IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0429-16

RUSSELL LAMAR ESTES, Appellant

v.

THE STATE OF TEXAS

ON STATE'S & APPELLANT'S PETITIONS FOR DISCRETIONARY REVIEW FROM THE 2ND COURT OF APPEALS TARRANT COUNTY

NEWELL, J., filed an opinion concurring in part and dissenting in part in which HERVEY AND RICHARDSON JJ., joined.

Sexual assault is usually a second-degree felony. The text of Penal Code Section 22.011(f), as it enhances the offense of sexual assault, reads as follows:

> (f) An offense under this section is a felony of the second degree, except that an offense under this section is a felony in the first degree if the victim was a person whom the actor was prohibited from marrying or purporting to marry or with

> whom the actor was prohibited from living under the appearance of being married under Section 25.01.[1]

Appellant argues that this statute differentiates between married and unmarried sex offenders in violation of the Equal Protection Clause. Appellant is incorrect. The classification at issue in this statute is rationally related to enforcing the prohibition against bigamy and sexual assault committed pursuant to a bigamous relationship. As such, it does not violate the Equal Protection Clause. Consequently, I concur in the Court's conclusion, though I disagree with its reasoning. However, because the Court chooses to remand the case to the court of appeals rather than address the appropriate standard of review for Appellant's equal protection claim, I respectfully dissent.

I. Equal Protection Challenges

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;" it is a direction that all persons similarly situated should be treated alike.[2] In determining whether a criminal statute violates the Equal Protection Clause, we begin with the

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[1] TEX. PEN. CODE § 22.011(f).

[2] *Schlittler v. State*, 488 S.W.3d 306, 316 (Tex. Crim. App. 2016) (citing U.S. CONST. amend XIV; *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985)).

presumption that the purpose of the statute is constitutional.[3] To prevail on an equal protection claim, the party complaining must establish two elements. First, the party must show he was treated differently than other similarly situated individuals due to a particular legislative classification.[4] Second, the party must prove that the statutory classification is not rationally related to a legitimate state interest.[5] A statute must be upheld unless the State relies on a classification "whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."[6]

This general deference to legislative classifications gives way if a statute contains a classification that impinges on the short list of personal rights protected by the Constitution or a suspect classification, such as race, alienage, or national origin.[7] A right is fundamental if it is explicitly

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[3] *Smith v. State*, 898 S.W.2d 838, 847 (Tex. Crim. App. 1995).

[4] *Id.*; *see also Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979) (noting that the focus of an equal protection challenge is the validity of the legislative classification). The Court does not address the court of appeals determination that Appellant established that he is "similarly situated" to unmarried offenders who are receiving less punishment. *See Estes v. State*, 487 S.W.3d 737, 748 (Tex. App.—Fort Worth 2016). However, the State does not contest this aspect of the court of appeals holding, and the Court appears to proceed on the assumption that Appellant has satisfied this criteria of his equal protection challenge.

[5] *Smith*, 898 S.W.2d at 847

[6] *City of Cleburne*, 473 U.S.. at 446.

[7] *Id*. at 440. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (due process clause protects the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to

or implicitly guaranteed by the Constitution.[8] And a suspect class is comprised of members that possess either an "immutable characteristic determined solely by the accident of birth,"[9] or have been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[10] In those situations, a statute is subject to strict scrutiny and will be sustained only if it is narrowly tailored to serve a compelling state interest.[11]

Simply put, "in assessing an equal protection challenge, a court is called upon only to measure the basic validity of a legislative classification."[12] When some other independent right is not at stake and there is no reason to infer antipathy, it is presumed that even

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abortion).

[8] *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S, 1, 33-34 (1972) (explaining that the key to discovering whether a particular right–in that case education–is "fundamental" is not to be found in comparisons of the relative societal significance of the right or weighing whether the right is as important as another right; the answer lies in assessing whether the right is explicitly or implicitly guaranteed by the Constitution).

[9] *Frontiero v. Richardson*, 411 U.S. 667, 686 (1973).

[10] *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (quoting *San Antonio Independent School Dist. v. Rodriguez*, 441 U.S. 1, 28 (1976)). Appellant does not appear to argue that marital status constitutes a suspect or quasi-suspect class.

[11] *City of Cleburne*, 473 U.S. at 440.

