Fifth Amendment — Immigration — Right to Marriage — Department of State v. Muñoz

Marriage bestows upon a couple a set of rights,[1] and chief among them is the ability to live with one's spouse.[2] However, this right seems to vanish if one spouse happens not to be a U.S. citizen. Sandra Muñoz, a U.S. citizen, learned this firsthand when her husband, Luis Asencio-Cordero, an immigrant from El Salvador, was denied a visa without a clear reason why.[3] Firm in her belief that she enjoyed the right to live with her spouse like any other U.S. citizen, Muñoz sued the Department of State, demanding the reason for her husband's denial.[4] Instead of requiring the State Department to answer, the Supreme Court decided that her husband's immigration status meant she never enjoyed this right to begin with.[5] Recently, in *Department of State v. Muñoz*,[6] the Supreme Court held that the right to marriage and family unity does not apply to a U.S. citizen and their noncitizen spouse.[7] In deciding the case based on substantive, rather than procedural, due process,[8] the Court took an opportunity to rewrite the law and undermine existing fundamental rights of marriage. *Muñoz* is troubling. It shows the current Court doubling down on its commitment to immigration exceptionalism — its practice of failing to apply traditional constitutional principles in the immigration context[9] — and signals how willing this Court is to unravel settled, substantive rights.

Sandra Muñoz, a U.S. citizen, is married to Luis Asencio-Cordero, a citizen of El Salvador, and together they have a U.S. citizen child.[10] In 2013, Muñoz filed for Asencio-Cordero to become a lawful permanent resident based on their marriage.[11] However, because Asencio-Cordero initially entered the United States without inspection and approval by an immigration officer, immigration laws required him to leave the country and apply for a visa from the U.S. consulate in El Salvador.[12] Accordingly, he returned to El Salvador, where the consulate denied his visa, citing 8 U.S.C. § 1182(a)(3)(A)(ii), which bars admission for an

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[1] *See* James Herbie DiFonzo, *Unbundling Marriage*, 32 HOFSTRA L. REV. 31, 31 (2003).

[2] Kerry Abrams, *The Rights of Marriage:* Obergefell*,* Din*, and the Future of Constitutional Family Law*, 103 CORNELL L. REV. 501, 519 (2018).

[3] Dep't of State v. Muñoz, 144 S. Ct. 1812, 1818–19 (2024).

[4] *Id.* at 1817, 1819.

[5] *Id.* at 1821.

[6] 144 S. Ct. 1812 (2024).

[7] *See id.* at 1821.

[8] *See id.* at 1828 (Sotomayor, J., dissenting).

[9] *See, e.g.*, David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 584 (2017).

[10] Muñoz v. U.S. Dep't of State, 50 F.4th 906, 910 (9th Cir. 2022).

[11] *Muñoz*, 144 S. Ct. at 1831 (Sotomayor, J., dissenting).

[12] *Id.*; *see* 8 U.S.C. §§ 1154(a)–(b), 1202, 1255(a); 22 C.F.R. § 42.61 (2024).

individual suspected of "unlawful activity."[13] Asencio-Cordero correctly suspected that he was denied because the immigration officer assumed he was a member of MS-13, an international criminal gang, and that his tattoos played a role in this determination.[14] Throughout this process, Asencio-Cordero and Muñoz maintained that he had no affiliation with MS-13 and requested the consulate reconsider, but it refused to change its decision.[15] They appealed to the Department of State, providing expert testimony that his tattoos were not gang-affiliated.[16]

More than a year after his initial application and separation from his wife and child, the State Department informed Asencio-Cordero and his family that it found no reason to overturn the consulate's decision.[17] Asencio-Cordero could not challenge his visa denial because he is not a citizen and has no constitutional right to enter the United States, but Muñoz, a U.S. citizen, could file her own challenge.[18] Muñoz did just that and sued the State Department in federal court.[19] Muñoz argued that her husband's visa denial was unconstitutional because she did not receive the requisite due process.[20] Typically, courts cannot review visa decisions by consular officers — known as the doctrine of "consular nonreviewability" — in deference to the Executive's broad power over immigration.[21] However, when a visa denial implicates a constitutional right of a *U.S. citizen*, courts may review the decision but only to ensure that the officer provided a "facially legitimate and bona fide reason" for the denial.[22] Under this exception, Muñoz argued that the State Department's denial of her husband's visa infringed her constitutional interest in her marriage and that the office denied the visa without providing a "bona fide factual reason."[23]

The district court granted summary judgment to the State Department.[24] It held that providing a citation to 8 U.S.C. § 1182(a)(3)(A)(ii) alone was insufficient reason for denying Asencio-Cordero's visa, as it was not specific enough to determine why the consular officer denied admission.[25] However, the State Department did eventually provide

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13 *Muñoz*, 50 F.4th at 910 (quoting 8 U.S.C. § 1182(a)(3)(A)(ii)).

