

# SAME-SEX MARRIAGE AND SLIPPERY SLOPES

*Eugene Volokh\**

I.	INTRODUCTION .....	1156
II.	THE SLIPPERY PAST .....	1158
III.	THREE OBJECTIONS TO SLIPPERY SLOPE ARGUMENTS .....	1163
	A. “You Don’t Really Care About the Slippery Slope— You Oppose the First Step on Its Own Terms” .....	1163
	B. “If We Can Distinguish A and B Now, Why Can’t We Distinguish Them Later?” .....	1164
	C. “Slippery Slope Arguments Are Wrong; You Should Consider Each Proposal on Its Own Merits” .....	1165
IV.	TOWARDS POLYGAMY: TWO SLIPPERY SLOPE MECHANISMS .	1167
	A. Attitude-Altering Slippery Slopes .....	1167
	B. Equality Slippery Slopes .....	1171
	C. The Likely Political Reasons Why Slippage Won’t Happen .....	1175
V.	TOWARDS RESTRICTIONS ON PRIVATE ANTI-HOMOSEXUAL DECISIONS.....	1178
	A. The Concern, and Whom It Concerns .....	1178
	B. Political Momentum Slippery Slopes.....	1183
	C. Attitude-Altering Slippery Slopes .....	1184
	D. Equality/Precedent Slippery Slopes .....	1190
	E. Constitutional Law Preventing Slippage.....	1193
VI.	CONCLUSION, INCLUDING WHY I STILL SUPPORT SAME-SEX MARRIAGE .....	1197

---

\* Professor, UCLA School of Law (volokh@law.ucla.edu). Thanks to Dale Carpenter, Maggie Gallagher, Andy Koppelman, Brett McDonnell, and Jim Lindgren for their help; and to the Hofstra University School of Law, which so kindly invited me to be a Visiting Scholar-in-Residence in early 2005 and thereby prompted the writing of this article.

## I. INTRODUCTION

Recognizing same-sex marriage, some say, will make it more likely that the law will one day recognize polygamy.<sup>1</sup> This is a classic slippery slope argument: Even if legal action A today (recognizing same-sex marriage) wouldn't be that bad, or would even be moderately good, it should be opposed because it will increase the likelihood of a supposedly much worse legal action B in the future (recognizing polygamy). And the argument isn't a logical one, but a psychological one: Though A and B are distinguishable, the argument goes, in practice it's likely that various actors in our legal system—legislators, voters, judges—will eventually end up not distinguishing them.<sup>2</sup>

Recognizing same-sex marriage, others say, will make it more likely that other “gay rights” laws will be passed and upheld, including laws that substantially burden religious objectors, institutions that are trying to further value systems that oppose homosexuality, or antigay speakers:

- Employers (including churches, religious schools, and groups like the Boy Scouts) will have to hire homosexuals, even if the employers believe that the homosexuality is inconsistent with the employee's position as a role model.
- Private landlords will be required to rent to same-sex couples, even if the landlords have religious objections to providing space that would likely be used for sinful activity.
- Roommates might be unable to advertise their preference for a same-sex heterosexual roommate.
- Fear of “hostile work environment” liability under antidiscrimination law may pressure employers or educators into suppressing antigay views by employees or students.

---

1. See, e.g., David Orgon Coolidge & William C. Duncan, *Reaffirming Marriage: A Presidential Priority*, 24 HARV. J.L. & PUB. POL'Y 623, 640 (2001); George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 628-31 (1999); Stanley Kurtz, *Beyond Gay Marriage: The Road to Polyamory*, WEEKLY STANDARD, Aug. 4, 2003. Some supporters of same-sex marriage endorse such slippage. See, e.g., David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 490-91 (1996); JUDITH STACEY, IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE 126-27 (1996).

2. See Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1028 (2003). I'm speaking here of fully informed and consensual polygamy: The husband's first wife knows, when they marry, that he might take future wives; she consents to his taking the second wife; the second wife knows the man is already married; and the same pattern continues for subsequent wives.

- Groups like the Boy Scouts may be required to have openly gay scoutmasters, or at least face exclusion from government benefits if they insist on limiting their leadership posts to heterosexuals.<sup>3</sup>

This too is a slippery slope argument: Legal action A might not be that bad, for instance because giving same-sex couples marriage licenses doesn't hurt anyone else. But taking action A will increase the likelihood of legal action B, which would be worse—from the perspective of some observers—because it would interfere with the free choice of people or groups who oppose homosexuality. (Naturally, some people might welcome the slippery slope, since they may favor B; but the argument's target audience is those who oppose B.)

How can we evaluate the plausibility of these arguments? In this Article, I'll try to briefly discuss this question—and in the process, illustrate more broadly how slippery slope arguments can be made and analyzed.<sup>4</sup>

Throughout, I'll focus on examining the mechanisms behind the “slippery slope” metaphor. Metaphors are falsehoods. If they were literally true, they wouldn't be metaphors.

Of course, metaphors are falsehoods that aim at exposing a deeper truth. They can be legitimate, and rhetorically powerful. Some of the most effective legal arguments use metaphor. Yet, as Justice Holmes cautions us, we must “think things not words”—“or at least we must constantly translate our words into the facts for which they stand, if we are to keep to the real and the true.”<sup>5</sup> So what are the facts for which the metaphor “slippery slope” stands? To determine how likely it is that we will “slip” from one legal decision to another, we need to understand how the “slippery slope” operates in fact, and not just metaphorically.

What follows will not discuss (except briefly in the Conclusion) whether recognizing same-sex marriage is good or bad on its own terms; whether recognizing same-sex marriage is so morally or pragmatically imperative that slippery slope arguments are irrelevant; or whether recognizing polygamous marriages or accepting broader antidiscrimination laws is itself good. These are all important parts of analyzing whether to

---

3. See *infra* Part V.A for more details on these scenarios.

4. Naturally, one can also argue that recognizing same-sex marriage will lead to slippage to other bad results; the analytical framework that I present here should also be applicable to those arguments.

5. Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899).

support recognition of same-sex marriage, but I leave them to the many other commentators who are happy to deal with them.<sup>6</sup>

Rather, I will focus solely on the empirical claims behind the slippery slope argument: that recognizing same-sex marriage will indeed help bring about those consequences. This is just a subset of the broader policy question, but I think an important subset, at least for those who like (or don't deeply dislike) the first step A but oppose the possible future step B. And I think that exploring this subset can help illuminate slippery slope phenomena more broadly.

## II. THE SLIPPERY PAST

Before we get to the analysis, though, let's briefly consider a bit of recent history—history that, I think, helps explain why opponents of same-sex marriage do worry about the slippery slope.

Those who defend traditional sexual morality likely look back on the sexual revolution of the past fifty years with some horror. And what they see when they look back at the legal landscape is indeed something that looks like a traditional “slippery slope”: a series of steps that eventually led from one modest liberalization to something much more. What's more, the future steps have happened even when they have been clearly distinguishable from the earlier steps—and even when critics originally dismissed as paranoid those slippery slope warnings that were made when the first steps were taken.

Consider the constitutional evolution of a right of sexual autonomy. In *Griswold v. Connecticut* (1965), the Supreme Court struck down a ban on the use of contraceptives. *Griswold* deeply relies on the rights of a *married* couple;<sup>7</sup> nothing in it asserts a broader sexual autonomy right. Moreover, a three-Justice concurrence (joined by Justice Brennan)

---

6. On the pro-same-sex-marriage side, see, for example, JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* (2004); EVAN WOLFSON, *WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY* (2004); EVAN GERSTMANN, *SAME-SEX MARRIAGE AND THE CONSTITUTION* 67-98 (2004); WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* (1996); Andrew Koppelman, *The Decline and Fall of the Case Against Same-Sex Marriage*, 2 U. ST. THOMAS. L.J. 5 (2004). On the anti side, see, for example, Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U. ST. THOMAS. L.J. 33 (2004); John Finnis, *The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations*, 42 AM. J. JURIS. 97, 119 (1997); Douglas W. Kmiec, *The Procreative Argument for Proscribing Same-Sex Marriage*, 32 HASTINGS CONST. L.Q. 653 (2004-05); Dent, *supra* note 1.

7. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *id.* at 491, 495, 497 (Goldberg, J., concurring).

seemed to dismiss the argument that this would lead to slippage to a broader right:

[T]he Court's holding today . . . in no way interferes with a State's proper regulation of sexual promiscuity or misconduct. As my Brother Harlan so well stated in [an earlier case in which he argued for a right of married couples to use contraceptives], "Adultery, homosexuality and the like are sexual intimacies which the State forbids . . . but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality . . . or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy."<sup>8</sup>

Presumably, Justice Harlan continued to hold this view, which means that four of the seven Justices who voted to strike down the law in *Griswold* believed that the case was no precedent for a broader right to sexual autonomy, or specifically a right to engage in homosexual conduct. And, at oral argument, when Justice Black (who ended up dissenting) suggested that recognizing a "right to privacy" would end up leading to a right to abortion, Justice White strongly suggested that there's no need to worry about this, because "abortion involves killing a life in being," which is "a rather different problem from contraception."<sup>9</sup>

---

8. *Id.* at 498-99 (Goldberg, J., concurring) (quoting *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting)).

9.

[JUSTICE BLACK]: Would your argument concerning these things you've been talking about relating to privacy, invalidate all laws that punish people for bringing about abortions?

MR. EMERSON: No, I think it would not cover the abortion laws or the sterilization laws, Your Honor. Those—that conduct does not occur in the privacy of the home.

[JUSTICE BLACK]: There is some privacy, as a rule, and the individual doesn't generally want it made known.

MR. EMERSON: Well, that aspect of it is true, Your Honor. But those are offenses which do not involve the type of enforcement apparatus as to what goes on in the home that this—

[JUSTICE BLACK]: Part of it goes on in the home, undoubtedly.

MR. EMERSON: Part of it does, Your Honor. But the conduct that is being prohibited in the abortion cases takes place outside of the home, normally. There is no violation of the sanctity of the home.

[JUSTICE WHITE]: Well, apart from that, Mr. Emerson, I take it abortion involves killing a life in being, doesn't it? Isn't that a rather different problem from contraception?

MR. EMERSON: Oh, yes, of course.

Yet only seven years after *Griswold*, in *Eisenstadt v. Baird*, the Court relied on *Griswold* to hold that *unmarried* couples have a right to use contraceptives.<sup>10</sup> The following year, the Court used *Griswold* and *Baird* as the foundations for recognizing a right to abortion—over the dissent of Justice White, who must have then realized that Justice Black’s slippery slope worry was prescient.<sup>11</sup> And in the recent *Lawrence v. Texas*, the Court used *Griswold* as “the most pertinent beginning point” for its decision to strike down laws banning homosexual conduct.<sup>12</sup> So the Court has been willing to depart from the very core of *Griswold*’s argument (the limitation to marriage), from the express assurances by the concurrence that the decision “in no way interferes” with bans on homosexuality, and from Justice White’s assurance at oral argument that abortion posed “a rather different problem from contraception.”<sup>13</sup> This willingness understandably makes people wonder what other steps there will be on this path, especially if the courts take another big step by finding a constitutional right to same-sex marriage.

Consider also the evolution of what is loosely called “gay rights” legislation. From the 1960s on, many states decriminalized same-sex sexual conduct.<sup>14</sup> Some states then banned sexual orientation discrimination in employment, housing, education, or public accommodations.<sup>15</sup>

[JUSTICE WHITE]: And isn’t it different in the sense of the State’s power to deal with it?

MR. EMERSON: Oh, yes. Of course, the substantive offense is quite different here.

See 61 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 452 (Phillip B. Kurland & Gerhard Casper eds., 1975); DAVID J. GARROW, LIBERTY AND SEXUALITY 240 (1998) (identifying Justices Black and White as the questioners); JOHN W. JOHNSON, *GRISWOLD V. CONNECTICUT: BIRTH CONTROL AND THE CONSTITUTIONAL RIGHT TO PRIVACY* 149 (2005) (same).

10. *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972).

11. *See Roe v. Wade*, 410 U.S. 113, 129 (1973).

12. *Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

13. LANDMARK BRIEFS, *supra* note 9, at 452.

14. Charles A. Kelbley, *Are There Limits to Constitutional Change? Rawls on Comprehensive Doctrines, Unconstitutional Amendments, and the Basis of Equality*, 72 *FORDHAM L. REV.* 1487, 1497 (2004) (“Justice White, who wrote for the Court in *Bowers*, noted that in 1961 every state had criminal sanctions against homosexual conduct. Yet when *Bowers* was handed down in 1986, only twenty-four states had anti-homosexual laws in effect . . . . By 2003 . . . the number of states banning sodomy had dwindled to thirteen. Thus, between 1961 and 2003, thirty-seven states had, either through judicial decisions or legislative repeals, abandoned their anti-homosexual laws.”).

15. CAL. GOV’T CODE § 12940 (West 2005); CONN. GEN. STAT. ANN. § 46a-81c (West 2004); D.C. CODE ANN. § 2-1402.11 (LexisNexis Supp. 2005); HAW. REV. STAT. § 378-2 (LexisNexis 2004); 2005 Me. Legis. Serv. 10, Sec. 11 (West) (adding “sexual orientation” to ME. REV. STAT. ANN. tit. 5 § 4572); MD. CODE ANN. art. 49B, § 16 (LexisNexis 2003); MASS. ANN. LAWS ch. 151B, § 4 (LexisNexis Supp. 2005); MINN. STAT. ANN. § 363A.08 (West 2004); NEV. REV. STAT. ANN. § 613.330 (LexisNexis 2003); N.H. REV. STAT. ANN. § 354-A:7 (Supp. 2004); N.J. STAT. ANN. § 10:5-12 (West Supp. 2005); N.M. STAT. ANN. § 28-1-7 (LexisNexis Supp. 2004);

Some states added crimes based on sexual orientation to the list of offenses that are treated as hate crimes.<sup>16</sup> Some states allowed same-sex couples to adopt.<sup>17</sup>

When such liberalizations were proposed, some people warned that these laws were steps down a slippery slope to broader rejection of traditional sexual rules, including towards same-sex marriage. These slippery-slope arguments were dismissed, sometimes contemptuously. The claim that a hate crime law “would lead to acceptance of gay marriages” was called “arrant nonsense.”<sup>18</sup> A proposed antidiscrimination law, people were assured, does not “put Massachusetts on a ‘slippery slope’ toward” “legaliz[ing] ‘gay marriage’ or confer[ring] any right on homosexual, lesbian or unmarried heterosexual couples to ‘domestic benefits.’”<sup>19</sup> “Those that truly have a problem with homosexuality will see [a domestic partnership proposal] as part of the ‘slippery slope’ toward gay marriages . . . . But, this legislation needs to be looked at on the face value of what it is, and it really does very little.”<sup>20</sup>

Yet when the Massachusetts Supreme Judicial Court held that the state constitution requires the legislature to recognize same-sex marriages, part of its reasoning rested on the legislature’s decision to ban sexual orientation discrimination: This decision, the Court reasoned, undermined the asserted government interest in condemning homosexuality as immoral, and thus helped strip away any rational basis the law might have had.<sup>21</sup> Likewise, when the Vermont Supreme Court held that the state constitution requires the legislature to recognize same-sex civil unions (marriages in all but name), a large part of its argument rested precisely on the legislature’s past enactment of various gay rights laws, including the enactment of antidiscrimination laws and hate-crime laws that refer to sexual orientation.<sup>22</sup>

---

N.Y. EXEC. LAW § 296 (McKinney Supp. 2005); OR. REV. STAT. ANN. § 659A.030 (2003) (as interpreted by *Tanner v. Oregon Health Sciences Univ.*, 971 P.2d 435 (Or. Ct. App. 1998)); R.I. GEN. LAWS § 28-5-7 (2003); VT. STAT. ANN. tit. 21, § 495 (2003); WIS. STAT. ANN. § 111.36 (West 2002).

