

THE MECHANISMS OF THE SLIPPERY SLOPE

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THE MECHANISMS OF THE SLIPPERY SLOPE

*Eugene Volokh**

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*, Speech to Parliament, Mar. 22, 1775.

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,"¹ and oppose a decision that you might have otherwise supported were it not for your concern about the

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For more citations beyond those given in the footnotes, see <http://www1.law.ucla.edu/~volokh/slippery2.htm>.

¹ JAMES MADISON, *A Memorial and Remonstrance Against Religious Assessments* (1785), in 8 THE PAPERS OF JAMES MADISON 298, 300 (Robert A. Rutland et al. eds., 1973).

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,² 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).³ Such an A may not have logically required the corresponding B, yet for political and psychological reasons, it helped bring B about.⁴

But, as thinkers such as Lincoln, Holmes, and Frankfurter have recognized, slippery slope objections can't always be dispositive.⁵ We accept, because we must, some speech restrictions. We accept some searches and seizures. We accept police departments, though creating such a department may lead to arming it, which may lead to some officers being willing to shoot innocent civilians, which may eventually lead to a police state (all of which has happened with the police in some places). Yes, 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.⁶ 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

² See *id.*; *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640–41 (1943) (Jackson, J.); *Texas v. Johnson*, 491 U.S. 397, 417 (1989) (Brennan, J.); *Cohen v. California*, 403 U.S. 15, 25 (1971) (Harlan, J.); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 137 (1961) (Black, J., dissenting); *Barenblatt v. United States*, 360 U.S. 109, 150–53 (1959) (Black, J., dissenting); see also http://www1.law.ucla.edu/~volokh/hall_of_fame.htm (last visited Jan. 11, 2003) (collecting some of the great slippery slope arguments and counterarguments).

³ See, e.g., pp. 1130–33.

⁴ Cf. DOUGLAS WALTON, *SLIPPERY SLOPE ARGUMENTS* 14 (1992) (stressing that slippery slope arguments aren't formal proofs, but instead are practical arguments about likely consequences).

⁵ See Letter from Abraham Lincoln to Erastus Corning and Others (June 12, 1863), in 6 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 260, 267 (Roy P. Basler ed., 1953); *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting); *Beauharnais v. Illinois*, 343 U.S. 250, 263–64 (1952) (Frankfurter, J.); *Dennis v. United States*, 341 U.S. 494, 545–46 (1951) (Frankfurter, J., concurring in the judgment).

⁶ See David J. Mayo, *The Role of Slippery Slope Arguments in Public Policy Debates*, 21–22 *PHIL. EXCHANGE* 81, 81–82 (1992) (noting that slippery slope arguments are "dismissed so glibly by some" though they "figure so centrally in the thinking of others"); Frederick Schauer, *Slippery Slopes*, 99 *HARV. L. REV.* 361, 382 (1985) (suggesting that the exaggeration present in many slippery slope claims makes it "possible for the cognoscenti to sneer at all slippery slope arguments, and to assume that all slippery slope assertions are vacuous"); Josh Young, *Contract's Money Serves District's Students Well*, *WIS. ST. J.*, July 15, 2000, at 7A ("The first is a basic argument, one infamous for the paranoid: the slippery slope."); Ann Scales, *Feminist Legal Method: Not So Scary*, 2 *UCLA WOMEN'S L.J.* 1, 15–16 (1992) (describing "the engine of the slippery slope argument" as "a paranoid fear" that "decision-makers in later cases either will not understand or will ignore the distinctions that drafters of regulations have tried to explain"). "Paranoia," of course, means not just fear but irrational fear.

sound distinction tomorrow.”⁷ To critics of slippery slope arguments, the arguments themselves sound like a slippery slope: if you accept this slippery slope argument, then you’ll end up accepting the next one and then the next one until you eventually slip down the slope to rejecting all government power (or all change from the status quo), and thus “break down every useful institution of man.”⁸

Exactly why, the critics ask, would accepting (for instance) a restriction on “ideas we hate” “sooner or later” lead to restrictions on “ideas we cherish”?⁹ 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?¹⁰

My aim here is to analyze how we can sensibly evaluate the risk of slippery slopes, a topic that has been surprisingly underinvestigated.¹¹ 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.¹² 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,

⁷ Attributed by Roy Schotland (in personal conversation) to Sir Frederick Maitland.

⁸ *State v. Chandler*, 2 Del. (2 Harr.) 553, 575 (1837); see also David Enoch, *Once You Start Using Slippery Slope Arguments, You’re on a Very Slippery Slope*, 21 OXFORD J. LEGAL STUD. 629, 637 (2001).

⁹ *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 137 (1961) (Black, J., dissenting).

¹⁰ See Schauer, *supra* note 6, at 381.

¹¹ The leading law review article on this subject is Frederick Schauer’s excellent *Slippery Slopes*, *id.*, 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.

¹² See, e.g., Schauer, *supra* note 6, at 369. Slippery slope arguments are sometimes made by people who dislike both A and B: the arguer may say “Even if A is good on its own, it might lead to a bad B,” while really thinking that A is bad itself. But the argument is framed this way only because the arguer thinks some *listeners* may like A but oppose B. These listeners need to decide whether to oppose A given the risk that it might lead to B, even if the arguer need not determine this (since he already opposes A).

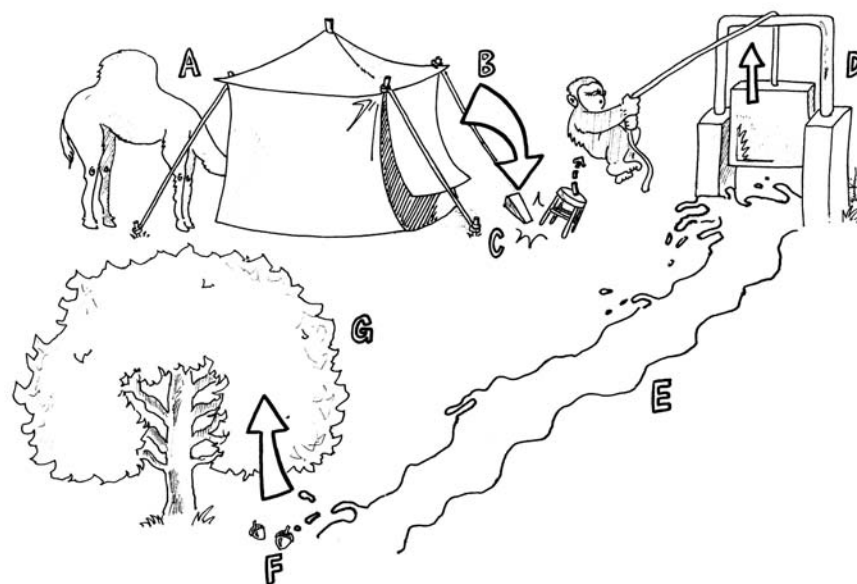
Sometimes, people might also fear that supporting A will lead them to eventually support B *themselves*, even though they strongly oppose it right now. See Schauer, *supra* note 6, at 374 (“Just as people who are trying to stop smoking make sure there are no cigarettes in the house, so too might formulators of principles recognize that they themselves have weaker moments, moments when they would be unwilling or unable to apply the distinction they now comprehend and favor.”). This is an interesting issue, but one that’s outside the scope of this Article, though some of the framework described below might end up being applicable to it.

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.¹³ 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.” But whatever one calls these arguments, the important point is that a person is asking the question “Does it make sense for me to support A, given that it might lead others to support B?,” which breaks down into “How much do I like A?,” “How much do I dislike B?,” and, the focus of this Article, “How likely is A to lead others to support B?”¹⁴ And this last question in turn requires us to ask “What are the mechanisms by which A can lead others to support B?”

¹³ For instance, is an abortion ban “more of” spousal notification requirements, because it is a more serious burden on pregnant women, or something that’s not on the same continuum, because it actually forbids conduct rather than just requiring that people be notified about it?

¹⁴ Of course, sound policy analysis should consider much more than this question: It should consider the preceding two questions (how good is A and how bad is B?). It should consider whether the *refusal* to enact A is likely to lead to bad consequences, perhaps including the very same decision B (for instance, if the refusal could yield a political backlash against what voters might perceive as the obstinacy of the anti-A forces). It should consider what the alternatives to A might be, and more factors still. But this Article focuses only on one part of the policy analysis, which is “How likely is A to lead to B?”



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.¹⁵ 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 help cause 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:

¹⁵ “Mechanism” simply refers here to the means by which A can lead to B; I don’t want to suggest that this means is “mechanical” in the sense of being automatic, since none of these processes works automatically or deterministically. See Mario J. Rizzo & Douglas Glen Whitman, *The Camel’s Nose Is in the Tent: Rules, Theories, and Slippery Slopes* 29 n.22 (Sept. 2002) (unpublished manuscript, on file with the Harvard Law School Library) (pointing out that though “mechanism” is potentially ambiguous, there’s no good alternative).

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.¹⁶

To illustrate this briefly, consider the claim that gun registration (A) might lead to gun confiscation (B).¹⁷ 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 therefore 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.¹⁸ 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.

¹⁶ I thus somewhat disagree with Fred Schauer's claim that "[e]ither linguistic imprecision or limited comprehension is necessary for a slippery slope claim," Schauer, *supra* note 6, at 380 (emphasis omitted), at least if slippery slope is defined as broadly as he and I define it, covering all situations where "permitting the instant case . . . [will] lead to, or increase the likelihood of, the danger case," *id.* at 369.

¹⁷ See *infra* note 40 (giving examples of this argument); *infra* note 301 (giving examples of calls for gun bans); *infra* note 58 (discussing political feasibility of gun bans in some regions). Many of the examples in this Article are drawn from controversies involving free speech, gun control, and privacy, simply because I mostly work and read in these areas and thus see such examples. I suspect, though, that similar examples could be drawn from many other fields.

¹⁸ See *infra* note 275.

- 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.¹⁹

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. (For instance, gun registration might energize gun-rights groups, and lead them to be even more effective in fighting broader gun controls; or if gun registration seems ineffective or unduly intrusive, some formerly pro-gun-control voters might become more skeptical of gun controls generally.) But the important point is that 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. Even if you are skeptical of one kind of slippery slope claim, you may find that others are worth considering.

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*²⁰), *judicial-legislative*, or *legislative-judicial*.²¹

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?,"²² but rather "Is it likely that *other* citizens, judges, and legislators will draw the line there?"²³

¹⁹ See *infra* note 57.

²⁰ See MADISON, *supra* note 1, at 300 (opposing a legislative proposal in part by pointing to its harmful long-term consequences, and expressing the need to act before "usurped power ha[s] strengthened itself by exercise, and entangled the question in precedents").

²¹ Much of this analysis may also be applicable to administrative decisions or executive decisions, but I have not focused closely on those matters.

²² Cf. Jack M. Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1, 29 (1986) (characterizing the "Anti-Slippery Slope" argument as being that "reasonable boundaries can be drawn to demarcate [the] scope [of a proposed rule]").

²³ See Schauer, *supra* note 6, at 373 ("The slippery slope fear arises precisely because someone other than the original formulator of the principle may be called upon to apply it."); Joseph E. Olson & David B. Kopel, *All the Way down the Slippery Slope: Gun Prohibition in England and Some Lessons for Civil Liberties in America*, 22 HAMLINE L. REV. 399, 433 (1999) (making the same point); Bernard Williams, *Which Slopes Are Slippery?*, in MORAL DILEMMAS IN MODERN MEDICINE 126, 127–28

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 (more on this in 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, 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. Slippery slopes are also connected to path dependence.²⁴ Once law B has been enacted, it’s often easy to assume that its enactment was predetermined by powerful social forces that no one could have derailed. But the path dependence literature suggests that sometimes a decision A can shift the evolution of a legal rule from one course to another, bringing about a B that would not have otherwise happened. The study of slippery slopes can thus illuminate forms of path dependence that haven’t yet been

(Michael Lockwood ed., 1985) (pointing out that even if “some distinction between A and B can reasonably be defended,” it may be that it “cannot *effectively* be” defended; some distinctions “are intrinsically reasonable merely in terms of the subject-matter, but if one tries to base policy on those distinctions, there are social factors which mean that it will not stick”).

²⁴ For discussions of path dependence generally, see Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 WASH. U. L.Q. 347 (1996); Eric Talley, *Precedential Cascades: An Appraisal*, 73 S. CAL. L. REV. 87 (1999); and Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 605 (2001).

fully investigated,²⁵ and the study of path dependence can help illuminate the slippery slope phenomenon.²⁶

6. One kind of slippery slope — the attitude-altering slippery slope — is connected to expressive theories of law.²⁷ The law, these theories suggest, “affects behavior . . . by what it says rather than by what it does”;²⁸ a classic example is laws against smoking in public places strengthening a no-smoking-in-public-places norm even when those laws are rarely enforced. Attitude-altering slippery slopes happen when the expressive power of law changes people’s *political* behavior as well as their other behavior, by leading them to accept proposals that they would have rejected before.

7. 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.²⁹ 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.³⁰

²⁵ Political momentum slippery slopes and attitude-altering slippery slopes, for example, may drive forms of path dependence. Likewise, the possibility of legislative slippery slopes as well as judicial ones suggests that insights about path dependence in the common law — which rest on the notion that “[p]ath dependence theory is relevant to the common law system for a simple reason: . . . stare decisis,” Hathaway, *supra* note 24, at 622 — may be applicable to legislative contexts as well.

²⁶ For instance, “increasing return path dependence,” in which decision A lowers the cost of decision B, *see id.* at 608–13, is analogous to the cost-lowering slippery slope discussed in section II.A.

²⁷ I speak here specifically of theories that focus on law’s possible practical effects on people’s attitudes, *see, e.g.*, Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 603–04 (1998); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 340 (2000); Michael H. Shapiro, *Regulation as Language: Communicating Values by Altering the Contingencies of Choice*, 55 U. PITT. L. REV. 681, 686 (1994); I do not refer to the theories that focus on the moral significance of the messages that law may send, *see, e.g.*, Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

²⁸ McAdams, *supra* note 27, at 339.

²⁹ *See, e.g.*, Bradley R. Gitz, *Blastocysts and Slippery Slopes*, ARK. DEMOCRAT-GAZETTE, July 19, 2001, at B7 (“On Social Security reform, fruitful steps that could be taken to strengthen the system through partial privatization are opposed by liberals because they sense (. . . not altogether inaccurately) that the people pushing such ideas are only using them as stepping stones toward their goal of dismantling the program as a whole.”); *id.* (making the same point about gun owners’ hesitation to support limited gun control proposals).

³⁰ *See infra* 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.³¹ Differential 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.³²

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.³³

8. 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: if a new proposal seems to have low costs (to liberty or the public fisc), it should be supported, or at least not strongly opposed, even if its likely benefits are low.³⁴ Many say this about modest restrictions on privacy, gun ownership, abortion, and other behavior — the restrictions may not offer huge benefits, but neither do they seriously restrict rights, so why not try them? Maybe the experiment will pleasantly surprise us, or give us some helpful information about which proposals work and which don't. And beyond this, fighting a modest experiment might make us seem foolishly intransigent — 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.

³¹ See, e.g., cases cited *infra* note 104. Of course, this slippage will happen only if the court concludes that A and B are similar enough along some relevant metric; and by hypothesis, the person deciding whether to support A despite the risk that it will lead to B thinks that A and B are quite different — A being good and B being bad. But there's nothing inconsistent here: one might see A and B as materially different, but might fear that a court applying the equality rule will disagree.

³² See *infra* p. 1087.

³³ See *infra* section VI.B.

³⁴ See, e.g., GERALD D. ROBIN, *VIOLENT CRIME AND GUN CONTROL* 87 (1991) (faulting “the gun lobby” for its “intransigence” in opposing “de minimus reforms which should not be considered the least bit controversial or threatening to law-abiding gun owners,” such as assault rifle bans and waiting periods); James S. Brady, *Lock and Unload: One Survivor Urges Sanity*, L.A. TIMES, Mar. 30, 2001, at B9 (criticizing “the gun lobby” for “kill[ing] the effort to pass even . . . modest and reasonable steps toward safer communities”).

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.³⁵

9. These heuristics³⁶ 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.

10. 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.³⁷

11. Thus, slippery slopes present a real risk — not always, but often enough that we cannot lightly ignore the possibility of such slippage. “In the absence of absolute knowledge and consequently absolute control over the consequences of our actions and decisions, we cannot afford to ignore the possible misuses of proposed reforms.”³⁸

* * *

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 situa-

³⁵ See *infra* section VI.B; see also *infra* section II.G.

³⁶ “Heuristic” here simply means a rule of thumb that people can follow when they lack the time and ability to conduct an exhaustive logical and empirical analysis. Heuristics are common reactions to rational ignorance.

³⁷ See *infra* sections II.D.4.b, III.D, and IV.C.

³⁸ DAVID LAMB, DOWN THE SLIPPERY SLOPE: ARGUING IN APPLIED ETHICS 120 (1988).

tions.³⁹ Part VII then briefly summarizes how we might apply this analysis to thinking about ideological advocacy groups, evaluating the likelihood of slippage, crafting slippery slope arguments and counterarguments, avoiding the slippery slope inefficiency, understanding the operation of judicial precedent, and 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)?⁴⁰ 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.⁴¹

But if guns get registered, searching the homes of all registrants who don't promptly surrender their guns would become both financially and

³⁹ I would have liked to illustrate the discussion with case studies of how the legal system has slipped down various slippery slopes, but unfortunately it's generally very hard to tell whether legal change A in fact caused legal change B (even if it's plausible that it did), or whether B would have taken place even in a counterfactual world where A had somehow been blocked; such case studies might therefore have become more controversial than persuasive. Cf. Talley, *supra* note 24, at 114, 117–18 (discussing a similar difficulty in determining whether the spread of a particular legal rule is a result of a “precedential cascade” — a form of path dependence — or rather a result of broader changes in society or the legal system). Still, I do mention some for possible examples in notes 318–323, and suggest that the framework might aid future analyses of such examples.

⁴⁰ See, e.g., “*I Think the Real Target Is the Second Amendment*”, NEWSWEEK, Aug. 23, 1999, at 30 (quoting NRA executive vice president Wayne LaPierre as saying that “[people] don't want their names on government lists. They know what the next step is. It's a knock on the door confiscating their guns.”); Nat'l Rifle Ass'n, *Fact Sheet: Licensing and Registration* (Oct. 7, 2000), available at <http://www.nraila.org/FactSheets.asp?FormMode=Detail&ID=28>. This argument is buttressed by the perception that gun registration would not help fight crime much. See *infra* note 61. If proposal A seems not very effective, then people may be less willing to tolerate the risk that A might lead to a harmful consequence B.

⁴¹ If guns aren't registered, such searches will probably also violate the Fourth Amendment. See *infra* section II.A.4. But if A is done before B, and gun owners have registered their guns by the time the gun ban is enacted, the registration will provide the probable cause needed to search the owners' houses.

politically cheaper, especially if a confiscation law bans just one type of gun, covers only a region where guns are already fairly uncommon, or perhaps covers only a subset of the population (such as public housing residents⁴²). Confiscation has eventually followed gun registration in England, New York City, and Australia.⁴³ 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.⁴⁴

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.⁴⁵ There's no requirement here that A be seen as a precedent, or that A change anybody's moral or pragmatic at-

⁴² See, e.g., Susie Stoughton, *Suffolk May Ban Guns from Public Housing*, VIRGINIAN-PILOT (Norfolk, Va.), Sept. 10, 2001, at B1; Editorial, *Gun Sweeps: No Model for Cities*, N.Y. TIMES, Apr. 20, 1994, at A18 (discussing President Clinton's proposal to allow warrantless searches for guns in public housing); *Pratt v. Chi. Housing Auth.*, 848 F. Supp. 792 (N.D. Ill. 1994) (striking down such a policy on Fourth Amendment grounds); see also Neal R. Peirce, *Let's Get Serious and End the Violence*, HOUSTON CHRON., Nov. 1, 1993, at 12 (advocating that "neighborhood residents be able to petition for an unscheduled police sweep of every house, a sweep that would check exclusively for unregistered firearms and confiscate all that are found").

⁴³ See Olson & Kopel, *supra* note 23, at 433 (discussing confiscation of handguns in England and certain semiautomatic rifles in New York City); Kirsten Lawson, *Gun Buy-Back: "Few" Illegal Weapons Left*, CANBERRA TIMES, Nov. 5, 1997, at A2 ("As of September 30, 174 registered illegal firearms remained unaccounted for, Mr Humphries told the Assembly. A spokesman said the Firearms Registry had since set about tracking them down, and confiscating them without compensation."); see also David B. Kopel, *Peril or Protection? The Risks and Benefits of Handgun Prohibition*, 12 ST. LOUIS U. PUB. L. REV. 285, 354 (1993) (describing a similar situation in Jamaica). But see DENNIS A. HENIGAN ET AL., GUNS AND THE CONSTITUTION: THE MYTH OF SECOND AMENDMENT PROTECTION FOR FIREARMS IN AMERICA 70 (1995) (asserting that the argument that registration will lead to confiscation is "a red-herring"); Editorial, *No Threat of Confiscation from Gun Legislation*, HERALD-SUN (Durham, N.C.), Oct. 17, 2000, at A10 (same).

⁴⁴ Richard Harris, *A Reporter at Large: Handguns*, NEW YORKER, July 26, 1976, at 53, 57-58 ("We're going to have to take one step at a time, and the first step is necessarily — given the political realities — going to be very modest. . . . The first problem is to slow down the increasing number of handguns being produced and sold in this country. The second problem is to get handguns registered. And the final problem is to make possession of *all* handguns and *all* handgun ammunition — except for the military, policemen, licensed security guards, licensed sporting clubs, and licensed gun collectors — totally illegal.").

⁴⁵ I'm not speaking here just about A lowering the political cost of getting B enacted — slippery slopes generally involve decision A making B easier to enact. Rather, the cost-lowering slippery slope involves A lowering the cost of making B work once it's enacted, for instance by making B cheaper to enforce.

titudes — only that it lower certain costs, in this instance by giving the government information.⁴⁶

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 demonstrate 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.⁴⁷ 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).⁴⁸

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.

⁴⁶ Cf. Peter P. Swire, *Financial Privacy and the Theory of High-Tech Government Surveillance*, 77 WASH. U. L.Q. 461, 497 (1999) ("Once the costs of the database [containing information that the government has gathered about us] and infrastructure are already incurred for initial purposes, then additional uses may be cost-justified that would otherwise not have been."). Likewise, as Professor Swire points out, Social Security numbers were introduced with the assurance that they wouldn't be used as national ID numbers; but once the expense of setting up the numbering system was incurred, it became tempting to use the numbers for many more purposes. *Id.* at 498–99.

⁴⁷ Cf. J.C. Herz, *Seen City*, WIRED, Dec. 2001, at 161 (describing the "no match, no memory" rule used in some camera systems that perform only face recognition to find a limited set of people and then immediately discard the photos of anyone whose face doesn't match).

⁴⁸ I take no position here on which of 0 (no cameras), A, and B is substantively better; I am only describing how some people might act to have the best chance of implementing their own preferences.

