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Introduction

The Due Process Clause of the Fifth Amendment provides that the United States government owes its citizens the due process of law when depriving them of life, liberty, or property.[1] This due process can be either procedural or substantive.[2] Procedural due process is the requirement that there be certain procedures a citizen is entitled to before they are deprived of their life, liberty, or property, such as notice and opportunity to be heard.[3] Substantive due process, on the other hand, entails that the government can only limitedly interfere with certain fundamental rights that an individual has.[4]

There has been an ongoing debate over whether the Due Process Clause should be understood to protect only procedural rights, or to also include substantive rights that are implied in the word "liberty" and not enumerated in the text of the Fifth Amendment.[5] Critics of substantive due process take an originalist approach and argue that the "substantive conception of due process rights" and the fundamental rights associated with it are unsupported by the text or pre-ratification history of the Due Process Clause.[6] However, substantive due process rights have been recognized in several Supreme Court decisions.[7] These decisions identify a category of liberty interests that are so fundamental that they "forbid[]

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1. U.S. CONST. amend. V ("[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . . .").

2. *See* 16C C.J.S. *Constitutional Law* § 1820.

3. *See id.* § 1822.

4. *Id.* § 1821.

5. *See* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 411–12 (2010) (introducing substantive due process).

6. *See, e.g.*, *id*. at 412.

7. *See id.* at 427 (citing Griswold v. Connecticut, 381 U.S. 479 (1965) and Shapiro v. Thompson, 394 U.S. 618 (1969)).

the government to infringe" upon them unless the infringement is "narrowly tailored to serve a compelling state interest."[8]

A foreign national who does not possess U.S. citizenship has very few rights available to them on U.S. soil.[9] The plenary power and the consular nonreviewability doctrine, rooted in the Supreme Court's interpretation of the Commerce, Naturalization, Migration and Importation, and War Power clauses of the Constitution, and recognized in *Ping v. United States* and *Nishimura Ekiu v. United States*,[10] limit due process protections for foreign citizens as well.[11] These legal doctrines give Congress unfettered power in its authority to admit or exclude noncitizens, delegate this authority to consular officials without any limitations, and restrict judicial interference in these matters.[12]

Complications arise when the sphere of the rights foreign nationals do not possess and the sphere of the rights U.S. citizens are guaranteed intersect, as in a marriage between a noncitizen and a U.S. citizen. The right to marriage is a fundamental due process right guaranteed to all citizens, and marriage has been defined by the Supreme Court to include living with one's spouse.[13] However, a foreign national cannot reside with their spouse in the U.S. without appropriate visa procedures.[14] An infringement on the right to marriage would typically trigger due process protections.[15] But, in a marriage between a U.S. citizen and a foreign

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8. *Id.* (citations omitted).

9. *See* Geoffrey Heeren, *Persons Who are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 367 (2013) (depicting how the rights of immigrants have decreased over time).

10. *See* U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. I, § 8, cl. 4; U.S. CONST. art. I, § 9, cl. 1; U.S. CONST. art. I, § 8, cl. 11; Ping v. United States, 130 U.S. 581 (1889); Ekiu v. United States, 142 U.S. 651 (1892).

11. *See* SHANE DIZON & POOJA DADHANIA, IMMIGRATION LAW SERVICE § 16:1, Westlaw IMMLS2D; James Lockhart, Annotation, *Construction and Application of Doctrine of Consular Nonreviewability*, 42 A.L.R. Fed. 2d 1 (2009).

12. *See* DIZON & DADHANIA, *supra* note 11, § 16:1 (explaining the plenary power as the principle that immigration discretion is a federal institution that lies in the hands of the legislative and executive branches with limited judicial review); *see generally* Lockhart, *supra* note 11, § 2 ("The doctrine of consular nonreviewability prevents courts in most cases from reviewing the decisions of consular officers regarding the grant or denial of a visa to an alien wishing to enter the United States.").

13. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (writing that the word liberty in the Due Process Clause substantively includes the right to marry); Maynard v. Hill, 125 U.S. 190, 205 (1888) ("Marriage . . . creat[es] the most important relation in life, . . . having more to do with the morals and civilization of a people than any other institution . . . ."); *infra* Section I.C. Marriage is characterized as a social institution that highlights the union between two individuals.

14. U.S. CITIZENSHIP & IMMIGR. SERVS., BRINGING SPOUSES TO LIVE IN THE UNITED STATES AS PERMANENT RESIDENTS (2018), https://www.uscis.gov/family/bring-spouse-to-live-in-US [https://perma.cc/HEG5-X4WQ] (explaining that in order for a noncitizen spouse to reside with their U.S. spouse in the U.S., a petition and subsequent visa application must be filed).

15. *See, e.g.*, Meyer v. Nebraska, 262 U.S. at 399 (enumerating the right to marry in a

national, how can the citizen's guarantee of due process be reconciled with their noncitizen spouse's lack of the same?

As this Note will discuss further, there are several instances in which the Supreme Court and other federal district courts have undermined the U.S. citizen's due process rights to reconcile the two sets of rights.[16] The judicial focus has been on the absence of a noncitizen's rights rather than the need to vindicate the citizen's liberty. A prime example of this is *State v. Muñoz,* a recent Supreme Court decision.

Sandra Muñoz, a U.S. citizen, married Luis Asencio-Cordero, a foreign national from El Salvador, in 2010.[17] While building a life and raising a child together in the U.S., they began the immigration process of adjusting Cordero's status to lawful permanent resident.[18] Following appropriate visa procedures, Muñoz first completed a petition to prove the validity of their marriage, which would render Cordero eligible to immigrate as an immediate relative.[19] Upon its approval, Cordero underwent consular processing for his visa, and he was required to leave the U.S. and be interviewed in his country of origin, El Salvador.[20] If his visa was granted, Cordero could then return to the U.S.[21] After numerous rounds of interviews with several consular officials, Cordero was notified that his visa was denied.[22] The officials referred to the statutory provision of 8 U.S.C. § 1182(a)(3)(A)(ii) in the Immigration and Nationality Act (INA), which prevents the admission of noncitizens if there is reason to believe that the noncitizen would engage in what the INA calls "unlawful activity."[23] They provided no other explanation for Cordero's visa denial.[24]

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non-exhaustive list of rights contained in the Fourteenth Amendment's conception of liberty) and Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that a statute that prohibits interracial marriage infringes on a citizen's fundamental due process right to marriage).

16. *See* Dep't of State v. Muñoz, 602 U.S. 899 (2024); Kerry v. Din, 576 U.S. 86, 101 (2015); Swartz v. Rogers, 254 F.2d 338 (D.C. Cir. 1958). In all three cases, the decisions state that even though the due process right of marriage is alleged to have been infringed, the right actually asserted is the right to have their spouse live in the U.S. There is, in these cases, a reframing of the due process right through an immigration lens. *See also infra* Section II.A (discussing these issues and tensions within the context of *Muñoz*).

