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David Schraub*

Legal literature is replete with references to the infamous "slippery slope"—situations in which a shift in policy lubricates the path towards further, perhaps more controversial, reforms or measures. Less discussed is the idea of a "sticky slope." Sticky slopes manifest when a social movement victory acts to block, instead of enable, further policy goals. Instead of greasing the slope down, they effectively make it "stickier." Despite the lack of scholarly attention, sticky slope arguments show up again and again in legal argument, particularly in areas focused on minority rights. Formal legal doctrine can create sticky slopes insofar as it reduces legal protections for marginalized groups as they gain political power. Informally, sticky slopes can also develop through backlash, through legal arguments whose valences drift from their original intention, or through society's exhaustion with attempting to address the problem of inequality to seemingly little effect.

I argue that attentiveness to sticky slopes is important for three reasons. First, awareness of the prospect of a sticky slope can be important in long-term social movement strategizing. Where social movements are in pursuit of a cluster of related political ends, they will want to choose their tactics carefully so as to minimize the degree that their past accomplishments can be turned against them. Second, when deployed by legal actors, sticky slope arguments sometimes do not play true causal roles, but instead act as a mask for

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other, less tolerable justifications. Unmasking sticky slope logic can force legal policymakers to be more explicit about the rationales and implications of their decision. Third, sticky slopes reveal how prior victories are themselves sites of social conflict and controversy over meaning, which social movements will want to turn to their preferred ends.

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INTRODUCTION

In 2008, the California Supreme Court ruled that the statutory prohibition of same-sex marriage violated that state's constitutional protections.[1] The justices rested their decision, in part, on the state's evolving conception of the status of gay and lesbian individuals. They found California had "repudiated past practices and policies that were based on a once common viewpoint that denigrated the general character and morals of gay individuals,"[2] and had enacted several progressive pieces of legislation reinforcing the view that these

1. *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008).
2. *Id.* at 428.

persons were to be regarded as full and equal members of the community.[3] While the court did not say its ruling was dependent on the existence of these statutes, it did take notice of how these provisions "provide[d] explicit official recognition of, and affirmative support for," the fundamental equality of gay and lesbian citizens.[4]

Approximately a year earlier, Maryland's highest court also had occasion to address the constitutionality of its state's same-sex marriage ban.[5] Making its ruling in *Conaway v. Deane*, the Maryland Court of Appeals also took notice of the growing intolerance toward legal discrimination against gays and lesbians, as well as the expanding body of statutes and judicial decisions aimed at equalizing their status.[6] But unlike California, the Maryland Court of Appeals used this information to weaken the case for same-sex marriage. The observed victories of the gay rights movement were deployed to buttress the court's holding that sexual orientation should not be accorded suspect status, because they showed gays and lesbians were not "so politically powerless that they are entitled to 'extraordinary protection from the majoritarian political process.'"[7]

California's conduct seems readily explainable as a manifestation of the "slippery slope." A slippery slope, in its simplest form, is "where one group's support of a first step A eventually [makes] it easier for others to implement a later step B."[8] Although slippery slopes are not formal proofs, it is easy to see how past victories might presage future successes, including those unpredicted by the proponents of the original action. Even moderate shifts in favor of gay rights create precedents which then can be applied in future, more expansive settings.[9] Moreover, legislative steps evincing approval and acceptance of gay and lesbian citizens are likely to make courts less willing to defer to other, inegalitarian legislative schemas.[10] Finally, past accomplishments (legislative or judicial) are signals that the movement has some sort of momentum, which makes its next victory less surprising.[11]

Less easy to explain, however, is the behavior of the Maryland court. To be sure, the legislature's passage of an anti-discrimination bill does not, as a matter of logical necessity, mandate the judiciary to find a right to same-sex marriage. Nor, given the substantial legal and political opposition to gay marriage, is the decision surprising as an outlier. But what does ring rather odd

3. *See id.* at 428 nn.46–47 (citing statutes barring discrimination on the basis of sexual orientation and laying out California's policy establishing that gay and lesbian persons are fully capable of supporting any family arrangement).

4. *Id.* at 428.

5. *See* Conaway v. Deane, 932 A.2d 571 (Md. 2007).

6. *Id.* at 611–13.

7. *Id.* at 611 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).

8. Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1029 (2003).

9. *See id.* at 1098–1100.

10. *See id.* at 1084–87.

11. *See id.* at 1121–26.

is the court's use of gays' political momentum as an argument *against* expanding their legally protected rights. This is at least a little counterintuitive: we intuitively expect political successes for the gay rights movement to be, if not beneficial, at least neutral as advocates continue to push their agenda forward.

The logic of the Maryland court is the polar opposite of the slippery slope. It represents instead what might be called a "sticky slope." Whereas in a slippery slope, policy *A* lubricates the way to policy *B*, in a sticky slope, *A*'s enactment is deployed to block achieving further policy goal *B*. Instead of greasing the path down, it makes the slope stickier.

The literature on slippery slopes has, by and large, ignored their stickier cousins.[12] Yet in the field of minority rights and anti-discrimination law particularly, sticky slopes are a genuine problem and pose a serious dilemma for scholars, lawyers, and judges.[13] Whereas the logic of the slippery slope forces us to ask "Does it make sense for me to support A, given that it might lead others to support B?,"[14] the specter of the sticky slope may counsel opposing, delaying, or modifying the demand for *A*, on the grounds that it will pose a later barrier to *B*.

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12. *See generally id.*; *see also* Eric Lode, *Slippery Slope Arguments and Legal Reasoning*, 87 CALIF. L. REV. 1469 (1999); Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985). The term "sticky slope" has appeared in a few, very scattered contexts, but has never been the subject of sustained analysis. *See* Max H. Bazerman et al., *The Human Mind as a Barrier to Wiser Environmental Agreements*, 42 AM. BEHAV. SCI. 1277, 1288 (1999); James J. Gillespie & Max H. Bazerman, *Pre-Settlement Settlement (PreSS): A Simple Technique for Initiating Complex Negotiations*, 14 NEGOTIATION J. 149, 153 (1998); Joel Rogers, *Two-Party System: Pull the Plug*, 52 ADMIN. L. REV. 743, 754 (2000).

13. There are, of course, sticky slope appearances outside of the field of antidiscrimination law. A recent example came via the opposition of some environmental groups to the Waxman/Markley "cap and trade" bill. One of the reasons cited for opposition was that the bill would dissipate public demand for a real solution without actually stemming the tide of global climate change.

> Since President Obama is likely to sign the bill with great fanfare, what will the public take away from this? Will they see it as a "win"—that the problem is solved? If so, what will that mean for pushing for the needed steps later? How will the public be mobilized to push their Representatives when the official and media message is that this is "landmark" legislation?

'Why We Cannot Support This Bill,' GRIST.ORG (June 25, 2009, 3:53 A.M.), http://grist.org/article/2009-06-25-energy-climate-debate-aces/ (reprinting an email from the TheClean.org, "a grassroots coalition . . . devoted to moving the U.S. . . . to an economy based on renewable energy"). Going to a further extreme, some scholars have queried whether the passage of aggressive anti-pollution regulations may end up hampering the environmental cause by stymieing individual motivation to change their own polluting behavior. *See* Bradley C. Bobertz, *Legitimizing Pollution Through Pollution Control Laws: Reflections on Scapegoating Theory*, 73 TEX. L. REV. 711, 715 (1995) (arguing that pollution regulations provide the "psychological guilt release" we need in order to continue engaging in environmentally unsustainable ways of life). For a similar example in the intellectual property context, see Irina Manta, *The High Cost of Low Sanctions*, 65 FLA. L. REV. (forthcoming 2014) (arguing that successfully limiting sanctions for intellectual property law violations actually facilitates their later expansion and normalization).

14. Volokh, *supra* note 8, at 1031.

Following the introduction, this Article proceeds in three parts. Part I introduces the concept of sticky slopes and explains why they matter. Sticky slopes have important implications for social movement strategizing. Sometimes it is plausible to identify a sticky slope as a causal player in the defeat of a given initiative—most obviously, where two important goals are desired, but there is enough political capital to attain only one of them. In such a case, the sticky slope identifies potential trade-offs latent in short-term decision making. Moreover, the avoidance of sticky slopes can play a role in long-term strategizing, where there might be many roads towards achieving the same (cluster of) ends. Certain paths down the road might be stickier than others; intelligent legal reformers should be mindful of how to organize their campaign strategically so as to minimize this effect.

Part II is taxonomic: it provides specific and prominent examples of sticky slopes throughout America's legal history and jurisprudence. Sticky slope logic shows up in many forms and has particular salience in minority rights litigation and discourse. One rather simple sticky slope argument comes when opponents of the original policy *A* recycle their earlier reasons in opposing the later policy *B*. If they thought *A* was an ill-advised move in the first place, then *B* is likely to be just another step down the wrong path. Since many reforms favoring politically marginalized groups are bitterly contested and only narrowly won, opponents too can use their memory as a rallying cry to organize opposition to the latest challenge. Particularly if the opposition was caught off guard by the original decision, that victory's presence in the public eye might motivate a higher degree of opposition to the next push than would otherwise be observed.

The second type of sticky slope is specific to particular doctrines that explicitly connect legal protections and political influence. In contemporary jurisprudence, the degree of scrutiny a minority group gets is dependent, at least in part, on its perceived lack of political power.[15] Entities which already have a well-entrenched place in the Supreme Court's three-tiered hierarchy of scrutiny generally preserve their location even when circumstances change. But for groups who began mounting a politically viable campaign for equality more recently, and whose jurisprudential status is more unsettled, political advances can operate at a cross-purpose with legal reform efforts. Likewise, in a few arenas, such as church/state jurisprudence, courts are doctrinally mandated to take note and be suspicious of certain groups attaining too much power in the public sphere.

Third, sometimes litigants win cases, but the reasoning courts use to give them their triumph also forecloses future progress down the line. Early advocates seeking to break new ground in front of a skeptical judiciary often

15. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

present their argument in the most minimal and least offensive form possible. Such arguments, however, are precisely those least likely to be useful in pursuing a long-term strategic agenda. Alternatively, legal actors may misestimate how effective their current tactics will be in winning the battles of the future. Because the early victories often create the frames by which future requests for extensions will be evaluated, the precedent of *A*, though a substantive victory, may be twisted to stymie further reforms or even to promote policies at odds with the original campaign.

Fourth, the passage of *A* may exhaust the political will to enact further reforms.[16] Expressing support for *A* might be seen as providing sufficient attention to the needs of any one interest group, freeing legislators and citizens to focus on other concerns. For minority groups, who are particularly dependent on arousing the passions of a legislative majority, this risk is greatly magnified. Meanwhile, judges who may have initially been sympathetic to the claims of a marginalized group might grow increasingly skeptical as years go by and nothing seems to change. Early cases with relatively extreme fact patterns get distinguished from murkier modern parallels. In general, the cause of the group goes from being a moral imperative to an unwelcome chore. Similarly, past support for a more moderate proposal on behalf of a disadvantaged group can act as a psychological balm which then helps justify refusing further assistance later. The literature on aversive racism indicates that persons who harbor prejudice, but view these thoughts as wrong or incompatible with their other ideals, resolve the dissonance by seeking out "neutral" explanations for their own discriminatory behavior.[17] Past support for anti-discrimination laws can be used as proof that one's opposition to the latest reform effort is not motivated by bigotry or intolerance.

Part III concludes the Article by illuminating what sorts of factors cause sticky slopes to appear and how social movements can combat them (or wield them against their foes). It also grapples with a special subset of sticky slopes—what might be called "pretextual" sticky slopes. Here, though sticky slope rhetoric is employed, it seems wrong to believe that it actually is playing a causal role in the success or failure of future social movement agenda items. These sorts of sticky slopes are still interesting, however, as a tool of legal justification. That legal policymakers can reference sticky slope arguments as warrants for their decisions means that they can avoid stating other, perhaps less politically palatable rationales. The very fact that sticky slope arguments are deployed even when they are *not* playing a causal role indicates that there is

16. *See generally* Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917 (2009).

17. *See, e.g.*, John F. Dovidio & Samuel L. Gaertner, *The Effects of Race, Status, and Ability on Helping Behavior*, 44 SOC. PSYCH. Q. 192 (1981) (finding White research subjects considerably less likely to aid Black vis-à-vis White persons in need if they have available a non-racist rationale for refusing aid).

another argument being hidden, one that might be worth bringing to the surface.

Beyond the purely predictive, however, the focus on a sticky slope illuminates an aspect of social movement progress that has been previously undertheorized in law—to wit, that the victory itself is a site of social contestation where both proponents and opponents struggle over meaning. In this sense, sticky slopes are more of a verb than a noun—they represent a tool that social movement players can use to arrest the momentum of their adversaries.

I.
THE BASICS OF A STICKY SLOPE

A. Defining the Sticky Slope

What is a sticky slope? The easiest point of departure is to draw a comparison to its cousin, the slippery slope. A slippery slope exists when the passage of policy *A* lubricates the way to policy *B*. The term "slippery slope" is perhaps most commonly used to denote a more specific form of this phenomenon, namely, the decision by courts to refrain from deciding a case in a certain way because of the belief that the principle they would announce would logically lead to intolerable outcomes in future disputes. However, slippery slopes can occur in many contexts beyond the inexorable march of principle. Indeed, most sophisticated accounts of slippery slopes reject that they exist solely as a question of abstract logic, instead relying on "temporally and spatially contingent empirical facts . . . [that] make[] one equally logical possibility seem substantially more likely to occur" than another.[18] For example, a given political victory could breach a taboo, rendering a previously unthinkable position more palatable. Or the new policy could alter prior political coalitions, turning a minority position into a majority. Moreover, there is no particular reason why a slippery slope has to be normatively bad—for every person dismayed that *A* heightens the risk of *B*, another person might be thrilled that *A* provides an otherwise unavailable opportunity to achieve *B*.[19]

18. Schauer, *supra* note 12, at 381; *see also* Volokh, *supra* note 8, at 1032–38 (introducing a variety of "mechanisms" through which a slippery slope might occur, most of which are not reliant on claims of logical or linguistic progression).

19. *See, e.g.*, Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 100 COLUM. L. REV. 1955, 1957 (2010) (observing that both supporters and opponents of polygamy attempt to tie it to the establishment of gay marriage, albeit for different reasons).

Despite my claim that slippery slopes are theoretically morally neutral, they do possess a sinister reputation. The reason, I suspect, is that inherent in the notion that one has to go through *A* to achieve *B* is that *B* is not popular enough to be attained directly. Hence, when perched at the top of the slope, for most voters the possibility of securing *B* along with *A* is a bug rather than a feature, and thus is a prospect that will be minimized by proponents of the change and magnified by opponents.

The critical element of a slippery slope is the slippage itself—the increased propensity for *B* to occur after *A* has already been secured.

The "slope" metaphor appeals because it captures an intuitive element of social change—that victory breeds victory; a movement that has enjoyed some success will find it easier to secure future advances. The first few steps provide momentum to carry the cause further "downhill." The idea of a sticky slope, however, pushes back against this intuition. A sticky slope exists whenever, in the course of pursuing an array of goals, the achievement of one victory makes it more difficult for the movement to attain others—where a victory at one stage helps presage a defeat at another. Put slightly more formally, a sticky slope can be identified with reference to a pattern of social movement achievement expressible as follows:

$$O \rightarrow A \rightarrow B$$

In this model, *O* represents the status quo, and *A* and *B* both represent some political achievement desired by a social movement.[20] A sticky slope occurs when the transition from *O* to *A* is utilized to block or hinder the further progression to *B* (which may or may not be inclusive of *A*).[21] To use the Maryland example, *O* is the original position where gays and lesbians enjoyed minimal political protection, *A* represents the passage of various anti-discrimination ordinances, and *B* represents legalized gay marriage.[22] A sticky slope manifests because the shift from *O* to *A* is cited by the court as a rationale for not moving to point *B*. The original victory of the Maryland gay rights movement in obtaining a legal barrier to discrimination in employment and public accommodations is turned against them as they seek to eliminate discrimination in marital status.

One fiction needed to stabilize the sticky slope concept is presenting an artificially unified picture of a social movement's objectives. After all, in order to illustrate the mechanics by which a past victory leads to future pitfalls, one needs to adopt some overall conceptual framework of what counts as a "victory" from the perspective of the social movement. Yet, of course, this is often hotly contested—what one person believes is a critical step in favor of racial progress, another might feel is a manifestation of racism itself. So, for example, in Part II.C I trace how the success of colorblind arguments early in the civil rights movement stymied future reform efforts later in the process,[23]

20. For most of the examples this will suffice, although the model is simplified, as many social movements have more than two desired ends. For the most part, it is conceptually immaterial whether the stickiness results from the first victory by the social movement or from ones later down the road, whether it stems from one specific victory or many, or whether it occurs due to the victory itself or something about the process used to attain it.

21. For example, the gay rights movement might seek to move from civil unions to gay marriage—replacing the former with the latter. Or, it might seek to progress from an employment discrimination law to a statute criminalizing "hate crimes"—maintaining both programs.

22. *See supra* note 5 and accompanying text.

23. *Infra* Part II.C.

even though some persons would label these "defeats" civil rights victories, because of a different conception of what the civil rights movement represents.[24] In doing so, I do not mean to suggest that one side of this dispute is correct and the other heretical.[25] I merely note the vitality of sticky slope obstacles by observing that, from within at least one relatively commonly held civil rights perspective, past victories have stymied future goals.

B. Why Sticky Slopes Matter

Sticky slopes are an important concept in law. Most obviously, social movements often pursue their objectives through legal means, and it thus matters to them a great deal if, in the course of pursuing one objective, they hinder or even reverse progress towards another. But sticky slopes also are important when discussing legal actors who aren't direct adjuncts of social movement organizations. Judges and lawmakers are also known to harbor multiple goals, and thus should likewise be attentive to sticky slope mechanics.

The literature on social movements indicates that the effects of incremental gains and losses are often curvilinear in practice.[26] "[F]or most movements, the vast majority of wins and losses are smaller battles in a larger war . . . interactions between movements, policy makers, and the public are protracted and iterative, [hence] . . . the outcomes of a prior round of contention can carry over and affect an organization's overall development."[27] These signals do not always proceed in a linear fashion. For example, while a victory by a social movement may signify that the group is effective and thus a worthy recipient of scarce resources, it might also satiate more moderate members of the group, drawing away their attention, or it might simply demonstrate that the group is doing fine on its own and does not need additional assistance. Losses likewise could drive away supporters wary of wasting resources on a lost cause, or mobilize them in order to stave off a total rout.[28] While after-the-fact accounts of social progress often portray simple, linear paths from darkness to light, these narratives are usually Pollyannaish—the effect of even highly

24. *See infra* note 203 (noting Justice Thomas's views on the matter).

25. Indeed, just the opposite: I note the predictable divergence in policy objectives among persons who genuinely believe themselves to be disciples of a social movement as a primary instigator of sticky slopes. *See infra* notes 182–184 and accompanying text.

26. *See* Peter K. Eisinger, *The Conditions of Protest Behavior in American Cities*, 67 AM. POL. SCI. REV. 11, 15 (1973) (positing a curvilinear model between the openness of a society and the utilization of protest by aggrieved social groups); Devashree Gupta, *The Power of Incremental Outcomes: How Small Victories and Defeats Affect Social Movement Organizations*, 14 MOBILIZATION 417, 426–28 (2009) (finding a statistically curvilinear relationship between political successes and organizational inflows and outflows in the American anti-death penalty movement).

27. Gupta, *supra* note 26, at 417–18.

28. *See id.* at 419–21 (discussing the "bandwagoning," "satiety," and "friend-in-need" models of how incremental outcomes affect social movements); *see also infra* notes 61–64 and accompanying text.

touted victories is often unclear and tortuous in practice.[29] In short, social movement progression represents a polycentric problem: each advance—its content, form, timing, etc.—has complicated impacts on the entire constellation of movement objectives.[30]

"Any social movement of potential political significance will generate opposition."[31] A social movement which seems politically viable might motivate the rise of a countermobilization aimed at checking and reversing the policy goals of the original movement.[32] Movements not only create the incentive for a countermovement by challenging the status quo and all those who benefit from it, they also have an expressive "demonstration effect": they show the opposition that collective action can be an effective tool for effectuating social change.[33] Like social movements, countermovements also often behave in a curvilinear fashion: not wasting their time with small, ineffectual agitation, mobilizing against groups which seem likely to pose a political threat, then dissipating if the original movement becomes too powerful to effectively oppose.[34] At least over the short run, both victories and defeats, opportunities and threats, can serve to mobilize social movements and countermovements as both sides seek to maneuver for maximum tactical advantage.[35]

For any given social controversy, the conditions under which a particular advance is likely to spark countermobilization is likely to be acutely fact-sensitive, making it hard to generalize what sorts of victories most risk

29. *See* Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L REV. 7, 76 (1994) (arguing that the *Brown* decision did indirectly aid in desegregation efforts, but only by catalyzing massive Southern resistance, which was then broadcast nationally in the form of intense violence against civil rights protesters, culminating in a shift in Northern public opinion repulsed by this extremism, which then provided the political will for legislative civil rights reform).

30. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 395 (1978) (defining and discussing the concept of polycentricity).

31. David S. Meyer & Suzanne Staggenborg, *Movements, Countermovements, and the Structure of Political Opportunity*, 101 AM. J. SOC. 1628, 1630 (1996).

32. *See* Clarence Y.H. Lo, *Countermovements and Conservative Movements in the Contemporary U.S.*, 8 ANN. REV. SOC. 107, 108 (1982) (defining a countermovement as that "which mobilizes against another social movement"); *see also infra* notes 66–72 and accompanying text.

33. Mayer N. Zald & Bert Useem, *Movement and Countermovement Interaction: Mobilization, Tactics, and State Involvement*, *in* SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY 247, 247–48 (Mayer N. Zald & John D. McCarthy eds., 1987) ("[M]ovements of any visibility and impact create the conditions for the mobilization of countermovements. By advocating change, by attacking the established interests, by mobilizing symbols and raising costs to others, they create grievances and provide opportunities for organizational entrepreneurs to define countermovement goals and issues. Movements also may have a 'demonstration effect' for political countermovements—showing that collective action can effect (or resist) change in particular aspects of society.").

