

PLURAL MARRIAGE, GROUP MARRIAGE AND IMMUTABILITY IN *OBERGEFELL V. HODGES* AND BEYOND

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For decades, opponents of marriage for same-sex couples have appealed to polygamy. The Chief Justice's dissent in Obergefell is no exception insofar as he says that the logic of the majority opinion with respect to same-sex marriage also applies to plural marriage. This Essay explores the resources for distinguishing polygamy from same-sex marriage, focusing on the mutability or immutability of the desire to engage in plural/group marriage as compared to the desires to marry someone of the same sex. It shows the appeal to immutability does not succeed in distinguishing plural/group marriages from same-sex marriages.

I. INTRODUCTION

At the oral argument for *Obergefell v. Hodges*, Justice Alito asked Mary Bonauto, the lawyer arguing on behalf of the same-sex couples seeking marriage equality, “[s]uppose that we rule in your favor . . . and then . . . a group consisting of two men and two women apply for a marriage license. Would there be any ground for denying them a license?”¹ Bonauto started her answer by citing “concerns about coercion and consent,”² but Alito tried to preclude this response by modifying his hypothetical as follows: “they’re all consenting adults, highly educated. They are all lawyers.”³

In light of this question, other questions about polygamy later in oral arguments,⁴ and the invocation of polygamy and bigamy in prior Supreme Court dissents in cases about LGBT rights,⁵ it is not surprising that one of the *Obergefell* dissents discussed group marriage and plural marriage. Specifically,

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¹ Transcript of Oral Argument at 17, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556-Question-1).

² *Id.* at 17-18.

³ *Id.* at 18.

⁴ *Id.* at 18-19; Transcript of Oral Argument at 5-7, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556-Question-2).

⁵ See *United States v. Windsor*, 133 S. Ct. 2675, 2707 (2013) (Scalia, J., dissenting) (“the Constitution neither requires nor forbids our society to approve of same-sex marriage much as it neither requires nor forbids us to approve of no-fault divorce, polygamy or the consumption of alcohol”); *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting) (Court’s finding Texas sodomy law unconstitutional “call[s] into question” states laws against “bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity.”); *Romer v. Evans*, 517 U.S. 620, 647-52 (1996) (Scalia, J., dissenting) (lengthy comparison of polygamy and homosexuality).

Chief Justice Roberts noted, “much of the majority’s reasoning would apply with equal force to the claim of a fundamental right to plural marriage.”⁶ Roberts intended this not as an argument that states should be required to solemnize the second or third marriage of a person who is already married (and not divorced and whose first spouse is alive) but, rather, as a slippery slope argument or a *reductio ad absurdum* argument against the majority’s conclusion that the U.S. Constitution requires all states to solemnize marriages between same-sex couples.⁷

Justice Kennedy’s majority opinion in *Obergefell* did not address polygamy, nor did it address what I shall call the *polygamy challenge* implicitly issued by Chief Justice Roberts’s dissent (that is, his claim that the logic of the majority opinion compels the conclusion that prohibiting a person from marrying more than one person at a time suffers the same constitutional infirmity as does prohibiting a person from marrying a person of the same sex).⁸ While Justice Kennedy did not need to address polygamy in order to decide the cases before the court in *Obergefell*, exploring the differences between prohibitions on polygamous marriages and prohibitions on same-sex marriage and considering the resources for distinguishing between them is an important post-*Obergefell* project. Among the possible ways of distinguishing between these two types of restrictions on marriage (see below for further discussion) are that polygamous marriages are bad for women, bad for children, and too administratively complicated to be implemented. For various reasons addressed below, I am not inclined to think these differences are up to the task of distinguishing same-sex marriage and polygamy within the confines of constitutional doctrine and policy.

In this Essay, I instead focus on another argument for distinguishing same-sex marriage from polygamous marriage: in contrast to the “immutable” desire of people who want to marry people of the same sex, the desire of people who want to marry more than one person at the same time is “mutable,” and thus, the latter desire need not be accommodated by the state.⁹ The idea is that this

⁶ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2621 (2015) (Roberts, C.J., dissenting).

⁷ For discussion of the distinction between a *reductio ad absurdum* argument against same-sex marriage based on polygamy and a slippery slope argument against same-sex marriage based on polygamy, see, e.g., Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 HOFSTRA L. REV. 1155, 1170 n.45 (2005). Roberts seems to be making a slippery slope rather than a *reductio* argument.

⁸ *Obergefell*, 135 S. Ct. at 2621-22 (Roberts, C.J., dissenting).

⁹ This argument has been mentioned in a variety of contexts over the years. SONU BEDI, BEYOND RACE, SEX AND SEXUAL ORIENTATION 236-44 (2013); Jonathan Rauch, *Marrying Somebody*, in SAME-SEX MARRIAGE: PRO AND CON 284, 286 (“[S]ome people are constitutively attracted only to members of the same sex. By contrast, no serious person claims that there are people constitutively attracted . . . to groups rather than individuals.”); Andrew Sullivan, *Three’s a Crowd*, NEW REPUBLIC (June 17, 1996), reprinted in SAME-SEX MARRIAGE: PRO AND CON, A READER 278, 279 (Andrew Sullivan ed., 1997) (“[H]omosexuality . . . occupies a deeper level of human consciousness than a polygamous impulse. . . . [P]olygamy is an activity, whereas both homosexuality and heterosexuality are states.”); Casey E. Faucon, *Polygamy After Windsor: What’s Religion Got to Do with It?*, 9 HARV. L. & POL’Y REV. 471, 501 (2015) (“[S]ame-sex

difference between LGBT¹⁰ people and polygamists can be used to resist the polygamy challenge to same-sex marriage. While the majority opinion in *Obergefell* is primarily based on the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment also plays a significant role in the Court's decision.¹¹ As discussed below,¹² the constitutional significance of immutability for LGBT rights issues has been a factor in determining the impact of the Equal Protection Clause on LGBT rights. The immutability response to the polygamy challenge, the focus of this paper, tries to repurpose immutability in aid of *Obergefell*'s conclusion. Support for this immutability response can perhaps be gleaned from Justice Kennedy's majority opinion insofar as he twice says same-sex sexual attraction is immutable.¹³ In this Essay, I show this appeal to immutability does not succeed as a reply to the polygamy challenge against same-sex marriage.

marriage stems out of one's natural sexual orientation, while polygamy does not implicate an alternative and unchangeable sexual orientation.”); Elizabeth Larcano, *A “Pink” Herring: The Prospect of Polygamy Following the Legalization of Same-Sex Marriage*, 38 CONN. L. REV. 1065, 1080 (2006) (“[T]he most inherent . . . difference . . . between same-sex marriage and polygamy is that polygamy represents a choice, while sexual orientation is an immutable characteristic.”); William Saletan, *The Case Against Polygamy*, SLATE (June 29, 2015, 2:47 PM), http://www.slate.com/articles/news_and_politics/politics/2015/06/-is_polygamy_next_after_gay_marriage_chief_justice_roberts_obergefell_dissent.html (“Immutability is the biggest difference between homosexuality and polyamory.”). For other discussion of this argument, see RONALD C. DEN OTTER, IN DEFENSE OF PLURAL MARRIAGE 251-54 (2015).

¹⁰ I talk about LGBT rights and people, grouping transgender people with lesbians, gay men and bisexuals even though, when I am talking about theories of the origin of LGBT people, I am focusing on how sexual orientations develop and arguments based on them and not on theories of how gender identities develop (due to significant differences between accounts of how sexual orientation develops and accounts of how gender identity develops). Specifically, when I discuss immutability arguments for LGBT rights, I am talking about the (alleged) immutability of sexual orientation, in particular, and not at all about the immutability of gender or gender identity.

¹¹ *Obergefell*, 135 S. Ct. at 2597-99. An analysis of the Due Process Clause “compels the conclusion that same-sex couples may exercise the right to marry.” *Id.* at 2602-04.

The right of same-sex couples to marry . . . is derived, too, from the [Fourteenth] Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way. . . . [T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.

¹² See *infra* text accompanying notes 81-83.

¹³ *Obergefell*, 135 S. Ct. at 2594. “Petitioners . . . immutable nature dictates that same-sex marriage is their only real path to this profound commitment.” *Id.* at 2596. Justice Kennedy notes “psychiatrists and others [now] recognize[] that sexual orientation is both a normal expression of human sexuality and immutable” citing the amicus brief of the American Psychological Association and others as support. *Id.* It is not clear what Justice Kennedy means by “immutable,” in particular, whether he means to use that word in the “hard” or “soft” sense of the term. See *infra* text accompanying notes 91-94. The aforementioned amicus brief does not resolve this ambiguity, as it does not use the word immutability at all, instead focusing on the lack of choice in the development of sexual orientations and their resistance to change. Brief for American Psychological Association, et al. as Amici Curiae Supporting Petitioners at 7, *Obergefell v.*

In the early 1970s, three same-sex couples sued in state courts seeking marriage; every judge who heard their arguments for marriage for same-sex couples rejected them.¹⁴ Some of the arguments that were made for marriage equality for LGBT people in those early cases have now been embraced by state supreme courts and by the U.S. Supreme Court in *Obergefell*.¹⁵ To use Jack Balkin's terminology, argument for same-sex marriage went from "off the wall" to "on the wall," that is, they went from arguments that "most well-trained lawyers think are clearly wrong" to "arguments that are at least plausible, and therefore may become law, especially if brought before judges likely to be sympathetic to them."¹⁶ Currently, for the most part, arguments for the legalization of polygamous marriages are "off the wall" and there is no significant social movement aiming to legalize polygamy, although there have been some legal victories for polygamous families in the United States.¹⁷ I do not claim to have a conclusive argument for or against legal recognition of polygamous marriages, but I do think some legal arguments made on behalf of marriage equality for LGBT people, including the argument embraced by the majority in *Obergefell*, may also, as a matter of constitutional doctrine, support plural and group marriage. There may, however, be other arguments that are consistent with *Obergefell* that are able to distinguish plural and group marriages.

