

COMING TO AMERICA: HOW CONSULAR ABSOLUTISM LEADS TO DISCRIMINATION

*Justina Fakhry**

Abstract

This Note critiques a pervasive mode of discrimination that goes unchecked. Consular absolutism allows consular immigration officers to make discriminatory visa decisions, which are not subject to review. This Note begins with a discussion of the case law that developed the concept of consular absolutism, primarily by analyzing the Supreme Court's gloss on the plenary power of the federal government in the realm of immigration. This Note then discusses how courts have built upon the plenary power doctrine to establish consular absolutism.

This Note suggests that Congress should amend the Immigration and Nationality Act (INA) to grant a private right of action to challenge visa denials based on discrimination in federal court in order to abolish consular absolutism. It further suggests that the Fifth Amendment Due Process Clause provides a constitutional basis for such an amendment. Additionally, or in the alternative, this Note suggests that Congress should amend the INA to establish a Visa Review Board within the Department of State vested with the power to conduct intra-executive reviews of consular visa denials.

INTRODUCTION	436
I. BACKGROUND ON THE IMMIGRATION SYSTEM	437
II. WHAT IS CONSULAR ABSOLUTISM AND WHERE DOES IT COME FROM?	438
III. HOW CONSULAR ABSOLUTISM DEVELOPED	442
IV. DISCRIMINATION IN VISA DENIALS	444
V. HOW CONSULAR ABSOLUTISM SHOULD BE ABOLISHED	446
A. <i>Constitutional Protections to Visa Applicants</i>	447
B. <i>Standing</i>	449
C. <i>Federal Jurisdiction</i>	450

* J.D., 2025, University of Florida Levin College of Law; B.A. in Political Science, 2023, University of Florida, with minors in Arabic Language and Culture and Philosophy. The author is grateful to Professor Juan Caballero for his guidance in writing this Note, and to her law school community for their unwavering support throughout law school and beyond.

VI. ADMINISTRATIVE REVIEW	451
CONCLUSION	453

INTRODUCTION

Youssef, a resident and citizen of Lebanon, has been endeavoring to obtain a B-2 (tourist) to the United States ever since his sister left Lebanon and immigrated to the United States thirty years ago. His sister is a successful business owner in the United States, and he has not seen her since she left Lebanon. He is desperate to see his family in the United States. He has nieces and nephews who he has never met, and his niece is getting married this summer. He wants to attend his niece's wedding more than anything, but he is disheartened by the system. He has applied for a tourist visa countless times. Each time, he arrives to the United States consulate in Lebanon to perform his interview with high hopes that this time will be different. Each time, the United States consular officer determines that he is not eligible for a tourist visa because they expect he will abuse his visa and will stay in the United States illegally once his visa expires. He can't help but feel as though the consular officer passes discriminatory judgment on him because he is poor. He works a minimum wage job and doesn't have much, but he knows other Lebanese residents who are able to secure a tourist visa who are much more affluent than he. He feels like he is being punished for his financial and socio-economic status, but there is nothing he can do.

Kate is a black resident and citizen of France. She is an artist, and her dream is to showcase her art in the United States. She applied for a temporary business visa, as she has spoken to an art gallery in New York about showcasing her art in an exhibit there. After her interview with the United States consulate in France, the consular officer denied her visa, stating that she is inadmissible because she is likely to be a public charge. She is heartbroken and outraged. She knows plenty of artists who were able to get the same visa status that she applied for. She suspects that the consular officer who conducted her interview had discriminatory biases and denied her visa on improper grounds.

There is no avenue of relief for Youssef or Kate. Due to consular nonreviewability, specifically, and consular absolutism more broadly, visa applicants who suspect that consular officers discriminatorily denied their visas cannot challenge the denial in court.

This Note discusses the origins of consular absolutism and how it has developed from the plenary power doctrine. Through specific examples, it then discusses how consular absolutism can lead to arbitrary discrimination. This Note argues that: (1) because consular absolutism allows for discriminatory practices by consular officers it should be abolished; and (2) Fifth Amendment Due Process Clause protections

should extend to visa applicants to guard them from arbitrary discrimination. This Note argues that Congress can accomplish those goals by amending the INA to grant a private right of action to challenge visa denials based on discrimination in federal court and/or by establishing a Visa Review Board within the Department of State to review visa denials internally. In making this argument, this Note grapples with potential roadblocks such as standing, jurisdiction, and constitutional extra-territoriality.

I. BACKGROUND ON THE IMMIGRATION SYSTEM

In most cases, a non-citizen seeking to enter the United States needs a visa to gain entry.¹ Among these are non-immigrant visas, which award entry to the United States for a specific duration of time (*e.g.*, student visas, business visas, tourist visas),² and immigrant visas, which award a non-citizen permission to stay in the United States permanently.³

The process to obtain a visa begins with submitting a visa petition with the United States Customs and Immigration Service (USCIS).⁴ This petition seeks to establish that the non-citizen seeking the visa meets the requirements of the particular status they are applying for.⁵ For example, a United States citizen may petition for her unmarried son to receive an immigrant visa.⁶ Once USCIS approves the visa petition, the non-citizen must then file a visa application with the United States consulate in their home country and, ultimately, submit to an interview by a consular officer.⁷

Consular officers exert unchecked power in the interview stage.⁸ The visa applicant must convince the consular officer (1) that she fits the definition of the visa status she is seeking, and (2) that no statutory admissibility exclusions bar her from entry.⁹ If the consular officer is

1. *Almaqrami v. Pompeo*, 933 F.3d 774, 776 (D.C. Cir. 2019) (“In general, a citizen of a foreign country who wishes to come to the United States must first obtain a U.S. visa, which is placed in the traveler’s passport. A visa does not guarantee entry into the United States; it only confers the right to travel to a port of entry and apply for admission to enter the country.”). *But see* 8 U.S.C. § 1187 (establishing that a non-resident may not need obtain a visa to visit the United States if they are eligible for entry through the visa waiver program).

