2009

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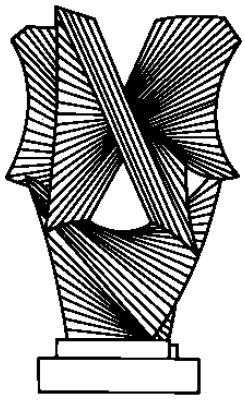
CHICAGO

JOHN M. OLIN LAW & ECONOMICS WORKING PAPER NO. 501
(2D SERIES)



Interest Groups and the Problem with Incrementalism

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November 2009

INTEREST GROUPS AND THE PROBLEM WITH INCREMENTALISM

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Incrementalism, as opposed to dramatic change, is conventionally lauded in law as the prudent path of change--a path that gives credit to history and precedent. But the conventional view pays little attention to interest groups. Step-by-step change poses a serious problem when it alters the constellation of supporters and opponents of further moves. The core problem is that once an interest group loses and becomes subject to some regulation, it has reason to turn on its competitors and encourage that they be similarly regulated. The laws that emerge on the incrementalist's path may therefore not mark progress toward socially desirable or democratic outcomes. Examples include environmental standards, smoking bans, disability accommodations, and minimum age legislation, but nearly all law can be seen as incrementalist, just as most tradeoffs might be described as on slippery slopes. The incrementalism problem is most striking where a prior regulatory step is, from the perspective of those who must comply, costly to reverse. The problem is reduced where there is real learning from experience; it is enlarged where advocates of change implement a divide-and-conquer strategy to separate defending interests. It is possible that compensation policies or even moratoria on certain kinds of regulation can be used to decrease wasteful rent-seeking and to minimize the interest-group problem.

Introduction

It is easy to encourage lawmakers to be moderate, or incrementalist. The case for incrementalism, or against dramatic change, where moderation and way stations could be managed, is built on claims about unintended consequences, expectations, risk aversion, and learning by doing. Meanwhile, any proposal for sweeping change can be derided as the product of impatience and an inadequate appreciation of history and precedent. Incrementalists favor leaps over baby steps only where systems are regarded as entirely broken and where bad habits need to be broken with prods rather than nudges. Incrementalism may also be encouraged by the presence of multiple sources of law, and where lawmaking is an interactive venture. Legislatures, courts, executive officers, administrative agencies, and even voters interrelate, and incremental lawmaking is often the strategy most respectful of the other players' roles. In this stew, each cook is told to fear that drastic action will spoil the broth. Incrementalism is encouraged by leading commentators.[1] Most of the encouragement is directed at judges, but the arguments used

[*] William B. Graham Professor of Law, University of Chicago. I am grateful for suggestions received from Brian Hanessian, Faye Paul, Ariel Porat, Zak Rosenfield, Cass Sunstein, and colleagues at a faculty workshop at the University of Chicago Law School.

[1] See, e.g., **Cass R. Sunstein**, **One Case at a Time: Judicial Minimalism on the Supreme Court** 4 (1999) (arguing that minimalism promotes deliberative democracy); Yair Listokin, Learning Through Policy Variation, 118 **Yale L.J.** 480, 519-522 (2008) (contrasting the cost-benefit approach, which looks for the "best" policy, with the Burkean approach, which is incrementalist rather than drastic); Cass R. Sunstein, Burkean Minimalism, 105 **Mich. L. Rev.** 353, 362-366 (2006) (defending a form of Burkean judicial minimalism that restrains judges to shallow and

in favor of incrementalism are at least as applicable to regulators and legislators. Incrementalism might also mean different things to different observers; one person's moderation is another's drastic change, and every new law can be seen as a step towards more far-reaching change. For present purposes, a proposal is incrementalist if advocates of more drastic change will support the proposal both because they approve the change it represents and because it may be a step toward their larger goal. It is, for example, incrementalist to propose a limitation on gun ownership or on a smoking ban with the aim of an eventual prohibition of all firearms or of smoking in all public places.

The conventional view of incrementalism pays little attention to interest groups. There is a serious problem with piecemeal change, however, when it alters the constellation of supporters and opponents of further moves and gives organized interest groups reason to realign themselves in response to the incrementalist change. I begin with such matters as the prohibition of smoking in restaurants, while it remained legal in bars and hotels, and the requirement of ramps and other disability accommodations, initially in new buildings and then in some older structures. However, one can substitute almost freely the imposition of progressively more exacting fuel economy standards on automobile manufacturers and the establishment of incentives to achieve targeted reductions in heat-trapping gases.[2] Incrementalism is everywhere, though certainly not everywhere alike. There is little reason to be confident that the laws that emerge on the incrementalist's path represent progress towards socially desirable, or democratic, outcomes--though I will make the realistic assumption in most of the examples here that we are uncertain as to the location of the social optimum. Part I describes representative cases, and explores what I call the "incrementalism problem." I develop the idea that this problem is especially interesting where a prior regulatory step is, from the perspective of those who must comply, irreversible. Part II takes on a common defense of incrementalism, that policymakers learn from experience and therefore from small, prior steps, and suggests that this defense is rather weak. The discussion extends the scope of the incrementalism problem to minimum-age legislation and to the larger topic of slippery (and nonslippery) slopes. Part III explores the idea of using compensation as a tool with which to solve the incrementalism problem. Compensation could push groups to form coalitions so that they can optimally defend against the divide-and-conquer strategy that is at the core of the incrementalism problem. It is an offshoot of the claim that, in a

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narrow changes in law). Most of the cases discussed in this Article deal with legislation and regulation, although some of the changes, such as disability accommodations, have also come about through judicial action. The argument advanced here applies to judicial decisions, for they too are influenced by interest groups, in litigation as well as in appointment and confirmation. However, the influence is different. Stare decisis also changes the argument as it is applied to courts. Finally, as is well known, various doctrines and conventions limit interest groups' ability to control the order in which incremental (or drastic) change is proposed to courts. See generally **Maxwell L. Stearns**, **Constitutional Process: A Social Choice Analysis of Supreme Court Decision Making** (2000); Maxwell L. Stearns, Standing Back from the Forest: Justiciability and Social Choice, 83 **Cal. L. Rev.** 1309 (1995) (standing doctrine ameliorates ability of litigants to control the critically important path of legal decisions). For the most part, the incrementalism problem as found in judicial decisions is left for another day.

