The Deliberative Ethics of the Slippery Slope

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Contents

1.   Introduction

This paper tries to answer two main questions. First, is there any reason to think that there will be a slippery slope from same-sex marriage to plural marriage (polygamy)? My answer is that there *is* some reason to think that a decision in favour of one will increase the likelihood of the other, but that a slide is not inevitable, and that there are ways we can lessen or eliminate the slope, if we are prepared to argue forcefully for a mildly perfectionist view of marriage. Second, what norms ought to govern the use of slippery slope arguments in political debate and decision-making, in a democracy that aspires to be deliberative? My answer is that we should adopt a presumption against making decisions on slippery slope grounds, a presumption that would be defeasible only if certain fairly stringent conditions are met. Among these conditions is the requirement that one have good reason to believe that the slippery slope in question cannot be eliminated. One way of eliminating some slippery slopes would be to adopt the principle of 'public reason', which stipulates that answers to certain inevitably reasonably contestable religious and philosophical questions are not legitimate grounds for decisions about public institutions and policies. A somewhat surprising conclusion of the paper is thus that the idea of state 'neutrality' can be part of the problem or part of the solution, depending exactly how it is specified. Along the way, the paper also aims to shed light on the secondary question what mechanisms generate slippery slopes, and in particular on the connection between the logical and causal aspects of slippery slopes.

Section 2 explains why we should take slippery slope arguments seriously. Section 3 defines the term 'slippery slope', and compares my terminology with that of others in the field.

Section 4 explains the different mechanisms that generate slippery slopes. In this section, I draw heavily on Volokh's work, but also integrate earlier work on slippery slopes in a more narrowly legal context. Section 5 deals with the alleged slippery slope from same-sex marriage to polygamy. Section 6 explores the question of why it might be a bad idea to consider ourselves entitled to make slippery slope arguments, and Section 6 proposes norms about when it is and isn't appropriate to make slippery slope arguments.

2. Why Should We Take Slippery Slope Arguments Seriously?

Slippery slope arguments ('SSAs') are a common but controversial element of everyday political discourse.[1] For example, one prominent argument against same-sex marriage (SSM) is that same-sex marriage will lead to polygamy (POLY).[2] Many people dismiss this claim as a red herring, either on the grounds that no slippery slope exists, or on the grounds that it is inappropriate to make SSAs, instead of debating the merits of the issue at hand.[3] The SSA aims to con-

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1. Frederick Schauer says that "the slippery slope metaphor pervades legal argument," but also that because many slippery slope claims are exaggerated "it is possible for the cognoscenti to sneer at all slippery slope arguments" (Schauer 1985, 364, 382 - see also note 10 on p.362 for a list of references to slippery slope arguments in American jurisprudence) Similarly, David Mayo notes that slippery slope arguments are "dismissed glibly by some," but "figure... centrally in the thinking of others" (Mayo 1992, 21-22). For references to people "impatient" with slippery slope arguments, see Volokh (2003, 1029, note 6).

2. From recent Canadian debates, Cosh (2004) and Kay (2005) believe in the slippery slope and fear it, while Lamey (2003) believes in the slippery slope but would welcome it; while the Globe and Mail editorial board (2005) and Andrew Coyne deny the existence of a slippery slope Coyne (2004, 2005a, 2005b). For American examples of this argument, see the excerpted articles from Hadley Arkes, William Bennett, Charles Krauthammer, and Rick Santorum in Sullivan (1997, 273-82) and in particular Kurtz (2003); for other references, see Volokh (2006, 1, note 1).

3. For example, Coyne calls the slippery slope from SSM to POLY "an illusion," and dubs recent discussion over polygamy a "panic," because, as a matter of political morality and constitutionality, "the two are entirely separable issues" (Coyne 2005b). Similarly, the Globe and Mail editorial board asserted that polygamy "has nothing to do with same-sex marriage" (2005). See also Lakritz (2004).

vince people who think SSM and POLY distinguishable that the move to SSM will make us unable to distinguish SSM from POLY. Yet if there are good reasons against polygamy that don't apply to same-sex marriage, and good reasons for same-sex marriage that don't apply to polygamy, why should moving to SSM make us forget or misunderstand the ethical differences between the two (Volokh 2006, 8)? Conversely, if there really is "no good answer" to advocates of POLY who claim that SSM and POLY are not distinguishable, why *shouldn't* we go all the way to POLY?[4]

There is an answer to this argument, however. Opponents of SSM who claim that POLY cannot be distinguished from SSM think that there are good reasons against both SSM and POLY, but that once one has rejected those reasons, and opted for SSM, there are no grounds upon which to distinguish the case for SSM from the case for POLY. The claim is that there is no good answer to the polygamist's complaint *that is consistent with the case for SSM*. Conversely, even if one thinks that SSM and POLY are morally distinct, other people may not recognize this distinction. When liberals claimed that banning Communist political advocacy would eventually lead banning of other forms of advocacy, they were not mollified by the response that Communist advocacy is different than other forms of political advocacy, because it is anti-system, because it is covertly supported by a hostile foreign state, and so on. These might all be important differences that do justify treating communist advocacy differently, but other people will not necessarily agree, and once the precedent has been established that it is legitimate to ban

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4.   When polygamous immigrants complain that their relationships are just as legitimate as same-sex relationships, Colby Cosh argues that "there is no good answer." But "if there is 'no good answer'," Andrew Coyne asks, "then what is Colby's objection [to polygamy]?... Why shouldn't we go down that slippery slope?" (Coyne 2004).

political advocacy, they will be more likely to support broader restrictions on speech (Volokh 2006, 8).

Moreover, if we look to what Volokh calls our 'slippery past', we find ample evidence that slippery slopes exist. The last 50 years have witnessed a series of incremental liberalizations of laws regulating sexuality, "even where slippery slope warnings made when the first steps were taken were dismissed as paranoia" (Volokh 2006, 4). The fact that A preceded B doesn't necessarily mean that A caused B, since each liberalization could have been the independent result of underlying causal factors C. However, in many cases the decision-makers responsible for further liberalizations cited the earlier liberalizations as precedent for their own decisions. *Griswold v. Connecticut* (1965) struck down a ban on use of contraceptives by *married* couples, and a three-justice concurrence explicitly denied that the decision had any broader implications. Yet *Eisenstadt v. Baird* (1972) relied on the Griswold decision to extend this right to unmarried couples, and *Lawrence v. Texas* (2004) cited Griswold as the starting point for its decision striking down laws banning homosexual sodomy (Volokh 2006, 4). It is not implausible to think that if Griswold had been decided differently, the arrival of *Lawrence* might have been delayed. From the 1960s on, many American states not only decriminalized same-sex sexual conduct, they banned sexual orientation discrimination, included sexual orientation in hate crimes legislation, and allowed same-sex couples to adopt. Fears that such measures would lead to SSM were dismissed, at the time (Volokh 2006, 5 - see notes 14-16 for references). However, the Massachusetts Supreme Court's 2003 decision in favour of SSM relied on the existence of such policies in rejecting the state's asserted rationale for opposite-sex-only marriage ('OSOM').

These policies constituted evidence that there was no official state preference for the biological, two-parent, family - hence the goal of promoting such a family could not be cited as grounds for refusing SSM (Volokh 2006, 6).[5] Finally, in the 1970s the claim that the proposed Equal Rights Amendment would lead to gay marriage was dismissed as a scare tactic (Volokh 2006, 6, note 19). Yet the sex discrimination argument against OSOM has found favour in the Hawaii, Alaskan, and Massachusetts Supreme Courts, based on state ERAs (Volokh 2006, 6).

Also, we will see in more detail later that there are plausible mechanisms that can generate slippery slopes. Much of the literature on slippery slopes has focused on jurisprudential slippery slopes, in which (for reasons to be explained below) respect for precedent and disagreement about the implications of principles can generate chains of decisions that initial decision-makers do not foresee, or are unwilling or unable to prevent. In two recent articles, however, Eugene Volokh has described a number of non-jurisprudential slippery slope mechanisms, mechanisms that don't depend on an institutional context in which decision-makers are required to give explicit reasons for decisions, nor to respect the prior decisions of others.

Finally, slippery slope arguments come in all ideological flavours. If the SSM $\rightarrow$ POLY argument seems obviously bogus, think of the slippery slope arguments that have been made against limits on free speech (i.e. for Nazis - Schauer 1985, 363, note 11), or against limits on access to abortion, or against unilateral, pre-emptive war against alleged 'rogue' states.   Some or all of these arguments may be false. But recognizing that one may have oneself made slippery

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5.   Vermont's Supreme Court made the same argument; see Volokh (2003, 1084-85).

slope arguments in the past, in other contexts, should make one careful about dismissing slippery slope arguments today.

