

# FOR RICHER OR POORER OR ANY OTHER REASON: ADJUDICATING IMMIGRATION MARRIAGE FRAUD CASES WITHIN THE SCOPE OF THE CONSTITUTION

MARCEL DE ARMAS<sup>\*</sup>

Introduction .....	744
Background.....	745
I. Two Kinds of Marriage Fraud.....	745
II. INS Procedures to Adjust Status of the Alien Spouse .....	747
III. Congressional Powers and Goals Relating to Immigration .....	747
and the Enactment of the IMFA .....	747
IV. Supreme Court Decisions that Affect the Determination as to Whether a Marriage is Fraudulent.....	748
A. Abuse of the War Brides Act Provided A Test to Determine Fraudulent Marriages.....	749
B. Fundamental Rights to Marriage and Privacy.....	749
V. A Circuit Court Split Resulted in Courts Using Two Tests to Determine Fraudulent Marriages.....	750
A. The Establish A Life Test .....	751
B. Evade The Law Test .....	751
Analysis .....	752
I. Courts Should Adopt the Establish A Life Test Because it Follows Supreme Court Precedent, Prevents Constitutional Conflicts, Effectively Uncovers Sham Marriages, and Has More Legislative and INS Support.....	752
II. The Use of the Establish A Life Test Follows Supreme Court Precedent Better Than the Evade The Law Test .....	753

---

<sup>\*</sup> Senior Publications Editor, *American University Journal of Gender, Social Policy and the Law*, Volume 16; J.D. Candidate, May 2008, *American University Washington College of Law*; B.S. in Industrial and Systems Engineering, cum laude, 2005, *University of Florida*. Thank you to my parents Oswaldo and Ana De Armas for their support in everything I do. Many thanks to the great group of people who went through this process with me, especially my editor Sarah Acker and mentor Alice Riener.

A. The Establish A Life Test Adheres to the Supreme Court's Determination of Marriage Fraud Under the War Brides Act .....	753
B. The Establish A Life Tests Protects the Fundamental Right of Marriage by Preventing the State or Courts from Defining the Marital Relationship .....	755
C. The Evade The Law Test Invades the Protected Privacy of the Bedroom .....	758
D. The Establish A Life Test Allows the Supreme Court to Avoid Determining if Fundamental Rights Take Precedence Over Congress's Plenary Powers.....	760
III. The Establish A Life Test is A More Effective Test to Uncover Marriage Fraud than the Evade The Law Test .....	761
A. The Establish A Life Test is Able to Detect Both Contractual and Unilateral Marriage Fraud.....	761
B. The Two-Year Conditional Resident Period Supports the Use of the Establish A Life Test .....	761
IV. Factors Listed in the Code of Federal Regulations and by the Board of Immigration Appeals Favor the Establish A Life Test .....	763
V. The Evade The Law Test Ignores the Congressional Goal of Keeping Families Together .....	765
Conclusion .....	766

#### INTRODUCTION

The United States of America has a long tradition of accepting immigrants into its borders. Included in this tradition is the standing policy of reuniting families using immigration laws.<sup>1</sup> In general, the United States legal system accords deep respect to the concept of family.<sup>2</sup> Therefore, it is surprising that some courts are inquiring into the private depths of marriage<sup>3</sup> and breaking apart legitimate families, resulting in a limitation on our tradition of liberal immigration based on marriage and family

---

1. See *Fraudulent Marriage and Fiancé Arrangements To Obtain Permanent Resident Immigration Status: Hearing Before the S. Comm. on the Judiciary*, 99th Cong. 1-3 (1986) [hereinafter *Senate Hearing*] (statements of Sen. Simpson and Sen. Simon) (explaining that the United States immigration system is based largely on the principle of family reunification, especially spousal reunification).

2. See *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997) (summarizing that the liberty interests protected by the Due Process clause include rights associated with marriage and family, such as the right to have children, to abortion, to contraception, and to marital privacy).

3. See, e.g., *United States v. Chowdhury*, 169 F.3d 402, 404-05 (6th Cir. 1999) (reviewing testimony regarding the number of times the couple consummated their marriage during an inquiry into the validity of the couple's marriage).

reunification.<sup>4</sup> Some courts, however, have found a way to respect our liberal tradition of immigration and the sanctity of marriage, while still enforcing our immigration laws.<sup>5</sup>

This Comment will argue that courts should make determinations about marriage fraud based on whether or not the couple intends to establish a permanent life together at the time of the marriage, regardless if the underlying motivation for their union is to obtain favorable immigration status. Part II outlines the background to immigration marriage fraud that resulted in a circuit court split, the procedures for adjusting an alien's status, Congress's plenary powers, and fundamental rights. Part III explains how the Ninth Circuit's test, which detects fraud based on a couple's intent to establish a life together, follows Supreme Court precedent and avoids violating an individual's fundamental rights. It further discusses how this test is more effective for detecting fraudulent marriages and how provisions of the Immigration Marriage Fraud Amendment ("IMFA"), the Code of Federal Regulations, and the congressional goal of keeping families together support this test. This Comment concludes by advocating that the Ninth Circuit's test properly determines if a couple has a sham marriage in the immigration context.

## BACKGROUND

### I. TWO KINDS OF MARRIAGE FRAUD

Congress enacted the IMFA<sup>6</sup> in an attempt to curb fraudulent marriages by aliens seeking to remain in the United States.<sup>7</sup> Fraudulent marriages are either contractual or unilateral in form.<sup>8</sup> Congress and the Immigration and Naturalization Service ("INS")<sup>9</sup> saw both types of marriage fraud as a

---

4. See, e.g., *Bazzi v. Ashcroft*, 118 Fed. Appx. 953, 960 (6th Cir. 2004) (admitting that the deportation of aliens has unfortunate collateral consequences for children who are United States citizens and relatives of the deportees).

5. See, e.g., *United States v. Tagalicud*, 84 F.3d 1180, 1184-85 (9th Cir. 1996) (asserting that the government should resolve the questions as to whether a marriage was a sham by looking at whether the man and woman intended to establish a life together at the time they married).

6. Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (codified in various sections of 8 U.S.C.) [hereinafter *Fraud Amendments*].

7. See *Almario v. INS*, 872 F.2d 147, 149 (6th Cir. 1989) (recognizing that since the United States began to limit the number of immigrants eligible for permanent resident status in 1921, fraudulent marriages became more prevalent as immigrants entered into these relationships in order to gain the preferred immigration status accorded to immediate relatives of American citizens).

8. See Note, *The Constitutionality of the INS Sham Marriage Investigation Policy*, 99 HARV. L. REV. 1238, 1240 (1986) (explaining that fraudulent marriages are either contractual, where the parties agree that the marriage will be terminated at a later date, or unilateral, where the alien deceives the citizen spouse about the marriage's legitimacy to obtain immigration benefits).

9. See 6 U.S.C. § 291 (2006) (abolishing the INS, formerly a part of the

growing problem.<sup>10</sup>

Contractual fraud is the more common form of sham marriage. It involves a couple agreeing from the outset that the marriage's only purpose is to acquire preferential immigration standing for the alien spouse, and that the marriage will end once the alien obtains permanent resident status.<sup>11</sup> An American citizen or permanent resident often agrees to contractual marriage fraud for financial gain, out of sympathy for an alien facing deportation, to travel abroad, or to help a friend.<sup>12</sup> Additionally, many people who participate in contractual marriage fraud believe it to be a victimless crime.<sup>13</sup>

More harmful for the resident spouse, but fortunately rare, is unilateral marriage fraud.<sup>14</sup> Unilateral marriage fraud occurs when an alien deceives an American citizen or permanent resident into marriage with the intent of leaving his or her spouse once the INS adjusts the alien's immigration status.<sup>15</sup> This intent often becomes apparent when the alien receives his or her green card and subsequently abandons his or her spouse.<sup>16</sup>

---

Department of Justice, and transferring its functions to the newly created United States Citizenship and Immigration Services ("USCIS") at the Department of Homeland Security); *see also* 6 U.S.C. §§ 211, 252, 271 (2006) (establishing USCIS, Immigration and Customs Enforcement ("ICE"), and Custom and Border Protection ("CBP")). Because courts continue to refer to the INS, this paper will use INS as an umbrella term.

10. *See Senate Hearing, supra* note 1, at 8 (statement of Alan C. Nelson, Comm'r, INS) (reporting that INS statistics showed that immigration to the United States between 1978 and 1984 decreased by 9.6 percent, but that the number obtaining residential status based on marriage increased by forty-three percent during the same period); *see also id.* at 57 (statement of David S. North, Center for Labor and Migration Studies, New TransCentury Foundation Director) (noting that, between 1962 and 1984, immigration-related marriages increased 600 percent, while American marriages only increased by sixty percent).

11. *See* 132 CONG. REC. S41, 3786 (daily ed. Apr. 8, 1986) (statement of Sen. Simon) (describing the usual exchange in this type of marriage, in which the alien pays the citizen a sum of money in return for the citizen filing all the necessary paperwork and appearing at the INS interview before terminating the marriage).