[12] *Feeney*, 442 U.S. at 272.

improvident decisions will eventually be rectified by the democratic process.[13] As the United States Supreme Court explained in *Dandridge v. Williams*:

> [A] State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodations–illogical, it may be, and unscientific. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.[14]

The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility.[15]

A. The Legislative Classification Was Rationally Related to a Legitimate State Interest

In this case, the problem with the court of appeals analysis lay in the focus upon whether there was a rational basis to elevate Appellant's punishment in this case, rather than upon whether there was a rational basis for the Legislature to draw a distinction between married and

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[13] *Id.*

[14] 397 U.S. 471, 485 (1970) (citations and internal quotation marks omitted).

[15] *Id.*

unmarried defendants in the statute.[16] The court of appeals set out the standard this way:

> "Generally, to prevail on an equal protection claim, the party complaining must establish two elements: (1) the party was treated differently than other similarly situated parties, and (2) the differential treatment does not have a rational governmental basis."[17]

Later, it framed the inquiry as a determination of "whether appellant's disparate treatment on account of his status of being married has at least a rational governmental basis."[18] But a proper application of the standard does not focus upon whether there is a rational basis for the treatment of the defendant, it focuses upon whether the Legislature had a rational basis for drawing a classification in the statute. This distinction is subtle, but significant.

By focusing upon whether the treatment at issue was rational, rather than whether a legislative classification was rational, the court of appeals effectively engrafted the "narrowly tailored" requirement of strict-scrutiny review onto rational-basis review. Under rational-basis review,

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[16] The court of appeals seems to focus exclusively on the effect the statute has on Appellant without identifying a particular legislative classification. *Estes*, 487 S.W.3d at 748. The court of appeals seems to proceed upon the assumption that Section 22.011(f) draws a legislative distinction between married and unmarried offenders. As no one challenges this assumption, neither do I.

[17] *Estes*, 487 S.W.3d at 747.

[18] *Id.* at 748.

courts must accept that a particular legislative classification will affect certain groups unevenly and these uneven effects upon particular groups within a class are ordinarily of no constitutional concern.[19] Rational-basis review does not require invalidation of a particular classification simply because the classification at issue is broader than it needs to be.[20] The question of overreach has no place in an equal protection analysis where the First Amendment is not implicated.[21]

Yet the court of appeals essentially required that the statute be narrowly tailored to the State's legitimate interest in punishing bigamous or polygamous relationships. The court of appeals acknowledged that the legislative history of the amendment to Section 22.011(f) reveals that the legislature was motivated by a desire to curb sexual assaults committed in bigamous or polygamous relationships, including against children, under the guise of religious freedom.[22] The State conceded as much.[23] Rather than consider whether this motivation provided a rational basis for the Legislature to draw the distinction between married and unmarried

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[19] *New York City Transit Authority v. Beazer*, 440 U.S. 568, 593 (1979).

[20] *Id.*

[21] *Dandridge*, 397 U.S. at 484.

[22] *Estes*, 487 S.W.3d at 748.

[23] *Id.*

defendants, the court simply held that the classification was not rational because this case did not involve a bigamous or polygamous relationship.[24] In other words, the court of appeals held that the classification at issue was not rationally related to a legitimate state interest because the classification was not narrowly tailored to apply to only bigamous or polygamous relationships.

We have already held that Section 22.011(f) would apply to a sexual assault pursuant to a bigamous relationship.[25] And we have held that this is a valid application of the statute.[26] By doing so, we implicitly held that there is at least a legitimate state interest in prohibiting bigamous or polygamous relationships and sexual assault pursuant to such relationships. Indeed, as the Supreme Court of Utah has observed when considering the constitutionality of its own bigamy statute, prohibitions against bigamy and polygamy serve the State's interest in protecting vulnerable individuals from exploitation and abuse.[27]

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[24] *Id.* ("Although not determinative of the constitutional issue before us, nothing in the record shows that the increased penalty based only on appellant's status of being married serves that rational purpose of the statute; the evidence does not show that appellant sexually assaulted Katie as part of an allegedly bigamous or polygamous relationship or under any ostensibly religious justification.").

[25] *State v. Rosseau*, 396 S.W.3d 550, 558 (Tex. Crim. App. 2013).