2. *Young v. Trump*, 506 F. Supp. 3d 921, 928 (N.D. Cal. 2020); *see also* 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> [https://perma.cc/E7DQ-C7MW] (last visited Mar. 2, 2026).

3. *Young*, 506 F. Supp. 3d at 928.

4. 8 C.F.R. §§ 204.2, 204.5(a)-(c); *see also* *Bahiraei v. Blinken*, No. 22 C 7360, 2024 U.S. Dist. LEXIS 26320, at *732 (N.D. Ill. Feb. 15, 2024).

5. *See, e.g.*, 8 U.S.C. § 101(a)(15)(K).

6. *Id.* § 203(a)(1).

7. *Id.* § 221(a).

8. *Id.* § 104(a).

9. *Id.*

adequately convinced that the non-citizen fulfills the requirements of the visa status for which she is seeking and no inadmissibility statute bars her entry, then the consular officer approves the non-citizen's visa application and awards a visa.¹⁰

However, United States consular officers enjoy unfettered discretion in awarding visas. Although, in theory, a non-resident visa applicant need only meet the statutory requirements of the visa for which they are applying¹¹ and be "admissible,"¹² the determination of these elements is subjective. To illustrate this, one ground rendering a visa applicant inadmissible is being determined to be a "drug abuser or addict."¹³ The determination of what activity constitutes drug abuse or addiction is subjective. One consular officer may find that occasional recreational drug use constitutes abuse and thus renders an applicant inadmissible, while others may not. Consular officers are required to cite the legal authority supporting the reason for denying the visa but are not required to elaborate much further.¹⁴

II. WHAT IS CONSULAR ABSOLUTISM AND WHERE DOES IT COME FROM?

Consular absolutism is an immigration doctrine derived from the concept of the plenary power of the federal government in the realm of immigration.¹⁵ Decades of case law have established that the United States federal government, representing the United States as a sovereign entity, should have sole discretion to decide who may enter and exit its borders.¹⁶

The plenary power doctrine traces back to *Ping v. United States (the Chinese Exclusion Case)*.¹⁷ *Chae Chan Ping* involved a congressional statute called the Chinese Exclusion Act,¹⁸ which barred Chinese laborers from entering the United States, but included a carve out permitting

10. *Id.* § 1201(a).

11. *See generally id.* § 1151(b) (describing requirements for quota-exempt immigrant visas); *id.* § 1153 (2022) (describing requirement for non-quota exempt immigrant visas); *id.* § 1101(a)(15) (2022) (describing requirements for various nonimmigrant visas).

12. *See id.* § 1182(a).

13. *Id.* § 1182(a)(1)(A)(iv).

14. *See generally* Cardenas v. United States, 826 F.3d 1164 (9th Cir. 2016) (holding that a consular officer may deny a visa under a valid statute of inadmissibility and must cite the inadmissibility statute that specifies discrete factual predicates, or there must be a fact on the record that provides at least a facial connection to the statutory ground of inadmissibility).

15. *Id.* at 1169; *Kleindienst v. Mandel*, 408 U.S. 753, 765–68 (1972) ("The Court without exception has sustained Congress' plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.").

16. *See Kleindienst*, 408 U.S. at 765–66; *Ping v. United States*, 130 U.S. 581, 602–04 (1889); *see also* Desiree C. Schmitt, *The Doctrine of Consular Nonreviewability in the Travel Ban Cases: Kerry v. Din Revisited*, 33 GEO. IMMIGR. L.J. 55, 58 (2019).

17. *See generally Ping*, 130 U.S. at 602–04 (1889).

18. 8 U.S.C. §§ 262–97 (1882) (repealed 1943).

Chinese laborers who were living in the United States at the time of the Act's passage to receive a certificate which allowed them to leave the United State and be permitted to enter upon return.¹⁹ The plaintiff, Chae Chan Ping, was a Chinese laborer in the United States.²⁰ Pursuant to the Chinese Exclusion Act, he received a certificate allowing him to depart to China and be readmitted upon his return.²¹ While he was on the ship returning to the United States, the Chinese Exclusion Act was amended to prohibit *all* Chinese laborers from entering the United States, including those who had received the re-entry certificate granted by the Chinese Exclusion Act prior to the amendment.²² Chae Chan Ping challenged the validity of the Chinese Exclusion Act in federal court on the grounds that it violated the Burlingame Treaty and was unconstitutional.²³ The Supreme Court upheld the Chinese Exclusion Act on two grounds.²⁴ First, the Court held that the Chinese Exclusion Act stood on equal footing to the Burlingame Treaty, so the Chinese Exclusion Act prevailed as controlling law because it was passed later.²⁵ Second, the Court held that the Chinese Exclusion Act was a valid execution of congressional authority, as a state's power to regulate immigration is derived from international law and established concepts of sovereignty.²⁶ The Court further stated that this power is reserved to the political branches of the United States government, limiting the judiciary's power to review based on the political question doctrine.²⁷

Since *Chae Chan Ping*, courts have reaffirmed the concept of plenary power in the realm of immigration policy time and time again. In *Nishimura Ekiu v. United States*,²⁸ the Supreme Court upheld a non-citizen's entry into the United States by an executive officer, holding that courts lacked the authority to review an immigration officer's factual finding that she was inadmissible because Congressional authority to regulate immigration is well settled under the plenary power doctrine.²⁹ In *United States ex rel. Knauff v. Shaughnessy*,³⁰ a non-resident, born in Germany and residing in Czechoslovakia during the Hitler regime, married a United States citizen and sought entry into the United States.³¹

19. *Ping*, 130 U.S. at 589.