12. *See Senate Hearing, supra* note 1, at 13, 17-18 (statement of Alan C. Nelson, Comm'r, INS) (acknowledging that citizens or permanent residents who agree to sham marriages are commonly subject to blackmail, extortion, violence, or threats of violence by the alien spouse to ensure that they keep their part of the agreement).

13. *See id.* at 17 (asserting that contractual marriage is not a victimless crime because citizens or permanent residents tricked into unilateral marriage fraud may be "duped, hurt financially or destroyed psychologically," and it facilitates the entry of aliens who are being excluded for good cause).

14. *See* 132 CONG. REC. S41, 3786 (daily ed. Apr. 8, 1986) (statement of Sen. Simon).

15. *See, e.g., Senate Hearing, supra* note 1, at 44-45 (testimony of Ms. Patricia Beshara) (describing her experience with marriage fraud, in which an alien duped her into a marriage solely to obtain preferential residential status, causing her subsequent embarrassment, emotional damage, and financial ruin).

16. *Id.* at 14 (statement of Alan C. Nelson, Comm'r, INS); *see also id.* at 42-48 (testimony of Amita Narielwala and Patricia Beshara) (recounting the rapid change in their immigrant husbands after obtaining immigration benefits).

## II. INS PROCEDURES TO ADJUST STATUS OF THE ALIEN SPOUSE

Immigration laws permit an alien who marries a United States citizen to request an adjustment of immigration status on a conditional basis.<sup>17</sup> Within ninety days of the second anniversary of the conditional residency period, the couple must jointly file for the removal of the temporary status.<sup>18</sup> The INS may conduct a personal interview of the couple to determine if a marriage is bona fide.<sup>19</sup> The INS interviews the husband and wife separately so that the interviewer can compare their answers for inconsistencies.<sup>20</sup> The government uses the information provided to decide if the couple legitimately married, and, consequently, if an alien deserves an immigration status adjustment.<sup>21</sup>

## III. CONGRESSIONAL POWERS AND GOALS RELATING TO IMMIGRATION AND THE ENACTMENT OF THE IMFA

Congress creates the rules that an alien must follow to legally enter the country and eventually become a United States citizen.<sup>22</sup> In *Ping v. United States* and *Oceanic Steam Navigation Co. v. Stranahan*, the Supreme Court interpreted the naturalization provision as providing Congress greater power over matters of immigration than most other subjects.<sup>23</sup> Congress's power regarding immigration matters is so great that the Supreme Court has upheld many immigration rules that would be unacceptable if they were applied to American citizens.<sup>24</sup> Courts' deference to Congress in this area

---

17. See *Cho v. Gonzales*, 404 F.3d 96, 97-98 (1st Cir. 2005).

18. See *id.* at 97-98 (noting that a petition to remove the condition on the alien spouse's residency must state that the marriage has not been judicially annulled or terminated and was not entered into for the purpose of procuring the alien spouse's admission to the United States).

19. INS EXAMINATIONS HANDBOOK, PART III § 38 RELATIVE VISA PETITION (Matthew Bender 2006) [hereinafter HANDBOOK] (acknowledging that the INS will complete most relative visa petitions without a personal interview; however, most interviews that the INS actually conducts concern the legitimacy of a marriage for spousal petitions).

20. *Id.*

21. *Id.* (explaining that interviews can be helpful in reaching a decision on a case but that questions should be limited to matters that are relevant to the relationship, such as the spouses' background stories, where the couple keeps certain items in the house, or the division of household chores, and cautioning that interviewers "must avoid any highly personal areas such as sexual relations").

22. U.S. CONST. art. I, § 8, cl. 4 (granting Congress the power to establish uniform rules for naturalization throughout the United States).

23. *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 340 (1909) (concluding that Congress's constitutional right to enact legislation limiting the right to admit aliens into the United States is the sole measure by which the courts can determine the validity of the legislation); *Ping v. United States*, 130 U.S. 581, 609 (1889) (stating that the U.S. government's power to exclude foreigners is sovereign and may not be stripped, restrained, or granted away).

24. See *Mathews v. Diaz*, 426 U.S. 67, 80 (1976) (finding that discrimination between citizens and aliens is permissible, such as providing welfare benefits to

is apparent in cases where a court applies a lower standard of review to challenges of general immigration statutes than they would for other statutes involving fundamental rights.<sup>25</sup> The courts also accord deference when reviewing INS decisions because the INS is in charge of enforcing immigration laws and has greater expertise in the area.<sup>26</sup>

When Congress passed the IMFA, it continued the long-standing policy of uniting families of citizens and immigrants.<sup>27</sup> At the same time, Congress also addressed growing concerns over marriage fraud.<sup>28</sup> Achieving these dual goals became more difficult as Congress wanted both to prevent fraudulent marriages and avoid violating constitutionally protected privacy rights, while not providing a definition for marriage.<sup>29</sup> One of the problems the INS pointed out to Congress was the lack of a comprehensive definition of marriage in the immigration context, although the Examination Handbook used by the INS provides a definition of what is not a legitimate marriage for immigration purposes.<sup>30</sup> The IMFA does not define what constitutes a valid marriage for immigration purposes, though it does provide a punishment for anyone whose sole purpose in marriage is to evade immigration laws.<sup>31</sup>

#### IV. SUPREME COURT DECISIONS THAT AFFECT THE DETERMINATION AS TO WHETHER A MARRIAGE IS FRAUDULENT

The Supreme Court dealt with the issue of fraudulent marriages prior to

---

citizens but denying the same benefits to aliens).

25. See *Almaro v. INS*, 872 F.2d 147, 152 (6th Cir. 1989) (applying a conceivably related standard of review to a statute that involves marriage and immigration, as opposed to the strict scrutiny that fundamental rights, like the right to marriage, usually receive).

26. See *id.* at 150 n.7 (explaining that Congress granted the executive branch the power to exclude aliens, which in turn delegated broad investigatory power to the INS).

27. See *INS v. Errico*, 385 U.S. 214, 220 n.9 (1966) (asserting that Congress, through immigration legislation, clearly meant to provide for family unification by allowing non-quota status for adopted and illegitimate children of immigrant parents, and for orphans adopted by United States citizens, and thus demonstrated that keeping families together was more important than strict enforcement of the quota limitations); *Senate Hearing, supra* note 1, at 1-2 (statement of Sen. Simpson) (arguing that the reunification of husband and wife should be accorded paramount importance because, unlike parental or sibling relationships, the spousal relationship is self-created).

28. See *Almaro*, 872 F.2d at 149 (articulating that Congress passed the IMFA, creating a two-year conditional residency period, in response to concerns that marriage fraud was increasing and with the hope that it would reduce fraudulent marriages).

29. See *Senate Hearing, supra* note 1, at 56 (statement of Sen. Simpson).

30. Compare *id.* at 10 (statement of Alan C. Nelson, Comm'r, INS) (explaining that the lack of a clear definition of marriage has resulted in immigration marriages that barely resemble the common understanding of a nuclear family), with *HANDBOOK, supra* note 19 (defining a sham marriage as a marriage that may comply with all formal requirements of the law, but in which the parties have no intent to live together because the marriage is solely to avoid the immigration laws).

31. 8 U.S.C. § 1325(c) (2006) (imposing a penalty of up to five years in prison and/or a \$250,000 fine for a person convicted of immigration-related marriage fraud).

the debate over the IMFA.<sup>32</sup> The Court also decided many cases dealing with the fundamental rights associated with privacy and marriage that courts need to consider when attempting to detect fraudulent marriages.<sup>33</sup>

*A. Abuse of the War Brides Act Provided A Test to Determine Fraudulent Marriages*

Congress passed the War Brides Act in 1945 to allow alien spouses of citizen war veterans to enter the United States and reunite with their families without the usual delays encountered under the quota system.<sup>34</sup> In *Lutwak v. United States*, the Supreme Court decided that the defendants had committed marriage fraud and abused the War Brides Act.<sup>35</sup> In this case, Mrs. Treitler arranged for Mr. Lutwak, a World War II veteran, to travel to Paris to marry her sister-in-law and bring her to the United States under the War Brides Act.<sup>36</sup> Later, Mr. Lutwak and Mrs. Treitler found two women willing to fly to Paris and marry Mrs. Treitler's brothers and bring them into the United States.<sup>37</sup> Upon arriving to the United States, all three couples separated, indicating that they never intended to live together as husband and wife.<sup>38</sup> The Supreme Court held that participating in a marriage solely for the purpose of entering the United States and without any intention of establishing a life together constitutes marriage fraud.<sup>39</sup>

*B. Fundamental Rights to Marriage and Privacy*

The Supreme Court has stated that there are certain fundamental rights

---

32. See *Errico*, 385 U.S. at 214-17 (resolving a circuit split regarding the deportability of aliens who misrepresented their status for the purpose of evading quota restrictions); *Lutwak v. United States*, 344 U.S. 604, 608-613 (1953) (considering whether the marriage between a World War II veteran and an alien, who applied for preferential immigration status under the War Brides Act, could obtain the sought after status if the couple married solely for the purpose of circumventing the immigration laws).

33. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (reaffirming that the constitutional right to marry, or not to marry, is essential to the pursuit of happiness, and that the government cannot restrict this freedom); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (finding that the fundamental right to privacy extends to the marital relationship).

