1-1-1992

IMMIGRATION LAW—FLORES v. MEESE: A LOST OPPORTUNITY TO RECONSIDER THE PLENARY POWER DOCTRINE IN IMMIGRATION DECISIONS

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IMMIGRATION LAW—Flores v. Meese: A Lost Opportunity to Reconsider the Plenary Power Doctrine in Immigration Decisions

Introduction

Thousands of alien children in the United States are being confined in government detention centers awaiting a deportation hearing.1 The Immigration and Naturalization Service ("INS") has the authority to fashion release conditions in between the time of initial detention and a deportation hearing.2 The INS has adopted a policy of releasing alien minors to legal guardians or related adults only.3 Most alien children must remain in detention since they have no parent, relative, or legal guardian to assume custody of them. The pleas of immigrants’ rights groups, church groups, and other concerned adults who want to accept custody of these children are to no avail. The rights and liberties secured to citizens of the United States under the Constitution never materialize for these immigrant children.

Recently, the United States Court of Appeals for the Ninth Circuit considered a challenge to the release conditions imposed on alien children. In Flores v. Meese,4 the court struck down the INS policy as an unconstitutional intrusion on the plaintiffs’ fundamental rights. This Note will consider the decision in Flores and the judicially created roadblocks to effective review of INS immigration policy. The Supreme Court has granted certiorari in Flores and will have the opportunity to reassess the validity of the plenary power doctrine5 as a bar to judicial review of congressional immigration decisions.

Section I.A of this Note will discuss the historic deference to Congress in matters of immigration under the plenary power doctrine. Section I.B will detail the statutory history of 8 C.F.R. § 242.24, the detention regulation at issue. In Section II, the facts and procedural

2. See infra note 55 and accompanying text.
3. See infra text accompanying notes 66-81.
5. The plenary power doctrine “denies the judiciary the power to review the constitutionality of immigration legislation.” Philip Monrad, Ideological Exclusion, Plenary Power, and the PLO, 77 CAL. L. REV. 831, 848 (1989).
history of Flores v. Meese and the majority and dissenting opinions issued by the court will be discussed. In Section III.A, this Note will observe the marked schism between immigration law and constitutional law due to the plenary power doctrine and the effect of the plenary power doctrine on the Flores decision. Finally, Section III.B will analyze the theories underlying the plenary power doctrine and conclude that the theories do not require or support complete and automatic judicial deference to congressional immigration policy.

I. BACKGROUND

A. The Plenary Power Doctrine

Congress has historically enjoyed the power to regulate the exclusion6 and deportation7 of immigrants. Under the plenary power doctrine, the actions of the political branches of government in the area of immigration are entitled to great judicial deference.8 A number of cases in the early twentieth century began to ameliorate the harsh effects9 of the plenary power doctrine by requiring procedural due process for aliens,10 but the Supreme Court reinvigorated the plenary

6. Chae Chan Ping v. United States, 130 U.S. 581 (1889) ("The Chinese Exclusion Case"). In 1882, Congress passed a federal law banning the immigration of Chinese laborers for 10 years and requiring any Chinese laborers traveling overseas to obtain a certificate from the collector of customs entitling them to return to the United States. Id. at 589. In The Chinese Exclusion Case, an 1888 statute excluding even those Chinese laborers who were returning to the United States with the proper certificate required under the 1882 law was challenged. Id. at 603. The decision established congressional authority to prevent aliens from entering the country (the exclusion power), and further suggested that the political branches could exercise this authority without being subject to judicial review. Id. at 606.

7. Fong Yue Ting v. United States, 149 U.S. 698 (1893). In Fong Yue Ting, the Court extended the regulatory power of Congress to the deportation of resident aliens (the deportation power). Congress continued the ban on Chinese immigration for 10 more years. Id. at 699 n.1. See supra note 6. Those already in the United States could stay only if they could prove pre-1892 residency through a "credible" white witness. Fong Yue Ting, 149 U.S. at 699 n.1. Fong claimed pre-1892 residency, but could not produce a white witness. Id. at 731. The Supreme Court rejected Fong's procedural due process challenge to the white witness rule. Id. at 730. Declining to distinguish between the power to deport and the power to exclude, the Court concluded that the political branches could regulate immigration, largely immune from judicial review unless provided for by Congress. Id. at 731.


9. See supra notes 6-7.

10. See, e.g., United States ex rel. Vajtauer v. Commissioner of Immigration, 273
power doctrine in the mid-twentieth century. Two cases are particularly important in examining the effect the plenary power doctrine had on the constitutional rights of aliens facing deportation or exclusion. The first is United States ex rel. Knauff v. Shaughnessy, decided in 1950.

Ellen Knauff fled to Czechoslovakia after the Nazi seizure of power in her native Germany. She then went to Great Britain where she served with the Royal Air Force during World War II. In 1948, she married a United States citizen and sought to enter the United States to be naturalized. The government, without a hearing, excluded her because "her admission would be prejudicial to the interests of the United States." The Supreme Court ultimately affirmed the exclusion order, holding that the power to exclude aliens is fundamental to sovereignty. The Court further declared that this power is beyond judicial review unless Congress provides otherwise. The Court stated that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."

The second case, Shaughnessy v. United States ex rel. Mezei, decided in 1953, further reaffirmed the plenary power doctrine. Mezei, a resident of the United States for twenty-five years, traveled to Eastern Europe in 1948 to visit his dying mother. His wife remained...
at home in the United States. Upon his return, the government excluded Mezei from the country without a hearing, on the "basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest."\(^{22}\) He was confined on Ellis Island for twenty-one months before a district court granted a writ of habeas corpus ordering his release.\(^ {23}\) The Supreme Court, relying on the plenary power doctrine and national security considerations, reversed the district court, stating that the exclusion statute\(^ {24}\) could deny Mezei both substantive rights and procedural safeguards.\(^ {25}\) These cases reaffirmed the power of Congress to exclude or deport aliens without being subject to judicial review based on notions of sovereignty and national security.\(^ {26}\)

The narrowness of judicial review under the plenary power doctrine in matters of deportation and exclusion has been firmly established.\(^ {27}\) In *Galvan v. Press*,\(^ {28}\) the Supreme Court upheld a statute authorizing deportation of legally resident aliens on the grounds that they had once been members of the Communist Party. The Court stated that it "cannot say that this classification by Congress is so baseless as to be violative of due process and therefore beyond the power of Congress."\(^ {29}\) With this statement, the Court implied that some statutes might fail to pass due process scrutiny. But the Court went on to say:

In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power, much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political

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22. *Id.*

23. *Id.* at 209.


26. The dissenting opinions in both cases expressed concern over the denial of access to judicial review for aliens. In *Mezei*, the dissenting Justices were concerned over the denial of both substantive and procedural rights to a permanent resident alien. *Mezei*, 345 U.S. at 216-28 (Black & Jackson, JJ., dissenting). In both *Mezei* and *Knauff*, the dissenters worried about the lack of procedural due process. *Id.* at 224-28 (Jackson, J., dissenting); *Knauff*, 338 U.S. at 547-52 (Frankfurter & Jackson, JJ., dissenting).


29. *Id.* at 529.
discretion heretofore recognized as belonging to Congress in regul-
ating the entry and deportation of aliens. . . .

But the slate is not clean. As to the extent of the power of
Congress under review, there is not merely "a page of history," but
a whole volume. 30

Thus the Court, constrained to defer to a long list of precedent estab-
lishing the plenary power of Congress in the immigration context, re-
affirmed the narrow substantive application of the Due Process Clause
on congressional power in this area.

Although the Supreme Court has consistently reaffirmed the ple-
nary power doctrine, more recent cases express a willingness to allow
some small measure of judicial scrutiny of federal regulations that do
not directly involve deportation or exclusion. Although the Court in
Fiallo v. Bell 31 reaffirmed broad congressional power, it also suggested
that substantive due process operates as some limited constraint on
Congress' plenary power in immigration matters. In Fiallo, a provi-
sion of the Immigration and Nationality Act that recognized only an
illegitimate child and mother, but not the natural father, as being pro-
tected under the special preference immigration status accorded by the
statute, was held to be constitutional. 32 The Court recognized "the
power to expel or exclude aliens as a fundamental sovereign attribute
exercised by the Government's political departments largely immune
from judicial control." 33 While the Court adopted a very narrow
standard of review requiring only that the relevant section of the Act
be based on "a facially legitimate and bona fide reason," 34 it sug-
gested that there is not total immunity from judicial review.

Mathews v. Diaz 35 also allowed for some constitutional scrutiny.
Diaz involved a constitutional challenge to a statute that barred aliens
from access to Medicare unless they were permanent residents who
had lived in the United States for five years. The Court upheld the
statute, stating that "In the exercise of its broad power over naturali-
zation and immigration, Congress regularly makes rules that would be

30. Id. at 530-31 (citations omitted).
32. Id. at 799-800 (referring to the Immigration and Nationality Act of 1952, as
101(b)(1)(D) of the Immigration and Nationality Act was amended in 1986 to include the
child's "natural father if the father has or had a bona fide parent-child relationship with the
33. 430 U.S. at 792 (quoting Shaughnessy v. United States ex rel. Mezei, 345 U.S.
206, 210 (1953) (emphasis added)).
34. Id. at 794 (quoting Kleindienst v. Mandel, 408 U.S. 753, 770 (1972)).
unacceptable if applied to citizens." 36 But the Court did allow minimal constitutional scrutiny, noting that: "The Fifth Amendment . . . protects [all aliens within the jurisdiction of the United States] . . . from deprivation of life, liberty, or property without due process of law." 37 The Court’s willingness to allow some scrutiny of immigration regulations has manifested itself in cases like *Fiallo* and *Diaz* where neither deportation nor exclusion was involved.

