
Engaged in Fraud: Detecting Sham Marriages Within the Bounds of the Constitution

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Recommended Citation

Zoe DiDomenico, *Engaged in Fraud: Detecting Sham Marriages Within the Bounds of the Constitution*, 72 DePaul L. Rev. 703 (2023)

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ENGAGED IN FRAUD: DETECTING SHAM MARRIAGES WITHIN THE BOUNDS OF THE CONSTITUTION

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I. INTRODUCTION

In the United States, one of the most common ways of obtaining a Permanent Resident Card (known as a green card), and eventually United States citizenship, is through family-based immigration.¹ Family-based immigration is often highlighted by the entertainment indus-

1. Juan Carlos Guerrero, *Six ways to legally enter the US and possibly obtain a green card*, ABC 7 NEWS, <https://abc7news.com/visa-lottery-student-work-asylum/3658889/> [<https://perma.cc/6ESE-Z8H2>] (last visited Nov. 23, 2021).

try. In particular, the show *90 Day Fiancé* highlights the K-1 visa and its process.² Specifically, the show follows the relationships of couples who have filed for the K-1 visa and their journey to the altar just ninety days following the arrival of the immigrant fiancé in the United States.³ Additionally, movies like *The Proposal*⁴ and *Green Card*⁵ highlight the utilization of sham marriages for noncitizens to remain in the United States. Although their purpose is entertainment, the show and movies demonstrate the use of marriages to secure lawful permanent resident (LPR) status in the United States and possible formation of sham marriages purely to secure this status.

Despite there being a variety of pathways for immigrants to become LPRs, and eventually United States citizens, some pathways are filled with obstacles or are even completely blocked, posing considerable challenges for individuals seeking to immigrate to the United States. Consequently, some immigrants opt for illegal pathways to the United States, like forming fraudulent marriages purely to secure a green card (known as sham marriages). This Article will analyze the detection and deterrence of sham marriages. In particular, this Article evaluates the conditional residence provision of the Immigration Marriage Fraud Amendment Act of 1986 (IMFA). This Article will argue that the IMFA conditional residence provision violates the constitutional right to marital privacy and should be repealed. Instead, more intrusive questioning should be reserved for processes occurring prior to the noncitizen's admission to the United States. While this Article's focus is on the conditional residence provision's violation of the constitutional right to marital privacy, it also offers several ways in which the IMFA's goal of deterring marriage fraud can still be achieved. This includes increasing the number of admission slots in all immigration categories, increasing per-country caps, and increasing funding to United States Citizen and Immigration Services (USCIS) to expedite application processing to reduce backlogs.

Part II begins by providing a general background of the main immigration categories, with primary focus on marriage-based immigration. Then, Part II takes a deeper look into the formation of sham marriages to quickly acquire LPR status. Subsequently, the United States government's enactment of the IMFA and the particularities of condi-

2. Faith Karimi, *What '90 Day Fiance' teaches us about love – and the US visa process*, CNN (Apr. 24, 2021, 3:01 AM), <https://www.cnn.com/2021/04/24/entertainment/90-day-fiance-new-season-trnd/index.html> [<https://perma.cc/8RT4-3MZZ>].

3. *Id.*

4. *THE PROPOSAL* (Touchstone Pictures, Kurtzman/Orci Productions, Mandeville Films 2009).

5. *GREEN CARD* (Touchstone Pictures, Australian Film Finance Corporation, Lam Ping 1990).

tional residency are explored. In addition to the distinctive characteristics of the IMFA, Part II explores some of the broader topics dealing with immigration such as the plenary power doctrine and Congress' power to control immigration. Furthermore, Part II discusses the foundational cases of the constitutional right to privacy and the constitutional protections afforded to immigrants. Lastly, Part II discusses marital privacy concerns in identifying sham marriages.

Part III analyzes the constitutionality of the IMFA's conditional residence provision to identify sham marriages. First, Congress' plenary power and its ability to implement strict immigration procedures is evaluated and its applicability to analyzing the validity of marriages. Second, the violation of the constitutional right to marital privacy by the IMFA is discussed. Third, the IMFA's ignorance of family reunification is assessed. Fourth, this part proposes that the IMFA be repealed so that investigative practices are more aligned with how constitutional protections are historically granted to immigrants. Furthermore, there should be increased focus on detecting sham marriages prior to the noncitizen's admission to the United States. In addition to proposing an alternative way to detect sham marriages that respects the Constitution, this part also offers several ways in which the formation of sham marriages can be deterred. This includes increasing annual admission caps and per-country caps as well as increasing funding to USCIS to expedite application processing to reduce backlogs.

Part IV examines the impact of repealing the IMFA and increasing annual admission caps, per-country caps, and funding to USCIS, while reserving intrusive questioning for processes taking place prior to the noncitizen's admission to the United States. Specifically, this part assesses the large-scale impact, including the ability to identify and deter sham marriages and the impact on family reunification interests. Furthermore, this part analyzes the individual impact on couples by discontinuing long-term surveillance.

II. BACKGROUND

First, this part provides an overview of the primary immigration categories, with detailed attention given to the process of acquiring a green card through marriage to a United States citizen or LPR (known as marriage-based immigration). Second, the types of marriage fraud, reasons for forming sham marriages, and criminal penalties are assessed. Third, the adoption of the IMFA is discussed. Fourth, this part looks at the plenary power doctrine and Congress' power to control immigration. Fifth, the constitutional right to privacy

and the applicable cases are discussed. Sixth, this part discusses the constitutional protections afforded to immigrants, primarily focusing the discussion on the connection with the physical location of the immigrant. Lastly, this part discusses court decisions regarding the evaluation of sham marriages and their concern with marital privacy.

A. *Immigration Pathways*

Immigrants have various ways to immigrate to the United States. The primary immigration categories are family-sponsored, employment-based, diversity, and humanitarian;⁶ however, most immigrant admissions are based on family.⁷ “Family-sponsored immigration includes immigrants who qualify as *immediate relatives* of U.S. citizens . . . or fall into one of the four family preference categories.”⁸ An immediate relative includes the “spouses and children, as well as parents of citizens who are over 21 years old.”⁹ This category is numerically unlimited.¹⁰ While immediate relatives are not subject to an annual cap, each of the four family preference categories have their own annual cap.¹¹ The first preference category, subject to an annual admissions cap of 23,400, is for the unmarried daughters and sons of U.S. citizens.¹² The second preference family visa is designated for spouses as well as the unmarried sons and daughters of LPRs.¹³ Currently, the cap is 114,200 admissions annually.¹⁴ The third preference category, dedicated to admissions for the married daughters and sons of U.S. citizens, is numerically capped at 23,400 annual admissions.¹⁵ Lastly, the fourth preference category, reserved for U.S. citizens’ brothers and sisters, is numerically capped at 65,000 annual admissions.¹⁶ Due to the significant number of applicants and insufficient admission slots, numerical caps are often plagued by backlogs.¹⁷

6. T. ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 114–15 (9th ed. 2021).

7. Guerrero, *supra* note 1.

8. ALEINIKOFF ET AL., *supra* note 6, at 117.

9. *Id.*

10. *Id.* at 118.

11. *Id.*

12. *Id.* at 119.