34. 8 U.S.C. §§ 232-37 (1946) (expired Dec. 28, 1948) (according non-quota immigrant status to alien spouses and minor children of members of the United States armed forces during World War II in order to expedite admission into the country).

35. 344 U.S. at 611.

36. *Id.* at 605-06, 608-09 (explaining that Mr. Lutwak and Maria Knoll never cohabitated after their marriage and that Mr. Lutwak continued to represent himself as an unmarried man).

37. *Id.* at 608-09.

38. *Id.*

39. *Id.* at 611 (stating that the common understanding of marriage in the context of the War Brides Act is that the two parties have undertaken to establish a life together and assume certain duties and obligations).

that are not enumerated in the Constitution, yet they cannot be denied.<sup>40</sup> In identifying them, the Court has carved out privacy rights that include a right to marriage, to procreate, to use contraception, to seek an abortion, to engage in consensual sexual relations, and a general right to privacy in the marital relationship.<sup>41</sup> The government can only infringe these rights when it has a substantial and legitimate purpose, and the regulatory infringement is narrowly tailored for pursuing this purpose.<sup>42</sup>

#### V. A CIRCUIT COURT SPLIT RESULTED IN COURTS USING TWO TESTS TO DETERMINE FRAUDULENT MARRIAGES

The Supreme Court decision in *Lutwak* defined a marriage within the War Brides Act as fraudulent when a couple marries solely for the purpose of circumventing the immigration laws without any intention to establish a life together.<sup>43</sup> Circuit courts, however, apply various definitions of marriage in the immigration context.<sup>44</sup> There is a split regarding the proper focus when determining marriage fraud.<sup>45</sup> Some circuits apply the “Establish A Life Test,”<sup>46</sup> determining the validity of a marriage on the basis of whether the couple intended to establish a life together at the time of the marriage.<sup>47</sup> Other courts apply the “Evade The Law Test,”<sup>48</sup> focusing on whether the purpose of the marriage was to evade a provision

---

40. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 491-92 (1965) (Goldberg, J., concurring) (asserting that the Constitution protects the right of privacy in a marriage as a “right so basic and fundamental and so deep-rooted in our society,” even though it is not explicitly guaranteed within the first eight amendments to the Constitution).

41. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (finding that the Constitution protects the right for adults to engage in consensual sexual relations); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that the Due Process Clause of the Fourteenth Amendment protects a woman’s right to choose whether or not to terminate her pregnancy); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (acknowledging that the freedom to marry is a personal right that is essential to the orderly pursuit of happiness, and that the states cannot restrict this right without violating the Constitution); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (finding that a law forbidding the use of contraceptives between married couples violated the couples’ right to privacy).

42. See, e.g., *NAACP v. Alabama*, 377 U.S. 288, 307-08 (1964).

43. 344 U.S. at 611-13.

44. Compare *United States v. Darif*, 446 F.3d 701, 710 (7th Cir. 2006) (ruling that the government must show that the defendant entered into marriage for the purpose of evading immigration laws, and that the government does not need to inquire into the defendant’s intent to establish a life with his spouse), with *United States v. Orellana-Blanco*, 294 F.3d 1143, 1151-52 (9th Cir. 2002) (stating that a marriage is a sham only if the couple did not intend to establish a life together, and that the motivations behind a marriage are at most evidence of intent and do not in themselves make a marriage a sham).

45. See *United States v. Islam*, 418 F.3d 1125, 1129 n.4 (10th Cir. 2005) (rejecting a defendant’s reliance on the Ninth Circuit’s reasoning that a marriage for a green card does not establish marriage fraud if the couple has an intent to establish a life together).

46. The author has created this term for ease of understanding.

47. See *Cho v. Gonzales*, 404 F.3d 96, 102-03 (1st Cir. 2005).

48. The author has created this term for ease of understanding.

of the immigration laws.<sup>49</sup>

#### A. *The Establish A Life Test*

The First, Second, and Ninth Circuits use the Establish A Life Test in determining fraudulent immigration marriages.<sup>50</sup> This test looks at the intent of the couple at the time of the wedding to decide if the marriage is fraudulent.<sup>51</sup> To establish intent, the courts look at the courtship prior to the marriage and the period after the wedding to the degree necessary to ascertain the couple's intent.<sup>52</sup>

The Ninth Circuit elaborated on the Establish A Life Test in *United States v. Orellana-Blanco*.<sup>53</sup> In that case, the wife testified that her marriage was fraudulent when she married the defendant because they agreed in advance to divorce after the three years required for immigration purposes.<sup>54</sup> Mr. Orellana-Blanco's testimony conflicted with his wife's testimony about the entire relationship.<sup>55</sup> The only fact that they agreed upon was that they never lived together.<sup>56</sup> Nonetheless, the court held that the intent to obtain something extra from the relationship, besides love and companionship, did not make the marriage fraudulent by itself, and remanded the case for a new trial.<sup>57</sup>

#### B. *Evade The Law Test*

The Sixth Circuit decision in *United States v. Chowhury*<sup>58</sup> and its

---

49. See *Darif*, 446 F.3d at 710 (stating that the government is only required to show that the defendant entered into a marriage for the purpose of evading immigration laws and that the defendant's intent to establish a life with the spouse is an irrelevant inquiry); *Islam*, 418 F.3d at 1128 n.3 (refusing to adopt the Establish A Life Test as the exclusive inquiry for determining fraudulent immigration marriages in accordance with 8 U.S.C. § 1325(c) (2006)).

50. *United States v. Tagalicud*, 84 F.3d 1180, 1185 (9th Cir. 1996) (explaining that the parties' intent to establish a life together rather than the parties' motivation behind the marriage is determinative as to whether a marriage is fraudulent).

51. See *Orellana-Blanco*, 294 F.3d at 1151 (stating that a marriage is a sham only if the couple did not intend to establish a life together at the time of marriage).

52. See *Rodriguez v. INS*, 204 F.3d 25, 27 (1st Cir. 2000) (considering evidence of post-marriage conduct, such as termination of the marriage and communication during the times the couple lived apart, relevant to the extent that it answers whether the couple had an intent to establish a life together).

53. 294 F.3d at 1151.

54. *Id.* at 1145-46 (recounting the wife's testimony that the marriage was a sham because she agreed to the marriage as long as his relatives agreed to paint her pick-up truck, but that they were still married because the immigration rules actually required five years of marriage and she was unable to afford a divorce attorney).

55. *Id.* (stating that the husband testified that he intended to live with her, that they had consummated their relationship, but the wife said they never had sexual relations, never lived together, and only met on the day of their wedding).

56. *Id.*

57. *Id.* at 1151-52.

58. 169 F.3d 402, 406-07 (6th Cir. 1999).

progeny support the use of the Evade The Law Test to determine whether a marriage existed for the purpose of obtaining preferential immigration status.<sup>59</sup> The Evade The Law Test considers much of the same evidence as the Establish A Life Test, but also looks to see if the alien had the specific motive of evading the immigration laws.<sup>60</sup>

The Tenth Circuit used the Evade The Law Test in *United States v. Islam*, which dealt with a marriage fraud ring where American females were paid to marry Pakistani males to help the men obtain permanent resident cards.<sup>61</sup> The court found that the couples married to evade immigration laws and determined that this motivation was sufficient to support a conviction for marriage fraud.<sup>62</sup> The Seventh Circuit also used the Evade The Law Test in *United States v. Darif*, in which a Moroccan paid an American citizen \$3,000 to fly to Morocco, marry him, and help him obtain the required paperwork to live in the United States.<sup>63</sup> The court stated that the government only needs to show that the goal of evading the immigration laws motivated the defendant.<sup>64</sup>

## ANALYSIS

### I. COURTS SHOULD ADOPT THE ESTABLISH A LIFE TEST BECAUSE IT FOLLOWS SUPREME COURT PRECEDENT, PREVENTS CONSTITUTIONAL CONFLICTS, EFFECTIVELY UNCOVERS SHAM MARRIAGES, AND HAS MORE LEGISLATIVE AND INS SUPPORT

The simultaneous use of both the Establish A Life Test and the Evade The Law Test has led to a circuit court split. The Evade The Law Test, unlike the Establish A Life Test, places restrictions on the reasons for marriage,<sup>65</sup> which may implicate constitutional issues.<sup>66</sup> On the other hand,

---

59. See, e.g., *United States v. Darif*, 446 F.3d 701, 710 (7th Cir. 2006) (explaining that the government only needs to prove that the marriage's purpose was evading the immigration laws, not that the defendant lacked the intent to establish a life with the spouse); *United States v. Rafiq*, 116 Fed. Appx. 456, 457 (4th Cir. 2004) (per curiam) (following the Sixth Circuit's requirements to sustain a conviction for marriage fraud under 8 U.S.C. § 1325(c) when the government proves the following: (1) the alien knowingly entered into the marriage; (2) the marriage's purpose was to evade the immigration laws; and (3) the alien knew or had reason to know of the immigration laws).