14 *Muñoz*, 144 S. Ct. at 1819.

15 *Id.*

16 *Id.* In fact, according to the expert, Asencio-Cordero's tattoos were simply "Catholic icons, clowns, and other non-gang related tattoos." *Muñoz*, 50 F.4th at 911.

17 *Muñoz*, 144 S. Ct. at 1832 (Sotomayor, J., dissenting).

18 *Id.* at 1817 (majority opinion).

19 *Id.* at 1819. The defendants were the Department of State, the Secretary of State, and the U.S. consul in San Salvador. *Id.*

20 Joint Appendix at 8–9, *Muñoz*, 144 S. Ct. 1812 (No. 23-334).

21 *Muñoz*, 50 F.4th at 920–21; Kerry v. Din, 576 U.S. 86, 106 (2015) (Kennedy, J., concurring in the judgment).

22 *Muñoz*, 144 S. Ct. at 1821 (quoting *Din*, 576 U.S. at 103–04; Trump v. Hawaii, 138 S. Ct. 2392, 2419 (2018)).

23 Muñoz v. U.S. Dep't of State, 526 F. Supp. 3d 709, 715 (C.D. Cal. 2021).

24 *Id.* at 727.

25 *Id.* at 720.

sufficient reasoning after it was sued, revealing that it denied Asencio-Cordero's visa based on believed gang affiliation.[26] Additionally, the court concluded that, under the doctrine of consular nonreviewability, it lacked jurisdiction to examine the evidence underlying the State Department's decision because Muñoz and Asencio-Cordero had failed to show that the denial was made in bad faith.[27]

The Ninth Circuit vacated the judgment.[28] It held that Muñoz did have a constitutionally protected liberty interest in her husband's visa application.[29] And because the State Department did not provide the basis for Asencio-Cordero's denial in a timely manner, it forfeited consular nonreviewability's protection from judicial review.[30] The Ninth Circuit remanded to the district court to determine whether the State Department had a proper reason to deny the visa.[31]

The Supreme Court reversed and remanded.[32] Writing for the Court, Justice Barrett[33] held that "a citizen does not have a fundamental liberty interest in her noncitizen spouse being admitted to the country."[34] To identify whether Muñoz asserted a fundamental right protected under the Due Process Clause, the Court applied the two-part test established in *Washington v. Glucksberg*[35] for substantive due process claims.[36] First, there must be a "careful description of the asserted fundamental liberty interest," and second, the right must be "deeply rooted in this Nation's history and tradition."[37]

On the first prong, the majority struggled to "pin down the nature of the right Muñoz claim[ed]," both on what the right itself was and whether it was a substantive or procedural due process claim.[38] It rejected Muñoz's claim to a "fundamental right to marriage" because she was already married, instead construing the asserted right as "something more distinct: the right to reside with her noncitizen spouse in the United States."[39] The Court was unsure what protection this right would receive, but ultimately, it declined to answer this question because Muñoz failed *Glucksberg*'s second prong.[40]

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[26] *Id.*
[27] *Id.* at 721, 723.
[28] Muñoz v. U.S. Dep't of State, 50 F.4th 906, 909 (9th Cir. 2022).
[29] *Id.* at 915.
[30] *Id.* at 923–24.
[31] *Id.* at 924.
[32] *Muñoz*, 144 S. Ct. at 1827.
[33] Justice Barrett was joined by Chief Justice Roberts and Justices Thomas, Alito, and Kavanaugh.
[34] *Muñoz*, 144 S. Ct. at 1821.
[35] 521 U.S. 702 (1997).
[36] *Muñoz*, 144 S. Ct. at 1822.
[37] *Id.* (quoting *Glucksberg*, 521 U.S. at 720–21).
[38] *Id.*
[39] *Id.* (emphasis omitted).
[40] *Id.*