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 and no archiving	14%	20%
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.⁴⁹ 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. The point here is simply 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 learning how to implement it properly, and the related risk that it will be implemented badly.

⁴⁹ I assume here that 56% support is enough for the proposal to win — not certain, but likely.

People are often skeptical of new proposals (from Social Security privatization to education reform) on these very grounds. Broad change B — for instance, an across-the-board school choice program — might thus be opposed by a coalition of (1) people who oppose it in principle (for instance, because they don't want tax money going to religious education or because they want to maintain the primacy of government-run schools), and (2) those who might support it in theory but suspect that it would be badly implemented in practice.⁵⁰ This lineup is similar to what we saw in the camera example.

But say that someone proposes a relatively modest school choice program A, for instance one that is limited to nonreligious schools or to children who would otherwise go to the worst of the government-run schools.⁵¹ Some people might support this project on its own terms. But as a side effect of A, the government and the public will learn how school choice programs can be effectively implemented, for instance what sorts of private schools should be eligible, how (if at all) they should be supervised, and so on.

If A is a total failure, then voters may become even more skeptical about the broader proposal B. But if after some years of difficulty, the government eventually creates an A that works fairly well, some voters might become more confident that the government — armed with this new knowledge derived from the A experiment — can implement B effectively.

A will thus have led to a B that might have been avoided had A not been implemented. In the path dependence literature, this is described as a form of “increasing returns path dependence” that focuses on “learning effects”: “In processes that exhibit . . . characteristics [such as learning effects], a step in one direction decreases the cost (or increases the benefit) of an additional step in the same direction, creating a powerful cycle of self-reinforcing activity or positive feedback.”⁵² And because of this path dependence, “decisions may have large, unanticipated, and unintended effects.”⁵³

For those who support broad school choice (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.

⁵⁰ As before, I express no view here on the merits of this particular B. My question isn't whether particular policies make sense in the abstract; rather, it's how people who do oppose B should act to better implement their preferences.

⁵¹ See FLA. STAT. ch. 229.0537 (2001) (enacting the Florida school choice program aimed at children who would otherwise go to failing government-run schools); *Miller v. Benson*, 68 F.3d 163, 164 (7th Cir. 1995) (describing Milwaukee's school choice program, which was initially limited to nonsectarian private schools).

⁵² Hathaway, *supra* note 24, at 608–09; see also Kahan & Klausner, *supra* note 24, at 350–58.

⁵³ Hathaway, *supra* note 24, at 629.

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.⁵⁴ Searching all homes for some or all kinds of guns would be unconstitutional, a classic impermissible general search.⁵⁵ This, in a sense, is a cost of confiscation — not a financial cost, but a legal cost that keeps confiscation from being performed efficiently.⁵⁶

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 — maybe the gun was stolen or lost, and you didn't report this to the police, or maybe you're keeping the gun in some other location — 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.⁵⁷

⁵⁴ Some have used this very argument to oppose gun prohibition. See, e.g., Wendy Kaminer, *Gun Shy*, AM. PROSPECT, Jan. 28, 2002, at 26.

⁵⁵ See, e.g., *Jones v. United States*, 357 U.S. 493, 497–98 (1958); see also *Carroll v. United States*, 267 U.S. 132, 153–54 (1925) (condemning such general searches as “intolerable and unreasonable” even for cars, where the Fourth Amendment is less demanding than it is as to homes).

⁵⁶ The legislature might still enact a gun ban, hoping that nearly all owners will voluntarily comply, planning to rely on informers, or recognizing that the ban would only be enforced gradually, as the gun owners somehow reveal themselves — for instance, by using a gun, either defensively or offensively. But such a legislative decision will be made less likely by the difficulty of enforcement, the public distaste for reliance on informers, and the possible public hostility to punishing even illegal gun owners when their gun ownership is revealed as a result of a legitimate defensive use.

⁵⁷ See, e.g., *United States v. Jones*, 994 F.2d 1051, 1056 (3d Cir. 1993) (finding probable cause to search a home for a gun based on evidence that the resident possessed the gun, reasoning that “fire-arms[] are . . . the types of evidence likely to be kept in a suspect's residence”); *United States v. Anderson*, 851 F.2d 727, 729 (4th Cir. 1988) (reaching the same conclusion); *United States v. Steeves*, 525 F.2d 33, 38 (8th Cir. 1975) (same); *United States v. Rahn*, 511 F.2d 290, 293 (10th Cir. 1975) (same); *Bastida v. Henderson*, 487 F.2d 860, 863 (5th Cir. 1973) (same); *State v. Metzner*, 338 N.W.2d 799, 805 (N.D. 1983) (same). But see *United States v. Charest*, 602 F.2d 1015, 1017 (1st Cir. 1979) (finding no probable cause to search the defendant's home for a murder weapon, because it was unlikely that a criminal would keep such an incriminating item at home); *United States v. Lockett*, 674 F.2d 843, 846 (11th Cir. 1982) (finding no probable cause to search the defendant's home for dynamite, even though there was evidence the defendant had bought dynamite).

The argument against finding probable cause based on registration alone is that the lapse of time between the registration date and the date of the search, coupled with the registrant's possible desire to hide the now-illegal gun away from home, makes it less probable that the gun is still at the registrant's

So gun registration (legislative decision A) would likely lead to some degree of public compliance with the registration requirement. This compliance has the legally significant effect of creating probable cause to search all registrants' homes, once guns are banned. This legally significant effect makes it easier to enforce the gun ban — thus making it more likely that such a ban will be enacted (legislative decision B).

Again, this scenario doesn't require us to assume that registration will be seen as morally indistinguishable from confiscation, 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 likely (though of course not certain).⁵⁸

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

home. But it seems to me that with durable goods such as guns, there would be a strong case for finding probable cause even when the gun was registered years earlier. See *Steeves*, 525 F.2d at 38 (pointing out that a lapse of time is less important when the search is for "property which is not consumable"). And since guns are most useful when they are easily accessible, it seems likely enough that an owner who chooses to keep his now-banned gun will store it close at hand.

In any event, while it's possible that some judges would find that registration doesn't provide enough probable cause to justify searches of registrants' homes, it's at least equally possible that other judges would reach the opposite result. This latter possibility is something that confiscation opponents may rightly keep in mind when considering whether to support registration.

⁵⁸ 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 there's strong support for handgun bans in parts of the Northeast — and if gun registration makes confiscation cheaper, it may also make confiscation more likely. See D.C. CODE ANN. §§ 7-2502.01 through .03 (2001); CHI. MUN. CODE § 8-20-200(c) (2002); see Tom W. Smith, Nat'l Opinion Research Ctr., 1999 NATIONAL POLICY SURVEY OF THE NATIONAL OPINION RESEARCH CENTER: RESEARCH FINDINGS 63-65 (2000), available at <http://www.norc.uchicago.edu/online/gunrpt.pdf> (finding that 54.3% of respondents in the Northeast support total bans on handgun possession except by the police and other authorized persons, while outside the Northeast, only 29.7% to 40.9% of voters support such bans); *supra* note 43 (discussing confiscations of guns in various places).

example, automated face recognition or videotape archiving) would be made cheaper by the existence of these tools?⁵⁹

- 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,"⁶⁰ 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.⁶¹

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, A may be rejected because enough of those voters fear that A will lead to B (gun prohibition), which they oppose.⁶² And the

⁵⁹ Cf. *Revenue Revision of 1942: Hearing Before the House Comm. on Ways & Means*, 77th Cong. 2302 (1942) (brief submitted by Martin Popper, Executive Secretary, National Lawyers Guild) ("Taxes which are easy to collect tend to be extended and expanded with similar ease by legislative bodies. The withholding provisions make it easy for the Treasury to collect taxes from wage earners and low-income groups generally. We must be ever vigilant to prevent this ease of collection from being used as a lever further to lower personal income tax exemptions or otherwise to impose new burdens on low-income groups.").

⁶⁰ See *supra* note 7.

⁶¹ Wilbren van der Burg, *The Slippery Slope Argument*, 102 ETHICS 42, 65 (1991).

⁶² Even many gun rights enthusiasts might think that registration may help solve some crimes without materially burdening people's ability to defend themselves, so long as registration doesn't lead to confiscation. But especially given that the crime-fighting effects of registration systems seem to be quite modest, see, e.g., DAVID B. KOPEL, *THE SAMURAI, THE MOUNTIE, AND THE COWBOY* 217,

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.⁶³ 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 be good both for those who want to moderately protect the right and for those who want to moderately restrict it — though naturally much depends on how broad the right would be, and on how much political power the various groups have.⁶⁴

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 pre-

238 (1992) (citing reports that gun registration in Australia and New Zealand didn't materially help fight crime), even a small possibility that registration may facilitate confiscation could reasonably lead gun rights supporters to oppose registration.

⁶³ See Robert Cottrol & Raymond Diamond, *Second Amendment Cannot Be Ignored*, LEGAL TIMES, May 27, 1991, at 24 (“If the courts were to send [a] . . . strong signal, backed by the legal profession and civil-liberties organizations, that they intended to enforce the Second Amendment, then gun-control measures could be debated on the utility of proposed measures and without the fear that gun-control measures are steps toward ultimate prohibition.”); see also Kaminer, *supra* note 54 (making a similar argument).

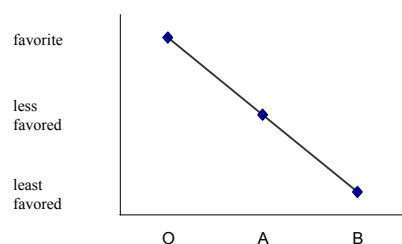
⁶⁴ Consider the key arguments for the enactment of the Constitution itself: Federalists proposed various checks and balances in the Constitution, and eventually the Bill of Rights, to alleviate concerns that creating even a small federal government would start the country down a slippery slope toward a much more powerful federal government that would dwarf the states, intrude on traditional state prerogatives, and interfere with traditional individual rights. See, e.g., THE FEDERALIST NOS. 45–46, at 289, 300 (James Madison) (Clinton Rossiter ed., 1961) (pointing to such checks and balances as evidence that “the operation of the federal government will [not] by degrees prove fatal to the State governments” and that “the powers proposed to be lodged in the federal government are [not] formidable to those reserved to the individual States”). We have indeed slipped down the slope in large measure — the federal government has gradually gained far more power than many of the Framers anticipated — but a strong federal government was probably inevitable given the changes in technology, commerce, and world politics. 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 coalition members disliked.

dict, though understanding the slippery slope mechanisms should help us investigate the likelihood of such effects.⁶⁵

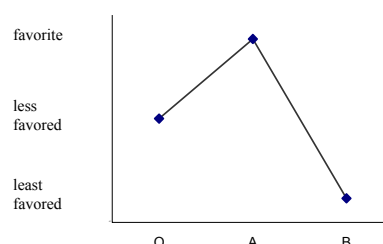
B. Cost-Lowering Slippery Slopes as Multi-Peaked Preferences Slippery Slopes

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":⁶⁶ 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, there's no slippery slope risk: those who prefer A can vote for it with little danger that A will enable B.⁶⁷

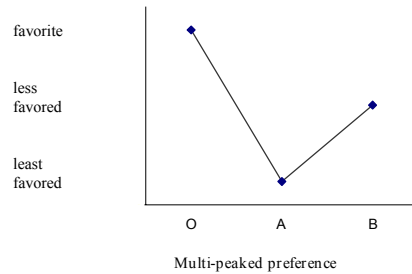
But say instead that some people prefer 0 best of all (they'd rather have no cameras, because they think installing cameras costs too much), but if cameras were installed they would think that position B (archiving and

⁶⁵ Thanks to Steve Frank for alerting me to this point.

⁶⁶ See, e.g., IAIN MCLEAN, PUBLIC CHOICE: AN INTRODUCTION 197, 203 (1987). Public choice theorists have long investigated the implications of whether preferences are single-peaked or multi-peaked, but generally not with an eye toward slippery slope effects.

⁶⁷ I assume here that the enactment of A doesn't change people's preferences. The possibility that enacting A might actually alter people's attitudes about B is discussed primarily in Part III.

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.



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).⁶⁸ 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 pre-fers	Next prefer-ence	Most dis-likes	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	18%

⁶⁸ See, e.g., MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* 55 (1982) (“[T]he typical procedural rules of democratic bodies tend to discourage reversals and to give the status quo an advantage over alternatives.”); Maxwell L. Stearns, *The Public Choice Case Against the Item Veto*, 49 WASH. & LEE L. REV. 385, 416 n.175 (1992) (describing the legislative process as creating a supermajority requirement).

						surveillance for it as possible”	
3	A	0	B	✓		“We prefer moderate surveillance level A, and definitely no more”	14%
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).⁶⁹ 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, 319 U.S. 624, 640–41 (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

⁶⁹ 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.

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."⁷⁰ 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.⁷¹

⁷⁰ See 2 HENRY F. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* 981, 989 (1964) (describing Taft as being opposed to Prohibition before it was enacted, "on the ground that temperance by national law would be difficult or impossible to enforce," but then being willing, as "a passionate zealot for enforcement of laws," to uphold a variety of harsh enforcement mechanisms, such as warrantless wiretaps and prosecutions both by state and federal authorities for the same crime).

⁷¹ This attitude is familiar, so I didn't want to take space in the text to establish why it might be common; but here are some factors that may reinforce it:

1. A's enactment may lead people to change their views (see the discussion of attitude-altering slippery slopes in Part III), and to choose B as their preferred option rather than the second-best.
2. People often tend to dislike those who are violating the law and getting away with it, which may lead them to focus more on suppressing lawbreaking than on the merits of the underlying law.
3. Banning conduct may sometimes change the makeup of the group that engages in the conduct. A marijuana ban, for instance, would drive out the most law-abiding dealers and instead attract criminal ones; it may also lead some otherwise law-abiding users to quit and still others to hide their use. The person whom voters see as the typical marijuana user or dealer will thus be much less sympathetic than before — and more voters may therefore support the law coming down hard on him.
4. People who think most laws are generally good may develop what we might call an "enforcement heuristic," the rule of thumb that more enforcement is usually better than less. These people may thus reason: "I'm not sure whether a marijuana ban is so good, and my preference for the status quo would have led me to oppose it when it was first suggested; but now that the ban has been enacted, my 'more enforcement is better than less' presumption leads me to support strict enforcement."
5. People sometimes also have a "persistence heuristic": Once a goal is set, it's good to be persistent in accomplishing the goal. "If at first you don't succeed, try, try again" is a cliché precisely because it captures a socially valued rule of thumb, helping us overcome our natural tendency to get discouraged. It also affects our evaluation of people: we tend to admire the persistent, and to have some contempt for "quitters," who "never win" (and "winners never quit"). True, people are sometimes seen as wise for not "throwing good money after bad," but there is a general tendency to feel that failure should lead us to redouble our efforts, rather than to give up. See *Loose Lips*, BUFFALO MAG., July 9, 1995, at 14M (crediting the "quitters" line to Vince Lombardi).
6. Persistence and the capacity to inspire persistence are seen as valuable attributes of leadership, so many political leaders may be reluctant to be seen as "giving up" by not aggressively enforcing a law. Sometimes persistence begins to be seen as folly rather than virtue, see, e.g., DAVID E. KYVIG, *REPEALING NATIONAL PROHIBITION* 84, 88 (2000) (describing how the flagrant violations of Prohibition led many to eventually favor its repeal), but generally a leader's willingness to retreat when a law is being flouted tends to

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,⁷² and let's assume — again, as a stylized hypothetical, though I hope a plausible one — that the group breakdown is as follows:

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%

generally a leader's willingness to retreat when a law is being flouted tends to be seen as failure, while the willingness to escalate enforcement is seen as admirable.

7. Even if the first step's failure suggests that the goal is genuinely unachievable, people may be psychologically and politically unwilling to admit error. Political leaders may hesitate to admit their mistakes, for fear of being discredited; and both voters and legislators may not admit their mistakes even to themselves. People may thus be emotionally and politically more willing to say "Our idea was good, but we just need to increase enforcement a bit" than to say "Getting people to comply will have too many collateral costs, so we might as well just leave the law unenforced."

⁷² See *supra* note 68 and accompanying text.

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%.⁷³

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 0.⁷⁴ 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.⁷⁵

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.⁷⁶

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;

⁷³ This phenomenon is reminiscent of Condorcet cycling, in which multi-peaked preferences lead people to shift from 0 to A to B and then back to 0, and of concerns about agenda control (control over the order in which A and B are proposed) dictating the result. But in the hypothetical, the mild supermajority requirement makes cycling impossible, and the order of decisions doesn't matter. So long as all possible moves are eventually voted on, the rule will move from 0 to A and then to B, where it will stay.

Cycling would also be impossible if, as with cost-lowering slippery slopes, the 0→A step would make B cheaper, thus making it more attractive to some subgroup.

⁷⁴ Decision A would lead the 10% in group 4 to oppose B, but that would be offset by group 2's 20%.

⁷⁵ The percentage of group 2 voters — the ones whose multi-peaked preferences ultimately cause the slippery slope — could theoretically be even lower than 20%. For instance, if the groups' voting strength is divided not 10/20/20/10/10/30 but 42/2/2/0/0/54, slippage would still take place (assuming that a policy change requires a 55% supermajority). I chose to use the 10/20/20/10/10/30 breakdown because it seems more plausible than the 42/2/2/0/0/54 breakdown, but of course these are all just stylized models. The important point is that under plausible conditions, the multi-peaked preferences slippery slope can happen even when a minority of all voters have multi-peaked preferences.

⁷⁶ This phenomenon is similar to “sequencing path dependence.” See Hathaway, *supra* note 24, at 645–46. Sequencing path dependence also requires multi-peaked preferences, and thus makes a 0→A→B shift possible even if a direct 0→B step would have been impossible.

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.

Unfortunately, though these points aren't rocket science, we often don't think about them in an organized way. Consider an example stemming from an article I wrote defending red-light enforcement cameras.⁷⁷ The cameras photograph the drivers and the front license plates of cars that enter intersections on red, and enforcement authorities then mail tickets to the cars' registered owners. The owner can fight the ticket either by showing up in court, where the judge can see that the owner wasn't the photographed driver, or by telling the court in writing who the actual driver was. My article reasoned that this proposal (A) was a good idea, for various reasons.

Unfortunately, I neglected to consider the enforcement need slippery slope. As some readers pointed out, A might lead some drivers to wear mild disguises — floppy hats, headscarves, large sunglasses — that conceal their identities. When the camera photographs these drivers, the photos probably won't provide enough evidence that they were actually driving, and this lack of evidence may let them evade the ticket.

This result may cause substantial political pressure to go on to step B, in which the law is changed to impose liability on the car's owner, who is identified by the license plate, regardless of who was driving.⁷⁸ In the pre-A world, such an owner liability proposal may arouse opposition, because many people might think it unfair for the owner to be punished for another's wrongdoing. But once A is enacted, people's desire to punish scofflaws and to enforce the law evenhandedly may persuade some fraction of the public to support B; and that fraction may be enough of a swing vote to enact B.

In my view, result B isn't bad,⁷⁹ but others might disagree because they strongly oppose vicarious liability systems such as B. Had I thought systematically about enforcement need slippery slopes, my article could have

⁷⁷ See Eugene Volokh, *Big Brother Is Watching — Be Gratefull!*, WALL ST. J., Mar. 26, 2001, at A22.

⁷⁸ Disguising the license plate is generally illegal, and violations of the law are deterred by the likelihood that a police officer will see the disguised plate and give the driver a ticket. Wearing floppy hats and big glasses, however, is legal, and will likely stay legal.

⁷⁹ Owner liability simply shifts the enforcement of some traffic tickets to the system that's already used for parking tickets. It seems fair to hold car owners primarily liable for minor misconduct committed by people to whom the owners lend the car — whether the misconduct relates to parking or to driving — especially if the enforcement is switched from a criminal fine to a civil fine, and if it can't contribute to a possible loss of the owner's driver's license.

alerted readers to this risk that A will lead to B, and might have anticipated and deflected some possible objections to B.

And thinking ahead about these slippery slope risks might also let opponents of owner liability (B) find ways to implement red-light cameras (A) while decreasing the chance that B will happen. For instance, supporters of red-light cameras and opponents of owner liability might make a legislative deal, in which the law allowing red-light cameras explicitly prohibits owner liability. The deal wouldn't be legally binding on future legislatures, but it might have at least some moral or political influence on the lawmakers, thus making B somewhat less likely.

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 let's 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.⁸⁰

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).⁸¹ Thus,

⁸⁰ Cf. Mike Flaherty, *Committee Expands “School Choice”*, WIS. STATE J., May 13, 1995, at 3B (“I’m warning you — every low-income voter in your districts is going to demand [after the broadening of a Milwaukee-only school choice program] to know why they’re being treated differently than people in Milwaukee,” Sen. Dale Schultz, R-Richland Center, told committee members. “The next time around, we’ll be voting to expand this program around the state.”); Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1697–98 (1999) (“[T]rademark law has been expanded quite significantly by means of new legal rules that make sense in a limited number of cases, but that then enter widespread use where they make less sense If Congress creates a new statute that protects some but not all trademark owners, every trademark owner will want his or her mark to be included in the new group and will seek to receive the added protections of the new rule.”).

⁸¹ Even the minority that accepts the analogy between A and B could recognize that the two are logically distinguishable, but still conclude that the similarities are substantial enough that the distinction shouldn’t lead to a difference in treatment.

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.

Consider also the assisted suicide debates, where allowing “those in the final stages of terminal illness who are on life support systems . . . to hasten their deaths by directing the removal of such systems” (A) has led to arguments that it's wrong for “those who are similarly situated, except for the previous attachment of life sustaining equipment, [to be] not allowed to hasten death by self-administering prescribed drugs” (B).⁸² Even some of the people who are hesitant about B at first (though probably not those who bitterly oppose B) might also be reluctant, once A is allowed, to deny to some of the dying a release that is offered to others. The acceptance of A may thus increase the chances that B will be enacted, even if A's supporters had sincerely insisted that they were only seeking A and not B.

Likewise, one might reasonably worry that once B (assisted suicide for the terminally ill) was implemented, equality concerns would push some decisionmakers to allow assisted suicide for still more people (C), such as the “chronically ill, who have longer to suffer than the terminally ill, or . . . individuals who have psychological pain not associated with physical disease” — “[t]o refuse assisted suicide or euthanasia to these individuals would be a form of discrimination.”⁸³ And even if courts can roughly distinguish categories A, B, and C in a way that's generally sensible, though arbitrary in close cases, judges may be reluctant to apply this distinction to a real person whose particular close case they are deciding.

This sort of equality-based slippage seems to have happened in the Netherlands. Dutch courts began by declining to punish doctors who assisted the suicides of the terminally ill. They then extended this principle to cover patients who were victims of “unbearable suffering,” without any requirement that the patients be terminally ill.⁸⁴ They then extended the principle to cover a patient who was in seemingly irremediable mental

⁸² *Quill v. Vacco*, 80 F.3d 716, 729 (2d Cir. 1996). The Supreme Court rejected an argument that this distinction is unconstitutional (though two judges on the Second Circuit had accepted it), *Quill v. Vacco*, 521 U.S. 793, 799–809 (1997); but if two Second Circuit judges found the equality argument persuasive enough to *constitutionally command* such equal treatment, at least some listeners may find it persuasive enough to justify such equal treatment as a policy matter, within the context of legislative debate.