17. Dep't of State v. Muñoz, 602 U.S. at 904 (2024).

18. *Id.*

19. *See id.*; Alison Moodie, *Form I-130, Explained*, BOUNDLESS (Aug. 31, 2025), https://www.boundless.com/immigration-resources/form-i-130-explained/ [https://perma.cc/XN6X-2G4Z] (explaining that the first step in acquiring a marriage-based visa is the I-130 form, also called the "Petition for Alien Relative." This form proves the authenticity of a marriage for the purposes of immigrating to the U.S.).

20. Dep't of State v. Muñoz, 602 U.S. at 904.

21. *Id.*

22. *Id.*

23. *See id.*; 8 U.S.C. § 1182(a)(3)(A)(ii) (1952).

24. Dep't. of State v. Muñoz, 602 U.S. at 904.

Cordero had no criminal record at the time of this visa decision, and both he and Muñoz could only guess how consular officials came to the opposite conclusion.[25] While consular officials' discretion in granting or denying a visa is almost unfettered, *Kleindienst v. Mandel* offers an exception in that a U.S. citizen is required to be given a facially legitimate and bona fide reason if their constitutional rights are infringed upon by a visa decision.[26] Muñoz claimed that Cordero's visa denial infringed her right to marriage (as encompassed in one's substantive due process rights) in hopes of getting a more concrete reason of why she could not continue the life she built with Cordero in the U.S.[27] The *Muñoz* Court denied her request, holding that a U.S. citizen has no due process rights infringed upon when their noncitizen spouse's visa is denied.[28]

This Note argues that the Supreme Court erroneously decided *State v. Muñoz*. Further, this Note posits that the Supreme Court's holding adversely affects the rights of a unique category of individuals: U.S. citizens who are married to noncitizens. The reasoning in *Muñoz* is wrong on two accounts: 1) it fails to apply the *Mandel* exception[29] and 2) it misunderstands the right that has been infringed upon. The Court focused on Muñoz's claim from an immigration standpoint and displayed a desire to override due process protections due to an unfounded fear of undermining the plenary power and consular nonreviewability.[30] This Note is not about immigration reforms or the strength of the right of marriage; rather, it is about the need to vindicate a U.S. citizen's constitutionally protected due process rights.

The first part of this Note will lay the foundation for why the Court's reasoning in *Muñoz* is erroneous. First, I will provide a more in-depth overview of the immigration standards and the *Mandel* exception. I will then discuss the Court's precedent on the *Mandel* exception and a citizen's substantive due process right of marriage in their noncitizen spouse's

25. *Id.*

26. *See* Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) (holding that if a U.S. citizen's First Amendment rights are infringed upon as a result of a noncitizen's visa denial, judicial review may be permitted so long as there is no facially legitimate and bona fide reason for the visa decision).

27. Dep't of State v. Muñoz, 602 U.S. at 904.

28. *Id.* at 919.

29. *Id*.

30. *Id.* at 912 (engaging in a substantial discussion of Congress's plenary power and consular nonreviewability in its reasoning to ultimately hold there is no due process right infringed). By including such a lengthy discussion, it appears that Justice Barrett is using Congress's broad discretion in immigration matters as a reason for concluding that no due process right has been infringed upon. However, it is possible to respect both Congress's immigration authority as well as a U.S. citizen's due process rights as seen in Section III.A of this note. Congress's discretion does not have to be compromised in order to vindicate due process rights. *See infra* note 126.

visa denial. From there, this Note will analyze the Court's misapplication of precedent and its flawed reasoning in *Muñoz*.

I. Background

A. An overview of immigration doctrine and the Mandel *exception.*

Under the plenary power doctrine, the federal government has full authority over any and all immigration matters.[31] The broad discretion to admit or exclude individuals is shared between the executive and legislative branches, and the judiciary has very limited authority to review any immigration decision.[32] This power comes from the Supreme Court's interpretation of several clauses in the Constitution.[33] Relying on the Commerce Clause in *Edye v. Robertson*, the Supreme Court upheld a federal statute that imposed a head tax on any foreign national entering the U.S., permitting federal authority over matters affecting immigration.[34] In *I.N.S. v. Chadha*, the Supreme Court held that Congress has plenary power over immigration issues regarding the admission and exclusion of noncitizens under the Naturalization Clause.[35] In *Ping v. United States.* and *Ekiu v. United States,* the Supreme Court maintained that Congress has the broad authority to admit and exclude noncitizens.[36] This expansive power is also reflected in other constitutional Clauses. The Migration and Importation Clause limits migration and importation to

31. *See, e.g.*, DIZON & DADHANIA, *supra* note 11 ("The plenary power doctrine establishes the authority of the federal government over immigration matters.").

32. *Id.* (explaining that the principles of the plenary power doctrine include that the authority over immigration matters is "shared between the executive and legislative branches of the federal government" and that "the judicial branch has very limited power to review immigration decisions.").

33. *See id.* (illustrating through several examples that this doctrine arose from the Supreme Court's interpretations of different clauses in the Constitution that grant the federal government enumerated powers, such as the Commerce Clause, the Naturalization Clause, the Migration and Importation Clause, and the War Power Clause).

34. *See* Edye v. Robertson, 112 U.S. 580, 600 (1884) ("[C]ongress having the power to pass a law regulating immigration as part of the commerce of this country with foreign nations, we see nothing in the statute by which it has here exercised that power forbidden by any other part of the constitution."); U.S. CONST. art. I, § 8, cl. 3.

35. DIZON & DADHANIA, *supra* note 11; INS v. Chadha, 462 U.S. 919, 939 (1983); U.S. CONST. art. I, § 8, cl. 4.

36. *See* Ping v. United States, 130 U.S. 581, 603 (1889) ("That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy."); Ekiu v. United States, 142 U.S. 651, 659 (1892) ("The supervision of the admission of aliens into the United States may be intrusted by congress either to the department of state . . . or to the department of the treasury, . . . and congress has often passed acts forbidding the immigration of particular classes of foreigners . . . .").