My discussion proceeds as follows. In Part II, I define some concepts central to the discussion that follows, in particular, sexual orientation, immutability, innateness, polyamory, group marriage, plural marriage, and polygamy. In Part III, I survey attempts to distinguish group or plural marriage and same-sex marriage. In Part IV, I focus on the immutability of sexual orientation as a way to answer the polygamy challenge, showing that the appeal to the immutability of sexual orientation does not usefully distinguish same-sex marriage from group or plural marriage. I conclude in Part V.

Hodges, 135 S. Ct. 2584 (2015) (No. 14-556). For further discussion, see generally Jessica Clarke, *Against Immutability*, 125 YALE L.J. 1, 22-23 n.133 (2015).

¹⁴ Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972); Jones v. Hallahan, 501 S.W.2d 588, 590 (Ky. 1973); Singer v. Hara, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974).

¹⁵ See, e.g., *Obergefell*, 135 S. Ct. at 2607-08; Varnam v. Brien, 763 N.W.2d 862, 884-86 (Iowa 2009); Goodridge v. Dep't Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003).

¹⁶ Jack Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (June 4, 2012), <http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/>.

¹⁷ See, e.g., Sanderson v. Tryon, 739 P.2d 623, 627 (Utah 1987) (holding parent cannot be denied custody of child solely on the basis of being involved in a polygamous relationship); Brown v. Buhman, 947 F. Supp. 2d 1170, 1226 (D. Utah 2013) (finding Utah's anti-bigamy law to be unconstitutional insofar as it criminalized cohabitation and associated sexual activity by a married person with non-spouse).

II. TERMINOLOGY

I begin with some terminology. Most people have sexual desires.¹⁸ We want to have sex and we find some sexual activities appealing and others unappealing. Similarly, we find some people sexually appealing and other people less so (or not at all). Further, people have different ways of integrating sex into their romantic and marital relationships: some people aim to limit their sexual activity (or at least some type(s) of sexual activities) to the one person with whom they are romantically involved or to whom they are married, while others do not. More generally, people's sexual desires can be sorted in various ways—for example, some people are sexually attracted to blondes, some to tall people, some to older people, some to people of a particular race or ethnic group; some people favor “rough” sex while others like “vanilla” sex; some people want to have lots of sex while others are fine with less frequent sex; some people like to have sex quickly while others like to take a very long time to do so, etc.¹⁹ In many cultures today, a central axis for the classification of sexual desire is *sexual orientation*, namely whether a person is attracted to people of the same sex, people of a different sex, or both (that is, whether a person is gay, heterosexual, or bisexual).²⁰

Many people ponder whether a person's biological make-up at birth determines or strongly constrains his or her sexual orientation (in other words, whether sexual orientations are *innate*) and the conceptually related, but distinct, issue whether sexual orientations are *immutable* (namely, whether sexual orientations can be changed and whether choice plays a role in their development).²¹ Certain claims relating to the development of sexual orientations

¹⁸ Those who do not have sexual desires are *asexual*. For an engaging discussion of asexuality, see Elizabeth F. Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303, 316-29 (2014).

¹⁹ See, e.g., ANNE FAUSTO-STERLING, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* 6 (2000); EDWARD STEIN, *THE Mismeasure of Desire: The Science, Theory and Ethics of Sexual Orientation* 61-67 (1999) [hereinafter STEIN, *Mismeasure*]; EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 22-27 (1990); Ruth Hubbard & Elijah Wald, *Gay Genes?*, in RUTH HUBBARD, *Profitable Promises: Essays on Women, Science and Health* 83 (1994); Frederick Suppe, *Curing Homosexuality*, in *PHILOSOPHY AND SEX* 391, 394-97 (Robert Baker & Frederick Elliston eds., rev. ed. 1984).

²⁰ See Brief for American Psychological Association, et al., as Amici Curiae Supporting Petitioners at 7, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556) (defining sexual orientation). For a more detailed discussion of the geography of sexual desire, see STEIN, *Mismeasure*, *supra* note 19, at 39-70. Note that sophisticated accounts of sexual orientation are bipolar or even two-dimensional. See *id.* at 51-61. Some people describe themselves as “pansexual” if they are attracted to men and women, perhaps because it suggests the sex/gender of the people they are attracted to is not important to them. See, e.g., Charles M. Blow, *Sexual Attraction and Fluidity*, N.Y. TIMES, Sept. 7, 2015, at A17, available at http://www.nytimes.com/2015/09/07/opinion/charles-m-blow-sexual-attraction-and-fluidity.html?_r=1.

²¹ On the proper understanding of the connections between innateness and immutability, see Edward Stein, *Immutability and Innateness Arguments about Lesbian, Gay and Bisexual Rights*, 89

are unquestionable: (i) people do not develop sexual orientations simply by deciding to which sex (or sexes) they are attracted in the manner like one might decide what entrée to order in a restaurant, and (ii) a person cannot change her sexual orientation as easily as one can change clothes or hairstyle. Developing a sexual orientation is, on any plausible view, much more complicated. The overwhelming evidence indicates that, for most people, sexual orientations are not consciously chosen and are very difficult or impossible to change.²² This is consistent with the claim that sexual orientations—and even sexual desires—are fluid, that is, they can change over the course of a lifetime.²³

Less certain is the extent to which sexual orientations are innate. Starting in the early 1990s, several apparent breakthroughs in scientific research on sexual orientation were reported in top scientific journals.²⁴ Some researchers see these and other studies as mutually supporting and pointing towards a unified theory of human sexual orientation according to which sexual orientations are strongly biological and either inborn or determined at an early age.²⁵ Various commentators have offered systematic critiques of this general research program, raising serious methodological and interpretive concerns that, in my view (although I am perhaps in the minority in this assessment), seriously undermine this unified theory and suggest there is much we do not know about how sexual orientations develop.²⁶

Besides sexual orientation, another noteworthy axis for classifying sexual desires is whether a person wants to limit their sexual and romantic activity to one person or at least to one person at a time. When a person limits his or her sexual activity to one person for a significant period of time, we say he

CHI.-KENT L. REV. 597, 602-11 (2014) (describing connections between innateness and immutability).

²² See *id.*; STEIN, MISMEASURE, *supra* note 19, at 258-74; Tia Powell & Edward Stein, *Legal and Ethical Concerns about Sexual Orientation Change Efforts*, HASTINGS CTR. REP. 32, 32-37 (2014) (Special Report: LGBT Bioethics).

²³ See, e.g., LISA M. DIAMOND, *SEXUAL FLUIDITY: UNDERSTANDING WOMEN'S LOVE AND DESIRES passim* (2008).

²⁴ See generally Dean H. Hamer et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 SCI. 321 (1993); see generally Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 SCI. 1034 (1991); see generally J. Michael Bailey & Richard C. Pillard, *A Genetic Study of Male Sexual Orientation*, 48 ARCHIVES GEN. PSYCHIATRY 1089 (1991). For more general discussion, see, e.g., SIMON LEVAY, *QUEER SCIENCE: THE USE AND ABUSE OF RESEARCH INTO HOMOSEXUALITY* 41 (1996) [hereinafter LEVAY, *QUEER SCIENCE*]; STEIN, MISMEASURE, *supra* note 19, at 39-70.

²⁵ See, e.g., Simon LeVay & Dean H. Hamer, *Evidence for a Biological Influence in Male Homosexuality*, SCI. AM. 44, 46 (May 1994); Edward Stein, *Evidence for Queer Genes: An Interview with Richard Pillard*, 1 J. LESBIAN & GAY STUD. 93, 94-95 (1993).

²⁶ For some critiques, see, e.g., FAUSTO-STERLING, *supra* note 19, at 235; STEIN, MISMEASURE, *supra* note 19, at 164-228; SCIENCE AND HOMOSEXUALITIES 2-3 (Vernon A. Rosario ed. 1997); see generally SEX, CELLS, AND SAME-SEX DESIRE: THE BIOLOGY OF SEXUAL PREFERENCE *passim* (John P. DeCecco & David Allen Parker eds. 1995); William Byne & Bruce Parsons, *Human Sexual Orientation: The Biologic Theories Reappraised*, 50 ARCHIVES GEN. PSYCHIATRY 228, 228 (1993).

or she is monogamous.²⁷ Most people, even if they are in a *dyadic* relationship (that is, a relationship with just one person), remain sexually attracted to other people besides the person with whom they are romantically involved and are *tempted*—for this reason or others—to have sex with other people. In fact, for a significant percent of people, it is very difficult to resist this temptation and remain sexually active with just one person for an extended period of time.²⁸ Some of these people may become less interested in sex with their spouse or partner while remaining interested in sex with other people. Others may remain as attracted to their spouse or partner as they always were while craving sexual variety, especially after being in a relationship for several years. And others may seek sex outside of their relationship when their spouse or partner becomes uninterested in sex or suffers from a health problem that leaves them unable to have sex.²⁹

People in dyadic relationships deal with their sexual desires for people other than their spouse or partner in different ways. Some people successfully repress their desires for extra-dyadic sex. Historically and presently, various cultural and legal norms that say married people must limit their sexual activity to their spouse to some extent assist married people to limit their sexual activity to their spouse. *Adultery*—which occurs when a married person has sex with a person to whom he or she is not married³⁰—was once a serious crime and it remains a crime in twenty-two states today.³¹ In the age of fault-based divorce—when you had to both prove your spouse was guilty of one of a statutorily-specified wrong and your own innocence in order to be granted a

²⁷ I add the qualifier “for a significant period of time” because a person is not monogamous if he has sex with only one person at a time but with a different person every week. This would be like the person who claims he is fasting between meals and snacks. “Serial monogamy,” the idea someone can be involved in several different relationships over a course of his or her life and still count as monogamous, implies such relationships are not overlapping and last a significant period of time. *But see* Terri Conley et al., *A Critical Examination of Popular Assumptions about the Benefits and Outcomes of Monogamous Relationships*, 17 PERSONALITY & SOC. PSYCH. REV. 124, 126 (describing the view that almost any personal relationship is monogamous, even one in a series of relationships in quick succession).

