

THE MECHANISMS OF THE SLIPPERY SLOPE

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In other countries [than the American colonies], the people . . . judge of an ill principle in government only by an actual grievance; here they anticipate the evil, and judge of the pressure of the grievance by the badness of the principle. They augur misgovernment at a distance and snuff the approach of tyranny in every tainted breeze.

— Edmund Burke, *On Moving His Resolutions for Conciliation with the Colonies*.

I. INTRODUCTION

You are a legislator, a voter, a judge, a commentator, or an advocacy group leader. You need to decide whether to endorse decision A, for instance a partial-birth abortion ban, a limited school choice program, or a gun registration mandate.

You think A might be a fairly good idea on its own, or at least not a very bad one. But you're afraid that A might eventually lead other legislators, voters, or judges to implement policy B, which you strongly oppose — for instance, broader abortion restrictions, an extensive school choice program, or a total gun ban.

What does it make sense for you to do, given your opposition to B, and given your awareness that others in society might not share your views? Should you heed James Madison's admonition that "it is proper to take alarm at the first experiment on our liberties," and oppose a decision that you might have otherwise supported were it not for your concern about the slippery slope? Or should you accept the immediate benefits of A, and trust that even after A is enacted, B will be avoided?

Slippery slopes are, I will argue, a real cause for concern, as legal thinkers such as Madison, Jackson, Brennan, Harlan, and Black have recognized, and as our own experience at least partly bears out: we can all identify situations where one group's support of a first step A eventually made it easier for others to implement a later step B that might not have happened without A (though we may disagree about exactly which situations exhibit this quality). Such an A may not have logically required the corresponding B, yet for political and psychological reasons, it helped bring B about.

But, as thinkers such as Lincoln, Holmes, and Frankfurter have recognized, slippery slope objections can't always be dispositive. We accept, because we must, some speech restrictions, searches and seizures, and other

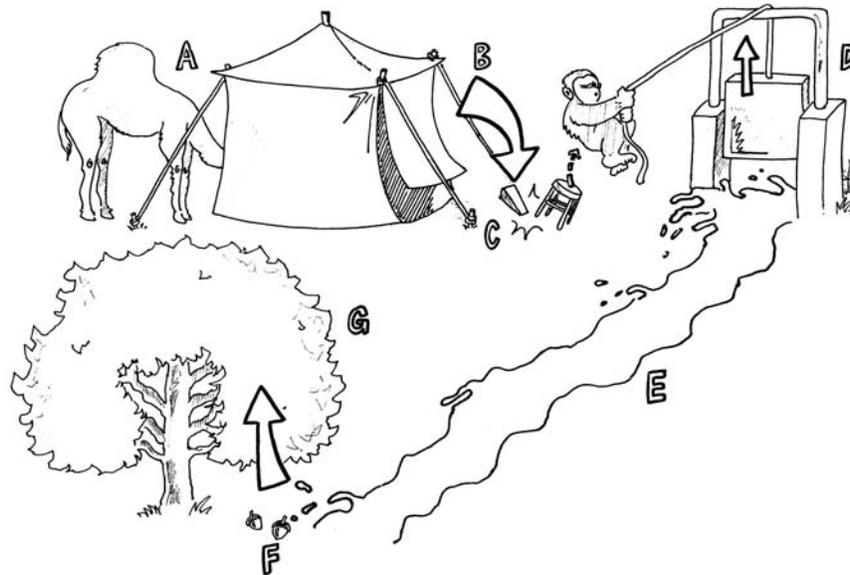
regulations. Each first step involves risk, but it is often a risk that we need to take.

This need makes many people impatient with slippery slope arguments. The slippery slope argument, opponents suggest, is the claim that “we ought not make a sound decision today, for fear of having to draw a sound distinction tomorrow.”¹ Exactly why, for instance, would accepting (for instance) a restriction on “ideas we hate” “sooner or later” lead to restrictions on “ideas we cherish”?² If the legal system is willing to protect the ideas we cherish today, why won’t it still protect them tomorrow, even if we ban some other ideas in the meantime? And even if one thinks slippery slopes are possible, what about cases where the slope seems slippery both ways — where both alternative decisions might lead to bad consequences?

My aim here is to analyze how we can sensibly evaluate the risk of slippery slopes, a topic that has been surprisingly underinvestigated.³ I think the most useful definition of a slippery slope is one that covers all situations where decision A, which you might find appealing, ends up materially increasing the probability that others will bring about decision B, which you oppose.

If you are faced with the pragmatic question “Does it make sense for me to support A, given that it might lead others to support B?,” you should consider all the mechanisms through which A might lead to B, whether they are logical or psychological, judicial or legislative, gradual or sudden. You should consider these mechanisms whether or not you think that A and B are on a continuum where B is in some sense more of A, a condition that would in any event be hard to define precisely.

You should think about the entire range of possible ways that A can change the conditions — whether those conditions are public attitudes, political alignments, costs and benefits, or what have you — under which others will consider B. The slippery slope is a familiar label for many instances of this phenomenon: when someone says “I oppose partial-birth abortion bans because they might lead to broader abortion restrictions,” or “I oppose gun registration because it might lead to gun prohibition,” the common reaction is “That’s a slippery slope argument.”



Camel (A) sticks his nose under the tent (B), which collapses, driving the thin end of the wedge (C) to cause monkey to open floodgates (D), letting water flow down the slippery slope (E) to irrigate acorn (F) which grows into oak (G). [Illustration by Eric Kim, from author's idea.]

These mechanisms will be the focus of this article. Slippery slopes, camel noses, thin ends of wedges, floodgates, and acorns are metaphors, not analytical tools. The article aims to describe the real-world paths that the metaphors represent — to provide a framework for analyzing and evaluating slippery slope risks by focusing on the concrete means through which A might possibly lead others to support B. This analysis should also help people construct slippery slope arguments (and counterarguments); but the primary goal is understanding the means through which slippery slopes may actually operate, and not simply the rhetorical structure of slippery slope arguments. Specifically, I want to make the following claims, which are closely related but worth highlighting separately:

1. Though the metaphor of the slippery slope suggests that there's one fundamental mechanism through which the slippage happens, there are actually many different ways that decision A can make decision B more likely. Many of these ways have little to do with the mechanisms that people often think of when they hear the phrase "slippery slope": development by analogy, by changes in people's moral or empirical attitudes, or by "desensitization" of people to earlier decisions.

To illustrate this briefly, consider the claim that gun registration (A) might lead to gun confiscation (B). Setting aside whether we think this slippery slope is likely — and whether it might actually be desirable — it

turns out that the slope might happen through many different mechanisms, or combinations of mechanisms:

- a. Registration may *change people's attitudes about the propriety* of confiscation, by making them view gun possession not as a right but as a privilege that the government grants and thus may deny.
- b. Registration may be seen as a *small enough change* that people will reasonably ignore it (“I’m too busy to worry about little things like this”), but when aggregated with a sequence of other small changes, registration might ultimately lead to confiscation or something close to it.
- c. The enactment of registration requirements may create *political momentum* in favor of gun control supporters, thus making it easier for them to persuade legislators to enact confiscation.
- d. People who don’t own guns are more likely than gun owners to support confiscation. If registration is onerous enough, over time it may discourage some people from buying guns, thus decreasing the fraction of the public that owns guns, decreasing the *political power* of the gun-owning voting bloc, and therefore increasing the likelihood that confiscation will become politically feasible.
- e. Registration may *lower the cost* of confiscation — since the government would know which people’s houses to search if the residents don’t turn in their guns voluntarily — and thus make confiscation more appealing to some voters.
- f. Registration may trigger the operation of *another legal rule* that makes confiscation easier and thus more cost-effective: if guns weren’t registered, confiscation would be largely unenforceable, since house-to-house searches to find guns would violate the Fourth Amendment; but if guns are registered some years before confiscation is enacted, the registration database might provide probable cause to search the houses of all registered gun owners.

In the registration-to-confiscation scenario, only the latter two mechanisms seem fairly plausible to me; in other scenarios, others may be more plausible. And there are of course mechanisms that may work in the opposite direction, so that decision A may under some political conditions make decision B *less* likely. But being aware of all these phenomena, including the several kinds of slippery slope mechanisms, can help us (as citizens and policymakers) think through all the possible implications of some decision A — and can help us (as advocates) make more concrete and effective arguments for why A would or would not lead to B.

2. As the above example illustrates, slippery slopes are not limited to *judicial-judicial* ones, where one judicial decision leads to another through the force of judicial precedent. They can also be *legislative-legislative*, where one legislative decision leads to another (Madison’s concern in his famous *Remonstrance Against Religious Assessments*), *judicial-legislative*, or *legislative-judicial*. (Much of this analysis may also be applicable to administrative decisions or executive decisions, but I have not focused closely on those matters.)

3. Slippery slopes may occur *even when a principled distinction can be drawn* between decisions A and B. The question shouldn't be "Can we draw the line between A and B?," but rather "Is it likely that *other* citizens, judges, and legislators will draw the line there?"

More broadly, the question ought not be "How should society (or the legal system) decide whether to implement A?" Societies are composed of people who have different views, so one person or group of people may want to oppose A for fear of what *others* will do if A is accepted. And these others need not constitute a majority of society: slippery slopes can happen even if A will lead only a significant minority of voters to support B, if that minority is the swing vote.

4. In a stylized world where voters and legislators are fully rational, have unlimited time to invest in political decisions, and have single-peaked preferences (see section II.B), slippery slopes are unlikely. In such a world, if B is unpopular today, it will still be unpopular tomorrow, whether or not A is enacted; enacting A therefore won't cause any slippage to B. The skepticism about slippery slopes may come partly from the common tendency to assume that we are living in this stylized world, an assumption that is often a sensible first-order approximation.

It turns out, though, that the mechanisms of many slippery slopes are closely connected to *phenomena that contradict these simplifying assumptions*: bounded rationality, rational ignorance, heuristics that people develop to deal with their bounded rationality, expressive theories of law, path dependence, irrational choice behaviors such as context-dependence, and multi-peaked preferences. And because these phenomena are common in the real world of voters, legislators, and judges, slippery slopes are more likely than one might at first think.

5. The existence of the slippery slope creates what I call the *slippery slope inefficiency*: decision A might itself be socially beneficial, and many people might agree that it's beneficial; but some swing voters' concern that A will lead to B might prevent decision A from being implemented. One corollary of the inquiry "How likely is A to lead to B?" is the inquiry "How can we make it less likely that A will lead to B, so that we can reach agreement on A despite some people's concern about B?" I propose a few hypotheses along these lines.

First, substantive constitutional limits on government power can be regulation-enabling, not just regulation-frustrating. A non-absolute constitutional right to get an abortion, to speak, or to own guns can free people to vote for small burdens on the right with less concern that these small steps will lead to broader constraints (see section II.A.6).

Second, constitutional equality rights — under the Equal Protection Clause, the Free Speech Clause, or other provisions — are themselves means by which decision A may lead to decision B, because a court might conclude that implementing A without implementing B would violate the equality rule. Deferential equality tests, such as the current weak rational basis test that applies to many equal protection claims, can thus prevent this type of slippery slope (see p. 29).

Third, legislators may sometimes decrease the risk of certain kinds of slippery slopes — such as political momentum slippery slopes — by enacting proposal A as part of a compromise where each side gets some change in the current policy, so that neither side is seen as the clear winner (see section VI.B).

6. Recognizing slippery slope concerns might lead us to *modify the rules of thumb we use* for evaluating the potential downstream effects of proposals. For example, people often urge others not to make a big deal out of small burdens, and argue that only the foolishly intransigent will fight such modest experiments — an argument often levied against abortion rights or gun rights “extremists.”

But the more we believe that one step now may lead to other steps later, the more we may view such experimentation with concern. We might therefore adopt a rebuttable presumption against even small changes, under which we oppose any proposal A (in certain areas) unless we see it as having great benefits, because even a seemingly modest restriction has the added cost of increasing the chances of undesirable broader restrictions B in the future. And this concern, if it can be persuasively articulated, can provide a response to the “You’re an extremist” argument.

Likewise, we are often cautioned against ad hominem arguments and against impugning our political opponents’ motives, and there is much to these cautions. Nonetheless, the existence of some slippery slope mechanisms suggests that what one might call an ad hominem heuristic — a policy of presumptively opposing even minor proposals made by certain groups that also support broader proposals, unless the proposals clearly seem to be very good indeed — may be more pragmatically rational than one might think (see sections II.F and IV.B).

7. These heuristics — rules of thumb that people can follow when they lack the time and ability to conduct an exhaustive logical and empirical analysis — may also *shed light on the behavior of advocacy groups* such as the ACLU or the NRA. Public consciousness of the possibility of slippage may help prevent the slippage, either by preventing the first steps or by building opposition to the subsequent ones. One role of advocacy groups is to alert the public to slippery slope risks, partly by trying to instill the heuristics mentioned above. This strategy can be dangerous for advocacy groups because it may make them seem extremist. But, as I discuss throughout and summarize in section VII.B, real slippery slope risks may make such a strategy necessary.

8. Thinking about legislative slippery slopes illuminates two aspects of judicial decisionmaking: *reliance on precedent* (where judicial-judicial slippery slopes may appear) and *deference to the legislature* (where legislative-judicial slippery slopes may operate). These parts of the judicial process, it turns out, are closely connected to analogous processes in legislative decisionmaking (see sections II.D.4.b, III.D, and IV.C).

9. Thus, *slippery slopes present a real risk* — not always, but often enough that we cannot lightly ignore the possibility of such slippage.

* * *

The analysis that follows explores the different kinds of slippery slopes that I have identified, illustrating each with a variety of hypotheticals based on real controversies (Parts II through VI). I hope that readers will find at least some of these illustrations plausible, and will conclude that slippery slopes are possible (even if not certain) in some of these situations. Part VII then briefly summarizes how we might apply this analysis to (1) evaluating the likelihood of slippage, (2) crafting slippery slope arguments and counterarguments, (3) thinking about ideological advocacy groups, (4) avoiding the slippery slope inefficiency, (5) understanding the operation of judicial precedent, and (6) designing future econometric, historical, or psychological research about slippery slopes.

II. COST-LOWERING SLIPPERY SLOPES AND OTHER MULTI-PEAKED PREFERENCES SLIPPERY SLOPES

A. Cost-Lowering Slippery Slopes

1. An Example. — Let's begin with the slippery slope question mentioned in the Introduction: does it make sense for someone to oppose gun registration (A) because registration might make it more likely that others will eventually enact gun confiscation (B)? A and B are logically distinguishable, but can A nonetheless help lead to B?

Today, when the government doesn't know where the guns are, gun confiscation would require searching all homes, which would be very expensive; relying heavily on informers, which may be unpopular; or accepting a probably low compliance rate, which may make the law not worth its potential costs. And searching all homes would be both financially and politically expensive, since the searches would incense many people, including some of the non-gun-owners who might otherwise support a total gun ban.

