

18 → Slippery Slopes

With Eugene Volokh

Slippery slopes are familiar to anyone who has spent more than ten minutes arguing about anything. You suggest that people should have to register their handguns; I reply that it's a slippery slope: next thing you know, everyone's handguns will be confiscated. Someone says they favor gay marriage, and back comes the argument that it will put us on a slippery slope toward legalized polygamy. Or perhaps you favor assisted suicide, or a ban on hateful speech, and in either case your antagonist describes a "parade of horrors" that could follow—mercy killings, or a ban on other kinds of speech. You are warned that after the first decision the camel's nose will be under the tent, or that the decision will serve as an entering wedge for a worse one, but the slippery slope will do fine as a placeholder for all those metaphors. The general structure of it is always the same. The decision at hand—"decision one," let us say—is acceptable (or so we may assume), but it might lead to a second decision later that sounds scarier: confiscating everyone's guns, making polygamy legal, and so forth. But of course the people who want decision one say that it by no means must lead to decision two, and they dismiss the concern about slippery slopes as a cliché. So how do you know when worries about them are just a distraction from the issue at hand? In this chapter we'll think about some answers to these questions—some reasons why a first decision can make a second one more likely later.

1. *The first decision lowers the cost of the second one.* The first reason is quite practical: sometimes decision one makes decision two less expensive. If everyone registers their handguns, then confiscating them later will be easier. We will know where the guns are; we will be able to find them right away. It still might not happen, of course; the fact that confiscation is easier need not change anyone's view of other parts of the question—the moral side, the constitutional side, and so on. But the costs and benefits of a decision are always an important feature of it. And remember that decisions get made at the margin. In this case that means the question won't be the *total* cost of confiscating guns; it will be the additional, incremental cost. In other words, decisions about confiscation will begin, "well, as long as we've *already* got them all registered . . ."

And then remember too that these decisions usually aren't made by one person. They are made by the voting public, or a legislature, or a set of bureaucrats, or some other group with lots of people in it. If *some* of those people—not necessarily now, but later on—consider the question of cost decisive, they might end up supporting confiscation and causing the balance of votes to tip that way, even if most people on both sides of the issue consider the cost a secondary point, and even if those swing voters worried about cost would have opposed confiscation earlier because (before all the guns were registered) it seemed too costly in various ways.

Of course none of this is meant to show that registering handguns necessarily is a bad thing. Maybe you *like* the idea of banning and confiscating handguns, in which case this discussion might make registration of them sound better than ever. (A complete or near ban on handguns has indeed followed registration in some places, such as England, Australia, and New York City.) But instead of guns we could have talked about letting the government put video cameras in public places (but only if the films are erased promptly unless a crime is reported), or letting it keep track of personal information that it intercepts on the Internet (but only to hunt down terrorists). The point is just to see one way that allowing any of these things can lead to further steps—keeping the films made by the video cameras for a long time and using them to monitor people more widely, or using the information found on the Internet for investigations that have nothing to do with terrorism. Once the first steps are taken, the costs of the second ones are lowered, so the second ones will seem more appealing. Thus the slippery slope.

Notice that the first decision can lower the cost of the second one in other senses besides conventional trouble and expense. Confiscating everyone's guns might be impossible as a legal matter if the police don't know where the guns are to be found; for then they would have to search everyone's house, and the Fourth Amendment wouldn't allow it. But once guns are registered, such a wide search for them might not be needed. The police could just look at the registration lists, check to see who on the list hasn't turned in their guns, and apply for a warrant to search the houses of those people. Whether a warrant could be obtained on those facts is an open question, but it would be a lot more likely in that case than if the police wanted to search every house in town. You can think of the legal obstacles to a search as one cost of trying to carry it out—maybe a prohibitive one. In that sense the removal of legal obstacles makes searches easier, or less costly—another, less obvious way in

which decision one (registration) can reduce the expense of decision two and so make it more likely.

