ROBBING SPECIAL IMMIGRANT JUVENILES OF THEIR RIGHTS AS US CITIZENS: THE LEGISLATIVE ERROR IN THE 2008 TVPRA AMENDMENTS

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THE PROBLEM

In 1990, aiming to ease the difficult situation for undocumented child immigrants who were dependent on juvenile courts for their protection, Congress enacted the Special Immigrant Juvenile provision of the Immigration and Nationality Act, located at 8 U.S.C. 1101(a)(27)(J) (the provision). In 2008, in an effort to further

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ease the plight of these young people, it amended the provision to relieve the proof requirement from proving abuse, abandonment, or neglect by *both* parents to that of one or both parents. Unfortunately, the provision maintains its "two-tier" citizenship system because one of its subsections denies Special Immigrant Juveniles (SIJ) who naturalize the same rights as other citizens possess to petition for their parents to immigrate.[1] In *Second Class Citizenship? The Plight of Special Immigrant Juveniles*, I concluded that this limitation violates Due Process[2] by creating this two-tier citizenship system.[3] To address this inequity, courts should employ the doctrine of "rational legislating" to interpret this provision in a way that would place SIJs on an equal footing with other citizens. This would more accurately reflect the intent Congress had when it amended the provision in 2008, and permit naturalized SIJs to reunify with their parents.

Imagine you are Rosa, a 14 year-old girl living in rural northwestern Guatemala. The region is known as the birthplace of the complex Mayan civilization that populated Central America for more than two thousand years and still maintains strong cultural traditions.[4] It is the late 1950s, just ten years after a democratization effort driven by new President Jacobo Arbenz Guzman, who was attempting to "narrow the chasm between the country's tiny elite and its impoverished peasants" with economic and agrarian reforms.[5] There is a subsequent *coup d'etat* planned by the United States' Central Intelligence Agency in 1954, and military governments are imposed.[6] Your family and many of your neighbors took up arms against the military leaders. The rebellion lasted decades, until a formal peace treaty was signed in 1996. Because of their participation in this rebellion, many Guatemalan Mayans located in your region were brutalized, and their communities were largely destroyed. In all, about 200,000 Guatemalans were killed during the Civil War, many of them Mayan peasants.[7] The army destroyed more than 600 villages, displaced about 1.5 million,

1. Section 8 U.S.C. 1101(a)(27)(J)(iii)(II).

2. Irene Scharf, *Second Class Citizenship? The Plight of Naturalized Special Immigrant Juveniles.* 40 Cardozo L. Rev. 579 (2019) (analyzing the meaning of U.S. citizenship) [hereinafter Scharf].

3. *Id.* Creating this 2-tier system thwarts the limited power of Congress to do more than "prescribe a uniform rule of naturalization," "the exercise of this power" exhausting Congress' power. *Id*. at 595 (discussing *Osborn v. Bank of U.S.*, 9 Wheat 738, 837 (1824) and *Schneider v. Rusk*, 377 U.S. 163, 166 (1964)) The Court struck down a statute denaturalizing a U.S. citizen after residing for three years in their country of birth: "This statute proceeds on the impermissible assumption that naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native born. This is an assumption that is impossible for us to make." Schneider, supra, at 168. The Court noted that "[t]he discrimination aimed at naturalized citizens drastically limits their rights to live and work abroad in a way that other citizens may. It indeed creates a second-class citizenship." *Schneider, supra, at* 168-69.

4. This description is a compilation of situations that I have become familiar with during the past 18 years running a law school immigration clinic that specializes in helping members of the local community, many of whom are young and hail from the so-called Northern Triangle countries:, Guatemala, Honduras, and El Salvador; see also Karin Suter & Sabrina Buell, *The Mayan Civilization*, https://web.stanford.edu/class/e297c/trade_environment/photo/hmayan.html (last visited Aug. 13, 2019).

5. Elisabeth Malkin, *An Apology for a Guatemalan Coup, 57 Years Later* (Oct. 20 2011), https://www.nytimes.com/2011/10/21/world/americas/an-apology-for-a-guatemalan-coup-57-years-later.html (last visited Aug. 13, 2019) [hereinafter Malkin].

6. Stephen Schlesinger, *Ghosts of Guatemala's Past,* https://www.nytimes.com/2011/06/04/opinion/04schlesinger.html (last visited Aug. 13, 2019) [hereinafter Schlesinger].

7. *See* Malkin, supra note 5; see also Schlesinger, supra note 6.

and caused more than 150,000 to seek refuge in nearby Mexico.[8]

Many of the Quiche fighters were teenage boys; at that early age, they learned to be warriors, to kill and brutalize the enemy. This left them to fall back on violence in their later years when they[9] faced difficult conditions in their country that remained after the war. Unemployment, poverty, and gang violence have blanketed the region.[10] Alcoholism became a serious problem, and often a cause of domestic violence.[11] Often, the frustration felt by these young men, freshly back from being killers during the civil war, turned to "femicide,"[12] the practice of killing women.[13] [14]

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8. *Genocide in Guatemala,* Holocaust Museum Houston, https://hmh.org/library/research/genocide-in-guatemala-guide/ (last visited Sept. 4, 2019); *see also Roddy Brett,* Guatemala: The Persistence of Genocidal Logic Beyond Mass Killing (Palgrave Macmillan, 1st ed. 2016); see also Bridget Conley-Zilkic, How Mass Atrocities End: Studies from Guatemala, Burundi, Indonesia, the Sudans, Bosnia-Herzegovina, and Iraq (Cambridge University Press, 2016). The campaign included: bombing villages and attacking fleeing residents; impaling victims; burning people alive; severing limbs; throwing children into pits filled with bodies and killing them; disemboweling civilians and slashing open the wombs of pregnant women. Patrick J. McDonnell, Guatemala's Civil War Devastated the Country's Indigenous Maya Communities, LA TIMES (Sept. 3 2018, 3:00 AM), https://www.latimes.com/world/mexico-americas/la-fg-guatemala-war-aftermath-20180903-story.html.

9. Simon Villareal*, Half The Sky Is Falling: Systemic Violence Against Women In Guatemala Ripples From* Brutal *Civil War,* International Business Times (Jan. 18, 2013)*,* https://www.ibtimes.com/half-sky-falling-systemic-violence-against-women-guatemala-ripples-brutal-civil-war-1024178# (referencing Guatemala Human Rights Commission); *see also* Jo-Marie Burt, *Former Military Commissioner Accuses Reyes Giron of Ordering Gang Rape,* International Justice Monitor (Feb. 25, 2016), https://www.ijmonitor.org/2016/02/former-military-commissioner-accuses-reyes-giron-of-ordering-gang-rape/ (detailing assault on indigenous Mayan women); see also Candice Piette, *Where Women are Killed by their own Families,* BBC News (Dec. 5, 2015), https://www.bbc.com/news/magazine-34978330 ("Sexual violence was 'at very high levels and used as a tool of war,' says Helen Mack, of the Myrna Mack Foundation. 'The stereotype was that women were used for sex and seen as an object, to serve families, and this continues today.'").

10. Unemployment, few social services, and a vast youthful population—73% of Guatemala's population is under 30 and 30% are between 14 and 30—act as a petri dish for gang organization. *Fact Sheet: Gange in Guatemala. Guatemala Human Rights Commission,* http://www.ghrc-usa.org/Publications/GangFactSheet.pdf (last visited Sept. 11, 2019). The war on drugs in Mexico has forced many Mexican gang members over the Guatemalan border seeking a safe haven. *Id.*

11. "In Guatemala, it is believed that the main reason for social violence in the country was men's consumption of alcohol caused by intra-family conflict, family disintegration, parental example, poverty and lack of employment. Observers cite the negative effects of alcohol – economic expense, sexual transgressions, and quarrels –. . . consumption to the point of intoxication can result in spousal abuse False" *Country Profiles. Region of the Americas: Guatemala, World Health Organization, at 4* (2004)(citations omitted),https://www.who.int/substance_abuse/publications/en/guatemala.pdf(last visited Sept. 11, 2019).

12. *Guatemala 2018 Human Rights Report*, at 16, https://www.state.gov/wp-content/uploads/2019/03/GUATEMALA-2018.pdf (last visited Aug. 13, 2019) ("femicide remained a significant problem. Unknown assailants murdered indigenous Maya women's rights leader Juana Ramirez in Nebaj on September 21. The PDH reported Ramirez and her organization, the Ixil Women's Network, had received multiple death threats for supporting female victims of violence."); *see also*Piette, supra note 9 ("Sexual violence was 'at very high levels and used as a tool of war,' says Helen Mack, of the Myrna Mack Foundation. 'The stereotype was that women were used for sex and seen as an object, to serve families, and this continues today.'").

13. Diana Russell, *The Origin and Importance of the Term Femicide,*https://www.dianarussell.com/origin_of_femicide.html (last visited Aug. 13, 2019); see also, Consueldo Corradi, et al., *Theories of Femicide and their Significance for Social Research,* 64:1 Current Sociology 975 (Nov. 1, 2016), https://journals.sagepub.com/doi/abs/10.1177/0011392115622256?journalCode=csia. This term was first published in 1976. *Id.*

14. *See Guatemala 2018 Human Rights Report*, supra note 12, at 16-9.For more on the effects of violence on post-war Guatemala, see Charles C. Branas*, et al., An exploration of violence, mental health and substance abuse in post-conflict Guatemala*, Health (Irvine Calif) (May 2013),

Imagine that in your village it became unsafe to even walk down the street to buy a loaf of bread for your family or to walk to school. Imagine, too, that you had never met your father although you were told he did see you once. So your mother, who suffers from breathing problems, is the sole provider for you and your three siblings.

In the meantime, at the young age of 14, you become pregnant after giving in to your boyfriend, Julio's, pressure for sex. Your boyfriend abandons you as soon as you tell him of your pregnancy. So you stay at home, where your mother now has one more mouth to feed. After the baby, David, is born, you leave school to work in the most common industry for women in rural Guatemala: housekeeping.

Over the next year or so, you have no contact with your son's father, but you occasionally hear about him through friends who see him at the nearby hardware shop he owns. You avoid that area; Julio never meets David. Life was hard, but you were committed to working to help your mother and feed the family. When David is about a year and a half old, Julio starts calling you, saying he wants the baby to live with him; he calls you insulting names and threatens to hurt both of you if you didn't obey him and "hand over" David to him. You keep these threats to yourself because you are afraid of what he would do to you and your family if you told anyone. You fear Julio, as you'd seen him become violent before when you were going out; he'd even threatened you when he got angry. Also, the police don't even have a headquarters where you live, so there was no use telling them. Even when the police did have headquarters in town, they never seemed to take domestic violence reports seriously or help at all, so you knew not to bother.

One night, on your way down the street to get something for your mother from her friend's house, two men you recognize to be in a local gang attack you. They try to take your clothes off and try to grab your body. But people nearby see what is happening and scream until your attackers run away. You run home. The next morning you get a call from Julio making it clear that he had arranged the attack; he tells you that if you refuse to give David to him, he'll have you both killed. Terrified, you realize you have to escape, so you gather together all the money you have and run north with David, going by bus, car, and foot, hoping to make it safely to the United States. When you reach the border, though, you are immediately caught by U.S. Border Patrol agents and kept in detention for a few months. You are transferred to three different centers before being released. By that time you are almost 18 years old.

Through your neighbors, you learn of the possibility of getting legal protection from deportation because you were young and had been victimized. You eventually find a lawyer through a complicated and long process (the government doesn't provide free lawyers to immigrants), and eventually, through the lawyer, apply for Special Immigrant Juvenile Status.

One of the odd things about this Status, the lawyers explain, is that, once you receive it, if you ever become a United States citizen, you could not bring your parents to the U.S. For you, it was only your mother, and, while this was a frightening thought, you decide you *have* to apply because you have no real option. You have no experience with legal systems in general, let alone the U.S. legal system, so you don't understand

https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5095616/ . Other brutalities practiced towards women and children—especially girls—in this region, became the norm. *Id.*

exactly what agreeing to this means for you. You don't understand how much you would need your mother to adjust to life in a completely different country. Also, the thought of some law might eventually prevent you from reuniting with your mother never really hits home. Had you even thought about that possibility, you probably would have assumed that by then the law would be different – it was just too far off in the distance for you to give it much thought.

In a recent article in the Cardozo Law Review,[15] I scrutinized the meaning of U.S. citizenship, particularly in light of the Special Immigrant Juvenile provision enacted in 1990.[16] Through this provision, "Congress created a mechanism to grant permanent resident status to undocumented unaccompanied minors arriving in this country seeking refuge from parents who were unavailable to care for and protect them."[17] The intent was to offer "immigration relief for undocumented children . . . dependent on juvenile courts for their protection."[18] This relief was meant to protect children like Rosa "by according them legal permanent residency"[19] or LPR status, which eventually could lead to United States citizenship.[20]

The federal statute requires that these young people first obtain a declaration from a state court,[21] Special Findings, specifying that:

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15. Scharf, *supra* note 2, at 581-85.

16. The Immigration Act of 1990, 8 U.S.C. § 101-649 (1990) [hereinafter 1990 Act]. The 1990 Act was previously incorporated in the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J) (1965) [hereinafter INA].

17. Scharf, *supra* note 2, at 581. Clearly, while the story I tell above is about a young girl in Guatemala, similar stories abound around the world, yet, given the geographic location of the U.S.—*vis a vis* Central America—and the harrowing condition in Honduras, El Salvador, and Guatemala—specifically, referred to as "the Northern Triangle,"—many of the children in the U.S. who need this protection hail from Central America. As a result, there is a long visa backlog awaiting children from these three countries even *after* receiving grants of SIJS. Austin Rose, For Vulnerable Immigrant Children a Longstanding Path to Protection Narrows, Migration Policy Institute (July 25, 2018), https://www.migrationpolicy.org/article/vulnerable-immigrant-children-longstanding-path-protection-narrows;

In May 2016, the State Department announced a green-card application cut-off date for individuals from countries that were close to exceeding the per-country cap—namely, El Salvador, Guatemala, and Honduras. This "priority date" is moved forward periodically, creating a process by which SIJ recipients from the high-demand countries apply for permanent residence on a staggered timeline. As a result, wait times for immigrants from the affected countries began to grow;

see also Liz Robbins, A Rule Is Changed For Young Immigrants and Green Card Hopes Fade, N.Y. TIMES (Apr. 18, 2018), *https://www.nytimes.com/2018/04/18/nyregion/special-immigrant-juvenile-status-trump.html (*". . . dramatic increase in SIJ applications in recent years, with 11,335 approved applications in 2017 compared with 1,590 in 2010, with the greatest increase coming after the surge of Central American minors coming to the U.S. in 2014."); see also Recent Migration to the United States from Central America: Frequently Asked Questions, Congressional Research Service, at 1-2 (Jan. 2019), https://fas.org/sgp/crs/row/R45489.pdf ("Currently, the majority of apprehended migrants are families and unaccompanied children." "From FY2012 to FY2018, the predominant national origins of such families changed from Mexico to the Northern Triangle countries False"); see also Mica Rosenberg, Exclusive: For Migrant Youths Claiming Abuse, U.S. Protection Can Be Elusive, Reuters (Mar. 7, 2019, 4:03 AM), https://www.reuters.com/article/us-usa-immigration-abuse-exclusive/exclusive-for-migrant-youths-claiming-abuse-u-s-protection-can-be-elusive-idUSKCN1QO1DS ("Applications ballooned during the Obama administration following a surge in unaccompanied minors crossing the U.S.-Mexico border, many from violent countries in Central America.").

18. *See* Scharf, *supra* note 2, at 582 (citation omitted).

19. *Id.* .

20. 8 U.S.C. § 1427(a) (2005).

21. When the 1990 ACT was enacted, the legacy INS—the former federal immigration agency—interposed various objections to the state courts' involvement in the SIJ process, apparently viewing the state courts' involvement as encroaching on their expectation of control. *See* Elizabeth Keyes,

(1) the child is dependent on the court for care and protection,

(2) the child was subject to abuse, abandonment, or neglect[22] by one or both parents that caused the child's reunification with one or both of the parents[23] to not be viable;

(3) it is not in the child's best interests to be returned to her home country (or that of last habitual residence),[24]

(4) it is in the child's best interests to stay in the United States and be maintained under the protection of the juvenile court ,[25] and that

Evolving Contours of Immigration Federalism, 19 Harvard Latino L. Rev. 33, 47-51 (2016). More recently, USCIS started interposing additional objections to juvenile courts' jurisdiction around the nation, to their Special Findings, etc.; the numerous, interesting issues arising out of these objections are unfortunately beyond the scope of this study.

22. In 1997, "Congress added language amending the INA to ensure that the SIJ benefit was 'sought primarily for the purposes of obtaining relief from abuse or neglect or abandonment." H. R. REP. No. 105-405 at 22-23 (1997) (Conf. Rep.); *see also* Ruth Ellen Wasem, Cong. Research Serv., R43703, Special Immigrant Juveniles: In Brief 2 (2014) [hereinafter Wasem CRS Report]; s*ee also* Meaghan Fitzpatrick & Leslye E. Orloff, *Abused, Abandoned, or Neglected: Legal Options for Recent Women and Girls,* 4:2 Penn. State J. of Law and International Affairs 614, 628 (Aug. 2016) [hereinafter Fitzpatrick & Orloff]. It was clear, then, that the child's motivation for applying for this status was relevant and that the law was intended to provide a safe haven for victimized children. Also added, was the requirement that the child was "deemed eligible . . . for long-term foster care" due to abuse, abandonment, or neglect. Departments of Commerce, Justice, and State, the Judiciary, and related Agencies Appropriations Act, Pub. L. No. 105-119, § 113, 111 Stat. 2440, 2460 (1997).

At the time, before the U.S. Senate Subcommittee of the Committee on Appropriations on March 6, 1997 (Hon. Judd Gregg, chair, presiding), Arizona Senator Dominici expressed his concerns about claims that "special immigrant status provision is being used for some other cases that I believe are clearly an abuse." *Departments of Commerce, Justice, and State, the Judiciary, and related Agencies Appropriations Act: Hearing on H.R. 2267/S. 1022 Before the Subcommittee of the Committee of Appropriations (1997),* https://www.govinfo.gov/content/pkg/CHRG-105shrg39831/pdf/CHRG-105shrg39831.pdf, at 111-112. (describing a New Mexico case the Senator found worthy of protection but three others he felt demonstrated abuse of the statute, with none of these examples either documented or referred to by name or citation.