Outside the scope of exclusion and deportation proceedings, aliens physically present in the United States do enjoy constitutional protection. *Yick Wo v. Hopkins* 38 is the leading early case in this regard. Yick Wo, a resident alien of Chinese descent, had been convicted of violating a San Francisco laundry ordinance that discriminated against persons of Chinese descent. 39 The Court, in holding that Yick Wo had been denied equal protection of the laws, stated:

> The Fourteenth Amendment to the Constitution is not confined to the protection of citizens . . . . These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. 40

*Yick Wo* stands for the proposition that aliens within the territorial United States are protected by the Constitution.

In *Wong Wing v. United States*, 41 a statute providing for the labor camp imprisonment of any Chinese national found to be in the United States illegally was challenged. The Supreme Court, in striking down the statute, held that an illegal alien present within the United States is entitled to the protection of the Fifth and Sixth Amendments. 42 *Wong Wing* has been cited as standing for the proposition that any alien present within the United States "is entitled to . . . constitutional protection." 43

These constitutional protections have been recognized outside the context of immigration law (i.e., deportation and exclusion) and have not been fully applied within the context of federal immigration law.

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36. *Id.* at 79-80.
37. *Id.* at 77.
38. 118 U.S. 356 (1886).
39. *Id.* at 357-59.
40. *Id.* at 369.
41. 163 U.S. 228 (1896).
42. *Id.* at 238.
due to the plenary power doctrine. But the tension between the plenary power doctrine and *Yick Wo* and its progeny is unmistakable. Indeed, the *Yick Wo* legacy has been extended to immigration cases involving state action, where the plenary power doctrine does not apply.

*Graham v. Richardson* is one such case. In *Graham*, the Supreme Court struck down a state residency requirement restricting legal aliens' access to welfare benefits. Relying on *Yick Wo*, the Court found the statute violated equal protection and stated: "[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate." The invalidated welfare statute at issue in *Graham* bears a resem-

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44. While cases such as Fiallo v. Bell, 430 U.S. 787 (1977), Mathews v. Diaz, 426 U.S. 67 (1976), and Carlson v. Landon, 342 U.S. 524 (1952), imply that the Constitution does limit the actions of Congress under the plenary power doctrine in some ways, the standard of review has been so deferential as to be almost meaningless. Indeed, the standard has been referred to as "completely 'toothless.'" *Fiallo*, 430 U.S. at 805 (Marshall, J., dissenting) (citation omitted). See supra text accompanying notes 31-37.


47. *Graham*, 403 U.S. at 372 (citations omitted). Not all statutes that differentiate between citizens and noncitizens will be held invalid under equal protection analysis. There is a "'political function' exception to laws through which States exclude aliens from positions 'intimately related to the process of democratic self-government.'" *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2402 (1991) (citations omitted). The rationale behind the political function exception is that a state may establish its own form of government and limit the right to govern to those who are full-fledged members of the political community. *Cabell v. Chavez-Salido*, 454 U.S. 432, 438-39 (1981). This exception has been construed rather broadly and excludes noncitizens from holding such jobs as police officers, *Foley v.*
blance to the Medicare law upheld under the plenary power doctrine in *Mathews v. Diaz.*

This illustrates the effect of the plenary power doctrine on the success of constitutional challenges made by aliens at the federal level. While state discrimination based on alienage is sharply scrutinized, congressional distinctions between aliens and citizens are ordinarily not suspect. "Congressional authority to regulate aliens and to treat them less favorably than citizens has been justified by invoking considerations of national sovereignty, war and peace, and international relations generally." This, in essence, is the plenary power doctrine. It acts as a restraint on the application of the *Yick Wo* legacy in the context of reviewing congressional decisions in the area of immigration. It is most extreme in the areas of deportation and exclusion where judicial review is virtually precluded. In all other areas of immigration law, *Yick Wo* is alive and well. This results in some tension in deciding cases where congressional regulations concerning immigration matters raise substantive and procedural due process questions. It is against this background that *Flores v. Meese* must be examined.

**B. Statutory Background**

The Supreme Court has held that Congress has authority to regulate immigration. Congress has delegated the administration of the immigration laws to the Attorney General. The Attorney General is authorized to delegate responsibilities to agencies within the Depart-

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50. *See supra* text accompanying notes 38-45.


52. Fong Yue Ting v. United States, 149 U.S. 698 (1893); The Chinese Exclusion Case, 130 U.S. 581 (1889). *See supra* notes 6-7.

53. Immigration and Nationality Act of 1952 § 103 (codified as amended at 8 U.S.C. § 1103(a) (1988)) (granting the Attorney General authority to "establish such regulations . . . as he [or she] deems necessary" to administer and enforce the immigration laws).
The authority of the Attorney General to detain aliens has been delegated to the INS.\textsuperscript{55}

In 1952, Congress enacted a statutory provision addressing the release or detention of aliens between the time of their arrest and the determination of deportability. This provision, 8 U.S.C. § 1252(a)(1), 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 ... ; or (C) be released on conditional parole.\textsuperscript{56}

To implement this statute, the Attorney General issued regulations in 1963, which are still in effect, providing for the release of aliens arrested on the suspicion of deportability pending further proceedings, and under conditions determined by the INS.\textsuperscript{57} In practice, release was usually granted unless the alien posed a risk to national security or was a flight risk.\textsuperscript{58} No separate national policy existed regarding the release of alien minors in deportation proceedings.\textsuperscript{59} Agency practice was to release minors to any responsible adult "who could care for the child and assure his or her presence at future proceedings."\textsuperscript{60}

In 1984, the Western Region of the INS initiated a new policy to detain minors awaiting deportation hearings unless a parent or legal guardian came for them. In a memorandum implementing the policy,
former Western Region Commissioner Harold Ezell asserted that the
"limits on release were 'necessary to assure that the minor's welfare
and safety is maintained and that the agency is protected against possi­
bile legal liability.' " In establishing the new policy, the Commis­sioner did not cite to any problems that had arisen under the existing
practice.

From 1984 on, the Western Region of the INS released children
arrested for deportation to parents and guardians only, while children
undergoing exclusion proceedings were released to relatives, as well as
parents and guardians. On July 1, 1987, the United States District
Court for the Central District of California in the Flores case held that
this differential treatment of children in exclusion and deportation
proceedings violated equal protection. The district court ordered the
Western Region of the INS to begin releasing minors held for deporta­tion
hearings on the same terms as those minors being held for exclusion
hearings. As a result, the Western Region adopted a uniform
policy of releasing all detained alien minors to parents, relatives, or
legal guardians.

In 1987, the INS published a proposed rule virtually identical to
the Western Region practice, which set forth INS policy regarding
detention and release of juvenile aliens in deportation and exclusion
proceedings and invited comments. In 1988, the INS codified the
Western Region policy into a nationally applicable regulation. The
final rule provided that "[j]uveniles shall be released, in order of pref­
ERENCE, to: (i) A parent; (ii) legal guardian; or (iii) adult relative

61. Flores, 942 F.2d at 1355.
62. Id. Neither the Commissioner's memorandum nor the published proposal, De­
(1991)), which codified the policy into the nationally applicable regulation, cited to any
existing problems under the then current practice of releasing children to any responsible
adult.
63. Deportable aliens are those aliens who have succeeded in gaining entry into the
United States illegally or have committed some type of misconduct prohibited by the immi­
gration laws following entry. Schmidt, supra note 55, at 307. Excludable aliens are those
aliens who have not entered the United States. Id. at 310. Generally, an alien who is
stopped at a land border, seaport, or airport has not entered the United States and may be
held for exclusion proceedings. Id.
64. The equal protection claim was resolved by the district court in Flores by motion.
See Flores v. Meese, 934 F.2d 991, 995 (9th Cir. 1990), vacated, 942 F.2d 1352 (9th Cir.
65. Plaintiffs/Appellees' Supplemental Brief on Rehearing En Banc at 5, Flores v.
Meese, 942 F.2d 1352 (9th Cir. 1991) (No. 88-6249).
(brother, sister, aunt, uncle, grandparent) . . . "67 "In cases where the parent or legal guardian is in INS detention or outside the United States, the juvenile may be released to such person as designated by the parent or legal guardian in a sworn affidavit . . . as capable and willing to care for the juvenile's well-being."68 And, "[i]n 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 . . . ."69

In promulgating this regulation, the INS noted the dramatic increase in the number of unaccompanied minor aliens illegally entering the United States.70 It also recognized that a primary concern in considering whether to detain or release an alien is the likelihood that the alien will appear for future proceedings.71 Yet, in determining to whom a minor alien should be released, its principal concern was for the welfare of the juvenile.72 The INS said the detention rule was necessary because, unless it was able to do a comprehensive "home study" of the proposed custodian, detention would better serve the best interests of the child.73 While release to "just any adult" was precluded in order to safeguard the child's welfare, the INS expressed a lack of expertise and resources to conduct "home studies" for the placement of each child.74 Therefore, a child would only be released to a related adult or a legal guardian.