"persons as any of the States . . . shall think proper to admit."[37] Through the War Power Clause, the federal government possesses the authority to prevent the entry of foreign nationals deemed to be the "enemy" and to remove them from the U.S.[38]

The doctrine of consular nonreviewability is derived from Congress's plenary power and states that, as a general rule, visa decisions are not subject to judicial review.[39] However, there is a narrow exception to the blanket bar from judicial review.[40] This exception can be traced back to *Kleindienst v. Mandel*, a Supreme Court case which held that if an individual's visa denial results in an infringement of a First Amendment right of a U.S. citizen, judicial review may be permitted so long as there is no facially legitimate and bona fide reason for the visa decision.[41]

In *Mandel*, Ernest Mandel, a Belgian national, applied for a temporary nonimmigrant visa to participate in an academic conference.[42] Mandel was a Marxist theoretician and was invited to the conference to discuss his ideologies.[43] His visa was denied by a consular official who cited a statutory provision in the INA that barred individuals "who advocate the economic, international, and governmental doctrines of world communism."[44] The *Mandel* Court recognized an infringement of the First Amendment rights of the scholars at the conference, who wanted to engage in unconstrained academic discourse.[45] However, before allowing judicial review of the visa decision because it infringed a U.S. citizen's rights, the Court analyzed whether there was a facially legitimate and bona fide reason behind the denial.[46] The threshold for what counts as a facially legitimate and bona fide reason is extremely low.[47] Essentially, a reference to a statutory provision in the INA that an officer believes the applicant does not comply with is adequate.[48] The consular

37. DIZON & DADHANIA, *supra* note 11 (quoting U.S. CONST. art. I, § 9, cl. 1); *see* Smith v. Turner, 48 U.S. 283 (1849); New York v. Compagnie Generale Transatlantique, 107 U.S. 59 (1883).

38. DIZON & DADHANIA, *supra* note 11; U.S. CONST. art. I, § 8, cl. 11.

39. LOCKHART, *supra* note 11, § 2 (citing Lem Moon Sing v. United States, 158 U.S. 538 (1895) as cited in Kleindienst v. Mandel, 408 U.S. 753 (1972)).

40. *Id.*

41. Kleindienst v. Mandel, 408 U.S. 753, 770 (1972).

42. *See id.* at 757.

43. *See id.* at 756–57.

44. *Id.* at 755–56 (citing Immigration and Nationality Act of 1952, 8 U.S.C. § 212(a)(28)(D)).

45. *See id.* at 760.

46. *Id.* at 770.

47. *See* Trump v. Hawaii, 585 U.S. 667, 703 (2018) (depicting *Mandel*'s standard of review as narrow and deferential).

48. Kleindienst v. Mandel, 408 U.S. at 770 (1972) (holding that pointing to a finding of inadmissibility under INA § 212(a)(28), which said aliens who advocate doctrines of communism are ineligible to receive visas, was a facially legitimate and bona fide reason

official's citation to INA § 212(a)(28)(D) and (G)(v) counted as a facially legitimate and bona fide reason, and the Court therefore declined to grant judicial review.[49]

As illustrated by later decisions, the Supreme Court has since applied the *Mandel* exception to constitutional rights outside of the First Amendment context.[50] For instance, *Trump v. Hawaii* determined the constitutionality of an executive proclamation issued by the President that restricted travel to the U.S. by citizens from eight countries, predominantly those that practice Islam as a religion.[51] The Court analyzed whether the President had the authority to suspend entry into the U.S. for a broad class of foreign nationals, even when doing so would affect the interests of U.S. citizens seeking to be united with their noncitizen family members.[52] In this opinion, Chief Justice Roberts recognized the separation of family members as a result of visa denials as a "sufficiently concrete" injury that is an "adequate ground for standing."[53] He cited *Mandel*, among other cases, in his statement that "[t]his Court has previously considered the merits of claims asserted by United States citizens regarding violations of their personal rights allegedly caused by the Government's exclusion of particular foreign nationals."[54] After citing *Mandel*, Chief Justice Roberts reaffirmed that a U.S. citizen suffers "concrete hardship" if their immediate relative is denied entry into the U.S.[55] Additionally, the Court stated that "our opinions have reaffirmed and applied [*Mandel*'s] deferential standard of review across different contexts and constitutional claims."[56] It recognized a "conventional application of *Mandel*," which is an inquiry

such that the Court need not review the decision).

49. *Id.*

50. *See, e.g.* Fiallo v. Bell, 430 U.S. 787, 795 (1977). This case addresses the consequences of excluding the relationship between an illegitimate child and his natural father, as opposed to his natural mother, citing Sections 101(b)(1)(D) and 101(b)(2) of the Immigration and Nationality Act of 1952 as a cause of this preferential treatment. The Court cited *Mandel* to hold that its narrow exception does not apply, and Congress's plenary power should not be undermined in this context; Trump v. Hawaii, 585 U.S. at 703 (2018); Kerry v. Din, 576 U.S. at 103–04, 106 (2015) (Kennedy, J. concurring).

51. Trump v. Hawaii, 585 U.S. at 667 ("'The Proclamation placed entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate.").

52. *See id.* at 698.

53. *Id.*

54. *Id.*

55. *Id.* at 698–99 ("[O]ne of our prior stay orders in this litigation recognized that an American individual who has a bona fide relationship with a particular person seeking to enter the country . . . can legitimately claim concrete hardship if that person is excluded.") (citation omitted).

56. *Id.* at 703.

into whether an action has a facially legitimate and bona fide reason if there is an infringement of a U.S. citizen's rights.[57]

Kerry v. Din is another decision that applies *Mandel's* reasoning to a constitutional right outside of the First Amendment. The facts in *Din* are strikingly similar to those of *State v. Muñoz*. Fauzia Din, a U.S. citizen, attempted to contest the visa denial of her husband, a foreign national from Afghanistan, using the *Mandel* exception by claiming the infringement of her right to marriage.[58] The plurality opinion foreshadowed *State v. Muñoz* by holding that "Din was not deprived of 'life, liberty, or property'" when her husband was denied admission into the U.S., and that no due process right was therefore infringed upon.[59] In his binding concurrence, however, Justice Kennedy explicitly indicated that *Mandel* is applicable in the denial of a noncitizen spouse's visa, implying that there is a valid infringement of a citizen's rights in those instances.[60] In his application of *Mandel*, Justice Kennedy determined that a citation to a statutory provision barring individuals from entry into the U.S. for terrorism related concerns constitutes a facially legitimate and bona fide reason so as to leave the visa decision undisturbed.[61]

The ultimate conclusion of both the plurality and the concurrence in *Din* are the same: the visa decision must be left undisturbed with no room for judicial review.[62] The plurality reached this result by asserting that the denial of a visa for a noncitizen spouse does not infringe the rights of a U.S. citizen, whereas Justice Kennedy's walk-through of the *Mandel* test illustrated that it is possible to arrive at the same conclusion while still recognizing a protected liberty interest.[63] *Din* left the question of whether a U.S. citizen has a due process right in the visa decision of their noncitizen spouse for a future court to decide, which is where *State v. Muñoz* enters the picture.

