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

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I. INTRODUCTION

Since the creation of the juvenile court movement over a century ago,[1] states have pursued an increasingly interventionist role in protecting children. Since 1944, courts have recognized that the state may affirmatively intervene in the family in order to protect the well-being of a child.[2] Later, as awareness of and sensitivity to child abuse heightened, the federal government passed a series of laws supporting state efforts to intervene in families to protect children from inadequate or dangerous caregivers.[3] The federal government also created incentives for states to provide permanency for children on whose behalf the state had intervened to sever the family relationship.[4] Despite federal efforts to support state child protective actions, a rela-

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[1] In 1899, as a result of societal changes in the perception of children and childhood, and the burgeoning Progressive Era, Illinois became the first state to create a juvenile court to segregate juveniles out of the more punitive adult system. "An Act to Regulate the Treatment and Control of Dependent, Neglected and Delinquent Children," Act of Apr. 21, 1899, 1899 Ill. Laws. 131. See generally, Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

[2] In 1943, Massachusetts chose to intervene as against a child's custodian in order to protect Betty Simmons, a nine-year-old Jehovah's Witness, from the dangers of preaching on public streets. The intervention satisfied the Massachusetts child labor laws, but was alleged to violate the custodian's right to raise the child and the child's right to exercise religious liberty. The Supreme Court, however, found the intervention constitutional. Prince v. Massachusetts, 321 U.S. 158 (1944).

[3] *See, e.g.*, Child Abuse Prevention and Treatment Act ("CAPTA"), 42 U.S.C. §§ 5101 et seq. (2000); Adoption Assistance and Child Welfare Act of 1980, Pub. L. 96-272, 94 Stat. 500 (codified at 42 U.S.C. §§ 620-629, 670-79); Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified at 42 U.S.C. § 671-75).

[4] 42 U.S.C. § 675(5)(E) (2000) (requiring states to initiate a termination of parental rights hearing if a child has been in foster care for 15 of the previous 22 months, except

tively discrete population of children remained unstable because they presented a unique challenge to permanency that the states could not rectify:[5] some children had no legal immigration status within the United States. States, through their respective family laws, could remove these children from harmful caregivers, place them in appropriate foster homes, and even free them for and facilitate their adoption; but, upon turning eighteen, these young adults would become "illegal immigrants" and would be unable to live and work legally in the United States on account of the federal immigration law.[6] Then, in 1990, Congress sought to rectify the problem by amending the immigration law. In enacting Public Law No. 101-649, Congress created the Special Immigrant Juvenile ("SIJ") status and gave undocumented, state-dependent minors hope for permanency through legalization of their immigration status. [7]

SIJ status is an exceptionally limited provision within the behemoth that is the Immigration and Nationality Act ("INA").[8] Yet, SIJ status is remarkable in that it intertwines uniquely state jurisdiction in family law with uniquely federal jurisdiction in immigration law. The SIJ provision of the INA broadly specifies that minors in the United States who are found to be dependent upon a state juvenile court and for whom return to their home country is contrary to their best interests may apply to legalize their immigration status.[9] The juveniles who potentially qualify for such relief fall into two broad categories: (i) minors who are physically present in the United States, but who have never had any involvement with Immigration Control and Enforcement ("ICE"), and (ii) minors who are detained or constructively held by ICE.[10]

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in specified circumstances).

[5] *See* Hines v. Davidowitz, 312 U.S. 52, 68 (1941) (finding that states enjoy no power with respect to the registration of aliens).

[6] The INA provides that aliens who are unlawfully present in the United States are ineligible for admission into the country and thus, ineligible for legal status. 8 U.S.C. § 1182(a)(9)(B) (2000). However, the law excepts any unlawful presence by an alien who is less than eighteen years old, 8 U.S.C. § 1182(a)(9)(B)(iii)(I). The INA also makes inadmissible any alien who has accepted work without receiving prior approval from the government. 8 U.S.C. § 1182(a)(5)(A).

[7] Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified in scattered sections of 8 U.S.C.).

[8] In 2004, the last year for which statistics are available, only 634 special immigrant juveniles were granted legal permanent resident status by the USCIS. U.S. Dep't of Homeland Security, 2004 YEARBOOK OF IMMIGRATION STATISTICS (2005).

[9] 8 U.S.C. § 1101(a)(27)(J) (2000).

[10] Prior to passage of the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified at 6 U.S.C. § 101 et. seq.), the Immigration and Nationality Service ("INS") handled both the benefit and enforcement aspects of immigration practice in the United States and unaccompanied children were both detained by the INS and granted legalization by INS. However, the Homeland Security Act divided the agency into a service agency, U.S. Citizenship & Immigration Services ("USCIS"), which handles benefits, and an enforcement agency, U.S. Immigration and Customs Enforcement

Because the new provision created a federal benefit—legal immigration status—grounded upon autonomous state action, disagreement immediately arose over the application of SIJ status to potentially dependent minors who fell into the latter group of minors in ICE custody. The predecessor to ICE, the Immigrationand Naturalization Service ("the Service"), contended that only aliens who succeeded in "entering" the United States, who were admitted or entered without inspection, were eligible for SIJ status.[11]

Then, in 1997, Senator Domenici from Arizona alleged that SIJ status was subject to unchecked abuse by the first group, non-detained juveniles.[12] As a result, Congress took action to curb the alleged abuses by non-detained minors and to address the issue of the availability of SIJ status to detained minors. The 1997 amendments to SIJ status attempted to define more restrictively the minors to whom SIJ status was available by codifying that such children have to be found dependent upon a state juvenile court "on account of abuse, neglect or abandonment."[13] The amendments also created an intermediate step in an application for SIJ status for all minors in the form of consent of the Attorney General.[14] Since December 1997, the Attorney General must "expressly consent to a dependency

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("ICE"), which is responsible for border control and enforcement. Thus, unaccompanied children who are now held by the federal government for immigration purposes are held under the auspices of ICE. 6 U.S.C.S. § 279 (2006).

Historically, the INS utilized a variety of state-licensed facilities around the country to house minors in INS custody. In 2001, the INS Juvenile Program contracted with "over 100 facilities, which provide[d] over 500 bed spaces for juveniles." Unaccompanied Juveniles in INS Custody, Report Number I-2001-009, Sept. 28, 2001. Most of the facilities were roundly criticized for their abusive treatment of the minors housed there. *See generally*, Amnesty International, *United States of America: Unaccompanied Children in Immigration Detention*, 2003; Human Rights Watch, *United States: Detained and Deprived of Rights: Children in the Custody of the U.S. Immigration & Naturalization Service,* December 1998; Amnesty International, *Slipping Through the Cracks: Unaccompanied Children Detained by the U.S. Immigration and Naturalization Service,* 1997. Since March 1, 2003, the Director of the Office of Refugee Resettlement ("ORR") of the Department of Health & Human Services ("DHHS") has been responsible for providing shelter care and/or detention for unaccompanied minors in federal custody due to their immigration status. *See* 6 U.S.C.S. § 279. ORR continues to fund a number of facilities which house only unaccompanied immigrant children. *See* http://www.acf.hhs.gov/programs/orr/programs/facilitiesmap.htm.

[11] I.N.S. Gen. Couns. Op. 96-9 (Apr. 23, 1996).

[12] *See infra* note 44 and accompanying text.

[13] 8 U.S.C. § 1101(a)(27)(J)(i).

[14] 8 U.S.C. § 1101(a)(27)(J)(iii). The amendment originally vested jurisdiction with the Attorney General. However, pursuant to the adoption of the Homeland Security Act of 2002, authority transferred to the Secretary of the Department of Homeland Security, who has authorized the ICE National Juvenile Coordinator to make consent decisions for detained juveniles. Memorandum from William R. Yates, Assoc. Dir. for Operations, U.S. Citizenship and Immigr. Serv., Dep't. of Homeland Security (May 27, 2004) [*hereinafter* Memorandum #3].

order serving as a precondition to the grant of special immigrant juvenile status" for every SIJ applicant, and must "specifically consent" to a state juvenile court exercising jurisdiction over undocumented children in "the actual or constructive custody of the Attorney General."[15] Thus did undocumented immigrant children find themselves in the care of their Evil Step-Uncle Sam.

