

NOTE

EXTENDING NEW PROPERTY THEORY AND CONSTITUTIONAL PROTECTIONS EXTRATERRITORIALLY TO PROVIDE PROCEDURAL DUE PROCESS TO FOREIGN NATIONALS DURING VISA REVOCATION PROCEEDINGS

*Matthew J. Sunday**

Section 221(i) of the Immigration and Nationality Act bestows the Department of State vast power to revoke a foreign national's visa at any time and without cause. In fact, over one hundred years of Supreme Court jurisprudence has given Congress and the Executive Branch the seldom-reviewable plenary power to regulate immigration in ways that are arbitrary, excessive, and in violation of basic constitutional standards of fairness and due process. For foreign nationals whose visas were revoked while located outside the United States, immigration jurisprudence does not currently extend the due process protections of the Constitution to those located beyond the shores of the United States. Beyond a weak reconsideration process, these foreign nationals have no forum to seek meaningful review of their visa revocation and to present defenses or seek remedies.

The Court's failure to require that a foreign national has some kind of process to challenge her visa revocation allows the government act without accountability and impunity. The Court must finally abandon its ancient, outdated, and racist precedents and bring Congress's and the Executive Branch's immigration regulatory powers within constitutional

* CUNY Macaulay Honors College–City College of New York, B.A., Political Science, 2015; Cornell Law School, J.D. Candidate, 2021; Notes Editor, Cornell Journal of Law and Public Policy, Volume 30. I would like to thank numerous friends, colleagues, and editors of the JLPP who were instrumental in making publication of my Note possible, including Evelyn Hudson, Editor-in-Chief; Jennifer Yu, Executive Editor; Kianna Early, Managing Editor; Kaitlyn Marasi, Senior Notes Editor; Kayla Gebhardt, Articles Editor; and the team of Associate Editors. I would also like to thank Jacob Tyson and David Owen for their comments and suggested revisions. In addition, I would like to thank Professor Stephen Yale-Loehr for providing me with the inspiration for my topic and the background knowledge of the intersection of immigration and constitutional law. Lastly, I would like to thank my friend and mentor Elisabeth Ames, Esq. for providing me with my first taste of immigration law and policy and the opportunity to advocate on behalf of many wonderful clients.

*norms, starting with the Court extending Fifth Amendment due process protections to foreign nationals whose visas were revoked while outside the United States. The trajectory of recent immigration decisions has already laid the foundation to provide such protections. The Court should adopt a framework to extend extraterritorial application of the Constitution by combining the functional test under *Boumediene v. Bush* and the substantial voluntary connection test under *United States v. Verdugo-Urquidez*. The Court should hold that foreign nationals who avail themselves of U.S. immigration laws and lawfully obtain a visa have created and maintained substantial voluntary connection to the United States, and that extending due process extraterritorially is both functionally practicable and required under the Fifth Amendment's Due Process Clause. After extending application of the Due Process Clause to these persons, the Court should hold that a lawfully granted visa contains a vested property interest—the entitlement to travel and be lawfully admitted to the United States—under the theory of “new property” the Court opined in *Goldberg v. Kelly*. Further, the Court must determine that U.S. immigration laws, rules, and regulations that grant a visa only after the foreign national meets rigorous qualifications impart to the foreign national an objective reliance interest in the property interest the visa contains. Accordingly, under *Mathews v. Eldridge*, the Court must find the Due Process Clause requires the foreign national have access to a hearing if the government seeks to impair or rescind the foreign national's property interest in her visa. As a matter of both law and good public policy, the Constitution requires far greater procedural due process safeguards for foreign nationals who voluntarily subject themselves to rigorous background checks and lengthy waiting periods all in pursuit of lawfully obtaining a visa to travel to the United States and to live their dreams.*

INTRODUCTION

Ismail Ajjawawi might have considered himself the luckiest person in the world. After years of hard work and a long application process, he was admitted to one of the world's most prestigious universities, Harvard.¹ But now he needed to apply for an F-1 nonimmigrant student visa.² The arduous process included registering with the Student and Exchange Visitor Information System, waiting for Harvard to issue him a

¹ Karen Zraick & Mihir Zaveri, *Harvard Student Says He Was Barred from U.S. Over His Friends' Social Media Posts*, N.Y. TIMES (Aug. 27, 2019), <https://www.nytimes.com/2019/08/27/us/harvard-student-ismail-ajjawawi.html>. In detailing Ismail's story, I take some reasonable artistic license to fill in some gaps while maintaining full accuracy as to all material facts.

² See Immigration and Nationality Act (INA) § 101(a)(15)(F)(i), 8 U.S.C. § 1101(a)(15)(F)(i) (2018).

Form I-20, submitting a lengthy Form DS-160, paying numerous application fees, waiting for an interview at a U.S. consulate, and then submitting to a background check and allowing the government to probe every aspect of his life— from the members of his family to where he had lived and went to school.³ Of course, Ismail applied anyway. He wasn't going to allow some background checks get in the way of his dream school. After the long, vigorous process, the Department of State granted Ismail his visa.⁴ Elated and overjoyed, Ismail made his preparations to travel to the United States and begin his college career. After the lengthy eleven-hour flight,⁵ Ismail arrived at Logan International Airport in Boston, eagerly awaiting to settle into his new dorm and his new life. He stepped up to the Customs and Border Protection (CBP) officer and presented his passport and F-1 visa to be admitted to the United States. Then Ismail's journey became a nightmare. The CBP officer demanded Ismail's phone and laptop.⁶ Ismail complied, and the officer searched them.⁷ Out of nowhere, the officer aggressively questioned Ismail about his friends' social media posts.⁸ Despite Ismail's response that he had "no business with such posts and that [he] didn't like, share or comment on them," he was accused of aligning himself with political views that oppose the United States.⁹ CBP detained Ismail for eight hours before CBP declared Ismail inadmissible, revoked his visa, and put him on a flight back to Lebanon.¹⁰ CBP provided Ismail no chance to rebut the allegations, no opportunity to consult an attorney, and virtually no due process whatsoever.¹¹

In one swift action, Ismail's dreams were shattered. He likely spent months applying to Harvard. Quite likely he relied on the government's information that, after he complied with all immigration laws, rules, and regulations, he would earn his visa and be able to travel to the United

³ See 8 C.F.R. § 214.2(f) (2020); *Student Visa*, U.S. DEP'T. OF STATE, <https://travel.state.gov/content/travel/en/us-visas/study/student-visa.html> (last visited Nov. 2, 2020); *Know Your Obligations: Visa Issuance Procedures*, FRAGOMEN, DEL REY, BERNSEN & LOEWY, LLP, <https://www.fragomen.com/sites/know-your-obligations/visa-issuance-procedures#3.4%20Security%20and%20Background%20Checks> (last visited Nov. 2, 2020).

⁴ See Zraick & Zaveri, *supra* note 1.

⁵ I calculated this estimate. See Flight Time from Lebanon to Boston, MA, TRAVELMATH, <https://www.travelmath.com/> (type "Lebanon" in the "From" box and "Boston, MA" in the "To" box; then click "Go") (last visited Nov. 2, 2020).

⁶ See Zraick & Zaveri, *supra* note 1.

⁷ See *id.*

⁸ See *id.*

⁹ See *id.*

¹⁰ Graham Kates, *A Harvard Freshman Says He Was Denied Entry to the U.S. Over Social Media Posts Made by His Friends*, CBS NEWS (Aug. 27, 2019, 12:33 PM), <https://www.cbsnews.com/news/harvard-freshman-palestinian-student-officer-rejected-by-cbp-border-protection-officer-at-boston-logan-airport/>.

¹¹ See Zraick & Zaveri, *supra* note 1.

States. And that reliance likely was underscored once he had his visa in hand. So, what could Ismail have done to protect himself? The answer is virtually nothing. The CBP officers' actions were lawful; Congress and the Department of State explicitly allowed it.¹² And neither immigration law nor the Constitution provided Ismail any right to due process for a hearing to challenge the inadmissibility allegations, the visa revocation, or his removal from the United States.¹³ Surely this situation is unfair.

Ismail has hardly been the only one whose visa was summarily revoked by a government officer. Shortly after publication of Ismail's story, at least a dozen Iranian students had their visas revoked even before they left for the United States.¹⁴ Although the Department of State does not release the number of visas it revokes annually,¹⁵ one estimate indicated that between 2001 and 2015, the Department revoked 122,000 visas, and in the first week alone after President Trump's Travel Ban took effect, the Justice Department stated over 100,000 visas had been revoked.¹⁶ Recently, in line with his general harsh stances against both legal and illegal immigration, President Trump issued an additional slew of executive actions calling for revocations of foreign nationals'¹⁷ visas.¹⁸ One such action, Proclamation 10,043, which, *inter alia*, suspended the entry of and revoked the visas of certain students and re-

¹² See INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (2018); 22 C.F.R. § 41.122(e)(2) (2020).

¹³ See INA § 235(b)(1)(C), 8 U.S.C. § 1225(b)(1)(C) (2018); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

¹⁴ Sarah Parvini, *Iranian Students Were Accepted to U.S. Schools. Then Their Visas Were Revoked Without Explanation*, L.A. TIMES (Sept. 25, 2019, 5:00 AM), <https://www.latimes.com/california/story/2019-09-24/iran-student-visa-uc>; Karen Zraick, *Iranian Students Set to Start at U.S. Universities Are Barred from Country*, N.Y. TIMES (Sept. 20, 2019), <https://www.nytimes.com/2019/09/20/us/iranian-students-visas.html>.

¹⁵ See Zraick, *supra* note 14.

¹⁶ Sam Shihab, *Can a Revoked Visa Be Reinstated?*, SAM SHIHAB & ASSOCIATES, LLC (July 21, 2017), <https://www.immigrationvisaattorney.com/blog/can-a-revoked-visa-be-reinstated/>; Mary E. O'Hara, *Over 100,000 Visas Have Been Revoked by Immigration Ban, Justice Dept. Reveals*, NBC NEWS (Feb. 3, 2017, 2:19 PM), <https://www.nbcnews.com/news/us-news/over-100-000-visas-have-been-revoked-immigration-ban-justice-n716121>. The Department of State later issued a statement disputing the Department of Justice's figure and stated the actual number of visas revoked was likely around 60,000. O'Hara, *supra* note 16.

¹⁷ U.S. immigration law generally uses the term "alien" to refer to non-U.S. citizens. INA § 101(a)(3), 8 U.S.C. § 1101(a)(3) (2018) (defining "alien" as "any person not a citizen or national of the United States"). As the term "alien" is often used pejoratively, I refer to non-U.S. citizens as "foreign nationals," and I will differentiate between the classifications of "immigrant" and "nonimmigrant" within "foreign national" where applicable.

¹⁸ Ted Hesson, *Trump's Crackdown Hits Legal Immigrants*, POLITICO (Dec. 22, 2018, 7:33 AM), <https://www.politico.com/story/2018/12/22/trumps-crackdown-hits-legal-immigrants-1039810>; Camilo Montoya-Galvez, *2019: The Year Trump "Effectively" Shut Off Asylum at the Border and Restricted Immigration*, CBS NEWS (Dec. 31, 2019, 6:59 AM), <https://www.cbsnews.com/news/immigration-2019-the-year-trump-restricted-legal-immigration-and-effectively-shut-off-asylum-at-the-border/>; Daniel Trotta & Mica Rosenberg, *New Trump Rule Targets Poor and Could Cut Legal Immigration in Half, Advocates Say*, REUTERS (Aug. 12,

searchers from the People's Republic of China (PRC) because the Trump Administration purportedly believed that the "PRC authorities use[d] some Chinese students, mostly post-graduate students and post-doctorate researchers, to operate as non-traditional collectors of intellectual property" that may be weaponized against the United States.¹⁹ Simply the threat of a visa revocation has caused foreign nationals great despair and anxiety.²⁰ The decisions themselves can cause extreme have life-changing impacts on foreign nationals coming to the United States.²¹

The visa revocation process is particularly harmful because the current process affords a targeted foreign national no meaningful opportunity to respond to the revocation, nor any process to appeal the revocation to an independent reviewer. The process clearly needs an overhaul, although an overhaul is easier said than done because of the Supreme Court's long-standing history of unwillingness to limit Congress's and the Executive Branch's powers to regulate immigration.²²

Although Congress has prescribed immigration laws through the Immigration and Nationality Act (INA),²³ much of the current immigration law has been guided by about a century and a half of judicial law. The Constitution does not expressly delegate powers to regulate immigration; yet, using inconsistent applications of the inherent sovereignty of the United States as a foreign power, national security concerns, and various provisions of the Constitution, the Supreme Court has constructed immigration regulatory powers such that Congress and the Executive Branch have largely plenary power to respectively legislate and enforce immigration laws.²⁴ Implicit in this construction, the Supreme Court and

2019, 9:22 AM), <https://www.reuters.com/article/us-usa-immigration-benefits/new-trump-rule-targets-poor-and-could-cut-legal-immigration-in-half-advocates-say-idUSKCN1V219N>.

¹⁹ Proclamation No. 10,043, 85 Fed. Reg. 34,353 (May 29, 2020).

²⁰ Gareth Evans et al., *US Student Visas: 'A Lot of People I Know Are Scared for the Future'*, BBC (July 9, 2020), <https://www.bbc.com/news/world-us-canada-53346006>.

²¹ Lisette Partelow & Philip E. Wolgin, *The Trump Administration's Harsh Immigration Policies Are Harming Schoolchildren*, CTR. FOR AM. PROGRESS (Nov. 30, 2018, 9:01 AM), <https://www.americanprogress.org/issues/education-k-12/news/2018/11/30/461555/trump-administrations-harsh-immigration-policies-harming-schoolchildren/>; Olivia Sanchez, *Endless Fear: Undocumented Immigrants Grapple with Anxiety, Depression Under Trump*, USA TODAY (Aug. 25, 2019, 1:04 PM), <https://www.usatoday.com/story/news/nation/2019/08/25/undocumented-immigrants-struggle-mental-health-survival-mode/1816672001/>; *US: Devastating Impact of Trump's Immigration Policy*, HUMAN RIGHTS WATCH (Dec. 5, 2017, 1:00 PM), <https://www.hrw.org/news/2017/12/05/us-devastating-impact-trumps-immigration-policy>.

²² See STEPHEN H. LEGOMSKY, *IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA* 209 (1987).

²³ Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101–1537 (2018)).

²⁴ See *Arizona v. United States*, 567 U.S. 387, 394–95 (2012); *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950); *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889).

lower courts have routinely held that many protections afforded by the Constitution, including those afforded by the Fifth Amendment, do not apply to non-citizens physically located outside of the United States.²⁵ As such, because foreign nationals have limited due process rights with respect to immigration, the Supreme Court has held that consular decisions of the Department of State and decisions of consular officers are unreviewable.²⁶ This immigration jurisprudence is what makes providing a fair process to a foreign national whose visa was revoked so difficult. But difficult does not mean impossible.

In light of evolving views on the nature of fundamental rights and our nation's fight with its racist past, U.S. immigration jurisprudence is in dire need of shifting course. U.S. immigration jurisprudence stems from antiquated and racially charged notions of sovereignty and a restrictive prioritization of "national security" over human beings. Through the lens of the visa revocation process, I will show why current U.S. immigration jurisprudence is harmful to foreign nationals' rights, the integrity of the Constitution, and a consistent and just application of immigration jurisprudence.

In Part One, I outline a brief history of U.S. immigration laws and a brief overview of the visa application process. In Part Two, I advocate for a framework that will provide extraterritorial application and access to the Fifth Amendment's Due Process Clause to foreign nationals located outside of the United States. In Part Three, I argue for an application of "new property" theory to U.S. visas whereby upon foreign national's receipt, the foreign national maintains vested property interest in the visa based on provisions of the INA, administrative regulations, and other rules that create an objective reliance on the benefits of the visa. In Part Three, I further argue that the Fifth Amendment Due Process Clause should provide foreign nationals geographically located outside the United States a property interest right to a meaningful hearing prior to visa revocation. In Part Four, I critique the current jurisprudence on Congress's and the Executive's plenary powers to control immigration law, policy, and enforcement, and I advocate that the Court overrule the plenary power and consular non-reviewability doctrines.

²⁵ See, e.g., *Kerry v. Din*, 135 S. Ct. 2128 (2015) (plurality opinion); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 213 (1953); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953); *Hernandez v. United States*, 785 F.3d 117, 119 (5th Cir. 2015); *Meshal v. Higgenbotham*, 804 F.3d 417, 429 (D.C. Cir. 2015).

²⁶ *Knauff*, 338 U.S. at 543.

I. BACKGROUND

A. *The Development of the Plenary Power and the Doctrine of Consular Non-Reviewability*

In order to understand how the Fifth Amendment Due Process Clause may serve as a viable means to safeguard foreign nationals during the visa revocation process, one needs to understand the historical context in which the plenary power and the consular non-reviewability doctrines developed and the national attitude towards immigrants (and particularly non-white immigrants), which was integral in the development of these doctrines.²⁷ These racial attitudes towards immigrants continue to inform and pervade today's immigration jurisprudence.

1. The Formation of Congress's and the Executive's Immigration Plenary Power

Despite its current complex system of immigration and naturalization, the United States at its founding had virtually no legal restriction on who could enter or reside in the country.²⁸ Before the adoption of the Constitution, the Articles of Confederation initially allowed each state to pass its own requirements for naturalization although the benefits of citizenship in the Confederation were uniform throughout.²⁹ The Constitution amended this process and ordained Congress with the power to create a uniform system of naturalization laws.³⁰

In the early 1800s, the United States began to see a rapid influx of immigrants.³¹ Starting in the 1840s, these groups largely consisted of

²⁷ I do not attempt to catalog the entire development of the plenary power doctrine—numerous other scholars have already written excellent accounts. *See generally, e.g.*, Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (1984).

