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Overcorrecting the Purported Problem of Taking Child Brides in Polygamist Marriages: The Texas Legislature Unconstitutionally Voids All Marriages by Texans Younger than Sixteen and Criminalizes Parental Consent.

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OVERCORRECTING THE PURPORTED PROBLEM OF TAKING CHILD BRIDES IN POLYGAMIST MARRIAGES: THE TEXAS LEGISLATURE UNCONSTITUTIONALLY VOIDS ALL MARRIAGES BY TEXANS YOUNGER THAN SIXTEEN AND CRIMINALIZES PARENTAL CONSENT

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I. INTRODUCTION

In the 79th Regular Legislative Session, Texas lawmakers amended and added numerous provisions to both the Texas Family Code and Texas Penal Code relating to the status of marriage. One of the changes was the inclusion of a section in the Family Code that voids a marriage if either party to the marriage is younger than sixteen years of age.[1] In addition, the legislators added criminal penalties to other laws relating to marriage.[2] Specifically, a parent is not only prohibited from giving consent for a child younger than sixteen to marry,[3] but the parent faces a third-degree felony charge if he or she knowingly provides such consent.[4] The legislative changes to the Texas Family Code and Penal Code were introduced by Representative Harvey Hilderbran of Kerrville in House Bill 3006 (H.B. 3006).[5] Subsequently, H.B. 3006 was incorporated into massive Senate Bill 6 (S.B. 6), the legislature's overhaul of the much-criticized Department of Family and Protective Services.[6] But what state interest did the legislature seek to advance by nullifying what was once a valid marriage and criminalizing what was once a parent's prerogative?[7]

The legislature voided certain underage marriages in Texas because of reports "that a polygamist cult in Texas had some parents regularly consenting to marriage of their [fourteen-] and [fifteen-

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1. TEX. FAM. CODE ANN. § 6.205 (Vernon Supp. 2005).

2. *See, e.g., id.* § 2.202(d) (making it illegal for an individual to knowingly marry a minor and classifying the offense as a third-degree felony); TEX. PEN. CODE ANN. § 25.02(c) (Vernon Supp. 2005) (stating that sexual intercourse between first cousins is a second-degree felony).

3. *See* TEX. FAMILY CODE ANN. § 2.102(a) (Vernon Supp. 2005) (allowing for parental consent for a child between the ages of sixteen and eighteen).

4. *Id.* § 2.102(h).

5. Tex. H.B. 3006, 79th Leg., R.S. (2005).

6. Tex. S.B. 6, 79th Leg., R.S., 2005 Tex. Sess. Law Serv. 621, 713-18.

7. Prior to the legislative changes, a marriage by a party younger than sixteen was presumed valid but could be invalidated under certain conditions. *See* TEX. FAM. CODE ANN. § 1.101 (Vernon 1998) (including a public policy concern that "every marriage entered into in [Texas] is presumed to be valid"); *see also id.* §§ 6.101-.102 (providing the means by which an annulment can be procured for a marriage entered into by a minor). *But cf.* TEX. FAM. CODE ANN. §§ 6.101-.102 (Vernon Supp. 2005) (changing the minimum age requirement from fourteen to sixteen, but maintaining all other means to obtain annulment of marriage). Prior to September 1, 2005, a parent was allowed to consent to the marriage of a child who was between the ages of fourteen and eighteen. TEX. FAM. CODE ANN. § 2.102(a) (Vernon 1998).

]year-old children."[8] In response, the stated purpose of H.B. 3006 was "to help protect Texas communities and Texas women and children" by regulation of "those activities associated with the practice of bigamy and polygamy."[9] To prevent cult members from perverting Texas marriage laws, the legislature, among other changes, raised the minimum marriage age to sixteen, meaning parents may no longer consent to the marriage of children fifteen years old or younger.[10] The question raised by these legislative changes, which were enacted to prevent an abrogation of the marriage relationship, is whether they are compatible with the public policy favoring marriage in Texas and the constitutionally-protected rights of young Texans and their parents.

II. THE STATE INTEREST

A. *The Testimony: The Problem of Child Brides in Polygamist Marriages*

On April 13, 2005, the House Committee on Juvenile Justice and Family Issues held a public hearing on H.B. 3006.[11] The committee heard impassioned testimony from four witnesses—the Attorney General of Utah,[12] a private investigator,[13] an author,[14] and the

8. JOHN J. SAMPSON ET AL., SAMPSON & TINDALL'S TEXAS FAMILY CODE ANNOTATED § 2.102 cmt. (Aug. 2005 ed.).

9. Hearing on Tex. H.B. 3006 Before the House Comm. on Juvenile Justice & Family Issues, 79th Leg., R.S. (Apr. 13, 2005) (statement of Rep. Harvey Hilderbran), *available at* http://www.house.state.tx.us/committees/broadcasts.php?session=79&cmte=340 (follow Apr. 13, 2005 archived broadcast hyperlink) (audiotape on file with the *St. Mary's Law Journal*).

10. TEX. FAM. CODE ANN. § 2.102(h) (Vernon Supp. 2005).

11. *See* Hearing on Tex. H.B. 3006 Before the House Comm. on Juvenile Justice & Family Issues, 79th Leg., R.S. (Apr. 13, 2005), *available at* http://www.house.state.tx.us/committees/broadcasts.php?session=79&cmte=340 (follow Apr. 13, 2005 archived broadcast hyperlink) (audiotape on file with the *St. Mary's Law Journal*).

12. The Attorney General of Utah, Mark Shurtleff, testified in favor of H.B. 3006. *See* State of Utah Office of the Attorney General, Attorney General Mark Shurtleff – Biography, http://www.attorneygeneral.uta.gov/bio.html (providing Mark Shurtleff's biography) (on file with the *St. Mary's Law Journal*).

13. Private Investigator Sam Brower testified in favor of H.B. 3006. *See* Rachel Olson, Private Eye Seeks FLDS Prophet, http://www.religionnewsblog.com/8412 (identifying Sam Brower as an investigator hired by a law firm representing Brent Jeffs, nephew of Warren Jeffs) (on file with the *St. Mary's Law Journal*).

14. Author Jon Krakauer testified in favor of H.B. 3006. *See* Jon Krakauer – Biography, http://www.bookbrowse.com/biographies/index.cfm?author_number=123 (providing an author biography) (on file with the *St. Mary's Law Journal*).

publisher of a small newspaper in Eldorado, Texas[15]—who sounded the alarm that a radical religious cult had relocated some of its members to a well-guarded, recently built compound near Eldorado, Texas.[16] The religious group had targeted Texas because of its "weak laws,"[17] and had secured a foothold in the small community in Schleicher County where it was purportedly practicing bigamy, polygamy, child abuse, child rape, welfare fraud, and de facto slavery.[18] If the group followed its usual mode of operation, as it had on the border between southern Utah and northern Arizona, it would eventually take over the town of Eldorado.[19]

According to the testimony of Jon Krakauer, author of *Under the Banner of Heaven: A Story of Violent Faith*, the Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS), broke away from the Mormon Church about one hundred years ago because they believe that polygamy is the "key to entering the celestial kingdom."[20] Warren Jeffs, described as "an evil, evil man," leads the group which Krakauer asked the committee to think of as an

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15. Randy Mankin, publisher of *The Eldorado Success*, testified in favor of H.B. 3006. *See* The Eldorado Success Home Page, http://www.myeldorado.net/ (describing *The Eldorado Success* as: "The Voice of Eldorado and Schleicher County Since 1901").

16. *See* Hearing on Tex. H.B. 3006 Before the House Comm. on Juvenile Justice & Family Issues, 79th Leg., R.S. (Apr. 13, 2005) (statement of Jon Krakauer), *available at* http://www.house.state.tx.us/committees/broadcasts.php?session=79&cmte=340 (follow Apr. 13, 2005 archived broadcast hyperlink) (stating that the compound in Schleicher County, near Eldorado, Texas, includes a 29,000 square foot house for the "prophet" Warren Jeffs and a huge temple in west Texas) (audiotape on file with the *St. Mary's Law Journal*); *see also Hilderbran's 30-06 Bill Gathers Momentum in Austin*, ELDORADO SUCCESS, Apr. 21, 2005, http://www.childbrides.org/texas_YFZ_Hilderbrans_bill_gains_momentum.html (describing H.B. 3006 as a "bill . . . prompted by developments on the YFZ Ranch near Eldorado where the openly polygamous FLDS is currently building a new town") (on file with the *St. Mary's Law Journal*).

17. *See* Hearing on Tex. H.B. 3006 Before the House Comm. on Juvenile Justice & Family Issues, 79th Leg., R.S. (Apr. 13, 2005) (statement of Harvey Hilderbran), *available at* http://www.house.state.tx.us/committees/broadcasts.php?session=79&cmte=340 (follow Apr. 13, 2005 archived broadcast hyperlink) (reporting that, while Texas has anti-bigamy and anti-polygamy laws, they have been difficult to enforce) (audiotape on file with the *St. Mary's Law Journal*).

18. *Id.*

19. *See id.* (estimating that several thousand people could occupy the compound in the next few years).

20. *Id.* (statement of Jon Krakauer). Mr. Krakauer emphasized that it is important not to confuse the FLDS with the present-day Church of Jesus Christ of Latter Day Saints, also known as Mormons. *Id.* Krakauer said this fundamentalist group believes that it is the true Mormon Church and that the present-day Mormons are their greatest enemies. *Id.*

"organized crime" ring rather than a religion.[21] According to the witnesses in favor of H.B. 3006, Jeffs is referred to as a "prophet," and he holds complete power over this theocracy.[22] Jeffs calls Texas the "new Zion, where Jesus is coming back," and "the most fanatical followers" are rewarded by being allowed to move to the church compound located fifty miles south of San Angelo, Texas.[23]

The Attorney General of Utah, Mark Shurtleff, who said he felt badly about the exportation of Utah's problems to Texas, described the role of polygamy within the FLDS as the "centerpiece of their religion."[24] According to the FLDS's teachings, "a man cannot be exalted in the kingdom of heaven unless he has three wives."[25] Furthermore, a woman "cannot be exalted in the kingdom of heaven without a husband."[26] In this community, "all the young girls are marrying the older men."[27] "In fact," the Attorney General testified, "the purpose of a woman is to have children, and they start them at fourteen, fifteen, and sixteen and each man is

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21. *See* Hearing on Tex. H.B. 3006 Before the House Comm. on Juvenile Justice & Family Issues, 79th Leg., R.S. (Apr. 13, 2005) (statement of Jon Krakauer), *available at* http://www.house.state.tx.us/committees/broadcasts.php?session=79&cmte=340 (follow Apr. 13, 2005 archived broadcast hyperlink) (making an analogy to the Mafia and the legislation used to combat organized crime) (audiotape on file with the *St. Mary's Law Journal*). The list of Jeffs's sins, according to witness testimony, included sodomy with a five-year-old boy, pedophilia, polygamy, child abuse, misuse of a charitable trust, tax evasion, racism, and violation of environmental standards. *Id.* (statements of Rep. Harvey Hilderbran, Utah Attorney General Mark Shurtleff & Sam Brower).

22. *Id.* (statement of Jon Krakauer).

23. *Id.*

24. *Id.* (statement of Utah Attorney General Mark Shurtleff) (testifying that FLDS beliefs are based on the principle of polygamy).

25. *Id.*

26. Hearing on Tex. H.B. 3006 Before the House Comm. on Juvenile Justice & Family Issues, 79th Leg., R.S. (Apr. 13, 2005) (statement of Utah Attorney General Mark Shurtleff), *available at* http://www.house.state.tx.us/committees/broadcasts.php?session=79&cmte=340 (follow Apr. 13, 2005 archived broadcast hyperlink) (audiotape on file with the *St. Mary's Law Journal*).