Eight years after the passage of the amendment, the content and parameters of federal consent remain undefined. No regulations have been promulgated, and SIJ applicants have been forced to rely on Field Memoranda explaining the agency's understanding of the provision.[16] Because the power to control immigration is plenary, and because the special immigrant juvenile statute expressly incorporates and defers to state juvenile court jurisdiction, the debate over the consent provisions has been confused. This article will attempt to clarify and resolve the debate. Part II will provide an overview of SIJ status and explain the rationale governing the addition of the consent provisions in 1997. Part III will address "specific consent" and challenge the jurisdictional decisions made by the courts to date. It will demonstrate that the federal government did not intend to preempt an area of substantive state law, leaving potentially abused, neglected or abandoned minors without relief. This section will argue that, at a minimum, if a child presents any evidence of abuse, neglect or abandonment, regulations establishing a presumption of Attorney General consent should be promulgated. Part IV will address "express consent" and assert that it is best incorporated into the federal adjudication of SIJ petitions in the same manner that state criminal convictions serve as a basis for deportation and/or removal proceedings. Finally, the article will conclude that state family law and federal immigration law can be intertwined successfully. This can happen if federal regulations defer to historically state court purview over family law and child dependency, and if federal adjudications of immigration petitions honor state court dependency findings in the same manner that federal deportation and removal proceedings honor state court criminal convictions. Through adoption of such regulation, the nation's historic commitment to protecting vulnerable minors, regardless of their immigration status can be fulfilled, and Evil Step-Uncle Sam can be redeemed.

II. AN OVERVIEW OF SPECIAL IMMIGRANT JUVENILE STATUS

Legal immigration into the United States is predominantly family-based.[17] As a result, children unable to live with or reunify with their biological families or legal

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[15] 8 U.S.C. § 1101(a)(27)(J)(iii)(I).

[16] *See, e.g., infra* part II.B.

[17] In 2003, for example, 491,551 of the 705,827 legally admitted immigrants were family based immigrants; 332,657 were, in fact, relatives of U.S. citizens. Department of Homeland Security, 2003 YEARBOOK OF IMMIGRATION STATISTICS (2004). *See generally,* 8 U.S.C. §§ 1151(a)(1), (b)(2)(A)(i) (2000) (providing respectively that family sponsored immigrants may apply for legal permanent residence and that immediate relatives of U.S. citizens may immigrate without numerical limitation.)

custodians historically have had no method for obtainingn legal immigration status.[18] The Immigration Act of 1990 ("the 1990 Act"), however, squarely addressed the issue of state court dependent minors.[19] Section 153 of the 1990 Act created SIJ status, a permanent form of immigration relief for minors: (i) who had been found dependent upon a state juvenile court; (ii) who were eligible for long-term foster care; and, (iii) for whom the state juvenile court had determined that it was contrary to their best interest to be returned to their country of origin or last habitual residence.[20] While the 1990 Act stirred controversy and debate because it liberalized the overall levels of immigration, the SIJ provisions were enacted with little fanfare or floor debate. [21] As a result, we are unable to discern definitively Congressional intent with regard to the overlay of federal immigration jurisdiction and state family court jurisdiction for all potential beneficiaries of SIJ status.

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[18] Prior to the enactment of SIJ status, the only opportunity for undocumented, court-dependent minors to seek legalization came through the general immigration relief provided by the Immigration Reform and Control Act of 1986 ("IRCA"). Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of U.S.C.); 8 U.S.C. § 1255a (2000). IRCA's benefits, however, were never intended to redress the status of undocumented minors: to qualify for IRCA benefits, an applicant was required to have been in the United States prior to 1982 and to file no later than 180 days after the effective date of the statute. 8. U.S.C. § 1255a(a)(1)(A). Thus, the IRCA was of extremely limited use for undocumented minors in state care.

Undocumented minors have always been able to apply for immigration relief in the form of asylum, withholding of deportation, relief under the Torture Convention, and through the Violence

Against Women Act ("VAWA"). See generally, 8 U.S.C. §§ 1158, 1231(b)(3)(A), 1182(a)(6)(B) (2000). None of these forms of relief, however, are directed specifically at minors and each involves unique challenges for minors who, because of their status as a minor, may not be able to satisfy the criteria of a specific provision under which he or she might apply.

[19] Immigration Act of 1990 § 153.

[20] 8 U.S.C. § 1101(a)(27)(J).

[21] The purpose of the 1990 Act was to "amend the Immigration and Nationality Act to change the level, and preference system for admission, of immigrants to the United States, and to provide for administrative naturalization, and for other purposes." S. 358, 101st Cong. (1990) (enacted.). The 1990 Act "provide[d] for a significant increase in the overall number of immigrants permitted to enter the United States each year." Statement by President George H.W. Bush, Office of the Press Secretary (Nov. 29, 1990) *reprinted in* SELECTED LEGISLATIVE HISTORY OF THE IMMIGRATION ACT OF 1990, at 2 (American Immigr. Law. Assoc. 1991). Because of these liberalized levels of immigration, the legislative history of the Act makes it clear that the House and Senate disagreed mostly over numerical limits as to the worldwide level of immigration, limits for family-based immigration, and limits for employment-based immigrants. The history does not reflect any particular controversy over the special immigrant juvenile status. *See generally* SELECTED LEGISLATIVE HISTORY OF THE IMMIGRATION ACT OF 1990 (American Immigr. Law. Assoc. 1991); 101 CIS Legis. Hist. P.L. 694 (1990) (LEXIS); 101 Bill Tracking S. 358 (1990) (LEXIS)

A. SIJ Status: 1990-1997

Two issues arose immediately upon the creation of SIJ status. First, no related provisions of the INA had been amended in the 1990 Act to ensure that those granted SIJ status could translate such a grant into legal permanent resident status.[22] Second, SIJ status juxtaposed the jurisdiction of state juvenile courts and federal immigration authority without explaining how such concurrent jurisdiction would operate. The change thus left open the question of the eligibility for special immigrant juvenile status of minors over whom ICE asserts custody: were they children or potential immigrants?[23]

In 1991, Congress addressed the first problem by passing technical amendments to "alleviate hardships experienced by some dependents of United States juvenile courts."[24] Created by the technical amendments, Section 245(h)[25] provides for the adjustment of status of SIJ applicants by waiving specific grounds of inadmissibility such as public charge[26] or absence of valid immigrant visa,[27] as well as allowing for waivers of other grounds of inadmissibility on a case-by-case basis.[28] Amendments to other provisions of Section 245 provide for the waiver of bars to adjustment of status, such as having accepted or continued in unauthorized employment.[29] Section 245(h) also provides that SIJ applicants are deemed paroled into the United States.[30] The technical amendments made clear that "for the purpose of applying for adjustment of status as a special immigrant juvenile . . . of the Act

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[22] "A significant number of aliens eligible for classification as special immigrant juvenile court dependents were ineligible to become lawful permanent residents because they could not meet the statutory requirements for immigrant visa issuance or for adjustment of status." Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court, 58 Fed. Reg. 42,843 (Aug. 12, 1993).

[23] *See infra* part II.A. notes 32-43.

[24] Special Immigrant Status, 58 Fed. Reg. at 42,844. The most egregious example, of course, being that court-dependent minors could not overcome public charge grounds for exclusion. *Id.*

[25] As enacted by Sec. 302(d)(2) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733; 8 U.S.C. § 1255(h) (2000).

[26] 8 U.S.C. § 1182(a)(4)(A) (2000).

[27] 8 U.S.C. § 1182(a)(7)(A).

[28] 8 U.S.C. § 1255(h)(2)(B). Some grounds of inadmissibility remain applicable to SIJ applicants, such as 8 U.S.C. §§ 1182(a)(2)(A) (criminal related grounds), (2)(B) (multiple criminal convictions), 2(C) (controlled substance traffickers (except as relates to less than 30 g. of marijuana), (3)(A)(security and related grounds), 3(B) (terrorist activities), (3)(C) (foreign policy), (3)(E) (participants in genocide or commission of any act of torture or extrajudicial killing).

[29] 8 U.S.C. § 1255(c).

[30] 8 U.S.C. § 1255(h)(1). While parole into the United States does not constitute an admission, 8 U.S.C. § 1182(d)(5); *see also* Leng May Ma v. Barber, 357 U.S. 185, 186 (1958), it is, nevertheless, necessary for adjustment of status if an applicant was never admitted. 8 U.S.C. § 1255.

only, these juveniles will be treated as if they had been paroled into the United States."[31]

Unlike adults, most minors are not actually responsible for their manner of entry, admission, or lack of admission into the United States.[32] In addition, all minors are, by definition, dependent, and likely to be a public charge if the state removes them from their parent or caregiver. Thus, allowing the waiver of grounds of inadmissibility and deeming minors paroled ensures that dependent minors can establish eligibility for the relief intended them in the 1990 Act: legal permanent resident status.