[2] As we will see, the last example represents a serious incrementalism problem. However, fuel efficiency standards do not, because they resemble minimum age legislation and other regulation that does not divide and conquer different groups. See infra Section III.C.

world with overachieving interest groups, we need organized groups to oppose one another in order to get good results.[3] This coalition-formation, or power-politics, approach to incrementalism proves difficult. One problem is specifying the trigger that brings about compensation; virtually every proposed law can be framed as embedded in a larger picture such that every law is a sly incrementalist move. Another problem becomes apparent when the focus moves from power politics to rent-seeking, because the possibility of obtaining compensation is likely to increase wasteful rent-seeking by those who gain from influencing lawmakers. The problems with most things compensatory suggest a solution, sketched in Part IV, that begins with upfront disclosure of regulatory aims, and then provides for a moratorium on regulation beyond a specified limit. Again, the problem is more apparent than the solution. A brief conclusion follows and suggests that we be aware that incrementalism in lawmaking should be feared as often as it is welcomed. As the discussion works toward this conclusion, it has two aims, one positive and one normative. The first is to develop a tool of analysis; the incrementalism problem and its possible solutions can help us understand the path of lawmaking and the role of interest groups in forging that path. The normative aim is to argue with those who believe in moderation in all, or most, things. My claim is that this view of optimal change ignores the presence of interest groups.

I. **Incrementalism and Irreversibility**

A. The Incrementalism Problem

Consider a case in which the American Association of People with Disabilities, or perhaps an advocate for disabled veterans, seeks to impose new building requirements in a jurisdiction that previously required accessibility only in new construction. The proposal is to mandate wheelchair-accommodating ramps in all commercial buildings, and thus to require substantial retrofitting.[4] Owners of these buildings are opposed, if only because compliance will

[3] See Gordon Tullock, Rent Seeking and Tax Reform, **Contemp. Pol'y Issues**, Oct. 1998, at 37, 46 ("Many years ago, James Buchanan suggested a solution: The U.S. could select--perhaps at random--some other group of people about the same size as the benefited group and could put the tax on them. Thus, two lobbying groups would be opposing each other and the outcome presumably would be improved."). On assessing the power of interest groups and the magnitude of rent-seeking behavior, see Paul J. Stancil, Assessing Interest Groups: A Playing Field Approach, 29 **Cardozo L. Rev.** 1273 (2008).

[4] The actual progression of the law has been complex. In 1968, Congress passed the Architectural Barriers Act, which requires accommodations for people with disabilities in all new federally funded construction. 42 U.S.C. §§ 4151-57 (2006). A variety of other regulations culminated in the Americans with Disabilities Act of 1990, which requires "reasonable accommodation" to the disabled in all places of employment with fifteen or more employees and in all places of public accommodation. Pub L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-213 (2006); 47 U.S.C. 225, 611 (2006)). The latter category is a broad one that includes most places in which commercial activity is undertaken. The determination of what accommodation is reasonable is largely left to the courts. Architectural requirements for new construction are remarkably detailed. See **U.S. Architectural & Transp. Barriers Compliance Bd., Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities** (2002), available at http://www.access-board.gov/adaag/html/adaag.htm#purpose (detailing complex requirements for ramps, stairs, elevators, drinking fountains, and many other features of new structures). For a

be costly. These owners did not choose to install ramps before the law required them to do so, even though it might have helped them generate more revenue since most other buildings remained inaccessible. They will argue that disabled persons can work and shop in other buildings where ramps have been voluntarily constructed, or where ramps have been required by law in new construction. These vulnerable property owners would like to gain political support from other groups, including their tenants, owners of multifamily residential buildings, small shop owners whose structures are likely excluded from the category of "commercial buildings," and perhaps even owners of single-family homes. But even the most sophisticated members of these groups are unsure whether to devote resources to opposing or supporting the proposal. From the perspective of shop owners, for example, the proposal will increase their competitors' costs, much as the previous legislation benefited many of them indirectly by raising the costs of new construction. Sophisticated owners recognize that advocates or lawmakers who champion the cause of mandated accommodations will likely advance their agenda step by step. Store owners and even homeowners might wonder whether they will eventually be required to modify their properties at significant cost, and with very little prospect of offsetting revenues.

The most straightforward version of what I will call the "incrementalism problem" depicts the accommodation advocates as considering the benefits, but not the costs, of accommodations and as aiming to push the law as far as they can. Perhaps they favor government-mandated access ramps wherever there are stairs and no lift, and of course doors could be widened and products on shelves made more accessible. These advocates, as I will call those who wish to alter the status quo, perceive that if these aspirations were packaged into a law and proposed in one swoop, in dramatic rather than incremental fashion, they would be defeated. The loss would occur because of the combined resistance of owners, especially those who could be easily organized in order to overcome the familiar collective action problem, joined perhaps by tenants and retailers.[5] If the advocates begin with large commercial buildings, where the cost-