The 1997 amendments also required that the Special Findings "were not sought for the sole purpose of receiving immigration relief through SIJ." H. R. REP. No. 105-405, s*upra*. The Amendments added a requirement that the government consent to each SIJ application. *See* 8 U.S.C. § 1101(a)(27)(J)(iii); s*ee also,* 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, 239 (2006).

Note that in this article, I often abbreviate the phrase "abuse, abandonment, or neglect" to "abuse," "abuser," or "abusing parent."

23. The requirement regarding "one or both parents" was added in 2008, with the enactment of the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008. 8 U.S.C. 1232, § 235(d)(1)(A) (2008) (effective March 23, 2009) [hereinafter TVPRA] (amending 8 U.S.C. § 1101(a)(27)(J)). Prior to that, achieving SIJ status effectively required that *both* parents had abused the child, as the youngster had to be eligible for long-term foster care "due to abuse, neglect or abandonment." This was interpreted to require that the child would only receive SIJS if she could reunify with neither parent. *See Id.* The requirement to prove abuse, abandonment, or neglect was added in 1997 (effective 1998), causing additional oversight by the federal authorities

24. While the standard of the "best interests of the child" is the universal test for child custody cases, in the U.S. probate and family courts, this standard is not otherwise in immigration law. *See* D. Marianne Blair & Merle H. Weiner, *Resolving Parental Custody Disputes – A Comparative Exploration*, 39 Fam. L.W. 2, 247 (Summer 2005).

25. 8 U.S.C.A. § 1101 (a)(27)(J) (2014) (demonstrating many states use *probate and family courts* rather than *juvenile* courts to handle issues regarding care of children, the use of the word *juvenile* in the statute has not unduly restricted the particular courts the states employ to issue these findings).

> (5) "the Secretary of Homeland Security consents to the grant of special immigrant juvenile status."[26]

These findings are filed with United States Citizenship and Information Services ("USCIS"), along with a request for approval of SIJ status ("SIJ or SIJS"), making the child eligible to apply for legal permanent residency.[27] Five years after receiving permanent residency, in a manner similar to most other LPRs, SIJs can naturalize.[28] However, here, "the law presents a conundrum for those with SIJS: Once they become citizens and reach twenty-one years of age, one would have assumed that, as with others who naturalize, they could apply to reunite with their parents (or at least the parent who did not abuse them, if that were the case) by applying to have them immigrate."[29] For those who achieved their status through SIJ, though, subsection (J)(iii)(II) has been interpreted to prevent their parents from benefiting by the young person's SIJ status, so cannot "be accorded any right, privilege, or status under this chapter."[30]

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26. *Id.*

27. The regulations are found at 8 CFR § 204.11 (Immigrant Petitions), and the relevant portions for the purposes of this Article are reproduced below:

> §204.11 Special immigrant status for certain aliens declared dependent on a juvenile court (special immigrant juvenile):
>
> (a) Definitions.
>
> . . . Juvenile court means a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles.
>
> (b) Petition for special immigrant juvenile. An alien may not be classified as a special immigrant juvenile unless the alien is the beneficiary of an approved petition to classify an alien as a special immigrant under section 101(a)(27) of the Act. The petition must be filed on Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant. The alien, or any person acting on the alien's behalf, may file the petition for special immigrant juvenile status. . . .
>
> (c) Eligibility. 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; . . .** .

8 CFR § 204.11 (2009) (emphasis added).

28. 8 U.S.C. § 1427(a) (2005).

29. *See* Scharf, *supra* note 2, at 583.

30. 8 U.S.C.INA § 101(a)(27)(J)(iii)(II) ("no natural parent or prior adoptive parent of any alien

As summarized earlier in Rosa's situation, abuse, abandonment, or neglect is not necessarily caused by both parents.[31] Thus, in these one-parent cases, it is difficult to justify denying naturalized SIJs the right to sponsor their non-abusing parent to share in their new lives in the United States. In 2008, when Congress amended the SIJ provision, it offered no justification for maintaining this two-parent ban even against a non-offending parent.[32] It is likely that this was an unintended and unanticipated consequence of the 2008 amendments.

While the discontinuity in this provision may have been inadvertent, its effects are considerable. It causes these children to, "essentially cease to be the 'child' of their natural parents or prior adoptive parents for immigration purposes. . . . not be able to use their new lawful immigration status to help their original [sic] parents to get lawful status, even if parental rights were not terminated."[33] Notably, this contrasts with benefits offered to other naturalized citizens.[34] The provision thus creates

provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter."). The common reading of this phrase can be challenged as a *mis*-reading, given that application for a U.S. visa by a citizen is not a "right, privilege, or status" of the noncitizen parent, but one that belongs to the citizen, here the naturalized SIJ. Javeria Ahmed, *No Parents Allowed: The Problem with Special Immigrant Juvenile Status,* 24 Cardozo J. Equal Rts. & Soc. Just. 131, 157 (Fall 2017) [hereinafter Ahmed].

31. *Special Immigrant Juvenile Status: A Primer for One-Parent Cases*, IMMIGRANT LEGAL RESOURCE CENTER, HTTPS://WWW.ILRC.ORG/SITES/DEFAULT/FILES/RESOURCES/ONE-PARENT_SIJS_PRIMER_FINAL.PDF (last visited 12/27/18) (discussing the procedures and practice of one-parent SIJS cases) (HEREINAFTER ILRC SIJC) "Federal SIJS regulations have not been updated following the TVPRA's revision of the SIJS statute to address the "1 or both" clause, nor are there any federal policy memos that speak directly to the interpretation of the clause." *Id.* at 9-10. "Nonetheless, there is significant federal support for one - parent claims." USCIS general information publication on SIJS acknowledges that "SIJ eligible children may. . .[b]e living with. . .the non-abusive parent." *Immigration Relief for Abused Children*, USCIS,

http://www.uscis.gov/sites/default/files/USCIS/Green%20Card/Green%20Card%20Through%20a%20Job/Immigration_Relief_for_Abused_Children-FINAL.pdf

(last visited Sept. 9, 2019).

32. SIJ applicants may not include family members on their SIJ applications as derivative beneficiaries; thereafter, they remain unable to apply for their parents through the family-based immigration system. *See 8* § 101(a)(27)(J)(iii)(II). "This prohibition also applies to a non-abusive, custodial parent, if applicable." *Policy Manual*, 6 USCIS Part J, Ch. 2-G (current as of Dec. 11, 2018).

33. *See* ILRC SIJC, *supra* note 31. Note that while the second clause of this quotation is correct, there is no legal support for the first clause. Unfortunately, because of the nature of this and other publications geared towards immigration law practitioners, many of them have taken this statement at face value, likely at the peril of SIJ applicants.

Oddly, interpretation of 8 § 101(a)(27)(J(iii)(II) by both the government and the immigration bar have been unified: For example, the USCIS Policy Manual states, ". . .a petitioner who adjusts status as a result of an SIJ classification may not confer an immigration benefit to his or her natural or prior adoptive parents. This prohibition also applies to a non-abusive, custodial parent, if applicable." Policy Manual, supra 32.. The beginning of this quotation cites only to 8 U.S.C. § 101(a)(27)(J)(iii)(II). The second sentence ("The prohibition. . .") contains citations to neither statutes nor regulations. Nor does this quotation specify whether an SIJ who naturalizes *as a result of an SIJ classification* is similarly limited, even as to a non-abusive parent, whether custodial or otherwise. In the non-custodial context, a naturalized SIJ, over 21, could otherwise seek to invoke the INA's immediate relative visa provisions to sponsor a non-abusive parent living in her native country to enter the U.S. as a legal permanent resident. The odd wording and interpretation of this provision is notable, in that, literally, it prevents the *parent* of the SIJ recipient from receiving immigration benefits, but the sponsorship of a parent by a naturalized SIJ is a benefit that inures to that person, only indirectly benefiting the parent. This is offered as an alternative *literal* interpretation of the statute. See generally 8 U.S.C. § 101 (2009).

34. *See* 8 U.S.C. § 1151(b)(2)(A)(i).

substantial Equal Protection and other constitutional issues,[35] particularly as a key right and privilege of U.S. citizenship is to offer new citizens expanded and expedited provisions "to bring family members to the United States."[36] It is an understatement to suggest that it is illogical to impose this restraint on newly minted United States citizens ("USCs"). Once naturalized, SIJs turn 21 and are unable to sponsor their non-abusing parent to immigrate to the United States under U.S. immigration law. This is unlike other naturalized USCs.[37] This is the case even if, as is generally the case in SIJ applications, parental rights were not formally terminated.[38]

My study of Special Immigrant Juveniles began with *Second Class Citizenship? The Plight of Special Immigrant Juveniles*, in which I concluded that the SIJ statute created an unconstitutional two-tier system for citizens whose naturalization derived from SIJ status.[39] I continue that study in this article, in which

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35. The substantial Equal Protection and Substantive Due Process difficulties with this provision are beyond the scope of this article and will be addressed in a subsequent study.

36. U.S. CITIZENSHIP AND IMMIGRATION SERV'S. POLICY MANUAL, VOL. 12 - CITIZENSHIP & NATURALIZATION PART A, CHAPTER 2: BECOMING A U.S. CITIZEN Citizen (current as of Sept. 26, 2018).

37. *See Kids in Need of Defense, Chapter 4: Special Immigrant Juvenile Status (SIJS)*, https://supportkind.org/wp-content/uploads/2015/04/Chapter-4-Special-Immigrant-Juvenile-Status-SIJS.pdf ("Children granted SIJS status will never be permitted to petition for any immigration benefit on behalf of their parents. Plainly put, a child with SIJS who becomes an [legal permanent resident] and later a U.S. citizen cannot file a petition for immigration status on behalf of either parent.").

38. *See* 8 U.S.C. § 1151(b)(2)(A)(i) (2018). Formal termination of parental rights in these cases is a rarity, if it occurs ever; I have found no SIJ case in which this has occurred. In fact, the USCIS's Policy Manual itself, discussing Parental Reunification, states that "[l]ack of viable reunification generally means that the court intends its finding that the child cannot reunify with his or her parent (or parents) remains in effect until the child ages out of the juvenile court's jurisdiction. The temporary unavailability of a child's parent does not meet the eligibility requirement that family reunification is not viable. However, actual termination of parental rights is not required."
U.S. Citizenship and Immigration Servs. Policy Manual, Vol. 6 - Immigrants Part J, Chapter 2: Eligibility Requirements, www.uscislgov/policy-manual/
volume-6-part-j-chapter-2 (citation omitted). Further, a recent Vermont Supreme Court case, *Kitoko v. Salomao*, 215 A.3d 698, 708-09 (Vt. 2019), stated:

> [i]n the SIJ context, the concept of abandonment is being considered not to deprive a parent of custody or to terminate parental rights but rather to assess the impact of the history of the parent's past conduct on the viability, i.e., the workability or practicability of a forced reunification of parent with minor, if the minor were to be returned to the home country. To the extent that the trial court perceived that a finding that reunification with father is not viable would be tantamount to terminating father's parental rights, we clarify that the requested finding would not amount to a termination of father's parental rightsFalse

For more on the deleterious effects of U.S. law's diminishment and devaluation of children's rights in the context of immigrant families, *see generally* David B. Thronson, *You Can't Get Here from Here*, 14 Va. J. Soc. Pol'y & L. 58 (2006). This devaluation of rights was exacerbated during the presidential administrations of Presidents Obama and Trump, with family detention centers created by Obama and parent-child separation created by Trump. **See** Julie Hirschfeld Davis & Michael D. Shear, *How Trump Came to Enforce a Practice of Separating Migrant Families,* N.Y. TIMES, (June 16, 2018), https://www.nytimes.com/2018/06/16/us/politics/family-separation-trump.html (last visited Dec. 27, 2018) (discussing the increasingly vigorous immigration perspective over recent administrations); Julia Preston, *Detention Center Presented as Deterrent to Border Crossings,* N.Y. TIMES (Dec. 15, 2014), https://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html (last visited Dec. 27, 2018) (describing President Obama's "fiercely debated executive actions on immigration.").

39. *See* SCHARF, *supra* note 2**.** Congress has limited power to "prescribe a uniform rule of naturalization," the exercise of which "exhaust[s] Congress' power." Id., at 595 (citing Osborn v. Bank of U.S., 9 Wheat. 738, 837 (1824), *cited in Schneider* v. Rusk, 377 U.S. 163, 166-68 (1964) (striking a statute denaturalizing a U.S. citizen after residing for three years in their birth country, stating "[t]his statute

I scrutinize the rationale for placing these limits on United States citizens. I then suggest ways Section 101(a)(27)(J)(iii)(II) can be understood to more precisely reflect what Congress meant when it amended the Act in 2008 but neglected to address the two-parent ban. This piece views the issues created by Section 101(a)(27)(J)(iii)(II) from the standpoint of statutory construction and legislative analysis. Part I studies judicial responses to federal immigration legislation, viewing the plenary power doctrine's effect on scrutiny of immigration statutes. Part II offers context to the Special Immigrant Juvenile provision in the Immigration and Nationality Act and the effects that the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 had on it. Part III lays out the principles of rational legislating and suggests that they should have been employed when this provision was amended in 2008, that the current provision fails to accurately reflect Congress's intention and violates Due Process. Part IV suggests ways in which the issues inherent in this provision can be addressed to promote Congress's ameliorative goals for Special Immigrant Juveniles when the 2008 Amendments were enacted.

I. HISTORICAL RESPONSES TO FEDERAL IMMIGRATION LEGISLATION

This article poses a challenge to a federal legislative provision. Naturally, then, it must address the historical deference enjoyed by courts as to both Congressional legislation and executive branch actions, particularly in the immigration realm.[40] For, if this "plenary power" remains as formidable as it has been historically, this SIJ provision will likely survive scrutiny. Although, the Supreme Court has seen fit particularly since the mid-1980s to curb this deference, evident in several recent judicial decisions addressing the current Presidential Administration's efforts to thwart immigration and make life unbearable for immigrants already here. In several of these cases, federal courts exercise considerable supervision over these matters. These decisions support an inference that the plenary power will not obstruct a challenge to this SIJ provision.[41]

Several recent examples of federal court scrutiny over efforts to curtail immigration illustrate this point. President Trump, soon after his inauguration, sought

proceeds on the impermissible assumption that naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native born. This is an assumption that is impossible for us to make.")). The Court noted, "[t]he discrimination aimed at naturalized citizens drastically limits their rights to live and work abroad in a way that other citizens may. It creates indeed a second-class citizenship." Rusk, 377 U.S. at 168-69.

40. The plenary power principle holds that the legislative and executive branches have full, or plenary, power over immigration. It is a long-standing tenet that has, since the late 19th century, generally constrained judicial review of statutes affecting immigration. For a more thorough explication of this power, see Scharf, *The Exclusionary Rule in Immigration Proceedings: Where it Was, Where it is, Where it may be Going,* 12 San Diego Int'l L.J. 53, 56, n.6 (2010). "Over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." Fiallo v. Bell, 430 U.S. 787, 792 (1977) (quoting Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)). *But see* Irene Scharf, *The Problem of Appropriations Riders: The Bipartisan Budget Bill of 2013 as a Case Study,* 42 Mitchell Hamline L. Rev. 791, 845 (2016) [hereinafter APPROPRIATIONS].

41. The *Chevron* principle is another potential bulwark against scrutiny of legislation hostile to immigrants, as the principle limits review of interpretations made by federal agencies; several theories could be offered to counter the effects of *Chevron.* For more on this issue, *see* Scharf, *Un-torturing the Definition of Torture and Employing the Rule of Immigration Lenity*, 66 Rutgers L. Rev. 1, 36-47 (2013) (suggesting the use of the lenity principle when legislative history is scant).

to exclude entry of those from nations whose citizenry was comprised of a majority of people who followed the Muslim faith; this effort was successfully challenged for months. This was until a third revision was proposed, which was claimed to have reduced considerably the scope of the exclusion against those from so-called Muslim-majority nations.[42]

Next, in September 2017, an attempt was made to terminate the Deferred Action for Childhood Arrival or DACA program that offered certain temporary benefits to immigrant children brought here by their parents without federal authorization.[43] It was thwarted by the federal courts.

Then, in early 2018, the Administration began separating families entering the U.S. at the U.S.-Mexican border. They segregated children of all ages from their parents,[44] holding them in prison-like conditions.[45] As this piece is being written, courts are examining the legality of these conditions.[46]

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42. *See* Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Feb. 1, 2017). Third time's a charm. See generally, Trump v. Hawaii, 138 S. Ct. 2392 (2018).). For reporting, see Adam Liptak & Michael D. Shear, *Trump's Travel Ban Is Upheld by Supreme Court*, N.Y. Times (June 26, 2018), https://www.nytimes.com/2018/06/26/us/politics/supreme-court-trump-travel-ban.html; Am. C.L. Union Washngton, *Timeline of the Muslim Ban*, https://www.aclu-wa.org/pages/timeline-muslim-ban (last visited Aug. 29, 2019).

There is legitimate disagreement as to whether this third iteration truly eliminated Muslims as targets, or whether a few countries without Muslim majorities were added to sanitize the ban. *See* Namira Islam, *An Anti-Immigrant narrative has shaped policy for decades. The Travel Ban will Make it Worse, Vox.com,*https://www.vox.com/first-person/2018/6/27/17510560/travel-ban-muslim-trump-islamophobia (last visited Aug. 29, 2019).

43. Casa de Maryland, v. U.S. Dep't of Homeland Sec., 924 F.3d 684 (4th Cir. 2019).

44. While in 2014 the Obama Administration adopted a policy to detain mothers and children, the Trump Administration brought this to another level by separating parents from their children. See Julia Preston, *Judge Orders Stop in Detention of Families at Borders, N.Y. Times* (Feb. 20, 2015), nytimes.com/2015/02/21/us/archived at perma.cc/HW8J-Y86N.