13. *Id.*

14. ALEINIKOFF ET AL., *supra* note 6.

15. *Id.*

16. *Id.*

17. *Id.* at 118. For information on current backlogs see, e.g., *Adjustment of Status Filing Charts from the Visa Bulletin*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/green-card/green-card-processes-and-procedures/visa-availability-priority-dates/adjustment-of-status-filing-charts-from-the-visa-bulletin> [<https://perma.cc/D2JY-L59U>] (last visited Apr. 4, 2023).

Noncitizens can also acquire a green card through employment-based immigration, which is divided into five different categories with varying qualifying characteristics.¹⁸ In total, these employment-based categories are numerically capped at 140,000 admissions annually.¹⁹ Family-based and employment-based categories are also subject to per-country caps. This means that in addition to the typical annual admission caps, there is an additional limitation which states “no single country [can] receive[] over 25,000 admissions annually in all preference categories combined.”²⁰

There is also diversity immigration.²¹ This form of immigration functions like a lottery.²² To qualify for a diversity visa, an immigrant needs “(1) a high school education or its equivalent, or (2) within five years preceding the application, at least two years of experience in an occupation that requires at least two years of training or experience.”²³ Each annual lottery requires a separate application and only one can be filed per year.²⁴ The last immigration category is humanitarian admissions.²⁵ This category includes refugees and asylees.²⁶ The numerical cap for this category fluctuates depending on the current presidency.²⁷

Notably, marriage can also provide individuals with a green card. A noncitizen can become a LPR through the K-1 fiancé visa. The K-1 fiancé visa is available when one individual is a U.S. citizen, and the couple is not yet married.²⁸ This visa allows the noncitizen to be admitted to the United States, contingent on the marriage of the couple within ninety days of the noncitizen’s admission.²⁹ The noncitizen can subsequently petition USCIS to adjust their status to a LPR upon marriage.³⁰

The first step in securing a K-1 visa, and eventually a green card, is filing a Petition For Alien Fiancé.³¹ Upon approval of this form, the

18. ALEINIKOFF ET AL., *supra* note 6, at 115.

19. *Id.*

20. *Id.* at 130.

21. *Id.* at 115.

22. *Id.*

23. *Id.* at 131.

24. ALEINIKOFF ET AL., *supra* note 6.

25. *Id.* at 115.

26. *Id.*

27. *Id.*

28. *Id.* at 147.

29. *Id.* at 147–48.

30. ALEINIKOFF ET AL., *supra* note 6, at 148.

31. *Visas for Fiancé(e)s of U.S. Citizens*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/family/family-of-us-citizens/visas-for-fiancees-of-us-citizens> [https://perma.cc/3EAX-TR2J] (last visited Nov. 24, 2021).

U.S. Embassy or consulate notifies the sponsoring spouse of the date and time of their fiancé's visa interview.³² The "fiancé(e) applies for the K-1 nonimmigrant visa and brings the required forms and documents to the visa interview."³³ Once approved, the foreign spouse will be inspected at a port of entry.³⁴ Subsequently, the couple will marry and then proceed with petitioning USCIS for adjustment of status.³⁵ The adjustment of status petition requires the submission of additional forms and documents to USCIS, and eventually the couple will attend an interview to determine the validity of their marriage.³⁶ A similar visa is the K-3 visa. The K-3 visa is available to a noncitizen who married a U.S. citizen overseas.³⁷ With a K-3 visa, physical separation is shortened since the noncitizen is allowed to enter the U.S. while awaiting approval of their visa petition.³⁸

B. Sham Marriages

There are a variety of reasons why individuals might engage in sham marriages.³⁹ These reasons include the limitation of immigration quotas for those without the qualifications for preferred treatment, a lengthy waiting period for admission, and "an extremely limited number of permanent resident visas available relative to the expansive pool of non-preferred foreign applicants."⁴⁰ In addition to the various reasons for sham marriages, it can also occur in different forms. Sham marriages occur when a U.S. citizen is asked to marry a noncitizen as a favor or for payment by the noncitizen to the U.S. citizen.⁴¹ It can also occur when a noncitizen "defrauds a U.S. citizen who believes the marriage is legitimate," or through mail-order marriages.⁴²

Despite the variety of reasons and varying forms of sham marriages, the Immigration and Nationality Act (INA) makes clear that:

[N]o petition shall be approved if (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. ALEINIKOFF ET AL., *supra* note 6, at 148.

38. *Id.*

39. Michael Virga, *Marrying Up: The Unsettled Law of Immigration Marriage Fraud and the Need for Uniform Statutory Guidelines*, 88 ST. JOHN'S L. REV. 1137, 1141 (2014).

40. *Id.* at 1141–42.

41. *Marriage Fraud Is A Federal Crime*, U.S. IMMIGR. & CUSTOMS ENF'T (June 15, 2016), <https://www.ice.gov/sites/default/files/documents/Document/2016/marriageFraudBrochure.pdf> [<https://perma.cc/ZXY8-A9RG>].

42. *Id.*

preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the Attorney General to have been entered into for the purpose of evading the immigration laws, or (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.⁴³

If it is determined that the noncitizen has attempted to form a sham marriage, then they face serious consequences. The main consequences of this conviction are imprisonment for a maximum of five years and a \$250,000 fine.⁴⁴ These consequences are applicable to both the U.S. citizen and the foreign national.⁴⁵ Possible additional charges, each with their own financial penalties and prison sentences, include “visa fraud, harboring an alien, conspiracy and making false statements.”⁴⁶ Sham marriages are important to identify because they “pose[] a national security threat, damages the integrity of the U.S. immigration system and endangers U.S. citizens who enter into these fake unions.”⁴⁷ Sham marriages are viewed as a serious problem because if successful, the benefits for the foreign national are substantial, and there is a low risk of detection.⁴⁸

C. Federal Response to the Sham Marriage Problem—IMFA

In 1986, Congress amended the INA⁴⁹ by enacting the IMFA. Significantly, the IMFA “establish[ed] a two-year conditional permanent resident status for alien spouses and their sons and daughters who become permanent residents through marriage or as immediate relatives.”⁵⁰ The driving force behind the enactment of the IMFA was Congress’ belief that there was a significant number of people who married U.S. citizens and LPRs for the sole purpose of acquiring immigration benefits.⁵¹ Consequently, the IMFA was designed to ensure “that only people who made ‘real’ marriages would be able to obtain

43. 8 U.S.C. § 1154(c).

44. *Marriage Fraud Is A Federal Crime*, *supra* note 41.

45. *Id.*

46. *Id.*

47. *TOP STORY: ICE leading nationwide campaign to stop marriage fraud*, U.S. IMMIGR. & CUSTOMS ENF’T (Apr. 2, 2014), <https://www.ice.gov/news/releases/top-story-ice-leading-nation-wide-campaign-stop-marriage-fraud> [<https://perma.cc/KRL2-UUKT>].

48. ALENIKOFF ET AL., *supra* note 6, at 156.

49. Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (1986).