[26] *Id.*

[27] *See State v. Green*, 99 P.3d 820, 830 (Utah 2004) (upholding Utah's bigamy statute against constitutional challenge).

> The practice of polygamy, in particular, often coincides with crimes targeting women and children. Crimes not unusually attendant to the practice of polygamy include incest, sexual assault, statutory rape, and failure to pay child support. *See* Richard A. Vasquez, Note, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence*, 5 N.Y.U. J. Legis. & Pub. Pol'y 225, 239-45 (2001). Moreover, the closed nature of polygamous communities makes obtaining evidence of and prosecuting these crimes challenging. *See Id.* at 243 ("Given the highly private nature of sexual abuse and the self-imposed isolation of polygamous communities, prosecution may well prove impossible. This wall of silence may present a compelling justification for criminalizing the act of polygamy, prosecuting offenders, and effectively breaking down the wall that provides a favorable environment in which crimes of physical and sexual abuse can thrive.").[28]

This alone provides a rational basis for drawing the distinction between married and unmarried offenders within the sexual assault statute. Indeed, without such a legislative classification, the statute would not be effective at its intended purpose of punishing more severely an individual who commits sexual assault pursuant to a bigamous or polygamous relationship.[29] When dealing with the offenses of bigamy or polygamy, drawing a line between married and unmarried offenders is inevitable.

Far from arbitrary, irrational, or attenuated from its asserted goal,

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[28] *Id.* (footnote omitted).

[29] In order to prosecute someone for the offense of bigamy, the State must first prove either that the defendant is legally married or that the person he or she purports to marry is already legally married. TEX. PEN. CODE § 25.01 (a)(1).

the distinction between married and unmarried offenders flows logically from the intended purpose of the statute. Though the statute is written more broadly than necessary to accomplish its intended goal, the distinction between married and unmarried offenders underlying Section 22.011(f) is at least rationally related to that goal. The Constitution does not require that the statute be more narrowly tailored absent a showing that Appellant is a member of a suspect class or that the statute significantly interferes with a fundamental right. So, while I ultimately agree with the Court that the legislative classification is rationally related to a legitimate state interest, I disagree with the Court's chosen path to that result.

B. The Court's Rational-Basis Analysis is Unnecessarily Broad

According to the Court, the classification at issue survives rational-basis review because marriage is really good and crimes against children are really bad, so crimes against children committed by married people are worse than crimes committed by unmarried people.[30] As discussed above, adopting this argument is unnecessary and focuses on the wrong question. However, I write separately to explain further implications of

[30] Judge Keasler argues that I mischaracterize the Court's holding. To paraphrase Shakespeare, "Methinks he doth protest too much." WILLIAM SHAKESPEARE, HAMLET act 3, sc. 2 ("The lady doth protest too much, methinks.").

this approach.

First, the observation that the State has at least a legitimate interest in protecting children is emotionally satisfying, but conceptually unhelpful. A variant of the same observation could be made about every offense in the Penal Code. Of course the State has a legitimate interest in punishing crime and setting punishment classifications.[31] However, a determination by the Legislature of what constitutes the proper exercise of police power is not final or conclusive.[32] The State's interest in protecting children does not explain why a legislative distinction between married and unmarried defendants is rational.[33] It only serves to make the State's argument supporting that distinction look more substantial.

Second, engaging in "rational speculation" regarding legislative intent by ignoring clear indications of that legislative intent could undermine the rationale behind rational-basis review. Reviewing courts get their license to speculate from the United States Supreme Court

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[31] *See Skinner v. Oklahoma*, 316 U.S. 535, 540 (1942) (noting that the equal protection clause does not prevent the legislature from recognizing degrees of evil).

[32] *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

[33] For example, in *Zablocki v. Redhail*, the State of Wisconsin sought to justify a statute that prohibited someone from getting a marriage license if he or she had failed to pay child support for an out-of-custody child on the basis of protecting the welfare of out-of-custody children. 434 U.S. 374, 388-89 (1978). The United States Supreme Court found this justification unpersuasive because it lacked a clear connection between the State's interest and the statute's requirement. *Id.* This lack of a connection led the parties to narrow the rationale oral argument to suggest that it would provide an incentive to make support payments. *Id.*

decision in *FCC v. Beach Communications*, *Inc.* In that case, Satellite Master antenna operators brought suit against the Federal Communications Commission arguing that the classification made between cable facilities in the Cable Communications Policy Act of 1984 violated equal protection.[34] At issue was whether there was a rational basis to justify the distinction made between cable facilities that serve separately owned and managed buildings and those that serve one or more buildings under common ownership or management.[35] The Supreme Court ultimately held that there was a rational basis for the distinction.[36] But it was how they got there that concerns this case.