See, e.g., J.S.R by and through J.S.G. v. Sessions, 330 F. Supp. 3d 731 (D. Ct. 2018) (enjoining alleged due process violations where plaintiffs demonstrated irreparable injury if children continued in detention separated from parents). *See Jenny Samuels, A Mother and Child Fled the Congo, Only to Be Cruelly Separated by the US Government, Am. C.L. Union* (Feb. 26, 2018), https://www.aclu.org/blog/immigrants-rights/deportation-and-due-process/mother-and-child-fled-congo-only-be-cruelly. *See also* M.M.M. on behalf of J.M.A v. Sessions*,* 347 F. Supp. 3d 526 (S.D. Cal. 2018)(granting a temporary restraining order in suit on behalf of migrant children forcibly separated from their parents shortly after crossing the U.S.-Mexico border); *J*acinto-Castanon de Nolasco v. U.S. Immigration and Customs Enf'tt*,* 319 F. Supp. 3d 491, 505 (D.C. Cir. 2018) (granting preliminary injunction compelling government to reunite Guatemalan mother and children in substantive due process claim after involuntary separation following illegal border crossing where allegedly attempting to escape gang violence); M.G.U. v. Nielsen, 325 F. Supp. 3d 111 (D.C. Cir. 2018) (enjoining federal agencies and officials for enforcing immigration laws and ordering reunification between mother and child where substantive due process allegations brought, arising from government's separation of mother from young son shortly after crossing the U.S.-Mexico border). Finally, see Ms. L. v. U.S. Immigration and Customs Enf't, 10 F. Supp. 3d 1133; (S.D. Cal. 2018).

45. Richard Gonzales, *Migrant Children Moved from Border Patrol Center after Outcry*, Nat'l. Pub. Radio (July 24, 2019), https://www.npr.org/2019/06/24/735552011/migrant-children-moved-from-border-patrol-center-after-outcry (discussing violations of the conditions of the settlement concerning children's conditions in immigration detention, stemming from the settlement of *Flores v. Reno,* commonly "the *Flores* Settlement," dating to 1997) (last visited Aug. 29, 2019).

46. Nomaan Merchant, *U.S. Border Patrol Faces new Legal Challenges Fighting 'Losing Battle' on Migrant Holding Conditions*, Time (Aug. 5, 2019), https://time.com/5642873/lawyers-border-control-detention/ (last visited Aug. 29, 2019); s*ee also KEPR Action News Staff*, *A.G. Ferguson Challenges Trumps* [sic] *Attempt to Remove Protections for Immigrant Children (Aug. 26, 2019),* https://keprtv.com/news/local/ag-ferguson-challenges-trumps-attempt-to-remove-protections-for-immigrant-children (last visited Aug. 29, 2019).

Later in 2018, the Administration attempted to restrict acceptance of asylum applications for those entering the U.S. at non-official border points. Even the Supreme Court declined to step in against a preliminary injunction granted to the plaintiffs.[47]

Next the Administration began, for months, denying interviews to asylum applicants intended to determine whether they had a "credible fear" of returning home; even bond hearings (akin to bail) were denied during this period. In the meantime, these asylum applicants were detained in prison-like conditions. Some have even died.[48] A case challenging these actions, already subject to an order stayed until July 2019, is pending in the Western District of Washington.[49]

In July 2019, the Northern District of California enjoined a new rule the Department of Homeland Security announced barring foreign nationals crossing the U.S.-Mexico border from seeking asylum if they traveled through a third country while *en route* to the United States without applying for asylum in that third country.[50] Since that time, Guatemala has entered into a similar type of agreement with the U.S.[51]

In 2016, the unexpected death of Supreme Court Justice Scalia and a Supreme Court with only eight members resulted in a significant curtailment in an Obama era measure to increase immigration benefits through a program entitled Deferred Action for Parents of Americans and Lawful Permanent Residents, or "DAPA." This program would have deferred government action against certain immigrants living in the U.S. since 2010 who had children who were either USCs or lawful permanent residents. Announced as an Executive Action in 2014 by the Obama Administration,[52] several

47. Trump v. East Bay Sanctuary Covenant, 139 S. Ct. 782 (2018) (denying, in 5-4 vote, the Administration's request to stay preliminary injunction granted when District Court Judge Tigar issued a nationwide temporary restraining order enjoining implementation of a policy limiting asylum eligibility and ordering the government to return to prior practices for processing asylum applications). For the Ninth Circuit Court of Appeals decision upholding injunction, see 909 F.2d 1219 (9th Cir. 2018). *See* Hannah McKay, *Read Trump's Proclamation Targeting the Caravan and Asylum Seekers*, N.Y. TIMES (Nov. 9, 2018), https://www.nytimes.com/2018/11/09/us/politics/trump-proclamation-caravan-asylum.html (last visited Dec. 28, 2018).

48. https://www.nbcnews.com/politics/immigration/22-immigrants-died-ice-detention-centers-during-past-2-years-n954781.

49. John Wagner, *White House Blasts Federal Judge in Asylum Case As 'at war' With the Rule of Law*, *Washington Post (July 3, 2019),*
https://www.washingtonpost.com/politics/white-house-blasts-federal-judge-in-asylum-case-as-at-war-with-the-rule-of-law/2019/07/03/ccc080fe-9d97-11e9-85d6-5211733f92c7_story.html (last visited Aug. 29, 2019).

50. The Department of Homeland Security is abbreviated as "DHS." Miriam Jordan & Zolan Kanno-Youngs, *Trump's Latest Attempt to Bar Asylum Seekers Is Blocked After a Day of Dueling Rulings*, N.Y. Times *(July 24, 2019),*
https://www.nytimes.com/2019/07/24/us/asylum-ruling-tro.html?smid=nytcore-ios-share. The prototype for these types of agreements is that between the U.S. and Canada, signed in 2002. *See* Agreement between the Government of Canada and the Government of the United States for cooperation in the examination of refugee status claims from nations of third countries, Treaty Law Division, Global Affairs, Canada.
See Peter Marguelis*, East Bay District Court Enjoins New Asylum Rule, LawFareblog.com (*July 26, 2019), *https://www.lawfareblog.com/east-bay-district-court-enjoins-new-asylum-rule* (last visited Aug. 29, 2019).

51. *See* Lauren Carasik, *Trump's safe third country agreement with Guatemala is a lie*, Foreignpolicy.com (July 30, 2019), https://foreignpolicy.com/2019/07/30/trumps-safe-third-country-agreement-with-guatemala-is-a-lie/
(last visited Aug. 29, 2019).

52. U.S. Citizenship and Immigration Services, *Executive Actions on Immigration. U.S. Citizenship and Immigration Services. Retrieved 2017-09-10.*

states quickly challenged it on constitutional and other grounds. In early 2015 the Program was enjoined, which was subsequently affirmed by the Fifth Circuit Court of Appeals, and thereafter effectively affirmed by an evenly divided, 4-4, decision by the Supreme Court in June 2016.[53] The Trump Administration rescinded the Program in June 2017.[54] While the "bottom line" of this case involved a "loss" by pro-immigrant supporters, that the courts took on the issues raised by opponents of DAPA further demonstrates the fallacy of claims that the plenary power remains a bulwark against immigration-related action by the Executive or Legislative branches. Notwithstanding a considerable and long-standing history of judicial avoidance of challenges to federal Executive or Legislative branch efforts concerning immigration, recent scrutiny of these laws continues.

II. SPECIAL IMMIGRANT JUVENILE AMENDMENTS IN THE WILLIAM WILBERFORCE TRAFFICKING VICTMS PROTECTION REAUTHORIZATION ACT OF 2008.

A review of the context and circumstances surrounding the 1990 enactment and 2008 Amendment to the SIJ provision, found at 8 U.S.C. 1101(a)(27)(J), fosters an appreciation of the significance that meaningful statutory interpretation would effect on this law. Most importantly, the beneficiaries of the law— immigrant children who have been abused, abandoned, or neglected by a parent (or parents) – would be served by attention to the legislative intent that propelled the recent Amendment. Specifically, courts interpreting the SIJ statute should appreciate the ameliorative aims guiding Congress in 2008, for the meaning assigned to the subsection at issue, (a)(27)(J)(iii)(II), will have dire consequences for naturalized SIJs who are all United States citizens. When the 2008 Amendment failed to address the reason the parental ban was maintained, Congress ignored the intended purpose of its legislation, resulting in, essentially, "irrational legislation" that violated the principles of Due Process.

The 2008 amendment to the Special Immigrant Juvenile provision ("2008 Amendment"), arose from enactment of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008.[55] While earlier versions of the SIJ law required that children prove they had been abused, abandoned, or neglected by both parents,[56] this requirement was reduced in 2008 to require proof of abuse by *one or both parents*. This change was consistent with Congress's intent to "provide critical protections for the tens of thousands of unaccompanied minors who come to the United States each year" by seeking "to create . . . broader legal protection and access to services for these youth."[57] The 2008 Amendment permitted SIJ approval when

53. Texas v. United States*,* 86 F. Supp. 3d 591 (S.D. Tx. 2015). *"Supreme Court Dapa Ruling".* Migration Policy Institute. *2016-06-29. Retrieved 2017-09-10.* This occurred following Justice Scalia's death, when the Court lacked a ninth justice.

54. Maria Sacchetti, *Kelly revokes Obama order shielding immigrant parents of U.S. citizens, Washington Post (June 25, 2017), https://www.washingtonpost.com/local/social-issues/kelly-revokes-obama-order-shielding-immigrant-parents-of-us-citizens/2017/06/15/d3b4db62-5244-11e7-91eb-9611861a988f_story.html* (last visited Oct. 9, 2017).

55. *See supra* note 22 and *infra* note 68.

56. On the requirement for abuse, abandonment, or neglect, *see supra* note 16. On the change from both parents as wrongdoers to one or both, *see supra* notes 15-16.

57. ANGIE JUNCK ET AL., SPECIAL IMMIGRANT JUVENILE STATUS AND OTHER IMMIGRATION OPTIONS FOR CHILDREN AND YOUTH, 1-16 (4th ed. 2015). Immigrant Legal Resource Center Ch. 1, at 1-

"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."[58] They also provided "additional protection for the thousands of unaccompanied minors," expanding legal protections and access to services.[59] Since then, these "one-parent cases" have been granted regularly. "In fact, responses from a 2012 national survey of immigrant youth advocates in 15 different states around the country . . . indicated a 100% approval rate of one-parent SIJS applications filed with USCIS."[60]

16.

The TVPRA "made significant changes to Special Immigrant Juvenile Status eligibility designed to promote healing for abused, abandoned, or neglected immigrant children by allowing immigrant children to apply for SIJ immigration relief and to allow the child to continue living with a protective non-abusive parent." FITZPATRICK & ORLOFF*, supra* note 22, at 633 (citing U.S. Immigration and Customs Enf't, Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions (2009) (available at:https://www.uscislgov/sites/default/files/USCIS/Laws/?Memoranda/Static_Files_Memoranda/2009/TVPRA_SIJ.pdf).

One expansion in the 2008 Amendments that is not the subject of study in this Article was elimination of the requirement that a juvenile court deem the SIJ applicant eligible for long-term foster care. TVPRA sec. 235(d)(1)(A). This provision had prevented many victimized children from receiving SIJ status [hereinafter SIJS], as many were living with a "non-abusive protective parent," not in foster care. (use of quoted term attributed to FITZPATRICK & ORLOFF*,* supra note 22, at 631, although I prefer "innocent" and largely use that). Children who had a "safe" parent with whom they could live were stuck with the Hobson's choice of having to separate from that parent in order to achieve SIJS. The 2008 Amendments corrected that counterintuitive situation that also conflicted "with best practices and research on the needs of abused children and children who had witnessed domestic violence in their homes. State family laws prohibit or discourage placement of a child in the custody of perpetrators of domestic violence and instead encourage courts to award custody to the non-abusive protective parent." Fitzpatrick and Orloff, *supra* this note, at 631-32 and n.68. Not surprisingly, these courts recognize that children are "best served by placing the child in the care of a protective non-abusive parent rather than placing the child in foster care." FITZPATRICK & ORLOFF, *supra* this note, at 632 (citation omitted). These 2008 changes "updated immigration law to be consistent with changes occurring in the family courts and child protective services systems, which had been moving . . . away from the foster care system and toward" placements that offered more support for children who had suffered trauma. FITZPATRICK & ORLOFF, *supra* this note, at 636.

Oddly, despite the 2008's liberalization of the SIJ statute, there is neither a publicly available accounting of the number of one-parent SIJ applications filed since the TVPRA was enacted in 2008. A June 2019 FOIA request I submitted (on file), requesting these numbers has not produced a substantive response as of the date of this printing. Nor have proposed federal regulations guiding these cases or addressing the 2008 SIJ been enacted. *See Immigrant Legal Resource Center*, *Special Immigrant Juvenile Status: A Primer for One-Parent Cases* at 9-10 (Mar. 12, 2015), https://www.ilrc.org/sites/default/files/resources/one-parent_sijs_primer_final.pdf (last visited Sept. 9, 2019); *see also,* William A. Kandel, Cong. Research Serv., *Unaccompanied Alien Children: An Overview,* 1-4 (2017).

58. For legislative history, see 154 Cong. Rec. H10888-01 (YEAR); 154 Cong. Rec. H10888-01 (2008), 10898. "The expansion of SIJ eligibility to include 'one or both parents' reflects the recognition of the strong relationship between domestic violence and child abuse." FITZPATRICK & ORLOFF, *supra* note 22, at 631 n.67. *See* SCHARF, *supra* note 2, at 583 n.24 (discussing linkage between domestic violence and child abuse).

59. SCHARF, *supra* note 2, at 582-83 (citing David B. Thronson & Veronica T. Thronson, *Immigration Issues-Representing Children who are not United States Citizens,* in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 559, 563-64 (Donald N. Duquette et. al. eds., 3d ed. 2016 (citing 8 U.S.C.A. § 1101(a)(27)(J); *see also* WILLIAM A. KANDEL, CONG. RESEARCH SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 1-4 (2017).

60. For survey results, *see* Immigrant Legal Resource Center, Special Immigrant Juvenile Status: A Primer for One-Parent Cases, https://www.ilrc.org/sites/default/files/resources/one-parent_sijs_primer_final.pdf at 10. *See supra* note 57, for details of FOIA request regarding one-parent cases.

The 2008 Amendment demonstrated Congress's "clear intent to protect not only children dependent on the state, but all immigrant children who have been abused, abandoned, or neglected as well as victims of domestic violence who are mothers of immigrant children experiencing child abuse or witnessing domestic violence."[61] This "remains the case even if, as is commonplace, the parental rights were never formally terminated."[62] Further, this prohibition remains in effect, even against a blameless parent, and even if that parent, along with the child, was a victim of the other parent's abuse.[63] The Amendments perpetuated an injustice, ignoring the completeparental denial of visa eligibility for a non-abusing parent. This is surprising, considering Congress's ameliorative motives in enacting these Amendments.

It is unknown why Congress failed to make a corresponding change in the SIJS law when it enacted the provision requiring only one parent's abuse.[64] . . . It could not have derived from an effort to deter parental abuse, as the prohibition applies to both parents of SIJs, regardless of whether the abuse stemmed from only one of them.[65]

III. THE SIJ PROVION FAIL TO ACCURATE REFLECT CONGRESSIONAL INTENTION, VIOLATES DUE, AND SHOULD NOT BE INTERPRETED LITERALLY

A. Principles Of Rational Legislating Should Applay To An Apraisal of The 2008 Ammendment

Rational legislating is the default method of evaluating the process of

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61. FITZPATRICK & ORLOFF**,** *supra* note 22, at 639. For a discussion of the difficulty discerning intent from legislation, see Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry,* 92 Nw.NW. L. Rev. 477, 487-91 (1998). This question has received considerable attention in the literature, with some scholars averring that there is no such thing. See Max Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863, 872 (1930) (discussing the "realist" interpretation); to those who say statutory text should control, see William Eskridge, Jr., *Textualism, the Unknown Ideal?,* 96 Mich. L. Rev. 1509 (1998) (discussing the "textualist" interpretation); to theorists claiming it is impossible to interpret a text without finding intent, as statements/texts are "inherently intentional acts."Stanley Fish, Play of Surfaces:Theory and the Law, in Legal Hermeneutics: History, Theory & Practice, 297, 300-01 (1992); to philosophers arguing that legislative intent is "impossible to know," Jeremy Waldron, Law and Disagreement, 77 (1999) (questioning how so many can possess a single 'intent'?). *See also* Victoria Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 Yale L.J. 70, 85 (2012).

On the other hand, in many situations, courts, left with the responsibility to glean whatever intent they do, have found many ways to do so. For example, both language and statutory structure can lend information, as "intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18 (1979).

62. SCHARF, *supra* note 2, at 583 (footnote 23 omitted). While some have concluded that "the SIJS recipient is no longer considered the "child" of the natural or prior adoptive parent" (*see* Immigrant Legal Resource Center, *Special Immigrant Juvenile Status*, CH. 3 PART II: SPECIAL IMMIGRANT JUVENILE STATUS FOR CHILDREN AND YOUTH UNDER JUVENILE COURT JURISDICTION at 63, *accessed at*

https://www.ilrc.org/sites/default/files/resources/sijs-5th-2018-ch_03.pdf [hereinafter ILRC SIJC], there is no evidence in the law that this is the case.

63. *See* SCHARF, *supra* note 2, at 583 (n.24 omitted).

64. *See* SCHARF, *supra* note 2, at 584, n.25; 585, n.30; 587, n.37 for explanations of the results of the extensive searches conducted in the legislative history of all of the acts related to SIJ, including the 1990 ACT, 1994 and 1998 changes, and 2008 Amendments. Addressing federal legislation enacted in haste, which could explain the failure in this case. *See* APPROPRIATIONS, *supra* note 41, at 795.

65. SCHARF, *supra* note 2, at 584.

statutory enactments. Here, rational legislation would more accurately capture Congress's stated objectives in enacting the 2008 Amendments, placing SIJs on an equal footing with other naturalized immigrants by permitting naturalized SIJs to reunify with their parents.