But if guns get registered, searching the homes of all registrants who don't promptly surrender their guns (or at least certain types of guns) would become both financially and politically cheaper. Confiscation has eventually followed gun registration in England, New York City, and Australia. While it's impossible to be sure that registration helped cause confiscation in those cases, it seems likely that people's compliance with the registration requirement would make confiscation easier to implement, and therefore more likely to be enacted. And Pete Shields, founder of the group that became Handgun Control, Inc., openly described registration as a preliminary step to prohibition, though he didn't describe exactly how the slippery slope mechanism would operate.

Under some conditions, then, legislative decision A may lower the cost of making legislative decision B work, thus making decision B cost-justified in the decisionmakers' eyes. There's no requirement here that A be seen as a precedent, or that A change anybody's moral or pragmatic at-

titudes — only that it lower certain costs, in this instance by giving the government information.

2. *A Diverse Preferences Explanation for Cost-Lowering Slippery Slopes.* — The cost-lowering slippery slope is driven by voters' having a particular mix of preferences; a numerical example might help show this.

Consider a hypothetical proposal to put video cameras on street lamps in order to help deter and solve street crimes. The plan obviously isn't perfect, but it seems promising: smart criminals will be deterred and dumb ones will be caught.

On its own, the plan might not seem that susceptible to police abuse, at least so long as (for instance) the tapes are recycled every day and the cameras aren't linked to face-recognition software. Under those conditions, the cameras might be effective for fighting low-level street crime, but they wouldn't make it that easy for the police to track the government's enemies. People might therefore support installing these cameras (decision A), even if they would oppose implementing face-recognition software or permanently archiving the tapes (decision B). (I take no position here on which view is substantively best; I am only describing how some people might act to have the best chance of implementing their own preferences.)

But once the legislature implements A and the government invests money in installing thousands of cameras, wiring them to central video recorders or to phone lines, and protecting them from vandals, implementing B becomes much cheaper economically, and thus easier politically. Imagine that, *if* money were no object, voters would have the following (highly stylized) mix of opinions:

- 20% of the public would oppose even decision A, because they don't want the police videotaping street activity at all;
- 20% of the public would support A but oppose B, because they like videotaping only if tapes are quickly recycled and no face-recognition software is used;
- 60% of the public would support B, because they like police videotaping more generally, and would certainly support A if they can't get B.

And imagine that 30% of the second and third groups would nonetheless oppose decisions A and B because they cost too much. The mix of preferences would thus be:

Group #	Preference	Would support in principle <i>and</i> given the cost (e.g., if there are no cameras yet, and we're in position 0)	Would support in principle, if there were no extra cost (e.g., if the cameras are already up, because A was already implemented)
I	0: no cameras	20%	20%
II	A: cameras, no face-recognition	14%	20%

	and no archiving		
III	B: cameras, with face-recognition and archiving	42%	60%

If the people in group II focus only on the vote on A, members of that group who don't mind the financial cost will vote "yes"; and with group II's $20\% \times 70\%$ + group III's $60\% \times 70\% = 56\%$ of the vote, A would be enacted. (I assume 56% support suffices for the proposal to win — not certain, but likely.) But a few years later, when someone suggests a move to B at no extra cost, that proposal would also be enacted, since 60% of the public would now support it, given that there's no more fiscal objection.

Thus, the group II people must make a tough choice: do they want A so much that they're willing to accept the risk of B as well, or are they so concerned about B that they're willing to reject A? The one item that is off the table is the one group II most prefers, which is A alone with no danger of B. The cost-lowering slippery slope has eliminated that possibility, at least unless there's a constitutional barrier to B or unless the government intentionally makes B expensive to implement, for instance by buying cameras that are incompatible with the technology needed for B.

This is, of course, just a hypothetical; obviously, if people's preferences break down differently, the slippery slope might not take place. But it shows that this sort of slippery slope *may* happen under plausible conditions — and that people who support A but not B should therefore consider the possibility of slippage.

3. *Cost-Lowering Slippery Slopes, the Costs of Uncertainty, and Learning Curves.* — The above example involves the cost of tangible items: cameras. But another cost of any new project is the cost of early implementation errors.

People are often skeptical of new proposals (such as Social Security privatization or school choice) on these very grounds. But if the government implements a modest version of the proposal (A), and then after some years of difficulty, the modest version is fine-tuned to work fairly well, some voters might become more confident that the government — armed with this new knowledge derived from the A experiment — can also effectively implement a much broader step B.

For those who support this broader B in principle, this is good: the experiment with A will have led some voters to have more confidence that B would be properly implemented, and thus made enacting B more politically feasible. But, as in the cameras example, those who support A but oppose B in principle might find that their voting for A has backfired.

Some of A's supporters might therefore decide to vote strategically against A, given the risk that A would lead to B. The government, they might reason, ought not learn how to efficiently do bad things like B (bad in the strategic voter's opinion), precisely because the knowledge can make it more likely that the government will indeed do these bad things.

4. *Legal-Cost-Lowering Slippery Slopes.* — Let us briefly revisit the argument that gun registration may increase the chances of gun confiscation. Today, gun confiscation would be hard to enforce, partly because of the Fourth Amendment. Searching all homes for some or all kinds of guns would be unconstitutional, a classic impermissible general search. This is a cost of confiscation — not a financial cost, but a legal cost that keeps confiscation from being performed efficiently.

If, however, guns are first successfully registered, and are later banned, a house-to-house search of the homes of registered owners who haven't turned in their guns may well become constitutional. Your registration as the owner of a weapon may be seen as probable cause to believe that you have it; and one place you're likely to be keeping it is your home. This isn't a certainty, but a magistrate may find that it suffices for probable cause and issue a search warrant that would let the police search your home for the gun.

Again, this scenario doesn't require us to assume that registration (decision A) will be seen as morally indistinguishable from confiscation (decision B), that registration will set a precedent, or that registration will desensitize voters to confiscation. Decision A can make B more likely even if it doesn't change a single voter's, legislator's, or judge's mind about the moral propriety of gun prohibition or confiscation. Rather, the legally significant effect of registration can change the practical cost-benefit calculus surrounding prohibition, thus making prohibition more probable (though of course not certain). Of course, decision B might not be made even if A makes it easier; in some places, voters would oppose handgun bans even if they could be cheaply and legally enforced. But in other places, handgun bans may be popular — handguns are already largely banned in Washington, D.C. and Chicago, for instance — and if gun registration makes confiscation cheaper, it may also make confiscation more likely.

5. *Being Alert to the Risk of Cost-Lowering Slippery Slopes.* — This suggests that decisionmakers — legislators, voters, advocacy groups, or opinion leaders — should consider how proposed government actions would change the costs of implementing future actions, in particular:

- a. How would this government action provide *more information* to the government (for example, who owns the guns), and what other actions (for example, seizing the guns) would be made materially cheaper by the availability of this information?
- b. How would this government action provide *more tools* to the government (for example, video cameras), and what other actions (for example, automated face recognition or videotape archiving) would be made cheaper by the existence of these tools?
- c. How would this government action provide *more experience* to the government in doing certain things, and what other actions would this extra experience make less risky and thus more politically appealing?
- d. How would this government action provide *more legal power* to the government (for example, the power to search people's homes), and

what other actions would this extra grant of power make possible or make easier?

Opponents of B thus can't simply console themselves with the possibility that a line between A and B *can logically* be drawn, dismiss the slippery slope concern as being that "we ought not make a sound decision today, for fear of having to draw a sound distinction tomorrow," or argue that

[s]omeone who trusts in the checks and balances of a democratic society in which he lives usually will also have confidence in the possibility to correct future developments. If we can stop now, we will be able to stop in the future as well, when necessary; therefore, we need not stop here yet.⁴

There's a different "we" involved: those who support A but oppose B should fear that if *they* vote for A now, such a vote may lead *others* to vote for B later — and that though a logical line could be drawn between A and B (yes cameras, no archiving, no face recognition), most voters will decide to draw the line on the far side of B rather than on the near side. Even those who generally trust that their society is democratic can therefore rationally oppose a decision that they like on its own, for fear that it will lower the cost of another decision that they dislike and thus make that decision more likely.

6. *Constitutional Rights as Tools for Preventing the Slippery Slope Inefficiency.* — The examples above illustrate the slippery slope inefficiency: even if most voters believe decision A (for example, gun registration) is good policy on its own — even some gun rights enthusiasts might think that registration may help solve some crimes without by itself materially burdening people's ability to defend themselves — A may be rejected because enough of those voters fear that A will lead to B (gun prohibition), which they oppose. And the examples point to one possible way of preventing the inefficiency: the recognition of constitutional rights that would prevent B, such as a non-absolute right to own guns.⁵ Once this constitutional precommitment makes B much less likely, opponents of B have less to fear (to the extent they trust the courts) and can therefore support A or at least oppose it less.

Constitutional constraints are thus not only legislation-frustrating (because they prohibit total bans on guns), but also in some measure legislation-facilitating (because some voters may support more modest gun controls, once they stop worrying that these controls will lead to a total ban). Changing a constitution to secure a right may therefore sometimes help both those who want to moderately protect the right and those who want to moderately restrict it — though much depends on how broad the right would be, and on how much political power the various groups have. Consider the key arguments for the enactment of the Constitution itself: Federalists proposed various checks and balances in the Constitution, and eventually the Bill of Rights, to alleviate concerns that creating even a small federal government would start the country down a slippery slope toward a much more powerful federal government. We have indeed slipped down the slope in large measure, but the Constitution likely did slow the slide, and

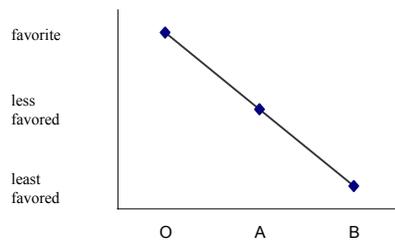
made possible coalitions that supported various sensible decisions A, because all coalition members could be confident that the constitutional regime would for a while block the potential downslope results B that some members disliked.

On the other hand, as Part III will describe, a constitutional right may also have *attitude-altering* effects that help cause slippage to greater and greater protection for the right. Judicial recognition of a right to bear arms may thus facilitate some compromise gun control proposals (A) because it will diminish some voters' concerns that A will lead to a total gun ban (B) — but recognizing the right to bear arms might eventually lead to A being undone, and to the law shifting back closer to the initial position 0, as judges or voters are influenced by the attitude-shaping force of the constitutional right. The long-term effects of any decision are not easy to predict, though understanding the slippery slope mechanisms should help us investigate the likelihood of such effects.

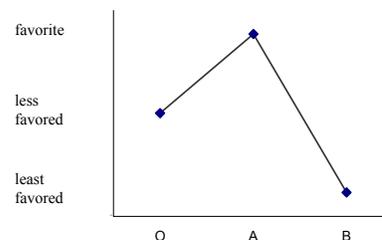
B. Cost-Lowering Slippery Slopes as Multi-Peaked Preferences Slippery Slopes

Cost-lowering slippery slopes, it turns out, are a special case of a broader mechanism — the multi-peaked preferences slippery slope.

In many debates, one can roughly divide the public into three groups: traditionalists, who don't want to change the law (they like position 0); moderates, who want to shift a bit to position A; and radicals, who want to go all the way to position B. What's more, one can assume "single-peaked preferences": both traditionalists and radicals would rather have A than the extreme on the other side. We can represent the preferences as follows, which is why the preferences are called "single-peaked":



Single-peaked preference for one extreme

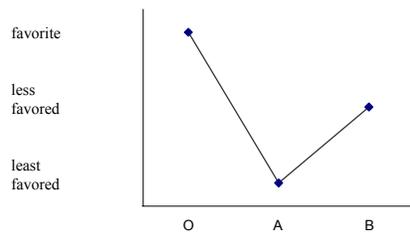


Single-peaked preference for the intermediate position

If neither the traditionalists nor the radicals are a majority, the moderates have the swing vote, and thus needn't worry much about the slippery slope. Say that 30% of voters want no street-corner cameras (0), 40% want cameras but no archiving and face recognition (A), and 30% want cameras with archiving and face recognition (B). The moderates can join the radicals to go from 0 to A; and then the moderates can join the traditionalists to stay at A instead of going to B. So long as people's attitudes stay fixed (we'll relax this assumption in Part III), there's no slippery slope

risk: those who prefer A can vote for it with little danger that A will enable B.

But say instead that some people prefer 0 best of all (they'd rather have no cameras, because they think installing cameras costs too much), but if cameras were installed they would think that position B (archiving and face recognition) is better than A (no archiving and no face recognition): "If we spend the money for the cameras," they reason, "we might as well get the most bang for the buck." This is a multi-peaked preference — these people like A *least*, preferring either extreme over the middle.



Multi-peaked preference

Let's also say that shifting the law from one position to another requires a mild supermajority, say 55%; a mere 50%+1 vote isn't enough because the system has built-in brakes (such as the requirement that the law be passed by both houses of the legislature, the requirement of an executive signature, or a more general bias in favor of the status quo). We can thus imagine the public or the legislature split into several different groups, each with its own policy preferences and its own voting strength.

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				"As little surveillance as possible, either (1) as a matter of principle, or (2) because we prefer surveillance level A as a matter of principle, but think cameras are too expensive"	26% (20% for (1) + 6% for (2))
2	0	B	A		✓		"Cameras are too expensive, but if the money is spent, might as well get as much surveillance for it as possible"	18%
3	A	0	B	✓			"We prefer moderate surveil-	14%

							lance level A, and definitely no more”	
4	A	B	0	✓		✓	“We prefer surveillance level A, and definitely no less”	0% (in this example)
5	B	0	A			✓	“We want maximum surveillance, but if we can’t have that, we’d rather have no surveillance instead of A”	0%
6	B	A	0	✓	✓	✓	“We want maximum surveillance, and cost isn’t a concern”	42%

This preference breakdown is exactly the same as in the simpler table on p. 1042; and, as in that table, the direct 0→B move fails, because it gets only 42% of the vote (group 6), but the 0→A move succeeds with 56% of the vote (groups 3 and 6) and then the A→B move succeeds with 60% of the vote (groups 2 and 6). Any proposed B→0 move will fail because group 2, which originally preferred 0 over B, no longer prefers it, since the money has already been spent and the cameras bought. As before, members of group 3 must now regret their original vote for the 0→A move, because that vote helped bring about result B, which they most oppose.

Multi-peaked preferences thus make the moderate position A politically unstable — which means that implementing A can grease the slope for a B that otherwise would have been blocked.

C. More Multi-Peaked Preferences: “Enforcement Need” Slippery Slopes

As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. . . . [T]he First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.

— *W. Va. State Bd. of Educ. v. Barnette* (1943) (Jackson, J.).