⁸³ Herbert Hendin, *The Slippery Slope: The Dutch Example*, 35 DUQ. L. REV. 427, 427 (1996); see also Walter Wright, *Historical Analogies, Slippery Slopes, and the Question of Euthanasia*, 28 J.L. MED. & ETHICS 176, 183 (2000) (“Recent [Dutch] court cases have acquitted doctors who killed patients in cases of transient psychological as well as persistent physical distress, cases of chronic as well as terminal illness, and involuntary as well as voluntary euthanasia. The prevailing argument for these extensions has been the claim that it would be discriminatory and unfair to allow euthanasia for some and to deny it to other closely similar cases.” (citation omitted)).

⁸⁴ Criminal Court Ruling, Leeuwarden, Feb. 21, 1973, NJ 1973, 183 (“ondraaglijk lijden”); CARLOS F. GOMEZ, *REGULATING DEATH* 32–33 (1991). Many thanks to Mark Moritz for checking the cited Dutch cases.

pain, caused by chronic depression, alcohol abuse, and prescription drug abuse, on the theory that the suffering of the mentally ill is “subjectively experienced as unbearable” by them, comparably to how the physically ill experience physical suffering.⁸⁵ Dutch courts then extended this principle to cover a fifty-year-old woman who was in mental pain partly caused by the death of her two sons, again on the theory that her suffering was unbearable.⁸⁶ “Intolerable psychological suffering is no different from intolerable physical suffering,” the doctor in that case reasoned,⁸⁷ and the court agreed, concluding that the relevant question was “the irreversibility of the intolerably experienced suffering, not the source of it.”⁸⁸

In these examples, the bottom of the equality slippery slope is more government funding or more freedom from restraint, but the slope could also lead toward greater government power and greater restrictions. For instance, when a free speech exception is created for one constituency, others may resent even more the absence of an exception for their own favored cause. Consider one argument in favor of campus speech codes:

Powerful actors like government agencies, the writers’ lobby, industries, and so on have always been successful at coining free speech ‘exceptions’ to suit their interest — copyright, false advertising, words of threat, defamation, libel, plagiarism, words of monopoly, and many others. But the strength of the interest behind these exceptions seems no less than that of a black undergraduate subjected to vicious abuse while walking late at night on campus.⁸⁹

⁸⁵ Criminal Court Ruling, Rotterdam, June 23, 1992, NJ 1992, 662 (“subjectief ondraaglijk leed”); J.K.M. Gevers, *Physician-Assisted Suicide and the Dutch Courts*, 5 CAMB. Q. HEALTHCARE ETHICS 93, 95 (1996).

⁸⁶ Supreme Court Ruling, June 21, 1994, NJ 1994, 656; Gevers, *supra* note 85, at 95.

⁸⁷ Anastasia Toufexis, *Killing the Psychic Pain*, TIME, July 4, 1994, at 61 (internal quotation marks omitted).

⁸⁸ Supreme Court Ruling, June 21, 1994, NJ 1994, 656, at 3150 (“de uitzichtloosheid van het alsondraaglijk ervaren lijden, niet de bron ervan”); Gevers, *supra* note 85, at 96. The judges found the doctor guilty because he failed to follow certain procedural safeguards, *id.* at 96, but they withheld punishment, presumably because they thought the doctor’s actions were substantively legal. See also GOMEZ, *supra* note 84, at 39 (pointing out that the Dutch courts ruled “that ‘psychic suffering’ or the ‘potential disfigurement of personality’ could be acceptable grounds for requesting euthanasia”).

⁸⁹ Richard Delgado & Jean Stefancic, *Ten Arguments Against Hate Speech Regulation: How Valid?*, 23 N. KY. L. REV. 475, 484 (1996); see also Brian Owsley, *Racist Speech and “Reasonable People”: A Proposal for a Tort Remedy*, 24 COLUM. HUM. RTS. L. REV. 323 (1993):

Those who ascribe to an absolutist approach to the First Amendment fail to notice that there already exist several exceptions to free speech where the government has an interest in prohibiting certain types of speech. These exceptions, such as exceptions for defamation, have been carved out to protect the interests of the more powerful members of society.

In order to address the inequity in the system, the interests of society’s more vulnerable members must be taken into consideration As it stands today, the legal system fails to adequately consider and sanction the harm of racist speech

Rich, powerful white men . . . can, however, be the victims of libel and defamation as well as deceit or fraudulent information in business. These types of speech have subsequently been regulated. Equal Protection requires that society’s more vulnerable individuals receive as much protection as the powerful individuals.

Or consider the similar argument that the existence of the obscenity exception justifies bans on Nazi advocacy because “[t]here is no principled reason to permit the banning of material that appeals to a depraved interest in sex but not the banning of material that appeals to a depraved interest in violence and mass murder.”⁹⁰

Some people who make such arguments might have supported proposal B (the creation of a new free speech exception) even had proposal A (the creation of the old free speech exceptions) never been implemented. But their use of the equality argument suggests that they think some *listeners* might be moved by the analogy between A and B.⁹¹ This attitude may be characterized as a worthy love of consistency, or as unworthy “censorship envy”⁹² — but in either case, it is a real phenomenon.⁹³ So far, U.S. courts have resisted these arguments, but American political leaders,⁹⁴ future U.S. courts,⁹⁵ and politicians and courts in countries that have a nar-

Id. at 326, 350 (citations omitted).

⁹⁰ Murray J. Laulicht & Eileen A. Lindsay, *First Amendment Protections Don't Extend to Genocide*, N.J. L.J., Dec. 9, 1991, at 15; see also KEVIN W. SAUNDERS, VIOLENCE AS OBSCENITY: LIMITING THE MEDIA'S FIRST AMENDMENT PROTECTION 3 (1996) (conceding that “arguments against the [obscenity] exception are not without force,” but arguing that given that “[t]he obscenity exception is a part of First Amendment law,” “[i]f sexual images may . . . be unprotected, there is no reason why the same should not be true of violence”); cf. *Sex and God in American Politics: What Conservatives Really Think*, POL'Y REV., Summer 1984, at 12, 24 (“I don't think the advocacy of homosexuality really falls under the First Amendment any more than the advocacy or publication of pornography does.” (quoting Irving Kristol)); Thomas D. Elias, *TV and Radio Stations Should Be Stripped of Their Licenses If They Aren't More Responsible in Covering Civil Unrest*, L.A. DAILY J., Jan. 26, 1993, at 6 (analogizing “irresponsible” coverage of the L.A. riot to “shouting ‘fire’ in a crowded theater”).

⁹¹ Consider, for instance, Martin E. Lee, *Free Speech in Mortal Joust with Hate Speech*, NAT'L CATH. REP., Oct. 4, 1996, at 17 (reviewing THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA AND PORNOGRAPHY (Laura Lederer & Richard Delgado eds., 1995)), a positive review of a book containing the Delgado arguments in favor of restricting racist speech, see *supra* note 89. The reviewer seems to find persuasive the book's discussion of the “routine exceptions to free speech absolutism (copyright, trademark and such) that hew to business interests,” and concludes that the “book provides a sober rejoinder to cliché-ridden thinking by highlighting the profound power imbalance and social inequities that dim the luster of the First Amendment.” *Id.* at 17.

⁹² See Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 HARV. L. REV. 1639, 1656 n.88 (1993); Eugene Volokh, *The U.S. Constitution Says We All Have To Live with Being Offended*, L.A. TIMES, July 18, 2001, § 2, at 13.

⁹³ See sources cited *supra* note 89 and accompanying text.

⁹⁴ See, e.g., Brett Sporich, *Video Game Biz Wins Injunction*, HOLLYWOOD REP., Oct. 19, 2000 (“The ordinance is a natural extension of current restrictions communities have on pornography. We're just trying to protect our children from violence.” (quoting Indianapolis Mayor Bart Peterson, who supported an ordinance barring unaccompanied children from playing violent video games in arcades)).

⁹⁵ See, e.g., *Am. Amusement Mach. Ass'n v. Kendrick*, 115 F. Supp. 2d 943, 981 (S.D. Ind. 2000) (“It would be an odd conception of the First Amendment and ‘variable obscenity’ that would allow a state to prevent a boy from purchasing a magazine containing pictures of topless women in provocative poses, as in *Ginsberg*, but give that same boy a constitutional right to train to become a sniper at the local arcade without his parent's permission.” (referencing *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding a ban on the sale of sexually explicit magazines to minors))), *rev'd*, 244 F.3d 572 (7th Cir. 2001).

rower view of free speech may well find them logically and emotionally appealing.⁹⁶

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.⁹⁷ 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. 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.⁹⁸

Likewise, a rule that legislatures may set prices only when a business is "affected with a public interest" may sound appealing in principle, but it might require so many contestable judicial decisions that judges may eventually choose to abandon the rule altogether, and give legislatures a free hand.⁹⁹ And once a law punishes the display of vaguely defined "pornography" — for instance, on the grounds that such displays constitute sexual

⁹⁶ For example, see Editorial, *'Hate Speech' Again, Abroad*, WASH. POST, Sept. 9, 1995, at A16, which discusses how France, following the enactment of its laws against Holocaust denial, is proceeding to punish supposedly incorrect characterizations of other historical atrocities:

In a 1993 interview with the French newspaper *Le Monde*, Prof. [Bernard] Lewis, author of many books about Ottoman history . . . expressed doubt that genocide was the proper word to describe the Armenian massacres, saying there was no "serious proof of a plan by the Ottoman government to exterminate the Armenian nation." . . . [Several] Armenian groups then brought civil suit against Prof. Lewis on charges of having insulted the Armenian nation. . . . [T]he court found Prof. Lewis guilty and fined him \$2,000 for this offense while at the same time declining to rule on whether his opinion as expressed was right or wrong.

Id.; see Patrick Marnham, *Sued over a History Lesson*, EVENING STANDARD (London), May 23, 1995, at 28 (discussing the case in more detail).

⁹⁷ See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 92–93 (1973) (Brennan, J., dissenting) (relying in part on the "institutional problem" created by the Court's obscenity jurisprudence, a jurisprudence that Justice Brennan himself helped create when recognizing a limited obscenity exception in *Roth v. United States*, 354 U.S. 476, 492 (1957)).

⁹⁸ See, e.g., *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (rejecting a "murder scene" exception to the Fourth Amendment warrant requirement because "the public interest in the investigation of other serious crimes is comparable. If the warrantless search of a homicide scene is reasonable, why not the warrantless search of the scene of a rape, a robbery, or a burglary? 'No consideration relevant to the Fourth Amendment suggests any point of rational limitation' of such a doctrine.").

⁹⁹ See *Nebbia v. New York*, 291 U.S. 502, 536–37 (1934).

harassment — it becomes likely that this law will be applied to “legitimate art” as well.¹⁰⁰

Similarly, the broad Free Exercise Clause protection established by *Sherbert v. Verner* and *Wisconsin v. Yoder* was developed in cases where people wanted to engage in well-established religious groups’ traditional practices that were seen as central to their belief systems and as consistent with the groups’ other religious tenets.¹⁰¹ But over the years, the Court extended the potential zone of free exercise protection to cover even idiosyncratic, seemingly not fully consistent beliefs, as well as beliefs that may not be central to people’s religions, partly because the Justices concluded that secular courts cannot properly inquire into the religious beliefs’ centrality and consistency.¹⁰²

Finally, linking this to equality slippery slopes, consider one prominent Dutch doctor’s argument that people should be able to commit assisted suicide simply to avoid burdening their families, just like they may commit assisted suicide to avoid unbearable suffering. There is no principled way, the doctor reasoned, to distinguish “that kind of influence — these children wanting the money now” from other influences “from the past that . . . shaped us all,” such as “religion . . . education . . . the kind of family [the

¹⁰⁰ See, e.g., Jennifer Goode, *It’s Art vs. Sexual Harassment*, TENNESSEAN, Mar. 1, 1996, at 1A (describing a case in which a harassment complaint led a City Attorney to order the removal of an Impressionist painting depicting a partly naked woman, because harassment law punishes the display of pornography and “[a]s far as I’m concerned, a naked woman is a naked woman”); Nat Hentoff, *Trivializing Sexual Harassment*, WASH. POST, Jan. 11, 1992, at A19 (describing a university administration’s removing a print of Goya’s *Naked Maja* from a classroom, citing as one reason *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), a case that imposed liability for workplace pornography); Nat Hentoff, *Sexual Harassment by Francisco Goya*, WASH. POST, Dec. 27, 1991, at A21 (describing the same incident); Vogel, Kelly, Knutson, Weir, Bye & Hunke, Ltd., *Political Correctness Gone Too Far or Serious Concern for Employers?*, N.D. EMP. L. LETTER, Nov. 1997 (concluding that “the Goya incident illustrates that . . . even paintings” containing nudity may now lead to liability); MADISON, WIS., MUN. CODE § 3.23(2)(gg) (2002) (defining “sexual harassment” to include the “display of sexually graphic materials which is not necessary for business purposes,” a definition that on its face includes “legitimate” art as well as pornography); MONT. HUM. RTS. COMM’N, MODEL EQUAL EMPLOYMENT OPPORTUNITY POLICY: A GUIDE FOR EMPLOYERS (no date) (listing “[d]isplays of magazines, books, or pictures with a sexual connotation” as “[e]xamples of prohibited sexual harassment”); Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, 63 L. & CONTEMP. PROBS. 299, 333 n.129 (2000).

¹⁰¹ 374 U.S. 398 (1963); 406 U.S. 205 (1972).

¹⁰² See *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989); *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 457–58 (1988); *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981); see also Williams, *supra* note 23, at 127 (“Suppose that some tax relief or similar benefit is allowed to couples only if they are legally married. It is proposed that the benefit be extended to some couples who are not married. Someone might not object to the very idea of the relief being given to unmarried couples, but nevertheless argue that the only non-arbitrary line that could be drawn was between the married couples and the unmarried, and that as soon as any unmarried couple was allowed the benefit, there would be too many arbitrary discriminations to be made.”).

person] was raised in, all kinds of influences from the past that we can't put aside."¹⁰³

People naturally hesitate to question others' judgments about what makes their lives worth living or death worth choosing. A rule that doctors may only assist patients who have certain reasons for suicide may seem defensible in principle, and may seem practicable enough that even those who are skeptical of broader assisted suicide schemes would endorse it. But if the public — or part of the public, such as doctors or judges — finds these decisions to be unduly disrespectful of patients' own value systems, then over time this rule may be replaced by a broader deregulation of assisted suicide.

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.¹⁰⁴ 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.¹⁰⁵ 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.¹⁰⁶

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)

¹⁰³ John Keown, *Some Reflections on Euthanasia in the Netherlands*, in EUTHANASIA, CLINICAL PRACTICE AND THE LAW 193, 203 (Luke Gormally ed., 1994) (quoting Dr. Herbert Cohen's comments in an interview with the author).

¹⁰⁴ See, e.g., *Carey v. Brown*, 447 U.S. 455 (1980). This situation can arise with any constitutional rules that bar underinclusive statutes or regulations, whether the underinclusiveness inquiry arises under the Free Speech Clause, the Equal Protection Clause, or the Free Exercise Clause, which some courts continue to interpret as forbidding underinclusive rules even after *Employment Division v. Smith*, 494 U.S. 872 (1990). See, e.g., *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (engaging in a Free Exercise Clause underinclusiveness inquiry post-*Smith*); Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise: Smith, Lukumi, and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850 (2001) (defending this approach). But see Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1539–42 (1999) (criticizing this approach).

¹⁰⁵ See Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341, 365–73 (1999) (discussing the issue and citing cases pointing in both directions).

¹⁰⁶ See, e.g., cases cited *supra* note 102.

is the worst position of the three, because it is unconstitutionally discriminatory.¹⁰⁷

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 both 0 and B over A (a multi-peaked preference) commands a shift to B.¹⁰⁸

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 argument that judicial decision A would “set a precedent” for decision B.¹⁰⁹ This generally means that (1) A would rest on some justification J and (2) justification J would also justify B.¹¹⁰

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).¹¹¹ In fact, a lower court might

¹⁰⁷ See *Frisby v. Schultz*, 487 U.S. 474, 488 (1988) (upholding a ban on all residential picketing).

¹⁰⁸ The Court might shift back to 0 instead — for instance, it might strike down a discriminatory school choice program and leave it to the legislature to choose whether to reenact it including the religious schools (move to B) or to abandon it altogether (stay at 0). But the Court might not do this; and even if it does, the parents who had been taking advantage of program A would strongly pressure the legislature to choose position B — which would at least preserve the school choice program that the parents had been using — instead of position 0. Thus, even a legislature that would have at first chosen 0 over B might find itself choosing B over 0 once A has been enacted and then struck down. See *infra* section V.B (describing this sort of political power slippery slope).

¹⁰⁹ Sometimes this sort of argument is made not to illustrate the practical risk that A may lead to B, but to use situation B as an illustration that the underlying theory of rule R is unsound. See, e.g., Ed Dawson, Note, *Legigation*, 79 TEX. L. REV. 1727, 1752–53 (2001). My discussion here, though, focuses primarily on the practical argument.

¹¹⁰ Frederick Schauer and James Weinstein characterize this category not as slippery slope arguments, but as “excess breadth,” “added authority,” or uncabinable principle arguments. Schauer, *supra* note 6, at 366–67; James Weinstein, *A Constitutional Roadmap to the Regulation of Campus Hate Speech*, 38 WAYNE L. REV. 163, 184 (1991). I call them slippery slope arguments because they share the form that decision A is assailed on the grounds that it might lead to result B. But whatever we label the arguments, my analysis is fundamentally compatible with Schauer’s and Weinstein’s.

¹¹¹ See, e.g., *Texas v. Johnson*, 491 U.S. 397, 432 (1989) (Rehnquist, C.J., dissenting) (urging suppression of flag burning on the grounds that it is of low constitutional value); *FCC v. Pacifica Found.*, 438 U.S. 726, 747 (1978) (plurality opinion) (accepting such an argument, in a limited context, regard-

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. Thus, suppose the Supreme Court concludes that campus bans on racial, sexual, and religious slurs are constitutional (decision A) because under a totality-of-the-circumstances balancing test the benefits of allowing the bans outweigh the costs (justification K). Proponents of the decision may claim that K wouldn't justify bans on reasoned arguments about biological differences between the sexes, about the supposed immorality of various religious belief systems, or about the supposed failings of various race-based cultures (result B). But it's hard to confidently accept this assurance — K is vague enough that future judges could equally well conclude that K *does* justify or even require B.¹¹²

Likewise, a decision and its underlying justification may sometimes grant extra authority to some decisionmakers.¹¹³ Imagine a proposal to ban all racist advocacy, and not just slurs, justified by the theory that racist ideas are wrong and therefore aren't constitutionally protected.¹¹⁴ A court that accepted this justification would also be setting a precedent that courts have the authority to decide which ideas are wrong and therefore punishable.¹¹⁵ Once this added authority is accepted, other bad decisions might follow from it: for instance, other judges might use this authority to uphold the suppression of antigovernment ideas, antiwar ideas, or socialist ideas.

ing profanity); Brief of Amicus Curiae Morality in Media, Inc. at 4, *Reno v. ACLU*, 521 U.S. 844 (1997) (No. 96-511) (making such an argument regarding sexually themed speech).

¹¹² See, e.g., WALTON, *supra* note 4, at 43 (discussing how the vagueness of the term "voluntariness" in euthanasia rules may lead to a slippery slope); LAMB, *supra* note 38, at 3 (same); *id.* at 4 ("[O]nce clear cut absolutes are replaced by indeterminate concepts moral boundaries can become a playground for sophistry.").

Judges who use justification K in making decision A may try to avoid result B by specifically saying in their opinion that K shouldn't be seen as applying to B. But such a dictum might not bind future courts (though it may be influential); and in any event, it still leaves K available as support for other potential B's that the judges didn't mention.

¹¹³ Schauer, *supra* note 6, at 367.

¹¹⁴ See, e.g., Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2358–59, 2380 (1989); Victor C. Romero, *Restricting Hate Speech Against "Private Figures": Lessons in Power-Based Censorship from Defamation Law*, 33 COLUM. HUM. RTS. L. REV. 1, 12–15 (2001).

¹¹⁵ The Supreme Court has disclaimed any such authority, at least since the 1950s Communist cases. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974) ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." (footnote omitted)); *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 689 (1959) (holding that a movie advocating "the opinion that adultery may sometimes be proper" is as protected as "advocacy of socialism or the single tax").

So far, the way that A can lead to B is clear: if A sets a precedent that embodies justification J, then lower courts in future cases may feel legally bound to apply J as well. Coordinate courts and the same court would also feel that they ought to apply J, unless there is a strong reason to reject the precedent.

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.¹¹⁶ 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.¹¹⁷ They may oppose giving flag burning, which they see as an anti-American epithet, more protection than other

¹¹⁶ See Schauer, *supra* note 6, at 366–67 (“Some form of narrowing or exclusion is thus always an available response to an objection of excess breadth. It is not a response, however, that defeats a slippery slope objection, and herein lies part of the special problem of the slippery slope.”).

¹¹⁷ See *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

epithets get.¹¹⁸ 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.¹¹⁹ 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 pro-	1/2/3/4

¹¹⁸ See, e.g., Gregory Pinto, Letter to the Editor, *Isn't Flag Burning a Form of Hate Speech?*, TIMES UNION (Albany), Aug. 22, 2001, at A8; Ray Richards, Letter to the Editor, *Flag-Burning Violent, Hostile*, DESERET NEWS, Mar. 26, 2001, at A8; see also *Texas v. Johnson*, 491 U.S. 397, 432 (1989) (Rehnquist, C.J., dissenting) (concluding that "flag burning is the equivalent of an inarticulate grunt or roar that . . . is most likely to be indulged in not to express any particular idea, but to antagonize others," and thus shouldn't be constitutionally protected).

¹¹⁹ See, e.g., *City of Indianapolis v. Edmond*, 531 U.S. 32, 56 (2000) (Thomas, J., dissenting) (concluding that so long as cases upholding drunk driving checkpoints and near-border checkpoints are on the books, "those cases compel upholding [drug checkpoints]," even though he is "not convinced that [the cases] were correctly decided"); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 113 (1977) ("The gravitational force of a precedent may be explained by appeal, not to the wisdom of enforcing enactments, but to the fairness of treating like cases alike.").