²⁸ *See, e.g.*, DAVID P. BARASH & JUDITH EVE LIPTON, *THE MYTH OF MONOGAMY passim* (2001); CHRISTOPHER RYAN & CACILDA JETHA, *SEX AT DAWN: HOW WE MATE, WHY WE STRAY, AND WHAT IT MEANS FOR MODERN RELATIONSHIPS passim* (2010).

²⁹ *See, e.g.*, DAN SAVAGE, *AMERICAN SAVAGE: INSIGHTS, SLIGHTS AND FIGHTS ON SEX, FAITH, LOVE AND POLITICS* 23-28 (2013).

³⁰ Some people count “virtual sex” with someone other than one’s spouse—or even having sexual desires for a person other than one’s spouse—as adultery. *See, e.g.*, Kathryn Pfeiffer, *Virtual Adultery: No Physical Harm, No Foul?*, 46 U. RICH. L. REV. 667, 667 (2012); Sandi S. Varnado, *Avatars, Scarlet “A”s, and Adultery in the Technological Age*, 55 ARIZ. L. REV. 371, 412 (2013). I do not view such virtual sex as adultery.

³¹ Alabama, Arizona, Florida, Georgia, Idaho, Illinois, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New York, North Carolina, North Dakota, Oklahoma, Rhode Island, South Carolina, Utah, Virginia, and Wisconsin.

divorce—adultery was central to divorce law;³² adultery remains a ground for divorce in thirty-two states today.³³ Despite the strong norms against it, adultery has been, and remains, rather common. Accurate data about the frequency of adultery is difficult to obtain given the norms against it and the fact that many individuals want to keep adultery secret from their spouse and most others. Although recent survey data suggests about one-quarter of married men and one-fifth of married women have sex outside of marriage, if I had to venture a guess, I would suspect at least fifty percent of married individuals have sex with someone other than their spouse during the period they are married.³⁴

³² See, e.g., JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND FAMILY IN 20TH CENTURY AMERICA* 161 (2011) (“As of the 1930s, every state that recognized divorce . . . listed adultery as one of the available grounds.”). See generally GLENDA RILEY, *DIVORCE: AN AMERICAN TRADITION* 41 (1991). Interestingly, in New York, adultery was the sole ground for divorce until 1966. See N.Y. DOM. REL. LAW § 170 (McKinney 1967) (adding cruelty, abandonment, and excessive prison confinement as grounds for divorce).

³³ Alabama, Alaska, Arkansas, Connecticut, Delaware, Georgia, Idaho, Illinois, Kansas (although Kansas does not explicitly list adultery as a ground, one ground is “failure to perform a material marital duty or obligation,” KAN. STAT. ANN. § 23-2701(2) (1982), and case law has held adultery is included under this language, see *Matter in re Marriage of Sommers*, 792 P.2d 1005 (Kan. 1990)), Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, and West Virginia. Further, in some jurisdictions, the fact that one spouse has committed adultery may have important financial implications upon divorce or death of a spouse and may undermine the adulterous spouse’s argument for custody of his or her child. See S.C. CODE ANN. § 20-3-130 (2002) (prohibiting award of alimony to spouse who committed adultery prior to either reaching a settlement agreement or the entry of an order dealing with spousal support and property distribution issues); N.C. GEN. STAT. ANN. § 50-16.3A (West 1998) (prohibiting award of alimony “[i]f . . . the dependent spouse participated in an act of illicit sexual behavior [defined to include acts of sexual . . . intercourse . . . voluntarily engaged in by a spouse with someone other than the other spouse, § 50-16.1A(3)(a)] during the marriage and prior to . . . separation”) (internal quotations omitted); MD. CODE ANN., FAMILY LAW, § 11-106(b)(6) (West 1992) (providing that “the circumstances that contributed to the [couple’s] estrangement” are relevant to determination of alimony); N.J. STAT. ANN. § 3A:37-2 (West 1992) (denying typical spousal inheritance rights to spouse who committed adultery). Maryland’s Attorney General recently released an opinion, in response to a question from a state legislator, expressing the view that adultery includes extra-marital sex with a person of the same sex. *Family Law-Divorce-Whether Same-Sex Marital Infidelity Can Qualify as Adultery for Purposes of Family Law Provisions Governing Divorce*, 100 Md. Op. Att’y Gen. 105, 2015 WL 4850421 (July 24, 2015), available at <http://www.oag.state.md.us/Opinions/2015/100OAG105.pdf>.

³⁴ For example, in a recent study of 918 men and women, almost a quarter of the men and almost twenty percent of the women indicated they were in a “monogamous” heterosexual relationship indicated that they had “cheated” during their current relationship in the sense that they had engaged in sexual interactions with someone other than their partner that could jeopardize or hurt their relationship. K.P. Mark et al., *Infidelity in Heterosexual Couples: Demographic, Interpersonal, and Personality-Related Predictors of Extradyadic Sex*, 40 ARCHIVES OF SEXUAL BEHAV. 871, 871 (2011). See also EDWARD LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICE IN THE UNITED STATES* 216 (1994) (24.5 percent of men and fifteen percent of women reported extramarital sex); Michael W. Wiederman, *Extramarital Sex: Prevalence and Correlates in a National Survey*, 34 J. SEX RES. 167, 167 (1997) (twenty-three percent of men and twelve percent of women reported extramarital sex). Given the social disapprobation associated with committing adultery, there is reason to believe many people who

It is useful to distinguish among the *desires* for extra-dyadic sex a person may have, the extra-dyadic *behaviors* in which a person may engage, and the *arrangement* that a person may have with his or her spouse or partner with respect to extra-dyadic sex. In terms of desires, a person may be sexually attracted only to one person at a time and be completely satisfied having sex with this person only and may be happy in a companionate and sexual relationship with that person. That person has *monogamous* desires. Alternatively, a person may want to be in a primary companionate and sexual relationship with one person but may be open to having sex with other people every now and then. Advice columnist Dan Savage calls people *monogamish* when they are “mostly monogamous, not swingers, [and] not actively looking [for extra-dyadic sex with others].”³⁵ Other people have stronger desires for extra-dyadic sex than monogamish people do. If they desire a primary sexual and romantic partner but are more actively looking for other sex partners—either with their spouse or partner, or on their own—or if they do not desire a primary relationship at all but like to have sex with one or more partners outside of a marriage or primary partnership, then they have *non-monogamous* desires. Further, in contrast to people with monogamous desires, monogamish desires, and non-monogamous desires, are *polyamorous* people, namely, who want to be seriously involved sexually and romantically with more than one person at a time.³⁶

I turn now from desire to behavior. One’s sexual behavior often does not accord with one’s desire. A person with polyamorous or non-monogamous desires may be monogamous in terms of behavior, for example, either to avoid social and legal sanctions or because of the lack of opportunity to find willing and appealing extra-dyadic partners. Similarly, a person who desires to be monogamous may, for various reasons, have extra-dyadic sex on occasion or may be celibate.

It is worthwhile to distinguish between two types of polyamorous behaviors. Polyamorous people sometimes seek to be married to more than one

deny they have committed adultery are not telling the truth. See, e.g., David L. Weis, *Adult Heterosexuality*, in 3 INT’L ENCYCLOPEDIA OF SEXOLOGY 1498, 1500-08 (Robert T. Francoeur ed., 1997), available at <http://www.sexarchive.info/IES/xmain.html>.

³⁵ Dan Savage, *Savage Love: Monogamish*, STRANGER (July 20, 2011), <http://www.thestranger.com/seattle/SavageLove?oid=9125045> (coining the word *monogamish*). For discussion of this concept and Savage’s use of it, see Mark Oppenheimer, *Married, With Infidelities*, N.Y. TIMES MAGAZINE (June 30, 2011), http://www.nytimes.com/2011/07/03/magazine/infidelity-will-keep-us-together.html?_r=0.