Early in the development of the American legal system, judges adopted the view of William Blackstone "that statutes were irrational creations of legislators, and thus inconsequential to the common law.[66] However, at the end of the nineteenth century Justice Oliver Wendell Holmes and others challenged this formalistic approach, which was largely abandoned in the first half of the twentieth century. Dean Roscoe Pound boldly pronounced that "judging mechanically, as had been the case through the 1930s, was 'stupid.'"[67] New theories were advanced, such as legal realism, underscoring that case results, rather than being inevitable, arose largely out of ideology.[68] Soon after, statutes supplanted common law as "the source of policy, law, and even principle."[69] In 1950, Julius Cohen suggested that the Realist critique be expanded to address legislative conduct, given that "'judges do not just find the law; they make it.'"[70] Hence, courts should scrutinize legislative conduct to ensure it was rational,[71] requiring legislators to be informed of the "conditions on which the proposed law will operate, and about the likelihood that the proposal would . . . further the intended purposes."[72] The mandate that legislation further its intended purposes derives from the Fifth Amendment's Due Process Clauses.[73]

There is much that legislators can do to prevent due process problems from arising out of insufficient legislative procedure. Professor Hans Linde, referring to what he termed *Due Process in Legislating,* suggested that the Due Process clauses "instruct government itself to act" through an appropriate process, and "not simply to

66. APPROPRIATIONS, *id.* at 847, n.337.

67. *Id.* at 847-48, n.343 (citing WILLIAM N. ESKRIDGE JR., ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY, 24-38 (3d ed. 2001) [hereinafter Eskridge]; *see also,* U.S. CONST. art. 1, § 7, cl. 2-3 (Presentment Clause)).

68. *Id.* at 847, n.340.

69. *Id.* at 847, n.341.

70. *Id.* at 848, n.349. Julius Cohen, *Towards Realism in Legisprudence,* 59 Yale L.J. 886, 888 (1950).

71. *Id.* at 848 n.350.

72. *Id.* at 849 n.360, quoting Hans Linde. The article suggested that the process through which new rules concerning access to the Death Master File, inserted in the Bipartisan Budget Bill of 2013, were not only misguided, but threatened to exacerbate the public's lack of confidence in Congress's commitment to core democratic principles. *Id.*

The controversy about *intent* in legislating is ongoing. *See supra* note 61.

73. *Id. at* 849 and 849 n.360 (citation omitted). Against this push for courts to see that legislators do *what they should do,* with the threat of judicial instruction deriving from courts if legislators do not do so*,* we have the classic tug-of-war in the American system of the three co-equal branches of government, but with the judiciary *not* being democratically derived, or *counter-majoritarian." See, e.g.,* Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16-23 (Vail-Ballou, 2d ed. 1986); *on counter-majoritarianism, see* John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (Harv. College 1980).

The discussion about statutory interpretation is much more expansive than what can be read in this article. For a piece that provides more about the current discussion of statutory interpretation, the judiciary's role in it, the contributions of purposivism and the problems with textualism, *see* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State,* 103 Harv. L. Rev. 405 (1989) (esp., as relates to this article, *see* Parts II and III) [hereinafter Sunstein].

legislate subject to later judicial second-guessing."[74] Others agree.[75] Professor Linde proposed that, during the enactment process, one committee should explain to the entire legislature the "factual and value premises" of the proposal.[76] Legislators should "explicitly lay out in the . . . record the path they have followed in enacting legislation. This record would likely . . . allow courts to exercise meaningful judicial review . . .—[its] proper judicial role in our democratic society."[77] Professor Lawrence Tribe and other scholars suggest that judicial review is the appropriate response to what he termed "insufficient legislative process."[78] Recent Supreme Court decisions reveal that statutes have been stricken when borne out of "legislative irrationalityFalse"[79] Linde's approach is supported by case law, such as *Hampton v. Mow Sun Wong*, involving a successful constitutional challenge to a federal Civil Service Commission rule barring non-citizen lawful permanent residents from employment in that system.[80] Based on principles of rational legislating, the law was stricken because it violated due process.[81] After a lengthy review of the history of the Civil Service Commission, including Executive Orders concerning the Commission and numerous rules regarding the Commission's employment of immigrants,[82] the Court concluded that the exclusion

- was not justified by the national interest,
- was overly broad,
- denied substantial employment opportunities to this large class of people, "deprives its members of an aspect of liberty,"[83] and
- was not justified by reasons that were an appropriate concern of the Commission, causing a violation of due process of law by depriving certain people of "an important liberty."[84]

The scrutiny the Supreme Court applied to the immigrant exclusion in *Hampton v. Mow Sun Wong* signaled, in 1976, that the Court had "begun to give

74. APPROPRIATIONS, *supra* note 41, at 852 n.382.

75. *Id.* at 852 n.383.

76. *Id.* at 852 (citations omitted).

77. *Id.* at 852 (citation omitted). *APPROPRIATIONS* identified public mistrust in government as a potential threat to the democratic process. *Id.* at 834-835. Rational legislating is not an equivalent to the substantial evidence test used when courts are determining whether legislative actions were the product of a deliberative process. *See* John Martinez, *Rational Legislating, 34* Stetson L. Rev. 548, 551 n.8 (2005). All rational legislating does is proscribe that the legislature was to have prepared a full record of its action; it "cannot guarantee that deliberation will occur at all, or that any deliberation will be enlightened and positive." ESKRIDGE, *supra* note 68, at 70.

78. *Id.* at 848-849, 852-855.

79. *Id.* at 849 and 849 n. 360 (citing cases as well as ESKRIDGE, *supra* note 68 and Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice,* 65 TEX. L. REV. 873, 907 (1987) [hereinafter Farber & Frickey]. Insufficient legislative process, or what is sometimes termed "irrationality," is often as an absurdity or absurd results. *See* discussion *infra,* Part III(C).

80. 426 U.S. 88 (1976).

81. 426 U.S. 88, at 115-117. *See* discussion of this case at APPROPRIATIONS, *supra* note 40, at 853 (citing Farber & Frickey, *supra* note 80, at 907).

82. *Id.* at 105-113.

83. *Id.* at 116.

84. *Id. at* 116-117.

greater consideration" to the structure and process of lawmaking.[85] This should not be surprising, as it is warranted and proper, supported by the historical constitutional debates. Those discussions concluded in a constitutional obligation that the power to enact statutes "may only be exercised in accord with a single, finely wrought and exhaustively considered, procedure."[86] Even the requirement of bicameralism proposed by James Madison in *Federalist #51* was intended to "ensure[s] that factious and *partial* laws . . . not be adopted."[87]

At the Supreme Court in the late 1970s to 1980s, Justice Paul Stevens began to base some of his opinions on principles of Rational Legislating. These decisions failed to achieve majority status, but in two dissents his underlying rationale was informed by these principles. In the first, *Delaware Tribal Business Committee v. Weeks,*[88] he cited Hans Linde's article, "*Due Process of Legislating*."[89]The plaintiffs, "Kansas Delawares," sued when excluded from an Indian Claims Commission award because they had severed relations with the tribe in 1866 and were no longer recognized as a tribe.[90] In his dissent, Justice Stevens concluded that the Act violated the Constitution, as the plaintiffs suffered a deprivation of property without the "due process of lawmaking" guaranteed by the Fifth Amendment,[91] "when an amendment to the Act had the unintended consequence of excluding the Kansas Delawares, whose ancestors were members of the tribe at the relevant time and suffered in a similar manner as those whose descendants were to be compensated."[92] Justice Stevens rejected several possible explanations for excluding the plaintiffs, as all "merely emphasized the lack of any rational explanation for the legislative malfunction."[93] He concluded that the exclusion was "manifestly unjust and arbitrary," as neither the actual explanation, nor any of the proposed explanations, was "tied rationally to the fulfillment of Congress'[sic] unique obligation toward the Indians."[94] While the Justice did find that the reason in part resulted from discrimination,[95] he noted that "the discrimination . . . is the consequence of a legislative accident," not "the product of an actual legislative choice,"[96] *perhaps caused by nothing more than the unfortunate fact that Congress is too busy to do all of its work as carefully as it should*."[97] Notwithstanding the Justice's concerns about the legislation, he cautioned against making a ruling as to constitutionality that "turn[ed] on the actual motivation, or the

85. APPROPRIATIONS, *supra* note 40, at 853. (citing Farber & Frickey, *supra* note 80, at 915). *See Hibbs v. Winn,* where Justice Ginsburg's majority opinion invoked the importance of context: "Our prior decisions are not fairly portrayed cut loose from their secure, state-revenue-protective moorings." 124 U.S. 2276, 2289 (2004).

86. APPROPRIATIONS, supra note 40, at 853 n. 390 (citing *Clinton v. City of New York*, 524 U.S. at 439-40 (1998)).

87. *Id.* at 853 (citing James Madison) (emphasis supplied).

88. 430 U.S. 73 (1977).

89. 55 Neb. L. R. 197 (1976).

90. *Delaware Tribal Business Committee v. Weeks*, 430 U.S. at 75-82.

91. *Id.* at 97-98 (citing Linde, *Due Process of Lawmaking,* 55 Neb. L. R. 197 (1996)).

92. *Id.* at 93.

93. *Id.* at 96.

94. *Id.*

95. *Id.* at 97.

96. *Id.* at 98.

97. *Id.* at 97 (emphasis supplied). Readers cannot ignore the language of Rational Legislating reflected in that comment.

lack thereof, of the legislators who participated in the legislative process."[98]

Next, in 1980, in another dissenting opinion he filed in Fullilove v. Klutznick, Justice Stevens questioned whether a particular piece of legislation reflected "true deliberation,"[99] The case involved another unsuccessful challenge to a federal statute, one that required a certain percentage of minority-owned businesses to be awarded federal funds in local public works projects. The Justice critiqued Congress's failure to explain its expansive goals in enacting the statute, observing, "the absence of either testimony or inquiry vital to the legislation, during either the legislative hearings or floor debate, highlighting that 'Congress for the first time . . . has created a broad legislative classification for entitlement . . . based solely on racial characteristics False'"[100] He noted that "[t]his dramatic point of departure is not . . . mentioned in the statement of purpose . . . or in the reports of either the House or the Senate Committee that processed the legislation and was not the subject of any testimony or inquiry in any legislative hearing on the bill. False [T]here was a brief discussion on the floor of the House as well as in the Senate . . ., but only a handful of legislators spoke and there was virtually no debate." [101]

In explaining why he concluded that the statute in *Fullilove* breached the Constitution, Justice Stevens expressed concern, reflecting rational legislating principles, for the "constitutional implications of disregarding legislative procedures."[102] As the Due Process Clause compels the Supreme Court to review federal legislation for violations of the Equal Protection Clause, it is legitimate for the Court to find a statute unconstitutional based on a "failure to follow procedures that guarantee . . . deliberation that a fundamental constitutional issue . . . merits."[103] Given these principles, Stevens concluded that the statute in question was not tailored sufficiently narrowly and raised numerous "questions that Congress failed to answer or even to address in a responsible way."

Scholars, including Professor Cass Sunstein and others, agree with Justice Stevens' concerns about rational legislating that a principle purpose of statutory interpretation "is to promote . . . deliberation in the lawmaking process,"[104] which is achieved through a reading of legislative history.[105] Put another way, Professor Bernard Bell encourages legislators to "explain statutes. . ."[106] in order to elucidate the rationale behind the language they use.[107]

B. Principles Of Rational Legislating Were Violated In a Deficient

98. *Id.* at 97.

99. APPROPRIATIONS, *supra* note 40, at 854 (citing Farber & Frickey, *supra* note 80, at 917).

100. *Id.* (citing 448 U.S. at 550).

101. *Id.* (citing 448 U.S. 448).

102. *Id.* (citing 448 U.S. at 551-52).

103. *Id.* (citing 448 U.S. at 551-52).

104. *Id.* at 855 (citing Cass R. Sunstein, Symposium: The Republican Civic Tradition, *Beyond the Republican Revival,* 97 YALE L. J. 1539, 1581 (1988)).

105. *Id.* (citing, at note 405, Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 OHIO ST. L. J. 1, 3 (1999)) [hereinafter Bell],

106. *Id.* (citing Bell). While theories of legislating need to have been noted, a detailed analysis is beyond the scope of this piece.

107. *Id.* at 856 (citing Bell).

Enactment Process Culminating In The 2008 Amendment.

Rational legislating offers the best chance that legislation makes it out of Congress and is signed into law by the President to reflect the legislators' intent. In the case of the 2008 Amendment to the SIJ statute, courts should intervene to discover the precise meaning of the statute. Such action would reflect Professor Tribe's suggestion that courts intervene to establish the precise meaning of a statute when the meaning is both unclear and when there is little evidence that the tenets of rational legislating were followed in enacting the law.

Evidently, none of the legislative process described in the prior section was followed during the enactment of this 2008 amendment:

- First, there is no evidence that legislators were aware of the distinction between the reduced SIJ proof requirements and maintenance of the two-parent ban.
- Second, there is no evidence that legislators deliberated concerning the key matter of maintenance of the two-parent ban, notwithstanding its harmful implications for SIJ recipients.
- Third, there is no evidence that Professor Linde's suggestion, to lay out the factual or value premises of the proposed legislation, was employed/followed/honored.
- Fourth, there is no evidence that the legislators laid out in the record the path they followed in enacting the legislation.
- Fifth, this provision violates Justice Stevens' instruction in *Fullilove.* While the Amendment contained an essential statement of purpose,[108] there was neither testimony nor inquiry vital to the legislation highlighting the life-long disability under which naturalized SIJs would suffer upon naturalization. Like *Fullilove,* this point "was not the subject of any testimony or inquiry in any legislative hearing on the billFalse"[109] Justice Stevens would likely conclude that these shortcomings fell short of adherence to the Due Process Clause.

In sum, there is no evidence of the "single, finely wrought and exhaustively considered, procedure"[110] urged by James Madison. These shortcomings would likely have caused him to label this merely a "partial law."[111] Scholars would likely agree that the SIJ provision violates the Due Process Clause. The effects of the 2008 Amendment run counter to the legislators' expressed aims; as no rationale was suggested for maintaining the two-parent ban despite Congressional statements that

108. *See supra* at Part III, page 19.
109. APPROPRIATIONS, *supra* note 40 at 854
110. *Id.* at 853.
111. *Id*.

the goal was to ease the burdens on SIJ recipients, one can say that Congress, in enacting the SIJ change, implicitly consented to future naturalized SIJs reuniting with their non-abusing parent.

At a minimum, the depth of analysis the Supreme Court applied to *Hampton v. Mow Sun Wong* should have been applied while this Amendment was being drafted.[112] In doing so, the legislative breakdown would have become apparent as lawmakers would have, likely concluded that the two-parent ban was overly broad, that it denied substantial citizenship rights to a large class of people, and that it violated due process of law by depriving naturalized SIJs an important liberty interest.

As to each of the suggestions for Rational Legislating described above, the 2008 Amendment falls short. The dearth of a legislative record makes the suggestions made by scholars Cohen, Tribe, and Linde difficult to even pursue. An available record would have reflected the path pursued in enacting the legislation[113] and the rationale for the legislators' decision. Instead, the record contains merely statements about the 2008 Amendment's ameliorative purpose, which, notably, were not realized by the provision. Additionally, little or no evidence exists of public participation in the legislative process, such as legislative hearings or meaningful floor debate over the issues addressed.[114]

The resulting legislation, which has little on record, highlights the justifiable concerns of both Justice Stevens and the scholars mentioned earlier. In a nutshell, employing the principles of Rational Legislating would have prevented the problems caused by this amendment. A deliberative legislative approach similar to that described above, supported by explicit connections between the Amendment's purpose and its constitutional rationale,[115] would have caused informed legislators to become aware that reducing the SIJ proof requirements while simultaneously maintaining the two-parent ban defied logic, causing the provision to fail to further Congress's expressed goals.[116] Had the legislators, notwithstanding this awareness, chosen to maintain the ban, that decision would have at least resulted from their

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112. *See* discussion, *supra* notes 80-83 and surrounding text.

113. APPROPRIATIONS, *supra* note 40, at 853 n. 394. In addition to the benefits of rational legislating's informed legislators, in APPROPRIATIONS, *id.* I also addressed an electorate mistrusting politicians, and added that, had the electorate witnessed Congress following its own prescribed process regarding the bill under scrutiny in that piece, some of that mistrust might have been allayed. *Id.*

114. For the 2008 Amendment's legislative history, *see supra* note 10.

115. APPROPRIATIONS*, supra* note 40, at 856 n. 412 (citing United States v. Lopez, where Congress' failure to make such findings doomed legislation promoting gun-free school zones).

While the controversy of discerning *intent* from Congressional legislation is both historically significant and of continuing interest, it is not a focal point of this article. For discussion and explication of the controversy over discerning the motivation of 535 members of Congress, see Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules,* 122 Yale L.J. 70, 74–75, 80-85 (2012).; see also Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 Chi.-Kent L. Rev. 123 (1989); see also Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. Pa. L. Rev. 1417, 1442–49 (2003); see also Max Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863 (1930); Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 31 (Amy Gutmann ed., 1997); see also Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 864–65 (1992); see also Michael E. Bratman, Faces of Intention: Selected Essays on Intention and Agency (1999); see also Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899) ("We do not inquire what the legislature meant: we ask only what the statute means.").

116. Because of the lack of legislative history explaining what occurred during the enactment process, it is fair to assume the worst case scenario.

deliberate act, obliging them to explain their rationale so that the record would have reflected their path to the final wording.[117] Instead, as James Madison cautioned, the Amendment turned out to be merely a "partial law," as, precisely as Justice Stevens feared, it resulted from "negligible deliberation," reminiscent of the statute at issue in *Fullilove.*[118]

Given all of this, it is fair to say that this deficient legislative process was irrational,[119] with the multiple failures resulting in an amended SIJ provision that largely contradicted Congress's expressed goals. In seeking to offer *additional* support to SIJs by *improving* the conditions under which they lived in the United States,[120] the amended statute largely continued to maintain the onerous burden of subsection 101(a)(27)(J)(iii)(II).