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detailed evolution of these regulations, see Jonathan C. Drimmer, Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities, 40 **UCLA L. Rev.** 1341, 1376-1405 (1993). Regulation of residential buildings is governed by the Fair Housing Act (FHA), which was amended to include people with disabilities in 1988. Pub. L. No. 90-284, 82 Stat. 81 (codified at 42 U.S.C. §§ 3601-3619, 3631 (2006)). Under the FHA, landlords must allow disabled tenants to make adjustments to unit and common spaces. In addition, all new residential buildings with four or more units must be made handicap-accessible. The example in the text may also be understood as concerning local law, which often precedes or adds to federal law. California, for example, enacted broad disability legislation in 1980, and this regime has been updated frequently and, we might say, incrementally. See The Fair Employment and Housing Act, **Cal. Gov't Code** §§ 12900-96 (West 2009). For a general overview, see Michael L. Murphy, Assembly Bill 2222: California Pushes and Breaks the Disability Law Envelope, 51 **Cath. U. L. Rev.** 495 (2002). The example in the text is intentionally ambiguous as to whether the requirement will attach to all older buildings or only to those on which some renovation or other work is done. The ambiguity reflects the pattern of existing law, in which the rules for new construction apply to the modification of older buildings, while the owners of untouched older buildings must simply remove architectural barriers that can readily be eliminated. But it also suggests that courts or agencies can choose to be more or less aggressive in declaring which buildings must be modified.

[5] There is the question of why new construction has been regulated more readily than old buildings or retailers. It is normally less expensive to build ramps when starting anew than it is to retrofit, so a cost-benefit analysis might have caused lawmakers to favor regulating new construction either as a start or simply to earn the highest social rate of return for a given investment. New construction costs also fall largely on dispersed and unidentifiable future

benefit calculus is likely to be most compelling, because ramps involve fixed costs and more users suggest greater benefit, then the opposition might be dispersed, modest in number, and unsympathetic. If successful here, the advocates can turn their attention and political resources to other structures, stores, or residential buildings.[6] In this next step, the property owners whom the previous step directly affected will have no reason to oppose the extension of the law. In fact, they will likely favor the next incremental move because it levels the playing field.[7] A ramp requirement will not raise the marginal cost of products in stores, but it might push some stores out of business and raise rents in the commercial buildings already regulated. The incrementalism problem is that a legal intervention might be both socially inefficient and democratically disfavored, and yet it might come about because advocates can nudge the law there step by step, taking advantage of uncoordinated opponents. The advocates might do this without any grand design, but the problem is more obvious where there is a strategy. An early target of regulation may not plan or be expected to turn against its competitor, but it will not work hard to protect its competitor against regulation.

We might think of the incrementalism problem as one of several ways in which the output of a political or judicial process appears paradoxical. There are intransitivities that cannot be solved; a number of voting paradoxes drive home the point that when we aggregate preferences we often get results that seem illogical but are in fact nearly inevitable.[8] Then there are slippery slopes, such that the final resting point of law is something unwanted when the polity started down the slope. Transaction costs, self-interest, and a variety of other factors can make this so. The guiding principle in all these sources of unease is that law can be path

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owners of properties, who may simply be less able to stand up to the advocates for improved access. In any event, the owners of newly constructed and regulated buildings have no great reason to favor (or disfavor) the regulation of preexisting structures unless they think that some of these will close down and rents will rise elsewhere.

[6] The tale in the text depicts a strategic advocacy group, but the incrementalism problem does not depend on conscious, strategic behavior. Advocates may innocently push for an incremental change, because they perceive that the smaller change is all that can be obtained at present. They may be unaware of the alignment of interest groups opposed to the changes they support. It is nevertheless a problem if this happens repeatedly, as if there were strategic division of the defense, and in a manner that takes us away from the social optimum.

[7] Competition is probably the key to recognition. For example, in 2009, United Parcel Service (UPS) supported legislation that would put FedEx, its direct competitor, under the jurisdiction of the National Labor Relations Board (NLRB), when it had previously operated under the Railway Labor Act. Alex Roth, FedEx and UPS Clash Over Legislation, **Wall St. J.**, July 20, 2009, at B1. An important difference between the regulatory structures is that workers can unionize on a location-by-location basis under the former, but not the latter. The reach of the Railway Act and of the NLRB can be thought of as incrementally altered.

[8] Voting paradoxes, arising out of preferences that cannot be aggregated in a way guaranteed to be consistent and to meet other seemingly simple requirements of democratic decisionmaking, are well known. See William H. Riker & Steven J. Brams, The Paradox of Vote Trading, 67 **Am. Pol. Sci. Rev.** 1235, 1241 (1973) (analyzing the logrolling paradox and concluding that "if each [legislator] behaves rationally and makes the trades possible for him, all the members suffer. They are, in fact, worse off than if they had voted sincerely or naively"). The problems may be compounded in the presence of overachieving interest groups. See generally Saul Levmore, Voting Paradoxes and Interest Groups, 28 **J. Legal Stud.** 259 (1999) (discussing basic voting paradox as well as logrolling and other voting paradoxes and introducing the idea that interest groups exploit paradoxes). These paradoxes are also present in the context of judicial processes. See Frank H. Easterbrook, Ways of Criticizing the Court, 95 **Harv. L. Rev.** 802, 823-831 (1982) (examining the decision-making processes of the Supreme Court from a public choice perspective and concluding that inconsistency is inevitable in such an institution).

dependent in a way that is troubling even to citizens who do not have idealistic expectations of law.[9]

This somewhat stylized tale of mandated investments, that may or may not be socially efficient, involves strategic behavior by advocates but little foresight on the part of those who would be regulated. In the accommodations example, it is easy to see the incrementalism problem from the perspective of the owners of significant commercial properties, but of course that is not the same as asserting that there is a serious social problem. That conclusion, and the quest for solutions to it, normally requires that the optimal regulation be identified. Here, as elsewhere, that is unlikely both because some of the costs are nonpecuniary and because extensive experimentation and data gathering would be required in order to assess the benefits of accommodations in selected locations, the effects of subsidies for accommodations, the share of benefits that might be obtained with modifications only to buildings located near accessible public transportation, and so forth. The same will be true for other instances of incremental lawmaking by legislatures, courts, and agencies. Indeed, one question to address is whether this incrementalism problem has any bounds at all. For the present, I address the question of the social optimum as well as that of boundaries by suggesting that we first get a sense of the problem of incrementalism and then see whether it can be solved in a way that runs little risk of creating a social problem where none had previously existed.

