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The Equal Protection Doctrine in the Age of Trump

THE EXAMPLE OF UNDOCUMENTED IMMIGRANT CHILDREN

Rebecca A. Delfino[†]

INTRODUCTION

Nearly a century ago, Supreme Court Justice Oliver Wendell Holmes, Jr. described an equal protection claim as “the usual last resort of constitutional arguments.”¹ Not anymore. In the last forty years, the “equal protection doctrine has become the Court’s chief instrument for invalidating . . . laws.”² Now dawns a new era—the age of Trump—when the equal protection doctrine has greater significance, a broader application, and renewed utility to invalidate federal laws and executive actions that deny due process or discriminate.

President Trump has made no secret of his desire to unwind policies of the prior administration in the areas of civil rights, voting rights, immigration, environmental protection, international relations, and health care.³ By the end of his first year in office, “approximately [thirty] major federal lawsuits were filed against the president and his administration challenging

[†] Clinical Professor of Law at Loyola Law School Los Angeles. I am grateful to my colleagues for their helpful comments, particularly Sande Buhai and Justin Levitt. I am also indebted to Nicholas Armer, Galen Bean, Chris Khasho and Gabrille Trujillo for their research assistance, Loyola Law School for its generous support of faculty scholarship, and as always, my family for their patience, indulgence and encouragement. This article is dedicated to the hundreds of thousands of immigrant children who have come to the United States alone without parents seeking a better life, including my late great-grandfather Giovanni Jelmini, Sr. who came to the United States alone as a teenager in 1911.

¹ *Buck v. Bell*, 274 U.S. 200, 208 (1927).

² *Zablocki v. Redhail*, 434 U.S. 374, 395 (1978) (Stewart, J., concurring).

³ See David Smith, *The Anti-Obama: Trump’s Drive to Destroy His Predecessor’s Legacy*, *GUARDIAN*, (May 11, 2018, 7:59 AM EDT), <https://www.theguardian.com/us-news/2018/may/11/donald-trump-barack-obama-legacy> [<https://perma.cc/YP77-C43Q>]; *Donald Trump: Year One*, *AM. CIV. LIBERTIES UNION*, <https://www.aclu.org/issues/executive-branch/donald-trump-year-one> [<https://perma.cc/6SBT-6C3S>].

[his executive orders or executive branch actions].”⁴ Specifically, equal protection claims appear in recent challenges to the executive branch’s actions related to the travel ban,⁵ transgender members of the military,⁶ the Deferred Action for Childhood Arrivals program,⁷ efforts to eliminate benefits under the Affordable Care Act,⁸ and the “zero tolerance”⁹ immigration

⁴ See Norman Siegel, *2017: The Constitution, Federal Courts and President Trump*, N.Y. L.J. (Jan. 9, 2018, 4:18 PM), <https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2018/01/09/2017-the-constitution-federal-courts-and-president-trump/> [<https://perma.cc/7TEY-CK3L>].

⁵ President Trump’s initial immigration order banned travel and refugee admission from seven predominantly Muslim countries. See Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017). Opponents of the ban claimed it violated equal protection (among other constitutional protections) by discriminating based on religion, even though the policy was facially neutral with respect to religion. See *Washington v. Trump*, 847 F.3d 1151, 1167–68 (9th Cir. 2017) (describing equal protection claim against the travel ban in a case that was later rendered moot); see also *Hawaii v. Trump*, 859 F.3d 741, 760 (9th Cir.), *vacated as moot*, 138 S. Ct. 377, 377 (2017) (challenging Trump’s second executive order banning travel from predominantly Muslim countries).

⁶ See *Stone v. Trump*, 280 F. Supp. 3d 747, 753–57, 763, 765, 768 (D. Md. 2017) (Transgender military service members’ claim that the Presidential Memorandum, which directed military to prohibit accession of transgender individuals to the military, authorize their discharge, and “generally prohibit expenditure of military resources on sex-reassignment surgeries for military personnel”, violated their equal protection rights because members alleged that directives “treated [them] differently from all other military service members,” and the “decision to exclude transgender individuals was not driven by genuine concerns regarding military efficacy.”).

⁷ See *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 298 F. Supp. 3d 1304, 1313–15 (N.D. Cal. 2018) (equal protection challenge based on the government’s rescission of the Deferred Action for Childhood Arrivals program).

⁸ See *Complaint for Injunctive and Declaratory Relief at 2, Medical Students for Choice v. Wright*, No. 1:17-CV-02096 (D.D.C. dismissed Feb. 6, 2018), ECF No. 1, <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Complaint-Medical-Students-for-Choice-vs-Wright.pdf> [<https://perma.cc/YR3R-2ZKV>]. This complaint, filed in late 2017 in the District of Columbia, challenged interim final rules the Trump administration implemented, which threatened to curtail access to birth control coverage for women by creating a broad exemption to the guarantee in the ACA of coverage for FDA-approved contraceptives without out-of-pocket costs. *Id.* The challenged interim rules enabled employers, health insurance providers, and universities claiming a religious or moral objection to deny their employees, students, and insurance beneficiaries coverage for contraception. *Id.* at 3. The plaintiffs argued the rules violated the Constitution’s Establishment Clause, the equal protection guarantee, and the fundamental right to contraception by imposing unreasonable burdens upon and unfairly targeting women. *Id.* at 3–4.

⁹ On April 6, 2018, Attorney General Jeff Sessions announced a new “zero-tolerance” policy on the United States’ southern border. *Complaint for Declaratory and Injunctive Relief at 15, Washington v. United States*, No. 2:18-cv-00939 (W. Dist. Wash. 2018), ECF No. 1. Instead of making case-specific evaluations of individual cases, respecting due process rights and family integrity, the Trump Administration began prosecuting all possible immigration crimes and detaining all accused adults—even those with legitimate asylum claims. *Id.* at 16. The intended and acknowledged effect of this policy has been the separation of children from their parents. *Id.* at 19–20. The Trump Administration has been clear that the purpose of the forced separation policy is not to protect children, but rather to deter potential immigrants from coming to the United States. *Id.* at 4. Although on June 20, 2018, President Trump signed an executive order that he claims ends the separations, it did not end the underlying policy. Exec. Order No. 13,841, 83 Fed. Reg. 29,435 (June 25, 2018).

policy.¹⁰ The federal courts appear ready, willing, and able to entertain these challenges.¹¹

This article explores the new frontier of potential equal protection challenges using federal immigration law as an example, specifically, the law governing Special Immigrant Juvenile Status (SIJS).¹² SIJS opens a pathway for undocumented immigrant children who are in the United States without a parent in order to obtain legal status. It is unique both in the context of immigration law and the general canon of federal law. The SIJS law embodies a bifurcated legal framework that requires SIJS applicants to apply first to the state courts to obtain predicate factual findings based on state family law, including findings that SIJS applicants cannot be reunified with a parent because of abuse, abandonment, or neglect, and that it would not be in the child's best interest to be returned to their home country. If the SIJS applicants obtain the state court predicate findings, they must then apply to the Department of Homeland Security (DHS) for approval, and if the applications are granted, the SIJS applicants obtain lawful permanent residence in the United States.¹³

This shared role of state courts and federal agencies and their respective realms of authority under the SIJS law are ambiguous and susceptible to different and inconsistent interpretations. On occasion, the state courts have exceeded their authority and interpreted the SIJS statute to apply their own legal standards, which effectively prevents certain applicants from obtaining the requisite predicate findings.¹⁴ Because DHS is not authorized to review a state court's refusal to issue SIJS findings, this refusal results in the automatic denial of the application by DHS. Consequently, the availability of SIJS may depend on the state where the predicate findings are sought, rather than the merits of the application. As a result, similarly situated SIJS applicants in different states will obtain inconsistent outcomes. For these reasons, a state court's denial of a request for predicate SIJS findings based on the state court's

¹⁰ See Complaint for Declaratory and Injunctive Relief, *supra* note 9 at 2, 115–16 (state attorneys general of seventeen states challenge the Trump Administration's policy of separating families crossing the nation's southern border on the basis that the policy violates the Constitution's guarantees of due process and equal protection); Teri Kanefield & Jed Shugerman, *Trump's Family Separations are Unconstitutional*, SLATE (June 21, 2018, 5:33 PM) <https://slate.com/news-and-politics/2018/06/trumps-family-separation-policy-is-unconstitutional-its-time-for-the-courts-to-award-damages.html> [<https://perma.cc/F4C5-Y4A4>].

¹¹ See Siegel, *supra* note 4.

¹² 8 U.S.C. § 1101(a)(27)(J) (2012).

¹³ See *infra* note 103.

¹⁴ See *infra* Sections III.A.1, III.A.2.

unique interpretation of federal law offends the Constitution's guarantee of equal protection under the law. This article proposes that the only viable solution to remedy the problems that plague SIJS is a novel challenge to the SIJS law in the federal courts, asserting that the subsection of the law which empowers the state courts to make SIJS eligibility findings violates the equal protection guarantees included in the Fifth Amendment's Due Process Clause.

This article proceeds in four parts. Part I describes the background and legal framework of the equal protection doctrine as it exists in the Fourteenth Amendment and as it has been read into the Fifth Amendment's Due Process Clause. This Part also describes the development of equal protection jurisprudence in the context of immigration law. Part II explores the development of the law of SIJS. It begins with a brief history of unaccompanied children immigrating to the United States before the enactment of SIJS in 1990, as well as the trends in the migration of unaccompanied children and changes to the SIJS law over the last twenty-seven years. This Part also highlights the significant legal and prudential problems with SIJS. Solutions to the problems with the SIJS legal framework previously proposed in the academic scholarship, including proposals to amend SIJS and its governing regulations, are also identified and deconstructed. This Part concludes by explaining that given the current political climate in the federal executive and legislative branches, none of the previously proposed fixes or changes to SIJS will be implemented, and thus a new approach is required.

Part III explores how the SIJS legal framework deprives SIJS applicants of equal protection and offers as an example the Nebraska and California courts' respective interpretations of the SIJS statute to demonstrate how SIJS denies equal protection. This Part also describes the proposed remedy—a challenge to the SIJS law in the federal courts—asserting that the law violates the equal protection guarantees included in the Federal Constitution. This Part also argues why this unique equal protection challenge will likely succeed.

Finally, Part IV ponders why an equal protection challenge to the SIJS legal framework has not previously been suggested in the legal academic scholarship or pursued in the courts. This Part asserts that in light of the federal courts' increasing willingness to entertain equal protection challenges against the actions of the current presidential administration, the time has come for a full-scale equal protection challenge to the SIJS law.

I. BACKGROUND AND LEGAL FRAMEWORK OF THE EQUAL PROTECTION DOCTRINE

A. *The Fourteenth Amendment Equal Protection Clause*

The Declaration of Independence’s proclamation that “all men are created equal” memorialized for the first time on the American continent an idea of equality that has ancient origins in Western civilization.¹⁵ The idea of equality under the law—that every similarly situated person should be treated the same by the government—appears in American history to have first passed from the aspirational to the juridical in the 1850s.¹⁶

Fifteen years later, in the aftermath of the Civil War, Congress proposed “equal protection” of the law in the Fourteenth Amendment to the Constitution, which embodied the new and radical idea¹⁷ that a state shall not “deny to any person within its jurisdiction equal protection of the laws.”¹⁸ It appears that the catalysts for passage of the Fourteenth Amendment were a desire to explicitly and deliberately reject the constitutional order described in Chief Justice Taney’s *Dred Scott* opinion¹⁹ and replace it with one that was in all respects its opposite.²⁰ The

¹⁵ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); see also James Sullivan, *The Antecedents of the Declaration of Independence*, 1 ANN. REP. AM. HIST. ASS’N 80 (1902); FRANCIS D. WORMUTH, THE ORIGINS OF MODERN CONSTITUTIONALISM ch. 2 (1949). The values of freedom and equality have ancient roots: Cicero considered liberty and equality to be necessary complements to each other in a free society of equal citizens. See MARCUS TULLIUS CICERO, THE REPUBLIC THE LAWS bk.1.47, p.21 (Niall Rudd trans., Oxford Univ. Press 1998).

¹⁶ See *Roberts v. Boston*, 59 Mass. (5 Cush.) 198, 201–05 (Mass. 1849) (Charles Sumner’s argument against school segregation); see also John P. Frank & Robert F. Munro, *The Original Understanding of “Equal Protection of the Laws,”* 50 COLUM. L. REV. 131, 138–40 (1950), updated and reprinted in 1972 WASH. U. L. REV. 421.

¹⁷ See Henry Steele Commager, *Equal Protection as an Instrument of Revolution*, in CONSTITUTIONAL GOVERNMENT IN AMERICA 467 (Ronald K. L. Collins ed., 1980).

¹⁸ U.S. CONST. amend. XIV, § 1 (The first section of the amendment offered “equal protection of the laws”: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”). The amendment also answered the citizenship question for African-Americans after the Civil War. “All persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside.” *Id.* And it extended “due process” to the states, not just the federal government. *Id.*

¹⁹ See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404–05, 416 (1857). In *Dred Scott*, Justice Taney had written that black people had not been included in “[We the P]eople of the United States” because they were “considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority.” *Id.* at 404–05.

²⁰ See Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, *The Supreme Court 1976 Term*, 91 HARV. L. REV. 1, 12–16 (1977); see also JACOBUS TENBROEK, EQUAL UNDER LAW 201 (First Collier Books 1965). But see WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 40–63 (Harv. Univ. Press, 1988) (arguing that Section 1 of the Fourteenth Amendment is ambiguous, the product of the framers’ political compromises, and that its specific legal meaning and impact was only emergent). On passage of the Fourteenth

amendment was also motivated by the framers' fear that important Reconstruction laws might be invalidated on the grounds that Congress exceeded its authority in enacting them.²¹

Since the term had no significant history before incorporation in the Fourteenth Amendment, the original understanding and intent of "equal protection" are difficult to discern and have led to debates about its meaning.²² For instance, Congress gave the amendment's entire first section, in which the Equal Protection Clause is found, little attention.²³ On the one hand, moderates in Congress wanted to limit the rights protected to the "civil rights" enumerated in the Civil Rights Act of 1866, such as the right to contract and hold property.²⁴ In contrast, more progressive members of Congress sought broader coverage that could expand with changing circumstances.²⁵ Scholars of congressional history have suggested that the Fourteenth Amendment was amenable to several interpretations.²⁶ First, that its immediate object was the protection of specific "civil rights" without contemplation of such changes in the social order as desegregation would entail; and second, that a more expansive interpretation is required given the general language

Amendment, *see generally* HORACE EDGAR FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (William S. Hein & Co., 1908); JOSEPH B. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* (D. Philip Locklin et al. eds., 1956); *JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, 39TH CONG., 1865-1867* (B. Kendrick ed., 1914). On the framing of the Equal Protection Clause specifically, *see* ROBERT J. HARRIS, *THE QUEST FOR EQUALITY: THE CONSTITUTION, CONGRESS, & THE SUPREME COURT* 32-33 (La. State Univ. Press ed., 1960) (explaining that Congressional Representative John A. Bingham led the drive for the Fourteenth Amendment, first proposing it in January 1866); TENBROEK, *supra* note 20 at 207 (explaining that in every subsequent draft, the objective of guaranteeing "equal protection" never changed). Congress passed the amendment in June 1866, and ratification was completed in 1868. NELSON, *supra* note 20, at 58-60.

