

EVOLVING CONTOURS OF IMMIGRATION FEDERALISM: THE CASE OF MIGRANT CHILDREN

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INTRODUCTION

The immigration lawyer settled in to work that morning, and reviewed the petition a client was filing for her spouse to get a green card. It looked good—she assembled all the evidence that the couple lived together, added copies of their joint bank account statements, moved the birth certificate of their new baby to the top of the filing, and threw in a few photos of their wedding for good measure. She sent it off to United States Citizenship and Immigration Services, the office within the Department of Homeland Security with the authority to decide whether her client’s marriage—a marriage that happened in state court—was a “good faith marriage” or not, and to grant or reject the petition as a matter of federal law. She talked with her summer law clerk for a few minutes about the kind of evidence they could get to prove another client was a victim of domestic violence. The district court judge had refused to enter a protective order in the case since the vase that her boyfriend threw hit the wall and shattered, instead of hitting her as intended. Fortunately, that client had pictures, photos of threatening text messages, and a strong letter from her counselor, all of which would be admissible evidence in the immigration application. She knew it was not an open-and-shut case, but she felt hopeful that it would be enough to succeed.

Then, with a sigh, the lawyer turned to her 8-year-old Honduran client, whose father had recently died, and whose mother was in jail in Honduras. The child qualified for a “special immigrant juvenile” immigration visa be-

cause she had been abandoned, but the lawyer could not just send the abandonment evidence in to the Department of Homeland Security, as she had for the other applications this morning. She had to first engage with the state court system, working with her client's 20-year-old brother, who was willing to be a guardian for the child. Unfortunately, in this state, guardianship could only happen after parental rights had been terminated—something that made her state different from almost any other state.² Now, the lawyer was going to devote much of her morning to figuring out termination of parental rights with an imprisoned mother in a foreign country whose legal system was entirely unfamiliar to her.

None of her other cases were particularly easy, but their exclusively federal nature provided her with the chance to develop true expertise in dealing with federal adjudications. This one was a stretch. Not for the first time, the lawyer wished she could just send her evidence off to immigration authorities, whom she was sure would interpret these facts as constituting abandonment, instead of going through what felt like increasingly unfair, inefficient, and unnecessary state court procedures. She pulled up the procedural rules for juvenile court and began.

Unprecedented numbers of unaccompanied children traveled to the United States seeking safety from increased gang violence in Central America.³ The children quickly encountered a legal system of staggering complexity, with all too few lawyers trained and available to help them navigate through it. Although the children's situation faded from headlines after the summer of 2014, children continue to arrive, and the difficult work of providing legal representation has intensified.

The scale of the problem has revealed an unnecessary unwieldiness in the humanitarian protection available to these, and other, vulnerable children. Many of the children have asylum claims, the legal complexities of which make legal representation vital. The asylum process, while difficult on emotional and legal levels, at least benefits from a relatively clear process, contained entirely within the boundaries of the traditional structures implementing immigration law: the Department of Homeland Security and the immigration courts within the Department of Justice. In its clarity and consolidation of adjudications, it contrasts sharply with the other humanitarian protection available to vulnerable children: Special Immigrant Juvenile Status (SIJS).

Immigration law has never known anything quite like Special Immigrant Juvenile Status (SIJS). Operating as a form of humanitarian protection in the law since 1990,⁴ SIJS relies heavily upon state court judges who must

² In Maryland, for example, a third party cannot be appointed guardian when a living parent's parental rights have not been terminated. *In re Guardianship of Zealand W.*, 102 A.3d 837 (Md. 2014).

³ SIJS is not limited to Central American children, and children from many regions of the world have benefited from it. It first caught popular attention, though, because of the concentration of new arrivals potentially eligible for the benefit.

⁴ See 8 U.S.C. § 1101(a)(27)(J) (2014).

issue a set of findings based on state law related to the child. This makes it unlike almost any other application for immigration status. Through guardianship, custody, dependency or similar proceedings, children with SIJS eligibility must obtain special findings that, among other things, they had been abused, abandoned, neglected, or similarly harmed. The court must also find that it would not be in their best interests to be returned to their home country. The children are then eligible to apply to the Department of Homeland Security (DHS) for lawful and enduring immigration status: lawful permanent residence.⁵

The work of representing vulnerable children in immigration proceedings required a large number of *pro bono* lawyers to become overnight experts in the intersection of two highly-specialized areas of the law: immigration removal defense, and child custody, guardianship and dependency proceedings.⁶ Immigration litigation is always difficult,⁷ but the children's cases raise a host of special challenges: not only are these minors with varying degrees of capacity and legal competence, but a sizable portion have suffered terrible traumas that may make it hard to build a case.⁸ Many, no doubt, also have a limited understanding of the multiple legal systems in which their cases are moving forward. At any given time, a child may be in the custody of the Department of Health and Human Services Office of Refugee Resettlement, appearing before a Department of Justice immigration court, appearing in a state court case, and have asylum applications pending before the Department of Homeland Security's United States Citizenship and Immigration Services.

The complexity for the children is one concern of this article, but the complexity for their attorneys deserves consideration as well. Difficult cases crossing multiple areas of law limits the availability of lawyers willing and able to represent these children. While some children reunite with family members who can pay for representation, the world of private attorneys with expertise in both immigration court and state court rules, procedures and laws is limited. For the many, many children who cannot afford representation, the pool of non-profit and *pro bono* attorneys trained and able to take on more than a handful of cases is lamentably low.⁹ Driven by this shortage,

⁵ If this paragraph seems confusing to a reader of a law review article, consider how confusing it might be to a child who speaks little or no English and who has experienced severe trauma both in the home country and along the way to the United States.

⁶ Many lawyers also needed to develop expertise in asylum law, but this article will be focusing on the specific issue of SIJS.

⁷ See Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 551-564 (2011) (naming harshness, complexity, and opacity as contributing to the tremendous overburdening of the immigration court system).

⁸ See U.N. HIGH COMM'R FOR REFUGEES, CHILDREN ON THE RUN (2014), available at http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf, archived at <http://perma.cc/UYE8-N2H5>.

⁹ See Elizabeth Keyes, Opinion, *Protecting and Serving U.S. Immigrants*, BALT. SUN (Nov. 24, 2014), available at <http://www.baltimoresun.com/news/opinion/oped/bs-ed-notarios-20141124-story.html>, archived at <http://perma.cc/3FRA-CFYA>.

and the depth of the access-to-justice crisis facing a vulnerable population, this article asks the question: Is all this complexity necessary? The answer is, emphatically, no.

Existing literature takes the bifurcated state-federal structure as given, and seeks to make important improvements from within that framework.¹⁰ This article questions the framework itself. First, in Part I, the article looks at adaptations to the bifurcated structure over time, showing a tug-of-war between federal and state authority over the course of the statute's 25-year history. The shifting power balance reflects an uneasy relationship at the heart of SIJS, with state courts playing an uncharacteristic gatekeeping role for implementation of a federal law. While one political branch of government, Congress, created this structure, the Executive branch has contested the power-sharing almost since the law's inception. The article contends that the present-day reassertion of federal oversight of state court decisions is a natural result of the federal government's uneasiness with the state court's pivotal role in this process. All of these shifts occurred without accompanying analysis of whether the allocation of authority helps achieve the law's objectives.

By grounding the article's subsequent analysis in this rich and shifting historical context, the article does two things. First, it builds our historical understanding of the law, which for many current practitioners is only understood in its most recent post-2008 incarnation. Second, and more importantly, it suggests that there are profound and enduring structural reasons for the tension between states and the federal government over the shared responsibility to implement this aspect of immigration law. Even in the current iteration that generally favors the state role, the federal government continues to question and look behind state court rulings. The consistently uncomfortable federal-state relationship has led to a more active federal oversight role. This new role duplicates and undermines the state's role, calling into question the rationale for even having a state role in the first place.

Why then in 1990 did Congress delegate this particular gatekeeping role to the States? The article considers two preeminent rationales. First, state courts were the only institution with competence, both substantive and procedural, to make "best interests of the child" determinations. State courts made such findings routinely in a variety of family and dependency-related causes of action, providing substantive competence. And foster care-eligible

¹⁰ See generally Laila Hlass, *States and Status: A Study of Geographical Disparities for Immigrant Youth*, 46 COLUM. HUM. RTS. L. REV. 266 (2014); Jessica R. Pulitzer, *Fear and Failing in State court: Special Immigrant Juvenile Status and the State Court Problem*, 21 CARDOZO J. L. & GENDER 201, 217 (2014); Randi Mandelbaum & Elissa Steglich, *Disparate Outcomes: The Quest for Uniform Treatment of Immigrant Children*, 50 FAM. CT. REV. 606 (2012); Aryah Somers, Pedro Herrera & Lucia Rodriguez, *Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States*, 14 U.C. DAVIS J. JUV. L. & POL'Y 311 (2010); David Thronson, *Thinking Small: The Need for Big Changes in Immigration Law's Treatment of Children*, 14 U.C. DAVIS J. JUV. L. & POL'Y 239 (2010); David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J. L. & POL'Y 45 (2005).

migrant children were typically already before state courts in various forms of dependency proceedings, providing procedural convenience. Second, the delegation of authority to those courts helped avoid a massive conflict of interest within the then-Immigration and Naturalization Service which had responsibility for the custody and wellbeing of the minors, while simultaneously being responsible for seeking their removal.

These justifications have changed and diminished in the intervening years. What was true in 1990 is not true today. In Part II, the article contrasts the strength of the justifications in 1990 to their strength today, and finds two things. First, state courts are no longer the only institutional actors with the competence to adjudicate a child's best interests. Second, institutional changes in the federal government have removed the conflict-of-interest justification.

Meanwhile, new problems have clearly emerged with the current structure. Part III explores four of these problems. First is the issue of disparate geographic access to SIJS, with dramatically uneven access to relief across thousands of jurisdictions.¹¹ State laws and procedures vary across the states, judicial attitudes vary even across courtrooms, and levels of available representation to navigate the processes likewise vary. The laws and systems operate smoothly in certain locations within the United States, but poorly—or not at all—in others. Such uneven implementation destroys the integrity of a nominally federal law.

Second, the current process requires children to engage in an adversarial process that is not particularly designed to meet their needs. There is no special cause of action that SIJS-eligible children can pursue in state court. Rather, they need to engage the state court system within some existing cause of action, like custody, guardianship, and dependency proceedings. In other areas of immigration law, children write application-specific affidavits for written applications, or go to non-adversarial asylum interviews with officers specifically trained to hear asylum cases. They do not need to invoke an opposing party or testify in court to have their claim considered.

Third, children face a “catch-22” within this system. Interpretive guidance requires that the children not be in court *just* to become eligible for SIJS, but rather must be in court for another reason. A child who was abandoned by one parent as a baby and who is now living safely with the other parent in the United States, might have almost no other reason to go into state court. Using the state court system is a *sine qua non* for the SIJS process, but the process does not permit access to the court only to advance a SIJS claim.

¹¹ See Hlass, *supra* note 10; Mandelbaum & Steglich, *supra* note 10. As will be discussed in Part III(A), Professor Hlass's research both ties into the descriptive understanding of the problems of state court adjudications, and documents one aspect of the federalism problems in the current system. Professor Hlass focuses on state-to-state differences, but there are also significant intra-state differences, from courthouse to courthouse. See also Pulitzer, *supra* note 10.

Finally, the needs of the children have created a crisis with access to justice. Potential SIJS petitioners need lawyers well versed in both immigration *and* family law, and those same lawyers and advocates need to educate judges county-by-county, and state-by-state, on the intricacies of immigration law. Despite dramatic, rapid expansions in the corps of attorneys staffing SIJS cases at free or low-cost legal services organizations, the needs nonetheless dramatically outstrip the available resources. The article draws on the specific experience of Maryland, a top destination for the recent and ongoing influx of Central American children, to illustrate this access to justice issue.

It is time to question the very model of relying upon state court determinations for all children seeking SIJS. Access to justice continues to grow worse for thousands of young people seeking safety in the United States, with children continuing to arrive since the 2014 crisis brought the issue into focus. The existing law is not designed to be effective for its current purposes. SIJS serves a population largely unable to pay for private representation. The system is so complicated with so many moving parts that many with viable claims will never have those claims heard. This leaves critical protections out of reach for the most vulnerable.

There are some identifiable positives to involving states more in immigration law's implementation. But where states are inclined to act favorably for immigrants needing protection, the article asserts that the state role is highly problematic in its unevenness, its complexity, and its distance from the federal immigration adjudication process. As Juliet Stumpf has written, in the context of criminal, labor, and welfare delegations of federal authority, "Subnational action may enhance federal enforcement of immigration law, but it may also usurp federal control over foreign policy and national membership and undermine individual protections for noncitizens."¹² Here, subnational action may enhance federal benefits for *some* prospective immigrants, but may also undermine protections for many others. SIJS is a part of our web of protection. Designating states as custodians of the gates to protection is out of step with the role SIJS now plays in addressing the crisis of child migration.

The article concludes that the extent of problems presented by state courts requires us to go back to fundamentals and challenge the state's involvement in this federal immigration law. Incremental change is vital, particularly given the gridlock surrounding federal immigration reform. Improving the law as we have it today means devising a system that will work for all involved. The article puts forward a definitive solution: a legislative change giving exclusive authority to the federal government through a centralized adjudications unit. Such centralization could better achieve the law's objectives than the current system, as demonstrated by decades of federal adjudications over other protective and humanitarian parts of the immi-

¹² Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1564 (2008).

gration law. While several solutions are feasible, this Article aims to build consensus over the deeper structural problem underlying this form of humanitarian protection. Now is the time to reimagine a system dedicated to providing relief to the children greatly in need of the security and protection promised by the law.

I. THE EVOLVING STATE-FEDERAL RELATIONSHIP IN SIJS

The relationship resulting from a bifurcated, state-federal process for SIJS has been neither easy nor stable. Since its inception in 1990, there have been three major iterations of SIJS. Each stage shows the law grappling with the question of an appropriate balance between state and federal roles. This section shows how the birth of the state role in 1990 prompted the federal immigration agency to seek ways of increasing its oversight and gatekeeping functions. This led to amendments in 1997 that restored some of these functions to the then-Immigration and Naturalization Service. But after this period of federal reclamation of power, the 2008 amendments tipped the balance back much more toward the states. This shift has led to the present uneasy relationship

A. *A Brief Overview of Federal Immigration Gatekeeping and its Variations*

Before turning to the specifics of those changes, it is useful to point out the mechanics of the federal government's typical and atypical processes. This power is one of gatekeeping: the authority to determine who may enter the United States physically and legally, and who may stay.¹³

a. The Norm in Immigration Gatekeeping

Although the states had a role in immigration gatekeeping until the late 19th century,¹⁴ the federal government's exclusive role has been the norm—and largely the law—ever since the 1880s. In a series of landmark cases establishing the plenary power doctrine, the Supreme Court held that the power to regulate admissions¹⁵ and deportations¹⁶ was exclusively federal. The Court, in turn, had to apply enormous constitutional deference to the political branches of the federal government. The Court relied upon the pre-

¹³ The term “gatekeeping” has been used in immigration law for generations, and was recently thoughtfully explored by Professor Motomura. See Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011).

¹⁴ See, e.g., Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1646 (2007); Elizabeth Keyes, *Race and Immigration. Then and Now: How the Shift to “Worthiness” Undermines the 1965 Immigration Law’s Civil Rights Goals*, 57 HOW. L. J. 899, 902–905 (2014).

¹⁵ *Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889).

¹⁶ *Fong Yue Ting v. United States*, 149 U.S. 698, 713–714 (1893).

emption doctrine to strike down state laws interfering with federal admission and deportation decisions.¹⁷

The practical import of this norm is that to seek admission to the United States, prospective immigrants engage *exclusively* with the federal government—the Department of State overseas, and the Department of Homeland Security within the United States and at its borders. For one, the Department of State screens prospective tourists for everything from criminal history, to their “nonimmigrant intent,” to the existence of qualified educational programs necessary for student visas. All such screening is governed by the Immigration and Nationality Act, and is detailed for officers in the Foreign Affairs Manual. At and within U.S. borders, the Department of Homeland Security (DHS) does this screening with comparable complexities. DHS reviews petitions that citizens and permanent residents file for their spouses, determines whether those are *bona fide* marriages, and whether the intending-immigrants meet the same range of admissibility criteria. An even more complex series of adjudications happens with many employment visas. For example, multiple agencies are involved in verifying a job offer, establishing that no American worker could be found for the position, and then screening the prospective employee for all the same inadmissibility issues for which the spouse in the example above was screened. Complex issues, yes, and addressed entirely at the federal level.

b. State Gatekeeping Variations

Since the mid-1980s, this federal gatekeeping norm has eroded in notable ways. Stephen Lee, Hiroshi Motomura and others have examined this phenomenon in the criminal context.¹⁸ With the expansion of criminal grounds of inadmissibility in 1996, state criminal courts took on a primary role by initiating a process by which immigrants could ultimately be removed from the United States. Juliet Stumpf has also considered this phenomenon in the employment context, noting that the Immigration Reform and Control Act of 1986 put local employers in a gatekeeping role because the requirement of checking immigration status of employees virtually made them private enforcers of immigration law.¹⁹ Kerry Abrams and others have explored how immigration law “regulates” families, as well as how family law influences federal approaches.²⁰ These scholars’ interest in the ill-defined

¹⁷ Although it is only one case in a long line of decisions considering the limits of the preemption doctrine as applied to immigration law, for an excellent history of this jurisprudence, see *Arizona v. United States*, 132 S.Ct. 2492 (2012).