This provision, "borne out of 'legislative irrationality,'"[121] should not be interpreted literally; if so, it should be invalidated. While the two-parent ban originally may have been rationalized by concerns that abusing parents not benefit by their abusive actions,[122] given the prime objective of the 2008 Amendment to *ease* SIJs' hardships,[123] by, *inter alia* softening the required proof,[124] justification for the ban evaporated along with the softened proof requirement.

C. Rational Legislating Offers Considerable Advantages (Over The More Traditional Tenets Of Statutory Interpretation).

Courts should interpret this provision to avoid its due process problems by eliminating the internal contradiction between its text and congressional motivation. While this is more likely to be accomplished through a modern, Purposivist approach reflected in Rational Legislating, even a Plain Language or Textualist approach to statutory interpretation could produce that productive conclusion. The principles of statutory construction embodied in Rational Legislating already employed by some courts in legislation analogous to the one at issue here should be used in interpreting the SIJ provision. This would avoid the due process issues extant in the current law.

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117. See analogous discussion of Section 203 of the Bipartisan Budget Bill of 2013, in APPROPRIATIONS, *supra* note 40, at 853.

118. Considerably more legislative deliberation took place in Fullilove v. Klutznik than did in this SIJ provision. In *Fullilove,* deliberations involved colloquies preceding the enactment that highlighted members' confusion about the drafting process and legislative intention; further, while not much, there was some public participation in the process. *See supra,* notes 101-106 and accompanying text; *see also* APPROPRIATIONS*, supra* note 40, at 855.

119. "Definition of rational. . . . a: having reason or understanding. b: relating to, based on, or agreeable to reason: reasonable . . . ." Rational, The Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/rational

120. *See Scharf, supra* note 2; see also APPROPRIATIONS, supra note 40.

121. APPROPRIATIONS, *supra* note 40, at 849 (citation omitted).

122. Surprisingly, there is no legislative history confirming this motivation as a basis for the original 1990 SIJ act, though there is *some in the* 1997 Amendments**.** "Congress enacted this rule to make sure that parents who abused, neglected, or abandoned their children would not benefit from the fact that the children qualified for SIJS." *See* ILRC SIJC, *supra* note 31, at ch. 3.

123. *See Scarf, supra* note 2.

124. *See* Junck, *supra* note 57, and citations therein; s*ee also Scharf*, *supra* note 2, at 584 n.25 and 587 n.37 (discussing the efforts to ascertain motivation behind the 2008 Amendments and the process of adoption of these Amendments.).

Statutory construction and interpretation[125] are filled with so-called instructions. The first instruction, a classic, is a strong presumption that the plain language of a statute expresses the legislators' intent.[126] Also reflecting the classic plain language approach is the notion that Congress expresses its intent through its choice of language,[127] usually resulting in clear and unambiguous language prevailing. Finally, when a statute fails to define a term, the "ordinary and obvious meaning" is considered an important indicator of Congress's intent, which is not lightly discounted.[128] Even under the more traditional view, when the clearly expressed legislative intention contradicts the statutory language," legislative history helps to locate the statute's meaning.[129]

Despite the above, courts construe statutes to avoid deciding constitutional questions[130] while trying also to avoid "usurp[ing] the policymaking and legislative functions of the legislators, pervert "the purpose of a statute[,]"[131] or, it is said, rewrite it.[132]

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125. What is meant by the use of the term "interpretation"? Most statutes are easily understood. The question as to how to interpret a statute, or more precisely, words comprising provisions in statutes, arises when uncertainties arise in understanding what the words in a statute mean. *See* Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation – And the Irreducible Roles of Values and Judgment Within Both*, 99 Cornell L. Rev. 685, 697–98 (2014) [hereinafter Fallon, *Three Symmetries*]. From the perspective of Critical Legal Studies, Duncan Kennedy has suggested that, as lawyers try to sow seeds of doubt in their cases to further their clients' claims, so might judges do the same, having their own ideological preferences for a particular side of a case. *See* Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology,* 36 J. Legal Educ. 518, 547–48 (1986).

126. Ardestani v. INS*,* 502 U.S. 129, 135-37 (1991). This "is rebutted only in 'rare and exceptional circumstances' . . . when a contrary legislative intent is clearly expressed." *Id.* at 135 (citing INS v. Cardoza-Fonseca*,* 480 U.S. 421, 432 n.12); see also Lewis v. Grinker, 111 F. Supp. 2d 142, 160 (E.D.N.Y. 2000). The question as to how a legislature, made up of many individuals and, in the United States, 535 in Congress, can have *an intent,* when that is sourced from hundreds of individual people – to put another way, when the legislature is not an *it* but a *they* – has inspired much discussion. *See APPROPRIATIONS, supra* note 119.

127. INS v. Cardoza-Fonseca, *supra* note 130, at 432 n.12. For more on the Plain Language Rule, see text at Part III(C)(3), and accompanying notes.

128. *Id.* at 431 ("Where, as here, the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.").

129. Matter of Li*,* 20 I. and N. Dec. 700, at 4 (Interim Decision 3207) (BIA 1993), citing U.S. v. James, 478 U.S. 597, 606 (1986) (determining there was no legislative history to explain the INA provision in question, indicating a congressional intent contrary to the plain meaning of the statute).

130. *See* Heckler v. Mathews*,* 465 U.S. 728, 741 (1984) (concluding, upon reviewing legislators' statements made in advance of enactment, that proposed interpretation defeated Congress's expressed intention). Some express this principle as "avoid[ing] constitutional invalidity." Sunstein, *supra* note 73, at 457 (citation omitted); *see also* Sunstein, *supra note 73* at 439, 443, 459-69. A more recent Supreme Court case, *Zadvydas v. Davis,* confirmed the ongoing vitality of the "'cardinal principle' of statutory interpretation . . . that when an Act of Congress raises 'a serious doubt' as to its constitutionality, the Court will attempt to avoid the constitutional issue." 533 U.S. 678, 689 (2001) (citing, among others, Almendarez–Torres v. United States*,* 523 U.S. 224, 238 (1998) (construing statute to avoid invalidation best reflects congressional will)). The Court pointed out that it had, over time, "read significant limitations into other immigration statutes in order to avoid their constitutional invalidation." *Id.* The case involved a statute providing for indefinite detention of legal permanent residents who have been ordered removed but have no country to return to. Rather than ruling that the provision breached the Fifth Amendment's Due Process Clause, the court held that the provision did not permit indefinite detention, reading in an 'implicit limitation [of detention] to a period reasonably necessary to bring about that alien's removal from the United States.

131. *Id.* at 76. See discussion of the absurdity doctrine later in this section.

132. *Id.* (citations omitted). See discussion of the practice of statutory revision, when appropriate, later this section.

1. Use Of Legislative History To Interpret The 2001 Amendment

Courts can look to the legislative history of the 2008 Amendment to clarify their meaning and avoid the due process problem created during their drafting. In this drafting process, Rational Legislating should be the default approach to federal statutory review in order to avoid the due process problems and other constitutional issues that arise when laws are created with little attention to the process. To be sure, the primary cause of the deficiencies in the Amendment is the absence of Rational Legislating principles during the drafting process. To review, evidence is lacking in several ways:

- legislators were aware of the disjunction between the reduced SIJ proof requirements and maintenance of the two-parent ban;
- legislators deliberated concerning the key matter of maintaining the two-parent ban, notwithstanding its harmful implications for SIJ recipients.
- legislators were aware of the factual or value premises of the legislation,
- legislators laid out in the record the path they followed in enacting the legislation.
- there was testimony or inquiry in any legislative hearing on the bill highlighting the life-long disability under which naturalized SIJs would suffer upon naturalization.
- the legislation was produced of a "single, finely wrought and exhaustively considered, procedure"[133] suggested by James Madison, such that he would likely have coined this a mere "partial law."[134]
- there was a rationale behind maintaining the two-parent ban.[135]

2. Textualist Objections Are Surmoutable

While Rational Legislating reflects a Purposivist approach to interpreting statutes, Plain Language and Textualist approaches to ascribing meaning to statutes are even more traditional and they acknowledge the import that context plays in statutory construction. I expect that, even for those who doubt the use of legislative history in ascribing statutory meaning, its value in understanding this SIJ provision will become apparent upon reflection. On the contrary, a more traditional Plain

133. *Id.* at 853.

134. *Id.*

135. See Part III(B) of this article to review the rationale behind maintaining the two-barent ban.

Language approach here could result in an illogical, absurd[136] interpretation that will inevitably invite constitutional challenges to this law.

Purposivists insist that judges determine statutory meaning by looking at the purpose or intent of the legislature[137] through "the construct of a reasonable legislator."[138] Textualists, on the other hand, prefer that courts enforce the meaning of the exact words enacted.[139] For textualists, the relevant actor to consider when determining statutory meaning "is an imagined reasonable person who must determine not what the legislature intended, but what its words mean, in context."[140] This is an attempt at a so-called *objective* approach, a way to address textualists' concerns that judges will inadvertently impose their own values onto these interpretations when searching for statutory purposes. .[141] Today, the term "new" or "modern" textualist[142] is used to distinguish objective textualists from those who adhere to the more traditional Plain Language[143] approach.

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136. **?**

137. *See* Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. Rev. 245, 266 (2002) (suggesting that "'purposive interpretation' reminds the judge . . . that it is in Congress, not the courts, where the Constitution places the authority to enact a statute").

138. Fallon, *Three Symmetries*, *supra* note 126, at 703 (citation omitted). The case of Church of the Holy Trinity v. United States is a classic example of the early use of Purposivist logic to decide a case. 143 U.S. 457 (1892). In Holy Trinity*,* the Court held that the Alien Contract Labor Act, which made it unlawful to assist in the immigration of a noncitizen under a labor contract, did not apply to efforts of the Holy Trinity Church to hire a foreign clergyman as its minister. While the statute contained no obvious ambiguity in its language, and had background information not been read into the law, it would clearly have covered the contract to hire the noncitizen minister. *Id.* at 458. Professor Fallon has described this as a typical occasion in which, at "first-blush," a statute's interpretation provoked what he termed "interpretive dissonance" in the Supreme Court, as the Members could not conceive that reasonable legislators could have meant to interfere with a religious congregation's choice of minister. Fallon, *Three Symmetries, supra 126*, at 690; *see also Holy Trinity,* 143 U.S. at 459. Not surprisingly, "[t]extualists routinely denounce *Holy Trinity.*" Fallon, *Three Symmetries, supra 126*, at 690.

139. *See* John F. Manning, *Textualism and Legislative Intent*, 91 Va. L. Rev. 419, 419–20 (2005).

140. John F. Manning, *Exchange: What Divides Textualists from Purposivists?*, 106 Colum. L. Rev. 70, 75 (2006) [hereinafter Manning, *What Divides Textualists*?].

141. *See* Frank H. Easterbrook, *Text, History and Structure in Statutory Interpretation*,17 Harv. J.L. & Pub. Pol'y 61, 63 (1994) (positing that judges "are supposed to be faithful agents, not independent principals."); see also John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev 1, 18 (2001) ("the textualist position is . . . in straight-forward faithful agent theory."); s*ee also,* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A Matter of Interpretation 3, 17–18 (Amy Gutmann ed., 1997) ("The . . . threat is that . . . common-law judges will . . . pursue their own objectives and desires . . . ."). In the asylum case of Immigration and Naturalization Service v. Carlos-Fonseca*,* Justice Scalia, while concurring, was not pleased that the majority resorted to legislative history when he believed it was unnecessary. Nonetheless, he added that the Court had recently permitted legislative history to be used if it revealed a "'clearly expressed legislative intention' contrary to [the enactment's] language . . . ." In those cases, the Court properly questioned "the strong presumption that Congress expresses its intent through the language it chooses." Still, to Justice Scalia, this represented "an ill-advised deviation from the venerable principle that if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity." 480 U.S. 421, 452 (1987) .

142. *See* Fallon, *Three Symmetries, supra* note 126, at 687, 703.

143**.** While officially known as the "Plain Meaning Rule," the term Plain Language is also often used, especially in recent times. The most commonly cited case used to describe the rule is Caminetti v. United States*,* 242 U.S. 470, 485 (1917) (where the statute's language is plain, "the sole function of the courts is to enforce it according to its terms."). The earliest case referencing it as a commonly-accepted rule is Gibbons v. Ogden*,* 22 U.S. 1, 9 Wheat. 1, 6 L. Ed. 23 (1824). Not surprisingly, there are references to the concept in English Common Law. Hans W. Baade, *Original Intent: in Historical Perspective: Some Critical Glosses,* 69 Tex. L. Rev. 1001, 1008 n.28 (1991) ("The sense and meaning of

Traditionalists who followed—and still follow—the Plain Language approach assumed that, so long as the words were clear and their meaning would not lead to absurd results, any fluent English speaker would understand a statute's meaning even without specialized knowledge of the law or its traditions.[144] They assumed the words were the final expression of the meaning intended.[145] Plain Language textualists strictly applied their guideline to limit the use of legislative history,[146] while venerable justices like Learned Hand suggested bluntly , suggested that "[t]here is no surer way to misread any document than to read it literally."[147] In 1944, the Supreme Court challenged the Plain Language rule in *United States v. American Trucking Association*,[148] inaugurating a new test for use of legislative history. The Court examined the meaning of "employee" in the Motor Carrier Act to determine if the Interstate Commerce Commission could regulate workers' qualifications and hours. The Court held that while the literal meaning of "employee" was plain, it did not comport with the "policy of the legislation as a whole." [149]

In limited circumstances, even courts using the plain-language approach to statutory interpretation expand their inquiries beyond a statute's precise words by considering context in interpreting the statute when the words alone would cause it to be ambiguous or would produce an absurd result.[150] The Absurd Results Doctrine

an Act of Parliament must be collected from what it says when passed into a law; and not from the history of changes it underwent in the house where it took its rise. That history is not known to the other house, or to the Sovereign." (citing Millar, 4 Burr. at 2332, 98 Eng. Rep. at 217)); s*ee also* Sutherland Statutory Construction 46.1, for an overview of the rule, along with references.

144. See John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2456 (2003) [hereinafter Manning, *Absurdity Doctrine*] ("In contrast with their literalist predecessors in the 'plain meaning' school, modern textualists reject the idea that interpretation can occur within the four corners of a statute." (quoting White v. U.S., 191 U.S. 545, 551 (1903)).

145. United States v. Missouri Pac. R.R., 278 U.S. 269, 278 (1929).

146. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term,* 68 Iowa L. Rev. 195, 197–98 (1983) (While the words "'plain meaning' linger[] on in Court opinions, . . . its spirit is gone.").

147. Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944).

148. 310 U.S. 534 (1940).

149. *Id.* at 543–45 (citation omitted).

150. *See* D. Wiley Barker, *The Absurd Results Doctrine, Chevron, and Climate Change*, 26 BYU J. PUB. L. 73 (2012). In Immigration and Naturalization Service v. Carlos-Fonseca, the revered textualist, Justice Antonin Scalia, invoked this exception to strict construction when by refusing to consider legislative history, the result would have been absurd. In Carlos-Fonseca, where the Court determined the standard governing an asylum applicant's proof that they had a well-founded fear of future persecution if deported to their native country, Justice Scalia, in concurring, lamented the majority's general reliance on legislative history, but he did acknowledge its importance when, as in this case, the language contained "a patent absurdity." 480 U.S. 421, 452 (1987). In 1989, Justice Scalia approved of the use of legislative history in Green v. Bok Laundry Machine Co., where, had a federal rule of evidence been read literally, an absurd result would have resulted. Justice Scalia noted that use of that history would only have confirmed that the absurd result the statute caused was *not* contemplated by Congress. 109 S. Ct. 1981, 1994 (1989) (Scalia, J., concurring). One might note that in Green, Justice Scalia refers not only to the general use of legislative history, but also to its use to infer Congress's "contemplation," *aka* intent. *See* Sutherland, Statutory Construction 46.1, (exemplifying statutes that, if read literally, would result in ambiguities or absurdities). A few examples where federal and state statutes that, if read literally, would result in ambiguities or absurdities include the following:

FEDERAL COURTS:

> Crooks v. Harrelson*,* 282 U.S. 55, 60 (1930) (concluding that courts may depart from a statute's literal meaning in cases of gross absurdity and contrary Congressional intent); *see also* Watt v. Alaska*,* 451 U.S. 259,

dictates that courts should interpret statutes according to clear legislative intent if enforcing the statute's plain meaning would produce absurd results.

United States v. Public Utilities Commission[151] addressed this issue when it determined California's authority to regulate electricity sales by a California company to a Nevada county and the U.S. Navy. The company delivered electricity to California, from where its buyers transmitted it to Nevada for use and resale..[152] While the State Commission and California Supreme Court upheld the State's authority, the U.S. Supreme Court reversed and held, *inter alia*, that the Federal Power Commission had jurisdiction to regulate the rates.[153]

The Court stated the obvious when it said, "[w]here the language and purpose of the questioned statute is clear, courts, of course, follow the legislative direction in interpretation. Where the words are ambiguous, the judiciary may properly use the

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266 (1981); Heppner v. Alyeska Pipeline Serv. Co., 665 F.2d 868 (9th Cir. 1981) (finding that where a congressional decision produces unexpected absurd results arising out of failure to trace the effects of legislation in cases in which Congress intended statute to apply, absurdity must normally be allowed to stand; but, if absurdity results from drafting error occurring when Congress, for example, uses more sweeping language than it would if it were made aware of situations outside the scope of its purpose to which language might be misunderstood to apply, a court may correct the mistake by interpretation if it is able to infer Congress's intent).