²⁸ Robbie Totten, *National Security and U.S. Immigration Policy, 1776–1790*, 39 J. INTERDISC. HIST. 37, 38–39 (2008).

²⁹ *See generally* ARTICLES OF CONFEDERATION OF 1781 (providing no specific limitation on states to govern the entry or exit of persons in and out of their borders); *id.* at art. II. (“Each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right which is not by this [C]onfederation expressly delegated to the [U]nited [S]tates, in [C]ongress assembled.”); *see also* Joseph Bessette, *Congress and the Naturalization of Immigrants*, HERITAGE FOUND. (Dec. 1, 2005), <https://www.heritage.org/report/congress-and-the-naturalization-immigrants> (noting widely varying state practices of naturalization under the Articles of Confederation).

³⁰ U.S. CONST. art. I, § 8 cl. 4. Although the Constitution addressed the power of regulating naturalization, it did not address any specific powers relating to regulating immigration. The Constitution conferred Congress with many other powers relating to foreign policy such as the sole power to declare war on foreign states; regulate commerce with foreign nations; regulate imports and exports; define acts that constitute piracy and try pirates in U.S. courts of law; to raise, support, and regulate armies and a navy; and to call forth a militia to repel invasions. *Id.* at cls. 1, 3, 10–14.

³¹ Totten, *supra* note 28, at 39–40.

Irish-Catholic immigrants fleeing famine in Ireland.³² By the 1850s, Chinese laborers began immigrating to the Western United States to capitalize on new labor opportunities spurred by the California gold rush.³³ For a time, the United States largely ignored this wave of immigration although anti-immigrant sentiment (mostly anti-Chinese sentiment later dubbed “The Yellow Peril”) began to build.³⁴ In 1882, the United States passed the Chinese Exclusion Act, which restricted entry, immigration, and naturalization of all Chinese laborers, who comprised most of Chinese immigration, and made Chinese permanent residents ineligible for naturalization.³⁵

After Chinese immigrants challenged the Chinese Exclusion Act’s constitutionality, the Supreme Court held in *Chae Chan Ping v. United States* (The Chinese Exclusion Case) that Congress, as part of its inherent power of sovereignty, had plenary power to regulate admission and exclusion of all non-citizens.³⁶ The Supreme Court reiterated Congress’s and the Executive’s plenary powers³⁷ and also held that such plenary powers of Congress and the Executive extend to their ability to regulate the removal of non-citizens from the United States with extremely limited judicial intervention.³⁸ As such, non-citizens had, and continue to

³² See *Immigration and Relocation in U.S. History: Irish-Catholic Immigration to America*, LIBR. CONG., <https://www.loc.gov/classroom-materials/immigration/irish/irish-catholic-immigration-to-america/> (last visited Nov. 2, 2020).

³³ *Chinese Exclusion Act*, HISTORY.COM (Aug. 24, 2018), <https://www.history.com/topics/immigration/chinese-exclusion-act-1882> (last updated Sept. 13, 2019).

³⁴ See John Kuo Wei Tchen & Dylan Yeats, *Yellow Peril: 19th-Century Scapegoating*, ASIAN AM. WRITERS’ WORKSHOP (Mar. 5, 2014), <https://aaww.org/yellow-peril-scapegoating/>.

³⁵ Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 58, amended by Geary Act of 1892, Pub. L. No. 52-60, 27 Stat. 25 (repealed 1943). Although the Chinese Exclusion Act was repealed in 1943, Chinese immigration did not pick up until the passage of the Immigration and Nationality Act of 1965, which abolished the National Origins Formula and allowed for far greater numbers of Chinese persons to immigrate. See Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911; *infra* note 42.

³⁶ 130 U.S. 581, 609 (1889) (“The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the [C]onstitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.”).

³⁷ *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893) (“[E]very sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States, this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress.” (quoting *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1891))). The *Fong Yue Ting* Court also delineated the specific powers which grant the President and Congress the power to regulate immigration. *Id.* at 711–12.

³⁸ See *Fong Yue Ting*, 149 U.S. at 713 (“The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the govern-

have, no fundamental right to enter or remain in the United States.³⁹ However, although Congress and the Executive had plenary power to respectively enact and enforce immigration law, the Court also held that, in cases of removal, foreign nationals had a right to limited due process protections, although these protections were extremely minimal and subject, again, to whatever Congress and the Executive, as delegated by Congress, decided they were.⁴⁰ These cases set the precedent for most immigration jurisprudence and continue to function as good law today.⁴¹

ment, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.”).

³⁹ See *id.* at 724.

⁴⁰ *Yamataya v. Fisher* (The Japanese Immigrant Case), 189 U.S. 86, 98 (1903) (“It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicil [sic] or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the [n]ational [g]overnment. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.”). *But see id.* at 100–01 (“[T]his court has never held . . . that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in ‘due process of law[.]’ . . . One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act. Therefore, it is not competent for . . . any executive officer . . . arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction . . . although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States.”).

⁴¹ Immigration jurisprudence comes at odds with other federal protections against alienage-citizenship discrimination. Just three years before the Court decided the *Chinese Exclusion Case*, the Court ruled that the Fourteenth Amendment’s Equal Protection Clause prohibited states from enforcing laws that discriminate, or aid in discrimination, based on one’s national origin or alienage. *Yick Wo. v. Hopkins*, 118 U.S. 356, 374 (1886). More recently, courts have held laws discriminating on the basis of alienage trigger heightened scrutiny. See, e.g., *Graham v. Richardson*, 403 U.S. 365, 372, 376 (1971) (holding a state law restricting access of lawful permanent residents, but not U.S. citizens, to certain welfare benefits warranted strict scrutiny and violated the Equal Protection Clause); *Plyler v. Doe*, 457 U.S. 202, 202 (1981) (holding that a state statute that authorized local school districts to deny public education to undocumented immigrant children warranted intermediate scrutiny and violated the Equal Protection Clause); *Dandamudi v. Tisch*, 686 F.3d 66, 81 (2d Cir. 2012) (holding a state law restricting access of nonimmigrants, but not lawful permanent residents or U.S. citizens, to pharmacist licenses warranted strict scrutiny and violated the Equal Protection Clause). The Court also held that “even aliens whose presence in [the United States] is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.” *Plyler*, 457 U.S. at 210. But the Court has also held that judicial review of laws related to the regulation of immigration warrant significantly less scrutiny than laws related to domestic matters that discriminate based on alienage. See *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976) (“In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.” (footnotes omitted)).

2. The Mid-Century Overhaul of the Immigration and Naturalization System and the Development of the Doctrine of Consular Non-Reviewability

In 1952, Congress passed the INA, which included a complete overhaul of the U.S. immigration system.⁴² Nonetheless, the Court declined to deviate from its earlier jurisprudence and strengthened the emerging doctrine of consular non-reviewability.⁴³ Consular non-reviewability, a logical outgrowth of the plenary power doctrine, refers to the doctrine that courts in most circumstances lack jurisdiction to review decisions of consular officers.⁴⁴

United States ex rel. Knauff v. Shaughnessy was a seminal case in the development of consular non-reviewability.⁴⁵ The Court affirmed that a foreign national had only a discretionarily-granted privilege and no right of entry as a matter of the United States' fundamental sovereign and plenary power to exclude persons not subject to its jurisdiction.⁴⁶ The Court opined that a foreign national is only entitled to due process that is “[w]hatever the procedure authorized by Congress is . . . as far as an

⁴² Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101–1537 (2018)). The INA defined the three major groups of immigrants that currently comprise the U.S. immigration preference-based system: employment-based immigrants, relatives of U.S. citizens and permanent residents, and refugees or asylum seekers. The INA also abolished virtually all racial restrictions in immigration and naturalization law, although the Act still retained a quota system for nationalities and regions. *See id.* Congress amended the INA in 1965, finally abolishing the National Origins Formula, thus eliminating *de jure* national origin, race, and ancestry as basis for immigration; increasing overall numbers of available immigrant visas; and placing a cap on immigration from countries in the Western Hemisphere. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911.

⁴³ *See United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

⁴⁴ A “‘consular officer’ means any consular, diplomatic, or other officer or employee of the United States . . . [who] issu[es] immigrant or nonimmigrant visas[.]” INA § 101(a)(9), 8 U.S.C. § 1101(a)(9) (2018).

⁴⁵ 338 U.S. at 537. Before the doctrine of consular non-reviewability appeared in Supreme Court jurisprudence, early twentieth century federal court cases displayed the doctrine’s prototype. In *United States ex rel. London v. Phelps*, the Second Circuit opined that “it [was] beyond the jurisdiction of the court” to review the denial of a visa, although without providing greater elaboration. 22 F.2d 288, 290 (2d Cir. 1927). A slightly more contoured doctrine appeared in *United States ex rel. Ulrich v. Kellogg* where the D.C. Circuit held that under then current immigration laws, the Immigration Acts of 1917 and 1924, the power to issue visas lay solely within the discretion of consular officers, and immigration laws provided no power for courts to review decisions of consular officers. 30 F.2d 984, 986 (D.C. Cir. 1929).

⁴⁶ *Knauff*, 338 U.S. at 542 (“[A]n alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe. It must be exercised in accordance with the procedure which the United States provides.” (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893) and *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1891))); *accord Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

alien denied entry is concerned.”⁴⁷ Moreover, the Court ruled that such exclusion applies to lawful permanent residents and temporary visitors, whether or not they have entered multiple times or for the first time.⁴⁸ In cases of exclusion, a foreign national is entitled to little due process when she is located outside the geographical, and hence jurisdictional, confines of the United States.⁴⁹ Nonetheless, the Court reaffirmed that, “[a]lthough Congress may prescribe the conditions for [a foreign national’s] deportation,” the Fifth Amendment entitles a foreign national located within the United States to a fair opportunity to be heard during deportation proceedings.⁵⁰ Thus, the *Knauff* articulation of consular non-reviewability is grounded not in the immigration laws but instead in the plenary power doctrine.⁵¹ As such, courts will not review discretionary immigration regulatory decisions and will entirely defer to the political branches (i.e., Congress and the Executive Branch).⁵²

3. Cracks in the Plenary Power Doctrine and the Doctrine of Consular Non-Reviewability

The plenary power doctrine is known as “a constitutional oddity” largely immune to traditional constitutional doctrinal analysis.⁵³ The Court has made immigration regulation exceptional under the plenary power doctrine, thereby subverting constitutional norms.⁵⁴ But even in spite of this subversion of constitutional norms and fidelity to the plenary power doctrine, the Court has hammered cracks into the plenary power doctrine even while upholding it.

In perhaps the first Supreme Court case challenging the plenary power doctrine, the Court in *Kleindienst v. Mandel* held that Congress’s and the Executive’s exercise of the plenary power are subject to only narrow judicial scrutiny even when the exercise of immigration regulation conflicts with a foreign national’s or U.S. citizen’s fundamental

⁴⁷ *Knauff*, 338 U.S. at 544.

⁴⁸ *Shaughnessy*, 345 U.S. at 213.

⁴⁹ See *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953). The Court later expanded the scope of minimum required due process protections to lawful permanent residents. See *Landon v. Plasencia*, 459 U.S. 21, 34–35 (1982); *infra* note 62 and accompanying text.

⁵⁰ *Kwong Hai Chew*, 344 U.S. at 596 & n.5, 597–98.

⁵¹ See *Knauff*, 338 U.S. at 542–44.

⁵² See *id.* at 543 (“Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.”).

⁵³ Legomsky, *supra* note 27, at 255.

⁵⁴ See Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549 (1990).

rights.⁵⁵ *Mandel* is noteworthy in two critical respects. First, in contrast to the Court in *Knauff*, which entirely declined jurisdiction to review an exercise of plenary power, the Court here granted standing to review an exercise of immigration plenary power because a fundamental right was implicated.⁵⁶ Second, the Court provided the modern standard for the doctrine of consular non-reviewability—courts will decline review of a consular officer’s discretionary decision, if there is “facially legitimate and bona fide reason” for the action.⁵⁷ Although it provided little contour to the “facially legitimate and bona fide reason” standard, the Court indicated for the first time that Congress’s and the Executive’s exercise of the plenary power is not absolutely immune from review.⁵⁸ Consular non-reviewability thus became a misnomer; the doctrine no longer invoked a question of “non-reviewability” but rather “what-reviewability,” or the extent to which *Mandel* permits a court to provide judicial review.⁵⁹ *Mandel*’s progeny provides some help at answering this question.

Landon v. Plasencia added an additional substantial wrinkle in plenary power jurisprudence.⁶⁰ Although foreign nationals who seek to enter the United States for the first time have little procedural due process to challenge denial of their entry, the *Plasencia* Court held that lawful permanent residents have greater access to due process to challenge agency decisions during the process of entry.⁶¹ Persons who continuously reside and are physically present in the United States are entitled to due process protections under the Fifth Amendment,⁶² and one who is

⁵⁵ 408 U.S. 753 (1972). In *Mandel*, the respondent, Ernest Mandel, was a Belgian academic specializing in Marxist economic theory. *Id.* at 756. Numerous professors at U.S. universities invited Mandel to speak, but a consular officer at the U.S. consulate in Brussels denied him a visa on the grounds that he failed to follow his speaking itinerary of his previous trip. *Id.* at 757–58 & n.5. Mandel sued on the grounds that, *inter alia*, the professors’ First Amendment right to receive information from Mandel’s speech were violated by (1) the consular officer’s denial of Mandel’s visa; (2) the Attorney General’s decision to not grant a waiver of the denial; and (3) the provisions of the INA that granted the power of the consular officer and Attorney General to make these decisions. *Id.* at 760. The Court granted standing to the claim regarding the professors’ First Amendment right. *Id.* at 764. Nonetheless, in applying the narrow “facially legitimate and bona fide reason” standard of review, the Court held that the First Amendment did not protect the professors’ right to receive information from a consular officer’s denial of Mandel’s visa. *Id.* at 770. Cases following *Mandel* saw unsuccessful challenges to congressional and executive immigration regulations that invoked other fundamental rights. See *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Kerry v. Din*, 135 S. Ct. 2128 (2015) (plurality opinion), *Fiallo v. Bell*, 430 U.S. 787 (1977); see also *infra* note 164.

⁵⁶ See Gabriela Baga, *Visa Denied: Why Courts Should Review a Consular Officer’s Denial of a U.S.-Citizen Family Member’s Visa*, 64 AM. U. L. REV. 591, 609 (2015).

⁵⁷ *Mandel*, 408 U.S. at 770.

⁵⁸ Baga, *supra* note 56, at 610–11 & n.90.

⁵⁹ See James A. R. Nafziger, *Review of Visa Denials by Consular Officers*, 66 WASH. L. REV. 1, 35 (1991).

⁶⁰ 459 U.S. 21 (1982).

⁶¹ See *id.* at 32–33.

⁶² See *id.* at 33 (quoting *Rosenberg v. Fleuti*, 374 U.S. 449, 460 (1963)).

absent from the United States for only a brief period will still be said to continuously reside in the United States.⁶³ However, such due process protections are not absolute, and courts will assess the scope of due process protections by balancing the foreign national's interests against those of the government.⁶⁴ In all, *Plasencia* drifted even further from the consular non-reviewability established in *Knauff*. Not only was the question, "what extent of judicial review is required for an exercise of immigration regulatory power?" but it also became, "what classes of foreign nationals are afforded this review?" In providing Fifth Amendment due process to lawful permanent residents, *Plasencia* opened the door for some classes of foreign nationals to similar protections. While immigrants and nonimmigrants who have never been the United States lack any due process protection, the Supreme Court affirmed its willingness to provide procedural due process of the Fifth Amendment to some foreign nationals regardless of their location inside the United States.

In recent years, the liberal Justices of the Roberts Court appear willing to further weaken the plenary power and consular non-reviewability doctrines. Joining Justice Kennedy in *Arizona v. United States*, the liberal Justices sought to ground Congress's power to regulate immigration in the text of the Constitution.⁶⁵ In the 2015 case *Kerry v. Din*, only two Justices voted to apply the *Mandel* standard of consular non-reviewability to a consular officer's decision to revoke the visa of the U.S.-citizen respondent's spouse.⁶⁶ Professor Michael Kagan views the Court's in-

⁶³ *Fleuti*, 374 U.S. at 462 (holding that departure is intended when there is "intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence.").

⁶⁴ See *Plasencia*, 459 U.S. at 34 (citing *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976)).

⁶⁵ 567 U.S. 387, 394–95 (2012) ("[Congress's] authority [over the subject of immigration and status of aliens] rests, in part, on the National Government's constitutional power to 'establish an [sic] uniform Rule of Naturalization,' and its inherent power as sovereign to control and conduct relations with foreign nations[.]" (citations omitted)). The Court's holding in *Arizona* is a substantial departure from the Court's earlier holdings regarding the source of Congress's immigration plenary power. See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936) ("[T]he investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution."). Justice Breyer has also noted that Congress's and the Executive's plenary powers over immigration affairs is "subject to important constitutional limitations." *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (dictum).