¹⁸ See, e.g., Stephen Lee, *De Facto Immigration Courts*, 101 CAL. L. REV. 553 (2013); Motomura, *supra* note 13.

¹⁹ See Juliet P. Stumpf, *Getting to Work: Why Nobody Cares About E-Verify (and Why They Should)*, 2 UC IRVINE L. REV. 381, 394–95 (2012) (“IRCA imbued the employer with the gatekeeping role of screening new hires, a function previously reserved to immigration enforcement officials.”); see also Stumpf, *supra* note 12 (considering the federal role in three areas of traditional state responsibility: crime, employment, and welfare).

²⁰ See, e.g., Abrams, *supra* note 14.

borders between immigration law and other, non-federal, areas of the law are undoubtedly persuasive. SIJS marks the most extreme and explicit breakdown yet of the proverbial “line” between federal and state jurisdiction.

The variation closest to SIJS is a visa for victims of crime, the U visa. U visa applicants must obtain a certification from law enforcement as to the nature of the crime, as well as evidence of the victim’s willingness to cooperate with an investigation or prosecution.²¹ This certification can be obtained from any law enforcement agency, including federal law enforcement.²² Some scholars have criticized the certification requirement for both requiring victims to become accusers²³ and for placing relief in the hands of law enforcement, not immigration authorities.²⁴ The otherwise comparable visa for trafficking survivors asks for certification, but only for situations where the applicant could *not* get the certification. Current regulations allow applicants to submit evidence demonstrating their efforts to at least try to obtain the certification. This mechanism thus keeps a significant federal role in the adjudication process.²⁵

Family law presents one of the most interesting, and apt, variations to consider in assessing the validity of the state’s role. Federal immigration law defers to state (and foreign) regulations for marriage by recognizing marriages that are “valid where performed.” A 15-year-old in Arizona, for example, can marry with parental consent and a court order and file for her spouse’s permanent residence; a 15-year-old in the District of Columbia, on the other hand, cannot. Likewise, a marriage meeting the requirements for a common law marriage in the District of Columbia²⁶ is valid for immigration purposes, but a similarly situated couple in Minnesota could not petition for a visa under Minnesota common law. Federal law tolerates such state variations, thus giving states a significant role in immigration gatekeeping. In her investigation of how the federal immigration law implicitly regulates marriage, Kerry Abrams notes the unusual tension between the “atypically broad power” Congress has to regulate immigration and its powerlessness in the family law realm. “[F]amily law—the law that says who may marry, what spousal obligations exist, and sets the terms for divorce—is one area

²¹ See 8 C.F.R. 214.14(c)(2)(i) (2013).

²² This federal level certification option is one aspect that distinguishes the U visa process slightly from the SIJS predicate-order requirement, whose requisite findings can *only* be made at the state level.

²³ See generally Michael Kagan, *Immigrant Victims, Immigrant Accusers*, 48 U. MICH. J. L. REFORM 915 (2015).

²⁴ See Tahja L. Jensen, *U Visa “Certification”: Overcoming the Local Hurdle in Response to A Federal Statute*, 45 IDAHO L. REV. 691, 693 (2009).

²⁵ For a comparison of the two provisions, see generally Leslye E. Orloff et. al., *Mandatory U-Visa Certification Unnecessarily Undermines the Purpose of the Violence Against Women Act’s Immigration Protections and Its “Any Credible Evidence” Rules—A Call for Consistency*, 11 GEO. J. GENDER & L. 619 (2010). For a proposal to alter the U visa process, see generally Kagan, *supra* note 23.

²⁶ See, e.g., *Thomas v. Murphy*, 107 F.2d 268, 269 (D.C. Cir. 1939) (requiring an intent to be married, holding themselves out as married, and residing together for a significant period of time).

that is clearly beyond any of Congress's enumerated powers and lies, rather, within the powers traditionally granted to the states."²⁷ As discussed below, variations only grow sharper in the SIJS process.

c. The SIJS Variation

The political branches of the federal government have specifically delegated to the states a piece of their plenary power to admit immigrants for one very specific sub-group: immigrant juveniles. This delegation happens in ways more explicit and intentional than any of the variations touched on above.

The SIJS process requires two steps within the immigration bureaucracy, the petition stage and the application for permanent residence ("green card") stage. The process is even more complex if the child is in custody. The petition stage requires the petitioning child to acquire the requisite state court findings (the "predicate order") before the petition can be filed. The permanent residence application stage meanwhile requires a much more thorough vetting of the child's admissibility like that for any green card applicant (as discussed below, SIJS applicants still have some exceptions and waivers available to them that are not available to other green card applicants). Altogether, this is what I term the SIJS "two-step." The remainder of this section looks at those areas where the state role diverges from the steps typical of other aspects of the immigration process.

The first step, the petition stage, nearly resembles the family law variations noted above. The predicate order is somewhat analogous, for example, to the marriage license that a U.S. citizen must provide for the spouse's immigration petition to be approved.²⁸ However, immigration status is not relevant to the ability to marry, and the citizen spouse and immigrant spouse do not need to make any reference to immigration status to get married. If they are eligible under state law to marry, they *can* marry, and the marriage registrar makes no inquiry into the relevance of immigration laws or to conditions in the immigrant spouse's country of origin. Indeed, there is no judicial determination at all. By contrast, immigration laws are highly relevant to the issuance of a state-court predicate order for SIJS. The state court must base the findings upon the requirements set forth in the Immigration and Nationality Act (INA), and as discussed more in Part II (A), *infra*, some states may also take the custodian or guardian's immigration status into account in deciding the custody or guardianship itself. The INA also requires the state court to consider conditions in the minor child's country of origin—creating problems discussed in more detail in Part III, *infra*.

The basic outline of the SIJ process has not fundamentally changed since its inception. It requires first a petition to immigration authorities

²⁷ Abrams, *supra* note 14, at 1646.

²⁸ See 8 C.F.R. 204.2(a)(2) (requiring "a certificate of marriage issued by civil authorities, and proof of the legal termination of all previous marriages of both the petitioner and the beneficiary").

based upon the predicate order obtained from state court, and then an application for permanent residence once the petition is approved. However, the requirements of the law have altered significantly over time in ways that have vastly reshaped how the process proceeds. Table 1 provides tracks these changes over time, for comparison and reference accompanying the analysis below. Significant changes are underlined.

TABLE 1: TRACING THE CHANGES IN SIJS

	1990: STATE-favored	1997: FEDERAL-favored	2008: STATE-favored
Kind of Minor Permitted to Apply	Declared dependent in juvenile court.	Declared dependent on juvenile court <u>or</u> legally committed or in custody of another State department or agency	All of the earlier bases, and also applies to minors placed in custody or guardianship of an <u>individual</u>
Connection to foster care	Eligible long-term foster care	Eligible for long-term foster care <u>due to abuse, neglect, or abandonment</u>	<u>None</u>
Best Interest Standard	Not in his/her best interest to be returned to country of nationality/ last habitual residence	Same	Same
Relationship to parents	None (except indirectly, insofar as parental issues would make minor eligible for foster care)	Foster care appropriateness must be <i>due to</i> abuse, neglect, or abandonment.	<u>Reunification with one or both parents not viable due to abuse, abandonment or neglect, or other similar basis found under State law.</u> ²⁹

²⁹ Federal law had, at this point, definitions of abuse and abandonment through the Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (Nov. 19, 1997). This “under state law” language in the 2008 amendment, however, clarified that if a state’s definition of abuse or abandonment was more restrictive than the federal one, the state one would be applied. I thank Sarah Rogerson for this insight.

	1990: STATE-favored	1997: FEDERAL-favored	2008: STATE-favored
Exceptions	Parents forbidden to benefit derivatively	Parents forbidden to benefit derivatively. AND <u>Juvenile court has no jurisdiction over minors in “actual or constructive custody “of Attorney-General, without the specific consent of Attorney-General</u> AND In any event, <u>approval of the dependence order as basis for petition requires express consent of Attorney-General</u>	Parents forbidden to benefit derivatively AND HHS must specifically consent to jurisdiction over minors in HHS “custody” (language about actual or constructive removed) ³⁰

The remainder of Part I explores these changes and their impacts on state-federal power allocation.

B. The State Role in SIJS 1990-1997

a. The Original Statute Giving Power to the States

In 1990, Congress passed the first law providing a path to lawful permanent residence for unaccompanied migrant children.³¹ The law arose out of a specific context: the problem of lasting solutions for unaccompanied minors in the custody of the then-INS, which at the time was under the Department of Justice.³² Social workers for these children were frustrated by the fate of their young migrant clients after the children aged out of the foster care system. The children went from receiving support services and care, to into removal proceedings if they had no legal immigration status. The social workers knew deportation proceedings would force these children back to countries where the children had experienced harm and would face

³⁰ The following year, HHS clarified that specific consent is required only where a change in federal custody is contemplated.

³¹ Immigration Act of 1990, Pub. L. No. 101-649, § 153, 104 Stat. 4978 5005-06 (1990) (codified at 8 U.S.C.A. § 1101(a)(27)(J) (West 2015)) [hereinafter 1990 SIJS Law].

³² The Community Relations Service, also within Department of Justice, formerly had custody of the children as well. See M. Aryah Somers et. al., *Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States*, 14 U.C. DAVIS J. JUV. L. & POL’Y 311, 334 (2010).

inordinately difficult futures.³³ Regulators, on the other hand, portrayed the new law as a means of aiding minors who had been left out of the amnesty provisions of the Immigration and Refugee Control Act of 1986, passed not long before the 1990 enactment of SIJS.³⁴

The original SIJS statute eased this frustrating problem by offering minors the possibility of converting their tenuous status as wards of the INS into permanent residence. Under the original 1990 version of the law, SIJS was available to a minor who 1) “has been declared dependent on a juvenile court located in the United States and has been deemed eligible by that court for long-term foster care,” and 2) “for whom it has been determined in administrative or judicial proceedings that it would not be in the alien’s best interest to be returned [to the country of origin].”³⁵ Thus, children who were already before the court for dependency proceedings now had a means of transitioning into a more stable, durable immigration status. Notably, the state juvenile court judges were the initial gatekeepers for this transition to permanent residence, equipped with the power to approve or deny a child’s petition to advance through the SIJS two-step.

The INS (also known as “the Service”) emphasized in implementing regulations that it had no intention of looking behind state-court adjudications about best interests. “The Service believes that it would be both impractical and inappropriate for the Service to routinely readjudicate judicial or social service agency administrative determinations as to the juvenile’s best interest.”³⁶ The sincerity of this belief was immediately tested, as seen below. But at least at the outset, the intention was to make a system based on a cooperative federal-state relationship.

The federal government—particularly the INS—retained a secondary gatekeeping role at SIJS’s second step. While the state court “best interest” adjudication was almost always going to be sufficient to let the minor have a valid immigration petition at the first step of the process, the petition had to be followed by the actual application for permanent residence. At this stage the government retained the power to screen out deportable (later, “inadmissible” minors) for a host of reasons, including criminal issues, poverty, health problems, prior immigration violations, and so forth. The size of this secondary gatekeeping role was quite small, however. Technical amendments to the Immigration and Nationality Act enacted in 1991 permitted the government to *wave* many of the issues that might have derailed this sec-

³³ For a full discussion and analysis of the origins of the law, and the significance of its various iterations, *see generally* Somers et. al., *supra* note 32.

³⁴ “Although many dependent alien juveniles were eligible for the legalization provisions of the Immigration Reform and Control Act of 1986 (IRCA), those benefits were only available for a limited period of time to certain aliens who had been in the United States since before 1982.” Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Amendments; Adjustment of Status, 58 Fed. Reg. 42843-01, 42844 (Aug. 12, 1993) [hereinafter Special Immigrant Status rule].

³⁵ 1990 SIJS Law, *supra* note 31 § 153(a)(3).

³⁶ Special Immigrant Status rule, *supra* note 34, at 42846.

ond-step, creating an almost uniquely³⁷ generous space—relative to other forms of immigration—for these unaccompanied minors.³⁸ The federal government typically has a litany of grounds upon which to deny a would-be immigrant admission to the United States. But the 1991 amendments eliminated a few fairly common grounds, including having made a misrepresentation to an immigration official, the likelihood of becoming a public charge, public health issues, and several more.³⁹ The amendments also permitted minors to seek SIJS if the juvenile court found that adoption or guardianship were in their best interests.⁴⁰

Thus between the 1990 law and subsequent 1991 amendments, the core responsibility for screening these minors for placement on a path to lawful permanent residence happened in state-level courts, specifically juvenile courts. Without the state court findings, the child could not proceed with even the first step of the process. And the 1991 amendments emphasized the critical nature of the state's gatekeeping role, since there were fewer reasons available to the federal government to deny residence at the second step.

b. Federal Contestation of the New State Gatekeeping Role

Although seen as a “cooperative state-federal system,”⁴¹ the then-INS contested this power-sharing arrangement in numerous ways. Beginning in the early 1990s, the INS challenged judicial assertions that state courts were preempted from making these decisions, as well as patterns of bureaucratic delays that prevented eligible children from benefiting from the SIJS process. Professor Adelson notes how these implementation problems undermined the goal of implementing a streamlined, rapid process between the cooperative entities.⁴²

³⁷ VAWA is also a similarly expansive space—with the key difference, from the point of view of this article, that the first-step of VAWA is a federal adjudication, thus the federal government still has the monopoly on gatekeeping, even if the gates are relatively wider for VAWA applicants. See *infra* Part II(A)(2).

³⁸ See Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. 102-232, 105 Stat. 1733 § 302(d)(2). Interestingly from the perspective of a polarized immigration political space in 2015, the regulations creating this more generous space justify the amendments in terms of the children's need for lawful permanent residence. Indeed, the original implementing rule called this a “technical” error, since Congress could not have intended to limit eligibility for the status: “Because many juveniles may be ineligible for adjustment of status because of these two provisions, the Service will seek a *technical correction* from Congress.” *INS Implements Special Immigrant Status for Juveniles, Bona Fide Marriage Appeal Process* 68 No. 20 INTERPRETER RELEASES 635 (1991) (emphasis added). This is sharply different than the modern norm of justifying laws in terms of the children's worthiness of inclusion, their contributing potential, or America's need for the children. See generally Elizabeth Keyes, *Defining American*, 14 NEV. L. J. 101 (2014).

³⁹ See 8 U.S.C. § 1255(h)(2) (2014).

⁴⁰ Special Immigrant Status rule, *supra* note 34, at 42850.

⁴¹ Gregory Zhong Tian Chen, *Elían or Alien? The Contradictions of Protecting Undocumented Children Under the Special Immigrant Juvenile Statute*, 27 HASTINGS CONST. L.Q. 597, 602 (2000).

⁴² See Wendi Adelson, *The Case of the Eroding SIJS*, 18 J. TRANSNAT'L LAW & POL'Y 65, 76–77 (2008).

The first form of resistance emerged through the juvenile court system, where the INS relied on arguments of federal preemption. The INS argued, often successfully, that it retained custody broadly over children for whom it either had physical *or* legal custody. As one Administrative Appeals Office decision found, “Although physical custody has been delegated to social services agencies who can better accommodate the special needs of juveniles, juveniles in such foster care are *still in the legal custody* of the Service.”⁴³

A Michigan District Court made a similar ruling in 1997, for a child in the *legal* custody (in removal proceedings, but placed by INS in the *physical* custody of a social services agency under contract with the federal government) of INS, noting the important dividing line between children who had not been placed in removal proceedings and those who had.⁴⁴ INS argued that the predicate order was invalid because the Michigan probate court was preempted from having jurisdiction in the matter. The Court noted,

If Plaintiff had not been previously arrested and taken into the custody of the INS, it appears that he would meet the special immigrant juvenile provisions. However, because Plaintiff was arrested, detained, and in the legal custody of the INS at the time of the probate court proceedings, the state probate court had no jurisdiction over him.⁴⁵

The Court concluded by noting, “The federal immigration proceedings preempt the state court proceedings and the state court is without jurisdiction to find the juvenile dependent,”⁴⁶ and cited non-binding Minnesota decisions (one published, one unpublished) that relied upon *Hines v. Davidowitz*.⁴⁷ The decision was ultimately reversed on appeal,⁴⁸ but shows the extent to which state courts had to grapple with federal immigration law in these cases.

In another case where a child had been awarded the predicate order for his SIJ case, the then-INS appealed, relying again upon preemption. After noting how Congress had occupied the field and asserted exclusive custody over “illegal [sic] immigrants,” the Minnesota Court of Appeals held, “By the principle of *expressio unius est exclusio alterius*, it can be inferred that Congress did not intend to give courts jurisdiction over aliens in other circumstances and did intend to preclude state jurisdiction over illegal

⁴³ Petition for Special Immigrant Juvenile Pursuant to Section 203(b)(4) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(4), 1997 WL 33170585, at *4, (emphasis added) (citing *Reno v. Flores*, 507 U.S. 292, 113 S.Ct. 1430, 1445 (1993)).