50. *Id.*

51. *US Immigration Law and Conditional Residency*, HG.ORG, <https://www.hg.org/legal-articles/us-immigration-law-and-conditional-residency-20276> [<https://perma.cc/3GWF-BRZ4>] (last visited Mar. 28, 2022).

immigration benefits.”⁵² It was estimated that 30% of visa petitions were suspected of fraud.⁵³ The figure was later perceived to be even between 30%–40%.⁵⁴ However, “the INS [Immigration and Naturalization Service] conceded the invalidity of the survey estimating that one-third of immigration marriages were fraudulent.”⁵⁵ In fact, during the initial hearing, the president of the American Immigration Lawyers Association stated that he “would be extremely surprised to learn, if it could be shown statistically, that more than one or two percent of the ‘green cards’ issued annually on the basis of marriage involved fraud.”⁵⁶

Conditional permanent residence is distinct from other immigration practices since immigration officials have the ability to evaluate the legitimacy of marriages well after the marriage has been established. Typical of all marriage-based immigration cases is the process of initial application for the green card. Here, proof of marriage is not enough.⁵⁷ Under current immigration procedures, it needs to be proven that the marriage is “bona fide,”⁵⁸ a standard originating from *Bark v. INS*.⁵⁹ When applying for a marriage green card, there are two main ways to prove the authenticity of the marriage.⁶⁰ The first way to prove the validity of the marriage is “[b]y providing documents in [the] I-130 petition package . . . (the first step of the marriage-based green card process).”⁶¹ Some of the documents that should be provided in an I-130 petition package include proof of combined finances, proof that the spouses live together, and proof that the spouses have children together.⁶²

The second opportunity to prove the validity of the marriage is “[b]y answering questions at [the] green card interview.”⁶³ The green card interview consists of questions that married couples are expected to answer with ease.⁶⁴ The green card interview may include questions

52. *Id.*

53. James A. Jones, *The Immigration Marriage Fraud Amendments: Sham Marriages or Sham Legislation*, 24 FLA. ST. U. L. REV. 679, 699 (1997).

54. *Id.*

55. *Id.*

56. *Id.*

57. *How Do We Prove Our Marriage Is Real?*, BOUNDLESS, <https://www.boundless.com/immigration-resources/how-do-we-prove-our-marriage-is-real/> [<https://perma.cc/79GP-9F4A>] (last visited Nov. 24, 2021).

58. *Id.*

59. *Bark v. INS*, 511 F.2d 1200, 1202 (9th Cir. 1975).

60. *How Do We Prove Our Marriage Is Real?*, *supra* note 57.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

on topics such as relationship history, the wedding, daily routines, questions about children, personal habits/needs, big events, and more.⁶⁵

The conditional residence provision impacts marriages that are less than two years old. Depending on the length of the marriage, a “permanent” green card may not be issued right away.⁶⁶ If a couple is married for less than two years, the immigrant spouse will receive a conditional green card, which is only valid for two years.⁶⁷ In the ninety days before the conditional green card expires, the couple must file a petition to remove conditions on residence.⁶⁸ The couple then needs to prove that the marriage is bona fide again following this two-year period.⁶⁹ Upon completion of this process, the noncitizen will obtain a permanent green card.⁷⁰

D. Plenary Power

While the federal government has the power to regulate immigration, the source of this power is not explicitly mentioned in the U.S. Constitution.⁷¹ A unique feature of immigration law is the plenary power doctrine which provides that “courts should defer to Congress and the executive branch” when presented with constitutional challenges in the immigration context.⁷² Two cases highlighting Congress’ plenary power are *Chae Chan Ping v. United States* and *Fong Yue Ting v. United States*.

In *Chae Chan Ping v. United States*, Chae Chan Ping, a Chinese laborer, came to the United States in 1875.⁷³ In 1887, Ping went to China to visit his family after the U.S. government enacted the Chinese Exclusion Act of 1882, which put a moratorium on any new im-

65. *Preparing for the Marriage Green Card Interview*, BOUNDLESS, <https://www.boundless.com/immigration-resources/preparing-for-the-marriage-green-card-interview/> [<https://perma.cc/XS8M-KZT6>] (last visited Nov. 24, 2021).

66. *Marriage Green Cards, Explained*, BOUNDLESS, <https://www.boundless.com/immigration-resources/marriage-based-green-cards-explained/> [<https://perma.cc/244Y-ALBT>] (last visited Nov. 24, 2021).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. ALEINIKOFF ET AL., *supra* note 6, at 28; *The Federal Role of Immigration*, NAT’L GEOGRAPHIC, <https://education.nationalgeographic.org/resource/federal-role-immigration/> [<https://perma.cc/497K-DZVA>] (last visited Mar. 30, 2023) (discussing the Constitution’s delegation of power to Congress to furnish procedures for naturalization, but the lack of explicit recognition in the text of the Constitution for the federal government to regulate immigration).

72. ALEINIKOFF ET AL., *supra* note 6, at 30.

73. *Chae Chan Ping v. United States*, 130 U.S. 581, 582 (1889).

migration coming from China.⁷⁴ In order to return, Chinese laborers needed a U.S. government certificate proving that they were present in the United States prior to the ban.⁷⁵ When Ping left, he had a certificate, but the government then applied the Scott Act, barring return even with a certificate.⁷⁶ Thus, it refused to readmit Ping after his trip to China.⁷⁷ The Court determined that this was a proper exercise of Congress' power. The Court stated that:

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 Constitution, 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.⁷⁸

In *Fong Yue Ting v. United States*, Fong Yue Ting applied for a certificate of residence and was refused issuance since his witness was Chinese, and thus, not a credible witness.⁷⁹ Since there was no one else able to swear that Ting was lawfully within the United States on May 5, 1892, he was arrested.⁸⁰ The judge ordered him deported without the certificate of residence.⁸¹ The Court stated that, “[t]he right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, [is] an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare.”⁸²

74. *Id.*; *Chinese Exclusion Act (1882)*, NAT'L ARCHIVES, <https://www.archives.gov/milestone-documents/chinese-exclusion-act> [<https://perma.cc/ZC8C-PQKL>] (last visited Mar. 30, 2023) (“This act provided an absolute 10-year ban on Chinese laborers immigrating to the United States.”).

75. *Chae Chan Ping*, 130 U.S. at 582; *Chinese Exclusion Act*, *supra* note 74 (“The 1882 exclusion act also placed new requirements on Chinese who had already entered the country. If they left the United States, they had to obtain certifications to re-enter.”).

76. *Chae Chan Ping*, 130 U.S. at 582; *Chinese Immigration and the Chinese Exclusion Acts*, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1866-1898/chinese-immigration> [<https://perma.cc/MQ5G-GBC3>] (last visited Mar. 30, 2023) (“In 1888, Congress took exclusion even further and passed the Scott Act, which made reentry to the United States after a visit to China impossible, even for long-term legal residents.”).

77. *Chae Chan Ping*, 130 U.S. at 582.

78. *Id.* at 609.

79. *Fong Yue Ting v. United States*, 13 S. Ct. 1016, 1018 (1893).

80. *Id.*

81. *Id.*

82. *Id.* at 1021.