34. Meyer & Staggenborg, *supra* note 31, at 1635–36 (arguing that the "relationship between movement success and countermovement emergence is curvilinear").

35. *Id.* at 1644–45. Over the long term, however, a movement likely needs to experience some victories in order to stay viable. *Id.* at 1647 (noting that a movement which does not win at all over a long enough time period "will decline").

generating sticky effects.[36] Still, a social movement that is attentive to the surrounding political context can often modify its tactics to minimize these effects. For example, so-called "critical events" can help focus attention on the issue on which a social movement is trying to mobilize.[37] However, because social movements often can *create* the sort of dramatic events or policy changes that become the source of countermobilization, they can also, to some extent, time the emergence of these "critical events" for historical moments when they perceive their position to be most advantageous.[38] Awareness of when a particular victory or accomplishment is likely to spark countermobilization is thus a crucial tool in the social movement toolbox.[39] However, to effectively wield this tool, actors must understand not just which victories might generate countermobilization, but who might join such efforts.

The basic countermobilization story assumes a simple bifurcation between the supporters and opponents of policy *A*, with a substantial chunk of the population indifferent and on the sidelines. A major victory by the supporters of *A* mobilizes its opponents, who see their interests or values threatened, but it does not affect those who had no opinion on the matter in the first place. However, sometimes a victory can produce a special kind of countermobilization stemming from previously neutral groups if the particular form of the victory is seen as threatening their discrete and previously

36. *Compare infra* Part III.A *with infra* Part III.B.

37. Meyer & Staggenborg, *supra* note 31, at 1638 ("Movements sometimes succeed in forcing public attention on issues by creating or exploiting critical . . . events."). Jeffrey Legro makes the important observation that there is nothing inherent in these "shocks" that mandates social change; rather, they have effects based on the presence and capacity of institutions to turn them to their preferred meaning. JEFFREY LEGRO, RETHINKING THE WORLD: GREAT POWER STRATEGIES AND INTERNATIONAL ORDER 28 (2005) ("The point is not that shocks are irrelevant but that their effects depend on preexisting structures . . . . [S]ocieties affected by similar political shocks react differently based on conceptual construction (that is, collective ideas).").

38. *See* Meyer & Staggenborg, *supra* note 31, at 1638 ("Movement activists not only generate some of these critical events, but they also play a large role in creating the climate in which certain events are deemed momentous."). This is important because it emphasizes the agency social movements possess in not just reacting to, but also affirmatively constructing, the social conditions that render change possible. *Cf.* Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 190 (2011) (warning against "[w]aiting for moments of 'racial fortuity' to present themselves" as this strategy "is, in many ways, not all that distinct an endeavor from waiting for lightning to strike—or, perhaps more appositely still, waiting for the stars to align. . . . Passivity, though, seldom if ever lends itself to creating the conditions that are necessary to bring about successful challenges to racial hierarchy.").

39. *See* Darren Lenard Hutchinson, *Sexual Politics and Social Change*, 41 CONN. L. REV. 1523, 1527–28 (2009) (arguing that the judicial press for gay marriage has created a backlash hurting gay rights, and urging activists to refocus "their advocacy on political issues that present the greatest opportunities for progress"); *see also* Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from* Brown v. Board of Education *and Its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493, 1536 (2006) (claiming that the gay rights movement did gain more than it lost in relying on the courts to lead social change, but arguing that "the movement has probably reached the point of diminishing returns" in terms of what it can accomplish through the judicial arena, and recommending a shift in tactics geared towards political and legislative forums).

unaffected interests. This is distinct from the prior account in an important way: whereas normal countermobilization merely activates latent preferences against the goals of the movement, this variation brings completely new political actors onto the battlefield. For example, White northerners who may have been previously indifferent on the question of civil rights could have begun mobilizing against it once they observed that the particular manner by which civil rights proponents were securing their desired goals (e.g., busing) conflicted with their own, hitherto external political preferences (e.g., local schools).[40] One could also imagine someone relatively indifferent to civil rights, but extremely committed to federalism, deciding to rally against the former based not on intrinsic hostility to the movement's principles, but on the view that the particular path the movement was taking was in conflict with seemingly unrelated political goals.[41] Symbolism, too, might matter in this analysis. A conflict that is framed so as to implicate outside groups can widen the political playing field and, if the purported effects are negative, create an impediment to continued success.[42] But the important point is that the impact of social movement agitation extends well beyond its direct, intended effects.[43]

Sticky slopes are not just for social movements, though. Political actors also have clusters of agenda items they seek to achieve and thus are also attentive to how any one goal might impact their ability to achieve the rest.

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40. *See* Meyer & Staggenborg, *supra* note 31, at 1638–39. The desire to preserve local schools is itself an example of a seemingly unrelated political value drifting from one side of a social controversy to the other, as at least part of the motivating force for *Brown v. Board* was the desire to send Black children to local school buildings. *See* Paul E. Wilson, *The Genesis of* Brown v. Board of Education, 6 KAN. J.L. & PUB. POL'Y 7, 11 (1996) (noting that one of the reasons Linda Brown sued over Topeka's segregated school system was that she had to attend a Black school that was three times further away from her house than the nearest White school).

41. The litigants who argued that the Civil Rights Act exceeded Congress's regulatory power under the Commerce Clause, for example, can plausibly be described as challenging the path of civil rights reforms because of the threat those reforms posed to federalism values. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (upholding the Civil Rights Act's prohibition on racial discrimination in places of public accommodation as falling under Congress's power to regulate commerce); Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding the Civil Rights Act as applied to a restaurant whose business was conducted nearly entirely intrastate). Even where it doesn't create outright opposition, tensions can develop where the legal strategy selected by one social movement weakens or erodes the foundation of victories secured by erstwhile allies. *See* Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation*, 57 UCLA L. REV. 1199, 1228 (2010) (warning that same-sex marriage litigation risks undermining the vitality of important sex discrimination precedents).

42. Meyer & Staggenborg, *supra* note 31, at 1640 (observing that a critical difference between the failed temperance movement, and the far more successful anti-drunk driving movement, was that the latter did not cast itself against the entire "lifestyle" of a major social group); *see also infra* Part III.B (discussing framing theory in the context of sticky slopes).

43. *See, e.g.*, Marco G. Giugni, *Was It Worth the Effort? The Outcomes and Consequences of Social Movements*, 24 ANN. REV. SOC. 371, 386 (1998) (explaining that "like all kinds of actions, the effects of social movements are often indirect, unintended, and sometimes even in contradiction to their goals"); Charles Tilly, *Invisible Elbow*, 11 SOC. F. 589, 594 (1996) (arguing that much social progression occurs from a series of unintended consequences and erroneous interactions which are progressively reacted and adapted to).

Consider the quasi-masochistic request of the city of Louisville for a federal court to continue "punishing" the school district for having previously maintained segregated schools.[44] Why wouldn't the city want to "succeed" in being declared unitary? The answer is the city's prescient prediction that achieving the "victory" of being labeled a unitary system would in fact destroy its ability to pursue further integrative measures.[45] Indeed, the problem where political bodies don't *want* judicial restrictions upon them removed is apparently so serious that one court has suggested that governmental actors have a continuing obligation to "monitor" judicially-imposed race-conscious remedies in order to ensure they continue to serve a legitimate purpose.[46] Rarely do those burdened by consent decrees need such encouragement! But legislators who know that their political agenda will be before courts again and again will often be willing to play the long game, sacrificing an immediate victory in order to secure a set of rules, precedent, or even just a political narrative more favorable to their broader body of ends.[47]

Finally, there is the question of judges thinking in terms of sticky slopes. This might seem the most disconcerting of all: the import of sticky slopes as described above is in how it enables or hinders the pursuit of various consequentialist objectives; and these concerns when applied to judges veer precipitously on the edge of illegitimate results-oriented decision making.[48] On closer examination, however, there is a strong case to be made for incorporating sticky slope thinking into judicial practice.

To begin, purely as a descriptive matter courts may be reticent to issue ringing, landmark constitutional decisions precisely because they cannot guarantee that the principles they elucidate will always be applied in manners amenable to the court's preferences.[49] Knowledge that the impact of a controversial decision may be cabined or otherwise restrained may assuage

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44. *See* Hampton v. Jefferson Cnty. Bd. of Educ., 102 F. Supp. 2d 358, 359 (W.D. Ky. 2000) (noting the "exceptional" posture of the motion to dissolve the consent decree, which was promoted by Black plaintiffs and opposed by the school board).

45. *See infra* notes 200–01 and accompanying text.

46. Martinez v. City of St. Louis, 539 F.3d 857, 861 n.2 (8th Cir. 2008) ("[A]s race-based affirmative action plans and decrees are viewed with disfavor, it makes sense to impose some responsibility on a governmental defendant to actively monitor whether a decree to which it is subject has served its remedial purpose.").

47. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 LAW & SOC. REV. 95, 100 (1974) (discussing the ability of repeat player litigants to "play for rules").

48. *See, e.g.*, Frank B. Cross & Stefanie A. Lindquist, *The Scientific Study of Judicial Activism*, 91 MINN. L. REV. 1752, 1766 (2007) (defining judicial activism as when judges "engage in 'result-oriented judging,' whereby their decisions are driven by their ideological preferences concerning substantive case outcomes"); Diarmuid F. O'Scannlain, *On Judicial Activism: Judges and the Constitution Today*, OPEN SPACES Q., Mar. 2000, at 20, 23 ("When a judge is swayed by his own sentiment rather than considerations of deference, predictability, and uniformity, he fails by definition to apply the law faithfully.").

49. *See* Jonathan F. Mitchell, *Reconsidering* Murdock*: State-Law Reversals as Constitutional Avoidance*, 77 U. CHI. L. REV. 1335, 1388–89 (2010).

some of these concerns, thus enabling judges to be more attentive to the particular case in front of them. But even normatively, the instinctive aversion towards judges considering these consequentialist impacts is misplaced.

Judges can and should look backwards, ensuring that their decisions are compatible with past precedent and predictable to the parties.[50] And likewise they should be present-looking, considering the equities with respect to the parties and facts in front of them.[51] But part of the judicial project should also be forward-looking—trying to build a cohesive system of law (contracts, torts, anti-discrimination, etc.) that seems likely to not just resolve today's problems but avoid tomorrow's as well.[52] This, after all, is why judges care about *slippery* slopes—the idea that while a given principle may provide tolerable results in the case at bar, it will lead to progressively worse outcomes in the next—and few find judicial attentiveness to that slope to be particularly pernicious.[53] Likewise, a judge can fairly be attentive to the consequences of her decision not just in terms of what it might enable but also in terms of what it might block.

II.
STICKY SLOPE EXAMPLES

In this Section, I trace some of the more notable and illustrative examples of sticky slopes as they have appeared in American law. I open with a few "simple" examples that help concretely ground the concept. I then proceed to identify sticky slopes as they appear in formal legal doctrine, in the deployment of specific arguments by social movements over time, and in the social reaction to triumphs and advancement by a given movement that still feels it has unsatisfied items on its agenda.

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50. *See, e.g.*, ROBERT BOLT, A MAN FOR ALL SEASONS 153 (Vintage International 1990) (1960) (quoting Sir Thomas More as saying "The law is a causeway upon which, so long as he keeps to it, a citizen may walk safely"); Scott J. Shapiro, *Law, Plans, and Practical Reason*, 8 LEGAL THEORY 387 (2002) (arguing that law is beneficial because it enables planning).

51. *See, e.g.*, Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (asserting that the purpose of the Article III Case or Controversy requirement is that it "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action"); J. WOODFORD HOWARD, COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS 128 (1981) ("There is no substitute for deciding the immediate case with justice for the parties.").

52. *See* ROBIN WEST, NORMATIVE JURISPRUDENCE: AN INTRODUCTION 1–2 (2011); Thomas B. Colby, *In Defense of Empathy*, 96 MINN. L. REV. 1944, 1976 (2012) (noting that in a common law system judges regularly are tasked with crafting new legal rules and standards, and that this process will inevitably be based, at least in part, on the judge's "sense of what will, on balance, be best for the parties and for society").

53. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 733 & n.23 (1997) (discussing the possibility of a slippery slope in recognizing a right to physician-assisted suicide); *see also* Lode, *supra* note 12, at 1471–73 (collecting examples).

A. Simple Sticky Slopes

The simplest form of a sticky slope, obvious almost to the point of banality, is when substantive opposition to a prior reform is recycled to engender opposition to proposed extensions. If one opposed the enabling of sexual immorality supposedly licensed by *Griswold v. Connecticut*,[54] then it is unsurprising if one also comes out against its extension to abortion rights in *Roe v. Wade*.[55] Technically, this is a form of a sticky slope, particularly if the original opponents can convince their fellow citizens to view the original victory as an error in and of itself, and certainly not worthy of extension. One can imagine a citizen who was originally indifferent to the *Griswold* decision, only to observe the nation's slide toward sexual licentiousness in its wake, thus learning a valuable lesson and resolving not to make the same mistake when *Roe* comes around.[56]

As noted, though, this is a rather mundane point—simply a standard observation about the vagaries of democratic deliberation in a pluralist society. But even basic sticky slopes can demonstrate some interesting permutations, particularly when juxtaposed against slippery slope rhetoric and the backlash hypothesis. In the former case, a slippery slope argument *itself* can represent an example of a sticky slope insofar as it uses the actual historical path a social movement has taken as proof that one cannot trust contemporary advocates' assurances that their agenda will have but limited effects. Justice Goldberg's concurrence in *Griswold* was quite confident that the Court's decision would in no way sanction homosexual conduct.[57] This confidence was clearly misplaced.[58] A similar trend can be observed with Equal Rights Amendments, which also were promised to be entirely irrelevant to the gay marriage debate, but which have nevertheless become key instruments in it.[59] Consequently, when opponents of same-sex marriage claim that legalization would pave the way to polygamy,[60] the past triumphs of the sexual revolution make this

54. 381 U.S. 479 (1965) (finding a right to privacy in the Constitution which protected the right of married individuals to use contraception).

55. 410 U.S. 113, 152 (1973) (locating precedent for the right to privacy upon which its decision rested in cases like *Griswold*).

56. *Cf.* Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 FORDHAM L. REV. 2269, 2273 (2001) ("Many supporters of contraception neither anticipated nor desired a 'revolution' in sexual morality.").

57. 381 U.S. at 498–99 (Goldberg, J., concurring).

58. *See* Lawrence v. Texas, 539 U.S. 558, 564 (2003) (identifying "the most pertinent beginning point" of an opinion which would declare unconstitutional prohibitions of homosexual sodomy as "our decision in *Griswold v. Connecticut*"); *see also* Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 HOFSTRA L. REV. 1155, 1158–63 (2005) (finding a clearly observable slippery slope beginning from *Griswold* and leading to the judicial enactment of same-sex marriage).

59. *See* Volokh, *supra* note 58, at 1162 (noting that state Equal Rights Amendments were used to support same-sex marriage decisions, a prospect which was derided as absurd by ERA proponents when those amendments were being debated).

60. *See, e.g.*, *Excerpt from Santorum Interview*, USA TODAY, Apr. 23, 2003, *available at* http://www.usatoday.com/news/washington/2003-04-23-santorum-excerpt_x.htm ("And if the

slippery slope argument considerably more compelling than it might be otherwise.

Another well-known example of the sticky slope is the risk that a major victory will lull the supporting social movement into a false sense of complacency, dissipating its momentum and rendering it vulnerable to counterattack. Devashree Gupta notes that a series of incremental victories can lead to a sense of "satiety among less committed movement backers and activists who . . . find themselves less willing to continue devoting scarce resources and time to the movement."[61] In this way, "success can be a bit of a poisoned chalice to groups if their demonstrated ability to achieve good outcomes leads to subsequent attrition in support levels."[62] This has been a prominent critique of *Roe v. Wade*[63] by pro-choice advocates, who allege that it both short-circuited an emergent liberalizing trend in state level abortion laws already occurring,[64] and drew the attention of feminist activists away from the legal and political aspects of abortion.[65]

As the attention of the victorious (for now) group wanes, the opportunity for a counterattack rises. This sticky slope is the "backlash" phenomenon, whereby a particular high profile victory mobilizes opponents, creating an effective cadre of political activists where none had previously existed.[66] Again, *Roe* represents a prominent template: "The sweep . . . of the opinion stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures" aimed at mitigating or reversing its

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Supreme Court says that you have the right to consensual sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything."); Stanley Kurtz, *Here Come the Brides*, THE WEEKLY STANDARD, Dec. 26, 2005, *available at* http://www.weeklystandard.com/Content/Public/Articles/000/000/006/494pqobc.asp (arguing that the approval of a Dutch cohabitation arrangement between three persons could lead to polygamy in the same way that the "small step" strategy was used to achieve gay marriage).

61. Gupta, *supra* note 26, at 420.

62. *Id.*

63. 410 U.S. 113 (1973).

64. *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 379–81 (1985) (observing that a nascent political trend towards abortion liberalization was largely reversed once *Roe* was decided).

65. *See* Kathryn Kolbert & Andrea Miller, *Legal Strategies for Abortion Rights in the Twenty-First Century*, *in* ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950–2000, at 95, 96–99 (Rickie Solinger ed., 1998) (arguing that after *Roe*, many members of the women's rights movement shifted their attention to other issues, such as passing the ERA, rendering abortion rights vulnerable to an intense counterattack by opponents).

66. *See, e.g.*, Mark A. Graber, *The Law Professor as a Populist*, 34 U. RICH. L. REV. 373, 403–04 (2000) (arguing that court decisions often act to give political issues national salience, which in turn encourages popular mobilization); Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 971 (2004) (noting that the ability to spark countermobilization is one arena in which the judiciary clearly has an effect on the development of the law, even in the weakest models of judicial power).

effects.[67] The greater a victory's scope, the more it may magnify the backlash effect, because large, bold strides are more likely to arouse popular passions than quiet, incremental approaches.[68] Some have argued that the *Dred Scott* case[69] exemplified this effect: while the South trumpeted the case as a stunning victory for their cause—which, on its face, it was—the North saw it as an illegitimate usurpation and was able to effectively rally against it, leading to the election of Abraham Lincoln in 1860.[70] A more recent example was the mobilization of conservative activists against lesbian, gay, bisexual and transgender (LGBT) rights in the wake of Massachusetts's path-breaking decision legalizing gay marriage.[71] Generally speaking, a clear, public repudiation of a position that still commands a strong cadre of committed supporters is at least as likely to cause those advocates to redouble their efforts as it is to put them on the defensive.[72] And of course, sometimes these countermobilization successes can generate unintended resistances of their own—intense social reaction against a judicial decision can prompt courts to dig in their heels so as to not be seen as bowing to popular pressure.[73]

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67. Ginsburg, *supra* note 64, at 381. *But see* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 410 (2007) (arguing that newer historical accounts demonstrate that the antiabortion movement had already coalesced prior to *Roe* and was equally aggrieved by abortion advances made in the legislature as those in the courts).

68. *See* David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 899 (2009) ("Legislative modernization might take place quietly, in a way that does not arouse much opposition. But a judicial decision that tries to accelerate the trend may be more visible. The decision will then serve as a rallying point for political opposition . . . ."). *But see infra* Part III.B.

69. 60 U.S. 393 (1856).

70. DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 561–67 (1978) (arguing that *Dred Scott* contributed to Republican electoral gains throughout the northern United States, laying the ground work for Lincoln's 1860 presidential victory); Michael J. Klarman, Brown v. Board of Education*: Facts and Political Correctness*, 80 VA. L. REV. 185, 188 (1994) ("*Dred Scott* did not convince Republicans that their party was, as the Court had declared it be, built upon an unconstitutional platform; if anything, the decision probably converted at least some northerners to the Republican cause.").

71. Ball, *supra* note 39, at 1511 (noting how conservative activists in 2004 were able to mobilize the right in response to a perceived threat against the institution of marriage).

72. *See* Klarman, *supra* note 70, at 188 (observing that anti-slavery northerners, segregationists, anti-abortion activists, and gay rights advocates all mobilized in response to contrary judicial decisions); Meyer & Staggenborg, *supra* note 31, at 1636–37 (noting that while *Roe v. Wade* "would seem to be an example of a decisive victory" for abortion rights, "it spurred the growth of an antiabortion countermovement rather than foreclosing protest"); Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 984 (2011) ("Whereas legal victory might lull movement members into a false sense of security, legal defeat might encourage new, more vibrant mobilization and direct action by bringing awareness to courts' ineffectiveness and explicitly demonstrating the failed promise of litigation.").

73. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 867 (1992) (arguing that "to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy").

B. Doctrinal Sticky Slopes

At several points, courts explicitly employ sticky slope logic in applying formal legal doctrine.[74] One example is in determining what level of "scrutiny" a given group gets under equal protection principles—courts here nominally investigate the group's political power, and accordingly grant (or refuse to grant) heightened judicial review to groups based on whether they are seen as sufficiently politically marginalized. In addition, religion clause jurisprudence is also explicitly concerned with religious groups aggregating too much political power, and courts sometimes intervene when it appears that a religious sect has demonstrated more political clout than is appropriate. These formal sticky slopes are intriguing because the stickiness is official—it is what courts tell themselves they should be doing when they address cases in this field.

1. Scrutiny-Based Sticky Slopes

The baseline standard for reviewing potentially discriminatory legislation under the equal protection clause is the "rational basis" test.[75] This test is notoriously lenient, only requiring that the legislative classification "bear[] a rational relation to some legitimate end."[76] However, ever since *Carolene Products*' famous footnote four,[77] the Supreme Court has recognized that politically marginalized groups may require more demanding judicial oversight to secure their constitutionally guaranteed rights.[78] As articulated in *San*

74. By formalism, here, I mean reasons for decision that are officially ensconced in legal doctrine. This contrasts with whatever reasons lying outside the official doctrinal rationale we might give to explain or justify a given legal action. *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 535–38 (1988) (comparing formalism to the "closedness" of a system—the degree to which the reasons a judge can give for a decision are truncated by the pre-existing annunciated rules); Roberto Mangaheira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 564 (1983) ("What I mean by formalism in this context is a commitment to . . . a method of legal justification that can be clearly contrasted to open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary.").

75. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985) (noting that legislation affecting a group that is not subject to heightened levels of scrutiny still "must be rationally related to a legitimate governmental purpose").