Slippery slopes of this general variety—in which the first decision changes the costs and benefits of a later one—bear a relationship to the phenomenon known as *path dependence*. Sometimes an initial decision affects later ones by sending everyone down a path that becomes expensive to leave. Some theorists have suggested that this happens easily in common law systems: early courts make decisions, and notions of *stare decisis* and the value of consistency cause those early decisions to have a disproportionate effect on the decisions by courts that reach the same issue, or variations on it, later.²³ There is a resemblance between this vision of slippery slopes and the cascades discussed in chapter 14.

2. *The first decision affects the attitudes brought to the second one.* Here is another mechanism that can create a slippery slope: the first decision might change the way people think or feel later about the second one. The reason is that the law can influence people's beliefs and attitudes.²⁴ Some people get their ideas about what is good and bad partly from what the law says about what is legal and illegal, and those ideas can cause one legal decision to have spillover effects on other decisions later. First, smoking is banned in restaurants; once everyone gets used to that, smoking seems a more disreputable activity and the idea of banning smoking in all public places (or—who knows?—banning it entirely) later comes to seem more sensible.²⁵ This also was Charles Krauthammer's reason for supporting registration of guns: "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."²⁶ (He *wants* the slippery slope.)

These kinds of slippery slopes are notably hard to predict—and may be hard to recognize after they have happened. The influence of law on private beliefs about right and wrong is incomplete and hard to specify. The law leaves room for choices about morality outside its rules; we have to distinguish, as David Friedman points out, between our society and the anthill in T. H. White's *The Once and Future King*, where everything is either forbidden or compulsory.²⁷ In countries where prostitution is legal, not everyone considers it a good thing. Has it nevertheless had some side effects on how people in such places think about sex or about women? Perhaps. How many, and of what sort? It is hard to say. (Nor has the *illegality* of prostitution concluded the question of its morality elsewhere.)

In any event, here is another way that a legal decision can affect attitudes that then bear on other decisions later: once a legal decision is in

place, many people may be inclined to treat it as a “given”—as a starting point for further discussion, and not itself open to question. After the terrorist attacks of September 11, 2001, there was much public discussion of various proposals to allow the government to keep track of people’s activity on the Internet: Web sites visited, e-mail addresses used, and so forth. Many of those discussions used, as a starting point, a 1979 decision by the Supreme Court saying that police could keep track of what phone numbers a person had dialed (using a device called a pen register) without violating the Fourth Amendment.²⁸ The question about monitoring people’s Internet usage easily became a debate about whether it was any worse than keeping track of the phone numbers people called.²⁹ One argument you didn’t hear much was that the decision about pen registers was itself wrong and shouldn’t be extended. Of course that is a possibility, but once a decision is “on the books” it may easily be regarded as presumptively correct and as setting a new baseline for deciding what is both lawful and desirable.

Fear about these sorts of slopes is the source of various claims about gay marriage, such as the argument that it would lead to expanded protections for gay rights generally. The idea is that the law’s attitude toward gay marriage may affect people’s attitudes toward gays generally. Over time it may encourage people to think there is nothing wrong with homosexuality; having reached that conclusion under the law’s influence, they may end up supporting laws that go further in the same direction. Some consider that possibility one of the best things about gay marriage, others one of the worst. This model of the slippery slope also helps explain the claim that recognizing gay marriage now may lead to legalized polygamy later. The concern—or one version of it—is that gay marriage will come to be treated as the baseline against which judgments about polygamy have to be made. Perhaps the question here (as with the case of the pen register) will become whether the two situations can be distinguished, not so much whether polygamy is a good or bad thing on its own. Or the thought process can play out in a different way: some people may view the law’s recognition of gay marriage as support for the idea that it’s none of their business who someone else marries; since that is the law’s position (or so it may seem), it sinks in widely; and then the idea of making polygamy legal doesn’t sound as crazy as it once did. Whether these changes in attitude are likely to occur is a question of sociology or psychology that we need not pursue. The important thing here is to understand the structure of the argument. The law does affect attitudes, and those attitudes then affect the law. The result of this dynamic *can* be

a slippery slope, though the operation of the dynamic is hard to predict with much confidence.