E. Evolution of the Constitutional Right to Privacy

The constitutional right to privacy has evolved substantially over time, especially recently.⁸³ The Constitution does not explicitly mention a right to privacy.⁸⁴ Despite this, the Supreme Court has stated that, “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”⁸⁵ The right to privacy exists in the penumbras.⁸⁶ The Court first articulated this right to privacy in *Griswold v. Connecticut*.⁸⁷

Griswold v. Connecticut is the landmark case in articulating the constitutional right to marital privacy.⁸⁸ In this case, a Connecticut statute made it a crime for any person to use contraception as well as a crime for people to assist in the offense.⁸⁹ *Griswold*, a licensed physician, was convicted under the statute for providing spouses with information and advice about how to prevent conception and providing contraception.⁹⁰ The Court recognized the existence of a constitutional right to privacy and held that the statute intruded on the right to marital privacy.⁹¹ This right to privacy is not found explicitly in the Constitution, rather, it is found in the penumbras of the Bill of Rights.⁹² Specifically, the majority opinion found that the First Amendment, Third Amendment, Fourth Amendment, Fifth Amendment, and Ninth Amendment exuded this right to privacy.⁹³

Following *Griswold v. Connecticut*, the Supreme Court extended the constitutional right to privacy.⁹⁴ The extension of the right to privacy can be seen in cases such as *Lawrence v. Texas*, *Loving v. Virginia*, *Obergefell v. Hodges*, and *Roe v. Wade*. In *Lawrence v. Texas*, the Court extended the right to privacy to same-sex couples who en-

83. *Privacy*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/privacy> [<https://perma.cc/ZNU2-5PHQ>] (last visited Nov. 24, 2021); *see generally* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

84. *Students: Your Right To Privacy*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/other/students-your-right-privacy> [<https://perma.cc/6JG3-Z4F8>] (last visited Nov. 24, 2021).

85. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

86. *Privacy*, *supra* note 83.

87. *Id.*

88. *Griswold v. Connecticut (1965)*, BILL OF RTS. INST., <https://billofrightsinstitute.org/e-lessons/griswold-v-connecticut-1965> [<https://perma.cc/38X5-ZTXT>] (last visited Nov. 24, 2021).

89. *Griswold*, 381 U.S. at 480.

90. *Id.*

91. *Id.* at 484–85.

92. *Id.*

93. *Id.* at 484; Amy Gajda, *How Dobbs Threatens to Torpedo Privacy Rights in the US*, WIRED (June 29, 2022, 11:09 AM), <https://www.wired.com/story/scotus-dobbs-roe-privacy-abortion/> [<https://perma.cc/33E9-7WLX>].

94. *Privacy*, *supra* note 83.

gage in sexual activity.⁹⁵ In *Loving v. Virginia*, the Court legalized interracial marriage.⁹⁶ In *Obergefell v. Hodges*, the right to same-sex marriage was, in part, based on the right to privacy.⁹⁷ In *Roe v. Wade*, the Court stated, “[t]his right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action . . . or . . . in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a women’s decision whether or not to terminate her pregnancy.”⁹⁸ In the summer of 2022, the *Dobbs* decision overturned *Roe v. Wade*.⁹⁹ This case decided that there is not a constitutional right to abortion and abortion is not part of the right to privacy.¹⁰⁰ Moreover, the Court “rejected any basis for recognizing ‘fundamental rights’ other than in the text of the Constitution or in deeply rooted historical traditions.”¹⁰¹ Consequently, the Court did not find either of these to be true of abortion.¹⁰² Despite *Dobbs*’ significant impact on the right to privacy in the abortion context,¹⁰³ the right to marital privacy still remains intact as it has roots in other cases that have not been overturned.¹⁰⁴

F. Constitutional Protections Afforded to Immigrants

Historically, the constitutional protections afforded to immigrants are determined by their location.

95. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

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

97. Lindsay Whitehurst & Zeke Miller, *Advocates worry other rights at risk if court overturns Roe* (May 4, 2022), <https://apnews.com/article/abortion-biden-us-supreme-court-right-to-privacy-6e1d7ee2a6d26bef09392971fd4948b5> [<https://perma.cc/89AM-NWYZ>].

98. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

99. *Dobbs*, 142 S. Ct. at 2242.

100. *Id.* at 2242–43.

Roe’s defenders characterize the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both *Roe* and *Casey* acknowledged, because it destroys what those decisions called “fetal life” and what the law now before us describes as an “unborn human being.”

Id. at 2243.

101. Gajda, *supra* note 93.

102. *Id.*

103. “*Dobbs* severely cut back the scope of constitutional protection for privacy and all but rejected any general autonomy right of privacy broader than specific textual guarantees.” *Id.*

104. *Id.*

What *Dobbs* did was reject the idea that the Constitution allows the courts to recognize “fundamental” liberties beyond those explicit in the text or deeply rooted in the nation’s history. It left standing, at least for now, other privacy decisions that recognize fundamental rights to contraception and of gay people to sexual intimacy and marriage. *Dobbs*, 142 S. Ct. at 2277–78 (“[W]e emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”).

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1. *Inside the United States*

The case *Yamataya v. Fisher* demonstrates the protections afforded to immigrants present inside the United States. In this case, Kaoru Yamataya, a Japanese citizen, traveled to the United States.¹⁰⁵ She was admitted at the border; however, an immigration officer later deemed her deportable since she was excludable at entry and “likely to become a public charge.”¹⁰⁶ Yamataya contested her deportation.¹⁰⁷ The Court stated:

[I]t is not competent for the Secretary of the Treasury or any executive officer . . . arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, 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. No such arbitrary power can exist where principles involved in due process of law are recognized.¹⁰⁸

Thus, Yamataya’s position within the United States and her admittance at the border entitled her to due process.

2. *At or Near the Border*

The case *Landon v. Plasencia* highlights whether the U.S. Constitution protects returning LPRs. In *Landon v. Plasencia*, Plasencia, a citizen of El Salvador, became a LPR of the United States.¹⁰⁹ She traveled to Mexico and planned to help some Mexican and Salvadoran nationals illegally enter the United States.¹¹⁰ At the border, Plasencia was caught with the illegal immigrants in her car.¹¹¹ She was detained and was given notice that she would have an exclusion hearing.¹¹² The case states:

[A]n 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. . . . [H]owever, once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.¹¹³

105. *Yamataya v. Fisher*, 189 U.S. 86, 87 (1903).

106. *Id.*

107. *Id.*

108. *Id.* at 101.

109. *Landon v. Plasencia*, 459 U.S. 21, 23 (1982).

110. *Id.*

111. *Id.*

112. *Id.* at 23–24.

113. *Id.* at 32.

In *United States ex rel. Knauff v. Shaughnessy*, Ellen Knauff sought admission into the United States.¹¹⁴ At the border, Knauff was denied entry without a hearing due to a regulation stating, “that the Attorney General might deny an alien a hearing . . . where he determined that the alien was excludable under the regulations on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest.”¹¹⁵ The Court determined that “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”¹¹⁶

Another case dealing with the rights of those at the border is *Kwong Hai Chew v. Colding*.¹¹⁷ Kwong Hai Chew was a Chinese seaman who married a U.S. citizen and became a LPR.¹¹⁸ Upon return from a work trip on a U.S. ship, the U.S. government detained and excluded him from the United States without a hearing.¹¹⁹ The Court determined that Chew’s constitutional status was not terminated by his work trip.¹²⁰

Lastly, in *Shaughnessy v. United States ex rel. Mezei*, Mezei was born abroad, but lived in the United States for twenty-five years.¹²¹ In 1948, he left the United States to go visit his sick mother in Romania.¹²² When he arrived back at the United States border, he was temporarily excluded by an immigration inspector.¹²³ Upon determination of his case, Mezei waited at Ellis Island.¹²⁴ It was finally determined that he was permanently excluded from the United States based on “information of a confidential nature, the disclosure of which would be prejudicial to the public interest.”¹²⁵ The Court stated that “[i]t is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.”¹²⁶ However, “an alien on the threshold of initial entry stands on a different footing.”¹²⁷

114. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 539 (1950).