16. See, e.g., CAL. PENAL CODE § 422.55 (2005).

17. See, e.g., *In re Adoption of R.B.F. & R.C.F.*, 803 A.2d 1195 (Pa. 2002).

18. Editorial, *A Vote Against Hate*, LOUISVILLE COURIER J., Feb. 3, 1994, at 6A.

19. Editorial, *A Gay-Protection Forum*, BOSTON GLOBE, Oct. 15, 1989, at A30.

20. Phil Pitchford, *Council Members Wary of Partner Registry*, PRESS-ENTERPRISE (Riverside), Apr. 30, 1994, at B1 (quoting Riverside Human Relations Commission member Kay Smith).

21. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 967 (Mass. 2003).

22. See *Baker v. State*, 744 A.2d 864, 885-86 (Vt. 1999); Volokh, *The Mechanisms of the Slippery Slope*, *supra* note 2, at 1084-85; see also *Lewis v. Harris*, 875 A.2d 259, 283 (N.J. Super. Ct. App. Div. 2004) (Collester, J., dissenting) (citing past “[j]udicial decisions . . . enhanc[ing] the rights of gays and lesbians in matters of family law,” such as decisions allowing gays to adopt or to

Similarly, when the Equal Rights Amendment was being debated in the 1970s and 1980s (both at the state and federal levels), and the ERA's foes argued that the sex discrimination ban might lead to legalization of same-sex marriage, such arguments were derided as "emotional scare tactics," "hysterical," and "canards."<sup>23</sup> Yet both the Hawaii Supreme Court and the necessary fourth vote on the Massachusetts Supreme Judicial Court relied on the state Equal Rights Amendments in concluding that the opposite-sexes-only marriage rule was indeed sex discrimination.<sup>24</sup>

Of course, many people would see this slippage as good, because they like what's at the bottom of the slope. Others might conclude that even if the subsequent decisions weren't that good, the first steps were morally imperative, and sliding down the slope was thus better than staying at the top.

It may also be possible that the relationship between the steps is simply temporal and not causal: Perhaps the first changes didn't help cause the subsequent ones; perhaps something else—changes in social attitudes towards sexuality, which weren't affected by changes in the law—caused both the initial steps and the later steps. And, finally, the risk of slippage doesn't equal the certainty of slippage. There have surely been many threatened slippages that never materialized; the Tennessee Supreme Court, for instance, once rejected an argument for the recognition of an out-of-state interracial marriage by arguing that,

Extend[] the rule to the width asked for by the defendant, and we might have in Tennessee the father living with his daughter, the son with the mother, the brother with the sister, in lawful wedlock, because

---

have the same custody and visitation rights as heterosexuals, as precedent for recognition of same-sex marriage).

23. See, e.g., Patricia Avery & Patrick Oster, *Equal Rights for Women—Doomed?*, U.S. NEWS & WORLD REP., Apr. 28, 1975, at 45 ("What foes of ERA contend were valid arguments and what advocates claim were emotional scare tactics also seemed to sway sentiment among the women against the amendment [in North Carolina]. Opponents, for example, suggested passage of ERA would mean abortion on demand, legalization of homosexual marriages, sex-integrated prisons and reform schools—all claims that were hotly denied by ERA supporters."); Betty Friedan, *Feminism's Next Step*, N.Y. TIMES, July 5, 1981, § 6, at 14 ("Discussion of [the ERA] bogged down in hysterical claims that the amendment would eliminate privacy in bathrooms, encourage homosexual marriage, put women in the trenches and deprive housewives of their husbands' support."); Judy Mann, *Obstruction*, WASH. POST, Feb. 19, 1982, at B1 ("The vote in Virginia [against the ERA] came after proponents argued on behalf of civil rights for women and opponents trotted out the old canards about homosexual marriages and unisex restrooms . . .").

24. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), *superseded by constitutional amendment*, HAW. CONST. art. I, § 23; *Goodridge*, 798 N.E.2d at 970 (Greaney, J., concurring); see also *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, \*6 (Alaska Super. Feb. 27, 1998).



they had formed such relations in a State or country where they were not prohibited. The Turk or Mohammedan, with his numerous wives, may establish his harem at the doors of the capitol, and we are without remedy. Yet none of these are more revolting, more to be avoided, or more unnatural than the case before us.<sup>25</sup>

But American constitutional law has somehow managed to distinguish the interracial marriage from the harem; American rules related to recognition of out-of-state marriages would likely have proven equally robust.

I think, though, that the history I outlined at least suggests that the slippery slope arguments can't be casually dismissed. It seems at least plausible that past liberalizations of traditional sexual rules had such effects, and that future liberalizations will have still more effects.

Of course, as I said at the outset, we need to do more than identify the possibility of slippage: We need to identify the mechanisms through which this slippage may happen, so we can better determine the probability. Yet the history sketched above suggests that the possibility of slippage is plausible enough that it's worth investing some effort into thinking about those mechanisms.

### III. THREE OBJECTIONS TO SLIPPERY SLOPE ARGUMENTS

Let me now briefly turn to three common objections to slippery slope arguments.

#### A. *"You Don't Really Care About the Slippery Slope—You Oppose the First Step on Its Own Terms"*

Many people who make the slippery slope argument actually think the first step A is itself very bad. Some observers conclude that the slippery slope argument—"even if A is fine, look how it will lead to the very bad B"—is therefore disingenuous. The arguer doesn't really care about polygamy, the observers say; he's really opposed to same-sex marriage on its own terms.

But there's nothing wrong with making slippery slope arguments even when you think A is bad on its own: The arguments are aimed at *listeners* who disagree with you about A, but agree with you about B. So long as those listeners like A or at least don't much dislike it, your primary argument—A is bad on its own—may be unpersuasive. So to reach those listeners, you can quite properly argue that regardless of whether A

---

25. *State v. Bell*, 66 Tenn. 9 (1872).

is fine, A will lead to B (which both you and the listeners agree is bad). So long as you believe that the slope is slippery, that's a perfectly honest argument to make.<sup>26</sup>

And as it happens, there probably is a large group of American listeners that neither firmly opposes nor firmly supports same-sex marriage, but pretty firmly thinks that polygamy ought not be recognized,<sup>27</sup> and a smaller but nontrivial group that is open to same-sex marriage but skeptical about at least some kinds of bans on sexual orientation discrimination.<sup>28</sup> People in these groups are thus potentially swayable by the slippery slope argument. Without it, they might moderately support same-sex marriage, or at least not invest much effort, money, time, or political capital into opposing it. But if they're persuaded by the slippery slope argument, they might shift to opposing same-sex marriage, or opposing it more strongly.

The argument might not move everyone, even if they're persuaded by the prediction that it makes. Still, it might legitimately move quite a few people, perhaps enough to swing the debate in some jurisdictions.

B. *"If We Can Distinguish A and B Now, Why Can't We Distinguish Them Later?"*

The slippery slope argument can persuade people only if they think that A and B are distinguishable. If the audience thinks same-sex marriages should be treated the same way as polygamous marriages, then the argument would be ineffective: Those members who think both should be supported will be happy that A will lead to B; those who think that both should be opposed won't need persuasion.<sup>29</sup>

---

26. See, e.g., James Madison, *A Memorial and Remonstrance Against Religious Assessments* (1785), in 8 THE PAPERS OF JAMES MADISON 298, 300 (Robert A. Rutland et al. eds., 1973).

27. See, for example, the Associated Press-Ipsos poll conducted by Ipsos-Public Affairs Nov. 19-21, 2004, available at <http://pollingreport.com/civil.htm>, which asked "Do you strongly favor, favor, oppose, or strongly oppose allowing gays and lesbians to marry legally?" Fifty percent of respondents expressed the strong view (14% strongly favoring and 36% strongly opposing), and 46% didn't describe their views as strong (21% favoring and 25% opposing). *Id.* I know of no surveys that measure American attitudes towards legally recognizing polygamous marriage, but a recent Gallup survey does report American moral attitudes towards polygamy (or at least one-husband-many-wives polygamy): 6% of the public says it's morally acceptable, and 92% says it's morally wrong; the numbers for homosexual conduct are 44% and 52%. Gallup Poll, questions 20-21, May 2-5, 2005, at LEXIS, NEWS database, RPOLL file.

28. See *infra* notes 66, 74 & 75 and accompanying text.

29. Either they will disapprove equally of both, in which case they don't really need the slippery slope argument to persuade them to oppose A; or they will approve equally of both, in which case they won't be concerned that B will come about.

And yet, the argument rests on the premise that the legal system will one day treat A and B the same: “You think same-sex marriages are fine on their own, but polygamous marriages are bad. But if same-sex marriages are recognized, this will make it likelier that polygamous marriages will be, too.” The obvious response is, “If same-sex marriages and polygamous marriages are really that different, then the legal system will recognize this distinction, and recognizing same-sex marriage wouldn’t help lead to recognizing polygamous marriage after all.”

But it seems to me that this response is not quite adequate: The slippery slope argument may work because it rests on a concern that *others* will refuse to recognize the distinctions that *we* (the people to whom the argument is made) do recognize. “Yes, same-sex marriages and polygamous marriages are different,” the argument would go. “I think so, you think so, but other people won’t think so—and if the law recognizes same-sex marriage, then those other people may form the swing vote that outvotes you and me on the polygamous marriage question.”

This, after all, is the implicit concern at the heart of liberal slippery slope arguments: “If you ban Communist advocacy, this will eventually lead to the banning of other kinds of advocacy, too.” “But I think Communist advocacy is different; if I were a judge or legislator, I would certainly draw that distinction, and other kinds of advocacy wouldn’t get banned.” “Well, maybe that’s true of you, but other people may disagree; once Communist advocacy is outlawed, they’ll be likelier to endorse bans on other advocacy.”<sup>30</sup>

The question, of course, is why we should think that others will indeed treat A and B the same way, even though we believe that A and B are different. What would be the mechanism by which the acceptance of same-sex marriage will change the political or legal environment, and lead some people to accept polygamy, too? The rest of this Article will try to confront this.

### C. *“Slippery Slope Arguments Are Wrong: You Should Consider Each Proposal on Its Own Merits”*

Some people argue that slippery slope arguments are improper. Each proposal, they say, should be considered on its own merits. If you think it’s right, then support it. It’s wrong to block a proposal you support for fear that it will lead society to implement another proposal in the future: It shows a distrust of your fellow citizens, and it shows an un-

---

30. See, e.g., *Barenblatt v. United States*, 360 U.S. 109, 150-53 (1959) (Black, J., dissenting).

willingness to let your mind be changed.<sup>31</sup> After all, if legalizing same-sex marriage makes us change our minds about (say) polygamy, what's the harm in that?

Well, if you're really not sure what you think about the possible downslope consequence B, then you might not worry much about slippage. You might embrace A as an experiment: Let's try to broaden marriage options, you might say to yourself, and if the result seems good, then perhaps we should indeed decide to broaden them further still.

But if you're quite confident that B is bad, and you think that empirically A may lead other people—people whom you may trust and respect, but whom you nonetheless disagree with—to support B, why should you ignore this possibility when deciding on A? Considering the long-term consequences of your actions is generally seen as prudent and praiseworthy. That's true even if the consequences flow from others' reactions to your actions. Someone who supports (say) a return to Prohibition because he thinks that it's good “on its own merits,” and who insists on rejecting the risk that others will start a black market in alcohol, would rightly be condemned as short-sighted.

And this should be equally true if your action is a vote: It doesn't make much sense to view legal proposals in isolation from their possible slippery slope consequences. We might well set aside such possible consequences if we think they're too unlikely, or if we think they aren't that bad. But if we do think they would be bad, then we should consider how likely they seem to be; and if the bad consequences of decision A seem likely enough, we might consider that in judging whether A is really that good.

Judges might be somewhat constrained in their concern about slippery slopes. If they believe that the Constitution mandates some result, they might feel obligated to reach that result, and render justice to the parties before them, even if this may eventually lead to results they think are unconstitutional and unjust. But even judges sometimes look at the potential slippery-slope consequences of their actions;<sup>32</sup> and voters and legislators often do this, and properly so.

---

31. See generally Volokh, *The Mechanisms of the Slippery Slope*, *supra* note 2, at 1134-35 (discussing these arguments).

32. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 417 (1989); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988); *Cohen v. California*, 403 U.S. 15, 25 (1971); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 137 (1961) (Black, J., dissenting); *Barenblatt v. United States*, 360 U.S. 109, 150-53 (1959) (Black, J., dissenting); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640-41 (1943).

IV. TOWARDS POLYGAMY: TWO SLIPPERY SLOPE MECHANISMS<sup>33</sup>A. *Attitude-Altering Slippery Slopes*

How might recognizing same-sex marriage lead to recognizing polygamy? One possible mechanism is what I call the *attitude-altering slippery slope*: The legislative or judicial recognition of same-sex marriage will influence some people to adopt some principles that will lead them to see polygamy as proper, too.<sup>34</sup>

Law does seem to affect some people's attitudes. People with firmly entrenched philosophies—whether the philosophy is religious or secular, left or right—may not care much about what legislatures or courts say. But people of a more pragmatic bent, who think of themselves as making case-by-case judgments based on all the circumstances, may well treat the opinions of influential government bodies as one of the circumstances to be considered.<sup>35</sup>

If they're in the middle on some question, the legal system's judgment may lead them to tentatively move to one side. If they're on the other side, the legal system's judgment may lead them to move closer to the middle. And if they're growing up, and thus had no opinion on the

---

33. Much of the reasoning in this Part can apply equally to the argument that recognizing same-sex marriage will lead to recognition of brother-sister, uncle-niece, aunt-nephew, or parent-child marriage. See generally Dent, *supra* note 1, at 631-33 (making this argument); Matthew J. Franck, *Kissing Sibs*, NAT'L REV. ONLINE, Aug. 4, 2005 (arguing that *Lawrence v. Texas*, fairly read, should lead to decriminalization of sex between close relatives, though using this as an argument against *Lawrence*); Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. 337, 359 (2004) (concluding that "the slide from decriminalizing sodomy to decriminalizing consensual adult incest is unlikely, except perhaps for incest between cousins or step-relatives," but that "[t]he arguments are not at all free from doubt given the many open questions arising from [*Lawrence v. Texas*]" and that there is "something unseemly about the efforts of many gay advocates to deny the analogy"); State v. Lowe, No. 2004CA00292, 2005 WL 1983964, at \*3 (Ohio Ct. App. Aug. 15, 2005) (holding that *Lawrence* doesn't invalidate incest bans, apparently resting the distinction on the government's "legitimate interest in protecting the family unit"); see also Muth v. Frank, 412 F.3d 808 (7th Cir. 2005) (holding that *Lawrence* wouldn't be used in habeas corpus cases to retroactively invalidate incest convictions, though not deciding whether incest prosecutions are constitutionally permissible post-*Lawrence*). It seems to me, though, that so few people would be interested in marrying such close relatives that it's more helpful to focus on a slightly more politically likely hypothetical. A few more people might be interested in marrying cousins, but the argument "don't recognize same-sex marriages because that might lead to recognition of cousin marriages" is unlikely to be very persuasive: I suspect that few people are really appalled by cousin marriages; in about twenty states, such marriages are legal, see HARRY D. KRAUSE ET AL., FAMILY LAW: CASES, COMMENTS AND QUESTIONS 77 (4th ed. 1998); <http://www.snpp.com/episodes/2F22.html> (discussing the founding of the city of Shelbyville).