³⁶ Polyamory can be defined as “a preference for having multiple romantic relationships simultaneously.” Ann E. Tweedy, *Polyamory as a Sexual Orientation*, 79 U. CIN. L. REV. 1461, 1462 (2011). It can include desiring to have “more than one sexual loving relationship at the same time with the full knowledge and consent of all the partners involved.” Hadar Aviram, *Make Love, Not Law: Perceptions of the Marriage Equality Struggle Among Polyamorous Activists*, 7 J. BISEXUALITY 261, 264 (2008). In addition, polyamory can be defined as a lifestyle that prioritizes and privileges “self-knowledge, radical honesty, consent, self-possession, and [variety when it comes to] love and sex.” Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 320 (2004). Focusing on desire, I employ the broadest definition of polyamory, using the first of these three definitions.

person at the same time. There are two distinct types of such relationships, *plural* marriages and *group* marriages. A person in a *plural* marriage is married to more than one person and the various people to whom he or she is married are not married to each other. In contrast, a person in a *group* marriage is married to two or more people all of whom are also married to each other.³⁷ When I use the term *polygamy*, I mean to include *both* plural marriage and group marriage. Note that nowhere in the United States is polygamy legal.³⁸ Marriage is restricted to people who have never been married or those whose prior marriages have ended through annulment, divorce, or due to the death of all prior spouses.³⁹ Despite this, *de facto* plural and *de facto* group marriages exist throughout the country.⁴⁰ When talking about polygamy, I mean to include such *de facto* marriages.⁴¹

Finally, people have different types of agreements about extra-dyadic sex. Some people who have extra-dyadic sex do so secretly, that is, without admitting to their spouse or partner that they have had or are having extra-dyadic sex. I call this *infidelity*. In contrast, when a couple agrees it is permissible for at least one of them to have sex with other people, at least under some circumstances, I call this *consensual non-monogamy*.⁴² Consensual non-monogamy can take many forms. In the movie *Hall Pass*, two wives give their husbands permission to have sex with other women for a week; the

³⁷ Some people define plural marriage as when a person is married to more than one person at a time, whether or not the person/people to whom he or she is married are also married to each other. On this alternative definitional scheme, all group marriages are plural marriages but not all plural marriages are group marriages. Note that Chief Justice Roberts talks about plural marriage in his dissenting opinion, but cites to an example of a group marriage (a “throuple” involving three women “married” to each other). *Obergefell*, 135 S. Ct. at 2622 (citing David K. Li, *Married Lesbian ‘Throuple’ Expecting First Child*, N.Y. POST (Apr. 23, 2014), <http://nypost.com/2014/04/23/married-lesbian-threesome-expecting-first-child/>). Roberts seems to include group marriages as a type of plural marriage. For clarity, I distinguish among them, although for much of my discussion, I consider them together.

³⁸ See, e.g., Nicholas Bala et al., *An International Review of Polygamy: Legal and Policy Implications for Canada*, in POLYGAMY IN CANADA: LEGAL AND SOCIAL IMPLICATIONS FOR WOMEN AND CHILDREN: A COLLECTION OF POLICY REPORTS 7, 27 (2005), available at <http://publications.gc.ca/collections/Collection/SW21-132-2005E.pdf>.

³⁹ Typical of this structure is New York’s marriage law, which states “[a] marriage is absolutely void if contracted by a person whose husband or wife by a former marriage is living, unless . . . [s]uch former marriage has been annulled or . . . dissolved. N.Y. DOM. REL. LAW § 6 (McKinney 2011).

⁴⁰ JANET BENNION, POLYGAMY IN PRIMETIME: MEDIA, GENDER, AND POLITICS IN MORMON FUNDAMENTALISM 4-7 (2012); Casey E. Faucon, *Marriage Outlaws: Regulating Polygamy in America*, 22 DUKE J. GENDER L. & POL’Y 1, 1-3 (2015); Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 1966-75 n.27 (2010).

⁴¹ Three other concepts worth mentioning are *bigamy* (when a person who is married attempts to marry another person—or lives in a *de facto* marriage with another person—without the first spouse’s knowledge), *polygyny* (having more than one wife) and *polyandry* (having more than one husband). Polyandry is much less common than polygyny. See Davis, *supra* note 40, at 1966, n.27.

⁴² As an example of research that uses this terminology, see Conley et al., *supra* note 27, at 126.

assumption is that the “hall passes” are not renewable and the husbands are not required to tell their wives about any of the sexual escapades they might engage in during the week.⁴³ Some couples will only have extra-dyadic sexual relationships together, that is, by having a *ménage à trois* or other type of group sex activity.⁴⁴ Other couples opt for a so-called “don’t ask, don’t tell” policy that allows extra-dyadic sex, but with the agreement they are not required to tell each other about sexual activity outside the relationship.⁴⁵ Others have an agreement that they can only have extra-dyadic sex when one of them is out of town.⁴⁶

III. DISTINGUISHING SAME-SEX MARRIAGE FROM PLURAL/GROUP MARRIAGE

In various contexts, opponents of same-sex marriage have attempted to link arguments for same-sex marriage to polygamy.⁴⁷ Along these lines, Chief Justice Roberts, while allowing that there may be significant differences between same-sex marriage and plural and group marriage,⁴⁸ maintains that *Obergefell*’s constitutional argument “appl[ies] with equal force to the claim of a fundamental right to plural marriage.”⁴⁹ Advocates of access to marriage for same-sex couples frequently respond to this type of invocation of polygamy by distinguishing same-sex marriage from polygamy. Among the main distinctions they offer are the unequal roles of men and women in polygamous relationships, the lack of consent in plural and group marriages, the negative impact on children whose parents are polygamous, the complexity of plural and group marriages, and an

⁴³ HALL PASS (New Line Cinema 2011).

⁴⁴ See BLAKE SPEARS & LANZ LOWEN, *BEYOND MONOGAMY: LESSONS FROM LONG-TERM GAY MALE COUPLES IN NON-MONOGAMOUS RELATIONSHIPS* 9-10 (2010).

⁴⁵ See *id.* at 11-13.

⁴⁶ See, e.g., *id.* at 37.

⁴⁷ See, e.g., Hadley Arkes, *Questions of Principle, Not Predictions: A Reply to Macedo*, 84 GEO. L.J. 321, 326 (1995) (“If the notion of marriage were separated . . . from the fact that only . . . a man and a woman, could beget a child[,] then on what ground of principle could the law confine marriage to ‘couples?’”); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 47 (“[I]f same-sex marriage must be legalized to accommodate the subjective, identity-defining sexual-intimacy preferences of gays and lesbians, it would be very difficult to refuse to recognize . . . polygamy . . . on a principled basis.”); Charles Krauthammer, *When John and Jim Say ‘I Do’*, TIME 1, 102 (July 22, 1996), available at <http://www.cnn.com/ALLPOLITICS/1996/analysis/time/9607/22/krauthammer.shtml> (“[I]f marriage is redefined to include two men in love, on what possible principled grounds can it be denied to three men in love?”); Stanley Kurtz, *Beyond Gay Marriage*, WEEKLY STANDARD (Aug. 4, 2003), <http://www.weeklystandard.com/article/4186> (stating “gay marriage [will] take us down a slippery slope to legalized polygamy and ‘polyamory’ (group marriage)”).

⁴⁸ *Obergefell*, 135 S. Ct. at 2262 (Roberts, C.J., dissenting) (“I do not mean to equate marriage between same-sex couples with plural marriages in all respects. There may well be relevant differences that compel different legal analysis. But . . . petitioners have not pointed to any.”).

⁴⁹ *Id.* at 2621. Relatedly, Roberts also notes “[a]lthough the majority randomly inserts the adjective ‘two’ in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not.” *Id.*

argument based on the simple fact that having two spouses is different from having one. Although these distinctions are not the main focus of this paper, I survey them and point to what I take to be a central problem with each proposal for dealing with the polygamy challenge.

Perhaps the most frequently made argument against polygamy is that such relationships are inherently sexist and bad for women.⁵⁰ This would be an important distinction from same-sex marriages, since same-sex relationships are neither sexist nor bad for women.⁵¹ Most polygamous relationships in the United States have been and are *polygynous* (a plural or group marriage in which a person has two or more wives) and women in polygynous relationships have, historically, had less power than the men in such relationships and some of them have suffered from abuse.⁵² In some polygamous relationships, however, women do not play subservient roles and the history of polygamy may not be as bad for women as some have claimed.⁵³ Further, there are polygamous relationships in which all of the parties involved are of the same-sex or polygynous or polyandrous relationships in which the parties are “sex-equal”;⁵⁴ women in these

⁵⁰ See generally JON KRAKAUER, UNDER THE BANNER OF HEAVEN: A STORY OF VIOLENT FAITH (2003). See also Bala et al., *supra* note 38, at 36 (concluding “polygamy is associated with significant negative outcomes for women” and that “the problems with polygamy are profound and inherent in the relations and are often caused by the polygamous relationship, not merely associated with it”); Susan Moller Okin, *Is Multiculturalism Bad for Women?*, in IS MULTICULTURALISM BAD FOR WOMEN? 7, 9-10 (Joshua Cohen et al., eds. 1999); Hema Chatlani, *In Defense of Marriage: Why Same-Sex Marriage Will Not Lead Us Down a Slippery Slope Toward the Legalization of Polygamy*, 6 APPALACHIAN J. L. 101, 129-33 (2006); Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, ¶ 8 (Can.), available at <http://www.courts.gov.bc.ca/jdb-txt/SC/11/15/2011BCSC1588.htm> (finding “women in polygamous relationships are at an elevated risk of physical and psychological harm [and] face higher rates of domestic violence and abuse, including sexual abuse”).

⁵¹ See WILLIAM ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 148-49 (1996).

⁵² See, e.g., Bala et al., *supra* note 38, at 7, 12-13; JESS EMBRY, MORMON POLYGAMOUS FAMILIES: LIFE IN THE PRINCIPLE 178 (1987); RICHARD VAN WAGONER, MORMON POLYGAMY: A HISTORY 92 (2d. ed. 1989).

⁵³ See BENNION, *supra* note 40, at 21-55; see IRWIN ALTMAN & JOSEPH GINAT, POLYGAMOUS FAMILIES IN CONTEMPORARY SOCIETY 364-65 (1996); see PHILIP L. KILBRIDE, PLURAL MARRIAGE FOR OUR TIMES: A REINVENTED OPTION 41-43 (1994); see generally Angela Campbell, *How Have Policy Approaches to Polygamy Responded to Women’s Experiences and Rights? An International, Comparative Analysis*, in POLYGAMY IN CANADA: LEGAL AND SOCIAL IMPLICATIONS FOR WOMEN AND CHILDREN: A COLLECTION OF POLICY REPORTS 1, 3-11 (2005), available at <http://publications.gc.ca/collections/Collection/SW21-132-2005E.pdf>.