STATE COURTS:

In re Stockwell, 210 A.D. 753, 206 N.Y.S. 834 (App. Div. 1924) (concluding that statutes must be construed to give effect to evident intention of Legislature, and to prevent inconsistency, unreasonableness, or unconstitutionality, it is permissible to ignore mere letter of statute and even disregard or supply words obviously inserted or omitted by mistake); Catholic Soc. Servs., Inc. v. Meese, 664 F. Supp. 1378 (E.D.C.A.. 1987) (finding that if ambiguity in statute remains after application of the plain meaning rule and examination of the legislative history, a court may resort to other textual means of construction, including extrinsic aids, so long as extrinsic information does not create an ambiguity either not inherent in the statute's language or that does not result from reviewing the legislative history); Progressive Nw. Ins. Co. v. Weed Warrior Servs., 245 P.3d 1209 (N.M. 2010) (stating that courts do not depart from the plain language of a statute unless they must resolve an ambiguity, correct a mistake or absurdity, or deal with a conflict between different statutory provisions).

To be sure, the absurdity doctrine has its detractors. See, for example, Justice Gorsuch's opinion, while on the Tenth Circuit Court of Appeals, in Lexington Insurance Co. v. Precision Drilling Co., involving an insurance company's claim that it was not obliged under a liability policy to indemnify an oil rig owner for money it paid to settle a worker's personal injury claim. Subsequent to the lower court's dismissal, the Court of Appeals reversed and remanded the case. Judge Gorsuch concluded that the drilling company was speculating about the legislature's intention, citing Holy Trinity in a censorious manner: "at one time some thought a court could override even unambiguous statutory texts like the one before us in order to avoid putatively absurd consequences" but, "this court some years ago all but rejected at least this particular form of the absurdity doctrine." 830 F.3d 1219, 1222 (10th Cir. 2016).

When traditionalists do extend their inquiry beyond a statute's language, evidence is evaluated as to its relevance, competence, and probative value to determine its admissibility. R. Dickerson, The Interpretation and Application of Statutes, 140 (1975). However, statements gleaned from committee reports are often disfavored, as they are often viewed as partisan and one-sided. *See* Costello, Sources of Legislative History as Aides to Statutory Construction, CRS Report for Congress (Jan. 27, 1990); see also Kenneth W. Starr, *Observations about the Use of Legislative History,* 1987 Duke L.J. 371, 375.

151. United States v. Pub. Util. Comm'n of Cal. 345 U.S. 295, 315-16 (1953).

152. *Id.* at 297-99.

153. *Id.* at 318.

legislative history to reach a conclusion. And that method of determining congressional purpose is likewise applicable when the literal words would bring about an end completely at variance with the purpose of the statute."[154] With those words, the Court determined that the purpose of the statute did not support a ruling against the Federal Power commission's authority to regulate these types of transactions. . The Court adjudged that neither the legislative aim nor the realities of coordinated rate regulation compelled such a decision.[155]

Even Justice Antonin Scalia, a noted textualist,[156] expanded the scope of materials determined relevant to ascertain a statute's meaning. *Green v. Bok Laundry Machine Company* involved the interpretation of a Federal Rule of Evidence that would have produced an absurd result if it were read literally. [157] Justice Scalia employed facts from a legislation's history to confirm congressional intention.[158] More recently, Justice Clarence Thomas, also partial to textualism, trusted "background principles" and congressional intent in affirming a denial of attorney's fees in a successful civil rights challenge to Oklahoma taxes that violated the "dormant" Commerce Clause.[159] His assertion there that "we found no evidence that Congress intended section 1983 to overturn the principle of federalism invoked in *Dows* and . . . followed by the courts[,]"[160] signaled his respect for the principles of Congressional intent in legislating.

Justice Thomas again applied context and background principles in another case in 2015.[161] In *Direct Marketing Association v. Brohl*, an association of retailers sued the Executive Director of the Colorado Department of Revenue, challenging the constitutionality of the notice and reporting requirements on retailers who did not collect sales taxes from Colorado purchasers. The Department appealed the District Court's grant of summary judgment to the Association and of an injunction against enforcement of the requirements, as they violated the Commerce Clause[162] The Court of Appeals for the Tenth Circuit remanded the case with instruction to dismiss it for lack of jurisdiction.[163] The Supreme Court reversed and remanded in an opinion penned by Justice Thomas, who allowed the case to proceed.[164] When the meaning of a particular statutory word was ambiguous, Justice Thomas looked to the overall context in which the word was used, discerning the meaning from the law dictionary and other sections of the statute in which the word appeared. According to the Justice, this process "provide[s] several clues that lead us to conclude" the precise meaning.[165] Here again, a noted textualist employed a broad array of contextual clues to ascertain the meaning of a key word used in a statute.

The absurdity doctrine, which "comes into play only after a court

154. *Id.* at 315 (citations omitted).
155. *Id.* at 316.
156. See Green v. Bok Laundry Mach. Co., 409 U.S. 504, 528 (1989) (Scalia, J. concurring)..
157. 114 U.S. 2351 (1995).
158. *Id.*
159. Nat'l Priv. Truck Council, Inc. v. Okla. Tax Comm'n, 515 U.S. 582, 584, 592 (1995).
160. *Id.* at 590 (citation omitted).
161. See Direct Mktg. Ass'n v. Brohl, 575 U.S. 1, 8 (2015).
162. Id. at 6-7.
163. *Id.* at 7.
164. *Id.* at 16.
165. *Id.* at 13

provisionally identifies the statute's clear social meaning,"[166] offers courts a profound tool whose use can negate a clear statutory command that nonetheless portends absurd results.[167] Rather than categorizing these statutes as absurd, some courts characterize their corrections as mere revisions.[168]

While traditionally textualists preferred that judges avoid appealing to context "to contradict a plain text,"[169] as is evident today, both modern textualists and purposivists do consider context to help ascribe statutory meaning.[170] These modern textualists generally acknowledge the need to consider context when "interpretive dissonance" arises, when a statute's plain text appears discordant with what one would expect reasonable legislators to have directed.[171] In these cases, textualists acknowledge that logic requires "a consideration of context to determine whether a text really does plainly mean what at first blush it appears to mean."[172] Today's textualists give primacy to the "semantic context"[173] of statutory language while purposivists prefer to focus on the policy context.[174]

Textualists worry that judges might impose their own values onto statutes if they employ a more contemporary, holistic-like approach to statutory interpretation. This, they fear, could lead to the uneven application of statutes throughout the country. While this could occur if various circuit courts rule on this statute's meaning and generate competing holdings, one should not fear that result.. To be sure, this could be a natural byproduct of using outside sources to glean a statute's meaning when plain language alone leads to an absurd result. However, this is not an aberration, but rather a result inherent in the form of government established in and by the United States Constitution. Article III establishes the federal court system, Article VI's Supremacy Clause specifies that the Constitution and the federal laws enacted under its authority are the supreme law of the land, and the case of *Marbury v. Madiso*n and its progeny reinforce the Supreme Court's role as the arbiter of what is and what is not

166. Manning, *supra* note 145, at 2471.

167. *Id.* at 2444.

168. *See* Fallon, *supra* note 126, at 690 n.29. When the legislature makes an obvious error in drafting a statute, the courts are likely to construe the statute as though the error had not occurred. See Cabell v. Markham, 148 F.2d 737 (2d Cir. 1945), which disregarded an otherwise unnoticed time limit in the Trading with the Enemy Act for settling claims against the U.S.; payment would otherwise have been denied for claims arising after 1917, denying World War II-based claims; see also, Ex Parte Copeland, 91 S.W.2d 700 (1936), for an affirmation ofan incest conviction notwithstanding that a 1925 revision of the Penal Code provided that any article omitted from the revision was repealed when the sections making fornication, incest, etc. crimes were inadvertently omitted).

See also Watt v. Alaska, 451 U.S. 259 (1981), for a discussion that while the starting point in statutory construction is the language itself, ascertaining meaning from the face of a statute need not end the inquiry, as the plain meaning rule is an axiom of experience as opposed to a rule of law and does not preclude consideration of persuasive evidence if it exists, such as the circumstances of enactment, which could persuade a court that Congress did not intend words of common understanding to have their literal effect.

169. Fallon, *supra* note 126, at 702-03 n. 29 (citing Scalia, A Matter of Interpretation, *supra* note 116, at 16 ("When the text of a statute is clear, that is the end of the matter."))

170. Manning, *What Divides Textualists?, supra* note 141, at 90-91.

171. Fallon, *supra* note 126, at 700.

172. Id.at 703.

173. Manning, *What Divides Textualists?*, *supra* note 141, at 91; *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts, 16 (West 2012).

174. Purposivists seek "evidence that goes to the way a reasonable person conversant with the circumstances underlying enactment would suppress the mischief and advance the remedy." Manning, *What Divides Textualists?*, *supra* note 141, at 91.

constitutional.[175] This is how the U.S. system, created by the Constitution, operates.

3. The Plain Language Aproach

Under the Plain Language approach, there is surely a scenario in which a purely strict, literal reading of the provision's words would maintain the two-parent ban, notwithstanding. that this absurd result would contradict the legislature's clear goal to ease the burdens suffered by SIJ recipients. Nonetheless, even within the confines of this approach, the proper meaning of the 2008 Amendment can be fairly deduced. This is because the changes made in the SIJ provision's language between1990 and 2008 force one of the following two conclusions. The first is that the legislature erred (by omission? ignorance?) in drafting the 2008 Amendment when it reduced the SIJ proof requirements yet neglected to amend the two-parent ban.[176] Thus, a statutory *revision* is necessary to substitute the words in the provision with words that mean what Congress meant. The second conclusion is that a literal interpretation would produce an absurd result, so courts must read into the provision a meaning that avoids the absurdity.

a. Revising for Error or Absurdity

As is evident, even under the Plain Language approach, this SIJ provision can be revised or corrected based on legislative error. A simple mistake in the drafting can be addressed by a statutory revision, replacing the wording of the two-parent ban with words that mean what Congress meant. Even from a textualist perspective, where context is sought only to clarify an ambiguity, it is likely that this Amendment would be considered internally contradictory, confusing, and/or ambiguous. As such, a court may derive context from the statute's legislative history to determine what the provision means and what it should say.

Further along the spectrum, yet still falling under the Plain Language approach, courts would need to address the absurdity in the statute.[177] Here, a literal interpretation would produce an absurd result that could be ameliorated by looking to the context of legislative history. During this review, the courts would likely conclude that the Amendment was merely "half baked," as the goal of easing conditions for SIJs by reducing the proof required to obtain special findings was obviated when the law retained the two-parent ban. This caused an absurd result.

Given that a literal interpretation would result in the absurdity that non-abusing parents would be barred from reuniting with their children, even textualists, who consider contextual information when a statute is internally contradictory and confusing, would welcome legislative history that would clarify the law.

To be sure, a court influenced by the purposivist view of statutory construction, seeking laws that further the policy being promoted by reasonable people

175. U.S. Const. art. VI, cl. 2; Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); *see also* John Locke, Second Treatise of Government (1690); Pauline Maier, Ratification: Americans Debate the Constitution, 1787-88 (Simon & Schuster 2010); Laurence H. Tribe, American Constitutional Law (3d ed. 2000). John E. Nowak & Ronald D. Rotunda, Constitutional Law (hornbook series) (West 8th ed. 2009).

176. *See supra* Part II.

177. *See supra* Part III.C.

conversant with the situation,[178] would surely consult legislative history to glean and foster the purpose of this provision.

While the plain meaning of this provision likely expressed Congress's intent in 1990 when enacted—preventing abusive parents from gaining U.S. immigration status through their children's' SIJ status—that meaning became largely irrelevant when the 2008 Amendments explicitly expressed Congress's intention to *ease* the hardships these children were facing in the U.S. Unambiguous language may not remain unambiguous when context changes. This occurred between 1990 and 2008, when Congress expressed its goal that the Amendments ease the SIJ recipients' situations, rather than to maintain their hardships. Further, while it is true that undefined statutory terms are normally assigned their ordinary and obvious meaning,[179] one cannot confidently lay claim to a static meaning when, as here, nearly 20 years passed between two enactments. Here, the ameliorative motivation of Congress in 2008 contravened the ordinary and obvious meaning of the statute's words.

To further the motivation of Congress when it enacted the 2008 Amendment, the judiciary should construe this provision to avoid Substantive Due Process and Equal Protection concerns raised by a strict, literal interpretation.[180] Judicial interpretation of this provision will not usurp the policymaking or legislative functions of Congress; on the contrary, it will foster the statutory purpose. The detriment to Congress would be interpreting this provision literally, as that would continue barring both parents from receiving immigration benefits from their child's SIJ status.

Further, what happened in 2008, the *legislative* history, is key here. It should not be overlooked. The two-parent ban was not addressed in 2008, causing the Amendment to truly constitute an *incomplete* law. The literal interpretation of the 1990 SIJ provision held true to Congress' intention. However, the same literal interpretation after 2008 actually subverts Congress' previous beneficial and expressed intentions.[181] That the Amendment delivered on Congress' promise to ease the burdens on these youngsters by reducing the proof requirement from abuse by both to abuse by one or both parent demonstrates the paucity for any rationale for continuing to impose on SIJ recipients the draconian measure of this provision. which only makes their lives worse.

D. Courts Employing Rational Legislating In Comparable Situations

1. Mistake of Omission Ignored to Preserve A Statute

Long ago, a court found a way of the conundrum today's courts are headed for on this SIJ issue. In 1890, this court chose to *ignore* a statute's plain meaning when its language thwarted clearly stated and legitimate purpose. In doing this, and to do it

178. *See supra* Part III.C.

179. Immigr. and Naturalization Serv.. v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987).

180. The Substantive Due Process and Equal Protection issues raised by the 2008 Amendment will be addressed in a subsequent piece.

181. See Heckler v. Mathews*, supra* note 131, for statements legislators made during the process of enacting the 2008 amendments as well as additional ameliorative changes made that confirm the accident of maintaining the two-parent ban; *see supra* note 55, at 3. An alternative literal reading of this provision that is plausible is that it prevents the *parent* from receiving benefits from the SIJ grant, while not affecting the benefits to be realized by the naturalized SIJ, one of which is to sponsor her parent for a U.S. visa. *See supra* note 40.

in a case that involved immigrants, the court corrected Congressional drafting errors. Justice Brandeis wisely suggested the Court did so without ruling the statute was unconstitutional. In *In re Chung Toy Ho and Wong Choy Sin* ("Ho"), the District Court of Oregon[182] enforced *not* the statute's actual language, but it's clear and intended purpose. The court held that a Chinese immigrant worker's wife and son could enter the country, notwithstanding that their admission was expressly prohibited by the Act's language. In doing so, the Court affirmed the principle of family unity in immigration law.[183]

Ho, who had been living in Portland, Oregon, visited China to return with his wife and child. But, under section 6 of the Act of July 5, 1884, Chinese leaving the U.S. needed a re-admission certificate.[184] While Ho did have the required certificate, his wife and child did not; they were all detained on the ship attempting to enter the U.S. As the court held that family reunification was a "natural right," it recognized the family's entry as an extension of the right to family unity, stating:

> "[U]nder the treaty and the statute, . . . a Chinese merchant who is entitled to come into and dwell in the United States is thereby entitled to bring with him, and have with him, his wife and children. *The company of the one, and the care and custody of the other, are his by natural right; and he ought not to be deprived of either, unless the intention of congress to do so is clear and unmistakable."*[185]

The court acknowledged that the authorities attempting to exclude Ho's family were acting according to the statutory language, as they qualified as "Chinese persons." The statutory purpose was affirmed by the Court, stating, "[t]he manifest purpose of this legislation is to exclude Chinese laborers from coming or returning to the United States" but "[t]he admission of the petitioners is not within the mischief that the exclusion act was intended to remedy."

In the court's judgment, as Ho's wife and child were not workers, they were "not the 'persons' contemplated . . . in the passage of the act."[186]

The Court cited an additional rationale allowing it to permit the family members' entry: the statute permitted merchants' servants to enter, even though they were workers.

> "It is impossible to believe that parties to this treaty, which permits the servants of a merchant to enter the country with him, ever contemplated the exclusion of his wife and children. And the reason why they are not expressly mentioned, as entitled to such admission, is found in the fact that the domicile of the wife and children is that

182. In re Chung Toy Ho, 42 F. 398, [](D. Or. 1890). Section 6 of the act of July 5, 1884 (23 Stat. 116) provided that "a certain certification is required for the admission into the United States of "every Chinese person," other than a laborer, who may be entitled by said treaty to such admission." *Id.* at 398-400.

183. See Matter of B, 9 I. & N. Dec. 46, 48 (B.I.A. 1960), for the import of family unity in American law, particularly immigration law. This is also a topic for future exploration.

184. *Ho,* 42 F. at 398.

185. *Id*. at 400 (emphasis added).

186. *Id.* at 399. *ee also Tsoi Sim v. U.S.,* 116 F. 920 (9th Cir. 1902) (affirming the principle in Ho)

> of the husband and father, and that the concession to the merchant of the right to enter the United States, and dwell therein at pleasure, fairly construed, does include his wife and minor children. . ."[187]

Determining that Ho's wife and child were being illegally restrained, the Court ordered them released from custody.[188]

The inspiration from this case should be instructive in the SIJ situation this article scrutinizes. The beauty of Tong Choy Ho when viewed with an eye toward the questions raised in this article is that, while Ho's wife and child were specifically "excludable" under the statutory language, the intent was to exclude Chinese laborers, not their family members.[189] The court nonetheless determined that their exclusion would have breached both congressional intention and Ho's 'natural right. In the same way that the Court refused to exclude Ho's family without clearly expressed congressional intent to do that, courts could decline to enforce section 101(a)(27)(J)(iii)(II) if it is not corrected. There is no evidence from the occasion of the 2008 enactment that Congress intended to exclude an SIJ's innocent parent from receiving immigration benefits through her. [190]There have been unproven insinuations that parents have falsified abuse claims to help their children gain SIJ status so the parents could eventually benefit[191] Prior to the 2008 Amendment, when proof of abuse by both parents was removed, exclusion of both parents could be defended as sensible. Since then though, as actions of only *one* parent suffice to support an SIJ finding, the two-parent exclusion has become nonsensical. A court interpreting Congress' intent today would find no justification for the apparent error, inadvertent as it may have been, to the original statute, which excluded *both* parents from reaping benefits related to a child's SIJ status.