There are many possible multi-peaked preferences slippery slopes besides the cost-lowering slippery slope; one example is the enforcement need slippery slope.

Imagine marijuana is legal, and the question is whether to ban it. Some prefer to keep it legal (0), others want to ban it but enforce the law lightly (A), and others want to ban it and enforce the law harshly, with intrusive searches and strict penalties (B).

But say also that some people would prefer 0 best of all (they’d rather keep marijuana legal), but once marijuana is outlawed they would think that position B (strict enforcement) is better than A (lenient enforcement). “Laws should be enforced,” they might argue, “because not enforcing them only teaches people that law is meaningless and that they can violate all

sorts of laws with impunity.” Obviously, if they thought the law was extremely bad, they would have preferred that it be flouted with impunity rather than strictly enforced. But let’s assume they think the law is only slightly unwise, whereas leaving such a law unenforced is very unwise. We again see a multi-peaked preference — people like A *least*, preferring either extreme over the middle.

Let’s assume, as before, that it takes at least a 55% supermajority to shift from the status quo, and let’s assume — again, as a stylized hypothetical, though I hope a plausible one — the following group breakdown:

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				“Restrict marijuana as little as possible”	10%
2	0	B	A		✓		“Restricting marijuana is bad, but contempt for the law is even worse”	20%
3	A	0	B	✓			“A little restriction is good, but hardcore enforcement is very bad”	20%
4	A	B	0	✓		✓	“A little restriction is good, and having no restriction is very bad”	10%
5	B	0	A		✓	✓	“Marijuana is bad, but contempt for the law is even worse”	10%
6	B	A	0	✓	✓	✓	“Marijuana is bad; do as much as you can to stop it”	30%

Given these preferences, a proposal to shift from position 0 (legal marijuana) to B (a sternly enforced marijuana ban) would fail: it would get the votes of groups 4, 5, and 6 — only 50%. But a proposed 0→A shift (to a weakly enforced ban) would succeed, with a 60% supermajority coming from groups 3, 4, and 6. Once A is enacted, a proposed A→B shift would also succeed, with the votes of groups 2, 5, and 6, also 60%. And then shifting from B back to 0 would be impossible, since such a proposal would only get the votes of groups 1, 2, and 3, just 50%.

In this hypothetical, decision A *wouldn't change anyone's underlying attitudes*; rather, it would lead one small but important swing group (the

20% of the voters in group 2) to vote for B, based on their preexisting preference for B over A, even though that group would have opposed B had the status quo remained at 0. Even when only a minority of voters (30%, groups 2 and 5) exhibits multi-peaked preferences, and an even smaller minority takes the enforcement need view that “we don’t much like the law but we dislike people flouting the law even more” (20%, group 2), moving to A can cause slippage to B.

The lesson, then, is for the moderates in group 3, who like A but worry that their support for A would eventually help bring about B, which they dislike most of all. They should ask themselves: “What fraction of our current anti-B coalition will start backing B if we enact A?” If the answer looks high enough — as it is in this hypothetical, and as it may be in many (though far from all) real-world scenarios — group 3 members may want to resist the original move to A, even if they like A on its own.

This analysis suggests that when people consider a proposal A, they should also think systematically about:

1. what enforcement problems might arise after A is enacted;
2. what new proposal B might become more popular as a means of fighting these enforcement problems;
3. whether this new B would be harmful enough and likely enough that the danger of B being enacted justifies opposing A; and
4. whether there’s some way of minimizing the risks that B will come about, perhaps by coupling A with some up-front assurances that B will be rejected.

D. Equality Slippery Slopes and Administration Cost Slippery Slopes

1. *The Basic Equality Slippery Slope.* — Multi-peaked slippery slopes can happen when a significant group of people prefers both extremes to the compromise position. One such situation is when A without B seems unfairly discriminatory. Consider the following example:

- Position 0 is no school choice: the state funds only public schools.
- Position A is secular school choice: the state funds public schools but also gives parents vouchers that they can take to private secular schools but not to religious schools.
- Position B is total school choice: the state funds public schools but also gives parents vouchers that they can take to any private school, secular or religious.

And say that voter preferences break down just as in the previous example:

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				“As little school choice as possible”	10%

2	0	B	A		✓		“No school choice is best, but better total school choice than discriminatory exclusion of religious schools”	20%
3	A	0	B	✓			“Secular school choice is better than none, but definitely no inclusion of religious schools”	20%
4	A	B	0	✓		✓	“Secular school choice is best, but we can live with including religious schools”	10%
5	B	0	A		✓	✓	“Total school choice is best, but better no school choice than discriminatory exclusion of religious schools”	10%
6	B	A	0	✓	✓	✓	“As much school choice as possible”	30%

Because 30% of the voters (groups 2 and 5) have multi-peaked preferences driven by their hostility to discrimination against religious schools, there is an equality slippery slope. Total school choice would have gotten only 50% of the vote (groups 4, 5, and 6) if it had been proposed without the intermediate step of secular school choice. But proceeding one step at a time, we have a 60% vote for secular school choice (groups 3, 4, and 6), and then a 60% vote for total school choice (groups 2, 5, and 6), driven largely by group 2's strong preference for equality.

Once the system has gone all the way to total school choice, group 3 will likely regret its original support for A (secular school choice). Total school choice is the worst option from group 3's perspective, and yet it was group 3's support for the halfway step of secular school choice that made total school choice possible.

This example illustrates that an equality slippery slope can happen even when A and B are distinguishable. Here, a majority of voters concludes that A and B needn't be treated equally — but the slippage happens because a minority (here, 30%) exhibits a multi-peaked preference by preferring either form of equal treatment (0 or B) to unequal treatment (A). Thus, even those who support A on its own, and who believe that A and B can be logically distinguished, might be wise to oppose A if there's enough risk that implementing A will lead *others* to also end up supporting B. And school choice debates are of course just one example; the same phenomenon

can happen in many other areas, such as assisted suicide or speech restrictions, and can cause slippage towards greater freedom from restraint or towards greater restrictions.⁶

2. *Administration Cost Slippery Slopes.* — An intermediate position A might also be untenable if it is burdensome to administer. One obvious burden might be the effort required to make and review decisions under a nuanced, fact-intensive rule: for instance, the Supreme Court came within one vote of slipping — for better or worse — down the slope to eliminating the obscenity exception, partly because of the perceived difficulties of administering the obscenity test. Another burden may be the risk of error in applying a complex rule, especially when the rule needs to be applied by many lower courts or executive officials.

The decisions that proposal A would require might also prove burdensome if they are seen as too arbitrary or as involving too much second-guessing of others' judgments. Just to give one of many possible examples, carving out an exception from a criminal procedure rule for especially serious crimes may at first seem appealing; but because courts are properly hesitant to disagree with legislative judgments that various crimes are serious, they may ultimately apply the rule to more and more offenses.

3. *The Relationship Between Equality and Administration Cost Slippery Slopes and Constitutional Equality Rules.* — Equal treatment, of course, is sometimes not just a political preference but also a constitutional command. If a legislature exempts labor picketing from a residential picketing ban (A), then a court will likely strike down the ban altogether (B), because content-based speech restrictions are presumptively unconstitutional. If a legislature enacts a school choice program limited to secular public and private schools (A), a court might conclude that religious private schools must also be covered (B), because of the constitutional ban on discrimination based on religiosity. Some administration costs are likewise seen as unconstitutional, for instance if a proposed rule requires a court to determine which practices are central to a religion's belief system.

This equal treatment command also flows from multi-peaked preferences, though preferences held by judges rather than by legislators. The Justices who created the residential picketing rule, and those who choose to follow it, believe that both 0 (all residential picketing is allowed) and B (all residential picketing is banned) are constitutionally acceptable, but that A (only labor picketing is allowed) is the worst position of the three, because it is unconstitutionally discriminatory.

Overlaying the multi-peaked judicial preferences with the legislative preferences, which might be single-peaked, thus produces the slippery slope. Legislators who prefer A over both 0 and B (a single-peaked preference) may enact A, but then an equality rule created by Justices who prefer 0 and B over A (a multi-peaked preference) commands a shift to B.

4. *Judicial-Judicial Equality Slippery Slopes and the Extension of Precedent.* — (a) *Simply Following Precedent: A Legal Effect Slippery Slope.* — One of the most common “A will lead to B” arguments is the ar-

gument that judicial decision A would “set a precedent” for decision B. This generally means that (1) A would rest on some justification J and (2) justification J would also justify B.

Consider, for instance, the debate about whether the government should be allowed to ban racial, sexual, and religious epithets (beyond those that fit within the existing fighting words and threat exceptions). To uphold such a ban (decision A), the courts would have to give some general justification for why these words should be punishable, essentially creating a new exception to First Amendment protection.

If this justification J were that “epithets add little to rational political discourse and are thus ‘low-value speech,’ which may be punished,” then courts could likewise use this J to uphold bans on flag burning, profanity, and sexually themed (but not obscene) speech, all examples of speech that some argue is of “low value” (result B). In fact, a lower court might feel *bound* to reach result B because of precedent A’s acceptance of justification J. We might call this process a legal effect slippery slope, because B follows from A as an application of an existing legal rule (the obligation to follow precedent). A related legal effect slippery slope may happen when the justification underlying A is vague enough that it *could* justify B, even if this effect isn’t certain.

But this legal effect slippery slope doesn’t by itself provide much of an argument against result A, because advocates of A could simply urge courts to implement A based on a narrower justification that avoids the excessive breadth or the added authority that would lead to B. For instance, A’s advocates could argue that bans on racial, sexual, and religious slurs are constitutional because

- only racially, sexually, and religiously bigoted epithets are “low-value speech” and can thus be prohibited (J1);
- epithets are “low-value speech” and thus may be restricted if a sufficient level of harm is shown — and this level of harm is present for racially, sexually, or religiously bigoted epithets but not for other epithets (J2);
- epithets are “low-value speech,” but the Court has the authority to draw such a conclusion only about epithets, not about more reasoned discourse (J3).

Under each of these justifications, A’s defenders would argue, bad result B would not necessarily follow as a direct legal effect. Arguing that judicial decision A will lead to B thus requires more than just an assertion that “A will set a precedent for B.” Defenders of A can always craft some legal justification for A that distinguishes it from the unwanted result B.

(b) *Extension of Precedent as a Judicial-Judicial Equality/Administration Cost Slippery Slope.* — But that a distinction between A and B *can* be drawn doesn’t mean that enough future judges will be persuaded by this distinction. Even judges who aren’t legally obligated to follow precedent A, because its justification is not literally applicable to current case B, might still feel impelled to extend A beyond its original boundaries.

Consider, for example, justification J1, which would authorize A (racial epithets are punishable but others are protected) but not B (epithets, bigoted or not, are unprotected). Supporters of J1 believe that racial epithets and other epithets are distinguishable, but some Justices might not be persuaded by the distinction. They may particularly oppose restrictions that they see as viewpoint-based. They may oppose giving flag burning, which they see as an anti-American epithet, more protection than other epithets get. Or they might simply conclude that bigoted epithets are not materially different from other epithets, and believe that their duty to treat like cases alike obligates them to treat all epithets the same way. Those Justices might therefore view A as the *least* satisfactory position, less appealing than either 0 or B.

Say, then, that the Justices form the following blocs (bloc I and bloc II can have any number of Justices between 1 and 4, so long as they add up to 5):

Bloc	Policy Preferences			Supports Proposed Move?			Attitude	# of Justices
	Most Prefers	Next preference	Most dislikes	0 → A	A → B	0 → B		
I	0	B	A		✓		“More speech protection is best, but distinguishing bigoted epithets from others is the worst”	4/3/2/1
II	A	0	B	✓			“Punishing only bigoted epithets is best, but if we can’t have that, then protect all epithets”	1/2/3/4
III	B	A	0	✓	✓	✓	“Restrict epithets as much as possible”	4

On a Court where the Justices fall into these blocs, a proposal to move directly from “epithets protected” (0) to “all epithets unprotected” (B) would lose 5–4; only bloc III would prefer B over 0. But a proposal to move from 0 to “bigoted epithets unprotected” (A) would win, with the support of blocs II and III. A proposal to move from A to B would then also win, with the support of blocs I and III. And any proposal to then move from B back to 0 would lose, so long as even one Justice is willing to adhere to precedent even though he substantively prefers 0 to B.

So in our scenario, the bloc II Justices believe that bigoted epithets should be treated differently from other epithets, and their arguments may

be logically defensible. But in practice, the arguments were not fully persuasive to blocs I and III, and so the bloc II Justices got what they saw as the worst result — their desire to create an exception for bigoted epithets led to the denial of protection to all epithets. Thus, even with no changes to the Court's personnel, a decision A that doesn't legally command B (and that some Justices see as consistent with the rejection of B) might still bring about B through the equality slippery slope.

Equality slippery slopes may be particularly likely in judicial decisionmaking. Judges are expected to explicitly justify their decisions, and to have principled reasons for the distinctions they draw. They may therefore be more reluctant than legislators or voters to adopt what they see as logically unsound compromises, which is how the judges in bloc I would view result A.

In fact, this sort of slippery slope may have occurred during the evolution of free speech law in the mid-1900s, as the rule that political advocacy is protected unless it creates a "clear and present danger" of some serious harm (A) was extended in the 1948 *Winters v. New York* case to protect entertainment as well as serious political discourse (B), and was then again extended to sexually themed speech, at least so long as the speech falls outside the narrow obscenity and child pornography exceptions (C). These extensions rested at least in part on the difficulty of administering any dividing line between political advocacy and entertainment, and the felt need to treat ideas — whether about sex or about politics — equally.

Thus, a judge deciding whether to adopt proposed principle A may rightly worry that future judges, who have different understandings of equality or administrability than the original judge does, might deliberately broaden A to B. And there is little that the original judge can do when adopting A to reliably prevent this broadening; for instance, saying "But this decision should not lead to B" in the opinion justifying A may have only a limited effect on future decisions, since judges who prefer B to A on equality or administrability grounds may not be swayed much by such a statement.

E. Multi-Peaked Preferences and Unconstitutional Intermediate Positions

Opponents of legalizing marijuana sales (A) have sometimes argued that legalizing sales might help lead to legalizing marijuana advertising (B), and to the spending of vast sums to persuade more people to smoke marijuana. But why would this be so? After all, A and B are clearly logically distinguishable.

The answer lies in the Supreme Court's commercial speech doctrine. Under current First Amendment law, the government may ban commercial advertising of illegal products. But if selling a product becomes legal, prohibiting advertising of the product becomes much harder (though perhaps not impossible). So if selling marijuana is legalized, courts may find that marijuana sellers have a constitutional right to advertise.