We need to take seriously, therefore the allegation that there will be a slippery slope from SSM to POLY. I would support SSM even if I knew that it would lead to POLY, but I oppose POLY. So if there really is a slippery slope mechanism at work, in this area, I would like to understand it so that I can resist it. The first purpose of this paper is to assess the prospects of such a slide, from SSM to POLY.[6]

The second source of hostility to SSAs is the feeling that it is improper or illegitimate to decide policy questions for slippery-slope reasons, and inappropriate to counsel others to do so, even if slippery slopes really do exist. It may seem inappropriately distrustful and paternalistic to oppose SSM on the grounds that one's fellow citizens might take the wrong lesson from this change. Sometimes we can learn valuable lessons from new policies; to refuse the move to SSM because of a potentially slippery slope to POLY would be to deny ourselves the possibility of learning from experience, for fear we might learn the wrong lesson. What's more, slippery slope decision-making conflicts with a norm that is commonplace in the literature on deliberative

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6.   One of the reasons that the slippery slope from SSM to POLY may seem implausible, in Canada at least, is that the Canadian criminal code makes polygamy an offence distinct from bigamy (Bala 2005, 28). The crime of polygamy is not fraudulently to enter into a civil marriage with more than one person, but simply to live in a conjugal-type relationship or to undergo a religious marriage ceremony with more than 2 people at the same time. The authorities in Canada are not prosecuting people for polygamy, for fear that the provisions in question would be found unconstitutional. Whether or not it is unconstitutional, the policy seems to me unjust. If three people want to declare themselves married in the eyes of their own religion and philosophy, and are not asking for the benefits and obligations of civil marriage, the state ought to leave them alone. I do not believe that polygamy should be recognized by the state as valid form of civil marriage, but if polygamy were decriminalized, as I think it ought to be, might we not be on a slippery slope to recognition? Given the considerations described above, I can't dismiss this slippery slope out of hand.

democracy, which is that citizens ought to seek to minimize, or at least not exaggerate, conflict, making an "economy of moral disagreement," in the words of Gutmann and Thompson.

> In justifying policies on moral grounds, citizens should seek the rationale that minimizes rejection of the position they oppose. While the corresponding component of integrity calls on citizens to accept the broader implications of their positions, this form of magnanimity tells citizens to avoid unnecessary conflict in characterizing the moral grounds or drawing out the policy implications of their positions. (Gutmann and Thompson 1996, 84-85)

What SSAs do is to connect otherwise unconnected issues. My disagreement with a supporter of POLY and SSM is no longer just about POLY, but now about SSM too, if I perceive a slippery slope, consider myself entitled to vote strategically on this basis, and think that the harms of POLY outweigh the benefits of SSM. For anyone who thinks that political debate and decision-making ought to be guided by deliberative norms, slippery slope arguments will be problematic. The paper's second goal is to determine what politcal norms ought to govern the making of slippery slope arguments, in a deliberative democracy.

3. What is a slippery slope?

I will use the term 'slippery slope' to describe the situation in which making one policy decision now (to move from the status quo '**0**' to a new policy '**1**', I will say), will increase the likelihood of our making another policy decision later (to move from the new policy **1** to a further policy **2**). The SSA is just the claim that a particular slippery slope exists, and that in determining which initial policy will have the best overall consequences we should take into account the indirect effect the first change in policy will have on the likelihood of the second. Suppose, for example, that we have two dichotomous policy dimensions: $X = x$ or $\neg x$, $Y = y$ or $\neg y$. The status quo (or 'state of rest', in Schauer's terminology) we label **0**: $(\neg x, \neg y)$. The proposed

policy is **1**: (x, ¬ y) (the 'instant case', according to Schauer). The feared ultimate policy is **2**: (x, y) (the 'danger case').[7] To set X = 'x' might be to define marriage so as to allow same-sex couples to marry, while setting Y = 'y' could be to define marriage so as to allow three or four people to marry each other. If the slope is slippery, our deciding to move from **0** (2-person, opposite-sex-only marriage) to **1** (2-person, same-or-opposite-sex marriage) will increase the probability of our later deciding to move to **2** (2 or more, same-or-opposite-sex marriage), relative to the what was the probability of a direct move from **0** to **2** (in other words, a direct move from 2-person-only, opposite-sex-only marriage to three-or-more-persons, same-or-opposite-sex marriage).

So defined, SSAs are consequence-based arguments that are distinctive in this respect, that we include among the consequences of the policies we are considering the effect that the initial decision will have on our future decisions about other policies. Such thinking is commonplace in the everyday decision-making processes of individuals. In deciding to put the TV in the basement, rather than the living room, even though it would be more convenient and comfortable to have it in the living room, I may be calculating that if the TV is in the living room I would watch too much. In principle, the best option is for me to watch just to watch the news, in the living room, but I fear that the decision to put the TV in the living room will increase the likelihood of me staying up late watching reruns of CSI. Slippery slope arguments are the collective analogue of this kind of forward-looking self-paternalism.

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7.   Volokh refers to the proposed policy or instant case as 'A', instead of '1', and the further policy or danger case as 'B', instead of '2', but it seems clearer to me not to mix letters and numbers, reserving letters early in the alphabet to refer to different decision-makers (judge A and judge B, for example).

Typically, SSAs are deployed when one believes that the first decision (the move from **0** to **1**) is unproblematic but the second decision (from **1** to **2**) is a mistake (unfair, inefficient, or what have you). Alternately, one may think **1** a mistake, but claim that even if **1** were unprob-lematic or somewhat beneficial in itself, this value would be outweighed by the negative value of **2**. Even if SSM were good policy, one might claim, its value is outweighed by the harm of POLY. This latter argument is not dishonest, so long as one truly believes that (a) the slope is slippery, and (b) 2 outweighs the conceded value of 1 (Volokh 2006, 7). I have not built these evaluative claims into the definition of the SSA, however, which means that anyone who argued *for* SSM on the grounds that SSM will increase the probability of POLY would also be making a slippery slope argument.

This definition is in some respects narrower than others in the literature, but largely con-sistent with the direction of recent work. It is common to distinguish logical from causal SSAs, whereas in my terminology, all SSAs are causal. Van der Burg distinguishes two logical SSAs (van der Burg 1991, 44). The first is the claim that because there is no relevant ethical difference between **1** and **2**, if we accept **1** then we are logically committed to accepting **2**.   However, van der Burg concludes that such arguments are not really SSAs, but a requirement to treat like cases alike (van der Burg 1991, 56;see also Enoch 2001, 645, concurring). If the case for **1** also justi-fies **2**, but **2** is unacceptable, then there is a direct argument against **1**, whether or not a decision in favour of **1** will increase the likelihood of a decision in favour of **2**. Conversely, Volokh stresses that the slippery slope mechanisms he describes do not depend on the assumption that **1** and **2** are distinguishable (Volokh 2003, 1034-35). I agree that the 'no relevant ethical distinc-

tion' claim is not itself an SSA, nor a necessary condition for the existence of an SSA. But in

three of the most important SSAs, I will argue, the 'no relevant distinction' claim plays an im-

portant supporting role.   The SSA itself is an empirical, causal claim, but, as we will see in more

detail, it can be supported by logical claims, by which I mean claims about the space of reasons

(what can and can't be justified, how easily, with how much room for reasonable disagreement,

and so on).

The other 'logical SSA' in Van der Burg's terminology is the Sorites-type argument, oth-

erwise known as the fallacy of the heap. The claim is that although **1** *is* distinct from **2**, **1** is not

really distinct from **1.1**, which is not really distinct from **1.2**, which is not really distinct from

1.3... which is not really distinct from **2**.[8] As a result, accepting **1** supposedly commits us to ac-

cepting **2**. It is commonly recognized that this is a bad argument.[9] The existence of a roughly

continuous dimension of variation makes any particular cut-off point locally arbitrary, but it does

not imply that any line is as good as any other, nor that we should draw no line at all (Schauer

1985, 379). It is somewhat (i.e. locally) arbitrary to determine that a jury of 6 is sufficiently

large, as opposed to a jury of 5. But once the line has been drawn at 6, there is no doubt about

where the line has been drawn and, if everyone recognizes the need to draw some line, given the

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8.   As van der Burg puts it, "there is a difference between A and B but... there is no such difference between A and
m, *m* and *n*, ... *y* and *z*, *z* and B, and... therefore, allowing A will in the end imply the acceptance of B" (van der Burg
1991, 44).

9.   Enoch provides the following example of the fallacy: "a 10-year-old boy is a person; from the time of
conception to the time when a child is a 10-year-old, there is no sharp cut-off point for which it is reasonable to
argue that before it the child (or fetus) is not a person, and after it it is; therefore, from conception the fetus is a
person." The mistake, as Enoch notes, is that "from the denial of a (sharp, determinate) cut-off point, the denial of a
distinction does not follow (or else, we must deny the existence of heaps, the baldness of any persons, and so on)"
(Enoch 2001, 643-44)

underlying continuity in some variable of agreed-upon ethical relevance, there is no reason to expect future slippage (Schauer 1985, 380).