Therefore, if a visa denial infringes on a constitutional right of a U.S. citizen and there is no facially legitimate and bona fide reason provided at the time of the decision, an individual may seek judicial review.[64]

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57. *Id.* at 704.

58. *See* Kerry v. Din, 576 U.S. 86 (2015).

59. *Id.* at 101; *see* Dep't of State v. Muñoz, 602 U.S. 899, 909 (2024).

60. Kerry v. Din, 576 U.S. at 103–04 (Kennedy, J., concurring) ("The reasoning and the holding in *Mandel* control here. . . . *Mandel* held that an executive officer's decision denying a visa that burdens a citizen's own constitutional rights is valid when it is made 'on the basis of a facially legitimate and bona fide reason.'").

61. *See id.* at 106.

62. *Id.* at 101, 106.

63. *Id.*

64. 3A AM. JUR. 2D *Aliens and Citizens* § 920, Westlaw (database updated May 2025).

B. The due process right of marriage and its interaction with a noncitizen spouse's visa denial in circuit caselaw precedent.

The right to marriage has been revisited by the Supreme Court time and time again. It was recognized as a substantive due process right in *Meyer v. Nebraska*.[65] In decisions where the right of marriage of a U.S. citizen has been vindicated, the Court defined marriage as more than just a legal contract and recognized cohabitation of spouses as an essential component of it.[66]

One notable example is *Loving v. Virginia*, in which the Court struck down a statute that prohibited interracial marriage because it infringed on a citizen's fundamental right to marry whomever they choose.[67] In *Obergefell v. Hodges*, another famous example, the Court recognized same-sex marriage as lawful by again upholding the right to marriage.[68] In its reasoning, the *Obergefell* Court highlighted the importance of marriage to household stability and companionship, especially in raising children.[69] By vindicating the right to marry in a variety of situations, it is apparent that the Court recognizes marriage as a fundamental due process right and gives it substantial weight when it is infringed upon.

While the Supreme Court had left unanswered the question of whether there is an infringement of due process rights in a noncitizen spouse's visa denial until the *State v. Muñoz* decision, the Ninth Circuit has consistently held that there is an infringement of the right of marriage in these instances.[70] In *Bustamante v. Mukasey,* the court stated that "[f]reedom of personal choice in matters of marriage and family life is, of course, one of the liberties protected by the Due Process Clause."[71] The Ninth Circuit's approach in *Bustamante* and subsequent cases can be readily summarized as follows. First, with a citizen's constitutionally protected right being at stake, the *Mandel* exception is triggered.[72] An

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65. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (noting that the word liberty in the Due Process Clause substantively includes the right to marry).

66. *See* Zablocki v. Redhail, 434 U.S. 374, 384 (1978) ("[Marriage is] an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects."); Maynard v. Hill, 125 U.S. at 211–12 (espousing marriage as a fundamental cornerstone of personal and civilizational stability).

67. Loving v. Virginia, 388 U.S. 1, 12 (1967).

68. Obergefell v. Hodges, 576 U.S. 644, 681 ("The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States.").

69. *See id.* at 667 (reasoning that another basis "for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.").

70. *See* Bustamante v. Mukasey, 531 F.3d 1059, 1062 (9th Cir. 2008); Muñoz v. Dep't of State, 50 F.4th 906 (9th Cir. 2022).

71. Bustamante v. Mukasey, 531 F.3d at 1062.

72. *See id.* ("[W]e hold that under *Mandel,* a U.S. citizen raising a constitutional challenge

inquiry into whether a facially legitimate and bona fide reason was provided at the time of the denial is then set into motion, and upon finding such a reason, like a citation to a statutory provision in the INA, the decision is left undisturbed.[73]

C. State v. Muñoz's *treatment of the* Mandel *exception and due process rights.*

In *State v. Muñoz*, Justice Amy Coney Barrett did not apply the *Mandel* exception in her analysis of whether there was an infringement of Sandra Muñoz's rights when her husband's visa was denied.[74] She stated that "procedural due process is an odd vehicle for Muñoz's argument, and *Mandel* does not support it."[75] In her discussion of *Mandel*, Justice Barrett wrote that "the 'facially legitimate and bona fide reason' in *Mandel* was the justification for avoiding a difficult question of statutory interpretation," as the Court did not address whether there would be a constitutional challenge available to individuals in which no justification at all was provided in their visa denial.[76] This, she stated, has nothing to do with due process.[77]

Justice Barrett strictly adhered to the facts of *Mandel*, where an individual asserted an infringement of a First Amendment right, and differentiated First Amendment rights from due process rights to explain why *Mandel* would not apply in Muñoz's situation.[78] Justice Barrett wrote that a First Amendment claim is an independent constitutional right that is different from due process, with no further elaboration on what an independent constitutional right is.[79] Additionally, her basis for why *Mandel* is not an appropriate test is her emphasis that the substantive due process right Muñoz asserted was her right to bring her noncitizen spouse to the U.S.[80] Justice Barrett wrote that in order for *Mandel* to apply, the right asserted must be constitutionally protected, and because the right to bring your noncitizen spouse to the U.S. is not deeply rooted in the tradition of this country, it is not a substantive due process right at

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to the denial of a visa is entitled to a limited judicial inquiry regarding the reason for the decision. As long as the reason given is facially legitimate and bona fide the decision will not be disturbed."); *see also* Muñoz v. Dep't of State, 50 F.4th at 909 ("Where the denial of a visa affects the fundamental rights of a U.S. citizen, judicial review of the visa decision is permitted if the government fails to provide 'a facially legitimate and bona fide reason' for denying the visa . . . .") (citing *Mandel*).

73. *See* Bustamante v. Mukasey, 531 F.3d at 1062.

74. *See* Dep't of State v. Muñoz, 602 U.S. 899, 919 (2024).

75. *Id.*

76. *Id.* at 918.

77. *Id.*

78. *Id.* at 919.