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THE MECHANISMS OF THE SLIPPERY SLOPE

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							tect all epithets”	
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.¹²⁰ Thus, even with no

¹²⁰ Here’s another possible bloc layout, which reflects a more complex set of judicial attitudes:

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

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.¹²¹

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.¹²² 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.¹²³

This sort of slippery slope may have occurred during the evolution of free speech law in the mid-1900s. Consider decision A, the rule that the government may not restrict political advocacy unless the advocacy creates a "clear and present danger" of some serious harm;¹²⁴ decision B, the extension of this protection to entertainment as well as serious political discourse, a step the Court took in the 1948 *Winters v. New York* decision;¹²⁵ and decision C, the extension of this protection to sexually themed speech, at least so long as the speech falls outside the narrow obscenity and child pornography exceptions.¹²⁶

The six-Justice majority in *Winters* relied in large part on the difficulty of administering any dividing line between political advocacy and entertainment.¹²⁷ Likewise, the Court eventually concluded that sexually themed entertainment should be protected alongside other entertainment,

Here, a proposed direct 0→B move would lose 5–4; only groups 4, 5, and 6 would prefer B over 0. But a proposed 0→A move would win 5–4, with the support of groups 3, 4, and 6. And then a proposed A→B move would win 5–4, with the support of groups 2, 5, and 6. (A proposal to move from B back to 0 might then in principle get 5 votes — the votes of groups 1, 2, and 3 — but such a proposal would be an explicit reversal of decision A's holding, so even one Justice's willingness to adhere to precedent would lock the result in position B.)

¹²¹ Nor does this result reflect simply a mistaken application of some justification, such as J1. Cf. Schauer, *supra* note 6, at 373–75 (discussing slippery slope arguments that rest on the risk that future courts will make mistakes in applying a proposed principle). In the decision B that I describe, judges are deliberately *rejecting* the limitation in J1, not inadvertently misapplying it.

¹²² See, e.g., Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 15.

¹²³ Equality slippery slopes may be especially likely in areas such as First Amendment law, where equality along some axis (for example, with respect to the viewpoint of the speech) is a strong constitutional norm. Thus, though some Justices (bloc II) may believe that racist epithets are different from other epithets, those that don't accept this position may feel an especially great compulsion — stronger than they would in doctrinal areas where equality is a weaker requirement — to treat the two kinds of epithets similarly.

¹²⁴ See, e.g., *Herndon v. Lowry*, 301 U.S. 242, 255 (1937).

¹²⁵ 333 U.S. 507, 510 (1948).

¹²⁶ *Miller v. California*, 413 U.S. 15, 23 (1973); *New York v. Ferber*, 458 U.S. 747, 758 (1982) (recognizing a child pornography exception).

¹²⁷ 333 U.S. at 510 ("The line between the informing and the entertaining is too elusive for the protection of [the freedom of the press]. . . . What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.").

largely because of a need to treat ideas — whether about sex or about politics — equally.¹²⁸ The clear-and-present-danger cases did not precedentially require the *Winters* result, and *Winters*, in turn, did not require the protection of sexually themed speech. But the precedents, combined with the Justices' concerns about administrability and equality, led to the law we have now, through precedential evolution rather than precedential command.

Some of the Justices who adopted the clear-and-present-danger test in the 1930s and early 1940s might have wanted B and C as well as A. But some might have been surprised by the eventual slippage, and might have thought twice about supporting A — at least in its pure form, with no qualifying language — had they anticipated these results. In 1942, for instance, the Court still assumed that “lewd,” “profane,” and “obscene” speech was unprotected,¹²⁹ and obscenity was at the time defined to include much sexually themed material that is protected today.¹³⁰ As late as 1951, Justice Douglas, who eventually became a solid vote for protecting sexually themed speech, said that “obscenity and immorality” were “beyond the pale.”¹³¹

The slippage from A to B and C was not just the effect, identified by Frederick Schauer, of “linguistic imprecision” or “limited comprehension.”¹³² Some of the Justices who voted for decisions B and C might have agreed that they were going beyond the boundaries that those who rendered decision A would have preferred. But the Justices would still have been willing to go beyond those boundaries, because they preferred B to A, and C to B.

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.

¹²⁸ See *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 689 (1959) (reasoning that “advoca[tes] . . . the opinion that adultery may sometimes be proper” is as protected as “advocacy of socialism or the single tax”); *Roth v. United States*, 354 U.S. 476, 484, 488 (1957) (reasoning that “[a]ll ideas having even the slightest redeeming social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion” are generally protected, even if they relate to sex, unless the speech “appeal[s] to prurient interest”).

¹²⁹ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

¹³⁰ See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-16, at 906–10 (2d ed. 1988) (describing the evolution of obscenity law).

¹³¹ *Dennis v. United States*, 341 U.S. 494, 581 (1951) (Douglas, J., dissenting).

¹³² Schauer, *supra* note 6, at 370, 373.

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.¹³³ 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.¹³⁴ But if selling a product becomes legal, prohibiting advertising of the product becomes much harder (though perhaps not impossible).¹³⁵ So if selling marijuana is legalized, courts may find that marijuana sellers have a constitutional right to advertise.¹³⁶

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.¹³⁷

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

¹³³ See, e.g., *The O'Reilly Factor: Interview with Libertarian Party Presidential Candidate Harry Browne* (Fox News television broadcast, Oct. 30, 2000) ("O'REILLY: You want drugs to be sold openly in the pharmacies. . . . [I]f drugs are legalized, that's what would happen, if the big companies marketed them. Plus, we'd have advertising."); Adam Keith, *Pot's a Boilin': Marijuana Legalization Still Debated*, TULSA WORLD, Oct. 5, 2001, at satellite 1 (quoting similar argument by high school student Craig Maricle).

¹³⁴ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563–64 (1980).

¹³⁵ If alcohol were illegal, for instance, the government could ban advertising of the price or alcohol content of various alcoholic beverages, or ban all alcohol advertising altogether. The legality of alcohol, however, makes those restrictions — and quite likely total bans on alcohol advertising — unconstitutional. See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); see also *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (striking down ban on tobacco advertising, even though it was designed to shield children).

¹³⁶ Commercial speech doctrine is vague enough that a court might uphold even a total ban on such advertising. Compare *Central Hudson*, 447 U.S. at 570 (suggesting that restrictions on advertising that promotes harmful though legal activity may be constitutional), with *44 Liquormart*, 517 U.S. at 518 (Thomas, J., concurring in part and concurring in the judgment) (suggesting the contrary). But it is far from certain that the Court would follow *Central Hudson* on this issue, so the possibility that decriminalization will lead to advertising cannot be lightly dismissed.

¹³⁷ For a time the Court reasoned that if an activity *could* be banned, its advertising could be banned even when the activity was permitted, see *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 346 (1986), but this is no longer the law, see *44 Liquormart*, 517 U.S. at 511.

move the law from A to B.¹³⁸ 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.¹³⁹

F. The Hidden Slippery Slope Risk and Unexpected Outcomes Exposing Multi-Peaked Preferences

The discussion above has assumed that we know up front the preferences people have among positions 0, A, and B. But sometimes B might not even be considered at first, and the apparent choice might just be between 0 and A: for instance, returning to the enforcement need slippery slope example (section II.C), shall marijuana be legal (0) or be subject to mild penalties (A)? Instead of this table,

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 mari-	20%

¹³⁸ A federal judicial-judicial slippery slope of this sort is less likely, because judicial decision A can anticipate and decrease the risk of A's being interpreted as requiring B. Say that the U.S. Supreme Court wants to hold that the Constitution protects assisted suicide (decision A). (Five current Justices have suggested that assisted suicide might be constitutionally protected under some circumstances. *See* *Washington v. Glucksberg*, 521 U.S. 702, 738, 739, 789, 792 (1997) (opinions of Justices O'Connor, Stevens, Souter, Ginsburg, and Breyer).) If the Court wants to do this but still avoid legalizing assisted suicide advertising (decision B), it can simply revise First Amendment doctrine — even if only through dictum — at the time it's implementing A. Such a revision might be unstable for other reasons (partly because it's just dictum), and might eventually either be undone or have its own harmful slippery slope consequences, but it could still somewhat decrease the chance of A leading to B.

On the other hand, a *state* court deciding whether to interpret its state constitution as allowing assisted suicide, *cf.* *Powell v. State*, 510 S.E.2d 18, 22, 26 (Ga. 1998) (interpreting the state constitution as protecting sodomy, despite *Bowers v. Hardwick*), can't easily guard against the risk that its decision will allow, as a matter of federal free speech law, the advertising of assisted suicide services.

¹³⁹ The legislature would be constitutionally free to move from B back to 0 (marijuana illegal), but there may be serious political barriers to such a move. The newly legalized marijuana industry, which may have quickly become rich and powerful, would fiercely fight the proposal. Legislators who supported the shift from 0 might be reluctant to cast a vote that seems like an admission of error. And the anti-B forces might have been strong enough to defeat a legislative proposal to move to B, but not strong enough to enact a legislative proposal to move away from B — it's generally easier to block legislative proposals than to enact them, *see supra* note 68.

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						juana is bad, but contempt for the law is even worse"	
3	A	0	B	✓		"A little restriction is good, but hard-core 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, so do as much as you can to restrict it”	30%

we might at first see just two large groupings: the aggregate of groups 1 and 2 (total strength 30%) opposing the mild prohibition, and the aggregate of groups 3, 4, 5, and 6 (total strength 70%) supporting it. Group 5 believes the mild prohibition will be obeyed, and will not lead to contempt for the law. Group 3 likewise believes A will work, and expects hardcore enforcement (B) to be unnecessary.

Then, once the mild prohibition A proves ineffective, option B is proposed. Members of group 5 would enthusiastically embrace B; they may regret having endorsed A, because A has created contempt for the law, but they now see B as the best option in any event. Members of group 2 would now reluctantly embrace B; they’re sorry that A was ever implemented, but given that there’s not enough support for going back to 0 (only 40%, from groups 1, 2, and 5), they’d rather go to B.

But members of group 3 would regret their actions: they would rather stay with A, or even go back to 0, because they strongly oppose B; but their endorsement of A back when B wasn’t even discussed now makes B possible. They might wish that they had thought earlier about the enforcement need slippery slope — but it would be too late, because there is now a 60% majority (groups 2, 5, and 6) for going all the way to the newly proposed B.¹⁴⁰

¹⁴⁰ Group 3 might try to undo the consequence of its support of A by proposing a return to 0 in place of the proposed A→B shift, but it will likely be too late. If both A and B are judicial decisions, stare decisis would make the A→0 return much harder than forbearing from the 0→A shift would have been. If A was a legislative decision, and the proposed B is a judicial decision, then the judges who want to avoid B might be unable to mandate a return from A to 0. If A was a constitutional judicial decision and the proposed B is a legislative decision, then the legislators who want to avoid B would be constitutionally barred from returning from A to 0.

Even if A and B are both legislative decisions, the proposed return to 0 won’t succeed — even if it’s voted on before B — because it would only get 50% of the vote (groups 1, 2, and 3), which is not enough, given our plausible assumption that a 55% supermajority is required, *see supra* p. 1030. Group 5 voters will see that they can soon get from A to their favorite option, B, so they won’t support group 3’s proposal, which is aimed at preventing B. Group 3 might also not be able to get the switch back to 0 on the legislative agenda; and if the shift to B is voted on first, then it will certainly be too late to return to 0.

Moreover, some other slippery slope — for instance, a political power or political momentum slippery slope, through which the opponents of 0 have gained strength because of A — might make

This slippage is especially likely if A fails not just unexpectedly, but also because of changed circumstances. Say the United States is deciding whether to commit troops to a small peacekeeping mission in a foreign country (A). When this decision is being made, committing more troops to a broader military action (B) may not even be contemplated. But if the modest disorder that prompted the mission turns into a full-scale war, option A would no longer be feasible; we'd have a multi-peaked slippery slope, and A might slip to B even though B wouldn't have been authorized up front, without the initial step A.¹⁴¹

G. 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. Sometimes A's advocates have explicitly said as much.¹⁴² Sometimes the proposal seems so unlikely to achieve its stated goals on its own that voters might reasonably conclude that it will surely be followed by other proposals.¹⁴³ And sometimes voters might reasonably infer from the group's ideology that A isn't the only thing on the group's agenda.

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

returning to 0 harder. And returning to a previously rejected position may also be politically harder because political leaders who supported the 0→A shift might not want to admit that they were wrong, and that the effort they undertook to go from 0 to A was wasted.

¹⁴¹ See Lilly R. Sucharipa-Behrmann & Thomas M. Franck, *Preventive Measures*, 30 N.Y.U. J. INT'L L. & POL. 485, 504–05 (1998):

If a preventive measure entails establishing an international presence at the scene of a potential crisis, what is to be done when the crisis is *not* prevented by the measures taken? The system is then faced with three unpalatable choices: withdraw, reinforce, or muddle through. When withdrawal is not the option chosen — sometimes because public opinion, developed by media attention, will not tolerate abandonment — the other two options, separately or together, tend to create the syndrome known as “mission creep[.]” . . . [where] an ad hoc peacekeeping mission evolve[s] into full-scale military action.

¹⁴² See *infra* note 301 (especially the Pete Shields quote).

¹⁴³ See, e.g., *infra* notes 301–304 and accompanying text.

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 heuristic 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.”¹⁴⁴

This heuristic can only be a presumption: if a voter sees that A is very appealing, or that the chances of A leading to some bad B seem especially low, then the presumption would be rebutted, and the voter should be willing to consider A on its own terms. But the presumption may make a difference in many cases — unless the voter sees some substantial benefit to A or some strong assurance that A won’t lead to B, the very source of A’s support can reasonably lead the voter to oppose it.

Unfortunately, even if the ad hominem heuristic is rational from each voter’s perspective, it might have harmful social consequences. Making decisions based on hostility to various advocacy groups could 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. Moreover, the ad hominem heuristic may exacerbate the slippery slope inefficiency — the social cost created when useful modest steps A, which on their own may be widely seen as socially valuable, are rejected because some voters fear that such steps A will lead to broader steps B.¹⁴⁵ 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 ex-

¹⁴⁴ This may be just a special case of a broader ad hominem heuristic that arises even outside the slippery slope context — busy people who don’t have the time to study some proposal deeply may rely on its supporters’ and opponents’ identities as a convenient, though highly imperfect, cue to what their own views on the subject should be.

¹⁴⁵ See *supra* section II.A.6.

ercise, 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* (1786).

“[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”¹⁴⁶

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.¹⁴⁷ (Note how this mechanism differs from the multi-peaked preferences slippery slope, which does not rely on people’s underlying attitudes’ being shifted.¹⁴⁸)

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.¹⁴⁹ Let’s call this “Internet tracking,” and

¹⁴⁶ Charles Krauthammer, *Disarm the Citizenry: But Not Yet*, WASH. POST, Apr. 5, 1996, at A19; cf. Mayo, *supra* note 6, at 89 (“I certainly *hope* the NRA is right in claiming that banning imported assault weapons will lead . . . to more decisions to restrict guns in other ways.”).

¹⁴⁷ Cf. WALTON, *supra* note 4, at 9 (“As one act becomes less and less the exception that has to be argued for as acceptable in a particular case, a social climate of opinion sets in which makes it easier for the next stage to arise as a real possibility. As what is tolerated in a society changes, the possible becomes the plausible.”).

¹⁴⁸ See *supra* Part II.

¹⁴⁹ See *ACLU Worried over New Antiterrorism Measures*, NAT’L J. CONGRESSDAILY, Sept. 20, 2001; Dave Kopel, *Don’t Press the Panic Button*, NAT’L REV. ONLINE (Sept. 21, 2001), at <http://www.nationalreview.com/kopel/kopel092101.shtml>. I say “may let” because whether the Patriot

let's assume for now that this power is undesirable. This is our result B.¹⁵⁰ 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").¹⁵¹ This was decision A.

Curiously, most arguments on both sides of the Internet tracking debate assumed A was correct,¹⁵² 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.¹⁵³ Few people argued that *Smith* was itself wrong and that the bad precedent shouldn't be extended. The "normative power of the actual"¹⁵⁴ 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 the is-ought fallacy;¹⁵⁵ 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.

Act allows tracking of the individual Web page addresses, as opposed to just the addresses of the host computers, remains a controversial interpretive question.

¹⁵⁰ The enactment of B wasn't a foregone conclusion, even given the September 11 attacks; Congress didn't give the Administration all that it wanted in the Patriot Act, and the power to track Web page access wasn't described as being central to the anti-terrorism campaign.

¹⁵¹ 442 U.S. 735 (1979).

¹⁵² See, e.g., Stewart Baker & Eugene Volokh, *Civil Liberties in Wartime*, SLATE (Sept. 20, 2001), at <http://slate.msn.com/?id=115633&entry=115888>.

¹⁵³ See *id.* (Volokh arguments); Kopel, *supra* note 149; *Techies' Views on Anti-Terrorism Package Differ*, NAT'L J. TECH. DAILY, Sept. 24, 2001 (quoting Bruce Heiman, executive director of Americans for Computer Privacy).

¹⁵⁴ Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 582 (1933) (attributing the phrase to Georg Jellinek); see also THE FEDERALIST NO. 8, at 70 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The inhabitants of territories, often the theater of war, are unavoidably subjected to frequent infringements on their rights, which serve to weaken their sense of those rights; and by degrees the people are brought to consider the soldiery not only as their protectors but as their superiors.").

¹⁵⁵ For a discussion of the is-ought fallacy, see generally DAVID HUME, A TREATISE OF HUMAN NATURE 293–306 (David Fate Norton & Mary J. Norton eds., 2000).

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.¹⁵⁶

The same approach may also apply to less empirical judgments. The proper scope of police searches, for instance, is a complex issue. Most people lack well-developed, comprehensive philosophies on the subject that would give them clear answers to most police search questions.¹⁵⁷ So instead of thinking deeply through the matter themselves, they may choose

¹⁵⁶ This reasoning may apply to many decisions that rely on complex factual evaluations. For instance, many citizens realize that they don't know enough about which countries we should choose as allies. If these citizens believe that the government usually (not always, but often enough) gets such matters right, then they may reasonably let the government's decisions influence their factual judgments about the world. Should Turkey be our ally? Well, for decades our government has chosen it as one, and that itself is some evidence that Turkey is friendly to us, if one knows nothing else about Turkey. See also Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 685–86 (1999) (discussing situations "when people with incomplete personal information on a particular matter base their own beliefs on the apparent beliefs of others"); Dhammika Dharmapala & Richard H. McAdams, *The Condorcet Jury Theorem and the Expressive Function of Law: A Theory of Informative Law 2* (Feb. 2001), available at http://papers.ssrn.com/paper.taf?abstract_id=260996 (discussing how legislative decisions can "cause individuals to update their beliefs" about factual questions).

¹⁵⁷ Cf. Craig M. Cornish & Donald B. Louria, *Employment Drug Testing, Preventive Searches, and the Future of Privacy*, 33 WM. & MARY L. REV. 95, 114 (1991) ("[W]e, as a society, do not have a clear definition of what privacy is To the extent that any privacy debate considers privacy issues outside the context of the particular case, all prior intrusions into privacy, which society has accepted, form a baseline for comparison to the type of intrusion.").

to defer to the Court's expert judgment, if they think that the Justices are usually (even if not always) right on such questions.¹⁵⁸

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."¹⁵⁹ 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.¹⁶⁰

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

¹⁵⁸ Cf. *id.* at 118 ("Who would have ever thought that the analytic test employed in *Camara* [*v. Municipal Court*, 387 U.S. 523 (1967)], which involved searches of buildings, and *Terry v. Ohio*, [392 U.S. 1 (1968)], which involved temporary stops and pat downs, would eventually yield cases upholding the systematic blood testing of workers? Under the Court's test, each new form of surveillance that is given a Fourth Amendment imprimatur becomes a springboard for tolerance of further incursions into individual privacy." (footnotes omitted)); PAUL M. SNIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* 132–33 (1993) (reporting that support for race preferences in federal contracting increased from 43% to 57% when survey respondents were told that Congress had enacted such preferences, and crediting this result to "an appeal [being] made to the law as a persuasive symbol").

¹⁵⁹ McAdams, *supra* note 27, at 339; see also van der Burg, *supra* note 61, at 51–52 ("The neo-intuitionist [for example, one adhering to reflective equilibrium theories,] introduces elements of positive morality into his critical morality There is, in our type of society, a clear interaction between legal norms, moral norms, and social practice."); Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CAL. L. REV. 643, 731–32 (2001) ("Law also has a unique aura of legitimacy because its substantive mandates are generally presumed to be reflective of society's interests as a whole [A]nti-gay members of the community who subscribe to this same understanding of the law (viewing law as the expression of public values, rather than constituting those values) are likely to feel emboldened in their antagonism to lesbians and gays." (footnote omitted)).

¹⁶⁰ Cf. 2 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 996–97 (1995):
[T]he belief in the rights of the majority lies very near to the belief that the majority must be right The habit of deference to a decision actually given strengthens this presumption, and weaves it into the texture of every mind. A conscientious citizen feels that he ought to obey the determination of the majority, and naturally prefers to think that which he obeys to be right. A citizen languidly interested in the question at issue finds it easier to comply with and adopt the view of the majority than to hold out against it.

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.¹⁶¹
2. We should expect attitude-altering slippery slopes to be more likely when *many voters are pragmatists rather than ideologues*. If the population were a mix of, say, devout Marxists, objectivists, and Christian fundamentalists — people who have firm underlying belief systems that purport to resolve most moral and even empirical issues — then few people would look to the government's actions for guidance, since most people would already have strong judgments of their own.

But for people who think that many problems can't be answered by a grand theory, and instead require pragmatic weighing of many factors, the judgment of the government may well be one of the factors that they consider. 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,"¹⁶² 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.

¹⁶¹ See, e.g., *id.* at 997:

Those who prefer to swim with the stream are numerous everywhere, and their votes have as much weight as the votes of the keenest partisans. A man of convictions may insist that the arguments on both sides are after the polling just what they were before. But the average man will repeat his arguments with less faith, less zeal, more of a secret fear that he may be wrong, than he did while the majority was still doubtful; and after every reassertion by the majority of its judgment, his knees grow feebler till at last they refuse to carry him into the combat.

¹⁶² EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 99 (Thomas H.D. Mahoney ed., Library of Liberal Arts 1955) (1790).

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).¹⁶³

Consider, for instance, Justice Harlan's opinion for the Court in *Moragne v. States Marine Lines, Inc.*,¹⁶⁴ 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.

¹⁶³ See *infra* pp. 1084, 1086.

¹⁶⁴ 398 U.S. 375 (1970).

Where death is caused by the breach of a duty imposed by federal maritime law, Congress has established a policy favoring recovery¹⁶⁵

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 fairly common. In *Li v. Yellow Cab Co.*, for instance, the California Supreme Court relied in part on twenty-five states' legislative shifts to comparative negligence as a justification for a similar judicial shift in California, and the Florida Supreme Court had done much the same two years before.¹⁶⁶ Three state supreme courts have similarly relied on many other states' legislative abrogation of the alienation of affections tort to justify abrogating the tort judicially.¹⁶⁷ And the enactment of limited antidiscrimination statutes has led some courts to create common law antidiscrimination rules that go beyond the statutes' terms, for instance prohibiting discrimination even by employers that the statutes specifically exclude because of their size.¹⁶⁸

The legislative-judicial attitude-altering slippery slope can occur in constitutional decisions, too. For instance, in cruel and unusual punishment cases, courts often inquire into whether a particular punishment scheme is commonly used today, deferring in some measure to the judgment of legislative bodies as the best evidence of "evolving standards of decency."¹⁶⁹ In substantive due process cases, courts ask whether a right has been traditionally recognized, drawing normative guidance from the aggregate of legislative judgments.¹⁷⁰ And in other constitutional cases,

¹⁶⁵ *Id.* at 390–93 (emphasis added) (footnotes omitted) (citations omitted).