76. Romer v. Evans, 517 U.S. 620, 631–32 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.").

77. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

78. This framework is also used to appraise due process challenges. A due process claim that does not implicate a fundamental right receives rational basis review, while one that does receives strict scrutiny. However unlike equal protection doctrine, which focuses on the disparate treatment of particular groups, due process challenges concern entitlements all citizens have a claim to (even if the state is withholding them on an equal basis). Consequently, the doctrinal tests for discerning whether a right is "fundamental" do not focus on the social standing of the claimant, but the substantive nature of the claim. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (fundamental rights are those "deeply rooted in this Nation's history and tradition"); Palko v. Connecticut, 302 U.S. 319, 325

Antonio Independent School District v. Rodriguez, "the traditional indicia of suspectness" that counsel according heightened scrutiny review are whether the targeted group has been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[79] While the Court has shuffled elements in and out of the heightened scrutiny test,[80] the alleged requirement that a group be politically powerless has endured.[81] Consequently, when determining whether a particular group should gain the protections of strict or heightened scrutiny, findings of past and current prejudice and discrimination can play a decisive role.[82] In theory, as the group becomes more politically influential and

(1937) (fundamental rights are those "implicit in the concept of ordered liberty"). For a general comparison of due process "liberty"-based protections versus equal protection "classification"-based protections, see generally Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011).

79. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

80. Several cases following *Rodriguez* seemingly added several more factors for the Court to consider. *See, e.g.*, Lyng v. Castillo, 477 U.S. 635, 638 (1986) (declaring that the class in question does not "exhibit obvious, immutable, or distinguishing characteristics"); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (stating that a suspect class ought to have faced stereotyping unrelated to its ability to contribute to society). Even as it has added additional factors, the Court has never indicated how these factors relate to one another, which (if any) are more or less important, or whether any or all of these are necessary or sufficient requirements to attain heightened scrutiny review. The result is a messy doctrinal hodgepodge that basically allows courts to pick their favorite factors to match their preferred result. *See, e.g.*, Sharon E. Rush, *Whither Sexual Orientation Analysis? The Proper Methodology When Due Process and Equal Protection Intersect*, 16 WM. & MARY BILL OF RTS. J. 685, 739 (2008); Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 147–48 (2011).

The political powerlessness prong is particularly ripe for abuse, both because of its inherent ambiguity (how much power is too much?) and because of the disjuncture between the judiciary's self-image as a front-line defender of minority rights and its actual status as a lagging indicator behind popular mobilization. *See* David Schraub, Comment, *The Price of Victory: Political Triumphs and Judicial Protection in the Gay Rights Movement*, 77 U. CHI. L. REV. 1437, 1462–63 (2010); *see also infra* notes 85–89.

81. *See, e.g.*, *Lyng*, 477 U.S. at 638 (holding that "close relatives are not a 'suspect' or 'quasi-suspect' class" because "[a]s a historical matter, they have not been subjected to discrimination . . . and they are not a minority or politically powerless"); *Mass. Bd. of Ret.*, 427 U.S. at 313 (citing the *Rodriguez* factors and adding whether the group has been "subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities" to contribute meaningfully to society); Frontiero v. Richardson, 411 U.S. 677, 686 & n.17 (1973) (plurality opinion) (noting, in the course of granting heightened scrutiny to sex-based classifications, that "women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena" even though they are not a minority as such).

82. In the challenge over the legality of California's Proposition 8, which overturned same-sex marriage in that state, commentators expected the question of whether gays and lesbians possessed political power to be crucial. *See, e.g.*, Maura Dolan, *Prop. 8 Trial Focuses on Gays' Political Power*, L.A. TIMES (Jan. 26, 2010), http://www.latimes.com/news/local/la-me-prop8-trial26-2010jan26,0,5053190.story; Bob Egelko, *Gays Have Political Power, Prop. 8 Defense Says*, S.F. CHRON. (Jan. 26, 2010), http://www.sfgate.com/nation/article/Gays-have-political-power-Prop-8-defense-says-3202470.php; Susan Ferriss, *Professor Testifies at Prop. 8 Trial that Gays Don't Lack Clout*, SACRAMENTO BEE, Jan. 26, 2010, at A1. This focus continued up to the Supreme Court, where Chief Justice Roberts questioned the alleged political powerlessness of gays and lesbians and stated that, "[a]s far as I can tell, political figures are falling over themselves to endorse" gay marriage. Transcript

discrimination dissipates, they should encounter more resistance from courts when they try to obtain enhanced judicial protection.[83]

At the same time, there is reason to be skeptical that courts really are more vigilant in protecting the rights of the politically powerless.[84] A group is rarely visible enough to be actively demanding equal status yet simultaneously totally marginalized. In this dynamic, many consider judicial protection to be somewhat of a lagging indicator, covering marginal groups "only after [they] have shown a fair degree of clout in the political process."[85] Professor Eugene Volokh's "political momentum" slippery slope may be illustrative.[86] Volokh argues that prior victories act as a heuristic, demonstrating that a hitherto marginal group may possess enough influence to pose a political threat; hence, a group that could safely be ignored before now must be taken seriously.[87] Consequently, as Jack Balkin argues, "legal elites—whether judicial or legislative—usually respond to 'disadvantaged' groups only after a social movement has demanded a response."[88] Where groups are "truly politically powerless, courts may not even recognize their grievances; and if they have just enough influence to get on the political radar screen, courts will usually dismiss their claims with a wave of the hand."[89] This, of course, leads to the opposite outcome compared to the orthodox story: political victories do not just presage judicial protection, they are a prerequisite.

The two perspectives are amply displayed in the opinions of *Frontiero v. Richardson*,[90] the first case to suggest some form of heightened scrutiny for

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of Oral Argument at 108, United States v. Windsor, (No. 12-307), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-307_jnt1.pdf. The Supreme Court ended up dismissing the *Perry* appeal for lack of standing, Hollingsworth v. Perry, No. 12-144, slip op. at 2 (June 26, 2013), and decided its companion case, *Windsor v. United States*, without clearly declaring what scrutiny level it was applying, No. 12-307 slip. op. at 19–20 (June 26, 2013); *id.* at 16–17 (Scalia, J., dissenting).

83. *See, e.g.*, Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 443 (1985) ("[T]he distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates . . . that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary."). *Cf.* David Schraub, *The Perils and Promise of the Holder Memo*, 2012 CARDOZO L. REV. DE NOVO 187, 195–96 (observing that the public pronouncement by the Attorney General that sexual orientation ought to receive heightened scrutiny status may paradoxically make that legal outcome less likely).

84. Schraub, *supra* note 80, at 1461–65 (observing that, historically, the presence or absence of political power has played little determinative role in deciding which groups receive heightened scrutiny); *see also infra* notes 85–89.

85. Jack Balkin, *What* Brown *Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1552 (2004).

86. Volokh, *supra* note 8, at 1122.

87. *See id.* at 1122–23 (stating that legislators intuit that "a movement that is winning tends to continue to win").

88. J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2340 (1997).

89. Balkin, *supra* note 85, at 1552.

90. 411 U.S. 677 (1973).

sex-based classification.[91] By the time *Frontiero* reached the high court, Congress had begun to attend to the problem of sex discrimination.[92] The decision to treat the increasing democratic consensus against sex discrimination as a point in favor of enhanced judicial review, rather than a strike against it, was an important point of differentiation between the plurality and Justice Powell's concurrence. Justice Powell, joined by two other Justices, argued that the passage of the Equal Rights Amendment through Congress counseled deferring a decision on heightened scrutiny to the democratic branches, which were in the process of deciding that very question.[93] The plurality, by contrast, took the Congressional action as a signal for courts to step up their protection against sex discrimination.[94]

Frontiero's ambiguity on the matter has encouraged litigants to continue to selectively deploy political power against socially disadvantaged groups in order to weaken their legal position—and courts are remarkably cooperative. Many recent gay rights cases demonstrate this trend. Like women, who tried and failed to mount an ambitious constitutional challenge against their subordination relatively early in their political development,[95] homosexuals also attempted to use the courts to enact social change well before they attained any meaningful political power. The Supreme Court in 1972 heard, and promptly dismissed, the case of *Baker v. Nelson*, which challenged the constitutionality of Minnesota's restriction of marriage to opposite-sex couples.[96] Indeed, the Court's entire disposition of the case took up a grand

91. *See id.* at 682 (plurality opinion) (agreeing that sex-based classifications "are inherently suspect and must therefore be subjected to close judicial scrutiny").

92. *See* William N. Eskridge, Jr., *A Pluralist Theory of the Equal Protection Clause*, 11 U. PA. J. CONST. L. 1239, 1258 (2009) (observing that "feminists won heightened scrutiny for sex-based classifications *only* after they had revealed their political muscle in a series of anti-discrimination laws adopted by Congress in 1964 and 1972") (emphasis in original).

93. Frontiero v. Richardson, 411 U.S. 677, 692 (1973) (Powell, J., concurring) ("If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. By acting prematurely and unnecessarily, as I view it, the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment.").

94. *See id.* at 687–88 (taking note of Congressional legislation aimed at sex discrimination in employment and equal pay, along with the Equal Rights Amendment, to observe that "Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration") (plurality opinion).

95. *See* Bradwell v. Illinois, 83 U.S. 130, 139 (1873) (holding Illinois's refusal to admit women to the bar did not violate the privileges and immunities clause of the Fourteenth Amendment). Justice Bradley insinuated strongly in his concurrence that he did not believe the movement for women's equality had been successful enough to warrant securing their right to practice law. *Id.* at 142 (Bradley, J., concurring) ("The humane movements of modern society, which have for their object the multiplication of avenues for woman's advancement, and of occupations adapted to her condition and sex, have my heartiest concurrence. But I am *not prepared to say* that it is one of her fundamental rights and privileges to be admitted into every office and position . . . .") (emphasis added).

96. 409 U.S. 810 (1972).

total of a single sentence: "Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question."[97]

As gays and lesbians began exhibiting more political influence, however, the rhetoric of the judiciary began to shift, evincing more sticky slope characteristics.[98] Whereas earlier decisions, such as *Padula v. Webster*, used the officially ratified discrimination against gays as a warrant for denying heightened scrutiny,[99] the Ninth Circuit in *High Tech Gays v. Defense Industry Security Clearance Office* became the first court in the nation to reject heightened scrutiny for gays on the grounds that they were beginning to overcome that discrimination.[100] The court observed that "legislatures have addressed and continue to address the discrimination suffered by homosexuals on account of their sexual orientation through the passage of anti-discrimination legislation."[101] "Thus," the court reasoned, "homosexuals are not without political power; they have the ability to and do attract the attention of the lawmakers, as evidenced by such legislation."[102] The evidence supporting this determination was quite scanty: in a footnote, the opinion cited to a hodgepodge of city ordinances prohibiting discrimination on the basis of sexual orientation, as well as statewide laws passed in Washington and Michigan (the latter relating only to health care provision), and finally a hate crimes bill in California.[103] But the Ninth Circuit at least cited actual victories—a Colorado district court found that gays and lesbians could not enjoy the legal protections associated with being a "suspect class" on the grounds that the state constitutional amendment discriminating against them, although ratified through a popular referendum, did not pass by a landslide.[104]

Courts in Maryland and Washington adopted similar logic in upholding, against constitutional challenges, their states' restriction of marriage to

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97. *Id.* at 810. Despite this cavalier treatment, the Court's decision was technically on the merits and thus is binding on lower federal courts. *See* Mandel v. Bradley, 432 U.S. 173, 176–77 (1977) (holding that such summary dismissals are binding on lower courts, but limited to the narrow facts).

98. *See* Schraub, *supra* note 80, at 1456–60 (reviewing federal and state cases).

99. 822 F.2d 97, 103 (D.C. Cir. 1987) (rejecting heightened scrutiny for gays as a class because the underlying conduct was, at the time, legally proscribable).

100. 895 F.2d 563, 574 (9th Cir. 1990). The Court also determined in a single sentence that "[h]omosexuality is not an immutable characteristic; it is behavioral." *Id.* at 573.

101. *Id.* at 574 (footnote omitted).

102. *Id.* (internal quotation marks omitted).

103. *Id.* at 574 n.10.

104. Evans v. Romer, No. 92 CV 7223, 1993 WL 518586 at *12 (Colo. Dist. Ct. Dec. 14, 1993) ("According to the figures presented to the court, more than 46% of Coloradans voting voted against Amendment 2. Testimony placed the percentage of homosexuals in our society at not more than 4%. If 4% of the population gathers the support of an additional 42% of the population, that is a demonstration of power, not powerlessness."), *aff'd on other grounds*, 882 P.2d 1335 (Colo. 1994) (affirming trial court's separate holding that the Colorado law unconstitutionally infringed on a fundamental right), *aff'd*, Romer v. Evans, 517 U.S. 620 (1996).

opposite-sex couples.[105] Both courts placed great weight on their respective states' passage of various anti-discrimination ordinances protecting gays and lesbians. Objectively, anti-discrimination measures "acknowledge—rather than mark the end of—a history of purposeful discrimination."[106] However, the Washington court claimed that the recent addition of sexual orientation to the state's anti-discrimination provision showed that gays and lesbians "exercise increasing political power," which prevented them from receiving heightened scrutiny.[107] The Maryland Court of Appeals cited an array of anti-discrimination measures and policies adopted by the state as proof that gays and lesbians do not deserve "extraordinary protection from the majoritarian political process,"[108] though at least the Maryland court purported to recognize "[t]he irony . . . that the increasing political and other successes of the expression of gay power works against Appellees . . . ."[109] In all these cases, the official rationale the courts gave for rejecting the claims of gay and lesbian litigants lay in the movement's previous victories in other political and judicial conflicts.

Because the demonstration of any political power, no matter how minimal,[110] is sufficient to reject heightened scrutiny under a plausible conception of the prevailing doctrine, even minor political triumphs by marginalized groups can have perverse effects on later litigation. Where there is no constraining precedent indicating which "tier" a group falls into, judges are more likely to rely on their individual conception of the group's political power to determine where it fits on the scrutiny scale. Ironically, this pattern of jurisprudence inherently discriminates against groups who have only recently begun flexing their political and legal muscles, because such groups will have had less time to build up a resume of cases clearly demonstrating their status as groups who deserve and require judicial assistance.

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105. *See* Conaway v. Deane, 932 A.2d 571, 611 (Md. 2007); Andersen v. King County, 138 P.3d 963, 975 (Wash. 2006).

106. Hernandez v. Robles, 855 N.E.2d 1, 28 (N.Y. 2006) (Kaye, C.J., dissenting) (citing Frontiero v. Richardson, 411 U.S. 677, 687–88 (1973)).

107. *Andersen*, 138 P.3d at 975. However, it also cited the democratic reversal of decisions in Hawaii and Alaska affording gays and lesbians heightened protection—in other words, demonstrations of gay and lesbian political impotency in those states—as further reason for rejecting heightened scrutiny in Washington. *See id.*

108. Conaway v. Deane, 932 A.2d at 611 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)) (internal quotation marks omitted).

109. *Id.* at 614 n.56.

110. *See Romer*, 1993 WL 518586 at *12. One opponent of gay rights argued that gays and lesbians had demonstrated their political power because "American voters have elected at least seventy-five open homosexuals into local, state and federal offices." Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 B.Y.U. L. REV. 1, 93 (footnote and quotation marks omitted). This translated to roughly 0.015% of all elected positions in the United States. Schraub, *supra* note 83, at 193 (citing 1 1992 CENSUS OF GOVERNMENT: POPULARLY ELECTED OFFICIALS, at v (June 1995)).

In sum, the *descriptive* claim of scholars like Jack Balkin and others is that legal protections for marginalized groups are slippery—they are more likely to occur as the group begins to demonstrate political influence and power.[111] However, the *normative* doctrine courts claim to be applying is sticky—protections wane as political clout grows.[112] Combined, these observations allow unsympathetic courts to seamlessly pivot between rationales to avoid protecting disadvantaged minorities—safely ignoring them when they are weak, then extolling their influence and power when they grow stronger.[113] The tension between the formal (sticky) doctrine, and the causal (slippery) dynamics that actually account for the timing of the extension of protections to marginal groups, leads to a severe indeterminacy in equal protection law.

2. Establishment Clause Sticky Slopes

A core intent of Establishment Clause jurisprudence is to guard against the "fusion of governmental and religious functions . . . ."[114] Courts will thus sometimes strike down legislative schemes that benefit certain groups if those groups are deemed to have gained too much political power. This approach runs up against legislative efforts to provide accommodations for minority religious practices. Because a seemingly abnormal expression of political power may arouse the judiciary's Establishment Clause suspicions, a sticky slope situation manifests.

Though historically the ideal of the melting pot has run strong in the American mind, religion is one area in which our collective political ideology is notably counterassimilationist.[115] American statutory law explicitly protects religious groups whose practices differ from those of the majority,[116] though

111. *See supra* notes 84–89 and accompanying text.

112. *See supra* notes 98–109 and accompanying text.

113. *See* Schraub, *supra* note 80, at 1445 ("Few courts are actually willing to protect the politically marginal. Yet once those groups begin emerging from the fringes of society, judges are eager to use that fact to justify continued nonintervention.").

114. Larkin v. Grendel's Den, 459 U.S. 116, 126 (1982) (citation and internal quotation marks omitted).

115. *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1139 (1990) ("The ideal of free exercise of religion . . . is that people of different religious convictions are different and that those differences are precious and must not be disturbed. . . . The ideal of free exercise is counter-assimilationist; it strives to allow individuals of different religious faiths to maintain their differences in the face of powerful pressures to conform."). McConnell cites to an array of founding-era state constitutional provisions which all provided for an expansive free exercise clause designed to protect religious expression that would otherwise be at odds with majoritarian legislation. *See id.* at 1116–20.

116. *See* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb (1993)). RFRA is only enforceable against the federal government. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (holding RFRA unconstitutional as applied to state and local government); *see also* Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 424 n.1 (2006) (recognizing that in *City of Boerne* the Court "held the application to States to be beyond Congress' legislative authority under § 5 of the Fourteenth Amendment"). Many states, however, have enacted their own "mini-RFRAs" to accomplish the same effects. *See, e.g.*, FLA.

our constitutional doctrine has been notoriously stingy on the matter.[117] Hence, normatively speaking we are committed to enabling religious groups of all sizes some measure of diversity and autonomy from general social practices.[118] But the manner in which this commitment manifests in the political sphere places religious minorities in a severe bind.

Religious majorities, by and large, do not need to explicitly pursue religious accommodation either in the legislature or in the courts—they enjoy an "inherent exemption from unfavorable legislative action."[119] Dominant majorities, after all, are unlikely to deliberately or inadvertently discriminate against themselves.[120] It is religious minorities who are most in need of attaining some political power in order to secure whatever it is that differentiates their needs from those of the majority.[121]

Unfortunately, the necessity of minority religious political agitation is likely to raise judicial hackles, for several reasons. One is simply that courts are inherently suspicious of religious political activity on Establishment Clause

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STAT. ANN. §§ 761.01–05 (LexisNexis 2008); 775 ILL. COMP. STAT. ANN. 35/1-30 (LexisNexis 2008); TEX. CIV. PRAC. & REM. § 110.003 (West 2008).

Technically speaking, RFRA does not explicitly concern itself with majority versus minority faiths—it protects all citizens from unwarranted religious impositions. In effect, though, the minority will mostly enjoy the benefit, since the majority faith is unlikely to discriminate against itself (at least without a sufficiently compelling reason). *See infra* notes 119–21 and accompanying text.

117. *See, e.g.*, Emp't Div. of Or. v. Smith, 494 U.S. 872, 882 (1990) (holding the Free Exercise clause did not prohibit application of state drug laws to religiously-based ceremonial ingestion of peyote); Bowen v. Roy, 476 U.S. 693, 699–700 (1986) (holding that Free Exercise Clause did not prohibit government agency use of a Social Security number to identify appellee's daughter in providing public benefits); Reynolds v. United States, 98 U.S. 145, 166–68 (1878) (holding that Free Exercise Clause did not provide a valid defense to violation of bigamy laws).

118. *Cf.* Abner S. Greene, Kiryas Joel *and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 44 (1996) (arguing that devolving political power to the Satmar village of Kiryas Joel would have been appropriate and consistent with our broader commitment to nurture distinctive "nomic" communities).

119. James D. Gordon III, *The New Free Exercise Clause*, 26 CAP. U. L. REV. 65, 69 (1997) (internal quotation marks and citation omitted); *see also* Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 15 ("[T]he majority's deeply held beliefs will normally be reflected in legislation without an exemption.").

120. *See* Gordon, *supra* note 119, at 70 ("What the majority believes interferes with its religious practices . . . is unlikely to become law; what the majority considers necessary for its religious practices . . . is unlikely to be prohibited by law; and what the majority finds objectionable . . . is not likely to be made a legal obligation.") (quoting FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE 115 (1995)); Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 BYU L. REV. 299, 313–14 (observing that it is unlikely that majorities will either intentionally or inadvertently burden their own religious practices). It is also worth noting that if the majority does decide to pass a law burdening its own religious practice, it is likely that its rationale for doing so represents a particularly grave or compelling governmental interest. David Schraub, *When Separation Doesn't Work: The Religion Clause as an Anti-Subordination Principle*, 5 DARTMOUTH L.J. 145, 162 (2007).

121. Gordon, *supra* note 119, at 69 (observing that while religious majorities can rely on the aforementioned "inherent exemption" from unfavorable legislation, "minority religions with significant political power can often protect themselves in the legislative process by obtaining express legislative exemptions from laws that would otherwise burden their religion").

grounds.[122] But two other reasons are more closely tied to the problem of the sticky slope. First, the presumption regarding minority faiths is that they are relatively politically powerless—that is part and parcel of being a minority. Hence, successful minority political campaigns will always stand out as seemingly aberrant or extraordinary. Second, these accomplishments will be compared back against the behavior of the dominant religious groups—groups which, due to their structural advantage,[123] need no "special" political accommodations at all. This, too, amplifies the exceptional character of explicit minority religious action. In both cases, religious minorities are punished for being successful—too successful—on the political playing field.