20. *Id.*

21. *Id.*

22. *Id.*

23. *See id.*

24. *Id.* at 600, 609.

25. *Id.* at 600.

26. *See id.* at 603–06.

27. *Id.* at 603.

28. 142 U.S. 651 (1892).

29. *Id.* at 662–63.

30. 338 U.S. 537, 538 (1950).

31. *Id.* at 539.

When she arrived in the United States, she was denied entry and detained on Ellis Island on the grounds that her admission would be “prejudicial to the United States.”³² She thereafter filed a writ of *habeas corpus* in the Southern District of New York, challenging the right of the Attorney General to exclude her without a hearing for security reasons.³³ The Supreme Court upheld the Attorney General’s exclusion, finding that the decision to admit or exclude an alien rests firmly with the president, who may delegate this function to an executive officer, the decisions of whom are final and conclusive.³⁴ “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.”³⁵ The Supreme Court goes further to infamously state, “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”³⁶

The vast power established by these cases continues today. Most recently, in 2020, the Supreme Court upheld a federal law limiting the rights of foreign nationals apprehended at the border as a valid exercise of Congress’s power under the plenary power doctrine in *Department of Homeland Security v. Thuraissigiam*.³⁷ In *Thuraissigiam*, a Sri Lankan national entered the United States without inspection or entry documents and was thus subject to expedited removal under 8 U.S.C. § 1225(a)(1).³⁸ He was detained by Immigration and Customs Enforcement after an asylum officer rejected his credible-fear claim.³⁹ He filed a federal *habeas* petition, requesting a new opportunity to apply for asylum, but the petition was denied because 8 U.S.C. § 1252(e)(2) limits the review that a federal court may conduct on a petition for a writ of *habeas corpus*.⁴⁰ The Ninth Circuit Court of Appeals reversed the dismissal, holding that 8 U.S.C. § 1252(e)(2) violates the Suspension and Due Process Clauses of the Constitution, but the Supreme Court upheld 8 U.S.C. § 1252(e)(2) under a plenary power theory, established by *Ekiu*, holding that Congress is entitled to set the conditions for an alien’s entry into the country.⁴¹

The plenary power doctrine has led to virtually unlimited power of the federal government to regulate matters of immigrant admissions with

32. *Id.* at 540.

33. *Id.*

34. *Id.*

35. *Id.* at 543.

36. *Id.* at 544.

37. 140 S. Ct. 1959 (2020).

38. *Id.* at 1967.

39. *Id.* at 1968.

40. *Id.*

41. See *id.* at 1982–83.

little to no direction or review from federal courts.⁴² At times, this has led to what many consider to be unchecked abuses of power by the federal government. *Trump v. Hawaii*⁴³ is a prime example. There, despite the presence of what arguably were mounds of evidence that showed racial and religious animosity as motivation for President Trump's "Muslim ban," the Court held that it must uphold the President's immigration policies if they are facially neutral and seemingly support a legitimate state purpose.⁴⁴

Consular absolutism is an outgrowth of this doctrine.⁴⁵ Consular absolutism describes the ability of consular officers abroad to make judgments on awarding United States visas, free from judicial and administrative reviewability.⁴⁶ This essentially means that consular officers have the power, appointed to them by the state, to award visas however they see fit with no higher authority ensuring fairness, consistency, or equality.⁴⁷ This insulation from reviewability allows consular officers to exercise their power unchecked, leading to discriminatory practices that run counter to the United States Constitution.

This unchecked authority leads to discriminatory practices in awarding visas and leaves those who face this discrimination with no legal recourse.⁴⁸ Although American jurisprudence historically has looked past discrimination in the realm of enforcing immigration laws,⁴⁹ denial of visas should be subject to judicial and administrative review to ensure that the United States complies with the values of the Constitution in all realms of its practice, including foreign affairs and immigration.

42. *See id.*; *see also* 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.").

43. 138 S. Ct. 2392 (2018).

44. *See id.* at 2417–23 (applying rational basis review to an establishment clause challenge of President Trump's executive order limiting immigration from a number of predominantly Muslim countries). The Court upheld the executive order on the grounds that the proclamation was facially neutral and served a valid state interest. *Id.*

45. *Kleindienst v. Mandel*, 408 U.S. 753, 765–66 (1972).

46. *Muñoz v. United States Dep't of State*, 50 F.4th 906, 909 (9th Cir. 2022).

47. *See id.*; 8 U.S.C. § 1104(a).

48. *See infra* notes 74–79.

49. *See generally* *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018) (holding that President Trump's executive order banning immigration from predominantly Muslim countries is constitutional because it is facially neutral and serves a legitimate state objective).

III. HOW CONSULAR ABSOLUTISM DEVELOPED

Following the establishment of the plenary power doctrine,⁵⁰ the doctrine of consular absolutism originated with two appellate court decisions in the 1920s.⁵¹ First, the Second District Court of Appeals tied the plenary power doctrine to insulation of consular decisions in *United States ex rel. London v. Phelps*.⁵² In that case, a Russian woman sought to enter the United States through Canada to visit her children in New York.⁵³ Once she arrived in New York, she was detained as an alien who had entered the United States without a proper visa.⁵⁴ She challenged her detention with a writ of *habeas corpus*, arguing that the issuance of visas is a ministerial act by consular officers which they are bound to perform.⁵⁵ The Second Circuit Court of Appeals denied this argument, concluding that issuing visas is not ministerial, as it requires inquiries on the spot and some determinations, stating, “[w]hether the consul has acted reasonably or unreasonably is not for us to determine.”⁵⁶ In this case, the Second Circuit, for the first time, explicitly denied reviewability of the decision of a consular officer, even if they acted unreasonably.