The incrementalism problem may also take the form of producing the "wrong" regulation rather than too much regulation. If A wants to gain Z by regulating W, then X, then on to Y, and then finally to Z, and the social optimum is likely to be W, A may look to start with the group that cannot only be divided and conquered but also that which will be most effective if it joins A and turns on a competitor in the second step. A may have the political power to take any one step, and it may, for example, bring about the regulation of X, knowing that X will then turn on Y with some political power. Power politics may be such that it all ends with WXY, when in fact it ought ideally to have ended with W alone or perhaps WX. In most of what follows, examples are constructed to emphasize the problem of too much regulation. However, it should be understood that there may instead, or also, be this danger of the wrong regulation. For example, smoking bans may have been imposed on restaurants before bars not because there is more second-hand smoke in restaurants or because a cost-benefit calculus suggested that the restaurant ban was the superior "investment," but rather because advocates perceived that restaurant owners, once regulated, would be better at overcoming their collective action problem in order to bring about the regulation of bars than the other way around. Once regulated, each group would likely favor the extension of the ban to the other inasmuch as they are rivals for patrons. If

[9] In describing the mechanisms of the slippery slope, Eugene Volokh describes how mandatory gun registration could lead to gun confiscation, even though confiscation could not have garnered sufficient support at the initial stage. See Eugene Volokh, The Mechanisms of the Slippery Slope, 116 **Harv. L. Rev.** 1026, 1033 (2003) ("Registration may change people's attitudes about the propriety of confiscation, by making them view gun possession not as a right but as a privilege that the government grants and therefore may deny.").

advocates' perceptions are incorrect, this incrementalism may cause the regulation to end with restaurants even if the social optimum includes the regulation of bars.

Returning to the specific case of access ramps, it is plausible that the cost of retrofitting buildings makes the optimum policy one of requiring ramps only for large buildings where this cost is spread over many users. In the absence of legal intervention, the market might arrive at something close to this conclusion on its own and might improve on legal intervention by settling on ramps in some but not all locations of each type.[10] In any event, let us posit that existing single-family homes and small shops will definitely escape regulation, either because lawmakers uniformly perceive such regulation to be socially inefficient, because advocates choose to expend their political capital on higher-valued ends, or because the owners of these homes and shops, however dispersed, have enough political power to defend against the considerable costs that would be imposed. Still, it is clear that inefficient law might come about because of the divide-and-conquer strategy. Storeowners, for example, are not well organized and do not know whether to join with the owners of larger commercial properties in opposing regulation that is drafted to apply only to the latter group. It may be that they free ride on the defense mounted by the larger property owners; it may be that they are simply too dispersed to organize in opposition; and it may be that they miscalculate how far legislation will go, though this last mistake has little to do with incrementalism.

If all structures in a jurisdiction were owned by a single party, there would be no incrementalism problem, or at least not one of the kind defined here. Based on the details first (or subsequently and incrementally) proposed, a property owner might miscalculate the investment it should make in opposing legal intervention. There might, in this sense, be an incrementalism issue, but one not different from that faced by participants in markets and politics everywhere who must assess the intensity of preferences and the strategic behavior of other parties. If A seeks to return a product purchased from B, or sues B because the product was found injurious, B needs to decide on its response without knowing whether A or another buyer will subsequently seek to return other products or bring suit regarding other injuries. B may underinvest or overinvest, but we normally expect B to bargain with A, and we use the law of fraud to constrain the responses the parties give one another when asked specific questions. Somewhat similarly, when X and Y contract, X may get better terms by implying that over time it will order more of Y's goods if satisfied; in response, Y may lower its price or overinvest in servicing the account. Y can protect itself in the contracting process. Y can stipulate that the price of each item shipped to X will be q dollars, but that there will be a discount to p dollars if X orders more than a thousand of the items within the calendar year. If this creates too much of a risk that Y will lower quality, X can contract for extra payments in the event of defective products, and so forth. The incrementalism problem can in this way be seen as a problem of incomplete information; Y and

[10] Market solutions normally involve change over time so that we do not expect all property owners who install ramps to do so at the same time. The owners may have different costs, discount rates, and so forth. A legal mandate generally requires compliance in a specified time period; sometimes the effective date is in the future and even then different owners can comply at different times. Effective dates and grandfather clauses are other sources of incrementalism and subjects of interest group activity.

X can overcome this problem, to a degree, with more bargaining. The property owners who fear regulation by the government are less able to solve their problem this way because they have much higher transaction costs. They may need to bargain with legislators and with a variety of interest groups.

Moreover, bargains with governments are not so easily made or enforced. It is difficult for the government to "precommit" regarding future law,[11] and markets for hedging the risk of future law are undeveloped. But the easiest way to think about the singular character of the incrementalism problem may be to recognize that when commercial parties, like X and Y, face incomplete information about subsequent transactions, they operate within the discipline of the market. X can make contractual demands on Y regarding future business because X can otherwise find another supplier who will guarantee future prices or quality. The government, however, faces little market pressure. When it-–or the interest groups or temporary legislatures that comprise "it"-–misleads property owners about future regulation, there is normally no recourse.[12] If the government were a benevolent monopolist, there would be little of an incrementalism problem because it would have no reason to hide its regulatory intentions or its cost-benefit analyses. It is when the government is an intermediary of sorts, motivated by competing interest groups, that the incrementalism problem becomes a threat as a result of the coordination problem among groups.