Several commentators75 suggested an expansion of the list of custodians in the proposed rule to include any responsible adult.76 The INS reiterated that release to any responsible adult would require "home studies" for which they lack funding and expertise.77 Furthermore, the INS pointed out that release to a responsible adult is al-

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68. Id. § 242.24(b)(3).
69. Id. § 242.24(b)(4).
71. Id.
72. Id.
75. See supra text accompanying note 66.
76. See Detention and Release of Juveniles, 53 Fed. Reg. 17,449 (1988) (codified at 8 C.F.R. § 242.24 (1991)). The commentators asserted that the list of custodians was too restrictive and would result in a large number of children being detained. They expressed concern over this since they believed that children's interests in general are best served, not by detention, but by placement in a home or shelter-care environment. Id.
77. Id.
owed in "unusual and compelling circumstances."78 In response to criticism of a lack of guidance regarding the term "unusual and compelling circumstances," the INS stated that the omission was intentional.79 "The intent of the regulation is to provide Service officials with the broadest possible discretion so that each case may be viewed based on a totality of the juvenile's circumstances."80 The INS noted that attempting to define the term would produce the unfavorable result of limiting INS discretion.81

II. FLORES V. MEESE82

A. Facts and Procedural History

Jenny Lissette Flores was detained by the INS as a minor alien awaiting deportation proceedings. Although present in the United States, Flores' mother refused to appear personally to claim custody of her daughter because she feared she would be deported to El Salvador, where civil war waged.83 On July 11, 1985, Flores initiated a class action on behalf of herself and all other children who were being detained under the INS Western Region policy. The plaintiffs posed no risk of flight or harm to the community, had responsible third parties willing to accept custody of them, and were being detained only because no relative or legal guardian was available to receive them upon release.84 After the Western Region policy was codified as a national regulation in 8 C.F.R. § 242.24,85 the suit was maintained as a challenge to that regulation.

The district court granted summary judgment to the plaintiff class.86 The order provided in relevant part:

80. Id.
81. Id.
83. Beth S. Rose, Comment, INS Detention of Alien Minors: The Flores Challenge, 1 GEO. IMMIGR. L.J. 329, 331 (1986) (citing Complaint for Injunctive and Declaratory Relief, and Relief in the Nature of Mandamus at 12, Flores (filed July 11, 1985)).
84. Flores, 942 F.2d at 1357.
85. See supra text accompanying notes 61-81.
Defendants . . . shall release any minor otherwise eligible for release on bond or recognizance to his [or her] parents, guardian, custodian, conservator, or other responsible adult party. Prior to any such release, the defendants may require from such persons a written promise to bring such minor before the appropriate officer or court when requested by the INS.87

In essence, "the order invalidated the blanket detention of minors where a responsible adult could ensure attendance at the deportation hearing . . . ."88

On appeal, the Court of Appeals for the Ninth Circuit vacated the district court order, holding that the detention policy did not implicate any of the plaintiffs' fundamental rights, and that deference to the INS's immigration decisions required approval of the detention policy.89 The panel opinion characterized the right at stake as a substantive due process right "to be released to an unrelated adult," a right the opinion found to be nonfundamental.90 Thus, the court applied a highly deferential standard of review to the INS policy.

Judge Fletcher, in her dissent, asserted that Congress' plenary power extended to decisions regarding whom to admit to the United States, not to the treatment of aliens once the deportation process is underway.91 She also stated that the INS was not entitled to deference in decisions relating to the protection of the children's welfare. Judge Fletcher called for heightened judicial scrutiny because "a quasi-suspect class [was] being deprived of a basic constitutional right."92 She declared that freedom from physical restraint is a fundamental interest at the core of the Due Process Clause.93 She maintained that none of

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87. Flores, 942 F.2d at 1357-58 (referring to an order issued by the district court to the defendant).
88. Id. at 1357. The district court also required a hearing before a neutral and detached official in each case to determine whether release was appropriate and to determine the conditions of release. Id. at 1358. This requirement was based on Gerstein v. Pugh, 420 U.S. 103 (1975), which involved a Fourth Amendment violation in a criminal case. See infra notes 89 & 101.
89. Flores v. Meese, 934 F.2d 991, 1004, 1007 (9th Cir. 1990), vacated, 942 F.2d 1352 (9th Cir. 1991), cert. granted sub nom. Barr v. Flores, 112 S. Ct. 1261 (1992). The court of appeals also held that Gerstein did not apply to civil deportation proceedings. Id. at 1012. See supra note 88. The court adopted the balancing test set out in Mathews v. Eldridge, 424 U.S. 319 (1976), for procedural due process evaluation. Flores, 934 F.2d at 1013. See also infra note 101.
90. Flores, 934 F.2d at 1006.
91. Id. at 1017 (Fletcher, J., dissenting). Judge Fletcher also stated that an administrative hearing would be required under either Mathews v. Eldridge, 424 U.S. 319 (1976), or Gerstein v. Pugh, 420 U.S. 103 (1975). See supra note 88.
92. Flores, 934 F.2d at 1018.
93. Id. at 1020.
the governmental concerns were sufficient enough to override this liberty interest.94

The court of appeals granted plaintiffs' petition for a rehearing en banc and vacated the panel opinion.95 Thereafter, by a vote of seven to four, the Court of Appeals for the Ninth Circuit affirmed the order of the district court.96

B. En Banc Opinion of Judge Schroeder 97

Judge Schroeder, writing for the majority, characterized the plaintiffs' interest at stake as a fundamental right to be free from governmental detention unless there is a significant governmental interest supporting the detention.98 The basis for this fundamental right lies in the habeas corpus guarantee in Article I, Section 9 of the Constitution.99 Judge Schroeder concluded that the plaintiffs' status as children did not affect the analysis of this fundamental right.100 Finally, she found that the governmental purposes in detention were not significant enough to justify an impingement upon the plaintiffs' fundamental right.101

1. Plaintiffs' Liberty Interests

Judge Schroeder recognized that the rights of aliens to due process and equal protection are protected under the Constitution.102 She reasoned that it is appropriate in assessing the nature of an alien's liberty interest to observe how the courts have historically recognized such an interest through habeas corpus proceedings.103 She noted that "a crucial component of the right to personal liberty is the ability to

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94. Id. at 1021-22.
96. Id.
97. Judge Schroeder was joined by Judges Nelson, Canby, and Thompson.
98. Flores, 942 F.2d at 1360.
99. Id. at 1359.
100. Id. at 1362.
101. Id. at 1362-64. Judge Schroeder also reaffirmed the district court order requiring a hearing before an immigration judge for the determination of the terms and conditions of release. She held that this procedural protection was required regardless of whether the court applied the Eldridge or the Gerstein approach. Id. at 1364. See supra notes 88-89.
102. Flores, 942 F.2d at 1359 (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)).
103. Id.
test the legality of any direct restraint that the government places on that liberty.”

The writ of habeas corpus allows a person to challenge the lawfulness of one’s imprisonment and is a key part of the American legal system and the constitutional guarantee of liberty.

Judge Schroeder held that “aliens have a fundamental right to be free from governmental detention unless there is a determination that such detention furthers a significant governmental interest.” This right is secured by the constitutional guarantee of habeas corpus to all individuals, including aliens.

2. Plaintiffs’ Liberty Interests as Children

Judge Schroeder next considered what effect the juvenile status of the plaintiffs had on the analysis and protection of their liberty interests. She began by noting that the Constitution protects the rights of children to due process of law under In re Gault.

In addition to relying on In re Gault, the majority stated that there is a “general rule that freedom from institutional confinement should be the norm, from which any deviation must be supported by specific reasons.” Judge Schroeder cited commentators who have observed that “a child’s ‘right to be treated in the manner least restrictive to . . . liberty . . . has its roots in the well-settled concept that, while constitutional rights may be restricted by the state for legitimate purposes, the restriction must be no greater than necessary to achieve . . . ”

104. Id.
106. Flores, 942 F.2d at 1359.
107. Id. (citing Wong Wing v. United States, 163 U.S. 228 (1896)).
108. Id. at 1360. Judge Schroeder relied on two habeas corpus cases, Carlson v. Landon, 342 U.S. 524 (1952), and United States v. Salerno, 481 U.S. 739 (1987), for the proposition that a person may not be detained unless it would further some important governmental interest or prevent harm to the community. The Carlson Court found that the petitioners, who were being detained due to their membership in the Communist party, should not be released since they posed “a menace to the public interest.” Carlson, 342 U.S. at 541. Similarly, in Salerno, the pretrial detention of arrestees was upheld because the petitioners were “potentially dangerous.” Salerno, 481 U.S. at 748. See infra note 145.
109. Flores, 942 F.2d at 1360.
110. Id. at 1361 (citing In re Gault, 387 U.S. 1 (1967)). The court relied on Gault without any further discussion and without noting that Gault refers only to the procedural due process rights of children.
111. Id.
these purposes.' ”112 Thus, she deduced that institutional confinement of a child by the government should be a last resort.113

Judge Schroeder concluded that the plaintiffs' minority status did not materially alter their liberty interest.114 She asserted that the INS was incorrect when it stated that the plaintiffs have no fundamental liberty interest at stake. The constitutional interest is not the "right to be released to an unrelated adult."115 It is the right to be free from governmental detention unless there is a significantly compelling governmental interest to support the detention. Indeed, Judge Schroeder stated that the "right to be released to an unrelated adult" was merely the remedy ordered by the district court.116 The appropriateness of the remedy was contingent upon the significance of the governmental purposes involved.117

3. Governmental Purposes Involved

Since Judge Schroeder found a fundamental right to be at stake, she required that the governmental purposes behind the regulation be significant.118 She proceeded under this heightened standard of review.