As with constitutional equality rules (see section II.D.3 above), this phenomenon arises out of the overlay of legislative preferences, which

may be single-peaked, and multi-peaked judicial preferences. The legislature may prefer position A (legalize marijuana sales but keep advertising illegal) over positions 0 (keep marijuana illegal) and B (legalize both sales and advertising). But a majority of the Justices have expressed a different preference — they see 0 and B as constitutional and thus within the legislature's prerogative, but they believe that position A is at least presumptively constitutionally invalid.

Combining the two preferences, and recognizing that the Justices' constitutional decisions trump the legislature's choices, we see that if the legislature moves from 0 to A, the Court's commercial speech jurisprudence — which is a result of the Justices' multi-peaked preferences — may then move the law from A to B. Again, voters or legislators who are considering whether to support a move from 0 to A should consider the possibility that A will be unstable, because some important group (here judges rather than other voters or legislators) may find A to be inferior to both extreme alternatives.

F. The Hidden Slippery Slope Risk and the Ad Hominem Heuristic

Slippery slope risks might also be hidden — especially from average voters — by information asymmetry. Voters might not know exactly which step B would be proposed after step A is adopted. They might not know whether the results of step A would prove to be politically stable, or whether there are enough voters or legislators whose multi-peaked preferences would cause slippage to some broader result. But voters might suspect that the politically savvy interest groups that are proposing A do know more about likely future proposals and likely voter preferences, and that those groups won't be satisfied with A but will push for something more.

What then should voters do, given their desire to make decisions without spending a lot of time and effort investigating the true magnitude of the slippery slope risk? One possible voter reaction is what might be called the *ad hominem heuristic*: if proposal A is being championed by a group that you know wants to go beyond A to a B that you dislike, you should oppose proposal A even if you mildly like it or have no strong opinion about it.

This heuristic seems similar to the *ad hominem fallacy*, in which a speaker asks listeners to reject certain arguments because the arguments are promoted by a group that the listeners dislike. We are properly cautioned to be wary of *ad hominem* arguments and to focus on the merits of the debate rather than the identities of the debaters.

But voters often lack the time and the knowledge base needed to evaluate proposals on their merits. Rationally ignorant voters need a simple rebuttable presumption that they can use when evaluating uncertain empirical matters, such as the risk that some behind-the-scenes mechanisms will cause proposal A to lead to result B. It is therefore rational for pro-choice voters, for instance, to reason that "If a pro-life advocacy group is for proposal A, then this increases my concern that A will lead to B, a broader abortion restriction, and persuades me to oppose A."

Even if the ad hominem heuristic is rational from each voter's perspective, it might be socially harmful; it might, for example, worsen the tone of political debate by fostering a culture in which more time is spent demonizing a proposal's supporters than debating a proposal's merits. Nonetheless, voters may reasonably conclude that time and information constraints make the ad hominem heuristic a valuable tool, which they can't afford to abandon even if it lowers the tone of political debate.

III. ATTITUDE-ALTERING SLIPPERY SLOPES

[I]t is proper to take alarm at the first experiment on our liberties. The free-men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle.

— James Madison, *Remonstrance Against Religious Assessments*.

“[T]he assault weapons ban is a symbolic — purely symbolic — move in [the] direction [of disarming the citizenry],” wrote columnist Charles Krauthammer, a *proponent* of a total gun ban. “Its only real justification is not to reduce crime but to desensitize the public to the regulation of weapons in preparation for their ultimate confiscation De-escalation begins with a change in mentality The real steps, like the banning of handguns, will never occur unless this one is taken first”⁷

This is a claim about slippery slopes, though made by someone who would welcome the slippage. Decision A (an assault weapon ban) will eventually lead to B (total confiscation of weapons) because A and similar decisions will slowly change the public's mind about gun ownership — “desensitize” people in preparation for a future step. (Note how this mechanism differs from the multi-peaked preferences slippery slope [Part II], which does not rely on people's underlying attitudes' being shifted.)

But how does this metaphorical “desensitization” actually work? Why don't people simply accept decisions A, B, C, and so on until they reach the level they've wanted all along, and then say “Stop”? Why would voters let government decisions “change [their] mentality” this way?

A. Legislative-Legislative and Judicial-Legislative Attitude-Altering Slippery Slopes: The Is-Ought Heuristic and the Normative Power of the Actual

In the wake of the September 11 attacks, Congress was considering the USA Patriot Act, which, among other things, may let the government track — without a warrant or probable cause — which e-mail addresses someone corresponded with, which Web hosts he visited, and which particular pages he visited on those hosts. Let's call this “Internet tracking,” and let's assume for now that this power is undesirable. This is our result B. Twenty-two years earlier, in *Smith v. Maryland*, the Supreme Court approved similar tracking of the telephone numbers that a person had dialed (the so-called “pen register”). This was decision A.

Curiously, most arguments on both sides of the Internet tracking debate assumed A was correct, even though a precedent holding that similar legislation was *not unconstitutional* might have at first seemed of little relevance in a debate about whether the new legislation was *proper*. The new proposals, one side argued, are just cyberspace analogs of pen registers and are therefore good. No, the other side said, some aspects of the proposals (for instance, the tracking of the particular Web pages that a person visited) are unlike pen registers — they are analogous not just to tracking whom the person was talking to, but to tracking what subjects they were discussing. Few people argued that *Smith* was itself wrong and that the bad precedent shouldn't be extended. The “normative power of the actual”⁸ was operating here — people accepted that pen registers were proper because they were legal.

Why did people take the propriety of pen registers for granted? Why didn't people ask themselves what they, not courts, thought of such devices, both for phone calls and for Internet access? Why didn't they consider the propriety of B directly, rather than being swayed by decision A, the legal system's possibly incorrect acceptance of pen registers?

Perhaps these people fell into what David Hume called the is-ought fallacy; they erroneously assumed that just because the law allows some government action (pen registers), actions of that sort must be proper. If this error is common, then one might generally worry that the government's implementing decision A will indeed lead people to fallaciously assume that A is right, which will then make it easier to implement B.

This worry doesn't by itself justify disapproving of A, since people's acceptance of the propriety of A will trouble you only if you already think A is wrong. But it might substantially intensify your opposition to A; even if you think A is only slightly wrong on its own, you might worry that its acceptance by the public could foster many worse B's.

But there may be more involved here than just people's tendency to succumb to fallacies. Sometimes, people may reasonably consider a law's existence (is) to be evidence that the law's underlying assumptions are right (ought).

Consider another example: you ask someone whether peyote is dangerous. It would be rational for the person's answer to turn partly on his knowledge that peyote is illegal. “I'm not an expert on drugs,” the person might reason, “and it's rational for me not to develop this expertise; I have too many other things occupying my time. But Congress probably consulted many experts and concluded that peyote should be banned, presumably because it thought peyote was dangerous.”

“I don't trust Congress to always be right, but I think it's right most of the time. Thus, I can assume that it was probably right here, and that peyote is indeed dangerous.” Given the person's rational ignorance, it makes sense for him to let the state of the law influence his factual judgment about the world. And the same approach may also apply to less empirical judgments, such as the proper scope of police searches. Instead of thinking deeply through the matter themselves, many people may choose to defer

to the Court's expert judgment, if they think that the Justices are usually (even if not always) right on such questions.

We might think of this as the is-ought heuristic, the non-fallacious counterpart of the is-ought fallacy. Because people lack the time and ability to figure out what's right or wrong entirely on their own, they use legal rules as one input into their judgments. As the literature about the expressive effect of law suggests, "law affects behavior . . . by what it says rather than by what it does."⁹ One form of behavior that law A can affect is voters' willingness to support law B.

The is-ought heuristic might also be strengthened by the desire of most (though not all) people to assume that the legal system is fundamentally fair, even if sometimes flawed. Those people may thus want to trust that legislative and judicial decisions are basically sound, and should be relied on when deciding which future decisions should be supported.

The is-ought heuristic may in turn reinforce the persistence heuristic mentioned in the discussion of enforcement need slippery slopes (section II.C). Once society adopts some prohibition A — for example, on unauthorized immigration, drugs, or guns — and the prohibition ends up being often flouted, the persistence heuristic leads people to support further steps (B) that would more strongly enforce this prohibition. The is-ought heuristic leads people to support B still further, because the very enactment of A makes its underlying moral or pragmatic principle (that unauthorized immigration, drugs, or guns ought to be banned) more persuasive.

When we think about attitude-altering slippery slopes this way, some conjectures (unproven, but I think plausible) come to mind. All of them rest on the premise that the is-ought heuristic flows from people thinking that they lack enough information about what's right, and therefore using the current state of the law to fill this information gap:

1. We should expect attitude-altering slippery slopes to be more likely when *many people* — or at least a swing group — *don't already feel strongly* about the topic.
2. We should expect attitude-altering slippery slopes to be more likely when *many voters are pragmatists rather than ideologues*. The Burkean, who believes that each person's "own private stock of reason . . . is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages," is more likely to be influenced by the judgments of authoritative social institutions — judgments that help compose "the general bank and capital" of people's knowledge — than someone who has a more deductive ideology.
3. We should expect attitude-altering slippery slopes to be more likely in those areas *where the legal system is generally trusted by much of the public*. For instance, the more the public views certain kinds of legislation as special-interest deals, the less attitude-altering effect the legislation will have.
4. We should expect attitude-altering slippery slopes to be more likely *in areas that are viewed as complex, or as calling for expert factual*

or moral judgment. The more complicated a question seems, the more likely it is that voters will assume that they can't figure it out themselves and should therefore defer to the expert judgment of authoritative institutions, such as legislatures or courts. Thus, replacing a simple political principle or legal rule with a more complex one can facilitate future attitude-altering slippery slopes.

B. Legislative-Judicial Attitude-Altering Slippery Slopes: "Legislative Establishment of Policy"

Judges, like voters, might also be influenced by legislative decisions. Judges might sometimes be less likely to perceive that they are less knowledgeable than legislators (the standard rational ignorance scenario), but they may still perceive that a legislative judgment is *more democratically legitimate* than the judges' own (at least where the decision isn't determined by binding precedent or by statutory or constitutional text).

Consider, for instance, Justice Harlan's opinion for the Court in *Moragne v. States Marine Lines, Inc.*, which dealt with whether wrongful death recoveries should be allowed in admiralty law. The Court has the power to make common law in admiralty cases, and in *Moragne* there was no binding federal statute mandating the result. Nonetheless, the Court looked to state and federal statutes to inform its judgment:

In the United States, every State today has enacted a wrongful-death statute. The Congress has created actions for wrongful deaths [in various contexts]

.....

These numerous and broadly applicable statutes, taken as a whole, . . . evidence a wide rejection by the legislatures of whatever justifications may once have existed for a general refusal to allow [recovery for wrongful death]. *This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law*

.....

. . . In many [though not all] cases the scope of a statute may reflect nothing more than the dimensions of the particular problem that came to the attention of the legislature, inviting the conclusion that the legislative policy is equally applicable to other situations in which the mischief is identical. This conclusion is reinforced where there exists not one enactment but a course of legislation dealing with a series of situations, and where the generality of the underlying principle is attested by the legislation of other jurisdictions [T]he work of the legislatures has made the allowance of recovery for wrongful death the general rule of American law, and its denial the exception. Where death is caused by the breach of a duty imposed by federal maritime law, Congress has established a policy favoring recovery

The statutes to which the Court referred thus had a legal effect beyond their literal terms. Legislative decision A (enacting wrongful death liability in certain areas) altered judicial attitudes about question B (wrongful death liability in another area). This phenomenon is common in many common-law-making areas, and even some constitutional inquiries: some degree of deference to the aggregate judgment of state legislatures is part of

the tests for what constitutes cruel and unusual punishment, denial of substantive due process, and other constitutional violations.

Moreover, just as a legislative decision may strengthen the attitude-altering force of a principle that's consistent with A, so it can weaken the attitude-altering force of a principle that seems inconsistent with A. Consider, for instance, the Vermont Supreme Court's decision in *Baker v. State*, which held that the Vermont Constitution's Common Benefits Clause requires the state to give same-sex couples "all or most of the same rights and obligations provided by the law to married partners." A major part of the court's stated reason was the legislature's previous decisions to enact laws allowing gay adoption, providing for child support and visitation when gay couples break up, repealing bans on homosexual conduct, prohibiting private discrimination based on sexual orientation, and enhancing penalties for crimes motivated by hostility to homosexuals. (The court might have struck down the law even without this justification, but the Justices' making the argument shows that they thought some readers would find the argument persuasive.)

This wasn't merely an equality slippery slope such as that described in section II.D.3; the theory was *not* "The legislature allowed heterosexual marriages (A), so because sexual orientation classifications are presumptively impermissible, the legislature must now allow homosexual marriages (B)." Rather, the court held that the Common Benefits Clause test required that all classifications — whether or not they turn on sexual orientation — have a "reasonable and just relation to the governmental purpose," something similar to the vigorous rational basis scrutiny that some have urged. And under this test, the court concluded, the legislature's granting homosexuals certain rights in the past (A) contributes to the requirement that homosexuals be given certain other rights now (B).

Why would past legislative decisions affect a constitutional decision this way? The court relied on the legislature's past pro-gay-equality decisions in two contexts:

[1.] The State asserts that [the goal of promoting child rearing in a setting that provides both male and female role models] . . . could support a legislative decision to exclude same-sex partners from the statutory benefits and protections of marriage. . . . It is conceivable that the Legislature could conclude that opposite-sex partners offer advantages in this area, although we note that . . . the answer is decidedly uncertain.

The argument, however, contains a more fundamental flaw, and that is the *Legislature's endorsement of a policy diametrically at odds with the State's claim*. In 1996, the [Legislature removed] all prior legal barriers to the adoption of children by same-sex couples. At the same time, the Legislature provided additional legal protections in the form of court-ordered child support and parent-child contact in the event that same-sex parents dissolved their "domestic relationship."

In light of these express policy choices, the State's arguments that Vermont public policy favors opposite-sex over same-sex parents or disfavors the use of artificial reproductive technologies are patently without substance.

. . . .

. . . [2. W]hatever claim [based on history and tradition] may be made in light of the undeniable fact that federal and state statutes — including those in Vermont — have historically disfavored same-sex relationships, *more recent legislation plainly undermines the contention*. [In 1977, Vermont repealed a statute that had criminalized fellatio.] In 1992, Vermont was one of the first states to enact statewide legislation prohibiting discrimination in employment, housing, and other services based on sexual orientation. Sexual orientation is among the categories specifically protected against hate-motivated crimes in Vermont. Furthermore, as noted earlier, recent enactments of the General Assembly have removed barriers to adoption by same-sex couples, and have extended legal rights and protections to such couples who dissolve their “domestic relationship.”