²¹ *See e.g.*, Civil Rights Act of 1866, ch. 31, 14 Stat. 27. The Act's constitutional validity had been challenged by Andrew Johnson in his veto message and by conservatives of both parties in Congress. *See* Karst, *supra* note 20, at 14. Contemporary concepts of equality before the law, understood in the privileges and immunities context, were most fully captured in the 1866 Civil Rights Act. That measure, enacted as its title proclaimed "to protect all Persons in the United States in their civil rights," first conferred national citizenship. 14 Stat. 27. It then affirmed that all citizens "shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property" as whites. *Id.* The law also protected the rights of contract, property, and juridical capacity (as witness and party) of those citizens. *Id.*

²² *See* Frank & Munro, *supra* note 16, at 138-42; *see also* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 1, 31-33 (1955).

²³ Bickel, *supra* note 22 at 47-48.

²⁴ *Id.* at 56; *see also* Lewis Henkin, *Foreword: On Drawing Lines, The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 95-103 (1968) (analyzing the Court's examination of the Civil Rights Act of 1866's legislative history in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) regarding "private discrimination in the sale or rental of property").

²⁵ Bickel, *supra* note 22, at 62-63.

²⁶ *See id.* at 59-63.

of the Equal Protection Clause, which on its face was not limited to racial discrimination.²⁷

Likewise, the understanding and application of the Equal Protection Clause of the Fourteenth Amendment has continued to evolve and expand in the last 150 years since it was adopted. It has played a starring role in some of the most prominent cases of the last century—cases which have had a profound influence not only on how Americans are treated by the government, but also on how Americans perceive themselves and treat others. In the 1873 decision of the *Slaughter-House Cases*, the Supreme Court stated that the Equal Protection Clause was “clearly a provision for [the African-American] race” and that it did not apply to economic affairs.²⁸ By 1886, however, as reflected in the Court’s decision in *Yick Wo v. Hopkins*, such a limited construction of the Fourteenth Amendment had disappeared.²⁹ Supreme Court decisions soon after recognized a more flexible and broad approach to the Equal Protection Clause. The Court not only applied the Equal Protection Clause to other racial groups but also extended it to economic affairs by allowing a corporation to assert the right.³⁰

Thereafter, in 1896, the Court decided *Plessy v. Ferguson*, considered one of first landmark cases to test the Fourteenth Amendment’s Equal Protection Clause.³¹ In *Plessy*, the Supreme Court said segregation was constitutionally acceptable as long as the facilities were equal.³² This “separate but equal” mantra facilitated the birth of the Jim Crow South, in which everything from water fountains to public schooling were legally segregated.

Nearly sixty years later, in 1954, the Supreme Court used the Equal Protection Clause of the Fourteenth Amendment to revisit segregation. In *Brown v. Board of Education of Topeka*, the Court decided that Kansas’ “[s]eparate educational facilities are inherently unequal,” and thus violated the Equal Protection Clause.³³ The ruling overturned *Plessy* and forced desegregation. The Supreme Court has continued to utilize a broader interpretation of the Equal Protection Clause in different factual

²⁷ *Id.* at 60–63.

²⁸ *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873).

²⁹ *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 373–74 (1886) (the first case in which the Supreme Court struck down a facially neutral municipal ordinance based on its discriminatory, disparate impact on resident alien Chinese business owners, recognizing that non-citizens were entitled to Equal Protection under the Fourteenth Amendment).

³⁰ *See id.* at 368; *see also* *Pembina Consol. Silver Mining Co. v. Pennsylvania*, 125 U.S. 181, 188–89 (1888) (finding private corporations are “persons” under the Fourteenth Amendment).

³¹ *Plessy v. Ferguson*, 163 U.S. 537, 542 (1896).

³² *Id.* at 544.

³³ *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

contexts over the past century. For example, in *Bush v. Gore*, amid the Florida recount that would decide the presidential election of 2000, George W. Bush's lawyers successfully argued that the recount of presidential ballots ordered by the Florida courts violated the Fourteenth Amendment's Equal Protection Clause because different standards of counting were used in different counties.³⁴ Likewise, the Supreme Court applied the Equal Protection Clause in *Obergefell v. Hodges* to strike down states' facially neutral same-sex marriage bans in 2015.³⁵ In its equal protection analysis, the Court was troubled by same-sex marriage bans' adverse impact on gays and lesbians.³⁶ Justice Anthony Kennedy invoked the equal protection portion of the amendment to assert that it "prohibits this unjustified infringement of the fundamental right to marry."³⁷ And in the last year, the Court decided the race discrimination case of *Cooper v. Harris*, in which the Court found that lawmakers were impermissibly motivated by race when they drew legislative districts.³⁸

To be sure, the central requirement of the Equal Protection Clause—requiring states to treat their citizens equally—has remained unchanged from its earliest, limited applications in the area of racial discrimination in the 1880s to its expansion in the 2000s to other classes of individuals who, though not expressly singled out under the law, have suffered from its disparate impact. Over time, "[j]udges deciding cases under the Equal Protection Clause have . . . defined . . . 'equal treatment'" differently for different classifications of individuals.³⁹ In all instances, however, an equal protection violation may be found where, depending on the level of scrutiny applied to the law,⁴⁰ the discrimination cannot be justified. The common thread

³⁴ *Bush v. Gore*, 531 U.S. 98, 100, 104–07 (2000) (per curiam).

³⁵ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015).

³⁶ *See id.* at 2601–08.

³⁷ *Id.* at 2604.

³⁸ *Cooper v. Harris*, 137 S. Ct. 1455, 1481–82 (2017) (finding that lawmakers improperly packed black voters into a few legislative districts to diminish the power of black voters).

³⁹ LENORA M. LAPIDUS, EMILY J. MARTIN, & NAMITA LUTHRA, *THE RIGHTS OF WOMEN: THE AUTHORITATIVE ACLU GUIDE TO WOMEN'S RIGHTS 2* (2009) https://www.aclu.org/files/pdfs/about/rightsofwomen_chapter1.pdf [<https://perma.cc/Y5QJ-NYX5>] (internal quotations omitted) (explaining that although a state may not pass laws that treat racial groups unequally, the state can discriminate based on certain classifications such as age "if [it has] a rational reason for doing so").

⁴⁰ Traditionally, courts have applied three degrees of scrutiny in analyzing challenged statutes under the Equal Protection Clause: "strict scrutiny," "intermediate" or "heightened" scrutiny, and "rational review." *See Plyler v. Doe*, 457 U.S. 202, 216–18 nn.14–16. (1982); the choice among the three levels depends upon the nature of the statute in question. If the legislative classification on its face or as applied disadvantages a "suspect class" or impinges upon the exercise of a "fundamental right," then the courts employ strict scrutiny. *Id.* at 216–17. The statute will fail unless the government can

running through all of the Fourteenth Amendment's Equal Protection Clause jurisprudence—from *Plessy* to *Harris*—is that the actor is the “state.”

B. *Equal Protection Under the Fifth Amendment*

On its face, the Fourteenth Amendment applies only to “state” actions; it does not constrain actions by the federal government.⁴¹ In fact, no provision in the Federal Constitution expressly requires the federal government to secure equal protection for its citizens.⁴² Consequently, the Court has looked elsewhere—specifically to the Fifth Amendment's Due Process Clause—to find the basic right of equals to equality under federal law. Chief Justice Taft spearheaded the effort to root equal protection within due process when, in 1921, he wrote that the Due Process and Equal Protection Clauses are “associated” and may “overlap” in that a violation of one clause violates the other.⁴³ He further observed that although the Due Process Clause “secure[s] equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty and property . . . [o]ur whole system of law is predicated on the general, fundamental principle of equality of application of the law.”⁴⁴

demonstrate that the “classification has been precisely tailored to serve a compelling governmental interest.” *Id.* at 217. If the “classification, while not facially invidious, nonetheless give[s] rise to recurring constitutional difficulties,” it will be tested under intermediate scrutiny. *Id.* Such difficulties arise, for example, when a statute discriminates against a class which shares some of the characteristics of the suspect classes. *See id.* at 218–23; *see also* *Trimble v. Gordon*, 430 U.S. 762, 767 (1977); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1090 (1st ed. 1978). To withstand intermediate scrutiny, the statutory classification “must serve important governmental objectives and must be substantially related to the achievement of those objectives.” *Craig v. Boren*, 429 U.S. 190, 197 (1976); *see also Plyler*, 457 U.S. at 216; *Lalli v. Lalli*, 439 U.S. 259, 265 (1978). If neither strict nor intermediate scrutiny is appropriate, then the statute will be tested for mere rationality—that the classification at issue bears some fair relationship to a legitimate public purpose. *Plyler*, 457 U.S. at 216.

⁴¹ U.S. CONST. amend. XIV, § 1 (“No *State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”) (emphasis added); *see also* *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (“The Fifth Amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states.”).

⁴² *See* *Detroit Bank v. United States*, 317 U.S. 329, 337 (1943) (“Unlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress.”) *see also* *Helvering v. Lerner Stores Corp.*, 314 U.S. 463, 468 (1941).

⁴³ *Truax v. Corrigan*, 257 U.S. 312, 331–32 (1921).

⁴⁴ *Id.* at 332; *see also* *Steward Machine Co. v. Davis*, 301 U.S. 548, 585 (1937) (“[W]e assume that discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment.”).

Thirty years later, the Court had another opportunity to recognize equal protection principles in the Fifth Amendment's Due Process Clause in connection with the school desegregation cases. In *Bolling v. Sharpe*, for example, a companion case to *Brown v. Board of Education*, the Court held that the equal protection principles of *Brown* would apply to District of Columbia schools through the Fifth Amendment's Due Process Clause.⁴⁵ Specifically the Court noted that the concepts of "equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive," and although "equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law'. . . . discrimination may be so unjustifiable as to be violative of due process."⁴⁶ Indeed, after *Bolling*, the Court has consistently reiterated that equal protection analysis embedded in the Fifth Amendment's Due Process Clause is the same as that under the Fourteenth Amendment.⁴⁷ The Court has thus applied much of its Fourteenth Amendment equal protection jurisprudence to strike down sex classifications in federal legislation,⁴⁸ overturn classifications with an adverse impact upon illegitimate

⁴⁵ *Bolling*, 347 U.S. at 499.

⁴⁶ *Id.*

⁴⁷ See *Buckley v. Valeo* 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."); see also *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.") (citations and internal quotation marks omitted); *Schlesinger v. Ballard*, 419 U.S. 498, 500 n.3 (1975); *Jimenez v. Weinberger*, 417 U.S. 628, 637 (1974); *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973).

⁴⁸ *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686, 1690, 1698 (2017) (invalidating gender-based distinction applicable to acquisition of United States citizenship by child born abroad to one parent who was United States citizen and another parent who was citizen of another nation, under which only one year of continuous physical presence was required before unwed mothers could pass citizenship to their children, but five years of continuous physical presence were required of unwed fathers); accord *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 57, 60 (2001) (involving a Fifth Amendment equal protection challenge to a federal gender classification with differing rules for unwed mothers and for unwed fathers in their ability to confer derivative citizenship); *Califano v. Westcott*, 443 U.S. 76, 84, 88–89 (1979) (holding unconstitutional provision of unemployed-parent benefits exclusively to fathers); see also *Califano v. Goldfarb*, 430 U.S. 199, 206–07 (1977) (plurality opinion) (holding unconstitutional a Social Security classification that denied widowers survivors' benefits available to widows); *Weinberger*, 420 U.S. at 648–53 (1975) (holding unconstitutional a Social Security classification that excluded fathers from receipt of child-in-care benefits available to mothers); *Frontiero*, 411 U.S. at 688–91 (plurality opinion) (holding unconstitutional exclusion of married female officers in the military from benefits automatically accorded married male officers); cf. *Reed v. Reed*, 404 U.S. 71, 74, 76–77 (1971) (holding unconstitutional a probate-code preference for a father over a mother as administrator of a deceased child's estate).

children,⁴⁹ and invalidated some welfare assistance provisions.⁵⁰ Almost all legislation, however, involves some degree of classification among particular categories of persons, things, or events. Just as the Equal Protection Clause does not outlaw “reasonable” classifications, the Due Process Clause is no more tolerant of the great variety of social and economic legislation typically containing what must be arbitrary line-drawing.⁵¹ As the next section will explore, the federal government has historically been endowed with some authority to classify persons upon certain grounds.

C. *The Equal Protection Doctrine in the Immigration Law Context*

The application of equal protection principles grounded in the Fifth Amendment has salience in the context of immigration law because the federal government has exclusive regulatory authority over immigration, citizenship, and alienage.⁵² As the Court has observed, “[t]he federal sovereign, like the States, must govern impartially. . . . [B]ut . . . there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State.”⁵³ Historically, the Supreme Court deferred to the federal government in the realm of immigration.⁵⁴ This power to

⁴⁹ Compare *Jimenez*, 417 U.S. at 637 (holding unconstitutional a Social Security classification denying benefits to one subclass of illegitimate children), with *Mathews v. Lucas*, 427 U.S. 495, 512–16 (1976) (holding the same Social Security classification did not unconstitutionally discriminate by withholding a presumption of dependency to one subclass of illegitimate children).

⁵⁰ U.S. Dep’t of Agric. v. Murry, 413 U.S. 508, 514 (1973); see also U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 538 (1973).

⁵¹ *Lyng v. Castillo*, 477 U.S. 635, 642–43 (1986) (food Stamp Act limitation of benefits to households of related persons who prepare meals together held constitutional); *Richardson v. Belcher*, 404 U.S. 78, 81 (1971). With respect to courts and criminal legislation, see *United States v. MacCollom*, 426 U.S. 317, 324 (1976); *Marshall v. United States*, 414 U.S. 417, 428–30 (1974); *Hurtado v. United States*, 410 U.S. 578, 590 (1973).