⁶⁶ 135 S. Ct. 2128 (2015) (plurality opinion). In *Din*, Fauzia Din, the U.S. citizen-respondent, challenged the constitutionality of (1) the Department of State's designation of her foreign national husband, Kanishka Berashk, as a terrorist, and (2) the consular officer's decision to deny her husband an immigrant visa because of this designation. *Id.* at 2131–32. The respondent argued that these decisions violated her Fifth Amendment liberty interest to live in the United States with her husband and her Fifth Amendment procedural due process right to rebut her husband's terrorist designation and visa denial. *Id.* at 2131. The Court held that the consular officer did not violate Din's due process rights. *Id.* at 2138. But only two Justices chose to invoke the *Mandel* inquiry in balancing Din's putative fundamental right to live with

ability to reach a majority decision based on the *Mandel* test as a sign that the plenary power doctrine is “on fragile jurisprudential ground and does not carry the force [of law] that it once did.”⁶⁷

Even one of the Court’s most recent addresses of the plenary power doctrine shows that the doctrine holds far less clout than its previous iterations. In *Trump v. Hawaii*, although the Court again upheld the plenary power doctrine, it may have inadvertently weakened it.⁶⁸ In upholding President Trump’s Travel Ban,⁶⁹ the Court applied rational basis review, a higher standard than that of the extremely narrow review of *Mandel* and post-*Mandel* cases.⁷⁰ Why the Court elected to follow this standard rather than apply precedent is curious,⁷¹ as the Court potentially

her husband in the U.S. against the government’s legitimate and bona fide reason to exercise immigration regulatory power. *Id.* at 2139–40 (Kennedy, J., concurring in judgment). Justices Kennedy and Alito opined that the government provided sufficient due process when it notified Din that a consular officer denied her husband a visa. *Id.* at 2139. The three-Justice plurality of the Court led by Justice Scalia sidestepped the *Mandel* inquiry entirely, with only a passing reference to the case. *Id.* at 2131. The plurality instead opined that the Fifth Amendment Due Process Clause provided no implied substantive liberty interest or fundamental for Din to live with her husband in the United States. *Id.* at 2138.

⁶⁷ Michael Kagan, *Plenary Power Is Dead: Long Live Plenary Power*, 114 MICH. L. REV. FIRST IMPRESSIONS 21, 22 (2015). Had four additional Justices joined Justice Breyer’s opinion—in which he opined that the respondent had a protected liberty interest in her freedom to live with her foreign national husband in the United States, such that the government owed her a process to change her husband’s visa denial—the plenary power doctrine would have been overruled. *See Din*, 135 S. Ct. at 2142 (Breyer, J., dissenting); Kagan, *supra* note 67, at 22.

⁶⁸ 138 S. Ct. 2392 (2018).

⁶⁹ Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017) (Travel Ban III) (expanding Exec. Order No. 13,780); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (Travel Ban II) (revoking Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017) (Travel Ban I)).

⁷⁰ *Trump*, 138 S. Ct. at 2420, 2423. *Cf.* *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (applying “narrow judicial review”); *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) (reviewing on the basis of a “facially legitimate and bona fide reason”).

⁷¹ The Court claims it broadened its review of the Travel Ban from “facially legitimate and bona fide reason” to “rational basis” at the Government’s request, although why the Government requested such review is not clear from the opinion. *See Trump*, 138 S. Ct. at 2420. Even more interesting to note is that neither the Government’s brief, nor the Court’s opinion in *Trump v. Hawaii*, reference the primordial case establishing the plenary power, the *Chinese Exclusion Case*. Professor Kagan notes that the Department of Justice (DOJ) was likely unwilling to mention the case in its brief because (1) explicitly linking the travel ban to the Chinese Exclusion Act, which is now seen as an overtly racist act of Congress, would have been politically unwise and disastrous; and (2) the DOJ may have believed the *Chinese Exclusion Case* was slipping into the anti-canon—“a category of decisions that are understood to be un-citable as precedent, and relevant to courts only as a warning.” Michael Kagan, *Is the Chinese Exclusion Case Still Good Law? (The President Is Trying to Find Out)*, 1 NEV. L.J.F. 80, 81 (2017) (footnote omitted); *see also* Shawn E. Fields, *The Unreviewable Executive? National Security and the Limits of Plenary Power*, 84 TENN. L. REV. 731, 753 (2017) (questioning whether the DOJ would ignore the *Chinese Exclusion Case* “for purely optics reasons”). Another commentator has noted that in the last forty years, despite remaining good law, the *Chinese Exclusion Case* has been cited by the Court only once. Garrett Epps, *The Ghost of Chae Chan Ping*, ATLANTIC (Jan. 20, 2018), <https://www.theatlantic.com/politics/>

has further opened up challenges to Congress's or the Executive's plenary power to broader judicial scrutiny when an exercise of plenary power implicates constitutional or fundamental rights.⁷² Moreover, all four of the liberal Justices appeared willing to invalidate the Travel Ban on the basis of violating the Establishment Clause, suggesting that a liberal faction of the Court is willing to provide greater scrutiny to congressional and executive immigration actions that implicate constitutional or fundamental rights.⁷³

B. *The Visa Application and Visa Revocation Processes*

1. The Visa Application Process

Foreign nationals who wish to come to the United States may do so only after obtaining a visa.⁷⁴ Some foreign nationals may want to travel to the United States only temporarily, such as for tourism or for completing their education, and as such must apply for a nonimmigrant visa.⁷⁵ In 2018, the Department of State issued over nine million nonimmigrant visas at foreign service posts (i.e., embassies or consulates).⁷⁶ A foreign

archive/2018/01/ghost-haunting-immigration/551015/. The hesitance of the Court to raise the specter of the *Chinese Exclusion Case*, similar to that of *Korematsu v. United States*, 323 U.S. 214 (1944), is likely because of its racist undertones and the Court's reluctance to address the case unless the Court finds a pressing reason to.

⁷² In her dissent, Justice Sotomayor argued for an even higher level of judicial scrutiny—strict scrutiny—for challenges to immigration laws that conflict with the Establishment Clause of the First Amendment. See *Trump*, 138 S. Ct. at 2441. Justice Sotomayor highlighted that the Court, in deciding rational basis review as the correct standard in substitute of the narrow review of *Mandel*, was inconsistently applying the law. See *id.* (“[T]he Court, without explanation or precedential support, limits its review of the Proclamation to rational-basis scrutiny. That approach is perplexing, given that in other Establishment Clause cases, including those involving claims of religious animus or discrimination, this Court has applied a more stringent standard of review.” (citation omitted)). In particular, Justice Sotomayor highlighted this inconsistency by referencing the Court's decision in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), decided only weeks earlier. There, the Court applied greater scrutiny to far less pervasive official State expressions of animus towards a particular religion than that which the Court applied to Trump's overt statements about Muslim persons in issuing his Travel Ban. See *id.* at 1729–31.

⁷³ *Trump*, 138 S. Ct. at 2433 (Breyer, J., dissenting) (“If this Court must decide the question . . . I would, on balance, find the evidence of antireligious bias . . . a sufficient basis to set the Proclamation aside.”); *id.* at 2441 (Sotomayor, J., dissenting) (“[T]he Proclamation is plainly unconstitutional under [the] heightened standard [of strict scrutiny]. But even under rational-basis review, the Proclamation must fall.” (citation omitted)). Justice Kagan joined Justice Breyer's opinion, and Justice Ginsburg joined Justice Sotomayor's opinion.

⁷⁴ 8 C.F.R. §§ 211.1, 212.1 (2020).

⁷⁵ Examples of nonimmigrant classifications include B-2 visitor, F-1 student, or H-1B specialty occupation worker. For a full list of nonimmigrant classifications and classification requirements, see 8 C.F.R. § 214 (2020), 22 C.F.R. § 41.12 (2020), and U.S. DEP'T OF STATE, 9 FAM 402.1-2, INTRODUCTION TO NIV CLASSIFICATION (2016), <https://fam.state.gov/FAM/09FAM/09FAM040201.html>.

⁷⁶ 2018 U.S. DEP'T OF STATE REP. VISA OFF. tbl.1, <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2018AnnualReport/FY18AnnualReport%20-%20TableI.pdf>.

national first needs to apply for a nonimmigrant classification, although the requirements differ from visa to visa.⁷⁷ Some require first filing a petition with U.S. Citizenship and Immigration Services (USCIS), the agency within the Department of Homeland Security that confers, *inter alia*, immigration classifications.⁷⁸ For other visas, such as the B visitor visa, a foreign national may apply for classification directly with the Department of State when she applies for the visa.⁷⁹ Upon application, a nonimmigrant must go through rigorous background checks, fingerprinting, and other investigations to ensure that the foreign national is eligible for her requested nonimmigrant classification.⁸⁰ Only after the foreign national receives approval of her classification may the foreign national apply for a visa from the Department of State.⁸¹ The application process requires that the foreign national file forms with the Department of State, pay a fee, and engage in an in-person interview with a consular officer, who then may grant a visa to travel to the United States.⁸² The process starting from the initial nonimmigrant classification request to visa approval can vary widely in waiting times, ranging from a few days to several months.⁸³

Other foreign nationals who seek to become lawful U.S. permanent residents must first apply for an immigrant visa.⁸⁴ In 2018, the Department of State issued 533,537 immigrant visas at foreign service posts.⁸⁵ The immigrant visa approval process often takes far longer than the non-immigrant visa process, although the process is similar in structure.⁸⁶ A foreign national looking to immigrate must generally first apply for an eligible immigrant classification with USCIS and then wait for approval.⁸⁷ Per the INA, the Department of State caps the number of immi-

⁷⁷ See e.g., *Directory of Visa Categories*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/all-visa-categories.html> (last visited Nov. 7, 2020).

⁷⁸ These classifications include the E investor, H-1B specialty worker, O-1 alien of extraordinary ability, among others. *Id.*

⁷⁹ *Id.*

⁸⁰ See 1 U.S. CITIZENSHIP & IMMIGR. SERVS., *Chapter 1 – Purpose and Background*, in POLICY MANUAL (n.d.), <https://www.uscis.gov/policy-manual/volume-1-part-c-chapter-1>.

⁸¹ See 22 C.F.R. §§ 41.101–41.108 (2020); *Visitor Visa*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visitor.html> (last visited Nov. 7, 2020).

⁸² See *Visitor Visa*, *supra* note 81.

⁸³ See *Visa Appointment Wait Times*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/wait-times.html> (last visited Nov. 7, 2020).

⁸⁴ *How to Enter the U.S.*, USA.GOV, <https://www.usa.gov/enter-us> (last visited Nov. 7, 2020).

⁸⁵ U.S. DEP'T OF STATE, *supra* note 76.

⁸⁶ See *Immigrant Visa Process: Step 1: Submit a Petition*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/immigrate/the-immigrant-visa-process/step-1-submit-a-petition.html> (last visited Nov. 7, 2020).

⁸⁷ See 8 C.F.R. § 245.2 (2020); *Immigrant Visa Process: Step 1: Submit a Petition*, *supra* note 86. For a full list of immigrant classifications and their requirements, see 8 C.F.R. § 204

grant visas it issues per year depending on the classification and the applicant's country of origin.⁸⁸ Immigrant classification approval essentially provides a prospective immigrant a waiting number for a visa interview.⁸⁹ Even if foreign nationals have immigrant classification approval, they may need to wait longer, sometimes years, before an immigrant visa in their category is available in their country of chargeability.⁹⁰

2. The Visa Revocation Process

Department of State consular officers, the Secretary of State, and other Department of State officials have the discretionary power to revoke any visa the Department of State issues regardless of whether a foreign national received visa approval.⁹¹ The Department of State's Foreign Affairs Manual (FAM) nonetheless provides some written guidance and restriction as to when consular officers may revoke a visa, differing between nonimmigrant and immigrant visas.⁹² With respect to nonimmigrant visas, the FAM directs consular officers to revoke in only three situations: (1) the foreign national is not eligible for the particular visa classification or is inadmissible to the United States under INA § 212(a) or INA § 214(b); (2) the visa has been physically removed from the passport in which it was issued; or (3) the foreign national has been arrested,

(2020), 22 C.F.R. § 42.11 (2020), and U.S. DEP'T OF STATE, 9 FAM 502.1-3, IV CLASSIFICATION SYMBOLS (2016), <https://fam.state.gov/FAM/09FAM/09FAM050201.html>.

⁸⁸ See INA § 201, 8 U.S.C. § 1151 (2018) (providing numerical limitations on the issuance of certain visa classifications); INA § 202, 8 U.S.C. § 1152 (2018) (providing numerical limitations on the issuance of immigrant visas to foreign nationals chargeable to certain foreign states); INA § 203, 8 U.S.C. § 1153 (2018) (providing preference allocation for family and employment-based visas); see also *Immigrant Visa Process: Step 2: NVC Processing*, U.S. DEP'T STATE, <https://travel.state.gov/content/travel/en/us-visas/immigrate/the-immigrant-visa-process/step-1-submit-a-petition/step-2-begin-nvc-processing.html> (last visited Nov. 7, 2020).

⁸⁹ See *NVC Timeframes*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/immigrate/nvc-timeframes.html> (last visited Nov. 7, 2020)

⁹⁰ The country of chargeability generally refers to the foreign state in which the foreign national was born, with some exceptions. See INA § 202(b), 8 U.S.C. § 1152(b) (2018). Here is an example demonstrating the wait periods some foreign nationals experience: as of August 2020, the Department of State is issuing immigrant visas for second-preference classification workers of exceptional ability (known as EB-2 immigrant classification) from India who applied for their visa only as recently as July 8, 2009. As such, if processing rates remain the same, an Indian foreign national applying today for an immigrant visa under EB-2 classification will take over ten years to receive their visa. See 44 U.S. DEP'T OF STATE VISA BULL. FOR AUG. 2020 1, 2, https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_august2020.pdf.

⁹¹ INA § 221(i), 8 U.S.C. § 1201(i) (2018); 22 C.F.R. § 41.122 (2020) (rules governing revocation of nonimmigrant visas); 22 C.F.R. § 42.82 (2020) (rules governing revocation of immigrant visas).

⁹² Compare U.S. DEP'T OF STATE, 9 FAM 403.11-3(A), WHEN CONSULAR OFFICERS MAY REVOKE VISAS (2019), <https://fam.state.gov/fam/09FAM/09FAM040311.html>, with U.S. DEP'T OF STATE, 9 FAM 504.12-2, GROUNDS FOR REVOCATION OF AN IMMIGRANT VISA (IV) (2016), <https://fam.state.gov/fam/09FAM/09FAM050412.html>.

convicted of, or suspected of driving under the influence.⁹³ Beyond these grounds a consular officer may not revoke a foreign national's nonimmigrant visa.⁹⁴ But the FAM allows the Department of State's Visa Office of Screening, Analysis, and Coordination (Visa Office) to "prudentially" revoke a foreign national's nonimmigrant visa if the Visa Office upon derogatory information provided by a U.S. government agency, intelligence agency, or law enforcement community, or if the Visa Office suspects the foreign national is ineligible for the visa or for *any* other reason.⁹⁵ With respect to immigrant visas, a consular officer may revoke if the officer suspects the immigrant visa "was procured by fraud, a willfully false or misleading representation, the willful concealment of a material fact, or other unlawful means," or if the consular officer believes the foreign national was ineligible to receive the visa at the time of issue.⁹⁶ But once a foreign national has passed inspection at a CBP port-of-entry and has entered the United States, a consular officer has no authority to revoke an immigrant visa.⁹⁷ Consular officers, the Secretary of State, and other Department of State officials may also provisionally revoke a visa while considering information related to whether the foreign national is eligible for the visa, upon which the visa will be reinstated if the official is satisfied that the foreign national is indeed eligible.⁹⁸ In all, although the FAM provides differing guidance for consular officers for when revocation is appropriate, the INA and its implementing regulations are clear that Department of State officials have unilateral discretionary power to revoke.⁹⁹

CBP officers¹⁰⁰ also have the power to revoke a foreign national's visa at a port of entry.¹⁰¹ If a CBP officer determines a foreign national is inadmissible to the United States before the foreign national is admitted,

⁹³ See U.S. DEP'T OF STATE, WHEN CONSULAR OFFICERS MAY REVOKE VISAS, *supra* note 92.

⁹⁴ See U.S. DEP'T OF STATE, 9 FAM 403.11-3(B), WHEN CONSULAR OFFICERS MAY NOT REVOKE VISAS (2015), <https://fam.state.gov/fam/09FAM/09FAM040311.html>; U.S. DEP'T OF STATE, 9 FAM 403.11-5(B), PRUDENTIAL REVOCATIONS (2020), <https://fam.state.gov/fam/09FAM/09FAM040311.html>. The FAM provides a fourth, classified ground for a consular officer to revoke a nonimmigrant visa. U.S. DEP'T OF STATE, WHEN CONSULAR OFFICERS MAY REVOKE VISAS, *supra* note 92.

⁹⁵ U.S. DEP'T OF STATE, PRUDENTIAL REVOCATIONS, *supra* note 94.

⁹⁶ U.S. DEP'T OF STATE, 9 FAM 504.12-2, GROUNDS FOR REVOCATION OF AN IMMIGRANT VISA (IV) (2016), <https://fam.state.gov/fam/09FAM/09FAM050412.html>. The FAM also provides an additional third, classified ground for revocation of an immigrant visa. *Id.*

⁹⁷ U.S. DEP'T OF STATE, 9 FAM 504.12-3(A), REVOCATION MUST TAKE PLACE PRIOR TO ENTRY INTO THE UNITED STATES, (2016), <https://fam.state.gov/fam/09FAM/09FAM050412.html>.

⁹⁸ 22 C.F.R. §§ 41.122(b), 42.82(b) (2020).

⁹⁹ INA § 221(i), 8 U.S.C. § 1201(i) (2018); 22 C.F.R. §§ 41.122, 42.82 (2020).

¹⁰⁰ CBP officers operate within the Department of Homeland Security, not the Department of State. See 6 U.S.C. § 211 (2018).