4.   Why do slippery slopes exist?

4.1.   Jurisprudential Slippery Slopes

The first broad category of slippery slope I will call 'jurisprudential'. Although non-jurisprudential slippery slopes can apply to the actions of the judiciary, there are certain slippery slopes that are distinctively jurisprudential, because they depend upon an institutional commitment to making decisions on the basis of explicit rules or principles, and to respecting past decisions (of other decision-makers) as precedent. As before, the status quo is $0 : (\neg x, \neg y)$, the proposed policy $1 : (x, \neg y)$, and the further policy $2 : (x, y)$. Now, however, we have two decision-makers deciding in order, Judges Anna and Bob. Anna and Bob are committed to accepting each other's decisions as precedent. But they disagree about which of two principles P_a and P_b should be used to decide these cases, and they also disagree about what P_a implies. Anna believes in P_a, and that P_a implies $X = x$, but not $Y = y$. Anna thus supports the move to $1 : (x, \neg y)$, but not $2 : (x, y)$. Bob believes in P_b, and that P_b supports neither $X = x$ nor $Y = y$. Bob thus supports the status quo $0 : (\neg x, \neg y)$. But Bob also disagrees with Anna about the implications of P_a. Bob thinks that P_a, though not the right principle, implies both $X = x$ and $Y = y$. The first case to arise is 0 vs. 1, and it comes before Judge Anna, who rules for 1, on grounds of her interpretation of P_a. The second case to arise is 1 vs. 2, and it comes before Judge Bob. Bob disagrees with Anna's decision in favour of 1 on the basis of P_a, but accepts the decision as pre-

cedent, and so accepts the decision that P_a is the controlling principle. But Bob believes that P_a implies both x and y, and so decides in favour of **2**. Paradoxically, the outcome **2** is sub-optimal in both their minds, and it is even possible that Anna ranks **2** higher than **0**, along with Bob.

van der Burg describes such a case, in the context a series of precedent-respecting judicial decisions as if it is an example of a Sorites-type line-drawing problem (van der Burg 1991, 50), but this seems to me a mistake. van der Burg recognizes that legislatures often draw cut-offs that are locally arbitrary but rational and secure[10], but thinks that in judicial decision-making, line-drawing slippery slopes are more likely to arise. Whether the line is drawn by legislature in a statute or by the precedent of a court decision, however, so long as everyone recognizes that there is a continuous dimension of ethically relevant variation, but that a sharp policy cut-off is needed, there is no reason to fear a slippery slope. The problem is not commonly recognized continuity, which makes sharp cut-offs locally arbitrary. The problem is disagreement about the correct solution to a line-drawing problem that the parties do *not* see a Sorites-type problem.

One important source of jurisprudential slippery slopes is the fact that some distinctions are fuzzier than others. That is to say, some distinctions are relatively clear-cut and relatively little subject to reasonable controversy, while others are much more subject to reasonable disagreement.[11] Suppose, for example, that we have two principles, P_a and P_b. P_a is that there

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10. Thirty mph is not noticeably different than 31 mph, as a speed limit, but 20 is a lot different than 40, and given the need to have some rule about when the police will start handing out tickets, 30 will do fine (van der Burg 1991, 48). Earlier we saw the example of minimum jury sizes, from Schauer, a cut-off established by judges.

11. Schauer describes this problem in terms of varying degrees of 'linguistic imprecision'. The problem, he explains is that "the line between the instant case [the proposed policy] and the danger case [the further policy] is

should be no restrictions on speech except for those required to protect individuals from harm directly associated with the speech (shouting fire in a crowded theatre, libel, and so on). P_b is that hatefulness provides a second valid ground for restricting speech. What exactly P_a implies in the way of rules regulating speech is not obvious, but it is more obvious, one might think, than what Pb implies, because P_b rests on the vague, ethically-laden term 'hate', and what one person perceives as hateful bigotry, another will perceive as moral principle. The worry, then, about hate speech laws putting us on a slippery slope, is that the notion of what is 'hateful' is more highly contested and controversial than the current standard of direct harmfulness. Any decision that hateful content is grounds for restriction, if accepted as precedent, will open the door to further restrictions of content, as people interpret the contested idea of hate differently.

4.2. Democratic Slippery Slopes

Jurisprudential slippery slopes are distinctive because they involve disagreements about the application of explicit rules, sequential decision-making by different decision-makers, and an institutional commitment to respect precedents set by earlier decisions. Slippery slopes can also arise, however, where we have a group of agents making a series of decisions by some democratic procedure, as opposed to a sequence of precedent-respecting individual decisions.

(a) Multi-Peaked Preferences Slippery Slope

One such slippery slope Volokh dubs the 'multi-peaked preferences slippery slope' (Vo-

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fuzzier than the line between the state of rest [the status quo] and the danger case (Schauer 1985, 370-71). Yet the fuzziness here is not just imprecision, as when we talk in terms of 'tall' and 'short' without specifying what the exact cut-off is between the two. Slippery slopes arise around the interpretation of terms such as 'offensive' and 'hateful', where differences of interpretation reflect not just imprecision but ethical disagreement, and greater precision would require greater ethical articulacy and insight into the underlying issues rather than just more careful measurement.

lokh 2003, 1039-76). We often assume that people's preferences are 'single-peaked', which is to say that some people rank the possible policies **0** > **1** > **2**, others the reverse **2** > **1**> **0**, while the rest rank the intermediate option **1** first, followed by either **0** or **2**. Sometimes, however, some people will rank the possible policies **0** > **2** > **1**. These people rank what other people consider the intermediate option (**1**) as the worst possible outcome. All it takes to get a slippery slope, in addition to there being a sufficiently large group of people who have this 'multi-peaked' prefer- ence, is that there be some 'stickiness' in the political system, such that more than a bare major- ity is required to change policy. The key idea is that the '**0**, but **2** if not **1**' group will initially vote for the status quo **0** against the proposed change **1**, and for **0** against **2**, but once a decision has been made in favour of **1**, will vote for **2** over **1**, on the grounds that although **2** is not ideal, it is better than **1**, which is the worst of all worlds. We could call this group 'switchers', since they initially vote *against* **2** (vs. **0**), then vote *in favour* of **2** (vs. **1**, with the option of **0** off the table). But why is **0** off the table – why don't switchers vote against **2**, hoping to vote policy back to **0**? If a majority was in favour of retaining **0** against **2**, won't a majority be in favouring of returning to **0** from **2**? Yes – but not necessarily the supermajority required to change policy.[12]

Volkh gives the example of the decision of whether or not to install cameras on the streets to deter crime, and the further decision of whether to install face recognition software on such cameras (Volokh 2003, 1041-43, 1048-51). We have **0** = no street cameras, **1** = street cam-

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12. The supermajority rule is the functional analogue of precedent in the jursiprudential slippery slope. But a supermajority rule is necessary in all cases, since some people who oppose the move from 0 to 1 may think it wrong or unwise to revert from 1 to 0, at least if some time has passes in between. Marriage is a good example of such a case. Once lots of same-sex couples are married, some opponents of same-sex marriage will be reluctant to declare them unmarried.

eras, but no face recognition software, and **2** = street cameras with face recognition software. Some people think the less monitoring we have the better, others the more monitoring the better, and some think monitoring without face recognition would be best. But some of those who oppose installing street cameras and face recognition software do so just because of the cost. Suppose that they would support installing cameras and software if the total package cost only what the software now costs. They vote for **0** over **1** initially, but once they lose that vote, and the street cameras are in place, and the money has already been spent, then they no longer oppose face recognition software (Volokh 2003, 1039-40).

A more interesting version of the MPPSS, for my purposes, is the equality or consistency-based slippery slope. In this slippery slope, the 'switchers' preference **0** > **2** > **1** is generated by people thinking that the intermediary policy **1** is unfairly discriminatory, or inconsistent, and that the negative value of this inconsistency outweighs the intrinsic negative value of the step beyond **1** to **2**. The example Volokh gives is school choice, with **0** = no school choice, **1** = choice of secular schools, and **2** = choice of secular or religious schools (Volokh 2003, 1056-58). I might prefer no choice to either secular choice or total choice, but think that if we're going to have a voucher program for secular schools, it's only fair to expand the program to include religious schools too. "School choice is a bad idea," I maintain, "and other things equal the more choice there is the worse things are, but if we're going to have school choice, we can't discriminate against the religious."