The Court of Appeals had held in *Beach* that there was no predominate rationale for the distinction at issue "on the record" and so it had remanded the case for more evidence before striking down the legislative classification.[37] In the remand order, the Court of Appeals had directed the FCC to provide "additional legislative facts" to justify the distinction.[38] The Court of Appeals ultimately struck down the

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[34] *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 309-11 (1993).

[35] *Id.* at 311.

[36] *Id.* at 320.

[37] *Id.* at 312.

[38] *Id.*

classification after receiving a report generated by the FCC in response to the Court of Appeals' order.[39]

The Supreme Court noted that those attacking the rationality of a legislative classification have the burden to negate every conceivable basis which might support it.[40] Moreover, the Court held that the actual motivation for the challenged distinction is entirely irrelevant for constitutional purposes because the Legislature is not required to articulate its reasons for enacting a statute.[41] According to the Court, the "absence" of legislative facts has no significance in a rational basis analysis, so "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."[42]

The Supreme Court characterized this as an act of judicial restraint because it deferred to the legislative prerogative to create classifications.[43] According to the Court, "Defining the class of persons

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[39] *Id.*

[40] *Id.* at 315.

[41] *Id.* at 315.

[42] *Id.*

[43] *Id.* ("These restraints on judicial review have added force 'where the legislature must necessarily engage in a process of line-drawing.'")(quoting *United States Railroad Retirement Bd. V. Fritz*, 449 US. 166, 179 (1980)).

subject to a regulatory requirement–much like classifying governmental beneficiaries–'inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.'"[44] In short, in the absence of any indication as to what the Legislature's predominate rationale was for drawing a particular distinction, courts must defer to the legislative choice and uphold it under any conceivable basis to avoid substituting its own policy preferences for those of the Legislature.

That's not quite what's going on in this case, though. Here, there is some indication, both in the text of the statute and in the legislative history, as to why the Legislature drew the distinction it did. As we have said, the literal text of the statute "is the only *definitive* evidence of what the legislators (and perhaps the Governor) had in mind when the statute was enacted into law."[45] As set out above, the text of Penal Code Section 22.011(f), as it enhances the offense of sexual assault, reads as follows:

> (f) An offense under this section is a felony of the second degree, except that an offense under this section is a felony

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[44] *Id.* at 315-16 (quoting *Fritz*, 449 U.S. at 179).

[45] *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991).

> in the first degree if the victim was a person whom the actor was prohibited from marrying or purporting to marry or with whom the actor was prohibited from living under the appearance of being married under Section 25.01.[46]

Section 25.01 of the Penal Code sets out the offense of bigamy.[47] We have already interpreted this reference by Section 22.011(f) to Section 25.01 as incorporating all six bigamy prohibitions found in the bigamy statute.[48] We also determined that this reference to Section 25.01 indicates that the Legislature intended for the State to prove facts constituting bigamy (as opposed to some other prohibition against marriage) whenever it alleges that the defendant committed sexual assault and the State invokes Section 22.011(f).[49] Even though the text is not limited to the commission of sexual assault pursuant to a bigamous relationship, it nevertheless provides a clear indication of "what the legislature had in mind" when it passed this statute: enhanced punishment for sexual assault committed in the course of a bigamous relationship.

Indeed, the Legislature did not draft Section 22.011(f) to simply

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[46] Tex. Penal Code § 22.011(f).

[47] Tex. Penal Code § 25.01.

[48] *Arteaga v. State*, 521 S.W.3d 329, 336-37 (Tex. Crim. App. 2017).

[49] *Id.*

enhance punishment upon a showing of marriage. By way of illustration, the text of the statute does not read like this:

> (f) An offense under this section is a felony of the second degree, except that an offense under this section is a felony of the first degree if the defendant was married at the time he committed the offense.

Our Legislature tied the punishment enhancement to the offense of bigamy for a reason. Yet, the Court relies upon *Beach* to speculate about what the Legislature really meant to say despite text that indicates a more narrow purpose.