60. See *United States v. Islam*, 418 F.3d 1125, 1128 n.3, 1129 n.4 (10th Cir. 2005).

61. *Id.* at 1127 (describing the marriage fraud ring as including separate living arrangements, creating joint paper work, and a payment schedule of \$500 up front, \$60 a month, and a final \$1000 payment once the immigration proceedings ended).

62. *Id.* at 1129.

63. 446 F.3d at 703-04.

64. *Id.* at 710.

65. Compare *Islam*, 418 F.3d at 1129 n.4 (disagreeing with the Ninth Circuit's reasoning that a couple can have other motivations for marriage besides love and finding that an alien's motivation to evade the immigration laws is the sole inquiry necessary in determining a fraudulent marriage), with *In re Laureano*, 19 I. & N. Dec. 1

the Establish A Life Test follows Supreme Court precedent regarding marriage fraud in the immigration context.<sup>67</sup> The Establish A Life Test is preferable to the Evade The Law Test because it protects American citizens' and permanent residents' constitutionally guaranteed rights, avoids a collision between congressional plenary power and fundamental rights, and still allows government officials to detect fraudulent marriages while not separating legitimate families that started out of convenience.<sup>68</sup>

## II. THE USE OF THE ESTABLISH A LIFE TEST FOLLOWS SUPREME COURT PRECEDENT BETTER THAN THE EVADE THE LAW TEST

### *A. The Establish A Life Test Adheres to the Supreme Court's Determination of Marriage Fraud Under the War Brides Act*

In *Lutwak*, the Supreme Court stated that the common understanding of marriage requires that two parties establish a life together and assume certain duties and obligations.<sup>69</sup> The Establish A Life Test adopts the same approach. The goal of the IMFA, unlike the War Brides Act, is to deter immigrants from committing marriage fraud to gain residential status in the United States.<sup>70</sup> The War Brides Act, however, was not intended to

---

(B.I.A. 1983) (stating that the government will deny an alien spouse the right to obtain immigration benefits if the couple entered a marriage in order to circumvent the immigration laws, but that the central issue is whether the couple intended to establish a life together).

66. *Compare* *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that marriage is a fundamental civil right protected by the Fourteenth Amendment), *and* *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (noting that it is demeaning to a married couple to characterize their marriage as simply about the right to have sexual intercourse), *with* *United States v. Vickerage*, 921 F.2d 143, 146 n.7 (8th Cir. 1990) (recognizing that marrying an alien to gratify one's sexual desires does not, in itself, establish the necessary criminal intent to commit marriage fraud), *and* *United States v. Dedhia*, 134 F.3d 802, 807-08 (6th Cir. 1998) (stating that evidence such as children born to the marriage will tend to show that the couple's marriage was not for the purpose of evading the immigration laws).

67. *See* *Lutwak v. United States*, 344 U.S. 604, 611-12 (1953) (noting the common understanding of marriage as two parties undertaking to establish a life together and assuming certain duties and obligations related to the marital relationship).

68. *See In re Betikua*, 21 *Immig. Rptr.* B1-244 (B.I.A. Apr. 4, 2000) (Rosenberg, Bd. Member, dissenting) (explaining that a marriage entered into for all the wrong reasons can develop into a marital relationship for all the right reasons); Rachel Blitzer, Comment, *The Kiss of Death for "Living in Marital Union": Strict Judicial Scrutiny of Department of Homeland Security Marital Fraud Procedures*, 2004 U. CHI. LEGAL F. 495, 510-11 (2004) (pointing out that the Court has shown deference to congressional plenary powers in the immigration context at the expense of fundamental rights).

69. *Compare* 344 U.S. at 611 (stating the congressional intent to define marriage in the War Brides Act as two parties having undertaken establishing a life together), *with* *Bark v. INS*, 511 F.2d 1200, 1202 (9th Cir. 1975) (stating that the key focus is whether the couple intended to create a life together at the time of the marriage and not the duration or time of separation).

70. *Compare* 132 CONG. REC. S41, 3786 (daily ed. Apr. 8, 1986) (statement of Sen. Simon) (outlining the following four requirements that an alien must show the INS to gain permanent resident status: (1) that the marriage was not for the purpose of

provide an easy avenue for immigrants to evade the immigration laws.<sup>71</sup> Furthermore, the part of the IMFA that Congress codified in 8 U.S.C. § 1325(c) increased the punishment for marriage fraud, an issue left unaddressed by the War Brides Act.<sup>72</sup>

The First and Ninth Circuits' approach in determining whether a marriage is fraudulent in the immigration context follows the Supreme Court's logic in *Lutwak*.<sup>73</sup> The Sixth Circuit's position in *Chowdhury* and the other circuit decisions following *Chowdhury* overlooked the Supreme Court's criteria used to determine if a couple married in good faith.<sup>74</sup> The Seventh Circuit also follows the Evade the Law Test even though it previously used the Establish A Life Test discussed by the Supreme Court and despite the Court's holding that determinations of marriage fraud should be based on intent instead of the motive for the marriage.<sup>75</sup>

Furthermore, the Board of Immigration Appeals does not clearly state which test it uses and excludes more legitimate marriages than does the Establish A Life Test.<sup>76</sup> This confusion is evident in the Examination Handbook, which defines sham marriages using the Establish A Life Test in one part and defines it by applying the Evade The Law Test in another.<sup>77</sup>

---

facilitating the alien's entry into the United States; (2) that the marriage was not annulled or terminated, except through death of the spouse; (3) that no fee was exchanged for the filing of a petition; and (4) that the couple maintained a legitimate marital relationship), *with Lutwak*, 344 U.S. at 606 (explaining that Congress intended, under the War Brides Act, to permit World War II veterans who married aliens to have their families join them without long delays).

71. See *Lutwak*, 344 U.S. at 611.

72. See 8 U.S.C. § 1325(c) (2006) (defining marriage fraud and providing a punishment of no more than five years, or a fine no more than \$ 250,000, or both for any individual who knowingly enters into a fraudulent marriage); 8 U.S.C. §§ 232-37 (1946) (expired Dec. 28, 1948) (providing no punishment for marriage fraud).

73. See *Lutwak*, 344 U.S. at 611; *Cho v. Gonzales*, 404 F.3d 96, 100-01 (1st Cir. 2005) (considering a good faith marriage as one in which there is an intent to create a joint life); *Bark*, 511 F.2d at 1201 (stating that a marriage is a sham if the bride and groom did not intend to establish a marriage together at the time they were married).

74. *United States v. Chowdhury*, 169 F.3d 402, 406-07 (6th Cir. 1999); see *United States v. Darif*, 446 F.3d 701, 710 (7th Cir. 2006) (disagreeing with the Ninth and First Circuits' interpretation of 8 U.S.C. § 1325(c), and stating that an individual who marries for the purpose of evading immigration laws has committed marriage fraud); *United States v. Islam*, 418 F.3d 1125, 1128-30 (10th Cir. 2005) (rejecting the Ninth Circuit's approach to determine fraudulent marriages under the Establish A Life Test and instead accepting the position explained in *Chowdhury*).

75. See *Darif*, 446 F.3d at 710 (requiring that the government only show that the motive for the marriage was to evade immigration laws, regardless of the couple's intention to establish a life together upon entering the marital relationship); *United States v. Lutwak*, 195 F.2d 748, 753-54 (7th Cir. 1952), *cert. granted*, 344 U.S. 604 (1953) (mentioning that if a couple enters into a marriage as society ordinarily understands it, by establishing a life together, the marriage is valid whatever the motive for the marriage).

76. See *United States v. Tagalicud*, 84 F.3d 1180, 1184-85 (9th Cir. 1996) (inquiring whether a couple intended to establish a life together to determine marriage fraud).

77. See HANDBOOK, *supra* note 19 (defining fraudulent marriages as those solely

Therefore, it is no surprise that the various Boards of Immigration Appeals use both tests. Some use one test exclusively, and others use a combination of the two tests.<sup>78</sup> The courts' inconsistency creates varying results, leads to unequal justice for people trying to obtain residential status, and makes it harder for defendants to know what evidence he or she needs to prove that a marriage is legitimate.<sup>79</sup> The degree of deference the circuit courts give to the Immigration Judge and the Board of Immigration Appeals further compounds these inconsistencies.<sup>80</sup> The use of the Establish A Life Test provided in *Lutwak* could eliminate these inconsistencies.

*B. The Establish A Life Tests Protects the Fundamental Right of Marriage by Preventing the State or Courts from Defining the Marital Relationship*

Several courts have decided that a couple does not have to conform to a specific type of marriage and may follow the lifestyle they deem appropriate.<sup>81</sup> The Establish A Life Test supports this concept by respecting the Supreme Court decisions that find a fundamental right to marriage and strongly warn against courts defining personal relationships.<sup>82</sup>

---

for the purpose of avoiding immigration laws with no intent of establishing a life together, while stating in a later section that a marriage entered into primarily for circumventing the immigration laws is fraudulent).

78. See, e.g., *In re Contreras-Contreras*, 25 Immig. Rptr. B1-148 (B.I.A. Apr. 25, 2002) (stating that the government must show the marriage was for the purpose of evading immigration laws, but finding the marriage fraudulent because the couple lacked joint financial assets and evidence of cohabitation and therefore had no intent to establish a life together).