The same point could be made with respect to polygamy and SSM. Volokh's blog received the following comment from a reader:

"What about the argument that (as far as I am aware), homosexual marriage has not been recognized anywhere until recently while polygamy has thousands of years of history as a workable form of marriage? In fact, polygamy is practised in many countries today, and I rather suspect that we have a constant trickle of immigrants who resent being told that their marriages are not legal and that they have to undergo the emotional stress of telling one (or more) wives that only wife X is a "real" wife. How can we reasonably say, well yes we have created a new kind of marriage, but yours is still right out? I don't think we can or should."[13]

Those who think SSM worse than POLY, who as Volokh points out may respect the religious sources and historical pedigree of polygamous marriages (Volokh 2006, 15), may think 'recognizing SSM but not POLY is insulting to many Mormons and Muslims, who have a deep faith that merits our respect; if we can't go back, we have to go forward'.[14] Depending on the numbers, the result could be a slippery slope.

(b) Attitude-Altering Slippery Slope

A second kind of democratic slippery slope Volokh labels the "attitude-altering slippery slope" (Volokh 2003, 1077-105). The idea is that changes in policy can change people's preferences over policy.[15] Gun registration might make people more inclined to accept gun confiscation; torture for real bad guys might make people more accepting of torture for ordinary criminals. The puzzle is why voters should let past decisions affect their views about what is acceptable in this way. One answer would be that people succumb to the is-ought fallacy (the

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13. http://volokh.com/2003_07_13_volokh_archive.html#105829553308248585. See (2006, 14-15) note 42 for a reference to a letter to the editor making a similar point.

14. If this same person were to make the slippery slope argument against SSM, it might sound like a threat, since the slippery slope exists in part because once at SSM, the speaker will vote to move to POLY. However, if the person sincerely believes that SSM + POLY would be preferable to SSM alone, then they are not breaking any democratic norms in voting this way, nor, it would seem, in informing others that this is the way they will vote.

15. This is unlike the MPPSS case, where we assumed people's orderings of the options 0, 1 and 2 were fixed; the switchers only switch in the sense that they seem to switch sides, voting for 0 over 2, then for 2 over 1, given their ranking 0 > 2 > 1.

mistake of believing that because something is legal it is morally acceptable). People might also want to believe that there legal system is just. Or, there may be framing effects. Compared to a partial handgun ban, a total handgun ban may seem extreme. But once a partial handgun ban is in place, the total handgun ban may seem moderate compared to a ban on all types of guns. Or, people may draw erroneously positive conclusions about the effects of a policy change, and so change their assessment of further changes (for all of these possibilities, seeVolokh 2003, 1079, 1101-04 Volokh 2006, 11).

In the face of complexity and limited time for deliberation and information-gathering, however, it is not unreasonable to consider a law's existence as evidence about what is right. The fact that peyote is illegal would lead me to think it is probably dangerous, if I haven't tried it, because various experts have probably looked into it (Volokh 2003, 1079).   I might also defer to experts on the more normative question the proper scope of the police's power to search. Volokh calls this the Is-Ought Heuristic, "the non-fallacious counterpart of the is-ought fallacy" (Volokh 2003, 1080). The mechanism of the AASS, therefore, is that people are encouraged to believe or give more weight to the principles they perceive to be behind policy changes, either for boundedly rational reasons or because of psychological causes, and hence they become more likely to accept other policy changes these principles would justify.

(c) Small Change Tolerance Slippery Slopes ('SCTSS')

The MPPSS and the AASS are the two most interesting examples of democratic SSs, but there are also a number of more mundane varieties. Slippery slopes can arise because voters may not notice or worry much about many small changes, whereas they would object to the big

change that all those small changes add up to. Unlike the AASS, in which one change affects the way people assess the prospects of a future change, in the SCTSS people just don't worry about small changes. People have limited time to spend on policy questions, and may prefer to spend it on a few big changes than many small ones; the media may prefer to cover novel changes rather than the latest in a long series of small changes; those who oppose a small change may also fear being labelled as extremist or alarmist, if they justify their decision with the prospect of further changes (Volokh 2003, 1107-12).

(d) Political Power Slippery Slope ('PPSS')

In a "political power slippery slope" , a decision in favour of one policy increases the power of a group that favours a further change in policy. If we legalize marijuana, we are not logically or ethically required to permit marijuana advertising, but there will develop a powerful industry that can fund lobbyists and bring pressure to bear on legislators. Restricting access to guns can, over time, reduce the number of people who own guns and, given that gun ownership plausibly influences views about gun control, reducing the number of people who own guns is a good way to reduce the number of people who support gun control (Volokh 2003, 114-20).

(e) Political Momentum Slippery Slope ('PMSS')

A closely related slippery slope involves changes in 'political momentum'. Legislators want to get elected. But they are uncertain about how powerful different groups are. Therefore, when one group wins a battle, that increases the legislators' perception of that group's power, and so makes the legislator more likely to bend to the group's will. Voters may similarly change their patterns of donation and activity based on their desire not to waste time and money on lost causes. Whereas the political power slippery slope involves one policy directly increasing the

numbers or resources of a particular constituency, the political momentum slippery slope involves changes in people's perceptions of groups' power, due to incomplete information and taking cues from policy victories (Volokh 2003, 1121-26).

4.3.   Mixed Examples

So far I have described jurisprudential slippery slopes, which arise in the context of sequential decision-making by different, precedent-respecting agents, and democratic slippery slopes, which arise in the context of decision-making by a given group of agents using a democratic procedure. But more complicated slippery slopes are possible, which mix these two forms.

Consider the following example, which Volokh describes under the 'cost-lowering' subsection of MPPSSs:

> Today, gun confiscation would be hard to enforce, partly because of the Fourth Amendment. Searching all homes for some or all kinds of guns would be unconstitutional, a classic impermissible general search... If, however, guns are first successfully registered, and are later banned, a house-to-house search of the homes of registered owners who haven't turned in their guns may well become constitutional. (Volokh 2003, 1044)

The pure MPPSS for the gun registration / confiscation example would involve the existence of a group of voters whose preference over policies is: **0** (= no registration or confiscation) > **2** (= registration and confiscation) > **1** (= registration without confiscation). The slippery slope arises because those who prefer **1** (= registration without confiscation) do not foresee that the multi-peaked group, which initially votes against registration, will then vote in favour of confiscation, after they have lost the vote on registration. But in the case Volokh describes, there need not be any such group of 'switchers'. Suppose we had a legislature that was unanimous in favouring gun registration but opposing gun confiscation. This legislature believes that confiscation is now

and will remain unconstitutional, whether guns are registered or not. But the legislature doesn't realize the court disagrees; the court interprets the principles involved in the 4th Amendment jurisprudence to imply that confiscation would be unconstitutional unless a registration system were in place. Now suppose that after the registration system has been set up, we have a different legislature, one that unanimously supports confiscation. When a challenge to the new law comes before the court, the court upholds the law mandating the confiscation of guns, because the registration system is in place. In this case, there is no group with the multi-peaked preference over policy: **2** (= registration and confiscation) > **0** (no registration or confiscation) > **1** (= registration without confiscation). The court does not 'prefer' registration and confiscation to neither registration nor confiscation, it simply believes that both are constitutionally permissible policies, while confiscation without registration is not. Nor does either legislature prefer **2** to **0** to **1**; the first legislature ranks **1** > **2** > **0**, while the second ranks **2** > **1** > **0**, we can suppose. Yet the case is clearly also not a simple jurisprudential slippery slope, in which a later court accepts the principle underlying an earlier decision as precedent but interprets the principle differently. Rather, what we have here is a legislature not foreseeing that its decision about **1** will change the court's view about the constitutionality of **2**, which a later legislature may then impose. Other permutations are of course possible.

Volokh describes what to my view is another mixed case, under the attitude-altering slippery slope. In its same-sex marriage decision, *Baker* v. *State*, the Vermont Supreme Court applied the principle that under the Vermont Constitution's Common Benefits Clause, all classifications must have a "reasonable and just relation to the governmental purpose." The question was

then what purpose it served to define marriage as opposite-sex-only. In the court's view, it was not sufficient that a reasonable person might think that it served some legitimate government purpose, to define marriage so as to exclude same-sex couples. There had to be evidence that this was a purpose that the state actually had, which the court took to mean that there had to be evidence of this purpose in other state policies. The state of Vermont had asserted that the goal of promoting child rearing in a setting that provides both male and female role models justified the decision to exclude same-sex partners from marriage. However, the court noted, the legislature had adopted a series of policies at odds with this goal. In 1996, for example, the state had removed all legal barriers to the adoption of children by same-sex couples. "In light of these express policy changes, the State's arguments that Vermont public policy favours opposite-sex over same-sex parents... [is] patently without substance" (*Baker* v. *State,* 744 A.2d 884-5, (Vt. 1999), quoted in Volokh (2003, 1085)). Similarly, the Massachusetts legislature's decision to ban sexual orientation discrimination was taken by that state's supreme court to undermine the asserted government interest in condemning homosexuality as immoral, leaving its marriage law without rational basis (*Goodridge* v. *Department of Public Health*, 798 N.E.2d 941, 967 (Mass. 2003), cited by Volokh (2006, 6)). Although we could say that a change in one set of policies lead the court to change its views about another policy, in this case, the mechanism does not involve the court adopting heuristics to cope with bounded rationality, or being psychologically influenced by the legislature's actions. The mechanism is rather that what policies are in place is one of the factors the court takes into account in apply rules that determine what is constitutional and what is not.