Similarly, we have already examined the legislative history behind this section and determined that the legislative intent behind the amendment of this section was directed at protecting children from the blight of bigamy and polygamy.

> Section 22.011(f) was created as part of a senate bill that was broadly aimed at providing more protection to children and the elderly. Tex. S.B. 6, 79th Leg., R.S. (2005). However, the substance of the amendment regarding bigamy actually came from a house bill authored by Representative Hilderbran. Tex. H.B. 3006, 79th Leg., R.S. (2005). He testified that his bill was directed at bigamy, polygamy, and the problems associated with those practices. Hearing on Tex. H.B. 3006 Before the House Committee on Juvenile Justice & Family Issues, 79th Leg., R.S. (Apr. 3, 2005) (Statement of Representative Hildebran). He also specifically identified "The Fundamentalist Church of Jesus Christ of Latter Day Saints" (FCLDS) and said that he proposed the legislation after it was brought to his attention that the FCLDS was moving its operations to Texas because the state had weak laws

> prohibiting bigamy and polygamy. *Id.* And, although Representative Hildebran's house bill failed to pass, he offered the substance of his bill as an amendment to Senate Bill 6, which did pass.[50]

We relied upon this history when determining that this amendment was not intended as an increased punishment for other forms of prohibited marriage. It is true that we did not construe Section 22.011(f) as limited to situations involving bigamy or polygamy. However, we cannot hold in this case that the legislative intent behind the statute was really about punishing sexual assault committed under a "cloak of marriage" and remain consistent with our legislative analysis in *Arteaga*.

So, the situation in this case differs from *FCC v. Beach*. There, the reviewing court was authorized to engage in rational speculation because it had no other information regarding the legislative intent. Here, we have some indication of the legislative intent behind the passage of this amendment, yet the Court nevertheless posits a different rationale for the statute. This threatens to turn *Beach* on its head. It is hard to see how a reviewing court exercises judicial restraint and deference by substituting its own policy preferences for that of the Legislature.

Perhaps the United States Supreme Court envisioned that *Beach*

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[50] *Id.* at 337. Nowhere in our examination of the legislative history behind the passage of Section 22.011(f) did we find an expressed concern regarding sexual assault committed under the "cloak of marriage."

should be applied to situations like this, but it is unnecessary to find out. In this case, we have indications from our Legislature in the text of the statute and the legislative history regarding its motivation for passing this statutory section. The purpose behind the passage of this statute already provides a rational basis for upholding the challenged classification. There is no need to resort to additional justifications.

Further, the Court's rationale for supporting this enhancement can be re-purposed to justify a marriage enhancement for virtually any criminal offense. As the United States Supreme Court has observed, marriage as an institution is at the center of so many facets of the legal and social order.

> Indeed, while States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. Valid marriage under state law is also a significant status for over a thousand provisions of federal law.[51]

Given this, an argument could be made that classifications based upon

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[51] *Obergefell v. Hodges*, 135 S.Ct. 2584, 2601 (2015) (citations omitted).

marriage always survive rational-basis review absent a concern that the classification significantly interferes with the right to marry.[52] We need not reach that determination in this case because is unnecessary to do so. As discussed above, the statute is rationally related to a legitimate governmental interest in punishing bigamy or polygamy and sexual assault pursuant to bigamous or polygamous relationships. It is unnecessary to go further than that in our holding.

C. As-Applied vs. Facial Challenges

The Court argues that focusing upon the legislative classification at issue renders it impossible to have an as-applied challenge to a statute based upon equal protection. But historically, this distinction has not been employed when considering Equal Protection challenges.[53] The distinction between as-applied and facial constitutional challenges goes to the breadth of the remedy employed by the Court, not necessarily the substance of the complaint itself.[54] The idea behind the distinction is that an as-applied challenge merely invalidates a particular application of a

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[52] *See Pavan v. Smith*, 137 S.Ct. 2075, 2078-79 (2017) (holding that deprivation of one out of a "constellation of benefits" associated with marriage to same-sex couples violated equal protection).

[53] *See City of Cleburne*, 473 U.S. at 476 (Marshall, J., concurring in the judgment in part and dissenting in part) ("To my knowledge, the Court has never before treated an equal protection challenge to a statute on an as-applied basis.").