The stickiness of religious political power manifested itself most clearly in the case of *Kiryas Joel v. Grumet*.[124] The Supreme Court, finding an Establishment Clause violation, struck down the creation of a school district the borders of which tracked the Satmar Hasidic village of Kiryas Joel. The school district was created because the Satmar community included a small set of students with disabilities entitled to governmentally funded accommodations and services under state and federal law.[125] At first the students were sent to the local public schools; however, this experiment was ended after the students experienced "panic, fear[,] and trauma" from the arrangement.[126] As an alternative, the Satmar convinced the New York state legislature to form the new school district solely to provide these children with disabilities with the benefits to which they were legally entitled.[127]

In striking down the arrangement, the Supreme Court was particularly attuned to the degree of political power vested in the Satmar. This was demonstrated in two areas. First, the court worried about the degree of control the Satmar would exercise over the new school district. Though the state of course did not give control of the district to the Satmar *per se*, the statute followed the borders of the village of Kiryas Joel and thereby ensured that any and all elected officials governing the district would be members of the community.[128] Second, the court was attentive to the seemingly disproportionate power the Satmar wielded to get the law passed in the first

122. *See* Oregon v. City of Rajneeshpuram, 598 F. Supp. 1208, 1216–17 (D. Ore. 1984) (declaring that the very existence of the City of Rajneeshpuram—a city which was created by members of a minority religious sect and designed to offer a space where they could exist as a separate, independent community—constituted an Establishment Clause violation). For a general discussion of the problem, see generally David E. Steinberg, Note, *Church Control of a Municipality: Establishing a First Amendment Institutional Suit*, 38 STAN. L. REV. 1363 (1986).

123. *See supra* notes 119–20 and accompanying text (discussing the "inherent exemption" enjoyed by the majority).

124. 512 U.S. 687 (1994).

125. *Id.* at 692–93 (citing Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (1988 ed. and Supp. IV); N.Y. Educ. Law, Art. 89 (McKinney 1981 and Supp. 1994)).

126. *Id.* at 692.

127. *Id.* at 693–94.

128. *Id.* at 698–99.

place.[129] Justice Souter's majority opinion indicated that the Satmar possessed political power uncharacteristic of a marginal sect, arguing that "this school district was created by a special and unusual Act of the legislature" which "gives reason for concern whether the benefit received by the Satmar community is one that the legislature will provide equally to other religious (and nonreligious) groups."[130] Justice O'Connor echoed this point, even though she conceded that the Court's worry was speculative and "the Satmars may be the only group who currently need this particular accommodation."[131] Commentators defending the decision likewise focused on the Satmar's political clout to show that they were inappropriate subjects for legislative protection.[132]

The Court's analysis demonstrates the paradox of the sticky slope with depressing exactitude. The Satmar's unique way of life regularly put them into conflict with generally applicable laws and policies, not because the state was overtly hostile to them, but simply because their mode of social organization was so markedly different from the average New Yorker contemplated by the legislature.[133] When the Satmar's desire to maintain multi-family houses conflicted with local zoning laws, they were able to form their own village which permitted such land use.[134] When the Satmar's private schooling regime threatened to deprive their disabled children of their federal rights to an equal education, the Satmar were able to convince the local public school to send (secular) special educators to an annex of a private school in the village.[135] When the Supreme Court invalidated such educational arrangements in *Aguilar v. Felton*[136] and *School District of Grand Rapids v. Ball*,[137] the Satmar

129. *See id.* at 702 (arguing that "the district's creation ran uniquely counter to state practice, following the lines of a religious community where the customary and neutral principles would not have dictated the same result . . . .").

130. *Id.*

131. *Id.* at 716 (O'Connor, J., concurring in the judgment).

132. *See* Judith Lynn Failer, *The Draw and Drawbacks of Religious Enclaves in a Constitutional Democracy: Hasidic Public Schools in Kiryas Joel*, 72 IND. L.J. 383, 391 (1997) ("As an enclave group, it is not clear how healthy the Satmars are for the larger democratic community, especially when they exercise political power."); Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 270 (1994) (arguing that the New York legislature "predictably responded to the circumstances and political strength of the affected sect. . . . Is it imaginable that New York State would create a new public school district at the behest of an insular group of Branch Davidians or members of the Unification Church[?]"); Ira C. Lupu, *Uncovering the Village of Kiryas Joel*, 96 COLUM. L. REV. 104, 118–19 (1996) (arguing that "New York's politicians had very good reason to be responsive to the concerns of the Village" because they are a swing vote and have high turnout rates, because the law in question had "all the marks of insider politics," and questioning if "most small religious sects could command [this] kind of legislative clout").

133. *See Kiryas Joel*, 512 U.S. at 712–13 (O'Connor, J., concurring in the judgment).

134. *Id.* at 712.

135. *Id.* at 692 (majority opinion).

136. 473 U.S. 402 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

137. 473 U.S. 373 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

successfully petitioned the legislature for assistance and successfully got their own school district.

This chain of events—the Satmar convincing the legislature to free them from what Justice Kennedy admitted was a "predicament into which we put them"[138]—could have been considered a great example of democracy responding to the needs of a minority. Instead the decision treated the Satmar's successes as something suspicious: an example of religious favoritism enabling a preferred sect to secure benefits beyond those it is due.[139] This logic depends on the perceived mismatch between the amount of political clout considered to be appropriate for a small religious organization such as the Satmar, and the political benefit it received through the legislative process.[140] The case demonstrates that even where religious minorities are able to win passage of an accommodative law, "the strict separation paradigm employs the establishment clause to strike down the legislation as religious favoritism."[141]

Nor can the Court's behavior be explained either as a vigilant guard against giving too much to the political "haves," or as a solicitude towards the political "have nots." On the former, Justice Scalia noted in dissent that several states and smaller political units (down to the county level) were all or nearly-all of one religion, today or at the time of their admission to the Union.[142] Yet because these were "natural" creations rather than legislative contrivances, their status was of course unthreatened by the *Kiryas Joel* opinion. As for the latter, Michael McConnell wryly observed that the Court found no constitutional problem when the legislature chopped up Hasidic communities to *deprive* them of political representation.[143] It was only when a Hasidic group appeared to be winning the political game that "stern warnings against 'segregation' along religious lines" were issued.[144]

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138. *Kiryas Joel*, 512 U.S. at 732 (Kennedy, J., concurring in judgment).

139. *See id.* at 716 (O'Connor, J., concurring in the judgment). This is particularly ironic because the Satmar had always contended that they desired a separate school for entirely secular reasons: their children were experiencing "panic, fear[,] and trauma" in the local public schools. *Id.* at 692. Moreover, the New York state courts had previously ruled that they could not assert a free exercise claim to a separate school as a matter of right precisely because the harm they alleged was secular, not religious, and thus not the subject of free exercise analysis. Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 189 (1988). Once the Satmar successfully petitioned the legislature to provide them this secular accommodation, the Supreme Court converted it into a religious grant, which necessitated strict Establishment Clause review.

140. *See* Schraub, *supra* note 120, at 146 n.4 (explaining why political power is unlikely to prevent religion clause doctrine from yielding unfavorable results to smaller religious groups).

141. *Id.* at 146.

142. *Kiryas Joel*, 512 U.S. at 735–36 & nn.1–2 (Scalia, J., dissenting).

143. Michael W. McConnell, *The Church-State Game: A Symposium on* Kiryas Joel, FIRST THINGS, Nov. 1994, at 40–41; *see* United Jewish Orgs. v. Carey, 430 U.S. 144, 152, 168 (1977) (finding no constitutional infirmity when New York cracked the Hasidic community into several legislative districts, eliminating their representation in order to create other majority-minority districts).

144. McConnell, *supra* note 143, at 41 (quoting *Kiryas Joel*, 512 U.S. at 711 (Stevens, J., concurring)).

To the extent we prefer to resolve social problems through democratic decision making, rather than via judicial fiat, it should be a welcome relief that formerly marginalized religious minorities have managed to obtain sufficient legislative clout to protect their communal interests.[145] This is not to say that the political endeavors of minority religious faiths should be immune from constitutional scrutiny, nor does it mean they will always make salutary choices.[146] But the alternatives are unappealing: either depending on courts to swoop in and protect the minority group—an option which had already admittedly failed the Satmar[147]—or hope that a political environment where the minority group is severely limited in the remedies it can secure for itself will nonetheless adequately protect their interests. Either way, the minority—unable to fully advocate for itself—is consigned to relying on the magnanimity of the majority.

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The Fourteenth Amendment's Equal Protection Clause and the First Amendment's Establishment Clause are both viewed as important bulwarks against majoritarian oppression. And often they are. But their doctrinal structures at times evince a deep suspicion of minority success. Whether through a (historically dubious) claim that only the "politically powerless" can be accorded heightened judicial scrutiny, or a selectively applied fear of disproportionate influence exercised by minority religious sects, both constitutional clauses explicitly incorporate a sticky slope into their doctrinal fabric.

C. Wrong Argument Sticky Slopes

As discussed in the previous section, sticky slopes are sometimes consciously incorporated into particular legal doctrines. At least formally

145. *See* Lisa Schultz Bressman, *Accommodation and Equal Liberty*, 42 WM. & MARY L. REV. 1007, 1044 (2001) ("Minority religious groups frequently possess enough political power, either alone or with the backing of other religious groups, or engender enough political compassion to achieve their goals.").

146. For example, *Incantalupo v. Lawrence Union Free School District*, 652 F. Supp. 2d 314 (E.D.N.Y. 2009), involved a suit alleging in essence that the predominantly Orthodox Jewish composition of the local school board had turned it into an extension of Jewish religious aims. Because the Orthodox Jewish community did not educate their students in public schools, their educational program involved cuts in school spending and a *de facto* shift in communal resources towards private schooling. *See id.* at 320–22. This program strikes me as gravely unsound, even immoral. But of course, in a democratic polity, electoral victors—even minority electoral victors—are allowed to pursue deeply wrong policies.

147. *See Kiryas Joel*, 512 U.S. at 730 (Kennedy, J., concurring in the judgment) ("[T]he problem to which the Kiryas Joel Village School District was addressed is attributable in no small measure to . . . rulings by this Court."). Justice Kennedy is referring to *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), and *Aguilar v. Felton*, 473 U.S. 402 (1985), which struck down an arrangement by which public teachers had been able to provide the statutory benefits in question to the disabled Satmar children on-site at private Satmar academies. Both *Grand Rapids* and *Aguilar* were overruled three years after *Kiryas Joel*. *See* Agostini v. Felton, 521 U.S. 203 (1997).

speaking, a court which follows the rules should observe a sticky slope. However, some sticky slopes are not so overt. At times, advocates will discover that particular successes they have early on in pursuing a legal or social agenda will foreclose future agenda items. Argumentation which secured initial victories can and often is turned against its original promoters.

In *Parents Involved in Community Schools v. Seattle School District No. 1*,[148] an intense colloquy developed between Chief Justice Roberts and Justice Thomas, and Justices Stevens and Breyer, over whose side could properly claim the legacy of *Brown v. Board of Education*.[149] Justice Breyer's lengthy dissent concluded by asking "what of the hope and promise of *Brown*?" and stating his view that the plurality opinion "threaten[s] the promise" of that decision.[150] Justice Stevens's dissent accused the plurality of "rewrit[ing] the history of one of this Court's most important decisions" through pointed use of the passive voice.[151] Whereas Chief Justice Roberts wrote that "[b]efore *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin[,]"[152] Justice Stevens acidly observed that the sentence carefully omits who was doing the ordering and who was so ordered: "[T]he history books do not tell stories of white children struggling to attend black schools."[153]

Justice Thomas responded by accusing his colleagues of replicating the logic of *Plessy v. Ferguson*[154] "to a distressing extent."[155] But his opening salvo in the debate was referencing the very arguments made by Thurgood Marshall and his NAACP colleagues when litigating *Brown* itself. Citing several of the briefs authored by lawyers for the plaintiffs in *Brown*, Justice Thomas argued that the "colorblind Constitution" was the "rallying cry for the lawyers who litigated *Brown*."[156] Chief Justice Roberts's argument took similar form, likewise citing to arguments made by the plaintiffs in *Brown* that pointed towards a colorblind approach and writing that "it was *that* position that prevailed in this Court," not the alternative vision forwarded by Justice Breyer and his cohorts.[157]

For Thurgood Marshall, at least, there is little mystery as to his ultimate view on the topic of race-conscious decision making in government. Upon

148. 551 U.S. 701 (2007) (holding unconstitutional race-conscious school assignment plans designed to preserve integration in districts which had previously achieved unitary status).

149. 347 U.S. 483 (1954).

150. *Parents Involved*, 551 U.S. at 867–68 (Breyer, J., dissenting).

151. *Id.* at 799 (Stevens, J., dissenting).

152. *Id.* at 747 (plurality opinion) (citation omitted).

153. *Id.* at 799 (Stevens, J., dissenting).

154. 163 U.S. 537 (1896).

155. *Parents Involved*, 551 U.S. at 774 (Thomas, J., concurring).

156. *Id.* at 772 (Thomas, J., concurring) (citations omitted).

157. *Id.* at 747 (plurality opinion) (emphasis added).

appointment to the Supreme Court, now-Justice Marshall expressed his view quite cogently in *Bakke*:

> I agree with the judgment of the Court only insofar as it permits a university to consider the race of an applicant in making admissions decisions. I do not agree that petitioner's admissions program violates the Constitution. For it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.[158]

Other attorneys who participated in *Brown* responded to the *Parents Involved* plurality's characterization of their arguments with a mix of disdain and outrage.[159] Robert Carter, whose argument before the *Brown* court was stated to have "no ambiguity" by Chief Justice Roberts,[160] said "[i]t's to stand that argument on its head to use race the way they use it now."[161] Jack Greenberg called the plurality opinion "preposterous," while William T. Coleman, Jr., said it was "100 percent wrong."[162]

It is possible that Justice Marshall and his NAACP colleagues simply changed their minds in the intervening period, with their prior faith in the ability of a "colorblind Constitution" to heal racial divides dashed upon the rocks of actual lived experience. Alternatively, perhaps the *Brown* attorneys made a tactical decision in *Brown* and its predecessors to avoid too aggressively challenging the racial status quo. In *Brown*, of course, the NAACP was asking the Supreme Court to enact no less than a revolution, both constitutionally and in terms of America's racial practice. It would seem prudent for the attorneys to avoid making the step look even *more* radical than it already undoubtedly appeared. Either way, the fact remains that the victory in *Brown* was later used to block further reforms that the racial progressives who led the fight deemed essential for achieving equality in America. Even though they were victorious, it seems as if they deployed the wrong argument if the goal was to preserve momentum for future progress.

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158. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 387 (1978) (Marshall, J., concurring and dissenting). This has not stopped other commentators from locating Justice Marshall definitively in the colorblind camp. *See, e.g.*, Stephen F. Smith, *Clarence X? The Black Nationalist Behind Justice Thomas's Constitutionalism*, 4 N.Y.U. J. L. & LIBERTY 583, 619 n.134 (2009) ("Ironically enough, the colorblindness principle that Professor Rosen and others criticize Justice Thomas for adopting was advocated by none other than Justice Marshall himself."); Stephen F. Smith, *The Truth About Clarence Thomas and the Need for New Black Leadership*, 12 REGENT U. L. REV. 513, 534 (2000) (promoting Marshall's defense of a constitutional colorblindness principle as his "greatest triumph as an advocate") [hereinafter Smith, *Tribute*].

159. *See* Adam Liptak, *The Same Words, but Differing Views*, N.Y. TIMES, Jun. 29, 2007, at A24.

160. *Parents Involved*, 551 U.S. at 747 (plurality opinion) (citation omitted).

161. Liptak, *supra* note 159.

162. *Id.*

1. Miscalculated Arguments

When attempting significant social reform, advocates often seize upon a particular strategy or ideology which they hope will lead them to victory.[163] Unfortunately for them, sometimes they select poorly. Worse yet, sometimes they secure victories with reference to a promising tactic, only to later discover that the strategy is a dead end. When this happens, they may find their overall agenda deeply tied with the practical program used to achieve it. Having miscalculated the ability of their mount to take them where they wanted to go, they find themselves in a quandary—unable to effectively renounce their strategy even as it proves itself feeble or even counterproductive. The history and development of the "colorblind" model is arguably an example of this phenomenon.

Racism, in the words of John Solomos and Les Back, is a "scavenger ideology, which gains its power from its ability to pick out and utilise ideas and values from other sets of ideas and beliefs in specific socio-historical contexts . . . ."[164] Like many other "isms," racism is a mutable ideology, capable of shifting and adapting to a variety of changing circumstances—be they social, historical, political, or legal. Consequently, it is unsurprising that a legal ideal or strategy that at one point seemed productive in fighting hierarchy might later become a burden.[165]

An early example demonstrating the flexibility of racist ideology after *Brown* came not from the Court's deployment of "colorblind" language, but from its use of social science data and its reference to the psychological harms suffered by Black children in segregated spaces.[166] Many advocates took away from the decision the conclusion that social science evidence was the key in

163. This Section concentrates on legal *argument*, such as constitutionally mandated colorblindness, racism as parallel to Nazism, and the legal relevance of social science research. But it can as easily be applied to broader social movement strategies. For example, Michael J. Klarman argues that *Brown* mistakenly encouraged civil rights actors to refrain from direct mobilization and collective protest, in the vain hope that the courts alone could lead them to victory. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 377–79 (2004). As a result, valuable years were lost before the civil rights protest movement began in earnest in the 1960s. *Id.*; *see also* David S. Meyer & Steven A. Boutcher, *Signals and Spillover:* Brown v. Board of Education *and Other Social Movements*, 5 PERSPECTIVES POL. 81, 83–89 (2007) (arguing that the movement strategy revealed by *Brown* spilled over into the tactics of other contemporary social movements, which adopted it regardless of whether it was best suited to their own situations).

164. JOHN SOLOMOS & LES BACK, RACISM AND SOCIETY 213 (1996).

165. *See* Christopher W. Schmidt, Brown *and the Color-Blind Constitution*, 94 CORNELL L. REV. 203, 235 (2008) ("While an anticlassification interpretation of *Brown* would be pressed with particular urgency as it received a newfound conservative political valence in the 1960s and beyond, this interpretation is more than just a pragmatic defense against the transformative potential of an antisubordination interpretation. Anticlassification claims . . . were a pervasive part of the civil rights debate in the period preceding and immediately following *Brown*.").

166. *See* Brown v. Bd. of Educ., 347 U.S. 483, 494 n.11 (1954) (citation omitted).

convincing courts to respond to the pleas of civil rights litigants.[167] Others feared that this very attribute of *Brown* had painted them into a corner. Noting the disciplinary frailty of the relatively young behavioral sciences field,[168] Edmond Cahn fretted that relying on the outcomes of such studies as a prerequisite to securing equal protection of the law was exceptionally dangerous, given that the field was rapidly evolving and could not confidently be considered solely a weapon of racial progressivism.[169] Meanwhile, contemporary observers watched as segregationists began arguing in court "that there is personality damage to *white* children forced to mix with persons they consider obnoxious."[170] "The Court, by entertaining the psychological argument in support of its decision, opened the way for this sort of rebuttal."[171]

Normative arguments are acutely sensitive to surrounding social context. When the context changes, the entire valence of a particular argument can change with it.[172] One of the earliest uses of social science in a legal context came in *Berea College v. Kentucky*,[173] where the Kentucky attorney general used contemporary social science pointing to inherent racial differences as supporting evidence for a law mandating school segregation.[174] This was in accordance with the dominant social science theories of the time, most of which aggressively promoted racial separation.[175] Later, as the composition of the social science discipline began to change, it became a tool instead of an obstacle for advocates promoting racial equality, as *Brown* demonstrated.[176] And yet, there is no reason to suspect that it could not waft back towards

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167. For example, Will Maslow of the American Jewish Congress stated:

> As long as the argument revolved about the size of classes, the length of school terms, the salaries of teachers, the physical condition of the school plant or the distance required to travel to school, little headway was made in convincing the court. But when the psychologists began to argue about the injury to pupil morale caused by governmentally imposed segregation . . . the Court pricked up its ears.

Will Maslow, *Address, The Uses of Law in the Struggle for Equality*, 22 SOC. RES. 297, 311 (1955).

168. Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 167 (1955) (arguing that social psychology suffers from "(1) the recurrent lack of agreement on substantive premises, and (2) the recurrent lack of extrinsic, empirical means for checking and verifying the inferred results").

169. *See id.* at 157–58, 167–68.

170. Herbert Garfinkel, *Social Science Evidence and the School Segregation Cases*, 21 J. POL. 37, 42 (1959) (emphasis in original).

171. *Id.*

172. *See Introduction* to CRITICAL RACE THEORY: THE CUTTING EDGE, at xv (Richard Delgado ed., 1995) ("Normative discourse . . . is highly fact-sensitive—adding even one new fact can change intuition radically."); Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 934 (2006) ("Changes in the ecology of a principle's application create uncertainty about the principle's meaning, which in turn provides incentive and opportunity for interested parties to propose new accounts of the principle's jurisdiction.").

173. 211 U.S. 45 (1908).

174. Alan J. Tomkins & Kevin Oursland, *Social and Social Scientific Perspectives in Judicial Interpretations of the Constitution: A Historical View and an Overview*, 15 LAW & HUM. BEHAV. 101, 107–08 (1991).

175. Herbert Hovenkamp, *Social Science and Segregation Before* Brown, 1985 DUKE L.J. 624, 629–30.

176. *See* Brown v. Bd. of Educ., 347 U.S. 483, 494 n.11 (1954).

illiberal ends, which is part of the reason why Justice Thomas dismissed the use of social science evidence in the *Parents Involved* case with the pithy aphorism: "[I]f our history has taught us anything, it has taught us to beware of elites bearing racial theories."[177]

The phenomenon where facially identical ideals change their political meaning and affiliation is known as "ideological drift."[178] Jack Balkin gives several well-known examples of ideological drift across American history: the ideology of "colorblindness" being used to oppose segregation, then affirmative action; *laissez-faire* economics being touted by Jacksonian populists, then business industrialists; judicial deference towards social and economic legislation being the hallmark of liberal New Dealers, then Nixonian conservatives.[179] Balkin analogizes legal and political ideas to signs, and argues that, like signs, ideas possess iterability[180] which makes them vulnerable to changes in meaning.[181]

If iterability is what makes a sign or idea liable to changes in meaning, then it follows that only ideas which are iterated will drift. Consequently, part of what makes an idea vulnerable to such a move is the very fact that it is gaining mainstream acceptance. As Balkin notes, "as a legal principle is repeatedly adopted and employed, as people accept it, argue about it, swear allegiance to it and apply it, its political valence changes."[182] This is quite sensible: as ideals gain in political influence, there is an incentive for political actors to try to harness their power and direct it to their own ends. Being "anti-racist", for example, shifted from being a position of fringe radicals to a pre-requisite characteristic of any respectable American.[183] This is not to say that any branch of persons claiming to be adherents of a particularly ideology are

177. *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 780–81 (2007) (Thomas, J., concurring); *see also* RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE 269–315 (1996) (claiming at least some racial differences in innate intelligence, with African-Americans scoring one standard deviation below the mean vis-à-vis Whites in IQ tests).