115. *Id.* at 541.

116. *Id.* at 544.

117. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 592 (1953).

118. *Id.*

119. *Id.* at 595.

120. *Id.* at 601.

121. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 208 (1953).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 212.

127. *Shaughnessy*, 345 U.S. at 212.

Eventually, the Court established a modern test for procedural due process in *Mathews v. Eldridge*.¹²⁸ This test involves an examination of three key factors: “(1) the interests at stake for the individual, (2) the government’s interests, and (3) the gain to accurate decision making from added procedural protections.”¹²⁹

G. Courts’ Interpretation of Privacy in Evaluating Sham Marriages

A central question to evaluating the legitimacy of a marriage between a U.S. citizen or LPR and a noncitizen is whether the couple intends to establish a life together. In *Bark v. INS*, Bark tried to adjust his status from student visitor to LPR based on his marriage to his wife, who was already a LPR.¹³⁰ Prior to either spouse living in the United States, the couple dated for several years while they were living in Korea.¹³¹ Eventually, Bark’s wife became a LPR in the United States. Bark initially came to the United States as a business visitor and subsequently, a student.¹³² Bark and his wife eventually got married in the United States.¹³³ Bark’s wife filed a petition to get his status changed to that of a spouse of a LPR.¹³⁴ Bark also filed his own application.¹³⁵ While they admitted they had married for love and not for immigration purposes, they did eventually separate.¹³⁶ The Immigration Judge determined the marriage was a sham, relying on their separation as evidence.¹³⁷ The court stated that their key issue to determine is whether the parties “intend[ed] to establish a life together at the time of their marriage.”¹³⁸ The court held that the Immigration Judge did not focus on this question and the case was reversed and remanded.¹³⁹

Subsequently, some courts have expressed concern over determining whether the couple intended to establish a life together. In particular, the court in *Chan v. Bell* concluded that the “INS has no expertise in the field of predicting the stability and growth potential of marriages—if indeed anyone has—and it surely has no business oper-

128. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

129. *ALEINIKOFF ET AL.*, *supra* note 6, at 323.

130. *Bark*, 511 F.2d at 1201.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Bark*, 511 F.2d at 1201.

137. *Id.*

138. *Id.* at 1202.

139. *Id.*

ating in that field.”¹⁴⁰ Likewise, *Dabaghian v. Civiletti* agreed with the holdings in *Bark v. INS* and *Chan v. Bell*,¹⁴¹ and expressed its “concern[] about potentially intrusive questioning that examiners might conduct to see if the marriage were still alive.”¹⁴²

III. ANALYSIS

This part analyzes the IMFA’s conditional residence provision and its purpose of deterring and detecting sham marriages. Specifically, it argues that while investigating the legitimacy of marriages is necessary, the prolonged surveillance of newlywed couples throughout the conditional residency period infringes on the constitutional right to marital privacy. First, Congress’ plenary power and its ability to implement strict immigration procedures is evaluated. Second, this part discusses the violation of the constitutional right to marital privacy by the IMFA. Third, the IMFA’s ignorance of family reunification, a central purpose underlying United States immigration policy, is examined. Lastly, this part proposes that the IMFA be repealed. In particular, it argues that, historically, the grant or denial of constitutional rights to immigrants is based upon their presence or absence in the United States. Consequently, the IMFA directly infringes upon the rights of immigrants that are within the jurisdiction of the United States.

A. *Plenary Power Permits Large Control Over Procedures Used to Detect Sham Marriages*

It is vital to recognize the importance of plenary power and how it impacts immigration law and the procedures used in detecting sham marriages. The plenary power doctrine states that Congress and the executive branch have authority over matters of national security and foreign policy.¹⁴³ Since immigration is heavily tied to these matters, courts only subject such decisions to deferential review.¹⁴⁴

Given Congress’ plenary power and its ability to regulate immigration, implementing investigative procedures to determine the appearance of marriage-based fraud is permissible. Over the years, the Supreme Court has reiterated Congress’ authority to make decisions about immigration as well as the limited ability of courts to review

140. *Chan v. Bell*, 464 F.Supp. 124, 130 (D.D.C. 1978).

141. *Dabaghian v. Civiletti*, 607 F.2d 868, 870 (9th Cir. 1979).

142. ALEINIKOFF ET AL., *supra* note 6, at 149.

143. Nitin Goyal, *The Plenary Power Shield: National Security and the Special Registration Program*, CUNY SCH. OF L., <https://www.law.cuny.edu/legal-writing/forum/immigration-law-essays/goyal/> [https://perma.cc/F2LW-TR4F] (last visited Jan. 29, 2022).

144. *Id.*

those decisions.¹⁴⁵ Even in the most arbitrary decisions, the Court has declined to review Congress' authority.¹⁴⁶ Thus, it is obvious that Congress would also have the power to control the procedures used in identifying sham marriages.

The plenary power doctrine has drawn sharp criticism since its invocation, particularly in the case of *Chae Chan Ping v. United States*.¹⁴⁷ *Chae Chan Ping* denied petitioner his rights based on a xenophobic and racist law.¹⁴⁸ The case is also criticized for the Court's declaration of sovereignty to illegitimately "trump rights claims."¹⁴⁹ However, it has been argued that the Court "invoked sovereignty . . . not to deny rights, but . . . to answer a federalism question."¹⁵⁰ In other words, the Court wanted to establish its power to regulate immigration, despite the lack of explicit language in the Constitution.¹⁵¹

Indeed, the plenary power doctrine's main function is not to continuously deny rights claims, rather it is to ensure a singular voice when dealing with matters of particular importance, like national security and foreign affairs. In fact, Justice Field in *Chae Chan Ping* stated, "[i]n the foreign arena, . . . as a matter of 'self-preservation,' the government has the 'highest duty' to 'preserve . . . independence, and give security against foreign aggression and encroachment.'"¹⁵² Applying this view in the marriage context, it is evident that invasive procedures are not used to deny the marital right of privacy to immigrants marrying a U.S. citizen or LPR, but to ensure the proper dealing of foreign policy matters.

Overall, despite chatter among critics of the plenary power doctrine, it is a doctrine with well-established roots in United States history, and any attempt to reject and erase years of judicial precedent is nothing short of implausible. Although the *Chae Chan Ping* decision lacks the qualities of fairness and justice, it acts as a foundation for courts' deference in immigration matters. The plenary power doctrine imparts Congress and the executive branch with means to address foreign affairs and national security concerns, matters highly integrated

145. Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (1984).

146. *Id.*; see generally *Chae Chan Ping*, 130 U.S. 581; see generally *Fong Yue Ting*, 13 S. Ct. 1016.

147. David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 29 (2015).

148. *Id.* at 30.

149. *Id.* at 31.