Like *Ho,* there is no clear, unmistakable Congressional intent supporting the SIJ ban against an innocent parent.[192] Further, like *Ho,* this provision is contrary to a SIJ-USC's "natural right" to reunite with her innocent parent in her new home country. Under no constitutionally defensible theory should a newly naturalized USC, on whose behalf parental rights were not terminated,[193] be unable to sponsor the immigration of

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187. Ho, 42 F. at 399-400.

188. Id.

189. *Id*.

190. *See supra*, Part II.

191. *See SCHARF, supra* note 17. It is a fact that anti-immigrant bias was stalking immigrants, even in 2007, leading up to this Amendment. The following quote from the Congressional record demonstrates it: "When I reviewed the original bill, my goal was to modify certain provisions that I was concerned would encourage illegal immigration and immigration fraud and leave us vulnerable to dangerous juveniles." 153 Cong. Rec. H14087, H14122 (2007).

For more on false assumptions of conduct in family settings, s*ee* Ruth Perrin, Overcoming Biased Views of Gender and Victimhood in Custody Evaluations When Domestic Violence Is Alleged, 25 AMERICAN UNIVERSITY JOURNAL OF GENDER, SOCIAL POLICY, & THE LAW 155, 162 (2017) ("It is commonly alleged that women falsify reports of domestic violence to gain an advantage in custody and divorce proceedings, but evidence shows otherwise." False Reporting, NATIONAL SEXUAL VIOLENCE RESOURCE CENTER (2012)("Research shows that rates of false reporting are frequently inflated, in part because of inconsistent definitions and protocols, or a weak understanding of sexual assault.").

192. Beyond that argument is the suggestion that so-called offending parents could be considered eligible to obtain immigration benefits if the abuse was relatively *minor* in nature orwhere neglect results from poverty endemic in the region's current conditions—as in many of the Central American cases.. This argument, though, is not one I am making.

193. *See supra* at note 37; see also,INA § 101(a)(27)(J) (iii)(II);*supra*, note 38 (discussing the termination of rights).

a non-abusing parent**.**

2. Literal Interpretation Rejected In Inter-Country Adoptions

Comparisons between the U.S. inter-country adoption provision and the SIJ section in question illuminate a rationale supporting the *non-literal* interpretation of the SIJ statute . Since 1957, the adoption statute has barred parents of internationally adopted children from receiving immigration benefits: "no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter."[194]This proscription seems likely to have inspired the SIJ parental prohibition in 101(a)(27)(J) (iii)(II) as the language in the two provisions is nearly identical.[195] Legislative intent became key in determining the proper response when finalized adoptions were legally terminated and natural parents applied for immigration benefits based on their relationship to their newly-naturalized birth children.

Section 101(b)(1)(E) of the INA offered these adopted children eligibility for immigration benefits while restricting the immigration rights of their natural parents. Because the term "child" under existing law had not previously included internationally adopted children, the statute extended the definition to include certain adopted children.[196] After the statute added the language limiting the rights of natural parents subsequent to an adoption, the BIA had occasion to clarify the statute by reading the legislative history, which, it said, "evinces a clear congressional intent to prevent hardship in the case of a family with adopted children by according such children recognition for immigration purposes."[197] The BIA added that, in framing the statute, Congress had long been concerned "[t]hat the adoptive relationship could be used as a means to circumvent the immigration laws ."[198]

Cases interpreting the foreign adoption statute offer a constructive approach to the SIJ issue. First, the importance of maintaining family integrity, a touchstone of immigration law since the outset of U.S. immigration legislation[199] and a key to foreign

194. 8 U.S.C. § 1101(b)(1)(E)(i) (2018); INA. § 101(b)(1)(E).

195. *See* INA. § 101(a)(27)(J)(iii)(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." Unfortunately, neither at this phrase's original invocation in the 1957 INA inter-country adoption definition, nor in the SIJ statute, is it defined in the statute or case law. *See generally Matter of B,* 9 I. & N. Dec. 46, 48 (BIA 1960). USCIS has interpreted this phrase to have the most restrictive meaning. *See supra* note 32.

196. Id. at 48 These children were defined as "(E) a child adopted while under the age of fourteen years if the child . . . has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years."

197. *Id.* at 48-49.

198. For the same reason, the INA-based status of natural sibling-sibling relationships following adoption has experienced upheavals. *See Matter of Li*, 20 I. & N. Dec. 700, at n.3 (voiding the natural sibling relationship' under the INA as dependent on the statute's definition of parent and child). *Matter of Li* was then limited by *Gee v. INS*, which held that natural siblings of inter-country adoptions who naturalized remained siblings, thus could benefit under family based preference classification in 8 U.S.C. sec. 1153(a)(4). 875 F. Supp. 666, 672 (N.D. Cal. 1994). Subsequently, the Ninth Circuit reversed. *See Young v. Reno*, 114 F.3d 879 (9th Cir. 1997). *See* discussion at *infra* at note 212.

199. Family life and familial association are among the liberties protected by the Fifth Amendment of the Constitutions Due Process Clause, whether a U.S. citizen or not; there is a realm within family life that courts cannot pierce. *See Troxel v. Granville*, 530 U.S. 57, 72 (2000), and subsequent jurisprudence. These rights are not absolute and have produced differing case results, which are fact-

adoption jurisprudence, was influential in *Matter of B.* The question was whether children admitted to the United States via adoption by their U.S.- citizen aunt and uncle[200] should be deemed to have permanently severed legal connections to their natural parents, preventing these parents from later obtaining a family-based visa through their birth children.[201] Soon after the adoption, when their uncle became incapacitated and could no longer care for the children, the family applied to have the children reunited with their natural parents.[202] The government argued that the natural parent-child relationship ended upon the children's adoption and that reuniting the family would encourage use of the foreign adoption system to contravene the immigration system. The Board of Immigration Appeals, the administrative review board for immigration cases, was able to decide the case without squarely addressing the government's argument. Because petitioner exceeded 14 years of age, they did not meet the federal standard for adoptions recognized for immigration purposes.

Thus, the adoption conferred no immigration right between the parties.[203] The court avoided a direct response to the question as to whether the government could oppose family unity between natural parents and their children where all thought the children had been adopted pursuant to a foreign adoption. However, the case did confirm the significance of family integrity in the U.S. immigration system.

A subsequent foreign adoption case, *Gee v. I.N.S.*,[204] informs this statutory interpretation discussion because the inter-country adoption provision found at INA101(b)(1)(E), is strikingly similar to the SIJ provision in question. In *Gee,* the issue was whether natural siblings of an international adoptee could gain a family-based preference under the immigration statute. Noting a lack of direction from the statute,[205] the court opined that, because the law did not define brothers and sisters, the

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dependent. Thus, *Ms. L. v. U.S. Immigration and Customs Enforcement*, 2018 WL 2725736 (S.D. Cal. 2018), challenged the practice of separating parents and their children in immigration detention. Th court referred to Aguilar v. U.S. Immigration and Customs Enforcement Div. of Dept. of Homeland Sec which supported the defendants' argument that the plaintiffs' constitutional right to familial association was not implicated but involved a workplace raid, and so, was factually distinguishable*.,* 510 F.3d 1 (1st Cir. 2007).. Thereafter, the D.C. Circuit ruled that the mere fact that the mother was lawfully detained in immigration custody, after crossing the border illegally in an alleged attempt to escape gang violence in Guatemala, did not deny her due process right to family integrity or mean that the government could constitutionally separate her from her children. *Jacinto-Castanon de Nolasco v. U.S. Immigration and Customs Enforcement,* 2018 WL 3472624 (D.D.C. 2018).

On family law, as largely governed by states, "transcend[ing] the immigration system," *See* Rogerson, *Lack of Detained Parents' Access to the Family Justice System and the Unjust Severance of the Parent-Child Relationship,* 47 *Fam. LQ.* 141, 145 (Summer 2013).

200. *See Matter of B,* 9 I. & N. Dec. at 47. This occurred after the natural parents were deemed ineligible for displaced person admission. *Id.* at 46.

201. *See id.* at 46; SCHARF, *supra* note 2, at 602-03, nn. 136, 142.

202. *See Matter of B,* 9 I. & N. Dec. at 47.

203. *Id.*

204. 875 F. Supp. 666 (N.D. Cal. 1994).

205. 875 F.Supp. at 669. In rejecting Gee's reasoning, *Young v. Reno,*114 F.3d 879, 886 (9th Cir. 1997) said "[w]hile . . . congressional intent in adopting this provision was to preserve the family unit, there is no indication that this intention extended to natural siblings of adopted children." *Id.* at 886*.* The Court was convinced that, "[a]lthough Congress did not expressly address preferences for natural siblings, we must give full meaning to its clear intention to prevent natural parents from gaining benefits-regardless of whether the *Gee* court finds this possibility realistic. Thus, neither the plain language rule nor the failure by Congress to exclude preferences for natural siblings after adoption indicates that Congress clearly intended that the natural sibling relationship survive adoption for immigration purposes." *Id.* at 886.

Young v. Reno does not negate the analogy between *Gee* and the SIJ situation. Congressional intent in the adoption statute was clear: preserving the family unit. but, because there was no evidence that Congress

"'ordinary and obvious meaning of the phrase is not to be lightly discounted.'"[206] Citing to Webster's Third New International Dictionary's definition of brother as "a male human being considered in his relation to another person having the same parents or having one parent in common,"[207] the court found that "[t]he established meaning of 'brothers and sisters' includes natural brothers and sisters of adopted siblings."[208]

While *Gee* applied the plain meaning of the statute to conclude that natural siblings fit the definition of siblings, even following adoption by distinct families, its conclusion *supports* the suggestion made in this article concerning SIJs. Congress expressly precluded natural parents from gaining special status under the inter country adoptions statute, but did not exclude siblings.. Thus, "it is unreasonable to construe the statute to impliedly exclude them."[209] The court therefore concluded that Congress was not particularly concerned about the issue because a court can "look beyond the plain meaning of a statute only when clearly expressed legislative intent contradicts that language."[210] This is because Congress expressed no "clear intent other than . . . to provide a liberal treatment of [adopted] children, [t]he court is therefore bound by the plain meaning of the statute."[211]

Both *Gee's* facts, as well as the Court's analysis, inform the SIJ question at issue. As in *Gee,* the 2008 SIJ Amendment neither expressly precluded nor even mentioned the non-abusing parent in one-parent SIJ cases. As in *Gee,* in drafting the 2008 SIJ Amendment, Congress expressed little concern about non-abusing parents, yet it did approve a statute that contained a significant contradiction in the two-parent ban. . In accord with *Gee,* the statute should be interpreted to permit immigration of the non-abusing parent, which will offer these children the added support Congress intended.

A subsequent decision in *In re Li*[212] confirms the suggested resolution of the two-parent ban. In *Li,* the BIA declined "to find that the natural relationship between a parent and child is *irrevocably* severed . . . when a child is adopted through an adoption that satisfies the requirements of section 101(b)(1)(E), even if that adoption subsequently is lawfully terminated."[213] The decision is justified because a ruling which holds that "natural relationships never could be recognized again under any circumstances for immigration purposes following the legal termination of an adoption[214] would be unjust. WWhere there was neither fraud nor manipulation of the immigration laws,[215] The Court refused to permanently severed the parent-child

intended to extend benefits to natural siblings of adopted children, it declined extension of benefits to natural siblings—and, apparently, Congress considered the adoptive family to be a new 'family unit.'. On the contrary, the 2008 TVPRA's ameliorative statements and ease in its the requirements support an inference that Congress would have determined that the best interests of the children permit SIJ sponsorship of a non-abusing parent.

206. 875 F. Supp. at 671 (citing INS v. *Cardoza-Fonseca*, 480 U.S. at 431).

207. *Id.*

208. *Id*. While Webster's definition is only of brother, the court later said that "sister is similarly defined." *Id.*

209. *Id.*

210. *Id*.

211. *Id*. at 672. (citing *INS. v. Cardoza-Fonseca*, 480 U.S. 421, at 432 n. 12).

212. 21 I. & N. Dec. 13 (BIA 1995).

213. Id. at 16.

214. *Id*.

215. *Id.*

relationship, to avoid causing the child to "be rendered 'parentless' under the immigration laws."[216]

Similarly, a literal reading of the SIJ provision also effectively renders naturalized SIJs *parentless,* which cannot have been Congress's intent in 2008. The 2008 Amendments allowed a child to gain SIJs if abused by only one parent, implying that the other parent is neither abusive, neglectful, nor absent."[217] It is nonsensical to force that child to leave such a parent behind – essentially separating a family – or indirectly asking that parent to raise that child in the U.S. without legal documentation." This would clearly thwart "fundamental societal values"[218] and frustrate the best interests of these young people. [219]

a. Distinguishing SIJ from Inter-Country Adoptions

Comparisons between inter-country adoption and the SIJ statute support the conclusions made in this article. INA adoption regulations declare them to terminate the natural parent-child relationship[220] and, once finalized, "any right, privilege, or status of the natural parents under the Act is thereafter terminated."[221] Yet, the SIJ statute specifies no such termination of rights.[222] Nor does the statute express an intent to terminate these relationships or to create an inference that can be made to that effect, even regarding the abusing parent. *Simply put, there is no language to support a claim that SIJ terminates the natural parent-child relationship*. Consequently, unlike inter-country adoptions, it is illogical to ban a non-abusive parent from being a beneficiary of a naturalized SIJ's visa petition.

The fallacy of the notion that SIJ terminates the natural parent-child relationship is demonstrated by the three avenues of proof available to support Special Findings: proof of abuse, abandonment, or neglect.[223] Federal regulations on inter-

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216. *Id.* In re Li established criteria that, when met, could establish that a natural parent-child relationship can be recognized for immigration purposes following termination of an adoption. *Id.* at 17.

217. AHMED, *supra* note 30, at 159. (emphasis added).

218. *Id.*

219. *Id.* at 162.

220. "Adoption means the judicial or administrative act that establishes a permanent legal parent-child relationship between a minor and an adult who is not already the minor's legal parent and terminates the legal parent-child relationship between the adoptive child and any former parent(s)." 8 CFR § 204.301(6) (2020).

221. 20 I&N Dec. at 3.

222. *See* 8 U.S.C. § 1101(a)(27)(J)(iii)(II) (2018). In some SIJ cases, parents file affidavits or notices with state courts assenting to the appointment of a guardian or other protections for their children; these are not couched as "surrender of rights." An example of such permission, used in Massachusetts, entitled *Notarized Waiver and Consent to Petition for Guardianship of Minor* reads:

> I STATE THAT: I am the mother/father of the above-named minor. I acknowledge that a Petition for Guardianship of Minor requesting the appointment of NAME as guardian . . . has been or will be filed. I understand that if the court appoints a temporary guardian, False a permanent guardian, I may be required to pay child support if I otherwise have an obligation to do so under the law. By signing this document, I consent to this guardianship and waive my rights to notice of hearings as required by the statutes.

Commonwealth of Massachusetts, the Probate and Family Court, form MPC 440 (5/30/11).

223. 8 U.S.C. § 1101(a)(27)(J)(iii)(II). While federal law contains definitions of abuse and abandonment in the Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (Nov 19, 1997), the SIJ statute refers to the state juvenile courts and to state law to make these determinations.

country adoptions define abandonment[224] and could inform SIJ cases. As neither abuse nor neglect are defined therein, state courts attach their own meanings to these terms. The federal regulations on abandonment refer to "surrender" or "forsaking" the rights to the child.[225] The statutes and cases addressing abuse and neglect nationwide[226] generally define abuse as willfully inflicting injury, unreasonable confinement, punishment resulting in physical harm, pain, emotional harm or intimidation, in verbal or physical form.[227] Neglect consists of failing to provide for a child's physical, educational, psychological, or medical needs.[228]

There is no support for a claim that the SIJ definition of abandonment, arising from a "surrender" or "forsaking" of rights, is analogous to that of the adoption statute's severance of the natural parent-child relationship. First, the two definitions are similar, yet not exactly the same.Second, abuse and neglect provide two additional avenues for a child to prove SIJ eligibility, neither of which terminates the parent-child relationship. Further, the SIJ process neither requires nor involves surrender, when parents consent to the Special Findings made by state courts—a common occurrence in SIJ cases.[229] Thus, claims that, as with inter-country adoptions, a SIJ grant terminates the natural parent-child relationship are fallacious.

Congressional concerns about potential abuse of the foreign adoption system are not comparable to the SIJ issue. In fact, *Matter of B* negated this unease to the benefit of adopted children, the intended beneficiaries of the adoption statute;[230] courts should act in a similar manner regarding SIJs. The adoption statute reflects fears expressed by the legacy INS[231] that natural parents of international adoptees would attempt to abuse the system. The BIA saw through this objection, as should courts in SIJ cases. The claim that some parents are trying to "game the system" by encouraging their children to enter the U.S., attain SIJ status, and then use that status to help *them* immigrate is essentially unproven, cited by only one court.[232]

The Third Circuit used this theory in *Yebodah v. U.S. Department of Justice.* In that case, the court upheld an SIJ denial based on failure

to prove parental abandonment, abuse, or neglect. The government argued

224. 8 CFR § 204.301 (2020) (emphasis added). **(**Abandonment requires "(1) That a child's parent has willfully forsaken all parental rights, obligations, and claims to the child, as well as all custody of the child without intending to transfer, or without transferring these right to any specific individual(s) or entity. (2) The child's parent must have *actually* surrendered such rights, obligations, claims, control, and possessionFalse").

225. *Id.*

226. S*ee Definition of Child Abuse*, Child Welfare Info. Gateway (March 2019), https://www.childwelfare.gov/pubPDFs/define.pdf (providing a state-by-state guide to these definitions).

227. For an example, *see* Mass. Gen. Laws ch. 111 § 72F (2019). Rhode Island maintains a unified definition of "abused or neglected child," at 40. R.I. Gen. Laws Ann. § 40-11-2 (West 2018) , extending to infliction (or allowing to be inflicted) of excessive corporal punishment that creates a risk of physical or mental injury; sexual abuse; denial of adequate food, clothing, shelter, or medical care; inadequate supervision; or sexual exploitation. ++

228. E.g.,Child Neglect, FINDLAW, https://criminal.findlaw.com/criminal-charges/child-neglect.html (last visited Aug. 16, 2019).