The Court concluded that the right to immigrate one's noncitizen spouse to the United States is not "deeply rooted in this Nation's history and tradition."[41] Early American history showed that immigration into the United States was "of favor [and] not of right."[42] The Court considered various immigration laws that allowed the government to remove or deny entry to noncitizens regardless of whether they had a citizen spouse.[43] "[W]hile Congress has made it easier for spouses to immigrate, it has never made spousal immigration a matter of right."[44] Nor have there been spousal exemptions to grounds of inadmissibility.[45] Finally, several Supreme Court decisions affirmed that Congress can establish restrictions on immigration that are insulated from court review.[46] Together, this evidence demonstrated that spousal immigration is not a fundamental right protected under substantive due process.[47]

As to procedural due process, the Court raised concerns about the "unsettling" implications of allowing Muñoz to raise a procedural due process right in someone else's legal proceedings.[48] This would be contrary to precedent establishing that procedural due process protections do not apply to government actions that "indirectly or incidentally" burden a citizen's rights.[49] Her husband's visa denial only *indirectly* harmed Muñoz, and thus she could not assert due process rights in his visa proceedings.[50] The majority rejected interpreting *Kleindienst v. Mandel*,[51] a case brought by a group of professors challenging the visa denial of a guest speaker, to allow citizens to bring procedural due process claims in the visa proceedings of others.[52] Thus, Muñoz's procedural due process claim also failed.[53]

Justice Gorsuch concurred in the judgment, stating that he would reverse the Ninth Circuit decision without reaching the questions about

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41 *Id.* at 1822–23 (quoting *Glucksberg*, 521 U.S. at 721).

42 *Id.* at 1823 (alteration in original) (emphasis omitted) (quoting JAMES MADISON, REPORT OF 1800 (1800), *reprinted in* 17 PAPERS OF JAMES MADISON 319 (David B. Mattern et al. eds., 1991)).

43 *Id.* (quoting Immigration Act of 1882, ch. 376, 22 Stat. 214) (citing 1798 Act Concerning Aliens, ch. 58, 1 Stat. 570; Immigration Act of 1891, ch. 551, 26 Stat. 1084; Page Act of 1875, ch. 141, 18 Stat. 477; Emergency Quota Act of 1921, ch. 8, 42 Stat. 5).

44 *Id.* at 1824 (citing Act of Aug. 9, 1946, ch. 945, 60 Stat. 975, as an example of restrictions on spousal immigration).

45 *Id.*

46 *Id.* at 1824–25 (quoting United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 543–44 (1950); Wong Wing v. United States, 163 U.S. 228, 237 (1896); Galvan v. Press, 347 U.S. 522, 531 (1954); Kleindienst v. Mandel, 408 U.S. 753, 765–66 (1972); Fiallo v. Bell, 430 U.S. 787, 795 n.6 (1977)).

47 *Id.* at 1825.

48 *Id.*; *see also id.* at 1826 (arguing that this type of claim "would usher in a new strain of constitutional law").

49 *Id.* at 1826 (quoting Castle Rock v. Gonzales, 545 U.S. 748, 767 (2005)).

50 *Id.*

51 408 U.S. 753 (1972).

52 *Muñoz*, 144 S. Ct. at 1826–27 (discussing how *Mandel* concerned a statutory interpretation issue and First Amendment rights, not a procedural due process claim).

53 *Id.* at 1827.

Muñoz's liberty interests.[54] Because Muñoz received the reason for her husband's visa denial in litigation, "the constitutional questions [about the right to marriage] . . . no longer have any practical relevance."[55]

Justice Sotomayor dissented,[56] also critiquing the majority for "choos[ing] a broad holding on marriage over a narrow one on procedure."[57] The dissent argued that the Court ignored precedent and wrongly narrowed the once expansive substantive right to marriage in the immigration context.[58] Contrary to the majority's historical reading, the dissent found that the constitutional right to marriage has "deep roots" in Supreme Court jurisprudence, noting that it "was one of the first building blocks of substantive due process."[59] The dissent argued that the majority mischaracterized Muñoz's asserted right: Instead of the right to immigrate her husband, Muñoz was asserting that her spouse's visa denial "burden[ed] her right 'to marry, establish a home and bring up children' with him."[60] As such, her claim fit neatly within the comprehensive right to "marriage and intimacy," a right that the Court has firmly recognized.[61] Justice Sotomayor argued that the visa denial itself burdened Muñoz's right to marriage, even if she could live outside the United States with her husband.[62] Therefore, Muñoz should be entitled to procedural due process protections in the form of a "facially legitimate and bona fide reason" for the visa denial.[63] Finally, Justice Sotomayor described how providing a reason is seemingly a "meager remedy" but a potentially powerful one to deter arbitrary denials.[64] She concluded by discussing the implications of the *Muñoz* Court's failure to uphold America's "centuries-old promise" to respect marriage, with disproportionate impacts on same-sex couples and couples without the ability or means to relocate to the noncitizen spouse's home country.[65]

As the concurrence and dissent noted, the Court unnecessarily reached the question of whether Muñoz had a liberty interest at stake.