⁵⁴ See Martha Nussbaum, *A Right to Marry? Same-Sex Marriage and Constitutional Law*, DISSENT (2009), <https://www.dissentmagazine.org/article/a-right-to-marry-same-sex-marriage-and-constitutional-law> (“The primary state interest that is strong enough to justify legal restriction is an interest in the equality of the sexes [does not] tell against a regime of sex-equal polygamy.”); Cheshire Calhoun, *Who’s Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy from the History of Polygamy*, 42 SAN DIEGO L. REV. 1023, 1040 (2005):

The quick dismissal of polygamy on grounds that it, unlike monogamy, is distinctively gender-inegalitarian is the result of smuggling in a set of unstated assumptions about the background social conditions for women, the social practice of polygamy, and its likely legal form that would render it

relationships are not subservient and are at least not more likely to be abused than women in other sorts of relationships. “Traditional” marriages—that is, marriages between one man and one woman—were historically deeply sexist in their legal character and women in such relationships were typically subservient to their husbands.⁵⁵ That said, although some problematic gendered assumptions remain associated with marriage, the institution of marriage had become more egalitarian (even before same-sex marriage reached all fifty states) and had, as a formal legal matter, shed virtually all of its sexist character.⁵⁶ Polygamous relationships might similarly become more egalitarian; perhaps legalizing polygamous marriage would speed up this process. But even if many polygamous relationships are bad for women, some are not; it is problematic to reject polygamy because some polygamous relationships are bad for women.⁵⁷ This suggests polygamy cannot be distinguished from same-sex marriage because the former has an inherently sexist character.

A related possible distinction between polygamy and same-sex marriage concerns whether every party to a polygamous relationship has consented. This was Mary Bonauto’s first—and second—reply to Justice Alito’s question involving the hypothetical four-lawyer group marriage.⁵⁸ It may well be true that in some non-sex-equal plural polygynous marriages, the first wife (or wives) does not consent to the husband taking on another wife. In Alito’s group marriage hypothetical and in many real world examples⁵⁹—including Roberts’s “throuple” example⁶⁰—at least on the surface, all parties have consented. It is possible a person who appears to consent to a group marriage or to his/her spouse’s plural marriage is not truly consenting and/or is suffering from a kind of false consciousness.⁶¹ But the same is true with respect to some traditional marriages—some women are pressured into marrying, some women marry because they feel they have no choice, and so on. We do not reason from the lack of consent in some dyadic marriages to prohibiting all such marriages nor should we reason about plural and group marriages in the same way. Although Alito was wrong to imply that the education or career choice of the people in his

inegalitarian, but that are implausible assumptions about plural marriage in a liberal egalitarian democracy.

⁵⁵ See, e.g., GROSSMAN & FRIEDMAN, *supra* note 32, at 58-60 (discussing gender asymmetry in marriage law focusing on doctrine of coverture and its demise).

⁵⁶ For a similar point, see Calhoun, *supra* note 54, at 1040 (pointing out that “traditional” marriage also takes “social forms that are oppressive to women”).

⁵⁷ For a lengthy and, I think, persuasive discussion that arguments based on harms to women and gender inequality are not strong arguments against polygamy generally, see DEN OTTER, *supra* note 9, at 69-122.

⁵⁸ Transcript of Oral Argument at 17-19, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556-Question-1).

⁵⁹ See *id.* at 17-18.

⁶⁰ *Obergefell*, 135 S. Ct. at 2622.

⁶¹ See Martha Bailey & Amy Kaufman, *Should Civil Marriage Be Opened up to Multiple Parties?*, 64 EMORY L.J. 1747, 1765-66 (2015). See generally CATHARINE MCKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW passim* (1978) (discussing problems with women’s consent).

group marriage hypothetical are determinative, he was right to be dissatisfied with Bonauto's appeal to lack of consent as an answer to the polygamy challenge. Some people do knowingly choose to be in (de facto) plural or group marriages.⁶²

Another argument distinguishing same-sex marriage from plural and group marriages is that children born to people in polygamous marriages will be negatively affected compared to other children including children of same-sex couples. This argument takes various forms including that, compared to children in other types of families, children in plural or group marriages are more likely to be abused, neglected, and are more likely to have psychological problems. While there are disturbing instances of children in polygamous communities entering marriages (or de facto marriages) when they are younger than the legal age for marrying,⁶³ this is neither a necessary nor common feature of plural or group marriages. There is no direct link or established correlation between polygamy and the neglect of children. Further, there are procedures within family law for dealing with parents who neglect their children. The best way to prevent child neglect and abuse is to directly attack these problems (including through criminal laws against child abuse), not by using polygamy as a proxy for these ills.⁶⁴ Additionally, while there is some limited empirical research to support the claim that children of polygamous parents have increased psychological problems, there is also empirical literature suggesting this is not true.⁶⁵ In fact, because children in polygamous families may have more than two parents who are caring for them, their upbringing may well be characterized by increased stability, support and love. Although the claim that polygamy is bad for children is widely held and has been used to justify raids on polygamous communities, this claim is unsupported and the raids carried out based on this claim have been disastrous.⁶⁶

⁶² See PATRICIA DIXON-SPEAR, WE WANT FOR OUR SISTERS WHAT WE WANT FOR OURSELVES: AFRICAN AMERICAN WOMEN WHO PRACTICE POLYGAMY BY CONSENT 25 (2009); Elizabeth Joseph, *My Husband's Nine Wives*, N.Y. TIMES, May 23, 1991, at A31 ("feminist" defense of polygamy). See also *supra* note 53.

⁶³ See Chatlani, *supra* note 50, at 129.

⁶⁴ State v. Holm, 137 P.3d 726, 774-76 (Utah 2006) (Durham, C.J., concurring in part and dissenting in part).

⁶⁵ Compare Salman Elbedour et al., *The Effect of Polygamous Marital Structure on Behavioral, Emotional, and Academic Adjustment in Children: A Comprehensive Review of the Literature*, 5 CLINICAL CHILD & FAM. PSYCHOL. REV. 255, 258-61 (2002) (identifying multiple psychological risk factors for children in polygamous households) with Mark Goldfeder & Elisabeth Sheff, *Children of Polyamorous Families: A First Empirical Look*, 5 J. L. & SOC. DEVIANCE 150, 242-43 (2013) (concluding that it is in the best interest of some children to live in a polygamous household that provides them more love and support).

⁶⁶ See *In re Steed*, No. 03-08-00235-CV, 2008 WL 2132014 at *1 (Tex. Ct. App. 2008) (holding that Family and Protective Services had no evidence of danger to physical health or safety of any of 450 children removed on an emergency basis from property associated with a church that espoused the belief in polygamy), *aff'd*, *In re Texas Dep't of Family & Protective Servs.*, 255 S.W.3d 613 (Tex. 2008). See generally Ralph Nader, *The Law v. Plural Marriages*, 31 HARV. L. REC. 10 (1960) (providing historical background). See also DEN OTTER, *supra* note 9, at 136-53 (providing detailed discussion of the argument that polygamy is bad for children).

More generally, with the expansion of no-fault divorce, the increased use of joint custody, and the frequency with which divorced people remarry, it has become increasingly common for children to have more than two parental figures.⁶⁷ In fact, along the lines of the decisional law in a few states,⁶⁸ California recently passed a statute allowing for three or more legal parents.⁶⁹ It is no longer unusual for children to have more than two parental figures in their lives and this may well be good for them. This cuts against making a distinction between same-sex marriage and plural/group marriage based on the impact on children.

Another commonly proposed distinction between polygamy and same-sex marriage is that polygamy is much more complicated. It has been observed that “[s]ince marriage is already structured to involve only two people, the recognition of same-sex marriages will have no economic costs. In contrast, recognizing polygamous marriages would have significant potential ramifications in terms of additional costs to the state . . .”⁷⁰ It is certainly true that U.S. family law is set up for two-person marriage and that, in order to incorporate group and plural marriages, non-trivial changes would be required to the default rules, statutes, common law, regulations, etc., that make up family law. The changes involved would surely be more complicated than those required when states began to recognize same-sex marriages. That said, marriage is a supple and evolving institution. Numerous significant changes have been incorporated into family law over the years, including, for example, the abolishment of coverture, the gradual elimination of gender asymmetries in family law, and the advent of no fault divorce.⁷¹ Further, as Adrienne Davis and others have shown, it is far from impossible to adapt family law for polygamy.⁷² Also, family law has evolved to deal with “serial polygamy” and complicated family structures that result when people marry three or more times and have children with different people. Again, the California law allowing for three legal parents is a useful

⁶⁷ See ANDREW CHERLIN, MARRIAGE GO ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY 51 (2010).

⁶⁸ See *Jacob v. Shultz-Jacob*, 923 A.2d 473, 477 (Pa. Super. Ct. 2007) (holding that a child can have three parents); *Geen v. Geen*, 666 So. 2d 1192, 1197 (La. Ct. App. 1995) (same).

⁶⁹ CAL. FAM. CODE § 4057 (West 2013) (“[A]uthoriz[ing] court[s] to find that more than [two] persons with a claim to parentage . . . are parents if the court finds that recognizing only [two] parents would be detrimental to the child.”).

⁷⁰ Bala et al., *supra* note 38, at 38.

⁷¹ On marriage as an evolving institution, see generally NANCY COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 205-07 (2000); HENDRIK HARTOG, MAN & WIFE IN AMERICA: A HISTORY *passim* (2000) (discussing marriage as an evolving institution). On elimination of gender asymmetries in family law, see, e.g., GROSSMAN & FRIEDMAN, *supra* note 32, at 70-71. On development of no-fault divorce, see, e.g., RILEY, *supra* note 32, at 161-68.