79. Compare *Darif*, 446 F.3d at 710 (suggesting that a defendant's rebuttal evidence needs to show that the defendant entered the marriage for other reasons besides evading the immigration laws, regardless of the evidence showing an intent to establish a life with the spouse), with *United States v. Orellana-Blanco*, 294 F.3d 1143, 1151-52 (9th Cir. 2002) (requiring that the defendant only prove he intended to establish a life with his spouse, regardless of his motive for marrying a United States citizen and despite conflicting spousal testimony, because a jury could reasonably have chosen either party as more creditable).

80. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council Inc.*, 467 U.S. 837, 842-43 (1984) (holding that courts should defer to an agency interpretation of a statute unless the statute itself is clear, and that if the statute is silent or ambiguous, the agency interpretation is controlling if it is based on a permissible reading of the statute); *Azizi v. Thornburgh*, 908 F.2d 1130, 1133 (2d Cir. 1990) (recognizing the court's limited powers to review immigration and naturalization legislation because of Congress's plenary power).

81. See, e.g., *Bark v. INS*, 511 F.2d 1200, 1201 (9th Cir. 1975) (noting that any attempt to regulate the life that partners choose to lead would raise serious constitutional questions); see also *In re Kim*, 5 Immig. Rptr. B1-62 (B.I.A. Oct. 13, 1987) (admitting that the marital residence's unkempt condition is unconventional, but not a valid basis for finding marriage fraud).

82. See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (advising against attempts to define a personal relationship, sexually or otherwise, because it affects some of the most private human conduct that a person can choose to engage in with another); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (stating that marriage is a fundamental right, and that the marital relationship lies within the constitutionally created zone of privacy).

The fact that marriage is a fundamental right and that at least one party to the marriage is a United States citizen or permanent resident should provide the marital relationship with greater protection than courts currently give under the Evade The Law Test.<sup>83</sup> While courts have not recognized the right to have an alien spouse remain in the United States, an alien spouse does have a substantial interest in remaining in the United States, as emphasized by the harsh and permanent repercussions of deportation.<sup>84</sup> Courts should view any fundamental right infringements as violations of the citizen's rights, not the alien spouse, because the INS considers that the rights in question belong only to the citizen spouse.<sup>85</sup>

The fact that the Supreme Court never mentioned love in *Lutwak* or *Loving*<sup>86</sup> supports the view that marriage, although it may be entered into for many reasons, exists as long as the parties create a life together and undertake certain duties and obligations specific to the marital relationship.<sup>87</sup> Thus, *Lutwak* further supports the Ninth Circuit's position in *Orellana-Blanco* that the intent to gain something in addition to or besides love and companionship does not make a marriage fraudulent.<sup>88</sup> In the same vein, the Establish A Life Test recognizes different approaches

---

83. See *Mathews v. Diaz*, 426 U.S. 67, 80 (1976) (admitting that the power to exclude an alien spouse does not give Congress the right to regulate an American citizen's conduct, while finding that Congress can place extra conditions on aliens, such as continuous residency over a five-year period to receive the same benefits as an United States citizen in a federal medical insurance program). *But see* *Anetekhai v. INS*, 876 F.2d 1218, 1222 (5th Cir. 1989) (noting that American citizens or permanent residents do not have a constitutional right to have their alien spouses remain in the United States).

84. See *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (recognizing that the rights to stay, live, and work in the United States, and the right to rejoin family are rights that rank high among the interest of an individual); *see also* *Ghaly v. INS*, 48 F.3d 1426, 1435-36 (7th Cir. 1995) (Posner, J., concurring) (stating that an alien convicted of marriage fraud faces a harsh punishment because it means that the alien may never become a United States citizen or permanent resident).

85. See HANDBOOK, *supra* note 19 (articulating that an alien lacks standing in proceedings for adjustment of immigration status because the matter is between the citizen or permanent resident spouse and the INS).

86. *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Lutwak v. United States*, 344 U.S. 604, 611-12 (1953); *see* *Ferrer-Herrera v. Ashcroft*, 113 Fed. Appx. 809, 810-11 (9th Cir. 2004) (mem.) (noting that a couple's lack of love may indicate a lack of intent to establish a life together, but it is not a necessary condition of a genuine marriage).

87. See *United States v. Orellana-Blanco*, 294 F.3d 1143, 1151 (9th Cir. 2002) (admitting that marriages for money, reasons of state, and for a green card may be genuine because obtaining something in addition to, or instead of, love and companionship does not make a marriage fraudulent). *But see* *United States v. Islam*, 418 F.3d 1125, 1129 (10th Cir. 2005) (asserting that obtaining legal residency does not constitute the basis of a legitimate marriage).

88. See *Lutwak*, 344 U.S. at 613; *Orellana-Blanco*, 294 F.3d at 1151; *see also* *In re Peterson*, 12 I. & N. Dec. 663, 664 (B.I.A. 1968) (finding that the marriage was legitimate when a husband's reason for marriage was that he needed a housekeeper and caretaker, while the wife married because she needed a place to live and felt sorry for her husband).

and reasons for marriage that have existed throughout history.<sup>89</sup> A couple's motive for marriage is at best only partial evidence of their intent to establish a life together at the time of the marriage.<sup>90</sup>

While the Supreme Court has not clearly defined marriage,<sup>91</sup> it has recognized that couples enter into marriage for many different reasons, so parties can still show by establishing some form of life together that the marriage is valid.<sup>92</sup> For example, the Establish A Life Test recognizes other reasons besides love and companionship as the basis of a marriage, allowing for differences with other nonwestern cultures that practice arranged marriages, while still exposing marriages where one party never intended to establish a life with his or her spouse.<sup>93</sup>

The Code of Federal Regulations supports the notion that courts should allow couples to determine what kind of marriage they have, as most of its recommended evidence for determining a good faith marriage deals with nonintimate details.<sup>94</sup> The Examination Handbook also reinforces the idea by forbidding questions relating to the couple's sexual relations during interviews for adjustment of immigration status.<sup>95</sup> By looking to whether a couple consummated their marriage, the courts are setting a requirement for what constitutes a marital relationship, which is contrary to the fundamental rights of marriage and the Supreme Court's advice against setting boundaries to define a relationship.<sup>96</sup>

The Establish A Life Test thus protects the fundamental rights to

---

89. See *Orellana-Blanco*, 294 F.3d at 1151 (arguing that marriages for financial gain, diplomacy between nations, and immigration benefits may also constitute legitimate unions); *United States v. Tagalicud*, 84 F.3d 1180, 1185 (9th Cir. 1996) (explaining that marriages for ulterior gain are as old as civilization; however, they may still be genuine).

90. See *Tagalicud*, 84 F.3d at 1185.

91. See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (describing marriage as "a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred"); *Johl v. United States*, 370 F.2d 174, 176-77 (9th Cir. 1966) (stating that a person's own marital experiences create different views of what constitutes a normal marriage).

92. See *Lutwak*, 344 U.S. at 611; *McClurg v. Terry*, 21 N.J. Eq. 225, 227 (N.J. Ch. 1870) (stating that the evidence must clearly show that both parties intended that the exchange of vows create a marital contract).

93. See *United States v. Dedhia*, 134 F.3d 802, 804-05 (6th Cir. 1998) (showing that the government will charge a couple with evading the immigration laws if they do not establish a life together even though the couple undertook a formal arranged marriage).

94. 8 C.F.R. § 216.5(e)(2) (2006) (providing guidance on how to determine if a marriage was entered into in good faith, including documentation of children born to the marriage as the only sexual information pertaining to the determination of whether a marriage was entered in good faith).

95. HANDBOOK, *supra* note 19 (emphasizing that the interviewer must avoid highly personal questions, such as those about the couple's sexual activities, when attempting to determine if the couple married solely for receiving immigration benefits).

96. See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

marriage and privacy within personal relationships, while it still exposes fraudulent marriages entered into solely to evade immigration laws.<sup>97</sup> Also, the test does not punish a couple for creating a life together that is similar to an arranged marriage, where the couple may lack love but intend to live together for their remaining years.<sup>98</sup>

*C. The Evade The Law Test Invades the Protected Privacy of the Bedroom*

The desire to know whether a couple consummated their marriage violates the adults' constitutionally protected liberty to privately engage in consensual and intimate relationships.<sup>99</sup> Moreover, by considering consummation of marriage as a factor, courts are unfairly penalizing older couples or those that marry later in life because sexual activity generally declines with age or disabilities, resulting in the couple not consummating the marriage.<sup>100</sup>

No court requires a couple to consummate their marriage for the union to be legitimate, so the government's inquiry into consummation for the purposes of immigration raises the standard above that applied to the rest of society.<sup>101</sup> The Supreme Court's recognition and application of different rules and rights between aliens and American citizens cannot justify the inquiry into sexual activity because the right of adjusting the alien's status lies with the American citizen or permanent resident spouse.<sup>102</sup> Some courts attempted to formulate the issue as one among aliens instead of being between citizen and aliens.<sup>103</sup> Regardless of how courts state the

---

97. See *United States v. Orellana-Blanco*, 294 F.3d 1143, 1152 (9th Cir. 2002).

98. See *id.* at 1151 (recognizing that marriages between princes and princesses for reasons of state are genuine and not indicative of fraud).