79. *Id.*

80. *Id.*

all.[81] She acknowledged that precedential cases like *Trump v. Hawaii* and *Kerry v. Din* reaffirmed the narrow *Mandel* exception, but disregarded that both cases found there to be an infringement on the right to marriage when a noncitizen spouse's visa is denied.[82] Justice Barrett offered no elaboration as to why she simultaneously recognized *Mandel* as applying to substantive due process rights (by arguing that Muñoz did not assert a substantive due process right) while also claiming that *Mandel* differentiates "independent constitutional right[s]" from due process ones.[83]

In Justice Barrett's due process analysis, she argued that while Muñoz invoked the "fundamental right of marriage," the right asserted was actually "the right to reside with her noncitizen spouse in the United States."[84] She claimed that this right is not merely spousal cohabitation, but a right for Muñoz's husband to immigrate to the U.S.[85] She reasoned that there is an "entitlement to bring Asencio-Cordero to the United States."[86] Justice Barrett subsequently treated this as a novel due process right and applied the appropriate test of whether the asserted right is "deeply rooted in this Nation's history and tradition."[87] Justice Barrett then provided an in-depth analysis in how a "right to immigrate" is not consistent with the U.S.'s history and tradition, in that it would conflict with the plenary power and the doctrine of consular nonreviewability.[88] The opinion stated that while Congress frequently prioritizes the unity of an immigrant family, this is "a matter of legislative grace rather than fundamental right" as provided in the Constitution.[89] There is no further explanation on why Justice Barrett chose to focus on the right to marriage in this instance through an immigration lens, rather than vindicating Muñoz's due process rights as a U.S. citizen. Based on the above reasoning, the Court held that a U.S. citizen does not have a fundamental liberty interest in her noncitizen spouse being admitted to the country.[90]

Adding more confusion to the substantive versus procedural due process debate, Justice Barrett constantly switched between saying the asserted right to immigrate is procedural and that it is substantive throughout the opinion.[91] Justice Barrett has generally been described as

81. *Id.*
82. *Id.* at 908.
83. *Id.* at 919.
84. *Id.* at 910.
85. *Id.*
86. *Id.*
87. *Id.* at 903 (quoting Washington v. Glucksberg, 521 U. S. 702, 720–721 (1997)).
88. *See id.* at 911–16.
89. *See id.* at 916 (quoting Kerry v. Din, 576 U.S. 86, 97 (2015)).
90. Dep't of State v. Muñoz, 602 U.S. 899, 919 (2024).
91. *Id.* at 918–19 ("Muñoz would have to claim that the denial of Asencio-Cordero's visa

an originalist.[92] In one of her law review articles, she claimed that while the "basic existence of substantive due process doctrine is no longer subject to challenge," originalists may refuse to read precedent expansively due to their skepticism that the Due Process Clause protects substantive rights as well as procedural rights.[93] The *Muñoz* opinion offers no additional insight into whether Justice Barrett leans one way or the other on this debate. However, the reasoning in *Muñoz* leads one to wonder whether the Court's holding that no liberty interest is infringed when a spouse's visa is denied is a result of Justice Barrett's hesitance to interpret the Due Process Clause substantively due to her originalist ideology.

II. Analysis

The reasoning underlying the *Muñoz* decision is erroneous for two reasons. First, the Court failed to invoke the *Mandel* exception and disregarded its own precedent in doing so. Second, the Court grounded its decision on a misunderstanding of the right that was infringed upon. The discussion that follows analyzes each error in more detail.

A. The Muñoz *opinion's error in its failure to apply the* Mandel *test.*

The first error by the *Muñoz* Court was its failure to apply the *Mandel* test. The roundabout manner in which Justice Barrett discussed *Mandel* and its application is confusing and does not clarify why the exception is not appropriate in Muñoz's situation.[94] Justice Barrett made two separate arguments in her opinion: 1) there is a narrow exception when a U.S. citizen's substantive due process rights are infringed upon, but the right Muñoz asserted is a right to immigrate, which is not a due

violated her substantive due process right to bring her noncitizen spouse to the United States . . . . [P]rocedural due process is an odd vehicle for Muñoz's argument.").

92. *See, e.g.*, Brian Naylor, *Barrett, An Originalist, Says Meaning of Constitution 'Doesn't Change Over Time'*, NPR (Oct. 13, 2020, at 10:08 ET) https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923215778/barrett-an-originalist-says-meaning-of-constitution-doesn-t-change-over-time [https://perma.cc/H8EU-QE93].

93. Amy C. Barrett, *Precedent and Jurisprudential Disagreement,* 91 TEX. L. REV. 1711, 1736 n. 146 (2013); *see also* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (noting that Justice Barrett was part of the majority in *Dobbs* that overturned well-settled substantive due process precedent); Nicholas Serafin, *Obergefell after Dobbs and the Future of Substantive Due Process,* 52 N. KY. L. REV. 215, 215 (2025) ("The [*Dobbs*] decision itself – which Chief Justice Roberts described as dealing 'a serious jolt to the legal system' – signaled a willingness to upend settled substantive due process precedent regardless of public opinion and regardless of the effect such a decision would have on related state and federal law . . . ."). Justice Barrett siding with the majority in such a decision corroborates a skepticism around substantive due process rights.

94. *See* Dep't of State v. Muñoz, 602 U.S. 899, 918–19 (2024).

process right;[95] and 2) *Mandel* can be differentiated as a test for "independent constitutional right[s]," such as a First Amendment free speech claim, and therefore *Mandel*'s holding does not extend to due process rights.[96] These two assertions are paradoxical in that they simultaneously recognize the place of the *Mandel* exception in due process claims but also state that the exception should not be applied to such claims.

The distinction between independent constitutional rights and due process also leads to confusion. It is unclear what Justice Barrett means by the phrase "independent constitutional right."[97] She does not further elaborate on this term, other than mentioning that free speech is such a right.[98] It is well-established that constitutional rights are individual rights guaranteed by the Constitution.[99] Due process rights clearly constitute constitutionally guaranteed rights since they are written into the text of the Fifth Amendment.[100] While substantive due process rights, such as the right to marriage, are not explicitly mentioned in the Constitution, there is Supreme Court precedent recognizing them as individual constitutionally guaranteed rights.[101] These are decisions that have not yet been overturned, and it is incorrect for the Court to disregard its precedent.[102] Without prior indication that those rights are not independent, or at least an explanation for why they are not, it is erroneous for Justice Barrett to make such a distinction and provide a different view of what *Mandel* stands for on that basis.

This brings us to the failure to apply the *Mandel* exception. As discussed earlier in this Note, the Supreme Court has recognized the *Mandel* exception which applies to constitutional rights. not limited to those similar to the First Amendment.[103] Previously the Court has

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95. *See id.* at 919.

96. *Id.*

97. *Id.*

98. *Id.*

99. *See, e.g.*, 13 CAL. JUR. 3D *Constitutional Law* § 200, Westlaw (database update Apr. 2025) ("Indeed, constitutional rights like the guarantees that all citizens enjoy equal protection of the laws and due process of law are not structural limitations on government power in the Supremacy Clause sense, but they are rights given to individual citizens which limit governmental power generally . . . .").

100. U.S. CONST. amend. V ("[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . . .").

101. *See supra* Section I.B.