With regard to the second problem, concurrent federal and state jurisdiction, it was not until the Service promulgated regulations in 1993 that there was any explication of how state dependency law and federal immigration law would concurrently apply. The comments to the final regulations, however, establish that the Service recognized the superseding jurisdiction of the family court with regard determining the best interest of the child.[33] The comments specifically provide that "the decision concerning the best interest of the child may only be made by the juvenile court or in administrative proceedings authorized or recognized by the juvenile court."[34] According to the Service, it would be "both impractical and inappropriate for the Service to routinely readjudicate judicial or social service agency administrative determinations as to the juvenile's best interest."[35] The Service further clarified:

[I]t would be impractical and inappropriate to impose consultation requirements upon the juvenile courts or the social service system, especially requirements which could possibly delay action urgently needed to ensure proper care for dependent children.[36]

Although the Service understood that Congress enjoys plenary power over immigration, it also recognized that the paramount determination for potentially state-dependent, undocumented minors is that of "proper care" and "best interest," which are decisions properly situated within the jurisdiction of the state juvenile courts.[37] Thus, the final regulations reflect the legislative intent to create a partnership between federal immigration authority and state jurisdiction over juveniles in

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[31] Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court, 58 Fed. Reg. 42,843, 42,849 (Aug. 12, 1993).

[32] The INS itself recognized in its comments to the final regulations for SIJ status that "a child in need of the care and protection of the juvenile court should not be precluded from obtaining special immigrant status because of the actions of an irresponsible parent or other adult." Special Immigrant Status, 58 Fed. Reg. at 42,847.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

which the state courts determine state-dependency and best interest before the Service makes any determination as to immigration status.[38]

Despite the unequivocal language in the regulations that calls for the unencumbered exercise of state court jurisdiction, the Service adopted an agency policy that distinguishes detained minors from non-detained minors.[39] The Service acknowledges in its legal opinion that "[n]othing in the statute or the regulations explicitly excludes detained juvenile aliens from eligibility for special immigrant juvenile status."[40] Nevertheless, the Service goes on to clarify that "the INS will seek revocation of any juvenile court dependency order issued for a detained alien juvenile [as] [s]uch juveniles are not eligible for long-term foster care because of their federal detention."[41]

In 1996, two Minnesota state appellate court decisions constitutionalized the Service's argument holding that "[a] finding that [a child] is in need of protection or services based on circumstances in China would directly conflict with the immigration proceeding, and thus, is preempted by federal law."[42] In reaching its conclusion, the Minnesota Court of Appeals gave no weight to the agency's own determination that "[n]othing in the statute or regulations explicitly excludes detained juveniles from eligibility."[43] Thus began the constitutional confusion over the concurrent jurisdiction of the state courts and the federal government.

B. 1997 Amendments and the Notion of "Consent"

In 1997, Senator Pete Domenici of Arizona proposed amendments to SIJ status because he believed that older Mexican teenagers were being granted SIJ status while resident in Mexico and were then entering the United States as legal permanent residents to attend American colleges and universities.[44] Congress had intended to insulate SIJ status from such abuse in two ways. First, any child who obtains legal status through the SIJ provision is barred permanently from sponsor-

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[38] *Id.*

[39] I.N.S. Gen. Couns. Op. 95-11, 1995 WL 1796318 (June 30, 1995).

[40] *Id.*

[41] The position was supported, albeit, without explanation, by the Administrative Appeals Unit of the INS in *In re X,* AAU A70 174 665 (February 9, 1996).

[42] *In re* C.M.K., 552 N.W.2d 768, 771 (Minn. Ct. App. 1996); *see also In re* Y.W., 1996 WL 665937 (Minn. App. 1996); *In re* X, 1997 WL 33170585 (INS) (May 14, 1997) (citing *In re C.M.K.* and concluding that "state juvenile courts have no jurisdiction to determine the custodial status and to enter dependency orders for juvenile aliens in federal custody.")

[43] I.N.S. Gen. Couns. Op. 95-11, 1995 WL 1796318 (June 30, 1995).

[44] Senator Domenici stated, "[T]his is a giant loophole .... every visiting student from overseas can have a petition filed in a State court declaring that they are a ward and in need of foster care ... [and] they are granting them." *Attorney General Reviewing Potential Abuse of Immigration Law: Hearings Before a Subcomm. of the Comm. on Appropriations.,* 105th Cong. 1 (1998) (statement of Pete Domenici, U.S. Senator).

ing a biological parent for legal immigration.[45] As family immigration creates the most accessible path to legal immigration into the United states, prohibiting a biological parent from immigrating through an adjusted, state-dependent child discourages families from sending children to the United States alone and without immigration status in order to leapfrog themselves into legal status.[46] Second, Section 245(h)[47] provides that "[n]othing in this subsection or section 101(a)(27)(J) shall be construed as authorizing an alien to apply for admission or be admitted to the United States in order to obtain special immigrant status."[48]

Despite the existence of protections in the law, Congress acted on Senator Domenici's anecdotes and constricted the SIJ provisions for both detained and non-detained minors.[49] For non-detained minors, the constraint on relief took the form of new language requiring that minors demonstrate eligibility for foster care on account of "abuse, neglect or abandonment."[50] In addition, the amendments codify and expand the notion of consent into legal requirements of "express" and "specific" federal consent.[51]

The new statutory language provides that a special immigrant juvenile is an immigrant "in whose case the Attorney General expressly consents to the dependency order serving as a precondition to the grant of special immigrant juvenile status; except that—no juvenile court has jurisdiction to determine the custody

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[45] 8 U.S.C. § 1101(a)(27)(J)(iii)(II) (2000).

[46] *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1998: Hearings Before a Subcomm. of the Comm. on Appropriations,* 105th Cong. 322-23 (1998) (statement of Pete Domenici, U.S. Sen.).

[47] 8 U.S.C. § 1255(h) (2000).

[48] *Id.*

[49] Sec. 113, Act of Nov. 26, 1997, Pub. L. No. 105-119, 111 Stat. 2460; H.R. Rep. No. 105-405, at 130 (1997) (Conf. Rep.).

[50] The conference report on the amendment states:

> The language has been modified in order to limit the beneficiaries of this provision to those juveniles for whom it was created, namely abandoned, neglected, or abused children, by requiring the Attorney General to determine that neither the dependency order nor the administrative or judicial determination of the alien's best interest was sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect.

H.R. Rep. No. 105-405, at 130 (1997) (Conf. Rep.); *see also* 8 U.S.C. § 1101(a)(27)(J)(i); 75 No. 40 INTERPRETER RELEASES 1445 (Oct. 19, 1998), app. II Memorandum from Thomas E. Cook, Acting Asst. Comm'r., Adjudications Div., Immigr. and Naturalization Serv., U.S. Dep't. of Just. (Aug. 7, 1998).

[51] 8 U.S.C. §§ 1101(a)(27)(J)(iii), (iii)(I). This change is significant because it created a new consent requirement for non-detained juvenile applicants where previously none had been codified. It also created a two layered consent requirement for detained juveniles; first, in the form of specific consent to juvenile court jurisdiction and then, in the form of the express consent that now applies to all applicants.

status or placement of an alien in the actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction . . . ."[52] Through this codification Congress unnecessarily conflated state dependency jurisdiction and federal immigration jurisdiction and created the opportunity for muddled preemption analysis that the Minnesota Court of Appeals would shortly thereafter adopt.[53]

Because the law took immediate effect and the regulations remained unchanged, the Service circulated a Field Memorandum in August of 1998 ("Memorandum") explaining the meaning and application of the new provisions.[54] The Memorandum reasoned, "Implementation of this provision will require District Counsel and the District Director . . . [to] liaison with state/local courts and child welfare agencies to formalize the Attorney General's consent . . . ."[55] In addition, the Memorandum provided that applicants for SIJ status submit to the Service evidence of "[i]nformation regarding the whereabouts and immigration status of the juvenile's parents and other close family members; [e]vidence of abuse, neglect or abandonment of the juvenile; [t]he stated reasons why it would not be in the best interest of the juvenile to be returned to his/her or the parents' country . . . ."[56] Almost two years later, in July 1999, the Service issued Field Memorandum #2: Clarification of Interim Field Guidance ("Cook Memorandum"), superseding the original Memorandum and reiterating that an applicant is required to provide the Service with evidence of abuse, neglect, or abandonment and an explanation that return to the juvenile's home country would be contrary in his/her best interest.[57]

The overriding problem with each of the first two field memoranda was that each required the Service to make independent determinations regarding a juvenile applicant's dependency status; thereby contradicting the Service's own decision in 1993 that "it would be both impractical and inappropriate for the Service to routinely re-adjudicate judicial or social service agency administrative determinations."[58] As a result, many child victims of abuse and abandonment were retraumatized in immigration interviews in which untrained immigration officers asked child victims for details of their abuse and abandonment.[59]

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[52] 8 U.S.C. § 1101(a)(27)(J)(iii).