¹⁶⁶ *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1232 (Cal. 1975); *Hoffman v. Jones*, 280 So. 2d 431, 436 (Fla. 1973) (relying, among other things, on the fact "that sixteen states have so far adopted some form of the comparative negligence doctrine").

¹⁶⁷ See *O'Neil v. Schuckardt*, 733 P.2d 693, 697 (Idaho 1986); *Fundermann v. Mickelson*, 304 N.W.2d 790, 792 (Iowa 1981); *Dupuis v. Hand*, 814 S.W.2d 340, 344 (Tenn. 1991).

¹⁶⁸ See, e.g., *Stevenson v. Superior Court*, 941 P.2d 1157, 1164–67 (Cal. 1997) (relying on various statutes, from California and elsewhere, that condemn age discrimination in employment); *Badih v. Myers*, 36 Cal. App. 4th 1289, 1294–96 (1995) (relying on California and federal statutes and a California constitutional provision); *Thibodeau v. Design Group One Architects, LLC*, 781 A.2d 363, 369–70, 372 (Conn. App. Ct. 2001) (relying on legislatively enacted provisions that "evidence a strong legislative intent to end discrimination on account of sex"); *Molesworth v. Brandon*, 672 A.2d 608, 616 (Md. 1996); *Roberts v. Dudley*, 993 P.2d 901, 906–09 (Wash. 2000) (relying on two Washington statutes). None of the cited enactments directly covered the discrimination in each case; if they had, there would have been no need for the courts to recognize a common law cause of action. Rather, the courts used the statutes as sources for a principle that was broader than the statutes' terms.

¹⁶⁹ *Atkins v. Virginia*, 122 S. Ct. 2242, 2252 (2002); see, e.g., *id.* at 2248–49 (looking to existing state laws when considering whether mentally retarded murderers could be executed); *Stanford v. Kentucky*, 492 U.S. 361, 370–71 (1989) (likewise looking to existing state laws when considering whether murderers who committed their crimes when only sixteen could be executed).

¹⁷⁰ See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997); *Griswold v. Connecticut*, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring).

courts look to legislative traditions as one source from which they can infer the meaning of vague concepts, such as the freedom of speech or the right to trial by jury.¹⁷¹ Thus, a legislative decision A (for example, a legislative prohibition of a particular punishment) could influence judicial attitudes about a constitutional decision B (a constitutional prohibition of that punishment) that would have an effect far broader than A alone.

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."¹⁷² 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.¹⁷³

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)."¹⁷⁴ 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,"¹⁷⁵ something similar to the vigorous rational basis scrutiny that some have urged.¹⁷⁶ 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).

¹⁷¹ See, e.g., *Burch v. Louisiana*, 441 U.S. 130, 138 (1979) (concluding that a conviction by a nonunanimous six-person jury violated the right to criminal jury trial by relying on the dominant view among states); *Ballew v. Georgia*, 435 U.S. 223, 244 (1978) (using similar reasoning, though less explicitly, for jury size); cf. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 375–77 (1995) (Scalia, J., dissenting) (urging more reliance on legislative traditions); *Rutan v. Republican Party*, 497 U.S. 62, 102–03 (1990) (Scalia, J., dissenting) (same).

¹⁷² *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999).

¹⁷³ See *id.* at 885–86. 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.

¹⁷⁴ See *id.* at 878.

¹⁷⁵ *Id.* at 878–79.

¹⁷⁶ See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973); Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20–24, 31 (1972).

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.¹⁷⁷

. . . [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 license¹⁷⁸

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 tradi-

¹⁷⁷ *Baker*, 744 A.2d at 884–85 (emphasis added) (citations omitted) (paragraph breaks added).

¹⁷⁸ *Id.* at 885–86 (emphasis added) (citations omitted) (paragraph break added).

tions from which [the State] developed.”¹⁷⁹ *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.”¹⁸⁰ 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.”¹⁸¹ But *Baker* suggests that the concern was factually well-grounded (though of course many might believe that the slip-page 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

¹⁷⁹ *Id.* at 879 (internal quotation marks omitted).

¹⁸⁰ *See, e.g., Caldor’s, Inc. v. Bedding Barn, Inc.*, 417 A.2d 343, 353 (Conn. 1979) (striking down a Sunday closing law under rational basis scrutiny because of its patchwork of exemptions, and concluding that the rationale for the law had been “seriously undermined by the steady addition of new classes of enterprises exempted from the Sunday closing law”). This effect is of course even more pronounced when courts apply heightened scrutiny. *See, e.g., Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173, 186–89 (1999) (striking down a ban on certain kinds of gambling advertising because “we cannot ignore Congress’ unwillingness to adopt a single national policy that consistently endorses” reducing the social costs associated with gambling or assisting states that restrict gambling; “any measure of the effectiveness of the Government’s attempt to minimize the social costs of gambling cannot ignore Congress’ simultaneous encouragement of tribal casino gambling, which may well be growing at a rate exceeding any increase in gambling or compulsive gambling that private casino advertising could produce”); *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989) (plurality opinion) (rejecting an asserted compelling interest because the law had exceptions that undermined the interest); *Carey v. Brown*, 447 U.S. 455, 465 (1980) (striking down a content-based speech restriction because an exception in that restriction suggested “that Illinois itself [had] determined that [the asserted government interest was] not a transcendent objective”).

This phenomenon is analogous to a legislative-legislative attitude-altering slippery slope, in which A doesn’t directly persuade voters of the rightness of the principle underlying A, but rather undermines voters’ belief in the rightness of the contrary principle underlying O.

¹⁸¹ Editorial, *A Vote Against Hate*, LOUISVILLE COURIER-J., Feb. 3, 1994, at 6A; *see also, e.g.*, Editorial, *A Gay-Protection Forum*, BOSTON GLOBE, Oct. 15, 1989, at A30 (“[A proposed antidiscrimination law] does not legalize ‘gay marriage’ or confer any right on homosexual, lesbian or unmarried heterosexual couples to ‘domestic benefits.’ Nor does passage of the bill put Massachusetts on a ‘slippery slope’ toward such rights.”); Phil Pitchford, *Council Members Wary of Partner Registry*, RIVERSIDE PRESS-ENTERPRISE, Apr. 30, 1994, at B1 (quoting Riverside Human Relations Commission member Kay Smith as saying that “[t]hose that truly have a problem with homosexuality will see [a domestic partnership proposal] as part of the ‘slippery slope’ [toward gay marriages] But, this legislation needs to be looked at on the face value of what it is, and it really does very little.”).

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.¹⁸² 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.¹⁸³

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*, 13 S.C.L. (2 McCord) 400, 406 (1823).

1. *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*. Madison reasoned:

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

¹⁸² See *supra* p. 1036.

¹⁸³ See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955) (stressing that legislatures may “take one step at a time” under the rational basis test); see also *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 811 & n.28 (1984) (seemingly rejecting the underinclusiveness test for content-neutral speech restrictions).

support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?¹⁸⁴

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.”¹⁸⁵

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.¹⁸⁶ 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 preeminence amongst the different societies or communities of Christians,” then his concerns would be less plausible.¹⁸⁷

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).¹⁸⁸ Decision A (cameras aimed at catching red light runners)

¹⁸⁴ MADISON, *supra* note 1, at 300.

¹⁸⁵ *Id.*

¹⁸⁶ Patrick Henry, *A Bill “Establishing a Provision for Teachers of the Christian Religion”* (1784), in THOMAS E. BUCKLEY, *CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776–1787*, at 188 (1977).

¹⁸⁷ *Id.*

¹⁸⁸ Cf. Sheila R. Cherry, *Big Brother Greets Visionics*, INSIGHT ON THE NEWS, Oct. 22, 2001, at 22 (quoting a spokesman for House Majority Leader Dick Armey who expressed the Congressman’s concern that the use of red-light cameras had put government entities “on a slippery slope to full-scale surveillance on every corner” and Armey’s subsequent shock when “lo and behold, a month later, that’s what we’re getting”).

might thus increase the chances that decision B (cameras throughout the city aimed at preventing street crime), which J2 would justify, will be implemented.¹⁸⁹ 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.¹⁹⁰ 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."¹⁹¹ 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.¹⁹²

Consider also Justice Holmes's statement that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic."¹⁹³ This aphorism has entered common usage as an argument — endorsed by one of the great Justices, and one of the

¹⁸⁹ This result would be especially likely if public opinion on B were already so closely divided that influencing even a small group of voters could change the result.

¹⁹⁰ Cf. Schauer, *supra* note 6, at 372 (discussing people's "bias in favor of simple principles").

¹⁹¹ 433 U.S. 562, 573 n.10, 576 (1977).

¹⁹² See, e.g., *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 80 Cal. Rptr. 2d 464, 471 (Ct. App. 1998) (concluding, in a name-or-likeness case, that *Zacchini* "considered, and rejected, a First Amendment defense to liability for infringement of the right of publicity"), *aff'd*, 106 Cal. Rptr. 2d 126 (2001); *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 622 (6th Cir. 2000) (same); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1401 n.3 (9th Cir. 1992) (same); Lorin Brennan, *The Public Policy of Information Licensing*, 36 HOUS. L. REV. 61, 99–100 (1999) (same).

¹⁹³ *Schenck v. United States*, 249 U.S. 47, 52 (1919).

Court's earliest advocates of strong free speech protection¹⁹⁴ — that some kinds of speech ought not be constitutionally protected.

But most people quoting the phrase omit the “falsely,” which changes the meaning substantially.¹⁹⁵ Under modern doctrine, for instance, falsely shouting fire would be punishable under the false statements of fact exception to free speech protection,¹⁹⁶ while accurately shouting fire probably wouldn't be punishable.¹⁹⁷ If Holmes's point were quoted precisely, it would provide little support for, say, restricting advocacy of anarchy, allegedly racist statements, or communication of private information about people.¹⁹⁸ Many commentators, though, seem to have absorbed the principle in a form that's broader than its literal boundaries.

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.¹⁹⁹ 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

¹⁹⁴ Justice Holmes's *Schenck* opinion was not particularly speech-protective, but his other opinions are properly credited as sources of the modern, fairly speech-protective First Amendment jurisprudence.

¹⁹⁵ A LEXIS search in the NEWS;US file for “(shouting fire in a theatre or shouting fire in a theater or shouting fire in a crowded theatre or shouting fire in a crowded theater) and date(< 1/1/2002)” yielded 333 results. The same query with “falsely” before each “shouting” yielded only 72. Some of these results were false positives (for example, stories that used the metaphor more broadly than just in a free speech context, and the occasional story discussing the common omission of “falsely”), but only relatively few.

¹⁹⁶ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

¹⁹⁷ Though one can argue that even accurately shouting fire should be punishable because it might cost some lives as well as save others, the argument is harder to make than for false statements. Accurately shouting fire is not, for instance, incitement, even if it does lead to a panic, because it is rarely said with the intention of causing a panic; and under modern case law, speech can't be considered incitement unless it's intended to cause unlawful conduct — mere knowledge that it might cause bad conduct isn't enough. See *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969).

¹⁹⁸ See, e.g., *Ad Generates Free Speech Debate at U. Colorado*, COLO. DAILY, Mar. 21, 2001 (“William King, a professor of Afro-American studies at CU, said that while free speech allows for ads [stridently denouncing the calls for reparations for slavery] to appear in print, common sense should keep them out. . . . ‘It's a whole lot like shouting “fire” in a crowded theater,’ said King.”); William Claiborne, *Community vs. Klan in a Contest of Rights: City of Gary Seeks To Stave Off Rally by “Spewers of Filth”*, WASH. POST, Jan. 19, 2001, at A3 (“For his part, [the mayor of Gary, Ind., Scott L.] King on Wednesday said that for the Ku Klux Klan to come to Gary, where the population is 85 percent African American, ‘gets pretty close to shouting “Fire!” in a crowded theater, which in my view is not constitutionally protected speech.”); Michael Ko, *Kirkland Sues over Police Data: Web Site with Officers' Personal Details Abuses Free Speech, City Manager Says*, SEATTLE TIMES, Apr. 3, 2001, at B2 (“The release of home addresses and Social Security numbers is like ‘shouting fire in a crowded theater.’”); Carrie Smith, *Board Denies Request for School Anarchy Club*, CHARLESTON DAILY MAIL, Oct. 30, 2001, at 5A (“A Sissonville High student's request to start an anarchy club at her school was overthrown by board members, who . . . likened it to shouting fire in a crowded theater.”).

¹⁹⁹ *Smith v. Maryland*, 442 U.S. 735, 737, 745–46 (1979).

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.²⁰⁰

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.²⁰¹ Had J2 been absorbed into people’s attitudes, people might well have resisted the analogy, since J2 doesn’t apply to Internet communications.²⁰² 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.”²⁰³ And the *Smith* decision may have thus led many people to accept a justification broader than what the opinion itself relied on.²⁰⁴

²⁰⁰ See *id.* at 741 (J1); *id.* at 742–43 (J2) (citations omitted); *id.* at 743–44 (J3).

²⁰¹ See *supra* p. 1078.

²⁰² Internet service providers don’t bill based on the location of the Web pages or e-mail addresses that one uses, or look at this information to determine whether accounts are used to conduct a business. Users aren’t sent lists of the addresses they have contacted. And few people probably expect the service provider to use the addresses “for a variety of legitimate business purposes,” or even to store these addresses beyond the brief period needed to process the request.

²⁰³ *Harrington v. Comm’rs*, 13 S.C.L. (2 McCord) 400, 406 (S.C. 1823) (emphasis removed), quoted *supra* p. 1088.

²⁰⁴ Likewise, consider arguments that try to justify bans on distributing material that depicts cruelty to animals (so-called “crush videos”) by analogy to child pornography. See Timm Herdt, *Committee OKs “Crush” Video Ban*, VENTURA COUNTY STAR, Mar. 15, 2000, at B1 (“Assistant District Attorney Tom Connors said the bill is modeled after legislation that bans the distribution of material that features

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.²⁰⁵

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

child pornography. “Illegal conduct . . . has never been given the constitutional protections of free speech.”). *New York v. Ferber*, 458 U.S. 747 (1982), upheld bans on distributing child pornography (material that depicts actual children engaging in sexual conduct) because two conditions were both present: the availability of distribution channels creates an incentive for people to produce child pornography (J1), *see id.* at 761, and the production of child pornography involves not just crime, but very serious crime — sexual abuse of children (J2), *see id.* at 757–59. The crush-video/child-pornography analogy would read *Ferber* as allowing speech to be restricted whenever J1 is present, though *Ferber* actually held only that speech can be restricted when J1 and J2 are both present.

The crush video ban was in fact enacted as 18 U.S.C. § 48 (2000); its constitutionality hasn't been tested, but I believe it is unconstitutional. *See* EUGENE VOLOKH, *TEACHER'S MANUAL, THE FIRST AMENDMENT: PROBLEMS, CASES AND POLICY ARGUMENTS* 62–64 (2001).

²⁰⁵ *See supra* notes 191–192 and accompanying text.

require warrants “subject only to a few specifically established and well-delineated exceptions.”²⁰⁶ 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).²⁰⁷

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,²⁰⁸ 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.²⁰⁹

The attitude-altering slippery slope may thus counsel against the creation of each additional exception,²¹⁰ 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 excep-

²⁰⁶ See, e.g., *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 126–27 (1991) (Kennedy, J., concurring in the judgment) (speech); *Katz v. United States*, 389 U.S. 347, 357 (1967) (searches).

²⁰⁷ This possibility is especially likely when all or most of the exceptions are likely to be seen as fitting 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. Such a rule, together with its exceptions, is more likely to be seen as a simple “Require a warrant unless there’s a clear, immediately pressing need to act without one,” rather than as a complex “Require a warrant except in case A1 for one reason and in A2 for another and in A3 for another” And if rational ignorance leads people to want to internalize a simple principle, the first principle will likely be accepted by people on its own terms, while the second may end up being simplified to “There really isn’t much of a warrant requirement at all.”

²⁰⁸ See *California v. Acevedo*, 500 U.S. 565, 582–83 (1991) (Scalia, J., concurring in the judgment) (“Even before today’s decision, the ‘warrant requirement’ had become so riddled with exceptions that it was basically unrecognizable. . . . Unlike the dissent, therefore, I do not regard today’s holding as some momentous departure, but rather as merely the continuation of an inconsistent jurisprudence that has been with us for years. . . . In my view, the path out of this confusion should be sought by returning to the first principle that the ‘reasonableness’ requirement of the Fourth Amendment affords the protection that the common law afforded.”).

²⁰⁹ See Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right To Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1106 (2000) (“Arguing by analogy to one restriction is hard. . . . Arguing by analogy to two restrictions is easier, by analogy to several restrictions easier still.”).

²¹⁰ See *id.* at 1079–80; Eugene Volokh, *Thinking Ahead About Freedom of Speech and Hostile Work Environment Harassment*, 17 BERKELEY J. EMP. & LAB. L. 305, 312 (1996) (“Any time one recognizes a new exception to free speech protection, one strengthens the argument that a future proposed exception ‘should not be seen as breaking new ground.’”).

tions 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.²¹¹

Consider, for instance, intellectual property rules. The legislators and courts that created these rules have generally limited the rules in important ways, ways that have often been influenced by free speech concerns.

Thus, copyright law bars you from publishing expression that's too similar to what another wrote, but leaves you free to use the ideas and facts that others have pioneered, or to use even their expression of those ideas and facts when it's needed for criticism, commentary, or parody.²¹² Right of publicity law bars you from broadcasting someone's entire act without permission, or using someone's name or likeness in your commercial ads, but leaves you free to use the name or likeness in a news report, a biography, a novel, or various other contexts.²¹³ Trademark law and trade secret law, the other two main intellectual property rules that restrict speech, are likewise constrained by their own limiting principles.²¹⁴

The Supreme Court decisions that have upheld various intellectual property laws against First Amendment challenge rely on these limitations.²¹⁵ The Court has never said that intellectual property laws are constitutional simply because they are called property rules. Rather, the Court has acknowledged that the laws restrict speech and thus must be tested against the First Amendment's commands, and has generally upheld re-

²¹¹ 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 uniting justification that goes considerably beyond the particular holdings of each case. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 204–14 (1890) (pointing to a variety of cases, decided under a variety of theories, and urging that they should be understood as protecting a general “right to privacy”).

²¹² See generally *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539 (1985).

²¹³ See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578–79 (1977); RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46–47 (1993).

²¹⁴ See Volokh, *supra* note 209, at 1067–68, 1070–73. Patent law generally does not restrict speech. See generally Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 234 (1998).

²¹⁵ See *Harper & Row*, 471 U.S. at 569 (upholding copyright law); *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 548 (1987) (upholding a special quasi-trademark statute); *Zacchini*, 433 U.S. at 578–79 (upholding a performer's right to block broadcasts of his entire act, which was called a right of publicity under state law, but which is much narrower than most modern right of publicity rules).

strictions on the ground that they are narrow and thus don't unduly burden others' speech.²¹⁶

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 that Congress may properly give people a monopoly over expression (but not ideas or facts), subject to fair use, 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."²¹⁷

This process, I think, explains the ease with which some have embraced new intellectual property-based justifications for speech restrictions, such as flag-burning bans, restraints on the use of facts disclosed by the Federal Election Commission, and bans on people communicating supposedly private information about others.²¹⁸ These arguments generally don't

²¹⁶ See Volokh, *supra* note 209, at 1066–70.

²¹⁷ *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); see also *Mutual of Omaha Ins. Co. v. Novak*, 836 F.2d 397, 402 (8th Cir. 1987) (“Mutual’s trademarks are a form of property, and Mutual’s rights therein need not ‘yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist.’”) (citations omitted); *Winterland Concessions Co. v. Sileo*, 528 F. Supp. 1201, 1214 (N.D. Ill. 1981) (quotation); cf. Lemley & Volokh, *supra* note 214, at 182–85 (explaining why this property rights analysis was inadequate to resolve the First Amendment question that the *Dallas Cowboys Cheerleaders* court confronted); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1537 (1993) (expressing concern that “[t]he incantation ‘property’ seems sufficient to render free speech issues invisible”).

²¹⁸ See, e.g., *Texas v. Johnson*, 491 U.S. 397, 429–30 (1989) (Rehnquist, C.J., dissenting) (suggesting that the government could ban flag desecration because it had a “limited [intellectual] property right” in the flag); H.R. 3883, 104th Cong. (1996) (statement of Rep. Torricelli) (proposing a flag desecration ban justified on this very theory); *FEC v. Int’l Funding Inst., Inc.*, 969 F.2d 1110, 1119–20 (D.C. Cir. 1992) (en banc) (Buckley, J., concurring) (arguing that the government may bar people from soliciting political contributions using contributor lists disclosed by the Federal Election Commission, because contributor lists are a form of property); see also *id.* at 1121 (Randolph, J., concurring) (same); Volokh, *supra* note 209, at 1063–80 (discussing proposed restrictions on communicating supposedly private information). Likewise, Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1416–17 (2000), defends information privacy speech restrictions on various grounds, but relies in large part on the argument that:

[W]e regulate the exchange of information as property all the time. . . . [T]he law routinely allows private parties to invoke property or contract rights to restrict others’ speech. If collections of personally-identified data are like other sorts of regulated information, or if indi-

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 J:²¹⁹ 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. And this principle seems so powerful to its adherents that they often don't even respond to the argument that the First Amendment limits the "power of [the legislature] to privatize [certain expressions, facts, or ideas], rendering [them] unutterable by anyone else."²²⁰ Constitutional law, some say, rests in large part on the allocation of baseline assumptions about what is mine and what is yours.²²¹ And the existence of intellectual property law seems to have shifted some people's baseline to be that words and symbols can be freely made someone's property — and thus unusable by others — just as tangible property can be.

Why do some people internalize just this broad principle J, rather than the narrower principles that actually correspond more closely to the boundaries of each law? One possible reason is that J 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 J, 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 J, and thus pave the way for new restrictions that are also justified by J but that lack the limiting principles present under the old rules — for instance, a right to own information about oneself

viduals have property or contractual interests that extend to (at least some) personally-identified information on an ongoing basis, the First Amendment landscape changes.

Id. at 1416–17. But see Volokh, *supra* note 209, at 1104 n.227 (criticizing this argument).

²¹⁹ Even if the argument might be makeweight from the perspective of those making it — perhaps because they would support the proposed speech restriction even if there were no intellectual property justification for it — their making the argument suggests that they think some in their audience (other judges, legislators, or voters) have accepted this intellectual property-based justification.

²²⁰ *Int'l Olympic Comm. v. S.F. Arts & Athletics*, 789 F.2d 1319, 1321 (9th Cir. 1986) (Kozinski, J., dissenting from denial of rehearing en banc).

²²¹ See, e.g., Michael C. Dorf, *Create Your Own Constitutional Theory*, 87 CAL. L. REV. 593, 604 (1999); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1414 (1986).

(B1), a property right in databases of facts (B2), or a broadened right of publicity (B3).²²²

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."²²³

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.²²⁴ 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"?²²⁵ This might reduce the risk of broadening: if a future Court

²²² See, e.g., Cohen, *supra* note 218, at 1416–17.