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[54] *Id.* (Gorsuch, J., concurring in the judgment).

[55] *Id.*

[56] Justice Sotomayor was joined by Justices Kagan and Jackson.

[57] *Muñoz*, 144 S. Ct. at 1828 (Sotomayor, J., dissenting).

[58] *Id.*

[59] *Id.* at 1833–34.

[60] *Id.* at 1834 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

[61] *Id.* (quoting Obergefell v. Hodges, 576 U.S. 644, 671 (2015)).

[62] *Id.* at 1835 (discussing how in Loving v. Virginia, 388 U.S. 1 (1967), and *Obergefell*, it did not matter that the plaintiffs could move elsewhere to have their marriage recognized by the state).

[63] *Id.* at 1838 (quoting Kleindienst v. Mandel, 408 U.S. 753, 770 (1972)). Justice Sotomayor also dismissed the majority's argument that allowing a procedural due process claim would have unsettling consequences because the majority overexaggerated the risks and underestimated how Muñoz's right to marriage was *directly* burdened. *Id.* at 1838–39.

[64] *Id.* at 1839 (discussing how the plaintiff in United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950), was able to gain admission eventually once the government had to justify its exclusion decision and was unable to).

[65] *Id.* at 1840.

Possibly guided by immigration exceptionalism, the Court made three deliberate choices in *Muñoz* that changed the law on fundamental rights with troubling implications outside of the immigration context. First, the Court improperly subjected the fundamental right of marriage to *Glucksberg*'s history and tradition test. Second, it framed Muñoz's liberty interest as one specific to residing with a *noncitizen* spouse, rather than a broader right to marital cohabitation. Third, the Court selectively used historical evidence in contravention to its supposed commitment to originalism. The willingness of the Court to veer from its standard constitutional analysis illustrates immigration exceptionalism and its consequences: By denying rights to noncitizens, the Court in the process will shake the foundation of settled constitutional law. *Muñoz* serves as another indication that this Court does not hesitate to strip away fundamental constitutional rights.

First, the Court chose to apply the *Glucksberg* history and tradition test to Muñoz's constitutional claim when precedent did not require it to.[66] This is the same tactical decision the Court made in *Dobbs v. Jackson Women's Health Organization*[67] to overturn abortion rights.[68] But *Dobbs* did not require the *Muñoz* Court to apply *Glucksberg* beyond abortion.[69] Moreover, *Glucksberg* applies to substantive due process rights and was not necessary to evaluate Muñoz's *procedural* due process claim.[70] Despite these clear signals from past precedent that the *Glucksberg* test need not apply, the Court chose to apply it anyway. The application of *Dobbs*'s rights-stripping method in *Muñoz* is ominous, suggesting that *Dobbs*'s reasoning now extends to new fundamental rights and potentially to all due process claims.[71] If the Court has no problem subjecting other substantive rights to stringent analysis under the *Glucksberg* test, then the Court will likely invalidate them.[72]

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66 *See Obergefell*, 576 U.S. at 671 (describing the *Glucksberg* test as "inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy").

67 142 S. Ct. 2228 (2022).

68 *See* Reva B. Siegel, *The History of History and Tradition: The Roots of* Dobbs*'s Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J.F. 99, 133 (2023).

69 *See Dobbs*, 142 S. Ct. at 2277–78 ("Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."). At least one lower court post-*Dobbs* has refused to expand the *Glucksberg* test to marriage rights. *See* Arias v. Garland, 696 F. Supp. 3d 531, 541 (W.D. Ark. 2023) (following *Obergefell* in rejecting the *Glucksberg* test in a case involving a citizen challenging a spouse's visa denial).