Thus, viewed in the light of *history*, logic, and *experience*, we conclude that none of the interests asserted by the State provides a reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license

The court thus reasoned that courts should generally pay some deference (though not complete deference) to *consistently asserted* government interests. As the court wrote earlier in the opinion, what keeps the inquiry into whether a law “bears a reasonable and just relation to the governmental purpose . . . grounded and objective, and not based upon the private sensitivities or values of individual judges, is that in assessing the relative weights of competing interests courts must look to the history and traditions from which [the State] developed.” *Baker* thus turns the is-ought heuristic into a constitutional mandate, at least where the current system of legal rules is internally consistent.

But when the court sees the legislature’s judgments as inconsistent with each other, this need to partly defer to the legislature apparently disappears, and the court becomes more willing to apply its own judgment about whether the classification is “reasonable and just.” A few legislative pro-gay-rights steps A may thus alter a court’s willingness to defer to the legislative policy of favoring heterosexuality over homosexuality, and may lead a court to take a step B (allowing homosexual quasi-marriages) that’s much broader than what the legislature envisioned.

Many have dismissed this particular slippery slope concern before, for instance rejecting as “arrant nonsense” the claim that a hate crime law “would lead to acceptance of gay marriages.”¹⁰ But *Baker* suggests that the concern was factually well-grounded (though of course many might believe that the slippage was good).

This example also illustrates how active rational basis review may sometimes discourage compromise, and how deferential review may encourage it. If courts routinely inquire into whether a body of laws is internally consistent, legislators may come to worry that one legislative step may undermine the consistency of a formerly clear rule, leading to future judicial steps that undermine the rule still further. Those legislatures may thus become more hesitant about enacting compromises, such as legalizing gay adoption but retaining the discrimination embodied in the heterosexuals-only marriage policy; this is the “slippery slope inefficiency” that was discussed earlier, where a potentially valuable compromise is ruled out by

some supporters' fear that it will lead to something broader later (see Part II.A.6). The highly deferential version of the rational basis test, in contrast, decreases the risk of the legislative-judicial slippery slope, thus making one-step-at-a-time compromises safer from the legislators' perspectives.

C. Just What Will People Infer from Past Decisions?

[H]owever narrow the first opening, there will never be wanting hands to push it wide, and those will be the hands of the strong, the sagacious, and the interested. . . . [S]omething peculiar may be found in every case, and future judges will look to the [newly adopted] principle alone, and lay aside the guards and qualifications. The *people will not comprehend such subtleties*.

— *Harrington v. Commissioners* (S.C. 1823).

I. From Legislative Decisions. — So far, I have argued that a legal rule may change some people's attitudes: People may apply the is-ought heuristic and conclude that if the rule exists, its underlying justifications are probably sound. And this conclusion may in turn lead people to accept other proposals that rest on these justifications.

Attitudes, however, are altered by the law's justifications as they are *perceived*. Say people conclude that A's enactment means that A is probably good, and that another proposal B is probably also good if it is analogous to A. Whether B is seen as analogous to A turns on which particular justification people ascribe to A, and see as being legitimized by A's enactment.

Consider, for instance, the tax for the support of Christian ministers that Madison condemned in his *Memorial and Remonstrance*:

Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

People should therefore be wary, Madison argued, of power "strengthen[ing] itself by exercise, and entangl[ing] the question in precedents" — they should recognize "the consequences in the principle," and "avoid[] the consequences by denying the principle."

But Madison's argument implicitly turned on the justification the public would infer from the law and accept as a "precedent" for the future. If the justification was, to borrow part of the statute's preamble, that the government may properly coerce people to do anything regarding religion, so long as such coercion supposedly has a "tendency to correct the morals of men, restrain their vices, and preserve the peace of society," then Madison's fears would have been well-founded. But if the justification was, to borrow another part, that the government may properly require people to pay a modest tax that will be distributed without "distinctions of preemi-

nence amongst the different societies or communities of Christians,” then his concerns would be less plausible.

Unfortunately, we often can’t anticipate with certainty which principle a statutory scheme will eventually be seen as endorsing. Sometimes, the debate about a statute will focus on one justifying principle, and for some time after the statute is enacted, that will probably be seen as the principle that the statute embodies. But as time passes, the debates may be forgotten, and only the law itself will endure; and then advocates for future laws B may cite law A as endorsing quite a different justification.

Consider the installation of cameras that photograph people who run red lights. If the policy’s existence will lead people to conclude that the policy is good, and will thus lead them to view analogous programs more favorably, what justification for the policy — and thus what analogy — will people accept?

Some people will infer the justification to be that “the government may properly enforce traffic laws using cameras that only photograph those who are actually violating the law” (J1). Others, though, may draw the broader justification that “the government may properly record all conduct in public places” (J2). Decision A (cameras aimed at catching red light runners) might thus increase the chances that decision B (cameras throughout the city aimed at preventing street crime), which J2 would justify, will be implemented, especially if public opinion on B were already so closely divided that influencing even a small group of voters could change the result. And if you strongly oppose B, this consequence would be a reason for you to oppose A as well.

This possibility suggests that Madison might have been right to consider the worst-case scenario in assessing how the tax for support of the Christian ministers might change people’s attitudes. People might have seen it as endorsing only a very narrow principle, to which even Madison might not have greatly objected, but they might also have seen it as endorsing a much broader principle. And if one thinks that one of the potential B’s that can flow from A is very bad, this may be reason to oppose A even if the chances of A facilitating that particular B are relatively low.

2. *From Judicial Decisions.* — Judicial decisions, unlike many statutes, explicitly set forth their justifications, and might therefore have more predictable attitude-altering effects. But people might still interpret a decision as endorsing a certain justification even if that’s not quite what the decision held, partly because many people don’t read court decisions very closely or remember them precisely (again because of rational ignorance).

All of us have some experience with this phenomenon, where a decision is boiled down in some observers’ minds to a brief and not fully accurate summary. Thus, for instance, in *Zacchini v. Scripps-Howard Broadcasting Co.*, the Supreme Court held that an unusually narrow state “right of publicity” claim didn’t violate the First Amendment, but repeatedly stressed that “[p]etitioner does not merely assert that some general use, such as advertising, was made of his name or likeness; he relies on the much narrower claim that respondent televised an entire act that he ordinarily gets paid to perform.” Nonetheless, *Zacchini* is regularly cited for the very proposition

that the Court explicitly *refused* to decide: that the more common version of the “right of publicity” — the right to control many uses of one’s name or likeness — is constitutional.

This tendency may be exacerbated when decision A is justified by a combination of factors, because it’s easy for people’s simplified mental image of the decision to stress only a subset of the factors. Consider, for instance, the pen register decision (*Smith v. Maryland*), which let the government get — without probable cause or a warrant — a list of all the phone numbers that someone has dialed. The decision rested on three main justifications: the Court began by pointing out that the phone numbers didn’t reveal that much about a conversation (J1); it ended by arguing that “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties” such as the phone company (J3); and in between, it included the following argument about people’s *actual* expectation of privacy (J2):

[W]e doubt that people in general entertain any actual expectation of privacy in the numbers they dial. All telephone users realize that they must “convey” phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed. All subscribers realize, moreover, that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills. In fact, pen registers and similar devices are routinely used by telephone companies “for the purposes of checking billing operations, detecting fraud, and preventing violations of law.” . . . Pen registers are regularly employed “to determine whether a home phone is being used to conduct a business, to check for a defective dial, or to check for overbilling.” . . . Most phone books tell subscribers . . . that the company “can frequently help in identifying to the authorities the origin of unwelcome and troublesome calls.” Telephone users, in sum, typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes. . . . [I]t is too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret.

When the Internet tracking question arose more than twenty years later, however, justification J2 was nowhere to be seen, though the analogy to *Smith* was a big part of the debate (see p. 24). Had J2 been absorbed into people’s attitudes, people might well have resisted the analogy, since J2 doesn’t apply to Internet communications. But apparently *Smith* led people to believe that the warrant requirement should be relaxed whenever J1 and J3 were applicable. J2 was largely forgotten — perhaps “[t]he people [did] not comprehend such subtleties.” And the *Smith* decision may have thus led many people to accept a justification broader than what the opinion itself relied on.

What can judges who see this possibility do? Making their justifications explicit, and perhaps giving some examples in which the justifications don’t apply, might help, but it might not be enough: consider, for instance, *Zacchini*, which explicitly refused to decide the constitutionality of

the broad right of publicity, but which has nonetheless been read as deciding just that.

Another option is to ignore this risk. I have a duty to decide the case as best I can, a judge might conclude, without changing my reasoning based on a speculative (even if sensible) fear that some people in the future might oversimplify the reasoning.

A third option, though, is to consider the possibility of oversimplification in close cases. A judge who feels strongly about, for instance, a broad vision of free speech or the Fourth Amendment, might adopt a rebuttable presumption against change — when it's a close question whether to create a new exception to speech protection or the warrant requirement, the judge might vote against the exception, because of the risk that even a carefully limited exception might later be oversimplified into something broader.

3. *From Aggregates of Legislative or Judicial Decisions.* — So far, the discussion has focused on the principles that people may draw from one statute or case. But people who are applying the is-ought heuristic often look to a broader body of law, especially since a set of decisions would likely be seen as more authoritative — and deserving more deference — than a single decision.

In looking at this broader body of law, people are especially unlikely to precisely absorb all the details of each past case or statute; instead, they tend to try to fit the decisions into a general mold that stresses one or two basic principles at the expense of many of the details. And it is this mold, imprecise as it may be, that is remembered and that can influence people's attitudes.

(a) *Rules and Exceptions.* — One classic example of such a general mold is “This is the rule, though there are some exceptions” — for instance, the government may not impose content-based speech restrictions unless the speech falls into one of several narrow exceptions, or searches require warrants “subject only to a few specifically established and well-delineated exceptions.” The simple rule can have powerful attitude-shaping force, and the first decision A1 carving out an exception probably wouldn't materially undermine this force: people would still think “There is a rule, though there's also a rare exception.” The second exception, A2, might not undermine the rule's force either, especially if it seems necessary (for example, a free speech exception for death threats), and if it fits within some exceptional supercategory (for instance, cases that have been traditionally recognized as being outside the main principle, or cases where there's a clear, immediately pressing need for the exception).

But at some point, some people who are surveying the body of decisions may start concluding that the law is so internally inconsistent that they can't distill any core underlying principles from it, or even that the exceptions themselves have become the rule. The first exceptions might not lead to this, but each additional exception might make it more likely, even after the first few exceptions have been accepted. One needn't take the “in for a penny, in for a pound” view that since the law has already

compromised a bit on the principle, there's nothing to be lost by compromising further.

The attitude-altering slippery slope may thus counsel against the creation of each additional exception, especially an exception that doesn't fit into some compelling overarching justification, such as one based on the presence of an emergency. Again we see a plausible argument for a rebuttable presumption against even small changes: avoid creating new exceptions unless there's a strong reason to do so, since even seemingly small exceptions may help undermine the rule's attitude-shaping force.

(b) *Several Decisions Being Read as Standing for One Uniting Principle.* — Just as people often try to identify what is the rule and what is the exception, they sometimes take several decisions — especially ones that already have a common label — and pull from them one basic justification that these decisions all share, placing less weight on the countervailing principles that might appear only in one decision or another. And it is this inferred justification, shorn of any limits or reservations, that may end up being remembered and affecting people's attitudes.¹¹

Consider, for instance, intellectual property rules. The legislators and courts that created these rules—especially copyright law, trademark law, and right of publicity law—have generally limited the rules in important ways, ways that have often been influenced by free speech concerns. The Supreme Court decisions that have upheld various intellectual property laws against First Amendment challenge rely on these limitations.

People who pay attention to the details of these laws might thus have their attitudes altered only modestly by the laws' existence. The is-ought heuristic may lead them to conclude from the Court's copyright and trademark cases that Congress may properly give people a monopoly over expression (but not ideas or facts), or may properly restrict the use of certain words and symbols in advertisements (but not in newspaper articles) to prevent consumer confusion and possibly trademark dilution.

But some courts, commentators, and legislators have drawn a much broader principle from the intellectual property laws' existence and constitutional validity: legislatures, they seem to conclude, should be free to create whatever intellectual property rights they want, whether in expression, facts, or symbols, and whether covering only commercial advertising or a wide range of other speech. And the First Amendment is inapplicable in such cases, simply because “[t]he First Amendment is not a license to trammel on legally recognized rights in intellectual property.”¹²

These arguments generally don't rely on detailed analogies to existing intellectual property rights, but rest instead on broader assertions that intellectual property rules are per se proper. The rules A1 (copyright), A2 (trademark), A3 (right of publicity), and a few others seemingly lead these observers to accept not a set of detailed, specific justifications, but rather one overarching justification: the government may constitutionally give an entity the power to restrict others' communication of material just by giving the entity an intellectual property right in that material.

Why do some people internalize just this broad principle, rather than the narrower principles that actually correspond more closely to the boundaries of each law? One possible reason is that the principle seems to undergird each intellectual property law, while the countervailing principles limiting each rule (copyright can't protect facts or ideas, the right of publicity doesn't apply to news or fiction) are more rule-specific. Thus, each new intellectual property rule that a person sees reinforces the common principle, but doesn't much reinforce the limiting principles, which vary from rule to rule.

And since people's bounded rationality tends to make them seek simple summaries, the principle on which they focus, and the one that most affects their attitudes, is the one overarching common thread, and not the many important but detailed reservations. The existing intellectual property rules can therefore influence some people (though not all people) to accept the broad justification, and thus pave the way for new restrictions that are also justified by this justification but that lack the limiting principles present under the old rules — for instance, a right to own information about oneself (B1), a property right in databases of facts (B2), or a broadened right of publicity (B3).

Some of the original A's may be sound, despite the risk that they may lead to the B's. But the more the public accepts intellectual property-based speech restrictions, the more people will shift from thinking "It's proper to let people own copyrights, subject to traditional copyright limits, trademarks, subjected to traditional trademark limits, and so on" to thinking "It's proper to let people have intellectual property rights over any concepts, be they expressions, ideas, facts, words, symbols, or anything else."

D. Judicial-Judicial Attitude-Altering Slippery Slopes and the Extension of Precedent

As section III.B argued, judges to some extent tend to be reluctant to rely on their own moral or practical judgments. This tendency shouldn't be overstated, but neither should it be ignored. Thus, judges may defer to policy judgments underlying past judicial decisions, even if the decisions aren't strictly binding precedent.

And this tendency may turn from merely a legal rule that judges presumptively follow into an attitude-altering influence — judges may well conclude that they should assume that the precedents are morally or empirically sound, at least unless there's some strong reason to doubt their soundness. This is especially so because precedents are supposed to be carefully reasoned, persuasively written, and authored by people with high status. Thus, if the Supreme Court upholds a ban on bigoted epithets using justification J ("epithets are 'low-value speech' and can thus be punished"), future Justices may be persuaded by this principle, rather than just reluctantly deferring to it. And, as a result, they may eventually apply it more broadly to bans on other epithets or other assertedly low-value speech.