150. *Id.*

151. *Id.*

152. *Id.* at 39.

with immigration. Specifically, in the marriage and immigration context, plenary power serves its highest purpose. Establishing investigative procedures in the green card process lessens the likelihood of the formation of sham marriages. Thus, Congress and the executive branch's plenary power over immigration legitimizes the implementation of procedures to detect and deter marriage fraud.

B. The IMFA's Conditional Residence Provision Violates the Constitutional Right to Marital Privacy

Despite Congress having practically unfettered authority to control immigration and the procedures used to detect sham marriages, the enactment of the IMFA conditional residence provision infringes on the constitutional right to marital privacy. In fact, “[r]arely has any single legislative enactment raised as many broad constitutional concerns as the IMFA.”¹⁵³

First, the IMFA violates the right to marital privacy by prying into information of highly personal character.¹⁵⁴ This information includes “sexual histor[y] and conduct, degree of intimacy, and extent and nature of time spent together.”¹⁵⁵ Couples are practically forced to respond to this type of intrusive questioning because refusal to comply could result in deportation.¹⁵⁶ Alternatively, compliance is an explicit violation of the marital right to privacy.¹⁵⁷

The IMFA is a manifestation of the concerns introduced in the cases *Chan v. Bell* and *Dabaghian v. Civiletti*. These cases feared the type of questioning that immigration officials would ask “to see if the marriage were still alive.”¹⁵⁸ It was even stated that the “INS has no expertise in the field of predicting the stability and growth potential of marriages—if indeed anyone has—and it surely has no business operating in that field.”¹⁵⁹ Notably, these cases had these concerns prior to the enactment of the IMFA. Thus, given that the IMFA gives the green light for these types of questions, it can be said that the courts in *Chan v. Bell* and *Dabaghian v. Civiletti* would be even more concerned now.

153. Joe A. Tucker, *Assimilation to the United States: A Study of the Adjustment of Status and the Immigration Marriage Fraud Statutes*, 7 YALE L. & POL'Y REV. 20, 95 (1989).

154. Note, *The Constitutionality of the INS Sham Marriage Investigation Policy*, 99 HARV. L. REV. 1238, 1245 (1986).

155. *Id.*

156. *Id.* at 1247.

157. *Id.*

158. ALEINIKOFF ET AL., *supra* note 6, at 149.

159. *Chan*, 464 F.Supp. at 130.

Second, the prolonged surveillance of the IMFA promotes the conformity of couples' behavior to that which is acceptable to immigration officials. INS pressures "couples who have a bona fide marriage to conform their marital conduct to what the INS declares to be the 'norm' for marriages in terms of time spent together, sexual behavior, and level of intimacy."¹⁶⁰ It is evident that this requirement of prolonged surveillance of couples infringes on their privacy rights and actually causes them to adopt "marital norms."¹⁶¹ This is especially concerning given that marriages between an immigrant and U.S. citizen or LPR is likely to encompass dynamics different than American norms.¹⁶²

Overall, not only does the IMFA demand access to highly personal information to decide the legitimacy of marriages, but it also promotes couples to act in conformity with American norms rather than cultural norms. Consequently, this two-year surveillance period is of a highly intrusive degree and infringes on the constitutional right to marital privacy, a right long established in United States jurisprudence.

C. *The IMFA's Ignorance of Family Reunification*

Apart from violating the constitutional right to marital privacy, the IMFA permits the prolonged surveillance of newlyweds and is a blatant rejection of the purpose underlying U.S. immigration policy: family reunification. The United States has long respected the concept of family.¹⁶³ "Congress enacted the IMFA to balance the competing policies of promoting family reunification and preventing marriage fraud."¹⁶⁴ While the purpose of the IMFA was to balance these objectives, it is evident that it heavily favored the detection of fraud at the cost of family unity. Indeed, the IMFA's effectiveness is questionable in light of its damage to the interests of families seeking reunification.¹⁶⁵ "It is surprising that some courts are inquiring into the private depths of marriage and breaking apart legitimate families, thereby re-

160. *The Constitutionality of the INS Sham Marriage Investigation Policy*, *supra* note 154, at 1246.

161. *Id.*

162. *Id.*

163. *How the United States Immigration System Works*, AM. IMMIGR. COUNCIL, https://www.americanimmigrationcouncil.org/sites/default/files/research/how_the_united_states_immigration_system_works_0.pdf [https://perma.cc/WG6R-FRDK] (last visited Jan. 29, 2022).

164. Jones, *supra* note 53, at 681.

165. Tucker, *supra* note 153, at 34.

sulting in a limitation on our tradition of liberal immigration based on marriage and family reunification.”¹⁶⁶

While “[f]amily unification is an important principle governing U.S. immigration policy,”¹⁶⁷ another important principle of U.S. immigration policy is border security and national security.¹⁶⁸ Thus, the key question often asked in this context is, “When does an individual’s interest in reunification with a family member outweigh a sovereign nation’s interest in controlling its borders?”¹⁶⁹ Throughout history, there has been tension between family reunification and border security; however, today, we are in the “age of balancing.”¹⁷⁰ Specifically:

[C]ourts today recognize the importance of family ties and even recognize them as a constitutional liberty interest, while simultaneously recognizing the importance of national security interests. This recognition is beginning to lead to a more nuanced analysis in specific cases, with an understanding that even a right as important as family unity can be overridden by security concerns but that the bald claim of “national security” without more does not automatically override family interests.¹⁷¹

While the IMFA already claims to be an attempt to balance detection of marriage fraud and family unity, the intrusive inquiry of conditional residency appears to tip the scale in favor of one interest over the other.

D. Proposal: Repealing the IMFA and Seeking Alternatives

Given that the IMFA infringes on the constitutional right to marital privacy and does not embody the family reunification principles underlying United States immigration policy, this Article proposes that the IMFA be repealed. In particular, the IMFA is an explicit divergence from how constitutional rights have been historically granted to immigrants. The constitutional right to marital privacy should operate similarly to how other constitutional protections have been historically granted; however, the IMFA does not do so. Consequently, intrusive questioning should be reserved for processes occurring outside the United States, prior to the immigrant fiancé’s arrival, when the Constitution is not violated. Moreover, more funding should be pro-

166. Marcel De Armas, *For Richer or Poorer or any Other Reason: Adjudicating Immigration Marriage Fraud Cases Within the Scope of the Constitution*, 15 J. GENDER SOC. POL’Y & L. 743, 744–45 (2007).

167. *How the United States Immigration System Works*, *supra* note 163.

168. Kerry Abrams, *Family Reunification and the Security State*, 32 CONST. COMMENT. 247, 247 (2017).

169. *Id.*

170. *Id.* at 265.

171. *Id.*

vided for USCIS to expedite green card processing and reduce backlogs as well as increasing the availability of admission slots in all immigration categories and per-country caps.