⁴⁴ See *Gao v. Jenifer*, 991 F. Supp. 887, 890 (W.D. Mich. 1997) *rev'd*, 185 F.3d 548 (6th Cir. 1999).

⁴⁵ *Id.* at 890.

⁴⁶ *Id.*

⁴⁷ See *Hines v. Davidowitz*, 312 U.S. 52, 62–63, (1941) (“[W]hen the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land.”).

⁴⁸ See *Gao v. Jenifer*, 185 F.3d 548 (6th Cir. 1999).

aliens.”⁴⁹ Of most interest for this article is the concurring opinion: the judge noted how this was “a pure political turf battle” with the INS, with Dakota County Community Services arrayed on one side and the immigrant minor’s foster parents and the juvenile court on the other.⁵⁰

A second form of federal resistance to the 1990 law emerged through bureaucratic opposition and delays. This pattern was first revealed through the various stages of the *Flores* class-action litigation. There, children had filed suit against a policy restricting the people to whom they could be released, creating what they alleged was a blanket detention policy that effectively limited their access to SIJS.⁵¹ The suit was ultimately resolved with the 1996 Stipulated *Flores* Settlement, but multiple sources show how the INS failed to effectively implement the agreement detailing the rights of children in INS custody.⁵² In her 2002 U.S. Senate testimony, Wendy Young of the Refugee Women’s Commission stated that,

The *Flores* agreement requires the INS to release children to parents, relatives or other responsible entities or to otherwise place them in the least restrictive setting possible. However, the INS often fails to release children even when family is available. Service providers in Houston report that family reunification has dropped from 75 to 35 percent.⁵³

Gregory Chen recounts the story of “Gustavo Sanchez” (altered name), a developmentally disabled Honduran boy who experienced vicious abuse at the hands of his mother.⁵⁴ The Los Angeles County child welfare system removed Gustavo and placed him in foster care, and a state court found he had been abused, neglected and abandoned—and fully eligible for SIJS. Before he could obtain the status, the INS took custody of Gustavo for the purposes of deporting him, and refused to return Gustavo to foster care even after a federal judge ordered them to do so in 1998. Aryah Somers details the

⁴⁹ In re Welfare of Y.W., a/k/a J.W., 1996 WL 665937, at *2 (Minn. Ct. App. Nov. 19, 1996) (unpublished decision).

⁵⁰ *Id.* at *5.

⁵¹ Of interest to those contesting the Obama Administration’s policy of detaining mothers and children starting in 2014, this policy, too, was the response to “dramatic increase in the number of juvenile aliens” found unaccompanied by a parent, guardian or a[n] adult relative. Detention and Retention of Juveniles, 53 Fed.Reg. 17,449 (May 17, 1988); cf. Julia Preston, *Judge Orders Stop to Detention of Families at Borders*, N.Y. TIMES, Feb. 20, 2015, available at <http://www.nytimes.com/2015/02/21/us/judge-orders-stop-to-detention-of-families-at-borders.html>, archived at <http://perma.cc/HW8J-Y86N> (“Homeland Security Secretary Jeh C. Johnson said the detention policy was devised to send a clear message to families in Central America, where most of the migrants were from . . .”).

⁵² Stipulated Settlement Agreement, *Flores v. Reno*, Case No. CV85-4544-RJK (C.D. Cal. 1996).

⁵³ The Unaccompanied Alien Child Protection Act: Hearing on S.121 Before the Subcomm. on Immigr., Border Security, and Citizenship of the Senate Judiciary Comm., 107th Cong. (Feb. 28, 2002) [hereinafter “2002 Child Protection Act Hearing”] (Statement of Wendy Young, Women’s Refugee Commission).

⁵⁴ See Chen, *supra* note 41, at 600–02.

various efforts to hold INS to their *Flores* duties, and the reports on the INS' failures to do so as late as 2003.⁵⁵

c. Plenary Power Pains

While power-sharing between any two agencies may be fraught with territorialism and power-plays to maintain traditional areas of control, the particular context between the federal and state levels in SIJS occurred in the shadow of the plenary power doctrine. This doctrine has long asserted, *inter alia*, that regulation of immigration was a purely federal duty, so states could not regulate the admission or expulsion of immigrants. Here, because Congress has explicitly delegated a piece of this authority to the state juvenile courts, the role for the states, while novel, was condoned and therefore constitutional.⁵⁶ It was, however, politically problematic—the immigration agency within the Executive Branch was effectively ceding power through the Legislative Branch's actions.

The willingness of Congress to delegate this authority to the states cuts against one of the bases for the plenary power doctrine: issues concerning foreign policy, such as migration, are only for the federal political branches. There has long been criticism of the doctrine as one that rests on very thin reeds, as well as skepticism about how much immigration decisions truly *would* affect foreign policy. But exceptional events, like the Elian Gonzalez custody battle, showed that at least in exceptional cases, migration issues could become significant foreign policy issues.⁵⁷ This possibility has sown pessimism towards individual states interfering with foreign policy through state-level immigration laws.⁵⁸ Yet in the context of SIJS, Congress has permitted precisely that outcome. Congress likely assumed state court findings about children's best interests would not raise foreign policy issues. While the possibility of such issues in any given child dependency case seems low, courts still make merit-based findings by comparing American conditions to that of the child's home country.⁵⁹ It is at least plausible to think that the

⁵⁵ See Somers, *supra* note 10, at 337–39.

⁵⁶ The constitutional *novelty* could, as suggested below, open space for further thinking about a state role in regulation of immigration, but developing that idea is far beyond the scope of this article.

⁵⁷ Tim Padgett, *How The Battle Over Elián González Helped Change U.S. Cuba Policy*, NPR, June 28, 2015, available at <http://www.npr.org/sections/parallels/2015/06/28/417716173/how-the-battle-over-eli-n-gonz-lez-helped-change-u-s-cuba-policy>, archived at <http://perma.cc/9CED-D47M>; see also Victor C. Romero, *On Elian and Aliens: A Political Solution to the Plenary Power Problem*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 343 (2001).

⁵⁸ With its origins in anti-Chinese immigration policies, it seems that both the states and the federal government had the same inclination to create anti-Chinese foreign policy tension, but the federal government wanted the exclusive right to do so.

⁵⁹ These findings rely upon evidence in the record about safety, and medical and educational opportunities in the home country, and they necessarily (for the child's case to be well argued) emphasize the worst parts of the home country and the best parts of the U.S. Problems in the source countries are real, but the repeated emphasis uniquely on those aspects of the three countries certainly feeds a problematic narrative of third-world insolvability that has been critiqued in international development and human rights literature for decades. See, e.g.,

source countries for the most SIJ cases (El Salvador, Honduras and Guatemala) would react negatively to consistent findings of harms or lack of opportunities within their borders.

The foreign-policy echo of these decisions is borne out by an earlier history of federal government involvement in determining the best interests of children. In the aftermath of World War II, prospective immigrant children's best interests had previously been adjudicated by the federal government as a foreign policy matter. At that time, the US accepted a large share of refugee children from the USSR, ultimately holding that return to the USSR was not in the children's best interests. This was clearly driven by Cold War-era concerns as foreign policy driven immigration determinations were entirely consistent with the criticized, but durable, plenary power doctrine. That 1950s experience was thus typical of the power the federal government had over migration issues, and represents a marked shift in the post-1990 power-allocation structure.⁶⁰ This also underscores the reality that the choice of state courts adjudicating best interests was not an historic inevitability.

C. 1997-2008: Amendments Asserting the Power of the Federal Government

a. The Era of Consent

In 1997, a set of amendments to SIJS restricted its scope in ways that privileged the federal government. This move strengthened federal oversight of the SIJS process, while substantively fine-tuning the categories of minors permitted to seek SIJS. The amendment, contained in a DOJ appropriations law, required the Attorney-General to *specifically consent* to the dependency order for a broad range of minors who would otherwise be eligible: minors in the actual or constructive custody of then-INS.⁶¹ This meant that express consent was required well beyond the situation of minors in the physical custody of then-INS facilities. "Constructive" custody was interpreted as applying to minors in the much broader net of removal proceedings. The case of *P.G. v. D.C.F.* reveals the extent to which this was a problem. There, a Florida state court found it had no jurisdiction to hear the case of a minor

Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201 (2001) (challenging the narratives of poor country "powerless victims" and human rights "saviors"). It also ignores real safety issues that follow these children into the United States. See, e.g., Tim Rogers, *10th Grader's Murder Highlights Threat of MS-13 Gang Violence in American Schools*, FUSION, Sept. 30, 2015, available at <http://fusion.net/story/205810/10th-graders-murder-highlights-threat-of-ms-13-gang-violence-in-american-schools/>, archived at <http://perma.cc/5QRL-S74T>.

⁶⁰ See Daniel J. Steinbock, *The Admission Of Unaccompanied Children Into The United States*, 7 YALE L. AND POL. REV. 137, 151 (1989). Subsequent schemes, including programs for Hungarian refugee post-1956 and Cuban refugee children also existed at the purely federal level.

⁶¹ This iteration of the SIJS law spanned the dismantling of the INS in 2002, and the placement of its functions within the Department of Homeland Security.

who was neglected and abandoned by both parents because the minor was in removal proceedings. The child, the state court held, was therefore in constructive custody of the Attorney General and in need of consent.⁶² (That breadth of constructive custody shifted in a subsequent case where only immigrants *already* ordered deported were deemed to be in the constructive custody of the Attorney General.)⁶³ A 1997 decision later confirmed that while consent could be given, the courts had no jurisdiction without such consent.⁶⁴

The consent requirement demonstrates a pronounced federal reassertion of a role in SIJS, both as a jurisdictional matter and as a form of federal gate-keeping. Since even where the state court had jurisdiction as a matter of state law, the “specific consent” provision would require a federal blessing of the state court’s jurisdiction. For each and every applicant seeking SIJS, then, the applicant (or most likely, the applicant’s attorney or social worker) needed to *first* secure this consent. State court orders made without that consent were hence invalid, even if consent came later.

Early memos interpreting the new version of the law gave the then-INS enormous powers of review over the substance of the minor’s dependency claims. The first two memos in 1998 and 1999 respectively, asked applicants to submit evidence of abuse and neglect to the INS, evidence of the location of parents and other relatives, and a statement of why it would not be in their best interests to be returned to the countries of origin.⁶⁵ As Angela Lloyd has noted:

The overriding problem with each of the first two field memoranda was that each required the Service to make independent determinations regarding a juvenile applicant’s dependency status; thereby contradicting the Service’s own decision in 1993 that ‘it would be both impractical and inappropriate for the Service to routinely readjudicate judicial or social service agency administrative determinations.’⁶⁶

This added considerable difficulty to the process. An Illinois training manual from this period recounts,

⁶² See *P.G. v. Dep’t of Children & Family Servs.*, 867 So.2d 1248 (Fla. Dist. Ct. App. 2004).

⁶³ *Matter of Saint Preux*, A97634322 (AAO 6/5/2007).

⁶⁴ “Since the state court lacks jurisdiction to determine the custodial status of an undocumented alien in federal custody, the INS considers these dependency orders to be invalid.” *INS Revises Legal Opinion on Special Immigration Status for Juveniles*, 74 No. 23 INTERPRETER RELEASES 964, 965 (1997).

⁶⁵ Memorandum from Thomas E. Cook, Acting Asst. Comm’r., Adjudications Div., Immigr. and Naturalization Serv., U.S. Dep’t. of Just. (Aug. 7, 1998); Memorandum from Thomas E. Cook, Acting Asst. Comm’r., Adjudications Div., Immigr. and Naturalization Serv., U.S. Dep’t. of Just. (Jul. 9, 1999).

⁶⁶ Angela Lloyd, *Regulating Consent: Protecting Undocumented Immigrant Children from Their (Evil) Step-Uncle Sam, or How to Ameliorate the Impact of the 1997 Amendments to the Sij Law*, 15 B.U. PUB. INT. L.J. 237, 246 (2006).

Obtaining DHS's consent to take the child to juvenile court can be an arduous and lengthy process. In the past, DHS has requested access to the child's files through ORR and, in certain cases, requested interviews with the child, her caseworker, and others involved in the care of the child.⁶⁷ Currently, no formal procedures or policies exist to govern DHS's inquiry.⁶⁷

Nor was consent a foregone conclusion, although under DHS guidance in 2004, consent was to be given if it appeared the minor would qualify for SIJS.⁶⁸ The Illinois manual goes on to say,

In the case where DHS refuses to grant consent to proceed to juvenile court, it may be appropriate to submit additional evidence to rebut the decision. Should additional evidence not be available, federal court action may be required. Such action may include filing a writ of mandamus to compel a decision or direct review of a denial of the consent request.⁶⁹

Professor Katherine Porter wrote in the early years after the law's passage, "Many children who previously were clearly eligible for SIJ status now face [the] difficult INS bureaucracy, interminable delays, and a tangled web of laws."⁷⁰ The federal insistence on a gate-keeping role in SIJS created a significant barrier to accessing the state courts, and a significant drain on the legal service community's resources as they sought to comply with this demanding process.

The story, though, is not one-sided. The 1997 amendment also expanded the range of state entities capable of making these findings. But while making SIJS findings possible in a broader array of state courts and agencies, the amendment substantively limited SIJS to include the requirement that the foster-care placement be made as a result of "abuse, abandonment or neglect." This change also opened the door to then-INS looking behind state court decisions to see if there truly was abuse, abandonment or neglect, and whether the federal government agreed with the state court interpretations. As Wendi Adelson, an advocate and law professor in Florida, noted:

[T]he Miami Office of USCIS has repeatedly readjudicated cases decided by Miami-Dade juvenile court judges based on their own perceptions of improperly decided adjudications on abuse, abandonment and neglect. Advocates have also encountered situations

⁶⁷ NATIONAL IMMIGRANT JUSTICE CENTER, SPECIAL IMMIGRANT JUVENILE STATUS IN ILLINOIS: A GUIDE FOR PRO BONO ATTORNEYS 9 (June 2007), available at <http://www.f2f.ca.gov/res/pdf/SpecialImmigrantJuvenile.pdf>, archived at <http://perma.cc/5AA3-4E8E>.

⁶⁸ See William R. Yates, *Memorandum #3 – Field Guidance on Special Immigrant Juvenile Status Petitions*, U.S. Citizenship and Immigr. Serv., HQADN 70/23 (May 27, 2004).

⁶⁹ NATIONAL IMMIGRANT JUSTICE CENTER, *supra* note 67, at 9.

⁷⁰ Katherine Porter, *In the Best Interests of the INS: An Analysis of the 1997 Amendment to the Special Immigrant Juvenile Law*, 27 J. LEGIS. 441, 442 (2001).

where their clients' SIJ applicants are denied based on what the Miami Office of USCIS terms their own "federal" standards of abuse, abandonment, and neglect [rather than those applied by the courts with primary jurisdiction over such determinations].⁷¹

Professor Daria Fisher Page has shown how, through interpretations of the consent authority, the 1997 amendments marked the resurgence of the federal role in SIJS. She writes, "Although the principle of deference [to state courts] has remained strong in theory, in fact the agency has used its consent authority to erode deference to the state court findings and to magnify its role as gatekeeper to an immigration benefit."⁷² Her argument, backed by a comprehensive analysis of the Administrative Appeals Office (AAO)'s published decisions from this period, is that the implementing regulations for the consent requirement necessitated the AAO to look behind the state court proceedings. This would ensure the state-court findings were not "sought primarily for the purpose of obtaining the status of an alien lawfully permitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect." This was true even though agency guidance instructed adjudicating officers to *not* look behind the state-court findings.⁷³

Interestingly, the phenomenon of "looking behind" the state court findings worked both for and against the petitioners. Fisher Page finds instances where the AAO used its consent authority to approve petitions where the state court predicate orders were facially deficient (e.g. failing to make an abuse, abandonment, neglect or similar finding). She writes, "Although this use of consent ultimately benefits the petitioner, it is still indicative of the agency's very liberal understanding of deference to the state court, in which it is free, in this category of cases, to read in what is necessary for the adjudication."⁷⁴ Fisher Page also documents multiple cases where "looking behind" facially adequate predicate orders worked against the petitioners.

Perhaps most interesting, given the emphasis on state court expertise for making findings of abuse, abandonment and neglect, and findings concerning children's "best interests," Professor Fisher Page demonstrates how the AAO engages in such findings itself. Concerning best interests, the AAO reads such findings into the predicate orders, even in the absence of any

⁷¹ Wendi Adelson, *Special Immigrant Juvenile Status in Florida: A Guide for Lawyers, Judges, and Child Advocates* 12 n.36 (June 2007), available at <https://www.law.miami.edu/clinics/children-and-youth/pdf/2007/special-immigrant-juvenile-manual-2007.pdf>, archived at <http://perma.cc/K3RT-QD8D>.

⁷² Daria Fisher Page, *The Tension Between Deference and Consent: An Analysis of the Jurisprudence of the Administrative Appeals Office in Special Immigrant Juvenile Status Cases, 1998-2014* (forthcoming, draft on file with the author).

⁷³ "Looking behind" the state or local-level findings happens in the U visa context as well—another argument in support of advocacy to amend the law enforcement certification requirement. *See, e.g.*, Petition for U Nonimmigrant Classification as a Victim of a Qualifying Crime Pursuant to Section 101(a)(15)(U) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(U), 2011 WL 9082005 (denying a case for lack of "qualifying criminal activity" despite the applicant's signed U visa certification).