The District of Columbia Circuit Court discussed consular absolutism in *United States ex rel. Ulrich v. Kellogg*.⁵⁷ There, an American citizen married a German national who applied at the American consulate in Berlin for a non-quota immigration visa.⁵⁸ The non-citizen wife was denied because she had committed four previous crimes of “moral turpitude.”⁵⁹ She sought review in federal court to issue a writ of mandamus to instruct the immigration inspectors in Berlin to approve and advise the issuance of a visa to the non-citizen.⁶⁰ The Court affirmed the decree below, holding that no statute provided any official review of consular officers’ action, whether by cabinet officers or other authority, and Section 2(a) of the Immigration Act of 1924⁶¹ committed visa issuance authority to issue a visa is committed to consular officers.⁶² The D.C. Circuit went on to state that it is “unable to find any provision of the

50. See generally *Ping v. United States*, 130 U.S. 581 (1889) (discussing the government’s power over immigration matters).

51. STEPHEN H. LEGOMSKY & DAVID B. THRONSON, IMMIGRATION AND REFUGEE LAW AND POLICY 620 (Saul Levmore et al. eds., 7th ed. 2019).

52. 22 F.2d 288, 290 (2nd Cir. 1927).

53. *Id.* at 289.

54. *Id.* at 289.

55. *Id.* at 289, 290.

56. *Id.* at 290.

57. 30 F.2d 984 (D.C. Cir. 1929).

58. *Id.* at 985.

59. *Id.*

60. *Id.*

61. Immigration Act of 1924, Pub. L. No. 68-139, § 2(a), 43 Stat. 153, 153.

62. *Kellogg*, 30 F.2d at 986.

immigration laws which provides for the official review of the action of the consular officers in such case by a cabinet officer or other authority.”⁶³ Here, the appellate court held both that the power to issue a visa is committed to consular officers and that there is no provision of the immigration statutes that allows for judicial review of consular officers.⁶⁴

Taken together, *Phelps* and *Ulrich* discuss three themes to justify consular absolutism: lack of jurisdiction, absence of statutory authority, and the “committing” of the visa issuing authority to consular officers.⁶⁵

About fifty years later, the United States Supreme Court heard a case challenging a visa denial of an alien scholar in *Kleindienst v. Mandel*,⁶⁶ upholding the consular officer’s visa denial under the doctrine of consular absolutism.⁶⁷ In *Kleindienst*, a Belgian journalist was invited to speak at a conference in the United States and applied for a temporary visa.⁶⁸ His application was denied, due to his purported ties to the communist party.⁶⁹ He challenged his visa denial as a violation of the First and Fifth Amendment.⁷⁰ The Supreme Court upheld his visa denial, stating that “plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established . . . when the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.”⁷¹

Consular absolutism is now an accepted doctrine of immigration law, as courts routinely refuse to hear cases challenging visa denials.⁷² Following decades of judicially exercised restraint, consular absolutism was codified in the United States Code in 2002, stating, “[n]othing in this section shall be construed to create or authorize a private right of action to challenge the decision of a consular officer or other United States official or employee to grant or deny a visa.”⁷³

63. *Id.*

64. *Id.*

65. LEGOMSKY & THRONSON, *supra* note 51.

66. 408 U.S. 753 (1972).

67. *Id.* at 769–70.

68. *Id.* at 757.

69. *Id.*

70. *Id.* at 760.

71. *Id.* at 769–70.

72. *See, e.g.,* *Patel v. Reno*, 134 F.3d 929, 931–33 (9th Cir. 1997); *Li Hing of Hong Kong, Inc. v. Levin*, 800 F.2d 970, 971 (9th Cir. 1986); *Mulligan v. Schultz*, 848 F.2d 655, 657 (5th Cir. 1988).

73. 6 U.S.C. § 236(f).

IV. DISCRIMINATION IN VISA DENIALS

The doctrine of consular absolutism serves as an insurmountable obstacle to addressing, let alone challenging, the considerable racial, ethnic, and class discrimination that pervades the granting and denial of visas. One particularly jarring and infamous example of consular discriminatory abuse of discretion occurred in the United States Consulate in Sao Paulo, Brazil, where the consulate was exposed for engaging in explicit racism and classism in awarding visas.⁷⁴ Officers were exposed for using abbreviations on visa forms such as “RK” for “rich kid,” “TP” for “talks poor,” “LP” for “looks poor,” etc.⁷⁵ Visas were denied for recorded reasons such as “[s]limy looking; wears jacket on shoulders [with] earring,” and “[l]ooks [and] talks poor.”⁷⁶ The consulate also distributed a manual which advised consular officers that people of Korean or Chinese ethnicity/descent are likely to commit fraud, and visas should not be issued to them “unless they have had previous visas and are older.”⁷⁷ The manual also advised that certain Brazilian cities with predominantly Black populations are known for fraud and “anyone born in these locations is suspect unless older, well-traveled, etc.,” and “Arab and Chinese last names set off bells and whistles, regardless of what passport/nationality they may have. Most Brazilians have no interest in [assuming a false identity], but Arabs and Chinese are two groups to worry about.”⁷⁸

Additionally, the consular officers were advised that they should spend approximately three minutes on each interview and “should attempt to achieve a thirty percent refusal rate.”⁷⁹ These discriminatory practices directly contravened INA section 202(a)(1)(A), which states “[n]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of a person’s race, sex, nationality, place of birth, or place of residence [except as specifically provided by the INA].”⁸⁰ Despite this direct violation of the INA, the discriminatory practices exposed in this case were not brought to public light through judicial review of visa denials; rather, the case was brought by a consular officer whose employment was terminated because he challenged the consulate’s discriminatory policies.⁸¹

Notably, the Sao Paulo exposé took place prior to 9/11. The terrorist attacks on September 11th were a major source of discrimination in

74. See *Olsen v. Albright*, 990 F. Supp. 31, 33 (D.D.C. 1997).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 33–34.