[54] *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 331(2010).

statute, rather than the entire statute.[55] Finding a statute unconstitutional "as-applied" is, simply put, an exercise in judicial restraint.

But in the context of rational-basis review, it is the opposite. As discussed above, when a legislative classification does not interfere with a fundamental right or target a suspect class, courts are required to defer to the lines drawn by the Legislature. In light of the standard set out in *Dandridge*, courts are not to set aside as unconstitutional a legislative classification if "any state of facts reasonably may be conceived to justify it."[56] By striking down a particular application of a rationally-drawn classification, courts necessarily engage in their own line-drawing by substituting their preferred classification for the one drawn by the

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[55] *United States v. National Treasury Employees Union*, 513 U.S. 454, 477-78 (1995) (noting that crafting a narrow remedy in a challenge to a statute based upon the First Amendment based upon its unconstitutional application furthers a policy of avoiding unnecessary adjudication of constitutional issues); *see also Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328-29 (2006) ("Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force").

[56] 397 U.S. at 485. This is the same standard utilized by the Supreme Court in *Beach*. 508 U.S. at 313 ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."). If this undermines the distinction between as-applied and facial constitutional challenges in the context of equal protection, then the distinction is incompatible with the standard for rational basis review set out by the United States Supreme Court.

Legislature.[57] That is why determining whether a particular legislative classification significantly interferes with a fundamental right or targets a suspect class is the most important inquiry when addressing equal protection challenges.

II. Strict Scrutiny Does Not Apply

Ultimately, the resolution of this case turns upon the level of scrutiny we must apply in our evaluation of the statute at issue. Does strict scrutiny apply because the distinction between married and unmarried offenders significantly interferes with the fundamental right to marry? Rather than remand the case to the court of appeals to decide the issue, I would address the issue head-on. The answer is no.

A. Discretionary Review is Appropriate

According to the court of appeals, it did not resolve the argument of whether strict scrutiny applied to Appellant's claim because it resolved

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[57] We have, in two previous cases, noted the distinction between as-applied and facial constitutional challenges in the context of equal protection, but that distinction was not outcome determinative in either case. In *State v. Rosseau*, we treated the defendant's challenge to the bigamy enhancement provision as a facial challenge to the statute. 396 S.W.3d at 556-57. By holding that the statute was facially constitutional, we necessarily conducted a proper rational-basis review by determining that there was a conceivable set of facts that provided a rational basis for the legislative classification at issue. *Id.* at 558. And while we held that a legislative classification was constitutional "as applied" in *Schlittler v. State*, this was also a proper rational-basis review because we determined that the set of facts presented in that case provided a rational basis for the legislative classification. 488 S.W.3d at 317. Neither case provides support for maintaining a distinction between as-applied and facial equal protection challenges in opposition to the standard for rational-basis review.

the claim under a rational-basis analysis.[58] But it is inaccurate to say that this means a strict-scrutiny analysis is not part of the lower court's decision. By invalidating the statute under the more deferential, rational-basis review, the court of appeals has issued a decision that necessarily includes a holding that the legislative classification at issue in this case cannot survive a less-deferential, strict-scrutiny analysis. Had the opinion been left to stand, it would have effectively decided the issue of whether strict-scrutiny review is appropriate. This is not a situation in which we would be addressing the merits of a claim that the court of appeals hasn't already touched on.

Further, we have granted discretionary review in other contexts to evaluate whether the court of appeals has simply applied the wrong standard of review.[59] In particular, we have done so to determine the appropriate level of deference a court of appeals owes to trial court decisions.[60] Here, we granted review to determine the appropriate level of deference owed to legislative enactments. And, as discussed above,

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[58] *Estes*, 487 S.W.3d at 747 n. 8.

[59] *See, e.g., Lancon v. State*, 253 S.W.3d 699, 704 (Tex. Crim. App. 2008) (noting that question of whether the court of appeals applied the correct standard of review when addressing the sufficiency of the evidence is a legal question reviewable by the Court of Criminal Appeals).

[60] *See, e.g., Montanez v. State*, 195 S.W.3d 101, 108 (Tex. Crim. App. 2006) (holding that court of appeals applied the wrong standard of review in the context of a review of a motion to suppress).

the court of appeals analysis essentially combined strict-scrutiny review with rational-basis review by focusing upon whether the treatment of Appellant was rationally related to a legitimate governmental interest. Analyzing whether the court of appeals applied the correct standard of review is appropriate for discretionary review, and it is appropriate in this case.