99. See *Lawrence*, 539 U.S. at 567, 578; *United States v. Diogo*, 320 F.2d 898, 910 (2d Cir. 1963) (Clark, J., dissenting) (expressing concern over the depth of an inquiry into a partially valid marriage where one of the defendants entered a marriage with an American citizen without exchanging money or previous discussions of consummation and divorce because it may violate the couple's constitutionally protected marital privacy).

100. See *In re Peterson*, 12 I. & N. Dec. 663, 664 (B.I.A. 1968) (regarding the absence of sexual intercourse from the marriage as insignificant because the husband was too old and sick and they formed a lasting relationship); see also TOM W. SMITH, AMERICAN SEXUAL BEHAVIOR: TRENDS, SOCIO-DEMOGRAPHIC DIFFERENCES, AND RISK BEHAVIOR 9 (1998) (showing a drop in sexual activity of approximately eighty-five percent for people over seventy years old compared to people in their twenties, thirties, and forties, and for people in their sixties the drops in sexual activity are approximately sixty seven, sixty-five, and fifty-seven percent respectively).

101. See *United States v. Rubenstein*, 151 F.2d 915, 919 (2d Cir. 1945).

102. See HANDBOOK, *supra* note 19 (describing the status adjustment proceedings as an issue between the American citizen or permanent resident and the INS, and that the alien spouse has no standing).

103. See, e.g., *Almario v. INS*, 872 F.2d 147, 152 (6th Cir. 1989) (permitting Congress to impose a two-year foreign residency requirement on deportable aliens who marry, while not imposing the same requirement on those aliens who marry before the government initiates deportation proceedings).

issue, they are still investigating an area of marital privacy protected by the Supreme Court.<sup>104</sup>

Additionally, the IMFA and the congressional statements relating to the IMFA never required that the couple consummate the marriage.<sup>105</sup> Instead, when Congress drafted the IMFA, they asked that the parties maintain the marital relationship while ensuring that the government did not overstep the bounds of personal liberties protected by the Constitution.<sup>106</sup> When courts consider if the couple maintained a monogamous relationship, they further violate personal liberties, specifically the right to marital privacy and intimate relations, because that inquiry enters the private domain of the bedroom.<sup>107</sup>

Courts should avoid considering consummation or fidelity of marriage under either test because it may implicate constitutional issues.<sup>108</sup> The Evade The Law Test is a more intrusive inquiry because the court looks at the motivation for the relationship, while courts that use the Establish A Life Test take a limited look at the relationship to determine intent.<sup>109</sup> Courts are to consider various non-intimate details, but they can still check to see if a marriage is fraudulent without inquiring into the couple's intimate relationships.<sup>110</sup>

---

104. See *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (stating that allowing inquiry into "the sacred precincts of marital bedrooms" is repulsive to the notions of privacy surrounding the marriage relationship); *Almario*, 872 F.2d at 152 (applying rational basis review because of the federal interest in deterring sham marriages despite the presence of a fundamental right in marriage).

105. Fraud Amendments, *supra* note 6.

106. 132 CONG. REC. S41, 3786 (daily ed. Apr. 8, 1986) (statement of Sen. Simon) (stating that the only difference under the new legislation and the current system is that the alien spouse must come back after a specific amount of time and prove that he or she did not deceive the INS in order to obtain his or her permanent resident status).

107. Compare *Lawrence v. Texas*, 539 U.S. 558, 565 (2003) (noting that after *Griswold* a privacy right exists to make certain decisions regarding sexual conduct), with *Cho v. Gonzales*, 404 F.3d 96, 104 (1st Cir. 2005) (implying that if the petitioner was in a non-monogamous relationship then the purpose of the marriage may have been to evade immigration laws).

108. Compare *Lawrence*, 539 U.S. at 567 (recognizing that consensual sexual behavior between adults and within the home is a personal liberty that the state cannot criminalize), with *United States v. Darif*, 446 F.3d 701, 704 (7th Cir. 2006) (noting that the couple never consummated their marriage and that the defendant had an affair prior to affirming the marriage fraud conviction), and *United States v. Orellana-Blanco*, 294 F.3d 1143, 1152 (9th Cir. 2002) (remanding the case because the husband and wife offered conflicting testimony regarding whether they consummated their marriage, and a jury could have found that the marriage was a fraud or that it was legitimate).

109. Compare *Darif*, 446 F.3d at 710 (requiring that the government show only that the alien's motivation for the marriage was evading immigration laws because an alien can still enter a marriage intending to establish a life with his or her spouse and evade the immigration laws), with *Rodriguez v. INS*, 204 F.3d 25, 27 (1st Cir. 2000) (considering post-marriage conduct, such as the couple's communications, or their reasons for an annulment relevant only to the extent that it indicates whether the couple intended to establish a life together at the time of the wedding).

110. See HANDBOOK, *supra* note 19, at 9.

*D. The Establish A Life Test Allows the Supreme Court to Avoid Determining if Fundamental Rights Take Precedence Over Congress's Plenary Powers*

The Establish A Life Test avoids infringing on citizens fundamental rights, while still recognizing Congress's plenary power over matters of immigration.<sup>111</sup> The Supreme Court has expanded Congress's plenary power over matters of immigration to the point that courts now consider the power more complete over immigration than any other subject.<sup>112</sup> Even though the Supreme Court has recognized that Congress's plenary power to exclude aliens is immune from judicial intervention, it has intervened in Congress's plenary power under the Commerce Clause<sup>113</sup> when legislation enacted under the Commerce Clause affected fundamental rights.<sup>114</sup>

Because some violations of fundamental rights occur when courts use the Evade The Law Test, the continued use of this test can pose difficult issues for the Court.<sup>115</sup> The Evade The Law Test may force the Supreme Court to determine what takes precedence: Americans' fundamental rights or Congressional plenary powers over matters of immigration.<sup>116</sup> The fact that fundamental rights and congressional plenary power sometimes intertwine makes this determination more difficult.<sup>117</sup> Because the government has a legitimate interest in preventing immigration marriage fraud, a limited inquiry into the marriage under the Establish A Life Test will guarantee both Americans' marital privacy and Congress's plenary powers.<sup>118</sup>

---

111. See *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972) (recognizing that Congress's power to exclude aliens is a settled area of law).

112. See, e.g., *Azizi v. Thornburgh*, 908 F.2d 1130, 1133 (2d Cir. 1990) (refusing to apply strict scrutiny to an alien-citizen couple's challenge to the IMFA as violating their fundamental right to marriage because immigration and naturalization legislation is in the province of Congress and thus only subject to limited review).

113. U.S. CONST. art. I, § 8, cl. 3.

114. See *United States v. Darby*, 312 U.S. 100, 115 (1941) (holding that Congress can regulate labor conditions under its plenary powers associated with the Commerce Clause unless the regulations violate constitutional provisions or fundamental rights). *But see Mathews v. Diaz*, 426 U.S. 67, 80 (1976) (allowing Congress to apply rules associated with its plenary powers related immigration and naturalization to aliens that would not withstand a constitutional challenge if applied to citizens).

115. See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (invalidating a state law because the statute furthered no legitimate state interest that would justify an intrusion into an individual's private life); *United States v. Chowdhury*, 169 F.3d 402, 404-05 (6th Cir. 1999) (determining whether the husband had committed marriage fraud after reviewing contradictory testimony from the wife and husband, the former stating that they never consummated the marriage, and the latter testifying that they engaged in sex twice but that she did not enjoy the intercourse).

116. See *Blitzer*, *supra* note 68, at 510-11 (comparing the deference given to Congress's plenary power over immigration matters to the lack of deference given to Congress's plenary power over interstate commerce).

117. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 305-06 (1992).

118. See *Almario v. INS*, 872 F.2d 147, 151 (6th Cir. 1989).

### III. THE ESTABLISH A LIFE TEST IS A MORE EFFECTIVE TEST TO UNCOVER MARRIAGE FRAUD THAN THE EVADE THE LAW TEST

#### *A. The Establish A Life Test is Able to Detect Both Contractual and Unilateral Marriage Fraud*

Regardless of the rules a couple sets for their relationship, the Establish A Life Test prevents contractual and unilateral marriage fraud because it looks at the intent of the couple at the time of the marriage and not the motive for the marriage.<sup>119</sup> When an alien's motivation for marriage is solely immigration benefits, the fact that the alien does not intend to establish a life with his or her spouse will reveal that the marriage was fraudulent.<sup>120</sup>

By identifying marriage fraud using the Evade The Law Test, a court likely will find evidence that seems suspicious, even though the alien spouse intended to establish a life with his or her partner.<sup>121</sup> Additionally, aliens who marry for immigration benefits can still get their status adjusted under the Evade The Law Test if the documents filed do not raise the INS's suspicion.<sup>122</sup>

#### *B. The Two-Year Conditional Resident Period Supports the Use of the Establish A Life Test*

While allowing United States citizens and permanent residents to obtain favorable immigration status for their alien spouse advances Congress's goal of promoting the family unit, the creation of the two-year conditional resident status serves the congressional goal of detecting fraudulent marriages.<sup>123</sup> Requiring a two-year period to prove that the marriage is legitimate is consistent with the aforementioned argument favoring the Establish A Life Test, and the conditional period also makes it more

---

119. See *United States v. Tagalicud*, 84 F.3d 1180, 1184-85 (9th Cir. 1996).

120. See *Lutwak v. United States*, 344 U.S. 604, 611 (1953) (requiring more proof than whether the marriage was solely for the purpose of obtaining immigration benefits to find the marriage a sham); *In re Betikua*, 21 Immig. Rptr. B1-244 (B.I.A. Apr. 4, 2000) (considering lease and electric bills with only one spouse's name on it as part of the relevant conduct after the wedding to determine if the marriage was fraudulent for immigration benefits).