34. See generally Volokh, *The Mechanisms of the Slippery Slope*, *supra* note 2, at 1077-1103.

35. *Id.* at 1081-82.

subject beforehand, they may accept the legal status quo as the baseline from which they will move only if they hear persuasive arguments to the contrary.<sup>36</sup>

Such a willingness to accept that what is the law ought to be the law may be reinforced by many people's desire to believe that they live in a fundamentally just regime, which may make them willing to adapt their sense of justice to the status quo.<sup>37</sup> But it's also quite rational: If one hasn't thought hard about a subject, and is thus rationally ignorant about the right answer, it makes sense to defer to the decisions of respected institutions—even if you think the legislators or the judges get it wrong some of the time, so long as they get it right most of the time it's sensible to endorse their judgment, at least if you aren't willing to invest the effort into thinking fully through the matter yourself.<sup>38</sup>

This suggests that if the legal system accepts same-sex marriage, over time more people will come to believe that same-sex marriage is acceptable: Even if today 60% oppose it, slowly or quickly the amount of opposition will in some measure decline.<sup>39</sup> But why should this affect people's judgment about the distinguishable subject of polygamy?

That depends on what underlying principle people accept when they accept same-sex marriage. People generally don't just endorse a particular decision; they usually want to see this decision as consistent with some broader principle.

If people see the recognition of same-sex marriage (whether by statute or by court decision) as resting on the principle that "marriages between two people are socially useful," or "the opposite-sex-marriage-only rule impermissibly discriminates based on sex or homosexual orientation," then accepting this principle won't lead them to endorse the

---

36. *Id.* at 1077-79 (discussing the is-ought heuristic).

37. *Id.* at 1080 (citing James Bryce).

38. *Id.* at 1079.

39. Even the hotly contested abortion decision, *Roe v. Wade*, was associated with a 6% increase in support for abortion rights from 1972, the year before *Roe* was handed down, to 1973, right after *Roe*—a larger increase than the annualized 3% increase in support for abortion rights from 1965 to 1972. Support remained roughly the same for the few years after *Roe*, however, and then continued to oscillate over the following decades, though in the aggregate falling by a few percentage points. See TOM W. SMITH, NAT'L OPIN. RES. CTR., PUBLIC OPINION ON ABORTION tbl. 2 (1998), available at <http://www.norc.uchicago.edu/library/abortion.htm>. But this simply illustrates that if a decision is controversial enough, and the opponents mobilize effectively enough, the decision's attitude-altering effect can be mitigated. See also *infra* note 88 (briefly discussing the limits of the available empirical data on the Court's influence on public opinion).

recognition of polygamy.<sup>40</sup> But if the legality of same-sex marriage is seen as resting on principles such as

- “all people have a right to marry whomever they choose,”<sup>41</sup>
- “it’s none of my business whom someone else marries,”<sup>42</sup>
- “people who want to enter into same-sex marriages should have equal rights with those who want to enter into opposite-sex marriages,”<sup>43</sup> or

---

40. See, e.g., Dale Carpenter, *Gay Marriage and Polygamy*, INDEP. GAY FORUM, Apr. 24, 2004, available at <http://indegayforum.org/authors/carpenter/carpenter46.html> (offering a primarily utilitarian defense of same-sex marriage, and using this to distinguish polygamous marriages, which the author plausibly argues will be less beneficial than same-sex marriages).

41. See, e.g., *Lewis v. Harris*, 875 A.2d 259, 286 (N.J. Super. Ct. App. Div. 2004) (Collester, J., dissenting) (concluding that people’s “right to marry the person of their choosing” includes same-sex marriage); *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at \*6 (Alaska Super. Feb. 27, 1998) (likewise, as to the “fundamental right” to “cho[ose one’s] life partner”); *Lawmakers Speak Out, Pro and Con, on Proposed Amendment*, BOSTON GLOBE, Mar. 30, 2004, at A8 (“Why do we wish, however well-intended, to take away the constitutional right to marry from some of our constituents?”) (statement of Massachusetts state Senator Marian Walsh); Dan Walters, *Official Status a Stumbling Block*, MERCED SUN-STAR, June 6, 2005, at 1 (“Unless you are willing to look me in the face and say I am not a human being, just as you are, you have no right to deny me access to marriage . . .,” Assemblywoman Jackie Goldberg . . . said during the heated debate.”); Cecil Foster, *Struggle for Gay Rights Mirrors Fight Against Slavery*, GUELPH MERCURY, Feb. 5, 2005, at A6 (arguing that freedom, in the context of the same-sex marriage debate, means “the ability to determine personally what is best and appropriate for one’s self and to live free of the dictates of others”); Bruce Severino, *Civil Unions—Gay Couples Denied Many Benefits Under Federal Law*, CHARLESTON GAZETTE, Feb. 20, 2004, at 5A (“[T]he institution of civil marriage . . . is a civil right that should be available to all citizens of this country, not just heterosexual citizens.”); *A Message from PFLAG’s Executive Director*, PFLAG WEEKLY ALERT, June 9, 2005, at <http://www.pflag.org/index.php?id=427> (discussing the July 9th, 2005 “Love Welcomes All” conference in Washington).

42. See, e.g., Deborah Locke, *It’s a Good Thing Legislators Are Focused on Pressing Issue of Same-Sex Marriage*, ST. PAUL PIONEER PRESS, Mar. 25, 2004, at A14 (endorsing the view that same-sex marriage is the couple’s “prerogative”—“[w]ho am I to tell them what to do?”); Severino, *supra* note 41 (“[R]eligious values should not dictate who gets married. That decision should belong to the individual, not to the government, religious groups or political extremists.”). This is a common argument in many pro-same-sex-marriage letters to the editor. See, e.g., Brian C. Jones, Letter to the Editor, ARIZ. REPUBLIC, July 3, 2005, at V4 (“[W]hy is the mate I choose a judgment for the religious right to make?”); Christopher Dazey, Letter to the Editor, OREGONIAN, Feb. 14, 2004 (“Personal relationships are just that—personal.”); Dan Warner, Letter to the Editor, PATRIOT LEDGER (Quincy, Mass.), Feb. 25, 2004, at 19 (“Government should have no say . . . in gay marriages and abortion.”) (in context, meaning that the government should recognize all marriages rather than deciding which should be recognized).

43. See, e.g., *Lawmakers Speak Out*, *supra* note 41 (statement of Massachusetts state Representative Benjamin Swan) (“[W]e should not amend this Constitution [speaking of a proposal to reverse the Massachusetts Supreme Judicial Court’s same-sex marriage rights decision] . . . to deny equal protection to any segment of our population.”); *id.* (statement of Massachusetts state Representative Lida E. Harkins) (speaking of same-sex marriage as a matter of “equal civil rights for all”); Severino, *supra* note 41 (“Gay men and lesbians in committed relationships want to be able to celebrate their love and fidelity in the same way that heterosexual couples do.”); Dale Kershner, *Festival Celebrates Communities, Friends*, SEATTLE POST-INTELLIGENCER, June 23, 2005, at B7

- “love should prevail over arbitrary legal restrictions,”<sup>44</sup>

and the recognition of same-sex marriage leads some citizens to accept those principles, then those citizens might become more open to recognizing polygamy as well.

There would still be counterarguments that polygamy and same-sex marriage should be treated differently. But those counterarguments would become less persuasive, because contrary principles, which apply to same-sex marriage and polygamy equally, would be strengthened.<sup>45</sup>

Moreover, some counterarguments would themselves be undermined by the recognition of same-sex marriage. For instance, when polygamists seek recognition of their marriages, one intuitive response is that polygamy just isn't “marriage” within the American constitutional right to marriage and the American legal tradition of marriage: Marriage is what it has traditionally been, namely the union of one man and one woman, and polygamous unions simply don't qualify.<sup>46</sup> And this definitional argument could be supported by a Burkean empirical claim—we shouldn't lightly change centuries-old institutions, because such changes are likely to be harmful.

But if the public accepts the notion that tradition isn't a good enough reason to reject same-sex marriage, it will be harder to argue that tradition is a good enough reason to reject polygamous marriage. Other

(“That's all we are about really—equal rights for all.”). The implicit argument here, of course, is not just that gays and lesbians are entitled to the same traditionally recognized right to marry one person of the opposite sex, but rather that they're entitled to the right to enter into a marriage that works for them.

44. See, e.g., *The News on CNBC* (CNBC television broadcast, Feb. 4, 2004) (“[Rep. Barney Frank, D-Mass.]: . . . I don't understand why people are so terrified by the notion that two women who love each other . . . will now become legally responsible to each other. . . . These are people who are in love and want to get married. . . . I don't understand what is so frightening about love. Two men, two women. They love each other . . . . [T]here are people who love each other, who are legally allowed to . . . raise children, . . . live together, . . . [and] share their assets, but they're not allowed to take that further step.”); Gregory & Jennifer Whelan, Letter to the Editor, *PATRIOT LEDGER* (QUINCY, MASS.), Mar. 29, 2004, at 8 (“Is the love and commitment of a gay couple entering into marriage any less real than ours, and do you think God values their love and commitment to each other any less than ours? . . . The spirit of the law, folks, is to love one another, and the more people we have committed to love, the better off we'll be.”).

45. Note that if the concern is simply that these broad right-to-marry-whom-you-like arguments will persuade citizens today (even before same-sex marriage is legalized), and will therefore lead them to support recognition of polygamy today, this is not a slippery slope concern. It might yield a *reductio ad absurdum* argument—“clearly this argument for recognizing same-sex marriage is wrong, because it logically leads to recognizing polygamous marriage, which we know to be wrong.” But it isn't focused on the slippery slope effects of recognizing same-sex marriage.

46. Cf., e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969, & n.34 (Mass. 2003) (making clear that invalidation of the opposite-sex-only marriage rule didn't invalidate the two-persons-only marriage rule, and defining marriage as “the voluntary union of two persons as spouses, to the exclusion of all others”).



arguments might still remain. But the argument from tradition—an important and easily understandable argument that might appeal to the public more than theoretical academic distinctions would—would be much weakened.

Nor would this attitude-altering effect be cancelled out by same-sex marriage advocates' insistence that they don't support recognition of polygamy. Some observers might take that insistence to heart, and accept both the principle that "it's none of my business whom someone else marries" and the limitation that "except for polygamy, because [polygamy is likely to oppress women / polygamy is likely to be bad for children / polygamy is likely to cause complicated problems at divorce]." But other observers might look at the legislative decision to recognize same-sex marriage and see it as embodying only the former principle about marriage broadly. And they might thus be moved to accept a broad right to marry, including a right to marry more than one person.

### B. *Equality Slippery Slopes*<sup>47</sup>

Say that same-sex marriage is recognized, and some years later polygamists demand the right to enter into polygamous marriages. All we ask, they say, is equal treatment: Same-sex couples have been allowed to marry. We deserve to be treated no worse. True, marriage in the United States has historically been defined as marriage between two people, not three or four. But it's also historically been defined as marriage between a man and a woman, not two men or two women. You've relaxed the historical constraint for the benefit of homosexuals—you ought to treat us the same.

This appeal to public support for equality can operate *even without* the attitude-altering effect I discussed earlier (though it can also reinforce such an effect). The argument is that even if you aren't wild about same-sex marriages—even if you think they probably shouldn't have been legalized, or are at least unsure about this—once they're recognized, polygamous marriages should be treated the same way.

Now this probably wouldn't be the majority view: Many people may say that one mistake shouldn't lead to another. If allowing one class of nontraditional marriages was wrong, there's no reason to extend that error further.

But some people, especially those who are near equipoise on the substantive question (should same-sex marriages and polygamous mar-

---

47. See Volokh, *The Mechanisms of the Slippery Slope*, *supra* note 2, at 1056-61.

riages be recognized?) may resolve this difficult issue by focusing on equality of treatment.<sup>48</sup> And this is especially true if they have little sympathy for same-sex marriages but some sympathy for polygamous marriages (perhaps because they respect the religious source of those marriages, or their historical pedigree<sup>49</sup>): It would have been best to stick

---

48. For some examples of such arguments in other areas, see *City of Indianapolis v. Edmond*, 531 U.S. 32, 56 (2000) (Thomas, J., dissenting) (concluding that so long as cases upholding drunk driving checkpoints and near-border checkpoints are on the books, “those cases compel upholding [drug checkpoints],” even though he is “not convinced that [the cases] were correctly decided”); *Am. Amusement Mach. Ass’n v. Kendrick*, 115 F. Supp. 2d 943, 981 (S.D. Ind. 2000) (“It would be an odd conception of the First Amendment and ‘variable obscenity’ that would allow a state to prevent a boy from purchasing a magazine containing pictures of topless women in provocative poses, as in *Ginsberg*, but give that same boy a constitutional right to train to become a sniper at the local arcade without his parent’s permission.” (referring to *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding a ban on the sale of sexually explicit magazines to minors)), *rev’d*, 244 F.3d 572 (7th Cir. 2001); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 113 (1977) (“The gravitational force of a precedent may be explained by appeal, not to the wisdom of enforcing enactments, but to the fairness of treating like cases alike.”); KEVIN W. SAUNDERS, *VIOLENCE AS OBSCENITY: LIMITING THE MEDIA’S FIRST AMENDMENT PROTECTION 3* (1996) (conceding that “arguments against the [obscenity] exception are not without force,” but arguing that given that “[t]he obscenity exception is a part of First Amendment law,” “[i]f sexual images may . . . be unprotected, there is no reason why the same should not be true of violence”).

Such arguments based on equal treatment often arise in pro-euthanasia reasoning. Thus, in *Quill v. Vacco*, 80 F.3d 716, 729 (2d Cir. 1996), the court reasoned that because “those in the final stages of terminal illness who are on life-support systems . . . [have a right] to hasten their deaths by directing the removal of such systems,” it’s wrong for “those who are similarly situated, except for the previous attachment of life sustaining equipment, [to be] not allowed to hasten death by self-administering prescribed drugs.” Likewise, “[r]ecent [Dutch] court cases have acquitted doctors who killed patients in cases of transient psychological as well as persistent physical distress, cases of chronic as well as terminal illness, and involuntary as well as voluntary euthanasia. The prevailing argument for these extensions has been the claim that it would be discriminatory and unfair to allow euthanasia for some and to deny it to other closely similar cases.” Walter Wright, *Historical Analogies, Slippery Slopes, and the Question of Euthanasia*, 28 J.L. MED. & ETHICS 176, 183 (2000); see generally Volokh, *The Mechanisms of the Slippery Slope*, *supra* note 2, at 1058-59 (discussing further this slippage in the Netherlands, and citing cases).

The Supreme Court reversed the Second Circuit’s holding in *Quill v. Vacco*, 521 U.S. 793, 799–809 (1997). But if two Second Circuit judges found the equality argument persuasive enough to constitutionally command such equal treatment, at least some listeners may find it persuasive enough to justify such equal treatment as a policy matter, within the context of legislative debate.