Finally, addressing the correct standard of review is warranted in the name of judicial economy.[61] Appellant has argued that strict scrutiny applies to his claim in the trial court and the court of appeals. The court of appeals has necessarily held that the legislative classification at issue fails under strict-scrutiny review because it fails under rational-basis review. We granted discretionary review and requested briefing on the appropriate standard of review. The question of what is the appropriate standard of review is properly before us.

B. Section 22.011(f) Does Not Significantly Interfere With The Right to Marry

Appellant argues that the appropriate standard of review for his claim is strict scrutiny because the legislative classification impinges upon his fundamental right to marry. The State maintains that rational-basis

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[61] *State v. Cortez*, ___ S.W.3d ___, 2018 WL 525696 at *1 (Tex. Crim. App. Jan. 24, 2018).

review was the proper standard because Appellant did not fall within a suspect class (marital status is not a suspect classification) and the statute does not significantly interfere with a fundamental right. The State is correct.

It is beyond question that the right to marry is fundamental, but that right has always been limited to marriage between two people. As the United States Supreme Court has observed, "polygamy has always been odious among the northern and western nations of Europe," and from the earliest history of England, polygamy has been treated as an offense against society.[62] In the United States, there has never been a time in any State of the Union when polygamy has not been an offence against society.[63] All fifty states have some form of prohibition against marriage between more than two people, each with punishments of varying severity.[64] Several states have the prohibitions woven into their

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[62] *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

[63] *Id.* at 165.

[64] CAL. PENAL CODE § 281 (2017); FLA. STAT. § 826.01 (2017); MO. REV. STAT § 568.010 (2017); UTAH CODE ANN. § 76-7-101 (2017); COLO. REV. STAT. § 18-6-201 (2016); D.C. CODE § 22-501 (2016); IND. CODE § 35-46-1-2 (2014); LA. STAT. ANN. § 14:76 (2014); IOWA CODE § 726.1 (2013); TENN. CODE ANN. § 39-15-301 (2013); 720 ILL. COMP. STAT. 5/11-45 (2011); KAN. STAT. ANN. § 21-5609 (2011); TEX. PENAL CODE § 25.01 (2011); WASH. REV. CODE § 9A.64.010 (2011); MONT. CODE ANN. § 45-5-611 (2009); VT. STAT. ANN. tit. 13, § 206 (2009); S.D. CODIFIED LAWS § 22-22A-1 (2005); VA. CODE. ANN. § 18.2-362 (2003); MD. CODE ANN., CRIM. LAW § 10-502 (2002); WIS. STAT. § 944.05 (2001); OKLA. STAT. tit. 21, § 883 (1999); DEL. CODE ANN. tit. 11, § 1001 (1995); N.C. GEN. STAT. § 14-183 (1994); HAW. REV. STAT. § 709-900 (1993); CONN. GEN. STAT. § 53A-190 (1992); 11 R.I. GEN. LAWS § 11-6-1 (1989); MINN. STAT. § 609.355 (1986); WYO. STAT. ANN. § 6-4-401 (1982); ALASKA STAT. § 11.51.140

state constitutions.[65] To the extent that Appellant's argument carries with it the implication that prohibitions against bigamy or polygamy themselves violate a fundamental right to marry, that argument fails.

Further, for a statutory classification to implicate the fundamental right to marriage, it must act to prevent or significantly interfere with the exercise of that right. For example, in *Zablocki v. Redhail*, the Supreme Court struck down a statute that placed a restriction on obtaining a marriage license if the person seeking the license owed child support for a child that was not in his or her custody.[66] According to the Supreme Court, this statute interfered with the right to marry directly and substantially.[67] The Court was careful, however, to draw the distinction between the statute at issue and other regulations that merely related to marriage.