⁷² See generally Davis, *supra* note 40, at 1958-61; Martha Ertman, *The Business of Intimacy*, in FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, AND SOCIETY 467, 467-69 (Martha Fineman & Terrance Dougherty, eds. 2005); Diane Klein, *Plural Marriage and Community Property Law*, 41 GOLDEN GATE U. L. REV. 33, 33-34 (2010). For further discussion of the complexity of polygamy, see DEN OTTER, *supra* note 9, at 153-58 (discussing the complexity of polygamy).

comparison.⁷³ This law and more complicated state laws do not allow for the legal possibility of having more than two parents, but if having a more complicated legal structure is better for the people involved or required by constitutional considerations, administrative complexity alone is not a strong argument.

Note that same-sex marriages may be more complicated than different-sex marriages in some contexts—for example, the marital presumption, according to which a child born to a married woman is presumed to be the child of the woman’s spouse, may require more complicated justification than in the context of same-sex marriages⁷⁴—but that is not a strong argument against same-sex marriage. I grant, however, that adapting family law and related areas of law to plural and group marriage would be significantly more complicated than with respect to same-sex marriages. Unlike the aforementioned attempts to distinguish same-sex marriage from polygamy, this complexity is a real difference between same-sex marriage and polygamy. But administrative convenience in the face of constitutional or strong policy arguments for legal change is rarely a good argument and it seems hardly a strong enough difference to address the polygamy challenge.⁷⁵

Finally, I turn to a suggestion for distinguishing polygamy from same-sex marriage that is less common than others I have considered thus far, but which has, for some people, an intuitive appeal. Jonathan Rauch suggests the following dis-analogy between laws that prohibit same-sex couples from marrying and laws that prohibit polygamy: arguments for same-sex marriage involve the demand by LGBT people for the right to marry someone they love, while arguments for polygamy involve the demand by polyamorous people for the right to marry everyone they love.⁷⁶ Rauch’s argument is plausible because the restriction that you can only be married to one person at a time seems different in kind from the restriction that you cannot marry any one at all to whom you are sexually and romantically attracted. Rauch believes this distinction is central, in part because he believes attraction to people of the same-sex is psychologically different than polyamory, a claim I turn to in the next part of this Essay. But the other aspect of the intuitive difference Rauch appeals to is connected to a sense that the demand for more than one spouse seems greedy. I think this is a misleading critique of polygamy.

To help see this, contrast the current “one spouse at a time” approach to marriage with the more restrictive “only one bite at the apple” approach that

⁷³ See generally CAL. FAM. CODE § 4057 (West 2013).

⁷⁴ See June Carbone & Naomi Cahn, *The Past, Present and Future of the Marital Presumption*, in THE INTERNATIONAL SURVEY OF FAMILY LAW 387, 397 (Bill Atkin & Fareda Banda, eds. 2013); Mary Patricia Byrn & Jenni Vainik Ives, *Which Came First: The Parent or the Child?*, 62 RUTGERS L. REV. 305, 337 (2010); Jana Singer, *Marriage Biology and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 247 (2006).

⁷⁵ See *Craig v. Boren*, 429 U.S. 190, 198 (1976) (discussing the limitation of administrative ease and convenience to overcome constitutional arguments).

⁷⁶ See Rauch, *supra* note 9, at 286.

would allow everyone the possibility to be married to only one person in his or her lifetime. Under the “one bite at the apple” approach, a person whose spouse dies or whose marriage ends in divorce, is not permitted to marry again.⁷⁷ Part of what is problematic about the “one bite at the apple” rule is that it seems to be a restriction on the right to marry. A person whose spouse has died seems entitled to marry again if he or she so desires. We might admire the widow who decided not to remarry because she already married her one true love and no one could compare to him, but it seems wrong to prevent her from remarrying if that is her wish. A person who wants to marry again is not being greedy even though he or she has already been married. Our current marriage system allows for “serial polygamy” but not “contemporaneous polygamy.” What justifies this difference if not one of the considerations I discussed above? This suggests that beyond the alleged psychological difference that I turn to in the next part, Rauch’s argument is circular.

IV. IMMUTABILITY AND INNATENESS

I turn now to a less commonly proposed solution to the polygamy challenge, namely one that appeals to immutability and innateness. The thought is that sexual orientation is innate or immutable while polyamory is not. This argument was recently made by William Saletan, who wrote “[i]mmutability is the biggest difference between homosexuality and polyamory.”⁷⁸ The same argument was also made twenty years ago in response to the argument that same-sex marriage will lead to polygamy. Jonathan Rauch, for example, distinguished polygamy from same-sex marriage by noting, “some people are constitutively attracted only to members of the same sex” while no one is “constitutively attracted . . . to groups rather than individuals.”⁷⁹ Especially in light of Justice Kennedy’s invocation of the immutability of same-sex sexual orientations,⁸⁰ this seems like a promising way to distinguish same-sex marriage from polygamy in response to the polygamy challenge.

Immutability first appeared in the Supreme Court’s equal protection jurisprudence in *Frontiero v. Richardson*, which held “classifications based upon sex, like classifications based upon race, alienage, and national origin, are

⁷⁷ This is not unprecedented in United States family law. South Carolina, for example, did not allow divorce until 1948. See GROSSMAN & FRIEDMAN, *supra* note 32, at 161. Additionally, until 1967, New York prohibited remarriage by a person who had committed adultery and whose spouse was granted a divorce on that basis (and is alive). N.Y. DOM. REL. LAW § 8 (McKinney 1966) (“[A] defendant for whose adultery the judgment of divorce has been granted in this State may not marry again during the lifetime of the complainant, unless the court in which the judgment of divorce was rendered shall in that respect modify such judgment.”).

⁷⁸ Saletan, *supra* note 9.

⁷⁹ Rauch, *supra* note 9, at 286.

⁸⁰ *Obergefell*, 135 S. Ct. at 2594.

inherently suspect and must therefore be subjected to close judicial scrutiny.⁷⁸¹ The Court continued:

[S]ince sex, like race and national origin, is an *immutable characteristic* determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility.⁸²

From this invocation of immutability in *Frontiero*, some advocates of LGBT rights developed an argument that starts with the premise that sexual orientations are inborn, not chosen and/or not changeable, and ends with the conclusion that sexual-orientation classifications are (like racial, ethnic, and sex classifications) constitutionally *suspect* and thus laws making use of such classifications deserve heightened scrutiny.⁸³ There is something intuitively plausible about using immutability as an argument for LGBT rights, namely, people should not be punished, discriminated against, or denied benefits from the state that are given to others because of a characteristic they were born with, did not choose, and/or cannot change.

That said, there are significant empirical, ethical, bioethical, practical, and legal problems facing the immutability argument for LGBT rights.⁸⁴ The

⁸¹ *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) (finding unconstitutional requirements for establishing that the spouse of a servicewoman, as compared to a spouse of a serviceman, was a dependent of the service member).

⁸² *Id.* at 686 (emphasis added and quotation omitted).

⁸³ See, e.g., E. Gary Spitko, *A Biologic Argument for Gay Essentialism-Determinism: Implications for Equal Protection and Substantive Due Process*, 18 U. HAW. L. REV. 571, 622 (1996); see generally Richard Green, *The Immutability of (Homo)sexual Orientation: Behavioral Science Implications for a Constitutional (Legal) Analysis*, 16 J. PSYCHIATRY & L. 537 (1988); Harris M. Miller II, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 817-21 (1984); Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 576 (1973). For arguments in non-legal contexts, see BRUCE BAWER, *A PLACE AT THE TABLE: THE GAY INDIVIDUAL IN AMERICAN SOCIETY* 84-87 (1993); LEVAY, *QUEER SCIENCE*, *supra* note 24, at 231-54; ANDREW SULLIVAN, *VIRTUALLY NORMAL* 170-71 (1995).

⁸⁴ See DAVID A. J. RICHARDS, *IDENTITY AND THE CASE FOR GAY RIGHTS: RACE, GENDER, RELIGION AS ANALOGIES* 7-10 (1999); STEIN, *MISMEASURE*, *supra* note 19, at 277-304; Edward Stein, *The Ethical, Legal, Social and Political Implications of Scientific Research on Sexual Orientation, in THE HEALTH OF SEXUAL MINORITIES: PUBLIC HEALTH PERSPECTIVES ON LESBIAN, GAY, BISEXUAL AND TRANSGENDER POPULATIONS* 130, 133-43 (Ilan Meyer & Mary Northridge eds., 2007); Edward Stein, *Law, Sexual Orientation and Gender*, in *HANDBOOK OF JURISPRUDENCE AND LEGAL PHILOSOPHY* 990 (Jules Coleman & Scott Shapiro eds., 2002); Stein, *supra* note 21, at 615-27; Edward Stein, *Sexual Orientations, Rights, and the Body: Immutability, Essentialism, and Nativism*, 78 SOC. RES.: AN INT'L Q. 633, 638-49 (2011); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 YALE L.J. 485, 487-94 (1998); Edward Stein, *The Relevance of Scientific Research about Sexual Orientation to Lesbian and Gay Rights*, 27 J. HOMOSEXUALITY 269 (1994), reprinted in *SAME SEX:*

most telling problem for this argument, granting that sexual orientations are either innate, not chosen, and not changeable, is that much of what is *ethically relevant* about being an LGBT person is *not* innate and *not* immutable. Actually engaging in sexual acts with a person of the same sex, publicly or privately, identifying as an LGBT person, marrying or otherwise establishing a household with a person of the same sex, and raising children as an openly LGBT person are *choices*—choices that one might not make. Regardless of the origins of sexual orientations, one can decide to be celibate, closeted, single, and childless. An argument based on immutability has the potential to protect a person from being discriminated against simply for having a sexual orientation, but this is quite limited protection. LGBT people deserve rights with respect to their *actions* and *decisions* not simply in virtue of their sexual orientation. LGBT people need protection against discrimination especially when they engage in same-sex sexual acts, when they openly identify as LGBT people, when they marry or are in spouse-like relationships with people of the same sex, and when they raise children. The immutability argument is impotent with respect to the most central claims for LGBT rights, namely, rights based on choices.