5. Is there a slippery slope from SSM to POLY?

Some of the mechanisms that can generate slippery slopes clearly do not apply in this case. For example, although recognition of SSMs might increase the power of the gay and lesbian community, gays and lesbians are still a small minority of the population, and only some of them favour a further move to POLY. There is little reason, therefore, to fear a *political power slippery slope*. Much the same reasoning applies to the *political momentum slippery slope*. The perception on the part of politicians that the gay community or the sexually liberationist segment of the population has more clout is not going to make politicians vote for POLY - the numbers just aren't there.[16] Nor is there any reason to fear a *small change tolerance slippery slope*. Neither the step to SSM nor the step to POLY are or will be perceived as small steps. SSM has been and POLY would be very controversial. If there is going to be a slippery slope from SSM to POLY, it will be because of the jurisprudential, attitude-altering, or equality-based multi-peaked preferences mechanisms.

Whether these mechanisms obtain, however, depends on what people believe. Although the SSA is a causal argument (an argument that one decision will increase the likelihood of our making another decision, justifiable or not), it is a causal argument that in these cases depends

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16. It might also be unfair to take a PPSS into account, where the group who's power we fear will increase is starting from a weak, disadvantaged position. It is one thing to worry about the power of tobacco corporations who will move into the sale of legalized marijuana; it is another to worry that a marginalized, disadvantaged group may come to have roughly the same clout as other groups of its size.

upon people having specific beliefs about which policies are ethically similar to other policies. For the JSS, the people in question are judges, and the issue is whether, after some court decides in favour of SSM, on the basis of some new principle or some new variant of an existing principle, other courts will accept this decision as establishing the new principle, but interpret it differently, concluding that the new principle mandates POLY as well as SSM. Suppose, for example, that an American court were to find in favour of SSM, on the grounds that there is a fundamental unenumerated constitutional right to marry, that therefore any limitation of this right must receive strict judicial scrutiny, and that the state's case for OSOM does not rise to this high standard.[17] If other courts accept the precedent that there is a fundamental right to marry, and that therefore any limitation on who can marry whom must receive strict scrutiny, the chances of a future decision in favour of POLY are much higher. In contrast, if OSOM were to be struck down on the grounds of sex discrimination, as happened in Hawaii and Alaska, there is much less reason to foresee any slide to POLY. If Bob is denied the right to marry Jane after marrying Jill, it is not because Jane is female, but because she is number three.[18] (I will deal with the more obvious argument that OSOM discriminates against gays and lesbians, which is the argument that has triumphed in Canada, below).

For the AASS, the people in question are citizens, and the initial decision-maker could either be a legislature or a court. If the move to SSM was made by the legislature, the principles

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17. For the case for same-sex marriage based on a fundamental constitutional right to marry, in the United States, see Gerstmann (2004) and Ball (2004).

18. For the case for same-sex marriage based on sex-discrimination, see Koppelman (2002).

behind the move may not be clear, but even if the move was made by a court that articulates its reasons clearly, the people may not be aware of these reasons in any great detail. Nor are citizens committed by their role to accepting a particular principle just because a court or a legislature enunciated it. Nonetheless, for boundedly-rational reasons, or because of psychological causes, the move to SSM may lead people to adopt or give added weight to whatever principle they perceive to be behind the move to SSM, and if (they think) this principle also justifies POLY, a slippery slope may ensue.

Finally, with the equality-based MPPSS, the people in question are the 'switchers', who believe that the correct principle rules out both SSM and POLY, but that a further principle of equal treatment or consistency requires that if we have wrongly but irreversibly decided in favour of SSM, we must move to POLY too. People who adopt this view must hold that what they take to be the added harm of POLY, in addition to SSM, is outweighed by the benefit of consistent treatment of non-traditional forms of marriage.

If enough people have the necessary views, each of these mechanisms could generate a slippery slope from SSM to POLY. But equally, if there is a plausible case to be made that SSM and POLY are distinct, as a matter of political morality, and if we can make this case in a manner that is widely accessible, and if there are a sufficient number of people who are sufficiently reasonable, in the sense of being willing and able to deliberate about what's right, we could reduce or eliminate the slippery slope. Even if at this moment there were a slippery slope, persuasive argument and deliberation might be able to get rid of the slippery slope, allowing us the option of SSM without POLY. So how exactly do SSM and POLY stand, morally speaking?

There are, first of all, strong reasons in favour of SSM that do not apply to POLY. The absence of SSM means that gays and lesbians are effectively denied the opportunity to marry anyone they could love. True, they can legally marry members of the opposite sex, which is a practical advantage - things could be worse - but they cannot fully or honestly marry anyone, given their fixed orientation towards members of the same sex. In contrast, anyone who would like to marry two people would at least like to marry one person; there is noone who simply couldn't honestly marry only one person. So denying polygamy is not as serious a setback to the interests of would-be polygamists as denying SSM is to gays and lesbians.[19] I find this argument convincing. All it really establishes, however, by itself, is that not recognizing polygamous marriages is not *as* unfair as not recognizing same-sex marriages. Would-be polygamists are still being denied the right to do something they really want to do, something they may even think they are obligated to do. For what reason are their relationships denied recognition?

One answer would be that, although 3(+)-person relationships are not necessarily bad, two-person relationships are generally or intrinsically better, more important, and more significant. One could argue that that there are special values that can only be realized in two-person relationships, and that society ought to be recognizing and endorsing two-person relationships because of these values, even though not prohibiting other kinds of relationships.

This response is plausible, and I endorse it. The Ontario decision in favour of SSM also

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19. "Gay people are not asking for the legal right to marry anybody they love or everybody they love. That would indeed be a radical transformation of marriage, or really an erasure of the boundary altogether. Instead, homosexuals are asking for what all heterosexuals possess already: the legal right to marry *somebody* they love." In contrast, "any man who can fall in love with two women can fall in love with each of them, and in fact has already done so" (Rauch 2004, 125-26)

appears to endorse this view, when it locates in the inequality of opposite-sex-only marriage in the fact that marriage is a special relationship, involving social recognition and endorsement.

> Marriage is, without dispute, one of the most significant forms of personal relationships. For centuries, marriage has been a basic element of social organization in most societies around the world. Through the institution of marriage, individuals can publicly express their love and commitment to each other. Through this institution, society publicly recognizes expressions of love and commitment between individuals, granting them respect and legitimacy as a couple. This public recognition and sanction of marital relationships reflect society's approbation of the personal hopes, desires and aspirations that underlie loving, committed, conjugal relationships... The ability to marry, and to thereby participate in this fundamental societal institution, is something that most Canadians take for granted. Same-sex couples do not; they are denied access to this institution simply on the basis of their sexual orientation (Halpern v. Canada, ¶5).

Many liberals do not accept this kind of perfectionism, however, even though it is relatively mild and non-coercive. It is a common view in academic political theory, though also beyond, that the state ought to be neutral with respect to competing conceptions of the good life (i.e. Dworkin 1985, 191, 203) One of the distinctive features of this view is that it extends the requirement of neutrality from its traditional home in the criminal law – where society exercises 'compulsion' and 'control', as Mill says – to other, less directly coercive forms of government action (Hurka 1995, 36). Marriage thus poses a problem, for liberals of this stripe. Same-sex marriage is clearly more just than opposite-sex-only marriage, but is marriage itself justified? As Ralph Wedgwood points out, many equality-based arguments for same-sex marriage take for granted that the fundamental unfairness of opposite-sex-only marriage is the exclusion of gays and lesbians from access to the special social recognition given to committed, intimate, two-person relationships.