27. *Id.* When questioned by a committee member about the fate of the young men of the community if the young girls are forced to marry older men, Shurtleff and Krakauer said (at different times during the hearing) they had accounts of some of the boys being escorted to "the edge of the desert" and cast out of the community. *Id.* (statements of Utah Attorney General Mark Shurtleff & Jon Krakauer). The role of the young men who are not banished from the compound is to work like slaves all day on construction projects for the church, such as Warren Jeffs's twenty-nine thousand square foot home and the "huge temple standing out in the middle of nowhere" in west Texas. *Id.* (statement of Jon Krakauer).

hoping like Warren Jeffs, their leader, to have upwards of a hundred kids."[28]

Shurtleff said the leaders of the FLDS would "sit down in [his] office and look [him] in the face and say, '[w]e do not marry fourteen- and fifteen-year-olds. That's absolutely forbidden.'"[29] Shurtleff testified the statements were absolute lies.[30] Shurtleff described the successful prosecution of one polygamist member of the FLDS, Tom Greene, who had "twelve- and thirteen-year-old brides."[31] In addition, Krakauer testified that within the religion "there's this thing called 'lying for the Lord'" if lying is "in the interest of the religion."[32]

Parent members of the group consent to the bigamous marriages of their young daughters.[33] Attorney General Shurtleff recounted the story of one girl:

> [She] wanted to be married. She consented to the marriage; her parents wanted it; and, then the fact of the matter was, that this woman, sixteen years-old, being told by her prophet, her sister, her brother-in-law (who is going to marry her), and both her parents, "if you do not marry this man, you will burn in hell." What does a sixteen year-old do under those circumstances?[34]

The witnesses said the women of the community suffered.[35] They were treated like chattel,[36] dressed in clothes from head to foot even in warm weather, denied education, kept in the com-

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28. *Id.* (statement of Utah Attorney General Mark Shurtleff).

29. *Id.*

30. *Id.*

31. Hearing on Tex. H.B. 3006 Before the House Comm. on Juvenile Justice & Family Issues, 79th Leg., R.S. (Apr. 13, 2005) (statement of Utah Attorney General Mark Shurtleff), *available at* http://www.house.state.tx.us/committees/broadcasts.php?session=79&cmte=340 (follow Apr. 13, 2005 archived broadcast hyperlink) (audiotape on file with the *St. Mary's Law Journal*).

32. *See id.* (statement of Jon Krakauer) (describing the belief among members of the FLDS that lying under these circumstances is *righteous*).

33. *Id.* (statement of Utah Attorney General Mark Shurtleff). Shurtleff told the story of one young girl who fled the compound because she was being forced to marry an older man. *Id.* The girl was escorted back to the compound by the sheriff because there was no "imminent threat." *Id.* Reportedly, the young girl was never heard from again. *Id.*

34. *Id.*

35. *Id.* (statements of Rep. Harvey Hilderbran, Utah Attorney General Mark Shurtleff, Jon Krakauer, & Sam Brower).

36. *See* Hearing on Tex. H.B. 3006 Before the House Comm. on Juvenile Justice & Family Issues, 79th Leg., R.S. (Apr. 13, 2005) (statement of Rep. Harvey Hilderbran), *available at* http://www.house.state.tx.us/committees/broadcasts.php?session=79&cmte=

pound except for occasional group trips to Wal-Mart,[37] and forced to work long hours performing manual labor.[38] The most egregious wrong inflicted upon the women was their subjugation to polygamist marriages, often when they were very young, with the expectation that they would produce many children for the group.[39]

One committee member asked about the methods used by FLDS members to marry more than one wife. Representative Senfronia Thompson asked the sponsor of the legislation, Representative Hilderbran, "[d]o they go around and make applications for marriage licenses and things like that?"[40] Hilderbran responded:

> As I understand it, . . . how they've gotten around polygamy laws is they have one wife that's recognized by law of the state and the rest of the wives are church wives or celestial wives, but the problem there is they use that to protect themselves against polygamy laws, but then they're having children with minors that the law . . . [does not recognize] as their wives. So to me that's shouting child rape, statutory rape, and everything else associated with sexual assault. But it's hard to enforce.[41]

Representative Hilderbran also noted in his opening statement, "[t]he Texas Legislature, Texas government, Texans in general, have never anticipated having more of a problem with polygamists and the other issues in crimes associated with their activities and their practices."[42] No one appeared at the committee hearing on

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340 (follow Apr. 13, 2005 archived broadcast hyperlink) (testifying that women and children "are chattel in this religion") (audiotape on file with the *St. Mary's Law Journal*).

37. *Id.* (statement of Sam Brower).

38. *See id.* (statement of Utah Attorney General Mark Shurtleff) (describing the types of manual labor FLDS members perform).

39. *See id.* (explaining that the only purpose of FLDS women, some as young as fourteen, is to please their men sexually and bear children).

40. *Id.* (statement of Rep. Senfronia Thompson).

41. *See* Hearing on Tex. H.B. 3006 Before the House Comm. on Juvenile Justice & Family Issues, 79th Leg., R.S. (Apr. 13, 2005) (statement of Rep. Harvey Hilderbran), *available at* http://www.house.state.tx.us/committees/broadcasts.php?session=79&cmte=340 (follow Apr. 13, 2005 archived broadcast hyperlink) (testifying that FLDS members in polygamist marriages call each other "husband and wife" and live together as if married, but claim no marriage when faced with polygamist prosecution) (audiotape on file with the *St. Mary's Law Journal*).

42. *Id.*

behalf of the FLDS, nor did anyone testify positively about any of its activities.[43]

Toward the end of the legislative hearing, Representative Toby Goodman, Vice Chair of the House Committee on Juvenile Justice and Family Issues, anticipated the counterargument to the proposed legislation:

> Well, I mean, . . . fourteen is too young, even with parental consent which is what current law is in Texas. Okay, your problem is the fifteen year-old girl who gets pregnant and the parents of the boy and the parents of the mom decide they should be husband and wife. I mean, that's the argument you're going to have on the other side of that. I agree it needs to be moved to sixteen.[44]

Perhaps the greatest fear, and the impetus for the recent legislative changes, was that this group could, and would, take over the small Texas community of Eldorado. The witnesses estimated that between two and four hundred members of the FLDS were in the Eldorado compound as of April 2005, but feared that several thousand would eventually relocate.[45] On the one hand, the group was described as a "closed secretive community" which the State of Utah had largely ignored for fifty years, while on the other hand, they were described as "politically active."[46] In the communities of Hildale, Utah, and Colorado City, Arizona, the church members occupied the positions of mayor, sheriff, police chief, and members

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43. Hearing on Tex. H.B. 3006 Before the House Comm. on Juvenile Justice & Family Issues, 79th Leg., R.S. (Apr. 13, 2005), *available at* http://www.house.state.tx.us/committees/broadcasts.php?session=79&cmte=340 (follow Apr. 13, 2005 archived broadcast hyperlink) (audiotape on file with the *St. Mary's Law Journal*). Warren Jeffs is currently on the FBI's most-wanted fugitive list. Federal Bureau of Investigation, *Wanted by the FBI*, http://www.fbi.gov/mostwant/fugutive/feb2006/febjeffs.htm (last visited Feb. 25, 2006). A federal arrest warrant was issued for him by the U.S. District Court for the District of Arizona on June 27, 2005, on two counts of sexual assault of a minor, conspiracy to commit sexual conduct with a minor, and unlawful flight to avoid prosecution. *Id.* No one but FLDS members has seen Jeffs since approximately 2004. *Id.*

44. Hearing on Tex. H.B. 3006 Before the House Comm. on Juvenile Justice & Family Issues, 79th Leg., R.S. (Apr. 13, 2005) (comments of Rep. Toby Goodman), *available at* http://www.house.state.tx.us/committees/broadcasts.php?session=79&cmte=340 (follow Apr. 13, 2005 archived broadcast hyperlink) (audiotape on file with the *St. Mary's Law Journal*).

45. *See id.* (statements of Rep. Harvey Hilderbran & Utah Attorney General Mark Shurtleff) (stressing that the majority of the sector that will relocate to Texas are women and children).

46. *Id.* (statement of Utah Attorney General Mark Shurtleff).

of the school and hospital boards.[47] Typically, only one candidate would run for a political office and that one candidate would receive unanimous support.[48] Shurtleff recalled meeting members of the FLDS at the Republican Convention when he was running for Attorney General of Utah.[49] The owner and publisher of *The Eldorado Success* newspaper, Randy Mankin, testified that the dangers of the FLDS were "on our doorstep," and these dangers have come to Texas.[50] He stated that Eldorado has only 1000 citizens and that there are only a total of 3000 people in Schleicher County.[51] He worried that "they could take us over quickly . . . we're just one little county out there."[52] Witness Krakauer concluded that "[Texas] need[s] laws—special laws—to deal with this group."[53]

B. *Texas's Power to Regulate Marriage*

After hearing testimony about the plight of women, especially young women, within the FLDS compound, the Committee on Juvenile Justice and Family Issues of the Texas House of Representatives took action to strengthen Texas's purportedly weak laws so that Texas communities and Texas women and children would be protected from bigamy, polygamy, and their attendant crimes. The committee ultimately recommended the passage of H.B. 3006, legislation "relating to certain requirements and limitations relating to a person's age, . . . marital status, residency, and relations by consanguinity and affinity. . . [and] providing criminal penalties."[54] The Regular Session of the 79th Legislature of the State of Texas

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47. *Id.* Shurtleff testified that only recently was he able to get the Chief of Police of Hildale decertified. *Id.* Among the reasons for the decertification was that he was a polygamist and he failed to report child sexual assault charges by members of his police force. *Id.*

48. *Id.*

49. Hearing on Tex. H.B. 3006 Before the House Comm. on Juvenile Justice & Family Issues, 79th Leg., R.S. (Apr. 13, 2005) (statement of Utah Attorney General Mark Shurtleff), *available at* http://www.house.state.tx.us/committees/broadcasts.php?session=79&cmte=340 (follow Apr. 13, 2005 archived broadcast hyperlink) (audiotape on file with the *St. Mary's Law Journal*).

50. *See id.* (stressing the urgency and necessity of Representative Hilderbran's legislation).

51. *Id.*

52. *Id.*

53. *Id.* (statement of Jon Krakauer).

54. Tex. H.B. 3006, 79th Leg., R.S. (2005).

passed numerous amendments to existing laws and numerous new laws to address the purported child bigamy problem.

Among the changes made to protect Texas women and children from polygamy was the passage of provisions which void a marriage by a party under the age of sixteen[55] and prevent a parent from consenting to such a marriage.[56] Through the exercise of its police powers—the "grant of authority from the people to their government agents for the protection of the health, safety, comfort, and welfare of the public"[57]—Texas can clearly regulate marriage.[58] "[M]arriage is a social relation subject to the State's police power . . . ."[59] Throughout the history of the state, Texas has regulated not only the minimum age at which a party can marry, but also the minimum age of a child for whom a parent may give consent for marriage.[60] These designations are presumed valid; legislators are presumed to have "acted carefully, deliberately, intelligently, openly, purposefully, and exercised discretion in a prudent and wise manner; the legislature is not ever presumed to have done a useless, futile act."[61] As such, the State of Texas may enact, pursuant to its police power, legislation that regulates mar-

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55. TEX. FAM. CODE ANN. § 6.205 (Vernon Supp. 2005).

56. *Id.* § 2.102(h).

57. Grothues v. City of Helotes, 928 S.W.2d 725, 729 n.6 (Tex. App.—San Antonio 1996, no writ) (en banc).

58. *See* Cleveland v. United States, 329 U.S. 14, 16 (1946) (noting that "the regulation of marriage is a state matter"); Potter v. Murray City, 585 F. Supp. 1126, 1137 (D. Utah 1984) (supporting the proposition that states have the power to regulate marriage in any manner so long as the regulation is consistent with the United States Constitution), *aff'd as modified by* 760 F.2d 1065 (10th Cir. 1985).