A final example involves the use, against people suspected of terrorism, of coercive forms of interrogation—physical and mental pressure that falls short of “torture,” though obviously there is a lot of room for debate about where that line gets drawn. One argument against using any such pressures at all is an appeal to the slippery slope: if we get used to putting physical pressure on people, we will become numb to its horrors and dangers and will be inclined then to move on to more aggressive methods that would more obviously amount to torture; or we will start using torture elsewhere—against people suspected of other things, or against people *convicted* of crimes whom we want to punish regardless of whether they have any useful information. (The “we” here might refer to the police who do the pressuring or to the public at large.) All these things could happen, but it is hard to prove that they *will* happen. The advocates of coercive interrogation reply by pointing to other steps already taken that might have been expected to have similar brutalizing effects but haven’t seemed to produce them in practice. Capital punishment has been widely adopted in the United States without leading to a slippery slope in which people call for it to be applied to crimes besides murder (though that may be because the Supreme Court has forbidden such extensions). The police are allowed to shoot people in some circumstances; this hasn’t led to a slippery slope in which they do it too much to be worth the benefits (or has it?).³⁰ A challenge of thinking about slippery slopes again becomes apparent. Not only is it hard to predict when the law will cause changes in attitudes that will lead to bad things; it can be hard to look back and be sure whether it has happened already.

3. *Ideas about equal treatment require the second decision to be made like the first one.* Sometimes the problem is this: between the first decision and the scary second one lie a series of distinctions that courts (or others, but it’s usually courts) find hard to draw as a practical matter. The point isn’t—or shouldn’t quite be—that scary decision B necessarily follows from decision A as a matter of principle. If that were true, the problem with decision A really wouldn’t involve slippery slopes; it would be that decision A commits us to decision B on the spot once the principle at stake is understood. The slippery slope we mean to describe here occurs when there are distinctions between the two decisions in theory that do not hold up in practice, so the possibly legitimate reasons for separating the two cases in the beginning turn out to fail in the end. The reason might be that courts lack the appetite or ability to draw the distinctions effectively; or it

might be that the distinctions are rickety and can be easily overridden by other preferences of later judges or other decision makers.

This sort of slippery slope lies behind some of the arguments about the end of life. First comes a decision to allow people to refuse medical treatment if they are terminally ill and in great pain. Next comes a proposal to allow assisted suicide by others who also are terminally ill and in great pain but who can't refuse treatment because there is no treatment for them to refuse. Why should a person's power to choose his time of death depend on whether he is hooked up to a machine that he wants to disconnect? If this much is granted, along comes someone who is not terminally ill but is in similar chronic, irremediable pain; he wants to know why he, too, shouldn't have the right to end his life, and why his choices should be more limited than someone who is more certain to die soon. Then comes someone whose agony is mental rather than physical.

A path of this kind, with the right to die expanded in each case, was followed by courts in the Netherlands.³¹ The first decision by itself might not have seemed to imply the last one, but each step between them turned out to be slippery. This might have been so because norms of equality—of treating like cases alike—made it hard to draw lines between any two of them; in that case we might question whether it was a true slippery slope or just a case where the implications of the first decision weren't fully appreciated until later. But it's also possible that distinctions between these cases are available and plausible yet hard to draw in practice: each case presents heart-rending facts, and judges may not have the stomach or, perhaps, the moral confidence to say that any two of these situations are different enough to deny relief. If so, the result could amount to a true slippery slope: a case where decision two really was not thought to follow from decision one when decision one was made, but did follow from it after all.