A related point can be made about bisexuals, people who are sexually attracted to both men and women and who can be sexually and emotionally fulfilled by relationships with people of either sex.⁸⁵ Even if bisexuality is innate, immutable, and/or not a choice, a bisexual can in fact choose to have sex with and build relationships with people of a different sex. In light of the immutability argument for LGBT rights, a bisexual woman's sexual relationship with a woman would be viewed differently from a lesbian's sexual relationship with a woman: the bisexual might choose to be in a relationship with a man in a way a lesbian could not (if she were being true to her sexual orientation). An argument for LGBT rights that turned out to be only effective as applied to the rights of gay men and lesbians but not to the rights of bisexuals would clearly be a deeply problematic and unsatisfactory argument.⁸⁶

While some U.S. courts have embraced the immutability argument for LGBT rights when it has been presented,⁸⁷ most have resisted it typically in one

DEBATING THE ETHICS, SCIENCE AND CULTURE OF HOMOSEXUALITY 135 (J. Corvino ed., 1997); David A.J. Richards, *Sexual Preference as a Suspect (Religious) Classification: An Alternative Perspective on the Unconstitutionality of Anti Lesbian/Gay Initiatives*, 55 OHIO ST. L.J. 491, 501-07 (1994); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 567-68 (1993-94).

⁸⁵ This formulation may be a bit of a simplification of the sexual desires of some bisexuals. For more on bisexuality, see MARTIN WEINBERG ET AL., DUAL ATTRACTION: UNDERSTANDING BISEXUALITY 39-58 (1994).

⁸⁶ See generally Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000) (describing bisexuality's treatment in the law). See Elizabeth Glazer, *Sexual Reorientation*, 100 GEO. L. J. 997, 1019-23 (2012). For an argument for same-sex marriage that focuses on bisexuality in a way that fits nicely with this point, see Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. 415, 452-53 (2012).

⁸⁷ *Baskin v. Bogan*, 766 F.3d 648, 654 (7th Cir. 2014). "Discrimination by [the] state . . . against a minority, when based on an immutable characteristic of the members of that minority . . . and occurring against an historical background of discrimination against the persons who have that

of three ways. First, some courts have said sexual-orientation classifications are *behavior*-based—in contrast to *status*-based—classifications, and argued behavior-based classifications cannot be immutable.⁸⁸ Second, courts have said sexual orientations are not immutable because some people can change, choose, or hide their sexual orientations.⁸⁹ Third, courts have said it is simply not yet known whether sexual orientations are immutable, and have thereby resisted the immutability argument's conclusion.⁹⁰

Over time, advocates of LGBT rights have developed an alternative version of the immutability argument that does not require sexual orientations be unchangeable or not chosen. I call this the “soft” immutability argument. A trait is “softly” immutable if changing it is very difficult *or* if the trait is so important to a person's identity that it is deeply problematic for the government to force a person to change that trait.⁹¹ The soft immutability argument captures the generally intuitive structure of “hard” immutability arguments while steering clear of the potential empirical problems related to hard immutability. A

characteristic, makes the discriminatory law . . . constitutionally suspect.” *Id.* See also *Equal Found. of Greater Cincinnati v. Cincinnati*, 860 F. Supp. 417, 437 (S.D. Ohio 1994), *rev'd*, 54 F.3d 261 (6th Cir. 1995), *vacated*, 518 U.S. 1001 (1996), *reinstated on reh'g*, 128 F.3d 289 (6th Cir. 1997).

⁸⁸ *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) (“[H]omosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage.”); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (“[M]embers of recognized suspect or quasi-suspect classes, e.g. blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in character.”); *Padula v. Webster*, 822 F.2d 97, 103-04 (D.C. Cir. 1987).

⁸⁹ *Equal Found. of Greater Cincinnati*, 54 F.3d at 267 (6th Cir. 1995), *vacated*, 518 U.S. 1001 (1996), *reinstated on reh'g*, 128 F.3d 289 (6th Cir. 1997) (holding sexual-orientation classifications not suspect because LGBT people do not “comprise an identifiable class,” in part because “many homosexuals successfully conceal their orientation”); *Padula*, 822 F.2d at 103 (holding sexual-orientation classifications not suspect because “[i]t would be quite anomalous . . . to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause”); *Steffan v. Cheney*, 780 F. Supp. 1, 6 n.12 (D.D.C. 1991) (“Homosexual orientation is neither conclusively mutable nor immutable, . . . [but because] some people exercise some choice in their own sexual orientation, the Court does not regard homosexuality as . . . immutable.”).

⁹⁰ See *Conaway v. Deane*, 932 A.2d 571, 615 n.57 (Md. 2007) (“[N]o studies currently available to the public have been subjected to rigorous analysis . . . to determine the scientific reliability of the methodology, principles, and resultant conclusion of the foregoing studies for the purposes of evidentiary admissibility.”); *Andersen v. King Cty.*, 138 P.3d 963, 974 (Wash. 2006); *Evans v. Romer*, No. 92-CV-7223, 1993 WL 518586, at *11 (D. Colo. 1993).

⁹¹ See Samuel A. Marcossan, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646, 651-57 (2001). The article attempts to resuscitate the immutability argument by defining immutability:

The condition of a characteristic or trait such that it is or is experienced as (1) either unalterable by a voluntary act of will by the individual, or alterable only with substantial cost or difficulty to the individual; and (2) not having been acquired through the voluntary choice of the individual.

Id. at 651. Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1513 (embracing soft immutability as unifying principle in employment discrimination law). Clarke, *supra* note 13, at 4-5 (using the term “the new immutability” for what I call soft immutability).

person's religious affiliation is (softly) immutable, not because it is impossible to change one's religious affiliation (it is possible, for example, to convert from Judaism to Christianity), but because the trait is so important to a person's identity that it is problematic—in fact, under the First Amendment, it is constitutionally impermissible—for the government to pressure a person to change their religion.⁹² The strength of the soft immutability for LGBT rights aside,⁹³ far more courts have been persuaded by soft immutability arguments for LGBT rights as compared to hard immutability arguments for LGBT rights. For example, the California Supreme Court held sexual-orientation classifications warrant strict scrutiny, “because a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment.”⁹⁴

The success or failure of soft or hard immutability arguments for LGBT rights generally is a distinct question than whether the immutability of sexual orientations can be used to distinguish arguments for same-sex marriage from arguments for plural or group marriage. The suggestion is that same-sex sexual desire “occupies a deeper level of human consciousness”⁹⁵ than the desire to have more than one sexual or romantic relationship at the same time. In other words, the idea is to address the polygamy challenge by showing there is a difference between same-sex sexual orientation and same-sex marriage, on the one hand, and polyamory and polygamy, on the other. Specifically, the idea is to show sexual orientations are innate, not chosen, or unchangeable while polyamory is not. I approach this suggestion applying both the hard and soft definitions of immutability. I conclude neither hard nor soft immutability supports the distinction between polyamory and sexual orientation.

⁹² Hoffman, *supra* note 91, at 1508 (discussing religious affiliation through the lens of immutability); Douglas Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEX. L. REV. 343, 383 (1981) (noting that religious affiliation should be treated as immutable, even though it can be changed, “because of fundamental interests in not changing [it]”).

⁹³ For critiques of soft immutability, see Clarke, *supra* note 13, at 10-11 (criticizing soft immutability); Stein, *supra* note 21, at 633-35.

⁹⁴ *In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008). See also *Latta v. Otter*, 771 F.3d 456, 464 n.4 (9th Cir. 2014) (“[S]exual orientation [is] immutable [because it is] so fundamental to one's identity that a person should not be required to abandon [it].”); *Zavaleta-Lopez v. Att'y Gen.*, 360 F. App'x 331, 333 (3d Cir. 2010) (in the context of asylum law, focusing on whether an individual has “[i] common, immutable characteristics such as race, gender, or a prior position, status, or condition, or [(ii)] characteristics that are capable of being changed but are of such fundamental importance that persons should not be required to change them, such as religious beliefs”); *Watkins v. United States Army*, 847 F.2d 1329, 1347 (9th Cir. 1988) (defining a trait as immutable if “changing it would involve great physical difficulty” or if it is “so central to a person's identity that it would be abhorrent for the government to penalize a person for refusing to change”), *vacated and aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 438-39 (Conn. 2008) (finding sexual orientation immutable because LGBT people “are characterized by a ‘central, defining [trait] of personhood, which may be altered [if at all] only at the expense of significant damage to the individual's sense of self.’”); *Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435, 446 (Or. Ct. App. 1998).

⁹⁵ Sullivan, *supra* note 9, at 279.

First, can the polygamy challenge be solved by showing sexual orientation is innate or immutable in the hard sense but polyamory is not? As discussed above, it is far from proven that sexual orientations are innate, but it is well established sexual orientations are (i) not consciously chosen, and (ii) are very difficult or impossible to change.⁹⁶ To establish the difference needed to address the polygamy challenge, polyamory would need to either be consciously chosen or relatively easy to change. Note there is very little research on the origins of polyamory. That said, some (but not all) polyamorous people claim they never chose to have the desire for multiple contemporaneous romantic relations and they have felt polyamorous as long as they have had sexual desires; this fits with the idea that polyamory is innate and not chosen.⁹⁷ In fact, given how robust sexual desires are and the fact that many people have a hard time being monogamous,⁹⁸ even given the social pressure and legal norms that push in this direction, indicates that polyamory is at least difficult, and perhaps impossible, to change. Just as, in the past, LGBT people tried to change their sexual orientation and failed,⁹⁹ and this was seen as supporting the immutability of sexual orientation, so too do many people who want to remain “faithful” to their spouses or partners (that is, to be monogamous) but cannot “control themselves.” This suggests the desire to be non-monogamous may also be immutable. And if this is the case, then so too might polyamory be immutable. Because of the lack of evidence about the origins of polyamory combined with some suggestive evidence polyamory might be neither chosen nor changeable, it is simply not clear how different sexual orientation and polyamory are in terms of innateness, lack of choice, and changeability.