178. J.M. Balkin, *Ideological Drift*, *in* ACTION AND AGENCY 13–31 (Roberta Kevelson ed., 1990) [hereinafter Balkin, *Ideological Drift*]; *see also* Jack M. Balkin, *Deconstruction's Legal Career*, 27 CARDOZO L. REV. 719, 731–32 (2005) [hereinafter Balkin, *Legal Career*]; J.M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869 (1993) [hereinafter Balkin, *Struggle*].

179. Balkin, *Ideological Drift*, *supra* note 178, at 13–14.

180. J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 749 (1987) (defining iterability as "the property of being able to be repeated in many different contexts").

181. *Id.* at 16–17; *see also* Mitchell, *supra* note 49, at 1388 (observing that "the Supreme Court announces constitutional doctrines behind a veil of uncertainty; it cannot anticipate or control how future court majorities might use or expand on its constitutional holdings in later cases"); Schauer, *supra* note 12, at 375 (noting that each time a legal principle is interpreted or applied by someone other than its original progenitor, there exists a risk of slippage in the principle's meaning).

182. Balkin, *Ideological Drift*, *supra* note 178, at 17.

183. *See* Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CALIF. L. REV. 1511, 1556 (1991) ("The need to deny one's status as a racist or sexist would seem prima facie evidence of the negative power that has come to be associated with those words."); *see also infra* notes 288–89.

lying—all parties might genuinely believe themselves to be heirs to the tradition in question.[184] The point is merely that an idea does not gain disciples who have any reason to war over its interpretation until after it has demonstrated some social, political, or intellectual potency.

Unfortunately, this also creates conditions ripe for a sticky slope. Balkin claims that "[i]deological drift occurs when the forms of background cultural and social power adapt to attempts to reform them."[185] As a reformist idea proves its viability through victories in the legal and political sphere, it becomes a ripe target for cooptation by conventional actors, who can both utilize its social force and pick off an emerging threat. This works in tandem with—not in opposition to—the mainstreaming of the idea, because the process by which the ideas are made palatable to the general public necessarily involves subtle modifications and reinterpretations as it is filtered through "increasingly less radical thinkers."[186] And so, Balkin argues, "[b]y the time that an idea has reached gradual acceptance, it is by definition no longer radical."[187] At that point, opponents of the political agendas held by the developers of the formerly radical idea can begin deploying it against its creators, "until the leftist slogans of the past are . . . hurled back at present day liberals by conservatives determined to protect what is now political and legal orthodoxy."[188] Ironically, the reason this maneuver has potency is precisely because of our historical memory of the injustice the original radicals were reacting against.[189] Their success in communicating their critique contributes to the very tools their enemies later wield against them.[190]

A classic example of this dynamic is in how anti-Nazism was deployed by Black leaders as an argument for civil rights. As Americans were fighting

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184. *See* Balkin, *Ideological Drift*, *supra* note 178, at 18–19 (noting that, for example, both Justice Douglas and Justice Frankfurter could honestly claim to be the heir to Justice Brandeis's legacy); Balkin, *Legal Career*, *supra* note 178 at 731–32 ("[D]ifferent groups can claim to be faithful adherents of the tradition and yet wish to continue it in radically different ways."); *see also* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1739 (1995) ("Incompletely specified agreements have distinctive social uses. They may permit acceptance of a general aspiration when people are unclear about what the aspiration means, and in this sense, they can maintain a measure of both stability and flexibility over time.").

185. Balkin, *Ideological Drift*, *supra* note 178, at 23.

186. *Id.* at 19.

187. *Id.*

188. *Id.*

189. *See* Richard Lempert, *The Force of Irony: On the Morality of Affirmative Action and* United Steelworkers v. Weber, 95 ETHICS 86, 88–89 (1984) ("Why does racial discrimination excite us when so many other kinds of discrimination do not? It is because of the way we interpret history, associating racial discrimination with practices that now appear self-evidently evil . . . . [A] claim made by a white person as a member of the dominant majority draws its moral force largely from our collective horror at centuries of oppressing black people.").

190. The master's tools may never dismantle the master's house, Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, *in* SISTER OUTSIDER: ESSAYS AND SPEECHES 110–13 (1984), but the masters themselves have proven extraordinarily adept at using the slaves' tools to preserve and legitimize their regime.

World War II, theories explicitly predicated on racial supremacy became increasingly unpopular and untenable. Civil rights advocates took advantage of this to launch a frontal attack on the regime of White supremacy.[191] In response, defenders of the status quo searched for ways to tie the anti-discrimination stance to Nazi ideals. Opponents of the Ives-Quinn Act, New York's path-breaking statute barring racial discrimination in employment, portrayed it as creating a "Hitlerian Rule of Quotas" and a throwback to anti-Jewish quota restrictions.[192] What looked like an unambiguously pro-civil rights argument was in fact bitterly contested by opponents, who sought to turn it into a principle blocking reform. Though here they were unsuccessful, the attempt to link the civil rights agenda to an anti-equality set of principles would arise again with far greater potency in the future.[193]

A more recent example may have manifested in the facts surrounding *Parents Involved*.[194] The plurality labeled the integration plans in use by Seattle and Louisville unconstitutional because they lacked a remedial quality. Yet the history of the two districts renders this assertion quite complicated. The Louisville schools had been subject to court-ordered desegregation, but by 2000 achieved unitary status and the recognition that they had eliminated, to the extent practicable, the vestiges of their segregationist pasts.[195] The plan challenged in *Parents Involved* was first developed in 1996 and continued in essentially identical form after the consent decree was dissolved.[196] By contrast, the plurality stated that "Seattle has never operated segregated schools . . . ."[197] However, while no court ever issued a desegregation order to Seattle schools, this was primarily because the city settled several lawsuits by the NAACP out of court, implementing desegregation plans voluntarily.[198]

In both these cases, events that were or seemed to represent victories ended up causing severe problems later down the road. The litigants in Seattle should have been thrilled that they were able to force the city into making

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191. *See* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 6–7 (2000) (observing that World War II and the Cold War offered a brilliant opportunity for civil rights advocates to press their case for equality).

192. *See generally* Anthony S. Chen, *"The Hitlerian Rule of Quotas": Racial Conservatism and the Politics of Fair Employment Legislation in New York State, 1941–1945*, 92 J. AM. HIST. 1238 (2006) (discussing opposition to the Ives-Quinn Act).

193. *See* Hutchinson, *supra* note 16, at 949 (identifying the debate over Ives-Quinn as an early precursor of later attempts to link civil rights reform efforts to an anti-egalitarian quota regime). *See generally infra* Part II.D.

194. 551 U.S. 701 (2007).

195. *Id.* at 715–16; *see Hampton v. Jefferson Cnty. Bd. of Educ.*, 102 F. Supp. 2d 358, 360 (W.D. Ky. 2000) (lifting the consent decree).

196. *See Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 817–19 (2007) (Breyer, J., dissenting).

197. *Id.* at 712 (plurality opinion) (describing Seattle's plan as an attempt to remedy "racially identifiable housing patterns").

198. *See id.* at 808–10 (Breyer, J., dissenting) (providing an overview of the NAACP lawsuits directed at Seattle's segregated school system, and the city's response).

substantial, meaningful steps towards desegregating the local school system without a lengthy, expensive court battle. Instead, the fact that the plurality could say "*no court* ever found that Seattle schools were segregated in law" dramatically weakened the vitality of their prior victory.[199] Louisville opposed the dissolution of the consent decree, claiming that the vestiges of the old system continued to exert an influence.[200] It was forced to attempt to forestall what should have been a glorious day in its progression away from Jim Crow and towards racial egalitarianism, based on its (accurate) prediction that without maintaining the consent decree, it could not continue to implement the policies it believed were necessary to consolidate and preserve its accomplishments. The dissolution order meant that the policy that was constitutionally mandatory one day became illegal the next.[201]

The operation of sticky slopes in *Parents Involved* creates some rather bizarre incentives for local authorities who take racial integration to be a strong value. They must argue, strenuously, that the past and present behavior of their community exhibits a discrete and tangible racial harm that needs remediation. Justice Breyer suggested that Seattle, on remand, might simply *admit* that its schools were *de jure* segregated in order to access the remedial powers that the Court withheld from them.[202] Assuming Seattle's integration program was beneficial for Black children,[203] we are forced to accept the strange conclusion that those children would have been better off had Seattle been more explicitly segregationist, for a longer period of time. The very declaration of victory becomes a barrier to success.[204] Forcing litigants and activists to try to navigate this minefield—securing victories, but not too early, or too many of them, or of

199. *Id.* at 824–25 (Breyer, J, dissenting) (characterizing plurality opinion); *see also id.* at 736–37 (plurality opinion) (denying that Seattle schools had ever been segregated by law). As Justice Breyer indicates, the plurality's further claim that Seattle's schools were never segregated by law "is simply not accurate." *Id.* at 824.

200. *Id.* at 818.

201. *See id.* at 821 (noting that the plurality's standard would often foreclose a local body from forwarding a plan prior to a dissolution order that they intended to continue with after achieving unitary status).

202. *Id.* at 820 (asking whether or not Seattle could take this approach and questioning what the response of the Court would be under the plurality's standard).

203. I do not mean to discount the possibility, argued passionately by Justice Thomas, that it is not. *See id.* at 763–64 (Thomas, J., concurring) (arguing that there is substantial evidence, including within the Seattle school district itself, that Black students perform better in racially homogeneous environments). If Justice Thomas is correct, of course, then the victorious path does not lead through Seattle's and Louisville's integration plans. But many people disagree with Justice Thomas's views on this matter. The point of this analysis (and indeed, this Article) is not to endorse a particular view of what policy decisions constitute "real" victories versus defeats for a group—it is merely to show that given certain relatively common sets of political preferences, past victories can impede future results.

204. *See* Mario Barnes et al., *A Post-Race Equal Protection?*, 98 GEO. L.J. 967, 998 (2010) (complaining about the prevalent view whereby "forty-six years after the formal end to de jure segregation, colorblindness is no longer treated as an aspiration, but rather as a presumptive reality: we are post-race").

the wrong kind—poses a serious barrier to the project of social agitation writ large.[205]

In sum, reformers looking at legal strategies or political rhetoric that seems promising at one point in time may miscalculate how such strategies or rhetoric will play out as circumstances and social dynamics evolve.[206] The tactical moves which got the ball rolling may turn out to be incompatible with steps needed in the future, or might throw up unforeseen barriers elsewhere.[207] As the various problems that cropped up in enforcing *Brown*'s promise multiplied the strategies needed to solve them began to diverge more and more radically from the "formal claim of equality" that actually grounded the court's decision.[208] Eventually, "[i]deological drift produced a disparity between the substantive vision of racial equality and the paradigm of formal equality previously designed to achieve it."[209] This evolution demonstrates a broader principle: legal argument is often metaphorical, and that attribute often

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205. Gerald Rosenberg, discussing Michael J. Klarman's hypothesis that the primary effect of the *Brown* decision was to mobilize opposition to desegregation (which then caused a backlash against segregation through Northerners revolted by Southern violence), wryly describes it as "an uncontrollable and dangerous way to bring about change . . . akin to arguing in favor of a self-inflicted wound on the ground that if you survive, sympathy will flow to you." Gerald N. Rosenberg, Brown *Is Dead! Long Live* Brown*!: The Endless Attempts to Canonize a Case*, 80 VA. L. REV. 161, 171 (1994).

206. Carlos Ball provides two additional examples of this debate occurring. In between *Brown I* and *II*, the NAACP was deeply divided over whether to recommend immediate or gradual desegregation. Both would represent "victories," in a sense, but the debate was over which was more likely to effectively desegregate the school system. Though the NAACP eventually decided to promote the former, the Supreme Court decided upon the latter. Ball, *supra* note 39, at 1495–1500. Whatever hopes the Court had of securing Southern support through this tactic seemed to have been dashed by the emergence of massive Southern resistance instead. *Id.* at 1500 ("It is difficult to imagine" how hypothetical Southern reaction to immediate desegregation "could have been much worse, in terms of concerted efforts to oppose and resist desegregation, than what actually took place in the years that followed the opinion.").

The second example was the debate among the gay rights movement over the establishment of civil unions in Vermont. *Id.* at 1502–03. Some argued that civil unions were effectively "separate but equal," which actually ratified anti-gay prejudice. *See* Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate but (Un)Equal*, 25 VT. L. REV. 113, 136 (2000) ("By agreeing to separation, we help [heterosexual society] perpetuate their view of us as inferior."). Others promoted them as an important gradual step forward for gay rights, sharply contrasting them from *Plessy*, which, far from granting an extension of rights to Black citizens, reified a racial caste system. *See* WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 140 (2002). This debate replayed itself when Massachusetts debated how to respond to the *Goodridge* decision, prior to an advisory opinion taking civil unions off the table. Ball, *supra* note 39, at 1500–05.

207. *See* J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275, 308–09 (1989) (arguing that the ambivalent manner in which the Warren Court began protecting the rights of the poor allowed the Burger Court to sap these decisions of their transformative power); Darren Lenard Hutchinson, *The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 L. & INEQUALITY 1, 62–63 (2005) (arguing that the "deference" the Supreme Court showed to affirmative action programs in *Grutter v. Bollinger*, 539 U.S. 306 (2003), could ultimately hinder social justice aims if it leads to a broader policy of courts giving "deference to discriminators").

208. Balkin, *Ideological Drift*, *supra* note 178, at 25.

209. *Id.*

intoxicates legal actors into forgetting the motivating vision for the claim in favor of superficial poetry.[210] Where the idea or founding metaphor commands more loyalty than the "substantive vision" that inspired it, a sticky slope may ensue.

2. Short-Term Gain Leading to Long-Term Pain

As indicated above, while it is possible that Marshall and his colleagues simply did not predict how their legal arguments would play out in new contexts, another possibility was that they were forced into making a suboptimal legal argument in terms of their long-term ends because they believed it was the only way to be successful in the short-term.[211] Even in its tamer form, *Brown v. Board* was still recognized as a titanic shift in American law and policy. Legal advocates attempting to convince judges to take that fateful step would be wise to downplay, rather than emphasize, its revolutionary qualities. Judges who know they may be releasing a bombshell likewise might be tempted to couch it in the most conciliatory language possible.[212] Unfortunately, the argument that is best suited to the exigencies of the immediate case may not be the one that best lays the groundwork for a broad-based reform movement. Necessary sacrifices in the short-term can turn a battlefield victory into a serious liability during the war.

One significant advantage so-called "repeat players" have in legal disputes is their ability to "play for rules" in litigation.[213] For a litigant who expects to be in court repeatedly, the outcome of any one case may be less important than how it impacts the state of the law as a whole. Consequently, repeat players "may be willing to trade off tangible gain in any one case for rule gain (or to minimize rule loss)."[214] By contrast, one-time litigants are significantly less likely to care about the effects their cases have on similar cases in the future.[215]

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210. As Justice Cardozo warned: "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y. 1926); *see also* David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 99 (asserting with regards to the idea of "colorblindness" that "[s]ometimes great slogans make bad law").

211. Robert Cover, drawing on the Talmudic tradition whereby the pillars upon which the world stands were said to shift dramatically before and after the destruction of the temple, observes that the normative principles necessary to bring a given moral nomos *into* existence are not the same as those necessary to *preserve* it. *See* Robert M. Cover, *Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 11–12 (1983) (citing Rabbi Joseph Karo).

212. *See* THOMAS H. HAMMOND ET AL., STRATEGIC BEHAVIOR AND POLICY CHOICE ON THE U.S. SUPREME COURT 125 (2005) (arguing that a final majority opinion must necessarily converge on the position of the median—and thus most moderate—Justice in that case); Schmidt, *supra* note 165, at 221–22 (noting how political considerations influenced how several of the Justices approached their decision in *Brown*).

213. Galanter, *supra* note 47, at 100.

214. *Id.* at 101.

215. One prominent area where this practice arises is in settlements with confidentiality agreements. The confidentiality agreement may hinder future litigation by similarly situated plaintiffs, which is why they are valuable to institutional actors. This precise fact means that the demand for a

Though this problem can be mitigated somewhat by having public interest groups take charge of an entire course of litigation, it can be difficult to police individual actors looking to file their own suit.[216] And the very reason why public interest groups want to control the field of litigation can create conflicts between the immediate interests of particular clients and the long-term agenda of the organization.

Looking back on the course of civil rights litigation in the post-*Brown* era, Derrick Bell notes an inherent tension for attorneys "serving two masters": their clients, and their employers seeking to develop a broad scale attack on Jim Crow institutions.[217] Pursuing the best interests of the former (generally "single shot") litigants could be at odds with the overall strategic methodology developed by the latter. In pursuing civil rights cases, the NAACP attempted to fit them within a broad strategic context, rather than view them each in isolation.[218] After *Brown* was decided, "civil rights lawyers would not settle for anything less than a desegregated system," even when the particular requests of local Black communities seemed to point in a different direction.[219]

Bell discusses a rural Mississippi community that approached him about reopening their local (segregated) Black school, which had been closed by local authorities even though it had been built with private funds and was partially supported by the local Black community. Bell counseled them that they should instead seek to fully desegregate their local system, and that the NAACP and Legal Defense Fund would not assist them in efforts to achieve separate but

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confidentiality agreement will likely come paired with a sweetened monetary settlement to the immediate benefit of the individual litigant, who does not care that it may block other lawsuits. *See, e.g.*, Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics*, 87 OR. L. REV. 481, 491 (2008) ("Defendants have strong incentives to seek such restrictions in order to avoid adverse publicity, decrease the chances of similar suits being filed, and make it more difficult for those who bring claims to prove their cases. Plaintiffs and their lawyers who believe that they can obtain a larger payment in exchange for promises of secrecy have incentive to agree."); Blanca Fromm, *Bringing Settlement Out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663, 676 (2001) ("Because confidentiality is so important to most defendants, plaintiff attorneys can place a higher price tag on confidential settlements.").

To remove this advantage, courts sometimes simply refuse to enforce the agreement. *See, e.g.*, Kalinauskas v. Wong, 151 F.R.D. 363, 365–66 (D. Nev. 1993) (refusing to enforce a prior confidentiality agreement because doing so would condone "buy[ing] the silence" of witnesses) (internal quotation marks omitted); *see also* Wendt v. Walden Univ., No. CIV. 4-95-467, 1996 U.S. Dist. LEXIS 1720, at *5–6 (D. Minn. 1996) (same).

216. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 18 (1991) ("[I]nterest groups planning a litigation strategy may find themselves faced with a host of cases not of their doing or to their liking. There is no way to prevent other lawyers, individuals, and groups from filing cases. And if these cases are not well-chosen and well-argued, they may result in decisions that wreak havoc with the best-laid plans.").

217. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 472 (1976).

218. *Id.* at 473 (noting the careful selection of cases and argumentative strategies with the goal of securing a broad principle in opposition to segregation, as opposed to scattered rulings inextricable from particular local facts).

219. *Id.* at 476.

equal schools. With few other options in terms of attorneys who would assist them if they were turned down by mainstream civil rights groups, the leaders of the community agreed to support a full-scale desegregation suit.[220] In this way, the victory won in *Brown* effectively closed off certain avenues of reform because they were at odds with the path *Brown* set for where civil rights could progress. From *Brown*'s vantage, the existence of "Black schools" was the problem to be corrected,[221] and thus reform proposals which sought to improve Black schools qua Black schools were constitutionally incognizable.[222] As resistance to *Brown* continued to assert itself, many local leaders wished to turn their attention towards increasing the quality of the schools serving their community at that moment, rather than waiting for the promise of integration to reveal itself. This goal clashed significantly with the desires of other groups that sought to push *Brown* to its furthest possible limits.[223]

Brown represents somewhat of a special case because the colorblind rhetoric was at once rather radical in terms of what laws it would invalidate, and quite timid in terms of the remedies it would offer. A bold anti-classification statement would force the Court to not only "void all school segregation laws, it would also void all the race-based laws on which Jim Crow had been built, thus delving into areas (such as interracial marriage regulations) that the Court was hoping to avoid for as long as possible."[224] But at the remedy stage, "this situation was reversed[,]" and the *Brown* lawyers assuaged judges skeptical of the potentially wide-ranging impact of their decision by assuring them that they sought only the elimination of formal barriers to integration, not affirmative relief.[225]

What is clear, however, is that the NAACP attorneys' avenue of attack hinged on how they perceived courts to be reacting.[226] Marshall and his colleagues moved adroitly back and forth between different arguments based on their perceived strength of position. In the days when the NAACP was still

220. *Id.* at 476–77 n.21.

221. *See* Green v. Cnty. Sch. Bd., 391 U.S. 430, 442 (1968) (articulating the demand of *Brown* as demanding a school system "without a 'white' school and a 'Negro' school, but just schools").

222. *Cf.* GARY PELLER, CRITICAL RACE CONSCIOUSNESS: RECONSIDERING AMERICAN IDEOLOGIES OF RACIAL JUSTICE 26–32 (2012) (discussing the Black nationalist critique of mainstream school integration ideology, which they saw as destructive of organic elements of the Black community).

223. *See* Bell, *supra* note 217, at 482–87 (discussing disputes between local and national leaders in Boston, Detroit, and Atlanta).

224. Schmidt, *supra* note 165, at 233.

225. *Id.* at 234. This was picked up on by Southern judges looking to delay implementation of *Brown*. *See* Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955) (arguing that *Brown* did not mandate that "the states must mix persons of different races in the schools" because it did not "require integration," only forbidding "the use of governmental power to enforce segregation").