59. Loving v. Virginia, 388 U.S. 1, 7 (1967) (citing Maynard v. Hill, 125 U.S. 190, 211-13 (1888)).

60. *See* Robertson v. Cole, 12 Tex. 356, 362 (1854) (prohibiting a court clerk from issuing a marriage license without parental consent unless the male applicant was twenty-one and the female was eighteen); Hardy v. State, 37 Tex. Crim. 55, 57-58, 38 S.W. 615, 615-16 (1897) (holding that males under sixteen and females under fourteen shall not marry); Simon v. State, 31 Tex. Crim. 186, 202, 20 S.W. 399, 401 (1892) (concluding that any marriage, despite the age of the parties, regularly made according to the common law is valid); Kingery v. Hintz, 124 S.W.3d 875, 877-78 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (holding that a minor may not enter into an informal marriage); W. Union Tel. Co. v. Procter, 6 Tex. Civ. App. 300, 303, 25 S.W. 811, 812 (1894) (holding that a female between the ages of fourteen and eighteen needs parental permission to marry).

61. Deep E. Tex. Reg'l Mental Health & Mental Retardation Servs. v. Kinnear, 877 S.W.2d 550, 563 (Tex. App.—Beaumont 1994, no writ) (citing Sax v. Votteler, 648 S.W.2d 661, 664 (Tex. 1983)).

riage, including legislation concerning parental consent and the appropriate age for marriage.

Additionally, Texas may legislate to prevent polygamist marriages because polygamy is illegal in the United States, and members of the FLDS do not have a constitutional right to practice polygamy. In 1878, the United States Supreme Court in *Reynolds v. United States*[62] settled the question of whether Mormons could practice polygamy as an expression of their religious freedom.[63] George Reynolds was accused of violating a statute of the Territory of Utah: "Every person having a husband or wife living, who marries another . . . is guilty of bigamy."[64] Evidence was presented that while married to Mary Ann, George married Amelia.[65] George testified that he was a member of the Church of Jesus Christ of Latter Day Saints, and that it was his duty to practice polygamy.[66] If he failed in his duty, he argued, he faced damnation in the life to come.[67] The trial court declined to give George's requested jury instruction: "[I]f they found that he had married in pursuance of and conformity with what he believed at the time to be a religious duty, their verdict should be 'not guilty.'"[68] In an opinion which has stood since 1848, the Court decided that George's religious beliefs could not excuse his crime of bigamy. The Court held, "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[69] Thus, Texas has the police power to enact laws that combat the problem of polygamy.

C. *New Legislation: The Means to Bolster Texas's "Weak Laws"*

After hearing the alarming testimony, the Texas Legislature took action and passed laws—special laws—to deal with the polygamist practices of the migrating FLDS members. A bigamous marriage, defined by the Family Code as a marriage "entered into when either party has an existing marriage to another person that has not

62. 98 U.S. 145 (1848).
63. *See* Reynolds v. United States, 98 U.S. 145, 166-67 (1848).
64. *Id.* at 150.
65. *Id.*
66. *Id.* at 161.
67. *Id.* at 161-62.
68. *Reynolds*, 98 U.S. at 150.
69. *Id.* at 166.

been dissolved by legal action or terminated by the death of the other spouse," is void in Texas.[70] Neither the definition nor the status of bigamy was changed by the 79th Legislature; however, the penalty for the crime of bigamy was enhanced from that of a Class A misdemeanor to that of a second-degree felony.[71] The penalty was raised to a first-degree felony if a party to the bigamous marriage is younger than sixteen.[72] Further, a defendant can no longer raise as a defense to bigamy the belief that a prior marriage was void or dissolved without substantiating evidence such as a death certificate or court order.[73]

Because the legislature was concerned with FLDS members' practices of child bigamy through parental consent to bigamous marriages, the most radical changes were made to the Texas Family Code. The legal age of marriage by parental consent was raised from fourteen to sixteen.[74] A parent who knowingly provides consent for a child under sixteen to marry commits a third-degree felony.[75] Effective September 1, 2005, the 79th Legislature made a marriage void if either party to the marriage is younger than sixteen years of age.[76] The legislature also amended the annulment statutes to provide for annulment of a marriage of a person younger than sixteen years-old, unless the party obtains the requi-

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70. TEX. FAM. CODE ANN. § 6.202(a) (Vernon 1998).

71. *Compare* TEX. PEN. CODE ANN. § 25.01(e) (Vernon 2003) (stating that the offense of bigamy is a Class A misdemeanor), *with* TEX. PEN. CODE ANN. § 25.01(e)(1) (Vernon Supp. 2005) (increasing punishment drastically from that of a misdemeanor to that of a felony). It is worth noting that the amendments to the bigamy statute are quite ambiguous. While the Penal Code initially provides third-degree punishment for an individual convicted of bigamy, it is unclear when this punishment would ever apply. *See* TEX. PEN. CODE ANN. § 25.01(e) (Vernon Supp. 2005) (stating that an individual who commits bigamy has committed "a felony of the third degree," but then adding the mystifying pronouncement that an individual who commits bigamy with a person *sixteen years of age or older* has committed "a felony of the second degree" and an individual who commits bigamy with a person *younger than sixteen* has committed a first-degree felony).

72. TEX. PEN. CODE ANN. § 25.01(e)(2) (Vernon Supp. 2005).

73. *Id.* § 25.01(c).

74. *See* TEX. FAM. CODE ANN. § 2.102(a) (Vernon Supp. 2005) (limiting a county clerk to issuing a marriage license based on parental consent to sixteen and seventeen year-olds only).

75. *Id.* § 2.102(h).

76. *Id.* § 6.205.

site court order pursuant to the Texas Family Code.[77] However, despite these changes, the legislature did not add an age requirement to the statute which allows a minor to petition a court for permission to marry.[78]

Other laws passed by the legislature include: (1) the nullification of a marriage between a current or former stepchild or stepparent of a party;[79] (2) the penalization as a third-degree felony the act of officiating a marriage when the officiant knows a party to the marriage is a minor;[80] and (3) the declaration by statute that a person may not be a party to an informal marriage if the person is presently married.[81] The legislature also changed the first cousins marriage law. Before September 1, 2005, first cousins could marry in Texas.[82] After September 1, 2005, sexual contact between first cousins became a second-degree felony.[83] However, while the legislature took definitive action in response to the threat of an FLDS takeover in Eldorado and the potential institutionalization of polygamy in Texas, the action does not effectively prevent the taking of child brides in polygamist marriages.

D. *Application of the New Legislation*

Consider the following potential applications of the new laws in the situation where a fifteen-year-old girl from the FLDS compound wants to marry an older man inside the compound.

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77. *See id.* § 6.101 (revising the grounds for annulment to include the marriage of an individual under sixteen years of age); *id.* § 6.102 (substituting sixteen in place of fourteen for the annulment of marriages of individuals under the age of eighteen).

78. *See id.* § 2.103 (allowing for minors to petition a court for judicial permission to enter into a marriage).

79. TEX. FAM. CODE ANN. § 6.206 (Vernon Supp. 2005).

80. *Id.* § 2.202(d).

81. *Id.* § 2.401(d).

82. *See* TEX. FAM. CODE ANN. § 2.004(6) (Vernon 1998) (listing in the marriage license application the various prohibitions against certain related individuals from obtaining a license); *id.* § 6.201 (voiding marriages between closely related persons, yet, not including first cousins in the list). The lawmakers amended the marriage license application form to preclude the issuance of a marriage license to first cousins, but they did not amend the consanguinity statutes to void such marriages. TEX. FAM. CODE ANN. § 2.004(6)(F) (Vernon Supp. 2005).

83. *See* TEX. PEN. CODE ANN. § 25.02(a)(6) (Vernon Supp. 2005) (stating that an actor commits a criminal offense if the actor has sexual intercourse with "the son or daughter of an actor's aunt or uncle of the whole or half blood or by adoption").

First, if the fifteen-year-old girl decides to obtain a marriage license from the Schleicher County clerk's office to marry the older man *as his first wife*, the clerk will not issue the license because the girl is too young—she must be eighteen years old to marry.[84] If the girl lies—produces a false document that says she is eighteen—and the clerk issues the license, the marriage is void because the girl is less than sixteen.[85] While the girl commits a Class A misdemeanor for lying,[86] the older man commits no crime for marrying her, but commits a crime for lying about her age.[87] In addition, the girl's parent may not give permission for her to marry. If the girl's parent gives permission for the marriage when the parent knows the child is less than sixteen years-old, the parent commits a third-degree felony.[88] A court may not be able to give permission for a person under the age of sixteen to marry because the legislature has said such a marriage is void.[89] If a judge or clergyman performs the marriage ceremony when the official knows the girl is fifteen, the official commits a third-degree felony.[90] If the older man lives with the girl as if married after this attempted marriage, he faces up to ninety-nine years in prison.[91]

Prior to the enactment of the void-marriage laws, a clerk would not have issued a marriage license for the marriage of the fifteen-

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84. *See* TEX. FAM. CODE ANN. § 2.101 (Vernon 1998) (providing that the general age requirement before a county clerk may issue a marriage license is eighteen). *But see* TEX. FAM. CODE ANN. § 2.102 (Vernon Supp. 2005) (allowing a minor sixteen years of age or older to obtain a marriage license with parental consent).

85. *See* TEX. FAM. CODE ANN. § 6.205 (Vernon Supp. 2005) (voiding any marriage in which a party to the marriage is younger than sixteen years of age).

86. *See id.* § 2.005 (stating that providing false identification information is a Class A misdemeanor).

87. *See id.* § 2.004(c) (stating that the punishment for providing false information in a marriage application is that of a Class C misdemeanor).

88. *Id.* § 2.102(h).

89. *Compare id.* § 2.009(a)(3) (allowing a clerk to issue a marriage license to an applicant under age sixteen if a court has given permission), *and id.* § 2.103 (providing no minimum age for a minor petitioner who is asking a court for permission to marry), *with id.* § 6.205 (rendering a marriage void if either party to the marriage is younger than sixteen years of age).

90. TEX. FAM. CODE ANN. § 2.202(d) (Vernon Supp. 2005).

91. *See* TEX. PEN. CODE ANN. § 22.011(f) (Vernon Supp. 2005) (providing first-degree punishment for individuals engaged in a bigamous marriage). Furthermore, the Penal Code allows for first-degree punishment to be imposed upon individuals who engage in sexual conduct with a person whom the individual is prohibited from marrying. *Id.* Thus, a man who purportedly marries a fifteen year-old and lives as if married or engages in sexual acts with the minor faces a potential conviction of ninety-nine years in prison. *Id.*

year-old girl and the older man because the legal minimum age for marriage in Texas was eighteen.[92] However, if the girl was older than fourteen, her parent could have given permission for the child to marry,[93] the clerk could have issued the license,[94] and the officiant could have performed the ceremony without breaking the law.[95] The child, possibly even if she were younger than fourteen, could obtain court permission to marry if her parent would not consent.[96] If the child lied about her age to obtain the license and the two married, the marriage would be valid.[97] The parties to the marriage or the parent of the child would have standing to bring an action to annul the marriage if the marriage took place without parental permission or a court order.[98]

Second, if the fifteen-year-old girl and the older man bypass the legal nicety of trying to get a license to marry as the man's first wife and the couple "married" by having a FLDS authority perform the marriage ceremony at the compound, (which, according to testimony is the usual means of marriage in the compound when underage girls are involved),[99] the marriage would be void.[100] Further,

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92. *See* TEX. FAM. CODE ANN. § 2.101 (Vernon 1998) (prohibiting a county clerk from issuing a marriage license if either applicant is under eighteen years of age).

93. *See id.* § 2.102(a) (allowing the county clerk to issue a marriage license to a minor between the ages of fourteen and eighteen if parental consent is given).

94. *Id.*

95. *Compare id.* § 2.203 (granting an authorized person permission to conduct a marriage ceremony), *with* TEX. FAM. CODE ANN. § 2.202(c) (Vernon Supp. 2005) (stating that a person commits a Class A misdemeanor if he or she knowingly conducts a marriage ceremony without authorization).