79. *Id.* at 34.

80. 8 U.S.C. § 1151.

81. *Olsen*, 990 F. Supp. at 32–33.

immigration policy.⁸² Since the attacks of September 11, 2001, noncitizens from certain countries designated as harboring terrorists required scrutiny at a higher level of government.⁸³ Countries in the Middle East and North Africa had student visa denial rates ranging from ten percent to fifty-five percent in 2022, whereas countries in western Europe had student visa denial rates ranging from nine percent to twelve percent.⁸⁴ Most recently, the Harvard School of Public Health brought attention to the racially motivated visa denials of health professionals from Africa.⁸⁵ The Harvard School of Public Health reported several high-profile instances of health professionals from Africa being denied visas to enter the United States and Canada after being invited to speak at global health conferences.⁸⁶

There is also evidence that consular officers deny visas to African students based on racial animus, with the world's highest student visa denial rate being from sub-Saharan Africa.⁸⁷ One study showed that more than half of all African students applying to study in the United States under an F-1 visa are denied, whereas student visa denial rates among applicants from South America, Australia, and the Pacific Islands fare between twenty-five percent to thirty percent.⁸⁸ Between 2018 and 2022, an estimated 92,051 potentially qualified African students applying to study in United States universities and colleges were denied.⁸⁹

Consular officers historically and presently use their discretion to make discriminatory decisions in visa denials and approvals.⁹⁰ This affects not only those abroad who are denied visas, but also their loved

82. See generally AM. IMMIGR. COUNCIL, TARGETS OF SUSPICION: THE IMPACT OF POST-9/11 POLICIES ON MUSLIMS, ARABS, AND SOUTH ASIANS IN THE UNITED STATES (2004), <https://www.americanimmigrationcouncil.org/sites/default/files/research/Targets%20of%20Suspicion.pdf> [<https://perma.cc/3T3V-DEQV>] (discussing the U.S. government's targeted immigration enforcement after 9/11); Karen C. Tumlin, *Suspect First: How Terrorism Policy Is Reshaping Immigration Policy*, 92 CAL. L. REV. 1173 (2004).

83. LEGOMSKY & THRONSON, *supra* note 51, at 609.

84. U.S. DEP'T OF STATE, ADJUSTED REFUSAL RATE - B-VISAS ONLY, BY NATIONALITY, FISCAL YEAR 2022 1-6, <https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/RefusalRates/FY22.pdf> [<https://perma.cc/MF3H-SP8G>] (last visited Mar. 4, 2026).

85. *A call to end visa discrimination*, HARVARD T.H. CHAN SCH. OF PUB. HEALTH (Feb. 8, 2023), <https://web.archive.org/web/20240209121249/https://www.hsph.harvard.edu/news/hsph-in-the-news/a-call-to-end-visa-discrimination/> [<https://perma.cc/744X-T5J9>].

86. *Id.*

87. Wachira Kigotho, *Is Racial Profiling Behind African Student Visa Denials?*, UNIV. WORLD NEWS (July 28, 2023), <https://www.universityworldnews.com/post.php?story=20230728085153266> [<https://perma.cc/ZV7P-EKBL>].

88. *Id.*

89. *Id.*

90. Andrew Rosenberg, *Racial Discrimination in International Visa Policies*, 67 INT'L STUD. Q. 1, 2 (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4328842 [<https://perma.cc/V5E7-BM7L>].

ones or those who would benefit from their admission into the U.S. These discriminatory practices pervade beyond those abroad who seek entry, but those domestically who are affected as well.

Despite these recognized and recorded instances of discrimination in visa denials, there is no way to administratively appeal visa denials or challenge visa denials in federal court.⁹¹ The solution to prevent consular officers from employing discriminatory practices in awarding and denying visas is to amend the INA to allow non-resident visa applicants to bring challenges to discriminatory visa denials to the federal courts and/or to an Internal Review Board within the Department of State.

V. HOW CONSULAR ABSOLUTISM SHOULD BE ABOLISHED

As the District of Columbia Court of Appeals aptly stated, “[consular absolutism] holds that a consular official’s decision to issue or withhold a visa is not subject to judicial review, at least unless Congress says otherwise.”⁹² Despite decades of jurisprudence leading to and consolidating the concept of plenary power and consular absolutism, Congress should amend the INA to include a private right of action for non-residents to challenge visa denials in federal court and internally within the Department of State, ending the era of consular absolutism.⁹³ Although data of instances in which consular absolutism has promoted discrimination in visa denials is limited, in large part due to the lack of transparency that comes as a result of lack of review, the instances of discrimination in visa denials that have been brought to light are quite telling.⁹⁴

Simply put, consular absolutism runs against the notion of equality and freedom from racial and ethnic discrimination that is foundational to our nation. By insulating the decisions of consular officers from both judicial and administrative review, we fail to guarantee these freedoms from arbitrary discrimination to those who seek entry. We weaken our own values of liberty to preserve the sovereignty of the United States in immigration decisions.

The systematic discrimination that the United States immigration system allows through consular absolutism runs counter to the principles of equality and due process protected under the Fifth Amendment.⁹⁵ The Fifth Amendment states “. . . nor shall any person . . . be deprived of life,

91. LEGOMSKY & THRONSON, *supra* note 51, at 610.

92. Saavedra Bruno v. Albright, 197 F.3d 1153, 1159 (D.C. Cir. 1999).

93. See Olsen v. Albright, 990 F. Supp. 31 (D.D.C. 1997); AM. IMMIGR. COUNCIL, *supra* note 82; Tumlin, *supra* note 82; HARVARD T.H. CHAN SCH. OF PUB. HEALTH, *supra* note 85.