> Many writers suppose that marital status is important because, as one legal scholar put it, marriage 'constitutes an affirmation by the state, a larger-than-life acknowledgement of one's relationship, a seal-of-approval'. It is widely believed that the state's purpose in honouring married couples in this way must be to express the view that married life is an especially virtuous or valuable way of life. But then marriage would itself conflict with the liberal principle mentioned above: in underwriting the institution of marriage, the state would be promoting the conjugal ideal, which is a controversial conception of the good. (Wedgwood 1999, 227)

If one accepts Wedgwood's principle of liberal neutrality, we must reject the *Halpern* argument about the unfairness of denying same-sex couples access to the special endorsement the state gives to marital relationships. Yes, OSOM is unfair, but the unfairness would best be remedied by getting the state out of the business of supporting and endorsing particular kinds of relationships, or by broadening the definition of marriage, so as to include plural marriage, for example.[20]

If a strong ideal of neutrality is thought to apply to the definition of marriage, rejecting polygamy will require the assumption that it is harmful, in some serious fashion, rather than just the premise that it is not ideal, and does not deserve special support and encouragement. Where then is the harm in polygamy?

One answer would be that polygamy is likely to be harmful to women, and undermine their status as equal citizens. Media reports and academic research on Muslim and fundamentalist Mormon polygamy in North America has raised doubts about whether women enter into polygamous marriages voluntarily, and whether they have a real say over whether and who the husband takes as a second or third wife. Research from a variety of cultures suggests that much tension and stress results from competition between wives for the resources and affections of the husband (see Bala Bala 2005, 7-17). Another worry is that polygamy is harmful to children. The concerns here range from poverty and weak bonds between fathers and children to reports of endemic abuse in some polygamist communities. According to Bala's reading of the literature,

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20. For another example of the liberal neutralist critique of mildly perfectionist family policy, see Estlund (1997, 164)'s comment on Macedo (1997).

"research across cultures consistently demonstrates that women in polygamous families experience greater emotional and mental health difficulties than women in monogamous relationships, while the children of polygamous families are more likely to have limited educational achievement" (Bala 2005, 19). A third concern is that polygamy would permit wealthy, powerful men to accumulate many wives, leaving poor, lower-status men with weak marriage prospects. Bala reports that in the United States "large numbers of adolescent and young males are being forced to leave Fundamentalist Mormon communities to ensure that it will be possible for the 'chosen' men to have multiple wives" (Bala 2005, 9). Rauch argues that countries in which polygamy is common have never been liberal democracies, because polygamy allows high-status men to accumulate many wives, leaving an angry underclass of unmarried, low-status men that can only be controlled via undemocratic repression (Rauch 2004, 129)[21]

Much of this evidence is persuasive. Given the history of men's oppression of women, it is plausible that polygamous marriages are less likely than monogamous marriages to approach the ideal of a partnership of equals, that significant numbers of women will involuntarily enter polygamous marriages that wouldn't otherwise have occurred, and that many who enter voluntarily will find their status as equal citizens compromised, and be unable fully to exercise their rights and responsibilities. However, there are also big problems with the research on the effects of polygamy. Much of the evidence comes from communities like the Fundamentalist Mormon

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21. As George Gilder put it, "monogamy is egalitarianism in the realm of love. It is a mode of rationing. It means – to put it crudely – one to a customer. Competition is intense enough even so… But under a regime of monogamy there are limits… One does not abandon one's own wife when she grows older, to take a women who would otherwise go to a younger man. One does not raid the marriages of others" (Gilder 1986, 58).

community in Bountfiul, B.C. "It is impossible," however, "to separate the effects of polygamy on women and children from the effect of living in a socially isolated community, with very strict expectations for its members that differ radically from those of broader society" (Bala 2005, 7). Evidence of the effects of polygamy *when polygamy is a crime* is not likely to be an accurate measure of the effects of polygamy when polygamy is recognized as a valid form of civil marriage. Furthermore, some of the problems associated with polygamy, such as young girls being forced into marriage, could be solved by recognizing polygamous marriages but effectively enforcing a higher minimum age for marriage. Evidence from countries where polygamy is legal faces the usual (and serious) problem of figuring out whether the observed discrepancies between polygamous and monogamous marriages are due to marriage itself, or instead to others factors that may lead people to choose polygamy.

Even if all of the problems with polygamy are real, however, they remain for the most part probabilistic. Even if women who enter polygamous marriages are more likely to suffer abuse, and less likely to be able to exercise and enjoy their liberties as free and equal citizens than if they had entered monogamous marriages, it is unlikely to be true that *every* woman in a polygamous marriage is worse than she would have been had polygamy been illegal, nor that *every* woman in a polygamous marriage is unable to exercise her rights as a citizen. Why then is it fair to ban *all* polygamous marriage because *some* polygamous marriages have bad qualities? Imagine that it were proposed to ban single-parent families, on the basis of the documented disparity in outcomes between children of two-parent families and children of single-parent families.[22]

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22. See (McLanahan and Sandefur 1994) and (Galston 1990); but for a critique that questions both the statistical

Even if single-parent families don't do as well for children on average, why is it fair to penalize all such families?

The argument about the possibility of generating an unmarried male underclass assumes, reasonably enough, that few men will be willing to enter into marriages in which there is just one woman but more than one man, though it also supposes, less plausibly, that social norms against polygamy would evaporate, once polygamy was recognized, and that North American women would consent to polygamous arrangements in large numbers. Furthermore, the argument assumes that if A, B, and C want to marry, D has a right to prevent them from marrying so that C will be more likely to marry D. We certainly wouldn't accept this reasoning in private romantic relationships - that I should be prohibited from dating two people at once, so as to leave a more equal romantic playing field for you. Perhaps, since in this case what is at stake is not prohibition but non-recognition, the community ought to have more leeway to shape institutions so as to encourage a more equal pattern of mating. But these and other concerns would have to be weighed against the reasons *for* recognizing adult polygamous marriages.

The arguments that recognizing polygamous marriages would necessarily harm women and children and undermine democracy are plausible, therefore, but far from conclusive. I find the perfectionist argument for supporting committed, two-person relationships persuasive, but to accept it one must reject the popular idea of state neutrality with respect to conceptions of the good life. It certainly is true that if everyone voted in favour of same-sex marriage for Rauchian

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evidence and the fairness of making policy based on averages, see (Young 1995).

reasons, which is to say for mildly-perfectionist, otherwise traditionalist reasons, and if everyone recognized that this is what everyone else was doing, then there would be no slippery slope. But many people are and will remain stricter liberals than me. If SSM comes to be seen as a victory for orthodox liberal antiperfectionism, as opposed to a more pragmatic, mildly perfectionist traditionalism, and if enough conservatives rank fairness and consistency (as they interpret them, given the impossibility of returning to the traditionalist status quo) above the added harm of polygamy, then a slippery slope becomes plausible. I cannot entirely dismiss the argument that there is a slippery slope from same-sex marriage to polygamy, therefore, though I think that, once we recognize the sources of a potential slide, the slipperiness could be eliminated or attenuated, as I will explain below.

6.   What's wrong with making SSAs?

This is just one example of a slippery slope argument, of course. In the last two sections of the paper, I address the broader question of whether it is legitimate to make decisions on slippery slope grounds, and to urge others to do so.

The first thing that makes SSAs problematic is that they may seem to involve and communicate the wrong attitude towards one's fellow citizens. When one makes a policy decision based on a fear of a slippery slope, one is voting against 1 because one fears that if 1 is implemented, other people might draw the wrong conclusion from 1, and come to support 2, even if, in one's own view, 1 is distinct from 2. V says that "This approach might at first seem improperly paternalistic or anti-majoritarian" (Volokh 2003, 1104). It might be taken to show "a distrust of

your fellow citizens, and... an unwillingness to let your mind be changed" (Volokh 2006, 9 - see also Volokh 2003, 1134-35). Sometimes slippery slopes can be good, because we learn from new policies. If so, aren't we attempting to deny other people the opportunity to learn from policy, in making a decision on slippery slope grounds, and aren't we ourselves refusing to be open to learning, when we make decisions for slippery slope reasons?

A more serious problem with slippery slope decision-making and argumentation, in my view, is that it may have perverse consequences, when it becomes common policy for citizens and legislators to think this way. If a perfectly slippery slope exists, we will have only temporary access to the intermediate policy, which may be the best policy; Volokh dubs this problem the "slippery slope inefficiency" (Volokh 2003, 1131). If the slope from **1** to **2** really is slippery, then it is better to know this so that when we choose between **0** and **1** we realize that we're really choosing between **0** and **2**. But some slopes are only probabilistically slippery, and others may not be slippery at all, even though we think they are. When we make mistakes, we may be denying ourselves intermediate policies that are better than the extremes we think we have to choose between. Thus, a mistaken belief in a slippery slope can also create an 'inefficiency' by depriving us of an optimal policy - *but only if* we consider ourselves entitled to make decisions on slippery slope grounds. As Volokh recognizes, if slippery slopes are rooted in our bounded rationality, this same bounded rationality will likely limit our ability to assess correctly long-term, indirect causal effects (Volokh 2003, 1135, note 329, citing Enoch 2001). Although it may be instrumentally rational for individuals in particular cases to make decisions for slippery slope reasons, or to counsel slippery slope decision-making, it may be collectively counterproductive

for everyone to follow the norm of calculating and acting on slippery slope possibilities. If we are prone to make mistakes about slippery slopes, then we will avoid slipping down slopes that aren't in fact slippery, and society will be needlessly deprived of intermediate policies which may be optimal policies, or reasonable compromises.