121. See *Cho v. Gonzales*, 404 F.3d 96, 103-04 (1st Cir. 2005) (admitting that a nearly two-year courtship leading to the marriage should dispel the INS's suspicion regarding a wedding ceremony that took place one week prior to the expiration of the wife's visitor visa).

122. See *United States v. Dedhia*, 134 F.3d 802, 804 (6th Cir. 1998).

123. See *Almario*, 872 F.2d at 149 (noting that Congress passed the IMFA to limit marriage fraud, which required a two-year probationary period before INS granted permanent resident status to the alien spouse); *In re X*, 9 Immig. Rptr. B2-87 (Admin. App. Unit Oct. 23, 1991) (acknowledging that the House Report that accompanied the IMFA noted the congressional intent in creating immigration laws that keep families together).

difficult to commit immigration marriage fraud.<sup>124</sup> Furthermore, the INS receives a second opportunity to review the marriage's legitimacy, thus increasing the likelihood of discovering a fraudulent marriage if a couple does not start a life together.<sup>125</sup>

The fact that Congress debated the length of time an alien spouse would be a conditional resident alien is another reason to use the Establish A Life Test to determine whether a marriage is fraudulent.<sup>126</sup> The choice of a two-year period despite senators' proposals for shorter periods shows that, regardless of the motive for the marriage, a couple needs to establish a life together if the marriage is going to provide any immigration benefits.<sup>127</sup> The two-year conditional resident period an alien must meet before obtaining permanent resident status favors the Establish A Life Test because it provides the couple time to form a new life together and show the court the life the couple created.<sup>128</sup> Allowing a couple time to create a life together is necessary because opening joint accounts, changing names, and transferring other assets or liabilities into joint ownership takes time and money to process.<sup>129</sup> Another potential issue requiring time when establishing a common residence is that children from previous marriages might not be receptive to the new spouse and prevent the couple from living together.<sup>130</sup>

The creation of the two-year conditional resident period specifically discourages contractual marriage fraud, where a United States citizen or permanent resident agrees to marry an alien in return for money or some other consideration.<sup>131</sup> People marrying for money is nothing new and will

---

124. See *Aguila-Cisneros v. INS*, 5 Fed. Appx. 415, 417-18 (6th Cir. 2001) (per curiam).

125. See *In re Mendes*, 20 I. & N. Dec. 833, 835 (B.I.A. 1994).

126. Compare 132 CONG. REC. S145, 17316 (daily ed. Oct. 18, 1986) (statement of Sen. Simpson) (proposing a two-year conditional resident status period), with 132 CONG. REC. S41, 3786 (daily ed. Apr. 8, 1986) (statement of Sen. Simon) (proposing a one-year conditional resident status period modeled on the British practice of allowing an alien marrying a British subject a one-year nonimmigrant visa before being allowed to apply for permanent status).

127. See 132 CONG. REC. S145, 17316 (daily ed. Oct. 18, 1986) (statement of Sen. Simpson).

128. See *Rodriguez v. INS*, 204 F.3d 25, 27 (1st Cir. 2000) (affirming the deportation order because the couple had very little documentation of relevant evidence such as cohabitation, telephone conversations, and exchanged letters).

129. See *In re Iturralde-Reinoso*, 18 Immig. Rptr. B1-240 (B.I.A. Mar. 4, 1998) (accepting the wife's argument that she did not have joint bank accounts with her new husband because she had an established household from a previous marriage and had only been in the new marriage for a short time).

130. *United States v. Orellana-Blanco*, 294 F.3d 1143, 1146 (9th Cir. 2002) (noting the fact that the wife needed time to tell her son about the marriage as the husband's reason for not living with his wife).

131. *United States v. Vickerage*, 921 F.2d 143, 145 (8th Cir. 1990); see also 132 CONG. REC. S41, 3786 (daily ed. Apr. 8, 1986) (statement of Sen. Simon) (arguing that the IMFA should address unilateral and contractual marriage fraud, the latter including

likely continue. However, with the conditional resident period, Congress prevents United States citizens and permanent residents from marrying anyone for money more than once every other year.<sup>132</sup> The Establish A Life Test enables a court to determine if a conspiracy to commit marriage fraud occurred because the couple still must prove the marriage was in good faith.<sup>133</sup> Therefore, the courts only need to apply one test.

The two-year wait period allows time for the collection of evidence that the couple intended to begin a life together at the time of the marriage.<sup>134</sup> The collection of evidence will make it easier to prove which couples never intended to establish a joint life and married solely for immigration benefits.<sup>135</sup>

The use of the Establish A Life Test with the two-year conditional period acts as a deterrent to marriage fraud because of the time and potential obstacles in obtaining favorable immigration status.<sup>136</sup> The two-year period also allows couples involved in fraud to transform a marriage originally entered into for the wrong reasons into a marriage for the right reasons.<sup>137</sup>

#### IV. FACTORS LISTED IN THE CODE OF FEDERAL REGULATIONS AND BY THE BOARD OF IMMIGRATION APPEALS FAVOR THE ESTABLISH A LIFE TEST

The Code of Federal Regulations and the cases from the Board of Immigration Appeals list factors to determine when a couple entered a marriage in good faith.<sup>138</sup> These factors support the Establish A Life Test

---

marriage fraud rings that may organize tens or hundreds of fraudulent marriages).

132. 132 CONG. REC. S41, 3786 (daily ed. Apr. 8, 1986) (statement of Sen. Simon).

133. See *United States v. Darif*, 446 F.3d 701, 710 (7th Cir. 2006) (holding that an alien who intended to establish a life with his or her spouse could also have married for the purpose of evading immigration laws); *Orellana-Blanco*, 294 F.3d at 1151 (stating that marrying for a green card does not make the marriage a sham if the couple still intends to establish a life together).

134. See *In re Kim*, 5 Immig. Rptr. B1-62 (B.I.A. Oct. 13, 1987).

135. See *Orellana-Blanco*, 294 F.3d at 1145, 1151.

136. See *Ghaly v. INS*, 48 F.3d 1426, 1427-28 n.1 (7th Cir. 1995) (noting that the defendant attempted contractual marriage fraud in two previous marriages, but his first two wives had both withdrawn the petitions to adjust his immigrant status because they felt the marriages were fraudulent).

137. See *In re Betikua*, 21 Immig. Rptr. B1-244 (B.I.A. Apr. 4, 2000) (Rosenberg, Bd. Member, dissenting).

138. 8 C.F.R. § 216.5(e)(2) (2006) (suggesting evidence a director may examine to determine if an applicant qualifies for a waiver because the marriage was in good faith, which includes documentation of combined financial assets and liabilities, documentation concerning the time spent living together, birth certificates of children born in the marriage, and any other pertinent evidence); *In re Laureano*, 19 I. & N. Dec. 1 (B.I.A. 1983) (listing possible evidence to prove the parties' intent at the time of the marriage, including joint insurance policies, property leases with the couple's signatures, joint income tax forms, evidence regarding courtship, the wedding ceremony, and shared experiences).

because they focus on the time after the marriage.<sup>139</sup> For example, the opening of a savings account can occur quickly and with a small sum of money, but the purchase of other assets like a home or car carry larger liabilities and are undertaken by couples who usually legitimately intend to live together.<sup>140</sup> In addition, a couple who married to evade immigration laws could still decide to live together for the benefits of having a roommate, while a couple in a legitimate marriage may live separately because they have children from previous marriages.<sup>141</sup> Although the presence of these factors along with children born to the marriage are indicative of establishing a life together, their absence is not probative of a marriage created solely for evading immigration laws.<sup>142</sup> Unfortunately, by looking at whether the marriage was for the purpose of evading immigration laws and not whether the couple intended to establish a life together, the court may give insufficient weight to these factors.<sup>143</sup> Additionally, the Evade The Law Test unfairly penalizes arranged marriages because of the lack of courtship and the possible age disparity.<sup>144</sup> Because most of the factors relate to the time after the marriage, it makes sense that any evidence the couple presents relating to this time should determine if they intended to establish a life together at the time they exchanged their wedding vows.<sup>145</sup> Finally, the fact that the timing of a

---

139. See 8 C.F.R. §§ 216.5(e)(2)(ii)&(iii) (2006) (considering time of cohabitation and if the couple had new children after the wedding as evidence of good faith intentions when marrying).