The INS articulated two reasons for the detention: (1) the child's interests would be better served by detention than by release to an unrelated adult who cannot be investigated; and (2) if it released a child to an unrelated adult without performing a detailed "home study," it could be subject to liability in the event some harm came to the child.119 Judge Schroeder noted that the detention in Flores did not serve the traditional purposes of punishment, ensuring attendance at further proceedings, or avoiding an identifiable risk of harm.120 Judge Schroeder declared that the first INS reason contradicted the Supreme Court's decision in In re Gault, that "children should be treated in a manner least restrictive of liberty."121 This reason was also contrary to the Supreme Court's decision in Schall v. Martin,122

112. Id. (quoting ROBERT M. HOROWITZ & HOWARD A. DAVIDSON, LEGAL RIGHTS OF CHILDREN § 10.10, at 431 (1984)).
113. Id.
114. Id. at 1362.
115. Id.
116. Id.
117. Id.
118. Id.
119. Id.
120. Id.
121. Id.
122. 467 U.S. 253 (1984). In Schall v. Martin, the Supreme Court upheld a New
which indicated that a foreseeable risk of harm was necessary to justify detention.\textsuperscript{123}

Judge Schroeder attacked the INS's reasoning that since the agency was unable to do foster care facility evaluations, the best interests of the child lay in detention rather than release.\textsuperscript{124} She found that the Constitution required the opposite conclusion.\textsuperscript{125} As a result, the INS may not assume that detention is in the best interests of the plaintiffs without affirmative evidence that the child would be placed in danger if released.\textsuperscript{126} Judge Schroeder noted that the INS had the authority to determine whether the adult assuming custody will ensure the child's attendance at future proceedings and whether release of the child poses a danger to the community or harm to the child.\textsuperscript{127}

Judge Schroeder found little merit in the second INS justification for the detention policy, namely, fear of liability if anything happened to a child it released to an unrelated adult without a "home study."\textsuperscript{128} Under \textit{DeShaney v. Winnebago County Department of Social Services},\textsuperscript{129} a state agency was held not liable for allowing a child to remain in the custody of an adult, despite clear evidence that the child was in danger. Judge Schroeder concluded that \textit{DeShaney} and several other cases\textsuperscript{130} indicated that "governmental agencies face far greater exposure to liability by maintaining a special custodial relationship than by releasing children from... custody."\textsuperscript{131} She drew additional support from \textit{International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.},\textsuperscript{132} where the Supreme Court refused to accept an argument that the remote possibility of tort liability justified a policy that vio-

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York statute authorizing pretrial detention of certain juveniles. The Court claimed that pretrial detention served the legitimate interest of protecting a child from the consequences of criminal activity that they might engage in if they were released prior to trial. \textit{Id.} at 274.

\textsuperscript{123} Flores, 942 F.2d at 1362.

\textsuperscript{124} \textit{Id.} at 1363.

\textsuperscript{125} \textit{Id.} (citing \textit{In re Gault}, 387 U.S. 1 (1967)).

\textsuperscript{126} \textit{Id.}

\textsuperscript{127} \textit{Id.}

\textsuperscript{128} \textit{Id.}

\textsuperscript{129} 489 U.S. 189 (1989).

\textsuperscript{130} Youngberg v. Romeo, 457 U.S. 307, 316-17 (1982) (stating that a state may acquire a constitutional duty to ensure a person's safety when that person is in state custody); LaShawn A. v. Dixon, 762 F. Supp. 959, 996 (D.D.C. 1991) (holding that under \textit{DeShaney} and \textit{Youngberg}, a state agency may be liable where it fails to ensure the safety and well-being of children in its custody). See also Laura Oren, \textit{DeShaney's Unfinished Business: The Foster Child's Due Process Right to Safety}, 69 N.C. L. REV. 113 (1990).

\textsuperscript{131} Flores, 942 F.2d at 1363.

lated individual rights.133

Judge Schroeder then acknowledged that agencies are entitled to some deference when making determinations relating to an area of their expertise.134 Thus, courts owe deference to INS decisions concerning matters of immigration. Judge Schroeder concluded, however, that the justifications asserted in the case related to child welfare, not an area of INS expertise and, consequently, its decision was not entitled to any deference.135 In fact, she observed that the policy at issue contravened Congress' determination that institutional detention of juveniles was disfavored.136

In reaffirming the district court's order, Judge Schroeder noted that release to a responsible adult was "an appropriate means to prevent incarceration of juveniles where such incarceration serves no legitimate purpose of the INS."137 The district court ordered release to a responsible adult only if the child would have been eligible for release to a relative under the challenged policy. Judge Schroeder concluded that the order took into account the need to secure attendance at future proceedings, allowed the INS to order detention if there were valid reasons, and allowed room for the INS to determine if a party who was willing to take custody of a child was "responsible."138

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133. Flores, 942 F.2d at 1364 (quoting Johnson Controls, Inc., 111 S. Ct. at 1208).
134. Id. at 1362.
135. Id. at 1365 (citing Hampton v. Mow Sun Wong, 426 U.S. 88, 114-15 (1976)).
136. Id.
137. Id. at 1364.
138. Id. There were three separate concurring opinions in Flores. Judge Tang, concurring in the majority opinion, asserted that the liberty right to be free from governmental detention was a fundamental right found not only in the Constitution's habeas corpus guarantee, but also in the Fifth Amendment's Due Process Clause. Id. at 1365 (Tang, J., concurring). He wrote separately to emphasize that two distinct deprivations of liberty were at stake—first, the initial decision to detain and, second, the release conditions imposed on children once in detention. Id. at 1370.

Judge Norris, in a separate concurring opinion based on reasoning similar to Judge Fletcher's dissent to the court of appeal's panel decision, asserted that the INS policy not only violated due process, but did so "flagrantly." Id. (Norris, J., concurring). See also supra text accompanying notes 91-94.

Judge Rymer concurred in part and dissented in part. She maintained that the entire case could be decided on a procedural level. Flores, 942 F.2d at 1372 (Rymer, J., concurring in part and dissenting in part). She asserted that the INS's regulation failed for lack of minimum procedures comporting with due process. Id. First, there was no provision for resolving custodial status when no relative was able to take custody of a child. Nor was there a time limit on continued detention. Second, there was no provision for a prompt hearing before a neutral hearing officer. Id. at 1375. Judge Rymer would not require release to any responsible adult but would uphold 8 C.F.R. § 242.24(b)(4) as written. She would also strike the majority's requirement of an administrative hearing and would, instead, require a prompt hearing before a neutral officer to determine whether the minor should be released under 8 C.F.R. § 242.24. Id. at 1377.
C. Dissenting Opinion of Chief Judge Wallace

Judge Wallace began by disagreeing with the majority's broad definition of the liberty right at stake. He asserted that such an expansive definition "conflicts with the Supreme Court's warning that rights . . . should be defined narrowly for the purposes of substantive due process balancing." The only liberty right involved is "the right to be released to unrelated adults."

Judge Wallace stated that there is no case in which a court has ever acknowledged a fundamental substantive due process right to physical liberty. This is because procedural due process analysis provides protection against any unwarranted deprivations of physical liberty. He adopted Justice Scalia's words in *Cruzan v. Director, Missouri Department of Health*:

"The text of the Due Process Clause does not protect individuals against deprivations of liberty simpliciter. It protects them against deprivations of liberty 'without due process of law.'"

Judge Wallace found that the habeas corpus cases the majority cited as supporting a "fundamental right to be free from government detention" merely established the proposition that aliens may challenge a detention through habeas corpus proceedings. The exist-

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140. Id. (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

141. Id.

142. Id. at 1378.


144. *Flores*, 942 F.2d at 1378 (quoting *Cruzan*, 110 S. Ct. at 2859 (Scalia, J., concurring)).

145. Id. (quoting the majority opinion in *Flores*, 942 F.2d at 1360). Judge Wallace asserted that the majority's reliance on United States v. *Salerno*, 481 U.S. 739 (1987), and *Carlson v. Landon*, 342 U.S. 524 (1952), was misplaced. *Flores*, 942 F.2d at 1378-79. See *supra* note 108. The *Carlson* Court stated that INS discretion to detain individuals could "only be overridden where it is clearly shown that it 'was without a reasonable foundation.'" *Carlson*, 342 U.S. at 540-41. Judge Wallace deduced that *Carlson* actually undermined the majority's broad characterization of the right and subsequent application of heightened scrutiny. *Flores*, 942 F.2d at 1379.

While the majority cited *Salerno* in support of its holding that the INS must come forward with a "significant" reason to justify its detention policy, Judge Wallace argued that *Salerno* was not on point. *Salerno* involved a blanket detention of certain felons whereas the regulation in *Flores* only prohibits release of alien minors to unrelated adults without INS approval. Id. Moreover, the Court's due process analysis in *Salerno* involved adults facing criminal proceedings. In *Flores*, the rights of juveniles are at issue and Judge Wallace maintained that these rights are not necessarily coextensive with those of adults. Id. Finally, "*Salerno* did not squarely hold that freedom from pretrial detention was a fundamental right." Id.
ence of a forum is distinct from the definition of the right at stake. 146

Judge Wallace concluded that since no fundamental right was at stake the regulation need only survive minimum scrutiny, which requires it be rationally related to any legitimate end of government. 147 Judge Wallace contended that the INS's goals of ensuring the safety of children and avoiding potential liability for harm that might occur to a child if released, were legitimate ends to which the regulation was rationally related. 148 Thus, the INS regulation did not violate substantive due process.