226. *See* MARK V. TUSHNET, THE NAACP'S CAMPAIGN AGAINST SEGREGATED EDUCATION, 1925–1950, at 145–46 (1987) (noting that the NAACP "attacked what might be called targets of opportunity. . . . If the military metaphor referring to a litigation campaign is helpful, the campaign was conducted on a terrain that repeatedly required changes in maneuvers").

primarily concerned about facial invalidations of Jim Crow laws (when the colorblind principle was most radical), their litigators would press the anti-classification argument "with increasing emphasis and directness as the lawyers' confidence in the Court's sympathy for their attack on segregation grew."[227] Where judges displayed more skepticism, the attorneys responded in kind by retreating to other arguments.[228] They behaved similarly at the remedy stage, only this time colorblindness was the tamer, more acquiescent position.[229]

* * *

Advocates standing at the precipice of long-term legal or social change always have to evaluate how their opening moves will affect their long-term agenda items. Early reformist rhetoric and argumentation often sets the tone for the entire course of the movement, and if it is not chosen carefully a social movement can get stuck due to initial missteps. At other times, the risk of a sticky slope may be entered into with open eyes—the allure of short-term victories proving too tempting to resist. In either case, though, the sticky slope problem still presents itself, and subsequent generations of advocates may find their ability to maneuver significantly circumscribed by arguments made by their predecessors.

D. Exhaustion and Aversive Sticky Slopes

A prominent argument against extending anti-discrimination or civil rights policies is that, thanks to prior advances, further efforts are at best redundant and at worst counterproductive or discrimination "in reverse."[230] Among many other arguments, opponents of civil rights reforms have persistently tried to cast these policies "as redundant given prior legislation and societal commitments to antiracism . . . and unnecessary because persons of color have ample opportunity to advance without additional legal protection and any barriers they face come from nonracial sources, such as poverty or lack of merit."[231] The crux of the argument is that past victories by the agitating groups render future reforms unnecessary. Because these prior triumphs are being deployed as reasons to stymie further advances, they represent a classic sticky slope.

Legal doctrine, especially the principles endorsed by the courts as bulwarks against majoritarian oppression, is often extremely malleable.[232]

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227. Schmidt, *supra* note 165, at 225.

228. *Id.* at 227.

229. *Compare Briggs*, 132 F. Supp. at 777 (holding that the Constitution "does not require integration. It merely forbids discrimination.") *with* United States v. Jefferson Cnty. Bd. of Educ., 380 F.2d 385, 389 (5th Cir. 1967) (rejecting *Briggs* and holding that the Constitution imposes an affirmative duty to desegregate beyond simply abandoning formal segregationist language).

230. For a discussion of how these arguments have appeared across American history, particularly in the area of race, see generally Hutchinson, *supra* note 16.

231. *Id.* at 953.

232. Girardeau Spann proffers two reasons why this is so:

Consequently, marginalized groups are most likely to gain protection when their interests coincide with those of the majority.[233] These interests can be material, but they can also stem from the psychological well-being of the majority group.[234] The conflict between America's dominant normative values of equality and egalitarian treatment, and lingering inequality, puts pressure on majorities to effect social change.[235] At the same time, this impulse lasts only as long as there is popular recognition of an unjust status quo. Once the majority can convince itself that the current social order is fundamentally fair, the dissonance is resolved, and the impetus for change fades.[236] This dynamic creates an incentive for dominant groups to seize on whatever historical tools are available in order to buttress the claim that the prevailing order is just.[237]

1. Exhaustion Sticky Slopes

Some sticky slopes come about because prior victories exhaust the political will of representatives and their constituents to support further efforts. Darren Lenard Hutchinson defines what he calls "racial exhaustion," for

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> First, in order to be generally acceptable, a legal principle must be stated at a high enough level of abstraction to permit interest groups with divergent preferences to believe that their objectives can be secured by the principle. This level of abstraction both precludes meaningful constraint and requires an act of discretion to give the principles operative meaning. Second, the contemporary nature of legal analysis makes it unrealistic to expect that even a precise principle can generate only one, consistent result. . . . [But,] because we are ambivalent about most of the social policies that we espouse, that ambivalence can cause a single principle to generate inconsistent outcomes.

Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 1989 (1990).

233. *See generally* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

234. Balkin, *supra* note 85, at 1553 ("All other things being equal, the most effective way for minorities to secure protection by courts and legislatures is for the minority group to demonstrate that protection of its rights is in the interest of majorities, is required by values that majorities hold dear, or is necessary to maintain a positive self-image for majorities.").

235. JUDITH H. KATZ, WHITE AWARENESS: HANDBOOK FOR ANTI-RACISM TRAINING 13 (2d ed. 2003) ("Racism has been diagnosed as a form of schizophrenia in that there is a large gap between what whites believe and what we actually practice, which causes us to live in a state of psychological distress . . . ."); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1135 (1997) (observing that we now possess a "constitutional culture" which "embraces 'equal opportunity' and 'nondiscrimination' as a form of civic religion[,]" making it exceedingly difficult to find explicit instantiations of discriminatory intent).

236. *See, e.g.*, Martha Minow, *After* Brown*: What Would Martin Luther King Say?*, 12 LEWIS & CLARK L. REV. 599, 607 (2008) (noting the temptation, in the wake of school resegregation, to redefine the goals of the desegregation movement away from the now-distant dream of integration, and to the still attainable goal of equal opportunity); *id.* at 608 ("With racial integration remote, it is convenient to conclude that it was never the point.").

237. *See id.* at 622 (observing that Whites have convinced themselves that racial integration is no longer a significant social problem because popular media and cultural images are often consciously diverse); *see also* Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413, 419 (2006) ("[P]eople crave justice . . . . [H]owever[,] . . . we often satisfy the craving through troubling means: when alleviating innocent suffering is at all difficult or complex, people reconceive the victim as deserving the suffering by assigning negative characteristics to her.").

example, as the point where citizens, judges, or policymakers believe that, due to past efforts at protecting the rights of a vulnerable minority, they have fulfilled their political and moral obligations to that group and perhaps even crossed too far in providing excessive remedies.[238] Further agitation for yet more reforms, protections, or policy changes is seen as unnecessary or even ungrateful—proof that the relevant population will never actually be satisfied and is not worth listening to.[239] For some, this stems from the view that progress is a "zero-sum" game—any advances for a hitherto marginalized group necessarily come at the expense of the majority.[240] But even putative allies, who have been in the trenches for a long time and sweated to provide important political victories, may wish to cast these triumphs as reason to declare the problem solved and move on to other issues. As Richard Delgado and Jean Stefancic memorably described it, the problem with relying on "the broad ringing landmark decision" is that

> after the celebration dies down . . . the minority group is left little better than it was before, if not worse. Its friends . . . believing the problem has been solved, go on to something else, such as saving the whales, while its adversaries . . . furious that the Supreme Court has given way once again to undeserving minorities, step up their resistance.[241]

Hutchinson traces the deployment of racial exhaustion arguments through American history, starting from the Reconstruction. The Freedman's Bureau came under substantial fire from congressmen across the country as excessive compared to the actual hardships faced by freed slaves, as well as unnecessary given the protections of the newly ratified Thirteenth Amendment.[242] These same considerations motivated President Andrew Johnson to veto a proposed extension of the Bureau.[243] This theme repeated itself in nearly every challenge raised by people of color against American racial apartheid. At times, formerly sympathetic actors simply grew "tired" of persistently having to intervene

238. *See* Hutchinson, *supra* note 16, at 922 (describing the *Civil Rights Cases* as resulting from the Supreme Court's conclusion that racial justice had essentially already been achieved and that Congress had gone too far in seeking to insure the enforcement of Black rights).

239. *See, e.g.*, Maggie Gallagher, *Obama to HRC: 'I'm with You, Sort of,'* THE NATIONAL REVIEW (Oct. 11, 2009, 8:14 P.M.), http://www.nationalreview.com/content/obama-hrc-im-you-sort (arguing that, in spite of President Obama's reconsideration of DADT, "it's not enough, no longer enough [for the gay rights movement]. The leveling wave of equality demands more, more, more, from government").

240. *See* Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game That They Are Now Losing*, 6 PERSP. PSYCHOL. SCI. 215, 216–17 (2011) (finding that Whites, but not Blacks, view racism as "zero-sum," whereby any reduction in perceived prejudice towards Blacks is paired with an increased belief in the prominence of bias against Whites).

241. RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 24 (2001).

242. Hutchinson, *supra* note 16, at 929–35.

243. *See id.* at 935–37.

against continued racial injustice.[244] In other instances, they affirmatively rallied against civil rights measures as unnecessary and excessive, given the putative dissipation of past racist practices.[245]

Insofar as certain types of victories are perceived by the public as being excessive and more than the marginalized groups deserve, they can have counterproductive effects on public opinion.[246] A court decision which at one point might have been seen as an important stride forward in the quest to create an egalitarian social sphere becomes instead yet another example of elites kowtowing to pushy minorities who want "special rights."[247] Indeed, the cause of justice turns in favor of those left behind—the beleaguered majority unable to access all the protections the minority group is hoarding for itself.[248]

Even advances that do not engender substantial backlash can still exhaust the political will for further reform, if they grant the minority group a victory on terms which effectively foreclose or circumscribe future avenues for change.[249] The decision to invalidate sodomy laws on rational basis grounds, for example, largely cabined the effect of *Lawrence v. Texas*, preventing it from being enlisted in service of a broader attack on laws disadvantaging gays and lesbians.[250] Those dispensing justice can also do so by reference to a very specific image of the group in question, one which may not be suited towards securing a full panoply of rights and protections.[251] Marginalized groups may be forced to excessively self-regulate in order to maintain their public

244. *See id.* at 939–40 (noting the withdrawal of congressional Republicans from the seemingly intractable problem of Southern resistance to Reconstruction); *see also* PHILIP A. KLINKNER & ROGERS M. SMITH, THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA 87 (1999) (quoting President Grant's refusal to send in federal troops to stem intimidation of Black and White Republican voters in Mississippi: "The whole public are *tired out* with these annual autumnal outbreaks in the South . . . [and] are ready now to condemn any interference on the part of the Government") (emphasis added); JAMES M. MCPHERSON, ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION 581 (1992) (citing several Republican politicians and activists as being "tired" by the racial problem).

245. Hutchinson, *supra* note 16, at 950–51 (citing opponents of the Civil Rights Act of 1964 as arguing that "racial discrimination among employers had dissipated to the point of nonexistence" and that "pre-existing legislation" was more than sufficient to protect the right to vote).

246. *See* Benjamin I. Page et al., *What Moves Public Opinion?*, 81 AM. POL. SCI. REV. 23, 31–32 (1987) ("There are indications . . . that interest groups and perhaps the courts . . . actually have negative effects. That is, when their statements and actions push in one direction . . . public opinion tends to move in the opposite direction.").

247. *See* Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 293–94 (1994) (discussing the deployment of "special rights" rhetoric in favor of anti-gay legislation).

248. *See id.* at 294.

249. *See* Hutchinson, *supra* note 207, at 40–58 (arguing that *Lawrence* will not be as effective as expected in protecting gay rights, because it frames the right in fundamentally majoritarian terms unsuitable to the broader project of combating heterosexism writ large); *id.* at 60–73 (same for *Grutter* with regards to racism).

250. *Id.* at 43.

251. *Id.* at 44–49 (arguing that *Lawrence* was framed so as to elevate the "respectable" homosexual, laid against the general stereotype of gay men as promiscuous and sexually licentious).

presentation in accordance with this image.[252] A desire to preserve hard-fought reputation gains may require disavowing segments of the community, such as accused criminals, who may be most in need of protection.[253]

2. Aversive Sticky Slopes

Related but subtly different from the above is the sticky slope model suggested by Samuel Gaertner and John Dovidio's model of aversive racism.[254] Like exhaustion, aversive racism comes from the clash between liberal egalitarian norms and ingrained prejudices—the conflict that Gunnar Myrdal famously described as the "American dilemma."[255] However, whereas exhaustion represents a public appeal to past policy decisions, aversive racism[256] deals with the internal psychological state of persons trying to resolve the dissonance between liberal ideals and prejudicial sentiments. It manifests when persons can find "neutral" reasons to cover for discriminatory behavior, convincing themselves and others that their decisions are not based on prejudice. In one prominent study, researchers found that White research subjects displayed "helping" in roughly equal proportions to needy White and Black persons when the subjects believed they were the only persons capable of rendering aid. By contrast, when the subjects believed that other persons were available to assist, thereby giving subjects a racially neutral reason for refusing aid, the level of White assistance to Blacks fell off dramatically.[257]

Since aversive racists are committed to egalitarian treatment, they will not behave in ways that openly threaten that self-image. Instead, they will engage in prejudicial behavior only when it can be rationalized away as something

252. *See* Farah Jasmine Griffin, *Black Feminists and Du Bois: Respectability, Protection, and Beyond*, 568 ANN. AM. ACAD. POL. & SOC. SCI. 28, 34 (2000) (detailing the emergence of the "politics of respectability . . . as a way to counter the images of black Americans as lazy, shiftless, stupid, and immoral in popular culture and the racist pseudosciences of the nineteenth century[,]" but leaving virtually no room for nonconformist Black behavior).

253. *See* JAMES GOODMAN, STORIES OF SCOTTSBORO 33 (1994) (noting that the NAACP was initially reticent to intervene in the Scottsboro case because they couldn't "blindly associate the NAACP with what looked to [secretary Walter White] like nine pathetic teenagers, a motley crew of miscreants at best, at worst a gang of rapists, without risking the respectability it had taken two decades to gain").

254. *See generally* Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, *in* PREJUDICE, DISCRIMINATION, AND RACISM 61 (John F. Dovidio & Samuel L. Gaertner eds., 1986).

255. GUNNAR MYRDAL, AN AMERICAN DILEMMA lxxix (Transaction Publishers 1996) (1944) (identifying the conflict as between the "American creed" guaranteeing liberal equality to all persons, and the substantial force of private prejudices and provincialism manifesting most prominently in the form of racism towards African-Americans).

256. Though they pioneered this inquiry in the context of race, Gaertner and Dovidio do not believe it necessarily restricts itself to the American racial context. *See* John F. Dovidio & Samuel L. Gaertner, *Aversive Racism*, 36 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 1, 3 (2004).

257. *Id.* at 10–11 (citing Samuel L. Gaertner & John F. Dovidio, The Subtlety of White Racism, Arousal, and Helping Behavior, 35 J. PERSONALITY & SOC. PSYCHOL. 691 (1977)).

else.[258] One easy way to convince oneself of a lack of prejudicial intent is to refer back to prior support for policies demanded by the relevant group—what Benoit Monin and Dale T. Miller refer to as "moral credential[ing]."[259] By injecting ambiguity into an otherwise clear history of animus and discrimination, this sort of behavior enables decision makers to access explanatory models that are not dependent on overt racism or prejudice.[260] So, a legislator who voted to liberalize divorce rules could assure himself that he is not sexist even if he opposes Title IX, rationalizing that the former act precludes prejudice from being a motivator for the latter position.[261] As the success of a social movement manifests in high-profile and pronounced steps against discrimination, the availability of these rationales increases.[262] Indeed,

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258. John F. Dovidio & Samuel L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 PSYCHOL. SCI. 315, 315 (2000) ("Because aversive racists consciously recognize and endorse egalitarian values, they will not discriminate in situations in which they recognize that discrimination would be obvious to others and themselves . . . . However, because aversive racists do possess negative feelings, often unconsciously, discrimination occurs when bias is not obvious or can be rationalized on the basis of some factor other than race."); Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1169 (1991) ("Where discrimination is illegal or socially disapproved, social scientists predict that it will be practiced only when it is possible to do so covertly and indirectly."); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322–23 (1987) ("[T]he human mind defends itself against the discomfort of guilt by denying or refusing to recognize those ideas, wishes, and beliefs that conflict with what the individual has learned is good or right. While our historical experience has made racism an integral part of our culture, our society has more recently embraced an ideal that rejects racism as immoral. When an individual experiences conflict between racist ideas and the societal ethic that condemns those ideas, the mind excludes his racism from consciousness."); *see also* JOE R. FEAGIN ET AL., WHITE RACISM: THE BASICS 26 (2d ed. 2001) ("[W]hites have created a set of 'sincere fictions'—personal and group constructions that reproduce societal myths at the individual and group level. In these fictions whites portray themselves as 'not racist,' as 'good people,' even as they think and act in racially antagonistic ways . . . .").

259. *See generally* Benoît Monin & Dale T. Miller, *Moral Credentials and the Expression of Prejudice*, 81 J. PERSONALITY. & SOC. PSYCHOL. 33 (2001) (finding the prior nondiscriminatory behavior gives actors a "credential" as nonprejudiced, which then gives them personal license to act in a biased manner later on).

260. *See* John M. Darley & Russell H. Fazio, *Expectancy Confirmation Processes Arising in the Social Interaction Sequence*, 35 AM. PSYCHOLOGIST 867, 876 (1980) ("A great deal of research suggests that ambiguous behaviors tend to be perceived in a biased manner.").

261. *See* Monin & Miller, *supra* note 259, at 34–36 (finding that giving subjects an opportunity to overtly disavow sexist stereotype resulted in them being more willing to indulge in such stereotypes in later, more ambiguous situations).

262. *See* ANNE PHILLIPS, THE POLITICS OF PRESENCE 95 (2003) (worrying that increasing the number of Black representatives in legislative chambers may "legitimize majority power" because these legislators will still be in the minority and their interests will be consistently outvoted by the White legislative majority); Schraub, *supra* note 80, at 1466–68 (arguing that, as gay political power increases, it becomes increasingly easy for recalcitrant legislators to rationalize not taking further steps while maintaining a self-image as a non-prejudiced person); *cf.* John B. McConahay, *Modern Racism, Ambivalence, and the Modern Racism Scale*, *in* PREJUDICE, DISCRIMINATION, AND RACISM 121 (John F. Dovidio & Samuel L. Gaertner eds., 1986) (arguing that the success of the civil rights movement "reduced the guilt that many Americans felt and added a tone [of] moral indignation to the arguments (or ideology) of those opposed to change in the racial status quo").

as self-reported prejudice drops, aversive racist behavior rises. One study found a significant disparity in White test subjects providing favorable recommendations to Black versus White candidates with ambiguous qualifications, but not with regards to either clearly qualified or clearly unqualified candidates—i.e., only those in which either a favorable or unfavorable decision could be effectively rationalized. This disparity actually rose when the study was repeated ten years later, even as self-reported prejudiced decreased.[263]

Because the mechanism of aversive racism is characterized by dissonance, the very effort to restrain racist impulses can also feed those same instincts.[264] Persons seeking to maintain a nonracist self-image may find that their "interracial interactions become characterized by anxiety or uneasiness."[265] This negative experience is then transmuted back onto the people of color associated with those feelings.[266] As overt prejudice towards a given group becomes more and more publicly unacceptable, the dissonance between professed ideals and private prejudice becomes more pronounced, exacerbating the effect.[267] In this way, public advances by a group can lead to enhanced private frustrations, which are likely to manifest whenever the situation is sufficiently blurry to render racially disparate treatment explainable on legitimate, nonracial grounds.[268]

III.
HARNESSING THE STICKY SLOPE

The concept of sticky slopes should be an integral part of social movement organization—either to avoid them in the pursuit of one's own agenda, or to mire an opposing movement inside one. Of course, it does little good to note the existence of sticky slopes, or advise that social movements should be attentive to them, without giving some guidance as to when they are

263. Dovidio & Gaertner, *supra* note 258, at 317–18 (noting that the disparity rose by twelve points, from 75 percent favorable ratings for White applicants versus 50 percent for Blacks in 1989 to a 77/40 split in 1999).

264. *See* Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1901 (2009) (worrying that "threat and confrontation about race and gender bias, which people do not want to possess or exhibit, may inadvertently provoke shame, guilt, and resentment, which lead to avoidance and resistance, and ultimately to more stereotyping. In other words, pressure and threat will often deepen bias rather than correct it").

265. Gaertner & Dovidio, *supra* note 254, at 64.

266. *Id.*

267. *Cf.* MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 2 (2010) (observing that diminished social acceptability of various prejudices, such as racism or homophobia, does not mean they have "stopped influencing the way people really think").

268. *See* Gaertner & Dovidio, *supra* note 254, at 66 ("[I]f the fear of acting inappropriately is a salient concern of many whites then racial discrimination would be most likely to occur when normative structure within the situation is weak, ambiguous, or conflicting.").

likely to appear. This concluding Section takes on this question, which turns out to be far more complex than might initially be suspected.

Unfortunately, the sheer breadth of cases, and their generally fact-sensitive nature, makes it very difficult to isolate specific variables that would render any particular victory a candidate for a sticky slope. The difference between when, for example, a given victory causes a bandwagoning effect (with new members jumping on board), or a satiating effect (with old members deciding their goals have been met and demobilizing), is in all probability very thin.[269] Whether the result tips one way or the other is likely to turn on very small differences in context.

Hence, it is unlikely that certain characteristics always create or preclude sticky slopes. Rather, there are certain factors that at least point towards the risk of a sticky slope, and this Section tentatively gestures towards identifying what those are. At the same time, it is important to think of sticky slopes not as the inevitable byproduct of a particular political situation. Rather, adopting the lens of the sticky slope enables us to understand that social movement victories are independent sites of contestation, with various groups struggling to recast the meaning of the event in ways that enhance its slippery or sticky character.

A. Predicting Sticky Slopes

Canvassing the examples laid out in Part II, some themes emerge that can assist in predicting what sorts of victories will exhibit sticky effects. Crafty social movements will attempt to pursue their objectives in ways that do not implicate these potential pitfalls. But sometimes, social actors cloak their actions in the garb of sticky slope language at times when it seems highly unlikely that such language actually is the cause of their opposition. This is a pretextual sticky slope, and it represents an interesting and perhaps more dangerous permutation of the broader phenomenon.

1. Causal Sticky Slopes

What are some red flags that a particular victory may turn out to be sticky? The examples laid out in Part II each point to separate factors that may cause stickiness. For example, backlash sticky slopes present the somewhat banal prediction that victories for relatively unpopular positions will tend to be stickier. This is an obvious point, perhaps so trivial that it can be ignored. As one commenter put it, in such cases "[t]he only way to minimize backlash is to lose."[270] But other instances of sticky slopes are more counterintuitive and generate more interesting predictions.

269. *See* Gupta, *supra* note 26, at 419–21.