[53] *See supra* note 51.

[54] Memorandum from Thomas E. Cook, *supra* note 50.

[55] *Id.*

[56] *Id.*

[57] Memorandum from Thomas E. Cook, Acting Asst. Comm'r., Adjudications Div., Immigr. and Naturalization Serv., U.S. Dep't. of Just. (Jul. 9, 1999) [*hereinafter* Cook Memorandum].

[58] Special Immigrant Status, 58 Fed. Reg. 42,843, 42,847.

[59] Gregory Zhang Tian Chen, *Elian or Alien: The Contradictions of Protecting Undocumented Children Under the Special Immigrant Juvenile Status,* 27 HASTINGS CONST. L.Q. 597, 623-26 (2000). In addition, we must also assume that some deserving applicants were denied SIJ status because they were unable to convince untrained immigration officers that they were the victims of, for example, abuse.

With the passage of the USA PATRIOT Act and the subsequent disbanding of the Service, the Department of Homeland Security took responsibility for implementing the SIJ provisions of the INA.[60] No regulations have yet been submitted for public comment, but a new Field Memorandum was issued to supersede the problematic 1997 and 1999 memoranda.[61] Field Memorandum #3 – Field Guidance on Special Immigrant Status Petitions ("Memorandum #3") clarifies that express consent does not require relitigating a state dependency finding, but rather that "approval of an SIJ application itself shall serve as a grant of express consent."[62] Moreover, Memorandum #3 eliminates the supplemental filings required by the earlier memoranda.[63] An applicant no longer needs to establish independently the grounds for the dependency or the best interest determination in the immigration interview. Memorandum #3 makes explicit that an "adjudicator generally should not second-guess the court rulings or question whether the court's order was properly issued. Orders that include or are supplemented by specific findings of fact as to the above-listed rulings will usually be sufficient."[64] The qualifier "usually," however, suggests that there may be times when the Department of Homeland Security may challenge an underlying state court order. Absent any regulatory criteria for what might trigger such a challenge, applicants remain at risk of erroneous determinations and rejection of valid juvenile cofinathers. Memorandum #3 fails to address eligibility criteria for the granting of specific consent."[65] Thus, despite the more liberal interpretation of express consent offered in Memorandum #3, specific consent remains undefined and detained minors remain subject to a Dickensian federal guardian.[66]

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[60] USA PATRIOT Act, 107 Pub. L. 56, 115 Stat. 272, 241 (2001).

[61] Memorandum #3, *supra* note 14.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] Juvenile advocates have spent the last quarter century challenging the conditions of confinement of minors in federal custody; yet, despite consent decrees and regulated standards, significant challenges remain. *See infra* note 10 and accompanying text. *See also* Christopher Nugent, *Whose Children Are These? Towards Ensuring the Best Interest and Empowerment of Unaccompanied Alien Children,* 15 B.U. PUB. INT. L.J. 187, 218 (2006) (see *supra* this volume).

In 1985, prior to the enactment of 8 U.S.C. § 1101(a)(27)(J), a class action suit was filed in the Central District of California seeking relief for the class of unaccompanied minors held in the INS Western region and, among other things, challenging the conditions of the minors' detention. Flores v. Meese, 681 F. Supp. 665 (C.D. Cal., Nov. 30, 1987).

In late 1987, the parties entered into a consent decree settling all conditions claims. *See* Memorandum of Understanding Re Compromise of Class Action: Conditions of Detention, Flores v. Meese, No. 85-4544-RJK (Px) (CD Cal., Nov. 30, 1987). In 1998, the regulations were revised to implement the settlement reached in *Flores,* maintaining the substance of 8 C.F.R. § 242.24(f), (g), and (h), but re-designating the regulations at 8

III. SPECIFIC CONSENT, PREEMPTION AND DETAINED MINORS

The legal battle over minors detained by the Service predates the existence of the SIJ provisions of the INA. In 1984, minors' advocates challenged Service policy resulting in the detention of unaccompanied minors.[67] While *Reno v. Flores* concludes that Service detention of juvenile aliens suspected of entering the United States illegally is sound, Justice Scalia implies that state court dependency jurisdiction is not impaired by federal detention of the children and, in fact, runs concurrently with federal immigration jurisdiction.[68] Yet, when the specific question as to the validity of state court jurisdiction was raised in 1996, prior to the passage of the 1997 amendments to the law, the Minnesota Court of Appeals found that federal immigration law preempted state dependency law.[69] Since the 1997 amendments, courts have relied on federal preemption analysis and found congressional intent to preempt state court jurisdiction. As a result, courts have limited themselves to reviewing the Attorney General's decisions to withhold consent to state court jurisdiction under the Administrative Procedures Act.[70] Yet, the preemption analysis is in error and the judiciary should reverse it accordingly. Until courts adopt an alternative legal analysis, however, the Department of Homeland Security should promulgate regulations that create a presumption of Attorney General consent to state court jurisdiction in order to alleviate the hardships created by the current application of the law.

A. The Immigration Case Law: Creating a Preemption Framework

Reno v. Flores, decided in 1993, held that the Service policy of detaining unaccompanied alien juveniles is constitutional on its face and that a decision to release any such minor falls within the administrative discretion of the Attorney General.[71] Yet, *Reno v. Flores* was a facial challenge to a regulatory scheme enacted "to codify Service policy regarding detention and release of juvenile aliens."[72] It did not address preemption or the ability of the Attorney General to consent to state court jurisdiction for minors held by the Service. In fact, Justice Scalia confidently notes in the opinion that:

C.F.R. 236.3 (2005).

[67] Reno v. Flores, 507 U.S. 292 (1993).

[68] *Flores*, 507 U.S. at 312 nn.7-8. *See also* 8 C.F.R. § 236.3.

[69] *See infra* note 42.

[70] *See infra* note 144.

[71] 507 U.S. at 306.

[72] Detention and Release of Juveniles, 53 Fed. Reg. 17,449 (May 17, 1988). However it is interesting to note that the Service analogizes the detention of undocumented juvenile aliens with the pre-trial detention of alleged juvenile delinquents. Detention and Release of Juveniles, 53 Fed. Reg. 17,449 (May 17, 1988). Yet, the Service prefaces its regulatory comments with the explanation that the reason for the regulations is its "concern for the welfare of the juvenile." *Id.*

[O]ne wonders why the individuals and organizations respondents allege are eager to accept custody do not rush to state court, have themselves appointed legal guardians (temporary or permanent, the States have procedures for both), and then obtain the juveniles' release under the terms of the regulation. Respondents and their *amici* do maintain that becoming a guardian can be difficult, but the problems they identify-delays in processing, the need to ensure that existing parental rights are not infringed, the "bureaucratic gauntlet"-would be no less significant were the INS to duplicate existing state procedures.[73]

Through his note, Justice Scalia suggests that the state courts maintain jurisdiction over custody and guardianship determinations for minors in federal custody, as he suggests that a person need only "have [oneself] appointed legal guardian"[74] and then apply for the release of the minor pursuant to the regulatory scheme enacted to facilitate such release.[75] Justice Scalia's remarks further suggest, as do the Service's comments to the regulations, that there is no reason to create a duplicative, federal family law dependency process for immigrant minors as sufficient state processes already exist.

In 1996, two sets of foster parents in Minnesota attempted to do as Justice Scalia suggested.[76] Both cases involved Chinese minors who had been smuggled into the United States and held as indentured laborers.[77] In both cases, the boys were without family in the United States, so the Service placed them in foster homes pursuant to an agreement between the United States, acting through the Department of Justice Community Relations Services (CRS),[78] and Lutheran Immigration and Refugee Services (LIRS). The Service, however, retained "constructive" custody of the boys and initiated deportation proceedings.[79]

In each case, the foster parents brought suit in the local juvenile court to have their foster child found dependent.[80] In both cases, the Minnesota Court of Appeals found that federal immigration proceedings preempted the state court dependency proceedings because Congress intended "to retain exclusive jurisdiction over illegal

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[73] *Flores*, 507 U.S. at 312, n.7.