Judge Wallace further criticized the majority for failing to consider the special circumstances of the case. He asserted that the court's analysis should focus on both the immigration context of the case, where judicial review is severely limited, and the fact that "a liberty interest is weighed differently for minors in comparison with adults." 149

In speaking of the immigration context of the case, Judge Wallace noted that the power over immigration is vested in the political branches. 150 The Supreme Court has long recognized Congress' plenary power to control matters relating to immigration. 151 "Because Congress's power over immigration is plenary and political in nature, the exercise of that power is subject "‘only to narrow judicial review.'" 152

Judge Wallace observed that as a result of Congress' plenary power and the narrowness of judicial review, 153 substantive due process rights of aliens have been limited. Indeed, "even if the right at issue is fundamental in character, the court should not apply strict scrutiny review to an immigration regulation." 154 Thus, even if the majority was correct in assuming the case involved a fundamental right, Judge Wallace argued that rational review was all that was required to evaluate the regulation. 155

Judge Wallace would defer to the INS's estimation of the risks

146. Flores, 942 F.2d at 1378.
147. Id. at 1380.
148. Id.
149. Id.
150. Id. (citing Mathews v. Diaz, 426 U.S. 67, 81-82 (1976)).
151. Id. (citing Fiallo v. Bell, 430 U.S. 787, 792 (1977)).
152. Id. (quoting Fiallo, 430 U.S. at 792 (quoting Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n.21 (1976); Diaz, 426 U.S. at 81-82)).
154. Flores, 942 F.2d at 1381 (citing Adams v. Howerton, 673 F.2d 1036 (9th Cir.), cert. denied, 458 U.S. 1111 (1982)).
155. Id.
involved in releasing children to third parties.\textsuperscript{156} He maintained that the majority's dismissal of the INS's views on child safety merely because "[c]hild welfare is not an area of INS expertise," was far too limited a view of the deference owed the INS.\textsuperscript{157} The INS's effort to protect detained children was significant enough to support the regulation.\textsuperscript{158}

Judge Wallace also found merit in the INS's claim that by releasing children to unrelated adults, they would be exposed to possible tort liability.\textsuperscript{159} According to Judge Wallace, the \textit{DeShaney} case, upon which the majority relied, did not remove the possibility that the INS would be held liable for releasing alien minors to unrelated adults. Judge Wallace pointed out that the \textit{DeShaney} Court asserted that if the State had removed the little boy from his parents and put him in a foster home, an affirmative duty to protect may have arisen.\textsuperscript{160} Thus, INS liability is a possibility if a child is harmed after being placed in the care of an unrelated adult.

Although children are persons under the Constitution and they have fundamental rights,\textsuperscript{161} Judge Wallace asserted that the majority failed to acknowledge that these rights are not coextensive with those of adults.\textsuperscript{162} In \textit{Schall}, the state was allowed to "restrict a child's liberty interest in order to secure that child's welfare."\textsuperscript{163} The Court noted that while the juvenile's interest in freedom from institutional detention was substantial, it must be qualified by the fact that children are always in some form of custody. Children are subject to parental control and if this fails, the State has a role as \textit{parens patriae}.\textsuperscript{164} Judge Wallace concluded that, in this light, "the juvenile's liberty interest may . . . be subordinated to the State's 'parens patriae' interest in preserving and promoting the welfare of the child."\textsuperscript{165} Judge Wallace contended that the INS regulation concerned itself with the welfare of alien minors and was an exercise of governmental power in the role of

\begin{itemize}
\item \textsuperscript{156} Id.
\item \textsuperscript{157} Id.
\item \textsuperscript{158} Id. at 1382.
\item \textsuperscript{159} Id.
\item \textsuperscript{160} Id. (citing \textit{DeShaney} v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 201 n.9 (1989)).
\item \textsuperscript{161} \textit{Tinker} v. Des Moines Indep. Community School Dist., 393 U.S. 503, 511 (1969).
\item \textsuperscript{162} \textit{Flores}, 942 F.2d at 1383 (citing \textit{Schall} v. Martin, 467 U.S. 253, 263-66 (1984); \textit{Bellotti} v. Baird, 443 U.S. 622, 633-39 (1979)).
\item \textsuperscript{163} Id. (referring to \textit{Schall} v. Martin, 467 U.S. 253 (1984)). \textit{See supra} note 122.
\item \textsuperscript{164} \textit{Flores}, 942 F.2d at 1383 (citing \textit{Schall}, 467 U.S. at 265).
\item \textsuperscript{165} Id. (quoting \textit{Schall}, 467 U.S. at 265).
\end{itemize}
Judge Wallace criticized the majority for relying on *In re Gault* for the proposition that "'children should be treated in a manner least restrictive of liberty.'" Not only did *In re Gault* involve a procedural due process challenge rather than a substantive due process challenge but, since it has been decided, the Supreme Court has clearly indicated that the rights of children are different from those of adults. Furthermore, Judge Wallace dismissed the majority's reliance on federal and state policies favoring avoidance of institutionalization as being irrelevant.

In sum, Judge Wallace concluded that "the diminished liberty interests of minors should be factored into [the] constitutional analysis." Judge Wallace asserted that the regulation, 8 C.F.R. § 242.24, was a valid exercise of the INS's authority for the legitimate purpose of protecting the best interests of detained children.

### III. Analysis

While many commentators have advocated the abrogation of the plenary power doctrine in matters of immigration, their efforts have gone largely ignored by the judiciary. Yet, there are indications that at least some of the lower courts are becoming dissatisfied with the doctrine. Although they are constrained by precedent to acknowledge the plenary power doctrine, they are increasingly finding ways to circumvent it in order to reach decisions consistent with the Constitution. No court has provided a searching analysis as to why the plenary power doctrine exists and why it should isolate immigration law from constitutional law. Such an exercise would reveal that the theories underlying the doctrine do not support the blanket assumption that all congressional immigration decisions should be shielded from judicial review.

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166. *Id.*
167. *Id.* (quoting the majority opinion in *Flores*, 942 F.2d at 1362).
168. *Id.* (referring to *Schall*, 467 U.S. at 265).
169. *Id.* at 1383.
170. *Id.* at 1384.
171. *Id.*
173. See infra text accompanying notes 174-86.
A. The Impact of the Plenary Power Doctrine on the Application of Constitutional Principles in Immigration Cases

While the plenary power doctrine has prevented aliens from receiving constitutional protection, especially in the context of deportation and exclusion, courts have struggled to provide some judicial review by refraining from discussing or relying on constitutional principles. "Instead, they reach[] results favorable to aliens by interpreting statutes, regulations, or other forms of subconstitutional immigration law."174 In these cases, courts rely on "phantom constitutional norms," which avoids the direct application of constitutional principles prohibited by the plenary power doctrine.175 The application of these "phantom norms" results in much more favorable decisions for aliens than would result if actual constitutional law was applied in cases involving the plenary power doctrine.176 Thus, many courts faced with blatant constitutional violations that would be upheld under the plenary power doctrine have found a way to reach decisions consistent with both the plenary power doctrine and Yick Wo v. Hopkins177 and its progeny.178 The Flores v. Meese179 court may also be viewed as a court that has strained to reach a decision consistent with the plenary power doctrine and Yick Wo.

In Rodriguez-Fernandez v. Wilkinson,180 an excludable Cuban alien was placed in indefinite detention because the Cuban government refused to readmit him.181 The petitioner alleged violations of both the Eighth Amendment and the Due Process Clause of the Fifth Amendment. The lower court held that while the petitioner could not claim these constitutional rights because of the plenary power doctrine, the denial of parole was an abuse of discretion because it violated principles of international law.182 The Tenth Circuit affirmed on the ground that the statute did not provide for indefinite detention.183

174. Motomura, supra note 11, at 560.
175. Id. at 549. Motomura coined the term "phantom constitutional norms" and expressed appreciation to T. Alexander Aleinikoff for suggesting it. Id. at n.13.
176. Id. at 564-65.
177. 118 U.S. 356 (1886).
178. For a discussion of some other ways courts have avoided the application of the plenary power doctrine, see Legomsky, supra note 19, at 296-303.
180. 654 F.2d 1382 (10th Cir. 1981).
181. Id. at 1384.
"[T]he heart of the opinion's reasoning was dictum, based on a phan-
tom norm of Fifth and Eighth Amendment protections for detained
would-be entrants that would render indefinite detention of these ex-
cludable Cubans unconstitutional punishment." The court ac-
nowledged that while the plenary power doctrine normally precludes
constitutional challenges, indefinite detention closely resembled pun-
ishment that must comply with the due process guarantees of the Fifth
Amendment. So while the case was decided on the subconstitu-
tional ground that the INS lacked statutory authority for indefinite
detention, it was based on constitutional reasoning. As a result, the
court was able to reach a favorable decision for the aliens by avoiding
the direct application of constitutional law in order to preserve the
plenary power doctrine, and instead interpreted the statute so as to
remain faithful to constitutional principles.

Other appellate decisions have consistently rejected Fifth and
Eighth Amendment protection for indefinitely detained aliens due to
the plenary power doctrine. For example, in Fernandez-Roque v. Smith,
a case involving the indefinite detention of Cuban nationals,
the United States Court of Appeals for the Eleventh Circuit reversed a
district court decision that adopted reasoning similar to the constitu-
tional dictum in Rodriguez-Fernandez. The Eleventh Circuit held
that parole decisions are within the political branches' plenary power
because they are part of the admissions process. Thus, it refrained
from Fifth and Eighth Amendment constitutional analysis.

Detention has been held to be a part of the deportation and ad-
mission process. As a result, the plenary power doctrine may apply
to detention decisions with the same force as to deportation decisions.
This would leave little room for constitutional challenges in detention
decisions. The court in Fernandez-Roque v. Smith recognized this
when it held that since there is no constitutional right to admission to
this country, and parole is part of the admission process, there is no

184. Motomura, supra note 11, at 593 (citing Rodriguez-Fernandez, 654 F.2d at
1386).
185. Id. at 594.
186. Id.
187. Id. at 595.
188. 734 F.2d 576 (11th Cir. 1984).
Fernandez-Roque v. Smith, 734 F.2d 576, 582 (11th Cir. 1984).
191. See Carlson v. Landon, 342 U.S. 524, 538 (1952); Wong Wing v. United States,
192. 734 F.2d 576 (11th Cir. 1984).
constitutional right to parole as well.\textsuperscript{193} Thus, it applied a deferential abuse of discretion standard of review.