Alternatively, can the polygamy challenge be solved by showing both (i) sexual orientation is *softly* immutable, that is, sexual orientation is difficult to change or so important to one’s identity that the state should not force (or try to force) a person to change it, and (ii) polyamory is *not* softly immutable. This argument seems a promising position given the comparative success of soft immutability arguments for LGBT rights generally in U.S. courts. Although sexual orientation is certainly softly immutable, the problem with this argument is polyamory is also softly immutable. Whether or not the desire to have multiple contemporaneous sexual or romantic partners is difficult to change, it surely can be important to a person’s identity¹⁰⁰ and it is deeply problematic for the government try to change it.¹⁰¹ The state should not try to change a person’s deeply-held attraction to people of the same sex, even if this were possible to

⁹⁶ See *supra* notes 22-26, and accompanying text.

⁹⁷ See Emens, *supra* note 36, at 350-52; Elisabeth Sheff, *Polyamorous Women, Sexual Subjectivity and Power*, 34 J. CONTEMP. ETHNOGRAPHY 251, 274 (2005).

⁹⁸ See generally RYAN & JETHA, *supra* note 28; BARASH & LIPTON, *supra* note 28.

⁹⁹ See Powell & Stein, *supra* note 22, at 33.

¹⁰⁰ See Tweedy, *supra* note 36, at 1481-98; Emens, *supra* note 36, at 340-54.

¹⁰¹ See DEN OTTER, *supra* note 9, at 251-54. See also *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878) (upholding the criminalization of polygamy but acknowledging religious beliefs are constitutionally protected).

change. For the very same reasons, the state should not try to change a person's deeply-held desire to have multiple, contemporaneous partners. This is especially clear for people who want to marry more than one person at the same time for religious reasons since religious affiliation and beliefs are canonical examples of characteristics that are softly immutable.¹⁰² The virtue of soft immutability as a possible solution to the polygamy challenge is its empirical strength as compared to the hard immutability with respect to sexual orientation. The defect of soft immutability as a possible solution to the polygamy challenge flows from its virtue: polyamory is as softly immutable as sexual orientation.¹⁰³

To review, in this Part, I considered the possibility of addressing the polygamy challenge by appeal to immutability. This suggestion had intuitive appeal because of the role of immutability in equal protection jurisprudence generally and as an argument for LGBT rights more specifically. There are, however, two types of immutability. To use immutability to distinguish sexual orientation from polyamory and, thereby, to differentiate prohibitions on same-sex marriage from prohibitions on plural and group marriage, the same sense of immutability must be used to show sexual orientation is immutable and polyamory is not. Although it is clear sexual orientation is softly immutable, so too is polyamory. With respect to hard immutability, the question is somewhat less clear. While sexual orientation is neither chosen nor susceptible to change, it has not been established that sexual orientation is innate. Some polyamorous people say they did not choose to be polyamorous and their polyamorous desires are resistant to change, but there is little evidence whether or not polyamory is immutable in the hard sense. Ultimately, the apparent inability of immutability to address the polygamy challenge is not so surprising given the problems with immutability (whether in the hard or soft form) as an argument for LGBT rights generally.¹⁰⁴

V. CONCLUSION

In Part III, I considered the use of some arguments against the polygamy challenge and found these arguments were not up to the task. In Part IV, I considered whether the polygamy challenge to same-sex marriage could be met by the invocation of the innateness or immutability of sexual orientations. My discussion showed neither hard nor soft immutability sufficed to distinguish between same-sex marriage and polygamy. In light of this, and in light of the apparent impotence of more common arguments against polygamy, now that the Supreme Court has said prohibitions on same-sex marriage are unconstitutional, does it follow that prohibitions on plural and group marriages are also

¹⁰² See Hoffman, *supra* note 91, at 1508; Laycock, *supra* note 92.

¹⁰³ For related arguments about immutability, see DEN OTTER, *supra* note 9, at 251-54; BEDI, *supra* note 9, at 238-44.

¹⁰⁴ See *supra* notes 84 and 93.

unconstitutional? If my discussion thus far is correct, two general answers remain.

First, although none of the arguments considered provide adequate grounds for distinguishing between same-sex marriage and polygamy, there might be other ways to usefully distinguish between the two. Although he did not engage in the sort of analysis typically associated with equal protection jurisprudence, Justice Kennedy did not foreclose the relevance of such analysis to the issues of same-sex marriage or LGBT rights more generally. In fact, *Obergefell* invoked the Equal Protection Clause as part of the discussion of the constitutional infirmity of prohibitions on same-sex marriage.¹⁰⁵ There might be additional equal protection arguments consistent with and complementary to *Obergefell* that could be used to address the polygamy challenge, a possibility Chief Justice Roberts seems to acknowledge.¹⁰⁶

For an example of a possible equal protection argument for same-sex marriage that might avoid the polygamy challenge, consider the sex-discrimination argument. Some scholars, litigators, and judges argue prohibitions on same-sex marriage are unconstitutional because they impermissibly discriminate on the basis of sex (or gender) under the Equal Protection Clause of the Fourteenth Amendment because laws that limit marriage to one man and one woman prohibit women from doing something men are allowed to do, namely, marry a woman.¹⁰⁷ Although the Supreme Court in *Obergefell* did not address this argument and the Court has not embraced this sex-discrimination argument for LGBT rights in other contexts, other judges have accepted it.¹⁰⁸ Elsewhere, I have discussed problems with the sex-discrimination argument generally,¹⁰⁹ although in the context of marriage this

¹⁰⁵ *Obergefell*, 135 S. Ct. at 2597-99.

¹⁰⁶ *Id.* at 2262 (Roberts, C.J., dissenting) (“There may well be relevant differences [between plural marriage and same-sex marriage] that compel different legal analysis.”).

¹⁰⁷ On the sex-discrimination argument for LGBT rights generally, see, e.g., WILLIAM ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 280-81 (1999) (discussing the sex-discrimination argument for LGBT rights); Andrew Koppelman, *Why Sexual Orientation Discrimination is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 199 (1994); Cass Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 1 (1994); Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 230. On sex discrimination argument for same-sex marriage, see, e.g., Deborah Widiss et al., *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 462 (2007) (discussing the sex-discrimination argument for same-sex marriage); Susan Frelich Appleton, *Same-Sex Couples: Defining Marriage in the Twenty-First Century: Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL’Y REV. 97, 103-04 (2005).

¹⁰⁸ *Goodridge*, 798 N.E.2d at 971 (Greaney, J., concurring); *Baker v. State*, 744 A.2d 864, 891, 897 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) (finding Vermont’s marriage law to be unconstitutional because it discriminates on the basis of sex); *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993) (holding Hawaii’s marriage law made use of sex classifications, thus requiring a compelling state interest).

¹⁰⁹ Compare Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 471-72 (2001), with Andrew Koppelman, *Defending the Sex*

argument might be able to overcome some of my general concerns. If laws prohibiting same-sex marriage are unconstitutional because they impermissibly discriminate based on sex, then this would be a promising strategy for addressing the polygamy challenge.¹¹⁰ There may also be other equal protection arguments for same-sex marriage consistent with *Obergefell* that do not extend to plural and group marriage.

Alternatively, one might “bite the bullet” and accept the implications of Chief Justice Roberts’s polygamy challenge. A growing minority of commentators and scholars suggest restrictions on marrying more than one person are unconstitutional for the same reasons restrictions on marrying people of the same sex are unconstitutional.¹¹¹ Although no court in the United States has embraced the more radical arguments in favor of the legalization of polygamy, some courts are as hostile to polygamy as they once were¹¹² and positive representations of polygamy can now be found in popular culture in ways that were inconceivable a decade ago.¹¹³ Polygamy has not yet gone from being “off the wall” to being “on the wall,” but it seems to be on its way.¹¹⁴

Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein, 49 UCLA L. REV. 519, 519 (2001).

¹¹⁰ See ESKRIDGE, *supra* note 107, at 280-81 (noting the sex-discrimination argument for same-sex marriage avoids the polygamy challenge).

¹¹¹ See generally DEN OTTER, *supra* note 9; MARK GOLDFEDER, LEGALIZING PLURAL MARRIAGE: THE NEXT FRONTIER IN FAMILY LAW *passim* (2015); Andrew F. March, *Is There a Right to Polygamy? Marriage, Equality and Subsidizing Families in Liberal Public Justification*, 8 J. MORAL PHIL. 244, 270-72 (2011); Sanford Levinson, *The Meaning of Marriage: Thinking About Polygamy*, 42 SAN DIEGO L. REV. 1049, 1049 (2005).

¹¹² *Brown*, 947 F. Supp. 2d at 1217-21 (finding Utah’s anti-bigamy law unconstitutional insofar as it criminalized cohabitation and associated sexual activity by a married person with a non-spouse); *Sanderson*, 739 P.2d at 625.

¹¹³ See generally BENNION, *supra* note 40.

¹¹⁴ Hadar Aviram & Gwendolyn M. Leachman, *The Future of Polyamorous Marriage: Lessons from the Marriage Equality Struggle*, 38 HARV. J.L. & GENDER 269, 335 (2015).