We probably find similar examples in a line of religion cases from the Supreme Court. The Court started by protecting the rights of people in mainstream religions to practice their faiths even if the practices ran afoul of general laws.³² At first the protections were given to beliefs that were consistent and central to the religions at issue; then over time the Court extended the protections to cover practices and beliefs that may have had more dubious claims to consistency or centrality.³³ There were distinctions available in principle here, but in practice the Court didn't feel comfortable second-guessing people's claims about their religious beliefs. When the first decisions were made, the fringe cases might have seemed distinguishable ("not to worry—we'll be able to decide those

cases differently because the beliefs involved probably won't be central or consistent"); but such distinctions ended up being too distasteful or otherwise difficult to make on the front lines. The result is a kind of slippery slope.

A different sort of slope, but related enough to consider here, occurs when distinctions between the first case and the later, scarier one *could* be drawn, both in principle and in practice, but they are too weak to withstand the press of the policy preferences held by whoever is making the later decisions. This is how some people think about *Griswold v. Connecticut*,³⁴ the 1965 decision in which the Supreme Court struck down a law banning the use of contraceptives by married couples; the law was said to violate constitutional rights to privacy. On its face the case didn't appear to create broad rights of sexual autonomy, and a majority of the Justices who voted to strike down the law indicated, there or elsewhere, that they didn't think they were creating such rights. But then eight years later in *Roe v. Wade*,³⁵ the Justices—or rather a majority of them, several of whom had not been on the Court for *Griswold*—used *Griswold* as a basis for striking down laws against abortion. How best to think about these developments is a controversial question, but it seems clear enough that the decision in *Griswold* did not require the decision in *Roe*. There were distinctions between them that might have been drawn, and that seemed persuasive to some of those who decided *Griswold* (and so caused them to think they weren't starting down a slippery slope). But the distinctions weren't robust enough to stop the decision from being extended by other Justices who considered abortion rights fundamental. The point is simple. The fact that a distinction *can* be drawn, or even that it would be drawn by an advocate of the first decision, is no assurance that it *will* be drawn by others later when they are making the second one.³⁶ The others—for example, the later judges—might find that the first decision enables them to do something that seems attractive and that the distinctions between the earlier case and the present one, while possible, are merely matters of discretion that have no constraining power.

4. *The first decision affects the power of those interested in the second one.* Sometimes a first decision creates an interest group, or gives power to a group that already exists, which in turn affects other decisions later and thus creates a variety of slippery slope. "If we legalize marijuana, next thing you know there will be advertisements trying to get people to smoke more of it." In principle, of course, it doesn't at all follow that legalizing marijuana would mean lots of advertisements for it. We could legalize the drug but forbid the ads. A possible problem, though, is that if marijuana

is legal, an industry will emerge to supply it. That industry will have a massive economic interest in finding ways to advertise. Its members will lobby in Congress; they will make campaign contributions; they will try to convince the public that some advertising in appropriate places wouldn't be a bad thing. Whether these efforts would succeed is anyone's guess, and as usual this illustration isn't our way of hinting that marijuana ought to be kept illegal. It's just an example of how decision one might affect decision two by changing the world in which decision two gets made. A similar story might be told about decisions to spend lots of money on certain sorts of military contracts or on construction projects or even on school vouchers. In every case one consequence may be to create a new constituency that will then work hard to cause more money to be sent in its direction. And then there are more obvious cases where extending voting and other political rights to a group naturally can result in the group voting itself still more of them, or other goodies.



The student of slippery slopes should be familiar with two other points about them: some prominent false alarms, and a possible antidote. (Both amount to studies in when and why slippery slopes *don't* occur.) A striking example of a false alarm was *State v. Bell*,³⁷ an 1872 case in which the Tennessee Supreme Court refused to recognize an interracial marriage solemnized in another state:

Extend[] the rule to the width asked for by the defendant, and we might have in Tennessee the father living with his daughter, the son with the mother, the brother with the sister, in lawful wedlock, because they had formed such relations in a State or country where they were not prohibited. The Turk or Mohammedan, with his numerous wives, may establish his harem at the doors of the capitol, and we are without remedy. Yet none of these are more revolting, more to be avoided, or more unnatural than the case before us.