The Fernandez-Roque court relied heavily on Jean v. Nelson.\textsuperscript{194} The Jean case presents a special problem. A class of Haitian asylum applicants claimed that an INS detention policy unconstitutionally discriminated on the basis of race and national origin.\textsuperscript{195} The district court and an Eleventh Circuit panel agreed in dictum that the plenary power doctrine did not apply because plaintiffs sought parole and not admission.\textsuperscript{196} The lower court, however, rested its decision on the subconstitutional ground that the government's detention policy was invalid because it had not been adopted properly under the Administrative Procedure Act.\textsuperscript{197} The Eleventh Circuit panel affirmed on this ground and on the additional ground that the statute itself prohibited discrimination.\textsuperscript{198} The Eleventh Circuit sitting en banc disagreed with the constitutional dictum of the district court and the panel opinion and held that aliens have no greater right to seek parole than to seek admission.\textsuperscript{199} Relying on Shaughnessy v. United States ex rel. Mezei\textsuperscript{200} as compelling it to reject the plaintiffs' constitutional claims, it upheld the detention policy.\textsuperscript{201}

In its review of the Jean case, the Supreme Court interpreted the statute, although neutral on its face, to bar any discrimination based on race or national origin.\textsuperscript{202} It refused to address the constitutional issue of whether aliens can invoke the Fifth Amendment's Due Process Clause to challenge a refusal of parole. However, there was a strong dissent, finding that the statute provided no actual constraints on the power to discriminate and criticizing the majority for failing to reach the constitutional issue.\textsuperscript{203} Indeed, all three lower court opin-

\textsuperscript{193} Id. at 582.
\textsuperscript{196} Id. at 998; Jean, 711 F.2d at 1484-85.
\textsuperscript{198} Jean, 711 F.2d at 1474-85.
\textsuperscript{199} Jean, 727 F.2d at 963.
\textsuperscript{201} Jean, 727 F.2d at 971.
\textsuperscript{203} See id. at 858-82 (Marshall, J., dissenting).
ions saw the only possible restrictions on discrimination as coming from the Constitution, not the statute. The Supreme Court could have rested its decision on constitutional grounds but had it done so, it would have significantly restricted the plenary power doctrine. The Court did not want to overrule or limit the plenary power doctrine as set out in Knauff and Mezei, but it wanted to reach a decision consistent with notions of constitutional fairness. Thus, it left the plenary power doctrine intact, and relied on a “phantom constitutional norm” of antidiscrimination.

Flores v. Meese can be seen as a reverse “phantom constitutional norm” decision. Although the court applied constitutional principles, it successfully avoided pitting the plenary power doctrine against constitutional law. In this respect, the court followed a long line of cases that isolate immigration law from constitutional norms and principles.

The Flores court avoided the plenary power doctrine by asserting that the INS was owed no deference in the case because “[c]hild welfare is not an area of INS expertise.” Yet, the majority overlooked the fact that 8 C.F.R. § 242.24 is a detention regulation and “[d]etention is necessarily a part of . . . deportation procedure.” By avoiding this issue, the Flores majority accomplished two things. First, it took the case out of the reach of the plenary power doctrine and, second, it avoided recent controversy over whether detention provisions are subject to the plenary power doctrine.

Judge Fletcher, in her dissent, asserted that when the INS acts to determine how those awaiting deportation are to be treated, as well as when it acts in the interest of alien children, there is no claim to deference. This, however, implies that there is no deference to detention decisions of the INS. Such an assertion ignores the Supreme Court’s

204. Motomura, supra note 11, at 592 (citing Louis, 544 F. Supp. at 998; Jean, 711 F.2d at 1483-85; Jean, 727 F.2d at 967-75).
205. Id. at 592.
206. Id. at 592-93.
indication that detention is a part of deportation procedure.\textsuperscript{211}

The en banc court, in the majority opinion of Judge Schroeder, did not agree with Judge Fletcher's assertion that the plenary power doctrine does not extend to determinations involving the treatment of those awaiting deportation hearings (i.e., detention regulations).\textsuperscript{212} Instead, the majority relied solely on the notion that the plenary power doctrine does not extend to matters of child welfare.\textsuperscript{213} Thus, the court refrained from deciding whether aliens have rights in detention proceedings. In this way, the court declined to limit or overrule \textit{Mezei}, much as the Supreme Court did in \textit{Jean v. Nelson}.\textsuperscript{214} It preserved the plenary power doctrine and was able to employ constitutional analysis by reaching the questionable conclusion that the plenary power doctrine was not implicated in this case.

Similar to courts that deny constitutional rights because of the applicability of the plenary power doctrine, yet decide cases on "phantom constitutional norms," the \textit{Flores} court achieved the same result. But it did so conversely by finding that the plenary power doctrine did not apply and then proceeding to reach the issue of constitutional rights. In both instances, sympathetic decisions for aliens may be reached. In both instances, the separation of immigration law from constitutional law is preserved.

Although the \textit{Flores} court took a progressive approach in defining fundamental rights for aliens and found a way to apply constitutional principles to immigration law, it provided no analysis as to why the plenary power doctrine did not apply to the \textit{Flores} case. It disposes of the plenary power doctrine in one sentence, asserting that "[c]hild welfare is not an area of INS expertise and its decisions in this area are not entitled to any deference."\textsuperscript{215} While the result the \textit{Flores} court reached was correct, it should have provided more analysis in reaching the conclusion that the plenary power doctrine was not applicable. In particular, the court should have looked to see if the purposes behind

\begin{footnotes}
\footnote{211. Carlson, 342 U.S. at 538. It is unclear whether the Supreme Court's indication that detention is a part of deportation procedure means that all detention requirements are entitled to deference under the plenary power doctrine. The Supreme Court avoided this issue in \textit{Jean v. Nelson}. For a discussion of \textit{Jean}, see supra text accompanying notes 194-206. For examples of the lower courts' approach to this issue, see supra note 209.}

\footnote{212. For a brief discussion of Judge Fletcher's opinion, see supra text accompanying notes 91-94.}

\footnote{213. Flores, 942 F.2d at 1362.}

\footnote{214. See supra text accompanying notes 202-06.}

\end{footnotes}
the plenary power doctrine were present in Flores to warrant judicial deference.

B. A Reassessment of the Plenary Power Doctrine

The plenary power of Congress in matters of immigration has been firmly established.\(^{216}\) The Supreme Court has accepted this proposition over the years without much discussion, often merely referring to the overwhelming precedent supporting the plenary power thesis.\(^{217}\) What started rather innocuously in The Chinese Exclusion Case\(^{218}\) has grown to be one of the most firmly embedded doctrines in legal history. The reasons underlying the plenary power doctrine have never been thoroughly examined by the Court for validity or continued relevance. There are three predominant theories supporting the plenary power doctrine: the sovereignty theory, the foreign affairs theory, and the membership theory. Each of these will be examined in turn.

1. The Sovereignty Theory

The Constitution is silent on immigration. In The Chinese Exclusion Case, the Supreme Court inferred the power to regulate immigration as inherent in the country's national and international sovereignty.\(^{219}\) Justice Field observed:

To preserve its independence, and give security against foreign aggression . . . is the highest duty of every nation and . . . all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us.\(^{220}\)

Thus, the implied power to regulate immigration is necessary to protect against foreign aggression. Yet, even if a power is inherent, it does not necessarily follow that it may be exercised free of constitutional restraint.\(^{221}\) Indeed, in his dissent in Harisiades v. Shaughnessy,\(^{222}\)

\(^{216}\) See supra text accompanying notes 6-30.


\(^{218}\) 130 U.S. 581 (1889). For a discussion of The Chinese Exclusion Case, see supra note 6.

\(^{219}\) The Chinese Exclusion Case, 130 U.S. at 603-04.

\(^{220}\) Id. at 606.

\(^{221}\) Monrad, supra note 5, at 858.

\(^{222}\) 342 U.S. 580 (1952).
Justice Douglas noted "[t]he power of deportation is . . . an implied one. The right to life and liberty is an express one. Why this implied power should be given priority over the express guarantee of the Fifth Amendment has never been satisfactorily answered."\(^{223}\) Other powers inherent in national sovereignty are subject to judicial review.\(^{224}\) Hence, national sovereignty in itself is not a justification for precluding judicial review.

The modern rationale for inherent powers of a sovereign state involves the concept of self-preservation.\(^{225}\) *The Chinese Exclusion Case* implied that restrictions on immigration were a matter of national security.\(^{226}\) Considering the underlying concerns of sovereignty, it would be logical to require that these concerns actually be present before allowing Congress the plenary power to treat aliens contrary to the Constitution. It is doubtful that all immigration decisions implicate national security or self-preservation concerns. Yet, all immigration decisions are deferred to by the judiciary. Indeed, *The Chinese Exclusion Case* may be seen as involving a discriminatory statute based on a general prejudice against persons of Asian ancestry, rather than on national security or self-preservation concerns.\(^{227}\)

If the reasons underlying the plenary power doctrine are not present in a particular case, it makes little sense to require the application of the doctrine. In *Flores*, the self-preservation and national security concerns of a sovereign state are not at issue. The release of children awaiting deportation hearings to a juvenile facility or church group hardly conjures up images of a threat to national security.

While the state may want to control the number of aliens it admits as a matter of self-preservation, this issue is not a concern in *Flores*. The children will eventually have a deportation hearing. It is at this time that the state may act on its concern to limit the influx of immigrants. Detention prior to the hearing is irrelevant to the ultimate decision of who and how many to admit.\(^{228}\) Thus, in *Flores* the

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223. Id. at 599 (Douglas, J., dissenting).
224. For example, the implied federal power to conduct foreign relations is subject to judicial review. Monrad, supra note 5, at 858. Yet, some foreign relations decisions are deferred to by the judiciary. See infra note 233.
225. Nafziger, supra note 172, at 816.
227. Legomsky, supra note 19, at 289. Indeed, Justice Field, who authored the majority opinion in *The Chinese Exclusion Case*, attacked the Chinese as a race just a few years earlier in *Chew Heong v. United States*, 112 U.S. 536, 560-78 (1884) (Field, J., dissenting).
228. Judge Fletcher made a similar observation in her dissenting opinion to the *Flores* panel decision. See supra text accompanying notes 91-94. She implied that detention
traditional theory of the rights of a sovereign state is not present to support the application of the plenary power doctrine. The current status of the plenary power doctrine does not allow the above inquiry and, instead, prevents meaningful judicial review of all immigration regulations.