⁷⁴ Fisher Page, *supra* note 72, at *26.

specific state court conclusion about the whether the child's best interests are best met by remaining in the United States.⁷⁵ More pervasively, there are multiple cases where the AAO interprets state law in a way that contradicts a state court's findings about whether abuse, abandonment neglect or other similar basis actually occurred.⁷⁶

b. Diffusion of Roles at the Federal Level

Within this 1997-2008 period, a major legislative overhaul of immigration led to two major developments in the dynamics of SIJS adjudications. First was the institutional choice of the Department of Health and Human Service's Office of Refugee Resettlement (ORR) to take charge of the care and placement of the minors instead of the Community Relations Service, which had been part of the INS since 1996.⁷⁷ ORR set up the still-operational Division of Unaccompanied Children's Services which, in the words of ORR, incorporates "child welfare values as well as the principles and provisions established by the Flores Agreement in 1997, the Trafficking Victims Protection Act of 2000 and its reauthorization acts, the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2005 and 2008."⁷⁸ As argued in Part II, *infra*, this effectively nullified one of the main arguments for creating the state court role in the first instance.

Less momentous, but also helpful in terms of reducing conflicts of interest, was the dissolution of the INS and absorption of its roles into different bureaus within the new Department of Homeland Security in 2003.⁷⁹ In addition to the challenge of one entity handling both the protection and the enforcement described above, one agency *also* handled both prosecution of removal hearings and the administration and adjudication of those hearings: the Department of Justice. Now, the hearings remained with DOJ. But the Department of Homeland Security's new Bureau for Immigration and Customs Enforcement (ICE) still had responsibility for the prosecutions in removal cases. The relationship between ICE and the benefits-adjudication part of the agency remained comparable, with a separate Bureau within DHS for benefits, just as there had been a separate sub-commission within INS previously.

⁷⁵ "In one case, the AAO concluded that simply because the child was placed by the court with a caregiver in the U.S., coupled with other facts regarding the lack of parental supervision, the court had also implicitly found that it was not in the child's best interest to return to her country of origin." Fisher Page, *supra* note 72, at 27. She also finds a more palatable interpretation that the AAO takes findings that it is in the child's best interests to remain in the US to mean the statutory requirement (best interest not to be returned to home country) is implicitly met. *Id.*

⁷⁶ Fisher Page, *supra* note 72 at *30-33.

⁷⁷ Somers, *supra* note 10, at 334-35, 341.

⁷⁸ Office of Refugee Resettlement, *Unaccompanied Children's Services*, available at <http://www.acf.hhs.gov/programs/orr/programs/ucs>, archived at <http://perma.cc/V7LT-27KX>.

⁷⁹ See Homeland Security Act of 2002, PUB. L. No. 107-296 116 Stat. 2135.

D. Federal Role in Decline: 2008 Through the Present

a. The Wilberforce Amendments

The next major development in SIJS eligibility came in 2008, when Congress passed the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008. As part of a broader bill combatting human trafficking, this law significantly broadened SIJ eligibility away from the foster-care context. The key changes appear in Section 235(d)(1)(A) of the Act. First, the amendment opens the number and kind of settings where SIJ findings could be made, and permitted SIJ proceedings for those declared dependent upon “an individual or entity appointed by a State or juvenile court located in the United States,” or the minor’s guardians or custodians.

Second, the substantive basis of eligibility was no longer linked to eligibility for long-term foster care, but instead linked to whether reunification with one or both parents was possible. As Kele Stewart and Meghan Johnson have noted, “When Congress added the language in 2008 that reunification is not viable with one parent, it intended to expand SIJS eligibility and specifically eliminated language that had previously been interpreted to foreclose one-parent SIJS applications.”⁸⁰

Third, the amendment maintained the general 1997 interest in focusing on the specific reasons for the minor’s situation, but then added some flexibility for those situations where the minor’s story did not neatly fit into the state law definitions of abuse, abandonment or neglect. To those three grounds, the 2008 law added “or a similar basis found under State law.” The cumulative effect of these three changes meant that now a minor living with one parent could seek SIJS, if the other parent had abused, abandoned or neglected the child, and accounted for situations where the other parent had died. The focus of the inquiry thus shifted from whether the minor had any parent to care for him or her (because previously, if they did, then they would not have been in foster care) to whether it was in the minor’s best interests to be returned to the home country. The minor still needed to show abuse, abandonment, neglect, or something similar by one of his or her parents, but this expansion permitted many more children to apply.

Finally, the 2008 amendments dramatically reduced the need for federal-level consent, perhaps the most literal gate-keeping role left to the federal entities in this process. Express consent was reserved only for those cases where a minor in the *actual* custody of HHS sought to use the family-court process to change his or her custody to someone other than HHS (a family member or other guardian, for example). In such cases, the minor could make the request via a form submitted to HHS—and was guaranteed a

⁸⁰ Meghan Johnson and Kele Stewart, *Unequal Access to Special Immigrant Juvenile Status: State Court*, AMERICAN BAR ASSOCIATION (July, 14, 2014), available at <http://apps.americanbar.org/litigation/committees/childrights/content/articles/summer2014-0714-unequal-access-special-immigrant-juvenile-status-state-court-adjudication-one-parent-cases.html>, archived at <http://perma.cc/UY74-TXLG>.

response within 30 days.⁸¹ The purpose of the HHS consent was “an acknowledgement that the request for SIJ classification is bona fide,” meaning that neither the dependency order nor the best interest determination was “sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect.”⁸² Nonetheless, despite this shift, consent became a significant way for the federal government to continue exerting authority.

b. Homeland Security’s Continuing Difficulty Accepting the New Balance of Power

It is admittedly impossible with an institution as complex, disparate and dispersed as the Department of Homeland Security to ascribe motives to results. Still, in varied ways, specific implementation problems post-1998 suggest the Department of Homeland Security had difficulty accepting its more minor role in this process.

First, the agency continued looking behind state adjudications to check for sufficiency. Three years after the 1998 amendments came into effect, the USCIS Ombudsman noted a significant problem with the agency looking at the evidence underlying state court adjudications—one way to reinsert a federal role into the process.⁸³ The USCIS Ombudsman named this as one of the two most significant problems in adjudication of SIJ petitions by USCIS, noting that “while USCIS is precluded from re-evaluating the facts and circumstances underlying the juvenile court dependency determination, stakeholders representing SIJ applicants report RFEs seeking access to such evidence used by the court when making a dependency determination.”⁸⁴ To a great extent, as documented by Fisher Page, such second-guessing still happens today.⁸⁵

Second, USCIS faced charges that it frequently failed to decide on pending adjustment applications for minors whose SIJ petitions had been

⁸¹ ACF, Interim Program Instruction: Specific Consent Requests (Dec. 24, 2009), *available at* http://www.acf.hhs.gov/sites/default/files/ort/special_immigrant_juvenile_status_specific_consent_program.pdf, *archived at* <http://perma.cc/HU7J-G2Y9>.

⁸² DONALD NEUFELD & PEARL CHANG, U.S. CITIZEN AND IMMIGRATION SERVICES, TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2008: SPECIAL IMMIGRANT JUVENILE STATUS PROVISIONS, HQOPS 70/8.5 (2009) (quoting H.R. Rep. No. 105-405 at 130 (1997)).

⁸³ Citizenship and Immigration Services Ombudsman Recommendation, *Special Immigrant Juvenile Adjudications: An Opportunity for Adoption of Best Practices* (April 2011), *available at* <http://www.dhs.gov/xlibrary/assets/Citizenship-and-Immigration-Services-Ombudsman-Recommendation-Special-Immigrant-Juvenile-Adjudications.pdf>, *archived at* <http://perma.cc/2WVQ-76R6>.

⁸⁴ *Id.* The Ombudsman clarified the limited appropriateness of seeking to peer behind the state court determination, and that such revisiting of the state-level events should be reserved for times that the state order “fails to specify whether it was issued on the basis of abuse, neglect or abandonment” or has stated an alternate basis like “parental failure to meet psychosocial or medical needs,” and the petitioner needs to establish that the state court finding is similar to abuse, neglect or abandonment.

⁸⁵ Fisher Page, *supra* note 72.

approved—until the minor reached age 21, and aged-out of eligibility.⁸⁶ Attorneys for minors alleged, too, that HHS withheld specific consent so that minors could proceed with their family or juvenile court proceedings, leading many minors to age out before being permitted to proceed. The government eventually settled a class action lawsuit, *Perez-Olano v. Holder*, addressing these problems.⁸⁷

For cases permitted to go forward (where jurisdiction was either not at issue, or where consent to jurisdiction was granted), data from shortly after the 2008 law took effect show that SIJ approvals rose with a consistently negligible number of denials by USCIS. For example, of 1,645 applications in FY2010, only 97 were rejected. That year, 1,590 of the state-level findings built a sufficient case for applicant eligibility. The numbers show that once a case was under state court jurisdiction, the federal government played only a slight gatekeeping role for the petitions. This, conversely, demonstrates the enormous gatekeeping role played at the state level; without the state-level findings (the “predicate order”), no application could be filed, yet once filed, the state-level predicate order had a 94.25% chance of leading to successful adjudication at the federal level.

It should be noted that the federal government plays a more significant role in the second stage of the process, the adjudication of applications for lawful permanent residence for those with approved SIJ petitions. By contrast with the petition stage, when the petitioner includes only very basic biographic information along with the state-court order, the second step requires the full gauntlet of screening for inadmissibility issues. This is the same admissibility screening that any applicant for permanent residence would face, and it is here that USCIS plays a more vigorous gate-keeping role. This latter-stage role is the traditional role that the federal government plays for all applicants seeking permanent residence.

Prior to the *Perez-Olano* settlement, the federal government’s gate-keeping role was felt most strongly first at the level of seeking consent, and then at the phase of adjudicating applications for adjustment of status. But within those two stages, state courts played a massive role in determining which minors could and could not be placed on a path toward lawful permanent residence.

II. CHANGING ROLES, CHANGING JUSTIFICATIONS

There have been two major justifications for giving a core gatekeeping role to state juvenile courts at SIJS’ inception. First was the competence of state courts in family law matters and other matters involving children, and

⁸⁶ Signed Settlement Agreement, *Perez-Olano v. Holder*, Case No. CV 05-3604 (C.D. Cal. 2010). available at http://www.uscis.gov/sites/default/files/USCIS/Laws/Legal%20Settlement%20Notices%20and%20Agreements/Perez-Olano%20v%20Holder/Signed_Settlement_Agreement.pdf, archived at <https://perma.cc/H6QQ-XN6C>.

⁸⁷ *Id.*

the relative *lack* of competence within the INS. Second was the conflict-of-interest within the then-INS, with its competing enforcement and protection roles concerning children. This section examines the merits of and critiques of each justification in 1990 compared with today, and holds that the landscape has changed so significantly that the original justifications for the state role are no longer compelling.

As a preliminary matter, it is critical to understand what this article is *not* proposing. The article is not proposing to strip state courts of jurisdiction over custody, guardianship, or dependency proceedings. Litigants who need to access state courts for any of those purposes would, of course, continue to have access. The article simply puts forward the argument that state courts are no longer necessary for the immigration-related determination of whether it is in the child's best interests to stay in the United States or return to the child's country of origin. While this would dramatically simplify the process for securing the child's immigration status, it does not at all diminish existing state court jurisdiction over traditional dependency or associated family law matters.

A. Institutional Competence

a. Then: State Court Expertise with No Federal Equivalent

A major and enduring justification for the state court role centers on two related dimensions of competence. First is the substantive judicial expertise in the adjudication of children's "best interests." Second is the effectiveness of the forum itself for meeting the requirements of the statute. In the substantive expertise line of argument, state courts are infinitely better suited to handle "best interests" kind of adjudication than immigration courts. Professor David Thronson has argued this most forcefully. He argues that immigration courts treat children as adults with no accommodations for age, contrasted with state court competence in handling proceedings for minors.⁸⁸ While not all state courts are particularly less harried than immigration courts,⁸⁹ and child-protection proceedings have themselves been heavily criticized,⁹⁰ it is true that immigration courts simply are not set up to play the *in loco parentis* role that a good state court can. The currently massive dockets of minors have placed an exceptional strain on court resources, including the judges who are trying diligently to ensure the ongoing safety, care, and

⁸⁸ David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 1000 (2002).

⁸⁹ The author has practiced in both state court at the D.C. Superior Court and immigration courts in multiple states, and is drawing upon personal experiences for this assertion. For a critique of the realities of domestic violence courts in particular, which share a concern for helping "victims," see Leigh Goodmark, *Clinical Cognitive Dissonance: The Values and Goals of Domestic Violence Clinics, the Legal System, and the Students Caught in the Middle*, 20 J.L. & POL'Y 301, 315–23 (2012).

⁹⁰ See Matthew Fraidin, *Stories Told and Untold: Confidentiality and the Master Narratives of Child Welfare*, 63 ME. L. REV. 1 (2010).

education of the many children appearing before them in a single morning or afternoon. This difference—comparing the potential of state court to the grim reality of alternatives within the immigration system in 1990—certainly created a powerful justification for the state court role.

Another fear at the time was that immigration judges, or the INS offices, would begin questioning children about sensitive issues of abuse, neglect, abandonment and so forth. And as Professor Thronson has written,

Given that the basic framework of immigration law fails to recognize that children exist without parents, substantive and procedural rules do virtually nothing to account for the possibility of children in proceedings unaccompanied by parents. When children find themselves in immigration proceedings unaccompanied by adults, the same substantive rules, evidentiary requirements, and procedural complexities that apply to adults also apply to them. Rather than remedies and procedures tailored for children, children suffer the same harsh consequences and limited procedural protections faced by adult immigrants.⁹¹

Moreover, in 1990, the INS received massive internal and external criticism for being poorly managed: the GAO reported that “INS continues to be ‘an agency at odds with itself,’ with overlapping and inconsistent programs, ‘weak management systems,’ a lack of ‘clearly defined goals, priorities and plans,’ and a decade of ‘inconsistent leadership.’”⁹² Faced with the prospect of a poorly managed entity undertaking sensitive adjudications of vulnerable children’s claims, legislators had a powerful motivation to seek an alternative. No doubt, they found this alternative in state courts.

It is also important to understand what the then-INS’s adjudicatory experience consisted of in 1990. The contrast in expertise at that time was indeed stark. The INS of 1990 had not yet begun to undertake adjudication of visas and petitions for domestic violence, human trafficking and other-crime survivors as those only entered the law as late as 1994. The asylum regime was ten years old, but already a line had been established between unaccompanied refugee minors (whose claims had been adjudicated prior to their arrival in the United States) and unaccompanied minors who were “treated in a punitive and hostile manner” and often faced rapid removal. This set of experiences argued against putting more questions of child safety in the hands of the INS.⁹³

Arguably the closest family-related benefit adjudication within INS at that time was the quest to discern whether marriages were made in “good faith,” a requirement aimed at reducing marriage fraud. The general rule for

⁹¹ Thronson, *supra* note 88, at 1000.

⁹² General Counsel Both Blast INS as Poorly Run, 67 No. 44 Interpreter Releases 1325, 1325 (1990).

⁹³ Somers, *supra* note 10, at 335. Somers has noted, “this meant that there were two parallel systems for custody in the United States for children, who in many ways, were similarly situated in their flight from civil wars, persecution, and exploitation.” *Id.* at 337.

recognizing the legality of a marriage was that it had to be valid where performed—therefore if a state issued a marriage license, the marriage was acceptable for immigration purposes, despite the wide variety of state rules about who could or could not get married. The petitioners, however, also had to show that it was a genuine, “good faith marriage” not entered into for immigration purposes. This required a good deal of sensitivity and case-specific balancing of a host of factors,⁹⁴ and Congress was at ease asking the INS to look behind the state law’s issuance of a marriage license in order to make that determination.⁹⁵ As Professor Abrams has noted, this is the opposite of a [formalist] understanding of marriage, wherein having the marriage certificate is the only matter of concern. Instead, “good faith marriage” adjudications closely—many say overly— inquire into the ways in which a couple’s marriage has manifested in such things as joint finances, travel history, relationships with in-laws, and more.⁹⁶ This adjudication, though, had nothing to do with children or children’s best interests, and was thus presumably deemed too remote to provide any useful comparison for what the SIJ-findings process might look like if handled on the federal level.

The state court forum itself was also well suited to the more limited form of SIJS that existed between 1990 and 1997. During that time, most unaccompanied minors who were SIJ-eligible were already before state courts as part of their dependency proceedings. For dependency purposes, the courts were already examining their interests, their placements, and so forth. Securing a finding to satisfy SIJS requirements involved an additional burden on the children’s attorneys, albeit a relatively small one because the court already had jurisdiction over the children’s cases. Moreover, minors whose cases were already before the court did not face some of the procedural oddities described in Part III.B, *infra*, such as filing custody cases where there is no contesting party, or effectuating service on disappeared or deceased parents in foreign countries.