It bears repeating that a coordination issue is not necessarily a social problem. If the advocates, rather than the defender-owners, have serious organization costs, then it may be a good thing if they can divide and conquer the property owners, as that might help the process of power politics find its way to the social optimum.[13] Indeed, many of the examples advanced here can be shaped so as to depict the advocates of change as the players with the collective action problem, who might be divided and conquered, or stymied. It is only by choosing examples where the advocates have a unitary goal, while the defenders must not only coordinate politically but also be prepared to suffer significant compliance costs in the event of regulation, that the incrementalism problem is made to appear on one side alone.[14] Regardless of whether the

[11] See Saul Levmore, Precommitment Politics, 82 **Va. L. Rev.**, 567, 618-22 (1996) (noting that, absent internal congressional regulations to facilitate precommitments, the judiciary is likely to strike down serious restrictions on legislative second thoughts as undemocratic in nature).

[12] There is the question of how a monopolist would impose or price ramps in a market where subsequent "customers" valued the ramps at decreasing amounts. But I do not pursue this analogy here because the emphasis is on interest groups.

[13] This is one application of the analysis in Eric Posner, Kathryn Spier, & Adrian Vermeule, Divide and Conquer 38-39(Harvard Law Sch. Pub. Law Working Paper No.09-24, 2009) (asserting that the divide-and-conquer strategy is ubiquitous; it is normatively hard to assess unless we know the social optimum; a fairly common "solution" is to impose a kind of equal treatment rule). Note that the equal treatment rule suggested by Posner et al. is unworkable in our regulatory setting because of the difficulty in identifying when situations are alike. Moreover, there is presumably some optimum that contradicts the value of equal treatment. It cannot possibly be that ramps should be everywhere.

[14] The focus on advocates rather than defenders might also be justified with the observation that the advocates set the agenda; they are on the attack and it is easier to think of them as dividing and conquering the defenders than the other way around.

collective action problem is as great for advocates as it is for defenders, it may be useful to think of incrementalism as a problem of nondisclosure, or even as a kind of fraud, since we normally think that full information is a good idea. For example, if the initial access proposal made it seem as though ramps would not be required in stores and homes, then it would be troubling to learn that advocates moved step-by-step to include all buildings, especially when they induced the earlier losers to their side in the later steps of the political game. I will continue to refer to incrementalism as problematic, though troubling is sometimes a better word. An important but modest version of the argument advanced here is that we ought not celebrate incrementalism because it will normally be difficult to know whether incremental changes in law, and especially legislated law, are desirable.[15]

B. Irreversibility

All instances of incrementalism are not alike. The prospect of smoking bans, by government order rather than by entrepreneurial decision, in aircraft, restaurants, hotels, offices, shops, and bars presents a different story than that of access ramps. It is tempting to see the same problem, or at least likelihood, of advocates' going far past the social optimum as they take on one set of interests after another--defeating one at a time when they could not have defeated all at once. But a difference between the cases is that ramps represent a kind of irreversible, sunk cost, while smoking bans can be reversed.[16] In theory, if advocates move on to bars after establishing

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It should be noted that the incrementalism exercise undertaken here does introduce a kind of status-quo bias, because I do not pause to ask how we came to the prevailing smoking, accommodation, or other policy that advocates now try to undo or outdo. But it is difficult to start in any other place, and the takings literature, which is something of a foil below, does much the same. There too we can ask whether existing property rights are fair or even efficient before we endeavor to restrain inefficient takings. See Saul Levmore, Property's Uneasy Path and Expanding Future, 70 **U. Chi. L. Rev.** 181, 183-189 (2003) (hypothesizing that property rights, both real and intellectual, may plausibly evolve as the result of wealth-maximizing allocations or interest group pressures; regulatory law normally assumes the former, and might add to the inefficiency when the latter is instead true); Saul Levmore, Two Stories About the Evolution of Property Rights, 31 **J. Legal Stud.** S421, S423-433 (2002) (arguing that every instance of privatization may have a transaction-cost and interest-group explanation; without a great deal of evidence to determine the actual origin, further government interventions that in any way rearrange the status quo are hard to evaluate).

[15] A note of caution in the other direction is also appropriate. Incrementalism may produce the wrong results even where there is no collective action problem among interest groups. Defenders may under-invest if they think that each regulatory step is minor and not worth opposing with sufficient force. But this is a problem with all bargains, as discussed in the text. There is also the danger that disparate interest groups care about proposed regulations to a different degree, so that it will be difficult to allocate costs, and the danger of free-riding will, therefore, be greater. I do not emphasize this sort of collective action problem here because there is no reason to think this problem greater for advocates or defenders, and no reason to think it is more a problem with respect to incrementalist proposals than to more drastic ones.

[16] Once the ramps are built, the regulated party has no interest in reversing the ban because there is no marginal cost to further compliance. In contrast, a smoking ban presumably imposes continuing costs on the entrepreneur who objected to it.