2. The Foreign Affairs Theory

The second theory in support of the plenary power doctrine is that the constitutionality of immigration regulations is a political question requiring judicial deference because foreign relations are implicated. Foreign policy is implicated because immigration decisions involve citizens of a foreign country on whose behalf the foreign country may become involved. Indeed, the plenary power cases often refer to foreign affairs as a justification for the plenary power doctrine.

decisions are not owed the same deference as deportation decisions. Flores v. Meese, 934 F.2d 991, 1015 (9th Cir. 1990) (Fletcher, J., dissenting), vacated, 942 F.2d 1352 (9th Cir. 1991), cert. granted sub nom. Barr v. Flores, 112 S. Ct. 1261 (1992). Judge Fletcher's argument does not go far enough. She did look to see if the reasons supporting the plenary power doctrine were present in Flores to warrant judicial deference and found that the detention regulation did not implicate any foreign policy issues, nor did it implicate a national security risk. Id. at 1018. Thus, she concluded that judicial deference is not necessary in detention decisions and conversely implied that deference is necessary in deportation decisions. Id. Rather than making the blanket assumption that all detention decisions should be reviewed by the judiciary and all deportation decisions should not, a case-by-case approach to both detention and deportation decisions would be better. In that way, deference to Congress would be ensured where national security concerns were really at issue, whether in the deportation or detention context.

229. Legomsky, supra note 19, at 261. One traditional view of the political question doctrine assumes that there are certain constitutional questions that are inherently nonjusticiable. Laurence H. Tribe, American Constitutional Law 97 (2d ed. 1988). These political questions concern matters as to which the political branch must have the final say, rather than the courts. The Supreme Court retains the power to determine whether Congress' actions are authorized by the Constitution. Id. Another view of the political question doctrine requires federal courts to determine whether constitutional provisions that litigants want enforced are capable of being interpreted as guarantees of enforceable rights. Id. at 106.

Sometimes the Supreme Court uses the political question doctrine to avoid review on the merits of some foreign policy issues. See id. at 102-06. "But the Supreme Court made clear that the classification of a decision as 'political' requires a 'discriminating inquiry in the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing.'" Legomsky, supra note 19, at 265 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)). Three characteristics of political question cases make judicial deference desirable: 1) issues that hinge on "'standards that defy judicial application'"; 2) issues that require exercise of a discretionary power vested in a coordinate branch of government; or 3) issues that "'uniquely demand single-voiced statements of the Government's views.'" Id. (quoting Baker, 369 U.S. at 211). Legomsky would require courts to consider each of the Baker facts in turn to see if they are present in any particular immigration decision before deferring to Congress under the plenary power doctrine. Id. at 269.

230. Legomsky, supra note 19, at 262.
and judicial deference.\textsuperscript{231}

Certain immigration decisions will undoubtedly implicate foreign policy and should be deferred to by the judiciary. This does not mean, however, that all immigration decisions inherently affect foreign policy. Again, as with the sovereignty theory, before summarily dismissing the prospect of judicial review the judiciary should make an inquiry to determine if foreign policy would actually be interfered with if it reviewed the regulation.

The \textit{Flores} case could be viewed as implicating foreign policy. The release of an alien child to a party whom the INS has not investigated may affect relations with a foreign country if any harm befalls the child. On the other hand, the detention of alien children might similarly implicate foreign policy. If the parent is present in the United States but unwilling to come forward for fear of being deported,\textsuperscript{232} the parent may ask his or her home country to become involved and demand release to a non-related adult or church group. Furthermore, if harm befalls a child while in INS detention, more friction might be caused between a foreign country and the United States than if the child was harmed while in the care of a stranger. Thus, release of alien children may implicate foreign policy less than any other course of action open to the INS.

While foreign relations concerns may require deference, precedent\textsuperscript{233} indicates that it can be done on a case-by-case basis. Such concerns do not require an absolute limit on judicial review. In \textit{Perez}

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\item That was the precise situation in \textit{Flores}. See \textit{supra} text accompanying note 83.
\item There are some cases implicating foreign relations where judicial review has been allowed. See New York Times Co. v. United States, 403 U.S. 713 (1971) (refusing the government's request to prevent publication of classified documents dealing with the United States' activities in the Vietnam war); Schneider v. Rusk, 377 U.S. 163 (1964) (holding that Congress could not withdraw citizenship from naturalized citizens who maintained continuous residence for three years in their home countries); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (holding that the unauthorized seizing of private property by the President, even in furtherance of international military policy, was unconstitutional since the seizure of property is an inherently congressional power).
\item There have also been cases where foreign policy considerations have precluded review. See Goldwater v. Carter, 444 U.S. 996, 1003 (1979) (vacating a court of appeals decision that the President had the power to terminate a treaty with Taiwan without the approval of the Senate because the President's power to abrogate treaties was a "political" question and therefore nonjusticiable); Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948) (holding that federal courts could not apply ordinary procedures for judicial review of administrative action in dealing with presidential orders concerning international air routes because the judiciary lacked the aptitude to review such decisions).
\end{enumerate}
v. Brownell,\textsuperscript{234} the Court stated:

Broad as the power in the National Government to regulate foreign
affairs must necessarily be, it is not without limitation. The restric-
tions confining Congress in the exercise of any of the powers ex-
pressly delegated to it in the Constitution apply with equal vigor
when that body seeks to regulate our relations with other
nations.\textsuperscript{235}

This language is indicative of the Supreme Court's attitude concerning
judicial deference where foreign affairs are implicated.

In \textit{Kennedy v. Mendoza-Martinez},\textsuperscript{236} the Court addressed the
constitutionality of a statute\textsuperscript{237} that automatically withdrew citizen-
ship from anyone leaving or remaining outside the United States dur-
ing a time of war to avoid service in the armed forces. The
government argued that the statute was valid as an exercise of Con-
gress' power over foreign affairs.\textsuperscript{238} Nevertheless, the Supreme Court
struck down the statute, finding it penal in nature and unconstitutional
in its lack of procedural safeguards. In doing so, the Court noted: "It
is fundamental that the great powers of Congress to . . . regulate the
Nation's foreign relations are subject to the constitutional require-
ments of due process."\textsuperscript{239} Thus, even though foreign affairs were im-
licated, the Court was not prevented from reviewing the statute to
determine if the presence of foreign policy issues actually warranted
deference. Indeed, the Court did not defer to Congress.

On the other hand, there are certain instances where foreign af-
fairs do merit judicial deference. In \textit{Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.},\textsuperscript{240} the Civil Aeronautics Board de-
nied an application of an American airline for a certificate for an over-
seas air route. The President modified the Board's decision in part.\textsuperscript{241}
The Supreme Court refused to review the decision because "the very

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\item 234. 356 U.S. 44 (1958), \textit{overruled on other grounds by} Afroyim v. Rusk, 387 U.S. 253 (1967). In \textit{Perez}, the Supreme Court reviewed and upheld congressional legislation expatriating certain citizens. \textit{Id.} Later, in \textit{Schneider v. Rusk}, 377 U.S. 163 (1964), the Court held invalid a regulation providing for the denaturalization of naturalized citizens who decided to live outside of the United States even though foreign relations were implicated.
\item 235. \textit{Perez}, 356 U.S. at 58.
\item 236. 372 U.S. 144 (1963).
\item 238. \textit{Kennedy}, 372 U.S. at 160.
\item 239. \textit{Id.} at 164-65 (citation omitted).
\item 240. 333 U.S. 103 (1948).
\item 241. \textit{Id.} at 110.
\end{itemize}
nature of executive decisions as to foreign policy is political, not judicial. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility . . . .”242 While judicial review was ultimately precluded, the Court at least analyzed the facts of the case to reach the decision that it should defer to the President. Indeed, its primary reason for denying judicial review was based on the President’s involvement in the matter.243 In sum, the Court undertook a fact-specific inquiry in determining whether judicial review was warranted, even though foreign affairs were clearly implicated. Thus, where foreign relations issues are raised, the question of judicial review is decided on a case-by-case basis. There is no blanket assumption that judicial review is precluded. If the plenary power doctrine rests primarily on the foreign relations theory, then there is no reason why it too should not be examined on a case-by-case basis.

3. The Membership Theory

The third theory supporting the plenary power doctrine is a derivation of the right-privilege distinction.244 The Supreme Court has stated that aliens have no constitutional right to enter the United States.245 Admission is a “privilege,”246 “a matter of permission and tolerance.”247 Under this view, the United States is defined in terms of members and nonmembers.248 Nonmembers, such as aliens, are viewed as seeking to become members. The members have complete

242. Id. at 111.
243. Id. at 110.
244. The right-privilege distinction originated in McAuliffe v. Mayor of New Bedford, 29 N.E. 517 (Mass. 1892). Justice Holmes, in referring to a police officer who was fired for his political activities, asserted: “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” Id. at 517. Holmes went on to observe: “There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech . . . by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him.” Id. at 517-18. Accordingly, once something is defined as a privilege, there can be no substantive constitutional claims in relation to it. See William W. Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 HARV. L. REV. 1439, 1441-42 (1968).