49. Cf. Carol A. Ranney, Letter to the Editor, *OREGONIAN*, Nov. 7, 2004, at F5 (“There is actually more historical and even biblical support for polygamy than for gay marriage, but a narrow traditional definition of ‘one man, one woman’ has always been seen as best serving the public good.”). On the other hand, one could argue that history should counsel in favor of treating polygamy with *more* skepticism than same-sex marriage: Polygamy, the argument will go, has been tried and generally rejected—both by our culture and by many others—while same-sex marriage has not yet been tried. “[Same-sex marriage] is arguably something we are evolving slowly toward (in Burkean fashion, with limited degrees of partnership recognition preceding it) while [polygamy] is something we’re evolving away from.” E-mail from Dale Carpenter, Associate Professor of Law, University of Minnesota Law School, to author (Sept. 13, 2005, 5:34 P.M.) (on file with author).

with the traditional American rule, they reason, but if some benefit is given to homosexuals then polygamists are at least equally entitled to it.

This is a familiar principle, of course, in judicial decisionmaking, and it's one of the justifications for precedent: If one litigant or class of litigants was treated in a particular way, others should be treated the same, even if the judge feels some misgivings about the original decision.<sup>50</sup> Courts, of course, feel something of a legal obligation to do this with regard to past court decisions—legislators and voters have no such legal obligation (at least outside the limited areas where the Equal Protection Clause or the First Amendment imposes it). But legislators and voters may still feel ethically moved to treat similar situations similarly.

Some people may also support equal treatment not because of an ethical commitment to equality, but because of their desire that the legal system be consistent. Many people like the law to make sense: Even if they don't think it's immoral for the law to treat two similar groups differently, they may just think that it's unreasonable. Part of this might be an esthetic sentiment. Part might be a desire to feel that they're living under a logical legal system. And part might be an assumption that the legal system functions more smoothly when it's internally consistent.

So let's consider a hypothetical, but I think plausible, political scenario. The population is divided into six groups, with different preferences among positions 0 (traditional opposite-sex two-person marriage only), A (same-sex marriage recognized but the two-person requirement is retained), and B (marriage recognized regardless of the sex or number of the parties):

---

50. See sources cited *supra* note 43.

Group	Policy Preferences			Supports Proposed Move?			Attitude	Voting Strength
	Most prefers	Next preference	Most dislikes	0→ A	A→ B	0→ B		
1	0	A	B				"Tradition!"	10%
2	0	B	A		✓		"The traditional model is best, but be consistent—either follow tradition, or treat polygamists and gays the same"	30%
3	A	0	B	✓			"Two-person marriages are good, regardless of whether they're same-sex, but polygamy is very bad"	15%
4	A	B	0	✓		✓	"Only two-person marriages should be recognized, but the most important thing is to recognize same-sex marriage, regardless of whether that brings in polygamy"	15%
5	B	0	A		✓	✓	"Total flexibility in marriages is best, but be consistent—either allow it, or treat polygamists and gays the same"	0%
6	B	A	0	✓	✓	✓	"As broad marriage rights as possible"	30%

Let's assume that we're in position 0, the current position in which only traditional opposite-sex, two-person marriages are recognized. Let's also assume that it takes 60% of the vote to shift from the status quo, a reasonable assumption given the brakes to change that our legal system contains.<sup>51</sup>

At the outset, when only traditional marriages are recognized, polygamy is a nonstarter: Only 45% of the population, groups 4 and 6, would support a proposal allowing polygamy (B) in place of the status quo of accepting only traditional marriages (0). But a proposal to allow same-sex marriages (A) would prevail, since 60% of the population (groups 3, 4, and 6) prefer it over the traditional rule (0).

So the legal system moves to position A—same-sex marriage has been recognized. A few years later, someone calls for recognizing polygamy; and now this proposal gets 60% of the vote (groups 2 and 6), because those are the groups that prefer allowing polygamy (B) over ac-

51. See, e.g., MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* 55 (1982) ("[T]he typical procedural rules of democratic bodies tend to discourage reversals and to give the status quo an advantage over alternatives."); Maxwell L. Stearns, *The Public Choice Case Against the Item Veto*, 49 WASH. & LEE L. REV. 385, 416 n.175 (1992) (describing the legislative process as creating a supermajority requirement).

cepting only two-person marriages, including same-sex ones (A). The key group here is group 2, which rejects the intermediate position (A) as inegalitarian: This group at first opposed recognizing polygamy when the legal rule was traditionalist (0); but once the law moved from 0 to A, group 2 swung around to supporting the further move to B (recognition of polygamy).

Finally, once we get to recognizing polygamy, we can't get back to the original traditionalist position: Only 55% of the population (groups 1, 2, and 3) support such a move, and that's less than the 60% required to move from one position to another. So if the call for recognizing same-sex marriage had been resisted at the outset, polygamy wouldn't have eventually been recognized. But once same-sex marriage was recognized, recognition of polygamy followed.

Naturally, this would make traditionalists furious. They had every reason to think they could stave off recognition of polygamy:

- Their preferred position (0) is the one preferred by the plurality (40%, as opposed to 30% for A and 30% for B).
- Most people prefer that position over the bottom of the slippery slope, which is recognition of polygamy (55%, consisting of groups 1, 2, and 3).
- Only a minority takes the hyper-egalitarian view that either extreme is better than the compromise (30%, group 2)—and those people actually prefer the traditionalist view over the pro-polygamy-recognition view.
- If only a small minority of voters (15%, group 3) had resisted the appeal of the first step A, and seen that it would help bring about B, position 0 would have been preserved.

Yet as a consequence of group 3's shortsightedness, the system took the first step down the slope, by recognizing same-sex marriages (A), and then slid further down to recognizing polygamy (B). If only the 15% in group 3 heeded the danger of slippery slopes, then this result (which is group 3's *least favored* outcome) could have been avoided—a good reason to think ahead about the slippery slope risks, traditionalists would say. And in retrospect, even the nontraditionalists in group 3 would have to agree.

### C. *The Likely Political Reasons Why Slippage Won't Happen*

So I have argued that recognizing same-sex marriage may well increase the likelihood that over time, polygamous marriages will also be

recognized. But I think that it will increase this likelihood from minuscule to merely very small.

Disapproval of polygamy seems deeply rooted in American culture; it is not easy to overcome this sort of opposition. The gay rights movement did overcome such opposition, but it had natural allies that polygamists likely will not. Gays have many straight friends and family members who are part of the American mainstream. Polygamy in America today seems to be chiefly practiced by separatist Mormon communities, whose political connections are limited by their living apart.<sup>52</sup>

There may be some push for polygamy from some Muslim groups, but those groups are unlikely to have a great deal of influence.<sup>53</sup> (This was so even before 9/11, and is likely to remain so even if world relations take a turn for the better and Muslim ideology is viewed with less suspicion.) There seem to be a few homegrown non-Mormon polyamorists who support group marriages,<sup>54</sup> and early in the gay rights movement, some gay activists called for recognition of group marriages.<sup>55</sup> But it appears to be a pretty small constituency—far smaller than the likely about 6-10 million American homosexuals and bisexuals<sup>56</sup>—with a correspondingly small network of supportive friends and family.

Moreover, the gay rights movement had natural allies on the American Left, which generally supported sexual autonomy. A polygamist rights movement would likely find less enthusiasm from the Left:

52. See, e.g., Jim Hughes, *Officials Keep Eye on Sect's Property*, DENV. POST., June 19, 2005, at C3 (describing the main Mormon polygamist group).

53. Debra Mubashshir Majeed, *The Battle Has Been Joined: Gay and Polygynous Marriages Are Out of the Closet and in Search of Legitimacy*, 54 CROSSCURRENTS, Summer 2004, at 73, available at <http://www.crosscurrents.org/Majeed0204.htm>.

54. See, e.g., *Loving More*, <http://www.lovemore.com>; Unitarian Universalists for Polyamory Awareness, <http://www.uupa.org>; Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277 (2004). Cf. Maura I. Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 CAP. U. L. REV. 439 (2003) (discussing polyamory and polygamy, but concluding that polygamous marriages ought not be treated the same as same-sex marriages).

55. See NAT'L COALITION OF GAY ORGS., 1972 GAY RIGHTS PLATFORM IN THE UNITED STATES, in FEDERAL BUREAU OF INVESTIGATION, FILE NO. 100-469170, GAY ACTIVISTS ALLIANCE, PART 1 OF 2 (retrieved via a FOIA request) (adopted Feb. 13, 1972) (calling, among other things, for "[r]epeal of all legislative provisions that restrict the sex or number of persons entering into a marriage unit") (on file with author). The National Coalition of Gay Organizations meeting was apparently a pretty significant event at the time. See LAUD HUMPHREYS, *OUT OF THE CLOSETS: THE SOCIOLOGY OF HOMOSEXUAL LIBERATION* 162-68 (1972) (describing the meeting, and quoting the platform, including the call for recognizing group marriages).

56. In 1992, about 2% of American women and 4% of American men reported having had at least one same-sex sex partner in the last five years. ROBERT T. MICHAEL ET AL., *SEX IN AMERICA* 175 (1994). The percentages reporting any same-sex sex partner since age eighteen are 4% of women and 5% of men; for the past twelve months, they are 1% of women and 3% of men. *Id.*

1. The rhetoric of religious obligation would probably be less appealing to the increasingly secular Left than the rhetoric of individual autonomy or opposition to discrimination based on immutable characteristics.
2. Enthusiastic feminists, an important constituency on the Left, seem likely to be skeptical of polygamy. (Though in theory polygamy could involve multiple husbands, or both multiple husbands and multiple wives, in practice polygamy has long been and is likely to remain overwhelmingly one-man-several-women.)
3. Left-wing social egalitarians will likely not be pleased by the tendency of polygamy to involve richer men having multiple wives, with poorer men having no wives at all.
4. Left-wing social planners will likely not be pleased by the possible social effects of this, either.

And the movement would likely find no enthusiasm from the Right, either: Polygamy is contrary to the religious beliefs that most on the Right share. It's contrary to American traditions, which the Right cares about. Even if men are less hostile to polygamy than women, and the Right is somewhat more male than the Left,<sup>57</sup> this effect would be fairly small: Relatively few men would derive much of a personal benefit from the legalization of polygamy, and few would even feel much sympathy for polygamists.<sup>58</sup>

Of course, it's impossible to predict all this for sure, as the changing social attitudes towards homosexuality—something that I suspect few people would have expected fifty years ago—remind us. Still, as best I can tell, pro-polygamy forces are in a lousy political position.<sup>59</sup>

It takes more than a plausible argument to win battles like this, either in the legislature or in court. It makes more than a plausible argument plus some slippery slope effects. It takes a broadly supported political and legal movement (whether of a majority or a committed substantial minority) of the sort that gay rights advocates have managed to muster. I doubt that there will be such a movement for polygamist rights, even with the potential slippery slope effects I describe.

---

57. In the 2004 Presidential election, the percentage of male voters who voted for Bush apparently exceeded the percentage of female voters who voted for Bush by 4%. See the L.A. Times exit poll, Nov. 2, 2004, available at <http://pollingreport.com/2004.htm#Exit>.

58. Even men who empathize with the desire to have multiple long-term sex partners may find themselves more resentful of polygamists than sympathetic to them.

59. Cf. McDonnell, *supra* note 33, at 357 (making a similar point about the unlikelihood that incest will be legalized).

## V. TOWARDS RESTRICTIONS ON PRIVATE ANTI-HOMOSEXUAL DECISIONS

### A. *The Concern, and Whom It Concerns*

The gay rights movement has long involved three related goals. One has to do with liberty from government repression—freedom from sodomy prosecutions, police harassment, and the like. A second has to do with equal treatment by the government: The movement to recognize same-sex marriages is the most prominent recent example. A third has to do with deligitimizing<sup>60</sup> and legally punishing private behavior that discriminates against or condemns homosexuals.<sup>61</sup>

To some, the third goal is obviously sound. To others, it is less problematic than the second goal, at least in some instances: No state legislative process has voluntarily recognized same-sex marriage,<sup>62</sup> but over a dozen states have banned sexual orientation discrimination in employment and other fields.<sup>63</sup> Surveys show considerably more public support for such bans on discrimination than for same-sex marriage<sup>64</sup>—in fact, majority support.<sup>65</sup>

60. See, e.g., Larry W. Yackle, *Parading Ourselves: Freedom of Speech at the Feast of St. Patrick*, 73 B.U. L. REV. 791, 791-92 (1993) (arguing that the “great civil rights movement, this one on behalf of gay, lesbian, and ambisexual citizens” will lead to “private homophobia, deprived of legal sanction, . . . [being] discredited and forced to the margin,” even in those contexts where the law cannot actually prohibit such “homophobia”).

61. See, e.g., Human Rights Campaign, *Advocating and Educating on Important Issues*, at [http://hrc.org/Content/NavigationMenu/HRC/Get\\_Informed/Issues/Index.htm](http://hrc.org/Content/NavigationMenu/HRC/Get_Informed/Issues/Index.htm). Not all gay rights activists support all three of these goals, but many seem to.

62. The California legislature enacted a bill to recognize same-sex marriage, but the Governor has promised to veto it, Michael Finnegan & Maura Dolan, *Citing Prop. 22, Gov. Rejects Gay Marriage Bill*, L.A. TIMES, Sept. 8, 2005, at A1. In Massachusetts, same-sex marriages are recognized because of the Supreme Judicial Court’s command in *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003)

63. See *supra* note 15.

64. See, e.g., Elizabeth Mehren, *Acceptance of Gays Rises Among New Generation*, L.A. TIMES, Apr. 11, 2004, at A1 (reporting a 72%-17% margin “favor[ing] laws to protect homosexuals from job discrimination” and a 74%-17% margin “favor[ing] laws to protect gays . . . from housing discrimination”); Harris Poll #27, June 13, 2001, tbls. 2-A to 2-B, available at [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=236](http://www.harrisinteractive.com/harris_poll/index.asp?PID=236) (reporting a 61%-20% margin “favor[ing] . . . a federal law prohibiting job discrimination on the grounds of sexual orientation,” and a 58%-29% margin when the question was prefixed with the information that “[i]n most jurisdictions in the United States, a person can be fired from their job for being gay or lesbian”); Harris Poll #9, Feb. 9, 2000, available at [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=1](http://www.harrisinteractive.com/harris_poll/index.asp?PID=1) (reporting a 56%-34% margin for favoring laws that make it illegal to discriminate against gays and lesbians); Harris Poll #42, Aug. 19, 1998, tbl. 1A, available at [http://www.harrisinteractive.com/harris\\_poll/tables/1998/aug\\_19\\_1998.asp](http://www.harrisinteractive.com/harris_poll/tables/1998/aug_19_1998.asp) (reporting a 52%-41% margin favoring laws that make it “illegal to discriminate against gays and lesbians”); DEMOCRATIC LEADERSHIP COUNCIL, THE NEW DEMOCRATIC



Yet others may well be quite troubled by the third goal. Libertarians who fervently support sexual autonomy, and who generally support equal access to marriage, may generally oppose legal restrictions on private discrimination. Likewise, some pragmatists may think that anti-gay-sex laws are pointless, and that same-sex marriage can decrease sexually transmitted disease, promote social stability, and make the spouses happier without harming anyone else—but they might think that new anti-discrimination laws would impose severe costs on business and the legal system, and make it hard to fire workers even for perfectly legitimate reasons. It turns out that, at least as recently as 2000, about 10% of the public seemed open to same-sex marriage (supported it or didn't have strong feelings either way) and at the same time opposed extending anti-discrimination laws to cover sexual orientation.<sup>66</sup>

Moreover, not all discrimination arouses the same sentiments. In some areas, some observers may find antidiscrimination laws to be particularly intrusive, for instance when

- churches, religious schools, and the Boy Scouts are forced to hire homosexuals as teachers and officials, even if the organizations oppose homosexuality and are trying to teach children that homosexuality is sinful,<sup>67</sup>

---

ELECTORATE: SURVEY RESULTS, Question 193 (1997), available at [http://www.dlc.org/documents/97electorate\\_poll.pdf](http://www.dlc.org/documents/97electorate_poll.pdf) (reporting a 49%-45% margin for "the government . . . prevent[ing] discrimination against gays in employment"); JAMES DAVIDSON HUNTER & CARL BOWMAN, THE STATE OF DISUNION: 1996 SURVEY OF AMERICAN POLITICAL CULTURE (1997), available at <http://www.virginia.edu/iasc/surveys.html> (reporting a 51%-39% margin against the view that landlords should who are "morally opposed to homosexuality" should be free not to rent to homosexuals); Scott S. Greenberger, *One Year Later, Nation Divided On Gay Marriage*, BOSTON GLOBE, May 15, 2005, at A1 (reporting a 50%-46% margin against "recognizing same-sex marriages from Massachusetts 'as legal in all 50 states'" and 50% to 37% margin "disapprov[ing] of 'gay and lesbian couples being allowed to get married'").