[74] *Id.*

[75] *Compare* Gonzalez v. Reno, 212 F.3d 1338 (11th Cir. 2000).

[76] *See infra note 42.*

[77] The boys were arrested during routine law enforcement raids of apartments known to be used by undocumented workers. *In re* C.M.K., 552 N.W.2d 768, 769 (Minn. Ct. App. 1996); *In re* Y.W., 1996 WL 665937, at *2 (Minn. App. 1996).

[78] 52 Fed. Reg. 15,569 (April 29, 1987); I.N.S. Gen. Couns. Op. 95-11 (June 30, 1995).

[79] *In re C.M.K.*, 552 N.W.2d at 770, n.2; *In re Y.W.* 1996 WL 665937 at *2; I.N.S. Gen. Couns. Op. 95-11. *See also* P.G. v. Department of Children & Family Services, 867 So. 2d 1248, 1249 (Fla. 2004).

[80] *In re C.M.K*, 552 N.W.2d. at 769; *In re Y.W.*, 1996 WL 665937 at *2. Petitioners in both cases claim that they sought dependency findings in the juvenile courts because their foster children were at risk of abuse if returned to China. Respondent, INS, alleged that both cases were brought in order to circumvent the immigration law and make the children eligible for SIJ status.

aliens."[81] Yet, as the Sixth Circuit would hold in *Gao v. Jenifer* only three years later, the more appropriate question, absent an express preemption, is "whether a judgment for [the juvenile] would 'interfere with public administration' or 'restrain the government from acting.'"[82] As the Sixth Circuit concluded in *Gao*:

> allowing the county court to exercise jurisdiction over Gao neither interferes with the public administration nor restrains the government from acting . . . . The INS position [that it does] leads to absurdity. For example, it would mean that if INS rules prevented deportation of a married illegal alien, state courts would violate sovereign immunity by licensing such a marriage."[83]

The Sixth Circuit reasoned that a state dependency finding mandates neither a grant of SIJ status nor an award of legal permanent residency.[84] Both decisions remain firmly within the discretion of the Service.[85] Through its original regulatory decision to rely on state juvenile courts and state administrative proceedings to make best interest determinations for alien minors, the Service recognized that the most appropriate forum for dependency and guardianship decisions is a state juvenile court or administrative proceedings.[86] Moreover, Justice Scalia reaffirmed in *Flores* that the courts have long recognized that the states "possess 'special proficiency' in the field of domestic relations, including child custody."[87] A state finding of dependency makes a child eligible for legal permanent resident status because the Service's own rules make it so.[88] Therefore, the exercise of state court jurisdiction cannot be preempted by the federal immigration law as it is the immigration law itself that relies on the state court to act in instances of abused, neglected or abandoned minors.[89]

Yet, the Sixth Circuit's holding in *Gao* failed to correct the erroneous preemption analysis utilized by the Minnesota Court of Appeals because it limited its rul-

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[81] *In re Y.W.*, 1996 WL 665937 at *2; *In re C.M.K.*, 552 N.W.2d at 771.

[82] Gao v. Jenifer, 185 F.3d 548, 554 (6th Cir. 1999).

[83] *Id.* at 555.

[84] *Id.* at 554.

[85] *Id.* at 554-55. It might also be noted here that such an understanding comports with Justice Scalia's implication that a potential guardian could proceed in state court while a minor is held by ICE. *See* Reno v. Flores, 507 U.S. 292, 312 n.7 (1993).

[86] 8 C.F.R. 204.11 (2005). In its comments, the Service specifically states:

[T]he Service believes that the decision regarding the best interest of the beneficiary should be made by the juvenile court . . . not by the immigration judge or other immigration officials. The final rule does not, however, require the decision to be made by the court which made the initial determination, since the Service believes this would be an unnecessary infringement upon the juvenile court system's ability to make determinations regarding its own jurisdictional issues.

Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court, 58 Fed. Reg. 42,843, at 42,848 (Aug. 12, 1993).

[87] *Flores*, 507 U.S. at 310 (quoting Ankenbrandt v. Richards, 504 U.S. 689, 704 (1992)).

[88] *Gao*, 185 F.3d at 554.

[89] 8 U.S.C. § 1101(a)(27)(J)(i) (2000).

ing to the "closed class of immigrants . . . . whose state dependency cases arose" prior to the November 1997 amendments to the special immigrant juvenile provisions.[90] In dicta, the Sixth Circuit concluded that Congress expressly preempted state court jurisdiction in 1997,[91] and that, as a result, state courts could only exercise jurisdiction if the Attorney General "specifically consented" to such exercise.[92] As a result, *Gao* appears to provide little help for juvenile aliens held by ICE and courts have proceeded on the basis that Congress preempted state court jurisdiction through the 1997 amendments to the special immigrant juvenile provisions of the INA.

B. An Alternative Preemption Analysis

The principle of federal preemption derives from Article VI of the Constitution, the Supremacy Clause.[93] Federal preemption analysis requires a determination of whether Congress expressly states its intent to preempt state law, or whether Congress implies its intent to preempt state law through the structure and purpose of a statute.[94] Implied preemption may itself take two different forms. Congress may so thoroughly occupy a field by enacting a comprehensive statutory scheme that it leaves no room for state action, or Congress may enact a federal law which makes compliance with a state law impossible.[95]

The Minnesota Court of Appeals and the Sixth Circuit both conducted an implied preemption analyses.[96] The Minnesota Court of Appeals reached an erroneous conclusion because it asked an erroneous question: does Congress mean to exercise exclusive control over immigration?[97] The answer to the question is unequivocal: "Yes." Congressional power over immigration is plenary and in few fields does the federal law so clearly preempt and prohibit state action.[98] Yet, as the Sixth Cir-

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[90] *Gao*, 185 U.S. at 553.

[91] *Id.* at 556.

[92] *Id.* at 553.

[93] U.S. Const. art. VI, cl. 2.

[94] Jones v. Rath Packing Co., 430 U.S. 519, 525-26 (1977).

[95] Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (citing, respectively, Pacific Gas & Elec. Co. v. State Energy Resource Conservation and Development Comm'n, 461 U.S. 190, 204 (1983) and Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta, 458 U.S. 141, 153 (1982)).

[96] *In re* C.M.K., 552 N.W.2d 768, 770 (Minn. Ct. App. 1996) (holding that application of state law would "conflict with" application of federal immigration law); *In re* Y.W., 1996 WL 665937 at *2 (Minn. App. 1996) (holding that Congress intended to retain "exclusive control over immigration"); *compare Gao*, 185 F.3d at 555 (holding that the action "of the county court did not refrain the government from acting.").

[97] *In re C.M.K.*, 552 N.W.2d at 770; *In re Y.W.*, 1996 WL 665937 at * 2.

[98] "[O]ver no conceivable subject is the legislative power of Congress more complete." Reno v. Flores, 507 U.S. 292, 305 (1993) (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977) (quoting Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339-40 (1909))).

cuit points out in *Gao*, state courts exercising dependency jurisdiction over minors do not impinge on federal immigration law.[99] If a state court exercises jurisdiction and finds a child dependent, then the child may apply for SIJ status.[100] The unfettered discretion as to whether to grant the status and admit the child for lawful permanent residence remains with the Attorney General.[101]

Thus, the Minnesota Court of Appeals erred in *C.M.K.* and *In re Y.W.* The boys in each case suffered abuse in the United States and feared further abuse if returned to China.[102] Had the New York Administration for Children's Services responded to a report of abuse and taken the boys into custody prior to the Service's raid on the New York apartment in which they were held, both Y.W. and C.M.K. would have been subject to the jurisdiction of the New York State family courts[103] and eligible for special immigrant juvenile status.[104] Thus, to accept the courts' implied preemption analysis is to conclude that preemption exists based on the point in time at which a child is taken into custody. Yet, a child who was never legally admitted into the United States and who lives on the streets of New York after the death of his parents is as removable under the immigration law as a child arriving unaccompanied in the country after the death of his parents.[105] Concluding that a state retains jurisdiction over the first case but is preempted as to the latter case is unsound.

The Attorney General possesses authority to detain aliens.[106] The authority to detain, however, does not facially conflict with the exercise of state court dependency jurisdiction.[107] The Service conflated the issues of dependency and detention when it opposed the Minnesota courts' exercise of jurisdiction and asserted that the boys could not be found dependent because the Service, which held them in detention, was their guardian.[108] Judge Randall of the Minnesota Court of Appeals notes the incongruity of the Service's position in his concurring opinion in *In re Y.W.*:

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[99] *Gao*, 185 F.3d at 555.