Yet as time went on, the courts did manage to distinguish between interracial marriages and harems. The court here might have been concerned less with a slippery slope than with the immediate reach of the principle it was considering, but it also is possible to interpret the court's statements along some of the lines sketched in this chapter—that the distinctions would be impossible to draw in practice, or that recognizing

the interracial marriage would cause changes in public attitudes that would lead to later recognition of harems. It might, in short, give people ideas; perhaps sons will start marrying their mothers. The fact that the problems didn't occur shows that the operation of slippery slopes usually depends, as we have noted, on details about human behavior and reaction that are hard to predict, or easy to predict badly. When someone is hostile to a decision for other reasons, it is easily for the hostility to get expressed in exaggerated or overconfident claims about where the decision might lead.

Here is another example. Traditionally, American juries in both criminal and civil cases had twelve members. But during the twentieth century many states began to experiment with juries having six members, and the experiments were challenged in the Supreme Court. A possible slippery slope appeared: if six members was enough for a jury, why not five? If five was enough, why not four? It is a modern version of a classic puzzle devised in Ancient Greece by Eubulides—the paradox of the *sorites* (heap): if you remove a grain of sand from a pile, you still have a pile; and again when you remove another grain, and so forth—until there is only one grain of sand left, yet still a pile, because you never were able to identify a grain of sand that made the difference between having a pile and not having one.³⁸ (Of course you can turn it around, too: one grain doesn't create a pile; adding one more surely doesn't make the difference; so you never have a pile no matter how many you add.) This in turn can be viewed as a restatement of one of the legal patterns we explored earlier: cases where there definitely is a distinction between having a pile and not having one, but it is hard to draw the distinction in practice when a court is presented with one case after another. But when it came to juries the Court fended off the paradox by simply announcing that no number smaller than six would do. The choice between five and six may have been arbitrary, but sometimes an arbitrary solution to a slippery slope is a solution nevertheless—especially where, as here, there is no ongoing constituency clamoring for anything different.³⁹

And now a final word about a nonarbitrary antidote to slippery slopes. Sometimes they can be avoided by constitutional or other foundational rules that more or less guarantee the slope will not be slippery. Suppose someone suggests a minor restriction on abortion. Some of those who strongly favor abortion rights might think the restriction reasonable but object to it anyway because they think it might result in a slippery slope. Perhaps once people get comfortable with the small restriction, they will then be ready to accept more restrictions until abortion rights

are eroded entirely. So the proposal fails—and this might be regarded as a shame, since both sides thought the proposal in itself was all right. We can consider this a kind of inefficiency, or waste: an arrangement that would have made both sides better off (or at least would have been preferred by one side and acceptable to the other) fell through because a certain kind of trust was impossible. But if the advocates of abortion rights were confident that the rights they cared about most *couldn't* be badly eroded because they were the subject of reliable constitutional protection, then perhaps they would be more willing to compromise after all. A dependable constitutional rule in the background, in other words, creates a safe environment in which two sides can compromise without fear of a slippery slope. The same logic can be applied in various other areas—to a reliable, though not absolute, constitutional right to certain kinds of speech, or to bear arms, or to other sorts of liberties. The more reliable the right, the more confidently those who enjoy it may be prepared to tolerate small losses at its outskirts. The constitutional guarantee is, among other things, insurance against slippery slopes, and the insurance allows bargains and efficient results that otherwise might be impossible.

SUGGESTIONS FOR FURTHER READING. Eugene Volokh's sequel to *The Mechanisms of the Slippery Slope*, 116 Harv. L. Rev. 1026 (2003), is *Same-Sex Marriage and Slippery Slopes*, 33 Hofstra L. Rev. 1155 (2005). Other interesting general discussions are Frederick Schauer, *Slippery Slopes*, 99 Harv. L. Rev. 361 (1985); Mario J. Rizzo and Douglas G. Whitman, *The Camel's Nose Is in the Tent: Rules, Theories, and Slippery Slopes*, 51 UCLA L. Rev. 539 (2003).