140. See *In re Phillis*, 15 I. & N. Dec. 385 (B.I.A. 1975) (finding that the marriage was fraudulent in part because the couple never lived together as husband and wife). But see *In re Iturralde-Reinoso* 18 Immig. Rptr. B1-240 (B.I.A. Mar. 4, 1998) (accepting petitioner's argument that she had insufficient time to create joint accounts before the consulate interviews, that it is within her discretion to keep her prior name, and that converting her assets to her new marital name would require significant expenses, as reasons petitioner and immigrant spouse lacked documentation of combined assets).

141. Cf. *In re Peterson*, 12 I. & N. Dec. 663 (B.I.A. 1968) (finding the marriage legitimate for immigration purposes because the couple intended a valid and lasting marital relationship, even though they refrained from sexual intercourse due to advanced age and bad health).

142. See, e.g., *Cho v. Gonzales*, 404 F.3d 92, 103-04 (1st Cir. 2005); see also *Roe v. Wade*, 410 U.S. 113, 153 (1973) (explaining that a couple may choose not to have a child for many reasons, including physical harm to mother and child, stress associated with the inability to provide or care for the child, or the psychological harm to all concerned of an unwanted child).

143. See *Cho*, 404 F.3d at 104; see also *Ghaly v. INS*, 48 F.3d 1426, 1438 (7th Cir. 1995) (Posner, J., concurring) (pointing out the irrationality of lower courts' reasoning because it implies that the INS is not allowed to consider rebuttal evidence in determining sham marriages).

144. See, e.g., *Roos v. U.S. Attorney General*, 167 Fed. Appx. 752, 753 (11th Cir. 2006) (per curiam).

145. See *Rodriguez v. INS*, 204 F.3d 25, 27 (1st Cir. 2000); see also 8 C.F.R. § 216.5(e)(2) (2006) (considering that the a period of cohabitation, creation of combined financial documents after the marriage, and children born to the marriage constitutes evidence of a good faith marriage).

marriage can be suspicious should not be dispositive when considering marriage fraud because some people can fall in and out of love quickly.<sup>146</sup>

Courts may have a difficult time determining what an alien's motivation was at the time of the marriage because, in general, the only evidence relevant to this determination is circumstantial or hearsay.<sup>147</sup> Any consideration of whether the marriage was for evading immigration laws should be made in conjunction with an inquiry into the intent to establish a life together, as in *Lutwak*.<sup>148</sup> The Establish A Life Test is more appropriate than the Evade The Law Test because the documentation requested by the courts and the INS does not demonstrate if the couple is attempting to evade immigration laws, but it is circumstantial evidence supporting the couple's intention to establish a life together.<sup>149</sup>

#### V. THE EVADE THE LAW TEST IGNORES THE CONGRESSIONAL GOAL OF KEEPING FAMILIES TOGETHER

Alarming, courts applying the Evade The Law Test show a disregard for the congressional goal of keeping the family unit together, even when an alien remarries and starts a legitimate family.<sup>150</sup> Courts interpret suspect timing and marital difficulties as marriage fraud under the Evade The Law Test and will separate couples that married for the right reasons but are experiencing difficulties.<sup>151</sup> If an alien marries for the purpose of obtaining an adjustment of immigration status and establishes a life with his or her spouse, the denial of residential status will break apart the family unit.<sup>152</sup> Fortunately, some courts have had difficulty finding marriage fraud when using the Evade The Law Test where a couple married for evading the immigration laws but apparently established a life together.<sup>153</sup>

---

146. See *Cho*, 404 F.3d at 103 (finding the closeness of a couple's wedding and an alien spouse's visa expiration dates as inconclusive of marriage fraud on its own, especially when considering that couple had a two-year, long-distance courtship).

147. See *United States v. Orellana-Blanco*, 294 F.3d 1143, 1145-46 (9th Cir. 2002).

148. 344 U.S. 604, 613 (1953); see *Cho*, 404 F.3d at 103 (1st Cir. 2005) (holding that intending to establish a life together makes a marriage legitimate, even if securing an immigration benefit was a factor that led to the decision to marry); *Bark v. INS*, 511 F.2d 1200, 1202 (9th Cir. 1975) (stating that conduct after the marriage is relevant but not dispositive of the couple's intent at the time of the wedding).

149. See *In re Contreras-Contreras*, 25 Immig. Rptr. B1-148 (B.I.A. Apr. 25, 2002).

150. See *Haddad v. INS*, 7 Fed. Appx. 420, 424 (6th Cir. 2001); *Azizi v. Thornburgh*, 908 F.2d 1130, 1139 (2d Cir. 1990) (Cardamone, J., dissenting).

151. See *Cho*, 404 F.3d at 103; *Bark*, 511 F.2d at 1202 (finding that separation after marriage does not conclusively show that the couple never intended to enter into a bona fide marriage because couples separate for different reasons like military service, educational needs, job opportunities, illness, and financial or domestic difficulties).

152. See *United States v. Darif*, 446 F.3d 701, 703, 710 (7th Cir. 2006); *Bazzi v. Ashcroft*, 118 Fed. Appx. 953, 960 (6th Cir. 2004). But see *In re X*, 9 Immig. Rptr. B2-87 (Admin. App. Unit Oct. 23, 1991).

153. See *United States v. Dedhia*, 134 F.3d 802, 804 (6th Cir. 1998) (pointing out that the investigation into marriage fraud did not begin until the wife filed a complaint

## CONCLUSION

The Establish A Life Test resembles the definition the Supreme Court used to determine if a marriage is valid for immigration purpose.<sup>154</sup> One of the concerns addressed by the IMFA was the increase in the number of aliens using fraudulent marriages to obtain legal residential status in the United States.<sup>155</sup> Enforcing IMFA, however, should not come at the expense of consistent and fair adjudication of marriage fraud cases.<sup>156</sup> The Establish A Life Test provides courts a method that does not violate a citizen's fundamental right to marriage and privacy. This is important because one of the spouses is an American citizen or permanent resident and the INS considers the alien spouse to have no standing in the process to adjust their status.<sup>157</sup> The Establish A Life Test allows distinctions between aliens and non-aliens, and a couple that does not establish a life together will reveal the marriage was for the purpose of evading immigration laws. Therefore, the Supreme Court can avoid deciding if Congress's plenary powers over matters of naturalization take precedence over fundamental rights.

Moreover, factors outlined in the Code of Federal Regulations and Board of Immigration Appeals decisions support the Establish A Life Test because they mainly look at the time after the wedding.<sup>158</sup> Similarly, the two-year conditional period provides time for the couple to create their new life together and deters marriages solely for evading the immigration laws.<sup>159</sup>

---

with the INS that her husband deceived her and after her ex-husband gained permanent status).

154. See *Lutwak v. United States*, 344 U.S. 604, 611-12 (1953) (defining the common understanding of marriage as one where the two people have embarked on creating a life together and assume specific responsibilities); *United States v. Orellana-Blanco*, 294 F.3d 1143, 1151 (9th Cir. 2002) (explaining that a marriage is legitimate for immigration purposes as long as the couple intends to establish a life together).

155. See *Almario v. INS*, 872 F.2d 147, 149 (6th Cir. 1989).

156. Cf. *United States v. Higdon*, 418 F.3d 1136, 1148 (11th Cir. 2005) (Tjoflat, J., dissenting) (denouncing selective application of a constitutional rule as violative of the tradition of treating people in similar circumstances in the same manner).

157. See *Cho v. Gonzales*, 404 F.3d 96, 97 (1st Cir. 2005) (explaining that a marriage between an alien and a United States citizen entitles the alien to petition for conditional residency in the United States); HANDBOOK, *supra* note 19 (stating that the petition process is between the citizen or permanent resident and the INS).

158. See 8 C.F.R. § 216.5(e)(2) (2006) (listing factors to determine if a bona fide marriage exists, such as documentation of combined finances and proof of cohabitation); HANDBOOK, *supra* note 19 (mentioning that if the family and friends are unaware of the marriage or if the couple has not lived together since the marriage, then it is likely that the marriage is fraudulent).

159. See *In re Iturralde-Reinoso*, 18 Immig. Rptr. B1-240 (B.I.A. Mar. 4, 1998) (according significant weight to the petitioner-wife's statement explaining that bank accounts remained in her name because changing all of her assets to a new marital name required significant expense, and that she and the beneficiary had been married for too short a time to have joint accounts).

Courts should adopt the Establish A Life Test over the Evade The Law Test because the first test looks at the couple's intent and recognizes that numerous motivations for marriage exist.<sup>160</sup> Finally, courts using the Evade The Law Test have recognized that they sometimes split families apart.<sup>161</sup> This goes against Congress's goal of keeping families together through the immigration laws. Courts should allow families that establish a life together to stay together by using the Establish A Life Test.<sup>162</sup>

---

160. *See* *United States v. Tagalicud*, 84 F.3d 1180, 1184-85 (9th Cir. 1996).

161. *Bazzi v. Ashcroft*, 118 Fed. Appx. 953, 960 (6th Cir. 2004).

162. *See Senate Hearing, supra* note 1, at 1-2 (statement of Sen. Simpson) (asserting that the most important reunification is of husband and wife and acknowledging that the United States immigration system advances the goal of uniting families).