96. *See* TEX. FAM. CODE ANN. § 2.103 (Vernon Supp. 2005) (listing the requirements for a minor seeking a court's permission to marry). The statute provides that a minor's petition to a court for permission to marry must include: (1) the "reasons the minor desires to marry"; (2) whether each of the minor's parents is alive or deceased; (3) "the name and residence address of each living parent"; and (4) whether a guardian or managing conservator has been appointed for the minor. *Id.* § 2.103(c).

97. *See* TEX. FAM. CODE ANN. § 2.301 (Vernon 1998) (stating, "the validity of a marriage is not affected by any fraud, mistake, or illegality that occurred in obtaining the marriage license").

98. *See* TEX. FAM. CODE ANN. §§ 6.101-.102 (Vernon Supp. 2005) (allowing a parent, guardian or court-appointed conservator to file for annulment of the marriage of a person under sixteen years of age).

99. Hearing on Tex. H.B. 3006 Before the House Comm. on Juvenile Justice & Family Issues, 79th Leg., R.S. (Apr. 13, 2005) (statements of Utah Attorney General Mark Shurtleff & Sam Brower), *available at* http://www.house.state.tx.us/committees/broadcasts.php?session=79&cmte=340 (follow Apr. 13, 2005 archived broadcast hyperlink) (audiotape on file with the *St. Mary's Law Journal*).

the church member who performed the ceremony could be a felon[101] because the girl is too young to marry without formalities.[102] If the older man lives with the girl as if married, he faces up to ninety-nine years in jail for statutory rape[103]—the same as it would have been prior to the 2005 amendments to the Texas Family Code.

Third, if the fifteen-year-old girl wants to marry the older man as his second wife while he is married to his first wife, he is guilty of bigamy[104] and faces the possibility of spending ninety-nine years in jail.[105] If the girl is his third, fourth, or any number past his first wife, he commits polygamy which is punished under the bigamy laws.[106] Accordingly, he cannot obtain a marriage license for such a marriage,[107] and the marriage is void regardless of the age of the subsequent wife.[108] This result is the same as it would have been

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100. TEX. FAM. CODE ANN. § 6.205 (Vernon Supp. 2005) ("A marriage is void if either party to the marriage is younger than [sixteen] years of age.").

101. *See id.* § 2.202(c) (expressing that an individual who conducts a marriage ceremony without authorization commits a Class A misdemeanor); *id.* § 2.202(d) (stating that an individual who illegally marries a minor commits a third-degree felony); *id.* § 2.302 (providing requirements for the validity of a marriage to be adversely affected when an unauthorized person conducts the marriage ceremony).

102. *See id.* § 2.401(c) (noting that a person younger than eighteen cannot "be a party to an informal marriage").

103. *See* TEX. PEN. CODE ANN. § 22.011(f) (Vernon Supp. 2005) (allowing for first-degree punishment to be imposed under the sexual assault statute if the offender engages in sexual acts with an individual whom the offender was precluded from marrying or with whom the offender was precluded from "living under the appearance of marriage"); TEX. PEN. CODE ANN. § 12.32 (Vernon 2003) (stating that the punishment for a first-degree felony could be up to ninety-nine years imprisonment).

104. *See* TEX. PEN. CODE ANN. § 25.01 (Vernon Supp. 2005) (establishing that the marriage of a man to more than one woman results in bigamy, and the man is guilty of a first-degree felony if the offense is committed with a person under sixteen years of age); TEX. FAM. CODE ANN. § 6.202(a) (Vernon 1998) (articulating that "[a] marriage is void if entered into when either party has an existing marriage to another person that has not been dissolved by legal action or terminated by the death of the other spouse").

105. *See* TEX. PEN. CODE ANN. § 25.01(e)(2) (Vernon Supp. 2005) (noting that an individual who violates the bigamy statute with someone younger than sixteen commits a first-degree felony); TEX. PEN. CODE ANN. § 12.32 (Vernon 2003) (indicating that bigamy results in a first-degree felony punishable by up to ninety-nine years imprisonment).

106. TEX. PEN. CODE ANN. § 25.01 (Vernon Supp. 2005).

107. *See* TEX. FAM. CODE ANN. § 2.009 (Vernon Supp. 2005) (expressing that a marriage license cannot be issued if the applicant is already currently married to another).

108. TEX. FAM. CODE ANN. § 6.202 (Vernon 1998).

prior to the various amendments, except for the enhanced punishment of the individual who commits bigamy.[109]

Importantly, the new Texas laws, periphery to the bigamy statute, do not solve the problem presented by the FLDS. Quite simply, Texas communities and Texas women and children are not now better protected from bigamy and polygamy than they were before the enactment of these marriage laws. Properly, the penalties will be more severe than they were on August 31, 2005, if FLDS members are caught practicing polygamy, but the only substantive change in the marriage laws merely prevents an FLDS member from legally taking a girl less than sixteen years old as his first wife. Thus, the only marriage prevented by the new legislation is the initial first marriage of a man to a child under the age of sixteen. Therefore, the legislature made the marriage of a woman younger than sixteen, who married a man already married, "double void" when it added the provision that "[a] marriage is void if either party to the marriage is younger than [sixteen] years of age."[110] However, according to the legislative testimony, the polygamists are not seeking to take children under fifteen as their first, state-sanctioned wives.[111]

III. TEXAS'S POLICY TOWARD MARRIAGE

Despite these recent legislative changes to the marriage laws, Texas has a strongly worded policy that presumes every marriage is valid. Texas has codified its public policy toward marriage in the Family Code:

> [I]n order to promote stability for those entering into the marriage relationship in good faith and to provide for an orderly determination of parentage and security for the children of the relationship, it is the policy of this state to preserve and uphold each marriage

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109. *Compare* TEX. PEN. CODE ANN. § 25.01(e) (Vernon 2003) (declaring that the offense of bigamy is a Class A misdemeanor), *with* TEX. PEN. CODE ANN. § 25.01(e) (Vernon Supp. 2005) (establishing, rather ambiguously, the new punishment for the offense of bigamy as a third-degree felony with the potential of becoming a second- or first-degree felony).

110. TEX. FAM. CODE ANN. § 6.205 (Vernon 1998).

111. *See* Hearing on Tex. H.B. 3006 Before the House Comm. on Juvenile Justice & Family Issues, 79th Leg., R.S. (Apr. 13, 2005) (statement of Rep. Harvey Hilderbran), *available at* http://www.house.state.tx.us/committees/broadcasts.php?session=79&cmte=340 (follow Apr. 13, 2005 archived broadcast hyperlink) (stating that the younger girls are taken as church or celestial wives) (audiotape on file with the *St. Mary's Law Journal*).

> against claims of invalidity unless a strong reason exists for holding the marriage void or voidable. Therefore, every marriage entered into in this state is presumed to be valid . . . .[112]

The policy is a statement about the importance of marriage in Texas, and Texas courts have replicated this sentiment in their holdings.[113] Specifically, courts have upheld marriages, including underage marriages, as valid in abiding by the policy of the State of Texas. In *Williams v. White*,[114] for example, the father of a sixteen-year-old daughter who lied about her age to obtain a marriage license sought to annul the marriage.[115] The appellate court reversed the trial court's grant of the annulment.[116] The *Williams* court repeated, with approval, language from a treatise on marriage and divorce:

> Every intendment of law is in favor of matrimony. When a marriage has been shown in evidence, whether regular or irregular, and whatever the form of the proofs, the law raises a presumption of its legality, not only casting the burden of the proof upon the party objecting, but requiring him throughout in every particular plainly to make the fact appear, against the constant pressure of this presumption, that it is illegal and void. * * * It being for the highest good of the * * * community that all intercourse between the sexes in form matrimonial should be such a fact, the law, when administered by enlightened judges, seizes upon all probabilities, and presses into its service all things else, which can help it in each particular case to sustain the marriage, and repel the conclusion of unlawful commerce.[117]

In an early case on the wisdom of divorce, the Texas Supreme Court pronounced marriage as "intended also for the benefit of [the parties'] common offspring," and described marriage as "an important element in the moral order, security and tranquility of

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112. TEX. FAM. CODE ANN. § 1.101 (Vernon 1998).

113. *See* Williams v. White, 263 S.W.2d 666, 668 (Tex. Civ. App.—Austin 1953, writ ref'd n.r.e.) ("It is the policy of the law to look with special favor upon marriage and to seek in all lawful ways to uphold this most important of social institutions." (quoting Gress v. Gress, 209 S.W.2d 1003, 1005 (Tex. Civ. App.—Galveston 1948, writ ref'd n.r.e.))).

114. 263 S.W.2d 666 (Tex. Civ. App.—Austin 1953, writ ref'd n.r.e.).

115. Williams v. White, 263 S.W.2d 666, 667 (Tex. Civ. App.—Austin 1953, writ ref'd n.r.e.).

116. *Id.* at 669.

117. *Id.* at 668 (quoting 1 BISH, MARRIAGE AND DIVORCE § 457 (6th ed.)).

civilized society."[118] In 1955, the Supreme Court of Texas also commented:

> The presumption in favor of the validity of a marriage . . . is one of the strongest, if, indeed, not the strongest, known to the law . . . and may even outweigh positive evidence to the contrary . . . for it is grounded upon a sound public policy which favors morality, innocence, marriage, and legitimacy rather than immorality, guilt, concubinage, and bastardy.[119]

Of course, the language about marriage in 1955, which included terms such as "immorality, guilt, concubinage, and bastardy,"[120] has changed to the modern policy to "preserve and uphold . . . marriage . . . unless a strong reason exists" to invalidate it.[121]

In sum, Texas's policy in favor of marriage is deeply rooted in statute and case law. The policy places such importance on marriage that the presumption in favor of marriage cannot be taken lightly by any court or the legislature. As such, all modifications of the Texas marriage statutes must be made in keeping with this policy. Further, just as the public policy of Texas favors the institution of marriage and presumes the validity of each marriage, the institution of marriage also finds protection under the United States Constitution.

IV. CONSTITUTIONAL STANDARDS AND THE AFFECTED RIGHTS

A. *The Fundamental Right to Marry*

The United States Supreme Court has recognized that the right of a person to marry is a fundamental right. As the Court stated in *Loving v. Virginia*, "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[122] Moreover, "the right 'to marry, establish a home and bring up chil-

118. Sheffield v. Sheffield, 3 Tex. 79, 85 (1848).

119. Tex. Employers' Ins. Ass'n v. Elder, 155 Tex. 27, 30, 282 S.W.2d 371, 373 (1955).

120. *Id.*

121. TEX. FAM. CODE ANN. § 1.101 (Vernon 1998).

122. Loving v. Virginia, 388 U.S. 1, 12 (1967) (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

dren' is a central part of the liberty protected by the Due Process Clause."[123]

Nevertheless, while a person has a fundamental right to marry, that right can be regulated by the state. In *Zablocki v. Redhail*,[124] the United States Supreme Court reviewed a Wisconsin statute which precluded a person who owed child support from obtaining a marriage license without a court order.[125] The Court recognized that the right to marry is a liberty right that is "fundamental to the very existence and survival of the race."[126] However, the Court also said:

> By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.[127]

After analyzing the Wisconsin statute which precluded a class of persons from marrying and which contained language which both voided marriages in violation of the statute and punished the participants in the marriages with criminal offenses, the Supreme Court found, using strict scrutiny, that the statutory classification directly and substantially interfered with the right to marry.[128] The Court in *Zablocki* set out a test for determining whether a state regulation of marriage impermissibly interferes with a person's fundamental right to marry: "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."[129]

Thus, the Texas legislation that significantly interferes with the fundamental right of a person to marry cannot be upheld unless the legislation is supported by sufficiently important state interests in preventing child polygamy and the legislation is closely tailored to

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123. Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

124. 434 U.S. 374 (1978).