⁵² See *Truax v. Raich*, 239 U.S. 33, 42 (1915) (immigration and alienage are the exclusive province of the federal government, and therefore states may not regulate or criminalize matters related to immigration or alienage).

⁵³ *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976). Thus, the power over immigration and aliens permitted federal discrimination on the basis of alienage. *Id.* at 100–01 (employment restrictions like those previously voided when imposed by States); see also *Mathews v. Diaz*, 426 U.S. 67, 85–87 (1976) (permitting discrimination on the basis of durational residency); *Fiallo v. Bell*, 430 U.S. 787, 798–99 (1977) (allowing discrimination on the basis of illegitimacy). Similar rules by States would be voided.

⁵⁴ Indeed, as early as May 1889, the Supreme Court ruled that “[t]he power of exclusion of foreigners being an incident of sovereignty . . . cannot be granted away or restrained.” *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889). Later during the Cold War, the Court reaffirmed the plenary power doctrine by holding that “it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government

regulate immigration and naturalization is the principal example of the national government's ability to classify upon some grounds—alienage, but also other suspect and quasi-suspect categories as well—that would result in invalidation were a state to enact them.⁵⁵

Traditionally, the courts divided immigrants into “two . . . categories: (1) lawful permanent residents . . . (immigrants who have been granted permission to live and work in the United States), and (2) inadmissible aliens (non-citizens who entered the country without authorization or who are otherwise ineligible to enter the country or remain).”⁵⁶ The government has typically granted lawful permanent residents “greater rights and privileges” than those granted to inadmissible aliens.⁵⁷ Thus, what appears in the context of immigration law is a sliding scale of rights, greatest in a naturalized citizen and least in a non-resident, non-citizen without any immigration status. In between these two are numerous other categories including those who are permanent legal residents,⁵⁸ who have “rights” that are “more extensive and

to exclude a given alien.” *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950). More recently, in February 2009, the United States Court of Appeals for the District of Columbia Circuit held that “a nation-state has the inherent right to exclude or admit foreigners and to prescribe applicable terms and conditions for their exclusion and admission.” *Kiyemba v. Obama*, 555 F.3d 1022, 1025 (D.C. Cir. 2009), *vacated*, 559 U.S. 131 (2010). The principle “to decide which alien may, and which alien may not, enter the United States, and on what terms,” Judge Randolph firmly asserted, “has been a matter of political determination by each State—a matter wholly outside the concern and competence of the [j]udiciary.” *Id.* at 1026 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 596 (1952)) (Frankfurter, J., concurring).

⁵⁵ “[T]he Fourteenth Amendment’s limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization.” *Mathews*, 426 U.S. at 86–87. That is so, because “it is the business of the political branches of the Federal Government, rather than that of . . . the States . . . to regulate the conditions of entry and residence of aliens.” *Id.* at 84.

⁵⁶ Andrew Bramante, Note, *Ending Indefinite Detention of Non-Citizens*, 61 CASE W. RES. L. REV. 933, 938 (2011) (emphasis omitted) (citations omitted).

⁵⁷ *Id.*; see also *Clark v. Martinez*, 543 U.S. 371, 389 (2005) (Thomas, J., dissenting) (“[C]onstitutional questions raised by detaining inadmissible aliens are different from those raised by detaining admitted aliens.”) (emphasis omitted); *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) (“The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights.”). Lawful permanent residents have the right to live and work permanently in the United States and “[b]e protected by all laws of the United States . . . state[s] . . . and local jurisdictions.” *Rights and Responsibilities of a Green Card Holder (Permanent Resident)*, U.S. CUSTOMS & IMMIGRATION SERVICES (July 15, 2015), <https://www.uscis.gov/green-card/after-green-card-granted/rights-and-responsibilities-permanent-resident/rights-and-responsibilities-green-card-holder-permanent-resident> [<https://perma.cc/9S7X-WAHU>].

⁵⁸ In *In re Griffiths*, 413 U.S. 717, 721–22 (1973) and *Graham v. Richardson*, 403 U.S. 365, 372 (1971), the Court subjected state laws disadvantaging legal aliens to strict scrutiny. In *Graham*, the Court struck down a law that conditioned the payment of state welfare benefits on citizenship. 403 U.S. at 374–75. Preserving limited state resources for citizens was not found to be a sufficiently compelling interest. *Id.* In

secure” because the person has made a “preliminary declaration of intention to become a citizen.”⁵⁹ Since immigration laws tend to single out and discriminate against people based on their ethnic, national origin or cultural status, the Supreme Court has often scrutinized the laws under the equal protection framework.⁶⁰

The tension between protecting the rights of the discriminated against “other” and safeguarding national security and national sovereignty is on display at the intersection of immigration and the equal protection doctrine. For example, in *Hirabayashi v. United States*, the Court upheld federal military orders regarding Japanese internment, concluding that although such orders discriminated against citizens of Japanese ancestry, they did not violate the Equal Protection Clause.⁶¹ In *Hirabayashi*, the Court recognized that “[d]istinctions between citizens solely because of their ancestry are, by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection.”⁶² Nonetheless, the Court also found no equal protection violation given the government’s interest in securing the country during wartime, concluding that “the challenged orders and statute afforded a reasonable basis for the action taken.”⁶³

Undocumented immigrants have also challenged laws under the Equal Protection Clause with varying degrees of success.⁶⁴ For example, in *Plyler v. Doe*, a case examining the legality of a school admission policy that restricted the registration of children of undocumented immigrants, the Court ultimately struck down the restrictions as violating equal protection.⁶⁵ The Court, however, initially dismissed the idea that undocumented aliens were a suspect class, which would warrant heightened review. Specifically, the Court held that an individual’s undocumented status did not permit the same level

Griffiths, the Court considered a state law that restricted bar membership to citizens. 413 U.S. at 724. Again, a majority of the Court applied strict scrutiny to strike down the law, finding citizenship to not be closely related to one’s ability to fulfill the responsibilities of a lawyer. *Id.*

⁵⁹ *Johnson*, 339 U.S. at 770.

⁶⁰ See *Plyler v. Doe*, 457 U.S. 202, 210–11 (1982).

⁶¹ *Hirabayashi v. United States*, 320 U.S. 81, 100–01 (1943).

⁶² *Id.* at 100.

⁶³ *Id.* at 100–01. For its part, the *Hirabayashi* Court relied on *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). In *Yick Wo*, the Court held that “any person” in the text of the Fourteenth Amendment was “universal in [it’s] application to all persons . . . without regard to any differences of . . . nationality.” *Id.*

⁶⁴ See e.g., *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (involving a successful challenge based on equal protection to a law that excluded children of undocumented immigrants from public education).

⁶⁵ *Id.* at 230.

of constitutional protections afforded to legal residents.⁶⁶ Therefore, it seemed that the *Plyler* Court had decided to apply the less demanding rational basis review. This notwithstanding, the *Plyler* majority emphasized that the class at issue was the children of undocumented immigrants, not just undocumented immigrants in general.⁶⁷ The Court stated that the state's exclusion of these children from educational opportunities "impos[ed] a lifetime hardship on a discrete class of children," who were in a particularly vulnerable position through no fault of their own.⁶⁸ The Court, therefore, required the state to point to a "substantial goal" furthered by the law to justify the discrimination.⁶⁹ Although the Supreme Court explicitly stated that it would use rational basis review, the "substantial goal" language implied that the Court was applying some form of heightened scrutiny.⁷⁰

Plyler has particular relevance to an examination of the treatment of undocumented juveniles seeking SIJS and the impediments they face navigating the SIJS legal framework, as discussed in Part II. Additionally, as asserted in Part III, *Plyler* provides significant support to the proposed cure to SIJS's endemic problems—an equal protection challenge to the SIJS law.

II. THE SIJS EXAMPLE

A. *Unaccompanied Immigrant Children in the United States Before 1990 and the Laws that Affected Them*

Children have been immigrating to the United States without parents or guardians at least as early as 1892 when Ellis

⁶⁶ *Id.* at 219–20.

⁶⁷ *Id.* at 220.

⁶⁸ *Id.* at 223–24.

⁶⁹ *Id.* at 224.

⁷⁰ *Id.* In addition to the language in *Plyler* acknowledging that undocumented children were "persons" entitled to equal protection, the *Plyler* Court also introduced the idea that undocumented children are particularly vulnerable and thus the laws that discriminate against them are subject to some level of judicial scrutiny higher than rational basis. *Id.* at 223–24. The framework of providing heighten protections to undocumented minors that *Plyer* introduced has been successfully used to challenge state laws that target them. For example, Alabama enacted HB 56, the "Alabama Taxpayer and Citizen Protection Act," in 2011, which "required schools to conduct a census of undocumented children in schools, until it was enjoined by the trial and circuit judges." Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 ALA. LAWS 535 (H.B. 56); Michael A. Olivas, *Undocumented Children 30 Years After Plyler*, AM. CONST. SOC'Y (Feb. 16, 2012), <https://www.acslaw.org/acsblog/undocumented-children-30-years-after-plyler/> [<https://perma.cc/XR9Q-WDYU>]. In addition, *Plyer*, and its result of opening the public schools to undocumented children, has been credited with generating wide-spread acceptance of undocumented children and motivating such legislation as the DREAM act. *See id.*

Island began processing immigrants.⁷¹ For the next one hundred years, hundreds of thousands of unaccompanied children, or unaccompanied alien children (UAC) as they are characterized under the law,⁷² have come to the United States to escape war, famine, and poverty from crisis-ridden areas around the world.⁷³ In that process they have been aided by charities, immigrant aid societies, and sometimes even the United States government.⁷⁴

⁷¹ See Sam Roberts, *Story of the First Through Ellis Island Is Rewritten*, N.Y. TIMES (Sept. 14, 2006), <https://www.nytimes.com/2006/09/14/nyregion/14annie.html> [<https://perma.cc/7MNY-LPJT>]. An unaccompanied child named Annie Moore was the first immigrant to step off the first ship that brought immigrants to Ellis Island on January 1, 1892, the day it initially opened. *Id.* Annie was awarded a \$10 gold liberty coin for being the first to register. *Id.* Most unaccompanied children, however, came to the United States in less desirable circumstances, and many were turned away. See Tasneem Raja, *Child Migrants Have Been Coming to America Alone Since Ellis Island*, MOTHER JONES (July 18, 2014, 10:00 AM), <http://www.motherjones.com/politics/2014/07/child-migrant-ellis-island-history> [<https://perma.cc/BG4L-Z23M>]. Unaccompanied children who were determined to come to the United States but were unable to purchase ship tickets often stowed away by hiding in the various inconspicuous areas of ships. *Id.* Henry Armetta was a famous actor in Hollywood's golden age who came to America from Italy stowed away on a ship bound for Ellis Island in 1902. *Id.* Armetta was not sent back to Italy because a local Italian offered to sponsor him. *Id.* Not all stowaways managed to remain in the United States, even the most persistent ones. See, e.g., Sam Apple, *The Boy Who Was Desperate to Be an American*, L.A. TIMES (July 5, 2014, 12:05 AM), <http://www.latimes.com/nation/la-oe-apple-axelrod-immigrant-minor-stowaway-20140706-story.html> [<https://perma.cc/48ZY-HXVU>]. For example, twelve-year-old Benjamin Axelrod reportedly stowed away on ships bound for New York seven times over the course of two years and was sent back each time. *Id.*

⁷² Under 6 U.S.C. § 279(g)(2) (2012), "unaccompanied alien child" is defined as a child that:

- (A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care or physical custody.

Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2205 (2002) (codified as amended at 6 U.S.C. § 279(g) (2012)).

⁷³ Daniel J. Steinbock, *The Admission of Unaccompanied Children into the United States* 7 YALE L. & POL'Y REV. 137, 141-42 (1989).

⁷⁴ BARRY MORENO, IMAGES OF AMERICA: CHILDREN OF ELLIS ISLAND 7-8 (Arcadia Publishing 2005). Charitable sponsors often purchased bonds, which allowed the children to be admitted to the United States. See *id.* at 8. For instance, the Hebrew Immigrant Aid Society purchased bonds for Jewish children whose parents were killed by anti-Semitic pogroms in Eastern Europe. See Tasneem Raja, *Child Migrants Have Been Coming to America Alone Since Ellis Island*, MOTHER JONES (July 18, 2014, 10:00 AM), <http://www.motherjones.com/politics/2014/07/child-migrant-ellis-island-history> [<https://perma.cc/BG4L-Z23M>]. The oppression of the Jews in Germany in the years preceding and during World War II also sparked multiple organizations to rescue Jewish children from Nazi persecution. *Jewish Aid & Rescue*, U.S. HOLOCAUST MEM'L MUSEUM: HOLOCAUST ENCYC., <https://encyclopedia.ushmm.org/content/en/article/jewish-aid-and-rescue> [<https://perma.cc/N5SQ-4EGG>]. The largest immigration of unaccompanied children into the United States prior to 2000 occurred in the 1960's during what is now known as 'Operation Pedro Pan' when over 14,000 unaccompanied children were admitted to the United States. *History*, OPERATION PEDRO PAN GROUP, INC. (2009), <http://www.pedropan.org/category/history> [<https://perma.cc/54AJ-TKEH>]. When diplomatic relations between the U.S. and Cuba were broken, unaccompanied Cuban children fled, and were sent by their parents on commercial flights to the United States, Florida in particular. *Id.* At the time, the U.S.

Since the arrival of the first UAC, various laws have affected the status of these children. The Immigration Act of 1907 placed “all children under sixteen years of age, unaccompanied by one or both of their parents” on a list of excluded immigrants.⁷⁵ In an apparent attempt to relax the exclusion of unaccompanied children, the Immigration Act of 1917 provided that children whose parents were already in the United States were no longer excluded, and gave the Secretary of Labor discretion to admit unaccompanied children if “in his opinion they are not likely to become a public charge and are otherwise eligible.”⁷⁶ In 1940, Congress passed a law allowing authorized American rescue ships to save refugee children from war zones and bring them to the United States on the condition that there was an American person or corporation ensuring that the child did not become a public charge.⁷⁷ Then, in 1947, Congress adopted the Constitution of the International Refugee Organization, which included a provision that unaccompanied children under the age of sixteen “who are war orphans or whose parents have disappeared, and who are outside their countries of origin, shall be given all possible priority assistance.”⁷⁸ In 1953, Congress passed a law to allow non-quota immigrant visas to be issued to “eligible orphans” under ten years old, which allowed them to be adopted from abroad.⁷⁹ The Refugee Act of 1980 created the Office of Refugee Resettlement within the

Department of State encouraged the children to come by waiving visa requirements for these children. *Id.*

⁷⁵ Immigration Act of 1907, Pub. L. No. 59-96, 34 Stat. 898, 898–99. In addition to unaccompanied children the act sets forth additional exclusions, such as: (a) persons deemed to have physical or mental defects that might affect their ability to support themselves; (b) persons infected with tuberculosis; and (c) so-called “feeble minded” persons. *Id.* at 898.