Many other differences exist that do not advance the present argument. Thus, there is a case to be made against smoking bans on the ground that consumers can simply avoid establishments that permit smoking, so that some sorting will provide places that do and do not permit smoking. It is possible that it is more difficult for owners of buildings to capture a portion of the benefits created by access ramps. And it is certainly puzzling to observe

a ban on smoking in restaurants, bar owners and restaurateurs could join forces not only to block the proposed ban in bars but also to roll back the restriction on restaurants. In the case of access ramps, the requirement attached to commercial buildings might have been similarly reversed as part of a package once other interests formed a political coalition. However, the owners of commercial buildings will have already invested in compliance; it is not as if they can disassemble the ramps and sell them at cost. In fact, regulations of that kind are rarely reversed (in the absence of technological change) because there is very little political pressure to do so; there is little pressure because there is little benefit to those have invested in irreversible fashion. It is thus likely that the incrementalism problem is relatively serious in the case of disability accommodations because the divide–and-conquer strategy is likely to be successful because of the irreversibility feature. Once a group loses, it has no incentive to join the defense when the next group is attacked, and it may even have reason to support the attack.

This interesting difference between cases where compliance costs are essentially upfront, nonrefundable investments and cases where there are ongoing costs is less impressive if there is a kind of endowment effect with respect to regulation, so that once smoking is banned, for instance, parties and expectations adjust so that there is much less pressure to reverse a law than to prevent its enactment in the first place. Still, it is doubtful that such an endowment effect can ever be as powerful as the fact of irreversibility, so that the problem of incrementalism remains more remarkable where compliance with an earlier step in the regulatory process is irreversible. The incrementalism problem is itself reinforced by the endowment effect such that laws, once on the books, are not easily removed.

The problem is not as simple as sketched to this point. There is no reason to think that most owners targeted in the first step of ramp requirements will overlook the fact that the accommodations about to be required are costly and irreversible. If these owners think that political battle will help their cause, they will seek allies among other interest groups, and they will try to impress upon these potential allies that the advocates for access will surely turn next to requiring further accommodations. The irreversible character of the proposed ramps (or elevators, or many other required improvements) is neither secret nor subtle. It ought to affect the likelihood that disparate interest groups will form a coalition to battle against an early regulatory step.

In contrast, when the owners of restaurants try to convince the owners of bars to join them in fighting the proposed ban on smoking, both groups know that if they fail to form an alliance at the first step, there will be opportunity to form one later on if the second step of lawmaking develops. If we compare the targets of the first steps in the two regulatory arenas, we see that those who must add accessibility ramps are in some sense worse off than the restaurateurs subject to a smoking ban because the former's compliance involves an upfront cost and is irreversible; on the other hand, the fact that the restaurateurs' compliance is a matter of reversible, ongoing behavior makes it more difficult for them to acquire allies for a defense at the

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overwhelming political success and yet so little market "success" in the preceding period. All this can be disputed and is, in any event, not necessary for the point advanced in the text.

first step. The incrementalism problem is in this way somewhat smaller than might first appear because, as the problem looms larger, disparate interests will be more inclined to form coalitions at earlier stages.

It is, however, implausible that this homeostatic device is so remarkable as to match the problem itself. Owners face transaction costs and a variety of collective action problems that make the divide-and-conquer metaphor seem appropriate. A large invading army, A, surely prefers to face two unrelated opponents, B and C, rather than one large opponent, D, that is as powerful as B and C perfectly combined. There will be many cases where A can battle B and then turn its full might on C, often with assistance from the remnants of B, much as the commercial property owners might eventually favor the law's extension to other properties. At best, B and C will sometimes form a defensive alliance, but that makes A no worse off than it would be with D as an opponent.

C. Reversibility by Compensation

No regulation is entirely irreversible because subsequent law can require retroactive compensation to one who paid to fulfill an unfunded mandate. I call this retroactive compensation, though that expression seems unnecessarily duplicative, to distinguish it from compensation that is promised in advance. One who has property taken by the government is compensated;[17] one who incurs costs by way of regulation might be retroactively compensated, in whole or in part, either because the government might choose to pay or because a legal regime might provide for compensation for the loss incurred in step one if and only if some other legal step is taken at step two. Compensation for government takings does not normally depend on results in subsequent legal steps. Thus, our commercial property owners might eventually join a coalition opposed to requiring ramps in all residential buildings, if that coalition agrees that it will press for a bill requiring retrofitting only when the government is willing to pay the costs of modification-–with a requirement that the government pay the costs for accommodations mandated and retrofitted during the past several years.

Legislative bundling of this kind appears to negate the role assigned to irreversibility. It does not undo the social loss from building ramps that would not have survived cost-benefit analysis, but it is the private cost and not the social loss that affects owners' willingness to join in the political power struggle. The prospect of retroactive compensation might cause a previous loser to join a defensive coalition. If so, the smoking ban and access ramp cases are close relatives. It is immediately apparent that compensation must play an important role in further discussion of the incrementalism problem and then again in Part III, where the focus is on power politics, or the notion of pitting organized interests against one another.

Reversibility by compensation seems like a promising means of eliminating or at least reducing the incrementalism problem. It avoids the larger question of why we do not have a rule

[17] See **U.S. Const.** amend. V ("[N]or shall private property be taken for public use, without just compensation.").

that all burdensome regulations come with compensation.[18] Virtually all legal systems provide for something like fair-market-value compensation for the complete taking of private property for public use, but not one constitutionalizes or legislates compensation for the burdens accompanying mundane regulations even when they fall on a narrow set of people or entities. Compensable regulatory takings are rare everywhere, perhaps because of valuation difficulties, because it is too difficult to tax or otherwise raise money from those who benefit from regulation, and because it is too difficult to establish a baseline from which such takings are measured.[19] Still, it is worth noting that if all regulatory burdens were compensated, or simply all that were not means of combating criminality or negligence or nuisance, there would be no incrementalism problem of the kind described here because there would be no reason for a property owner to object to socially efficient regulations.[20] Although reversibility by compensation can be seen as a selective application of a broader takings law, its purpose is very different from that normally found in the takings literature. There the idea is to protect investments in private property, encourage only efficient government interventions, diminish the incentive to engage in political activity at the expense of dispersed interests or single owners, and perhaps provide insurance to losers; here the notion is to prevent and reverse inefficient regulations by giving those who were once burdened reason to join coalitions that might block further, presumably inefficient, regulation. This is, of course an optimistic view. It might be that the regulation undertaken in the first step was efficient, and that now the promise of compensation generates a coalition that not only defeats incremental regulation, but also reverses the earlier, desirable law. In any event, the law of takings is more a reference point than a source of real law for the issues explored here. Among other things, incrementalism may be a problem where there is no "property" right at issue, so reversibility by compensation is independent of takings law.