But what if the Court tries to prevent this broadening by explicitly adopting a limited justification J1, which is that "Only racially, sexually,

and religiously bigoted epithets are ‘low-value speech’ and can thus be punished” (p. 20)? This might reduce the risk of broadening: if a future Court accepts this entire principle as a guide, then it will be accepting the new exception’s boundaries (“only racially, sexually, and religiously bigoted epithets are ‘low-value speech’”) as well as the exception itself (“[such] epithets . . . can thus be punished”).

These two components, however, might have different degrees of attitude-altering force. A future Justice might find the “epithets may be punished” sub-principle to be more morally or pragmatically appealing than the “racially, sexually, and religiously bigoted epithets are special” sub-principle. The precedent would thus have persuaded future Courts that epithets should indeed be punishable — but not persuaded them to limit this to only a narrow class of epithets.

This danger might help explain why various Justices have refused to adopt new principles that lack well-defined, coherent limits. Thus, *Cohen v. California* reasoned that the proposed principle that profanity is unprotected but other offensive words remain protected “seems inherently boundless,” and *Texas v. Johnson* and *Hustler v. Falwell* used similar reasoning in rejecting new exceptions for flagburning and speech that intentionally inflicts emotional distress on public figures.

The Justices *could* have drawn boundaries and said “Profanities, flagburning, and parodies alleging grotesque sexual relationships are punishable because they are offensive, but other speech is protected even if it is offensive.” But the apparent arbitrariness of these boundaries would likely have made them less influential in altering judges’ attitudes. Even Justices who might want to draw such a line in one particular case might recognize that future Justices might find this line morally or pragmatically unappealing, and might thus accept the seemingly less arbitrary underlying principle (offensive speech may be punished because of its offensiveness), but reject the limitation to profanity, flagburning, and gross insult.

E. The Attitude-Altering Slippery Slope and Extremeness Aversion Behavioral Effects

Implementing decision A may also lead people to see B as less extreme and thus more acceptable. When we’re at position 0 (no handgun ban), the leading policy options may be 0, A (a ban on small, cheap handguns), and B (a total handgun ban), and B may seem like a large step. But after A is adopted, the leading options may become A (the narrow handgun ban), B (the total handgun ban), and C (a ban on all firearms, whether handguns, rifles, or shotguns), and B may thus seem more moderate; position 0 might no longer be considered, because it’s been tried and rejected.

In principle, such framing effects — whether B is seen as the extreme option among 0, A, and B or as the middle option among A, B, and C — should be irrelevant. When the choice is between A and B, people shouldn’t be influenced by the presence of options 0 or C.

But social psychologists have shown that people do tend to view proposals more favorably if they are presented as compromises between two

more extreme positions. In one experiment, for instance, one group of subjects was asked to decide which of two cameras, a low-end model and a mid-level model, was the better deal; 50% chose the mid-level as the better deal. Another group was asked to choose among the same two cameras plus a high-end model; in this group, the mid-level was favored over the low-end by over two-and-a-half to one.

The result may seem irrational; the addition of the new option might reasonably *decrease* the fraction of people choosing either of the other two options, but it shouldn't *increase* the relative fraction preferring the mid-level option. At the very least it reflects bounded rationality. But in any event, that's the result, which has been replicated for legal decisions by mock juries. And it fits our experience: people are often (though not always) more sympathetic to options framed as "moderate" than to those framed as "extreme." To the extent this phenomenon occurs among voters, it can produce slippery slope effects, as the enactment of even modest steps makes a formerly extreme proposal seem more moderate.

F. The Erroneous Evaluation Slippery Slope

Experience with a policy can change people's empirical judgments about policies of that sort, and this can of course be good. Sometimes, though, people learn the wrong lesson, because they err in evaluating an experiment's results. For instance, suppose that after A is enacted, good things happen: stringent enforcement of a drug ban is followed by reduced drug use; an educational reform is followed by higher test scores; a new gun law is followed by lower crime rates.

People might infer that A caused the improvement, even if the true cause was different. Crime or drug use might have fallen because of demographic shifts. Test scores might have risen because of the delayed effects of past policy changes. The furor that led to enacting this policy might also have produced other policies (such as more efficient policing), which might have caused the improvement. But because A's enactment was *correlated* with the improvement, people might incorrectly assume that A *caused* the improvement, and thus support a still more aggressive drug enforcement strategy, educational reform, or gun control law (B).

Those who are skeptical about A can argue that correlation doesn't necessarily mean causation, and that post hoc ergo propter hoc ("after, therefore because of") is a fallacy. But, as with the is-ought fallacy, the fact that philosophers have had to keep condemning this fallacy for over 2000 years shows that it's not an easy attitude to root out.

Moreover, as with the is-ought fallacy, post hoc ergo propter hoc may correspond to an often non-fallacious heuristic. People might be rational to generally assume that when a legal change is followed by a good result, the result probably flowed from the change, but be mistaken to believe this in a particular case. If we have reason to anticipate that voters or legislators who follow this heuristic will indeed draw a mistaken inference from the outcome of decision A, that may be reason for us to oppose A.

This concern about erroneous evaluation of decision A might be exacerbated, or mitigated, by two kinds of circumstances. First, we might foresee that people will evaluate certain changes using some incomplete metric that ignores the changes' costs and focuses too much on their benefits. The benefits might be more quickly seen, more easily quantifiable, or otherwise more visible than the costs. The benefits might be felt by a more politically powerful group than the costs might be. The benefits might be deeply felt by easily identifiable people, while the costs might be more diffuse, or might be borne by people who aren't even aware of them. (Of course, if the harms flowing from decision A are more visible than the possible benefits, then A's net benefits may be underestimated. If that's so, then we needn't worry as much that an improper evaluation of A's effects will lead to greater enthusiasm for implementing B.)

Second, we might doubt the impartiality of those who will play leading roles in evaluating A's effects. Most new laws have some influential backers (whether media, government agencies, or interest groups), or else they wouldn't have been enacted. These influential authorities will want their favorable predictions to be confirmed, so we might suspect that they will consciously or subconsciously err on the side of evaluating A favorably. B might then be adopted based on an unsound evaluation of A's benefits. Again, though, the opposite may also be true: if we know that, say, the media is generally against proposal A, then we shouldn't worry much about an improper evaluation of A leading to further step B — if A is seen as a success even by a generally anti-A media, then it probably is indeed a success, and perhaps the further extension to B is therefore justified.

This danger suggests that we might want to ask the following when a policy A is proposed:

1. Is there some other trend or program that might yield benefits that could be erroneously attributed to A?
2. Is there reason to think that measurements of A's effectiveness will be inaccurate because they underestimate some costs or overestimate some benefits?
3. Do we distrust the objectivity and competence of those who will play leading roles in evaluating A's effects?
4. Have the effects of similar proposals been evaluated incorrectly in the past?
5. Are there ways to reduce the risk of erroneous evaluation? For instance, opponents of B might want to negotiate for including a sound evaluation system in the proposal. There will doubtless be debate about which evaluation system is best, but the opponents of B may have more power to insist on a system that's acceptable to them while A is still being debated.

If any of the answers to the first four questions is "yes," that might give those who oppose B reason to also oppose A, at least unless they can find — per question 5 — some way to decrease the risk of the erroneous evaluation slippery slope.

IV. SMALL CHANGE TOLERANCE SLIPPERY SLOPES

[J]ealously maintain[] . . . the spirit of obedience to law, more especially in small matters; for transgression creeps in unperceived and at last ruins the state, just as the constant recurrence of small expenses in time eats up a fortune. The expense does not take place at once, and therefore is not observed; the mind is deceived, as in the fallacy which says that “if each part is little, then the whole is little.” . . .

In the first place, then, men should guard against the beginning of change

— Aristotle, *Politics*.

Libertarians often tell the parable of the frog. If a frog is dropped into hot water, it supposedly jumps out. But if a frog is put into cold water that is then heated, the frog doesn’t notice the gradual temperature change, and eventually dies.¹³ Likewise, the theory goes, with liberty: people resist attempts to take rights away outright, but not if the rights are eroded slowly.

The frog doesn’t notice the increase because of a sensory failure; it senses not absolute temperature but changes in temperature. Perhaps our decisionmaking skills suffer from an analogous cognitive feature. Maybe we underestimate the importance of gradual changes because our experience teaches us that we needn’t worry much about small changes — but unfortunately this trait sometimes leads us to unwisely ignore a sequence of small changes that aggregate to a large one.

This theory suggests that we just don’t pay much attention to the small change from 0 to A, the small change from A to B, and so on, even though we would have paid attention to the change from 0 all the way to E. (Of course, people might also pay *more* attention — and express more opposition — to all the small changes in the aggregate than to one sharp shock. I claim only that, at least in *some* situations, the aggregate opposition to a series of small changes might be less than the opposition to one large one.) This is not an attitude-altering slippery slope, or a multi-peaked preferences slippery slope: the small shifts don’t necessarily persuade people to support the next shift, and don’t move the law to a politically unstable position. Rather, people simply don’t think much about each shift.

Consider, for instance, the following exchange on an *ABC News* special:

[Peter] Jennings: And the effect of the assault rifle ban in Stockton? The price went up, gun stores sold out and police say that fewer than 20 were turned in. Still, some people in Stockton argue you cannot measure the effect that way. They believe there’s value in making a statement that the implements of violence are unacceptable in our culture.

[Stockton, California] Mayor [Barbara] Fass [(a supporter of the ban)]: I think you have to do it a step at a time and I think that is what the NRA is most concerned about, is that it will happen one very small step at a time, so that by the time people have “woken up” — quote — to what’s happened, it’s gone farther than what they feel the consensus of American citizens would be. But it does have to go one step at a time and the beginning of the banning of semi-assault military weapons, that are military weapons, not “household” weapons, is the first step.

Did Mayor Fass have reason to believe that Americans might indeed take time to wake up to changes that “happen one very small step at a time,” or was she mistaken?

*A. Small Change Apathy, Small Change Deference,
and Rational Apathy*

It is seldom that liberty of any kind is lost all at once. Slavery has so frightful an aspect to men accustomed to freedom that it must steal in upon them by degrees and must disguise itself in a thousand shapes in order to be received.

— David Hume, *Of the Liberty of the Press*.

Let’s say a legislator is proposing a ban on .50-caliber rifles. Some kinds of guns are already entirely or mostly banned, while other kinds are allowed. You know that .50-caliber rifles are fairly rare; neither you nor anyone you know owns one. And no one is claiming that the .50-caliber rifle ban will by itself significantly impair gun rights or significantly decrease gun crime. What is your reaction to this proposal?

Most people would probably say “I don’t much care” (at least unless they have slippery slope concerns in mind). People have limited time to spend on policy questions; they’d rather invest this time in researching and discussing a few big, radical policy changes than many small, incremental ones. Even if their gut reaction is against the law, they won’t feel strongly about it. We might call this *small change apathy*. And this apathy may be exacerbated by the media’s relative lack of interest in small changes, at least when those changes are outside some hot issue, such as abortion.

Media outlets also operate with what one might call *subsequent step apathy*: they prefer to cover novel changes rather than the latest change in a long progression, partly because it seems more exciting to the journalists, and partly because viewers prefer the novel. Reporters tend to be less likely to cover a story about the sixth or seventh step in the sequence; try pitching such a story to them and see how far you’ll get.

If voters are generally apathetic about small changes, they may support the law just because they know that some influential opinion leaders — politicians, the media, or reputable interest groups — support it. Voters might not defer to expert judgment on big debates (for instance, should dozens of varieties of guns, owned by 20% of the population, be banned all at once?), but for small changes, they might prefer to follow the experts rather than investing the effort into arriving at an independent conclusion.

We might call this decisionmaking process the *small change deference heuristic*: if a change seems small enough, defer to elite institutions, so long as you think the institutions are right on most issues most of the time. Like most heuristics, this one stems from rational ignorance, or rational apathy. When there seems to be little at stake in a decision, and the cost of making the decision thus exceeds the benefit of independent investigation (both the practical benefit that flows from an informed vote, and the good feeling that one gets from knowing how to vote), deferring to others makes sense, even if their views don’t always perfectly match your own.

Voters' small change deference heuristic may also carry over to legislators: when voters care little about a proposal, legislators will tend to care little about it as well (though other factors, such as interest group pressures, party discipline, and political friendships and enmities, may counteract or reinforce this tendency). But beyond this, legislators and their staffs may themselves be rationally ignorant or apathetic about certain proposals, and may often defer to elite opinion or the views of fellow legislators and the party leadership.

This small change deference heuristic doesn't itself favor all small changes; rationally ignorant voters may defer to others' opposition to the changes as well as to others' support of them. But the heuristic does favor small changes that are supported by elite institutions. Thus, for instance, gun rights supporters in a state where the media favors gun control more than the public does might worry that their gun rights may be eroded in small steps unless mildly pro-gun-rights voters are made aware of the slippery slope risk.

Small change apathy likewise favors small changes that are backed by intense supporters. A strongly committed minority may often prevail if the majority on the other side is less concerned about the issue. Thus, in a state where pro-life voters are better organized and on average more committed than pro-choice voters, abortion rights supporters might worry that abortion rights may be gradually eroded by a sequence of small pro-life victories, unless the mildly pro-choice voters block each small change.

B. Small Change Tolerance and the Desire To Avoid Seeming Extremist or Petty

Say you care little about the .50-caliber rifle ban, but your neighbor strongly supports or opposes it. His vote in the election, he says, will be influenced by the candidates' views on the ban, and he has donated time and money to pro- or anti-ban groups. If you don't think the law will tend to lead to broader laws, you might think this fellow is a bit extremist.

Voters and legislators who like to see themselves and to be seen by others as "moderate" might therefore adopt a small change tolerance heuristic; and when a law's opponents don't want to seem extremist but the law's supporters don't mind appearing this way — either because they're extremist by temperament or because the status quo looks so bad to them that they feel a strong "don't just stand there, do something" effect — a small change tolerance slippery slope might take place. Supporters will push for small changes, and opponents won't push back much.

Small change tolerance slippery slopes can also interact with other slippery slopes, for instance when step A ends up being easily evaded and then a small extension B is promoted as a "loophole-closing measure." The combination of some people's opposition to situations where a law is being evaded (an enforcement need slippery slope), A's enactment changing others' minds about B's merits (an attitude-altering slippery slope), and the tendency of still others not to care much about small loophole-closing proposals (a small change tolerance slippery slope) can facilitate decision

B once A is enacted, even if B would have been rejected at the outset had it been initially proposed instead of A.