102. *See* Min K. Lee, *Stare Decisis on Thin Ice: Mulling Over the Supreme Court After Ramos v. Louisiana*, 45 SETON HALL LEGIS. J. 295, 307–11 (2021) ("In place to ensure that courts will decide similar cases in a consistent manner, . . . stare decisis is the legal principle for awarding precedential force to prior court decisions, and it transfers a court decision from the hands of the judge into the realm of either binding or strongly persuasive legal principles.").

103. *See, e.g.*, Trump v. Hawaii, 585 U.S. 667, 698 (2018); Kerry v. Din, 576 U.S. 86, 103–

validated the *Mandel* exception's application in scenarios where a U.S. citizen has an immediate relative who is a foreign national and they are denied entry into the country.[104] Justice Barrett acknowledged prior precedent from *Trump v. Hawaii* and *Kerry v. Din*, but only to affirm that the *Mandel* exception exists.[105] In her discussion of both *Trump* and *Din,* she disregarded the Supreme Court's recognition that the hardship a U.S. citizen would experience as a result of their family member's visa denial is concrete enough to suggest an infringement of constitutional rights.[106]

In failing to apply the *Mandel* exception, Justice Barrett ignored the infringement of the U.S. citizen's right to marriage and focused instead on the absence of a noncitizen's right to immigrate. A proper application in *Muñoz* of the *Mandel* holding would be as follows: prior precedent suggests that a noncitizen spouse's visa denial infringes on the U.S. citizen's due process right to marriage.[107] The *Mandel* exception would then be triggered, setting into motion an inquiry into whether a facially legitimate and bona fide reason was provided at the time of Asencio-Cordero's visa decision.[108] Because the consular official referenced a specific statutory provision at the end of the decision-making process, a court would find this sufficient and would not permit judicial review.[109] The Court's own precedent, as it stands, favors leaving Asencio-Cordero's visa denial undisturbed. This approach would vindicate the U.S. citizen's rights while respecting Congress's plenary power and the doctrine of consular nonreviewability.

While Justice Sonia Sotomayor's dissent also emphasizes the *Mandel* test as a remedy in this situation, it ignores the practical reality of its application.[110] Her argument is that the *Mandel* test will result in the

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04, 106 (2015) (Kennedy, J., concurring).

104. *See* Trump v. Hawaii, 585 U.S. at 698.

105. Dep't of State v. Muñoz, 602 U.S. 899, 908 (2024).

106. *See id.;* Kerry v. Din, 576 U.S. at 103-04, 106 (Kennedy, J., concurring); Trump v. Hawaii, 585 U.S. at 698.

107. *See* Trump v. Hawaii, 585 U.S. at 698 ("This Court has previously considered the merits of claims asserted by United States citizens regarding violations of their personal rights allegedly caused by the Government's exclusion of particular foreign nationals."); Kerry v. Din, 576 U.S. 86, 103–04, 106 (2015) (Kennedy, J., concurring) (indicating in his binding concurrence that *Mandel* is applicable in a noncitizen spouse's visa denial and thus implying that there is an infringement of a citizen's right to marriage in that instance).

108. *See, e.g.*, Trump v. Hawaii, 585 U.S. at 704.

109. *See* Kerry v. Din, 576 U.S. at 103–04, 106 (Kennedy, J., concurring); Trump v. Hawaii, 585 U.S. at 704.

110. *See* Dep't of State v. Muñoz, 602 U.S. 899, 936 (2024) (Sotomayor, J., dissenting) ("[W]hen a visa denial burdens a noncitizen's constitutional rights, . . . a court should accept the Government's 'facially legitimate and bona fide reason.' That minimal requirement ensures that courts do not unduly intrude on 'the Government's sovereign authority . . .' while also ensuring that the Government does not arbitrarily burden citizens' constitutional rights.") (citations omitted).

citizen-noncitizen couple receiving a factual basis for the visa denial.[111] The reality, however, is that this test almost never leads to judicial review such that the factual basis for the visa denial would be revealed.[112] Given the extremely low threshold for what counts as a bona fide and facially legitimate reason that must be provided at the time of a visa decision, there is a more significant importance in applying the *Mandel* test: simply, the recognition that a due process right has, in fact, been infringed upon.[113] The *Mandel* test is not triggered unless a U.S. citizen's rights are infringed upon.[114] Even if the resulting outcome is that no factual basis for the visa denial is revealed, the application of the test itself in this case acknowledges the infringement of a right, thereby respecting the due process rights of U.S. citizens. Further, the dissent continues to look at the issue through an immigration lens as Justice Sotomayor discusses the idiosyncrasies of immigration law and its potential avenues of reform at length.[115] Similar to Justice Barrett's majority, a focus on immigration law draws the attention away from the curtailment of a U.S. citizen's due process rights.

The reasoning in *Muñoz* is confusing in its inconsistent application and interpretation of *Mandel* to situations where a U.S. citizen asserts an infringement of their right to marriage in their noncitizen spouse's visa denial. It is unclear why Justice Barrett offers two contradictory arguments regarding *Mandel*'s application to due process rights and why she makes the distinction between due process rights and "independent constitutional right[s]."[116] The lack of clarity and explanation will create subsequent confusion to lower courts when they attempt to discern what the appropriate interpretation of *Mandel* actually is.

B. The Muñoz *opinion's error in its due process analysis.*

The second error the *Muñoz* Court makes is in its analysis of whether there is a due process right infringed upon in the instance of Asencio-Cordero's visa denial. The Court concludes that there is no constitutionally protected right implicated.[117] Despite Muñoz invoking the infringement of her right of marriage when her husband's visa was

111. *Id.* at 939–40 ("The Government's exclusion of Muñoz's husband entitles her at least to the remedy required in *Mandel*: a 'facially legitimate and bona fide reason' for the exclusion.")

112. *See supra* notes 41–48.

113. *See, e.g.*, Dep't of State v. Muñoz, 602 U.S. at 934 (Sotomayor, J., dissenting).

114. *Id.*

115. *Id.* at 922–23 (Sotomayor, J., dissenting).

116. *See id.* at 919.

117. *Id.* at 919 (2024) ("[The argument that Asencio-Cordero's visa denial violated Muñoz's substantive due process rights] cannot succeed . . . because the asserted right is not a longstanding and 'deeply rooted' tradition in this country.") (citation omitted).

denied,[118] Justice Barrett argued that Muñoz is actually claiming a right to have her husband immigrate to the U.S.[119] This is a recurring argument in similar cases that hold a U.S. citizen does not have a constitutional liberty interest in their noncitizen spouse's visa denial.[120] This assertion is conclusory and skips a few steps in its reasoning.