125. *Zablocki*, 434 U.S. at 375.

126. *Id.* at 384 (quoting *Skinner*, 316 U.S. at 541).

127. *Id.* at 386.

128. *Id.* at 387.

129. *Id.* at 388.

only prevent child polygamy. It is clear that the legislation significantly interferes with a person's right to enter into marriage, particularly an individual under the age of sixteen.[130] Quite simply, the new laws prevent a person younger than sixteen from validly entering into a marriage by declaring such a marriage void. Thus, the legislation significantly interferes with the ability of a person under the age of sixteen to marry, and appears impermissible if the young person has the same fundamental right to marry as an adult.

B. *A Minor's Due Process Right to Marry*

In *Bellotti v. Baird*,[131] the United States Supreme Court considered the interplay between the constitutional rights of minors, the constitutional rights of their parents, and the police powers of the state in a case challenging the constitutionality of a state statute regulating the access of minors to abortions.[132] Massachusetts passed legislation which required parental consent or, alternatively, a court order before a minor could obtain an abortion.[133] Members of the affected class challenged the statutes as an unconstitutional infringement on a minor's right to an abortion.[134] Ultimately, the Court decided that the particular Massachusetts statutes impermissibly interfered with a minor's fundamental right to an abortion; however, in its opinion the Court memorialized several important truths about the constitutional rights of minors.[135] Importantly, "[a] child, merely on account of his minority, is not beyond the protection of the Constitution."[136] Yet, minors have a unique status under the law because of the role of the family in the minor's life, and constitutional principles must be "applied with sensitivity and flexibility to the special needs of parents and children."[137]

The Court gave three reasons why a minor's rights under the Constitution are distinguishable from an adult's rights under the

130. TEX. FAM. CODE ANN. § 6.205 (Vernon Supp. 2005).

131. 443 U.S. 622 (1979).

132. *See* Bellotti v. Baird, 443 U.S. 622, 630 (1979) (favoring the rights of a minor who did not want to seek parental consent for an abortion).

133. *See id.* at 623 (requiring all unmarried women under the age of eighteen to obtain parental consent for an abortion or obtain an order from the superior court).

134. *Id.* at 626.

135. *Id.* at 635-38.

136. *Id.* at 633.

137. *Bellotti*, 443 U.S. at 633.

Constitution. First, a child is particularly vulnerable when compared to an adult.[138] When considering a claim that a child has been deprived of a liberty or property interest (such as due process in juvenile proceedings or the taking by the state of a child's property), a child's rights are "virtually coextensive with that of an adult."[139] While the child is generally protected by the same constitutional guarantees as adults, "the State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention.'"[140]

Second, because children and adolescents lack the experience, perspective, and judgment to make important choices, the state may validly "limit the freedom of children to choose for themselves."[141] The Court referred to a precedential case in which the Court acknowledged that both adults and children enjoy freedom of speech.[142] In deference to the freedom of speech, a state could not permissibly pass legislation which prevents adults from receiving sexually oriented printed materials.[143] However, a state may restrict the receipt of such materials by children.[144] In other words, the state's interest in protecting children from improvident choices is quite significant. "Notwithstanding the importance the Court always has attached to First Amendment rights . . . 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . . .'"[145]

Third, the role of parents in raising their children justifies the limitation on the freedoms of minors, and "[t]he State commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors."[146] The Court cited precedent for the proposition that children need parental involvement to grow into "mature, socially responsible citizens," and parents have the

138. *Id.* at 634.

139. *Id.*

140. *Id.* at 635 (quoting McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971)).

141. *Id.*

142. *See* Bellotti v. Baird, 443 U.S. 622, 636 (1979) (citing Ginsberg v. New York, 390 U.S. 629 (1968), as an example of the Court dealing with the "inability of children to make mature choices").

143. *Id.* at 636 (citing Ginsberg, 390 U.S. at 634).

144. *Id.*

145. *Id.* (quoting Ginsberg v. New York, 390 U.S. 629, 638 (1968)).

146. *Id.* at 637.

right and duty to provide "a substantial measure of authority over [their] children."[147] The Court stated, "Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter."[148] In other words, the child's constitutionally protected rights are necessarily attached to the parent's authority over the child. Thus, under an application of the principles expressed by the Supreme Court in *Bellotti*, a child does have constitutional rights, but the state may adjust these rights because a child is particularly vulnerable, lacks the maturity to make judgments without guidance, and is subject to parental authority.

In *Moe v. Dinkins*,[149] a New York federal district court specifically addressed the right of a minor to marry. Eighteen-year-old Raoul, fifteen-year-old Maria, and their one-year-old son, Ricardo (and others similarly situated), claimed that the state regulation which required them to obtain parental consent before the parties could marry deprived them of their liberty interest in marriage guaranteed by the Due Process Clause of the Fourteenth Amendment.[150] Because Maria's mother would not give consent for her fifteen-year-old daughter to marry, the couple could not obtain a marriage license in New York.[151] The state cited mature decision-making and the prevention of unstable marriages as its interests in requiring parental consent before a minor could marry.[152] While the federal district court in New York acknowledged that the right to marry is a fundamental right protected by the Due Process Clause of the Constitution, and that minors have rights under the Constitution, it adopted the premise expressed by the Supreme

147. *Bellotti*, 443 U.S. at 638.

148. *Id.*

149. 533 F. Supp. 623 (S.D.N.Y 1981).

150. *See* Moe v. Dinkins, 533 F. Supp. 623, 627-28 (S.D.N.Y 1981) (deciding the constitutionality of a New York statute requiring males between the ages of sixteen and eighteen, and females between the ages of fourteen and eighteen, to obtain written parental consent to marry).

151. *See id.* at 625 (stating that Maria's mother would not sign the consent for fear that she would lose her welfare benefits).

152. *See id.* at 629 (holding that "[t]he State interests in mature decision-making and in preventing unstable marriages are legitimate under its *parens patriae* power").

Court in *Bellotti* that the state has the power to adjust the rights of minors.[153]

While a court reviewing a claim of infringement of a fundamental right usually applies a strict scrutiny standard of review, the *Moe* court declined to subject the New York statute to a strict scrutiny review because the plaintiffs were minors and their rights to marry could be adjusted.[154] Using a rational basis analysis, the court concluded that the requirement of parental consent as a prerequisite to a minor's marriage was rationally related to the state's interest "in mature decision-making and in preventing unstable marriages."[155] The court held that the state permissibly interfered with the young couple's right to marry by requiring the couple to obtain parental consent before doing so.[156] The plaintiffs also alleged that the statute denied "them the only means by which they can legitimize their children and live in the traditional family unit sanctioned by law."[157] The court rejected this argument by stating the New York law that required parental consent for a minor to marry did not prohibit the parties from marrying; rather, it merely delayed their "access to the institution of marriage."[158] In effect, thus, the New York statute provided for a parental veto of a child's marriage.

The court in *Moe* reviewed the New York statute under a rational relationship level of scrutiny.[159] The state did not have to show that the interference was supported by sufficiently important state interests that were closely tailored to effectuate only those interests; it only had to show a rational relationship between the adjustment and the state interest.[160] Thus, according to the court in

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153. *Id.* at 628 (citing Zablocki v. Redhail, 434 U.S. 374 (1978)) (reiterating that states have the power to modify and adjust a minor's constitutional rights).

154. *Moe*, 553 F. Supp. at 629. The court explained that although strict scrutiny "must be applied whenever a state statute burdens the exercise of a fundamental liberty protected by the Constitution," the status of minors under the Constitution leads the court to invoke a rational basis analysis. *Id.*

155. *Id.*

156. *See id.* at 630-31 (concluding that the state action was a valid exercise of state power).

157. *Id.* at 630.

158. *Id.*

159. *See Moe*, 533 F. Supp at 629 (rejecting the plaintiffs' argument that strict scrutiny should apply).

160. *See* Moe v. Dinkins, 533 F. Supp. 623, 629 (S.D.N.Y 1981) (holding that rational basis scrutiny, not strict scrutiny, is used to determine the constitutionality of a state statute

Moe, as it interpreted *Bellotti*, a child has a fundamental right to marry, but because of a child's vulnerability, inability to make decisions without guidance, and subjugation to parental authority, the state may permissibly adjust the child's right to marry and such adjustments will be subject to a rational basis review.[161]

If an eighteen-year-old Texan, like Raoul in *Moe*, and a fifteen-year-old Texan, like Maria, claimed that the Texas regulation—which declares void any marriage by a person under the age of sixteen—deprived them of their liberty interest in marriage as guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, how would a court reviewing the Texas legislation rule and what standard of scrutiny would it apply? If the court applied the reasoning used in the *Moe* decision, it would rule that while each has a fundamental right to marry, that right can be adjusted as to Maria because of her vulnerability as a child, her lack of maturity to make judgments without guidance, and her subjugation to her parent's authority.[162]

Thus, the court could apply rational basis scrutiny because the state has the power to adjust the rights of a minor.[163] The court would only need to determine that there was a rational relationship between the adjustment to Maria's right to marry and the state interest in voiding all marriages in which a party to the marriage is under the age of sixteen.[164] At this point, however, Maria would assert that no rational relationship exists between the legislative act of voiding all marriages of persons under the age of sixteen and the state interest in preventing child polygamist marriages.

According to the testimony before the House committee, the polygamists do not obtain marriage licenses from the State of Texas to marry their second or third wives.[165] The polygamists pur-

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that interferes with a minor's right to enter into marriage). *But see* Zablocki v. Redhail, 434 U.S. 374, 388 (1978) (stating that when a statutory classification interferes with a fundamental right, it must be supported by sufficiently important state interests and closely tailored to those interests).

161. *Moe*, 533 F. Supp. at 631 (upholding the New York law on the grounds that it does not infringe upon the constitutional rights of minors, but rather exercises a valid state power).

162. *Id.* at 630.

163. *Id.*

164. *Id.* at 629.

165. *See* Hearing on Tex. H.B. 3006 Before the House Comm. on Juvenile Justice & Family Issues, 79th Leg., R.S. (Apr. 13, 2005) (statements of Utah Attorney General Mark

portedly have one wife who is recognized by the law of the state and other wives who are church or celestial wives.[166] By its legislation, the State of Texas has only prevented cult-member Texans from marrying cult-member females under the age of sixteen as their first wives. Not only does the legislation fail to prevent polygamy, it prevents non-cult-member Texans under the age of sixteen, like Maria, from marrying at all.[167] In other words, the legislation is not rationally related to the state's interest in preventing polygamy or preventing the taking of child brides in polygamist marriages.

Conversely, in *Moe*, the State of New York required parental consent before a minor could marry because it has an interest in the prevention of "immature decision-making and . . . unstable marriages."[168] No such comparable interest was discussed during the Texas legislative hearings. At one point during the committee hearing, Representative Goodman said that "fourteen is too young to marry even with parental consent."[169] The committee heard *no* testimony about the appropriate minimum age for marriage in Texas, except for the testimony about older FLDS members taking young brides in polygamist marriages.[170] Thus, a court could justifiably rule in Maria's favor that Texas's interest in preventing polygamy is not rationally related to the adjustment to the child's right to marry.

C. *A Minor's Equal Protection Right to Marry*

While the state may adjust a minor's right to marry without violating the Equal Protection Clause of the Constitution, the state

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Shurtleff & Sam Brower), *available at* http://www.house.state.tx.us/committees/broadcasts.php?session=79&cmte=340 (follow Apr. 13, 2005 archived broadcast hyperlink) (explaining that FLDS members enter polygamist marriages through a ceremony in the compound) (audiotape on file with the *St. Mary's Law Journal*).

166. *Id.*

167. *See* TEX. FAM. CODE ANN. § 6.205 (Vernon Supp. 2005) (applying the statute to all Texans, and not just FLDS members).

168. *Moe*, 533 F. Supp. at 629.