70 Brief for Respondents at 19 n.10, *Muñoz*, 144 S. Ct. 1812 (No. 23-334). *See generally* Michael C. Dorf, *The Twisted Career of the Term "Liberty Interest" Gets Twistier Still in* Dep't of State v. Muñoz, DORF ON LAW (June 25, 2024), https://www.dorfonlaw.org/2024/06/the-twisted-career-of-term-liberty.html [https://perma.cc/PH76-NQSD] (discussing how the majority opinion conflated substantive and procedural due process rights).

71 *Muñoz*'s conflation of substantive and procedural due process makes it harder to win on a procedural due process claim, as the asserted liberty interest must now meet "the more demanding deeply-rooted-in-history-and-tradition requirement." Dorf, *supra* note 70.

72 *See Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring) (explicitly challenging other fundamental rights).

Second, even assuming the *Glucksberg* test is proper, the Court deployed it in a remarkably narrow way when identifying the right at stake. The Court construed Muñoz's asserted constitutional right as it saw fit, which made denying her claim seem like the logical outcome of its reading of immigration history.[73] Muñoz asserted that her husband's visa denial jeopardized her right to "[m]arital [c]ohabitation."[74] But the Court focused on her spouse's *lack of* U.S. citizenship and framed her claim as a "right to have her noncitizen husband enter (and remain in) the United States."[75] This strategic move allowed the Court both to cast her argument as unreasonable and to ignore how the right she actually asserted, the right to marital cohabitation, is "deeply rooted in this Nation's history and tradition"[76] and extends to the immigration context.[77]

Third, the Court selectively utilized history to undermine Muñoz's marriage right. In search of historical evidence against U.S. citizens' right to live with their noncitizen spouses, the Court used Founding-era history that originalist scholar Professor Ilya Somin characterizes as "false or misleading."[78] For example, Justice Barrett quoted James Madison to argue that from the beginning of U.S. history, admission of noncitizens was "of favor [and] not of right."[79] But Madison expressed this as an assumption to advance an overall argument that a proposed 1798 immigration law was unconstitutional because the federal government did *not* have the power to regulate prospective immigrants.[80] In fact, the idea of the federal government regulating immigration was so unpopular during the Founding that this law was never used to deport anyone and expired without consequence in 1801.[81] The majority knew that history at the Founding supported flexible immigration laws, writing that "[t]he United States had relatively open borders until the late

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[73] *See Muñoz*, 144 S. Ct. at 1822–25; Siegel, *supra* note 68, at 145 (arguing that the framing of the liberty interest is determinative in finding whether it is rooted in history and tradition).

[74] Brief for Respondents, *supra* note 70, at 19.

[75] *Muñoz*, 144 S. Ct. at 1822.

[76] *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion) (finding that the "institution of the family" is rooted in American historical tradition); *see also* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (holding the right "to marry, establish a home and bring up children" is included in the "liberty guaranteed" under the Fourteenth Amendment).

[77] *See* Landon v. Plasencia, 459 U.S. 21, 34 (1982) (discussing in the context of deportation, the "right to rejoin [one's] immediate family" as "a right that ranks high among the interests of the individual") (citing *Moore*, 431 U.S. at 499, 503–04; Stanley v. Illinois, 405 U.S. 645, 651 (1972)).

[78] Ilya Somin, *The Supreme Court's Dubious Use of History in* Department of State v. Munoz, REASON: VOLOKH CONSPIRACY (June 24, 2024, 11:00 AM), https://reason.com/volokh/2024/06/24/the-supreme-courts-dubious-use-of-history-in-department-of-state-v-munoz [https://perma.cc/5CWH-6DKC] (arguing that Justice Barrett's use of Founding-era historical evidence took quotes out of context and characterized minority views and rejected views during debates as consistent with views at the Founding).

[79] *Muñoz*, 144 S. Ct. at 1823 (alteration in original) (emphasis omitted) (quoting MADISON, *supra* note 42).

[80] Somin, *supra* note 78.

[81] *Id.*

19th century."[82] For a Court wedded to originalism, this open-border policy at the Founding should support Muñoz's constitutional right. But perhaps with a will to undermine this right, the Court found a way.