Volokh is aware of this possibility, but doesn't explicitly deal with another problem, which has to do not with the optimality of the policy decisions we make, but with the nature of the conflict we face. If we consider it legitimate to make decisions on slippery slope grounds, then we will be more likely to calculate slippery slope possibilities. The more slippery slopes we perceive, however, the fewer independent policy options we will perceive, and the more we will see the political landscape as being be divided up into a small number of factions. Consider, for example, the case in which Abbie and Bill think that the issues of the sex of the marriage part-ners and the number of the marriage partners are independent. Abbie favours SSM, but above all wants to prevent POLY, while Bill favours SSM and POLY. Ordinarily, Abbie would vote for SSM alongside Bill, but then part ways in the vote on POLY – a cross-cutting cleavage. When Abbie realizes that there is a slippery slope from SSM to POLY, however, she will change her vote, and oppose SSM, making her Bill's opponent across the board. As the space of policies perceived to be feasible is reduced, the number of possible cleavages is reduced, and hence also the number of possible cross-cutting cleavages.[23]

These two problems - mistaken beliefs in slippery slopes denying us potentially optimal

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23. There's no guarantee that in a complex policy space all of the possible combinations of policies will have supporters. Hence a slippery slope will not always exacerbate conflict, but it can't help.

policies, and belief in slippery slopes reducing cross-cutting cleavages - would be greatly heightened by the strategies Volokh describes for dealing with uncertainty about the existence of slippery slopes, which are heuristics (cognitive rules of thumb) that involve presumptions against changes in policy. Given the inevitable uncertainty and time involved in determining whether a given slope is likely to be slippery, Volokh argues that it may make sense to oppose small changes, changes that are insignificant or even positive, in themselves, on the grounds that small changes now might lead to big changes later. It might make sense, for example, for abortion rights activists to oppose any restriction on abortion, no matter how small and well justified, unless it can be clearly proved that there will be no slippery slope, and unless the benefit from the proposed restriction is very large. Volokh dub this rule the 'presumption against even small changes heuristic' (Volokh 2003, 1037-38). It may also make sense to oppose any policy change, *in any dimension*, if the change is proposed or supported by a group that one knows aims to change policy in the dimension of concern. Given limited time and information, it is not unreasonablefor the vote to surmise that if the activist group on issue Y is taking a stand on issue X, maybe it knows something the voter doesn't, and has a reason to suspect a slippery slope. If groups favouring polyamory are supporting same-sex marriage, maybe I should oppose same-sex marriage, the voter might think, at least until I can be sure that there will no slippery slope. This rule of thumb Volokh calls the "ad hominem heuristic" (Volokh 2003, 1075-76).

These heuristics are the exact opposite of the norms Gutmann and Thompson proposed for dealing with moral disagreement in democratic debate. When abortion or gun rights advocates adopt these strategies, they are often labelled as extremists, as Volokh recognizes (Volokh

2003, 1037). It was in part to combat such extremism that Gutmann and Thompson developed their particular version of deliberative democracy. Volokh recognizes that widespread use of these heuristics, although individually rational, could have harmful social consequences, such as worsening the tone of political debate (Volokh 2003, 1076, see also 1134-5). The problem, however, is not just that slippery slope arguments worsen the "tone" of political debate between people who would be political enemies anyway. The problem is that widespread use of slippery slope arguments and slippery slope heuristics increases the number of people and groups who consider each other to be enemies, rather than just sometimes allies, sometimes opponents.

7.   What norms ought to guide the use of SSAs?

Given the potential collective irrationality of making policy decisions for slippery slope reasons, and of urging others to do so, I think it would make sense for us to adopt the general norm of not making slippery slope arguments, except where certain fairly stringent conditions can be met.[24]

First, one must have a plausible account of the mechanism that is alleged to be generating the slippery slope. It is not enough to say 'what if SSM lead to POLY?'; one must have some

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24. The idea that the conduct of citizens can and ought to be guided by norms that limit instrumental, act-consequentialist thinking is not unfamiliar. The norm that citizens ought to vote is the most obvious example. The voting paradox results not from the assumption that individuals are self-interested, but from the assumption that they decide how to act by calculating the full consequences of each possible action, and choosing the action that maximizes the expected value of these consequences. Even pure altruists would run into the voting paradox, so long as voting is costly; why spend one hour voting, if one's vote will not be decisive, when one could be cleaning up the park, writing a letter for Amnesty International, etc.? My suggestion, given the problems canvassed above, is that it make sense to adopt a norm against making slippery slope arguments, or deciding policy on slippery slope grounds, that is similar to the norm in favour of voting, in that it would help us overcome the potentially perverse consequences of unrestrained, individual act-rationality.

concrete reason for thinking that a decision in favour of SSM will increase the likelihood of a decision in favour of POLY, to some significant extent.

Secondly, the negative consequences of the ultimate policy and the increase in the probability of this policy must be high enough to outweigh the value of 1, and to outweigh it by enough to merit violating an important political norm. One can't say that any risk of even small harms that might result from POLY justifies refusing SSM, as if the well-being of gays and lesbians and their children is of no consequence (Rauch 2004, 68). And the expected disvalue of or wrongs involved in POLY (2) must be sufficiently larger than the value or rights of SSM (1) to justify exempting oneself from the general norm against making decisions on slippery slope grounds.

Finally, even if one has a plausible account of the SS mechanism and the stakes are high, one must also have reason to believe that there are no feasible ways to eliminate the probability of slippage (by means other than simply not taking the first step). Slippery slopes are not laws of nature; they are the product of specific sets of values and beliefs, interests and resources, policies and procedures. Sometimes, there are ways of reducing or removing the slipperiness, so that we can take the feared step to **1** without slipping down to **2**, and if so, one ought not decide against **1** simply for fear of moving to **2**, nor counsel others to do so.

To avoid political momentum slippery slopes, for example, policies can be packaged in ways that give both sides of the debate something, or that give this appearance, so that neither side is seen to have won outright (Volokh 2003, 1126). To avoid political power slippery slopes, as in the case of tobacco companies lobbying to make marijuana advertising legal, we can

work to reduce the influence of money on politics - admittedly a difficult task, a fact that would make this slippery slope argument more reasonable than many others.[25]

Another strategy for eliminating slippery slopes is simply to engage actively in debate and deliberation. As we saw above, the mechanisms responsible for the slippery slope from SSM to POLY, if they indeed exist, depend upon people having specific beliefs about the ethical similarity of SSM and POLY. But there is also a clear and to my mind convincing case to be made that they are different, and if we can make that case, in a convincing way, the risk of a slide to POLY will be reduced. Before one makes a decision against SSM on slippery slope grounds, therefore, or counsels anyone else to do so, one ought to have specific reasons for thinking that more deliberation on the topic cannot be successful, despite the merits of the case.

A third and final strategy for eliminating some slippery slopes would be for citizens to agree not to use competing answers to certain contested religious and philosophical questions in making decisions about public policies, or at least the most important public policies. Broadly speaking, this is the "public reason" strategy. The principle of public reason requires that when we make decisions about public institutions, we not do so on the basis of reasonably contestable views about spiritual, metaphysical, or philosophical questions. As individuals, as members of associations, or as members of religious communities we will continue to live according to our

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25. Trying to avoid political power and momentum slippery slopes may not be the right thing to do, however, if (as mentioned earlier) the group who's increased power we fear is already disadvantaged. Volokh hints at this idea by suggesting that it may be unethical to vote strategically to avoid political power slippery slopes (Volokh 2003, 1135). If one accepts the principle that all citizens ought to have equal opportunity for political influence, however, only political power slippery slopes involving the already powerful would justify making decisions on the basis of slippery slope reasons.

own views about such questions. But when designing our common institutions, we should agree to consider these matters of deep reasonable controversy irrelevant, not just out of a desire to avoid conflict, but out of respect for each other as free and equal citizens. What is distinctive about public reason, therefore, is that it involves the principled avoidance, bracketing, or tabling of certain disagreements, via the agreement not to use the views in question when making some or all collective decisions (Larmore 2003 Rawls 1996).