65. Of course, the lack of such laws in many jurisdictions shows that the question is still open politically. Opponents of such laws may understandably worry that shifts in political attitude could enable those laws to be enacted in those jurisdictions or at the federal level.

66. See Harris Poll, Jan. 6-10, 2000, Study No. 11767, available at [http://www.irss.unc.edu/data\\_archive/pollsearch.html](http://www.irss.unc.edu/data_archive/pollsearch.html). The study of Florida residents discussed in Stephen C. Craig, Michael D. Martinez, James G. Kane & Jason Gainous, *Core Values, Value Conflict, and Citizens' Ambivalence About Gay Rights*, 58 POL. RESEARCH Q. 5 (2005), reported similar results: "11.1% [of respondents] had a positive feeling for legal gay marriages and a negative feeling about [laws to protect homosexuals against] job discrimination." E-mail from Jim Kane to Amy Atchison, Aug. 22, 2005 (on file with author).

67. See, e.g., Matthew Spalding, *A Defining Moment: Marriage, the Courts, and the Constitution*, HERITAGE FOUNDATION BACKGROUNDER, May 17, 2004, at 5, available at <http://www.heritage.org/research/legalissues/bg1759.cfm> (offering this criticism); see also Egan v. Hamline United Methodist Church, 679 N.W.2d 350 (Minn. Ct. App. 2004) (discussing a church music director's claim that it was illegal for the church to fire him because of his homosexuality). Egan lost because the Minnesota ban on sexual orientation discrimination in employment excluded religious

- religious landlords are required to rent to same-sex couples even when the landlords think that homosexuality is a grave sin, and that renting to same-sex couples would itself be sinful (as aiding of sin),<sup>68</sup>
- tenants who, for privacy reasons, don't want a roommate who might be sexually attracted to them (whether opposite-sex heterosexual or same-sex homosexual), are barred from choosing roommates based on sexual orientation, or mentioning their preferences in advertising,<sup>69</sup>
- the Boy Scouts and similar groups are required to accept gays as scoutmasters, even though they oppose homosexuality and want their scoutmasters to be role models for scouts,<sup>70</sup>
- such groups that discriminate against gay scoutmasters are excluded from equal access to government benefits (public parks, meeting rooms in public schools, and the like),<sup>71</sup>
- parents who want to teach their children that homosexuality is improper find that the groups that can help in child-rearing (such as the Boy Scouts or private schools) are being forced to place homosexuals in role model positions,<sup>72</sup> or

---

institutions, see MINN. STAT. ANN. § 363A.26(2) (2003), but many other such bans do not. *See, e.g.*, MD. CODE art. 49B, § 16(g)(3) (2005); MASS. GEN. LAWS ANN. ch. 151B, § 4, subd. 18 (2004). None that I have seen exclude hiring decisions by groups such as the Boy Scouts.

68. *See infra* note 124 (citing cases where landlords were sued based on religious refusals to rent to unmarried couples; similar lawsuits could arise under sexual orientation discrimination bans as easily as under marital status discrimination bans); Coolidge & Duncan, *supra* note 1, at 636 (noting this as an argument against recognition of civil unions and same-sex marriages).

69. *See* DAVID E. BERNSTEIN, *YOU CAN'T SAY THAT!* 131-34 (2003) (discussing cases brought based on discrimination in choice of roommate, both as to sexual orientation and other criteria).

70. The Supreme Court decision recognizing the Scouts' right to exclude gays was a 5-4 case, which might be overturned with a small change in the Court's personnel. *See* *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

71. *See* Coolidge & Duncan, *supra* note 1, at 647 (expressing this concern); Anthony R. Picarello, Jr., *Other Rights Are at Stake*, NAT'L L.J., July 19, 2004, at 26 (likewise). For examples of governmental exclusion of the Boy Scouts from various generally available benefit programs, on the grounds that the Scouts discriminate based on sexual orientation, see *Boy Scouts of Am. v. Wyman*, 335 F.3d 80 (2d Cir. 2003) (upholding such an exclusion); *Boy Scouts of Am. v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001) (striking down such an exclusion).

72. *Cf., e.g.*, Paul Schwartzman, *Seven Days: The Last Word on Last Week*, N.Y. DAILY NEWS, Aug. 8, 1999, at 16 ("'It's a sad day when the state dictates to parents what role models they must provide for their children,' said George Davidson, an attorney for the Boy Scouts."); *see also* Coolidge & Duncan, *supra* note 1, at 636-37 (arguing that recognition of same-sex marriages or civil unions "could prevent religious organizations who provide government services"—such as adoption placement agencies—"from acting on their sincere religious objections to same-sex partnerships").

- employers are coerced by bans on “sexual orientation harassment” into suppressing employee speech that opposes homosexuality.<sup>73</sup>

In fact, polls suggest that opposition to applying bans on sexual orientation discrimination to the Boy Scouts or to religious schools is considerably higher than opposition to such bans more generally.<sup>74</sup> It’s therefore likely that considerably more than 10% of the public is open to same-sex marriage but nonetheless opposes thoroughgoing antidiscrimination rules that apply even to the Scouts or to religious schools.<sup>75</sup>

---

73. See *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 607 (9th Cir. 2004) (characterizing an employee’s posting of anti-homosexuality Bible passages as being “intended to demean and harass” gay employees); State University of New York (Albany), *Sexual Orientation Discrimination and Harassment or Intolerance*, available at [http://www.albany.edu/affirmative\\_action/sexual\\_orientation.html](http://www.albany.edu/affirmative_action/sexual_orientation.html) (prohibiting “harassment” using definitions that basically track sexual orientation harassment law, and giving as examples of prohibited speech “[t]elling ‘jokes’ that reinforce the false stereotypes related to lesbians, gays, transgendered persons, or bisexuals” and “[d]isplaying signs or posters that denigrate gays and lesbians”); CITY OF LOS ANGELES PERSONNEL DEP’T, SEXUAL ORIENTATION COMPLAINT PROCEDURE, available at <http://www.lacity.org/per/EEO/sexorint.htm> (likewise treating “derogatory . . . comments . . . or jokes respecting sexual orientation” as violating harassment law); Letter from Cheryl R. Clarke, Deputy Attorney General, State of New Jersey to Greg Lukianoff, Foundation for Individual Rights in Education, July 15, 2005, available at <http://www.thefire.org/index.php/article/6116.html> (characterizing a student-employee’s e-mail condemning homosexuality as a “perversion” as “discriminatory” speech that is “not protected” “under the First Amendment”). If employment discrimination based on sexual orientation were banned, then speech that “harass[es]” employees based on sexual orientation would lead to liability, and employers would be coerced into restricting it. See Eugene Volokh, *What Speech Does “Hostile Work Environment” Harassment Law Restrict?*, 85 GEO. L.J. 627 (1997), available in updated form at <http://www.law.ucla.edu/volokh/harass/breadth.htm>.

74. In 2000, for instance, an L.A. Poll reported 68%-23% sentiment in favor of banning employment discrimination against gays and 66%-24% in favor of banning housing discrimination against gays, but 47%-46% sentiment in favor of the proposition that “the Boy Scouts have every right to exclude gays from their organization” as opposed to “excluding gays from joining the Boy Scouts is wrong.” L.A. Times Poll, June 8-13, 2000, questions 43, 44, 56, at LEXIS, NEWS database, R POLL file.

Likewise, while recent polls report 80% to 90% sentiment for the view that “homosexuals should . . . have equal rights in terms of job opportunities,” they show only 54% to 61% sentiment for the view that “homosexuals should . . . be hired” as elementary school teachers, and 60% to 67% sentiment for the view that “homosexuals should . . . be hired” as high school teachers. See AM. ENTER. INST., AEI STUDIES IN PUBLIC OPINION: ATTITUDES ABOUT HOMOSEXUALITY & GAY MARRIAGE 11, 13 (updated May 20, 2005). And I suspect people take the same view as to antidiscrimination laws: While relatively few people oppose bans on sexual orientation discrimination in employment generally, a much more substantial minority would be troubled by such laws’ applying to schoolteachers and (I suspect) especially to teachers at religious schools run by denominations that oppose homosexuality. Unfortunately, I couldn’t find polling data on any of the other scenarios I list in the text.

75. According to the 2000 Harris poll, about 30% of those who generally oppose bans on sexual orientation discrimination are open to same-sex marriage, and 55% of those who generally support such bans are open to same-sex marriage. Harris Poll, *supra* note 66. If, as the L.A. Times poll suggests, about 20% of the public opposes bans on sexual orientation discrimination by the Boy

And some traditionalists may even worry about nongovernmental pressure, for instance if churches that condemn homosexuality end up being socially ostracized for their views. We see how groups, including religious groups, that defend racism have become marginalized in American life (and rightly so). Especially given that the gay rights movement often analogizes sexual orientation discrimination to race discrimination,<sup>76</sup> people who oppose homosexuality may fear that their churches and civic organizations will become marginalized, too.<sup>77</sup>

The libertarians, pragmatists, and traditionalists may then worry: Would a gay rights victory on government recognition of same-sex marriage yield broader gay rights victories—and thus defeats for people’s ability to choose whom to deal with—as to private discrimination? Nor is this like the distant, improbable prospect of polygamy being recognized. These are politically plausible restrictions, which have already been enacted in some jurisdictions, though they are also politically avoidable restrictions, given that many jurisdictions have not enacted them. To those who oppose such restrictions, they are significant dangers, and ones that are worth trying to avoid.

---

Scouts but supports bans on most other forms of sexual orientation discrimination, and these people’s sentiments on same-sex marriage are halfway between the 30% and 55%, then this means that 8% of the public (a) is open to same-sex marriage, and (b) opposes bans on sexual orientation discrimination by the Boy Scouts but supports bans on most other forms of sexual orientation discrimination. L.A. Times Poll, *supra* note 57. Add this to the 10% who (a) are open to same-sex marriage, and (b) oppose bans on sexual orientation discrimination generally, and we have about 18% of the public who are open to same-sex marriage but might worry about at least some antidiscrimination laws. This is a guess, of course, but an educated one.

Likewise, the Florida voter study cited *supra* note 66 found that 11.1% of respondents had some positive feelings towards recognizing same-sex marriages and negative feelings towards enacting laws banning job discrimination; but 21.5% had some positive feelings towards recognizing same-sex marriages and negative feelings towards allowing homosexuals to join the Boy Scouts. E-mail from Jim Kane, Editor & Chief Pollster for Florida Voter, to author (Aug. 23, 2005, 8:01 A.M.).

76. See, e.g., sources cited *infra* notes 82, 84.

77. See, e.g., Spalding, *supra* note 67, at 5:

The legalization of homosexual “marriage” would invite an ongoing assault on individuals and organizations that uphold traditional marriage or have moral or religious objections to the practice of homosexuality. By definition, all dissenters will find themselves at odds with the new political ethos and are likely to be stigmatized as prejudiced and discriminatory. Such characterizations already have been made by activists, politicians, and judges who are sympathetic to the arguments for same-sex “marriage.” The legalization of homosexual “marriage” will greatly accelerate these pressures to marginalize the nation’s religious communities and the values that define them.

### B. *Political Momentum Slippery Slopes*

Here's one possible mechanism through which recognition of same-sex marriage might lead to broader antidiscrimination laws: Both are mostly backed by the same political movement—the gay rights movement and, more broadly, the multiculturalist left.<sup>78</sup> When this movement wins on one issue, its perceived political power will increase; it will look like a winner, and its adversaries will look like losers. Swing-vote legislators are more likely to accede to the demands of a movement that seems to have “political momentum”—a movement that has had a recent victory, and thus seems likely to have more victories in the future.<sup>79</sup>

Naturally, this tendency is far from irresistible. For instance, a legislator may know that his constituents oppose broad antidiscrimination laws, and thus not care what the movement urges him to do; or he may conclude that the movement's victory on same-sex marriage doesn't predict its power on other matters. But when legislators aren't sure about what is the politically safe thing to do, they may be especially influenced by a group that they see as successful—or the successful group's support may embolden them to do what they wanted to do in the first instance.

It thus follows that people who oppose one part of the gay rights movement's agenda (broad antidiscrimination laws) may also want to oppose another part of that agenda (recognition of same-sex marriage), simply because they want the movement to get a reputation as a loser. They may borrow the attitude of a 1993 *New York Times* editorial: “In these early days of the struggle for bullet-free streets, the details of the legislation are less important than the momentum. Voters and legislators need to see that the National Rifle Association and the gun companies are no longer in charge of this critical area of domestic policy.”<sup>80</sup>

---

78. Naturally, there are exceptions, such as Jonathan Rauch, author of *GAY MARRIAGE*, *supra* note 6, and many of his fellow members of the Independent Gay Forum, <http://indgayforum.org>—who are generally moderates or libertarians—as well as Andrew Sullivan, who is hard to categorize. But the advocacy groups at the core of the same-sex marriage campaign are nonetheless mostly on the Left.

79. See generally Volokh, *The Mechanisms of the Slippery Slope*, *supra* note 2, at 1121-26.

80. Editorial, *Give Peace a Chance*, N.Y. TIMES, Dec. 12, 1993, § 4, at 14. Conversely, if your adversary prevails in one battle, this may raise his supporters' morale for the next. For instance, one historical account of Prohibition suggests that the 1923 repeal of a New York state prohibition law “gave antiprohibitionists a tremendous psychological lift. The hitherto invincible forces of absolute and strict prohibition”—only four years before, over two-thirds of Congress and three-quarters of state legislatures ratified the Eighteenth Amendment—“had been politically defeated for the first time. Could not other, and perhaps greater, victories be achieved with more determination and effort?” DAVID E. KYVIG, *REPEALING NATIONAL PROHIBITION* 54, 57 (2000); see also Joshua L. Weinstein, *Turkey Day Tradition; Bills Could Revive Gay Rights Debate, but Sponsors Wary*, PORTLAND PRESS HERALD, Nov. 24, 1995, at 1A (“Karen Geraghty,

Regardless of what you think of the merits of gun control, that sounds like good political advice for gun control proponents—<sup>81</sup> and perhaps for people in other movements as well.