Considered within the context of Sandra Muñoz and Luis Asencio-Cordero's situation, it cannot be said that she asserted a right for him to immigrate to the U.S. When Sandra and Luis got married, they were aware that they had to subsequently go through the appropriate immigration procedures for Luis to lawfully reside in the U.S.[121] By following the correct legal procedures to apply for a visa after their marriage, the couple showed an understanding that marriage does not guarantee automatic passage to the U.S.[122] The fact that the couple participated in the administrative hurdles of immigration procedures is incompatible with an assertion of a right to immigrate, which assumes that one has the entitlement to enter and live in a country as they wish. Therefore, this is likely an incorrect interpretation of the right Sandra Muñoz claimed has been infringed and must be re-evaluated.

A more apt approach for the Court would have been to analyze whether there is an infringement on the right to marriage as pled by Sandra Muñoz, without characterizing it as something different. As discussed above, the right to marriage has substantial weight in the eyes of the Supreme Court.[123] Spousal cohabitation is seen as an essential component of marriage, which is itself viewed as a harmonious union between two individuals whose joint life provides a better outcome for the development of children.[124]

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118. *Id.* at 910 ("Muñoz invokes the 'fundamental right of marriage,' but the State Department does not deny that Muñoz (who is already married) has a fundamental right to marriage.")

119. *Id.* ("Muñoz claims something distinct: the right to *reside with her noncitizen spouse in the United States*. That involves more than marriage and more than spousal cohabitation—it includes the right to have her noncitizen husband enter (and remain in) the United States.").

120. *See, e.g.*, Kerry v. Din, 576 U.S. 86, 89 (2015) ("[The denial of a noncitizen spouse's visa is] nothing more than a deprivation of her spouse's freedom to immigrate into America."); Swartz v. Rogers, 254 F.2d 338, 339 (D.C. Cir. 1958) ("But the essence of appellants' claim [against the deportation of her husband], when it is analyzed, is a right to live in this country.").

121. *See* Dep't of State v. Muñoz, 602 U.S. at 904–05.

122. *See id.* at 922 (Sotomayor, J., dissenting) ("Marriage is not an automatic ticket to a green card. A married citizen-noncitizen couple must jump through a series of administrative hoops to apply for the lawful permanent residency that marriage can confer.").

123. *See supra* Section I.B.

124. *Id.*

Based on this description of marriage from the Supreme Court's own precedent, it is difficult to rationalize how the right of marriage would not be infringed when two spouses are separated because of a visa decision. In such a separation, the so-called "harmonious union" ceases to exist, and there is no joint life they can continue to build together. Luis Asencio-Cordero and Sandra Muñoz had built a home and raised a child together during their marriage of over fourteen years.[125] When that life came to an abrupt halt because of her spouse's visa denial, it would be natural to conclude that Sandra Muñoz would feel deprived of her ability to enjoy that marriage to the same degree as she did prior to her husband's denial of entry. To assert otherwise is to undermine marriages between citizen-noncitizen spouses as compared to citizen-citizen spouses.[126] As discussed later in this section, it is possible to acknowledge the infringement of the right of marriage without claiming a right for the noncitizen spouse to immigrate, contrary to what Justice Barrett argues.

A solution offered by courts is that the U.S. citizen can relocate to the country of the noncitizen spouse to avoid physical separation.[127] However, then, the U.S. citizen's right to reside in America is infringed upon, and that is one of the most intrinsic and fundamental rights associated with being an American citizen.[128] Given the availability of these rights to other U.S. citizens who are not married to noncitizens, the Court not recognizing their infringement undermines these rights in the specific instance of their connection to a noncitizen.

It appears as though the Court is reluctant to agree there is an infringement of due process rights in fear of stepping on the toes of the plenary power and the doctrine of consular nonreviewability. This is apparent in the lengthy discussion of the history and the strength of Congress's authority in these matters as detailed in the *Muñoz* opinion.[129]

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125. Dep't of State v. Muñoz, 602 U.S. at 927 (Sotomayor, J., dissenting) ("They have been married since 2010 and have a child together.").

126. *See id.* at 931–33 (Sotomayor, J., dissenting) ("There can be no real question that excluding a citizen's spouse from the country 'burdens' the citizen's right to marriage as this Court has repeatedly defined it."). *Compare* Obergefell v. Hodges, 576 U.S. 644, 667 (2015) (emphasizing that the act of living with another is integral to the purpose of marriage) *with* Swartz v. Rogers, 254 F.2d 338, 339 (D.C. Cir. 1958) (positing that cohabitation is a mere physical condition that marriage does not depend on).

127. Swartz v. Rogers, 254 F.2d at 339 ("The physical conditions of the marriage may change, but the marriage continues.").

128. *See, e.g.*, *Rights and Responsibilities*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://my.uscis.gov/citizenship/information [https://perma.cc/H5VV-C37Z] ("You have the right to live in the United States.").

129. Dep't of State v. Muñoz, 602 U.S. at 911–12 ("[O]nce Congress began to restrict immigration, 'it enacted a complicated web of regulations that erected serious impediments to a person's ability to bring a spouse into the United States.") (citing Kerry v. Din, 576 U.S. 86, 96). In its discussion of the congressional authority in all matters relating to immigration, the Court continues to emphasize Congress's restrictive nature in admitting

However, recognizing the infringement of constitutionally protected rights does not undermine immigration law or the broad discretion for Congress to exclude or admit foreign nationals with limited judicial interference. As Ninth Circuit precedent and the discussion in Section I, Part B of this Note indicates, it is perfectly possible to vindicate a U.S. citizen's individually guaranteed rights while still leaving a visa decision undisturbed by following the *Mandel* test.[130] Because of how narrow the *Mandel* exception is, there will be no room for judicial review as long as a visa decision has a citation to a statutory provision in the INA. The low threshold for what counts as a facially legitimate and bona fide reason to satisfy the *Mandel* test suggests that, in practice, asserting an infringement of the right to marriage is essentially asking for a sliver of more information for a spouse's visa denial beyond a statutory provision in the INA. It is not a claim that the noncitizen spouse should be residing in the U.S., but a request for an explanation as to why a married couple cannot live together, even after following proper visa procedures.

By characterizing the right to marriage as a right to immigrate instead, the Court limited its discussion to immigration law, thereby ignoring and undermining the due process rights issues of the U.S. citizen involved. Instead of attempting to vindicate a U.S. citizen's rights while still respecting Congress's plenary power and the doctrine of consular nonreviewability using the *Mandel* test, the Court resorted to incorrectly assuming the issue to be concerned with immigration and refused to fully engage in it.

In arguing that Sandra Muñoz claimed a right to immigrate, Justice Barrett claimed that she is asserting a new due process right.[131] A new due process right is only recognized if it is deeply rooted in the Nation's history and tradition.[132] If Muñoz was asserting a right for her noncitizen spouse to immigrate, it would be correct to conclude that it is not deeply rooted in the Nation's history and tradition, given the scope of Congress's authority in the plenary power and the doctrine of consular nonreviewability.[133] But, as the analysis above indicates, Sandra Muñoz was in fact asserting a right to marriage, *not* claiming her spouse has a

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foreign nationals. *Id.* at 912–14.