One of the reasons some people oppose same-sex marriage is that, even if SSM can be given a plausible quasi-traditionalist justification, in terms of extending the good of monogamous commitment to gays and lesbians, people may think that the definition of marriage has been changed because homo- and heterosexuality are fully ethically and spiritually equivalent. Decriminalization of homosexuality was clearly compatible with moral disapproval, but symbolic recognition via marriage may seem to presuppose that we as a society are putting ourselves behind the view that the Catholic Church and all of the other conservative forms of religion that disapprove of homosexuality are wrong to do so, and that henceforward we will designing public policies and institutions to promote this, the correct (liberal) view about sin and sexuality. If this principle were the one animating the move to same-sex marriage, it would not be unreasonable to fear (or to hope for, depending one's view) further changes in policy as a result of same-sex marriage: in the domain of the curriculum of public education, the charitable tax status of private organizations, and so on. Agreeing that answers to questions about sin do not provide valid public reasons would assuage these fears, to some extent (though the principle of teaching toleration and public non-discrimination will still impinge some religions more than others).

One of the obstacles to compromise is the suspicion that the other side's motivation is purely strategic. Even if some intermediate policy seems like a sensible accommodation, moderates on either side may fear that accepting this policy will put them on a slippery slope to a more extreme policy, because radicals on the other side of the issue will use the intermediate or compromise policy as a tool to move further towards the opposing ideal. One of the ways radicals will do this is to characterize the principles motivating the move to the intermediate policy more broadly than necessary – to characterize the principle behind the move to same-sex marriage as the principle that *because homo and heterosexuality are fully ethically and spiritually equivalent*, there is no reason that same-sex couples shouldn't be able to marry. A common understanding that the institution of marriage is or must be justified in terms of a limited set of public values, rather than by particular religious (or anti-religious) doctrine, would limit the extent to which change in the definition of marriage would act as (and be seen as) a vehicle of broader cultural change. A commitment to public reason could, in other words limit the possibilities for attitude-altering slippery slopes.

It may seem surprising to suggest that the principle of public reason can reduce the probability of slippery slopes, since the idea of public reason is often closely associated with the anti-perfectionist liberal view that the state must remain neutral with respect to competing conceptions of the good life[26], and as we have seen, it is the popularity of this idea that gives the slippery slope from SSM to POLY is credibility. Although I cannot fully defend the point here, I

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26. See, for example, Quong (2004, 233), Caney (1999, 19), Chan (2000, 5-8), and Estlund (1997, 164). Rawls's symmetrical treatment of religious persecution and moral perfectionism in *A Theory of Justice* also supports this view (Rawls 1971, 207, 327).

believe that there are important distinctions to be made between the 'politically liberal' idea of public reason, and what is often a 'comprehensively liberal' commitment to antiperfectionist neutrality, particularly as to the scope of these ideas. The idea of public reason makes most sense when it is understood to exclude only answers to religious and quasi-religious questions. What is distinctive about religious views is that they are (a) fundamental to moral personality (intimately bound up with conceptions of moral obligation and integrity), and (b) inevitably the subject of reasonable controversy, in a democratic society. The fact of current reasonable controversy by itself (about the dynamics of supply and demand, say) does not create the moral problem to which public reason is meant to be a solution. It also seems important that the view in question speak in a fairly direct way to a basic spiritual or philosophical question having to do with fundamental values, as suggested by Rawls' initial presentation of the idea of political liberalism (Rawls 1996, 3-4). Whether homosexuality is a sin in God's eyes would be a good example of such a question. Whether long term intimate commitment is an important human good – not mandatory for all, but deserving of recognition and support – might not be.

In summary: fears and hopes of a slippery slope from SSM to POLY are not totally unfounded, but if we understand the roots of such a slope, there is a reasonable prospect that more deliberation can reduce its slipperiness. The idea of public reason, properly construed, can play an important supporting role. At the same time, we ought to adopt the norm that it is illegitimate to appeal to slippery slope considerations, except where conditions such as the ones I outlined above can be met.

8. References

Bala, Nicholas. 2005. *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 Research Reportsù*, Ottawa: Research Directorate, Status of Women Canada.

Ball, Carlos A. 2004. The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence V. Texas. *Minnesota Law Review* 88 (5): 1184-232.

Caney, Simon. 1999. *Liberal Legitimacy, Reasonable Disagreement and Justice*. In *Pluralism and Liberal Neutrality*, edited by Richard Bellamy, and Martin Hollis. Illford, Essex: Frank Cass Publishers.

Chan, Joseph. 2000. Legitimacy, Unanimity, and Perfectionism. *Philosophy and Public Affairs* 29 (1): 5-42.

Cosh, Colby. 2004. Gay Marriage and Polygamy, Hand in Hand. *National Post*, Aug. 14, 10.

Coyne, Andrew. 2004. The Slope is Not That Slippery. *National Post*, Aug. 21, 16.

Coyne, Andrew. 2005a. For Better Or Worse: It is Simply the Right Thing to Do. *National Post*, Jun. 29, 1.

Coyne, Andrew. 2005b. Panic Over Polygamy. *National Post*, Jan. 22, 20.

Dworkin, R. M. 1985. *A Matter of Principle*. Cambridge, Mass.: Harvard University Press.

Enoch, David. 2001. Once You Start Using Slippery Slope Arguments, You're on a Very Slippery Slope. *Oxford Journal of Legal Studies* 21 629-47.

Estlund, David M. 1997. *Shaping and Sex: Commentary on Parts I and Ii*. In *Sex, Preference, and Family: Essays on Law and Nature*, edited by David M. Estlund, and Martha Craven Nussbaum. New York: Oxford University Press.

Galston, William. 1990. A Liberal-Democratic Case for the Two-Parent Family. *The Responsive Community* 1 (1): 14-26.

Gerstmann, Evan. 2004. *Same-Sex Marriage and the Constitution*. Cambridge: Cambridge University Press.

Gilder, George. 1986. *Men and Marriage*. Gretna, Louisiana: Pelican Publishing Company.

Gutmann, Amy, and Dennis F. Thompson. 1996. *Democracy and Disagreement*. Cambridge, Mass.: Belknap Press of Harvard University Press.

Hurka, Thomas. 1995. Indirect Perfectionism: Kymlicka on Liberal Neutrality. *The Journal of Political Philosophy* 3 36-57.

Kay, Barbara. 2005. The Broken Windows Theory of Marriage. *National Post*, Jan. 26, 16.

Koppelman, Andrew. 2002. *The Gay Rights Question in Contemporary American Law*. Chicago: University of Chicago Press.

Kurtz, Stanley. 2003. Beyond Gay Marriage: The Road to Polyamory. *The Weekly Standard* 8

(45).

Lakritz, Naomi. 2004. Same-Sex Vote Would be Immoral. *Calgary Herald*, Dec. 16, 20.

Lamey, Andy. 2003. Why Everyone Should be Able to Marry Anyone: The Case for Polygamy is Similar to the Case for Gay Marriage. *National Post*, Jul. 30, Front, 6.

Larmore, Charles. 2003. *Public Reason*. In *The Cambridge Companion to Rawls*, edited by Samuel Richard Freeman. Cambridge: Cambridge University Press.

Macedo, Stephen. 1997. *Sexuality and Liberty: Making Room for Nature and Tradition?* edited by David M. Estlund, and Martha Craven Nussbaum. Oxford: Oxford University Press.

Mayo, David. 1992. The Role of Slippery Slope Arguments in Public Policy Debates. *Philosophical Exchange* 81 ???.

McLanahan, Sara, and Gary D Sandefur. 1994. *Growing Up With a Single Parent : What Hurts, What Helps*. Cambridge, Mass: Harvard University Press.

Quong, Jonathan. 2004. The Scope of Public Reason. *Political Studies* 52 233-50.

Rauch, Jonathan. 2004. *Gay Marriage: Why it is Good for Gays, Good for Straights, and Good for America*. New York: Henry Holt and Company.

Rawls, John. 1971. *A Theory of Justice*. Cambridge, Mass.: Harvard University Press.

Rawls, John. 1996. *Political Liberalism*. New York: Columbia University Press.

Schauer, Frederick. 1985. Slippery Slopes. *Harvard Law Review* 99 361-83.

Sullivan, Andrew. 1997. *Same-Sex Marriage, Pro and Con : A Reader*. New York: Vintage Books.

van der Burg, Wibren. 1991. The Slippery Slope Argument. *Ethics* 102 42-65.

Volokh, Eugene. 2003. The Mechanisms of the Slippery Slope. *Harvard Law Review* 116 1028-137.

Volokh, Eugene. 2006. Same-Sex Marriage and Slippery Slopes. *Hofstra Law Review* 34 1-40.

Wedgwood, Ralph. 1999. The Fundamental Argument for Same-Sex Marriage. *Journal of Political Philosophy* 7 225-42.

2005. What Does Polygamy Have to Do With it? *The Globe and Mail*, Jan. 22, 20.

Young, Iris Marion. 1995. Mothers, Citizenship and Independence: A Critique of Pure Family Values. *Ethics* 105 535-79.