94. See Olsen v. Albright, 990 F. Supp. 31 (D.D.C. 1997); AM. IMMIGR. COUNCIL, *supra* note 82; Tumlin, *supra* note 82; HARVARD T.H. CHAN SCH. OF PUB. HEALTH, *supra* note 85.

95. U.S. CONST. amend. V.

liberty, or property, without due process of law.”⁹⁶ *Boiling v. Sharp*⁹⁷ interpreted the Fifth Amendment Due Process Clause to require equal protection under the laws of the federal government via reverse incorporation.⁹⁸ The federal government holds itself to this standard with regard to people within the territory of the United States but has declined to extend constitutional protections to people outside the nation’s borders.⁹⁹ To allow the federal government to hold itself to these standards of fairness and freedom from arbitrary discrimination and still to turn a blind eye when it occurs in the context of immigration, is hypocritical. To justify amending the INA to afford a private right of action to non-residents to challenge visa denials based on discriminatory grounds, the Fifth Amendment must be interpreted to extend to visa applicants.

A. Constitutional Protections to Visa Applicants

To date, the Supreme Court has declined to apply constitutional protections to non-resident aliens absent a “sufficient connection” to the United States to trigger constitutional protection.¹⁰⁰ In *Landon v. Plascencia*,¹⁰¹ the Supreme Court stated, in *dicta*, “an alien seeking 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 . . . however, once an alien [that] gains admission to our country begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.”¹⁰² Additionally, the Supreme Court denied Fourth and Fifth Amendment protections to a non-resident whose home was searched by United States Drug Enforcement agents in Mexican territory in *United States v. Verdugo-Urquidez*,¹⁰³ finding that a non-citizen must show a “sufficient connection” to the United States to be entitled to constitutional protections.¹⁰⁴

96. *Id.*

97. 347 U.S. 497 (1954).

98. *See generally* *Boiling*, 347 U.S. 497, 498 (1954) (holding that, although there is no equal protections guarantee in the Fifth Amendment to apply to the federal government, equal protection under the law may be inferred from the Due Process Clause of the Fifth Amendment).

99. *See generally* *Agency for Int’l Dev. v. All. For Open Soc’y Int’l, Corp.*, 591 U.S. 430, 430 (2020) (holding that foreign organizations abroad have no First Amendment rights); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 261 (1990) (holding that the Fourth Amendment protection against unreasonable searches and seizures does not apply to aliens outside the United States with no voluntary attachment to the United States).

100. *Id.*

101. 459 U.S. 21, 32 (1982).

102. *Id.*

103. 494 U.S. 259, 270–72 (1990).

104. *Id.* at 254.

This refusal to extend constitutional protections to foreign nationals is rooted in xenophobia and elitism,¹⁰⁵ and it is one school of thought that the constitutional language reserving certain rights to citizens necessarily implies that other rights are not meant to be restricted to citizens or residents.¹⁰⁶ In fact, there are arguments that, at the time the Bill of Rights was adopted, the rights enumerated in the Bill of Rights were not viewed as a set of contractual provisions enforceable because the states in the union agreed to enforce them, but as unalienable and natural rights inherent in humanity.¹⁰⁷ Thus, all humans should be protected by the protections of the Bill of Rights, not just citizens or residents of the United States.

While these arguments have merit, the suggestion that Congress should grant a statutory private right of action to challenge consular visa denials does not venture this far. Rather, the fact that an individual is applying for a visa establishes a “sufficient connection” to the United States sufficient to warrant the constitutional protections of the Fourth Amendment, as required in *United States v. Verdugo-Urquidez*,¹⁰⁸ ensuring freedom from arbitrary discrimination in visa awards and denials.

The Court in *Verdugo-Urquidez* refused to apply Fifth Amendment protections to the search and seizure of a car located in Mexico that belonged to a Mexican citizen with no voluntary attachment to the United States.¹⁰⁹ Visa applicants, on the other hand, are individuals with a pre-existing tie to the United States through familial relationships or through prospective employers. In 2022, the largest class of legal permanent resident (LPR) admissions was immediate relatives of United States citizens, comprising 42.1% of the total number of new LPRs, followed by 16.1% who obtained status as family-sponsored preferences, and 26.5% of LPRs who obtained status as employment-based preferences.¹¹⁰ In each of these cases, the non-resident alien applying for admission was a person with sufficient connections to the United States. This relationship with the United States is sufficient to afford the limited protection against discrimination guaranteed by the Fifth Amendment.

Further, refusal to review visa denials for discriminatory intent stands starkly against American values and protections, regardless of resident

105. David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 369 (2003).

106. *Id.* at 370.

107. *Id.* at 372.

108. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265, 271 (1990).

109. *Id.* at 269.

110. *Legal Immigration and Adjustment of Status Report*, OFFICE OF HOMELAND SEC. STAT., <https://www.dhs.gov/immigration-statistics/special-reports/legal-immigration#:~:text=The%20largest%20LPR%20class%20of,obtained%20status%20employment%20Dbased%20preferences> [https://perma.cc/ZN75-CDRH] (last visited Mar. 6, 2024).

status. The principles of equality, liberty, and freedom from arbitrary discrimination, upon which the nation was founded, should be extended to those who seek entry to our country as well. Otherwise, these principles mean nothing.

B. *Standing*

To bring these challenges to federal court, a non-resident must establish that they have standing to sue,¹¹¹ and that the court has jurisdiction to hear the case.¹¹² These present additional hurdles for non-resident aliens in federal court to challenge visa denials.