This is a pretty hard-ball approach, and may even seem a bit rude. Observers who value friendly disagreement may frown on people who say, “It’s not A that worries me so much as the people who support it, and I want them to lose on A because I want them to be seen as losers.” Still, if you really think that B would be gravely wrong, and that your opponents’ victory on A would make them likelier to achieve B, then you may be justified in fighting them on A even if—were B not at stake—you might actually find A to be tolerable on its own.

Finally, note that this argument (unlike the others) applies chiefly to legislative decisions, not judicial ones. If the gay rights movement wins a political battle, this will lead people to see the movement as more politically effective, and thus make it easier for it to win the next battle. “They won this time,” legislators may reason; “they must be pretty influential; I’d better stay on their good side.” But if the gay rights movement wins a judicial battle, this won’t much affect legislators’ perceptions of the movement’s power. Few legislators would say “the gay rights movement has gotten courts to accept same-sex marriage, so the politically safe move for me is to go along with its legislative proposals to enact new antidiscrimination laws.”

### C. *Attitude-Altering Slippery Slopes*

Say that you’re trying to persuade voters to support laws that ban employers, landlords, or organizations from discriminating based on sexual orientation. You want to argue that sexual orientation discrimination is just like race discrimination or sex discrimination, but you know that many people aren’t persuaded by that: Even if they don’t firmly oppose your proposal, neither do they support it—they just don’t see sexual orientation as being similar enough to race or to sex.

---

president of the Maine Lesbian and Gay Political Alliance, acknowledged that many gay-rights supporters, fresh off their Nov. 7 victory, believe they have the momentum necessary to pass a statewide law. . . . But she said she fears that a statewide gay-rights law passed on the heels of [an earlier anti-gay rights referendum that was narrowly rejected] could galvanize opponents to undertake a successful repeal.”)

81. Gay rights advocates are not as influential in their field as the NRA seems to be in its, but the advice applies equally: However influential your political adversaries might be, you want to make them less influential, and one way might be to defeat them in ways that decrease their perceived power.

Would you feel your argument strengthened if the Supreme Court strikes down bans on same-sex marriages, or if legislatures reverse such bans, on the grounds that

1. bans on same-sex marriage are like bans on interracial marriages,<sup>82</sup>
2. sexual orientation discrimination is a form of sex discrimination,<sup>83</sup>
3. governmental sexual orientation discrimination violates the Equal Protection Clause, much as does governmental sex and race discrimination,<sup>84</sup>

---

82. See, e.g., *In re* Coordination Proceeding, Special Title [Rule 1550(c)], No. 4365, 2005 WL 583129, at \*3 (Cal. Super. Mar. 14, 2005) (using the 1948 case that outlawed bans on interracial marriages in California, as precedent to declare bans on same-sex marriages illegal); *Lewis v. Harris*, 875 A.2d 259, 280 (N.J. Super. Ct. App. Div. 2004) (Colleston, J., dissenting) (rejecting a tradition-based defense of opposite-sex-only marriage rules by saying that the defense “is reminiscent of arguments in support of anti-miscegenation laws”); Richard A. Epstein, *Caste and the Civil Rights Laws: From Jim Crow to Same-Sex Marriages*, 92 MICH. L. REV. 2456, 2474-75 (1994); Vik P. Solem, Letter to the Editor, BOSTON GLOBE, May 22, 2005, at D10 (“Last Wednesday’s letter from Robert Powers of Canton contains many of the signs that continue to show the shortsighted and prejudicial view of the people who oppose homosexual marriage. In speaking about relationships, he used the phrase ‘male-male and female-female.’ If you replaced that phrase with the word ‘interracial,’ then one might expect to be reading a letter from 60 years ago opposing miscegenation.”).

83. See, e.g., *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), superseded by constitutional amendment, HAW. CONST. art. I, § 23; *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 970 (Mass. 2003) (Greaney, J., concurring); Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL’Y. REV. 97 (2005); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Branden Wolner, Letter to the Editor, BOSTON GLOBE, May 23, 2003, at L10 (“[G]ender-based discrimination is clearly illegal. Gay-marriage bans are nothing more than gender-based discrimination. If a man is legally entitled to marry a woman, then denying that same right to a woman is a violation of the equal protection clause of the Fourteenth Amendment.”).

84. See, e.g., *Simply Put, He Explained: Same Sex Marriage*, ECONOMIST, Mar. 19, 2005, at 82 (“Indeed, to limit marriage in this way is anti-homosexual discrimination akin to racial discrimination. In 1948, California’s Supreme Court ruled that the state’s ban on interracial marriage violated the equal-protection clause of the United States constitution. Advocates of the racial ban had asserted that, because historically blacks had not been permitted to marry whites, the statute was justified. The court, Judge Kramer recalled, had rejected this argument: ‘Certainly the fact alone that the discrimination has been sanctioned by the state for many years does not supply such [constitutional] justification.’”); see also Steve Schmidt, *S.F. Mayor Won’t End Fight For Same-Sex Marriage*, UCSD TOLD, SAN DIEGO UNION TRIB., Apr. 12, 2005, at B3 (“[San Francisco Mayor Gavin Newsom] said allowing gays and lesbians the same rights as heterosexual couples ‘was not bold, it was not courageous.’ It was simple, he said. Keeping gays from marrying is discriminatory, akin to the nation’s Jim Crow laws and the ban on women voting that were overturned long ago, he said.”); Plaintiff’s Opening Brief, *In re* Marriage Cases, Case No. 429-539 (Cal. Super. Ct. Sept. 2, 2004), available at [http://www.sfgov.org/site/uploadedfiles/cityattorney/notable\\_cases/SFBRIEF.PDF](http://www.sfgov.org/site/uploadedfiles/cityattorney/notable_cases/SFBRIEF.PDF) (drawing an analogy between bans on interracial marriage and bans on same-sex marriage).

4. treating same-sex couples differently from opposite-sex couples is irrational,<sup>85</sup> or
5. the attempt to maintain traditional values, which include the judgment that heterosexual relationships are superior to homosexual ones, isn't itself reason enough for governmental discrimination?<sup>86</sup>

I think the answer in each case would be yes. You wouldn't be assured of victory. Audience members who strongly oppose your proposal will still oppose it. Audience members who don't respect the Supreme Court won't care what the Court says. And some audience members might find government discrimination to be so different from private discrimination that they won't accept analogies from one field to the other. But your chances would be improved.

First, some people are swayable. That's why we have debates—presumably some listeners still have their minds open. But beyond that, we've seen a dramatic shift over the last thirty years in public attitudes towards homosexuality.<sup>87</sup> There's no reason to assume that the shift is necessarily over. People seem to be open to persuasion here, whether because they're too young to have thought much about the subject, because they're older but have had no occasion to seriously consider it, or because they've thought about it and find it a close issue.

Second, some people might well respect the Court enough to defer in some measure to its judgment, deliberately or subconsciously. The Court is still an influential and fairly well-regarded institution, at least among many.<sup>88</sup>

85. See, e.g., *Goodridge*, 798 N.E.2d at 961-68.

86. See, e.g., *Hernandez v. Robles*, 794 N.Y.S.2d 579, 609 (N.Y. Sup. Ct. 2005) (“Rote reliance on historical exclusion as a justification improperly forecloses constitutional analysis and would have served to justify slavery, anti-miscegenation laws and segregation. There has been a steady evolution of the institution of marriage throughout history which belies the concept of a static traditional definition. Marriage, as it is understood today, is both a partnership of two loving equals who choose to commit themselves to each other and a State institution designed to promote stability for the couple and their children. The relationships of [same-sex couples] fit within this definition of marriage.”); Lee Romney, *Judge Hears Debates on Same-Sex Unions*, L.A. TIMES, Dec. 24, 2004, at B1 (“Debated in the courtroom was the very definition of marriage—whether it is bound by tradition or flexes with the times. ‘What exactly is the state talking about when it uses the word ‘tradition?’” asked Chief Deputy City Attorney Therese Stewart, who argued the case for the city. ‘What the state is talking about is the tradition of exclusion of gays and lesbians. ‘We’ve always done it this way’ is not a reason; it’s a conclusion.”).

87. See AM. ENTER. INST., *supra* note 74, at 2 (reporting, based on National Opinion Research Council General Social Study data, that the percentage of respondents who said that homosexuality was “not wrong at all” rose from 11% in 1973 to 33% in 2002).

88. See Volokh, *The Mechanisms of the Slippery Slope*, *supra* note 2, at 1077-82; Gallup Poll, May 23-26, 2005, reported at <http://pollingreport.com/institut.htm> (reporting that 16% of respon-



So if the Court holds that, for instance, sexual orientation discrimination is like race discrimination—even if the Court holds this in one particular context—some people will be more open to the analogy in other contexts, too. This may only be a minority of voters, but even a small group can be the swing vote that makes the difference between victory and defeat.<sup>89</sup>

As I've mentioned before, this is not because treating bans on same-sex marriages the same as bans on interracial marriages *logically* requires that sexual orientation discrimination be banned. It doesn't: One could argue that bans on same-sex marriages should be treated the same as bans on interracial marriages only because everyone has a right to marry the partner of his or her choice; this doesn't logically show that everyone has a right to be employed without regard to sexual orientation.

But it may have a *psychological* effect on the discrimination debate. Associating bans on same-sex marriage with bans on different-race marriage makes it easier to characterize discrimination against people who engage in same-sex relationships as similar to discrimination against people who engage in different-race relationships. Firing a white woman because she prefers dating black men is illegal.<sup>90</sup> Firing a woman because she prefers dating women thus becomes similarly unsavory.<sup>91</sup>

Likewise, one can certainly argue that, even if a form of discrimination by the government violates the Equal Protection Clause, similar discrimination by private parties shouldn't be illegal. Many libertarians take

dents said they had "a great deal" of confidence in the Supreme Court, 25% "quite a lot," 38% "some," and 18% "very little"; the Court did considerably better than the television news, newspapers, or Congress, and about the same as the presidency).

89. This is common-sense inference, but it would naturally be great to test it empirically; unfortunately, the data that I've seen is not terribly probative. For instance, one influential study, THOMAS R. MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT* 167-81 (1987), reports that Supreme Court opinions have mixed effects both on short-term and long-term opinion, with some decisions moving opinion in the direction in which the Court went, others moving it in the opposite direction, and others having no effect. Professor Marshall concludes that those decisions that are generally seen as "liberal"—which would include a decision recognizing a right to engage in same-sex marriage—on balance pull some people in the direction in which the Court's decision points, *id.* at 178-81; but this study was based on only a few data points. See also Patrick Egan & Nathaniel Persily, *Gay Marriage, Public Opinion and the Courts* (working draft, Sept. 2005), available at <http://www.law.upenn.edu/fac/npersily/workinprogress/NEWEST%20DRAFTS/eganpersily.9.7.pdf> (discussing the complicated effects of *Bowers v. Hardwick*, *Lawrence v. Texas*, and *Goodridge v. Department of Health* on public opinion).

90. See, e.g., *Gresham v. Waffle House*, 586 F. Supp. 1442, 1445 (N.D. Ga. 1984); cf. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (treating a university's ban on interracial dating as race discrimination).

91. Samuel A. Marcossan, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1, 6-10 (1992).

precisely that view,<sup>92</sup> and in some situations, so does the legal system—governmental discrimination based on political affiliation, for instance, is presumptively unconstitutional, but in most states it's not prohibited. There are lots of good logical reasons why the rules should be different for the government than for private entities.

Yet if some form of discrimination is seen as not just illegal but unconstitutional, that becomes a potent argument that this discrimination is at least often wrong, and nonlibertarians—especially those who see private power as similar in many ways to government power<sup>93</sup>—may see the wrongfulness as independent of who's doing the discriminating. Certainly people often argue that because some action is unconstitutional for the government, it should also be illegal or at least constitutionally unprotected if done by private people; and this argument is sometimes successful.

The same may happen when same-sex marriage is authorized by the legislature. Say that the legislation's backers support the proposal by arguing that the government ought not discriminate based on sexual orientation, or that sexual orientation discrimination is analogous to race discrimination or sex discrimination. This argument may become part of the popularly understood meaning of the enactment. And some people who find legislative decisions credible may come to accept this principle, and to generalize from it.

Just as recognition of same-sex marriage may strengthen arguments for antidiscrimination laws, so it can weaken arguments against those laws. Defenders of employers', landlords', and organizations' rights not to associate with homosexuals often invoke traditional values: We believe homosexuality is not the right way to live; this is a centuries-old religious and social tradition; and this tradition is entitled to respect.<sup>94</sup>

The limitation of marriage to opposite-sex couples reinforces this argument: It shows that the legal system endorses the superiority of heterosexual relationships, and thus the inferiority of homosexual ones.<sup>95</sup>

---

92. See, e.g., RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992).

93. See STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* 257-60 (1995).

94. See, e.g., Brief of Equal Rights, Not Special Rights, Inc., as Amicus Curiae Supporting Petitioners, *Romer v. Evans*, 517 U.S. 1620 (1995), at 29 n.12 ("Civil rights laws protecting homosexuals necessarily deny employers and landlords their traditional freedom to associate with whom they please and to attach significance to a sexual behavior or lifestyle that they may believe is inappropriate or sinful.").

95. See, e.g., Joe Rollins, *Same-Sex Unions and the Spectacles of Recognition*, 39 *LAW & SOC'Y REV.* 457, 469 (2005).

Naturally, one can still respond that, whether or not homosexual relationships are inferior, it's not right to discriminate against people for preferring such relationships.<sup>96</sup> Yet many people may still conclude that the legal system's endorsement of the traditional disfavoring of homosexuality—even when other disabilities imposed on homosexuals are lifted—helps reinforce the legitimacy of this tradition in other areas, such as private disassociation from homosexuals.<sup>97</sup>

The legal recognition of same-sex marriage would be a powerful and deliberate repudiation of tradition. In fact, one reason that many gay rights advocates seek the label of “marriage,” and aren't satisfied with civil unions, is precisely that they want to root out this tradition from our legal system and thus delegitimize that tradition as an argument for the inferiority of homosexuality.<sup>98</sup> And by doing that, they would weaken one of the defenses—respect for traditional values—possessed by those who want to retain the right to disassociate themselves from homosexuals.<sup>99</sup>

---

96. Many people apparently take this view, since 50-75% of survey respondents tend to say that they support bans on sexual orientation discrimination, *see supra* note 66, but 60% of respondents say that homosexual conduct is “always wrong” (55%) or “almost always wrong” (5%). *See AM. ENTER. INST., supra* note 74, at 2.

97. *See, e.g.,* Opinion of the Justices to the Senate, 802 N.E.2d 565, 571 (Mass. 2004); *Halpern v. Toronto*, [2003] O.C.A. 276. *Cf.* RICHARD A. POSNER, *SEX AND REASON* 311 (1992) (arguing that “permitting homosexual marriage would be widely interpreted as placing a stamp of approval on homosexuality . . .”); Chambers, *supra* note 1, at 450 (arguing that recognizing same-sex marriage “would signify the acceptance of lesbians and gay men as equal citizens more profoundly than any other nondiscrimination laws that might be adopted”) (footnote omitted); Dent, *supra* note 1, at 581 n.1 (citing these and other sources).