130. *See supra* Section I.B; Bustamante v. Mukasey, 531 F.3d 1059 (9th Cir. 2008); Muñoz v. Dep't of State, 50 F.4th 906 (9th Cir. 2022), *rev'd sub nom.*, Dep't of State v. Muñoz, 602 U.S. 899 (2024).

131. Dep't of State v. Muñoz, 602 U.S. at 903 ("To establish this premise, she must show that the asserted right is 'deeply rooted in this Nation's history and tradition.'").

132. *See id.*; Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) ("[W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition' . . . .").

133. *See* Dep't of State v. Muñoz, 602 U.S. at 919.

right to immigrate. The Court cannot deny that the right of marriage is deeply rooted in the Nation's history. The right of marriage has extensive precedent that illustrates the Court's commitment in prioritizing this right.[134] This approach would vindicate the U.S. citizen's due process rights without undermining the plenary power or the doctrine of consular nonreviewability.

C. The consequences of Muñoz's errors and a pattern of unfair curtailment of U.S. citizens' rights if they are married to noncitizens.

State v. Muñoz highlights a recurring pattern of the Supreme Court curtailing a U.S. citizen's rights when they have a connection to a noncitizen by marriage.[135] The Court tends to prioritize a noncitizen's absent rights instead of vindicating the U.S. citizen's due process rights.[136] The preferential treatment between a citizen-citizen couple and a citizen-noncitizen couple becomes crystal clear in the following comparison between *Obergefell v. Hodges* and *Kerry v. Din*.

As mentioned in Section I, Part B, *Obergefell v. Hodges* is a landmark decision that is celebrated for its expansion of the right to marriage to include same-sex couples.[137] By broadening the scope of this right to legalize same-sex marriage, the decision is inclusionary and reaffirms the notion that marriage is a socially rewarding endeavor that brings fulfillment in the union of two people building a life together.[138] Framing marriage in this way makes it clear that marriage is not a mere contract.

However, *Kerry v. Din* has an entirely different approach to the meaning of the right to marriage. The *Din* Court describes marriage in a contractual manner. The argument here is that if the marriage is still legal, the right to marriage has not been infringed upon.[139] But as with Fauzia Din's situation following her husband's visa denial, a marriage where the two spouses are physically separated with no indication of when they will be reunited is reduced to being merely contractual. The right to marriage as defined in the *Obergefell* decision simply does not align with the Court's description of marriage in the *Din* opinion.

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134. *See supra* Section II.B.

135. *See supra* Section I.B.

136. *See supra* Section I.A.

137. *See* Obergefell v. Hodges, 576 U.S. 644 (2015).

138. *Id.* at 681 ("No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were.").

139. Kerry v. Din, 576 U.S. 86, 94 (2015) ("[T]he Federal Government here has not attempted to forbid a marriage.").

The decisions of *Obergefell* and *Din* were made *eleven days* apart.[140] Because they were decided within only eleven days from one another, the discrepancy in the treatment of the institution of marriage appears more likely to be the result of the factual and societal context instead of an evolution in the legal understanding of marriage over time. The Court seems to approach marriage expansively with regard to same-sex marriage rights, yet restrictively when evaluating a marriage between a citizen and noncitizen. The stark contrast between *Obergefell's* view of marriage as an opportunity for two people to build a life together and *Din's* view that spousal cohabitation is a mere physical condition of marriage suggests that the right to marriage is not given equal weight when a U.S. citizen is married to a foreign national.

Another result of this approach is the infringement upon the right of marriage in another aspect: raising children. *Obergefell* and other Supreme Court decisions concerning the right to marriage are straightforward in emphasizing the importance of marriage in the development of children.[141] In *Obergefell*, the right to marriage is upheld in part because of the benefit to children of being raised in a stable household.[142] By holding that the separation of spouses is just a physical condition, the Court undermines the effect that spousal separation can have on the children involved.[143] In *State v. Muñoz*, the majority opinion makes no mention of Luis Asencio-Cordero and Sandra Muñoz's child—the existence of their child is only apparent in Justice Sotomayor's dissent.[144] Scientific research confirms that the distress experienced due to the separation of families through immigration procedures after developing emotional ties is positively correlated with the emergence of physical and depressive symptoms.[145] Because it can affect the mental and physical health of children, and thereby their development, it is not appropriate for the Court to depict the separation of families as a simple physical condition with no other effects.

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140. Obergefell v. Hodges, 576 U.S. 644 (June 26, 2015); Kerry v. Din, 576 U.S. 86 (June 15, 2015).

141. *See* Obergefell v. Hodges, 576 U.S. at 667–68 (2015) ("A third basis for protecting the right to marry is that it safeguards children and families . . . . Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser."); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (explaining that the concept of liberty discussed in the Fourteenth Amendment includes the rights to marry and bring up children, among others).

142. Obergefell v. Hodges, 576 U.S. at 668.

143. *See* Swartz v. Rogers, 254 F.2d 338, 339 (D.C. Cir. 1958) (stating that cohabitation is a mere physical condition that marriage does not depend on).

144. Dep't of State v. Muñoz, 602 U.S. 899, 921 (2024) (Sotomayor, J., dissenting).

145. *See* Thania Galvan, Dana Rusch, Melanie M. Domenech Rodriguez & Luz M. Garcini, *Familias Divididas [Divided Families]: Transnational Family Separation and Undocumented Latinx Immigrant Health*, 36 J. FAMILY PSYCH. 513, 513 (2022).

From these instances, it is clear that the Court's judicial focus on legal issues concerning a citizen-noncitizen couple through an immigration lens has direct consequences of undermining the U.S. citizen's right to marriage, a constitutionally guaranteed due process right.

Conclusion

The Supreme Court decision of *State v. Muñoz* is erroneous on two accounts: 1) it failed to apply the *Mandel* exception and 2) it misunderstood the right that was allegedly infringed upon. The Court focuses on the issue of an infringement of a U.S. citizen's constitutionally protected rights from an immigration standpoint. But as a result, the Court undermined the due process rights of U.S. citizens. It is imperative for the Court to vindicate the rights of the United States citizen in their marriage with a noncitizen moving forward. While seemingly irreconcilable, the Court should work towards rectifying the interaction of constitutionally protected rights for a U.S. citizen with the lack thereof for noncitizens. This Note illustrates that it is possible to do so with the use of the *Mandel* test, but there might be other approaches that would prove to be efficient, constructive resolutions to this issue.