⁹⁴ “Evidence to establish intent could take many forms, including, but not limited to, proof that the beneficiary has been listed as the petitioner’s spouse on insurance policies, property leases, income tax forms, or bank accounts; and testimony or other evidence regarding courtship, wedding ceremony, shared residence, and experiences.” Matter of Laureano, 19 I. & N. Dec. 1, 3 (BIA 1983).

⁹⁵ “It is impossible to contradict the Service’s assessment that it lacks the ‘expertise,’ and is not ‘qualified,’ to do individualized child-placement studies, and the right alleged here provides no basis for this Court to impose upon what is essentially a law enforcement agency the obligation to expend its limited resources in developing such expertise and qualification. That reordering of priorities is for Congress—which has shown, we may say, no inclination to shrink from the task. *See, e.g.*, 8 U.S.C. § 1154(c) (requiring INS to determine if applicants for immigration are involved in ‘sham’ marriages); *Reno*, 507 U.S. at 1445 (1993). In one early case where the petitioner had not shown any evidence of a bona fide marriage, the Board of Immigration Appeals noted that “the marriage is deemed invalid for immigration purposes *regardless* of whether it would be considered valid under the domestic law of the jurisdiction where performed. *See* Matter of M——, 8 I. & N. Dec. 217, 217 (BIA 1958) (emphasis added).”

⁹⁶ *See* Abrams, *supra* note 14. Indeed, as Professor Abrams notes, the immigration law regulates family relationships extensively now.

Finally, in many states—38 as of the most recent report looking at children’s right to counsel across the United States—the child in proceedings has some level of right to representation, which is thus far absent in the immigration context.⁹⁷ To be sure, 12 states permit appointed counsel as a discretionary matter, but it is not required.

For the most part, this competence justification for the state court role endures. Arguably, however, the federal government now has concurrent expertise in this area that should not be overlooked.

b. Now: Concurrent Competence

At the outset, it is critical to note that “competence” does not mean perfection. If it did, even state courts would be inadequate.⁹⁸ When I consider institutional competence, I define it to mean that the agency has sufficient structures, processes, training, and experience to handle cases responsibly, including sufficient safeguards to correct mistakes that do happen. As one scholar considering the role of state court in adjudicating children’s rights wrote:

When we ask, as a policy matter, which institution in a democratic republic should make a decision, we are really asking which institution is best suited to carry out the task. This recognizes three things. First, institutions have different competencies—or example, courts are better at adjudicating individual disputes than a legislature. Second, all institutions may be capable, but one is more capable than the others. Third, no institution may be ideal, but we have to pick between the lesser of two (or several) evils. Thus, institutional competence is relative.⁹⁹

⁹⁷ CHILDREN’S ADVOCACY INSTITUTE, FIRST STAR, UNIV. OF SAN DIEGO SCHOOL OF LAW, A CHILD’S RIGHT TO COUNSEL: A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED AND NEGLECTED CHILDREN 1, 20, 22–23 (2009), available at http://www.cachildlaw.org/Misc/Final_RTC_2nd_Edition_lr.pdf, archived at <http://perma.cc/G2N2-JZN8>; see also Benjamin Good, *A Child’s Right to Counsel in Removal Proceedings*, 10 STAN. J. CIV. RTS. & CIV. LIBERTIES 109, 111 (2014).

⁹⁸ See, e.g., FEERICK CENTER FOR SOCIAL JUSTICE, NEW YORK UNACCOMPANIED IMMIGRANT CHILDREN PROJECT STATE COURT WORKING GROUP (Mar. 2014) [hereinafter NYUICP Report] (describing the flaws and inconsistencies in the New York City court system that is otherwise well-regarded), available at http://www.fordham.edu/download/downloads/id/3019/findings_from_a_survey_of_lawyers_representing_immigrant_youth_eligible_for_special_immigrant_juvenile_status_in_nys_family_court.pdf, archived at <http://perma.cc/UW4V-3NZ8>.

⁹⁹ Larry Cunningham, *A Question of Capacity: Towards A Comprehensive and Consistent Vision of Children and Their Status under Law*, 10 U.C. DAVIS J. JUV. L. & POL’Y 275, 370 (2006); see also Pulitzer, *supra* note 10, at 223 (“When SIJS was enacted, there was an expectation that children and youth in need of protection would benefit from the chance to appear before a ‘neutral’ entity that had expertise in adjudicating children’s cases. If New York is any indication, state courts might not be as neutral as anticipated. The simple fact is that when judges adjudicate cases involving requests for special findings, the proceeding becomes tainted. The focus shifts away from a child’s best interests and towards immigration gatekeeping. Knowledge of SIJS has now started to impact negatively state court proceedings. The result is a best interest of the child standard that is two-tiered, whereby abused, abandoned, and

This section explores how state courts do, unquestionably, still have a high degree of competence (especially considering experience, training and structures) to determine a child's best interests. Likewise, it examines how the federal government now has comparable competence, with years of training and experience adjudicating comparably complex issues, and with procedures better suited to most SIJS-eligible children.

i. State Court Competence Today

The original focus on institutional competence concerned itself primarily with the ability to handle sensitive family law determinations *and* to deal with minors in a litigation process. In both cases, the state courts still clearly have competence. As late as 2011, when USCIS issued draft regulations for comment, USCIS noted the state court's expertise at determining the viability of parental reunification.¹⁰⁰ And perhaps for one specific sub-category of SIJS-eligible minors, those in foster care and dependency proceedings, the analysis ends there. For these cases, the role and advantages of state court have not significantly changed. The process still largely works without some of the problems that have emerged for others as SIJS has changed and evolved. Experts such as Professor Hlass and others, however, have noted how state screening procedures and policies may make access to SIJS via the foster-care system unpredictable and uneven as well.¹⁰¹

State court competence itself has several important caveats. First, state courts and dependency proceedings have been criticized by scholars of family law for being narrow in their conception of litigants' best interests, being overly secretive (for dependency proceedings), and providing a hostile forum for a variety of litigants.¹⁰² Second, state courts have not been uniformly well-disposed toward immigrant litigants,¹⁰³ or well-informed about immigration law.¹⁰⁴ Multiple courts have determined that a parent's immigration status is a relevant factor in determining custody.¹⁰⁵ In her discussion of one

neglected immigrant children are treated differently than their U.S.-citizen counterparts in family and juvenile court.”)

¹⁰⁰ Department of Homeland Security Special Immigrant Juvenile Petitions, 76 Fed. Reg. 54978-01 (Sept. 11, 2011) (“Determining the viability of reunification with one or both of a child's parents due to abuse, neglect, abandonment, or a similar basis under State law is a question that lies within the expertise of the juvenile court, applying relevant State law.”).

¹⁰¹ See Hlass, *supra* note 10.

¹⁰² See Goodmark, *supra* note 89.

¹⁰³ David Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. State Courts*, 11 TEX. HISP. J. L. & POL'Y 45 (2005).

¹⁰⁴ “The main immigration statute, the Immigration and Nationality Act (“INA”) is hundreds of pages long and written in a highly-technical manner that can be opaque and confusing to outsiders. Even intelligent and experienced judges can have a difficult time understanding the provisions of the INA, especially if their practice does not normally involve interpreting it.” Kerry Abrams, *Immigration Status and the Best Interests of the Child Standard*, 14 VA. J. Soc. POL'Y & L. 87, 92 (2006).

¹⁰⁵ See, e.g., Ramirez v. Ramirez, 2007 WL 1192587 (Ky. Ct. App. 2007); In re Duenas, 725 N.W.2d 658 (Iowa Ct. App. 2006); Rico v. Rodriguez, 121 Nev. 695, 120 P.3d 812 (2005); see generally Ann M. Haralambie, *Handling Child Custody, Abuse and Adoption Cases* § 4:19.50 (“Immigration Status”).

such case from Nevada, Professor Abrams comments, “the [Rico v. Rodriguez opinion] serves as an example of how damaging a state court’s misperceptions about federal immigration law can be, and shows how these misperceptions can significantly affect the outcome in child custody cases.”¹⁰⁶

In many jurisdictions, well-trained judges embrace their role in the SIJ process, and attorneys have no trouble achieving favorable outcomes for eligible clients. But in some of the worst cases, noncitizens seeking custody of their children have faced overt discrimination as a result of their immigration status.¹⁰⁷ Sarah Rogerson notes that the tension between parental and child’s rights is magnified when immigration enforcement systems in particular are involved. Indeed, a “parent’s unauthorized status, potential state criminal conviction and/or incarcerated status, can be unfairly and disproportionately counted against both parental fitness and the best interests of the child—particularly if the child is a United States citizen.”¹⁰⁸ A detained immigrant parent might not be able to help her child apply for SIJS, even if the child is otherwise eligible, because the mother’s detention would be considered a negative factor for establishing her custodial rights. This is the case even though custody is the mechanism through which the court has jurisdiction to issue the necessary SIJ findings.

Professor Rogerson notes another problematic outcome in abuse and neglect proceedings. For example, a typical case could involve a mother who is subjected to intense domestic violence, who is unable to leave the home, and who is then convicted of failing to protect her child from harm. Because this kind of conviction is a deportable offense, the mother may be deported and the child could then go into the custody of the abusive father. Rogerson writes, “The child welfare system and immigration enforcement mechanisms operate independent of one another with little regard for how actions in one can impact a parent’s legal rights in the other, often permanently separating children from their parents.”¹⁰⁹ Professor Theo Liebmann underscores this point in his examination of how admissions made by litigants in state court can have negative immigration consequences.¹¹⁰ State court’s appropriateness as the institution of choice for the SIJS procedure thus comes with some significant critiques.

¹⁰⁶ Abrams, *supra* note 104, at 88 (2006).

¹⁰⁷ Thronson, *supra* note 10, at 54–58.

¹⁰⁸ Sarah Rogerson, *Lack of Detained Parents’ Access to the Family Justice System and the Unjust Severance of the Parent-Child Relationship*, 47 *FAM. L.Q.* 141, 146 (2013).

¹⁰⁹ Sarah Rogerson, *Unintended and Unavoidable: The Failure to Protect Rule and Its Consequences for Undocumented Parents and Their Children*, 50 *FAM. CT. REV.* 580, 580 (2012).

¹¹⁰ Theo Liebmann, *Family Court and the Unique Needs of Children and Families Who Lack Immigration Status*, 40 *COLUM. J.L. & SOC. PROBS.* 583, 584 (2007).

ii. Federal Competence Today: HHS and DHS

The major change between 1990 and 2015 is that state courts do not *alone* possess competence. Rather, since the inception of the 1990 law, the federal government has gained considerable traction in this area.

First, the Department of Health and Human Services' Office of Refugee Resettlement (ORR) already does much of the interviewing and evaluation of the children's best interests as part of the process of releasing minors to suitable caretakers. The first two responsibilities ORR lists concerning unaccompanied minors are 1) "[m]aking and implementing *placement* decisions for the unaccompanied children" and 2) "[e]nsuring that the *interests of the child* are considered in decisions related to the care and custody of unaccompanied children."¹¹¹ Such decisions are already undertaken for each child apprehended at the border and placed in HHS custody, and encompass much of the kind of fact-finding the system currently assigns to the state courts. HHS also provides ongoing monitoring of the children's placements to best ensure the child's ongoing wellbeing.¹¹²

Second, within the Department of Homeland Security itself, USCIS has far more experience adjudicating complex family issues. This is done through the Violence Against Women Act Unit (VAWA Unit, also known as the Crime Victims Unit) located within the USCIS Vermont Service Center and through the Administrative Appeals Office. The latter agency looks at VAWA Unit decisions *de novo*, playing an important feedback role in trying to ensure that everything from the application of evidentiary standards to the legal interpretations of various statutory terms are consistent and accurate. Since not all SIJS-eligible children are in HHS custody, it is important to understand how DHS, too, has expertise in areas comparable to that of state courts.

Three humanitarian forms of protection fall under the VAWA Unit's jurisdiction: T-visas for human trafficking survivors,¹¹³ U visas for survivors or indirect victims of serious crimes,¹¹⁴ and Violence Against Women Act (VAWA) self-petitions for abused spouses of citizens or lawful permanent residents.¹¹⁵ Each of these demands that adjudicators make multi-variable decisions on a host of eligibility requirements, and that the adjudicators be aware of such influencing factors as trauma, dynamics of abuse. Because many of those involved in SIJS are less familiar with these adjudications and the VAWA Unit process, below is a summary of the kinds of decisions that the VAWA Unit and the Administrative Appeals Office routinely make.

¹¹¹ Emphasis added. Office of Refugee Settlement, About Unaccompanied Children's Services, available at <http://www.acf.hhs.gov/programs/orr/programs/ucs/about>, archived at <http://perma.cc/SVQ3-JPGP>.

¹¹² See *id.*

¹¹³ See Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386 Division A, 114 Stat. 1464.

¹¹⁴ See *id.*

¹¹⁵ Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902.

U visas: Generally, U visas are available to those noncitizens who have been the victim of one or more of a host of serious crimes, ranging from rape to child abuse to assault to extortion. The visa applicant needs law enforcement to certify, essentially, that they were a victim of the qualifying crime (or equivalent crime); that they possess information about the crime; and that they have been, are, or are willing to be helpful to law enforcement in the investigation or prosecution of this crime. Although the certification requirement exists in order to draw upon the expertise of the law enforcement entity most closely involved with assessing whether a crime occurred, and then investigating and prosecuting it, the VAWA Unit revisits those determinations by applying the facts and evidence as presented by the applicant to the relevant state statutes. While this is a valid criticism of the certification process, it demonstrates the kinds of analysis experience USCIS already possesses.

Beyond what law enforcement can certify, which it does through the Supplement B certification discussed in Part I(a) *supra*, the applicant must also show that they suffered extreme physical or mental abuse¹¹⁶ as a result of the crime. This last element, adjudicated uniquely by the VAWA Unit, examines multiple complex factors, including:

the severity of the perpetrator's conduct, the severity of the harm suffered, the duration of the infliction of the harm and the extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim, including aggravation of pre-existing conditions.¹¹⁷

To do this, the VAWA Unit typically weighs evidence such as the applicant's own statement, medical records, witness letters, psychological evaluations, and so forth, and will request further evidence from the applicant if the initial application is insufficient.¹¹⁸

T Visas: T visas have more elements requiring USCIS-only analysis (as opposed to local law enforcement analysis). A labor trafficking survivor must show that he or she was (1) recruited, obtained, etc. (2) through force, fraud or coercion, for (3) the purpose of involuntary servitude, debt bondage, peonage, or slavery.¹¹⁹ Sex trafficking victims need to show that a (1) commercial sex act was (2) induced through force, fraud or coercion. Like U applicants, T applicants also need to show their willingness to cooperate with law enforcement, although they do not have to do so through a certifi-

¹¹⁶ "Abuse" is an oddly narrow word for this requirement, as the regulations define this in terms of a broader range of harms than "abuse."

¹¹⁷ 8 C.F.R. § 214.14(b)(1) (2013).

¹¹⁸ See, e.g., Petition for U Nonimmigrant Classification as a Victim of a Qualifying Crime Pursuant to Section 101(a)(15)(U) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(U), 2015 WL 1189756 (noting that Vermont Service Center requested further evidence on, *inter alia*, the subject of mental or physical abuse).

¹¹⁹ See 8 U.S.C. § 1101(a)(15)(T) (2012); 8 CFR § 214.11(a).

cation,¹²⁰ and they can avail of a trauma exception to this requirement. And finally, the applicants need to show that they would “suffer extreme hardship involving unusual and severe harm if removed from the United States.” Many terms of these requirements are terms of art that require significant factual analysis, including but not limited to “coercion,” “involuntary servitude” and “unusual and severe harm.” The VAWA Unit is, for example, weighing whether threats of deportation constitute “coercion,” or whether more indicators of coercion are required, whether an exceedingly low rate of pay places the labor inside or outside the confines of “involuntary servitude,” and whether fear of retaliation from the trafficker’s network constitutes “unusual and severe harm.” All of these questions require inquiry into sensitive subjects or complicated psychological dynamics or both—something the VAWA Unit has developed the competence to do through trainings and practice.

VAWA Self-Petitions: Some aspects of VAWA eligibility are simple: a petitioner must have married a U.S. citizen or lawful permanent resident.¹²¹ Others are more subtle: they must have a good faith marriage (a multi-factor analysis discussed *supra* in the general marriage context), jointly resided together (oftentimes clear-cut, but sometimes not), and the person must have suffered battery or extreme cruelty from his or her spouse.¹²² The regulations defining extreme cruelty show the difficulty of developing a legal standard for a concept so complex that it is often illustrated as a wheel with spokes and wedges: eight behavioral spokes and eight wedges cover the categories of possible harms a domestic violence victim might experience, from economic harm to psychological harm.¹²³ Per the regulations, battery or extreme cruelty “includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury.”¹²⁴ The regulations go on to define “acts of violence” to include, *inter alia*, “psychological or sexual abuse or exploitation.”¹²⁵ One example of a finding of extreme cruelty occurred in a case where the Administrative Appeals Office overturned a decision of the VAWA Unit because the wrong evidentiary standard had been applied; the case involved sexual degradation, lack of medical care and verbal abuse which led to depression and suicidal ideation—a cluster of factors

¹²⁰ Of the approximately two dozen T visa applications I submitted, none had a law enforcement certification (despite multiple criminal investigations) and all were approved without the certification.

¹²¹ 8 U.S.C. § 1101(a)(1).