⁷⁶ Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat 874, 876.

⁷⁷ Act of Aug. 27, 1940, ch. 695, Pub. L. No. 76-776, 54 Stat. 866, 866 (amending Neutrality Act of 1939).

⁷⁸ Constitution of the International Refugee Organization, *opened for signature* Dec. 15, 1946, annex I, pt. I, § A, 62 Stat. 3037, 3050, 18 U.N.T.S. 18 (entered into force Aug. 20, 1948).

⁷⁹ Act of July 29, 1953, ch. 268, Pub. L. No. 83-162, 67 Stat. 229, 229. Eligible orphan is defined in part as a child who has experienced the death, abandonment, or disappearance of one or both parents, and the remaining parent is incapable of caring for the child and “irrevocably release[s] the child for emigration and adoption.” *Id.* In 1957, Congress amended the act to, among other things, increase the age of eligible orphans to fourteen years old and allow visas to be issued until June 30, 1959. *See* Act of Sept. 11, 1957, Pub. L. No. 85-316, 71 Stat. 639, 639. Congress later amended the act in 1959 to extend the term whereby visas could be granted to immigrant orphans to June 30, 1960. *See* Act of Sept. 9, 1959, Pub. L. No. 86-253, 73 Stat. 490, 490. In 1961, Congress permanently permitted adoption of eligible children under the age of fourteen by U.S. Citizens. *See* Act of Sept. 26, 1961, Pub. L. No. 87-301, 75 Stat. 650, 650. In 1981, the age of eligible orphans was raised to sixteen years old. Immigration and Nationality Act Amendments of 1981, § 2(b), Pub. L. No. 97-116, 95 Stat. 1611, 1611 (codified as amended at 8 U.S.C. § 1101 (2012)).

Department of Health and Human Services and detailed procedures and programs to help with refugees' interactions with the government.⁸⁰ The history of the last century—prior to 1990—shows a progressive federal legal and regulatory approach, reflecting clear, open pathways for admission to the United States for these unaccompanied children.

B. The Immigration of Unaccompanied Immigrant Children After 1990 and Emergence of SIJS

1. The Roots of SIJS and Its Evolution to the Present

Originally enacted as a part of the Immigration Act of 1990,⁸¹ the Special Immigrant Juvenile Status (SIJS),⁸² a seemingly minor and uncontroversial addition to the landscape of immigration law, created a pathway to permanent legal status for certain undocumented immigrant children who had become dependent on a state's juvenile courts and for whom return to their country of origin would not be possible. The provision stated two basic requirements for SIJS: (1) that the immigrant child "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) that it is not "in the [child's] best interest to be returned to the [child's] or parent's previous country of nationality or country of last habitual residence."⁸³

⁸⁰ Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, 111–18 (codified as amended at 8 U.S.C. §§ 1521–1524 (2012)).

⁸¹ The Act amended key components of the original 1965 Immigration and Nationality Act ("the INA") and was intended to be a broad and sweeping update to the systems and processes the United States used to legally admit immigrants and to administer the naturalization of immigrants. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended at 8 U.S.C. §§ 1101–1537 (2012)).

⁸² *Id.* § 153, 104 Stat. 4978, 5005–06; 8 C.F.R. § 204.11 (2018).

⁸³ § 153, 104 Stat. at 5005–06. In 1991, Congress passed a series of technical amendments to the INA that explicitly waived these and other grounds of inadmissibility that presented unintended obstacles to SIJS applicants. *See* Miscellaneous and Technical Immigration and Naturalization Amendments of 1990, Pub. L. No. 102-232, sec. 302, 105 Stat. 1733, 1742–46 (codified as amended at 8 U.S.C. § 1255(h) (2012)). The 1990 amendments also designated SIJS applicants as being deemed paroled into the United States, effectively avoiding the immigration consequences that would normally flow from being present in the United States without ever having been legally admitted. *Id.*; *see also* 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. 42,843, 42,844–50 (Aug. 12, 1993) (codified at 8 C.F.R. § 204.11 (1993)). Lastly, the 1991 amendments stated unequivocally that nothing in either the SIJS statute or these new amendments permitted an alien to be admitted into the United States, or apply for admission, for the purpose of obtaining SIJS. sec. 302, 105 Stat. at 1745. The legislative materials and conference reports accompanying the 1991 legislation are silent as to the purpose for including the prohibition against permitting an alien to be admitted into the United States, or to apply for admission, for the purpose of obtaining SIJS. However, the

The creation of SIJS was a response to a growing humanitarian concern over the welfare of undocumented children, who had been victims of parental abandonment, abuse, or neglect,⁸⁴ that began to immigrate to the United States at the end of the last century.⁸⁵ The SIJS statute sought to address this humanitarian concern in two ways: first by creating a path to permanent residency for these children, and second by including a standard that required a determination of whether deportation of the child back to their home country or previous country of residence would really serve the best interests of the child.⁸⁶ Given, however, that the federal court system has no family law courts, Congress delegated to state courts the duty to render the juvenile dependency and best interest of the child determinations.⁸⁷

Congressional Research Service commentary regarding the purpose behind the enactment of the 1991 Amendment indicates that the text of the original statute contained a type of loop-hole that would potentially permit an immigrant to apply for and obtain admission into the United States explicitly for the purpose of obtaining SIJS. *See* RUTH WASEM, CONG. RESEARCH SERV., R43703, SPECIAL IMMIGRATION JUVENILES: IN BRIEF 3 (2014).

⁸⁴ § 153, 104 Stat. at 5005–06; *see also* Act of Nov. 26, 1997, Pub. L. No. 105-119, sec. 113, 111 Stat. 2440, 2460; 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, 240, 245 (2006); WASEM, *supra* note 83, at 3.

⁸⁵ Beginning in the 1990s, large numbers of unaccompanied children came to the United States came from Mexico, Honduras, El Salvador, and Guatemala. *See* WILLIAM A. KANDEL, CONG. RESEARCH SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 1–3 (2016), <https://fas.org/sgp/crs/homesecc/R43599.pdf> [<https://perma.cc/4YBM-4P55>]. Like their counterparts in the last one hundred years, UAC are escaping “[h]igh violent crime rates, poor economic conditions fueled by relatively low economic growth rates, relatively high poverty rates, and the presence of transnational gangs” in their countries of origin. WILLIAM A. KANDEL ET AL., CONG. RESEARCH SERV., R43628, UNACCOMPANIED ALIEN CHILDREN: POTENTIAL FACTORS CONTRIBUTING TO RECENT IMMIGRATION 3 (2014), <https://fas.org/sgp/crs/homesecc/R43628.pdf> [<https://perma.cc/3RF5-B9GJ>]. Out of the nine sectors of the Southwest border that the United States Border Patrol monitors, the overwhelming majority of UAC arrive in the Southwest sector. *See* Statement by Secretary Johnson on Southwest Border Security, United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016, U.S. CUSTOMS & BORDER PROTECTION (Oct. 18, 2016), <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016> [<https://perma.cc/MT5N-2BFC>]. In total, from 2008 through August 2016, at least 277,798 UAC were encountered by United States Border Patrol. *See id.* In the first two years of the Trump administration, apprehension of undocumented individual and family units by the Board Patrol has increased overall, with more 80,000 apprehensions of UAC from the fall of 2016 through the end of July 2018. *See U.S. Southwest Border Migration FY 2018*, U.S. CUSTOMS & BORDER PROTECTION (Aug. 8, 2018), <https://www.cbp.gov/newsroom/stats/sw-border-migration> [<https://perma.cc/BJ6U-SGR6>]; *U.S. Border Patrol Southwest Border Apprehensions by Sector FY 2017*, U.S. CUSTOMS & BORDER PROTECTION (Dec. 15, 2017), <https://www.cbp.gov/newsroom/stats/usbp-sw-border-apprehensions-fy2017> [<https://perma.cc/42HY-8JU8>].

⁸⁶ § 153, 104 Stat. at 5005–26; *see also* 8 C.F.R. § 204.11(c) (2018).

⁸⁷ Neither the legislation itself, nor the accompanying conference report contain any commentary explaining Congress’ purpose behind the enactment of SIJS. The Congressional Research Service and scholarly commentary regarding the purpose behind the enactment of SIJS consistently agree, however, that the purpose for having the State courts render the juvenile dependency determinations was to leverage the child

By the late 1990s, however, a concern emerged among lawmakers that parents were purposely abandoning their children so they could obtain SIJS.⁸⁸ As a result, Congress amended the act to specify in the first requirement that the child is “eligible . . . for long-term foster care due to abuse, neglect, or abandonment.”⁸⁹ In 1997, Congress added a third requirement making it necessary that the Attorney General consent⁹⁰ to the dependency order.⁹¹ The Homeland Security Act of 2002⁹² shifted most enforcement responsibilities from the Department of Justice’s INS to the Department of Homeland Security.⁹³ Furthermore, in 2006, Congress supplied the guideline that a child should never be compelled to contact their alleged abuser in applying for SIJS, sacrificing efficiency for the welfare of the child.⁹⁴

In 2008, Congress passed the Trafficking Victims Protection Reauthorization Act (TVPRA), which applied directly to UAC and set out detailed rules, policies, and guidelines that also amended

welfare expertise that state courts already possessed, which the federal government lacked. *See, e.g.*, WASEM, *supra* note 83, at 3; Jessica R. Pulitzer, Note, *Fear and Failing in Family Court: Special Immigrant Juvenile Status and the State Court Problem*, 21 CARDOZO J. L. & GENDER 201, 212 (2014); *see also* Lloyd, *supra* note 84 at 243. It is worth noting that standards based on the best interests of the child are not new in American family law courts, and states apply a “best interests of the child” standard when making determinations on a citizen child’s custody or placement with a guardian, for example. *See* Pulitzer, *supra* note 87, at 202–03.

⁸⁸ By 1997, there was a growing concern in Congress, championed by former Arizona Senator Peter Domenici, that college age Mexican nationals were abusing SIJS to gain lawful permanent residency, so they could attend United States colleges and universities. *See* Lloyd, *supra* note 84, at 239 n.12, 244 n.44. That year, Congress addressed those concerns by passing the first significant amendments to the statutory language that created SIJS. Act of Nov. 26, 1997, Pub. L. No. 105-119, Act of Nov. 26, 1997, Pub. L. No. 105-119, sec. 113, 111 Stat. 2440, 2460–61; H.R. REP. NO. 105-405, at 130 (1997) (Conf. Rep.); *see also* WASEM, *supra* note 83, at 3.

⁸⁹ Act of Nov. 26, 1997, Pub. L. No. 105-119, § 113, 111 Stat. 2440, 2460 (codified as amended at 8 U.S.C. § 1101(a)(27)(J)(i) (2012)).

⁹⁰ The 1997 amendment divided “consent” into “express” consent for undocumented juvenile immigrants that were not in the custody of the federal government, and “specific” consent for undocumented juvenile immigrants that were in federal custody. Act of Nov. 26, 1997, Pub. L. No. 105-119, sec. 113, 111 Stat. at 2460 (codified as amended at 8 U.S.C. § 1101(a)(27)(J)(iii) (2012)).

⁹¹ *Id.*

⁹² Homeland Security Act of 2002, Pub. L. No. 107-296, § 462, 116 Stat. 2135, 2202–05 (2002) (codified as amended at 6 U.S.C. § 279 (2012)).

⁹³ *Id.*; *see also* WASEM, *supra* note 83, at 3 n.3. DHS was not, however, transferred the responsibility for the custody and care of unaccompanied immigrant children. Instead the Homeland Security Act gave those responsibilities to the Office of Refugee Resettlement (ORR) within the Department of Health and Human Services (HHS). Homeland Security Act of 2002 § 462 116 Stat. at 2202–05 (codified as amended at 6 U.S.C. § 279 (2012)); *see also* Lauren R. Aronson, *The Tipping Point: The Failure of Form over Substance in Addressing the Needs of Unaccompanied Immigrant Children*, 18 HARV. LATINO L. REV. 1, 8 (2015).

⁹⁴ Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960, 3066 (2006) (codified as amended at 8 U.S.C. § 1357(h) (2012)).

SIJS eligibility requirements.⁹⁵ First, TVPRA replaced the requirement that the juvenile is deemed eligible for long-term foster care with the requirement that “reunification with [one] or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law.”⁹⁶ The TVPRA also amended the SIJS statute and gave consent authority for undocumented immigrant children not in federal custody to the Secretary of DHS (rather than the Attorney General), while giving “specific[]” consent authority for undocumented immigrant children in federal custody to the Secretary of Health and Human Services.⁹⁷ Additionally, the statute now permitted a grant of SIJS even in situations where reunification with one parent presented no risk of abuse, abandonment, or neglect, so long as reunification with the other parent was not viable for those reasons.⁹⁸ Finally, the inclusion of “similar basis found under state law” language eliminated the unnecessarily restrictive requirement that SIJS was only available in cases specifically of abandonment, abuse, and neglect.⁹⁹

SIJS was now also available to undocumented immigrant children that were the victims of behavior similar to abandonment, abuse, or neglect—behavior that the state would normally remove children from to protect them.¹⁰⁰ The TVPRA also added a requirement that all SIJS applications be adjudicated by DHS within 180 days of the date upon which the application was filed with United States Citizenship and Immigration Services (USCIS). It clarified that any undocumented immigrant who was a “child” on the date his or her SIJS application was filed could not be denied SIJS regardless of his or her age at the time of adjudication.¹⁰¹ Thus, Congress effectively broadened the scope of people eligible for SIJS at a time when there was an increasing number of UAC

⁹⁵ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235, 122 Stat 5044, 5074–82 (2008) (codified as amended at 8 U.S.C. § 1232 (2012)).

⁹⁶ *Id.* at 5079. The requirement necessitating eligibility for long-term foster care was added in 8 C.F.R. § 204.11 (2018). In order to be eligible, children must satisfy the requirements in both the statute and regulations. § 235, 122 Stat. at 5080.

⁹⁷ Section 235, 122 Stat. at 5079–80. More significantly, the TVPRA dramatically altered the consent practice by eliminating the need for “express[]” consent “to the dependency order serving as a precondition to the grant” of SIJS. *Id.* Instead, DHS consent for undocumented immigrant children would function as acknowledgement that the SIJS request was being sought for the purpose of escaping abandonment, abuse, neglect, and not for the purpose of gaining legal status. *Id.* at 5079.