169. Hearing on Tex. H.B. 3006 Before the House Comm. on Juvenile Justice & Family Issues, 79th Leg., R.S. (Apr. 13, 2005) (comments of Rep. Toby Goodman), *available at* http://www.house.state.tx.us/committees/broadcasts.php?session=79&cmte=340 (follow Apr. 13, 2005 archived broadcast hyperlink) (audiotape on file with the *St. Mary's Law Journal*).

170. *Id.* (statements of Rep. Harvey Hilderbran, Utah Attorney General Mark Shurtleff & Jon Krakauer).

may only do so if the legislation is rationally related to a legitimate state interest. "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike."[171] The United States Supreme Court has said that legislation is presumed valid, and a rational basis standard of review will generally be utilized to sustain the legislation if "the classification drawn by the statute is rationally related to a legitimate state interest."[172] However, if legislation impinges upon a fundamental right or classifies by race, alienage or national origin—deemed suspect classes—then strict scrutiny is employed.[173] While race, national origin, and alienage are suspect classifications, the Supreme Court has said that age is not a suspect classification pursuant to the Equal Protection Clause and, thus, age classification is subject only to a rational basis review.[174]

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171. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985); *see also* Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("[T]he crucial question [in equal protection cases] is whether there is an appropriate governmental interest suitably furthered by the differential treatment."); Baxstrom v. Herold, 383 U.S. 107, 111 (1966) ("Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made.").

172. *See City of Cleburne*, 473 U.S. at 440 (citing Schweiker v. Wilson, 450 U.S. 221, 230 (1980)) (discussing the general parameters of analysis under the Equal Protection Clause); *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973) (emphasizing that if legislation does not operate "to the disadvantage of some suspect class or impinge[ ] upon a fundamental right explicitly or implicitly protected by the Constitution," then rational basis will be used in analyzing the legislation); Comm'n for Lawyer Discipline v. Benton, 980 S.W.2d 425, 436 (Tex. 1998) (acknowledging that in order to overcome an equal protection challenge, a law must be rationally related to the furtherance of a legitimate state purpose).

173. *See City of Cleburne*, 473 U.S. at 440 (asserting that statutory classifications by race, alienage or national origin are subjected to strict scrutiny); *San Antonio Indep. Sch. Dist.*, 411 U.S. at 17 (affirming that strict scrutiny will be used, for the purpose of equal protection analysis, when a fundamental right or suspect class is affected by a statute); Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (determining that race, national origin and alienage are suspect classifications that are protected by a strict scrutiny analysis); *see also* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (allowing for more rigid scrutiny to be applied when statutes classify "discrete and insular minorities").

174. *See* Gregory v. Ashcroft, 501 U.S. 452, 470 (1991) (echoing that the "Court has said repeatedly that age is not a suspect classification under the Equal Protection Clause"); *see also* City of Dallas v. Stanglin, 490 U.S. 19, 26 (1989) (finding that an adult dance hall's denial of admittance to teenagers did not implicate a suspect class or impinge on any fundamental right).

In evaluating whether a government action violates the Equal Protection Clause, a court looks to the degree to which a law is under-inclusive or over-inclusive. An under-inclusive law does not apply to all individuals who are similarly situated.[175] "Since the classification does not include all who are similarly situated with respect to the purpose of the law, there is a prima facie violation of the equal protection requirement of reasonable classification."[176] Meanwhile, an over-inclusive classification burdens a wider range of individuals than necessary because it extends beyond those persons possessing the trait contributing to the mischief or evil that the legislature seeks to eradicate.[177] "Over-inclusive classifications reach out to the innocent bystander, the hapless victim of circumstance or association."[178] As is the case with under-inclusive laws, lawmakers must be careful to avoid drafting over-inclusive legislation because there is a greater chance the law will be declared unconstitutional.[179]

Texas's interest in protecting women and children from polygamy is clearly a legitimate interest.[180] However, the legislation cannot be sustained because the means selected to achieve the interest are not rationally related to the state interest. As previously mentioned, the polygamists do not obtain marriage licenses from the State of Texas to marry their second or third wives; if the polygamists are marrying females under the age of sixteen, they are not doing so by obtaining licenses from the State of Texas to effectuate the marriages.[181] In this instance, because the legislation

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175. *See* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 348 (1948) (noting that under-inclusive classifications work such that "[a]ll who are included in the class are tainted with the mischief, but there are others also tainted whom the classification does not include").

176. *Id.*

177. *See id.* at 351 (asserting that an over-inclusive law "imposes a burden upon a wider range of individuals than are included in the class of those tainted with the mischief at which the law aims").

178. *Id.*

179. *See id.* (recognizing that over-inclusive laws present a stronger prima facie case of an unreasonable classification prohibited by the Equal Protection Clause than do under-inclusive laws).

180. *See* Reynolds v. United States, 98 U.S. 145, 166 (1878) (declaring that polygamy is constitutionally prohibited in the United States).

181. Hearing on Tex. H.B. 3006 Before the House Comm. on Juvenile Justice & Family Issues, 79th Leg., R.S. (Apr. 13, 2005) (statement of Utah Attorney General Mark Shurtleff), *available at* http://www.house.state.tx.us/committees/broadcasts.php?session=79

does not reach polygamists, a court would likely conclude that it is impermissibly under-inclusive—and therefore violative of the Equal Protection Clause of the Fourteenth Amendment.

Further, the legislation is over-inclusive. The Texas legislature has classified by age those who may or may not enter into marriage; only persons over the age of sixteen may validly marry.[182] By its legislation, the State of Texas prevents cult-member Texans from marrying cult-member females under the age of sixteen as their first wives, but also prevents all non-cult-member Texans under the age of sixteen from marrying. As such, a reviewing court would likely find that the legislation is over-inclusive and therefore not rationally related to the legitimate interest of preventing polygamist marriages.

D. *A Parent's Due Process Right to Raise a Child*

A parent has a constitutional right to make decisions regarding the care, custody, and control of a child.[183] Notwithstanding this right, the lawmakers of the 79th Regular Legislative Session not only deprived a parent of the right to consent to the marriage of a fourteen- or fifteen-year-old child, but the legislators also made it a felony for a Texas parent to knowingly consent to the marriage of a child under the age of sixteen.[184] In *Troxel v. Granville*,[185] the United States Supreme Court reaffirmed that parents have a fundamental right "to make decisions concerning the care, custody, and control of their children."[186] The Court, after reviewing decades of its decisions recognizing that parents have a liberty interest in rearing their children, concluded that "[i]n light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamen-

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182. TEX. FAM. CODE ANN. § 6.205 (Vernon Supp. 2005).

183. *See* Troxel v. Granville, 530 U.S. 57, 65-66 (2000) (reviewing the Court's previous holdings recognizing parents' fundamental right to make decisions regarding their children).

184. TEX. FAM. CODE ANN. § 2.102(h) (Vernon Supp. 2005).

185. 530 U.S. 57 (2000).

186. *See* Troxel v. Granville, 530 U.S. 57, 66 (2000) (holding that "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children").

tal right of parents to make decisions concerning the care, custody, and control of their children."[187] The Court wrote that "the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court."[188] Among the liberty interests parents have are: (1) the right to establish a home;[189] (2) "the right to 'direct the upbringing and education of children under their control;' "[190] and (3) the right to care and nurture their children and prepare their children "for obligations the state can neither supply nor hinder."[191] Implicit in this fundamental right is the presumption that a parent acts in the child's best interest.[192] The Court concluded that the parent, not the state, is constitutionally protected in making decisions about a child's care, custody, and control.[193]

At issue in *Troxel* was a Washington visitation statute which allowed any person to petition a court for visitation rights for any child at any time.[194] The trial court could grant visitation whenever the court found that the visitation was in the child's best interest.[195] The statute did not require the court to give any deference to the wishes of the parent.[196] The grant of visitation was based solely on the court's determination of the child's best interest. If the court and a fit parent disagreed on the visitation, the judge's view necessarily prevailed.[197] The statute did not require any special conditions before the state could interfere with a parent's decision, and the statute contained no presumption that a parent acts in the

187. *Id.*

188. *Id.* at 65 (discussing historical cases that established this principle of law).

189. *Id.* (citing Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923)).

190. *Id.* (quoting Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925)). The Court also explained that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.*

191. *Troxel*, 530 U.S. at 66 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

192. *See id.* at 68 (stating that the presumption only extends to a fit parent).

193. *See id.* at 66 (stating that it cannot be doubted that the Constitution protects the fundamental right of parents to make decisions involving their children).

194. *See id.* at 67 (acknowledging that the Washington statute is very broad).

195. *Id.*

196. *See Troxel*, 530 U.S. at 67 (noting that once the petition was filed and the matter was placed before a judge, the parent's concerns or decisions were given no deference).

197. Troxel v. Granville, 530 U.S. 57, 67 (2000).

child's best interest.[198] The Supreme Court described the Washington non-parental visitation statute as "breathtakingly broad,"[199] stating:

> [S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.[200]

The Court held that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."[201] As such, it found the Washington statute unconstitutional, "as applied in this case," because it placed no limits on who could petition for visitation and it did not limit the court's general discretion to grant visitation.[202]

Though the plurality made a reference to an intermediate level of scrutiny, two concurring justices disagreed with the level of scrutiny employed in the decision.[203] Justice Souter wrote in his concurrence that the Court had heard enough to agree with the Supreme Court of Washington that the statute, on its face, was unconstitutional.[204] Because it swept too broadly, he found "no need to decide whether harm is required or to consider the precise scope of the parent's right or its necessary protections."[205] Justice Thomas stated in his concurring opinion that the Court should have applied a strict scrutiny standard to the infringement on the parent's fundamental right to the care, custody, and control of her children.[206] In addition, he objected to the unspecified level of

198. *See id.* (stating that, in effect, a Washington court could overturn any decision by a parent regarding visitation).

199. *Id.*

200. *Id.* at 68-69.

201. *Id.* at 72-73.

202. *Troxel*, 530 U.S. at 73.

203. *Id.* at 65 (noting that the Fourteenth Amendment's Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests").

204. *Id.* at 75 (Souter, J., concurring).

205. *Id.* at 77.

206. *See id.* at 80 (Thomas, J., concurring) (expressing that the "State of Washington lacks even a legitimate governmental interest—to say nothing of a compelling one").

scrutiny in the plurality opinion.[207] In writing for the plurality, Justice O'Connor said only that the Due Process Clause provides "heightened protection against government interference."[208]

While a parent has the fundamental right to the care, custody, and control of his or her child, that right, as with any individual right, might have to give way to an overriding state interest.[209] The Supreme Court in *Troxel* could have provided more guidance on how to analyze a challenge to a state statute that infringes on a parent's fundamental right. Since no constitutional standard was explicitly adopted, a court reviewing the Texas statutes which affect the right of a parent to consent to the marriage of a child must choose whether to apply a strict, intermediate, or rational basis level of scrutiny. For example, if the parent of a fifteen-year-old Texan, like Maria in *Moe*, claimed that the Texas regulation, which declares that a parent commits a third-degree felony offense if the parent knowingly provides parental consent for a child under the age of sixteen to marry,[210] deprives the parent of the fundamental right to the care, custody, and control of a child guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution,[211] how would a court rule and what standard of scrutiny would it apply? If the court applied strict scrutiny, as used in *Zablocki*, the court would determine whether the state regulation impermissibly interferes with a fundamental right. If the regulation significantly interferes with the exercise of a fundamental right, the statute cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.[212] At this highest level of scrutiny, the court would likely find that the parent has a fundamental right

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207. *See Troxel*, 530 U.S. at 80 (Thomas, J., concurring) (commenting that the plurality, as well as Justices Kennedy and Souter, failed to articulate the appropriate constitutional standard).

208. Troxel v. Granville, 530 U.S. 57, 65 (2000) (citing Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).

209. *See* Grothues v. City of Helotes, 928 S.W.2d 725, 731 (Tex. App.—San Antonio 1996, no writ) (en banc) ("Where public interest is involved, individuals' rights often yield to overriding public interests and are often regulated under the police power of the state.").