Not resting on simply mischaracterizing history, the Court abandoned any effort to construct a consistent, originalist analysis. Justice Barrett fell victim to the same faulty analysis she once rejected,[83] departing from Founding history and using evidence from the twentieth-century, nearly a century after the Constitution's ratification, to undercut Muñoz's asserted right.[84] She followed Justice Scalia's lead in *Kerry v. Din*,[85] where he "[c]arefully cho[se] one of the most xenophobic moments in American history as" evidence against the right to family unity in immigration.[86] Likewise in *Muñoz*, Justice Barrett cited immigration laws passed during Congress's "nativist and racist hostility to[ward] Chinese immigration."[87] But her analysis of these laws lacked nuance. During these exclusionary periods, immigration laws still *favored* spousal cohabitation.[88] For instance, even during the late nineteenth century, when immigration laws were rife with anti-Chinese racism,[89] the Court allowed for some Chinese wives and children to immigrate with their husbands without obtaining their own admissibility certificates.[90]

Muñoz is not the first time the Court has found ways to curtail constitutional rights in the immigration context. In fact, this case reflects the Supreme Court's larger practice of immigration exceptionalism, where the Court authorizes "government action that would be unacceptable if applied to citizens."[91] For example, the plenary power doctrine allows "the federal government virtually unchecked power to make immigration decisions," which provided cover for President Trump's ban on admissions "from certain predominantly Muslim countries."[92] "[T]he plenary power doctrine and its vestiges" — like consular nonreviewability, which limited Muñoz's ability to seek justice through the courts — make disputing discriminatory or arbitrary decisions nearly

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82 *Muñoz*, 144 S. Ct. at 1823.

83 *See, e.g.*, United States v. Rahimi, 144 S. Ct. 1889, 1924 (2024) (Barrett, J., concurring) ("[F]or an originalist, the history that matters most is the history surrounding the ratification of the text; that backdrop illuminates the meaning of the enacted law. History (or tradition) that long postdates ratification does not serve that function.").

84 *See Muñoz*, 144 S. Ct. at 1823–24.

85 576 U.S. 86 (2015) (plurality opinion).

86 Abrams, *supra* note 2, at 542. Notably, Justice Barrett used this historical analysis in *Muñoz*. *See* 144 S. Ct. at 1823 (quoting *Din*, 576 U.S. at 96, 97).

87 Somin, *supra* note 78.

88 *See* Brief of Immigration Law and History Scholars as Amici Curiae in Support of Respondents at 5–6, *Muñoz*, 144 S. Ct. 1812 (2024) (No. 23-334) (citing BILL ONG HING, DEFINING AMERICA THROUGH IMMIGRATION POLICY 11–25 (2004)).

89 Somin, *supra* note 78.

90 *See, e.g.*, United States v. Gue Lim, 176 U.S. 459, 464, 468 (1900).

91 Rubenstein & Gulasekaram, *supra* note 9, at 584–85.

92 *Id.* at 585–86.

impossible.[93] *Muñoz* fits within these doctrinal trends, and in the majority opinion, Justice Barrett explicitly recognized the exceptional nature of immigration law.[94] The Court here created exceptions to fundamental rights and originalism, troubling the state of unenumerated constitutional rights as a whole.

Certainly, denying constitutional rights to noncitizens is reason enough for concern. Yet the resulting decisions that stem from immigration exceptionalism can and do have ramifications for the rights of U.S. citizens, too. The Court's approach to immigration policing is illustrative. The Fourth Amendment's protection from unreasonable searches largely applies to noncitizens,[95] but the Court seems to have concluded that nothing, even racial prejudice, is unreasonable if it is against immigrants. When policing is done at the border, the Fourth Amendment's reasonableness test strongly favors the government's interests over an immigrant's constitutional rights.[96] In *United States v. Brignoni-Ponce*,[97] for example, the Court found the government's interest significant enough to permit racial profiling based on "Mexican appearance" during immigration stops.[98] But as the Court itself noted, appearance is not determinative of citizenship,[99] meaning the decision functionally curtailed Fourth Amendment protections for U.S. citizens of Mexican appearance as well.[100] Similarly, the Court has used foreign policy and national security interests to immunize U.S. Customs and Border Protection (CBP) agents from damage suits arising from cross-border shootings.[101] Yet again, this exceptional carveout for immigration officials also implicated the ability of *citizens* to hold CBP, and

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[93] *Id.* at 597; *see* Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After "9/11?"*, 7 J. GENDER, RACE & JUST. 315, 341 (2003) ("If a consular or immigration officer is motivated by any form of bias, it seems unlikely that the victim of bias can overcome the adverse decision.").

[94] *See Muñoz*, 144 S. Ct. at 1822 ("[I]t would be remarkable to put the Government to the most demanding test in constitutional law in the field of immigration, an area unsuited to rigorous judicial oversight." (citing Fiallo v. Bell, 430 U.S. 787, 792 (1977))).