⁹⁸ *Id.*

⁹⁹ *See id.*; *see also* 8 U.S.C. § 1101(a)(27)(J)(i) (2012).

¹⁰⁰ *See* § 235, 122 Stat. at 5079.

¹⁰¹ *Id.* at 5080.

arriving in the United States.¹⁰² Today, SIJS remains substantially the same as it was when amended in 2008.¹⁰³

¹⁰² Memorandum from Donald Neufeld, Acting Assoc. Dir. of Domestic Operations, USCIS, Pearl Chang, Acting Chief of Office of Policy & Strategy to Field Leadership (Mar. 24, 2009), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVpra_SIJ.pdf [<https://perma.cc/4WS5-9ZRG>].

¹⁰³ See 8 U.S.C. § 1101(a)(27)(J) (2012). It provides:

(27) the term “special immigrant” means—

(J) an immigrant who is present in the United States—

(i) who has been 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, and whose reunification with [one] or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;

(ii) 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 alien’s or parent’s previous country of nationality or country of last habitual residence; and

(iii) in whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status, except that—

(I) no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction; and

(II) no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter.

8 U.S.C. § 1101(a)(27)(J) (2012). The governing regulations, 8 C.F.R. § 204.11(c) (2018), prescribe:

An alien is eligible for classification as a special immigrant under section 101(a)(27)(J) of the Act if the alien: (1) Is under twenty-one years of age; (2) Is unmarried; (3) Has been declared dependent upon a juvenile court located in the United States in accordance with state law governing such declarations of dependency, while the alien was in the United States and under the jurisdiction of the court; (4) Has been deemed eligible by the juvenile court for long-term foster care; (5) Continues to be dependent upon the juvenile court and eligible for long-term foster care, such declaration, dependency or eligibility not having been vacated, terminated, or otherwise ended; and (6) Has been the subject of judicial proceedings or administrative proceedings authorized or recognized by the juvenile court in which it has been determined that it would not be in the alien’s best interest to be returned to the country of nationality or last habitual residence of the beneficiary or his or her parent or parents; or (7) On November 29, 1990, met all the eligibility requirements for special immigrant juvenile status in paragraphs (c)(1) through (c)(6) of this section, and for whom a petition for classification as a special immigrant juvenile is filed on Form I-360 before June 1, 1994.

8 C.F.R. § 204.11 (2018); see also *Eligibility Status for SIJ*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (July 5, 2011), <https://www.uscis.gov/green-card/special-immigrant-juveniles/eligibility-sij-status/eligibility-status-sij> [<https://perma.cc/BA84-27Z3>].

2. The Problems with SIJS

SIJS creates a bifurcated state-federal structure and thus represents a novelty in federal immigration law in that it expressly requires input and participation from state courts.¹⁰⁴ As a result, certain aspects of the SIJS framework and the unique state-federal structure have impeded SIJS applicants from obtaining SIJS protection, therefore making the entire framework susceptible to scrutiny and criticism from immigration lawyers and scholars.

Immigration legal scholars have thoroughly and thoughtfully documented the systemic problems with the SIJS framework, which create unsurmountable obstacles for UAC to obtain SIJS. These problems include: (1) no right to appointed counsel and the general lack of affordable, competent immigration lawyers;¹⁰⁵ (2) conflicts between and diffusion of SIJS responsibilities among federal agencies tasked with administering SIJS;¹⁰⁶ (3) the lack of adequate guidance to the federal authority responsible for granting consent;¹⁰⁷ (4) the application of “privileged, American parenting standards” which fail to account for familial situations that may exist “in . . . different socio-economic circumstances” in other countries;¹⁰⁸ (5) the failure to expressly recognize poverty alone as a legitimate “basis for children seeking a better life in the United States”;¹⁰⁹ and (6) conflicts within DHS itself as the agency

¹⁰⁴ See 8 C.F.R. § 204.11(a) (2018).

¹⁰⁵ See Laila L. Hlass, *States and Status: A Study of Geographical Disparities for Immigrant Youth*, 46 COLUM. HUM. RTS. L. REV. 266, 267 (2014); Elizabeth Keyes, *Evolving Contours of Immigration Federalism: The Case of Migrant Children*, 19 HARV. LATINO L. REV. 33, 38, 82–83 (2016); Randi Mandelbaum & Elissa Steglich, *Disparate Outcomes: The Quest for Uniform Treatment of Immigrant Children*, 50 FAM. CT. REV. 606, 613 (2012); 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, 363 (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, 63 (2005) [hereinafter Thronson, *Of Borders*]; David B. 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) [hereinafter Thronson, *Thinking Small*]; Pulitzer, *supra* note 87, at 207.

¹⁰⁶ See Keyes, *supra* note 105, at 71–72; see also Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 823 (2015).

¹⁰⁷ Immigration Act of 1990, Pub. L. No. 101-649 § 153, 104 Stat. 4978, 5005 (codified as amended at 8 U.S.C. § 1101(a)(27)(J) (2012); 8 C.F.R. § 204.11(c)(2012)); see also Act of Nov. 26, 1997, P.L. 105-119, § 113, 111 Stat. 2440, 2460 (1997) (codified as amended at 8 U.S.C. § 101(a)(27)(J)(i) (2012)); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235, 122 Stat. at 5079; H.R. REP. NO. 105-405, at 130 (1997) (Conf. Rep.); Lloyd, *supra* note 84, at 239–40.

¹⁰⁸ Sarah Rogerson, *The Politics of Fear: Unaccompanied Immigrant Children and the Case of the Southern Border*, 61 VILL. L. REV. 843, 886–87 (2016).

¹⁰⁹ *Id.* at 887.

attempts to simultaneously enforce the removal of undocumented children and provide them with a legal path to residency.¹¹⁰

This “disparate geographic access to SIJS, with [the] uneven [availability of] relief [within state] jurisdictions,” has also been thoroughly explored in legal scholarship.¹¹¹ Several scholars have studied the ways that SIJS availability varies between states. Professor Laila Hlass, in particular, has examined statistics to illustrate the tremendous geographic disparity in accessing SIJS.¹¹² These disparities are attributed to factors including variance in child welfare policies and practices among states, in addition to differing state laws, which gives rise to divergent state court definitions of SIJS eligibility terms based on state law.¹¹³ Others writing on this issue have focused on statutory differences, such as the age limit for state court jurisdiction over minors,¹¹⁴ as well as case law differences.¹¹⁵

Among the landscape of commentary on the problems that plague SIJS, this article is the first to argue that the SIJS legal framework, which has allowed state courts broad authority to adjudicate SIJS disparately, presents significant equal protection concerns, and makes the law ripe for an equal protection challenge. As discussed in Part III, the decisions by the state courts in Nebraska and California interpreting the plain language of the SIJS statute demonstrate this problem adroitly.

3. Sensible Remedies and Why They Will Now Fail

The United States’ need for an effective program to address unaccompanied, undocumented, minor victims of abuse has only grown in the twenty-seven years since the inception of SIJS. Not only would such a program serve the best interests of these children by protecting them from abusive family situations, but it would also serve the best interests of the United States. Humanitarian interests would be served by embracing this largely faultless and

¹¹⁰ See Keyes, *supra* note 105, at 71.

¹¹¹ *Id.* at 38.

¹¹² See Hlass, *supra* note 105, at 266–67. As Professor Keyes has observed: “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.” Keyes, *supra* note 105, at 38 n.11.

¹¹³ *Id.*; see also Pulitzer, *supra* note 87, at 214–22 (exploring in detail the problems among and within states in defining and applying “abuse, abandonment and neglect,” “best interest” standards, as well as the other required eligibility standards).

¹¹⁴ Heryka Knoespel, Note, *Special Immigration Justice Status: A “Juvenile” Here is Not a “Juvenile” There*, 19 WASH. & LEE J. CIV. RTS. & SOC. JUST. 505, 519–20 (2013) (addressing the state juvenile court’s efforts to resolve the challenges faced by eighteen through twenty-one-year-old SIJS applicants in obtaining SIJS findings).

¹¹⁵ Pulitzer, *supra* note 87, at 217–18.

highly vulnerable undocumented immigrant population; furthermore, economic interests would be served by integrating these individuals legally into society, allowing them to both contribute to and reap the rewards of the most powerful economy on Earth. Unfortunately, the SIJS program in its current iteration is simply not up to the task, and the bifurcated structure of state and federal roles, which may have made sense when SIJS was first implemented, now impede the program's success.

a) Proposed Congressional and Executive Branch Solutions

Scholars writing in this area have proposed sensible solutions to the problems with SIJS. Many focus on ways to improve procedures in the state courts or recalibrate the amount of deference given to state courts' determinations.¹¹⁶ Professor Hlass, who extensively documented the differences among state court applications under SIJS, recommends fixes such as "forming a working group to analyze SIJS application disparities and state practices; . . . enacting [new] federal law[s] to increase state screening and assistance for immigrant children to apply for SIJS; and . . . amending SIJS to create a federal safeguard to address state discrepancies."¹¹⁷ Other possible proposals include legislative amendments to SIJS to "creat[e] redundant jurisdiction" so that if SIJS applicants are unable to obtain SIJS findings from state court, they can seek review and intervention from the federal government.¹¹⁸ Professor Elizabeth Keyes proposes a comprehensive reconsideration of the allocation of power under SIJS and recommends eliminating the state's role in making SIJS determinations. Accordingly, she urges "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."¹¹⁹

Another possible solution that does not rely on congressional action could originate within the DHS, which could use the federal rulemaking process to revise SIJS regulations

¹¹⁶ See generally Hlass, *supra* note 105; Mandelbaum & Steglich, *supra* note 105, at 606; Pulitzer, *supra* note 87, at 217; Somers et al., *supra* note 105, at 317; Thronson, *Of Borders*, *supra* note 105, at 48; Thronson, *Thinking Small*, *supra* note 105, at 240–41.

¹¹⁷ See Hlass, *supra* note 105, at 329.

¹¹⁸ Keyes, *supra* note 105, at 85. Professor Keyes discusses, as an alternative, a review "process [similar to] that [which] currently exists for T visas, where victims must attempt to get a law enforcement certification that they cooperated in[] an investigation of human trafficking but can also show USCIS evidence of their efforts to cooperate if law enforcement refuses to issue a certification for them." *Id.*

¹¹⁹ See *id.* at 86–88.

concerning the definition of “juvenile court” to provide a federal department, such as DHS, discretion to achieve the same ends.¹²⁰ Finally, other administrative fixes for SIJS could be addressed through the Administrative Appeals Office review process.¹²¹

Amending SIJS or revising its implementing regulations, as suggested here and in other scholarship, would significantly improve the SIJS framework and resolve the problems that impede equal access to SIJS. These ideas have much to commend them, and in a different political climate with different leadership in the federal government they might have come to pass. In the current political environment, however, those remedies are only aspirations.

b) All of the Solutions Will Fail: The Lack of the Political Will to Improve the SIJS Law

Despite the clear need for reform to SIJS demonstrated in this article and in the other legal academic literature, the necessary reforms to SIJS will not occur in the near term. The current President and others in his administration are openly hostile to most immigration policies, particularly policies regarding illegal immigrants, as evidenced in the Executive Orders banning

¹²⁰ DHS could revise the definition of “juvenile court” found in 8 C.F.R. § 204.11(a), which provides “[s]pecial immigrant status for certain aliens declared dependent on a juvenile court.” 8 C.F.R. § 204.11 (2018). For the purposes of SIJS, “juvenile court” currently “means a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles.” *Id.* DHS could amend the SIJS regulation definition of juvenile court to include, “under federal” or state law. With this change, Federal courts with the jurisdiction to make judicial determinations about the custody and care of juveniles would have the same authority to grant SIJS dependency and custody orders that state courts have now. This would likely include USCIS immigration courts that make judicial determinations about juvenile refugees and juvenile victims of human trafficking and would certainly include the AAO which has authority to review certain denied immigration petitions involving children. See *The Administrative Appeals Office (AAO)*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (July 11, 2018), <https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-ao/administrative-appeals-office-ao> [<https://perma.cc/A3CX-RR8J>].

¹²¹ The current SIJS framework allows for applicants denied SIJS to appeal the denial to the AAO within USCIS. See *The Administrative Appeals Office (AAO)*, *supra* note 120. A judge at the AAO then reviews the denial “to ensure consistency and accuracy in the interpretation of immigration law and policy” and has the authority to reject the denial where USCIS improperly applied the law. *Id.* If the denial of SIJS is rejected, the judge can issue a precedent decision that becomes binding federal precedent for all future cases (anywhere in the federal government) involving the same or similar facts. See *id.* Precedent decisions are very rare, and they require the Secretary of DHS to directly petition the Attorney General to approve the AAO decision as binding legal precedent for the entire federal government. See *id.* “[P]recedent decisions may announce new legal interpretations or agency policy, or they may reinforce existing law and policy by demonstrating how it applies to a unique set of facts.” *Id.* In the entire twenty-seven-year history of the SIJS program, there has never been a precedent decision that deals with SIJS. *DHS/AAO/INS Decisions*, U.S. DEP’T OF JUST. (Jan. 29, 2018), <https://www.justice.gov/eoir/dhs-ao-ins-decisions> [<https://perma.cc/D7LZ-DS7D>].

immigrants from certain countries;¹²² the lack of commitment to the Deferred Action for Childhood Arrivals recipients;¹²³ the efforts to deprive so-called sanctuary cities of federal funding;¹²⁴ the recommendations to allow the National Security Agency to conduct mass surveillance and create a racial profiling database;¹²⁵ and the implementation in the spring of 2018 of the “zero tolerance” policies, which resulted in the mass separation of undocumented children and their families.¹²⁶ Furthermore, President Trump has consistently exhibited hostility towards undocumented immigrants in public statements and Tweets.¹²⁷ With respect to SIJS, President Trump said that he would like to further limit the “unaccompanied” status.¹²⁸ Therefore, SIJS applicants have no champions in the executive branch.

Likewise, since the 2016 election some Members of Congress, in both the House of Representatives and the Senate, have been equally hostile to immigrants, while those in the legislative branch who support undocumented immigrants have been unable to effectively challenge the opposition or the president on immigration issues.¹²⁹ The distance between Republican and

¹²² See Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Exec. Order 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

¹²³ See Katie Reilly, *Here’s What President Trump Has Said About DACA in the Past*, TIME (Sept. 5, 2017), <http://time.com/4927100/donald-trump-daca-past-statements/> [<https://perma.cc/72DN-FRLY>].