¹⁰¹ See 22 C.F.R. § 41.122(a) (2020).

the officer may revoke her visa and order her removed without a further hearing through a process known as “expedited removal.”¹⁰² Even though the foreign national may be on U.S. soil, because the foreign national has not yet been lawfully admitted, she has not “entered” the United States such that constitutional rights automatically attach.¹⁰³ As such, the foreign national may not be entitled to due process under the Constitution for a hearing to challenge his visa revocation or his removal. Thus, for visa revocation purposes, the United States treats non-admitted foreign national on U.S. soil as those physically located outside the United States.

In general, the procedures for nonimmigrant and immigrant visa revocations are the same—when a consular officer revokes a visa, the officer is required to (1) “if practicable,” notify the foreign national of the consular officer’s intent to revoke; (2) allow the foreign national the opportunity to show why the visa should not be revoked; and (3) request the foreign national to present the travel document or passport in which the visa was issued.¹⁰⁴ The FAM notes that notice may not be practicable if the consular post does not know the foreign national’s current location, or if the consulate has reason to believe the foreign national’s departure to the United States is imminent.¹⁰⁵ The FAM also allows a consular officer to withhold notice of intent to revoke a visa if the consular officer has reason to believe that this notice would cause the foreign national to attempt immediate travel to the United States.¹⁰⁶ However, if the Department of State itself, in its discretionary power, revokes a foreign national’s visa, then the Department of State need not notify the foreign national.¹⁰⁷ In addition, for nonimmigrant visas, a consulate can provide a “silent revocation” where it withholds notice of intent to revoke from a

¹⁰² INA § 235(b), 8 U.S.C. § 1225(b) (2018); 22 C.F.R. § 41.122(e)(2) (2020).

¹⁰³ See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212–13 (1953) (holding that a foreign national’s harborage at Ellis Island before admission by an immigration officer did not constitute an “entry,” thus the foreign national was not owed constitutional protections of due process) (“[A]n alien on the threshold of initial entry stands on a different footing: ‘Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.’” (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950))). Ismail Ajjawī, whose case is discussed *supra* notes 1–13 and accompanying text, was in a similar situation as the respondent in *Mezei* whereby Ismail was physically located in the United States yet not admitted at the time of his visa revocation.

¹⁰⁴ 22 C.F.R. §§ 41.122(c), 42.82(c) (2020); U.S. DEP’T OF STATE, PRUDENTIAL REVOCATIONS, *supra* note 94; U.S. DEP’T OF STATE, 9 FAM 504.12-3(B), REVOCATION PROCEDURES AT POST (2020), <https://fam.state.gov/fam/09FAM/09FAM050412.html>.

¹⁰⁵ U.S. DEP’T OF STATE, 9 FAM 403.11-4(A)(1)(a)(2), REQUIRED PROCEDURES (2020), <https://fam.state.gov/fam/09FAM/09FAM040311.html>.

¹⁰⁶ *Id.*

¹⁰⁷ See U.S. DEP’T OF STATE, 9 FAM 403.11-5, REVOCATION OF VISAS BY THE DEPARTMENT (2020), <https://fam.state.gov/fam/09FAM/09FAM040311.html>. When the Department of State itself revokes a visa, it will send a notice of revocation to the appropriate consular post and establish a point of contact between that post and the Visa Office. *Id.* Although the Depart-

foreign national when law enforcement or intelligence agency interests require that the foreign national remain unaware of the cancellation or other government surveillance.¹⁰⁸ Once the consular officer enters her decision to revoke a visa, the officer must physically write or stamp “REVOKED” on the visa itself, if available, and the officer must enter the foreign national’s name in the Department of State’s Consular Lookout and Support System (CLASS), officially rendering the visa invalid.¹⁰⁹

The FAM additionally provides a weakly-detailed process for visa revocation reconsiderations. The FAM provides only a few contours: the FAM allows the foreign national to (1) ask the consular officer to reconsider the revocation of her visa; (2) ask the consular officer to consider any evidence the foreign national submits; and (3) have an attorney or representative advocate on the foreign national’s behalf on a matter in connection with the request for reconsideration.¹¹⁰ The revocation reconsideration process is not established under the Fifth Amendment Due Process Clause; it is established by the Department of State within the bounds permitted by the INA, although the INA does not require any appeals process or reconsideration.¹¹¹ If the Department of State wishes, it may eliminate the process.¹¹² Beyond this limited reconsideration process, the INA explicitly prohibits a foreign national from seeking judicial review of her visa revocation.¹¹³

3. The Dangerous Public Policy Implications of the Visa Revocation Process and the Potentially Serious Consequences

The Department of State’s power to revoke visas and the process for doing so carries tremendous consequences (1) as a legal matter, (2) as a political matter, and (3) as a humanitarian matter. Determining the number of annual visa revocations is elusive as the Department of State does not release the number of visas that either consular officers or the De-

ment of State is not required to notify a foreign national of her visa revocation, FAM guidance nonetheless advises the consular post to provide notice to the foreign national. *Id.*

¹⁰⁸ U.S. DEP’T OF STATE, PRUDENTIAL REVOCATIONS, *supra* note 94.

¹⁰⁹ 22 C.F.R. §§ 41.122(c)–(d) (2020). The unavailability of the visa to a consular officer does not affect the validity of the revocation. 22 C.F.R. § 41.122(d) (2020).

¹¹⁰ U.S. DEP’T OF STATE, 9 FAM 504.12-4, RECONSIDERATION OF REVOCATION (2016), <https://fam.state.gov/fam/09FAM/09FAM050412.html>; *see also* U.S. DEP’T OF STATE, 9 FAM 403.11-6(A), REINSTATEMENT FOLLOWING REVOCATION (2020), <https://fam.state.gov/fam/09FAM/09FAM040311.html>.

¹¹¹ *See* U.S. DEP’T OF STATE, RECONSIDERATION OF REVOCATION, *supra* note 110.

¹¹² *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) (“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”); *Yamataya v. Fisher* (The Japanese Immigrant Case), 189 U.S. 86, 98 (1903) (“[T]he decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.”).

¹¹³ INA § 221(i), 8 U.S.C. § 1201(i) (2018).

partment itself revokes.¹¹⁴ One immigration attorney estimates that between 2001 and 2015, approximately 122,000 visas were revoked, and during a 2017 court hearing involving a challenge to President Trump's Travel Ban, the Justice Department revealed it had revoked over 100,000 visas in the first week following imposition of the ban.¹¹⁵ Although those numbers are only a fraction of the millions of visas issued during the same period, over one hundred thousand visa holders were subject to a potentially arbitrary and unfair process. As a matter of public policy, no government agency should have the opportunity to act without accountability. Beyond the numbers, the mere threat of revocation allows the federal government to wield an incredible amount of international political power in deciding which foreign nationals are undeserving of visas.

From a legal standpoint, the Department of State's current procedural unilateral power to revoke visas without significant external oversight provides a dangerous lack of accountability and creates conditions rife for abuses of discretion. As an initial matter, the intent-to-revoke notice procedure may be ineffectual because the procedure does not require "actual" notice, only "practicable" notice as discussed *supra*.¹¹⁶ While the FAM freely directs its officers to attempt to provide a foreign national with its intent to revoke, the "if practicable" qualifier and the numerous exceptions to notice swallow the purpose of providing notice.¹¹⁷ Without ensuring actual notice in any given case, there is a substantial chance that the Department of State may fail to provide a foreign national a meaningful opportunity to respond. Further, once a revocation has been entered into the CLASS, the visa becomes invalid, regardless of whether the foreign national received actual notice.¹¹⁸ This system of "practicable notice" encourages a "revoke first, review later" system, putting foreign nationals in the unfair position of having to expend resources to defend their visa eligibility in a largely opaque, informal process. Under the current reconsideration process, a visa revocation reconsideration goes right back to the officer that made the potentially arbitrary and capricious decision.¹¹⁹ The lack of an independent reviewer effectively denies the foreign national a fair review of her decision and a full and fair opportunity to respond.¹²⁰ Since the INA precludes any judicial review of a visa revocation, the foreign national is at the mercy of a process primed for arbitrary and biased review with little accountability.

¹¹⁴ Zraick, *supra* note 14.

¹¹⁵ Shihab, *supra* note 16; O'Hara, *supra* note 16.

¹¹⁶ See *supra* Part I.B.2 para. 3.

¹¹⁷ See *supra* Part I.B.2 para. 3.

¹¹⁸ See 22 C.F.R. §§ 41.122(c), 42.82(c) (2020).

¹¹⁹ See U.S. DEP'T OF STATE, RECONSIDERATION OF REVOCATION, *supra* note 110.

¹²⁰ See *id.*

Moreover, the issuance and subsequent revocation of a visa can carry significant political overtones. By its very nature the immigration process is politically and foreign policy-wise sensitive.¹²¹ The FAM fully recognizes this fact in advising consular officers to proceed with caution when revoking certain classifications of visas.¹²² Nonetheless, the Department of State has used its visa revocation power to exert influence and control over many of its foreign rival states.¹²³ Recently, the Department of State has revoked business visas, tourist visas, and student visas for Chinese, Iranian, and Palestinian foreign nationals.¹²⁴ And as mentioned *supra*, President Trump wielded the power of INA § 221(i) to revoke visas of certain Chinese students and researchers as a maneuver to show political strength against China.¹²⁵

Revocation of a foreign national's visa can create chaotic, devastating, and expensive consequences for the visa holder. When Sepideh, an Iranian graduate engineering student at the University of California, Riverside, was about to board her plane to the United States, airline employees told her that the Department of State notified the airline that her visa was revoked.¹²⁶ Devastated and in tears, Sepideh had to travel to the U.S. Embassy in Armenia—over 700 miles away—instead of attending her school's orientation and moving into her apartment, for which she had already paid rent.¹²⁷ Amin, another Iranian student, spent eight months securing his F-1 student visa and was denied entry at Boston's Logan International Airport after CBP were notified by the Department of State that it revoked Amin's visa.¹²⁸ Neither Sepideh nor Amin were provided a reason as to why their visas were revoked.¹²⁹ Other students reported

¹²¹ Nafziger, *supra* note 59, at 48.

¹²² See U.S. DEP'T OF STATE, 9 FAM 403.11-4(C)(1), KEEPING DEPARTMENT INFORMED IN HIGH PROFILE CASES (2020), <https://fam.state.gov/fam/09FAM/09FAM040311.html> ("The revocation of the visa of a public official or prominent local or international person can have immediate and long-term repercussions on our political relationships with foreign powers and on our public diplomacy goals in a foreign state."); U.S. DEP'T OF STATE, 9 FAM 403.11-4(C)(2), DIPLOMATIC AND OFFICIAL VISAS (2015), <https://fam.state.gov/fam/09FAM/09FAM040311.html>.

¹²³ See Emily Feng, *Visas Are the Newest Weapon in U.S.-China Rivalry*, NPR (Apr. 25, 2019 5:12 AM), <https://www.npr.org/2019/04/25/716032871/visas-are-the-newest-weapon-in-u-s-china-rivalry>; Zraick, *supra* note 14; Zraick & Zaveri, *supra* note 1.

¹²⁴ See Feng, *supra* note 123; Karin Fischer, *An Iranian Student's Visa Was Voided on His Way to America. He Still Doesn't Know Why.*, CHRONICLE (Oct. 8, 2019); Zraick, *supra* note 14; Zraick & Zaveri, *supra* note 1.

¹²⁵ See Proclamation No. 10,043, 85 Fed. Reg. at 34,354 (June 4, 2020); see also *supra* note 19 and accompanying text.

¹²⁶ Parvini, *supra* note 14.

¹²⁷ See *id.*

¹²⁸ See *id.*

¹²⁹ See *id.*

that they “had left high-level jobs or sold their homes, or had turned down opportunities in Europe or Canada.”¹³⁰

On another recent occasion as described *supra*, Ismail Ajjawi, a Palestinian student from Lebanon set to begin his undergraduate studies at Harvard University was denied entry to the United States after a CBP officer revoked his visa based on statements Ismail’s friend made on social media that Ismail allegedly commented on.¹³¹ In some cases, a visa revocation can lead to a visa holder being barred from entry into the United States for years or even permanently.¹³² In addition, if a foreign national’s family members attempt to obtain a visa, those persons’ eligibility could be affected.¹³³ From these examples, one can see that visa revocations carry very serious and harsh consequences.

II. EXTRATERRITORIAL APPLICATION OF PROCEDURAL DUE PROCESS TO FOREIGN NATIONALS ABROAD: ESTABLISHING STANDING UNDER THE BOUMEDIENE-VERDUGO-URQUIDEZ TEST

My discussion in this Note addresses three specific populations: (1) foreign nationals located outside of the United States who have been granted immigrant visas, who have not yet entered the United States on their immigrant visas, whose respective visas were subsequently revoked by the Secretary of State or a consular officer (“Group 1 FNs”); (2) foreign nationals located outside of the United States with nonimmigrant visas, who have not yet entered the United States on their nonimmigrant visas, whose respective visas were subsequently revoked by the Secretary of State or a consular officer (“Group 2 FNs”); and (3) foreign nationals located outside of the United States who have been granted nonimmigrant visas who have previously entered the United States on their nonimmigrant visas and whose visas were revoked by the Secretary of State or a consular officer while the foreign nationals were outside the United States (“Group 3 FNs”). The following table highlights the distinctions between these categories:

¹³⁰ Zraick, *supra* note 14.

¹³¹ Zraick & Zaveri, *supra* note 1. The Department of State eventually reinstated Ismail’s visa, although only following public outcry, significant media attention, and intervention from Harvard. See Anemona Hartocollis, *Palestinian Harvard Student Blocked from Coming to U.S. Is Allowed to Enter*, N.Y. TIMES (Sept. 3, 2019), <https://www.nytimes.com/2019/09/03/us/palestinian-harvard-student.html>. Naturally, one should expect most foreign nationals lack the clout to attract enough public attention to pressure the government into reversing a visa revocation decision.

¹³² Shihab, *supra* note 16.

¹³³ *Id.*

	Prior Admission Status to the United States	Where FN Was Located During Visa Revocation	Type of Visa Revoked	Court Recognition of Standing to Challenge Revocation
Group 1 FNs	Not Previously Admitted	Outside the United States	Immigrant Visa	None yet
Group 2 FNs	Not Previously Admitted	Outside the United States	Nonimmigrant Visa	None yet
Group 3 FNs	Previously Admitted	Outside the United States	Nonimmigrant Visa	Yes. <i>See Ibrahim v. Department of Homeland Sec.</i> , 669 F.3d 983 (9th Cir. 2012)

TABLE 1: DISTINCTIONS BETWEEN CATEGORIES OF FOREIGN NATIONALS DISCUSSED IN THIS NOTE.

Persons physically present within and lawfully admitted to the United States unquestionably have access to Fifth Amendment procedural due process rights regardless of immigration status.¹³⁴ As such, visa revocations that trigger removal proceedings already warrant some kind of hearing for affected foreign nationals physically located inside the United States. The jurisprudence and policy this I advocate for concerns foreign nationals physically located outside the United States, which makes their standing unclear.

When this I refer to “challenging a visa revocation,” I am concerned with establishing a constitutionally-sufficient process that protects foreign nationals’ due process rights in all visa revocation proceedings, rather than the merits of the unlawfulness of an individual visa revocation.¹³⁵ Thus, I aim to address the possible legal arguments under the Constitution and the INA that (1) establish Article III standing for a foreign national located outside the United States, (2) substantiate an attack on the constitutionality of INA § 221(i) and its implementing regulations (22 C.F.R. §§ 41.122, 42.82), and (3) provide for a legal remedy that protect a foreign national’s due process rights.

¹³⁴ *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“[T]he Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful unlawful, temporary, or permanent.”).

¹³⁵ In fact, Section 221(i) of the INA explicitly precludes judicial review of an individual visa revocation decision. INA § 221(i), 8 U.S.C. § 1201(i) (2018).

A. *The Development of a Framework for Extraterritorial Application of the Constitution*

Before addressing a constitutional rights theory upon which a foreign national would be owed due process before her visa revocation under INA § 221(i), a foreign national would first need to show they have standing to challenge the constitutionality of the revocation process.¹³⁶ In the many cases in which the Supreme Court has decided whether the plenary power contravenes fundamental rights, the rights at stake were those of U.S. citizens or U.S.-based organizations representing the interests of U.S. citizens, not the foreign nationals themselves.¹³⁷ In most situations, under current immigration jurisprudence, the Constitution and its protections do not extend to foreign nationals physically located outside of the United States.¹³⁸ Many foreign nationals, whether they are applicants of immigrant or nonimmigrant visas, do not have U.S. citizen or U.S.-based organization sponsors.¹³⁹ As such, if the Department of State revoked a foreign national's visa, the foreign national may not have the putative shield of a U.S. citizen's rights to establish standing

¹³⁶ With respect to the various doctrines related to standing, here I primarily address standing to request judicial review provided by the common law (i.e., the review of the constitutionality of federal statutes provided by *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)) because judicial review provided by statute—namely provided by the Administrative Procedure Act (APA) of 1946, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 500-96 (2018))—cannot provide safeguard to a foreign national outside the United States challenging her visa revocation. The APA establishes standing for judicial review if a person has suffered a “legal wrong” or has been adversely affected by an agency action, unless, *inter alia*, a statute explicitly precludes judicial review. 5 U.S.C. § 701(a)(1) (2018). Since Section 221(i) of the INA explicitly precludes judicial review of an individual visa revocation decision, the APA's safeguards are inapplicable to visa revocations. It is important to note that, that while INA § 221(i) precludes judicial review of the act of revocation by the Secretary of State or consular officer, Section 221(i) does not preclude review of challenging the constitutionality of Section 221(i) itself.