Historically, cases discussing the grant or denial of constitutional rights to immigrants have based this inquiry on the immigrant's physical location with respect to the United States. Consequently, looking at the historical grant of constitutional protections to immigrants, the IMFA is an explicit rejection of this history and undermines the constitutional right to privacy to an untenable degree. In particular, more constitutional protections are typically afforded to those immigrants who have been admitted and are entirely within the jurisdiction of the United States. Cases like *Yamataya v. Fisher*¹⁷² and *Landon v. Plasencia*¹⁷³ are examples of noncitizens being granted due process rights because of their physical location within the United States and the ties they have built within its jurisdiction. Alternatively, little or no constitutional protections are afforded to immigrants abroad. For example, in *United States ex rel. Knauff v. Shaughnessy*, Knauff attempted to enter the United States for the first time.¹⁷⁴ She was not entitled to due process given her position at a port of entry.¹⁷⁵

Presently, the IMFA allows immigration officials an additional attempt at determining legitimacy of marriages two years into couples' marriages. This explicitly diverges from other cases granting or denying immigrants' constitutional rights. Not only is the noncitizen physically present in the United States, but they have also spent enough time in the United States to develop ties to the country. Considering immigration officials' ability to surveil couples under conditional residency and even potentially cause them to conform their behavior to

172. *Yamataya*, 198 U.S. at 101.

[I]t is not competent for the Secretary of the Treasury or any executive officer . . . arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, 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.

Id.

173. *Landon*, 459 U.S. at 32 ("however, once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly").

174. *United States ex rel. Knauff*, 338 U.S. at 539.

175. *Id.* at 541–42.

[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.

Id.

that which is deemed socially acceptable, this constitutes a direct violation of the principles enshrined in the Constitution.

Using location as the guidepost for this proposal, an immigrant's marriage to a U.S. citizen or LPR can be subjected to more intrusive investigative practices prior to noncitizen's admittance to the United States since the Constitution does not apply. Consequently, this more invasive questioning would allow for sham marriages to still be adequately detected. Thus, more focus should be on investigating the relationship when the immigrant is outside the United States and first applying for the visa. However, once individuals are within the jurisdiction of the United States, the Constitution would apply and the right to marital privacy would have stronger protection. Having the right to marital privacy primarily tied to the immigrant's location, and therefore ensuring that the Constitution and its protections are not compromised, ensures a balance between marital privacy rights of noncitizens and the ability to effectively detect sham marriages.

A key concern of repealing the IMFA is its effect on the detection and prosecution of marriage fraud. The IMFA was enacted with the presumption that sham marriages were "a significant threat to the United States" at the time.¹⁷⁶ It was inaccurately estimated that 30% of marriages may be a sham.¹⁷⁷ Subsequently, it was even estimated that the number was between 30%–40%.¹⁷⁸ Later, however, it was discovered that the survey was invalid and inaccurately estimated the percent of fraudulent marriages.¹⁷⁹ Therefore, the presumption that sham marriages are a significant threat facing the United States has been refuted. Consequently, the IMFA's conditional residence provision proves to be less necessary since prior to its enactment, the presence of marriage fraud in the United States was, in reality, smaller than first thought.

Ensuring the identification of sham marriages is crucial. Reserving more intrusive questioning for procedures taking place prior to the noncitizen's admission adequately addresses the necessity of detecting sham marriages. Meanwhile, implementing safeguards such as additional funding to USCIS and expanding the number of admission slots addresses the importance of deterring sham marriages in the first place. In fact, "[b]efore passing the IMFA, Congress was encouraged to provide for enhanced enforcement of the present marriage fraud

176. Jones, *supra* note 53, at 699.

177. *Id.*

178. *Id.*

179. *Id.*

regulations, not to pass broad, sweeping legislation.”¹⁸⁰ Consequently, these more individualized actions should replace the IMFA and its infringement into immigrants’ constitutionally protected rights.

More recently, the Court has established a modern test for procedural due process in *Mathews v. Eldridge*.¹⁸¹ This test examines three factors: “(1) the interests at stake for the individual, (2) the government’s interests, and (3) the gain to accurate decision making from added procedural protections.”¹⁸² Given this modern test, it could be potentially argued that this Article’s proposal utilizes the wrong backdrop and should instead use a balancing test. However, even analyzing the constitutional right to marital privacy with a balancing test similar to *Mathews v. Eldridge*, this Article’s proposal prevails. With conditional residency, the interests of immigrants strengthen given the ties they can create with the United States. While the government has a strong interest in detecting fraudulent marriages and ensuring accuracy, it is worth noting that the IMFA was enacted based on exaggerated statistics. Nonetheless, given the importance of promoting legitimate marriages, the government’s interest in preventing fraud and ensuring accuracy remains significant. Additionally, reserving more intrusive questioning to processes occurring prior to the noncitizen’s admission to the United States would properly serve to combat sham marriages in a manner that upholds and respects the interests of noncitizens.

Overall, repealing the IMFA would end the overly intrusive surveillance of newlywed immigrant couples. Furthermore, this proposal acknowledges the significance of detecting sham marriages and appreciates the government’s attempt to combat this fraud; however, the IMFA explicitly infringes on a constitutional right, and it should be repealed and replaced with other measures that respect the bounds of the Constitution.

IV. IMPACT

This part examines the impact of repealing the IMFA’s conditional residence provision in its relation to marital privacy and respecting constitutionally granted rights and instead, increasing annual admission caps and per-country caps as well as increasing funding to USCIS. Specifically, this part assesses the large-scale impact, including the detection of sham marriages, its effect on admission slot availability, and

180. *Id.* at 700.

181. *Mathews*, 424 U.S. at 335.

182. ALEINIKOFF ET AL., *supra* note 6, at 323.

impact on family reunification interests. Furthermore, this part analyzes the individual impact on the couple without being surveilled by immigration officials.

Upon examining the plenary power doctrine, the violation of constitutional rights by the IMFA, and its lack of focus on family reunification, it is evident that the IMFA is an improper use of Congress' power and should be repealed. It is crucial to place a high value on examining the constitutional rights that are granted to immigrants. Additionally, it is important to focus funding on alternative procedures that do not compromise the constitutional right to marital privacy. This Article's proposal strikes a balance between respecting the marital privacy rights of the couple with the necessity to detect sham marriages and deter fraud. By implementing this proposal, there will be both large-scale impact and individual.

A. *Large-Scale Impact*

The most notable change under this Article's proposal is the respect for the constitutional right to marital privacy. Under the proposal, marital privacy interests are balanced with the government's interest in detection and deterrence of marriage fraud. In particular, the marital right to privacy is nonexistent only prior to the noncitizen's admission to the United States. Once within the jurisdiction of the United States, the immigrant's right to marital privacy shields them from intrusive questioning.

Repealing the IMFA would also uphold the principles behind the decisions of *Chan v. Bell* and *Dabaghian v. Civiletti* as well as limit the opportunities for intrusive questioning to noncitizens who have not yet been admitted into the United States. Thus, while the concerns of *Chan* and *Dabaghian* are not fully diminished, repealing the IMFA does signify an end to the explicit rejection of the issues raised in those cases.

A key concern of repealing the IMFA is its effect on the detection and prosecution of marriage fraud. However, the IMFA was enacted with the presumption that sham marriages were posing a significant threat to the United States at the time. Later, it was discovered that the survey was invalid and inaccurately overestimated the percent of fraudulent marriages. Therefore, the threat posed by sham marriages was not as significant as presumed.

Moreover, the threat of sham marriages will be adequately deterred by increasing the number of admission slots in all immigration categories and per-country caps. The current appeal of marriage fraud is the fact that "there is an extremely limited number of permanent resident

visas available relative to the expansive pool of non-preferred foreign applicants.”¹⁸³ Consequently, by increasing the numerical caps on all immigration categories, noncitizens would be less incentivized to engage in illegal behavior since there would be an increased possibility of receiving a green card.