For reversibility by compensation to work, potential political allies must know that it will be forthcoming. But retroactive compensation is hardly a constitutional right and, though it might be promised in a bargain, there is no way to enforce that bargain. An association of

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[18] See **Richard A. Epstein**, **Takings: Private Property and the Power of Eminent Domain** 57 (1985)("[C]ompensation must be paid . . . Let the government remove any of the incidents of ownership, let it diminish the rights of the owner in any fashion . . . no matter how small the alteration and no matter how general its application.").

[19] See, e.g., Lawrence Blume & Daniel L. Rubinfeld, Compensation for Takings: An Economic Analysis, 72 **Cal. L. Rev.** 569 (1984) (stating that the judicial approach to regulatory takings is unsatisfactory, and proposing an approach based purely on maximizing economic efficiency in which the government can be said to supply otherwise unavailable insurance through ex post compensation); Jeremy Paul, The Hidden Structure of Takings Law, 64 S. **Cal. L. Rev.** 1393 (1990-1991) (stressing the need to identify a "neutral baseline" in takings cases so that courts may evaluate regulation "against a reference point that is not provided by the regulators themselves . . . [nor] upon a method for evaluating regulatory goals that is more than merely the courts' own judgment concerning the wisdom of the regulation."); Thomas W. Merrill, Incomplete Compensation for Takings, 11 **N.Y.U. Envtl L.J.** 110 (2002-2003) ("When one examines American compensation law . . . one finds that . . . there is little guidance about how to measure just compensation in regulatory takings.").

[20] Incrementalism could be a problem because voters, now burdened not only by inefficient regulations but also by the financial responsibility of compensation, might pay more attention to drastic changes than to small ones, and advocates might thus slide things past voters by proceeding incrementally. But this is a different kind of incrementalism problem.

storeowners may gain an alliance with owners of commercial properties, who lost in the previous step, by promising to push for compensation even as they forestall further regulation, but the storeowners might back out or relax their efforts in the face of compromise legislation which proposes to exempt singly owned stores but does not offer compensation to those who had earlier been forced to invest in ramps. The owners of commercial buildings may not be able to observe the effort expended by their coalition partners and, in any event, the coalition between these nonrepeat players is likely to be unstable.

When the promise to gain retroactive compensation is not credible, the parties might agree to enforceable contracts. The targets of the second step of regulation might simply promise by contract to indemnify the losers in the first step for the cost of the political campaign or, more remarkably, for the cost of earlier compliance, such as the ramps previously required and installed. Alternatively, they may promise to pay only if they succeed in halting the incrementalist attack but do not gain retroactive compensation from the government. These are risky contracts for the storeowners to sign because they remove the incentive for aggressive political action on the part of the already regulated party. A better contract might provide for partial compensation so that all the parties have reason to push for the results that they respectively seek. The example assumes that it is most unlikely that legislation will compensate for the old burdens and mandate but not compensate for the step-two regulation, though that risk could also be minimized through contract.

I have hardly exhausted the possibilities here, but it is clear that the problem of incrementalism is greater, though not insoluble, where early-stage compliance involves irretrievable investments. And it is useful to repeat that whatever the level of irreversibility, the incrementalism problem is a possibility and not a fact. If it be efficient (or right or fair) to ban smoking everywhere, then we should celebrate the ability of advocates to get us close to that optimum by taking on interest groups one at a time. If reversibility by compensation is intriguing, it is because this compensation does not undo socially efficient regulation.

II. **Learning on the Slopes**

An obvious and important argument for incremental change, whether by legislation, judicial decision, or regulation, is that we often learn from experience. Lawmakers, and even the most avid proponents of drug legalization, might think it wise to begin with the legalization of marijuana alone in order to assess substitution effects, use by minors, and other consequences of legalization. An incremental approach might overcome political opposition, but a secondary, expected benefit is that the design of a second step is likely to reflect lessons learned from the first. A familiar pair, or entanglement, begins with a claim by opponents of a regulation that a given proposal starts down a slippery slope toward an endpoint that most citizens or legislators would regard as abhorrent. There will be cases, real or imagined, where the first step will indeed lead eventually to this endpoint because of intransitivity, political exhaustion, coordination

problems, or adherence to precedent.[21] In turn, advocates for the proposed regulation might say, first, that every good law occupies a compromise position between unattractive extremes, so that mention of the slippery slope and its endpoint is a mere scare tactic and, second, that there is learning from experience on the slope itself. We may not know at the outset where the social optimum is located, but it is normally sensible to gather information and then reevaluate the likely costs and benefits of further regulation (or deregulation). As we will see, irreversibility also plays a role in this argument. Lost in all this is the idea that the value of experimentation does not necessarily translate into a good argument for learning through incrementalism.