¹²⁴ Ruthie Epstein, *Trump and Sessions Keep Trying to Institute Anti-Immigrant Policies*, AM. CIV. LIBERTIES UNION (Nov. 17, 2017, 4:45 PM), <https://www.aclu.org/blog/immigrants-rights/trump-and-sessions-keep-trying-institute-anti-immigrant-policies> [<https://perma.cc/3YAB-VK5M>].

¹²⁵ AM. CIV. LIBERTIES UNION, *THE TRUMP MEMOS: THE ACLU’S CONSTITUTIONAL ANALYSIS OF THE PUBLIC STATEMENTS AND POLICY PROPOSALS OF DONALD TRUMP 11–14* (2016), <https://www.aclu.org/report/trump-memos> [<https://perma.cc/4HW3-JFE6>].

¹²⁶ See Katie Rogers & Sheryl G. Stolberg, *Trump Calls for Depriving Immigrants Who Illegally Cross Border of Due Process Rights*, N.Y. TIMES (June 24, 2018), <https://www.nytimes.com/2018/06/24/us/politics/trump-immigration-judges-due-process.html> [<https://perma.cc/2BJ9-FGGL>].

¹²⁷ In June 2018, after signing an executive order aimed at preventing additional family separations of undocumented children from their parents, President Trump tweeted those who cross into the United States illegally should be sent back immediately without due process or an appearance before a judge. *See id.*; *see also* Amrit Cheng, *Trump’s Lawyers Say the Muslim Ban Has No Bias, but His Tweets Show Otherwise*, AM. CIV. LIBERTIES UNION: SPEAK FREELY BLOG (Nov. 30, 2017, 3:00 PM), <https://www.aclu.org/blog/immigrants-rights/trumps-lawyers-say-muslim-ban-has-no-bias-his-tweets-show-otherwise> [<https://perma.cc/GU9G-EY69>] (discussing President Trump’s outward hostility toward Muslim immigrants).

¹²⁸ See Sarah Gonzalez, *What it Means That Trump Wants to Limit ‘Unaccompanied’ Status for Minors Crossing the Borders*, WNYC (Mar. 8, 2017), <http://www.wnyc.org/story/unaccompanied-children-face-trump-proposals-immigration-protections/> [<https://perma.cc/HRE3-4TLH>].

¹²⁹ See Sheryl Gay Stolberg & Thomas Kaplan, *Congress Struggles for Path Forward on Immigration*, N.Y. TIMES (Feb. 16, 2018), <https://www.nytimes.com/2018/02/16/us/politics/congress-immigration-dreamers.html> [<https://perma.cc/TW8K-HJTL>].

Democratic positions and their unwillingness to compromise suggests that Congress will not reform SIJS.¹³⁰

Thus, in the near term, any relief for SIJS applicants will not originate from the executive branch or Congress; neither will act to fix SIJS. Accordingly, SIJS applicants and their advocates must now look to the courts to compel action.

III. THE PROPOSAL: A CONSTITUTIONAL CHALLENGE

It is clear that the problem of UAC is not going away anytime soon. Since 2013, a surge of unaccompanied children have come to the United States escaping poverty, conflict, crime and violence from their families and home countries;¹³¹ their desperate efforts to cross the border (and sometimes several borders) represent an ongoing humanitarian crisis.¹³² Prior to the passage of SIJS in 1990, states could render the child of undocumented immigrants a dependent of the state in the face of parental abandonment, abuse, or neglect; however, the child could not engage in any activities requiring citizenship or lawful status, including gainful employment.¹³³ No immigration mechanism existed that could take the minor's full situation into account when determining his or her undocumented status.¹³⁴ After undergoing removal proceedings, the child would ultimately have to return to a country he or she often had no real connection to.¹³⁵ As discussed in preceding sections, the federal government's solution was to create SIJS, a program that could provide these vulnerable victims a path to legal, permanent residency.¹³⁶ Unlike nearly every other immigration law and federal initiative, however, SIJS granted the states a core "gatekeeping role" in granting immigration benefits to these children.¹³⁷ This current

¹³⁰ See *id.*; see also Ashley Killough & Tal Kopan, *Here Are the Key Players in Congress on Immigration*, CNN (Jan. 11, 2018, 10:08 AM ET), <https://www.cnn.com/2018/01/11/politics/key-players-immigration-congress/index.html> [<https://perma.cc/S4B4-B96Z>].

¹³¹ See *supra* note 85.

¹³² "From October of 2016 through February of 2017, Border Patrol apprehended 27,591 unaccompanied children—an average of nearly [two hundred] children per day." Karen Coates, *Crossing The Border As an Unaccompanied Child*, PAC. STANDARD (May 24, 2017) <https://psmag.com/social-justice/crossing-the-border-as-an-unaccompanied-child> [<https://perma.cc/D52T-PZDN>]. Although the total number of apprehensions in the Southwest border have dropped since President Trump took office, they nonetheless still remain in the hundreds of thousands. See *U.S. Southwest Border Migration FY 2018*, *supra* note 85. Apprehensions represent a fraction of the total number of individuals crossing the border.

¹³³ See WASEM, *supra* note 83, at 2; Keyes, *supra* note 105, at 45.

¹³⁴ See WASEM, *supra* note 83, at 2; see also Lloyd, *supra* note 84, at 240–41, 241 n.18.

¹³⁵ Lloyd, *supra* note 84, at 41.

¹³⁶ See *infra* Section II.B.

¹³⁷ Keyes, *supra* note 105, at 58.

SIJS state-federal power-sharing framework is overly complicated; it is often unpredictable and sometimes broken. Depending on the state where the applicant seeks predicate findings, some applicants will be denied all access to SIJS because certain state courts have created insurmountable legal barriers in order to obtain the predicate findings.¹³⁸

It is likewise apparent that the reasonable fixes to SIJS proposed in legal scholarship will not come to fruition.¹³⁹ They are workable and well-taken, but in light of the current executive branch's implementation of anti-immigrant policies and the polarization of Congress, these solutions represent a Sisyphean¹⁴⁰ exercise. The only foreseeable path forward is full-throated, vigorous legal assaults on SIJS in the courts. A Fifth Amendment's due process equal protection claim, although novel in this context, is the appropriate vehicle to transport this challenge.¹⁴¹

¹³⁸ See Hlass, *supra* note 105, at 321; see also Keyes, *supra* note 105, at 43; Lloyd, *supra* note 84, at 255, 260–61.

¹³⁹ See *supra* Section II.B.3.

¹⁴⁰ In Greek mythology Sisyphus was the king of Ephyra. Sisyphus believed that his cleverness surpassed that of Zeus. As punishment for his self-aggrandizing actions and beliefs, Zeus required him to push an immense boulder up a steep hill. When Sisyphus and the boulder neared the top, the boulder would roll back down the hill. Sisyphus could never complete the task, and thus he was consigned to an eternity of useless efforts and unending frustration. *Sisyphus*, GREEKMYTHOLOGY.COM, <https://www.greekmythology.com/Myths/Mortals/Sisyphus/sisyphus.html> [<https://perma.cc/VD5Y-PV7Z>]; see also *Sisyphean*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/180455?redirectedFrom=sisyphean#eid> [<https://perma.cc/W99X-4FDD>]. Activities that are both laborious and futile have since come to be characterized as “Sisyphean.” *Id.*

¹⁴¹ The exact contours of the lawsuit alleging the equal protection challenge proposed here and the possible remedies are beyond the scope of this article and warrant further exploration and discussion. Nonetheless, in general, when confronted with a constitutional flaw in a statute, the courts attempt to limit the solution to the problem. For example, courts may enjoin only the unconstitutional applications of a statute while leaving other applications in force, see *United States v. Raines*, 362 U.S. 17, 20–22 (1960), or to sever its problematic portions while leaving the remainder intact, see *United States v. Booker*, 543 U.S. 220, 245–49 (2005).

Consequently, in challenging SIJS in the federal court, possible approaches might include a request to enjoin the enforcement of the law in those states where applicants have been denied SIJS findings based on the state overstepping its limited role and invading the province of the federal government in the SIJS application process. In the alternative, a plaintiff might argue that the language in section 1101 (a)(27)(J)(i), which authorizes the state courts to make SIJS eligibility findings, violates equal protection. Rather than nullify the entire SIJS framework, plaintiffs might invite the court to excise that section from the statute. Under either approach the court could order the DHS to revise the existing regulations and work with the DOJ to develop a method to continue to implement SIJS while using exclusively federal decision makers or processes, and thereby salvage the law and honor the intent of the legislature to provide SIJS.

A. *The SIJS Legal Framework Deprives Applicants of Equal Protection*

As explained above, the Equal Protection Clause requires that the government treat individuals equally.¹⁴² Equal protection problems are present in the very DNA of SIJS, which requires the applicant to apply to the appropriate state court and obtain certain predicate factual findings based on state law. After that, the applicant must then apply to DHS, which will ultimately determine whether to grant SIJS status based on that state court's findings.¹⁴³ By design, SIJS's bifurcated state and federal power-sharing arrangement contains blurred boundaries, and thus contains space for the state courts to overstep their role—to interpret and possibly misconstrue the federal law. If (and when) that occurs, the values of equal protection are offended because the availability of SIJS will then depend on the state where the predicate findings are sought, rather than on the merits of the application.

As discussed below, some states have overstepped their limited role of answering predicate state law matters and invaded the province of the federal government by interpreting the SIJS law to determine whether applicants meet the requirements for SIJS status.¹⁴⁴ Two states, specifically Nebraska and California, are discussed below because they present clear case studies of state courts surpassing the authority granted in the SIJS framework to infringe on the province of the federal government.

1. Nebraska's Interpretation of Federal Law: A Requirement that the State Court Find the Child Cannot Reunify with *Both* Parents

The SIJS statute requires a state court finding that “reunification with *[one] or both . . .* parents is not viable due to abuse, neglect, abandonment.”¹⁴⁵ The Nebraska Supreme Court in *In re Erick M.*, interpreted the “*[one] or both*” language in SIJS.¹⁴⁶ Erick M. sought SIJS findings during his delinquency proceeding and argued that although he was planning to reunite with his mother,¹⁴⁷ he was nonetheless eligible for SIJS findings because his

¹⁴² See U.S. CONST. amend. XIV, § 1.

¹⁴³ 8 U.S.C. § 1101(a)(27)(J) (2012).

¹⁴⁴ See *infra* Sections III.A.1., III.A.2.

¹⁴⁵ 8 U.S.C. § 1101(a)(27)(J) (2012)(emphasis added).

¹⁴⁶ *In re Erick M.*, 820 N.W.2d 639, 647 (Neb. 2012).

¹⁴⁷ *Id.*

father had abandoned him.¹⁴⁸ The Nebraska delinquency court refused to issue special findings that would enable Erick M. to apply for SIJS based on his father's abandonment because he had not also shown that he was abused, abandoned, or neglected by his mother. The Nebraska Supreme Court affirmed this decision.¹⁴⁹ Although the plain language of the SIJS statute permits the state court to make the requisite findings when the abuse, abandonment, neglect or other stipulation is by *one* or both parents, the state argued that "Erick's interpretation render[ed] the 'or both' superfluous," thus making the statute ambiguous.¹⁵⁰ Concluding that one-parent abandonment was insufficient to establish SIJS eligibility, the Nebraska Supreme Court agreed with the state and held that "when ruling on a petitioner's motion for an eligibility order under § 1101(a)(27)(J) [the SIJS provision in the Immigration and Nationality Act], a court should generally consider whether reunification with either parent is feasible" and that abuse, abandonment, or neglect by *both* parents was a requisite for special findings.¹⁵¹

After the Supreme Court of Nebraska decided *Erick M.*, family law courts in New York¹⁵² and New Jersey¹⁵³ agreed with the Nebraska Supreme Court's interpretation of the "one or both" language, while California courts soundly rejected it.¹⁵⁴ The

¹⁴⁸ *Id.* at 643.

¹⁴⁹ *Id.* at 648.

¹⁵⁰ *Id.* at 643.

¹⁵¹ *Id.* at 648 (emphasis added) (citing *In re Luis G.*, 764 N.W.2d 648 (Neb. Ct. App. 2009)).

¹⁵² *See, e.g.*, In the Matter of Fernandez, NN-9132/22, NYLJ 1202584001199, at 1 (Fam. KI, Decided Dec. 18, 2012), <http://www.newyorklawjournal.com/id=1202584001199?slreturn=20141006234750> [<https://perma.cc/4SC7-SCWU>] ("Emanuel ha[d] only had one parent, his mother. He cannot be 'reunified' with a parent he has never met. . . . [T]his Court [located in Kings County, New York] concurs with the reasoning in *Erick M.*, *supra*, regarding the statutes [sic] use of the word 'or' in the phrase 'reunification with one or both parents.'"). *But see, e.g.*, *Diaz v. Munoz*, 989 N.Y.S.2d 53, 54 (App. Div. 2014) (Youth in question was eligible for SIJS special findings because of abandonment by her father, even though the youth "had never met her father"); *In re Karen C.*, 973 N.Y.S.2d 810, 812 (App. Div. 2013) (holding that a child met the statutory requirements when her father, but not her mother, had abandoned her); *Marcelina M.-G. v. Israel S.*, 973 N.Y.S.2d 714, 722 (App. Div. 2013) (holding that the plain language of the statute only requires that one parent abused, abandoned or neglected the child when both did not); *In re Mario S.*, 954 N.Y.S.2d 843, 852 (Fam. Ct. 2012) (granting motion for predicate findings where "the father has abandoned the child, and his reunification with his mother [was] tenuous given her apparent immigration status").

¹⁵³ *See H.S.P. v. J.K.*, 87 A.3d 255, 266 (N.J. Super. Ct. App. Div. 2014) ("We agree with the holding of the Nebraska court, and overrule the contrary holding."), *rev'd*, 121 A.3d 849, 859 (N.J. 2015) (rejecting the lower court's interpretation of the "[one] or both" language to require findings as to both parents).

¹⁵⁴ *See, e.g.*, *Eddie E. v. Superior Court*, 183 Cal. Rptr. 3d 773, 779 (Ct. App. 2015) (a literal interpretation of the statute allows SIJS findings when only one parent abused, abandoned, or neglected the child); *see also In re Israel O.*, 182 Cal. Rptr. 3d 548,

concern here is not which construction is the correct interpretation of federal law. Instead, the problem is that these state courts are engaged in statutory interpretation of federal immigration law in the first instance, in addition to the fact that states are making divergent pronouncements about the federal law that are conclusive¹⁵⁵ and binding on the SIJS applicants within their respective jurisdictions. This circumstance raises the possibility that similarly situated SIJS applicants might be subjected to different interpretations of the federal law (and therefore different treatment) in other states, which renders the SIJS framework problematic under the equal protection doctrine.