270. Scott Lemieux, Roe *v. World*, AM. PROSPECT (Nov. 18, 2011) http://prospect.org/article/roe-v-world.

One potential source of stickiness is the degree to which a prior victory makes demands on the majority. A political objective that demands sacrifice from those in power will be more difficult to attain than one which is in the majority's interest—that claim is hardly novel.[271] But it is also the case that such victories may act to stymie future social movement progress ex post. This is less evidently clear: the sort of victory that forces considerable majority buy-in is often precisely the sort of outcome that is seen as momentum-building for a movement.[272]

However, to the extent that prior victories can lead to "exhaustion" by political allies who wish to move on to other concerns, it stands to reason that they are more likely to experience such fatigue in situations where more has been demanded of them.[273] Similarly, such scenarios are likely to create a stronger "credential" as an ally of the movement which in turn gives the actor more leeway to ignore their later requests.[274] Exhaustion and aversive sticky slopes are thus very real risks that stem from these sorts of social movement victories.

Of course, most attempts by minority groups to organize will require buy-in from the majority—at least eventually. The argument cannot be to never challenge broader society. Rather, the prescriptive implication may be to cast an early focus on objectives that are largely internal to the group. These advances help give the group more leverage so that its members are less dependent on majoritarian magnanimity when they do make the pivot toward broader social objectives.[275]

Perhaps the most intriguing theme that prevails across the examples addressed above, however, is a disjuncture between the concrete victory enjoyed by the social movement, and the strength, character, or understanding of the underlying sustaining norm.[276] For example, a backlash scenario might

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271. *See generally* Bell, *supra* note 233.

272. *See, e.g.*, Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 30 (2005) (arguing that the "two key mechanisms through which social movements influence constitutional interpretation" are gaining the support of political party elites and gaining the support in the court of public opinion); Cass R. Sunstein, *Social Norms and Social Rules*, 96 COLUM. L. REV. 903, 929–30 (1996) (discussing the role of "norm entrepreneurs" in lowering the cost tolled on persons expressing hitherto deviant norms, allowing for a bandwagoning effect that can bring about rapid social change).

273. *See supra* Part II.D.1.

274. *See* Monin & Miller, *supra* note 259, at 40 ("Thus, the stronger a person's nonsexist or nonracist credentials, the less worried he or she will be that a given action would constitute (or would be seen as constituting) evidence of a sexist or racist disposition.").

275. *Cf.* STOKELY CARMICHAEL & CHARLES V. HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION 44 (1967) ("*Before a group can enter the open society, it must first close ranks*. . . . [G]roup solidarity is necessary before a group can operate effectively from a bargaining position of strength in a pluralistic society.").

276. *Cf.* Murray Edelman, *Contestable Categories and Public Opinion*, 10 POL. COMM. 231, 236 (1993) (observing that there may be a gap in the social valence of the categories "liberal" or "conservative" and the concrete policy objectives pursued under the ambit of those ideologies).

result where a particular victory in the gay rights field is strongly out of sync with the broader understanding of what rights gays are owed.[277] "Wrong argument" sticky slopes relate to a gap between commitment to a doctrinal point used to secure early victories and substantive, but more distant, future desires.[278]

In a 2000 article, Dan Kahan modeled the processes by which one might use law to overcome certain relatively entrenched social norms (that is, ones where the populace is, at best, ambivalent about the proposed change).[279] One might suspect that the best way to overcome social resistance to such a norm shift would be to apply overwhelming pressure—what he calls a "hard shove."[280] But Kahan argues this is self-defeating: where the law deviates too far from prevailing views about the relative wrongfulness of an act, legal actors (jurors, judges, prosecutors) rebel, and the rule goes unenforced.[281] Moreover, this nonenforcement will signal to others that the rule is worthy of breach, further entrenching the very norm the law is attempting to challenge.[282] By contrast, Kahan asserts, a "gentle nudge"—a legal regime that is only incrementally more hostile to the prevailing norm—may be more effective at overturning it in the long term.[283] People probably will not allow slight gaps between the law and their personal beliefs to outweigh their general perceived duty to enforce the law.[284] Moreover, the constant enforcement of the replacement-norm will exhibit a cascading effect, helping dislodge the formerly entrenched position.[285]

Kahan's model translates well into the concept of the sticky slope. For a social movement struggling against a deep-seated social norm, surely it would seem a glorious triumph if the movement's proponents managed to pass a strongly condemnatory legal proscription. But Kahan forces them to look a gift horse in the mouth: a victory of this variety may in fact prove detrimental to a

277. *See supra* note 71 and accompanying text.

278. *See supra* notes 207–10 and accompanying text.

279. Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 609 (2000).

280. *See id.* (describing a "hard shove" as where the law applies severe condemnation in order to "break the grip of the contested norm (and the will of its supporters)").

281. *Id.* at 608 ("If the law condemns the conduct substantially more than does the typical decisionmaker, the decisionmaker's personal aversion to condemning too severely will dominate her inclination to enforce the law, and she will balk."); *see also* Lewis R. Katz & Robert D. Sweeney, Jr., *Ohio's New Drunk Driving Law: A Halfhearted Experiment in Deterrence*, 34 CASE W. RES. L. REV. 239, 288–95 (1984) (finding that sharply increased penalties for drunk driving had little effect because police officers, prosecutors, and judges simply became progressively less inclined to enforce them).

282. Kahan, *supra* note 279, at 608.

283. *See id.* at 610.

284. *Id.* ("If, however, the law condemns the behavior only slightly more than does the typical decisionmaker, her desire to discharge her civic duties will override her reluctance to condemn, and she will enforce the law.").

285. *See id.* at 613–15.

movement's long-term objectives.[286] In a world where there is considerable ambivalence between the status quo norm and a proposed replacement, a social movement deciding whether to promote a "hard shove" legislative proposal or judicial precedent should worry that a sticky slope will result.[287]

An interesting permutation might exist in situations where the norms in question are less concrete. Imagine a somewhat indeterminate moral norm that exhibits a very strong pull on an individual's sense of duty. The American perspective on racial egalitarianism would seem to be a solid example. There exists today a very strong norm against racial prejudice or inequality, and opposing "racism" carries with it "legitimating power."[288] This is a considerable advance from the normative baseline even a half-century ago, when American attitudes were (to say the least) considerably more ambivalent.[289]

But what constitutes "racism" or "racial equality" is not self-defining—indeed, it is the subject of bitter controversy. Tactically speaking, there is good reason why social movements are attracted to the use of such vague framing. It allows them to more rapidly build a working coalition of adherents all of whom believe that their ideals are encompassed under the governing principle.[290] But as applied to an individual person trying to conceptualize what a given norm means in her own daily life, vagueness carries with it considerable peril. The typical person who knows she is bound to oppose "racism" but is not sure what opposing racism entails, is likely to conclude that racism encompasses only a small range of behaviors that she is comfortable labeling abominable: rabid instances of hatred or violence.[291] After all, if racism is so bad, then surely it

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286. As Kahan puts it in his section on prescriptive implications, "Don't be greedy." *Id.* at 641.

287. *See, e.g.*, William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1405 (2000) (advocating an incremental approach because the "larger the gap between a new legal entitlement and prior social norms, the more likely it will be that people feel social endowments have been taken away").

288. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 351 (1987).

289. *See, e.g.*, Barbara Trepagnier, *Deconstructing Categories: The Exposure of Silent Racism*, 24 SYMBOLIC INTERACTION 141, 141–42 (2001) ("In the 1960s, when the civil rights movement was on the rise, overt racism was rampant and the few white people who inhabited the 'not racist' category took an unpopular stand for change in race relations. Since then, 'not racist' has become a default . . . .").

290. *See* Richard Flacks, *The Party's Over—So What Is To Be Done?*, *in* NEW SOCIAL MOVEMENTS: FROM IDEOLOGY TO IDENTITY 330, 334 (Enrique Laraña et al. eds., 1994) (pointing out the need to "adopt moderate programs or otherwise reduce . . . ideological clarity . . . in order to gain majority support"); SIDNEY G. TARROW, POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS 146 (3d ed. 2011) ("Symbols and frames can serve to unite diverse actors; at the same time, their meanings can be ambiguous and multivalent across different movement constituencies, which allows leaders to attract diverse constituencies that come together behind ambiguous symbols."); *see also supra* note 184 and accompanying text.

291. Taunya Lovell Banks, *Exploring White Resistance to Racial Reconciliation in the United States*, 55 RUTGERS L. REV. 903, 948 (2003) ("The dominant perception of a 'racist' is only the most

cannot encompass situations or events that she is even somewhat ambivalent about.[292] The more intense the moral weight of the norm becomes, the more the window of issues it can address shrinks.

By contrast, an indeterminate norm with only a mild pull on an individual's sense of duty may allow that individual to at least consider the possibility that a wide range of different activities may fall under its ambit. Consider the norms surrounding safe driving. Most people recognize that they have an obligation to drive safely while on the road, but most don't view that obligation as possessing the same moral gravity as our obligation not to be racist. As a result, when thinking about safe driving we probably can recognize that even some relatively common actions—speeding, instances of road rage, rolling through stop signs—are inconsistent with the norm and should be tamped down on. And if we are told that something we ourselves have done on the road is unsafe, we are likely to at least consider whether the assessment is valid. Even if there is some clash between our prior belief or behavior and the requirements of the norm, the stakes are greatly reduced. It is a minor moral lapse, not a major ethical catastrophe. And as individuals get acclimated to viewing a particular goal or aspiration as contained inside a moral norm, that belief is likely to sustain itself even if the norm's moral weight is subsequently strengthened.[293]

Does this mean that social movements should always be concerned when their objectives are seen as a strong ethical imperative? Not necessarily. Rather, they should be worried when their *vaguely described* ambitions are seen as strong imperatives, but are not yet linked to specific policy objectives. Where the normative power of an idea or metaphor has raced ahead of its connection

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extreme example—a person who rabidly hates, often to the point of violence, persons from other racialized groups.").

292. *See id.* ("[A] person who believes that racism is wrong will have trouble admitting that her own acts, though not motivated by racial hatred normally attributed to Klansmen or Nazis, can still be classified as racist."); *see also* Hanson & Hanson, *supra* note 237, at 446 ("Because 'racists' are people with ugly prejudices or malignant dispositions, most of us do not perceive ourselves to be racists—indeed, we abhor such people; by adopting [a narrow] definition, we comfort ourselves with the assurance that we are not among them.").

This problem was also well-evidenced in Justice Scalia's dissent in *Windsor v. United States*, No. 12-307, slip op. at 21 (June 26, 2013) (Scalia, J., dissenting). Justice Scalia fulminated that a finding that DOMA was motivated by "animus" and violated fundamental rights was akin to adjudging opponents of gay marriage to be "beyond the pale of reasoned disagreement" and "enemies of the human race." *Id. See also* David Schraub, *Our Divine Constitution*, 44 LOY. U. CHI. L.J. 1201, 1259 n.266 (2013) (reviewing ROBERT A. BURT, IN THE WHIRLWIND: GOD AND HUMANITY IN CONFLICT (2012)) ("I believe . . . that the implicitly understood moral indictment present in a hostile constitutional ruling accounts for the anger one sees in Justice Scalia's *Romer* and *Lawrence* dissents. When the Court says laws that express disapproval towards homosexuals are violations of equal protection or due process, they are telling a considerable section of Americans . . . that their deeply held moral commitments are at fundamental odds with our national charter.").

293. *See, e.g.*, LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 3 (1957) (asserting that people prefer to behave in manners consistent with their past practices, and will mold their current ideologies and behaviors to maintain this sense of consonance).

to particular social movement agenda items, then the risk of a sticky slope is greatly magnified.[294]

There is a sharply incrementalist thread that runs through this advice, with sticky slopes seemingly more likely to occur when social movements play the part of the hare instead of the tortoise. Judge Traynor famously proclaimed that "a judge must plod rather than soar," and perhaps the same advice can be leveled at social movements.[295] Instead of pursuing sweeping national victories, social movements might elect to slowly accrue a series of smaller, local reforms, or laboriously amend existing regulations so they progressively encompass more and more of their policy vision.[296] But this prescriptive advice can be overstated. In part, this is because it can simply be re-expressed as "no risk, no reward." But even beyond that, as explained below the incrementalist approach probably will not avoid stickiness at all, and may even be vulnerable in its own way.[297]

2. Pretextual Sticky Slopes

Despite the manifestations of sticky slope situations illustrated above, there might still be suspicion that the impact of the sticky slope phenomenon may sometimes be more phantasmal than real. Consider the political power doctrinal sticky slope discussed in Part II.B. The use of state anti-discrimination laws in rejecting a gay marriage challenge implies that the judicial challenge should have been launched before such political victories were reached.[298] But it seems decidedly implausible that a state would ratify gay marriage—judicially or legislatively—without taking the step of providing some form of anti-discrimination legislation first.[299] What of situations like these—where the "sticky slope" seems more of a pretext than an actual, causal player in the course of social movement success?

Pretextual sticky slopes are most likely to manifest where prior prejudices are responsible for the current state of legal affairs, but the prejudices

294. *See supra* notes 207–10 and accompanying text.

295. Roger J. Traynor, *The Limits of Judicial Creativity*, 63 IOWA L. REV. 1, 11 (1977).

296. *See* Kristin A. Goss, *Policy, Politics and Paradox: The Institutional Origins of the Great American Gun War*, 73 FORDHAM L. REV. 681, 687–88 (2004) (explaining the concepts of vertical and horizontal incrementalism).

297. *See generally infra* notes 319–28 and accompanying text.

298. *See supra* text accompanying notes 106–09.

299. Indeed, courts that struck down state gay marriage bans often do cite judicial and legislative advances protecting gay rights as part of their rationale. *See, e.g.*, In Re Marriage Cases, 183 P.3d 384, 428 (Cal. 2008) (noting the "fundamental and dramatic transformation in this state's understanding and legal treatment of gay individuals and gay couples[,]" manifested in several important legislative reforms); Varnum v. Brien, 763 N.W.2d 862, 890–91 & n.19 (Iowa 2009) (citing anti-discrimination measures to buttress its determination that homosexuality should receive heightened scrutiny); Goodridge v. Dep't Pub. Health, 798 N.E.2d 941, 967 (Mass. 2003) (observing that legislative protections to homosexuals demonstrate "a strong affirmative policy of preventing discrimination on the basis of sexual orientation").

themselves have become sufficiently contentious that they cannot themselves be deployed as justification for the law.[300] Instead, other, more neutral explanations are sought to ratify decisions no longer publicly defensible (or at least not solely defensible) on their underlying rationales.[301] Even though the prior advances are not directly responsible for the continued vitality of the old doctrine, the ability to reference them may have a rejuvenating effect on a legal regime that was otherwise reeling. As Alexander Bickel observes, even in those cases which might appear to be immediately pretextual in their effects, "[t]he Court's prestige, the spell it casts as a symbol, enable it to entrench and solidify measures that may have been tentative in the conception or that are on the verge of abandonment in the execution."[302] For example, when the Supreme Court upheld the constitutionality of a Georgia law banning homosexual sex in *Bowers v. Hardwick*,[303] a series of cases decided between 1986 and 2003 used that case as warrant for declining to extend heightened scrutiny to gays and lesbians. A class defined by activity that can be constitutionally proscribed surely cannot claim enhanced constitutional protection.[304] After *Bowers* was overruled in *Lawrence v. Texas*,[305] these precedents would seem to be in grave peril. However, they have been given a new lease on life by lower court decisions that continue to accord them precedential authority at the precise moment when the doctrine seemed most vulnerable.[306] In this respect, these doctrines are not just laundered—in that they are no longer dependent on overruled and repugnant precedents like *Bowers*—but they actively inhibit legal progress by reforming themselves as new, "neutral" legal reasons which mask the underlying ugliness that had nearly been revealed.

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300. *See* Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1975 (2006) (identifying how social groups contest doctrinal structures built up in periods where traditional, prejudicial rationales dominate).

301. *See id.* at 1977 n.80 (referencing the new sort of legal controversy that develops once a formerly dominant norm that undergirded a legal regime begins to face serious social contestation).

302. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 129 (1962).

303. 478 U.S. 186 (1986).

304. *See, e.g.*, Thomasson v. Perry, 80 F.3d 915, 928 (4th Cir. 1996) (arguing that a group identified by its propensity to engage in behavior that could be criminalized cannot claim heightened scrutiny protection); Equality Found. of Greater Cincinnati, Inc. v. Cincinnati, 54 F.3d 261, 266 (6th Cir. 1995) ("Since *Bowers*, every circuit court which has addressed the issue has decreed that homosexuals are entitled to no special constitutional protection, as either a suspect or a quasi-suspect class, because the conduct which places them in that class is not constitutionally protected.") (footnote omitted).

305. 539 U.S. 558 (2003).

306. Schraub, *supra* note 80, at 1457 ("Even after *Lawrence*, federal courts still have referred to these [*Bowers*-influenced] precedents to hold that the position of gays and lesbians in the three-tiered scrutiny system has been established, notwithstanding the fact that these cases relied on overturned precedent."); *see, e.g.*, Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 818 & n.16 (11th Cir. 2004) (citing exclusively pre-*Lawrence* precedent in holding that anti-gay classifications do not deserve heightened scrutiny).

The pretext, in other words, transfers the offensive decision out of the realm of pure prejudice or bigotry and relocates it inside a more widely accepted ideological construct. This ideology is used to redefine oppressive practices as warranted, meritorious, or justifiable.[307] The existence of this sort of ideology is an important element in maintaining the social order.[308] The presumption is that the status quo could not stand were it laid bare—not just because the oppressed would revolt, but because the oppressor would not be able to live with him or herself. Because a legitimating ideology helps resolve the cognitive dissonance latent between our desire to see ourselves as just and the reality of injustice, buying into these ideological justifications is to the advantage of privileged persons.[309] Aside from the psychic benefits, the social stratification often promoted by these ideologies can act to insulate their beneficiaries from their effects; they experience all of the pleasure and see none of the pain.[310] At the very least, stripping away a rather benign but fictive

307. *See* JOE R. FEAGIN, RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS 32 (2000) ("Whites have not been content to exploit African Americans and then to admit candidly that such action is crass exploitation to their individual or group advantage. Instead, white Americans have developed a strong ideology defending their own privileges and conditions as meritorious and accenting the alleged inferiority and deficiencies of those being oppressed."); Lawrence, *supra* note 258, at 326 (arguing that "ideology is a defense mechanism against the anxiety felt by those who hold power through means and with motives that they cannot comfortably acknowledge").

Notably, for an ideology to be credible, it generally must allow for some "contradiction closing cases" which cut against (generally nonessential) interests of the propagating class. *See* Derrick Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 32 (1985) (internal quotation marks omitted); *see also* Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1289 (2001) (observing that "[e]ven a wholly self-interested legislator cannot afford to take positions in constitutional argument that are too transparently favorable to his own interests. So legislators who want to invest in credibility will have to adjust their positions to disfavor or disguise their own interests to some degree.").

308. As Robert Cover argued:

> No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. . . . In this normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse—to be supplied with history and destiny, beginning and end, explanation and purpose. And every narrative is insistent in its demand for its prescriptive point, its moral. History and literature cannot escape their location in a normative universe, nor can prescription, even when embodied in a legal text, escape its origin and its end in experience, in the narratives that are the trajectories plotted upon material reality by our imaginations.

Cover, *supra* note 211, at 4–5 (footnotes omitted).

309. *See* Melvin J. Lerner & Dale T. Miller, *Just World Research and the Attribution Process: Looking Back and Ahead*, 85 PSYCHOL. BULL. 1030, 1031–32 (1978) (summarizing research indicating people try to interpret social facts so as to ratify the idea of a "just world"); *see also* Hanson & Hanson, *supra* note 237, at 419–20 (arguing that persons witnessing injustice they feel they cannot change or challenge simply reinterpret the events in front of them as deserved).

310. *See* Alison Jaggar, *Feminist Politics and Epistemology: The Standpoint of Women*, *in* THE FEMINIST STANDPOINT THEORY READER: INTELLECTUAL AND POLITICAL CONTROVERSIES 55, 56 (Sandra Harding, ed. 2004) ("Because their class position insulates them from the suffering of the oppressed, many members of the ruling class are likely to be convinced by their own ideology; either they fail to perceive the suffering of the oppressed or they believe that it is freely chosen, deserved, or inevitable. They experience the current organization of society as basically satisfactory and so they

justification for a political action can reveal deep inconsistencies between the projected image of a society and its base reality.[311]

Rendered in this light, the appeal of sticky slope argumentation shines through as particularly pernicious. If one does not believe that the Maryland Court of Appeals really would have invalidated the state's restriction on gay marriage were it not for the passage of legislative anti-discrimination laws,[312] the question arises as to what the actual rationale for the court's action might be. The answer, it seems clear, is the continued sentiment that governmental animus and discrimination against gays and lesbians remains permissible. However, consciously or not, this motive is masked by the legitimating force of the sticky slope. Judicial nonprotection of minorities capable of equal democratic participation is a publicly acceptable justification in a way that bare animus is not. And given the aforementioned tendency of majority actors to interpret ambiguous decisions in ways that reinforce their self-conception as fair-minded, we should expect aversive actors to utilize pretextual sticky slope arguments whenever feasible.[313] The sticky slope allows us to avoid saying what we cannot publicly bear to admit.

While the Maryland example is conjectural (though intuitively quite plausible), the recent defeat via referendum of Maine's law legalizing gay marriage concretely demonstrates a pretextual sticky slope. Previously, many gay rights activists blamed the gay marriage movement's judicial focus for engendering a severe political backlash.[314] The fact that courts were legalizing

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accept the interpretation of reality that justifies that system of organization."); *see also* IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 205–10 (2000) (arguing that residential segregation causes the concentration of social resources in the hands of the elite, while simultaneously obscuring from them the situation of the disempowered).