¹³⁷ *See, e.g.*, *Kerry v. Din*, 135 S. Ct. 2128 (2015) (plurality opinion) (U.S. citizen-respondent's putative fundamental right to live with a spouse); *Fiallo v. Bell*, 430 U.S. 787 (1977) (U.S. citizen-father's putative fundamental rights to privacy, to establish a home, to raise natural children, and for children to be raised by their natural father); *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (U.S. citizen-respondent's putative First Amendment right to receive information).

¹³⁸ *See infra* Part II.A para. 2.

¹³⁹ For example, B nonimmigrant classification for temporary visitors does not use a sponsor (which, depending on the circumstances when a sponsor is needed, may take the form of a U.S. citizen, a lawful permanent resident, a U.S.-based employer, or a U.S.-based agent). *Compare, e.g.*, 8 C.F.R. § 214.2(h)(2)(i) (2020) (requiring sponsorship for temporary-worker H classification from a U.S. employer), 8 C.F.R. § 214.2(o)(2)(i) (2020) (requiring sponsorship for extraordinary ability O classification from a U.S. agent or U.S. employer), and 8 C.F.R. § 214.2(p)(2)(i) (2020) (requiring sponsorship for artist, athlete, or entertainer P classification from a U.S. agent or U.S. employer) *with* 8 C.F.R. 214.2(b)(1) (2020) (listing no sponsorship requirement for temporary visitor B classification). In addition, the EB-1 alien of extraordinary ability immigrant classification does not require a sponsor (although such classification allows the use of one if the applicant desires). *See* 8 C.F.R. § 204.5(h)(1) (2020).

in a U.S. court. Thus, a foreign national would first need to show that the Constitution indeed applies extraterritorially and that the Constitution's Fifth Amendment due process protections apply to the foreign national.

As discussed *supra*, the Court in *Landon v. Plasencia* held that a foreign national geographically located outside of the United States lacks the constitutional right to challenge decisions regarding her entry to the United States.¹⁴⁰ In *Plasencia*, however, the Court, relying on its precedent in *Johnson v. Eisentrager*,¹⁴¹ noted that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly."¹⁴²

Since *Eisentrager* and *Plasencia*, the Court has elaborated its test for extraterritorial application of the Constitution to foreign nationals outside the United States. In *United States v. Verdugo-Urquidez*, the Court held "aliens receive constitutional protections when they have come within the territory of the United States and developed *substantial connections* with this country[.]"¹⁴³ and that "[an] alien [is] accorded a generous and ascending scale of rights as he increases his identity with our society."¹⁴⁴ Moreover, the Court stressed that the connections with the United States must be voluntary.¹⁴⁵ The Court's employment of a standard rather than a rule is important; the Court implies that foreign nationals of any kind—not just lawful permanent residents—may have access to some constitutional rights and protections depending on their connection to the United States.

In *Boumediene v. Bush*, the Court departed from its formal test for extraterritorial application of the Constitution in *Eisentrager* and held that "questions of extraterritoriality turn on objective factors and practical concerns[.]"¹⁴⁶ No majority of the Supreme Court has yet held that the *Boumediene* functional test applies beyond habeas petitions, although one Court of Appeals has held that *Boumediene's* functional analysis ap-

¹⁴⁰ 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative. Our recent decisions confirm that view." (citations omitted)); *supra* note 60–61 and accompanying text.

¹⁴¹ 339 U.S. 763 (1950).

¹⁴² *Plasencia*, 459 U.S. at 32.

¹⁴³ 494 U.S. 259, 271 (1990) (emphasis added).

¹⁴⁴ *Id.* at 269 (quoting *Eisentrager*, 339 U.S. at 770).

¹⁴⁵ *See id.* at 271.

¹⁴⁶ 553 U.S. 723, 764 (2008). In *Boumediene*, the question before the Court was whether the Constitution afforded petitioners, foreign nationals captured by the United States on foreign battlefields and held in Guantanamo Bay, Cuba, a right to petition for habeas corpus under the Suspension Clause. *Id.* at 732, 734. The Court held that the petitioners had a right to file a habeas petition after analyzing three factors: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ." *Id.* at 766.

plies to the Fifth Amendment's Due Process Clause.¹⁴⁷ In contrast, other courts, such as the D.C. Circuit and the Court of Federal Claims, have rejected *Boumediene*'s application beyond habeas petitions, embraced a bright-line formal sovereignty-based test, and held that foreign nationals without property or presence in the United States have no constitutional rights.¹⁴⁸ Given the inconsistency of lower courts' application of *Boumediene*, it is currently unclear how much value *Eisentrager* retains as precedent.

During the 2019–20 term, as this Note underwent review and revision before publication, the Court decided *Agency for International Development v. Alliance for Open Society International, Inc. (AOSI II)* and stated “foreign citizens outside U. S. territory do not possess rights under the U. S. Constitution.”¹⁴⁹ As Justice Breyer, joined by Justices Ginsburg and Sotomayor, noted in his dissent, such an absolute rule is unsupported by previous Court precedent (specifically citing *Boumediene* and *Verdugo-Urquidez*), and the three Justices signaled they would have been willing to extend *Boumediene*'s functional analysis to cases involving constitutional rights violations beyond the habeas context.¹⁵⁰ As the Court in *AOSI II* did not purport to overrule any of the cases Justice Breyer cited, it remains to be seen whether this rule will become settled law or whether the rule is merely dicta and that future Justices may reconsider the functional approach to the extraterritorial reach of the Constitution outlined by *Boumediene*.

¹⁴⁷ *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 997 (9th Cir. 2012).

¹⁴⁸ *See Al Hela v. Trump*, 972 F.3d 120, 148 (D.C. Cir. 2020) (“[W]e conclude that the protections of the Due Process Clause . . . do not extend to aliens without property or presence in the sovereign territory of the United States.”); *Doe v. United States*, 95 Fed. Cl. 546, 570 (2010) (“Nothing in *Boumediene* suggests that the Court intended its holding to broadly apply to the Bill of Rights or to the takings clause[.]”).

¹⁴⁹ *See* 140 S. Ct. 2082, 2086 (2020). This decision was the second disposition of the case by the Supreme Court, which previously heard the case in 2013. *See Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013) (*AOSI I*).

¹⁵⁰ *See AOSI II*, 140 S. Ct. at 2100 (Breyer, J., dissenting) (“The law, we confirmed in *Boumediene*, is that constitutional ‘questions of extraterritoriality turn on objective factors and practical concerns’ present in a given case, ‘not formalism’ of the sort the majority invokes today. . . . [T]hey . . . include the nature of the constitutional protection sought, how feasible extending it would be in a given case, and the foreign citizen’s status vis-à-vis the United States, among other pertinent circumstances that might arise. . . . Our precedents reject absolutism.” (quoting *Boumediene*, 553 U.S. at 762)). Justice Kagan took no part in the consideration or decision of the case. In an earlier case, Justice Breyer, in a dissenting opinion joined by Justice Ginsburg, reasoned that the *Boumediene* test should apply to some substantive rights protected by the Constitution, such as those guaranteed by the Fourth Amendment. *See Hernandez v. Mesa*, 137 S. Ct. 2003, 2008–09 (2017) (Breyer, J., dissenting).

B. *Using the Boumediene-Verdugo-Urquidez Test to Achieve Standing for Foreign Nationals Abroad to Challenge the Visa Revocation Process*

Notwithstanding the uncertainty of whether the rule stated in *AOSI II* will become settled law, one possible solution to the standing problem may involve a combination of the *Boumediene* and *Verdugo-Urquidez* tests. In *Ibrahim v. Department of Homeland Security*, the Ninth Circuit rejected a “bright-line ‘formal sovereignty-based test’” and embraced a combination of the *Boumediene* functional test and *Verdugo-Urquidez* substantial connection test.¹⁵¹ The Ninth Circuit held that that a foreign national studying in the United States on a student visa, who voluntarily departed from the United States intending to return to continue her studies, had developed “a significant voluntary connection” to the United States to assert a Fifth Amendment due process challenge against the Department of Homeland Security, which placed the petitioner on a “no-fly list.”¹⁵² The Ninth Circuit’s adoption of a combined *Boumediene* and *Verdugo-Urquidez* (*BVU*) framework provides a path forward for foreign nationals located outside the United States to achieve standing under the Constitution.

The *BVU* test would be a viable means for Group 3 FNs¹⁵³ to establish standing. Nonetheless, because the *BVU* test has been applied only to nonimmigrant foreign nationals who have previously been present in the United States, Group 1 and 2 FNs¹⁵⁴ may have a harder time achieving standing. Because foreign nationals seeking admission to the United States for the first time have no constitutional rights,¹⁵⁵ the Court would have to overrule the plenary power doctrine for Group 1 and 2 FNs to find standing.¹⁵⁶ Under *Plasencia-Eisentrager*, a foreign national who is lawfully admitted to the United States on an immigrant visa and then departs the country the next day would have procedural due process rights to challenge any future exclusion, while an otherwise similarly

¹⁵¹ 669 F.3d 983, 997 (9th Cir. 2012) (“The law that we are bound to follow is . . . the ‘functional approach’ of *Boumediene* and the ‘significant voluntary connection’ test of *Verdugo-Urquidez*.”).

¹⁵² *Id.* The Ninth Circuit held that petitioner, by studying at Stanford for four years, established a substantial voluntary connection to the United States, and that when the petitioner voluntarily departed the United States, she expected her departure to be brief and did not intend to sever her voluntary connection to the United States. *Id.* (“Ibrahim has established ‘significant voluntary connection’ with the United States such that she has the right to assert claims under the First and Fifth Amendments.”).

¹⁵³ See *supra* Part II para. 1 and tbl.1.

¹⁵⁴ See *supra* Part II para. 1 and tbl.1.

¹⁵⁵ See *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596, n.5 (1953) (Murphy, J., concurring) (“The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores.” (quoting *Bridges v. Wixon*, 326 U.S. 135, 161 (1945))).

¹⁵⁶ See generally *infra* Part IV for my discussion of overturning the plenary power and consular non-reviewability doctrines.

situated foreign national who has yet to enter the United States on her immigrant visa has no standing. The difference of one day's entry to the United States should not justify a foreign national's ability to challenge exclusion versus another foreign national's inability to contest her visa revocation. In one scenario, a prospective B-2 nonimmigrant tourist outside the United States who invests thousands of dollars in a vacation to Disneyland has no procedural due process rights to contest a visa revocation. Meanwhile, a different B-2 nonimmigrant visitor with dreams of visiting Disneyland located inside the United States can challenge a revocation of her visa the very minute she leaves customs at Los Angeles International Airport.¹⁵⁷ The bright-line *Plasencia-Eisentragher* test for extraterritorial application of the Constitution ignores serious practicalities that can have major consequences on foreign nationals' lives.

Availing oneself of the laws of United States through the visa application process should be enough to justify a substantial voluntary connection to the United States. This statement is not an endorsement for the Court to create a fundamental right to immigrate or a requirement that a foreign national, whose application for a visa is denied, is owed a hearing to challenge said denial.¹⁵⁸ A foreign national who has merited a visa has a substantial voluntary connection, while a foreign national who has merely applied for a visa and has been denied lacks this substantial voluntary connection.¹⁵⁹ Rather, all foreign nationals, by virtue of availing themselves of the laws, rules, and regulations of the United States and

¹⁵⁷ See, e.g., *Knoetze v. U.S. Dep't of State*, 634 F.2d 207, 209 (5th Cir. 1981), *aff'g* *Knoetze v. United States*, 472 F. Supp. 201, 205 (S.D. Fl. 1979) (holding that a nonimmigrant then-present in the United States whose visa was revoked had standing to request judicial review of the revocation; "[T]he judiciary may review a decision by the Secretary of State to revoke the visa of an alien within our country."). But see *Castellanos v. Pfizer, Inc.*, 555 F. Supp. 2d 1343, 1349 (S.D. Fl. 2008) (distinguishing *Knoetze* because the plaintiffs were outside the United States when they challenged their visa revocations, and reasoning that the Fifth Circuit only had jurisdiction to review the petitioner's visa revocation because the petitioner was located within the United States and the revocation of his visa was the basis of his grounds for deportation).

¹⁵⁸ I acknowledge that creating a fundamental right to immigrate is tantamount to creating an "open-borders" system of immigration. While I favor open-borders, what the merits of creating an open-borders policy are is a question outside of the scope of this Note. Further, Congress is the appropriate body to enact legislation to create such a system, not the courts. Thus, until Congress can decide the open-borders question, I advocate that the *BVU* test is the correct legal doctrine that should govern when constitutional rights attach to a foreign national located outside of the United States.

¹⁵⁹ One could argue that some classes of nonimmigrants, such as students or treaty investors, may have substantial contacts to warrant a right to visa revocation hearing, while other foreign nationals, such as those on a tourist visa or an artist engaging in a limited series of performances as part of a cultural exchange program, may lack such substantial contacts. But classification should have no bearing on whether a foreign national may achieve standing. So long as the foreign national voluntarily avails herself of U.S. laws, complies with all laws during the application process, and receives her visa, she should have Article III standing to challenge the constitutionality of the revocation process.

who then the Department of State grants a visa, create and maintain a substantial voluntary connection with the United States. In other words, a foreign national creates and maintains a substantial voluntary connection to the United States by both submitting to the visa application process and possessing the lawfully granted visa. It is this substantial voluntary connection that warrants extraterritorial application of the Constitution and should provide a foreign national with standing required to challenge a visa revocation. It is fundamentally unfair for a foreign national who voluntarily avails herself of the laws (and thus the jurisdiction) of the United States to be denied the protections of those laws. Thus, the Court should definitively abandon the rigid *Plasencia-Eisentrager* test for extraterritorial application of the Constitution in favor of the *BVU* test advocated by the Ninth Circuit, notwithstanding the unclear prospect that Court has already done so in *Boumediene*.

III. THEORY OF NEW PROPERTY—ESTABLISHING A RIGHT TO CHALLENGE A VISA REVOCATION UNDER *LANDON V. PLASENCIA AND GOLDBERG V. KELLY*

Provided that a foreign national has standing to challenge their visa revocation, a foreign national would then need to show that the Constitution protects some right upon which the foreign national is owed due process protection.¹⁶⁰ To determine whether Fifth Amendment procedural due process is owed, the Court engages in a two-step inquiry: (1) whether there exists a liberty or property interest of which a person has been deprived, and, if so, (2) whether the established procedures of review are constitutionally sufficient to protect that interest.¹⁶¹

A. *The Unlikely Possibility of Using a Liberty Interest Theory*

With respect to immigration, the Supreme Court has provided very few substantive rights to foreign nationals under the Due Process Clause. The Court has held on numerous occasions that foreign nationals have no fundamental right to enter the United States, nor does the Constitution provide a liberty interest to foreign nationals outside the United States to enter the country.¹⁶²

The Court has been skeptical about providing most foreign nationals a liberty interest in other areas partly because doing so would erode Con-

¹⁶⁰ See U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .”). The Fifth Amendment’s Due Process Clause is apposite here because the Fifth Amendment is a safeguard for persons from actions by the federal government that deprive a person of a life, liberty, or property interest.

¹⁶¹ *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (per curiam).

¹⁶² See, e.g., *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); see also *supra* note 46 and accompanying text.

gress's immigration plenary power, but also because by providing large numbers of foreign nationals or classifications of foreign nationals access to due process, the system of reviewing cases would collapse under its own weight.¹⁶³ Moreover, the Court has even declined to extend due process protections to U.S. citizens when their putative liberty interests or constitutional rights are impaired by a foreign national's exclusion from the United States.¹⁶⁴ Lawful permanent residents, once admitted to the United States, are entitled to some procedural due process protections—including during exclusion proceedings at a port of entry before admission to the United States—that other foreign nationals do not have.¹⁶⁵ Yet, in most instances where the Court has determined non-lawful permanent resident foreign nationals have some protected liberty interests—largely those related to length of detention—the Court sidestepped any constitutional questions and instead determined such interests derive from the INA.¹⁶⁶ Thus, using a theory of a liberty interest inherent in a foreign national's visa to establish procedural due process rights would likely be a futile endeavor.

¹⁶³ See Ann Woolhandler, *Procedural Due Process Liberty Interests*, 43 HASTINGS CONST. L.Q. 811, 848–49, 848 n.158 (2016) (“Professor Martin has discussed problems with giving to excludable aliens the same procedural rights as apply to others: ‘We are talking about literally everyone in the world. . . . [P]rocedural cumbersomeness probably only makes the numbers problem worse, by increasing the attraction of migration for those who would test the limits of the system.’” (quoting David A. Martin, *Due Process and Membership in the National Community Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 180–81 (1983)))

¹⁶⁴ See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 794–95 & n.6 (1977) (declining to provide review of an immigration law that impaired a U.S. citizen-father's putative fundamental rights of family unification and to raise their foreign national child within the United States); *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972) (holding that respondents', some of whom were U.S. citizens, First Amendment right to receive information from Mandel did not defeat the Department of State's exercise of its plenary power, as exercised through a consular officer, to deny Mandel a visa to travel to the United States); see also *supra* note 55.

¹⁶⁵ See *Landon v. Plasencia*, 459 U.S. 21, 41 (1982); see also Woolhandler, *supra* note 163, at 848, 858 (“In the immigration context, however, statutes limiting discretion do not generally create positive liberty interests, given the possibility of constitutionalizing processes for a broad swath of unadmitted and nonresident aliens who otherwise have no recognized liberty interest in access to the United States. On the other hand, the Court has held that a prior grant of permanent residence status would entitle the grantee to some procedural due process protections, including for removal at the border—thus recognizing a sort of positive liberty interest.”); *supra* note 62 and accompanying text.

¹⁶⁶ See, e.g., *Clark v. Martinez*, 543 U.S. 371, 377–78 (2005); *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001).