(1978); ARIZ. REV. STAT. ANN. § 13-3606 (1978); N.J. STAT. ANN. § 2C:24-1 (1978); ALA. CODE § 13A-13-1 (1977);NEB. REV. STAT. § 28-701 (1977); ARK. CODE ANN. § 5-26-201 (1975); KY. REV. STAT. ANN. § 530.010 (1975); ME. STAT. tit. 17-A, § 551 (1975); OHIO REV. CODE ANN. § 2919.01 (1974); N.H. REV. STAT. ANN. § 639:1 (1973); N.D. CENT. CODE § 12.1-20-13 (1973); IDAHO CODE § 18-1103 (1972); 18 PA. CONS. STAT. § 4301 (1972); OR. REV. STAT. § 163.515 (1971); MASS. GEN. LAWS ch. 272, § 15 (1969); GA. CODE ANN. § 16-6-20 (1968); N.Y. PENAL LAW § 255.15 (Consol. 1967); NEV. REV. STAT. § 171.055 (1963); N.M. STAT. ANN. § 30-10-1 (1963); S.C. CODE ANN. § 16-15-10 (1962); MISS. CODE ANN. § 97-29-13 (1942); MICH. COMP. LAWS § 750.440 (1931); W. VA. CODE § 61-8-1 (1923).

[65] ARIZ. CONST. art. 20, para. 2; IDAHO CONST. art. I, § 4; OKLA. CONST. art. III, § 1; UTAH CONST. art. III, § 1.

[66] 434 U.S. 374, 390-91 (1978).

[67] *Id.* at 387.

> 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 be legitimately imposed. The statutory classification at issue here, however, clearly does interfere directly and substantially with the right to marry.[68]

On the one hand, the Supreme Court has applied rational-basis review to distinctions between married and unmarried individuals that effect eligibility for Social Security benefits.[69] But more recently, the Court has stricken down direct statutory limitations upon entering into a marriage.[70]

The ability to commit sexual assault or bigamy is not a "benefit" of marriage. The idea that someone might refrain from getting married just to avoid being punished more severely for a future sexual assault is, to put it politely, simply unrealistic. Any interference with the right to marry due to a statutory distinction between married and unmarried offenders

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[68] *Id.* at 386-87 (citations omitted).

[69] *See, e.g., Claifano v. Jobst*, 434 U.S. 47, 58 (1977); *Mathews v. De Castro*, 429 U.S. 181, 185 (1976).

[70] *See, e.g., Obergefell*, 135 S.Ct. at 2601; *United States v. Windsor*, 570 U.S. 744, 755 (2013). Most recently, the United States Supreme Court invalidated a statute that authorized the omission of a birth mother's female spouse from her child's birth certificate. *Pavan v. Smith*, 137 S.Ct. 2075, 2078 (2017). The Court's summary reversal and remand in the case makes it unclear as to why the statute violated the Equal Protection Clause other than that it was, according to the Court, proscribed by the Court's decision in *Obergefell*. *Id.*

is, at most, incidental, if not purely hypothetical.[71] As such, the statutory classification does not "significantly interfere" with the fundamental right to marry, and the distinction between married and unmarried offenders may be upheld if it is rationally related to a legitimate state interest.[72] Because the Court would rather remand the case than address this issue, I dissent to the Court's dismissal of Appellant's petition for review as improvidently granted.

III. Conclusion

In reviewing a statute for an equal protection violation, we must first determine the level of scrutiny required.[73] I dissent from the Court's refusal to answer that question. I also disagree with the Court's resolution of Appellant's challenge to statutory classification at issue through resort to rational speculation rather than first considering the text and history of the statute itself. However, I agree with the Court that the punishment enhancement for sexual assault in Section 22.011(f) serves a legitimate purpose because it allows the State to punish more

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[71] *See Schlittler v. State*, 488 S.W.3d 306, 317 (Tex. Crim. App. 2016) (any infringement upon father's fundamental liberty interest in the care, custody, and management of his son is triggered only incidentally by his conduct in sexually assaulting a member of his own family); see also Johnson v. Rodriguez, 110 F.3d 299, 316 (5th Cir. 1997) (noting that a burden on a fundamental right does not warrant strict-scrutiny review if the burden is merely "incidental").

[72] *C.f. Zalbocki*, 434 U.S. at 388.

[73] *Cannady v. State*, 11 S.W.3d 205, 215 (Tex. Crim. App. 2000).

harshly sexual assault committed through a bigamous or polygamous relationship. Absent a showing that the statute significantly interferes with the fundamental right to marry, the statute does not have to be narrowly tailored to its intended goal. If the statute sweeps too broadly, it is up to our Legislature to pick a different broom.

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