) (slip op., at 8). "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 . . . ." *DeShaney* v. *Winnebago County Social Services Dept.*, 489 U. S. 189, 200 (1989). The institutionalization of an adult

by the government triggers heightened, substantive due process scrutiny. There must be a "sufficiently compelling" governmental interest to justify such action, usually a punitive interest in imprisoning the convicted criminal or a regulatory interest in forestalling danger to the community. *United States* v. *Salerno*, 481 U. S. 739, 748 (1987); see *Foucha*, *supra*, at ___–___ (slip op., at 8–9).

Children, too, have a core liberty interest in remaining free from institutional confinement. In this respect, a child's constitutional "freedom from bodily restraint" is no narrower than an adult's. Beginning with *In re Gault*, 387 U. S. 1 (1967), we consistently have rejected the assertion that "a child, unlike an adult, has a right `not to liberty but to custody.'" *Id.*, at 17. *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. As we explained,

> "Ultimately, however, we confront the reality of . . . the Juvenile Court process . . . . A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a `receiving home' or an `industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes a building with whitewashed walls, regimented routine and institutional hours. Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, [and] state employees . . . ." *Id.*, at 27 (footnote and internal quotation marks omitted).

See also *In re Winship*, 397 U. S. 358 (1970) (proof-beyond-reasonable-doubt standard applies to delinquency proceedings); *Breed* v. *Jones*, 421 U. S. 519 (1975) (double jeopardy protection applies to delinquency proceedings); *Parham* v. *J. R.*, 442 U. S. 584 (1979) (proceedings to commit child to mental

hospital must satisfy procedural due process).

Our decision in *Schall* v. *Martin*, 467 U. S. 253 (1984), makes clear that children have a protected liberty interest in "freedom from institutional restraints," *id.*, at 265, even absent the stigma of being labeled "delinquent," see *Breed*, *supra*, at 529, or "mentally ill," see *Parham*, *supra*, at 600–601. In *Schall*, we upheld a New York statute authorizing pretrial detention of dangerous juveniles, but only after analyzing the statute at length to ensure that it complied with substantive and procedural due process. We recognized that children "are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*." 467 U. S., at 265. But this *parens patriae* purpose was seen simply as a plausible *justification* for state action implicating the child's protected liberty interest, not as a limitation on the scope of due process protection. See *ibid.* Significantly, *Schall* was essentially a facial challenge, as is this case, and New York's policy was to detain some juveniles in "open facilit[ies] in the community . . . without locks, bars, or security officers where the child receives schooling and counseling and has access to recreational facilities." *Id.*, at 271. A child's placement in this kind of governmental institution is hardly the same as handcuffing her, or confining her to a cell, yet it must still satisfy heightened constitutional scrutiny.

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." *Parham*, *supra*, at 627–628 (footnotes omitted) (opinion of Brennan, J.). 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," *Salerno, supra,* at 755, 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.

In sum, this case does not concern the scope of the Due Process Clause. We are not deciding whether the constitutional concept of "liberty" extends to some hitherto unprotected aspect of personal well-being, see, *e.g.*, *Collins* v. *Harker Heights*, 503 U. S. ___ (1992); *Michael H.* v. *Gerald D.*, 491 U. S. 110 (1989); *Bowers* v. *Hardwick*, 478 U. S. 186 (1986), but rather whether a governmental decision implicating a squarely protected liberty interest comports with substantive and procedural due process. See *ante*, at 9–13 (substantive due process scrutiny); *ante,* at 13–17 (procedural due process scrutiny). Specifically, the absence of available parents, close relatives, or legal guardians to care for respondents does not vitiate their constitutional interest in freedom from institutional confinement. It does not place that interest outside the core of the Due Process Clause. Rather, combined 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,' *Santosky* v. *Kramer*, 455 U. S. 745, 766 (1982), and is not punitive since it is not excessive in relation to that valid purpose." *Ante*, at 10. Because this is a facial challenge, the Court rightly focuses on the Juvenile Care Agreement. It is proper to presume that the conditions of confinement are no longer "`most disturbing,'" *Flores* v. *Meese*, 942 F. 2d 1352, 1358 (CA9 1991) (en banc) (quoting *Flores* v. *Meese*, 934 F. 2d 991, 1014 (CA9 1990) (Fletcher, J., dissenting)), and that the purposes of confinement are no longer the troublesome ones of lack of resources and expertise published in the Federal Register, see 53 Fed. Reg. 17449 (1988), but rather the plainly legitimate purposes associated with the government's concern for the welfare of the minors. With those presumptions in place, "the terms and conditions of confinement . . . are in fact compatible with [legitimate] purposes," *Schall*, *supra*, at 269, and the Court finds that the INS program conforms with the Due Process Clause. On this understanding, I join the opinion of the Court.