Article III standing requires (1) “injury in fact,” (2) causation, and (3) redressability.¹¹³ “Injury in fact” requires an invasion of a legally protected interest which is both (a) “concrete and particularized,” and (b) “actual or imminent.”¹¹⁴ Courts have held that individuals who are denied visas have standing to bring suit in federal court through one of two avenues: (1) a U.S. resident may bring suit on behalf of a family member who was denied a visa, and (2) some courts have held that those who have been denied visas have standing to sue for themselves.¹¹⁵

Courts are split on whether non-resident aliens have standing to sue for visa denials. The Seventh Circuit Court of Appeals has held that a non-resident alien met the *Lujan* standing requirements, finding that the petitioner had an “injury-in-fact” in her interest in her admissibility to the United States.¹¹⁶

The District Court for the District of Columbia, on the other hand, found that non-resident aliens do not have standing to bring suit to federal court, even if they meet all requirements of Article III standing,¹¹⁷ relying heavily on Supreme Court precedent establishing that “enemy aliens” do not have standing to sue in United States federal courts.¹¹⁸ In *Berlin Democratic Club v. Rumsfeld*,¹¹⁹ the District Court for the District of Columbia stated that the general rule is non-residents have no standing to sue in United States courts with three exceptions: (1) where the *res* is the United States; (2) where the statutory scheme allows suits by non-resident aliens; and (3) where a non-resident is seized abroad and transported to the United States for prosecution.¹²⁰

111. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

112. U.S. CONST. art. III, § 2.

113. *Lujan*, 504 U.S. at 560–62.

114. *Id.* at 560.

115. *Khachatryan v. Blinken*, 4 F.4th 841, 849–51 (9th Cir. 2021); *Abourezk v. Reagan*, 785 F.2d 1043, 1050–51 (D.C. Cir. 1986).

116. *Matushkina v. Nielsen*, 877 F.3d 289, 293–94 (7th Cir. 2017).

117. *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144, 152 (D.D.C. 1976).

118. *Johnson v. Eisentrager*, 339 U.S. 763, 776 (1950).

119. 410 F. Supp. 144.

120. *Id.* at 152.

Following this rule, including a private right of action to challenge discriminatory visa denials in the INA, squarely satisfies the second exception discussed in *Berlin Democratic Club v. Rumsfeld*, solving the contentious non-resident standing issue.¹²¹

C. Federal Jurisdiction

*Hermina Sague*¹²² found that federal courts do not have jurisdiction to hear visa denial cases. The court stated it lacked jurisdiction to hear the case under INA section 279, but the INA read at the time, “the district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any provisions of” Title II.¹²³ The relevant provisions of the INA were sections 221 and 222, both of which were under Title II. Section 221 of the INA authorized consular officers to issue visas, and forbade visa issuance to anyone who is barred by the inadmissibility grounds laid out in section 212(a), which is also under Title II.¹²⁴ The INA seemed to squarely allow for judicial review, despite the court’s finding.¹²⁵ Either way, Congress has since amended section 279 of the INA in 1996 to restrict the use of the jurisdiction statute, so section 279 is now not an avenue for claiming federal jurisdiction over visa denials.¹²⁶ However, a broader grant of federal jurisdiction still exists under the federal question doctrine of 28 U.S.C. § 1331.¹²⁷

Section 1331 grants federal jurisdiction in “all civil actions arising under the Constitution, laws, or treaties of the United States.”¹²⁸ At the time *Hermina Sague* was decided, establishing federal question jurisdiction under section 1331 was not an option because it required an amount in controversy in excess of 10,000 dollars.¹²⁹ Today, no such amount in controversy exists for the federal question jurisdiction statute, so the court does seem to have jurisdiction¹³⁰ to hear these cases as these issues arise under federal statute INA section 212,¹³¹ governing inadmissibility.

121. *Id.*

122. *Hermina Sague v. United States*, 416 F. Supp. 217, 221 (D.P.R. 1976).

123. Immigration and Nationality Act, Pub. L. No. 82-414, § 279, 66 Stat. 163, 230 (1952) (current version at 8 U.S.C. § 1329).

124. *Id.* § 221, 66 Stat. at 191–92.

125. *See id.*

126. *Id.*

127. 28 U.S.C. § 1331.

128. *Id.*

129. Act of July 25, 1958, Pub. L. No. 85-554, 72 Stat. 415 (amending the jurisdiction of district courts in civil actions with regard to amount in controversy and diversity of citizenship).

130. 28 U.S.C. § 1331.

131. Immigration and Nationality Act, Pub. L. No. 82-414, § 212(a), 66 Stat. 163, 182–87 (1952) (current version at 8 U.S.C. § 1182). (identifying the classes of aliens ineligible for visas and admission into the United States).

Section 1331 seems to be a plausible avenue to establish jurisdiction, despite court precedent denying jurisdiction to hear visa denials.

VI. ADMINISTRATIVE REVIEW

In addition to federal courts declining to hear visa denial appeals, visa denials are also generally ineligible for administrative appeal.¹³² The Board of Immigration Appeals (BIA) is an administrative body within the Executive Office of Immigration Review, a subset of the Department of Justice.¹³³ The BIA is responsible for reviewing decisions from immigration judges within the Department of Justice.¹³⁴ The BIA, however, is not equipped to review the decisions of consular officers, as consular officers operate within an entirely separate branch of the executive.¹³⁵

Congress should allow for intra-executive administrative review of visa denials by establishing a Visa Review Board within the Department of State to review discriminatory visa denials. In fact, this solution has previously been considered and introduced to Congress numerous times by many different legislators and has been rejected by Congress each time.¹³⁶

The following bill proposal, drafted by House Representative Henry B. Gonzalez in 1987, is illustrative:

Section 1. Visa Review Board.