¹²² VAWA is also available to some children of US citizens or LPRs, but for simplicity I am discussing only spousal petitions here.

¹²³ See, e.g., MINNESOTA CENTER AGAINST VIOLENCE AND ABUSE, Immigrant and Refugee Power and Control Wheel (June 2002), available at <http://www.mincava.umn.edu/documents/immigrantwheel/immigrantwheel.html>, archived at <http://perma.cc/PF47-BH3E>.

¹²⁴ 8 C.F.R. § 204.2(c)(vi) (2007).

¹²⁵ *Id.*

that further demonstrates USCIS' experience considering difficult issues and interpreting amorphous legal terms.

For all three of these kinds of adjudications, USCIS now has experience and ability to undertake the requisite evidentiary analysis, weighing multiple variables to assess whether a certain level of harm has occurred, and considering the ways that vulnerability and trauma might affect the individual's statements, story, ability to collect evidence and so forth. USCIS established one centralized office, the VAWA Unit, to handle adjudications of these case from across the nation, meaning there is one set of officers to train and retrain, and one place where advocates can work with the government to improve implementation of the law and quality of decisions. The VAWA Unit has decades of experience and training in these issues, from trainings on the law itself to cultural competence and trauma training. All of this collected wisdom comprises expertise the agency similarly needs in the SIJS context, to assess whether abuse, abandonment or neglect has occurred, and whether it is in the child's best interests to be returned to the home country. Decisions of the Unit can be appealed to the Administrative Appeals Office (AAO) within USCIS, another centralized unit. The AAO provides *de novo* consideration of the applications, and routinely reviews any trending issues or problems with the Vermont Service Center.

What about the experience from the applicant's perspective? Here, too, the USCIS alternative is significantly different from the immigration court alternative feared by advocates when SIJS was first created. The process for affirmative applications before USCIS is non-adversarial, and done entirely in writing at the application or petition stage. This permits the applicant to present a carefully written personal statement that might be developed and refined over multiple interviews. This also comes with the chance for the applicant to build a trusting relationship with their attorney who can probe inconsistencies, dig more deeply into holes in the story and so forth.¹²⁶ This stands in stark contrast to the often difficult experience of testifying in court and being cross-examined by both the Government attorney and, often, by the Immigration Judge him or herself.¹²⁷

¹²⁶ The depth of effort taken on client statements of course varies from attorney to attorney, but best practices abound. *See, e.g.* Evangeline Abriel and Sally Kinoshita, *THE VAWA MANUAL: IMMIGRATION RELIEF FOR ABUSED IMMIGRANTS*, Chapter 4 (6th Ed., 2014); Stacy Caplow, *Putting the "I" In Writing: Drafting an Effective Personal Statement to Tell A Winning Refugee Story*, 14 *LEGAL WRITING: J. LEGAL WRITING INST.* 249 (2008).

¹²⁷ Inevitably, without an adversary, the emerging concern is fraud, for could it not be easier to put forward a false story without an adversary? The answer to that is twofold. First, practically, the Department of Homeland Security carefully screens any cases where adjudicators suspect fraud, and have an active unit devoted to fraud investigation. Second, while state court proceedings are set up in an adversarial posture, by the time of the hearing, it is exceedingly rare for the adversarial party to appear and provide testimony, which means state court judges, too, are relying only upon the facts introduced by one party.

The applicant (or in the case of VAWA or SIJS, the petitioner)¹²⁸ assembles all available evidence—and the standard for VAWA petitions and T and U visa applications is all credible evidence.¹²⁹ Even in removal proceedings, the standard “favors admissibility as long as the evidence is shown to be probative of relevant matters and its use is fundamentally fair so as not to deprive the alien of due process of law.”¹³⁰ This standard is much more forgiving than the standard for admitting evidence in state court where, for example, hearsay is generally not allowed and where authentication rules for evidence can be quite strict.

To illustrate the breadth of evidence that might be included to support a VAWA self-petition—a petitioning process that shows what a strictly-federal SIJS process might look like—the regulations themselves suggest an enormous range of potential supporting documents:

[R]eports and affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel. Persons who have obtained an order of protection against the abuser or have taken other legal steps to end the abuse are strongly encouraged to submit copies of the relating legal documents. Evidence that the abuse victim sought safe-haven in a battered women’s shelter or similar refuge may be relevant, as may a combination of documents such as a photograph of the visibly injured self-petitioner supported by affidavits. Other forms of credible relevant evidence will also be considered. Documentary proof of non-qualifying abuse may only be used to establish a pattern of abuse and violence and to support a claim that qualifying abuse also occurred.¹³¹

This expansive view of probative evidence is enormously helpful to attorneys trying to bring to life both the legal elements and the human elements of any given case.¹³²

¹²⁸ Functionally, applicants and petitioners are very similar, but petitions are filed as a first stage to establish eligibility for a permanent residence, while one files an application for a visa—hence referring to SIJS and VAWA *petitioners*, but U or T visa *applicants*.

¹²⁹ See INA § 204(a)(1)(J) (“In acting on [VAWA] petitions. . . shall consider any credible evidence relevant to the petition. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the [Secretary of Homeland Security]”); 8 C.F.R. § 214.14(c)(4) (establishing the “any credible evidence” standard for U visas); 8 C.F.R. § 214.11(d)(3) (establishing the “any credible evidence” standard for T visas).

¹³⁰ *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980)

¹³¹ 8 C.F.R. § 204.2(c)(2)(iv).

¹³² At a non-profit where I worked alongside social workers to develop client’s cases, I assembled all of the above for various clients, but also submitted such evidence as the meticulously hand-written notes a client had written on a photocopy of the power and control wheel (a process she said made her finally connect the dots of all the things her husband had done to her over the years), a drawing a trafficking survivor’s child had made of “her past, her present, and her future” showing her past as a sad little girl in the home where her mother had been forced to work. The “all credible evidence” standard helped me go beyond meeting the legal

In sum, while the states retain competence, albeit subject to critique, the federal government has two agencies with comparable competence. HHS already undertakes a best interests assessment for unaccompanied minors, thus rendering the state court role somewhat duplicative. And DHS has capacity to make such decisions after many years of experience adjudicating similarly difficult and complex issues in other areas of humanitarian relief. This is a significant change in the landscape of institutional competence between 1990 and the present.

B. *Conflict-of-Interest*

a. Then: Jailer and Caregiver

In 1990, the then-INS was in charge of both care for these unaccompanied minors, and prosecuting deportation proceedings against them—a significant institutional conflict of mission. As Aryah Somers writes, “[T]he INS became the custodian and prosecutor of unaccompanied children detained while crossing the border or within the United States.”¹³³ This conflict was one justification for putting state courts at the heart of the new immigration status: the 1990 law makes the role of juvenile courts central to the entire eligibility process, requiring dependency *and* judicial findings of fact about the minor’s best interests.¹³⁴ In the words of one judge concurring in the result for a SIJ appeal won by the government:

When all is said and done with this case, I believe we have followed the law, but I feel uneasy. We have accomplished nothing constructive. I am not comfortable with the INS holding itself out as Y.W.’s guardian, while at the same time they vigorously line up a case to deport him.¹³⁵

In 2002, in hearings reviewing proposals to improve the process for children, Senator Kennedy noted a similar concern:

We know enough about the Immigration Service that it has two functions: One is law enforcement and one is a support function—Éto support those that have legitimate interest in coming here. And the review of the history of responsibility that was given to this program would demonstrate, I think quite clearly, that this has been more of a law enforcement function rather than it has been in

elements—which were all there—to painting a fuller picture of the clients, the harms done to them, their favorable discretionary factors, and so forth.

¹³³ Somers, *supra* note 10, at 334.

¹³⁴ 1990 SIJS Law, *supra* note 31, §153(a)(3).

¹³⁵ *Welfare of Y.W.*, No. C8-96-715, 1996 WL 665937, at *5 (Minn. Ct. App. Nov. 19, 1996).

terms as a supportive function to the most vulnerable people in our society, which are the children in our society.”¹³⁶

For children’s rights advocates, the results of this were disastrous, with significant violations of rights by the agency charged with protecting them. Wendy Young, Director of the Women’s Refugee Commission testified that “Children are subject to handcuffing and shackling, even at times during their immigration hearings. Translation assistance is rare. In some facilities, access to the outdoors is extremely limited—Children are sometimes misclassified as adults and are co-mingled in adult detention centers or prisons.”¹³⁷At the same hearing, Andrew Morton, a lawyer who headed a project at Arnold and Porter to increase access to counsel for these children, described it as follows:

INS now has the incompatible yet simultaneous roles as caregiver, prosecutor and jailer. And most troubling, in the absence of counsel to advocate and safeguard a child’s legal interests, each and every INS decision respecting the well-being of a detained and unrepresented child remains completely unchecked—As Americans, we never would stand for a system where the district attorney serves as public defender in the same. For the same reasons, the INS, with its primary mission of immigration law enforcement, simply cannot ensure the legal interests of an unrepresented child. They should want that responsibility; they should not have that responsibility. The system is to blame, and the system must be fixed.¹³⁸

These concerns centered squarely on the children’s protection, and did not stretch to the adjudication of the children’s visa applications, although the visa-adjudication and enforcement functions were relatively closely held within the then-INS.¹³⁹

b. Now: Attenuated Conflicts

The original conflict-of-interest justification changed substantially in 2002 when the prosecution function shifted to the new Bureau of Immigration and Customs Enforcement (ICE) in the new Department of Homeland Security, and the custody function went to Department of Health and Human Services Office of Refugee Resettlement (ORR).¹⁴⁰ As one Vera Institute

¹³⁶ 2002 Child Protection Act Hearing, *supra* note 53 (statement of Senator Kennedy).

¹³⁷ *Id.*; see also Somers, *supra* note 10, at 338–40.

¹³⁸ 2002 Child Protection Act Hearing, *supra* note 53 (statement of Andrew Morton).

¹³⁹ The functions were under different associate commissioners below the Commissioner him or herself—who was subordinate to the Attorney-General within DOJ.1987 INS Organizational Chart on file with the author.

¹⁴⁰ See generally Dara Kay Cohen, Mariano-Florentino Cuéllar, and Barry R. Weingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 702–04 (2006). “Put differently, Members of Congress knowingly pass an inco-

report stated, “In 2002, the conflict of interest was finally resolved.”¹⁴¹ While this still means one agency of the federal government is concerned with the enforcement of immigration laws against the minors, and another agency is charged with tending to their long-term interests, the diffusion of roles across agencies significantly lowers the conflict.¹⁴² Indeed, as Bijal Shah has been studying, even when agencies intend to cooperate across agency lines, a host of factors makes such inter-agency cooperation extremely difficult.¹⁴³

A less dramatic *intra*-agency conflict continues to exist within DHS, because USCIS is charged with administering benefits while ICE is charged with enforcement and removal. This conflict is common to so many immigration cases—cases in removal where the immigrant has some benefit she or he can apply for before USCIS. Professor Shah notes how in phased inter-agency coordination, the first fact-finding agency may be the prosecutor when the second agency takes its turn at review, as happens with asylum adjudications (reviewed first by USCIS within DHS, then prosecuted by ICE within DHS once the proceedings are referred over the Department of Justice).¹⁴⁴ Interestingly, in her article devoted to the problems associated with coordination, Professor Shah notes this dual role, but meets it with more description than critique. This suggests its relative benignness in the system.

The depth and implications of possible intra-agency conflicts of interest within DHS are beyond the scope of this article, and worthy of deeper consideration. It is important, however, to recognize that being within one agency does little or nothing to guarantee homogeneity of approach of the entities within the agency. Professor Elizabeth Magill and Adrian Vermeule peer into intra-agency power-sharing, like this division between USCIS and ICE, and note how agencies are a “They, not an It. Even casual observers of the administrative state recognize that agencies, like nearly all large organizations, are not unitary actors. They are fractured internally.”¹⁴⁵ This obser-

herent measure, in that its provisions are internally inconsistent to the point of profound ambiguity, when they would not be able to pass the more coherent version. *See id.* at 704.

¹⁴¹ Olga Byrne & Elise Miller, *The Flow of Unaccompanied Children Through the Immigration System: A resource for Practitioners, Policy Makers, and Researchers*, VERA CENTER ON IMMIGRATION AND JUSTICE (Mar. 2012), at 6, available at <http://www.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf>, archived at <http://perma.cc/MUB4-3R36>.

¹⁴² *See* Maura M. Ooi, *Unaccompanied Should Not Mean Unprotected: The Inadequacies of Relief for Unaccompanied Immigrant Minors*, 25 GEO. IMMIGR. L.J. 883, 887 (2011) (“To an extent, procedural concerns have been addressed by the separation of enforcement and caretaking responsibilities in the Homeland Security Act, the adoption of the Flores settlement agreement as agency policy in 1996, and most recently, the enactment of the TVPRA.”).

¹⁴³ Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 833 (2015).

¹⁴⁴ An initial agency may also play the role of both “trial court” and “prosecutor” (in defense of the agency’s decision before the appellate-level agency). In the immigration/asylum context, the DHS takes on the role of advocate for the government in administrative appeals before the DOJ. Thus, the agency acting as the initial-level adjudicator of the asylum case becomes the asylum applicant’s adversary at the agency appeals level.” *Id.*

¹⁴⁵ Elizabeth Magill and Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1036 (2011).

vation is particularly true of the Department of Homeland Security, long criticized for its lack of cohesion (mirrored and perhaps caused by the extraordinary range of Congressional committees and subcommittees providing oversight to its work), and founded in a task to meet a dizzying array of divergent goals.¹⁴⁶ And indeed, the divergence and diversity manifests in simple but important ways in immigration court—this is where the rubber meets the road for Special Immigrant Juveniles.¹⁴⁷ And as a matter of policy, USICS does not routinely refer denied SIJ petitioners to ICE for issuance of a Notice to Appear that would commence removal proceedings (applicants already in proceedings have previously been issued with such a Notice, and the denial of the petition would therefore come to ICE and the Court’s attention).¹⁴⁸

Thus, to the extent that the conflict-of-interest within the INS created a justification for the state court role, that justification either no longer exists or is sharply attenuated.

III. A CONCEPTUAL PROBLEM WITH SIGNIFICANT PRACTICAL COSTS

Thus far, the Article has shown that as the law and its implementing contexts have changed since 1990, the need for the state role has sharply diminished. This matters because the state-court role in the immigration system is not merely a conceptual oddity in immigration federalism, but an entrenched reality that brings with it significant, currently undervalued, costs. While recognizing that the system works well for many children in particularly accessible jurisdictions, the Article turns to the costs that have not yet been thoroughly examined. In this section, the Article demonstrates that the problems range from unequal implementation of the law across jurisdictions (one of the best studied aspects of the state court role), to legal infirmities resulting from the “consent” function discussed above, to the access to justice issues created by the bifurcated and complex nature of proceedings.

A. *Geographic Disparities Mean a Federal Statute is Not Truly Federal*

Several scholars have studied the ways that SIJ availability varies depending on geography. Professor Hlass in particular has examined statistics to show the tremendous geographic disparity in access to SIJS. She attributes the disparities to three factors: 1) variance in child welfare policies and

¹⁴⁶ See generally Dara Kay Cohen et. al., *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 Stan. L. Rev. 673, 689–700 (2006).

¹⁴⁷ See Liebmann, *supra* note 110, at 588–589.

¹⁴⁸ USCIS Policy Memorandum, PM-602-0050: REVISED GUIDANCE FOR THE REFERRAL OF CASES AND ISSUANCE OF NTAs IN CASES INVOLVING INADMISSIBLE AND REMOVABLE ALIENS, Nov. 7, 2011, available at http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf, archived at <http://perma.cc/B8QB-5XDG>.

practices; 2) differing state laws; and 3) differing availability of legal representation for the minors. Experienced SIJ attorneys Megan Johnson and Yasmin Yevan hone in on particular statutory differences, such as the age-limit for state court jurisdiction over minors, as well as case law differences, such as how courts view one-parent SIJ cases (that is, cases where the child can be cared for by one parent, but was abused, abandoned, neglected or other by the other parent).¹⁴⁹ Professor Hlass's research reveals important ways the state process can be improved (for example, requiring better screening for immigrant children in child welfare programs, and increasing rates of representation). She also calls for a federal safeguard for minors whose cases fall through the cracks for whatever reason—a suggestion that would surely help address some of the problems with the state role. As this section reveals, however, a federal safeguard would not address other problems emerging from the patchwork, complex system of state-level involvement in the federal immigration role.

a. Geographically Disparate Results

Johnson and Yevan's case study of Nebraska shows just how increasingly states are getting involved in developing federal immigration law. They tell the story of Erick M., whose father had abandoned him, but whose mother maintained an active, supportive role. While the plain language of the 2008 version of the SIJ statute permits the state court to make the requisite findings when the abuse, abandonment, neglect or other stipulation is by one *or* both parents (emphasis added), the state argued that this interpretation "rendered the 'or both' superfluous, thus making the statute ambiguous. The Nebraska Supreme Court found the language ambiguous, and turned to the legislative history, and then to its interpretation of what USCIS guidance there was. The court found only two two-parent cases for reference, concluding that one-parent abandonment was insufficient to establish SIJ eligibility. *In re Erick M* stands as good law in Nebraska, despite abundant decisions from USCIS granting SIJS where there was one parent with whom the minor could be reunited.