98. *See, e.g.,* Lambda Legal Defense Fund, *Talking About the Freedom to Marry*, at <http://www.lambdalegal.org/cgi-bin/iowa/news/fact.html?record=47> (arguing that civil unions aren't an adequate alternative to same-sex marriage because they “set[] same-sex couples apart for second-class citizenship in the eyes of others, which will carry over into how such couples are treated in other areas of their lives,” and therefore urging “full equality” in the form of “[h]aving the choice to marry”).

99. Gay rights advocates often argue that certain laws—for instance, even completely unenforced antisodomy laws—contribute to antigay attitudes, and lead to broader antigay behavior (such as physical attacks on gays). *See, e.g.,* Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1482-91 (1992). I think such effects are sometimes overstated; the typical thug doesn't know much about what laws are on the books. But they may indeed exist: Labeling someone a criminal, even if you don't prosecute him, can lead some people to be less willing to respect his rights.

Similarly, official discrimination against homosexuals can reinforce views that private discrimination against homosexuals is at least tolerable. After all, if the government discriminates against same-sex marriage, some may conclude, it shouldn't bar people from discriminating against homosexuals in employment, housing, or private associations. *See* Lambda Legal Defense Fund, *supra* note 98 (making such an argument). The legally preferred status of heterosexual relationships, and the legally disfavored status of homosexual relationships, thus helps protect the liberty (whether or not you think it's a valuable liberty) of employers, landlords, and private associations to

#### D. Equality/Precedent Slippery Slopes

In Part IV, which discussed the possibility that recognizing same-sex marriages may lead to recognizing polygamous marriages, I talked about the possibility of an equality slippery slope: Some people might conclude that if homosexuals can enter into the marriages they prefer, equality demands that polygamists be allowed to do the same.

This sort of equality slippery slope wouldn't generally operate for same-sex marriages and antidiscrimination laws: Few people would say that equality demands that, if same-sex marriages are recognized, anti-discrimination laws be implemented as well.<sup>100</sup> The two just seem too different. All the slippery slope phenomena that I describe here (attitude-altering, equality, and political momentum) may appear in some contexts. But there's no reason to think that each one will appear in every context.

Yet one sort of equality slippery slope may indeed happen here, and it's closely related to the way judicial precedent operates. Consider the theory, forcefully urged by many proponents of same-sex marriage, and accepted by some judges, that sexual orientation discrimination is unconstitutional because it is sex discrimination.<sup>101</sup> If Jane is barred from marrying Kate but is allowed to marry Larry, that's sex discrimination—the law is considering Jane's, Kate's, and Larry's sex in deciding whom they may marry. Under similar circumstances, bans on interracial marriage are treated as race discrimination,<sup>102</sup> therefore, bans on same-sex marriage should be treated as sex discrimination. Let's assume this argument is indeed accepted, and courts hold that traditional marriage rules violate the Equal Protection Clause (or a state Equal Rights Amendment).

Exactly the same argument would be available as to discrimination by private parties, under statutes that bar sex discrimination. If sexual orientation discrimination is logically sex discrimination under constitutional rules, then it would be sex discrimination under statutory rules. After all, antidiscrimination law bars employers from firing people for

---

choose whether to associate with homosexuals. And this is so even though as a purely logical matter, this preferred status extends only to government action, not private action.

100. Some might say that the imperative of equal treatment without regard to sexual orientation demands that both steps be taken, but that's not a slippery slope phenomenon: These people would support both A and B on their own, rather than supporting B in part because A had been implemented.

101. Koppelman, *supra* note 83; cases cited *supra* note 24.

102. See *Loving v. Virginia*, 388 U.S. 1, 15-17 (1967) (discussing the Equal Protection Clause).

dating outside their race.<sup>103</sup> Under the logic of the Jane/Kate/Larry argument, the sex discrimination branch of that law would likewise bar employers from firing people for dating within their own sex. And the same would apply to housing, public accommodations, and any other contexts where sex discrimination is banned (though probably not scouting organizations, which are allowed to discriminate based on sex).<sup>104</sup>

I call this an equality slippery slope argument because such arguments based on analogy to precedent often rest on a perceived need for equal treatment: If decision A has employed one principle, then lower courts are obligated to follow that principle even in a different decision B, and coordinate courts or future instances of the same court are encouraged to follow that principle as to B. Otherwise, the result may be unfair, unpredictable, administratively difficult, and in a way even un-aesthetic. The litigant in B would be denied the benefit of the principle that won the case for a litigant in A. People wouldn't be able to know when the principle will be followed and when it won't be. Future courts would have to continually decide whether to follow the principle from A or a contrary principle from B. And the law just wouldn't make logical sense, something that many observers might care about. The felt need for equality can thus pull courts (or even legislatures) to make decision B, given the past making of decision A, even if they wouldn't have supported B on its own.<sup>105</sup>

Now naturally one can draw some possible distinctions that would explain why sexual orientation discrimination equals sex discrimination under the Equal Protection Clause, but doesn't equal sex discrimination under antidiscrimination statutes. For instance, one could argue that it's fine for courts to impose constitutional requirements on the *government* that weren't intended by the constitutional drafters, but that courts shouldn't read statutes in ways that restrict private organizations' freedom absent strong evidence that the statutes' authors intended such restrictions. Likewise, one could argue that *stare decisis* should operate especially strongly in the statutory context, where judicial errors can be

---

103. See *supra* note 86.

104. See Marcossou, *supra* note 91, at 3-10. Courts have rejected this theory so far as to Title VII. *Id.* at 3; see also *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 331 (9th Cir. 1979); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326-27 (5th Cir. 1978). The question, though, is whether they might change their minds if the U.S. Supreme Court accepts the theory under the Equal Protection Clause.

105. This is not an attitude-altering slippery slope phenomenon: It doesn't rely on judges' changing their views about the merits of B on its own terms, but simply on judges' strong preference for equal treatment (*here, following precedent*) overcoming their continued opposition to both A and B, or at least their continued ambivalence about both A and B.

corrected by the legislature,<sup>106</sup> so courts shouldn't overturn past decisions that have rejected the theory that sexual orientation discrimination equals sex discrimination under antidiscrimination statutes.<sup>107</sup>

Yet again, the question is not just whether the two matters are distinguishable, but whether they will in fact be distinguished this way by judges, or whether at least some judges will treat the two the same. Again, let's consider a hypothetical (but not implausible) breakdown of the nine Supreme Court Justices. Each Justice can have a separate view on three questions—(i) is sexual orientation discrimination inherently a form of sex discrimination under the Equal Protection Clause, (ii) is it inherently a form of sex discrimination under antidiscrimination statutes, and (iii) if in an earlier case the Court had answered the first question yes, should I also answer the second question yes?

Group	Legal judgments			Supports proposed move?			Attitude	# of Justices
	(i) S/o disc = sex disc as to equal protection?	(ii) S/o disc = sex disc as to statutes?	(iii) If the Court has said yes to (i), should I say yes to (ii)?	0 → A	0 → B	A → B		
1	N	N	N				"S/o disc ≠ sex disc, but even if the two are equal as to equal protection, they needn't be as to statutes"	1
2	N	N	Y			✓	"S/o disc ≠ sex disc, but if it is as to equal protection, we must follow this precedent for statutes"	3
3	Y	N	N	✓			"S/o disc = sex disc for equal protection but not statutes"	3
4	N	Y	Y		✓	✓	"S/o disc = sex disc for statutes but not equal protection"	0
5	Y	Y	Y	✓	✓	✓	"S/o disc = sex disc"	2

Group 1 thinks that the two cases are distinguishable, but that the "sexual orientation discrimination is sex discrimination" argument should be rejected in both. Group 2 thinks that the argument should be

106. See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989).

107. Thanks to Andy Koppelman for pointing out this argument.

rejected, but that the cases aren't distinguishable, so if the argument is accepted as to same-sex marriage, it must also be accepted as to antidiscrimination statutes. Group 3 members think that the cases are different on the merits, and that sexual orientation discrimination is indeed sex discrimination under the Equal Protection Clause but not under antidiscrimination statutes; by definition, they don't think that a yes to question (i) requires a yes to (ii). Group 4 takes the opposite view, though in this hypothetical I assume no Justices actually endorse this position. Group 5 thinks that sexual orientation discrimination is sex discrimination in all circumstances.

Here again there may be a slippery slope. If, before a pro-same-sex-marriage decision, the Court were asked to hold that Title VII's sex discrimination ban prohibits sexual orientation discrimination (the 0→B proposal), the Court would reject this position 7-2; only group 5 would endorse that view.

But if the Court is first faced with this theory as to same-sex marriage (the 0→A proposal), the Justices would accept the theory 5-4 (with the votes of groups 3 and 5). And if the Court is then asked to find that antidiscrimination law bans private sexual orientation discrimination (the A→B proposal), that too would be accepted 5-4 (with the votes of groups 2 and 5). Group 2, committed as it is to precedent, would pull the law down that slope. And group 3 might wish that it had thought ahead: It doesn't like the bottom of the slope, but its votes on same-sex marriage put the Court on that slope.<sup>108</sup>

Finally, note that these slippery slope mechanisms can work together: A legislative decision to recognize same-sex marriage can have both attitude-altering effects and political momentum effects. A similar judicial decision can have both attitude-altering effects and equality/precedent effects. Even if each mechanism's effect is modest, put together they can be substantial, especially since swinging only a substantial minority of voters, legislators, or judges can sometimes mean the difference between victory and defeat.

### *E. Constitutional Law Preventing Slippage*

So far, I have mostly discussed the possibility that recognizing same-sex marriage will lead to new antidiscrimination laws—something that may alarm a significant minority of people more than same-sex mar-

---

108. The same effect would be present for lower court judges deciding what to do with a Supreme Court decision that accepts the "sexual orientation discrimination equals sex discrimination" Equal Protection Clause argument.

riage itself would. Yet that alarm would likely be slight compared to the alarm people would feel if they thought that recognizing same-sex marriage would lead to laws banning anti-homosexuality speech (including anti-homosexuality religious teachings).

Say that racist speech and ethnically bigoted speech were prohibited in the United States, as they are in some countries. People who disapprove of homosexuality would then have an especially strong reason to vigorously oppose any court decisions or legislative actions that treat sexual orientation discrimination like race discrimination: If sexual orientation discrimination is really like race discrimination, and racist speech is banned, then it seems likely that anti-homosexual speech would be banned as well. The next step from antidiscrimination norms to "hate speech" bans would be short, familiar (because it has already been taken as to race and ethnicity), and dire.

And there would be ample evidence supporting this concern, in the form of what has happened in other countries: In Sweden, for instance, a minister has been convicted for preaching a sermon condemning homosexuality; the conviction was reversed by an appeals court, but the government has now appealed the reversal to the nation's supreme court.<sup>109</sup> In Canada, a person has been fined for putting up billboards containing anti-homosexuality quotes from the Bible,<sup>110</sup> and a Canadian Catholic bishop has a legal complaint pending against him stemming from his letter criticizing same-sex marriage and likening homosexuality to prostitution, adultery, and pornography.<sup>111</sup> To protect their right to speak, and to protect their religions, people who oppose homosexuality would have to fight every gay-rights proposal, because of a reasonable fear that it would lead to speech restrictions as well as antidiscrimination laws.<sup>112</sup>

---

109. *In Brief*, WASH. POST, May 14, 2005, at B9 ("Sweden's Supreme Court said Monday it will review the acquittal of Pentecostal pastor Ake Green, who faced criminal charges over a sermon on homosexuality. An appeals court in February threw out a hate crimes conviction against Green, saying it's not illegal to preach a personal interpretation of the Bible. But Sweden's chief prosecutor, Fredrik Wersaell, appealed to the Supreme Court in Stockholm, contending that Green violated Sweden's tough 2003 hate crimes law. A lower court gained international attention last year when it punished Green with a 30-day prison sentence, which was then suspended pending appeal.")

110. BERNSTEIN, *supra* note 69, at 157; *Hellquist v. Owens*, [2002] SKQB 506.

111. *See Man Drops Beef Against Bishop*, EDMONTON SUN, Aug. 26, 2005, at 29 (noting that one such complaint was dropped by the complainant, but that another complaint remains pending).

112. Those who support restrictions on bigoted speech may assure people that "reasonable" or "good faith" criticism of homosexuality would still remain protected. *See, e.g.*, Criminal Code (Can.) R.S.C. 1985, c. C-46, § 319 (Canada) (barring "wilfully promot[ing] hatred against any identifiable group," including groups defined by sexual orientation, but excluding speech in which "in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text," or statements that "were relevant to any



In the United States, though, such arguments are rarely heard, because of the First Amendment. American law protects racist and ethnically bigoted speech, even though a wide range of race discrimination has been illegal for decades.<sup>113</sup> There is little reason to think that the courts will depart from this well-settled principle (except, unfortunately, as to speech in workplaces, where hostile work environment harassment law has emerged in the lower courts as an often potent restriction on racially, religiously, and sexually offensive speech).<sup>114</sup> Even if sexual orientation discrimination is treated like race discrimination, anti-homosexuality speech would still be generally protected.

Thus, opponents of homosexuality have less to fear from same-sex marriage than they would if restrictions on bigoted speech were constitutionally permissible. First Amendment law takes a particularly threatening B—restrictions on anti-homosexuality speech and therefore on religions that criticize homosexuality—pretty much off the table. And by thus greatly reducing the risk of slippage from A (recognition of same-sex marriage) to this B, the First Amendment makes A less threatening and thus more politically feasible.<sup>115</sup>

So while constitutional protections for some sorts of anti-homosexual actions may frustrate some parts of a truly far-reaching gay rights agenda,<sup>116</sup> they thereby facilitate other, more moderate parts. Constitutional guarantees, by being regulation-blocking, are also regulation-enabling, because they allow people to compromise on some intermediate positions without fear that this compromise will lead them down a slippery slope to much more radical positions.<sup>117</sup>

At the same time, this compromise-facilitating effect works only if people really trust the courts to enforce the constitutional guarantee.

---

subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true"). Yet even moderate critics of homosexuality might well be unmollified. What constitutes good-faith criticism is always a subjective matter: You may feel confident that your speech really is reasonable and in good faith, but worry that the legal system, which deeply disagrees with your ideas, will wrongly consider it extremist and beyond the pale.

113. See, e.g., *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992).

114. See Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, *supra* note 73; Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992), available in edited form at <http://www.law.ucla.edu/volokh/harass/substanc.htm>.

115. Naturally, many people might still oppose recognition of same-sex marriage, both by itself and for fear that it will lead down the slippery slope to other restrictions (employment discrimination laws, housing discrimination laws, and the like). Taking speech restrictions off the table doesn't eliminate this opposition, but it would likely decrease it.

116. For instance, they prevent prosecution of anti-homosexuality speakers, such as the ones that took place in Sweden and Canada. See *supra* notes 100-110.

117. See Volokh, *The Mechanisms of the Slippery Slope*, *supra* note 2, at 1047-48.

Many supporters of the Boy Scouts, for instance, feel strongly about the Scouts' right to insist that the role models it provides for children be heterosexual.<sup>118</sup> They also feel strongly about parents' rights to get help in child-rearing from groups that take such a position.<sup>119</sup> And they may therefore worry that gay rights successes in other fields will deny the Scouts and the parents their rights.