²²³ See Volokh, *supra* note 209, at 1076–80.

²²⁴ Such a reason might not be enough to justify overruling the precedents, but it might suffice to weaken their "gravitational force" — their tendency to apply even to cases that they do not on their own terms cover. DWORKIN, *supra* note 119, at 113.

This effect can complement the judicial-judicial equality slippery slope, see *supra* section II.D.4.b, but the two kinds of slopes are fundamentally different: The equality slippery slope is driven by a judge's *hostility* to the intermediate position A, caused by the judge's belief that A violates equality principles and that the more evenhanded B is better than A. The attitude-altering slippery slope is driven by a judge's *acceptance* of the intermediate position A and its underlying justifications, which also justify B.

²²⁵ See *supra* p. 1066.

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.²²⁶ Thus, *Cohen v. California* reasoned that the proposed principle that profanity is unprotected but other offensive words remain protected "seems inherently boundless."²²⁷ *Texas v. Johnson* reasoned that "[t]o conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries."²²⁸ *Hustler v. Falwell* asserted that "[i]f it were possible by laying down a principled standard to separate [the attack on Jerry Falwell and his mother] from [traditional political cartoons], public discourse would probably suffer little or no harm," but concluded that "we doubt that there is any such standard, and we are quite sure that the pejorative description 'outrageous' does not supply one."²²⁹

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.

Of course, Justices considering a particular distinction may disagree on how "defensible," and thus influential, the distinction would be. Some Justices, for instance, might conclude that creating an exception for flagburning wouldn't lead to broader decisions later, because the flag "occupie[s] a unique

²²⁶ Of course, another part of the reason might be that the Justices are concerned that the proposed principles will be too vague to be properly applied by lower courts.

²²⁷ 403 U.S. 15, 25 (1971).

²²⁸ 491 U.S. 397, 417 (1989).

²²⁹ 485 U.S. 46, 55 (1988).

position as the symbol of our Nation.”²³⁰ Identifying the *possibility* of an attitude-altering slippery slope doesn’t tell us how *likely* this slippage will be.

Nonetheless, such slippage is possible, and judges may want to be concerned about it when crafting their proposed tests. A particular judicial decision A might rest on a limited principle that on its own terms doesn’t authorize a future decision B — for instance, the narrower justification J1 (“only racially, sexually, and religiously bigoted epithets are ‘low-value speech’ and can thus be punished”) rather than the broader J (“epithets are ‘low-value speech’ and can thus be punished”). But this limitation might ultimately prove inadequate, and A might cause B in spite of the Justices’ attempts to prevent such slippage. This possibility itself might sometimes be reason enough for the Justices to reject A, even if A — say, upholding a verdict against *Hustler* for publishing its outrageous attack on Falwell — might seem desirable on its own.

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 cam-

²³⁰ *Johnson*, 491 U.S. at 422 (Rehnquist, C.J., dissenting). But see Amici Curiae Brief of the National Writers Union et al. at 28, *Aguilar v. Avis Rent A Car Sys., Inc.*, 980 P.2d 846 (Cal. 1999) (No. S054561) (drafted by Bruce Adelstein) (“But Aguilar’s general argument — the speech we want to ban is unique — is not unique. Many would-be censors have claimed that certain speech or expressive conduct is unique.” (citation omitted)); Steve Kurtz, *Sensitive Censors: The Ubiquity of Uniquity*, REASON, July 1994, at 48 (suggesting that supposedly unique exception proposals are actually far from unique).

eras 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.²³¹

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.²³² 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.²³³

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.²³⁴ 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), and those policies 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).

²³¹ Itamar Simonson & Amos Tversky, *Choice in Context: Tradeoff Contrast and Extremeness Aversion*, 29 J. MARKETING RES. 281, 290 (1992).

²³² Mark Kelman, Yuval Rottenstreich & Amos Tversky, *Context-Dependence in Legal Decision Making*, 25 J. LEGAL STUD. 287 (1996).

²³³ Cf. Christine Jolls, Cass R. Sunstein & Richard Thaler, *Theories and Tropes: A Reply to Posner and Kelman*, 50 STAN. L. REV. 1593, 1596 (1998) (suggesting that voters are influenced by framing effects).

²³⁴ See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 624 (1971) (stating that "[d]evelopment by momentum is not invariably bad; indeed, it is the way the common law has grown," though ultimately invoking slippery slope concerns as a reason not to allow a certain step); *Gun Rights Advocates Chalk Up State Wins*, FOXNEWS.COM, Mar. 13, 2002, at <http://www.foxnews.com/story/0,2933,47755,00.html> ("I hope that we do get the right to concealed carry," said Rick Salyer[, who is] involved in the NRA 'If it can be proven it's safe at one step, then later on you can say, 'If this worked, why don't we give them a little more freedom.'").

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.²³⁵

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 disproportionately on their benefits.²³⁶ The benefits might be more quickly seen, more easily quantifiable, or otherwise more visible than the costs.²³⁷ The benefits might be felt by a more politically powerful group than the costs might be. The

²³⁵ The fallacy has been known as post hoc, ergo propter hoc for at least 300 years. See 12 OXFORD ENGLISH DICTIONARY 182–83 (2d ed. 1989) (quoting a 1704 source). Aristotle condemns it under the name of the fallacy of false cause. ARISTOTLE, *On Sophistical Refutations*, in ON SOPHISTICAL REFUTATIONS: ON COMING-TO-BE AND PASSING AWAY, AND ON THE COSMOS 2 (C.S. Forster trans., 1955).

²³⁶ For instance, many opponents of school choice are concerned that studies of pilot school choice programs will erroneously conclude that they are successful because of foreseeable flaws in the studies' design. See Stephanie Saul, *Cleveland's Choice: City Tests Vouchers for Religious Schools*, NEWSDAY, Sept. 1, 1996, at A8.

Likewise, many opponents of the Brady Bill — which requires gun buyers to undergo background checks to determine whether they have felony records — have expressed concern that people were evaluating the bill based on the number of gun purchases blocked because the check came back positive, or based on the fall in gun crime following the bill's enactment. See, e.g., Mike Dorning, *Study Says Brady Act Hasn't Cut Gun Deaths*, CHI. TRIB., Aug. 2, 2000, at N1 ("The Clinton administration and gun-control advocates repeatedly have cited [falling gun crime rates] as evidence of the Brady Act's success. They also quote statistics showing that more than 500,000 attempts to purchase a weapon at a gun store were halted because of the required criminal history checks."). These metrics, the Brady Bill opponents said, were flawed because (1) blocked attempts to buy a gun don't equal actually denying felons guns, since felons can still easily get guns on the black market, and (2) the fall in crime rates had other causes, and would have happened even without the Brady Bill. A study performed by two leading pro-gun-control criminologists six years after the Brady Bill was enacted suggested that the Bill had no measurable effect on homicide and suicide rates. See Jens Ludwig & Philip J. Cook, *Homicide and Suicide Rates Associated with Implementation of the Brady Handgun Violence Prevention Act*, 284 JAMA 585 (2000).

²³⁷ See FRÉDÉRIC BASTIAT, *What Is Seen and What Is Not Seen*, in SELECTED ESSAYS ON POLITICAL ECONOMY 1 (George B. de Huszar ed., Seymour Cain trans., 1964); HENRY HAZLITT, *ECONOMICS IN ONE LESSON* 15–16 (2d ed. 1979) (discussing the "persistent tendency of men to see only the immediate effects of a given policy, or its effects only on a special group, and to neglect to inquire what the long-run effects of that policy will be not only on that special group but on all groups"); Todd J. Zywicki, Book Review, 16 BANKR. DEV. J. 361, 373 & n.30 (2000).

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.²³⁸

Second, we might reasonably 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.²³⁹

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.

G. Are Attitude-Altering Slippery Slopes Good or Bad?

When a decision A alters people's attitudes about B, this alteration may be part of a good learning process. People might, for instance, initially oppose a broad market in human organs (B), but once they see that a lim-

²³⁸ 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.

²³⁹ 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.

ited market (A) works well, they may change their views.²⁴⁰ And if we decide our initial aversion to B might be mistaken, we might want to try A and see if we learn something from it.²⁴¹

The danger, though, is that our experience with A might leave our aversion to B unchanged, but might lead others — in our view, erroneously — to support B. After all, what some people call good “learning” is precisely what others might call bad “desensitization.” Maybe being confronted with happy beneficiaries of an organ market will lead our fellow voters to underestimate the moral harms of such markets. If that’s so, then we might regret having supported A in the first place, because it would have indeed brought about a B that we continue to oppose.

This approach might at first seem improperly paternalistic or anti-majoritarian, but it simply reflects political reality. We want the political process to reach results we like. Sometimes it doesn’t reach those results, because others disagree with us. In our view, those people are mistaken; but their votes can force their mistake on us. So if we do think that implementing A would lead others to support B while we ourselves would continue to oppose B, that’s a reason for us to oppose A.

Recall the question at the heart of this article: “Does it make sense for me to support A, given that it might lead others to support B?”²⁴² The possibility of good attitude-altering slippery slopes shows that even if we oppose B, we might still endorse A if (1) we have reason to doubt our judgment that B is bad, and (2) we are fairly confident that if A persuades our fellow decisionmakers that B is good, it will also persuade us. But if these conditions aren’t met, then we’re back to the slippery slope that we’d like to avoid rather than embrace.

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* bk. V, pt. VIII.

²⁴⁰ LLOYD R. COHEN, INCREASING THE SUPPLY OF TRANSPLANT ORGANS 99 (1995). Cohen distinguishes such a learning effect from a slippery slope, but under the definition used in this Article, it’s a form of slippery slope, albeit a benign one: decision A has indeed led to decision B.

²⁴¹ “The spirit of liberty is the spirit which is not too sure that it is right,” LEARNED HAND, THE SPIRIT OF LIBERTY 190 (3d ed. 1974), and surely this is even more true of the spirit of sound policy analysis.

²⁴² See *supra* p. 1030.

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.²⁴³ Likewise, the theory goes, with liberty: people resist attempts to take rights away outright, but not if the rights are eroded slowly.²⁴⁴

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.²⁴⁵ This is not an attitude-altering slippery slope, or a multi-peaked preferences slippery slope: the small shifts don't necessarily persuade people to eventually support the next shift, and don't move the law to a politically unstable position. Rather, people simply don't pay much attention to each shift.

Consider, for instance, the following exchange:

[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.

²⁴³ I have not checked this myself, nor do I intend to. Some sources suggest that real frogs don't behave this way. See, e.g., *Next Time, What Say We Boil a Consultant*, FAST COMPANY, Nov. 1995, at 20, available at <http://www.fastcompany.com/online/01/frog.html>. 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.

²⁴⁴ See, e.g., Olson & Kopel, *supra* note 23, at 422.

²⁴⁵ 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. For instance, if some people strongly oppose any tax increase, no matter how small, it might be easier for supporters of higher taxes to increase the tax rate from 20% to 40% in one big political fight, rather than fighting ten battles over ten 2% increases. The same may apply if people oppose even tiny new burdens on abortion rights, gun rights, privacy rights, free speech rights, or economic freedom, perhaps precisely because they worry about the small change tolerance slippery slope; I will discuss this possibility in more detail below, in section IV.A. Furthermore, people may sometimes get disillusioned with a sequence of small changes when each change has little effect, and may therefore lose enthusiasm for small changes of that sort. For now I just want to claim 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.

[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.²⁴⁶

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* (1742)

Let’s say a legislator is proposing a ban on .50-caliber rifles.²⁴⁷ Some kinds of guns are already entirely or mostly banned,²⁴⁸ 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.²⁴⁹ 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*.

²⁴⁶ *Peter Jennings Reporting: Guns* (ABC News Special television broadcast, Apr. 11, 1991).

²⁴⁷ See, e.g., H.R. 3182, 107th Cong. § 4 (2001).

²⁴⁸ See, e.g., 26 U.S.C. §§ 5845, 5861 (2000) (banning possession of short-barreled shotguns); 18 U.S.C. § 922(o) (2000) (banning possession of machine guns, except ones that were lawfully possessed as of 1986); 18 U.S.C. §§ 921(a)(30), 922(v)(1) (2000) (banning possession of so-called “semiautomatic assault weapons,” except ones that were lawfully possessed as of 1994); MD. CODE ANN. art. 27, § 36J (1996) (prohibiting handguns based on factors such as “caliber,” “weight,” and “quality of materials,” which is the way so-called Saturday Night Specials are sometimes defined); MINN. STAT. §§ 624.712 subd. 4, 624.716 (2002 Supp.) (prohibiting handguns based on the quality of the materials from which they are constructed, likewise a common way to define Saturday Night Specials); David Phinney, *Feinstein Targets .50 Caliber Sniper Rifle for New Law*, STATES NEWS SERV., Mar. 9, 2001 (stating that the gun “has yet to be connected to a crime in the United States,” but quoting Tom Diaz, senior policy analyst for the Violence Policy Center and a leading proponent of a ban on .50-caliber rifles, as arguing that “it’s only a matter of time” before that happens).

This apathy may be exacerbated by the media's relative lack of interest in small changes. Media outlets want stories that they can tout as big and important. A small change might get little coverage, especially if it's in an already unsexy area of the law,²⁵⁰ or at the state or local level rather than the federal level.²⁵¹

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 time and effort into arriving at an independent conclusion.²⁵²

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, deferring to others makes sense, even if their views don't always perfectly match your own.

Of course, *any* investment of effort by typical voters may be irrational if their only goal is simply bettering their own lives — the chances of any vote affecting the result are too slight to outweigh the costs of learning

²⁵⁰ See, e.g., *The Supreme Court, 2001 Term—Leading Cases*, 116 HARV. L. REV. 200, 412 (2002) (“[ERISA] may not be the sexiest statute in the U.S. Code . . .”).

²⁵¹ Even small changes may sometimes be heavily covered if they touch on a hot issue (such as abortion); there, attempts to change the law in five small steps might draw more aggregate attention than attempts to make the change in one large step. But if the question is less hotly contested, the steps may be small enough that they fall below the media's threshold for serious coverage.

²⁵² Cf. Nelson Lund, *Infanticide, Physicians, and the Law: The “Baby Doe” Amendments to the Child Abuse Prevention and Treatment Act*, 11 AM. J.L. & MED. 1, 27–28 (1985) (“In the smaller forums [such as states rather than the federal government], where financial resources and media scrutiny are in shorter supply, special interest groups are likely to be especially effective. This general tendency is liable to be particularly pronounced [in the context of infanticide of severely deformed infants] because the new legislation defines the prohibited practices as deviations from ‘reasonable medical judgment.’ Physicians are the recognized experts in medicine, and as we have seen, the ethical questions in this area are in practice closely intertwined with technical medical considerations.”).

about the issues.²⁵³ But many voters also enjoy feeling informed about important political matters and being able to discuss such matters intelligently with friends. These voters likely get less utility from feeling educated about the proposed small changes than from feeling educated about the big ones; they are thus more willing to remain rationally ignorant and rationally apathetic, and to defer to authorities, on the small proposals. And this is doubly true for potential volunteers and contributors, who'd rather spend their time and money on big issues than on small ones.

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 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. Lawmakers and their staffs have more time to devote to policy questions than voters do, but they also have more questions to deal with. A state legislator facing a budget battle, education reform, and a .50-caliber rifle ban might understandably defer to others' views on the last question — or, as discussed below, might be willing to compromise on this issue to get something valuable on some other issue.

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.²⁵⁴

Small change apathy likewise favors small changes that are backed by intense supporters. In politics, 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

²⁵³ See, e.g., Herbert Hovenkamp, *Rationality in Law & Economics*, 60 GEO. WASH. L. REV. 293, 317 (1992) ("The voter votes even though it is irrational, given the costs of voting and the minuscule likelihood that his vote will affect the outcome."). Of course, occasionally a few hundred votes matter, and some local races are won by ten votes or fewer. Still, when aggregating over all the races in which a person will likely vote, the chances of one vote changing the outcome are tiny.

²⁵⁴ See generally Gary Kleck, *Media Bias: Gun Control, Assault Weapons, Cop-Killer Bullets, the Goetz Case, and Other Alarms in the Night*, in DON B. KATES, JR. & GARY KLECK, *THE GREAT AMERICAN GUN DEBATE* 53 (1997) (citing evidence that media organs tend to favor broad gun controls); see also Jeff Jacoby, *The Media's Antigun Bias*, BOSTON GLOBE, Jan. 17, 2000, at A15; John R. Lott, Jr., *Off-Target News: When It's Guns, Media Miss Big Part of Picture*, INVESTOR'S BUSINESS DAILY, Feb. 7, 2002, at A17; Geoffrey Dickens, *Outgunned: How the Network News Media Are Spinning the Gun Control Debate*, MEDIA RESEARCH CENTER, Jan. 5, 2000, at <http://secure.mediaresearch.org/specialreports/news/sr20000105.html>.

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.²⁵⁵

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. Some people might enjoy being perceived as rigid on such matters: "Extremism in the defense of liberty," they might say, echoing Barry Goldwater, "is no vice."²⁵⁶ But people who like to see themselves and to be seen by others as "moderate"²⁵⁷ might not want such a reputation, and might therefore adopt a small change tolerance heuristic. And this may apply to legislators as well as voters — though some legislators cultivate a reputation for never budging on some issues,

²⁵⁵ Cf. Socrates in the *Phaedrus* dialogue:

Soc. . . . Where is deception most likely to occur — regarding things that differ much or things that differ little from one another?

Phaedr. Regarding those that differ little.

Soc. At any rate, you are more likely to escape detection, as you shift from one thing to its opposite, if you proceed in small steps rather than in large ones.

Phaedr. Without a doubt. . . .

Soc. Clearly, therefore, the state of being deceived and holding beliefs contrary to what is the case comes upon people by reason of certain similarities.

Phaedr. That is how it happens.

PLATO, *Phaedrus*, in PLATO: COMPLETE WORKS 538–39 (John M. Cooper & D.S. Hutchinson, eds., Alexander Nehamas & Paul Woodruff, trans., 1997). This also illustrates the authentic Socratic method, which, fortunately, law schools do not use: the teacher gives the answers in the form of questions and the student responds "Yes, Socrates."

Or perhaps the truly authentic Socratic method is for someone to ask people tough questions, until they kill him.

²⁵⁶ Said by Barry Goldwater at the 1964 Republican Convention, and credited by some to Karl Hess, see Lynn Scarlett, *In Memoriam: Karl Hess*, REASON, July 1994, at 7, 7, and by others to Harry Jaffa, see Jay D. Hartz, *The Impact of the Draft Goldwater Committee on the Republican Party*, CONTINUITY: A JOURNAL OF HISTORY, Fall 2000, at 79 n.1.

²⁵⁷ See, e.g., Randolph J. May, *Our Middle Road*, LEGAL TIMES, Jan. 7, 2002:

In one sense, the sentiment expressed by [the Goldwater line] is not only perfectly acceptable but also perfectly noble. In another sense, especially in the summer of 1964 after President John F. Kennedy's assassination and in the midst of the civil rights struggle, Americans simply were made uncomfortable by praise of "extremism" in any cause

. . . My father, the immigrant peddler's son, walked out of the den in which we watched the televised speech. . . . After what I saw in Europe [during World War II, he said,] I don't like any politician invoking extremism.

Id. at 38.

others might want to avoid looking like “rigid ideologues” to their constituents, or alienating colleagues with whom they’ll have to work again.

Small change tolerance slippery slopes can therefore happen 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.²⁵⁸ Supporters will push for small changes, and opponents won’t push back much.²⁵⁹

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.”²⁶⁰ 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

²⁵⁸ See, e.g., Bud Baker, *An Education in Revised Air Travel*, DAYTON DAILY NEWS, Nov. 22, 2001 (“Some [new airport security systems and procedures made] sense, while others seemed designed to satisfy the ‘Don’t just stand there, do something!’ sentiment so understandable since Sept. 11.”); Editorial, *Criminal Over-Federalization*, PROVIDENCE J.-BULL., Jan. 17, 1999 at 10B (“The problem starts when an instance of criminality gains widespread notoriety The message is sent to Washington: ‘Don’t just stand there — do something!’ [Politicians] wish to give the impression that they are responsive to the public’s needs and desires. So they join to pass a law making it a federal crime to . . . (fill in the blank).”); Cynthia Tucker (editorial page editor), *Voters Can End the Gun Lobby’s Reign of Terror*, ATLANTA J.-CONST., Sept. 3, 2000, at P10 (“A little more than a school year since the massacre at Columbine High School, . . . [w]e should not forget the promises we made to ourselves and each other to do something about the gun violence that stalks us and our children everywhere . . .”).

The “don’t just stand there, do something” phenomenon works in the opposite direction from the is-ought heuristic, but there’s no contradiction there. The is-ought heuristic tends to operate when people generally think the legal system is doing a fairly good job, and are therefore willing to tentatively accept the principles on which the existing rules are based. The “don’t just stand there” phenomenon tends to operate when people think the current situation is very bad, perhaps because of serious flaws in the current legal system, and some substantial change is probably needed (though they don’t know for sure whether this proposed change is the best one).

²⁵⁹ See, e.g., OSHA GRAY DAVIDSON, UNDER FIRE: THE NRA AND THE BATTLE FOR GUN CONTROL 240 (1993) (describing how NRA official Wayne LaPierre “wears the epithet ‘hard-liner’ like a red badge of courage”); Jeffrey H. Birnbaum, *Under the Gun*, FORTUNE, Dec. 6, 1999, at 211, 218 (“[A] gentler, more compliant gun lobby would also be a less effective one. . . . The NRA’s right flank may seem scary or even borderline insane to many Americans. But its fervor and single-mindedness are what make it so politically potent.”).

Of course, if a law’s supporters don’t want to insistently press their case, but the law’s opponents don’t mind seeming insistent, the law will more easily be blocked, and the slippery slope likely won’t happen. The small change tolerance slippery slope, like the other slippery slopes, happens under particular political circumstances; it is a plausible phenomenon, but far from a certain one.

²⁶⁰ See, e.g., Ludwig & Cook, *supra* note 236, at 590. Ludwig and Cook find no association between the enactment of the Brady Bill and any decrease in overall handgun homicide or suicide rates, but seemingly conclude (not implausibly) that the Brady Bill should be broadened to cover private transfers as well as transfers by professional gun sellers: “The secondary market in guns, which is currently almost completely unregulated, is thus an enormous loophole that limits the effectiveness of primary-market regulations.” *Id.*; see also Sam Stanton, *California’s Sweeping Control Laws Remain Intact*, SCRIPPS HOWARD NEWS SERV., June 29, 2000 (describing how an initial California assault weapon ban proved ineffective, and was eventually followed by a supposedly loophole-closing broader ban).

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,²⁶¹ 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, 116 U.S. 616, 635 (1886).

Just as precedents can be extended beyond their original terms through equality slippery slopes and attitude-altering slippery slopes,²⁶² they can also be extended through small change tolerance slippery slopes.

Legal rules are often unavoidably vague at the margins.²⁶³ 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.