[95] United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (holding that the Fourth Amendment extends to people with "sufficient connection with this country," which is not solely based on citizenship (citing United States *ex rel.* Turner v. Williams, 194 U.S. 279, 292 (1904))).

[96] Jennifer M. Chacón, *Border Exceptionalism in the Era of Moving Borders*, 38 FORDHAM URB. L.J. 129, 134–35 (2010); *see, e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975) ("The Government makes a convincing demonstration that the public interest demands effective measures to prevent the illegal entry of [noncitizens] at the Mexican border.").

[97] 422 U.S. 873 (1975).

[98] *See id.* at 886–87.

[99] *Id.* at 886 ("Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry . . . .").

[100] *See* Chacón, *supra* note 96, at 138; Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1030 (2010).

[101] *See* Hernandez v. Mesa, 140 S. Ct. 735, 739 (2020).

potentially all government agents, accountable.[102] These cases make clear that the spillover effects of decisions restricting constitutional rights in an immigration context easily jeopardize the rights of U.S. citizens, too, making *Muñoz* even more troubling regarding the rights of marriage.[103] Justice Barrett's assurance that other fundamental rights remain intact[104] provides little comfort. The durability of immigration exceptionalism, combined with the Court's willingness to bend its tools to redefine established rights, suggests a murkier, more uncertain future.[105]

The Court's choices, guided by immigration exceptionalism, should sound the alarm not only for the right to marriage[106] but also for other fundamental rights. Marriage is a bundle of several rights,[107] but such a bundle is sapped of practical significance if the ability to live with one's spouse can so easily be separated from the ability to marry them.[108] The Court's power to selectively determine the asserted right, and resulting historical analysis, demonstrate the ease with which the Court vitiates central components of the rights of marriage. Furthermore, imposing the *Glucksberg* test on intimate fundamental rights like marriage, as well as procedural due process claims, risks eroding rights that cannot meet this exacting standard, especially when the Court is free to frame a right as contrary to history and tradition. *Muñoz* opens the door to overruling revered and relied-upon cases like *Obergefell* and *Loving*, which protect the ability of spouses to live together in the state of their choosing, not just the ability to be legally married.[109] As the Court erects its own borders around the right to marry, what will remain is not clear.

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[102] *See* Egbert v. Boule, 142 S. Ct. 1793, 1810–11 (2022) (Sotomayor, J., concurring in the judgment in part and dissenting in part) (critiquing the majority, in a case involving a claim by a U.S. citizen, for rewriting precedent to "close the door" to damage suits against federal agents, *id.* at 1811).

[103] *See, e.g.*, *Muñoz*, 144 S. Ct. at 1840 (Sotomayor, J., dissenting) (acknowledging the impact of the majority's decision on Asencio-Cordero and Muñoz's U.S. citizen child).

[104] *Id.* at 1825 n.9 (majority opinion) ("To be clear: Today's decision does not remotely call into question any precedent of this Court, including those protecting marriage as a fundamental right.").

[105] *See id.* at 1840 (Sotomayor, J., dissenting) ("Today, the majority fails to live up to that centuries-old promise [of respect for marriage].").

[106] *See* Dahlia Lithwick & Mark Joseph Stern, *Sonia Sotomayor Just Sounded a Dire Warning About Marriage Equality*, SLATE (June 22, 2024, 8:30 AM), https://slate.com/news-and-politics/2024/06/supreme-court-opinions-sonia-sotomayor-marriage-equality.html [https://perma.cc/V62R-PA2V]; Elie Mystal, *The Supreme Court Just Took Its First Swipe at Marriage Equality*, THE NATION (June 25, 2024), https://www.thenation.com/article/society/munoz-supreme-court-marriage-immigration [https://perma.cc/J8C2-XCCR]; Marjorie Cohn, *SCOTUS's Anti-Immigrant Ruling Imperils Marriage Equality and LGBTQ Lives*, TRUTHOUT (June 24, 2024), https://truthout.org/articles/scotuss-anti-immigrant-ruling-imperils-marriage-equality-and-lgbtq-lives [https://perma.cc/X898-WNPF].

[107] DiFonzo, *supra* note 1, at 31.

[108] *See* Abrams, *supra* note 2, at 519 ("[M]arriage would mean little if there was no physical proximity.").

[109] *See Muñoz*, 144 S. Ct. at 1835 (Sotomayor, J., dissenting).