229. SIJ regulations are silent on this issue. *See* 8 C.F.R. § 204.11 (2020); *see also supra* note 31 (demonstrating more on the lack of post-2008 regulations).

230. *Matter of B*, 9 I & N. Dec. 46, 48 (B.I.A. 1960)

231. The term *legacy INS* refers to the Immigration and Naturalization Service, abolished on March 1, 2003, upon the creation of the Department of Homeland Security.

232. Yebodah v. U.S. Dept. of Justice, 345 F.3d 216 (3d Cir. 2003).

that the child's entry was part of the father's plan to send him to the U.S. so the father could obtain permanent residence.[233] Apparently, this argument worked because the court held that the 1997 amendments were intended to "close loopholes in the SIJ process by denying [status] . . . to juvenile aliens who seek it primarily to obtain permanent residence when . . . the parents . . . are attempting to manipulate the system. . . . It is the parents of such children whom we want to deter from future efforts to subvert the SIJ process; the children are innocent pawns."[234] In the nearly 30 years since the enactment of the Special Immigrant Juvenile provision, no other opinion has adopted the questionable theory that parents are trying to abuse the SIJ process. Courts should reject this argument when it comes to a non-abusing parent, as did the BIA in *Matter of B*. Significantly, the Ninth Circuit, in *C.J.L.G. v. Barr*, recently affirmed that "a conclusion that a proceeding is primarily motivated by a desire to secure SIJ findings is not a ground for declining to issue the findings."[235]

Just as a state court may not consider a child's motives for immigrating in a special immigrant juvenile case, it is similarly barred from considering the child's motives in their parents' proceedings.

"A state court's role in the SIJ process is not to determine worthy candidates for citizenship, but simply to identify abused, neglected, or abandoned alien children under its jurisdiction who cannot reunify with a parent or be safely returned in their best interests to their home country." [236]

As a California Superior Court stated:

> Nor . . . does such a 'primary motivation' qualification appear in either the federal statute governing the SIJ classification or its implementing regulations. As a practical matter, such a requirement would foreclose a considerable number of children from securing the state court findings necessary to apply for immigration relief, even though they meet the stated statutory criteria.[237]

Matter of B affirms the continuing importance of legislative history in discerning statutory meaning where the meaning is either missing or nonsensical.[238] In SIJ cases, where the relevant limiting language mirrors that in the adoption statute, courts have applied a generous interpretation of the limiting language in the adoption statute, and they should apply the same generous interpretation to SIJ cases interpreting the ameliorative intent of INA section 101(a)(27)(J)(iii)(II).

Barring an SIJ's non-abusing parent from receiving benefits contradicts both the legislative history and the expressed congressional intent of the SIJ statute. There is no evidence in the reports of either the Conference Committee or related hearings except the unproven fears of one Senator supporting a claim that these children were

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233. *Id.* at 224.

234. *Id*.

235. 923 F.3d at 643 (citing Bianka M. v. Super. Ct., 5 Cal. 5th 1004, (2018)).

236. Bianka M. v. Super. Ct. of L.A. Cty., 423 P.3d 334, 346 (Cal. 2018) (citing Leslie H. v. Super. Ct. of Orange Cty. 224 Cal. App. 4th 340, 351, 168 Cal. Rptr. 3d 729 (2014))

237. *Id*. .

238. Matter of B, 9 I. & N. Dec. at 48-49 (explaining that "[t]he legislative history . . . evinces a clear congressional intent to prevent hardship in the case of a family with adopted children by according such children recognition for immigration purposes" and that "adequate safeguards were included in the new legislation to prevent [natural parent] abuses in adoption cases, such as . . . fraudulent adoptions made for the purpose of circumventing the immigration laws")

sent to the U.S. by their parents to manipulate the immigration system for the parents' eventual benefit.[239] When Congress eased the proof requirements eighteen years after the original SIJ legislation, it failed to simultaneously change the language of 101(a)(27(J)(iii)(II). This was clearly and oversight and should not unfairly prejudice naturalized SIJs."

3. Rejection Of Plain Meaning In Pregnant Immigrant Medicaid Case

While the "plain language" of INA section 101(a)(27)(iii)(II) states that natural parents are not to benefit from their children's SIJ status, given the changes made in 2008, a reading of this provision must proceed beyond the superficial. It is true that the plain language of a statute generally controls its ultimate interpretation, but a non-literal reading is more appropriate in some circumstances.

The *Lewis v. Grinker* line of cases began in 1979, offers a prime example of such an instance.[240] In this litigation, plaintiffs, pregnant immigrant mothers lacking U.S. immigration status, sought a ruling that the Welfare Reform Act (hereinafter WRA) unconstitutionally denied them prenatal care. Ultimately their challenge was unsuccessful relative to the mothers, but it succeeded as to their U.S. citizen children.[241]

Nonetheless, the case offers a lesson in statutory interpretation that can inure to the benefit of SIJs[242] because, while an early decision in the series of cases found that Congress had not meant to deprive pregnant mothers of prenatal care, a later decision held to the contrary, that Congress had intended to do just that. The Second Circuit affirmed an injunction in 1992, concluding that generally "a reviewing court's analysis of congressional intent must end where the plain language of the statute is clear and unambiguous."[243] The WRA involved one of those "rare and exceptional' circumstances where legislative intent and purpose should prevail over clear statutory text."[244] The Circuit Court reasoned that the evidence of " congressional inattention,"[245] causing this to be "a special case"[246] in which the law's "unexpected result . . . ran counter to the clear purpose of the statute: to make government more cost-effective."[247]

239. For more on these claims, and counterclaims, see *supra* notes 17, 30 & 35. That this anticipated benefit would be reaped so far into the future adds to the discredit of this argument. Given statutory and systemic delays, which are only increasing, the parents would not reap the anticipated benefit, in the best of circumstances, for at least a decade and likely more (at least three years to receive SIJ and get LPR status, then five years from that to apply to naturalize, then waiting for naturalization).

240. Lewis v. Grinker (Lewis III), 111 F. Supp. 2d 142, 147 n.7 (E.D.N.Y. 2000). *See also* Lewis v. Grinker (*Lewis I*), 794 F. Supp. 1193 (E.D.N.Y. 1991) (permanently enjoining enforcement of the Act against Medicaid-eligible pregnant women).

241. Lewis v. Thompson, 252 F.3d 567 (2d Cir. 2001).

242. Id.

243. Lewis v. Grinker (*Lewis II*), 965 F.2d 1206, 1215, 1221 (2d Cir. 1992).

244. Thompson, 252 F.3d at 577 (quoting Lewis II, 965 F.2d at 1222) and 965 F.2d at 1221-22 .

245. *Id*. at 576 (citing Lewis II, 965 F.2d at 1216-18).

246. *Id*.

247. *Id*. The Court did hold that the statute raised equal protection concerns, but only as to the U.S. citizen children, as it made their medicaid eligibility depend solely on whether their mothers were citizens. *Id*. at 576-77 (citing *Lewis II*, 965 F.2d at 1217-18); see also Lewis III, 111 F. Supp. 2d 142, 155

The statute raised equal protection concerns, as it made the Medicaid eligibility of U.S. citizen children depend solely on whether their mothers were citizens. Further, because this "broad statutory prohibition" led to "unforeseen results contrary to the purpose of the prohibition, the courts may . . . recognize an exception. . . to further Congress' purpose."[248] In 2001 the Second Circuit reversed the earlier ruling,maintaining the injunction mandating prenatal Medicaid assistance and affirming the requirement that the government "make automatic eligibility for Medicaid coverage available to the citizen children of the plaintiff class upon their birth, on terms as favorable as those available to the children of citizen mothers. . . ."[249]

These courts justified reinterpreting the Medicaid Act because its 'unparalleled complexity' had prevented Congress from foreseeing its impact on 'future citizens.'"[250] Essentially, Congress had been confused. Curiously, while the 1992 Second Circuit case did not find that Congress initially appreciated the effects the WRA would have on prenatal care, the legislative history available later on, in 2000, demonstrated that Congress did appreciate and intend the statute's effects.[251] The Court found it unlikely that twice in ten years, concerning two different portions of a comprehensive statute, Congress would coincidentally arrive at the same result.[252] To be sure, courts are loathe to permit an unexpected result "when there is strong reason to doubt that Congress intended that result."[253] In this case, however, the Court determined that "Congress fully realized the effects of WRA's plain language," so applied the wording of the statute itself.[254]

The extensive history of this Medicaid litigation informs the current SIJ discussion. It highlights the difficulties the judiciary can cause when it assumes that members of Congress have thoughtfully considered the range of implications of their legislative decisions. In the SIJ statute we find two ways in which, similarly to the *Lewis* cases, 'congressional inattention' fostered contradictions between the plain language of the statute and congressional intent.[255] First, the 2008 Amendment was so far from the minds of the legislators that it was not even mentioned during the Congressional proceedings leading up to it.

Second, the provision caused an "unexpected result [running] counter to the clear purpose of the statute,"[256] which was to ameliorate conditions for these youthful victims.

(E.D.N.Y. 2000) . For more on the principle of family unity as a fundamental organizing principle of U.S. immigration law, see *supra* note 207.

248. Lewis III, 111 F. Supp. 2d at 155-56 (citing Lewis II, 965 F.2d at 1215).

249. Reversal was due to the new evidence that demonstrated congressional intent to deprive the mothers of routine prenatal care. It was a ruling that technically benefitted the citizen children, not their mothers. *See id*. *Lewis IV*, 252 F.3d at 592.

250. Lewis II, 965 F.2d 1206, 1219 (2d Cir. 1992).

251. *See* Lewis III, 111 F. Supp. 2d 142, 163.

252. The WRA did not carve out an exception permitting undocumented pregnant mothers access to prenatal care. To support this argument, the federal defendant cited aspects of the House bill and Conference Committee Report from the 1996 legislation, confirming Congress's failure to make an exception to the prenatal care exclusions. H.R. Rep. No. 104-725, at 874-75 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 2649, 2767–68. *See* Grinker III, 111 F. Supp. 2d at 157-58.

253. Lewis II, 965 F.2d at 1215.

254. Lewis III, 111 F. Supp. 2d at 156, 163.

255. *Id.* at 576

256. Id.

At first glance it might seem that the *Lewis* cases should argue against the benefit to SIJs. This is not the case. The difference between the Lewis cases and the SIJ statute is that, in *Lewis*, the courts eventually received evidence of the legislators' clear intent that it sought to prevent immigrant mothers from receiving prenatal care. In the SIJ case, rather than there being evidence of an attempt to narrow the rights of recipients, there is evidence that the 2008 statute was intended to enhance the rights of SIJs.[257] No evidence has come forward since 2008 to contradict this ameliorative intent of the legislators. [258]Considering this, it would contravene Congress's purpose to force this unforeseen result upon SIJ recipients, a caution highlighted in *Lewis*. To be sure, the provision should not be maintained with its presently accepted meaning, given the magnitude of the consequences flowing from the oversight.[259]

As 2008 offers the most recent evidence of legislative intent and purpose, it is that intent which should prevail over the statutory text. Thus, following Lewis v. Grinker, a court could "legitimately recognize an exception to a broad statutory prohibition . . . to further Congress's purpose" because its "broad statutory purpose [led] to unforeseen results contrary to the purpose of the prohibition."[260]
[261]

Absent a Congressional amendment, the next step will likely involve litigation alleging violations of the Substantive Due Process and Equal Protection clauses.[262] It is unconstitutional to deny *some* United States citizens the right to reunify permanently in the United States with their parents and not others, based on the manner in which they obtained their citizenship.[263] .

Courts employing proper principles of legislative interpretation should strike down a literal interpretation of INA section 101(a)(27)(J)(iii)(II). These courts would begin by observing that Congress could not have intended the statute to breach the Constitution, and thus find that the statute's internal contradiction resulted from an inadvertent error. Courts would then decide how to proceed. One option would be to interpret the statute to be constitutional.[264] Alternatively, courts could employ the strategy of both *Zadvydas* and *Lewis,* by reading into the provision an "implicit limitation" that restricts its literal application to cases based on abuse caused by both parents; or by avering that such an interpretation is a "fairly possible" alternative construction of the statute that avoids the constitutional dilemma.[265]

257. *See supra* note 55.

258. This inference is based on the fact that SIJ was only permitted when the child was eligible for foster care, which occurred when neither parent was able to care for the child. *See* 1990 ACT § 101(a)(27)(J).

259. *See* AHMED, *supra* note 30, at 158.

260. Lewis III, 111 F. Supp. 2d 142, 155-56 (E.D.N.Y. 2000) (quoting Lewis II, 965 F.2d 1206, 1215 (2d Cir. 1992)).

261. *See* Id.

262. The scope of this article does not permit a full analysis of these issues; they will be addressed in a subsequent piece.

263. *See supra* note 2.

264. *See id.* at 163.

265. *See id.* at 164 (citing, for comparison, Lewis v. Grinker, 965 F.2d 1206, 1223 (1992).) For discussion of *Zadvydas, see supra* note XXX, **at page XXX.**

IV. POSSIBILITIES FOR PRODUCTIVE REFORM

Applying the suggested legislative theories and judicial practices discussed above to INA section 101(a)(27)(J)(iii)(II) would have produced more effective legislation.[266] The envisioned effects of the 2008 Amendment were more likely to have been achieved if the legislators had both deliberated more purposely over the wording of the provision and elucidated more fully their rationale for and intended impact of the changes.[267]

One goal of this study has been to alert others of the potential for challenges to INA section 101(a)(27)(J)(iii)(II). Another is to help steer the conversation towards productive reform. In this final section, I suggest additional avenues for alleviating the problems inherent in this provision and summarize others mentioned previously.

First, Congress could enact a Technical Corrections Amendment. Through such legislation, Congress could craft language that either (1) denies benefits to a naturalized SIJ's parent found to have abused, abandoned, or neglected their child, or (2) extends immigration visa benefits to a non-abusing parent.

Without such action, the issues this provision raises are likely to be addressed through legal challenges. While judicial responses are largely unpredictable, they could include first, declaring the provision to be an unconstitutional breach of the Fifth Amendment's requirement of Due Process; second, constitutional avoidance—the opposite[268]—leaving the status quo intact by upholding the statute via constitutional avoidance; or third, finding some type of incompleteness, ambiguity, or absurdity that requires courts to decide what Congress meant in the 2008 Amendment.[269] They could effectively rule that Congress's ameliorative intent has been thwarted by the provision's current language and interpretation and could, to avoid *absurd results,*[270] read into the statute words that convey the actual legislative intent.

Enacting a Technical Corrections Amendment is the first and best option and the most direct way to resolve the law's dilemma. These Amendments are common in federal legislating, especially in cases where a bill turns out to contradict congressional intent. While this often becomes obvious shortly after enactment, in cases of longer delay, changes must be made through a Technical Corrections Amendment.."[271] These correction amendments are common.[272] In the immigration arena, an overwhelming majority of statutes enacted since 1990 were subject to Technical Corrections Amendments,[273] which makes sense, given the haste with which much of this

266. *See supra* note 41, at 855.

267. *Id.* at 856.

268. *See supra* notes 134 & 279 and accompanying text.

269. *See supra* Part III(C).

270. For more on this doctrine, *see supra* note 155.

271. *Id.* at 4. In these cases, Congress could pass new legislation to make the "'technical corrections' to a law that did not accurately reflect congressional action or intent due to clerical errors or other changes made during the enrollment process." *Id.*

272. For example, on August 15, 2019, there were 90 federal bills (not confined to immigration) pending in the current legislative session that were denoted using the phrase "technical corrections." *See* govtrack.us.

273. *See* Technical Corrections to Immigration Nursing Relief Act of 1989; Immigration Act of 1990 https://www.uscis.gov/sites/default/files/ocomm/ilink/0-0-0-2593.html; Miscellaneous and Technical Immigration and Nationality Amendments of 1991, https://www.uscis.gov/ilink/docView/PUBLAW/HTML/PUBLAW/0-0-0-6414.html (accessed Aug. 21, 2019), Pub. Law 102-232, 105 Stat. 1733, 102nd Congress (Dec. 12, 1991) (implemented August 12, 1993

legislation is finalized.[274] A Technical Corrections Amendment to the SIJ statute would avoid a likely constitutional challenge to it.[275]Judicial scrutiny of any Technical Correction is likely to affirm the changes made, as wide berth is afforded to clarifications of laws, generally not seen as usurping Congress's policy-making function. These changes would address a clear error, seemingly made out of inadvertence, which has disrupted rather than advanced Congress's intent.

Next, if courts were to identify incompleteness, ambiguity, or absurdity in the current interpretation of the SIJ provision, they could effectively rewrite the provision by reading into the statute words that actually convey the true legislative intent.

In revising this provision, courts could either (1) maintain the extant wording and adding a caveat permitting the visa applicant (naturalized SIJ), to submit a waiver of section (a)(27)(J)(iii)(II) when the Special Findings reference only one parent and not the one for which the naturalized SIJ is applying for the visa; or (2) rephrase it from "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" to:

> "no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph who was identified in Special Findings issued pursuant to this paragraph to have abused, abandoned, or neglected said child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter."

The first option is more complex. Congress would need to flesh out multiple aspects of the waiver application process, such as the form used, the deadlines imposed, and the level of proof required. The second is more straightforward, reflecting Congress's clear intent to refuse family visas *only* to those parents who harmed their children.

by 8 CFR Parts 204, et. al., 1993 WL 304167 (F.R.), 58 FR 42843-01); Immigration and Nationality Technical Corrections Act of 1994, 1994 Enacted H.R. 783, 103 Enacted H.R. 783, 108 Stat. 4305, 103 P.L. 416, 1994 Enacted H.R. 783, 103 Enacted H.R. 783 Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103-416 (Oct. 25, 1994), https://www.govtrack.us/congress/bills/103/hr783/summary; Immigration Reform and Immigrant Responsibility Act of 1996, https://epic.org/privacy/e-verify/iirira-program.pdf; and Immigration Technical Corrections Act of 1997 was introduced but never passed, https://www.govtrack.us/congress/bills/105/hr2413/text. ++

274. *See supra* note 41, at 795.

275. *See supra* note 2.