[100] 8 U.S.C. §1101(a)(27)(J) (2000).

[101] *Id.; see also Gao*, 185 F.3d at 554-55.

[102] The Minnesota Court of Appeals notes in both cases that each boy was abused by smugglers before being apprehended by the Service and faced potential abuse if returned to China. *In re C.M.K.*, 552 N.W.2d at 770; *In re Y.W.*, 1996 WL 665937 at *1, *3.

[103] N.Y. SOC. SERV. LAW §§ 1011-1013, 1015.

[104] 8 U.S.C. § 1101(a)(27)(J).

[105] In 1996, the Illegal Immigration Reform and Responsibility Act (IIRIRA) replaced the definition of entry with a definition of admission. 8 U.S.C. § 1101(a)(13)(A). As a result, an immigrant who was not lawfully admitted and entered without inspection is inadmissible and thus removable as if he had been detained when trying to enter the country. 8 U.S.C. § 1182(a)(6)(A)(i) (2000); 8 C.F.R. § 235.1(d)(2) (2000).

[106] 8 U.S.C. § 1226(a) (2000); 8 C.F.R. § 236.1(c) (2005).

[107] *See* Reno v. Flores, 507 U.S. 292, 312 n.7, n.8 (1993); Gao v. Jenifer, 185 F.3d 548, 555 (6th Cir. 1999).

[108] *In re C.M.K.*, 552 N.W.2d at 770-771; *In re Y.W.* 1996 WL 665937, at *4 (Minn. App. 1996).

The INS puts itself in a truly anomalous position. They argue that Y.W. cannot really be a CHIPS, because a real CHIPS has no 'guardian' and the INS points out that it is 'his guardian' . . . . I am not comfortable with the INS holding itself out as Y.W.'s guardian, while at the same time they vigorously line up a case to deport him.[109]

Just as the state courts do not impinge upon the plenary federal immigration power, neither does the Service act as a guardian in any state law sense of the word. While it is true that the Service provides for the immediate daily needs of a child in its custody, it has no long-term intention to parent the child[110]—the very job a guardian is charged with performing.[111] Thus, any implied preemption analysis resting on the Attorney General's authority to detain and care for a child while in detention is unfounded.

Although the Sixth Circuit found that the exercise of state court dependency jurisdiction did not force the government to take any immigration action, and thus was not preempted,[112] it concluded in dicta that the language of the 1997 amendments creates an express preemption of state law.[113] No court has ruled on whether the 1997 amendment creates an express preemption. Each court that has addressed the issue of the Attorney General's consent since 1997 starts from the premise that state dependency jurisdiction is preempted and review is limited to an abuse of discretion determination.[114] Therefore the dicta in *Gao*' that finds express preemption in the 1997 amendments must be refuted.

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[109] *In re Y.W.*, 1996 Minn. App. LEXIS 1302 at *15 (Randall, J., concurrence). It should also be noted that both boys were subject to deportation, not exclusion and that nothing in the statute precludes detained minors from accessing SIJ status. The general counsel's opinion, in which the Service established that it would oppose any exercise of state court jurisdiction over minors in Service custody, found that adjustment of status remained available to "juveniles in INS foster care detention . . . subject to deportation proceedings . . . ." I.N.S. Gen. Couns. Op. 95-11, 1995 WL 1796318 (June 30, 1995). Yet, when such a case was taken to court, the Service took the position that aliens in INS custody, even those subject to deportation proceedings, are ineligible for SIJ status because no court can declare them dependents. *Gao*, 185 F.3d at 553 n.2.

[110] Juveniles are held pursuant to the Attorney General's authority to detain an alien pending a determination on whether the alien is to be removed from the United States. 8 U.S.C. § 1226. Therefore, by definition, ICE is acting as "guardian" for the child only for the purpose of determining whether the child will be removed from the United States and not to make a determination of the child's best interest. This is further supported by prior statements by the Service that only state family courts and administrative procedures should be used to make determinations of a child's best interest, 58 Fed. Reg. 42,847. *See also Flores*, 507 U.S. at 314 (finding that "[t]he period of custody is inherently limited by the pending deportation hearing").

[111] *See, e.g.*, OHIO REV. CODE ANN. § 2151.011(B)(16) (2005); N.J. STAT. ANN. § 2A:4A-22(f) (2005).

[112] *Gao*, 185 F.3d at 555.

[113] *Id.* at 555-56.

[114] M.B. v. Quarantillo, 301 F.3d 109, 109 (3d Cir. 2002); Yeboah v. U.S. Dep't of

Federal immigration law can only preempt state law to the extent that state dependency law actually conflicts with federal law. Congress itself reaffirmed the need to sever the responsibility for caring for a juvenile from the responsibility for prosecuting such a child in 2002 when it transferred to the Office of Refugee Resettlement the responsibility for "coordinating and implementing care and placement of unaccompanied alien children who are in Federal custody by reason of their immigraion status."[115] State law redressing the needs of abused, neglected, and abandoned children does not conflict with federal immigration law; to the contrary, it is incorporated into the immigration law in numerous ways.[116] To find preemption only as to the limited category of "detained" immigrant juveniles is ungrounded. The key to resolving the jurisdictional question is recognizing that the children in issue are *simultaneously* children and undocumented immigrants and are thus subject both to state child protective laws, where state jurisdictional statutes are satisfied,[117] and to federal immigration law. Preemption is no barrier to state juvenile court action.

In one of its most authoritative cases on preemption, the Supreme Court held that "issues arising under the Supremacy Clause 'start[] with the assumption that the historic police powers of the states [are] not to be superseded by . . . [a] Federal Act unless that [is] the clear and manifest purpose of Congress.'"[118] When Congress amended the special immigrant juvenile provisions of the INA in 1997, it used language that the Sixth Circuit presumed in dicta expressly preempted state court jurisdiction: "no juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction."[119]

Justice, 345 F.3d 216, 220-221 (3d Cir. 2003); F.L. v. Thompson, 293 F. Supp. 2d 86, 92-93 (D.D.C. 2003); A.A.-M. v. Gonzales, 2005 WL 3307531 *2 (W.D. Wash., Dec. 6, 2005).

[115] 6 U.S.C.S. § 279(b)(1)(A), (B) (2006); *see also* Hearing Before the Senate Comm. on the Judiciary, 107th Cong. 4 (Feb. 28, 2002).

[116] 8 U.S.C. §§ 1101(a)(27)(J) (2000) (special immigrant juvenile status for state court dependents); § 1154(d) (requiring favorable home studies by state or agency authorized by the state prior to juvenile orphan adoption being approved); § 1522(d)(2)(B)(ii) (requiring refugee children to be placed under the laws of the state into which they are resettling).

[117] Many states, for example, grant state court jurisdiction in the county of the child's residence, the county in which the abuse, neglect or abandonment occurred, or where no state court would otherwise have jurisdiction; *see, e.g.*, N.Y. FAM. CT. ACT § 1015 (1998); OHIO REV. CODE ANN. §§ 2151.06, 2151.27(A)(1) (2006); TEX. FAM. CODE ANN. § 152.201 (1999).

There may be detained immigrant children who are unable to meet state jurisdictional requirements for dependency actions. This article does not argue that such a barrier is specious; but rather, that such a barrier is the only potentially legitimate, statutory barrier to state court action, albeit never addressed in existing caselaw.

[118] Cipollone v. Liggett Group, Inc., 505 U.S. 504, 515-16 (1992) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

[119] Gao v. Jenifer, 185 F.3d 548, 553 (6th Cir. 1999); 8 U.S.C. § 1101(a)(27)(J)(iii).

The congressional record, however, reflects that Congress amended the law to curb abuse of the SIJ provisions, and "to limit the beneficiaries of this provision to those juveniles for whom it was created, namely abandoned, neglected, or abused children . . . ."[120] Congress sought to ensure that "neither the dependency order nor the administrative or judicial determination of the alien's best interest was sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect."[121] Nothing in the legislative history suggests that Congress intended to divest state courts of jurisdiction or to distinguish between minors based on their detention status.[122] Some number of minors detained by the Service are abused, neglected or abandoned.[123] Yet, under the express preemption analysis suggested by *Gao*, such minors are left with no protective relief: there is no federal family court to provide them protection, and their "guardian" actively seeks their deportation. Thus, the intent of Congress is frustrated by the *Gao* court's reasoning that denies these potentially abused, abandoned or neglected minors access to state courts.