311. *See* Martha Nussbaum, *On Moral Progress: A Response to Richard Rorty*, 74 U. CHI. L. REV. 939, 940 (2007) ("[T]he exposure of . . . behavior as what it is, the sheer naming of it as oppression, and the existence of widespread public argument about it, changes things for good . . . ."); Joseph Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 58–59 (1984) ("Legal scholars can perform an edifying role by broadening the perceived scope of legitimate institutional alternatives. One way to do this is to demonstrate the contingent and malleable nature of legal reasoning and legal institutions. . . . By systematically and constantly criticizing the rationalizations of traditional legal reasoning, we can demonstrate, again and again, that a wider range of alternatives is available to us."). *But see* LAWRIE BALFOUR, THE EVIDENCE OF THINGS NOT SAID: JAMES BALDWIN AND THE PROMISE OF AMERICAN DEMOCRACY 4 (2001) (arguing that "perhaps . . . the subtler, subterranean forms of racism that lurk beneath the surface of public discourse ought to be left undisturbed. For what surfaces as frankness may simply be expressions of racism, formerly discredited, reemerging in a new guise."); Robert S. Wyer, Jr. et al., *Cognitive Mediators of Reactions to Rape*, 48 J. PERSONALITY & SOC. PSYCHOL. 324, 330–32, 337 (1985) (finding that exposure of test subjects to instances of criminal behavior makes them more likely to evaluate crime victims negatively, as they seek to reestablish their belief in a just world).

312. *See supra* text accompanying notes 5–7, 108–09.

313. *See supra* Part II.D.2.

314. *See, e.g.*, John D'Emilio, *The Marriage Fight Is Setting Us Back*, GAY & LESBIAN REV. WORLDWIDE 10 (Nov.–Dec. 2006) ("The battle to win marriage equality through the courts has done something that no other campaign or issue in our movement has done: it has created a vast body of *new* antigay law."); Jeffrey Rosen, *Disputations: Learning from Prop. 8*, THE NEW REPUBLIC (Nov. 6,

gay marriage allowed commentators to argue that popular mobilization against gays and lesbians was motivated by anger towards these allegedly anti-democratic acts.[315] However, after Maine voters reversed a legislatively enacted gay marriage statute, this argument became considerably harder to maintain.[316] As one commentator put it: "Maine represents another example of a fact that should be obvious: Opposition to judicial decisions legalizing same-sex marriage is substantive, not procedural. Prop. 8 and similar initiatives are motivated by opposition to same-sex marriage, not by some principled opposition to judicial review."[317] The Maine scenario removed the cloak of legitimacy, currently possessed by the judicial backlash sticky slope, as being primarily a post hoc justification for anti-gay sentiments which would manifest regardless of whether the putatively instigating event occurred or not.

Determining whether a sticky slope is causal or pretextual thus is tremendously important for social movements because it has significant implications for their subsequent strategies. The inquiry is necessarily counterfactual: we ask how effective the push for *B* would have been had victory *A* not already been reached. Above, I described the dilemma of social movements faced with a sticky slope—they have to determine whether pursuit of *A* is worthwhile, knowing that it might serve as a bar to attaining *B*.[318] But this dilemma only properly exists if a sticky slope has a causal role in barring or significantly slowing the progress of reform. If the legal decision would have been the same regardless of whether the first victory has been won, the situation shifts. Now, the goal often will be to unmask the underlying rationale behind the decision blocking *B*, the one that courts are trying to hide. That the sticky slope is pretextual does not make it any less sticky—it is still the desiccant that dries up the possibility of legal reform—but it does remove the paradox the movement otherwise would be facing. At the very least, forcing the

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2008), http://www.tnr.com/article/politics/disputations-learning-prop-8 (characterizing the California Supreme Court as "naïve and overconfident blunderers" who did not heed past lessons about judicial backlash).

315. *See, e.g.*, Megan McArdle, *The People Have Spoken*, THE ATLANTIC (Nov. 5, 2008), http://meganmcardle.theatlantic.com/archives/2008/11/the_people_have_spoken.php ("[T]he issue was pressed too quickly, and in the wrong venue. Using the courts to establish a right to gay marriage made opponents feel threatened, and railroaded. If socially conservative voters hadn't felt they needed to protect themselves from activist judges, we wouldn't be seeing these provisions written into state constitutions.")

316. *See* Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1325 (2010) (noting that opponents of same-sex marriage in Maine found it easy to pivot from attacking "a handful of judges" to "a handful of politicians," and were able to secure the same narrow consensus against marriage equality that had presented itself in California) (internal quotation marks omitted); Scott Lemieux, *The Myth of Judicial Backlash*, AM. PROSPECT (Nov. 11, 2009), http://www.prospect.org/cs/articles?article=the_myth_of_judicial_backlash (observing that those who had blamed the reversal of previous gay rights victories on overeager courts have "had very little to say" about the similar reversal of the Maine provision).

317. Lemieux, *supra* note 316.

318. *See supra* text accompanying note 14.

official system to concede the bare fact of injustice can act as a mobilization agent, potentially changing things for the better.

B. Stickiness as a Tool of Social Contestation

The previous sections flagged some warning signs of a potential sticky slope. But their limitations are immediately apparent. Kahan, for example, argues against "hard shoves" and in favor of "gentle nudges" as more likely to effectively change norms in the face of social ambivalence.[319] But as he concedes, it is easy to imagine a scenario where a "gentle nudge" is instead interpreted as a "sly wink"—a sign that the underlying conduct is not really worthy of condemnation at all, and that the legal regime is simply going through the motions to satisfy a pushy interest group.[320] In this situation, it is the incremental approach that acts to ossify the status quo, and a more aggressive advance that would help create the space for further progress.

Indeed, on closer examination, it appears most potential instigators of sticky slopes have slippery analogues.[321] In large part, it is this very paradox that makes sticky slopes so intriguing in the first place. They are counterintuitive, and often the factual predicates that launch them appear substantively identical to those which lead to slippery slopes.[322] Political power is more commonly thought of as a boon rather than an obstacle to future social movement success.[323] A strategy dependent on buy-in by the majority could contribute to exhaustion or enable aversive behavior.[324] But it could also give the majority "skin in the game," providing an incentive for them to ensure that the policies they supported were not in vain and lead to the outcomes they desire.[325] Movement objectives focused on self-organization and improvement instead of engagement with broader society could meet with approval as taking personal responsibility, but they might also be seen as potentially separatist or hotbeds of resistance.[326] Monin and Miller admit that their findings on

319. *See supra* notes 279–87 and accompanying text.

320. Kahan, *supra* note 279, at 624–25.

321. *Cf.* Schauer, *supra* note 12, at 381 (arguing that "in virtually every case in which a slippery slope argument is made, the opposing party could with equal formal and linguistic logic also make a slippery slope claim" of its own).

322. *See supra* notes 1–10 and accompanying text (discussing the Maryland and California comparison).

323. *Compare supra* Part II.B, *with* Volokh, *supra* note 8, at 1114–27.

324. *See supra* notes 230–68, 271–75 and accompanying text.

325. *See, e.g.*, Anthony E. Varona, *Taking Initiatives: Reconciling Race, Religion, Media and Democracy in the Quest for Marriage Equality*, 19 COLUM. J. GENDER & L. 805, 897 (2010) (arguing that mobilizing straight supporters for gay marriage via direct democracy referendums gives them a sense of ownership in the conflict "and ultimately, to feel the sting of anti-gay animus by having their votes countermanded by majorities favoring discrimination").

326. *See, e.g.*, JAMES H. CONE, BLACK THEOLOGY AND BLACK POWER 77 (Orbis 1997) (1969) (asserting that early "integrated" churches were created because of the perceived risks of allowing Blacks independent spaces where they might develop anti-slavery theologies); *cf.* NAACP v.

"credentialing" (where a prior stance against discrimination results in an actor behaving in a more discriminatory fashion later on) exist in considerable tension with other research exploring the "foot-in-the-door" effect (where prior cooperative conduct results in subjects acting in ways that confirm their self-image as cooperative).[327]

Even the broader incrementalist thread of the prescriptive advice can be challenged. As the old saying goes, "There is nothing more dangerous than to leap a chasm in two jumps."[328] One can easily imagine cases where a movement might be more concerned at how slow, step-by-step reform might cause future blockages, and instead favor a strategy of sweeping, bold strokes. Incremental victories may be more vulnerable to co-optation or absorption by dominant actors,[329] and social movements that delay pursuit of key agenda items may become more concerned about preserving their own power and prestige than in risk-taking.[330] And the case of pretextual sticky slopes indicates that, at least in certain circumstances, the form or content of the underlying victory might not matter at all—sticky slope logic will be deployed against the social movement's agenda regardless.

The writers who explicate these theories do have arguments for distinguishing their own observed dynamics from seemingly oppositional counterparts.[331] However, by their own admission these distinctions often turn out to be "excruciatingly context dependent."[332] This sharply limits the ability to make ex ante predictions about when a slope will be sticky or slippery.

But perhaps sticky slopes are less something one finds, and more something one does. The interplay of sticky and slippery slope dynamics in the same factual scenarios, as part of the same social movement controversies, indicates that they are not static facts on the social movement map—bogs that can be identified and avoided from afar. Social movement progress is an iterated game, and thus individual victories—be they cultural, political, or judicial—do not simply end a social controversy by fiat. Nor can the fact of a particular victory be left behind as yesterday's news. Instead, victories become

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Patterson, 357 U.S. 449 (1958) (invalidating an attempt by Alabama to learn the membership rolls of the local NAACP).

327. Monin & Miller, *supra* note 259, at 41 (citing William DeJong, *An Examination of Self-Perception Mediation in the Foot-in-the-Door Effect*, 37 J. PERSONALITY & SOC. PSYCHOL. 2221 (1979)).

328. FREDERICK L. SCHUMAN, DESIGN FOR POWER: THE STRUGGLE FOR THE WORLD 200 (1941) (quoting David Lloyd George).

329. *See supra* notes 185–90 and accompanying text.

330. *See* Mayer N. Zald & Roberta Ash, *Social Movement Organizations: Growth, Decay and Change*, 44 SOC. FORCES 327, 327 (1966) (arguing that "participants in [social organization] structure have a stake in preserving the organization, regardless of its ability to attain goals").

331. *See, e.g.*, Kahan, *supra* note 279, at 641; Monin & Miller, *supra* note 259, at 41.

332. Kahan, *supra* note 279, at 641.

themselves powerful locations of social argument and controversy, as both sides struggle to "turn" them towards their preferred meaning.[333]

Framing theory is a branch of sociology which argues that social movements are not simply responding to pre-existing dynamics necessarily flowing from particular institutional or social arrangements. Rather, they are in the business of creating and manipulating what social facts mean in the context of their constituencies, their opponents, and the surrounding polity.[334] "To frame," writes Robert Entman, "is to *select some aspects of a perceived reality and make them more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation* for the item described."[335] Social events may or may not possess an inherent valence in favor of one social movement or another, but the realm of moral argument is surely rich enough that any party could still weave a tale emphasizing attributes of the event that assist in their own cause while deemphasizing other tropes.[336] For example, earlier this year when the Supreme Court invalidated a portion of the federal Defense of Marriage Act in *Windsor v. United States*, Chief Justice Roberts's dissent emphasized the federalism rationale embedded in the majority opinion as a means of limiting its applicability to future gay marriage challenges.[337] The goal is to "selectively punctuat[e]" and "encod[e]" relevant social events in a way that helps encourage mobilization for a person or group's preferred social ambitions.[338]

Slippery and sticky slope dynamics are tools in the social movement toolbox through which this battle is waged, and the fact that these tropes are deployed even when their direct causal effects are slim indicates that their rhetorical punch is significant indeed.[339] So an advocate for future reforms may try to cast a past triumph as making further steps relatively costless,[340] or as

333. *See* Schraub, *supra* note 292, at 1259–60.

334. *See* Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 25 ANN. REV. SOC. 611, 613 (2000) (arguing that from within framing theory "social movements are not . . . merely . . . carriers of extant ideas and meanings that grow automatically . . . . Rather, movement actors are viewed as signifying agents actively engaged in the production and maintenance of meaning for constituents, antagonists, and bystanders or observers").

335. Robert M. Entman, *Framing: Toward Clarification of a Fractured Paradigm*, 43 J. COMM. 51, 52 (1993).

336. *See* Edelman, *supra* note 276, at 232 ("[T]he social world is . . . a kaleidoscope of potential realities, any of which can be readily evoked by altering the way in which observations are framed and categorized.").

337. Windsor v. United States, No. 12-307, slip op. at 2–4 (June 26, 2013) (Roberts, C.J., dissenting). If respect for state sovereignty is what motivated *Windsor*, of course, the precedent would if anything be adverse to challenges to state-level gay marriage bans.

338. TARROW, *supra* note 290, at 142.

339. *See supra* Part III.A.2

340. *See* Volokh, *supra* note 8, at 1039–47.

rendering their opponents extremists,[341] or as signifying rising group political influence of the sort one would not want to cross.[342] And in turn, their opponents will retort that the victory demonstrates the need to countermobilize and hold the line,[343] or that the group should be satiated by the reform and allow the broader polity to move on to other concerns,[344] or that the principle of the prior advance in fact stands in opposition to new demands.[345] Successful control of the framing helps dictate whether the event in question ultimately helps or hinders future social movement objectives. This point is missed insofar as one views prior victories as static elements in the otherwise dynamic field of social movement controversy.

The specific dynamics by which groups struggle to impose their preferred meaning on a movement's triumph—what causes certain groups to "win" the framing battle and others to lose—must be put aside for future research. But sticky slope language helps illuminate that a prior triumph is precisely the sort of social fact ripe for this sort of framing behavior, and all sides can and will seek to do so for their own benefit. Rather than passively hoping that, for example, a norm/accomplishment disjunction will help arrest the momentum of one's political opponents, a countermovement instead will aggressively emphasize the (alleged) fact of the disjunction in a bid to frame the meaning of the victory as an example of political overreach. It may be that the fact of a disjuncture makes it more likely the sticky slope will take.[346] But it is exceedingly unlikely that a sticky slope will emerge absent some countermovement that is actively seeking to bring it into existence. And likewise, a movement seeking to evade a sticky slope can seek to move the battlefield to more favorable terrain by utilizing arguments and strategies that appear less amenable to sticky slope argumentation—but the odds of avoiding the clash entirely are slim.

C. The Judge and the Sticky Slope

This Part has focused primarily on social movement usage of sticky slopes. However, as noted above, sticky slopes matter to judges as well,[347] and viewing sticky slopes as an argumentative tool rather than a static social feature helps situate their special importance and peril from a judicial standpoint. I therefore conclude by making some initial observations on how judges can and cannot properly use this particular argumentative tool.

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341. *Cf. id.* at 1100–01 (observing that past triumphs can shift the window of political possibilities so that formerly extreme positions are considered moderate—and presumably vice versa).

342. *See id.* at 1122–26.

343. *See supra* Part II.A.

344. *See supra* Part II.D.

345. *See supra* Part II.C.

346. *See supra* Part III.A.1.

347. *See supra* notes 44–53 and accompanying text.

To be sure, judges' use of sticky slope argumentation at least partially parallels that of social movements. Judges are not just external arbiters on the subjects that social movements contest. They carry their own normative preferences,[348] preferences which may track the battle lines of the larger social controversy. Indeed, the process by which judges are appointed is often part of a running "dialogue" occurring in the political branches responding to the political effects of judicial decisions on current social disputes.[349] In this way, judges may fairly be considered to be part of social movements, albeit in a specialized and particular way.[350] To the extent the judiciary is just another field of social contestation, we should expect the judiciary's relationship with sticky slopes to differ only slightly, if at all, from other social movement actors.

Despite their social role, however, judges are circumscribed in the types of arguments they can justly make. Even the great realist Karl Llewellyn contended that judges "are not free to do what they choose or to decide as they choose[,] . . . their action in matters which concern the rest of us is circumscribed and limited . . . ."[351] Consequences do matter in judicial decisions, but so do norms of predictability, transparency, and reliance.[352] Sticky slope argumentation is often at odds with these important judicial values. Most obviously, pretextual sticky slopes gain their power by obfuscating and obscuring the true rationale behind a judicial decision.[353] But

348. *See, e.g.*, Thomas Reed Powell, *The Logic and Rhetoric of Constitutional Law*, 15 J. PHIL. PSYCHOL. & SCI. METHODS 645, 648 (1918); Vicki Schultz & Stephen Patterson, *Race, Gender, Work and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1167 (1992) ("There is little disagreement that judges' political, social, and personal values may affect their decisions.").

This does not mean that judges are not influenced by other considerations. *See generally* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does*), 3 SUP. CT. ECON. REV. 1 (1993). Nor does it mean that they follow their normative preferences to the exclusion of all else. But these preferences are there and they are influential in governing judicial behavior. *See, e.g.*, DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS 133–34 (2002); Anthony Niblett, *Do Judges Cherry Pick Precedents to Justify Extra-Legal Decisions?: A Statistical Examination*, 70 MD. L. REV. 234, 260 (2010) (finding that if "judges have preferences that conflict with the outcomes of precedent, they are significantly less likely to hand down a decision similar to the precedent").

349. *See* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 655–58 (1993) (noting that among the many ways that politicians respond to unfavorable judicial decisions is by nominating and confirming judges whose opinions are more in line with their constituents' views).

350. *See* Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 733 (2012) ("[S]ocial movement activists do not see judges as impartial outsiders . . . . Rather, judges are, at a minimum, part of a dynamic political opportunity structure in which they function as sympathetic or hostile elites. And in the eyes of some activists, judges are more than that; they are social movement actors embedded in the state, using their elite institutional positions to enact the constitutional, political, and moral vision pushed by the movement with which they identify.").

351. Karl Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 COLUM. L. REV. 581, 583 (1940).

352. *See* LON FULLER, THE MORALITY OF LAW 34–38 (1964); Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 30–31 (2007); *supra* note 50 and accompanying text.

353. *See supra* Part III.A.2.

many of the sticky slope examples outlined in Part III also rely on their power to create ambiguity—in critical legal doctrines,[354] in the meaning of prior legal arguments and precedents,[355] or in the severity or resolvability of particular problems.[356] Ambiguity, in turn, gives objective credence to decisions that may actually be the product of bias or external preference.[357]

I argued at the beginning that both sticky slopes and slippery slopes are theoretically morally neutral—problematic only if one favors or opposes whatever happens to be downslope.[358] Nonetheless, I acknowledged that slippery slopes have a sinister reputation because "inherent in the notion that one has to go through *A* to achieve *B* is that *B* is not popular enough to be attained directly."[359] Slippery slopes, in other words, are worrisome because they allow a movement to attain victories even where a majority of voters perched at the top of the slope would oppose the reform.[360] Sticky slopes, though vested with the same theoretical neutrality, often appear worrisome for similar reasons: they have the effect of collaterally obstructing a given reform for reasons apart from whether that reform, taken on its own, would be preferable or advisable. Indeed, sticky slopes' capacity for creating ambiguity means they often provide a rationale for judges to avoid directly addressing the issue of whether the status quo is justified.

The use of slippery and sticky slopes in this way may be unavoidable to some degree, particularly when we are talking about the rough and tumble of democratic politics or social agitation. But judges are not situated identically to other political actors, and certain tactics, arguments, or rhetorical maneuvers which may be acceptable in general may justifiably be forbidden to the judiciary.[361] At minimum, judges should accept the obligation to say what they mean when announcing the legal rules that govern people's lives. A sticky slope argument is fine (or at least not intrinsically objectionable) if a judge is

354. *See supra* Part II.B.

355. *See supra* Part II.C.

356. *See supra* Part II.D.

357. *See supra* note 260 and accompanying text.

358. *See supra* note 19 and accompanying text.

359. *Supra* note 19.

360. *See, e.g.*, Volokh, *supra* note 8, at 1042.

361. *See, e.g.*, William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365, 414–15 (1990) ("In a democracy, we accept the legislature's political decisions which favor and disadvantage interests, because legislators are accountable to the people and can be disciplined if they make poor political choices. The legitimacy of 'political' decisions by unelected judges cannot be defended in this way, because they are not accountable to the democratic process."); Marie A. Failinger, *Can a Good Judge Be a Good Politician? Judicial Elections from a Virtue Ethics Approach*, 70 MO. L. REV. 433, 510–11 (2005) (contending that many behaviors that would be unremarkable if conducted by a politician on a campaign trail would be deeply frowned upon if done by a judge). *But see* Richard Briffault, *Judicial Campaign Codes After* Republican Party of Minnesota v. White, 153 U. PA. L. REV. 181, 220 (2004) ("It is not clear if the interest in integrity is unique to the judiciary, or whether the integrity of the judiciary is more threatened by candidate misrepresentations than the integrity of elected executives and legislators. Surely, there is a public interest in the honesty of all elected officials and in the public's confidence in the honesty of all those in power.").

conscious and open that this is what she is doing. It is often entirely legitimate to argue that a given social trend should be arrested, and the deleterious effects of certain changes certainly qualify as consequences a judge can rightly consider. But that argument should be made on its merits. The normative risk of sticky slopes—beyond whether we have a particular taste or distaste for what lies downslope—is that they block changes without judges ever having to directly address the substantive merits of the claim and often without clearly identifying the doctrinal problem barring it. This is a worrisome result regardless of whether one ultimately believes judges should take an active role in social reform endeavors.

CONCLUSION

Though less well known, sticky slopes play as important a role in American legal argument as their slippery cousins. A sticky slope can dramatically affect the course of a social movement, closing off once-promising avenues for reform and opening new opportunities for reactionary resistance. Sticky slopes also play a role in official legal doctrine, as prevailing constitutional law exemplifies in mandating an inverse relation between political power and judicial protection. But even—or perhaps especially—when sticky slopes are not playing a causal role in legal decision making, they still exert considerable influence. Beyond its ability to constrain and channel social movement strategy, the usefulness of sticky slope logic as a mechanism for leveraging legitimating ideology to mask otherwise unpalatable legal or political rationales renders it extraordinarily important to any understanding of how seemingly unjust social orders persist.

Social movements working in the legal and political arena ought to be cognizant of sticky slopes, and can mitigate their effects in three ways. First, simply by being aware of the potential prospect of a sticky slope, the movement can engage in more robust long-term strategic thinking to help minimize the risk that it will end up impeding its own prospects. Second, noticing where sticky slopes are being deployed in a pretextual fashion offers opportunities to force the hand of legal policymakers by stripping bare the underlying rationale for their decisions. The same vulnerabilities which motivate their progenitors to hide their underlying justifications hopefully will make them wide targets when brought to the surface. Third, appreciating the existence of sticky slopes in the context of an iterated social movement struggle recasts prior victories as themselves sites of future controversy and struggle over meaning. A single accomplishment can often be framed in ways that either encourage or stymie the future objectives of the propagating movement, and that framing process itself is important as the movement seeks to progress to further agenda items.