B. The More Likely Possibility of Using a Property Interest Theory

Deriving a workable theory of recovery using “new property”¹⁶⁷ theory is possible by arguing that the INA, its implementing regulations, and other rules create an inherent property interest in a visa.¹⁶⁸

The concept of statutory property interests protected by constitutional procedural due process dates to the early 1970s. In *Goldberg v. Kelly*, the Court held that some government benefits are protected from summary termination by statute, and one is entitled to some kind of process before the government can revoke such benefits; thus, the Court established the early conception of statutory property interests.¹⁶⁹ The Court additionally eroded earlier distinctions of rights versus privileges; the Constitution protects certain government benefits from summary revocation even if the benefit exists solely because of statutory positive law.¹⁷⁰ In later cases, the Court clarified what constitutes a property interest that is protected by due process—a property interest in a government benefit requires that the beneficiary have more than “an abstract need or desire for it” or “a unilateral expectation of it[,]” but rather “a legitimate claim of entitlement to it.”¹⁷¹ A legitimate claim of entitlement refers to an objective expectation that both the government and the beneficiary understood that the beneficiary was entitled to such a benefit.¹⁷² In other words, so long as the beneficiary qualifies for the benefit, and the beneficiary had an objective reliance interest in her entitlement to the

¹⁶⁷ “New property” refers to a phrase coined by Professor Charles Reich, whereby “government-created statuses” such as public benefits, professional licenses, government employment, and similar benefits should be treated as forms of property. David A. Super, *A New New Property*, 113 COLUM. L. REV. 1773, 1779 (2013) (citing Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 738, 778 (1964)). These government-created statuses may have greater value to a person than other forms of traditional property. *Id.* (citing Reich, *supra* note 167, at 738).

¹⁶⁸ See INA §§ 211(a), 214(a)–(b), 8 U.S.C. §§ 1181(a), 1184(a)–(b) (2018); Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972).

¹⁶⁹ See 397 U.S. 254, 264–65 (1970) (holding that a state could not revoke an eligible beneficiary’s welfare benefits without first providing the beneficiary an evidentiary hearing to show that the beneficiary is entitled to receive such benefits).

¹⁷⁰ See *id.* at 262 (“Such benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are a ‘privilege’ and not a ‘right.’” (internal quotation marks omitted) (footnote omitted)); accord *Roth*, 408 U.S. at 571–72 (“[T]he Court has fully and finally rejected the wooden distinction between ‘rights’ and ‘privileges’ that once seemed to govern the applicability of procedural due process rights.” (citing *Kelly*, 397 U.S. at 262)).

¹⁷¹ *Roth*, 408 U.S. at 577.

¹⁷² *Perry v. Sindermann*, 408 U.S. 593, 601–02 (1972) (holding that, based on “rules and understandings, promulgated and fostered” by state education officials, respondent had a protected property interest in the reemployment as an educator despite no contractual offer of tenure; “A person’s interest in a benefit is a ‘property’ interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.”).

benefit, the beneficiary is guaranteed due process before revocation of the benefit.

In the immigration context, the Court has extended the concept of protected property interests to some foreign nationals. As discussed, lawful permanent residents have a procedural right to seek a hearing to contest charges that would exclude the foreign national from entry into the United States.¹⁷³ In these cases, the sufficiency of process is not standardized; it “varies with the circumstances”¹⁷⁴ and is subject to the *Mathews v. Eldridge* balancing test.¹⁷⁵ Courts must balance the claimant’s right to reentry against the government’s interest in depriving the claimant of that right, while also weighing the benefits and costs of additional or different procedures that would aid in correct determination of the claimant’s deprivation.¹⁷⁶ In this context, one can view the *Plasencia* Court in its application of *Eldridge* as transforming lawful permanent resident’s reentry into a property interest—one that is guaranteed by immigration statutory law and common law.¹⁷⁷

In establishing reentry as a property interest, the Court created a workable framework to establish a property interest in other foreign national visas, not just lawful permanent residence status.¹⁷⁸ While the Court has previously held that admission of foreign nationals to the United States is a privilege and not a right,¹⁷⁹ *Plasencia* and *Eldridge* began to deconstruct the distinction between privileges and rights. Thus, in the modern era, one cannot use the rights-privileges distinction as a viable counterargument to the notion that a visa lacks a vested property interest.¹⁸⁰

The Court should extend the *Plasencia-Eldridge* procedural due process test to the visa revocation process. As an initial matter, when a foreign national obtains a visa, she must avail herself of the laws and rules of immigration authorities.¹⁸¹ A foreign national expects that, so long as she qualifies for the visa, she will receive it; the government maintains

¹⁷³ See *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

¹⁷⁴ *Id.*

¹⁷⁵ 424 U.S. 319 (1976).

¹⁷⁶ *Plasencia*, 459 U.S. at 34 (quoting *Eldridge*, 424 U.S. at 334–35); see also Nathan S. Chapman, *Due Process Abroad*, 112 Nw. U.L. Rev. 377, 447–49 (2017) (explaining the *Eldridge* balancing test in the immigration context).

¹⁷⁷ See Chapman, *supra* note 176, at 448.

¹⁷⁸ In one case, the Second Circuit held that an immigrant visa does not contain an inherent property interest, but because the court failed to elaborate any reasoning for this holding, such a holding likely lacks significant precedential value. See *Azizi v. Thornburgh*, 908 F.2d 1130, 1134 (2d Cir. 1990).

¹⁷⁹ *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).

¹⁸⁰ See *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (“The constitutional challenge cannot be answered by an argument that public assistance benefits are a ‘privilege’ and not a ‘right.’” (internal quotation marks omitted)).

¹⁸¹ See *supra* Part II.B.

that all foreign nationals that meet the qualifying criteria after application shall receive a visa. The INA, its implementing regulations, and other rules in the aggregate create an objective expectation that the visa provides the holder a right to travel to the United States, even if the INA does not explicitly say so.¹⁸² In other words, having complied with all government requirements during the visa application process and having actually received the visa, a foreign national has an objective legitimate entitlement. Therefore, under the Court's objective reliance test for a property interest, a visa should fall squarely into this category of protected interests.

Moreover, a foreign national's visa property interest stems not just from a mutual legal understanding with the government, but also from the foreign national's monetary investment to procure the visa. When a foreign national obtains a visa, she may spend years and substantial amounts of money to obtain the visa and to prepare for her travel to the United States.¹⁸³ For example, foreign nationals looking to procure a second-preference skilled-worker immigrant visa may spend years working with a future employer, applying for their visa, and submitting to rigorous background checks, all the meanwhile foregoing other employment opportunities.¹⁸⁴ Foreign national students, many of whom have little access to educational opportunities in their home countries and rely on opportunities in the United States, may spend tens of thousands of dollars to apply and enroll at a U.S.-based university.¹⁸⁵ Even tourists may invest thousands of dollars to visit the United States and wait months to receive their B-2 visitor visa.¹⁸⁶ In all, a foreign national's time and monetary investment into their visa carries a monetary value equivalent to that of property, and such value should be a protected interest that cannot be unilaterally revoked without procedural due process.¹⁸⁷

¹⁸² See *Perry v. Sindermann*, 408 U.S. 593, 601–02 (1972). Cf. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972) (“It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.”).

¹⁸³ See *supra* Part I.B.1.

¹⁸⁴ See U.S. DEP'T OF STATE, *supra* note 90, at 3–4.

¹⁸⁵ See Farran Powell & Emma Kerr, *What You Need to Know About College Tuition Costs*, U.S. NEWS & WORLD REP. (Sept. 17, 2020, 9:00 AM), <https://www.usnews.com/education/best-colleges/paying-for-college/articles/what-you-need-to-know-about-college-tuition-costs> (“Among ranked National Universities, the average cost of tuition and fees for 2019–2020 school year was \$41,426 at private colleges, \$11,260 for state residents at public colleges and \$27,120 for out-of-state students at state schools, according to data reported to U.S. News in an annual survey.”).

¹⁸⁶ See *Visa Appointment Wait Times*, *supra* note 83.

¹⁸⁷ See *Roth*, 408 U.S. at 571–72 (“The Court has . . . made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.” (footnote omitted)).

Moreover, although the INA precludes judicial review of visa revocations,¹⁸⁸ this preclusion is not necessarily a complete bar to any review process. Under *Mathews v. Eldridge*¹⁸⁹ balancing, a party requesting a process to be heard is not necessarily guaranteed the protections of a full jury or bench trial. What *Eldridge* balancing does afford are minimal procedural due process protections in some kind of hearing—just not necessarily a trial in a court of law.¹⁹⁰ Thus, an interpretation of the INA vesting a property right in a visa, and that revocation of that right triggers procedural due process protections, is consistent with INA § 221(i) barring judicial review of visa revocations.

C. *The Current Procedures to Contest a Visa Revocation are Constitutionally Inadequate*

While the Department of State technically provides a process to a foreign national to allow the foreign national to ask the same consular officer for a reconsideration of the decision, this process is constitutionally inadequate to provide a safeguard of a foreign national's property interest.¹⁹¹ The current review process of visa revocation decisions lacks virtually all of the elements of a fair hearing, famously discussed by Judge Henry Friendly, that provide adequate, constitutionally-sufficient protections of an aggrieved party's interests.¹⁹² These elements are: (1) an unbiased tribunal, (2) notice of and grounds for the action taken against the aggrieved party, (3) a meaningful opportunity for the aggrieved party to respond, (4) providing the right to call witnesses, (5) providing the right to see the evidenced presented against the aggrieved party evidence, (6) providing the right to have the decision be based solely on the evidence presented, (7) access to counsel, (8) the making of a record, (9) a statement of reasons justifying the neutral fact-finder's decision, (10) a public trial, and (11) judicial review of the fact-finder's

¹⁸⁸ INA § 221(i), 8 U.S.C. § 1201(i) (2018).

¹⁸⁹ 424 U.S. 319 (1976).

¹⁹⁰ See William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1452 (1968) (“The character of the hearing to which a person may be constitutionally entitled may depend upon the importance of what he stands to lose, of course, but his constitutional right to procedural due process entitles him to a quality of hearing at least minimally proportioned to the gravity of what he otherwise stands to lose through administrative fiat.”).

¹⁹¹ See U.S. DEP'T OF STATE, REINSTATEMENT FOLLOWING REVOCATION, *supra* note 110; U.S. DEP'T OF STATE, RECONSIDERATION OF REVOCATION, *supra* note 110; see also *supra* Part I.B.2.

¹⁹² See Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279–95 (1975); see also *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) (“[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.”).

decision.¹⁹³ For the sake of efficiency and expediency, not all hearings require all of the elements afforded by a full trial.¹⁹⁴ Regardless, the current process to challenge a visa revocation is woefully inadequate.

I do not fully detail the contours of what a visa revocation hearing should look like or the practicality of being able to provide a hearing to foreign nationals overseas,¹⁹⁵ but I highlight some of the few essential features the hearing should include. First, as mentioned, the current process does not provide for constitutionally sufficient notice.¹⁹⁶ The Department of State or a consular officer should provide at least seven-days' notice of intent to revoke such that the foreign national has a meaningful opportunity to assess the situation, contact counsel, and mount a proper rebuttal.

Second, the foreign national should have access to a fair tribunal by a competent, unbiased factfinder or reviewer that affords the foreign national a meaningful opportunity to respond. Under the current process, a visa revocation reconsideration goes right back to the officer that made the decision, which effectively neuters the potential for a fair review of the decision and a full and fair opportunity to respond.¹⁹⁷ The unbiased factfinder could consist of multiple reviewers on a visa revocation hearing review board, a Department of State administrative law judge stationed at the consulate or embassy, or even simply a consular officer supervisor.

Third, the current process does not require that the foreign national have access to the evidence that was used against her during the first decision to revoke her visa, nor that the evidence that will be considered upon review of the decision.¹⁹⁸ In order to have a meaningful opportunity to respond, the foreign national needs to be able to view the evidence against her so that she can mount any necessary rebuttal to that evidence. By allowing the foreign national to see evidence used against her, the foreign national can build a record against she can challenge her

¹⁹³ Friendly, *supra* note 192.

¹⁹⁴ See *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” (alteration in original) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972))).

¹⁹⁵ Professor Nafziger provides a thorough set of recommendations to ensure that administrative hearings provide basic constitutionally sufficient protections outlined by Judge Friendly. These recommendations include, *inter alia*, direct changes to the structure and procedure of hearings, creation of new consular review boards, greater access to meaningful and effective representation of the visa holder, and shifting of funding as to provide a workable framework of implementation of these recommendations. Although Professor Nafziger provides these recommendations in the context of visa denial hearings, these recommendations are equally applicable to visa revocation hearings. See Nafziger, *supra* note 59, at 95–101.

¹⁹⁶ See *supra* Part I.B.2.

¹⁹⁷ See *supra* Part I.B.2.

¹⁹⁸ See U.S. DEP’T OF STATE, REINSTATEMENT FOLLOWING REVOCATION, *supra* note 110; U.S. DEP’T OF STATE, RECONSIDERATION OF REVOCATION, *supra* note 110.

revocation as possibly an arbitrary and capricious action or an abuse of discretion¹⁹⁹ on the part of the consular officer or Department of State official. In addition to the foreign national's inability to see the evidence used against her, the FAM guidelines do not require an officer to make record of or provide the foreign national a statement of reasons for the decision.²⁰⁰ Without a record, statement of reasons, or the ability to see evidence presented against the foreign national, the current revocation process deprives the foreign national of her right to know whether the consular officer or Department of State official based her decision solely on the evidence the foreign national presented. Under the current process, a biased, overzealous, or corrupt official can render an arbitrary and capricious decision with virtually no accountability, oversight, or recourse on the part of the foreign national.

Finally, under the current system, the foreign national lacks access to contest a consular officer's revocation decision with the assistance of counsel.²⁰¹ Currently, the visa section of each consular office may define for itself the extent to which attorneys may appear in order to provide counsel to foreign national visa applicants or holders.²⁰² These limits can even include whether the attorney may enter the consular premises.²⁰³ In the related area of consular interviews to determine visa eligibility, consular offices may restrict when and how long an attorney may be present during an adjudication, whether the attorney may speak on behalf of the applicant, whether the attorney may discuss the case with the adjudicating officer, or whether the attorney may represent the applicant effectively in requesting reconsideration of a visa denial.²⁰⁴ Given the discretionary nature of these limits on attorney representation in visa adjudication hearings, one would expect the same limits in the case of visa revocation hearings. Further, even if the consular official provides a fair review of his decision, as most foreign nationals naturally lack the intricate knowledge of the U.S. immigration system, a foreign national will unlikely be able to mount a proper rebuttal to the decision on her own.

¹⁹⁹ “[A]rbitrary [and] capricious” and “abuse of discretion” are two of the standards upon which a court of law may review an agency action under the APA. See 5 U.S.C. § 706(2)(A) (2018). While these standards are codified by the APA and apply to a court of law, they nonetheless serve as useful standards against which to judge a consular official's visa revocation decision.

²⁰⁰ See U.S. DEP'T OF STATE, REINSTATEMENT FOLLOWING REVOCATION, *supra* note 110; U.S. DEP'T OF STATE, RECONSIDERATION OF REVOCATION, *supra* note 110. The FAM does require the consular officer to provide reasons for reinstatement in the foreign national's case file, which is confidential, but the FAM is silent as to requiring the consular officer to provide reasons for denial of reinstatement. See U.S. DEP'T OF STATE, RECONSIDERATION OF REVOCATION, *supra* note 110.

²⁰¹ See U.S. DEP'T OF STATE, RECONSIDERATION OF REVOCATION, *supra* note 110.

²⁰² Nafziger, *supra* note 59, at 19–20.

²⁰³ *Id.* at 19.

²⁰⁴ See *id.* at 19–20.

Requiring consulates to issue uniform rules that permit counsel to freely attend visa revocation hearings and speak on behalf of their clients without limitation would additionally help ensure that foreign nationals have had a meaningful opportunity to be heard.

IV. *STARE DECISIS*, OVERRULING THE PLENARY POWER DOCTRINE,
AND ENDING THE APPLICATION OF CONSULAR NON-
REVIEWABILITY TO VISA REVOCATION DECISIONS
AS A MATTER OF GOOD PUBLIC POLICY

The doctrine of consular non-reviewability, the core barrier to providing extraterritorial foreign nationals with procedural due process under the Constitution, is a logical outgrowth of the plenary power doctrine; in other words, the doctrine of consular non-reviewability retains its power of limiting judicial inquiry into decisions of consular officers because the plenary power doctrine prevents courts from reviewing immigration regulatory acts of Congress and the Executive. While the doctrine of consular non-reviewability is a logical extension of the plenary power doctrine, each doctrine has a symbiotic relationship with the other. To destroy the doctrine of consular non-reviewability, the Court must first overrule its precedent granting Congress and the Executive immigration plenary power.

Numerous highly influential immigration scholars have argued in favor of overturning the plenary power doctrine.²⁰⁵ But because the constitutional arguments I advocate for conflict, to an extent, with the plenary power and consular non-reviewability doctrines, I believe it is important to address arguments in overturning these doctrines. However, rather than retread well-paved ground, I argue in favor of overturning the plenary power doctrine using new frameworks for the application of *stare decisis* that the Supreme Court has provided in the recent 2019–2020 term. Once the plenary power doctrine has been overruled, the doctrine of consular non-reviewability will have no basis to exist, and thus too will be overruled.

