

In Defense of the Slippery Slope

Despite the metaphor's poor reputation, a good decision now can lead to a bad one later.

By Eugene Volokh & David Newman

IN LATE DECEMBER, THE EDITORIAL PAGE OF *THE BOSTON GLOBE* weighed in against Virginia's ban on cross burning, a law currently being considered by the U.S. Supreme Court. *The Globe* took issue not so much with the ban itself but with the possibility that its acceptance might open the door for future bans the paper is less inclined to support. "What about the confederate flag?" the paper asked. "Or the communist hammer and sickle?" In other words, the editorial explained, the ban creates a "slippery slope."

Most of us have made some slippery slope arguments and ridiculed others. They are a staple of debates about topics from free speech and privacy to church-state relations, gun control, and euthanasia. Respected thinkers from James Madison to William Brennan have argued that we should resist some appealing (or at least seemingly harmless) proposition now for fear it may lead others to implement a dangerous proposition in the future. Yet equally eminent thinkers from Abraham Lincoln to Felix Frankfurter have expressed skepticism about slippery slope arguments.

Exactly how, skeptics ask, would one step today lead to another, quite different step later? Why shouldn't voters, legislators, and judges have the confidence to consider each proposal on its own merits? To accept a slippery slope argument, detractors claim, is to say that "we ought not to make a sound decision today, for fear of having to draw a sound distinction tomorrow."

It turns out, though, that the realities of the political and judicial processes can make the slippery slope—or, more precisely, several different kinds of mechanisms lurking behind the label "slippery slope"—a real concern. Consider, for instance, a proposal to put video cameras on street lamps to catch or deter street criminals. On its own, the plan may not seem that susceptible to police abuse, as long as the tapes are viewed only when someone reports a crime and otherwise recycled every day or two. Many people may be inclined to support installing the cameras, even if they would oppose a more intrusive extension of the policy, such

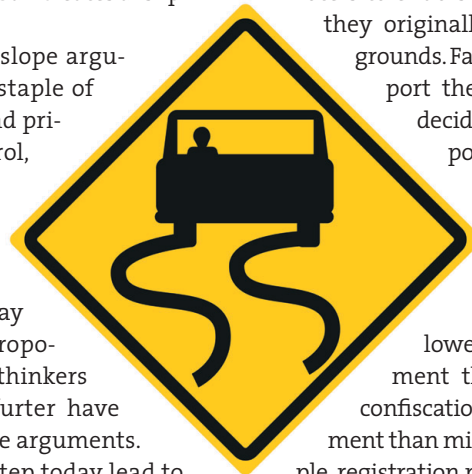
as linking the cameras to face-recognition software or permanently archiving the tapes.

But once the government implements the policy and invests money in buying, installing, and wiring thousands of cameras, the costs of implementing the next step plummet. Comprehensive surveillance becomes much cheaper and thus politically easier: The money already invested may persuade a bloc of swing voters to endorse a broader surveillance operation, even if they originally opposed the camera program on cost grounds. Faced with this prospect, then, those who support the cameras but reject the archiving must decide: Should we implement the limited camera policy now and risk that it will lead to permanent surveillance records in the future? Or should we reject the limited camera policy we want for fear of the more intrusive policy that we oppose?

Or consider another example of a cost-lowering slippery slope: the often-heard argument that gun registration might lead to gun confiscation. It turns out that there's more to this argument than might appear at first. As in the previous example, registration may lower the financial cost of confiscation. Today, the fact that the government doesn't know who owns guns would make it exceedingly expensive to effectively enforce a ban—but this practical barrier would be lessened if a registration law passed.

Registration could also ease confiscation in another way, by eliminating a legal hurdle. When guns aren't registered, confiscation is hard to enforce, since a house-to-house search to find guns would violate the Fourth Amendment. A registration database, on the other hand, might give police enforcing a ban probable cause to search registered gun owners' houses for unreturned firearms. And when policies such as gun confiscation become cheaper and more enforceable, they become more likely.

Of course, if you think that gun registration is extremely valuable, or that gun confiscation would be good, or that gun confiscation would be politically infeasible even with gun



registration, then you shouldn't be bothered by the slippery slope possibility (or might even embrace it). But some who worry about gun confiscation, and who think gun registration will be at best modestly helpful, might be reasonably swayed by the danger that the latter step will lead to the former.

CONSIDER ALSO ANOTHER KIND OF SLIPPERY SLOPE, WHICH we might call an "attitude-altering slippery slope." "The assault weapons ban is . . . symbolic," wrote the columnist Charles Krauthammer, a *defender* 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. . . . Deescalation begins with a change in mentality. . . . The real steps, like the banning of handguns, will never occur unless this one is taken first." But how does this "desensitization" or "change in mentality" actually work? Why would people allow their attitudes about all guns to be altered by the enactment of a law about assault weapons?

This kind of slippery slope is connected to expressive theories of law, which suggest that the law affects behavior by what it *says* rather than by what it *does*. A classic example is the ban on smoking in public places, which helps strengthen a no-smoking norm not because offenders are often punished—they're not—but because people often take their cues from the law.