The important point here is not whether this was a good or bad result. Rather, what matters is that it was a state-driven outcome in the implementation of a federal law. This raises two problems. First, while Congress delegated authority to the states to make traditional juvenile court kinds of findings, the statute did not delegate authority to interpret the Immigration and Nationality Act itself. Second, the case shows the real disparities that could arise across states. A minor in Erick's position in California *would*

¹⁴⁹ Megan Johnson and Yasmin Yevan, *Uneven Access to Special Immigration Juvenile Status: How the Nebraska Supreme Court Became an Immigration Gatekeeper*, 33 CHILD L. RIGHTS J. 64, 77-78 (2013); see also Heryka Knoespel, *Note: Special Immigrant Juvenile Status: A "Juvenile" Here Is Not a "Juvenile" There*, 19 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 505 (2013) (focusing on the variation on age-out provisions for minors seeking to be under the jurisdiction of state courts).

have access to SIJS: *Eddie E. v. Superior Court* specifically criticizes *In re Erick M.* for finding the word “or” to be ambiguous.¹⁵⁰ While that is certainly good news for minors seeking SIJS in California, the California court still engaged in statutory interpretation¹⁵¹ of an immigration law in ways that made it a gatekeeper, just as Nebraska did. Being a more generous gatekeeper does not extinguish the problematic nature of the gatekeeping role at the state-level.

Documenting this disparity—and especially its sources—is the subject of Professor Hlass’ important recent article. Among its many findings, she notes a state’s level of SIJS application does not correlate to the percentage of a state’s undocumented population, presumably a reasonable, if rough, guidepost for how many SIJS cases one would expect to see in a state.¹⁵² Thus, Nevada, which has the 13th highest undocumented population, ranks 30th for SIJ applications—proportionately under-represented in SIJ applications—while Michigan is 18th for its undocumented population, and yet ranks 8th for SIJ applications.¹⁵³ Professor Hlass interviewed Ken Borelli, the child welfare worker who inspired the original passage of SIJS. She writes, “Mr. Borelli calls the implementation of SIJS a ‘tragedy,’ as there is absolutely no consistency in implementation across the country.”¹⁵⁴

These state-level disparities also mask the profound disparities within states, from county to county, as some counties develop robust procedures for identifying and processing potential SIJS cases, and other counties refuse to engage whatsoever.¹⁵⁵ This is in line with other sub-state disparities that have arisen in the context of immigrant rights in the past decade.¹⁵⁶

As a momentary aside to which the article will return in the conclusion, it is vital to note that, currently, the disparity across state courts is mirrored in disparities at the final stage of the process federally. Once the immigration petitions are approved, the children apply to adjust status to lawful permanent residence. This “adjustment” adjudication has primarily happened at USCIS district offices around the country, and those district offices also produced widely disparate outcomes—which explains my recommendation for centralization of the SIJS function in one place within USCIS, as is done with the VAWA Unit. As of 2015, USCIS announced that it would, in future,

¹⁵⁰ *Eddie E. v. Superior Court*, 234 Cal. App. 4th 319, 183 Cal. Rptr. 3d 773 (2015).

¹⁵¹ The California court relied on the statute’s plain language to reach its result and while for many SIJS advocates, the plain language is hardly a subject that needs interpretation, “plain language” is nonetheless a tool of statutory interpretation—and the contrary Nebraska result shows this is a matter of at least *some* ambiguity.

¹⁵² *Id.* at 297 (Figure 8).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 300.

¹⁵⁵ “The [U.S. Committee for Refugee and Immigrant Children] has mentioned that a few juvenile court judges in New Jersey and northern Florida have refused to adjudicate a child dependent who otherwise appeared eligible for dependency because the judge assumed that the child would later seek immigration relief.” Adelson, *supra* note 42, at 81.

¹⁵⁶ See Pulitzer, *supra* note 10; NYUICP Report, *supra* note 98. For a case study of other intra-state disparities, see Elizabeth Keyes, *Examining Maryland’s Views on Immigrants and Immigration*, 43 U. BALT. L.F. 1 (2012).

centralize adjudications of SIJS applications as well, recognizing the problem of disparities across offices.

b. Thought-Experiment: SIJS as an Experiment in State-Level Involvement in Granting Immigration Status

It is worth pausing to consider the argument that perhaps there is value to more state-level involvement in the benefits-side of immigration, such as we see with SIJS. As I have written elsewhere,¹⁵⁷ states currently bear a significant portion of enforcement responsibility for immigration, with no commensurate ability to provide the *benefits* of immigration, which creates enormous problems at the state level. States that are effectively and generously implementing SIJS are certainly permitting more state residents to gain lawful status in ways that are of tremendous benefit not only to the immigrants themselves, but also to the states: immigrants with permanent residence can avail of federal loans for education, leading to better and more regular employment, and other kinds of benefits long-documented in policy debates concerning immigration reform itself.¹⁵⁸

SIJS-friendly states hence provide a counter-example to the norm of states being uninvolved on the benefits-side of immigration, and show the possibilities—purely hypothetical under all major existing immigration doctrine—of what states might do, if constitutionally permitted, to provide reasonable, effective paths to citizenship for immigrant residents, or develop innovative systems for attracting future migrants, and so forth. Per Professor Hlass’s study, immigrant minors in states like New York, Massachusetts, Michigan and California are benefiting tremendously from having robust access to SIJS, through a combination of good laws and child welfare policies, and access to representation. More still, it arguably shows how other immigrants in such states might similarly benefit if this quirky state role were not limited to SIJS.

There is, of course, a flip side to this trend. The question remains of what would happen in states where immigrants have not been welcomed, and how limited the options would be in such states. As well studied throughout and beyond legal scholarship,¹⁵⁹ when the rights of minorities

¹⁵⁷ See Keyes, *supra* note 156.

¹⁵⁸ See, e.g., The White House, *The DREAM Act: Good for our Economy, Good for our Security, Good for our Nation*, available at <https://www.whitehouse.gov/sites/default/files/DREAM-Act-WhiteHouse-FactSheet.pdf>, archived at <http://perma.cc/UBM4-ZDA6> (“According to a recent UCLA study, students that would be impacted by the DREAM Act could add between \$1.4 to \$3.6 trillion in taxable income to our economy over the course of careers, depending on how many ultimately gain legal status.”); Immigration Policy Center, *Economic Benefits of Granting Deferred Action to Unauthorized Immigrants Brought As Youth* (June 22, 2012), available at <http://www.immigrationpolicy.org/just-facts/economic-benefits-granting-deferred-action-unauthorized-immigrants-brought-us-youth>, archived at <http://perma.cc/YEM7-JFRB>.

¹⁵⁹ See, e.g., Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074 (2013) (examining the impact of subfederal regulation of immigrants).

like immigrants are concerned, protection of those rights is best, if imperfectly, served under federal law. And the disparities Professor Hlass has documented show that while some states do very well with SIJS adjudications, in others, the combination of laws, less-developed child welfare systems, and lack of resources hinder access. Although it is absolutely impossible to predict even loosely what state-level immigration laws and systems might look like, what *is* possible to predict is that lack of resources, anti-immigrant animus, or perhaps a combination of the two, would lead to some states being significantly less welcoming than others. Perhaps that merely codifies a *de facto* defederalization that encourages or discourages immigrant residents through pro- or anti-immigrant state and municipal laws. But the constitutional problems this creates (everything from issues of full faith and credit to rights of travel across states) are gargantuan. Any revisiting of the federal role in immigration should be undertaken intentionally, and not inadvertently through provisions of immigration law like the state role in SIJS.

B. *Adversarial Versus Non-Adversarial Proceedings*

SIJS cases, as already noted, occur in both the dependency/child welfare setting, and other state court settings like guardianship and custody proceedings. This divide, expectedly, provides the source of another set of disparities. Randi Mandelbaum and Elissa Steglich present the problem as follows: “Often children who lived through very similar abuse or neglect circumstances will have very different immigration outcomes depending on whether they were found to be in need of state care, as compared to those outside the system (residing with a relative caregiver, homeless, or simply unable to access the child welfare system).”¹⁶⁰ They tell the story of a young woman, Jessica, who suffered a clear case of abuse, was unable to be reunited with either parents, and was better off in the United States. Yet, they continue,

[A] huge question will remain for Jessica as to whether she can meet the fourth threshold criterion, which requires that she be ‘declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States.’ Stated differently, it is unclear whether Jessica will ever be able to trigger the jurisdiction of a state court, despite the obvious fact that she is an abused child in need of the state’s attention.¹⁶¹

¹⁶⁰ Randi Mandelbaum & Elissa Steglich, *Disparate Outcomes: The Quest for Uniform Treatment of Immigrant Children*, 50 FAM. CT. REV. 606 (2012). Professor Hlass notes that the foster care context has worked well in jurisdictions that have good screening mechanisms in place for SIJS children, but that screening policies vary widely. See Hlass, *supra* note 10.

¹⁶¹ *Id.* at 609.

The case Mandelbaum and Steglich describe is not rare. Many children are not already in dependency proceedings; only those who were detected at entry, transferred to ORR custody, and for whom no suitable guardian was found are in those proceedings, or children who came into dependency proceedings through abuse or neglect issues that arose while in the United States. A child who successfully entered the country without detection would not be placed in ORR custody, which might be a path to the dependency proceedings that would help them qualify for SIJS. Likewise, a child who was detected but placed in ORR custody and released to a suitable relative is not on a path to SIJS through dependency proceedings .

Even if the minor is able to access state court without a dependency case, the manner in which dependency and non-dependency cases are conducted differs significantly as well. In the dependency setting, the minor is already in some way involved in the court system. The judge, the welfare agency, the guardian for the minor and, if there is counsel, the immigration lawyer, all share the same goal, which speeds resolution of the process and allows SIJS to move forward with reasonable speed. In adversarial custody or guardianship proceedings, the opposite is true—the court, properly, needs to be concerned with the rights of both parents, which are often at odds with the rights of the child.

The need for an adversary in custodial or guardianship proceedings creates its own issues, from inefficiencies to the emotional costs when cases demand a compromise of minor clients' dignity. Other cases from the University of Baltimore clinic, for example, have steadily illustrated these issues.¹⁶² In one, a grandparent with no guardianship or custody order had trouble accessing medical benefits for the grandchildren. They went to state court to get the order, and also asked for the SIJ predicate order. The grandparent first needed to terminate the children's mother's rights (the minor's father had been killed) before seeking guardianship. This required an attorney delving into advanced family law matters, and delaying the case many months as the grandparent attempted to serve a mother who had disappeared years earlier. Had the children been able to apply directly to USCIS, the attorney could have assembled all the evidence of abandonment through affidavits and other corroborating evidence. This could have been developed in a fraction of the time required for the court to work through all the periods of time for service, deciding motions for alternative service and so forth. In both cases, the same evidence is ultimately presented—while the USCIS option would not allow another party to submit contrary evidence in state court with missing parties and default orders, only the plaintiff or petitioner's evidence is presented anyway.

In another custody case for two brothers who lived with their father, the clerk demanded that the boys' deceased mother be named on the papers as an adversary. Naming the mother this was extremely difficult for the boys to accept, and showed the cost to client dignity. The dignitary value of a client's

¹⁶² The stories have been blended to help conceal the identity of the clients.

narrative has been well articulated elsewhere,¹⁶³ and is a value that the Clinic shares. Yet the demands of the forum required this as a tactical matter. The entire situation showed a square peg trying to fit in to a round hole, simply to pass through the filing protocols. While such dignitary issues might emerge in any family law proceeding, they would *not* have arisen had the boys been able to apply directly to USCIS where no adversary is needed.

Finally, the adversarial setting requires service of process. Service issues alone add considerable delay and expense to proceedings, since there is no general equivalent to a process server in the countries where these children are from. Even if it were easy to find a process server, any addresses for a parent or parents may be extremely old or non-existent since many of the minors have not had contact with a parent since infancy, if ever. Even where the parent's location is known, it may be extremely rural, with no postal address. Service would hence depend upon the willingness of a relative to undertake sometimes arduous travel to deliver the documents. Some jurisdictions understand this, and will rule quickly on motions for alternate service, even before the initial (likely-futile) service attempt is made—or will undertake a *pendente lite* proceeding to get a predicate order in place while awaiting service. But in other jurisdictions, attorneys must make the service effort, then file a motion for alternative service, and then *effectuate* the alternative service. This process takes money and attorney time, and extends the timeline of these cases, while also frustrating the immigration courts that are trying to move the cases along with reasonable speed. Where states are terminating parental rights, the Hague Convention may be triggered, resulting in further complexity of the state adjudication. Due process demands all of this, and rightly so, because parental rights are at issue. But this constitutes a significant downside of needing to process SIJS cases through forums where parental rights *are* at issue.

Furthermore, when procedural requirements are ultimately met, the substantive treatment of these cases can also be poor. While many judges know the SIJS statute and apply the law effectively, others either refuse to consider SIJS cases at all (during the writing of this article, Loudon County in Virginia, which has a roughly 20% foreign-born population, became another such jurisdiction), refuse to consider one-parent SIJS cases (Nebraska, as noted above, and a county in Tennessee), or apply standards more typical of contested custody proceedings. For example, courts may be disinclined to hear the testimony of children witnesses, lest it work against the court's family preservation mission. Similarly, they may be hesitant to terminate another parent's rights in the absence of the overseas parent.

One attorney shared this experience with me, writing that "In the transcript, as well as in the order, she acknowledges that the [minor] and his father's testimony is consistent and uncontested. However, the judge doesn't like the idea of making findings of abuse, neglect or abandonment without

¹⁶³ Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 GEO. J. LEGAL ETHICS 1 (2000).

the mother's testimony."¹⁶⁴ The same judge voiced her opinion that both father and son had a strong incentive to fabricate a story for immigration purposes, which is an example of another source of poor judicial outcomes in state courts: judges may fear how immigration law muddles their mission. Megan Johnson and Yasmin Yevan have written that "local officials are often wary of the implications of their actions and nervous about what they perceive as making decisions about whether a person will obtain an immigration benefit. Some may not want to participate in what they perceive as a process that condones or further encourages illegal immigration."¹⁶⁵ While many family judges embrace SIJS claims, access to the federal protection should not depend upon the good fortune of landing in such a judge's courtroom or living in a particularly SIJS-friendly county.

C. *The Catch-22 of Using State Court Primarily for SIJS Purposes*

Since 2004, if not before, immigration authorities have examined whether the minor is in court only for purposes of seeking the predicate order to apply for SIJS. In a memo interpreting the 1997 SIJS statute, Associate Director for USCIS Operations William Yates says that adjudicators must look for an application to be bona fide before providing express consent to the SIJ petition. Citing the conference report accompanying the 1997 law, but not the statute itself, Yates writes that a petition is bona fide if the adjudicator determines: "that neither the dependency order nor the administrative or judicial determination of the alien's best interest was sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect [or abandonment.]"¹⁶⁶

For many potential SIJS petitioners, this additional determination is not problematic. Immigrant minors in the state foster care system, for example, would meet this requirement because a state court had deemed that no parents or other suitable relatives were able to take care of them—whether or not they actually sought SIJS status, their case was before the state court, and the immigration benefit was not the reason for the immigrant being entangled with state court in the first place.

For many others, they are seeking the dependence order for both reasons: to pursue permanent residence *and* to obtain relief from abuse or neglect. This is relief that comes best with permanent residence, which dramatically reduces the risk of the minor being sent back into harm's way in the country of origin. These two motivations are almost impossible to disentangle. However, it is possible for the government to say that when SIJS expanded beyond its original context, a sub-section of newly eligible minors were going to state court *primarily* for access to the immigration benefit—

¹⁶⁴ This correspondence is on file with the author.

¹⁶⁵ Johnson and Yevan, *supra* note 149.

¹⁶⁶ Yates, *supra* note 68.

and to deny the petition on that basis (again, problematically looking behind the state court findings to do so). Generally, when one parent dies, the other parent has custody by default. Because SIJS requires the predicate order, however, the parent does need the custody proceeding, without which there is simply no vehicle to get the predicate order required for the immigration benefit. Likewise, where one parent abandoned the child before or shortly after the child's birth, and had not been heard from since, the remaining parent would have little need for a formal custody order, since no one was contesting legal or physical custody.¹⁶⁷

Per this interpretation, a child who *has* been abused, abandoned or neglected by one or both parents, who *is* in the jurisdiction of an appropriate state entity, and whose best interests would not be served by returning to the country of origin—i.e. a child who meets the definition stated in INA 101(a)(27)(J)—cannot apply for SIJS if the primary reason for availing of the state proceeding is to acquire the predicate order. This is a significant Catch-22: the only way to apply for the status is *through* the state. This consent function, then, which emerged as a way for the federal government to reclaim its control over gatekeeping for these cases, actually complicated effective implementation of the statute's protective function.

The contention of this article is that as the state court role has shifted from something it has traditionally done (custody and foster care placement) to something it has *not* traditionally done (the first-phase of an immigration benefit adjudication) the federalism issues and geographic disparities reveal a troubling new phenomenon. This is not immigration as incident to a traditional state role, but rather a state role in the purveyance of immigration benefits. Notably, state criminal courts play a comparable role on the enforcement side, but their judgments are held to a federal standard (through the categorical and modified categorical approaches) that limit the extent to which the federal government is governed by the state criminal judgments.¹⁶⁸ That is not the case here. No federal standard helps state courts reach a determination on the issues of abandonment, abuse, neglect and similar issues.