²⁰⁵ See generally, e.g., Matthew J. Lindsay, *Disaggregating “Immigration Law,”* 68 FLA. L. REV. 179, 179 (2016) (arguing the Court must overrule the plenary power doctrine to bring judicial review of immigration law in line with mainstream constitutional norms); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 934 (1995) (arguing that the “slate” must be cleaned and that the Supreme Court should, and likely will, overrule the plenary power doctrine); Ilya Somin, *Immigration Law Defies the American Constitution*, ATLANTIC (Oct. 3, 2019), <https://www.theatlantic.com/ideas/archive/2019/10/us-immigration-laws-unconstitutional-double-standards/599140/> (arguing that “[t]he plenary-power doctrine has no basis in the Constitution . . . and deserves to suffer the same fate as *Plessy v. Ferguson*”).

A. *Why the Plenary Power and Consular Non-Reviewability Doctrines Endure*

The immigration plenary power doctrine endures in U.S. jurisprudence for a number of reasons. Professor Fields has identified three pillars that the plenary power doctrine rests on: (1) inherent national sovereignty, (2) judicial deference, and (3) national security.²⁰⁶ Because the Court continues its reliance on these “three foundational characteristics,” the doctrine has survived despite longstanding criticism, even from Justices on the Court itself.²⁰⁷ In *Galvan v. Press*, for example, Justice Frankfurter, joined by six other Justices, questioned the Court’s unwillingness to review congressional and executive exercises of the immigration plenary power that conflict with putative constitutional or fundamental rights, but noted that the Court’s prior decisions bound their ability to review.²⁰⁸ Professor Legomsky notes that, even now, decades of snowballing have set the course such that the Court feels unwilling and unable to review the plenary power doctrine in the face of putative constitutional rights violations for fear of upsetting too much established law.²⁰⁹ But an unclean slate is not a justification for continuing to uphold bad law. In fact, the principles of *stare decisis*, developed over a time far longer than the existence of the plenary power, are well-equipped for determining when the Court should and must abandon bad law. Thus, I endorse policy reasons in addition to a legal framework to overrule the plenary power doctrine, as overruling the doctrine comes down to ideology, not solely the blackletter law.

B. *The Plenary Power Doctrine Should Not Survive on Account of Stare Decisis, A Principle of Public Policy*

Even after 130 years, the Court can (and should) overrule the plenary power doctrine. As the Court has held on multiple occasions, *stare*

²⁰⁶ Fields, *supra* note 71, at 737–38.

²⁰⁷ See *id.* Professor Nafziger reminds us that the “slate” of the plenary power doctrine consists of the “‘yellow peril’ cases of the late nineteenth and early twentieth century [that] upheld the right of Congress to exclude entire nationalities for essentially racist reasons.” Nafziger, *supra* note 59, at 31–32 (footnote omitted).

²⁰⁸ See 347 U.S. 522, 530–32 (1954) (“In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power, much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. . . . But the slate is not clean. . . . We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, especially those who have been most zealous in protecting civil liberties under the Constitution, and must therefore under our constitutional system recognize congressional power in dealing with aliens[.]” (citation omitted)).

²⁰⁹ See LEGOMSKY, *supra* note 22. See generally *id.* at 195–211 for Professor Legomsky’s description of “the snowball effect.”

decisis is “pragmatic and contextual”;²¹⁰ it is neither an “inexorable command,”²¹¹ nor “a mechanical formula of adherence to the latest decision[.]”²¹² *Stare decisis* is instead a “principle of policy.”²¹³ Moreover, in the words of Chief Justice Roberts, a staunch adherent to *stare decisis*, *stare decisis*’ “greatest purpose is to serve a constitutional ideal—the rule of law. . . . [W]hen fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent.”²¹⁴

While the Court does not commonly overrule its own precedents, overruling precedent is not novel or rare. As of January 2021, the Court has overruled its precedents 227 times since its first term in 1790.²¹⁵ In fact, the Roberts Court overruled the Court’s precedent four times in the 2018–19 term, including two longstanding precedents—one standing for over 120 years and another at approximately 40 years.²¹⁶ The Court itself is keenly aware of its record of overruling its own precedents, as Justice Kavanaugh noted recently in commentary on his list of thirty landmark cases overruling prior Court precedent.²¹⁷ Thus, the Court frequently recognizes when its previous interpretations have been to the detriment of just and consistent interpretations of the Constitution and public policy. If the Court were to overrule its precedents upholding the immigration plenary power, such an act by the Court would not be unprecedented or

²¹⁰ June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2135 (2020) (Roberts, C.J., concurring in judgment).

²¹¹ *Id.* at 2134 (quoting *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020)).

²¹² *Citizens United v. FEC*, 588 U.S. 310, 377 (2010) (Roberts, C.J., concurring) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

²¹³ *Id.* at 378 (quoting *Helvering*, 309 U.S. at 119).

²¹⁴ *Id.*

²¹⁵ Cong. Research Serv., *Table of Supreme Court Decisions Overruled by Subsequent Decisions*, CONST. ANNOTATED, <https://constitution.congress.gov/resources/decisions-overruled/> (last visited Jan. 16, 2021).

²¹⁶ *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019) (overruling *Ward v. Race Horse*, 163 U.S. 504 (1896)); *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485 (2019) (overruling *Nevada v. Hall*, 440 U.S. 410 (1979)).

²¹⁷ *Ramos* 140 S. Ct. at 1411–12 (Kavanaugh, J., concurring in part); *see also, e.g., id.* (overruling *Apodaca v. Oregon*, 406 U.S. 404 (1972) (plurality opinion) and overturning the power of states to enact laws allowing convictions for felony offenses by non-unanimous jury verdicts); *Janus v. Am. Fed’n of State, Cty. & Mun. Emps., Council*, 138 S. Ct. 2448 (2018) (overruling *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) and overturning the power of labor unions to require collection of fees from non-union members); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (overruling *Pace v. Alabama*, 106 U.S. 583 (1883) and overturning the power of states to enact laws prohibiting co-habitation of persons of different races); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896) and overturning the “separate, but equal” doctrine); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (overruling *Swift v. Tyson*, 41 U.S. 1 (16 Pet. 1) (1842) and overturning the federal courts’ power to create general federal common law related to state law claims when hearing such claims in diversity jurisdiction suits).

inconsistent with the Court's ideology—in fact, there is significant precedent supporting the Court to overturn the plenary power doctrine.

The Court has not always been consistent in its reasoning with when and why it departs from *stare decisis*, although the Court has held that departure from the doctrine requires a “special justification.”²¹⁸ The Court has never expressly defined this term, but it has identified some factors that can determine whether the Court should overrule a precedent. The Court may depart from *stare decisis* if the quality of a previous decision's reasoning is unsound, the decision lacks consistency with related decisions, legal or policy developments since the decision suggest that the decision's precedential value has eroded, and the public or government can no longer rely on the previous decision.²¹⁹ Recently, Justice Kavanaugh has taken the initiative to finally define “special justification” and has articulated a concrete, three-part test:

- (1) Is the prior decision (and its progeny) egregiously wrong?²²⁰
- (2) Has the decision caused significant negative jurisprudential and real-world consequences?
- (3) Does overruling the decision unduly upset any reliance interests?²²¹

The plenary power doctrine (and by extension the consular non-reviewability doctrine) is egregiously wrong because it is antithetical to the principles of the Constitution and separation of powers. Further, the plenary power doctrine's precedential power has eroded through inconsistent application across related decisions. Moreover, in upholding a doctrine that is deeply entrenched in perpetuating systemic racism, foreign nationals, and the integrity the U.S. legal system has been significantly harmed. As the Court itself has weakened the power of the plenary power doctrine and as modern legal policy developments suggest that adherence to the plenary power doctrine is no longer tenable in an ever-

²¹⁸ See *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) (“Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification.”).

²¹⁹ See *Franchise Tax Bd.*, 139 S. Ct. at 1499; *accord* *Planned Parenthood v. Casey*, 505 U.S. 833, 854–55 (1992) (plurality opinion).

²²⁰ Justice Kavanaugh defines “egregiously wrong” in the negative to mean a wrong that is not simply a “garden-variety error or disagreement.” *Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring in part). Justice Kavanaugh notes, to determine whether a decision is egregiously wrong, the Court “may examine the quality of the precedent's reasoning, consistency and coherence with other decisions, changed law, changed facts, and workability, among other factors.” *Id.* at 1415. He additionally cites *Korematsu v. United States*, 323 U.S. 214 (1944) and *Plessy v. Ferguson*, 163 U.S. 537 (1896) as cases egregiously wrong at the time of decision, and *Nevada v. Hall*, 440 U.S. 410 (1979), as a case later “unmasked as egregiously wrong based on subsequent legal or factual understandings or developments.” *Id.*

²²¹ *Ramos*, 140 S. Ct. at 1414–15 (Kavanaugh, J., concurring in part).

shifting global economy, overruling the plenary power doctrine does not unduly upset reliance interests.

C. *The Supreme Court's Erroneous Decisions to Root the Plenary Power Doctrine in National Sovereignty Bestow Congress and the Executive Powers the Constitution Does Not Grant to the Federal Government*

1. Grounding the Doctrine in National Sovereignty is Egregiously Wrong

By rooting Congress's and the Executive's immigration plenary power in national sovereignty, the Court is egregiously subverting Constitutional norms and separation of powers that the Constitution was designed to protect. Professor Ilya Somin argues that the immigration plenary power is subject to a double standard as compared to all other areas of law—where Congress is constrained by the Constitution in its exercise of its powers, Congress is not similarly constrained in its exercise of immigration regulation.²²² Professor Somin highlights that, in the early years of the republic, the Framers did not intend to provide Congress with the absolute power to regulate immigration, otherwise the Framers would have provided for such a power in the Constitution.²²³ Immigration decisions that have followed the *Chinese Exclusion Case*²²⁴ have thus warped the Framers' original intentions regarding the U.S. immigration system, and the Court has provided Congress powers that the Framers never intended to provide it.²²⁵

Moreover, the Court's concept of sovereignty with respect to immigration cases differs significantly in other contexts. In deciding the earliest immigration cases, the Court looked to traditional international law, which then referred to the absolute sovereignty of nation states, whereby one state was only bound to the laws of another state by consent through formal treaty or practice and custom.²²⁶ In writing its opinions, the Court

²²² See Somin, *supra* note 205.

²²³ See *id.*

²²⁴ 130 U.S. 581 (1889).

²²⁵ See Somin, *supra* note 205.

²²⁶ See, e.g., *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936) (“[T]he investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution.”); *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893); Julian Ku & John Yoo, *Globalization and Sovereignty*, 31 *BERKELEY J. INT'L L.* 210, 222 (2013).

Professor Nafziger additionally argues that the United States, even proudly asserting its sovereignty, routinely binds itself to international customary law. *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our [federal] law[.] . . . [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations[.]”); Nafziger, *supra* note 59, at 44. As part of international custom, Professor Nafziger notes that “[s]tates unquestionably may control immi-

may have envisioned the concept of globalization that has come to define the world's economy and culture and sought to protect the United States' power from encroachment by other nation-states as those nation-states' citizens immigrated to the United States.²²⁷

Today, such a theory of sovereignty is untenable as both a matter of law and of public policy. In legal terms, the concept of Westphalian absolute sovereignty has never really been adopted by the United States.²²⁸ The United States adopted popular sovereignty, whereby the "sovereignty" of the United States is held by the collective power of the people, and, through the Constitution, sovereignty is delegated by the people to their representatives in Congress.²²⁹ In other words, the U.S. republican form of national government derives its power not from Congress (or any other body of government), but from the people itself.²³⁰ Indeed, as

gration and exclude aliens, but their right to do so is not unlimited." *Id.* at 41. International custom imposes a qualified duty to uphold the basic human right to allow persons to travel. *Id.* at 40. In other words, the United States may exclude (or revoke the visas of) individual or classes of foreign nationals only if such foreign nationals pose a risk to public safety, security, or the general welfare of the State. The government of the United States had long understood this qualified duty. For nearly a hundred years, between the founding of the nation and the first immigration laws in the 1880s, the United States maintained an "open-borders" immigration policy and rejected only those who posed a security or welfare threat to the nation. *See supra* note 27 and accompanying text. Curiously, the Court decided *The Paquete Habana* only seven years following the *Chinese Exclusion Case*, 130 U.S. 581 (1889), and three years after *Yamataya v. Fisher* (The Japanese Immigrant Case), 189 U.S. 86 (1903). Thus, the racial undertone of the plenary power doctrine's roots in domestic sovereignty becomes quite clear; the Court declared all international custom is federal law, with the exception of the universal freedom to travel since adherence to such custom would have allowed a mass entry of non-white foreign nationals.

As Justice Kavanaugh, one of the Court's most conservative Justices, writes, *stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Ramos*, 140 S. Ct. at 1411 (Kavanaugh, J., concurring in part) (quoting *Payne v. Tennessee*, 501 U. S. 808, 827 (1991)). If the Supreme Court's goal is indeed faithful adherence to *stare decisis* as Justice Kavanaugh describes it, the Court must overrule the *Chinese Exclusion Case* and its progeny by holding that Congress's and the Executive's plenary power is not absolute with respect to immigration regulation, and that their powers are limited by the qualified duty to admit foreign nationals who pose no threat to the interests of the United States. *See Nafziger, supra* note 59, at 45. Thus, courts have a judicial responsibility to review cases in which the Congress and the Executive contravene this qualified duty. *Id.* at 45–46.

²²⁷ Professors Ku and Yoo have described globalization as the "internationalization of societies and economies, the universalization of a 'global culture,' the Westernization of societies along European or American models, and finally the de-territorialization of geography and social space." Ku & Yoo, *supra* note 226, at 212 (footnote omitted).

²²⁸ *See id.* at 227.

²²⁹ *See id.* at 233.

²³⁰ *Id.* The Ninth and Tenth Amendments enshrine into law the concept of popular sovereignty. *See* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." (emphasis added)); *id.* amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." (emphasis added)); *see also id.* pmbl. ("We the People of the United States . . . ordain and establish this

Professors Ku and Yoo underscore, the concept of U.S. sovereignty as deriving from powers external to Constitution has not been developed much in subsequent Supreme Court decisions, and the theory has been subject to substantial scholarly criticism.²³¹ As such, the Court has little reason to cling to external sovereignty as a basis for Congress' immigration plenary power. Such a basis runs contrary to the Constitution and much of the Court's precedent.

Finally, by grounding Congress's and the Executive's immigration power in sovereignty instead of the Constitution, the Court has inconsistently held that Congress has limits over some of its plenary powers, such as regulating commerce, but has not applied this standard to immigration regulation. Between the late 1930s and the 1990s, the Court largely deferred to Congress on regulating all matters that substantially affected commerce.²³² But in *United States v. Lopez*, the Court reined in Congress's powers, noting that the Constitution does not provide a "plenary and complete" power to regulate interstate commerce as the Court held in *Wickard v. Filburn*.²³³ More recently, the Court affirmed these constitutional limits.²³⁴ Chief Justice Roberts clearly affirmed that "[t]he

Constitution[.]"); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 472 (1793) (opinion of Jay, C.J.) ("Sovereignty is the right to govern; a nation or State sovereign is the person or persons in whom that resides. In Europe, the sovereignty is generally ascribed to the Prince; here, it rests with the people; there, the sovereign actually administers the government; here, never in a single instance; our Governors are the agents of the people[.]"), *superseded by constitutional amendment*, U.S. CONST. amend. XI; *see generally* Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and Expressly Delegated Power*, 83 NOTRE DAME L. REV. 1889 (2008) (arguing, *inter alia*, that the Framers' inclusion of references to "the people" in the Ninth and Tenth Amendments meant that the Framers intended for the powers of the federal government to derive from popular sovereignty and to entail a "strict construction of delegated power").

²³¹ Ku & Yoo, *supra* note 226, at 233.

²³² *See, e.g.*, *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

²³³ *United States v. Lopez*, 514 U.S. 549, 560, 567–77 (1995); *Wickard v. Filburn*, 317 U.S. 111, 124 (1942). The *Wickard* Court stated that Congress's power to regulate interstate commerce included any activity, even local, so long as the activity directly or indirectly "exerts a substantial economic effect on interstate commerce[.]" *Wickard*, 317 U.S. at 125. The *Lopez* Court explicitly abrogated Congress's "plenary" power to regulate interstate commerce in reasoning that "Congress' authority is limited to those powers enumerated in the Constitution, and . . . those enumerated powers are interpreted as having judicially enforceable outer limits." *Lopez*, 514 U.S. at 566. *Lopez* limited Congress's power to regulate interstate commerce to (1) the regulation of the use of channels of interstate commerce; (2) the instrumentalities, people, or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *Id.* at 558–59.

²³⁴ *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 552, 558, 561 (2012) (holding that the individual mandate provision of the Patient Prevention and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010), requiring purchase of health insurance could not be sustained under the Commerce Clause or the Necessary and Proper Clause because "Con-

Constitution’s express conferral of some powers makes clear that it does not grant others[. . .] and the Federal Government ‘can exercise only the powers granted to it.’”²³⁵ Providing Congress with the power to regulate immigration under a theory of sovereignty runs contrary to Chief Justice Robert’s affirmation; doing so provides Congress with limitless authority despite only being able to exercise powers granted to it. In the words of Justice Kavanaugh, “Why stick by an erroneous precedent that is egregiously wrong as a matter of constitutional law . . .”²³⁶ By more strongly linking Congress’s immigration powers to the Constitution, the Court can better create a workable, consistent standard to constrain Congress’s powers and ensure that Congress is only acting within its powers granted by the Constitution, just as the Framers envisioned.²³⁷

2. The Plenary Power Doctrine Has Significantly Harmed Foreign Nationals and Has Caused Real-World Harms by Perpetuating Systemic Racism

As a matter of empirical evidence, the Court’s fidelity to upholding the plenary power on the grounds that the Court should defer to Congress and the Executive on matters of national security is misguided and reflective of racist stereotypes.