In fact, at one point, President Biden’s Build Back Better Act included provisions calling for increases to the annual caps of various immigration categories and per-country caps.¹⁸⁴ For example, his administration proposed an increase to employment-based green cards beyond that of the current 140,000 per year cap.¹⁸⁵ Furthermore, his plan “would allow the use of unused visa slots from previous years and allow spouses and children of employment-based visa holders to receive green cards without counting them against the annual cap.”¹⁸⁶ Likewise, President Biden’s proposal “would expand access to family-based green cards in a variety of ways, such as by increasing per-country caps.”¹⁸⁷ In fact, currently, “[i]mmigrants from countries with large numbers of applicants often wait for years to receive a green card because a single country can account for no more than 7% of all green cards issued annually.”¹⁸⁸ Increases to the annual caps and per-country caps would allow admissions slots not to be filled as quickly and provide more opportunity for noncitizens to claim a spot. Thus, by making admissions slots more widely available, noncitizens would feel less pressured to engage in the illegal act of forming sham marriages.

Continuing, noncitizens in other immigration categories would benefit from increases in annual caps. For instance, the diversity visa operates like a lottery.¹⁸⁹ Thus, by increasing the number of admissions for this category, the noncitizen will have increased odds of being selected. Similarly, an increase in humanitarian admissions will help combat illegal immigration by those individuals facing a humanitarian crisis.¹⁹⁰

183. Virga, *supra* note 39, at 1142.

184. Jens Manuel Krogstad & Ana Gonzalez-Barrera, *Key facts about U.S. immigration policies and Biden’s proposed changes*, PEW RSCH. CTR. (Jan. 11, 2022), <https://www.pewresearch.org/fact-tank/2022/01/11/key-facts-about-u-s-immigration-policies-and-bidens-proposed-changes/> [<https://perma.cc/XE5P-QK6E>].

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. ALEINIKOFF ET AL., *supra* note 6, at 115.

190. In fact, this category has seen a substantial increase in its admission cap during the Biden administration compared to the Trump administration. During the Trump administration, admissions were capped at 15,000. Under the Biden administration, admissions are capped at 125,000. Julie Watson, *Biden keeps US target for refugee admissions at 125,000*, AP NEWS (Sept. 27, 2022),

Increased admission slots will be unable to deter marriage fraud if backlogs still exist. Consequently, in order to appropriately account for increased admissions, more funding will need to be provided to USCIS in order to decrease processing time of applications. “Making additional funding available to clear backlogs and staff up departments would speed up and ease the immigration process.”¹⁹¹ Indeed, current staff is bombarded with the “humanitarian crises in Afghanistan and Ukraine [that] led to an increase in asylum and related processing backlogs.”¹⁹² Evidently, increased funding to hire more staff and acquire more hi-tech equipment would be beneficial in conquering the backlogs and, consequently, make increasing the admission caps more feasible in deterring sham marriages.

Lastly, repealing the IMFA, taking an alternative approach to detect sham marriages, and increasing the annual admissions caps and per-country caps will help to shift the emphasis back to the family reunification purpose that drives family-based immigration law. Considering that immigration officials currently delve into the most intimate aspects of marriage and may even dissolve valid unions, the elimination of this intrusive inquiry following a noncitizen’s admission into the United States will diminish the likelihood of such outcomes and allow legitimate marriages to endure. Furthermore, increases in annual admissions caps and per-country caps will help those families separated by lengthy backlogs.

B. Individual Impact

The effects of repealing the IMFA will have a significant impact at the individual level. While couples will still be subject to an investigation of their marriage, this Article’s proposal prioritizes the right to marital privacy. Consequently, couples will no longer face ongoing surveillance for the two-year period following their marriage. As a result, the proposed changes will reduce the anxiety experienced by couples during the process, and they will no longer feel pressured to conform to societal norms in order to obtain a green card.

The visa process as a whole tends to invoke fear. Consider the ABC News story about a couple named Max and Maria. Max and Maria are so intimidated by the process “that the couple has still not filed the

<https://apnews.com/article/biden-government-and-politics-b19f7754da4cc6d55dfb84b4da7152ea> [<https://perma.cc/L5KW-V8DL>].

191. Marisol Hernandez, *Immigration Backlogs and Congressional Funding*, BIPARTISAN POL’Y CTR. (Oct. 6, 2022), <https://bipartisanpolicy.org/explainer/immigration-backlogs/> [<https://perma.cc/GY82-RG8K>].

192. *Id.*

paperwork for a green card, four months after getting married and despite confidence their marriage would pass the test.”¹⁹³ These feelings of fear can be exacerbated when newlyweds have to comply with the requirements of conditional residency. In fact, “it is feasible that the INS will harbor an unwritten expectation that the spouses will be greatly familiarized with each other, and will consequently demand more exacting responses to the marriage ‘quiz’”¹⁹⁴ when the interview takes place two years after being granted conditional residency. Consequently, repealing the IMFA and removing this prolonged surveillance that infringes of the marital right to privacy will help eliminate some of the stress.

Despite the hurdles couples will still face in obtaining a green card, this proposal places greater emphasis on respecting the right to marital privacy. Consequently, couples will no longer be subjected to unrestrained intrusive questioning and their rights will be considered more in the process.

V. CONCLUSION

Although the IMFA was enacted with the aim of detecting and deterring the use of sham marriages to acquire green cards, it has been highly criticized since its inception.¹⁹⁵ In particular, the IMFA is an unconstitutional abuse of power over immigration by the United States government by infringing on the right to marital privacy. Moreover, the IMFA was enacted under the false premise that approximately 30% of marriages are fraudulent.¹⁹⁶ Additionally, the IMFA tips the scale in favor of detecting and deterring marriage fraud to such an extent that it disregards the family unity interest that is a fundamental component of U.S. immigration policy.

Given the complications of the IMFA and its disregard of constitutional boundaries, repealing the IMFA and exploring alternative solutions that respect the Constitution’s bounds is the best course forward. Implementing more intensive investigative practices abroad would not violate the Constitution, increasing admission slots in all immigration categories and per-country caps would reduce the incentive to engage

193. Devin Dwyer, *Immigrant Couples Face Scrutiny in Bid to Root Out Sham Marriages*, ABC News (May 25, 2010, 9:55 AM), <https://abcnews.go.com/Politics/immigration-green-card-marriage-young-couple-faces-feds/story?id=10738962> [<https://perma.cc/3G7R-9YFS>].

194. Karen L. Rae, *Alienating Sham Marriages for Tougher Immigration Penalties: Congress Enacts the Marriage Fraud Act*, 15 PEPP. L. REV. 181, 193 (1988).

195. Tucker, *supra* note 153, at 95.

196. Jones, *supra* note 53, at 699.

in sham marriages, and increasing funding to USCIS would help reduce backlogs in visa processing.

While investigative procedures are necessary for identifying sham marriages, the IMFA conditional residence provision and its second attempt to uncover fraud violates the constitutional right to marital privacy due to prolonged surveillance of the couple. Consequently, this Article's proposal to repeal the IMFA and adopt alternative procedures that conform to the Constitution strikes a necessary balance between marital privacy rights and the identification of sham marriages while remaining within the bounds of the United States Constitution.

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