2. California's Interpretation of Federal Law: A Requirement that the State Court Determine that the Child's Request for SIJS Findings is "Bona Fide"

The California state courts, like the courts of Nebraska, have also endeavored to interpret SIJS in a manner that raises due process equal protection concerns. Specifically, in *Bianka M. v. Superior Court*,¹⁵⁶ a juvenile filed a parentage action in a California family court requesting an order "to place her in the sole legal and physical custody of her mother and to make the additional findings necessary to allow her to petition for SIJ[S]."¹⁵⁷ The family court declined to make the requested findings, concluding that Bianka M.'s alleged father was a necessary party to the proceedings and that the superior court lacked personal jurisdiction over him.¹⁵⁸ Before the California Court of Appeal, Bianka M. argued that a state court was required to make SIJS findings at any time upon request.¹⁵⁹ The California Court of Appeal rejected this argument and observed that "an order containing SIJ findings will not be useful to Bianka unless it is issued in the context of a bona fide custody proceeding."¹⁶⁰ The appellate court also found that "[b]ecause

554–56 (Ct. App. 2015) (holding that although the child lived with his mother in the United States, the statute was satisfied because his father had abandoned him).

¹⁵⁵ See, e.g., *In re Erick M.*, 820 N.W.2d at 641 (remains the law in the state of Nebraska).

¹⁵⁶ *Bianka M. v. Superior Court*, 199 Cal. Repr. 3d 849, 854 (Cal. Ct. App. 2016), *rev'd*, 423 P.3d 334 (Cal. 2018).

¹⁵⁷ *Id.* at 853–54.

¹⁵⁸ The family court concluded that the juvenile's request for an award of sole custody to her mother in a UPA action necessarily required the court to determine paternity and her father's parental rights *Id.* at 854. The custody order "made [the juvenile's alleged father] an indispensable party to the parentage action [under the UPA]." *Id.* Additionally, the court was also concerned that it did not have personal jurisdiction over the minor's father to render any order affecting his parental rights. *Id.*

¹⁵⁹ *Id.* at 861.

¹⁶⁰ *Id.* at 864.

Bianka's parentage action . . . appears to have been brought only to obtain SIJ findings, the proceeding below was not a bona fide custody proceeding under the [Uniform Parentage Act]."¹⁶¹

The Court of Appeal in *Bianka M.* interpreted SIJS law to require that superior courts may only make SIJS findings "in the context of ongoing, bona fide proceedings relating to child welfare, rather than through specially constructed proceedings designed mainly for the purpose of issuing orders containing SIJ findings."¹⁶² Federal law, however, imposes no such "bona fide" requirement during adjudication of state court SIJS petitions. Thus, *Bianka M.* effectively invaded the federal government's authority to regulate immigration by creating additional predicate findings for California SIJS applicants that a similarly situated applicant in another state would not be required to obtain.

The California State Supreme Court subsequently reversed the intermediate court's decision in *Bianka M.*¹⁶³ In doing so, however, the California State Supreme Court did not conclude that the Court of Appeal had overstepped its authority and invaded the province of the federal government in interpreting the language of SIJS.¹⁶⁴ Instead, the California Supreme Court grounded its analysis in California state law.¹⁶⁵ The failure of the California Supreme Court to even acknowledge that the intermediate appellate court's opinion represented a clear overreach into federal authority to interpret SIJS leaves open the possibility that California state courts may in the future continue to exceed their authority with respect to SIJS.

3. *Erick M.* and *Bianka M.*: Why the SIJS Bifurcated State-Federal Structure is Inherently Flawed

Both *Erick M.* and the intermediate appellate court's decision in *Bianka M.* are emblematic of the problems inherent in the SIJS bifurcated state-federal structure. First, although Congress delegated authority to the states to make certain juvenile court SIJS eligibility findings, the statute does not delegate authority to interpret the Immigration and Nationality Act to the states. Second, these cases demonstrate that genuine

¹⁶¹ *Id.*

¹⁶² *Id.* at 860.

¹⁶³ See *Bianka M. v. Superior Court*, 423 P.3d 334, 336 (Cal. 2018).

¹⁶⁴ *Id.* at 340–45 n.5 (concluding as a matter of state law that the court of appeal erred in concluding that *Bianka M.*'s SIJS petition could not proceed in absence of her biological father).

¹⁶⁵ *Id.* at 343–46 (finding that under the California Code of Civil Procedure, section 155, the state court must issue SIJS findings, if factually supported, regardless of the trial court's assessment of the child's motivations in invoking the court's jurisdiction).

disparities will arise among the states that overreach and interpret federal immigration law, which ultimately leads to disparate geographic access to SIJS, and, most significantly, unequal treatment among SIJS applicants based on the fortuity of where they seek state court SIJS findings.

The structure of SIJS that allows state courts to interpret the federal law differently leads to unequal treatment of SIJS applicants and makes SIJS subject to an equal protection challenge under the Fifth Amendment's Due Process Clause. This situation does not present the classic Fourteenth Amendment Equal Protection Clause problem in which a state government discriminates against similarly situated state residents in a way that offends equal protection.¹⁶⁶ Indeed, every SIJS applicant in Nebraska who is similarly situated to Erick M. will be treated the same by the Nebraska courts. For our purposes, the relevant comparison is between a SIJS applicant, as in the case of Erick M., who lived in Nebraska and could be reunited with only one parent, but is denied SIJS findings based on the state of Nebraska's interpretation of SIJS, and a similarly situated SIJS applicant who lives in another state that has deferred interpretation to the federal government and are thus found to be SIJS eligible in a state court. This is not a problem that can be effectively attacked under the Fourteenth Amendment's Due Process Clause.¹⁶⁷ Instead, the equal protection problem here arises because of the federal government's actions.

DHS has no authority under SIJS to grant a SIJS application if the applicant does not obtain the requisite state court predicate findings.¹⁶⁸ Specifically, in those states where the state court has interpreted the federal law in a way that denies access to SIJS, then the predicate findings will not be obtained. DHS has no legal authority to review a state court's refusal to issue SIJS findings, even in situations (such as in *Erick M.* and *Bianka M.*) where the denial is based on the state's interpretation of federal law.¹⁶⁹ Thus, DHS will be required as a

¹⁶⁶ See *supra* note 64.

¹⁶⁷ See *supra* text accompanying note 33. Given that the analysis is similar in terms of the outcome it should not matter whether action is held to violate the Fourteenth Amendment's Equal Protection Clause or the Fifth Amendment due process provision.

¹⁶⁸ See 8 U.S.C. § 1101(a)(27)(J) (2012).

¹⁶⁹ See Memorandum from William R. Yates, Assoc. Dir. for Operations, U.S. Citizenship & Immigr. Servs., to Reg'l Dirs. & Dist. Dirs. (May 27, 2004), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2004/sij_memo_052704.pdf [<https://perma.cc/5CL9-6RCA>]; Memorandum from Lori Scialabba, Deputy Dir., U.S. Citizenship & Immigr. Servs., to January Contrera, Citizenship & Immigr. Servs. Ombudsman (July 13, 2011), <https://www.dhs.gov/xlibrary/assets/Citizenship-and-Immigration-Services-Ombudsman-Recommendation-Special-Immigrant-Juvenile-Adjudications.pdf> [<https://perma.cc/NK9C-UGRS>].

matter of law to reject the SIJS application out of hand, even though had that same applicant resided in a different state the application would have been granted. Thus, because of the structure of SIJS, the DHS will treat similarly situated SIJS applicants from different states unequally.

In enacting SIJS, Congress chose to extend its privileges to every applicant who was eligible, and having done so, the federal government cannot deny those privileges based on the fortuity of where the applicant applied. When Congress acts, as it did when it enacted the SIJS legal framework, the Constitution requires that the law comports with Fifth Amendment principles of equal protection and due process. SIJS does not satisfy those principles.

B. Why the Equal Protection Challenge Should Succeed

As discussed elsewhere here,¹⁷⁰ *Plyler* introduced the idea that undocumented children are particularly vulnerable and thus the laws that discriminate against them are subject to some level of judicial scrutiny higher than rational basis; the court required that the government show that the discrimination satisfied a “substantial” state goal.¹⁷¹ Thus, notwithstanding the deference otherwise granted to the executive and congressional branches in the area of immigration,¹⁷² deference to Congress and the executive does not insulate discriminatory immigration laws from the judicial scrutiny under equal protection principles.

Furthermore, although this article proposes a novel and unique application of the equal protection doctrine, no meritorious counterargument exists that might undermine the equal protection challenge presented here. The equal protection injury at issue—that SIJS’s framework lacks uniform legal guidance, allowing states to interpret federal law inconsistently, which ultimately causes the federal government to apply SIJS

¹⁷⁰ See *supra* notes 65–70 and accompanying text.

¹⁷¹ See *Plyler v. Doe*, 457 U.S. 202, 224 (1982).

¹⁷² In deference to the plenary power in the area of immigration to the other branches of the federal government, courts typically apply rational basis review to discriminatory immigration laws that, if enacted by a state, would trigger strict scrutiny. See, e.g., *Halaim v. INS*, 358 F.3d 1128, 1135 (9th Cir. 2004) (“[B]ecause federal authority in the areas of immigration and naturalization is plenary, [f]ederal classifications distinguishing among groups of aliens . . . are valid unless wholly irrational.”) (second alteration in original) (quoting *Sudmir v. McMahon*, 767 F.2d 1456, 1464 (9th Cir. 1985); see also *Lawrence v. Holder*, 717 F.3d 1036, 1041 n.9 (9th Cir. 2013) (addressing a “half-hearted” equal protection argument, the court noted that Congress can “draw lines that specify effective dates when it enacts or amends relief statutes.”); *Hernandez-Mezquita v. Ashcroft*, 293 F.3d 1161, 1163–64 (9th Cir. 2002) (filing deadline for NACARA relief did not violate equal protection); *Perez-Oropeza v. INS*, 56 F.3d 43, 45–46 (9th Cir. 1995) (limited eligibility for family unity waiver did not violate equal protection).

unequally—is harm unlike those that the federal courts traditionally countenance. Indeed, there are some instances where the federal courts, including the Supreme Court, have tolerated variation in statutory and constitutional interpretations of the law among the courts.¹⁷³ This resembles none of them.

For example, “[n]o court has ever held that the mere existence of a circuit split on an issue of statutory interpretation violates due process or equal protection.”¹⁷⁴ Courts recognize that disagreements among the federal circuit courts often lead to a review by the Supreme Court,¹⁷⁵ and thus circuit splits are tolerated in part because they are temporary.¹⁷⁶ At least in the case of criminal defendants, circuits splits are accepted as a rational consequence of their conviction.¹⁷⁷ In contrast, the SIJS cases involve minors, not criminal defendants. Moreover, the problem with the interpretation of SIJS does not involve differing interpretations and applications of the law among federal circuits—it involves a split among the states’ interpretation of federal law. As the *Erick M.* case demonstrates, the situation is not temporary. *Erick M.* is the law in Nebraska and all similarly situated SIJS applicants in Nebraska are bound by it.¹⁷⁸

In addition, this problem does not involve the interpretation or application of federal regulations. When reviewing challenges to administrative agencies’ interpretations of laws they implement, the federal courts defer under *Chevron U.S.A. Inc. v. Natural Resources Defense Council* to the agencies unless their interpretation violates “the unambiguously expressed intent of Congress.”¹⁷⁹

Likewise, this is not a situation where variation in the interpretation of the law should be tolerated because a state is simply interpreting state law. In general, the federal courts defer to the interpretation of state law by the state’s highest court on matters of state law.¹⁸⁰

¹⁷³ See *infra* text accompanying note 175.

¹⁷⁴ *Habibi v. Holder*, 673 F.3d 1082, 1088 (9th Cir. 2011) (rejecting contention that the differing application of the law in different circuits violates equal protection).

¹⁷⁵ See, e.g., *Graham v. United States*, No. CV-91-4112, 1992 WL 141998, at *7 (E.D.N.Y. June 4, 1992) (“The Supreme Court commonly grants certiorari to heal circuit splits.”).

¹⁷⁶ *Id.* at *9; see also *Allegheny Pittsburgh Coal Co. v. Webster Cty.*, 488 U.S. 336, 343 (1989) (inequalities between tax rates would not violate equal protection if they were temporary, since “the constitutional requirement is the seasonable attainment of a rough equality”).

¹⁷⁷ See, e.g., *Hernandez v. Gilkey*, 242 F. Supp. 2d 549, 554 (S.D. Ill. 2001) (observing that a criminal defendant’s equal protection rights are not violated on the ground that “similarly situated” defendants are treated differently as a result of a circuit split).

¹⁷⁸ *In re Erick M.*, 820 N.W.2d 639, 648 (Neb. 2012).

¹⁷⁹ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

¹⁸⁰ See e.g., *Cent. Union Tel. Co. v. Edwardsville*, 269 U.S. 190, 195 (1925) (upholding Illinois Supreme Court’s interpretation of a state waiver rule, even though

The deference afforded to state courts to interpret state law has been recognized even in the context of SIJS. In 2008, in *Perez-Olano v. Gonzalez*, a class of SIJS applicants challenged, *inter alia*, the “age-out” regulations in SIJS law.¹⁸¹ They argued that the regulations violated the Equal Protection Clause because in some states the process of obtaining SIJS state court predicate findings took so long that by the time applicants received those findings they were no longer eligible under state law, i.e., they had aged out of the state dependency system, and thus could no longer receive SIJS predicate findings from the state.¹⁸² The district court rejected all of the plaintiffs’ arguments challenging the “age-out” regulations, afforded the regulations deference under *Chevron*, and concluded that the SIJS regulations were uniform and rational.¹⁸³ With respect to the equal protection claim, the court dispatched in a footnote that the problem for the SIJS applicants was not that the federal government had engaged in differential treatment in the application of the federal regulations, or that the states had interpreted the federal regulations in a manner that failed to comply with the federal law.¹⁸⁴ Instead, the plaintiffs’ complaint centered on the state’s interpretation and application of the state’s dependency law, which the court implicitly concluded did

that interpretation resulted in the forfeiture of federal constitutional rights; refusing to supplant Illinois law with a federal definition of waiver, the Supreme Court explained that the state court’s declaration “should bind us unless so unfair or unreasonable in its application to those asserting a federal right as to obstruct it.”)