Legislators and voters, like smokers, are indeed sometimes influenced by the principles they see embedded in the law. In the wake of the September 11 attack, for instance, Congress considered the USA Patriot Act, which was drafted to let the government track (without a warrant or probable cause) which e-mail addresses a person corresponded with, which web hosts he visited, and possibly which pages he visited on those hosts. Twenty years before, in *Smith v. Maryland*, the Supreme Court approved similar monitoring of the telephone numbers that a person had called—the so-called "pen register."

Curiously, the debate on the Patriot Act proceeded mostly on the assumption that pen registers were a good idea. The new proposals, supporters argued, were just cyberspace analogs of pen registers and were therefore fine. No, opponents said, some aspects of the proposals (for instance, the tracking of the particu-

lar web pages that people visited) were unlike pen registers—they were analogous to tracking not just whom the person was talking to, but what subjects they were discussing. Nearly no one argued that the pen register itself set a bad precedent that shouldn't be extended. It was accepted that pen registers were proper because they were legal.

Why did people accept what the courts had said about pen registers, rather than considering the propriety of pen registers for themselves? People who took this view may have been adopting what one might call the "is-ought" heuristic, a rule of thumb that if something—the permissibility of pen registers—is the law, it probably ought to be the law.

It's quite rational for people to look to legal rules for pragmatic or moral guidance when they have neither the time nor expertise to investigate the matter on their own. Ask someone whether peyote is dangerous, and his answer might understandably turn on his knowledge that peyote is illegal. "I'm not an expert on drugs," he might think, "but Congress consulted many experts and concluded that peyote should be banned, presumably because it thought peyote was dangerous." Implementing a policy will thus often lead voters to conclude that the policy is good and thereby build support for still more sweeping versions of the policy (e.g., tracking of Internet access as well as phone calls).

Many people think of slippery slopes as most applicable to judicial decisions, where judges are supposed to follow precedent and one decision is legally supposed to lead to others. But the pen register example illustrates that the political process itself contains a precedent-like system. Voters and legislators aren't legally obligated to take for granted the policy judgment embedded in past legislative and judicial decisions. Still, they often do, because they find it rational to rely on past judgments in order to save the time and effort needed to think through the matter on their own. And so long as this happens—so long as our support of one political or legal decision today can change people's attitudes and thus lead them to enact another decision later—we have to take this sort of mechanism into account when deciding on an initial proposal.

THERE ARE OTHER SORTS OF SLIPPERY SLOPES AS WELL. Sometimes, for instance, the first step changes the power of various political groups. Consider an example: Opponents of decriminalizing marijuana sales have sometimes argued that such decriminalization might help lead to legalizing marijuana advertising, in which vast sums would be spent to persuade more people to smoke marijuana. But why would this be so? Why can't Congress decide on a policy of decriminalizing sales but banning the advertising?

Well, once marijuana sales are decriminalized, a multibillion-dollar industry will come out in the open. It will have money to spend on public-advocacy campaigns, on contributions aimed at electing pro-advertising candidates, and on organizing marijuana users into a powerful voice—and the industry may thus end up being able to pressure Congress to legalize marijuana advertising. The decriminalization decision changes the balance of political power so that a decision (legalizing advertising) that is unlikely at the time of decriminalization becomes much more likely some time later.

Other slippery slopes happen because people often tend to ignore relatively small changes and concentrate on the big ones. Voters have limited time and effort to devote to thinking about issues. Many voters may therefore adopt a rule of thumb: We'll pay close attention only to the seemingly big changes and defer to the government or to elite opinion on the seemingly small ones. Life is too short to worry about every tiny proposal that someone makes. But this means that a big change that would arouse a lot of opposition if made all at once might become politically more feasible if it's made through many small steps; accepting the first step might therefore lead to more such steps.

PEOPLE SOMETIMES CALL THIS "DESENSITIZATION," OR REPEAT the parable of the boiling frog: A frog that's dropped into boiling water will jump out, but a frog that's put into cold water

which is gradually warmed supposedly won't notice the temperature change—and will get cooked. Likewise, people will let their liberty be taken away slowly, though they would have resisted the changes to their freedom had they been proposed all at once.

But desensitization, boiling frogs, and slippery slopes are metaphors. While metaphors can be helpful, they often start by enriching our vision and end by clouding it. Metaphor, after all, is a term for a figure of speech ("All the world's a stage") that's literally false. The trick is to look beyond the metaphor to the actual mechanism by which the "slippage" or "desensitization" happens. By identifying this concrete mechanism (for instance, people's often-rational desire not to devote their time to considering seemingly small policy changes) we can better evaluate the actual likelihood of slippage—the probability that by supporting an appealing decision now, we will make a dangerous one later.

So slippery slopes are a real risk, and wise decision makers should worry about them. But arguments such as "Oppose this law, because it starts us down the slippery slope" have earned a deservedly bad reputation, because they're too abstract to be helpful. One can always shout "Slippery Slope!" but without more details this is hardly an argument at all.

What is valuable is the ability to identify ways in which slippage might happen and to tell listeners a plausible story about how this first step might lead to specific other ones. Cataloging and analyzing the mechanisms of the slippery slope—mechanisms such as the cost-lowering slope, the attitude-altering slope, and others—can help us further develop this ability. ■

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