²⁶¹ 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 (either when an authoring judge changes the wording or when another judge doesn’t insist on a change) to persuade another judge to join, to increase the chances of the authoring judge changing the opinion on another point, or to earn the authoring judge’s goodwill on a future case. See Judge Alex Kozinski, *Conduct Unbecoming*, 108 YALE L.J. 835, 861–62 (1999); Frank Cross, *The Justices of Strategy*, 48 DUKE L.J. 511, 548 (1998); Mark Tushnet et al., *Members of the Warren Court in Judicial Biography*, 70 N.Y.U. L. REV. 791, 807 (1995).

²⁶² See *supra* sections II.D.4.b & III.D.

²⁶³ Cf. Schauer, *supra* note 6, at 370 (observing that some slippery slopes can arise because of linguistic imprecision).

For other speech (for example, “Jesus freak” or “Bible-thumper” or “son-of-a-bitch”), the result might be uncertain.²⁶⁴

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.²⁶⁵ Judges may also be reluctant to alienate sometimes prickly colleagues, with whom they must regularly work, by fighting seemingly minor battles. Thus, while each judge may in theory review the authoring judge’s draft *de novo*, in practice there’s some deference. And this effect will be even greater when judges are deciding whether to rehear a case *en banc*, where deference to the panel opinion is part of the rule.²⁶⁶

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

²⁶⁴ Some readers might conclude that some words in this last example are clearly epithets and other words are clearly not, but I suspect others would disagree. My point here is a descriptive one — that the result would indeed be uncertain — and not that the result *should* be uncertain.

²⁶⁵ This may at first seem like an administration cost slippery slope, *see supra* section II.D.2, but the mechanism is significantly different. In an administration cost slippery slope, decision A leads to decision B because some people find A to be too costly to administer, and thus end up preferring B over A. In a small change tolerance slippery slope, decision A leads to decision B because some people find it too costly to *object to the change from A to B*, or even to pay much attention to such a change; they might therefore allow the change even if they *do not* themselves prefer B over A. Administration cost slippery slopes are driven by multi-peaked preferences (people like both A and B more than they like A) — the small change tolerance slippery slope is driven by people’s bounded rationality, and their rational reluctance to worry about small changes such as the change from A to B.

²⁶⁶ *See, e.g., United States v. Lynch*, 690 F.2d 213 & n.22 (D.C. Cir. 1982) (stating that *en banc* review is generally reserved for cases where panel decisions create inconsistencies within a circuit court, the matter is of exceptional importance, or review is needed “to cure a gross injustice”).

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.

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. If that judgment diverges substantially from those reached by the professional's peers, observers may review the judgment more skeptically. But if the judgment diverges only slightly from past decisions, observers might tend to defer, even if they wouldn't fully agree were they reviewing the issue *de novo*.

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 that the Supreme Court holds that Congress may legalize marijuana but ban marijuana ads, notwithstanding the commercial speech doctrine.²⁶⁷ 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).

²⁶⁷ See *supra* section II.E, which introduces this example.

But can Congress prevent *itself* from legalizing marijuana advertising?²⁶⁸ 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.²⁶⁹ 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.²⁷⁰

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 politically easier than getting to B directly (though of course still not certain). 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 strong economic interest 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.²⁷¹

Thus, for example, a school choice program that provides \$4000 vouchers will create a cadre of parents who use the program, and who will mostly strongly support increasing the voucher value (say, to the over

²⁶⁸ I owe this example to Mark Kleiman. See Mark A.R. Kleiman, *Neither Prohibition Nor Legalization: Grudging Toleration in Drug Control Policy*, DAEDALUS, Summer 1992, at 53, 79.

²⁶⁹ This may not be so: industry leaders may conclude that marijuana advertising won't increase *total* marijuana demand, but will only move users from one brand to another. Cf. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 506 n.16 (1996) (discussing this possibility for alcohol). But while this is possible, it's far from certain: companies may conclude that advertising will let them pull in new users, or powerful new entrants — such as alcohol or tobacco producers looking for a new market — may want to advertise to take market share from the established players. Cf. *id.* (noting that the petitioner sought to advertise to compete for existing alcohol consumers).

²⁷⁰ Cf. Jane Ann Morrison, *Political Muscle May Lose Punch*, LAS VEGAS REV.-J., Apr. 3, 2000, at 1B (describing casinos' political power, flowing from factors such as "aggressive voter registration campaign[s] among [casino] employees," campaign guides for employees, candidate recommendations, and campaign contributions).

²⁷¹ Cf. HERBERT SPENCER, *THE MAN VERSUS THE STATE* 47–48 (LibertyClassics 1981) (1884) ("A comparatively small body of officials, coherent, having common interests, and acting under central authority, has an immense advantage over an incoherent public which has no settled policy, and can be brought to act unitedly only under strong provocation. Hence an organization of officials, once passing a certain stage of growth, becomes less and less resistible . . .").

\$6500 that equals the average per-pupil cost in the public schools).²⁷² Government spending on military procurement or prison construction increases the number of military contractor employees and prison guards who will probably press their legislators to vote for still more spending.²⁷³ Temporary wartime rent control creates a political bloc of beneficiaries, which may lead to permanent rent control.²⁷⁴ The creation of an enforcement agency creates a group of people who tend to favor broadening the law that they are enforcing. Though these trends aren't ineluctable, the constituency created by the enactment of A may often help bring about B.

The same 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.²⁷⁵

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

²⁷² See NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS, 2000, tbl.170 (2001), available at <http://nces.ed.gov/pubs2001/digest/dt170.html>.

²⁷³ See, e.g., Katharine Q. Seelye, *Arms Contractors Spend To Promote an Expanded NATO*, N.Y. TIMES, Mar. 30, 1998, at A1 ("American arms manufacturers, who stand to gain billions of dollars in sales of weapons, communication systems and other military equipment if the Senate approves NATO expansion, have made enormous investments in lobbyists and campaign contributions to promote their cause in Washington."); Daniel M. Weintraub, *Prison Guards Set Record with Gift to Wilson*, L.A. TIMES, Oct. 30, 1994, at A28 ("California's prison guards, in what apparently is the largest single contribution ever reported to a candidate for governor, donated \$425,000 on Oct. 4 to Gov. Pete Wilson, whose support for longer prison sentences will mean the hiring of thousands more guards in the years to come.").

The guards' and contractors' sentiments may be sincere; people generally like to feel good about what they do for a living, so working in an industry tends to make one think that the industry is socially useful and that the government should support it even more. But whatever the actors' motivations, lengthening prison terms means more prison guards, which may lead to political pressure for still longer terms, and military spending means more influence for military contractors, which may lead to political pressure for more spending.

²⁷⁴ See ROBERT HIGGS, CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT 208–09 (1987).

²⁷⁵ Views on at least some proposed gun laws, such as handgun bans, are highly correlated with gun ownership. See, e.g., TOM W. SMITH, NAT'L OPINION RESEARCH CTR., 1999 NATIONAL GUN POLICY SURVEY OF THE NATIONAL OPINION RESEARCH CENTER: RESEARCH FINDINGS 54 tbl.11 (2000), available at <http://www.norc.uchicago.edu/online/gunrpt.pdf> (showing 10% support among gun owners for a ban on handguns for all except the police and other authorized persons, 30% support among people living in a household that contains a gun, and 53% support among those living in a household that doesn't contain a gun). Of course, this correlation doesn't prove causation, but it does reinforce the intuition that there is some causation at work here: people worry more about laws that directly burden them than about laws that don't.

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,²⁷⁶ which may in fact be part of A's purpose.²⁷⁷ 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 ($40\% \times 80\% + 60\% \times 25\% = 47\%$).²⁷⁸ 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.²⁷⁹

²⁷⁶ Cf. Steve LeBlanc, *Gun Licenses Plummet Under New Weapons Law*, PROVIDENCE J., Aug. 20, 2002, at C3 (“The number of active firearms licenses in Massachusetts has plummeted in the four years since the state adopted one of the toughest gun control laws in the country. There were nearly 1.5 million active gun licenses in Massachusetts in 1998. By June, that number was down to just 200,000, in large part because the new law abolished lifetime licenses.”).

²⁷⁷ 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. See, e.g., Jessica Hansen, *Jones, Welch Argue About Guns*, MILWAUKEE J. SENTINEL, Oct. 19, 2001, at 1B (quoting Fire and Police Commission Chairman Robert Welch as saying “[w]hat I want is a comprehensive, collaborative plan . . . to reduce the number of guns in the city”); Stephanie Mojica, *Program To Purchase Guns from Residents Starts Soon*, VIRGINIAN-PILOT, July 22, 2000, at B2; Editorial, *Straight Talk About Guns*, SOUTH BEND TRIB., June 10, 2001, at B8. Those who want to reduce the total gun stock may not intend this reduction as a first step in making broader gun bans more politically feasible. See, e.g., *id.* (“With these [proposed] measures, we still would be a nation of guns. But, for the most part, the guns would be in the hands of responsible people.”). But gun rights advocates may still reasonably worry that reducing the number of law-abiding gun owners through measures that make legal gun ownership more burdensome might create a political environment in which much broader gun bans are possible.

²⁷⁸ For example, see Jeffrey H. Birnbaum, *Under the Gun*, FORTUNE, Dec. 6, 1999, at 211, 218, which reasons that gun-rights groups are likely to start losing eventually, partly because “[a]lthough NRA membership has been growing lately, overall gun ownership is not [growing, but is rather falling].” I’m not sure that gun ownership is indeed falling, but I agree that *if* gun ownership falls, the power of gun owner groups and thus the opposition to broad gun controls will fall, too.

²⁷⁹ Consider, for instance, Chris Kraul, *Bullfighting on Horns of a Dilemma*, L.A. TIMES, Dec. 22, 2001, at A20, which describes the concern that a new Mexico City law banning people under eighteen from attending bullfights may eventually lead to the disappearance of the sport: “‘Youth are our future fans,’ [a bullring spokesman] said. ‘If we don’t create them as minors, in a few years the spectacle will be finished’” The spokesman’s argument is probably just expressing a concern about the loss of the audience, not about legal prohibition, but it seems likely that as the number of bullfighting fans decreases, total prohibitions will become easier to adopt.

Olson and Kopel note the same about some gun controls:

[The 1967 British Criminal Justice Act] contained one other provision that illustrated a key strategy of how to push something down a slippery slope: it is easier to legislate against people who cannot vote, or who are not yet born, than against adults who want to retain their rights. Reducing the number of people who will, one day in the future, care about exercising a particular right is a good way to ensure that, on that future day, new restrictions on the right

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.²⁸⁰ 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.²⁸¹

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).²⁸²

will be politically easier to enact. Thus, the 1967 law did nothing to take away guns from law-abiding adults, but the Act did severely restrict gun transfers to minors. It became illegal for a father to give even an airgun as a gift to his thirteen-year-old son. The fewer young people who enjoy the exercise of a civil liberty such as the shooting sports, the fewer adults there will eventually be to defend that civil liberty.

Olson & Kopel, *supra* note 23, at 421 (footnotes omitted); cf. N.Y. PENAL LAW § 265.05 (McKinney 1999) (barring persons under age sixteen from possessing any guns — including airguns — with no exception for use under parental supervision, or at target ranges; the only exception is for hunting).

²⁸⁰ Moreover, the relative *size* of the groups and the numbers in each group that support B aren't the only important factors: the relative *intensity* of people's feelings also matters. For instance, to the extent that decision A makes the remaining gun owners feel more strongly about the need to block B — perhaps because it makes them feel embattled, *see infra* p. 1123, or because those people who continue owning guns after a burdensome regulation is enacted will likely to be the more hardcore supporters of gun ownership — the risk of slippery slope would decline.

²⁸¹ These categories are the ones most likely in free regimes. Despots can of course go further, to imprisoning or even exterminating (A) some groups that might oppose broader oppression of others (B) in the future. This divide-and-conquer approach is one aspect of what Martin Niemöller described in his famous lament:

First [the Nazis] came for the Communists, but I was not a Communist — so I said nothing. Then they came for the Social Democrats, but I was not a Social Democrat — so I did nothing. Then came the trade unionists, but I was not a trade unionist. And then they came for the Jews, but I was not a Jew — so I did little. Then when they came for me, there was no one left who could stand up for me.

Ruth Zerner, *Martin Niemöller, Activist as Bystander: The Oft-Quoted Reflection*, in JEWISH-CHRISTIAN ENCOUNTERS OVER THE CENTURIES (Marvin Perry & Frederick M. Schweitzer eds., 1994), *quoted in* PETER NOVICK, THE HOLOCAUST IN AMERICAN LIFE 221 (1999).

²⁸² Noncitizen voting has been seriously proposed. *See* Mary Hurley, *Cambridge Seeks Local Voting Rights for Noncitizens*, BOSTON GLOBE, Nov. 7, 2000, at B7; Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV.

2. Decisions that *change the immigration or emigration rate* could also lead to political power slippery slopes.²⁸³ 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.²⁸⁴
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).²⁸⁵ 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).²⁸⁶ 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.²⁸⁷
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 de-

1391 (1993) (arguing that noncitizen immigrants should be allowed to vote). Such changes can affect federal law even if they aren’t endorsed nationwide: noncitizen residents who are allowed to vote in state elections will also be allowed to vote in federal ones. See U.S. CONST. art. I, § 2, cl. 1; *id.* amend. XVII, cl. 1.

²⁸³ The same may be true of decisions that change childbearing rates by changing economic or social conditions in a way that makes having children more or less attractive.

²⁸⁴ Cf. Paul M. Krawzak, *Illinois Commentary*, Copley News Serv., Nov. 15, 2000 (“The outward migration from Chicago of minorities and other voters sympathetic to Democrats has started to change the political character of some suburbs . . .”); Wade Rawlins, *Priorities Change with Population*, NEWS & OBSERVER (Charlotte, N.C.), Mar. 23, 2001, at A1 (discussing a similar development in North Carolina).

²⁸⁵ 435 U.S. 765, 768, 795 (1978).

²⁸⁶ See, e.g., John M. Glionna & Joe Mozingo, *OSHA Urges Bulletproof Glass To Protect Clerks*, L.A. TIMES, Apr. 29, 1998, at B1 (“Union officials . . . denounce[d] . . . an initiative . . . designed to weaken organized labor’s political sway by requiring unions to seek permission before using a member’s dues for political purposes. Union leaders said this would weaken their ability to lobby for worker protection by giving them less money for political advocacy.”).

²⁸⁷ See *supra* pp. 1114–15; cf. Morrison, *supra* note 270 (describing casinos’ efforts to attain political influence).

cisions that preserve and expand this service.²⁸⁸ 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.²⁸⁹

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. True, people can still publicly oppose calls for more serious punishments by saying (honestly or not) that they aren't users but want to defend the rights of those who are. But this is probably not as effective as people coming out of the closet to neighbors and coworkers by saying "Look at me — I like to smoke pot occasionally, but I'm still successful and otherwise law-abiding."²⁹⁰

²⁸⁸ See HIGGS, *supra* note 274, at 69; John Mark Hansen, *The Political Economy of Group Membership*, AM. POL. SCI. REV., Mar. 1985, at 79, 81 (concluding that "people are more easily mobilized in response to threats than in response to prospects" because "[p]olitical benefits that avoid losses are weighed more heavily than political benefits that promise gains").

²⁸⁹ See, e.g., *Status of Social Security and Medicare Trust Funds: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 105th Cong. (1997) (statement of the AARP), 1997 WL 10572140 ("If Social Security benefits were conditioned solely upon need, i.e., means tested, public support would drop precipitously. And, if benefits were denied to high-income workers, they would be far less willing to support and participate in the program."); see also Olson & Kopel, *quoted in* note 279 *supra*; Olson & Kopel, *supra* note 23:

Thanks to decades of such restrictions aimed at restricting entry into the shooting sports, the vast majority of the public has no familiarity with guns other than what the media choose to let them know. Legal British gun owners now constitute only four percent of total households Given that many Britons have no personal acquaintance with anyone who they know to be a sporting shooter, it is not surprising that seventy-six percent of the population supports banning all guns. Thus, the people who used long guns in the field sports — who confidently expected that whatever controls government imposed on the rabble in the cities who wanted handguns, genteel deer rifles and hand-made shotguns would be left alone — have been proven disastrously wrong.

Id. at 427.

²⁹⁰ For instance, the Pulitzer Prize-winning astronomer Carl Sagan believed that marijuana use promoted creativity, and wrote an essay supporting legalizing marijuana — but under a pseudonym. Keay Davidson, *Sky High*, S.F. EXAMINER, Aug. 22, 1999, at M12. Had he made his statements openly, they might have been more persuasive to his many admirers. Likewise, for many years Peter Lewis, the billionaire chairman of Progressive Insurance and a marijuana legalization supporter, refused to discuss rumors of his own marijuana use. See, e.g., Carol J. Loomis, *Sex. Reefer? And Auto Insurance!*, FORTUNE, Aug. 7, 1995, at 76. He ultimately admitted his conduct, and began to say that "[m]y personal experience lets me understand and have a view of the relative effects of some of these substances" — but only after he was caught using marijuana. David Bank, *Counterattack: Soros, Two*

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.”²⁹¹ 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.”²⁹² 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

Rich Allies Fund a Growing War on the War on Drugs, WALL ST. J., May 30, 2001, at A1. Thanks to Jacob Sullum, who has written extensively about drug legalization issues, for alerting me to these examples.

²⁹¹ News Conference on Passage of the Brady Bill, FED. NEWS SERV., May 8, 1991; *see also Vice President Al Gore Holds News Conference with Senators Daschle, Schumer and Others on Gun Legislation*, FDCH POLITICAL TRANSCRIPTS, May 20, 1999:

Daschle: What you just saw is the NRA losing its grip on the United States Senate, at long last. . . .

. . . .

Schumer: . . . On gun control [this is] clearly a turning point because the stranglehold of the NRA is broken. . . . I think the Republican party is sort of realizing that to just dance with the people at the extreme right is politically unproductive And I think what this bodes for is a Congress where maybe we can get some real things done.

Id.; *see also* Mike Dorning, *After Shootings, Pro-Gun States Wrestle with Limits*, CHI. TRIB., Oct. 28, 2000, at 1 (quoting the president of the pro-gun-control group Americans for Gun Safety as saying that “[i]f these two Western, pro-gun states pass [the gun show background check] initiative, it provides a tremendous shift in momentum nationally to close the gun show loophole.”); Jean Latz Griffin & Eric Krol, *Federal Gun Bill Fails To Disarm Illinois Debate*, CHI. TRIB., May 7, 1994, at 1 (quoting a spokesman for a pro-gun-control state legislator as saying that “the federal action was significant ‘because another legislative body has broken the stranglehold of the NRA’”).

²⁹² Editorial, *From Brady to Bentsen*, PROVIDENCE J.-BULL., Jan. 7, 1994, at 14A. *See also* Jim Schneider, *The Year of the Phoenix; Gun Legislation*, SHOOTING INDUSTRY, Dec. 1991, at 72, *available at* LEXIS, News Library, Allnws File:

[T]he gun lobby appeared to be going up in flames earlier in the year as the [Houses of Congress] passed their own versions of the Brady Bill [But] like the Phoenix, the gun lobby emerged from the ashes with renewed vigor and strength when on Oct. 17 the House voted 247–177 not to add a ban on 13 models of so-called “assault weapons” and large-caliber magazines to its crime bill. . . .

. . . .

John Snyder, director of public affairs and Washington lobbyist for the Citizens Committee for the Right to Keep and Bear Arms (CCRKBA) said, “We really had to win this one to show that the gun lobby still has clout . . . This was a great victory for us.”

Id. (last ellipsis in original).

of the NRA's political power, which is to say the power of the voters who are influenced by the NRA. 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.²⁹³ 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.²⁹⁴ 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 in the eyes of legislators, 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 oppos-

²⁹³ 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.

²⁹⁴ Cf., e.g., Editorial, *Law Banning Gun Lawsuits Hurts Efforts To Curb Violence; Gov. King and the Legislature Are Pandering to the NRA*, PORTLAND PRESS HERALD, June 12, 1999, at 8A ("The problem with Maine's support of [a law barring cities from suing gun manufacturers] is that it lends momentum to the NRA's drive to pass similar laws in other states. It also lends the NRA an air of accomplishment . . ."); Ronald Brownstein, *No Cease-Fire in Fight over Gun Ban*, CHI. SUN-TIMES, May 8, 1994, at 25 ("To reverse [the] perception [that fewer legislators fear the NRA because of its recent legislative defeats], and slow the momentum behind gun control, the NRA may have to prove in November that it can still punish its enemies by defeating them at the ballot box. . . . 'If they don't do that,' said one ranking Republican party operative . . . 'they are heading for more of the same as the assault-weapon ban.'").

This process is of course related to a Bayesian approach to probability, in which "new data may change beliefs about the adequacy of particular hypotheses or models, about the probable values of parameters, and about the values of as yet unconfirmed observations . . ." ENCYCLOPEDIA OF ECONOMICS 65 (Douglas Greenwald ed., 1982).

ing 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 legislators, 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. Citizens don't care as much as legislators do about backing a winner (though backing winners may make them feel good),²⁹⁵ but potential activists and contributors tend to prefer to spend their time and money on contested issues rather than on lost causes or sure victories.²⁹⁶ Likewise, voters may be more likely to choose among candidates

²⁹⁵ Cf. 2 BRYCE, *supra* note 160:

A small number of men with strong convictions or warm party feeling will, for a time, resist [even after they're defeated]. But even they feel differently towards their cause after it has been defeated from what they did while it had still a prospect of success. They know that in the same proportion in which their supporters are dismayed, the majority is emboldened and confirmed in its views. It will be harder to fight a second battle than it was to fight the first, for there is (so to speak) a steeper slope of popular disapproval to be climbed.

Thus, just as at the opening of a campaign, the event of the first collisions between the hostile armies has great significance, because the victory of one is taken as an omen and a presage by both, so in the struggles of parties success at an incidental election works powerfully to strengthen those who succeed, and depress those who fail, for it inspires self-confidence or self-distrust, and it turns the minds of waverers.

Id. at 997 (paragraph break added). Moreover, as Timur Kuran has argued, citizens may be reluctant to publicly voice their views on certain topics unless they see evidence that many others think like them. TIMUR KURAN, *PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION* 71–72 (1997). A prominent political victory for a cause can thus embolden quiet supporters of the cause to express their opinions, and thus build still further support for the cause.