D. Access to Justice

a. Limited Access to Legal Representation

Another significant problem resulting from the state-role in SIJS is the way in which the complex process limits access to justice for prospective

¹⁶⁷ Fortunately for parents in such situations, there are other reasons to go to state court, such as complying with passport issuance requirements that demand both parents' signatures or a formal finding of legal custody, or as in one case I handled, the simple ease of presenting a familiar document to the minors' schools, health care providers, insurance companies and so forth.

¹⁶⁸ See generally, MARY KRAMER, *THE IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS* (6th ed. 2015).

beneficiaries of the law. These minor children, or their would-be guardians or custodians, must retain a lawyer who is competent in at least two areas: affirmative immigration applications and state court custody, and guardianship or child welfare cases. Immigration law is famously opaque and difficult to practice, and the custody and guardianship proceedings of family law require an additional set of skills that are best obtained through specialized training, immersion in the culture of particular state courts, and strong networks within the family law bar.¹⁶⁹ Most likely, the attorney also needs to be competent at removal defense, since so many of the unaccompanied minors are already in removal proceedings. Each of these three areas requires a plethora of detailed, and often court-specific, knowledge.

A non-exhaustive list of competencies for a lawyer engaging in typical SIJS representation would include:

- Interviewing and counseling traumatized children
- Understanding the ethics of representing minors and/or the ethics surrounding joint representation of the minor and the prospective custodian/guardian (conflict of interest issues, in particular)
- Fluency in Spanish or expertise working with interpreters
- Familiarity with immigration court rules, and understanding of how specific immigration judges run their courtrooms
- Ability to assess the sufficiency of immigration charging documents
- Understanding of other potential avenues of relief including asylum (usually complex in its own right for these minors)
- Knowledge of FOIA and ORR processes for obtaining complete records of the children from the point at which they first crossed the border
- Mastery of state court service rules
- Knowledge of substantive state laws concerning custody, guardianship, and termination of parental rights
- Awareness of how different courts in different counties channel SIJS cases, or whether those counties accept SIJS cases at all
- Knowledge of particular judges' views on SIJS and those judges' litigation styles
- Ability to work with other professionals like guardians-at-litem, social workers and psychologists.

Many excellent non-profit organizations, like KIND and Catholic Charities, provide low-cost or free direct representation *and* also train pro bono

¹⁶⁹ One family lawyer put forth advice in the ABA 101 Practice Series urging young lawyers not to “dabble.” She writes, “The practice of family law is truly a myriad of areas of practice . . . As numerous the areas of family practice, there are also the nuances and complications that may arise in each area that can trip up even a seasoned family law attorney.” Katherine L. Provost, *What I Wish I Knew Starting Out in Family Law*, ABA 101 PRACTICE SERIES, available at http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/things_i_wish_i_knew_starting_out_in_family_law.html, archived at <http://perma.cc/UFM5-NRZE>.

attorneys, but this list of competencies explains why the available resources have never yet been sufficient to meet the need. Some jurisdictions have marshaled extraordinary resources to try to meet the needs, like New York City (which benefits both from the innovative Immigrant Defense Project and the coordinated services of organizations like Catholic Charities, KIND, Safe Passages, as well as a strong tradition of pro bono work). But many more struggle to make a dent in the level of need. In general, larger cities have more such resources to draw upon, and many children are released to relatives in or near those cities, but many go to more remote areas with far less abundant services.¹⁷⁰ Those children will struggle to find a lawyer who can meet their legal needs, and without the lawyer, the protection of SIJS is out of reach. A simplified process that lets immigration lawyers simply be immigration lawyers would greatly assist the effort to find representation for the children's immigration cases.¹⁷¹

While this might be seen as a sacrifice of expertise and thoroughness for the sake of efficiency and access to justice, the article posits that this is a false dichotomy. As Section II, *supra*, establishes, there is at most only a minimal sacrifice in expertise—and the extent to which it is even a sacrifice is debatable. And to the idea that a non-adversarial process is less thorough, the article responds that immigration applications are exceptionally thorough, as adjudicators expect to see ample corroboration and attorneys understand that they must fight against a narrative of fraud that casts doubt on the applications. While state court filings might be quite slim, sometimes just a dozen or so pages of one or two affidavits, birth certificates and the like, immigration filings are very often exhaustive, containing as much corroboration as possible. This includes case-specific corroboration from witnesses, proof of education and medical care, expert psychological evaluations, abundant evidence of country conditions, and other information.¹⁷² Efficiency and

¹⁷⁰ The FY2014 data on counties to which HHS released unaccompanied minors can be found at Office of Refugee Resettlement, Unaccompanied Children Released to Sponsors by County FY14, June 2, 2015, [hereinafter HHS data] available at <http://www.acf.hhs.gov/programs/orr/resource/unaccompanied-children-released-to-sponsors-by-county-fy14>, archived at <http://perma.cc/PW3V-CM9E>. Many surround major metropolitan areas, but others are farther afield, including Morgan County, Alabama (51 children), El Paso County, Colorado (65 children), Elkhart County, Indiana (65 children), Anne Arundel County, Maryland (210 children) and Morris County, New Jersey (234 children). While some of these locations are within reasonable driving distance of cities with significant bilingual legal services resources, not all of these children have caretakers who can drive, have cars, or can take a day off work each time it is necessary to meet with the lawyer, which makes even the smaller distances highly significant for access to representation.

¹⁷¹ Professor Rogerson rightly notes that even where representation is bifurcated between the family law piece and the immigration law piece, family lawyers may not be familiar with the “downstream” ramifications of the state court hearing—for example, the need to avoid including any of the parent’s own transgressions (such as helping a child cross the border illegally, or working under false papers) in testimony that could affect their immigration status along the line. Email from Professor Rogerson, Aug. 11, 2015 (on file with author).

¹⁷² For a typical list of suggested supporting documents in an immigration case, see Immigrant Law Resource Center, *Document Gathering Under the Violence Against Women Act: A Step-By-Step Guide* (2008), available at http://www.ilrc.org/files/document_gathering_for_

thoroughness are by no means at odds in the federal, non-adversarial process.

b. The Cautionary Tale of Maryland: Trying Hard and Still Struggling to Meet the Need

Maryland provides an excellent illustration of a state grappling with this problem.¹⁷³ Some 4,000 Central American children came to Maryland in the 2014 “surge” of child migrants—most to counties near Washington, DC (another city with a strong tradition of pro bono lawyering), Baltimore or Annapolis, but others farther removed from the denser legal resources of the larger cities.¹⁷⁴ In many ways, the efforts to respond to the new needs were commendable. From state and local governmental authorities to the private bar to legal services providers, the response was intense. First, local organizations and bar associations quickly began coordinating their efforts, especially in regard to building pro bono capacity. Catholic Charities of the District of Columbia (which serves the Maryland counties bordering Washington, D.C.) held a training for Maryland attorneys as early as July 1, 2014,¹⁷⁵ and several more occurred over the following months as the Maryland Pro Bono Resource Center came up to speed on SIJS and developed a coordinating role among the various non-profits. Multiple organizations participated in a forum held with the Executive Office of Immigration Review in Baltimore in August 2014, where both immigration officials and advocates agreed on the urgent need for improving rates of representation for the children. Esperanza Center (Catholic Charities in Baltimore) organized a massive screening event in September that recruited and trained attorneys. KIND held regular trainings at various law firms to help develop its cadre of pro bono attorneys. In October 2014, the Pro Bono Resource Center held a state-wide pro bono training for hundreds of lawyers, and later received funding to create a full-time SIJS coordinator within the Center in early 2015. And the Maryland State Bar Association’s Immigration Section won the MSBA’s service award for its pro bono response to this crisis.

But their efforts were not enough. Despite this coordinated activity from such a range of entities, too many children could not find lawyers, and the non-profits providing most of the representation still have lengthy waiting lists as of this writing. These lists are likely to worsen as limited-time funding for staff attorneys at those non-profits expires and positions disappear, and as new groups of children arrive. Efforts at recruiting pro bono attorneys continue, but with the children no longer occupying the headlines,

self-petitioning_under_the_violence_against_women_act.pdf, archived at <http://perma.cc/6GCZ-Q67B>.

¹⁷³ All details in this miniature case study come from the author’s own experience playing a coordinating role in these 2014 efforts, and are all documented in emails on file with the author.

¹⁷⁴ See HHS Data, *supra* note 170.

¹⁷⁵ Catholic Charities had been holding such trainings before the surge as well, but intensified efforts to meet the new needs.

recruitment may become more difficult. Finally, a previous experiment with pro bono assistance for similar cases led to issues of pro bono attorney burnout,¹⁷⁶ something Maryland has not yet experienced generally but should be watchful for.

Without representation, the SIJS process is almost impossible to access. Pro se litigants would need to know how to raise the issue of a predicate order with the state court, assuming they were able and willing to access state court on their own (state courts do frequently provide pro se assistance to litigants, although it would not help with other issues, like serving disappeared foreign defendants). This is all while routinely appearing before an immigration judge who may or may not be familiar with the state court process and resulting, often slow, timeline. All of the above is daunting without the added issue of language access, which is mandated by law yet poorly implemented at many levels of the legal system. A simpler process situated uniquely within the immigration bureaucracy would—in addition to addressing the issues of geographic disparities and inappropriately adversarial settings noted above—make it easier to recruit and train attorneys for the children, and easier for them to then find counsel to guide them through the process.

CONCLUSION: TIME TO CONSIDER FULLY RESTORING THE FEDERAL ROLE

Scholars have already proposed alternatives that would ameliorate some, but not all, of the problems identified by this article, largely focusing on ways to improve the existing state court processes,¹⁷⁷ or clarifying the level of deference to state court decisions.¹⁷⁸ Other ideas include creating redundant jurisdiction, so that if a child cannot avail of a state court process, he or she can turn as a fail-safe to the federal government. Such an effort is much like the process that currently exists for T visas, where victims must attempt to get a law enforcement certification that they cooperated into an investigation of human trafficking, but can show USCIS evidence of their efforts to cooperate if law enforcement refuses to issue a certification for them. All, though, would significantly improve the existing system, and in the absence of full-scale reform, are extremely important to implement.

What this article has shown, however, is that at its core, this system of sharing power between the federal and state levels for these particular immigrant children is not a cooperative system, but a tense one. Power-sharing is contested, and this comes to the detriment of the children themselves and to

¹⁷⁶ Then-Chief Judge Michael Creppy of the Executive Office of Immigration Review testified before the U.S. Senate in 2002 about a pilot project in Arizona: “Now, as an example, in Phoenix, we have the private bar there agree to take juvenile cases for pro bono. But they did it for a number of months and they’re burned out, taking one case after the other. You start to whittle down those that have the willingness to do it.” 2002 Child Protection Act Hearing, *supra* note 53 (statement of Judge Creppy).

¹⁷⁷ See Hlass, *supra* note 10.

¹⁷⁸ See Fisher Page, *supra* note 72.

the frustration of the law's own objectives. The article has also shown how involving states adds an untenable burden for the children and for the legal service providers who serve them, creating an access to justice crisis. The extent of these issues demands a reexamination of the allocation of power for protection of child migrants, and one such result would be legislative reform making SIJS a purely federal immigration process, with a dedicated, centralized corps of decision-makers akin to the Crime Victims Unit or the Asylum Corps.

Such an overhaul would create its own set of issues. First, it would need to be done with the vision of mirroring the very best of existing state law interpretations of eligibility for SIJS, from permitting petitions through age 21 to broad understandings of "abuse, abandonment, neglect, or other similar basis." Second, lawyers who have been working with Department of Homeland Security on other applications voice frustration with everything from fee waivers that are unevenly implemented to requests for evidence that seem ill-informed (or which ignore the evidence already submitted), and it is almost certain that such frustrations would be true of SIJS adjudications as well. Third, USCIS makes its own mistakes and has its own biases, particularly concerning the level of fraud in the system. Recent revelations of fraud from the New York area are likely to elevate scrutiny for fraud even farther.¹⁷⁹

Nonetheless, there is a remarkable and largely untold case study from the Crime Victims Unit that suggests that this could still be done and done well. A small, focused cadre of advocates from organizations like the National Immigration Project¹⁸⁰ and the National Network to End Domestic Violence Against Immigrant Women¹⁸¹ have developed effective means of working with the USCIS unit in charge of these adjudications. This means that many of the adjudication issues that have arisen have been improved over time through training, advocacy, development and submission of ami-

¹⁷⁹ See Kirk Semple, *Federal Scrutiny of a Youth Immigration Program Alarms Advocates*, N.Y. TIMES, Mar. 31, 2015, available at http://www.nytimes.com/2015/04/01/nyregion/federal-scrutiny-of-a-youth-immigration-program-alarms-advocates.html?_r=0, archived at <http://perma.cc/8YPR-FK3L>. Professor Adelson commented upon this issue almost a decade ago, blaming fraud issues for the slow-down in adjudications: "One possible source for this blowback is the new anti-fraud directive issued from USCIS national headquarters. Certainly fear over a juvenile trying to game the system and receive a benefit to which they are not lawfully entitled could inspire those in the USCIS adjudicators' seats to closely scrutinize SIJ applications." Adelson, *supra* note 42, at 85.

¹⁸⁰ *Victims of Crime, including Intimate Partner Violence and Workplace Crimes*, NAT'L IMMIGR. PROJECT OF THE NAT'L LAW. GUILD, available at <http://www.nationalimmigration-project.org/victims.htm>, archived at <http://perma.cc/BEX8-7N92>.

¹⁸¹ Among the Network's work, it lists two of principal interest to this article. First is "Developing training materials and serving as faculty for training . . . Department of Homeland Security and Department of Justice personnel . . . on the legal rights of immigrant survivors of violence." Second is "Advocating with government officials to ensure that federal, state and local justice, benefits, social services and health care systems treat immigrant women and children with respect and affords them all the benefits intended by Congress." *About Us*, THE IMMIGRANT WOMEN NETWORK, available at <http://www.immigrantwomensnetwork.org/AboutUs.htm>, archived at <http://perma.cc/R2BY-8TX7>.

cus briefs and so forth. With only one unit to focus on, instead of the hundreds of diverse state, county, and city courts and courtrooms of the current system, advocates are able to monitor emerging problems, raise issues with the people supervising the adjudicators, and continuously improve the process.¹⁸² Over time, too, attorneys for immigrants have learned best practices that apply to their clients wherever those clients live, and can submit applications with the strongest possible chance of prevailing and acquiring the protections their clients need. The Crime Victim Unit experience has therefore demonstrated how having a centralized decision-maker provides advocates with many advantages for developing expertise, for using their experiences to improve the quality of the process, for training and retraining the adjudicators in issues most relevant to the visas they are deciding, and developing workable case law through appellate advocacy.

The original justifications for the state role were compelling, but have dramatically changed over time. The conflicts-of-interest justification dissolved as the caretaking function for the children moved to a different federal agency in 2002. And the institutional competence justification, while decidedly more complex, has changed significantly as well. States remain competent to handle SIJS adjudications, although this article has demonstrated how much that competence may be questioned with geographic disparities, ill-suited rules and processes, and uneven understanding of SIJS law among judges across states, across jurisdictions within the states, and across courtrooms within any given jurisdiction. This diffusion requires a diffusion of advocacy resources as well, to increase access to SIJS county-by-county, state-by-state. Children would, of course, have ongoing access to state courts for family law claims and other matters. But the federal government has established that it, too, has experience and institutional competence to undertake adjudications like those at the heart of SIJS. While undoubtedly imperfect—as are the state courts—the federal scheme is a robust alternative that did not exist at SIJS creation in 1990.

The benefits for enhancing the protection of the children are plentiful. Beyond removing the geographic disparities, centralized decision-making also means that attorneys would only need to be expert in one set of decisions and the rules of one forum instead of dozens. This would, in turn, improve the ability to recruit pro bono attorneys and to serve children in more remote areas (still not an easy task, but one made easier by the simplified nature of the claims). With one adjudicating body (a SIJS unit equivalent to the Crime Victims Unit) and one appellate body (the Administrative Appeals Office) providing a check on that lower unit, this centralization also helps develop the kind of feedback loop that is utterly missing between state courts and the USCIS.¹⁸³

¹⁸² This story needs to be told, and the author intends to interview the many players in the story over the last two decades to develop a future article on this topic.

¹⁸³ Professor Fisher Page has studied this in her forthcoming work. See Fisher Page, *supra* note 72.

This positive view of what a federalized process would look like will, I hope, generate scrutiny, discussion and critique by scholars and advocates alike, to deepen and refine what such a system could look like. These immigrant children deserve to place their hopes for safety in a system whose structure and design best addresses its goals. Right now, we are far from having such a system in place. As this article has shown, the children's safety in the United States depends too much upon the arbitrariness of where they live and their access to a limited set of lawyers competent to undertake their representation. Indeed, their safety has been too much subjected to the tensions between a "cooperative" state-federal system that has proved to be far less than cooperative in practice.

It is time to consider letting the federal government implement its own immigration law.