210. TEX. FAM. CODE ANN. § 2.102(h) (Vernon Supp. 2005).

211. *See Troxel*, 530 U.S. at 66 (articulating that a parent enjoys the fundamental right to raise his or her children).

212. Zablocki v. Redhail, 434 U.S. 374, 384 (1978).

to the care of his or her child and that the Texas provision significantly interferes with the exercise of that fundamental right by imposing criminal sanctions on the parent in the exercise of that right. Indeed, the Texas Family Code in its section entitled "Rights and Duties in the Parent-Child Relationship," lists as one right of a parent, without specifying the age of the child, the right to consent to the child's marriage.[213]

Once the court determined that the statute significantly interferes with a parent's fundamental right, the court would not sustain the statute unless it was supported by sufficiently important state interests and was closely tailored to effectuate only those interests.[214] Texas has criminalized parental consent for the marriage of a child under the age of sixteen to prevent parents in the FLDS from forcing fourteen- or fifteen-year-old females into polygamist marriages.[215] However, no testimony was presented that any cult-member parent went to any county courthouse in Texas and gave permission for an underage daughter to marry, as the second or third wife, a polygamist.[216] The legislative committee heard no testimony about non-cult-member parents who wish to consent to the marriages of their children under the age of sixteen.[217] Accordingly, the court would likely find that the legislation is not closely tailored to effectuate only the interest of preventing parents who favor polygamy from consenting to the polygamist marriages of their young daughters; it prevents all Texas parents from consenting to the marriages of their children under the age of sixteen.[218]

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213. TEX. FAM. CODE ANN. § 151.001(a)(6) (Vernon 2002).

214. *Zablocki*, 434 U.S. at 384.

215. *See* Hearing on Tex. H.B. 3006 Before the House Comm. on Juvenile Justice & Family Issues, 79th Leg., R.S. (Apr. 13, 2005) (statement of Rep. Harvey Hilderbran), *available at* http://www.house.state.tx.us/committees/broadcasts.php?session=79&cmte=340 (follow Apr. 13, 2005 archived broadcast hyperlink) (discussing the purposes of H.B. 3006) (audiotape on file with the *St. Mary's Law Journal*).

216. Hearing on Tex. H.B. 3006 Before the House Comm. on Juvenile Justice & Family Issues, 79th Leg., R.S. (Apr. 13, 2005), *available at* http://www.house.state.tx.us/committees/broadcasts.php?session=79&cmte=340 (follow Apr. 13, 2005 archived broadcast hyperlink) (audiotape on file with the *St. Mary's Law Journal*).

217. *Id.*

218. *See* TEX. FAM. CODE ANN. § 2.102 (Vernon Supp. 2005) (applying to all Texans, not just FLDS members).

However, it is conceivable that the court could interpret *Troxel*'s ambiguity as requiring something less than strict scrutiny on the issue of a parent's right to consent to the marriage of a child under the age of sixteen. If so, the court might apply only a "heightened" level of protection (i.e., intermediate scrutiny) against the government's interference.[219] Under the heightened standard, the court would determine if the parent had a due process right in the care of a child and if that right has been provided "heightened protection against governmental interference."[220] In light of the parent facing criminal charges for consenting to an underage child's marriage, and in light of the reason for the statute—to prevent polygamist practices by some Texas parents—under the heightened standard, a court could justifiably find that the regulation is unconstitutional.

Normally, a court reviewing legislation which affects an individual's fundamental right would apply a strict level of scrutiny or, pursuant to *Troxel*, at least a heightened level of scrutiny, but even if the court uses a rational basis level of scrutiny,[221] the court would only need to determine that there was a rational relationship between the criminalization of the parental consent and the state interest in preventing parents from forcing their underage daughters into polygamist marriages.[222] At this point, the parent would assert that no rational relationship exists between the legislative act of denying and criminalizing the act of a parent consenting to the marriage of a fourteen- or fifteen-year-old child and the state interest in preventing a parent from consenting to the polygamist marriage of a fourteen- or fifteen-year-old daughter. The court in the parent's case could justifiably rule that the state interest in preventing parents from consenting to the polygamous marriages of their

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219. *See* Troxel v. Granville, 530 U.S. 57, 65 (2000) (articulating intermediate scrutiny language, although not necessarily applying this standard in the Court's analysis).

220. *Id.*

221. For example, in his dissenting opinion in *Troxel*, Justice Stevens disagreed with Justice Thomas that the review of the statute that affected the parent's fundamental right to decide who could spend time with her children required a strict level of scrutiny. Justice Stevens envisioned instances in which a parent's fundamental right would necessarily be tempered by the State's interest in protecting the child, and he spoke of the "overlapping and competing prerogatives of various plausibly interested parties" at stake. "[A]t a minimum," the interests of the child had been implicated, and thus, a reviewing court should not apply strict scrutiny to the infringement on the parent's right—thereby ignoring any rights of the child. *See Troxel*, 530 U.S. at 86-88 (Stevens, J., dissenting).

222. *See* Moe v. Dinkins, 533 F. Supp. 623, 629 (S.D.N.Y 1981) (applying rational basis to legislation affecting a minor's ability to enter into a marriage).

young daughters is not rationally related to the denial and criminalization of a parent's right to consent to the marriage of a child.

E. *A Parent's Equal Protection Right to Raise a Child*

A parent is protected under the Equal Protection Clause in the right to consent to the marriage of his or her child. The right to care and control the upbringing of a child is a fundamental right of a parent.[223] A parent enjoys the presumption that the parent acts in the child's best interest.[224] According to the United States Supreme Court, a reviewing court will apply a strict level of scrutiny to a regulation which either classifies a person by race, alienage, or national origin or impinges upon an individual's fundamental right.[225] The state has the power to impinge upon a fundamental right only if the legislation is suitably tailored to serve a compelling state interest.[226] For example, in *Zablocki*, the Supreme Court used a strict level of scrutiny to conclude that the statutory classification created by the statute—people who owe child support cannot marry while those who do not owe child support can marry—violated the plaintiff's equal protection rights because it impinged upon his fundamental right to marry and could not be justified by a compelling interest of the state in collecting child support.[227]

Texas has impinged upon the fundamental right of a parent to consent to the marriage of a child to serve a state interest in preventing children from becoming child brides in polygamist marriages. This interest can be described as compelling. However, the Texas legislature did not narrowly tailor its legislation to serve only its compelling interest. A narrowly tailored statute would prevent a parent from consenting to the polygamist or bigamist marriage of

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223. *See Troxel*, 530 U.S. at 66 (stating that parents have the fundamental right to raise their children).

224. *See id* at 68 ("[T]here is a presumption that fit parents act in the best interests of their children."); Parham v. J.R., 442 U.S. 584, 610 (1979) (emphasizing that a presumption exists in Texas "that parents act in the best interests of their child").

225. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (asserting that statutory classifications by race, alienage or national origin are subjected to strict scrutiny, as well as impingements upon fundamental rights); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973) (advancing that, under equal protection analysis, strict scrutiny will be used when a fundamental right or suspect class is affected by a statute).

226. *City of Cleburne*, 473 U.S. at 440.

227. Zablocki v. Redhail, 434 U.S. 374, 386-87 (1978).

a child under the age of sixteen. The statute as written prevents a Texas parent from consenting to any marriage of a child younger than sixteen, and it criminalizes a parent as a felon who knowingly consents to the marriage.[228] As such, the statute does not afford equal protection under the law to a Texas parent who wants to consent to the non-polygamist marriage of his or her child.

Another component of equal protection analysis is whether a statute is over-inclusive.[229] As previously described, over-inclusive classifications burden a wider than necessary range of individuals, extending beyond those persons possessing the trait contributing to the mischief or evil the legislature seeks to eradicate.[230] Though an over-inclusive statute is not per se unconstitutional, there must be a substantial fit between the classification and the compelling interest.[231] In general, governmental power may not supersede parental authority in all cases solely because some parents abuse or neglect their children.[232] The legislative classifications must be suitably tailored to serve a compelling state interest.

The State of Texas has impermissibly prevented the parents of young Texans to consent to their children's marriages because members of the FLDS are purportedly engaging in polygamist marriages with fourteen- and fifteen-year-old girls. The legislature did not consider the rights of non-cult-member parents when it passed the amendment to the Texas Family Code which penalizes as a felony the act of a Texas parent consenting to the marriage of a child under the age of sixteen. The State of Texas decided that because some Texas parents in the compound in Eldorado, Texas, were consenting to polygamist marriages (not at the courthouse,

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228. TEX. FAM. CODE ANN. § 2.102(h) (Vernon Supp. 2005).

229. *See* Cabell v. Chavez-Salido, 454 U.S. 432, 440 (1982) ("[A] classification that is substantially overinclusive . . . tends to undercut the governmental claim that the classification serves legitimate [or compelling] political ends.").

230. *See* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 351-53 (1949) (providing a detailed commentary on over-inclusive classifications).

231. *See Cabell*, 454 U.S. at 442 (declaring that "the inquiry [with an over-inclusive statute] is whether the restriction reaches so far and is so broad and haphazard as to belie the State's claim that it is only attempting to" further or protect a compelling interest).

232. *See* Parham v. J.R., 442 U.S. 584, 603 (1979) ("The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.").

but within the compound)[233] of their young children, all Texas parents are precluded from consenting to the marriages of their young teenagers. In other words, the State of Texas decided that because some Texas parents are not acting in their children's best interests, no Texas parent may decide that it is in a fourteen- or fifteen-year-old child's best interest to marry. Under a strict scrutiny standard of review, the law which denies and penalizes a parent for the act of consenting to a child's marriage does not accomplish the State's interest—compelling or not—in preventing polygamy, and it sweeps too broadly by preventing and punishing all Texas parents for exercising their fundamental right to consent to the marriages of their children.

Even if a reviewing court determined that, for whatever reason, it would apply either a "heightened" standard of review or a rational basis standard of review to the Texas legislation, the legislation would not likely be sustained.[234] Under a heightened level of protection against government interference, a court would probably find that the legislation is overbroad and not sufficiently related to the state's interest in preventing polygamy because it prevents a parent from consenting to a child's marriage—in fact punishes a parent for the act—but does not prevent polygamists from taking child brides. Similarly, the legislation is not even rationally related to preventing child polygamist marriages. Thus, the legislation almost certainly violates the Equal Protection Clause of the Constitution.

V. TEXAS'S FORGOTTEN INTEREST: THE UNWED, PREGNANT FIFTEEN-YEAR-OLD

Based on the testimony before the House Committee on Juvenile Justice and Family Issues, the Texas Legislature took action to impede the polygamist practices of the FLDS in Texas. While the amendments to the Texas Family Code and Texas Penal Code were specifically aimed at this small group, the amendments have pre-

233. Hearing on Tex. H.B. 3006 Before the House Comm. on Juvenile Justice & Family Issues, 79th Leg., R.S. (Apr. 13, 2005) (statements of Utah Attorney General Mark Shurtleff & Sam Brower), *available at* http://www.house.state.tx.us/committees/broadcasts.php?session=79&cmte=340 (follow Apr. 13, 2005 archived broadcast hyperlink) (audiotape on file with the *St. Mary's Law Journal*).

234. *See* Troxel v. Granville, 530 U.S. 57, 65 (2000) (referencing intermediate scrutiny but not applying this standard in its analysis).

vented all Texans, including non-cult-member Texans, under the age of sixteen from marrying, and have prevented all Texas parents, including non-cult-member Texas parents, from deciding if marriage for a child under sixteen is in that child's best interest.