²⁹⁶ For instance, once Prohibition was enacted, donations to anti-alcohol groups fell dramatically, partly because of “the apathy of prominent dries who still thought that the battle for a boozeless America had been won in 1920.” HERBERT ASBURY, *THE GREAT ILLUSION: AN INFORMAL HISTORY OF PROHIBITION* 322 (1950). This loss of money proved significant: “[T]he wets had plenty of money, and their astute leaders eventually built up a propaganda machine which was at least as powerful as the steam roller which the Anti-Saloon League had used to force the Eighteenth Amendment through Congress and the state legislatures.” Before Prohibition, the wets spent more than \$1.5 million per year on “propaganda and political activity,” but after Prohibition the tables turned. *Id.* at 323. See also JERRELL RICHER, *GREEN GIVING: AN ANALYSIS OF CONTRIBUTION TO MAJOR U.S. ENVIRONMENTAL GROUPS* 18–19 (Res. for the Future, discussion paper No. 95-39, 1995) (finding that donations to environmental groups were higher during the Reagan and George H.W. Bush presidencies than during the Clinton presidency, controlling for various other factors); Jeffrey Milyo, *The Political Economics of Campaign Finance*, 3 INDEP. REV. 537, 544 (1999) (“[T]he expected closeness of the election increases the propensity of donors to give to candidates”); Terry D. Van Doren, Dana L. Hoag & Thomas G. Field, *Political and Economic Factors Affecting Agricultural PAC Contribution Strategies*, 81 AM. J. AGRIC. ECON. 397 (May 1, 1999), available at LEXIS, News Library, Allnws File (“Agricultural PAC contributions rose as expected in close election races for fifteen of the PACs (i.e., as margin increases, contributions decrease).”); Birnbaum, *supra* note 259, at 211, 214 (“The worst thing that can happen to a cause-based group is to get what it wants. After the 1994 election [which was seen as a big victory for NRA-supported candidates], NRA membership declined, in

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" — only four years before, over two-thirds of Congress and three-quarters of state legislatures ratified the Eighteenth Amendment — "had been politically defeated for the first time. Could not other, and perhaps greater, victories be achieved with more determination and effort?"²⁹⁷

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."²⁹⁸ And those who oppose the broader downstream controls might likewise try to prevent this sort of momentum by voting against the modest first steps, even if they would have otherwise supported those steps.

This is especially so because movements rarely just disband after a victory.²⁹⁹ Successful movements often have paid staff who are enthusiastic

part because it raised its dues from \$25 to \$35, but also because its members didn't feel threatened anymore.").

²⁹⁷ DAVID E. KYVIG, *REPEALING NATIONAL PROHIBITION* 54, 57 (2000); see also Joshua L. Weinstein, *Turkey Day Tradition; Bills Could Revive Gay Rights Debate, but Sponsors Wary*, PORTLAND PRESS HERALD, Nov. 24, 1995, at 1A ("Karen Geraghty, president of the Maine Lesbian and Gay Political Alliance, acknowledged that many gay-rights supporters, fresh off their Nov. 7 victory, believe they have the momentum necessary to pass a statewide law. . . . But she said she fears that a statewide gay-rights law passed on the heels of [an earlier anti-gay rights referendum that was narrowly rejected] could galvanize opponents to undertake a successful repeal.").

²⁹⁸ Editorial, *Give Peace a Chance*, N.Y. TIMES, Dec. 2, 1993, § 4, at 14.

²⁹⁹ See OLSON, *supra* note 68, at 40 ("[T]he leader who is making a living out of an organization may keep it alive even after its original purpose has disappeared . . ."); Birnbaum, *supra* note 259, at 216 (a seemingly pro-gun-control article) ("As with tobacco, the defeats and concessions [of the gun-rights advocates] never seem to satisfy reformers. . . . [T]he suits filed by cities and counties against gun manufacturers are probably only the first wave. 'If 25% of these suits are still going forward at this time next year, there'll be a second wave,' predicts John Coale, one of the lawyers involved in the early gun cases."); Ed Quillen, *Why Nothing Ever Gets Settled in America*, DENVER POST, June 22, 1999 ("Once you've established an institution, you find things for it to do, even if it's served its initial

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.³⁰⁰

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,³⁰¹ and some gun control advocates have specifically said that their strategy is to win by incremental steps.³⁰² 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.³⁰³ In such cases, foes of B may

purpose. . . . Nobody stops at 'reasonable' in America, and the NRA has figured this out, even if a lot of other people haven't."). Thanks to C.D. Tavares for pointing me to the Quillen article.

³⁰⁰ 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, and others, either more radical or more moderate, may gain control; if the movement wins, those leaders who most strongly supported the winning strategy may gain more power. See, e.g., DAVIDSON, *supra* note 259, at 238–40 (describing how, "[a]s NRA membership declined and more battles were lost," the leadership was removed by the NRA board of directors and replaced by more hard-line leaders). The result in A might thus affect the movement's willingness to back proposal B and not just, as discussed in section V.A, its political ability to do so — though such effects may be hard to predict, especially for outsiders who know little about the movement's internal politics.

³⁰¹ See, e.g., Michael K. Beard (president of the Coalition to Stop Gun Violence), Letter to the Editor, WALL STREET J., July 23, 1997, at A19 ("The best way to prevent gun violence is to ban handguns."); Richard Harris, *A Reporter at Large: Handguns*, THE NEW YORKER, July 26, 1976, at 53, 57–58 (quoting Pete Shields, founder of Handgun Control, Inc., which was recently renamed the Brady Campaign to Prevent Gun Violence) ("We're going to have to take one step at a time, and the first step is necessarily — given the political realities — going to be very modest. . . . [T]he final problem is to make possession of *all* handguns and *all* handgun ammunition — except for the military, policemen, licensed security guards, licensed sporting clubs, and licensed gun collectors — totally illegal."); Jeff Muchnick, *Better Yet, Ban All Handguns*, USA TODAY, Dec. 29, 1993, at 11A (Muchnick is the legislative director of the Coalition to Stop Gun Violence); Violence Policy Center, *Ban Handguns Now*, at <http://www.banhandgunsnow.org>.

Some pro-gun forces likewise hope to start a slide down a slippery slope in the other direction. See, e.g., Stephanie Simon, *Ohio Ban on Concealed Guns Voided*, L.A. TIMES, Apr. 11, 2002, at A1 ("In Missouri, instead of pushing for a comprehensive concealed carry bill, gun-rights activists are trying to win the more limited right for citizens to carry loaded guns [concealed in their cars]. The goal, they say, is to get some laws on the books — with the expectation that they can return in a year or two and lobby for easing the restrictions.").

³⁰² See Harris, *supra* note 301 (quoting Handgun Control, Inc. founder Pete Shields); Krauthammer, *supra* note 146 (Krauthammer is a leading op-ed columnist and advocate of a total ban on all guns); *supra* p. 1106 (quoting Stockton, California mayor Barbara Fass defending the Stockton assault rifle ban).

³⁰³ See, e.g., David B. Kopel, *On the Firing Line: Clinton's Crime Bill*, HERITAGE FOUND. REPS., Sept. 24, 1993, at 1 ("Other than professional employees of the gun control lobby and New York City Mayor David Dinkins, I don't know anyone who seriously thinks [the Brady Bill] is going to have a major impact on crime. . . . Accordingly, the fact that the Brady Bill stands as the centerpiece of the Clinton crime bill is one indication that the bill is more about politics than about crime control. . . . [I]t

well be wise to try to block A, rather than wait until the pro-B movement has been strengthened by a success on A.³⁰⁴

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

is accurately described by proponents and opponents alike as 'the first step' toward much more restrictive gun controls."); Krauthammer, *supra* note 146 (advocating an assault weapons ban because it will "desensitize the public to the regulation of weapons in preparation for their ultimate confiscation," while acknowledging that it will have little practical effect on its own); see also Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 AM. U. L. REV. 53 (1992):

[G]un aficionados have some cause to be nervous about gun control measures like the Brady bill. To a large extent, passing the Brady bill, as even some of its proponents conceded, was more a symbolic victory over the NRA than the implementation of an effective means of keeping criminals from getting guns. And while many supporters of the measure took pains to pledge their allegiance to the right to bear arms, others candidly suggested that the Brady bill was . . . the "first step" toward more stringent controls on gun ownership.

Id. at 87 (citations omitted). Professor McClurg (a gun control advocate) goes on to conclude that "[the fact that] the prohibition of handguns is the goal of many gun control advocates gives some credence to the slippery slope arguments advanced against the Brady bill, but not enough to make them non-fallacious," because "there is virtually no chance [guns] ever will be banned," *id.* at 88, but it seems to me that the latter point is incorrect, because gun rights supporters (like abortion rights supporters) are also worried about local bans in particular areas, which might mirror the already-implemented existing handgun bans in Chicago and Washington, D.C., see *supra* note 58.

³⁰⁴ Naturally there's a possible cost to this strategy: sometimes, blocking decision A may make B more likely, see *supra* note 14, 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 gun ban). The discussion of political momentum slippery slopes merely identifies one possible cost (from the anti-B movement's perspective) of such compromises.

implement more radical proposals B later.³⁰⁵ Acting this way might seem too partisan or even ill-mannered; a culture that values friendly disagreement may frown on people saying “It’s not A that worries me so much as the people who support it, and I want them to lose on A because I want them to be seen as losers.” Moreover, if overt concern about political momentum slippery slopes is seen as distasteful, the desire to hide this concern will tempt people to be disingenuous.³⁰⁶ 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.³⁰⁷

Conversely, sometimes a slippery slope may seem intuitively 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

³⁰⁵ See *supra* section II.G.

³⁰⁶ Instead of candidly saying, for instance, “We should oppose school choice (A), though we like it on its own terms, because much of its support comes from the Religious Right, and if the Religious Right wins here, they’ll have the momentum to do other things (B) that we strongly dislike” (an argument that I heard myself in a meeting with leaders of one group), people who worry about this slippery slope will claim that A is actually a bad idea on the merits.

³⁰⁷ In this respect, the taxonomy that I provide is much like other catalogs — for instance, of interpretive canons or standard First Amendment policy arguments — that list possible ways to attack a particular problem. See generally Jack M. Balkin, *A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason*, in *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 211, 221 (Peter Brooks & Paul Gewirtz eds., 1996) (“Knowing the standard forms of legal justification helps the advocates to discover new arguments and to frame existing ones more persuasively”); see also EUGENE VOLOKH, *THE FIRST AMENDMENT: PROBLEMS, CASES AND POLICY ARGUMENTS* 34–51, 114–21, 166 (2001) (giving examples of the various genres of free speech policy arguments).

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 changes³⁰⁸ and the ad hominem heuristic³⁰⁹ — 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 pervasive 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.³¹⁰ These groups' efforts may have helped prevent us

³⁰⁸ See, e.g., *supra* sections III.C.2 and III.C.3.a.

³⁰⁹ See, e.g., *supra* sections II.G and VI.B.

³¹⁰ See, e.g., Robynn Tysver, *Traffic-Camera Bill Hits Bump in the Road*, OMAHA WORLD-HERALD, Feb. 23, 2001, at 9 (“Tim Butz of the Nebraska chapter of the ACLU said [the installation of cameras to catch traffic offenders] is a ‘slippery slope’ that infringes on people’s rights. ‘[When] it comes to privacy, what’s next?’ Butz asked. ‘Are we going to put cameras in buses, city parks or restrooms?’”); *News Conference To Announce Opposition to Late Term Abortion [Ban]*, FDCH POLITICAL TRANSCRIPTS, Nov. 7, 1995 (“[This] is the first time that the Congress has used its federal authority to ban and outlaw an established medical procedure. . . . I know a lot of people use slippery slope arguments et cetera but I think in this case this is an extremely dangerous precedent that could lead the

from slipping down various slopes; I've heard people who don't much agree with the ACLU express gratitude that it exists, precisely because its vigilance often helps prevent sensible regulations from leading to broader prohibitions.

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; these criticisms may often be largely correct and politically potent, and may lead voters to distrust these groups.³¹¹ What's more, the perceived extremism of some advocacy groups can increase the public's concerns about slippery slopes that go in the opposite direction. For instance, if a gun rights group becomes known as extremist for opposing even modest gun regulations, voters might become more skeptical of modest *deregulations* that the group proposes, because they may reasonably fear that the group will use such compromise deregulations to push for broader deregulations in the future.³¹² 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

Congress to look at other medical procedures, indeed and in fact in the House, several members of the House made it very clear that in the case of abortion, they intend to introduce legislation that would ban other abortion procedures.”) (remarks of Kate Michelman, President, National Abortion Rights Action League); *All Things Considered: Daily Prayer Sessions in Attorney General John Ashcroft's Office* (NPR radio broadcast, May 18, 2001) (“Laura Murphy, the Washington director of the American Civil Liberties Union, says holding the open prayer meetings in the attorney general's office is a slippery slope.”).

³¹¹ See, e.g., Ramesh Ponnuru, *Target Practice: A Media Gun Show*, NAT'L REV., June 14, 1999, at 11:

The gun-control lobby no longer talks about banning handguns, only about keeping guns from criminals and children. The pro-gun coalition is left making the slippery-slope argument: Accept this tiny regulation, and eventually all guns will be outlawed. Now this is in fact what the gun-control lobby clearly hopes for, and some proposed regulations make sense only as way stations to a sweeping ban. But to most people, the slippery-slope argument sounds paranoid. So the anti-gun side achieves a strategic objective: making the NRA and its allies look first unreasonable and then disreputable.

³¹² See, e.g., *Gun Rights Advocates Chalk Up State Wins*, *supra* note 234 (quoting gun rights advocates who are pushing for modest relaxation of restrictions on gun carrying, partly as a way of stimulating still broader relaxation of those restrictions). Thanks to Rick Su for bringing this point to my attention.

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: "Even though we might not strongly disagree with [the Religious Right/the Brady Campaign/etc.] on this particular issue, we will still oppose them here for fear that their victory today might increase their chances of winning broader restraints tomorrow."³¹³

4. Advocacy groups must do more than just adopt certain 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 complex, nuanced policy positions — rather, they'll need simple heuristics that they can follow.

"Pay close attention to the purported evidence underlying gun control proposals" is thus not an effective message for the NRA to send people. It is wise advice in the abstract, but most voters won't be willing to devote the time needed to follow it. "If guns are outlawed, only outlaws will have guns" may be less accurate in theory,³¹⁴ but it's easier to apply in practice. And under conditions of bounded rationality, it makes sense for voters to adopt a simple heuristic that quickly leads them to the right result most of the time, rather than a nuanced approach that theoretically yields the right result more often but requires extended research to apply.

Of course, it would be better yet for the ACLU or the NRA if they could persuade people to follow the heuristic "On [civil liberty/gun regulation] questions, vote the way we suggest." And if the group believes that many people might adopt this heuristic, it might want to develop a reputation for being open to moderate compromises because this reputation may build public confidence in the group's advice. But if the group believes most voters are too independent to vote exactly as it recommends in each case, and instead will insist on making the decisions themselves, the group might prefer to influence those decisions by promoting a few simple 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 re-

³¹³ See *supra* section VI.B; see also *supra* section II.G.

³¹⁴ Most obviously, this heuristic applies literally only to total gun bans, but many people tend to apply it to more modest restrictions as well, where it might not be as sound.

sults are likely to be evaluated in a way that will make B seem appealing.³¹⁵ 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 advocacy groups are an important means of fighting the slippery slope, and that in the process of fighting it, they may reasonably take positions that would have looked unreasonable had the slippery slope risk been absent. And 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 — the situation 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.³¹⁶ 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.

³¹⁵ See *supra* sections VI.B, II.G, and III.F.

³¹⁶ See *supra* section II.A.6, and section VI.B.

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 similar 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,³¹⁷ 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.

To begin with, can econometric models help us empirically evaluate the likelihood of certain kinds of slippage, and perhaps even generate testable predictions? If such analysis is possible, identifying the different kinds of slippery slopes might make it more productive, since the factors influencing the slippery slope risk likely vary with the mechanism involved. Investigating the likelihood of political momentum slippery slopes, for instance, may require a different sort of research plan or experimental model from that required for investigating the likelihood of multi-peaked preferences slippery slopes.

It would also be valuable to do detailed historical case studies, exploring which changes in the law (such as the growth of police surveillance,³¹⁸ of income tax rates,³¹⁹ of antidiscrimination law,³²⁰ of public smoking

³¹⁷ See *supra* sections II.D.4, III.D, and IV.C.

³¹⁸ I refer to the acceptance of some sorts of checkpoints and surveillance — such as border checkpoints or airport searches — leading to drunk driving checkpoints, cameras on street corners, and other kinds of police practices that were traditionally seen as troubling intrusions on privacy.

³¹⁹ The peacetime income tax was initially limited to high-income taxpayers, and began with a 2% maximum rate in the 1890s. It eventually grew to a maximum 91% marginal income tax rate in the 1950s and early 1960s, with substantial tax rates for lower- and middle-income taxpayers as well. See Tariff Act of 1894, ch. 349, 28 Stat. 509, 553 (2% rate); 2 U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, at 1095 (1976) (7% rate in 1913, 91% in 1954–63); cf. WORTHINGTON C. FORD, ESTIMATE OF THE PROBABLE OR POSSIBLE REVENUE UNDER THE PROPOSED INCOME TAX, S. MISC. DOC. NO. 232, at 6 (2d. Sess. 1894) (“Wherever an income tax has been in practice for any time the small incomes as well as the large are taxed; and it is the small incomes which yield the largest revenue to the state.”).

bans,³²¹ of free speech protections,³²² or of hostile environment harassment law³²³) came about as a result of slippery slopes and which ones didn't; such research might help us estimate the likelihood of slippery slopes operating in other cases. Unfortunately, it's often hard to tell whether some end result B was caused by the first step A, or whether it would have come about even if A had been blocked. But again, if such a study is possible, identifying and analyzing the various kinds of slippery slope mechanisms might help researchers see slippery slope processes that otherwise would have been hidden.

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.

F. When (If Ever) Should We Avoid Slippery Slope Reasoning?

The analysis in this Article implicitly rebuts the argument that slippery slope arguments are inherently logically fallacious: the claim that A's will inevitably lead to B's as a matter of logical compulsion might be mistaken, but the more modest claim that A's may make B's more likely seems plau-

³²⁰ The landmark 1964 ban on private race, sex, and religious employment discrimination was followed by the 1967 federal age discrimination ban, the 1990 federal disability discrimination ban, and the 1970s (and later) state marital status discrimination bans. It's hard to imagine the latter restrictions, which interfere with what until the 1960s was a strong tradition of broad employer choice rights, being enacted without the former. See Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000); Age Discrimination in Employment Act, 29 U.S.C. § 621 (2000); Americans with Disabilities Act, 42 U.S.C. § 12101 (2000); CAL. GOV'T CODE § 12940(h)(1) (West 1992 & Supp. 1995) (enacted 1976) (barring marital status discrimination); D.C. CODE § 2-1402.11 (barring discrimination based on marital status, "personal appearance, . . . family responsibilities, matriculation, or political affiliation") (2001) (enacted in 1977); Nicole Buonocore Porter, *Marital Status Discrimination: A Proposal for Title VII Protection*, 46 WAYNE L. REV. 1, 15-16 (2000) (counting 21 states, plus the District of Columbia, that bar marital status employment discrimination).

³²¹ Bans on public smoking began in limited areas (such as airplanes), but grew in some states to pretty much all workplaces, including those — such as bars — where smoking was customary.

³²² See generally *supra* section II.D.4; see also epigraphs to the Conclusion *infra* p. 1136.

³²³ "Hostile environment harassment law" began by punishing workplace racial segregation, threats, and persistent face-to-face slurs; then it expanded to punish massive workplace postings of hardcore pornography; then it went on to punish the display of other sexually suggestive material, sexually themed jokes, allegedly bigoted political statements, and religious proselytizing; and it also grew to cover speech in universities and places of public accommodation, not just workplaces. See generally Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, 63 LAW & CONTEMP. PROBS. 299, 312-13, 317, 326 (2000); Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627 (1997), available in updated form at <http://www1.law.ucla.edu/~volokh/harass/breadth.htm>.

sible.³²⁴ The analysis also responds to the assertion that slippery slopes can be ignored because

[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.³²⁵

As I have argued, the majority may remain *able* to stop B, but it may no longer be *willing* to do so once A is enacted — and then some of those who voted for A may regret their actions, which facilitated a result B that they may bitterly oppose. Those pro-A, anti-B forces might thus be wise to think ahead when A is being proposed, and consider opposing A because of the risk of the slippery slope.

But even if slippery slopes are a serious pragmatic concern, there may be some other reason why they shouldn't be considered, or at least not considered in certain ways. Perhaps, for instance, there is an ethical imperative to "trust" your fellow voters' future decisions even if you think that those decisions may end up being mistaken. Perhaps it's illegitimate (even if instrumentally rational) for voters, legislators, or interest groups to use the ad hominem heuristic,³²⁶ to reject proposal A on the grounds that it may give the government knowledge about how to do B more effectively,³²⁷ or to block a proposal for fear that one's fellow voters will improperly evaluate its results.³²⁸ Considering such arguments could also be counterproductive: maybe our bounded rationality itself limits our ability to think about all of a proposal's indirect consequences, and we should therefore focus on a decision's immediate results rather than speculate about its future effects.³²⁹ Or maybe existing obstacles to change are great enough that adding new ones — such as the ad hominem heuristic or the presumption against small changes — would usually yield too much caution about new proposals, rather than the proper amount of caution.

³²⁴ Cf. WALTON, *supra* note 4, at 14 (1992) (arguing that slippery slope claims "should not be seen as having to meet a perfect, deductive ideal of never admitting of counterexamples," but instead are practical arguments about possible consequences).

³²⁵ Van der Burg, *supra* note 61, at 65.

³²⁶ See *supra* sections II.G and VI.B.

³²⁷ See *supra* section II.A.3.

³²⁸ See *supra* section III.F. My colleague Robert Goldstein has suggested the following distinction: "It is entirely appropriate to oppose proposal B because it logically entails proposal C, or implicates a principle that entails C, because collective rational deliberation, beyond mere preference summation, is an essential part of democratic decisionmaking. By contrast, certain [other tactics] — which often explicitly rest on a purely instrumental notion of the political process — might violate, or be experienced as violating, an ongoing duty that members of a political community might owe each other to cooperate in solving their common problems."

³²⁹ I owe this point to my colleague David Sklansky. See also Enoch, *supra* note 8, at 635 (arguing that people are bad at distinguishing sound slippery slope arguments from unsound ones, and that therefore we ought to reject slippery slope arguments generally).

I don't share these views, except with respect to some ethical constraints on permissible decisionmaking by judges. I think voters who believe that proposal B is wrong may ethically adopt various strategies and heuristics — short of illegality or fraud, of course — to help defeat B. And I think that considering possible slippery slope consequences can be helpful, especially if voters can rely on time-saving heuristics and take cues from interest groups that have more time to devote to policy analysis than they have.

Still, even if the ethical or pragmatic criticisms of slippery slope thinking have some merit, understanding the mechanisms of the slippery slope can help us to evaluate these criticisms. Perhaps it's unethical to vote strategically to avoid some kinds of slippery slopes (say, political power slippery slopes), but ethical to vote strategically to avoid others (say, small change tolerance slippery slopes). Perhaps it's unproductive to consider certain mechanisms, which are just too hard to evaluate, but more productive to consider others. Any claim that certain rational behavior by voters, legislators, interest groups, or judges is illegitimate is worth closely analyzing, and I hope this article has provided the tools to facilitate such an analysis.

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, § 1, at 52.

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, at L7.

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 make decisions based on thorough analysis rather than on heuristics. Policy decisions in that world end up being 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,³³⁰ 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

³³⁰ See *supra* note 6.

it.³³¹ 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.

³³¹ See David A. Anderson, *Metaphorical Scholarship*, 79 CAL. L. REV. 1205, 1214–15 (1991) (“[Metaphor] liberates the author from some of the rigidity of exposition, but also from the demands of precision and clarity. The subtlety that makes metaphor the poet’s boon can be the lawyer’s bane . . .”).