The language of the amendment as codified provides no clear guidance as to Congress's intent. Courts have recognized since before *Flores* that "the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."[124] The Service and its successor, the Department of Homeland Security, have similarly deferred to the expertise of the state juvenile courts.[125] Finally, the INA continues to rely on the findings of state juvenile and family courts in a number of areas. The *Gao* court's dicta is illogical given such scant evidence of an express Congressional preemption'.

The Sixth Circuit's implied preemption analysis remains sound and should not be limited to pre-1997 cases: state court dependency jurisdiction does not conflict with the application of the immigration law, and therefore is not preempted.[126] Discretion regarding whether or not to grant immigration status remains with the Attorney General.[127] In addition, to find federal preemption of state court jurisdiction, one would have to accept that some minors are utterly without relief. Federal law, itself, provides no remedy for abused, neglected or abandoned minors, and

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[120] H.R. Rep. No. 105-405, at 130 (1997).

[121] *Id.*

[122] *See id.*

[123] In 2004, the last year for which statistics are available, 25 arriving immigrants were found to be abused, neglected or dependent. U.S. Dep't of Homeland Security, 2004 YEARBOOK OF IMMIGRATION STATISTICS (2005).

[124] Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992) (quoting In re Burrus, 136 U.S. 586, 593-594 (1890)).

[125] *See supra notes* 32-40.

[126] Gao v. Jenifer, 185 F.3d 548, 554-55 (6th Cir. 1999).

[127] *Id.*

ICE, through exercise of its deportation and removal authority, actively strives to remove each child from its custody—the antithesis of a guardian's role.

The Supreme Court has held prohibiting application of state law where federal law fails to provide a remedy is "jurisprudentially unsound."[128] In *Silkwood v. Kerr-McGee Corp.* the Supreme Court found that comprehensive federal legislation addressing nuclear energy provided no relief for victims of radiation.[129] As there was no legislative history to suggest that Congress intended to prohibit such relief, Justice White concluded for the Court that "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."[130] It is similarly difficult to believe that Congress would bar relief for those abused, abandoned and neglected children who have the misfortune of being detained by ICE.[131] As Justice Brennan said in *Plyler*, punishing children for their parents' misconduct:

> does not comport with fundamental conceptions of justice. '[V]isiting . . . condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual—as well as unjust—way of deterring the parent.'[132]

Despite the apparent clarity of the language, the legislative history of the 1997 amendments and the plain language of the statute demonstrate no clear Congressional intent to expressly preempt state juvenile court jurisdiction, or to leave abused children without relief. INA § 101(a)(27)(J)(iii)(I) and the requirement of specific consent of the Attorney General should be stricken from the law. Its present interpretation leaves a discrete class of abused, abandoned and neglected children without any form of relief and subject to removal and return to the abuse they fled. Children in the Service's custody are deserving of the state's protection and

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[128] Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970).

[129] Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984).

[130] *Id.* at 251.

[131] It is plausible that Congress feared the cost and the imposition on the states if every child detained by ICE were submitted to state juvenile court jurisdiction. Each year, for example, approximately 80,000 unaccompanied immigrant children are stopped at U.S. borders. Danielle Knight, *Waiting in Limbo, Their Childhood Lost*, U.S. NEWS AND WORLD REPORT, Mar. 13, 2004, *available at* http://www.usnews.com/usnews/culture/articles/040315/15asylum_4.htm. Nevertheless, there are always costs involved in actions taken with regard to children. Finding that there is no federal preemption does not have to mean that all 80,000 children will have to be admitted to state foster care systems. It does mean, however, that regulations that ensure that children who raise issues of abuse, neglect or abandonment—even those arriving illegally—are given an opportunity for a fair hearing to determine whether they fall within the category of congressionally intended beneficiaries.

[132] Plyler v. Doe, 457 U.S. 202, 220 (1982) (quoting Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972)).

must be given access to a court that can address their "best interests" without consideration of their immigration status.

C. *A Workable Regulatory Scheme*

The ideal resolution of the muddled preemption analysis created by the courts is a repeal of 8 U.S.C. § 1101(a)(27)(J)(iii)(I). As such a resolution is unlikely, correcting the regulatory scheme is the next best chance to resolve the issues raised by the specific consent language inserted into the statute in 1997. Regulations could provide, for example, that the Secretary of Homeland Security shall consent to refer detained minors to state juvenile courts upon any showing of abuse, neglect, or abandonment. In this way, every juvenile who raises a child protection issue would get a substantive hearing on the facts alleged.[133]

Under the current schema, the Secretary's decision whether or not to specifically consent to state court jurisdiction is reviewed under § 706(2)(A) of the Administrative Procedure Act for abuse of discretion.[134] Yet, because no standard for granting consent has been promulgated, courts are left with little guidance for determining when the Secretary's action constitutes an abuse of discretion. As a result, different courts have used different standards and reached different conclusions as to whether the Secretary abused his discretion in withholding consent to state juvenile court jurisdiction.

The Third Circuit has reviewed two challenges to the Secretary's denial of consent.[135] In *M.B.*, the court found that the existing regulations along with the Cook Memorandum[136] provide "some law to apply," making judicial review available.[137] In *Yeboah*, the Third Circuit relied on *M.B.* to find the Secretary's decision reviewable, but then looked, in part, to the legislative history of the amendment to inform the court's review.[138] Most recently, the district court in Washington relied on the Cook Memorandum to provide a "sufficient standard by which to judge the agency's exercise of discretion."[139] Yet, the Third Circuit and the Washington Dis-

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[133] As noted supra, juveniles would also have to meet jurisdictional requirements. I recognize that such a schema could encourage DHS to detain juveniles in states in which juveniles would be unable to meet jurisdictional requirements, but it would, nevertheless, give more juveniles access to the state courts than the current 10 percent obtaining specific consent annually. *See* U.S. Dep't of Homeland Security, 2004 YEARBOOK OF IMMIGRATION STATISTICS (2005).

[134] *See* Yeboah v. U.S. Dep't of Justice, 345 F.3d 216, 221 (3d Cir. 2003); M.B. v. Quarantillo, 301 F.3d 109, 112-13 (3d Cir. 2002) for a legislative history of the amendments; A.A.-M. v. Gonzales, 2005 WL 3307531, *3 (W.D. Wash., Dec. 6, 2005).

[135] *M.B.*, 301 F.3d 109 and *Yeboah*, 345 F.3d at 216.

[136] Cook Memorandum, *supra* note 57.

[137] M.B. v. Quarantillo, 301 F.3d 109, 113 (3d Cir. 2002).

[138] *Yeboah*, 345 F.3d 216 at 221.

[139] *A.A.-M.*, 2005 WL 3307531 at *4.

trict Court reached different outcomes: the Third Circuit finding no abuse of discretion while Washington found abuse.[140]

In order to ensure that child victims of abuse, neglect and abandonment are not divested of state protection as a result of federal intervention to protect its enforcement authority, at a minimum, regulations must be promulgated that establish the parameters of specific consent. The Third Circuit suggests that the critical determination is "whether the [Secretary] should determine if SIJ status is sought 'primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect' prior to consenting to the dependency hearing or afterward."[141] Yet the Third Circuit Third Circuit again conflates detemtion authority with dependency adjudications and, as a result, finds no abuse of discretion where "allowing the juvenile court proceeding to go forward would have amounted to endorsing an exercise in futility."[142] As noted repeatedly the Secretary is neither equipped nor competent to make dependency evaluations.[143] Moreover, the Secretary is without jurisdiction or authority in state juvenile courts and, as a result, cannot know when a foray into state court is an "exercise in futility." The agency recognized this fact in 1993; Congress reaffirmed it in 1997 and 2002;[144] and the Department of Homeland Security re-emphasized it when contracting with the Department of Health and Human Services' Office of Refugee Resettlement ("ORR") to provide care for detained, unaccompanied, alien minors.[145]

Field Memorandum # 3 specifically withdraws from the Third Circuit's reasoning in affirming that "[t]he role of the District Director in determining whether to grant express consent is limited to the purpose of determining special immigrant juvenile status, and not for making determinations of dependency status."[146] By its own acknowledgement, the agency (ICE) should not attempt to evaluate a child's intent in coming to the United States while that child is being detained and alleging abuse, neglect or abandonment.[147] Despite the best intentions of any individual custodian, the dual role of guardian and border enforcer are incongruous and cannot mimic the environment of a state juvenile court in which parties are expressly driven by the custodial and best interests of children.