¹⁸¹ *Perez-Olano v. Gonzalez*, 248 F.R.D. 248, 252 (C.D. Cal. 2008). In *Perez-Olano*, the plaintiffs’ primary challenge to the “age-out” regulations was that they “impose[d] additional eligibility requirements unauthorized by the statute.” *Id.* at 268–69. They also challenged the government’s policy requiring in-custody minors to obtain ICE’s specific consent, contending that 8 U.S.C. § 1101(a)(27)(J) did not authorize the defendants to acquire specific consent for a SIJS-predicate order because such orders do not “determine the custody status or placement” of an in-custody minor. *Id.* at 263–67. As they existed when *Perez-Olano* was decided,

8 C.F.R. § 204.11(c)(1) preclude[d] SIJ classification once a youth [was] no longer “under twenty-one years of age.” [The regulation] require[d] that a youth seeking SIJ status “continue to be dependent upon the juvenile court and eligible for long-term foster care, such declaration, dependency or eligibility not having been vacated, terminated, or otherwise ended” Similarly, for SIJ-based adjustment of status, 8 C.F.R. §§ 205.1(a)(3)(iv)(A, C, & D) revoke[d] a youth’s SIJ classification “[u]pon the beneficiary reaching the age of 21; . . . the termination of the beneficiary’s dependency upon the juvenile court; . . . [or] the termination of the [youth’s] eligibility for long-term foster care.”

Id. at 267.

¹⁸² *Id.* at 269 n.14.

¹⁸³ *Id.* at 269.

¹⁸⁴ *Id.* at 269 n.14.

not represent a violation of equal protection guarantees.¹⁸⁵ In contrast, here, the equal protection problem originates from states' differing interpretations of federal law, which was not an issue in *Perez-Olano v. Gonzalez*.

Finally, the problem presented in this article does not fall within the narrow category of criminal cases, notably in the federal habeas context, where the federal courts often defer to the state court application of federal law.¹⁸⁶ The deference to the state courts' interpretations in the criminal habeas context is by design; it stems from the large role the state courts play in the criminal justice system compared to the more limited role of federal courts.¹⁸⁷ Nonetheless, although the federal courts defer to the state courts in the context of habeas, even that deference has its limits—the federal court will grant relief where the state court's action violates constitutional rights.¹⁸⁸ And that is exactly the situation presented here—the state courts interpreting SIJS in a way that results in a violation of the Constitution's guarantee of equal protection. Indeed, SIJS was intended to serve a fair, uniform, and unitary nationwide process for UAC to seek protected status under federal immigration law. The states were not invited into the process to place their own unique spin

¹⁸⁵ *Id.* *Perez-Olano* was settled in 2010 and the settlement updated again in 2015. As part of the settlement, the class members who had been deprived of SIJS findings based on the age-out provision were eligible to reopen their SIJS cases with the DHS. See Settlement Agreement at 8, *Perez-Olano v. Holder*, 2:05-cv-03604-DDP-RZ (C.D. Cal. Aug. 31, 2010) (No. 2:05-CV-3604), ECF. No. 159-1; see also William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235, 122 Stat. 5044, 5074–82 (codified as amended at 8 U.S.C. § 1232 (2012)); Stipulation Settling Motion for Class Wide Enforcement of Settlement at 2–6, *Perez-Olano v. Holder*, 2:05-cv-03504-DDP-RZ (C.D. Cal. Mar. 4, 2015) (No. 2:05-CV-3604), ECF No. 186, <http://immigrantchildren.org/PDF/186%2003-04-15%20Perez%20Olano%20%20STIPULATION%20SETTLING%20MOTION%20FOR%20CLASS-%20WIDE%20ENFORCEMENT%20OF%20SETTLEMENT.pdf> [<https://perma.cc/5H4C-BPDT>].

¹⁸⁶ *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976) (Recognizing that “there is ‘no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to [federal law] than his neighbor in the state courthouse’”) (quoting Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 509 (1963)).

¹⁸⁷ Habeas relief will be granted if the petitioner demonstrates that the state court's decision “was contrary to, or involved an unreasonable application of, clearly established Federal law.” 28 U.S.C. § 2254(d)(1) (2012). This “highly deferential standard” is “difficult to meet,” because the purpose . . . is to ensure that federal habeas relief functions as a ‘guard against extreme malfunctions in the state criminal justice systems,’ ‘and not as a means of error correction.’” *Cullen v. Pinholster*, 563 U.S. 170, 180 (2011) (citation omitted); *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (quoting *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011)). “The Court is not to determine whether the court of appeals's decision was correct or whether this Court may have reached a different outcome.” *Larson v. Patterson*, No. 2:09-CV-989-PMW, 2011 WL 129485, at *1 (D. Utah Jan. 14, 2011) (citing *Lockyer v. Andrade*, 538 U.S. 63, 75–76 (2003)). “The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited.” *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983).

¹⁸⁸ See, e.g., *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003).

on the federal law; rather, when originally enacted, the states were included in the framework simply because the drafters believed that state courts had the family law expertise and experience needed to make the predicate factual findings relevant to the eligibility determination.¹⁸⁹ As has been shown, however, in cases such as *Erick M.* and *Bianka M.*, the state courts have overstepped that authority. Thus, SIJS applicants, similar to *Erick M.*¹⁹⁰, have no recourse except to assert a federal equal protection claim because their highest state court has interpreted the federal law in a way that is unfair and forecloses their access to the federal privileges of SIJS.¹⁹¹

Admittedly, this novel proposal—asserting an equal protection challenge—to achieve reform of an entire framework of federal law and the arguments offered in support of this idea is without precedent in the context of SIJS. It is not, however, entirely without analogical support in the canon of Supreme Court jurisprudence. A useful comparison can be drawn between the equal protection harms here and those that the Supreme Court found in *Bush v. Gore*.¹⁹² The majority in *Bush v. Gore* identified the Florida Supreme Court’s failure to formulate uniform rules and specific standards for the counties to use to determine voter intent as the reason the state court’s recount procedures violated the Equal Protection Clause.¹⁹³ The Florida Supreme Court had baked in uncertainty and ambiguity in the vote counting process, allowing counties in Florida to apply their individual legal standards, leading, according to the majority of the Supreme Court, to the unequal evaluation of the ballots across the state.¹⁹⁴ SIJS suffers from the same failings. SIJS’ bifurcated, state-federal power-sharing framework, as well the language of SIJS, have given the states too much space to interpret the SIJS law and to create legal standards based on state interpretation of

¹⁸⁹ See *supra* note 87.

¹⁹⁰ *In re Erick M.*, 820 N.W.2d 639, 639 (Neb. 2012).

¹⁹¹ This point is clearly illustrated in the case of Nebraska after *Erick M.* In 2014, two years after the Nebraska Supreme Court decided *Erick M.*, USCIS, the agency charged with administering the Act, including applications for SIJS, took the position that abuse, neglect or abandonment by *one* parent was sufficient for purposes of SIJS predicate findings. See *Immigration Relief for Abused Children*, U.S. CITIZENSHIP & IMMIGR. SERVS. at 1 (Apr. 2014), https://www.uscis.gov/sites/default/files/USCIS/Green%20Card/Green%20Card%20Through%20a%20Job/Immigration_Relief_for_Abused_Children-FINAL.pdf [<https://perma.cc/7YPB-2UUH>] (providing that SIJ-eligible children may “[b]e living with a foster family, an appointed guardian, or the non-abusive parent”). This notwithstanding, the Nebraska Supreme court’s interpretation of the “one or both” parent language—now at odds with the USCIS view—remains the law for SIJS applicants in Nebraska.

¹⁹² *Bush v. Gore*, 531 U.S. 98, 105 (2000).

¹⁹³ *Id.* at 105–08.

¹⁹⁴ *Id.* at 106.

federal law, ultimately leading to the unequal application of federal law. There is no conceivable rational basis to justify the unequal treatment of SIJS applicants; there is no interest, substantial or otherwise, that it serves. Following *Bush v. Gore*, therefore, SIJS violates equal protection.

IV. IF NOT BEFORE, WHY NOW?

Interestingly, none of the immigration scholars researching and writing passionately about SIJS' failings and potential fixes have suggested an equal protection challenge to it. Legal research has revealed that among the numerous legal attacks on SIJS mounted since its enactment almost thirty years ago, an equal protection challenge has been asserted only once in *Perez-Olano v. Gonzalez*, which claimed that SIJS's "age-out" provision violated the equal protection doctrine only as an adjunct and alternative argument to its primary attack on the regulation.¹⁹⁵

Why is that the case? If, as this article posits, an equal protection problem is ingrained in SIJS, and the entire framework of the law is susceptible to a successful equal protection challenge, why has the claim not been proposed in the scholarship or litigated before now?

Maybe it has not been asserted because the question presented is too complicated, i.e., does a violation of the constitutional right to equal protection of the law result when a state actor interprets the federal law in a way that causes a federal actor to apportion federal benefits unequally? This is a difficult question to pose, let alone answer. Or maybe the challenge has escaped attention for prudential reasons, such as when the identity of the defendants is not clear. Alternatively, it could be that scholars and advocates that are usually focused on the intricacies of immigration law (rather than constitutional law) have simply not considered asserting an equal protection claim.

On the other hand, it is also possible that immigration law advocates have previously considered equal protection claims but decided against asserting them because of the risk associated with attacking the entire SIJS framework. They may fear that the courts might invalidate the law in its entirety—"throw the baby out with the bath water"¹⁹⁶—leaving all unaccompanied,

¹⁹⁵ See *Perez-Olano v. Gonzalez*, 248 F.R.D. 248, 262–69 (C.D. Cal. 2008); see also *supra* note 181 and accompanying text.

¹⁹⁶ This idiom derives from a German proverb, "das Kind mit dem Bade ausschütten." This phrase first appeared in 1512, in *Narrenbeschwörung* (Appeal to Fools) by Thomas Murner. Michael Quinion, *Newsletter* 826, WORLD WIDE WORDS (Apr. 6, 2013), <http://www.worldwidewords.org/nl/ohfq.htm> [<https://perma.cc/WDG5-8GPW>].

undocumented children with no opportunity to remain in the United States legally.¹⁹⁷ This fear is genuine. Nonetheless, given the anti-immigrant political sentiments expressed during the 2016 election cycle, the Trump administration's attempts to end DACA, its "zero tolerance" immigration policy, the open hostility expressed by members of the executive branch towards the undocumented community, and the lack of political will and inaction in Congress, non-litigation options are not viable.¹⁹⁸ In addition, given the climate of deregulation that currently prevails in federal agencies,¹⁹⁹ the SIJS as we have known it for more than twenty-five years may soon no longer exist. Consequently, there is nothing left to lose by asserting an equal protection challenge to the SIJS framework.

Challenges to federal government actions based on the Equal Protection Clause are increasing.²⁰⁰ They are the new black.²⁰¹ In the last eighteen months, equal protection challenges have been filed to enjoin a number of the executive branch's actions and the federal courts have not hesitated to review the merits of these cases.²⁰² The moment for an equal protection challenge to SIJS has arrived. No time like the present.

¹⁹⁷ Given the recent jurisprudence of the Supreme Court, this fear is not entirely unjustified. *See e.g.*, *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1701 (2017). In *Morales-Santana*, the Supreme Court held the different treatment of unmarried fathers and unmarried mothers in, 8 U.S.C. § 1409(c) (2012), with regard to the required length of physical presence, was an equal-protection violation. *Id.* at 1696–1701. The Court, however, disagreed with the United States Court of Appeals for the Second Circuit on the appropriate remedy for this violation. Rather than choosing to extend the benefits of § 1409(c) to Mr. Morales-Santana and others disadvantaged by the equal-protection violation, the Court held that withdrawing the benefits of § 1409(c) from those to whom it applied was more consistent with Congressional intent, because § 1409(c) was merely an exception to the broader and stricter rule of 8 U.S.C. § 1401(a)(7). *Id.* at 1699. "Going forward," the Court said, "Congress may address the issue and settle on a uniform prescription that neither favors nor disadvantages any person on the basis of gender." *Id.* at 1701. Until Congress does so, however, the Court held that "[i]n the interim . . . § 1401(a)(7)'s now-five-year requirement should apply, prospectively, to children born to unwed U.S.-citizen mothers." *Id.* This notwithstanding, as described *supra* note 141, here plaintiffs might request an injunction prohibiting unconstitutional applications or a holding that consistency with legislative intent requires invalidating a section of the law that offends equal protection and in so doing seek a narrow remedy with preserves the entitlement intended by the legislature in promulgating SIJS.

¹⁹⁸ *See supra* Section II.B.3.b.

¹⁹⁹ *Tracking Deregulation in the Trump Era*, BROOKINGS INST. (Oct. 20, 2017), <https://www.brookings.edu/interactives/tracking-deregulation-in-the-trump-era/> [<https://perma.cc/J588-J5HN>].

²⁰⁰ *See supra* notes 4–11.

²⁰¹ Because "black" is always in style in the fashion industry, proclaiming that something is "the new black" means that it is the hottest new thing. This phrase is no longer limited to the world of fashion; it highlights the "coolness" of anything. *The New Black*, FARLEX DICTIONARY OF IDIOMS (2015), <https://idioms.thefreedictionary.com/the+new+black> [<https://perma.cc/9KQQ-6XGV>].

²⁰² Indeed, the litigation of President Trump's travel ban provides an example where the courts have shown a willingness to decide the outer limits of discrimination

CONCLUSION

The values embodied in the equal protection doctrine—that similarly situated people will be accorded equal treatment under the law—are central to American democracy. Likewise, and undeniably, the United States has always been a nation of immigrants—they have been given equal protection under the law and fair access to the privileges to which they are entitled. These ideals, however, are under siege. The current executive and legislative branches are not only ineffective in safeguarding the equal protection rights of immigrants but are also leading the attacks on them. Consequently, as discussed in the SIJS example, when equal protection concerns arise based on states' inconsistent interpretations and application of the federal laws, in conjunction with the hostility from the executive and legislative branches, resorting to the courts is the only viable option to vindicate those rights. Although the problems in the SIJS framework are inborn, existing since the law's enactment, given the tremendous increase in immigration of unaccompanied immigrant minors to the United States in the last five years, it is crunch time for addressing the problems in SIJS. Since 2016, the federal courts have shown a greater willingness to consider equal protection challenges to government action. Thus, an equal protection challenge to SIJS is viable and ripe. It is time to strike while the iron is hot—the Trump era demands nothing less.

in the name of national security. The Ninth Circuit confirmed that “evidence of purpose beyond the face of the challenged law may be considered in evaluating Establishment and Equal Protection Clause claims.” *Washington v. Trump*, 847 F.3d 1151, 1167–68 (9th Cir. 2017) (finding that President Trump's statements regarding a “Muslim ban” raised “serious allegations and presented significant constitutional questions,” although it ultimately reserved consideration of plaintiffs' equal protection claim).