The federal government has long held to the belief that Congress, as a matter of sovereignty and national security, should have plenary power to exclude foreign nationals on the grounds that they are more likely than U.S. citizens to commit violent acts against the United States.²³⁸ In his 2017 address before a joint session of Congress, President Trump stated that, based on statistics compiled by the Department of Justice (DOJ), a majority of foreign nationals convicted of terrorist or terror related offenses since 9/11 were born outside of the United States.²³⁹ Nonetheless, when the DOJ was asked to verify this statement, the DOJ found “no

gress could reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it.”).

²³⁵ *Id.* at 534–35 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819)).

²³⁶ *Ramos v. Louisiana*, 140 S. Ct. 1390, 1419 (2020) (Kavanaugh, J., concurring in part).

²³⁷ See *THE FEDERALIST* No. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961) (“[P]ower is of an encroaching nature and that it ought to be effectually restrained from passing the limits assigned to it.”). The Framers viewed “[t]he legislative department [as] everywhere extending the sphere of its activity and drawing all power into its impetuous vortex[.]” and sought to constrain its powers under the Constitution. *Id.* at 309.

²³⁸ See *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952) (“[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”).

²³⁹ *President Donald Trump, Remarks by President Trump in Joint Address to Congress (Feb. 28, 2017)* (transcript available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-joint-address-congress/>) (“According to data provided by the Depart-

responsive records” to support President Trump’s claim.²⁴⁰ In fact, most of the foreign nationals on the list compiled by the DOJ were convicted of crimes unrelated to terrorism or were convicted of planning to commit terrorist crimes outside of the United States.²⁴¹ Such statements from government officials fuel a debunked claim that foreign nationals are more dangerous and commit more crimes than U.S. citizens commit. The data not only show that there is no causal connection between immigration and crime, but just the opposite: immigrants commit fewer crimes per capita than U.S.-born Americans.²⁴²

Moreover, evidence suggests that not only are immigrants less likely to commit crimes, they are also a net benefit to the economy. Immigrants contribute more in tax revenue than they receive in government assistance, are employed in jobs that help boost other parts of the economy, and take jobs that are otherwise unfilled by U.S.-born workers.²⁴³ If not for immigrants, the U.S. workforce would shrink.²⁴⁴ In addition, the Congressional Budget Office released a report indicating that comprehensive immigration reform that would allow greater numbers of immigrants to come to the United States would provide a net benefit to the

ment of Justice, the vast majority of individuals convicted of terrorism and terrorism-related offenses since 9/11 came here from outside of our country.”).

²⁴⁰ Benjamin Wittes, *The Justice Department Finds ‘No Responsive Records’ to Support a Trump Speech*, LAWFARE (July 31, 2018, 1:55 PM), <https://www.lawfareblog.com/justice-department-finds-no-responsive-records-support-trump-speech> (citing Letter from Department of Justice’s Office of Information Policy to Benjamin Wittes, Editor in Chief, Lawfare (July 24, 2018)).

²⁴¹ Alex Nowrasteh, *Guide to Trump’s Executive Order to Limit Migration for “National Security” Reasons*, CATO INST. (Jan. 26, 2017, 12:03 PM), <https://www.cato.org/blog/guide-trumps-executive-order-limit-migration-national-security-reasons>.

²⁴² See Anna Flagg, *Is There a Connection Between Undocumented Immigrants and Crime?*, N.Y. TIMES (May 13, 2019), <https://www.nytimes.com/2019/05/13/upshot/illegal-immigration-crime-rates-research.html>. A report by the Cato Institute found that unauthorized immigrants in Texas were convicted of fewer crimes than their U.S.-born counterparts, and another study in *Criminology* found that undocumented immigration was not only not associated with an increase in violent crime but was actually negatively correlated with it. Michael T. Light & Ty Miller, *Does Undocumented Immigration Increase Violent Crime?*, 56 CRIMINOLOGY 370, 393–96 (2018); Alex Nowrasteh, *Criminal Immigrants in Texas: Illegal Immigrant Conviction and Arrest Rates for Homicide, Sex Crimes, Larceny, and Other Crimes*, CATO INST. (Feb. 26, 2018), <https://www.cato.org/publications/immigration-research-policy-brief/criminal-immigrants-texas-illegal-immigrantimmigrant>.

²⁴³ Gretchen Frazee, *4 Myths About How Immigrants Affect the U.S. Economy*, PBS NEWSHOUR (Nov. 2, 2018, 6:48 PM), <https://www.pbs.org/newshour/economy/making-sense/4-myths-about-how-immigrants-affect-the-u-s-economy>.

²⁴⁴ See *id.*; Jeffrey S. Passel & D’vera Cohn, *Immigration Projected to Drive Growth in U.S. Working-Age Population Through at Least 2035*, PEW RES. CTR. (Mar. 8, 2017), <https://www.pewresearch.org/fact-tank/2017/03/08/immigration-projected-to-drive-growth-in-u-s-working-age-population-through-at-least-2035/>; see also Jeffrey S. Passel & D’vera Cohn, *Mexicans Decline to Less than Half the U.S. Unauthorized Immigrant Population for the First Time*, PEW RES. CTR. (June 12, 2019), <https://www.pewresearch.org/fact-tank/2019/06/12/us-unauthorized-immigrant-population-2017/>.

economy.²⁴⁵ In all, immigration to the United States is a boon for the economy and may contribute to safer communities.

Yet, despite the empirical evidence that suggests immigration is good for our national security, public safety, and economy, the Court continues to defer to Congress and the Executive to implement immigration regulations that discourage immigration, such as the visa revocation policy. Part of the reasoning behind the Court's deferral may be because much of immigration since 1965 has been from countries where the majority of foreign nationals are persons of color.²⁴⁶ It is no coincidence that immigration policy in the United States has its roots in racist laws and policies such as the Chinese Exclusion Act.²⁴⁷ Many immigration scholars refer to the plenary power doctrine as either outright racist or racially influenced.²⁴⁸ Professor Kagan points out that the seminal plenary power case—the *Chinese Exclusion Case*²⁴⁹—is perhaps universally “known by its explicitly racist title.”²⁵⁰ Even some Justices of the Court have recognized the prejudicial undertones of U.S. immigration policy.²⁵¹ In fact, the Court has overruled its own precedent explicitly on the grounds that its prior decisions are poisoned by racial animus—including just this past term in *Ramos v. Louisiana*.²⁵² Given the racist

²⁴⁵ See Cong. Budget Office, *The Economic Impact of S. 744, the Border Security, Economic Opportunity and Immigration Modernization Act* (2013).

²⁴⁶ *Modern Immigration Wave Brings 59 Million to U.S., Driving Population Growth and Change Through 2065*, PEW RES. CTR. (Sept. 28, 2015), <https://www.pewresearch.org/hispanic/2015/09/28/modern-immigration-wave-brings-59-million-to-u-s-driving-population-growth-and-change-through-2065/>.

²⁴⁷ Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 58, *amended by* Geary Act of 1892, Pub. L. No. 52-60, 27 Stat. 25 (1892) (repealed 1943).

²⁴⁸ See, e.g., Nafziger, *supra* note 59, at 31–32; Carrie Rosenbaum, *Immigration Law's Due Process Deficit and the Persistence of Plenary Power*, 28 BERKELEY LA RAZA L.J. 118, 143, 144 n.160 (2018); Somin, *supra* note 205; Leah Litman, *Opinion, Unchecked Power Is Still Dangerous No Matter What the Court Says*, N.Y. TIMES (June 26, 2018), <https://www.nytimes.com/2018/06/26/opinion/travel-ban-hawaii-supreme-court.html>.

²⁴⁹ 130 U.S. 581 (1889).

²⁵⁰ Kagan, *supra* note 67, at 28.

²⁵¹ See *Trump v. Hawaii*, 138 S. Ct. 2392, 2448 (2018) (Sotomayor, J., dissenting) (comparing the racist undertones of the majority opinion in *Korematsu v. United States*, 323 U.S. 214 (1944) with the holding and reasoning of the majority opinion and stating that the decision in *Trump* “redeploys the same dangerous logic underlying *Korematsu* and merely replaces one ‘gravely wrong’ decision with another”).

²⁵² See 140 S. Ct. 1390 (2020). The Court factored into its decision to overrule *Apodaca v. Oregon*, 406 U.S. 404 (1971) (plurality opinion), the racially discriminatory purposes of Louisiana's and Oregon's laws allowing a non-unanimous jury to convict a criminal defendant of a felony charge. *Ramos*, 140 S. Ct. at 1401 & n.44. In joining the Court in its judgment, Justice Kavanaugh stated that the prior decision the prior decision was egregiously wrong, in part, because “tolerates and reinforces a practice that is thoroughly racist in its origins and has continuing racially discriminatory effects[.]” *Id.* at 1419 (Kavanaugh, J., concurring in part). Justice Kavanaugh even went as far as to say that the nonunanimous jury “is today the last of Louisiana's Jim Crow laws.” *Id.* at 1418 (Kavanaugh, J., concurring in part) (quoting THOMAS AIELLO, *JIM CROW'S LAST STAND: NONUNANIMOUS CRIMINAL JURY VERDICTS IN LOUISIANA*

ideology upon which the plenary power doctrine is based and the fact that the doctrine continues to allow the Court to uphold “gravely wrong” executive actions like that of the Travel Ban at issue in *Trump v. Hawaii*,²⁵³ it is time the Court departs from this doctrine that perpetuates systemic racism and casts aside normal constitutional review.²⁵⁴

3. The Court’s Weakening of the Plenary Power Doctrine Suggests Departure from *Stare Decisis* Does Not Unduly Upset Reliance Interests

At one time, the Court held that Congress, as the sovereign of the United States, had powers inherent in the law of nations to regulate affairs that extend beyond the United States’ borders, one of these powers being immigration regulation.²⁵⁵ But the Court appears to have departed from this precedent and seems amenable to rooting Congress’s immigration regulatory powers in a constitutional framework.²⁵⁶ Thus, it is hard for the Court to claim that the government maintains a reliance interest in the plenary power doctrine as the Court has routinely and inadvertently weakened it in recent years.²⁵⁷ In addition, the Court has numerous other ways that it can root the immigration power in the Constitution. Under a penumbra or combination theory of powers, in addition to the Naturalization Clause,²⁵⁸ the Court can root Congress’ immigration powers in its regulation of foreign commerce,²⁵⁹ as well as its powers to protect na-

63 (2015). Moreover, Justice Sotomayor, in her concurring opinion additionally noted that her support for overruling *Apodaca* lay with its tether enforcing racial discrimination. *Id.* at 1410 (Sotomayor, J., concurring in part).

²⁵³ *Trump*, 138 S. Ct. at 2448 (Sotomayor, J., dissenting).

²⁵⁴ Professor Somin argues that the plenary power doctrine, born from the *Chinese Exclusion Case* and from “the racial and ethnic bigotry of the late 19th century, . . . deserves to suffer the same fate as *Plessy v. Ferguson* and other products of that mind-set.” Somin, *supra* note 205. I wholeheartedly agree.

²⁵⁵ See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 18 (1936).

²⁵⁶ See *Arizona v. United States*, 567 U.S. 387, 394–95 (2012) (rooting Congress’s immigration powers partly in the Naturalization Clause); *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (rooting Congress’s immigration powers in the Naturalization Clause, the Foreign Commerce Clause, and Congress’s broad authority over foreign affairs); *Fong Yue Ting v. United States*, 149 U.S. 698, 711–12 (1893) (rooting Congress’s and the Executive’s immigration powers in an array of constitutional powers and provisions).

²⁵⁷ See *supra* Part I.A.3.

²⁵⁸ U.S. CONST. art. I, § 8, cl. 4.

²⁵⁹ *Id.* art. I, § 8, cl. 3; *Edwards v. California*, 314 U.S. 160, 172 (1941) (holding that “the transportation of persons[, including foreign nationals into and out of the United States,] is ‘commerce’” within the meaning of the Commerce Clause). In fact, before the *Chinese Exclusion Case*, the Court on numerous occasions held Congress had the power to regulate immigration under the Foreign Commerce Clause. See, e.g., *Edye v. Robinson* (The Head-Money Cases), 112 U.S. 580, 593 (1884) (holding that the federal government had the power to regulate immigration under the Foreign Commerce Clause based on the need for uniform laws “applicable to all ports and to all vessels”); *Chy Lung v. Freeman*, 92 U.S. (2 Otto.) 275, 280 (1876) (holding a state statute that excluded admission of certain foreign nationals absent pay-

tional security through its ability make laws against piracy and other crimes on the high seas,²⁶⁰ declare war on foreign states,²⁶¹ create and maintain militia forces,²⁶² fund the common defense of the nation,²⁶³ and its foreign affairs powers to enter into treaties with foreign nations.²⁶⁴ Moreover, the Court ties these powers together under one immigration regulatory power, using Congress's powers to "make all [l]aws which shall be necessary and proper for carrying into [e]xecution" of its constitutionally granted powers.²⁶⁵ The Court need not resort to the vacuous notion of national sovereignty to establish Congress's immigration regulatory powers. By rooting immigration powers in the Constitution rather than sovereignty, the Court can bring immigration jurisprudence back under the authority of the Constitution and allow the Court to create precedents consistent with the powers the Constitution bestows upon Congress.

Moreover, rooting immigration powers in the Constitution rather than some extra-constitutional source of power does not mean that the United States will lose its sovereignty or ability to regulate who enters and exits the country. By overturning the plenary power doctrine and rooting immigration regulation in the Constitution, the United States will still be able to regulate immigration. But instead, the Court will simply ensure that immigration law and policy will be subject to constitutional limitations and reviews just as other congressional and executive exercises of constitutional powers are.²⁶⁶ The United States can still impose qualifications and criteria as to who can be admitted or receive a visa, but there will at least be constitutional safeguards to ensure that Congress does not engage in practices that go beyond their constitutionally-granted

ment of a bond was unconstitutional because it conflicted with Congress's "power to regulate commerce with foreign nations"); *Henderson v. Mayor of New York*, 92 U.S. (2 Otto.) 259, 270 (1876) (holding Congress's power to regulate foreign commerce included regulation of laws concerning navigation, admission of vessels to ports, and immigrants, who bring wealth and resources to the United States).

²⁶⁰ U.S. CONST. art. I, § 8, cl. 10.

²⁶¹ *Id.* art. I, § 8, cl. 11.

²⁶² *Id.* art. I, § 8, cl. 15.

²⁶³ *Id.* art. I, § 8, cl. 1.

²⁶⁴ *Id.* art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation[.]"); *id.* art II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur[.]"); *Missouri v. Holland*, 252 U.S. 416, 432 (1920); ("[T]he power to make treaties is delegated expressly, . . . along with the Constitution and laws of the United States made in pursuance thereof[.]"). In addition to the Constitution as a source of immigration regulatory power, the INA itself provides that the "immigration laws" includes "all laws, conventions and treaties of the United States[.]" INA § 101(a)(17), 8 U.S.C. § 1101(a)(17) (2018).

²⁶⁵ U.S. CONST. art. I, § 8, cl. 18; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819).

²⁶⁶ Somin, *supra* note 205.

powers. As such, this will allow a legal framework whereby a foreign national visa holder can be guaranteed due process if his visa is revoked.

CONCLUSION

The current U.S. immigration jurisprudence is harmful to the Constitution, immigrants' rights, the global economy, and to the notions of global citizenship that define the United States' role in the international sphere. The Supreme Court has a duty to overrule immigration plenary power, and thus too the doctrine of consular non-reviewability, and provide for greater protection of the rights of foreign nationals when they are located outside of the United States.²⁶⁷ The Court can start to do this by endorsing a framework that will provide extraterritorial application and access of the Fifth Amendment's Due Process Clause to foreign nationals located outside of the United States. Such a workable framework should include the *Boumediene-Verdugo-Urquidez* functional substantial-connection test to apply the Constitution (including the Fifth Amendment's Due Process Clause) to non-lawful permanent resident foreign nationals with valid U.S. visas who are located outside of the United States.²⁶⁸ The Court should also endorse the view that immigrants and nonimmigrants who receive visas from the U.S. Department of State have a vested property interest in said visas and that immigrants and nonimmigrants geographically located outside the United States have a Fifth Amendment due process right to a meaningful opportunity to challenge a revocation of said visas.²⁶⁹

Professor Kagan opines that the "traditional plenary power doctrine is that it did not limit immigrant rights so much as it limited judicial review[,]” so to end immigration exceptionalism and crack the plenary power doctrine, all the Court needs do is to review cases within the bounds of established constitutional doctrines.²⁷⁰ Once the Court recognizes that immigration decisions have constitutional limits when they implicate fundamental rights other questions will follow.²⁷¹ Professor Legomsky writes that “[l]ittle by little, exceptions and qualifications will reduce the doctrine to a shadow of its former self without an express overruling of contrary precedent.”²⁷² Although the Court appears to continue to resist abandoning immigration exceptionalism, even the most recent immigration decision suggests Professor Legomsky's prophecy is coming true.²⁷³ The Court may not overrule the plenary power doctrine

²⁶⁷ See *supra* Part IV.C.

²⁶⁸ See *supra* Part II.

²⁶⁹ See *supra* Part III.B.

²⁷⁰ Kagan, *supra* note 67, at 25.

²⁷¹ *Id.* at 27.

²⁷² Legomsky, *supra* note 205, at 934.

²⁷³ See *supra* Part I.A.3.

overnight, but it has the power and the legal precedent already to provide foreign nationals, some of the most vulnerable members of our society, access to a process to challenge an unjust summary revocation of their visas.