Regulations can ensure that any child who raises an issue of abuse, neglect, or abandonment will be referred to a state juvenile court for a hearing on the facts. In state court, the child will be appointed a guardian *ad litem* to advocate for the out-

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[140] *Yeboah*, 345 F.3d 216, at 224; *A.A.-M.*, 2005 WL 3307531, at *5.

[141] *Yeboah*, 345 F.3d 216, at 222 n.5.

[142] *M.B.*, 301 F.3d at 115.

[143] *See supra* notes 32-40, 116.

[144] H.R. Rep. No. 105-405, 130 (1997).

[145] *See* the statement of principles between The Department of Homeland Security and The Department of Health and Human Services Unaccompanied Alien Child program, *available at* http://www.acf.hhs.gov/ programs/orr/programs/uac.htm.

[146] Memorandum #3, *supra* note 61.

[147] *Id.*

come independently determined to be in the child's best interest.[148] Within the context of such an action, the Secretary is able to apply to be a party; and, the state retains discretion to decline to prosecute the abuse, neglect, or abandonment case. The existing procedural checks on state juvenile courts adjudicating dependency actions mean that an appropriate forum exists in which to hear juvenile cases regarding allegations of abuse, neglect or abandonment. Barring potentially abused youth from state juvenile courts when they have been detained by ICE serves no legitimate government purpose. The federal immigration authorities have recognized on multiple occasions that duplicating state family law within a federal context is unnecessary. Thus, regulations are needed to allow state courts to do what federal authorities have recognized that state courts do best: make determinations regarding potentially abused, neglected or abandoned minors.

IV. EXPRESS CONSENT: JUVENILE COURT ORDERS AND CRIMINAL CONVICTIONS

Assuming that regulations are implemented to correct the specific consent challenges posed by the 1997 amendments, we are still left with Section 101(a)(27)(J)(iii), which requires the Secretary to expressly consent to a juvenile court order serving as a basis for SIJ status.[149] The first two Field Memoranda that attempted to explain "express consent" confused both agency adjudicators and children's advocates. As noted *infra*, the problem with Field Memorandum #1 and the Cook Memorandum was that both called for the applicant to supply proof to the agency, in addition to a valid state court order, of abuse, neglect, or abandonment and to explain why return to the juvenile's home country would not be in the child's best interest.[150] The memoranda thus called for the agency to make independent determinations of a juvenile applicant's dependency status: this effectively required the agency "to routinely readjudicate judicial or social service agency administrative determinations" in contravention of the agency's own stated preference for deferring to state agency decisions.[151] Nevertheless, the agency's decision to adjudicate is consistent with its historic role in adjudicating other forms of affirmative relief.

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[148] States receiving federal funding pursuant to the Child Abuse and Prevention Act ("CAPTA") are required to appoint a guardian for a child in a dependency proceeding. 42 U.S.C. § 5101 (2000). *See also* FLA. STAT. ANN. § 415.508 (2005). Unlike an attorney who is ethically obligated to advocate a client's express preferences, a guardian ad litem is required to represent the child's "best interest." *See, i.e.*, N.Y. FAM. CT. ACT § 241 (1998).

[149] 8 U.S.C. § 1101(a)(27)(J)(iii) (2005).

[150] Memorandum from Thomas E. Cook, *supra* note 50; Cook Memorandum, *supra* note 57.

[151] 58 Fed.Reg. 42,847 (1993). It is also important to note that the readjudication of state dependency decisions posed significant problems vis-à-vis broaching federally endorsed confidentiality provisions, or worse, retraumatizing children forced to recount instances of abuse to untrained immigration examiners.

In asylum cases, DHS is the fact finder.[152] The statute provides that all decisions regarding credibility and weight of the evidence fall squarely within the purview of the DHS.[153] Similarly, the Violence Against Women Act ("VAWA")[154] provides that the agency is the fact finder. [155] VAWA applications, like SIJ applications, can use state court orders as offers of proof.[156] However, within a VAWA adjudication, unlike an SIJ application, the state court orders are merely one set of facts among many to be evaluated.[157] One can be a beneficiary of a VAWA petition and have submitted no state court orders at all. Similarly, one can have received multiple, valid state protective orders, but be unable to benefit from the provisions of VAWA.[158]

SIJ status petitions are uniquely different. SIJ status establishes the fact finder for SIJ purposes as the state juvenile court which must determine whether an unaccompanied alien minor is the victim of abuse, neglect, or abandonment, and whether returning the child to his or her home country would be contrary to the child's best interests. One could assert that SIJ petitions are most like marriage petitions, as they both rely on state sanction. Yet, marriage certificates involve no judicial determination of facts as to the legitimacy of the marriage. Hence, the burden must shift to the agency to litigate the validity of marriages in adjustment of status applications. In contrast, state juvenile court dependency orders involve a judicial determination of facts.

Field Memorandum #3 largely eliminates the problems of the earlier memoranda with regard to express consent, as it only requires that an applicant submit the court order making the requisite findings by the state court.[159] The Memorandum goes on to instruct that "[o]rders that include or are supplemented by specific findings of fact as to the above-listed rulings will *usually* be sufficient to establish eligibility for consent."[160] Until regulations are promulgated, however, dependent children remain at some risk as a USCIS examiner could find on any grounds that the child's court order is insufficient.

Thus, the adjudication most analogous to the affirmative application for SIJ status is a removal proceeding based on a criminal conviction. State dependency

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[152] *Id.;* 8 U.S.C. §1158(b)(1)(A) (2000); In an asylum claim, the applicant bears the burden of establishing to the Secretary of Homeland Security or the Attorney General that he is a refugee within the meaning of INA § 101(a)(42)(A).

[153] 8 U.S.C. §§ 1158(b)(1)(A); (b)(1)(B)(iii).

[154] 8 U.S.C. §§ 1154(a)(1)(A)(iii)-(iv), (a)(1)(B)(ii)-(iii) (2000); 8 C.F.R. § 204.2(c), (e) (2000). The Violence Against Women Act created immigration status relief for the battered spouses and children of U.S. citizen and resident alien batterers to apply for lawful immigration status without relying on their abusive spouse or parent to file a petition on their behalf.

[155] *Id.*

[156] 8 C.F.R. § 204.2(c)(2)(iv) (2005).

[157] *See supra* notes 153, 155.

[158] 8 C.F.R. § 204.2(c)(3)(ii)-(iii) (2005).

[159] Memorandum #3, *supra* note 61.

[160] *Id.* (emphasis added).

orders are most like state criminal convictions in that they apply the facts of a case to the specific law of a state and make findings as to whether these facts meet the requirements or elements of a particular state law. In a challenge to removal on criminal grounds, the alien is not able to relitigate the state court conviction. The most the alien can challenge is that the state criminal conviction fails to make the findings necessary to establish the commission of a prohibited crime as defined in the INA. Since both state criminal convictions and state dependency determinations make findings of fact and conclusions of law, both should be given equal deference by federal immigration adjudicators. Just as federal adjudicators cannot "look behind a criminal conviction," so too should they be proscribed from evaluating the facts in a state dependency finding. Thus, as suggested in Memorandum #3, if a state court dependency order makes factual findings, USCIS should only be able to "review" these to the extent that it reviews the language to ensure it makes the necessary federal findings to qualify a child for special immigrant juvenile status.

V. CONCLUSION

SIJ status is a tremendously important form of immigration relief that comports with our national and state decisions to focus first on the safety and health of the children and not to punish a child for the sins of the parents. Without updated regulations in place, however, the availability and effectiveness of SIJ status is in question. Courts are left to adjudicate challenges on an *ad hoc* basis and as a result applicants worry whether theirs will be the state court order that is unusual and therefore challenged. The government must promulgate regulations immediately to clarify that children are children first and potential immigrants second. Regulations must require that the Secretary refer detained minors to state courts upon any showing of abuse, neglect, or abandonment. Regulations must also require agency examiners to treat state dependency orders as facially valid and to accept a state court's findings of fact. The language of "express consent" reinforces the iddea that the immigration decisions remain unbounded and they do—so long as they remain immigration decisions and not dependency decisions. Family court decisions, in contrast, must sit in the family court and the Agency must give full faith and credit to final family or juvenile court decisions just as they do to criminal court convictions. Only through such regulations and such an interpretation of express consent can the government adequately rein in the notion of consent and protect the full range of minors to whom Congress offered relief with the creation of SIJ status in 1990.