(a) Amendment to INA.—Chapter 3 of title II of the Immigration and Nationality Act is amended by adding after section 224 the following new section:

Visa Review Board

Sec. 225. (a)(1) There is hereby established, within the Department of

132. *Denials of Visas or Green Cards & Your Legal Options*, JUSTIA (2025), <https://www.justia.com/immigration/denials-of-visas-or-green-cards/> [https://perma.cc/SQU7-Y5FK].

133. U.S. DEP'T OF JUST., BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL § 1.2(b), at 5 (2022), https://www.supremecourt.gov/opinions/URLs_Cited/OT2024/23-929/23-929-1.pdf [https://perma.cc/58J3-PZC3].

134. *Board of Immigration Appeals*, EXEC. OFF. FOR IMMIGR. REV. (2026), <https://www.justice.gov/eoir/board-of-immigration-appeals#:~:text=The%20Board%20of%20Immigration%20Appeals,Deputy%20Chief%20Appellate%20Immigration%20Judges> [https://perma.cc/4TJ8-SSXY]; see also Jacob Sandler, *Uncompelling Uniformity*, 76 FLA. L. REV. 1961, 1984 (noting that internal administrative tribunals, such as the Board of Immigration Appeals, enable the federal government to apply federal law more uniformly).

135. § 104(a), 66 Stat. at 174 (granting the Secretary of State the authority to delegate duties to consular officers).

136. See, e.g., H.R. 3305, 103rd Cong. (1993); S. 3203, 114th Cong. § 3 (1969); H.R. 1156, 106th Cong. (1999); H.R. 2567, 100th Cong. (1987). LEGOMSKY & THRONSON, *supra* note 51, at 614.

State, a Visa Review Board (hereinafter referred to as the 'Board') which shall be composed of regular and ad hoc members to be appointed by the Secretary of State . . .

(2) In considering any appeal, the Board shall act through a panel of 3 members, not more than 2 of whom may be ad hoc members, and not more than 1 of whom may be a consular officer.

(3) The Board shall have authority, as provided in this section, to review the case of aliens specified under paragraph (4) who have been denied visas . . .

(4)(b)(2) The Board shall review each denial by a consular officer of an immigrant or nonimmigrant visa to an alien described in subsection (a)(4) upon the request of such alien, or of [the petitioner] . . .

(4)(c)(3) In reviewing the decision of a consular officer denying a visa to an alien, the Board shall hear testimony and receive evidence from (A) any official of the government requesting the privilege to be heard with respect to a matter pending before the Board, and (B) the attorney or other designated representative of the alien whose case the Board is reviewing, or the attorney or other designated representative of the [petitioner] . . .¹³⁷

In addition to a private right of action in federal court, the establishment of a Visa Review Board would relieve pressure and caseload from the federal judiciary. Further, because the Visa Review Board would be settled within the Department of State, an executive administrative agency, the doctrine of plenary power faces no challenge. Decisions of consular officers, who are executive officers, would be reviewed by a higher-ranked executive officer. This scheme of review within the executive branch thereby raises no threat to the principle of sole authority in the realm of international dealings, as inherent in sovereignty, belonging to the executive branch, as the plenary power doctrine finds its origins.¹³⁸

Allowing for intra-executive review of consular decisions of visa denials is not the end-all solution to consular absolutism. By isolating executive officers from the checks and balances of the federal judiciary, there is still the issue of allowing power and discriminatory practices to reign free. By limiting review of consular visa denials to the authority of the executive branch, a political entity, the power of the executive branch and the political party in office at that time is isolated from checks and balances, leading to unbridled authority of one party's ideals in visa awards and denials. The Visa Review Board should be established in addition to a private right of action to challenge visa denials in federal court. However, administrative review as an alternative to judicial review

137. H.R. 2576, 100th Cong. (1987).

138. *Chae Chan Ping v. United States*, 130 U.S. 581, 602-04 (1889).

is an avenue that may impose accountability on consular officers and may provide relief to those who are arbitrarily discriminated against by consular officers. Any form of review for discriminatory visa denials is an improvement to the system we operate under now. In the absence of an avenue for remedy in United States federal courts, it is not only appropriate, but also necessary to allow for administrative review internally within the executive.

CONCLUSION

Consular absolutism developed in American case law as an outgrowth of the plenary power doctrine.¹³⁹ The plenary power doctrine and the doctrine of consular absolutism are well-settled in the courts and are rarely challenged. However, the plenary power doctrine and consular absolutism, as its outgrowth, have allowed the executive branch to apply discriminatory policy and decision-making in a manner that runs contrary to American constitutional principles of liberty and freedom from arbitrary government intervention and discrimination, and should be subject to judicial review to curb this discriminatory application of our immigration laws.

This Note has shown that issues of jurisdiction and standing do not stand as barriers for some visa declination cases to be brought and heard in federal court, either by visa applicants themselves or by those people who petitioned on their behalf. Further, this Note has shown that United States consular officers have a history of discriminatory practices, beginning with the blatant racial and socioeconomic discrimination against visa applicants in Sao Paulo, to visa applicants from Sub-Saharan Africa to visa applicants from the Middle East and North Africa after September 11, 2001. Even with a substantial lack of access to data on discrimination by consular officers, this discrimination is documented and evident in the United States' immigration practices.

Through the system that federal courts have created through the plenary power doctrine and consular absolutism, consular officers have no incentive to exercise our principles of equality and liberty if their actions are conclusive and nonreviewable, because there is no higher body of authority that holds them accountable. The simplest and most effective solution is to amend the INA to grant a private right of action for non-residents to challenge visa denials in federal court and internally by establishing a Visa Review Board within the Department of State.

139. *Id.* at 629–31.