Finally, small change tolerance can also be reinforced by the need to compromise. Legislators and appellate judges often have to give up something on one issue to get what they want on another — few judges will explicitly offer to change their *votes* on one case in exchange for a colleague's vote on another, but judges routinely compromise on an opinion's *wording* to earn another judge's support or goodwill — and such compromise is naturally more common on small matters than on big ones. Decisionmakers might thus be more willing to compromise on a small step A, then small extension B, and then small extension C than they would have been had the larger extension C been proposed up front.

C. Judicial-Judicial Small Change Tolerance Slippery Slopes and the Extension of Precedent

It may be that [this] is the obnoxious thing in its mildest and least repulsive form, but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.

— *Boyd v. United States* (1886).

Just as precedents can be extended beyond their original terms through equality slippery slopes and attitude-altering slippery slopes (see sections II.D.4.b & III.D), they can also be extended through small change tolerance slippery slopes.

Legal rules are often unavoidably vague at the margins. Even when a rule usually yields a clear result, there will often be some uncertainty on the border between the covered and the uncovered. If, for instance, a new free speech exception allows the punishment of “racial, sexual, and religious epithets,” some speech (for example, “nigger” or “kike”) would pretty clearly be covered. Other speech (for example, “blacks are inferior” or “Jews are conspiring to rule the world”) would clearly not be covered. For other speech (for example, “Jesus freak” or “Bible-thumper” or “son-of-a-bitch”), the result might be uncertain.

In such situations, the judge deciding each case has considerable flexibility. The test's terms and the existing precedents leave a zone of possible decisions that will seem reasonable to most observers. If the judge draws the line at any place in that zone, most observers won't much complain. This is a *small change deference heuristic*: if the distance between this case and the precedents is small enough, defer to the judge.

There can be various causes for this deference. Judges on a multi-member panel may defer to an authoring judge's draft opinion because they know that they can't debate every detail of the many cases that need to be decided; this isn't rational ignorance as such, but more broadly rational management of the court's time. Judges may also not want to alienate colleagues, with whom they must regularly work, by fighting seem-

ingly minor battles. Thus, while each judge may in theory review the authoring judge's draft *de novo*, in practice there's some deference.

Future judges who aren't bound by the precedent (either because they're on another court or because they're considering a case that is a step beyond the precedent) may also be more easily influenced by a past decision that makes only a small change. If a judge sees that the precedents imposed liability in four fairly similar situations A, B, C, and D, the judge may quickly conclude that the dominant rule is liability in all situations falling between A and D. If the judge sees that the precedents imposed liability in three similar situations A, B, C, and in a very different situation Z, the judge may be more likely to look closely and skeptically at the big change Z. This deference to closely clumped decisions is probably a rational ignorance effect — because judges, law clerks, and staff attorneys lack time to closely examine the merits of every potentially persuasive precedent, they spend more of their skepticism budget on outlier cases than on the ones that seem more consistent.

Decisions that make small changes may also be less criticized by academics or journalists. An article saying that some decision is a small change and a slight mistake is less interesting to write, and less likely to be read and admired, than one saying that another decision is a big change and a big mistake. And this effect may be strengthened to the extent that laypeople, lawyers, and other judges view judges as professionals exercising technical judgment within a system of rules: Deferring in some measure to people who are exercising professional judgment is usually seen as good sense and good manners, so long as the judgment doesn't diverge much from those reached by the professionals' peers.

And this effect is not limited to changes that are part of a judge's deliberate campaign to alter some legal test. Some small changes can happen simply because judges are faithfully trying to apply a vague rule, and conclude that the rule should extend a bit beyond its previous applications (especially if extending the rule is viscerally appealing, perhaps because one side in the typical case seems so sympathetic). Moreover, judges' ingrained habit of defending their decisions as being fully within the precedents may lead them to downplay — even to themselves — the broadening of the rule, and to describe the rule as having been this broad all along.

Thus, because of small change tolerance, a legal rule may evolve from A to B to C to D via a judicial-judicial slippery slope, even if legal decisionmakers would not have gone from A to D directly. And just as with legislative-legislative slippery slopes, those who strongly oppose D might therefore want to try to stop the process up front by arguing against A in the first place.

V. POLITICAL POWER SLIPPERY SLOPES

A. Examples

Assume again that the Supreme Court holds that Congress may legalize marijuana but ban marijuana ads, notwithstanding the commercial

speech doctrine. Now Congress can enact a law that allows marijuana sales but not advertising (decision A) without fear that the Court will hold that marijuana advertising must also be legal (result B).

But can Congress prevent *itself* from legalizing marijuana advertising? Once marijuana sales are decriminalized, a multi-billion dollar marijuana industry will come out into the open, and probably grow. If industry members find that advertising is in their interest, they will probably lobby Congress to repeal the advertising ban. They may spend money on public advocacy campaigns, on contributions aimed at electing pro-advertising candidates, and on organizing marijuana users into a powerful voice. They will have employees who will tend to support the companies' positions. And the companies will likely have the ear of legislators from marijuana-growing states.

Decision A may thus change the balance of political power by empowering an interest group that might use this power to promote B; getting to A first and then to B would thus be easier than getting to B directly. And this would happen without multi-peaked preferences, small change tolerance, or attitudes altered by public deference to legal institutions.

Another classic political power slippery slope arises when a legislature creates a new benefits program or a new bureaucracy (decision A). The legislature might not want the program or bureaucracy to get bigger (result B), but decision A creates interest groups — the funding beneficiaries and the agency employees — that have a stake in the program's growth. Getting to B directly from the initial position 0 might have been politically impossible, because of the legislature's initial reservations about creating the program. But getting to A and then going to B would be easier.

Political power slippery slopes can happen even without financial incentives for one or another political actor; all that matters is that a law changes the size of a political group. Consider a hypothetical example: say the public is currently 52.5%–47.5% against a total handgun ban (decision B), but this split breaks down into two groups — 50% of the voters are gun owners, who are 80%–20% against the ban, and 50% are nonowners, who are 75%–25% in favor of the ban.

The legislature then enacts a law (decision A) making it harder for new buyers to buy handguns, for instance by requiring time-consuming and costly safety training classes. We're not banning handguns, the legislators say — we're only imposing reasonable safety regulations. Many existing handgun owners may support the law because it seems reasonable, and because it doesn't affect them. They might respond similarly if the legislature imposes a substantial but not prohibitive tax on new gun purchases.

Over time, though, the extra difficulty of getting a gun may lead fewer people to become gun owners, which may in fact be part of A's purpose. (Many gun control advocates say that part of their reason for supporting even nonconfiscatory gun controls is to "reduce the number of guns" generally, and not just the number of illegally owned guns.) Some gun owners die or move away, and are replaced by new residents who are less likely to

own guns because of the new law. The population now shifts from 50%–50% to 40% gun owners and 60% nonowners.

Thus, without any changes in attitudes among gun owners or nonowners, the overall public attitude towards a total handgun ban has shifted from 52.5%–47.5% opposed to 53%–47% in favor ($40\% \times 80\% + 60\% \times 25\% = 47\%$). B would lose if proposed at the outset, but it can win if A is enacted first and then B is enacted after A has helped shift the balance of political power.

This is a stylized example, with a wide gulf between the views of the two groups — the non-gun-owners, whose number increases as a result of decision A, and the gun owners, whose number decreases — and with a considerable change in the groups' populations. But these effects may be reinforced by others. Gun owners may, for instance, be likelier than nonowners to contribute to pro-gun-rights groups, and nonowners may be likelier than owners to contribute to pro-gun-control groups; and beyond that, the political power slippery slope may work together with some of the other types of slippery slopes that this article has identified.

B. Types of Political Power Slippery Slopes

Decision A may change the political balance in several different ways.

1. Decisions to *change the voting rules* (such as rules related to voter eligibility, ease of registration, apportionment, or supermajority requirements) may lead to more changes in the future. For instance, if noncitizen immigrants tend to support broader immigration, and oppose laws excluding noncitizens from benefits, then letting such noncitizens vote (A) may lead to more benefits for noncitizens, and more immigration (B).

2. Decisions that *change the immigration or emigration rate* could also lead to political power slippery slopes. This is true for both international migration and interstate and inter-city migration, and for both actual migration rules and any decision that makes migration more or less appealing. Allowing more residential development in a rural area (A), for instance, may lead to more policy changes (B), as migration from urban areas changes the political makeup of the rural area.

3. Political power slippery slopes can also be created by decisions that *change the levels of participation in political campaigns*, for instance the enactment of limits on what certain groups can say about candidates or proposals, or on how much money they can spend or contribute. The Massachusetts ban on corporate speech regarding various ballot measures (A), which was struck down in *First National Bank of Boston v. Bellotti*, was probably an attempt to ease the path to imposing new burdens on corporations, such as a corporate income tax (B). Likewise, some oppose “paycheck protection” measures that limit union spending on elections (A) because they are concerned that these measures would weaken unions politically and thus make broader anti-union laws easier to implement (B). Similar effects may also flow from changes in who in fact participates in campaigns and not just from changes in election rules, as the marijuana advertising example shows.

4. Political power slippery slopes may also be driven by changes in the *number of people who feel personally affected by a particular policy*, as in the school choice example — people who start using a valuable government service become a constituency for political decisions that preserve and expand this service. This is also why some oppose means-testing for certain benefits programs, such as Social Security or Medicare. If a general benefit program shifts to being open only to a smaller and poorer group (A), the political constituency that deeply supports the program declines in size and power, and further reductions (B) become easier to enact.

5. Finally, political power slippery slopes may be driven by government actions that *make it easier or harder for supporters or opponents of a certain policy to organize* or that *affect the supporters' or opponents' credibility with the public*. For instance, even mildly enforced criminalization of some activity (for instance, marijuana use) may diminish the political power of those who engage in this activity, because they may become reluctant to speak out for fear of being arrested or at least discredited.

VI. POLITICAL MOMENTUM SLIPPERY SLOPES

Following the passage of the Brady Bill by the House of Representatives in 1991, the pro-gun-control movement was jubilant, not only savoring its victory but anticipating more to come. “The stranglehold of the NRA on Congress is now broken,” said then-Representative Charles Schumer. “[T]hey had this aura of invincibility . . . and they were beaten.” One newspaper editorialized that “with the post-Brady Bill momentum against guns, we hope fees (including on gun makers) can be increased, and the monitoring of dealers tightened,” thus “reduc[ing] the total number of weapons in circulation.” Decision A (the Brady Bill) was thus seen as potentially leading to a decision B (further gun controls) that may not have been politically feasible before decision A had been made.

Why would people take this view? Say that the gun control groups' next proposal (B) was a handgun registration requirement, and that right before the Brady Bill (A) was enacted, B would have gotten only a minority of the vote in Congress — perhaps because some members were afraid of the NRA's political power. Wouldn't B have still gotten only a minority of the vote even after the Brady Bill was enacted? The conventional explanation for the importance of the NRA's victory or defeat is “political momentum,” but that's just a metaphor. What is the mechanism through which this effect might operate?

A. Political Momentum and Effects on Legislators, Contributors, Activists, and Voters

The answer has to do with imperfect information. Most legislators don't know the true political costs or benefits of supporting proposal B; they may spend some time and effort estimating these costs and benefits, but their conclusions will still be guesses. (Polls are of only limited use here; they generally don't accurately reveal the depth of voters' feelings and don't reveal what the voters would think about the proposal once the NRA

and its opponents started running their ads.) And in this environment of limited knowledge, decision A itself provides useful data: the NRA's losing the Brady Bill battle is some evidence that the gun-rights movement may not be that powerful, which may lead some legislators to revise downward their estimates of the movement's political effectiveness. So behind the metaphor of "momentum" lies a heuristic that legislators use to guess a movement's power: a movement that is winning tends to continue to win.

This phenomenon is different from the political power slippery slope, because it focuses on the movement's *perceived* power, not on its actual power. And it's different from the attitude-altering slippery slope, though both operate as a result of bounded rationality: In an attitude-altering slope, A's enactment leads decisionmakers to infer that *A is probably a good policy*, and thus that B would be good, too. In a political momentum slippery slope, A's enactment leads decisionmakers to infer that *the pro-A movement is probably quite strong*, and thus that the movement will likely win on B, too. And since legislators tend to avoid opposing politically powerful movements, they may decide to vote with the movement on B.

Some legislators, of course, will vote their own views, and others may oppose B despite the movement's perceived strength, because they know that their own constituents disagree with the movement. But a movement's apparent strength may affect at least some lawmakers, and in close cases this may be enough to get B enacted.

Citizens may also change their estimates of a movement's power based on its recent record. Potential activists and contributors tend to prefer to spend their time and money on contested issues rather than on lost causes or sure victories. Likewise, voters may be more likely to choose among candidates based on a single issue when that issue seems up for grabs, rather than when success on that issue seems either certain or impossible.

Thus, when a movement's success in battle A makes the movement seem more powerful and its enemies more vulnerable, and therefore makes the outcome of battle B seem less certain than before, potential activists may be energized. For instance, one history 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 had been politically defeated for the first time. Could not other, and perhaps greater, victories be achieved with more determination and effort?"¹⁴

So it's sometimes rational for voters and legislators to support or oppose decision A based partly on the possibility that A will facilitate B by increasing the perceived strength of the movement that supports both A and B. For example, those who want to see expansion from a modest gun control to broader controls may take the view that, in the words 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."¹⁵ And those who oppose the broader downstream

controls might likewise try to prevent this momentum by blocking the modest first steps.

This is especially so because movements rarely just disband after a victory. Successful movements often have paid staff who are enthusiastic about pushing for further action, and unenthusiastic about losing their jobs. The staff have experience at swaying swing voters, an organizational structure, media contacts, volunteers, and contributors. It seems likely that they will choose some new proposal to back.

This possible slippage seems more likely still if the pro-A movement's leadership is already on the record as supporting the broader proposal B. For instance, many leaders in the gun control movement have publicly supported total handgun bans, even though their groups are today focusing on more modest controls, and some gun control advocates have specifically said that their strategy is to win by incremental steps. Likewise, if a group's proposal is so modest that it seems unlikely to accomplish the group's own stated goals, then we might suspect that a victory on this step will necessarily be followed by broader proposals, which the momentum created by the first step might facilitate.

In such cases, foes of B may well be wise to try to block A, rather than wait until the pro-B movement has been strengthened by a success on A. Naturally there may be a cost to this strategy: sometimes, blocking decision A may make B *more* likely, for instance if it enrages a public that thinks that something needs to be done. This is a common argument for compromise: let's agree on the modest concession A (say, a modest gun control) because otherwise voters might demand B (a total ban). But the discussion of political momentum slippery slopes identifies one possible cost (from the anti-B movement's perspective) of such compromises.

Finally, a movement's victory or defeat in battle A may also affect the movement's internal power structure: if the movement loses, its leaders may be discredited; if the movement wins, those who most strongly supported the winning strategy may gain more power. The result in A might thus affect the movement's willingness to back proposal B and not just its ability to do so — though such effects may be hard to predict, especially for outsiders who know little about the movement's internal politics.