While the new laws do not prevent bigamy or polygamy, they do satisfy the concern of Representative Goodman who believes fourteen is too young to marry.[235] Yet, the committee heard *no* testimony about the appropriate minimum age for marriage in Texas; it heard only about older FLDS members taking young brides in polygamist marriages.[236] Further, Representative Goodman recognized that the legislation would apply to all Texans, not just the citizens of Schleicher County.[237]

In its zeal to deal with polygamists who take child brides, the legislature forgot to consider other state interests, such as reducing the number of unwed mothers in Texas. Underage Texas females can and often do become pregnant.[238] The parent of the impregnated female child has rights and duties toward his or her child, which include the duty to financially support the child until she graduates from high school or becomes emancipated.[239] Likewise, the pregnant female will be in all ways responsible for her child

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235. Hearing on Tex. H.B. 3006 Before the House Comm. on Juvenile Justice & Family Issues, 79th Leg., R.S. (Apr. 13, 2005) (comments of Rep. Toby Goodman), *available at* http://www.house.state.tx.us/committees/broadcasts.php?session=79&cmte=340 (follow Apr. 13, 2005 archived broadcast hyperlink) (stating that fourteen is too young to marry, even with parental consent, and stating that the age limit "needs to be moved to sixteen") (audiotape on file with the *St. Mary's Law Journal*).

236. *See id.* (statements of Rep. Harvey Hilderbran, Utah Attorney General Mark Shurtleff, Jon Krakauer & Sam Brower) (failing to discuss an appropriate minimum age for marriage).

237. *See id.* (comments of Rep. Toby Goodman) (emphasizing that "it's not going to just apply to this one county in Texas [but] it's going to apply to the whole State of Texas [and all] two hundred and fifty-four counties [and] twenty-three million people [will be affected]"). Representative Goodman also emphasized that the legislators should "think through these [concerns] and determine whether they are good policy" before adopting the legislation. *Id.*

238. *See* N. Scafetta, E. Restrepo & B.J. West, *Seasonality of Birth and Conception to Teenagers in Texas*, 50 SOC. BIOLOGY 1, 1 (2003), *available at* http://www.fel.duke.edu/~scafetta/pdf/teens_2004.pdf *and* http://www.findarticles.com/p/articles/mi_qa3998/is_200304/ai_n9188082 (stating Texas ranks fifth in the nation in its teenage pregnancy rate, and in 1996 the pregnancy rate for teenagers in Texas was 113 per 1000 teenage girls between the ages of fifteen and nineteen).

239. *See* TEX. FAM. CODE ANN. § 151.001(a)(3) (Vernon Supp. 2005) ("A parent of a child has . . . the duty to support the child, including providing the child with clothing, food, shelter, medical and dental care, and education.").

after the birth[240]—her parent(s) will not have a duty to support the new grandchild.[241] Prior to the amendments to the Texas Family Code, marriage to the father of the expected child would have been an option for the pregnant child. Today, that option is no longer available.

The actions that the Texas Legislature took would preclude a pregnant fifteen-year-old girl and the father of her baby from marrying in Texas, even if both of their parents would consent to the marriage. The parents of the boy can consent to his marriage if he is older than sixteen,[242] but he cannot marry the girl he impregnated.[243] The parents of the girl cannot consent to their daughter's marriage without facing felony charges.[244] Moreover, if "void" means void, a court could not grant permission to an individual under the age of sixteen to marry.[245] If the couple does not marry before the baby is born, the child will be born without a presumed father.[246] While a child born to unmarried parents may not be discriminated against because of the child's parents' marital status,[247] it is still the policy of the State of Texas to encourage marriage of

240. *Id.*

241. *See* TEX. FAM. CODE ANN. § 101.025 (Vernon 2002) (delineating that a parent-child relationship includes "the mother and child relationship and the father and child relationship," but it does not include a grandparent and grandchild relationship); TEX. FAM. CODE ANN. § 151.001(a)(3) (Vernon Supp. 2005) (noting that the parent has an obligation to support a child).

242. *See* TEX. FAM. CODE ANN. § 2.102(a) (Vernon Supp. 2005) ("If an applicant is [sixteen] years of age or older but under [eighteen] years of age, the county clerk shall issue the license if parental consent is given . . . .").

243. *See id.* § 6.205 (precluding marriage as an option because the girl is younger than sixteen, and such marriage is void).

244. *See id.* § 2.102(h) (penalizing a parent with a third-degree felony if he or she knowingly provides marital consent for a child that is younger than sixteen years old).

245. *Compare id.* § 2.103 (authorizing a minor to petition, in the minor's own name, for a court order granting permission to marry, yet never stating a minimum age requirement for the minor in order to execute the petition), *with id.* § 6.205 (outlining that any marriage involving a minor younger than sixteen is automatically void).

246. *See id.* § 160.204 (stating that if a young couple does not marry prior to their baby's birth, there will be no presumption of paternity because the situation does not fit into one of the five possible statutory presumptions of paternity).

247. *See* TEX. FAM. CODE ANN. § 160.202 (Vernon 2002) ("A child born to parents who are not married to each other has the same rights under the law as a child born to parents who are married to each other.").

the child's parents before the child is born.[248] The words of the policy are "to provide for an orderly determination of parentage and security for the children."[249] Seemingly, Texas's public policy towards marriage would favor the marriage of a pregnant fifteen-year-old girl to her baby's father if both her parents and his parents consent.[250]

Additionally, the legislature did not consider statistics that show females under the age of sixteen have received Texas marriage licenses in recent years. According to the Texas Department of Health, 448 females fifteen or younger obtained marriage licenses in 2003.[251] In 2002, 507 females under the age of sixteen obtained marriage licenses.[252] Because a court clerk would not issue a marriage license to a minor without either parental consent or a court order,[253] it is fair to state the child's desire to marry was sanctioned by an adult, either a parent or a judge, who found it was in the child's best interest to marry.

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248. *See* TEX. FAM. CODE ANN. § 1.101 (Vernon 1998) (providing public policy reasons for presuming every marriage is valid). This section of the Code reads, in part, as follows:

> [I]n order to provide stability for those entering into the marriage . . . and to provide for an orderly determination of parentage and security for the children of the relationship, it is the policy of this state to preserve and uphold each marriage against claims of invalidity unless a strong reason exists for holding the marriage void or voidable.

Id.

249. *Id.*

250. *Id.* Bearing in mind, of course, that the baby's father must be no older than eighteen, or he could face statutory rape charges. TEX. PEN. CODE ANN. § 22.011 (Vernon Supp. 2005).

251. Tex. Dep't of State Health Servs., Texas Marriage and Divorce Records, Marriage Index, http://www.dshs.state.tx.us/vs/marriagedivorce/mindex.shtm (follow 2003 hyperlink) (last visited Mar. 9, 2006) (providing that of the 448 females who obtained marriage licenses, 1 was thirteen-years old, 82 were fourteen-years old, and 365 were fifteen-years old) (on file with the *St. Mary's Law Journal*). It should also be noted that 929 females age sixteen obtained marriage licenses in 2003. *Id.*

252. *Id.* (follow 2002 hyperlink) (showing 409 fifteen-year-olds, 96 fourteen-year-olds, and 2 thirteen-year-olds obtained marriage licenses in 2002). Again, 1045 females who were sixteen procured marriage licenses in 2002. *Id.*

253. *See* TEX. FAM. CODE ANN. § 2.102 (Vernon 1998) (stating that an applicant between fourteen and eighteen years of age may marry with parental consent); *id.* § 2.103 (allowing a minor, without reference to age, to petition a court for permission to marry).

Of course, the fourteen- or fifteen-year-old can marry with parental permission when she turns sixteen;[254] her right to marry is admittedly only postponed rather than denied.[255] But Texas has denied her and her parents the right to decide if it is in her best interest to marry at age fourteen or fifteen, not because Texas had evidence that fourteen- or fifteen-year-old children in Texas should not marry, but because Texas had evidence that some fourteen- or fifteen-year-old children were being forced into polygamist marriages.[256] Thus, the option no longer available to Texans under the age of sixteen is the option of creating a family by marriage.

The amendments to the Family Code run contrary to Texas's policy towards marriage. The purported actions of the renegade FLDS do not provide a strong reason to void a marriage by any person under the age of sixteen, pursuant to the policy toward marriage that is codified in the Texas Family Code, nor does the FLDS threat supply a strong reason to criminalize the consent of a parent to such a marriage. After hearing the testimony about the treatment of women and children in the Eldorado compound, the legislature had a strong reason to reaffirm that any bigamous or polygamist marriage coming out of the compound was void, but Texas already had laws criminalizing and voiding such marriages.[257] The legislature clearly had a strong reason to penalize any individual guilty of committing polygamy with harsher punishments,[258] but a strong reason did not exist for voiding every marriage by every party under the age of sixteen and for making a felon out of

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254. *See* TEX. FAM. CODE ANN. § 2.102(a) (Vernon Supp. 2005) ("If an applicant is [sixteen] years of age or older but under [eighteen] years of age, the county clerk shall issue the license if parental consent is given . . . .").

255. *See* Moe v. Dinkins, 533 F. Supp. 623, 630 (S.D.N.Y 1981) (stating that the result of a similar statute passed in New York was that it merely delayed or temporarily suspended the marriage of the minors).

256. *See* Hearing on Tex. H.B. 3006 Before the House Comm. on Juvenile Justice & Family Issues, 79th Leg., R.S. (Apr. 13, 2005), *available at* http://www.house.state.tx.us/committees/broadcasts.php?session=79&cmte=340 (follow Apr. 13, 2005 archived broadcast hyperlink) (failing to discuss any testimony on reasons to void all marriages by parties under the age of sixteen) (audiotape on file with the *St. Mary's Law Journal*).

257. TEX. FAM. CODE ANN. § 6.202(a) (Vernon 1998); TEX. PEN. CODE ANN. § 25.01 (Vernon 2003).

258. *Compare* TEX. PEN. CODE ANN. § 25.01 (Vernon 2003) (penalizing individuals guilty of bigamy with a Class A misdemeanor), *with* TEX. PEN. CODE ANN. § 25.01 (Vernon Supp. 2005) (increasing the punishment from that of a misdemeanor to the possibility of the offense increasing to that of a second- or third-degree felony).

every parent who consented to the marriage of a child under the age of sixteen. Representative Goodman recognized that the actions of the legislature must be good policy for all Texans,[259] but the legislature failed on that count—the 2005 Family Code amendments are not good policy for all Texans.

VI. CONCLUSION

The Texas legislature voided the ability of Texans under the age of sixteen to marry, not to promote an interest such as encouraging mature decision-making or preventing unstable marriages—the legislative committee heard no testimony regarding the wisdom of a sixteen year-old being able to marry as opposed to a fourteen- or fifteen-year-old—but to promote the state interest of strengthening purportedly weak Texas laws against polygamy. The 2005 Family Code amendments not only interfere with the child's ability to enter into a marital relationship, as well as the child's parents' decision to allow such a relationship, but the amendments are not even rationally related to the state interest of preventing child polygamy. In fact, the amendments do *nothing* to prevent child polygamy. In that regard, the new legislation is under-inclusive.

Furthermore, the irrational legislative amendments to the Family Code, aimed at the FLDS, sweep too broadly and adversely affect the populace of the entire state. While preventing polygamy is a valid state interest, that interest is not accomplished by voiding a fifteen-year-old's marriage and criminalizing a minor's parents for consenting to such marriage. As such, the new laws are over-inclusive and not rationally related to preventing polygamy. With the additions to the Texas Family Code, neither a Texan younger than sixteen nor the child's parents, in the face of circumstances in which marriage might be in the best interests of the child, may opt for marriage.

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259. *See* Hearing on Tex. H.B. 3006 Before the House Comm. on Juvenile Justice & Family Issues, 79th Leg., R.S. (Apr. 13, 2005) (comments of Rep. Toby Goodman), *available at* http://www.house.state.tx.us/committees/broadcasts.php?session=79&cmte=340 (follow Apr. 13, 2005 archived broadcast hyperlink) (stressing that all 254 counties would be bound by laws passed essentially for one county, Schleicher County, and that the laws had to be good policy for all Texans) (audiotape on file with the *St. Mary's Law Journal*).