For various discussions of this theory, see T. Alexander Aleinikoff, Aliens, Due Process and “Community Ties”: A Response to Martin, 44 U. PITT. L. REV. 237 (1983); David Martin, Due Process and Membership in the National Community: Political Asylum and Beyond, 44 U. PITT. L. REV. 165 (1983).
power to define the rules for attaining membership. The membership theory is premised on the right-privilege distinction. The right-privilege distinction relies on the principle that people do not have rights when accorded a privilege.\textsuperscript{249} While the acceptance of the right-privilege distinction theory has significantly declined,\textsuperscript{250} it is far from gone.\textsuperscript{251} The right-privilege distinction, if accepted, precludes judicial review of virtually all immigration decisions, including the one at issue in \textit{Flores}. Jenny Flores is not a “member” of this country and, therefore, she does not have any membership rights (i.e., constitutional rights). She has only those rights the “members” wish to give her.

The membership theory may account for the tension between \textit{Yick Wo v. Hopkins}\textsuperscript{252} and its progeny and the plenary power doctrine.\textsuperscript{253} While resident aliens generally enjoy constitutional protections,\textsuperscript{254} once aliens become involved in exclusion and deportation proceedings they have no substantive constitutional rights due to the plenary power doctrine. One possible explanation for this result may be that resident aliens are perceived as coming nearer to membership than those aliens who are seeking entry or being forced to leave the country.\textsuperscript{255} Thus, while the First Amendment prohibits the imprisonment of resident aliens for protected speech, it does not prevent their deportation for the same speech.\textsuperscript{256}

Yet, it can be argued that the membership theory should not preclude the application of the Constitution to deportation and exclusion proceedings. The Fourteenth Amendment to the Constitution pointedly provides protection to “persons.”\textsuperscript{257} The Supreme Court made note of this in extending constitutional protections to resident aliens in \textit{Yick Wo v. Hopkins}.\textsuperscript{258} The Constitution does not distinguish between

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\item \textsuperscript{249} See \textit{Monrad}, \textit{supra} note 5, at 856.
\item \textsuperscript{250} See generally \textit{Van Alstyne}, \textit{supra} note 244; see also \textit{Sugarman v. Dougall}, 413 U.S. 634, 644 (1973) (“[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a ‘right’ or as a ‘privilege.’”) (citations omitted).
\item \textsuperscript{252} 118 U.S. 356 (1886).
\item \textsuperscript{253} See \textit{supra} text accompanying notes 6-50.
\item \textsuperscript{254} See \textit{supra} notes 38-43 and accompanying text.
\item \textsuperscript{255} See \textit{Aleikoff}, \textit{Citizens}, \textit{supra} note 248, at 18.
\item \textsuperscript{256} \textit{Id.} at 19.
\item \textsuperscript{257} “[N]o State [shall] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” \textit{U.S. Const. amend. XIV}, § 1.
\item \textsuperscript{258} 118 U.S. 356, 369 (1886). See \textit{supra} text accompanying notes 38-40.
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members and nonmembers in this respect. Similarly, the Bill of Rights avoids using the word "citizen." Indeed, the membership/nonmembership distinction as a way of denying constitutional protection has been struck down in other contexts.\textsuperscript{259} The membership model has been challenged in at least one instance by the Supreme Court.

In \textit{Graham v. Richardson},\textsuperscript{260} decided in 1971, the Court struck down state provisions denying public assistance to aliens.\textsuperscript{261} Justice Blackmun declared that discrimination between aliens and citizens amounts to use of a suspect classification.\textsuperscript{262} But the Court had more to say on the issue. In 1973, the Court held that a state could not restrict its classified civil service to citizens.\textsuperscript{263} Justice Blackmun stated, however, that this was not meant to affect a state's power to limit voting to citizens.\textsuperscript{264} Further, the state could make certain public offices available only to citizens.\textsuperscript{265} The rationale for this exception was inextricably wound up in the idea of maintaining a "political community."\textsuperscript{266}

The Court has taken another, more recent step in the direction of questioning the membership theory. In \textit{Plyler v. Doe},\textsuperscript{267} the Supreme Court held that a state may not deprive the children of undocumented aliens of the right to a free public education. While not finding alienage a suspect classification, the Court noted that the Fourteenth Amendment provides that:

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`No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' . . . Whatever his status under the immigration laws, an alien is surely a 'person' in any ordi-
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\item[259.] See Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), where the Supreme Court designated the entire slave population as nonmembers who were not protected by the Constitution. The Fourteenth Amendment reversed the effect of this decision by providing that the Constitution applies to all persons.
\item[260.] 403 U.S. 365 (1971).
\item[261.] At least one commentator views \textit{Graham} as consistent with the membership theory, asserting that \textit{Graham}'s "holding is at home in membership theory: the states cannot upset the terms of the federal government's invitation." Aleinikoff, \textit{Citizens}, supra note 248, at 23. See supra text accompanying notes 46-48.
\item[262.] \textit{Graham}, 403 U.S. at 376.
\item[263.] Sugarman v. Dougall, 413 U.S. 634 (1973).
\item[264.] \textit{Id.} at 647.
\item[265.] \textit{Id.} See supra note 47. The inconsistency that results when aliens are given suspect status, yet denied the right to vote and hold certain offices, has been attacked. See generally Gerald M. Rosberg, \textit{Aliens and Equal Protection: Why Not the Right to Vote?}, 75 Mich. L. Rev. 1092 (1977).
\item[266.] See Sugarman, 413 U.S. at 647.
\item[267.] 457 U.S. 202 (1982).
\end{footnotes}
The Court emphasized that the protection of the Fourteenth Amendment extends to anyone within the territorial United States. The "may mark a fundamental break with classical immigration law's concept of national community and of the scope of congressional power to decide who is entitled to the benefits of membership."  

Plyler may indicate a growing willingness to reconsider and reject the membership theory. Jenny Flores is a "person" under the Constitution and thus, under Plyler, is entitled to its full protection. She, like others in INS detention, is within the territorial United States. But the Plyler decision may be limited in two important ways. First, since it invalidates a state law and not a federal law, it may represent an assertion that only the federal government, exclusive of the states, can define and impose conditions on membership. If that is the case, aliens like Jenny Flores would still be denied constitutional protection since the conditions imposed on them are the product of federal regulation. Second, if the Plyler decision does apply to the federal government, it may not apply to those decisions involving deportation or exclusion, the areas traditionally falling under the plenary power doctrine. Accordingly, if detention is found to be subject to the plenary power doctrine since it is a part of the deportation process, then constitutional protection may still be denied.

Nevertheless, while Plyler did not involve the plenary power doctrine, there is no reason why its rationale should not extend to all immigration decisions. Plyler and Flores are similar cases. Both involve illegal alien children who claim basic constitutional protection. The plenary power doctrine provides the sole reason to deny the children in Flores constitutional protection. But to say the outcome of a case turns on the plenary power doctrine alone is to reach a conclusion without any analysis. The membership model is not a valid justification for the plenary power doctrine.

Justice Holmes, who originally suggested the right-privilege distinction, later implied the weakness of this theory in discussing the nature of a legal right: "[F]or legal purposes a right is only the hypothesis of a prophecy . . . . One phrase adds no more than the other to

268. Id. at 210 (citation omitted).
269. Id. at 212.
271. See supra note 261.
272. See supra text accompanying notes 191-93 & 207-09.
273. See supra note 244.
what we know without it."\textsuperscript{274} Thus, to deny that someone has a "right" to something is a mere conclusion that a court would not grant him or her relief, "but the denial itself provides no reason whatever why such relief should be denied."\textsuperscript{275} The use of the term "right" is not a reason in itself to support a court's decision, but rather is a reiteration of the result.\textsuperscript{276} Similarly, the membership theory is not a reason supporting the plenary power doctrine but only a reiteration of the result: the prevention of judicial review of federal immigration law.

\section*{Conclusion}

The \textit{Flores} opinion circumvents the plenary power doctrine in order to apply constitutional principles in the immigration context. While it correctly decides that the plenary power doctrine is not applicable to the \textit{Flores} case, it does so without meaningful analysis to support its conclusion. Instead of confronting the plenary power doctrine directly, the court skirts the issue by merely saying that it is not implicated in this case. Other courts also continue to avoid analyzing the plenary power doctrine in "phantom norm" cases but, unlike the \textit{Flores} court, do so by finding the plenary power doctrine applicable and then artificially construing a statute so as to apply constitutional principles. Thus, courts are struggling to find a way to apply constitutional principles in immigration cases. While this result is desired, it would be better reached by undertaking an inquiry into the theories behind the plenary power doctrine and determining if they are implicated in each immigration case.

The theories underlying the plenary power doctrine are not present in every immigration case, nor do they independently mandate absolute judicial deference. Consequently, the judiciary should not automatically defer to Congress in every case. The plenary power doctrine should be applied on a case-by-case basis with the judiciary deciding if sovereignty or foreign affairs concerns are present to such a degree as to disfavor judicial review. In all other cases, constitutional principles should be fully applied.

It is time the plenary power doctrine be reassessed and, hopefully, reformulated. The Supreme Court will have the chance to do this in its pending decision in \textit{Flores}. Such a reformulation would allow the lower courts to explore new analytic possibilities rather than being

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\textsuperscript{274} Oliver W. Holmes, \textit{Natural Law}, 32 Harv. L. Rev. 40, 42 (1918) (emphasis added).
\textsuperscript{275} Van Alstyne, supra note 244, at 1459.
\textsuperscript{276} See Oliver W. Holmes, Jr., \textit{The Common Law} 169 (M. Howe ed. 1963).
\end{flushright}
forced to pay lip service to a doctrine with foundational weaknesses. The Supreme Court must be willing to acknowledge and confront these weaknesses with intellectual honesty, else it risks sacrificing doctrinal integrity. It is only with a probing analysis as to why the plenary power doctrine exists, something which has never been done before, that the proper bounds of the doctrine may finally be established.

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