B. Reacting to the Possibility of Slippage — The Slippery Slope Inefficiency and the Ad Hominem Heuristic

As with other slippery slopes, the danger of a political momentum slippery slope creates a social inefficiency: the socially optimal outcome might be A, but it might be unattainable because some people who support A in principle might oppose it for fear that it will lead, through political momentum, to B.

This slippery slope inefficiency might sometimes be avoided by coupling a proposal supported by one side with a proposal supported by the other, for instance a new gun control with a relaxation of some existing control. This isn't just a compromise that moves from the initial position 0 to a modest gun control (A) but not all the way to a strict gun control (B)

— such compromises are still moves in one direction and may lead legislators to upgrade their estimate of the gun-control movement's power. Rather, it's a proposal under which both sides win something and lose something, which should have no predictable effect on legislators' estimates of either side's strength.

Another reasonable reaction by B's opponents, though, may be to adopt the ad hominem heuristic, the presumption that one should usually oppose even modest proposals A that are being advocated by those who hope to implement more radical proposals B later (see section II.F). Acting this way might seem too partisan or even ill-mannered. Still, it seems to me that voters or legislators who strongly oppose B may rightly choose to oppose anything that could help bring B about, even to the point of trying to block passage of an intermediate matter A in order to diminish the movement's political momentum.

VII. IMPLICATIONS AND AVENUES FOR FUTURE RESEARCH

This article has tried to describe how slippery slopes can actually operate. How can these descriptions be practically helpful?

A. Considering Slippery Slope Mechanisms in Decisionmaking and Argument Design

Identifying the various slippery slope mechanisms can help us estimate the risk of slippage in a particular case. Will legalizing marijuana sales, for instance, be likely to lead to the legalized advertising of marijuana? Just asking "Is the slippery slope likely here?" might lead us to guess "no," because we might at first think only of attitude-altering slippery slopes or small change tolerance slippery slopes, which might not seem particularly likely in this situation. But if we systematically consider all the possibilities, we may find that the first step might indeed lead to other steps through, say, the political power slippery slope or the legal-cost-lowering slippery slope.

Conversely, sometimes a slippery slope may seem plausible, but looking closer at the potential mechanisms might persuade us that in this situation none of them is likely to cause slippage. (For instance, we might recognize that the slippery slope we had in mind was a multi-peaked preferences slippery slope, and either a survey or our general political knowledge might suggest that not enough voters have multi-peaked preferences on this issue to make slippage likely.) In either case, considering the concrete mechanisms will give us a more reliable result than we'd get just by focusing on the metaphor.

If we think through the various slippery slope mechanisms, we can also come up with some general heuristics or presumptions governing our actions in particular areas. I've identified two — the rebuttable presumption against even small changes (see sections III.C.2 and III.C.3.a) and the ad hominem heuristic (see sections II.F and VI.B)— but doubtless there are others. Finding such heuristics, and figuring out where they can sensibly apply, can be an important research project, especially in light of the per-

vasive need for heuristics under conditions of bounded rationality. Understanding the slippery slope mechanisms might help in this research.

Studying these mechanisms might also help us persuade others, in our capacities as lawyers, scholars, commentators, judges, and legislators. Arguments such as “Oppose this law, because it starts us down the slippery slope,” have earned a deservedly bad reputation because they are just too abstract to be persuasive. One can always shout “Slippery slope!,” but without more details, listeners will wonder “Why will a slippery slope happen here when it hasn’t happened elsewhere?”

If, however, one identifies the concrete mechanism through which slippage might happen, and tells listeners a plausible story about the steps that might take place, the argument will usually become more effective. And when that happens, understanding the mechanisms of the slippery slope can likewise help the other side craft effective counterarguments.

B. Thinking About the Role of Ideological Advocacy Groups

Being aware of the slippery slope mechanisms can help counter them: such awareness may help prevent the initial decision A that might set the slippage in motion, and may possibly stop B even if A is indeed enacted. This awareness, of course, is part of why ideological advocacy groups, such as the ACLU and the NRA, try to persuade people to pay attention to slippery slope risks.

Slippery slope risks thus help explain and, to some extent, justify these groups’ behavior. Such groups are often faulted as being extremist or unwilling to endorse reasonable compromises, and these criticisms may often lead voters to distrust these groups. But the phenomena discussed in this article might suggest that these groups’ tactics could, on balance, be sound:

1. Most obviously, the ACLU’s or the NRA’s opposition to a facially modest compromise A may seem more reasonable and less fanatical given the risk that A may indeed make a broader restriction B more likely.

2. Of course, one can’t know for sure just how likely A is to lead to B, and some might reason that in the absence of this knowledge, the advocacy group should be willing to compromise. But the plausibility of many slippery slope mechanisms suggests that such modest compromises can indeed be dangerous. If an advocacy group strongly opposes B, it can reasonably adopt a rebuttable presumption against even small changes that might help bring B about (rebuttable by evidence that A is very good on its own, or that A is highly unlikely to lead to B).

3. Likewise, groups may reasonably fear that their opponents’ victories could create political momentum for the opponents’ broader proposals, by increasing the opponents’ perceived political strength. The advocacy groups might therefore reasonably adopt an ad hominem heuristic, distasteful as it may be: “Though we might not strongly disagree with [the Religious Right/the Brady Campaign/etc.] on this issue, we will still oppose them here for fear that their victory today might increase their chances of winning broader restraints tomorrow” (see sections VI.B and section II.F).

4. Advocacy groups must do more than just adopt policy stances; they must also persuade the public to adopt those stances. But because of rational ignorance, many voters won't be willing to adopt nuanced policy positions — rather, they'll need simple heuristics that they can follow.

“Look closely at the purported evidence underlying gun control proposals” is thus not an effective message for the NRA to send. It's wise advice in the abstract, but most voters won't be willing to spend the time needed to follow it. “If guns are outlawed, only outlaws will have guns” may be less accurate in theory, but it's easier to apply in practice (though it may also risk alienating voters who oppose such simplistic-seeming heuristics).

5. Finally, this need to give voters some simple heuristics increases the importance of the ad hominem heuristic. Most voters have little information about the likelihood that enacting A will eventually lead to B. They don't know how the battle over A will change the power of various advocacy groups. They don't know whether other voters have multi-peaked preferences that could make A unstable. They don't know whether A's results are likely to be evaluated in a way that will make B seem appealing.

But they do know that A is being backed by a group with which they disagree most of the time, and which is also committed to ultimately enacting B. In an environment of severely bounded rationality, it makes sense for voters to adopt an ad hominem heuristic, and for advocacy groups to try to instill this heuristic in voters, though the groups should recognize that stressing this approach too much might cause a backlash among voters who find such arguments unfair, offensive, or divisive.

Of course, these considerations are only a small part of how advocacy groups plan their strategy. My point here is simply that (1) advocacy groups are an important means of fighting the slippery slope, that (2) in the process of fighting it, they may reasonably take positions that would have looked unreasonable had the slippery slope risk been absent, and that (3) perhaps these groups can make their positions more politically effective by explaining more explicitly why the slippery slope is a real risk.

C. Fighting the Slippery Slope Inefficiency

Understanding slippery slope mechanisms can also help us think about how to avoid the slippery slope inefficiency, where a potentially valuable option A, which would pass if considered solely on its own merits, is defeated because of swing voters' reasonable fears that A will lead to B. Various tools can help prevent this slippery slope inefficiency by decreasing the chance that A could help bring about B, and thus increasing the chance that A will be enacted. This article has discussed three such tools: (1) strong constitutional protection of substantive rights; (2) weak rational basis review under equal protection rules; and (3) proposals in which both sides win something and lose something, thus preventing either side from gaining political momentum. We may want to look for other such tools.

For instance, to what extent can interest groups use their permanent presence, and their continuing relationships with legislators and members of opposing advocacy groups, to work out deals that can prevent slippery

slope inefficiencies — deals that unorganized voters could not themselves make? Can such deals be reliable commitments, even though they aren't constitutionally entrenched, or is there too much danger that future legislatures will overturn the deals?

It might also be interesting to do case studies of situations where a slippery slope seemed plausible, but no slippage occurred. Here, too, this article's taxonomy and analysis might be useful, because the slippage avoidance techniques would probably differ depending on the kind of slippery slope that's involved.

D. Slippery Slopes and Precedent

Slippery slopes in judicial decisionmaking might at first seem quite different from slippery slopes in legislatures. Judicial decisionmaking, the theory would go, involves a legal obligation to follow precedent, but legislative decisionmaking doesn't — and without a system of binding precedent, slippery slopes are unlikely.

But this article suggests that judicial and legislative slippery slopes are more alike than we might suppose. Many judicial-judicial slippery slopes rely on more than just the binding force of precedent — they rest also on pressures for equal treatment, on the attitude-altering effects of legal rules, and on small change tolerance, forces that may operate in legislatures as well. Considering how slippery slopes work might thus provide a perspective on the way legal rules evolve within the judicial system; and considering how judge-made rules evolve may likewise illuminate similar mechanisms in the evolution of statutes.

E. Empirical Research: Econometric, Historical, and Psychological

The analysis in this article cries out for empirical research, though unfortunately such research is hard to do. Econometric models, for instance, might possibly help us empirically evaluate the likelihood of certain kinds of slippage, and perhaps even generate testable predictions. Likewise, it would be good for people to do historical case studies, exploring which changes in the law (such as the growth of police surveillance, of income tax rates, of antidiscrimination law, of public smoking bans, of free speech protections, or of hostile environment harassment law) came about as a result of slippery slopes and which ones didn't. This article's identification of the different kinds of slippery slopes might make this sort of research more productive, since the factors influencing the slippery slope risk likely vary with the mechanism involved.

This article has also linked slippery slopes to other phenomena that scholars have recently discussed: multi-peaked preferences, rational ignorance, the expressive effect of law, path dependence, and possible departures from rationality, such as context-dependence. Understanding these connections — especially from the perspective of those who, unlike me, are experts in social psychology and related fields — might help us further explore slippery slopes, and understand when the risk of slippage is higher and when it is lower.

VIII. CONCLUSION

Sandra Starr, vice chairwoman of the Princeton Regional Health Commission . . ., said there is no “slippery slope” toward a total ban on smoking in public places. “The commission’s overriding concern,” she said, “is access to the machines by minors.”

— *New York Times*, Sept. 5, 1993.

Last month, the Princeton Regional Health Commission took a bold step to protect its citizens by enacting a ban on smoking in all public places of accommodation, including restaurants and taverns. . . . In doing so, Princeton has paved the way for other municipalities to institute similar bans

— *The Record (Bergen County)*, July 12, 2000.

Let me return to the question with which this article began: When should you oppose one decision A, which you don’t much mind on its own, because of a concern that it might later lead others to enact another decision B, which you strongly oppose?

One possible answer is “never.” You should focus, the argument would go, on one decision at a time. If you like it on its own terms, vote for it; if you don’t, oppose it; but don’t worry about the slippery slope. And in the standard first-order approximation of human behavior, where people are perfectly informed, have firm, well-developed opinions, and have single-peaked preferences, slippery slopes are indeed unlikely. People decide whether they prefer 0, A, or B, and the majority’s preferences become law without much risk that one decision will somehow trigger another.

Likewise, in such a world, law has no expressive effect on people’s attitudes, people’s decisions are context-independent, no one is ignorant, rationally or not, and people act based on thorough analysis, not on heuristics. Policy decisions in that world are easier to make and to analyze.

But as behavioral economists, norms theorists, and others have pointed out, that is not the world we live in, even if it is sometimes a useful first-order approximation. The real world is more complex, and this complexity makes possible slippery slopes and their close relative, path dependence. We can’t just dismiss slippery slope arguments as illogical or paranoid, though we can’t uncritically accept them, either.

The slippery slope is in some ways a helpful metaphor, but as with many metaphors, it starts by enriching our vision and ends by clouding it. We need to go beyond the metaphor and examine the specific mechanisms that cause the phenomenon that the metaphor describes — mechanisms that connect to the nature of our political institutions, our judicial process, and possibly even human reasoning. These mechanisms and their effects deserve further study, even if paying attention to them will make policy analysis more complex. So long as our support of one political or legal decision today can lead to other results tomorrow, wise judges, legislators, opinion leaders, interest group organizers, and citizens have to take these mechanisms into account.

ENDNOTES

¹ Attributed by Roy Schotland (in personal conversation) to Sir Frederick Maitland.

² *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 137 (1961) (Black, J., dissenting).

³ The leading law review article on this subject is Frederick Schauer's excellent *Slippery Slopes*, 99 HARV. L. REV. 361 (1985), but it focuses chiefly on slippery slopes in judicial reasoning, a fairly small though important subset of the problem discussed here. Philosophers' recent work on the subject, *see generally* Eric Lode, *Slippery Slope Arguments and Legal Reasoning*, 87 CAL. L. REV. 1469, 1479 (1999), and sources cited therein, has typically focused on theoretical questions (such as whether these arguments are logically valid) rather than on the concrete mechanisms of how slippery slopes operate.

⁴ Wilbren van der Burg, *The Slippery Slope Argument*, 102 ETHICS 42, 65 (1991).

⁵ *See* Robert Cottrol & Raymond Diamond, *Second Amendment Cannot Be Ignored*, LEGAL TIMES, May 27, 1991, at 24 (making this argument).

⁶ For more detail on slippery slopes in assisted suicide liberalization and in speech restrictions, *see* Eugene Volokh, *Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1057-60 (2003).

⁷ Charles Krauthammer, *Disarm the Citizenry: But Not Yet*, WASH. POST, Apr. 5, 1996, at A19;.

⁸ Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 582 (1933) (attributing the phrase to Georg Jellinek).

⁹ Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 339 (2000).

¹⁰ *E.g.*, Editorial, *A Vote Against Hate*, LOUISVILLE COURIER-J., Feb. 3, 1994, at 6A.

¹¹ A whole genre of legal writing, of which Warren & Brandeis's *The Right to Privacy* is the classic example, tries to take advantage of this tendency by drawing from a line of cases a single unifying justification that goes considerably beyond the particular holdings of each case.

¹² *E.g.*, *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188-89 (5th Cir. 1979) (rejecting a First Amendment defense to a trademark claim).

¹³ I have not checked this myself, nor do I intend to. Some sources suggest that real frogs don't behave this way; but consider the discussion as referring to the metaphorical frog — a creature much like the metaphorical ostrich, which (unlike a real ostrich) does bury its head in the sand when danger looms, and which is thus far more useful to us than a real ostrich could ever be.

¹⁴ DAVID E. KYVIG, *REPEALING NATIONAL PROHIBITION* 54, 57 (2000).

¹⁵ Editorial, *Give Peace a Chance*, N.Y. TIMES, Dec. 2, 1993, § 4, at 14.