The 5-4 decision in *Boy Scouts of America v. Dale*<sup>120</sup> probably does relatively little (though it does something) to reassure these people. First, one new Court appointment could turn the decision around. Second, even while the decision is on the books, governments might be able to burden organizations like the Boy Scouts in ways short of total prohibition on sexual orientation discrimination, for instance by denying them equal access to government property and services.<sup>121</sup>

Likewise, while churches have a well-established right to discriminate as they please in hiring clergy, they have no such right as to most other employees, including teachers at religious schools who teach relatively nonreligious subjects.<sup>122</sup> Some state courts have held that landlords who have sincere religious objections to renting to unmarried heterosexual couples are entitled to exemption from housing discrimination laws,<sup>123</sup> and perhaps this will be applied to sexual orientation discrimination, too; but other state courts have rejected such claims.<sup>124</sup>

118. See, e.g., Donna Ragusa, Letter to the Editor, *Temple's Policy Excludes Many*, J. NEWS (Westchester County, N.Y.), Feb. 23, 2002, at 6B ("As a parent and Scout leader, I do not think the gay lifestyle is an acceptable role model for my sons, and I applaud the Boy Scouts for standing their ground on the issue instead of bending to political correctness.").

119. See, e.g., *supra* note 72.

120. 530 U.S. 640 (2000).

121. See *supra* note 71.

122. See, e.g., *DeMarco v. Holy Cross High School*, 4 F.3d 166, 171-72 (2d Cir. 1993) (holding that the First Amendment doesn't bar application of antidiscrimination law to the firing of a math teacher at Catholic school).

123. *State v. French*, 460 N.W.2d 2, 11 (Minn. 1990) (plurality opinion) (accepting a landlord's religious objection under a state constitutional religious accommodation regime); *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 718 (9th Cir. 1999) (accepting such an objection), *rev'd on procedural grounds*, 220 F.3d 1134, 1142 (9th Cir. 2000) (en banc); *Jasniewski v. Rushing*, 685 N.E.2d 622 (Ill. 1997) (reversing, with no opinion, a lower court's rejection of such a claim), *rev'g* 678 N.E.2d 743 (Ill. App. Ct. 1997); *Swanner v. Anchorage Equal Rights Comm'n*, 513 U.S. 979, 981-82 (1994) (Thomas, J., dissenting from denial of certiorari) (suggesting that the claim should have been accepted); *McCready v. Hoffius*, 586 N.W.2d 723 (Mich. 1998) (rejecting such a claim), *vacated and remanded*, 593 N.W.2d 545 (Mich. 1999) (appearing to reverse course, with little explanation).

124. *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274, 277, 284 (Alaska 1994); *Smith v. Fair Employment & Hous. Comm'n*, 913 P.2d 909, 914, 929 (Cal. 1996) (plurality opinion); *Att'y Gen. v. DeSilets*, 636 N.E.2d 233, 242-43 (Mass. 1994) (concluding that the result depends on factual findings, and remanding for such findings).

If Free Exercise Clause doctrine firmly exempted religious objectors from antidiscrimination laws, those objectors—and people who sympathize with them—might be more willing to accept steps (such as recognition of same-sex marriage) that may lead to such laws.<sup>125</sup> But the Clause hasn't been interpreted this way, so defenders of broad religious rights to disassociate from behavior that one believes to be sinful may feel the need to block any proposals that may eventually lead to encroachments on those rights.

## VI. CONCLUSION, INCLUDING WHY I STILL SUPPORT SAME-SEX MARRIAGE

I started writing this Article tentatively supporting same-sex marriage. Channeling sex and romantic love into long-term monogamous relationships is good for society. It reduces sexually transmitted disease. It provides a more stable home for children; and with or without marriage, same-sex couples will be rearing children, whether adopted or inherited from a previous heterosexual relationship. It helps people make long-term investments—for instance, moving so that a spouse can get a better job—with some confidence that the relationship will endure so that the short-term sacrifice can yield mutual long-term benefits. Almost all the reasons to value opposite-sex marriage seem to me to apply to same-sex marriage (the exception being that same-sex relationships can't result in accidental children, so same-sex couples may need marriage less than opposite-sex couples do).

Legal recognition of same-sex marriage is also good for society because it's good for the spouses, who are members of society. Marriage seems to on average make people happier. If it doesn't hurt others, and it helps the spouses, why not recognize it?

And legal recognition of same-sex marriage also does make the legal system more egalitarian. I don't view legally recognized marriage as a moral right, but as a government-provided benefit,<sup>126</sup> especially once the law has stopped requiring marriage as a prerequisite for the legality of sexual behavior.<sup>127</sup> It may well be legitimate for the law to be purely

---

125. I actually oppose such an interpretation of the Free Exercise Clause, though I think such a position is more plausible under state religious freedom statutes. See Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465 (1999).

126. See Earl M. Maltz, *Constitutional Protection For The Right To Marry: A Dissenting View*, 60 GEO. WASH. L. REV. 949 (1992). I realize that I part ways from current constitutional doctrine in this respect. See *Zablocki v. Redhail*, 434 U.S. 374 (1978).

127. *Zablocki* rested in part on the argument that “if appellee’s right to procreate means anything at all, it must imply some right to enter the only relationship in which the State of Wisconsin

instrumental in disbursing this benefit, and to provide it only to those relationships that especially help society.<sup>128</sup> Giving same-sex couples equal marriage rights is thus not an overriding moral imperative for me. But it is definitely a plus.

Finally, many of the attitude-altering effects that I described in this article go the other way, too: Legal discrimination against homosexuals can affect people's attitudes, just as equal treatment can. And it seems to me plausible that such effects are both bad and fairly severe. I don't believe that homosexuality is immoral, and I think the world would be a better place if people came to share that belief. Even if discrimination based on sexual orientation should be legally tolerated, I think it's generally bad; and certainly beating, taunting, and other abuse of homosexuals (adult and teenage) is bad. Continued legal discrimination against homosexual relationships might help contribute to attitudes that, in some people, cause such harms.<sup>129</sup>

Nor do I find most of the arguments against same-sex marriage to be strong. The claim that same-sex marriage will deter heterosexual marriage seems to me implausible; I just can't see a likely mechanism for it. It would seem odd that the permission of same-sex marriages among the approximately 3% of the population that is homosexual<sup>130</sup> would materially affect the behavior of the remaining 97%.<sup>131</sup>

---

allows sexual relations legally to take place," given that "Wisconsin punishes fornication as a criminal offense." *Zablocki*, 434 U.S. at 386, n.11.

128. I do view sexual autonomy, at least within broad boundaries, as a moral right, which is why I strongly opposed antisodomy laws, but I don't view government recognition of marriage the same way.

129. See Thomas, *supra* note 99, at 1482-91.

130. See MICHAEL ET AL., *supra* note 56, at 175.

131. Some argue that broadening marriage to include same-sex marriage would mean that "[i]nstead of a unique community, marriage becomes one more relationship," which may no longer be seen as "special" because "it has no necessary connection to children, or even to sex." Coolidge & Duncan, *supra* note 1, at 639. But I doubt that this will be so. People will likely continue to seek the label of marriage for certain relationships precisely because they see that particular relationship as "special"; they'll likely keep doing it overwhelmingly for sexual relationships; and many of the same-sex marriages will be entered into to provide a stable environment to raise children (whether adopted, biologically parented within the marriage by one of the spouses, or brought to the marriage by one of the spouses from a previous heterosexual relationship), precisely because marriage is such a good means for providing this sort of stable environment. Loving heterosexual couples who seek children aren't alienated from the relationship by the fact that some percentage of married couples marry for money rather than for love, or marry with no expectation and even no possibility of having children. I can't see how they'd be alienated from the relationship by the fact that a few percent of all marriages will be same-sex.

Similarly, some reason that recognizing same-sex marriages would mean "that traditional child-bearing and child-rearing messages would no longer be legally special. They would be treated as no better than a gay partnership, which to most people would constitute not only the denial of a deserved accolade but a calculated insult." Dent, *supra* note 1, at 617. But I'm skeptical that most

Legitimizing same-sex relationships might move some people toward homosexual relationships and away from heterosexual relationships. Plenty of people who have some homosexual tendencies describe themselves as bisexuals,<sup>132</sup> and at least some of them may be shifted towards predominantly homosexual behavior or predominantly heterosexual behavior by the norms that the law shapes and even the benefits that the law provides.

Yet I think this effect will likely be quite minor; people's sexual behavior, I suspect, just isn't that sensitive to symbolism such as this. Moreover, the benefit flowing from this effect would be minor, too. There are some instrumental reasons to prefer heterosexual relationships at least to male homosexual relationships—male homosexual conduct (though not female homosexual conduct) is, at least today, much more medically dangerous than heterosexual conduct.<sup>133</sup> But I suspect any public-health benefit of slight shifts away from male homosexuality would likely be exceeded by the public-health benefits of shifting more male homosexuals into stabler and more monogamous relationships.

A more serious objection is the Burkean one: Marriage has, throughout the history of our nation and our civilization, meant the marriage of a man and a woman. Polygamy has existed in pockets of our civilization, and in neighboring civilizations; but same-sex marriage has

people would indeed feel the recognition of same-sex marriages as an "insult" to their own (current or prospective) opposite-sex marriages; and I'm particularly skeptical that the result would be "to diminish regard for marriage" and thus to "[w]eaken[] the [i]ncentives to [m]arry." *Id.* at 617, 623.

132. EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 311 (1994) reports that of the 6.3% of men who said they felt at least some attraction to the same sex, over half (3.9%) said they felt some attraction to the opposite sex—2.6% mostly opposite-sex, 0.6% both sexes, 0.7% mostly same-sex. Of the 4.4% of women who said they felt at least some attraction to the same sex, nearly all (4.1%) said they felt some attraction to the opposite sex—2.7% mostly opposite-sex, 0.8% both sexes, 0.6% mostly same-sex.

133. See *CTRS. FOR DISEASE CONTROL, CASES OF HIV INFECTION AND AIDS IN THE UNITED STATES, 2003* (HIV/AIDS Surveillance Report, Vol. 15) tbl. 1, available at <http://www.cdc.gov/hiv/stats/2003SurveillanceReport/table1.htm> (reporting that 2/3 of new HIV cases in their database, which covers nearly 2/3 of all states, involved people who had engaged in homosexual contact). Given that roughly 4% of American men report having had homosexual experiences in the last 5 years, see *supra* note 56, we see that the relative risk of HIV acquisition for male homosexuals as opposed to male heterosexuals is  $(2/3 / .04) / (1/3 / .96) =$  nearly 50. The risk that a man who engages in homosexual behavior will contract AIDS thus appears to be nearly fifty times more than the risk for a man who engages only in heterosexual behavior. I realize that these numbers are for obvious reasons highly imprecise, and method of acquisition of HIV is not a perfect proxy for whether one is generally a homosexual or a heterosexual. But even if we discount the 50-fold ratio by a factor of as much as five, there's still a huge different in risk.

Good people, even ones who (unlike me) oppose homosexuality on moral grounds, must surely deeply regret the death and sickness caused by HIV and by other sexually transmitted diseases that are more common among male homosexuals than among heterosexuals. But regretting shouldn't lead to ignoring, if we are talking serious public policy analysis.

been virtually absent.<sup>134</sup> One shouldn't lightly tinker with such long-standing aspects of tremendously important institutions.<sup>135</sup> The liberalization of divorce and of social attitudes about premarital sex and premarital childbearing has, I think, shown this—while these changes have had definite benefits, it seems to me that they've also caused serious harms, at least enough to counsel deep caution about other changes in this field.<sup>136</sup> Yet I suspect that a change towards recognizing same-sex marriage is nonetheless unlikely to cause much harm, and may well cause much good: Such a change would directly affect only a small fraction of the population,<sup>137</sup> and seems likely to foster personal stability more than personal experimentation.

I therefore cautiously stand by my tentative judgment, even faced with the slippery slope risks that I've identified in Part V. I'm not a cheerleader for the broadening of antidiscrimination law. I think antidiscrimination law creates substantial litigation costs, litigation avoidance costs, and costs to private actors' freedom from government restraint (though it also helps increase workers' choices, diminish the real and serious feeling of insult that group-based discrimination often causes, and erode inefficient and harmful social norms). Still, on balance it seems to me that the potential slippery slope harms caused by recognizing same-

---

134. William Eskridge points to some historical examples of same-sex marriages, but these are very much exceptions—the limitation to opposite-sex marriages has been the overwhelming rule. See, ESKRIDGE, *supra* note 6, at 15-50.

135. See, e.g., Spalding, *supra* note 67, at 2, 4. By contrast with this historical near universality in Western culture, antimiscegenation laws were far less common: They were never common outside the United States, Dent, *supra* note 1, at 615; at the time of *Loving v. Virginia*, only sixteen states had such laws. 388 U.S. at 6 (1967); and even before the end of World War II, only about thirty states had such laws, ESKRIDGE, *supra* note 6, at 157-59 & n. c.

136. See Douglas W. Allen, *An Economic Assessment of Same-Sex Marriage*, <http://www.sfu.ca/~allen/gay.pdf>, which lays out (in my view persuasively) some of the social costs of no-fault divorce, and then proceeds (in my view unpersuasively, see *infra* note 137) to argue that recognition of same-sex marriage could impose similar costs.

137. The availability of no-fault divorce potentially affects all spouses, including those who don't want to take advantage of such a divorce: Among other things, even people who are committed to staying in a marriage for life must face the possibility that the other person can easily exit the marriage. Moreover, the availability of relatively easy divorce can even affect people's behavior long before they marry; some women, for instance, might decide to postpone marriage and childbearing until they can become educated and professionally successful enough that they could afford to raise their children if their husband divorces them.

The availability of same-sex marriage is much less likely to affect those who don't want to take advantage of same-sex marriage. A person who's marrying a definitely heterosexual partner needn't worry that the heterosexual partner will flee into a same-sex marriage. And even a person who's marrying a bisexual will probably not be much affected by the availability of same-sex marriage. Whether one's wife will leave one for another woman may possibly be affected by the legality and social acceptability of lesbianism; but it's unlikely to be much affected by the legal recognition of lesbian marriages as such.

sex marriage, while plausible and potentially significant, are not very likely; their costs, discounted by their improbability, are thus exceeded by the more direct benefits.

But perhaps this is because I won't have to bear the costs of anti-discrimination law. I don't care whether my tenants have marital sex, premarital sex, extramarital sex,<sup>138</sup> heterosexual sex, homosexual sex, or no sex at all. I don't care whether a teacher at my child's school or a scoutmaster at my child's scouting group is homosexual.

Perhaps I would see the slippery slope risk as much more menacing if these things did matter to me, especially for religious reasons. I've tried to consider the concerns of people who disagree with me on this, as well as the concerns of same-sex couples to whom the value of same-sex marriage may be much more urgent and concrete than it is to me. But I might well have failed.

And it seems to me that voters, legislators, policy analysts, and judges who disagree with my views are entitled to make up their own minds on these matters, and to do so with an understanding of the potential indirect consequences as well as the direct ones. As I explained in Part III, I think it's permissible to try to stymie my fellow citizens' actions through strategic decisionmaking. But as an academic, I think it's my job to inform them about their own strategic decisionmaking options.

Slippery slope risks are real risks, in this area as well as in others. We shouldn't exaggerate them, but neither should we pooh-pooh them. I hope that this Article has helped expose the mechanisms that may cause such risks, and helped people evaluate the risks for themselves.

---

138. I think adultery is generally immoral, but I don't feel that I am sinning, or violating my moral code, by renting out the apartment in which the adultery takes place.