Consider a favorite example of the slippery slopers, gun control. Advocates of gun control might favor a first step of registration and licensing, but their opponents raise the specter of the slippery slope and argue, among other things, that registration will make complete confiscation easier.[22] Confiscation of all firearms in the hands of private citizens is anathema to most audiences. Advocates claim that easy ownership of assault weapons and pocket-size handguns cannot possible survive cost-benefit analyses; opponents disagree and may intuit that every step down the slope weakens the likely configuration of defenders ready to halt the next step on the path to confiscation. Advocates might also claim that a jurisdiction will learn a good deal from regulation. If licensing or a ban on assault weapons is associated with a dramatic reduction in violent crime, then there may be more support for further restrictions; if licensing leads to a serious increase in home burglaries and firearm theft, then a case might be made for requiring firearms to be kept under lock and key. Most businesses and individuals engage in a kind of search, or experimental process, before committing to major changes, and there is every reason to think that governments ought to do the same.

In principle, advocates might respond to the argument about learning-from-regulation with a promise, however unenforceable, that if a ban on fully automatic weapons, say, does not produce an x percent improvement in some stated measure, then they will forswear a ban on semi-automatic weapons and indeed might agree to rescind the first step, which is to say the ban on fully automatic weapons. The promise might be slightly more convincing if the experimental ban is legislated with a sunset provision. Similarly, a ban on smoking in bars is opposed, in part, by bar owners who fear a reduction in patronage, and who claim more generally that tourism and convention business will wilt. Advocates who argued that a substantial health gain could be enjoyed at low cost might agree to rescind the ban if alcohol sales or the hotel occupancy rate dropped by more than five percent. One way to think about or advance the rescission promise is

[21] For a catalogue of path-dependent accounts, see Volokh, supra note 9, at 1033-34 & 1051-52. Volokh tells several stories in which small incremental steps may lead to larger regulations, initially undesired. For example, the effects of gun registration might appear to be too small to merit a defense, but small steps may nevertheless aggregate to regulation that would have been highly objectionable. Registration might create political momentum on the side of gun control. Registration might reconfigure the opposition to gun control, if fewer people own guns as a result. Registration may lower the cost of confiscation, which could have been a principal point of opposition to confiscation for many people. Implementing confiscation might become constitutional where it previously was not, because the registration system can provide probable cause to search the houses of all registered gun owners. Id. at 1033-34.

[22] Id.

to recognize that if the health benefits could eventually be shown to exceed those projected by the advocates, it is almost certain that a subsequent step and wider ban would be proposed.

The absence of such promises might reflect their unenforceability, but it might also suggest that learning-from-regulation is largely a rhetorical device. Very few advocates suggest sunset provisions or agree at the outset that if the benefits of a regulation fall short of some stated expectation, then the law ought to be revoked. Perhaps this is because data rarely influence the most passionate advocates or interest groups, whose positions usually reflect very strong preferences rather than the likely efficient position for the population at large. If a local ban on smoking in bars produces a dramatic decrease in patronage and tax revenues from alcohol sales, then advocates of the ban are unlikely to apologize and say that their cost-benefit claims were wrong. They might believe that smokers moved to outdoor cafes or other unregulated locations, and propose that the ban ought to be extended to new venues. Owners of bars do not internalize the nation's health care costs, and the American Medical Association–-a surprisingly late-arriving advocate for smoking bans[23]–-does not take responsibility for local tax revenues or the profits of tavern keepers.[24]

Learning-from-regulation sometimes suggests careful experimentation rather than legal incrementalism. Indeed, the idea that states might be laboratories suggests not so much incrementalism as somewhat controlled, dramatic experiments. In the case of access ramps, it would be useful to have data about frequency of use and about the impact of ramps on workforce participation by disabled persons. A structured experiment might do this best. But, again, data matter more to agnostic citizens and nonpartisan lawmakers than to passionate advocates. If there were no significant workforce effect, then advocates might note the importance of more accessible public transportation in bringing disabled employees to accommodating workplaces.

In other settings, drastic changes might teach more than incremental ones. A single month or year in which smoking was banned everywhere in one jurisdiction, in all eating and lodging establishments there, or in all places on a rotating basis might yield useful data. Learning-from-regulation is a good argument for change and experimentation, but it is not always, or even often, an argument for incremental change, especially where incrementalism operates on the legal system as a whole rather than with the idea of using one or two jurisdictions as proving grounds.[25]

Learning-through-incrementalism seems most likely where the social or political optimum is widely understood to be in a specified range so that there is little support for either endpoint of what might otherwise be a slippery slope. Consider cases of minimum-age

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[23] See Alan Blum & Howard Wolinsky, AMA Rewrites Tobacco History, 346 **Lancet** 261 (1995) ("Today's AMA should be commended for attempting to tackle the tobacco pandemic. But it should be remembered that this organisation is a latecomer to the war.").

[24] Both groups might care about the health of employees in bars and restaurants, but these employees might self-select. It is interesting that neither side produces evidence of the sentiments of the employees.

[25] See Listokin, supra note 1, at 483, 533-38 (describing the value of high-variance experiments, especially when they are reversible). But reversibility in that work is not limited to compliance costs, and is not at all focused on its role in creating or blocking political coalitions.

regulation. Countries differ as to the minimum ages for drinking (alcohol), driving, voting, and other rights and privileges; but, apart from a few reconstructed prohibitionists, no one seriously espouses that these minima be in the thirties or forties. Incrementalism thus seems like the way to discover the "right" age at which one might be permitted to purchase alcoholic beverages. But here, too, partisans will disagree about the lessons to be drawn from experience. Imagine that advocates succeed in legislating a drinking age of nineteen, where it had previously been eighteen, with the claim that a higher age will reduce fatal automobile accidents, inasmuch as many of those are associated with alcohol consumption. If the new drinking age does not then bring about a substantial decrease in fatalities, advocates might say that nineteen-year- olds purchased alcoholic beverages for their younger friends and classmates, or perhaps that cashiers and bartenders misconstrued eighteen-year-olds to be older patrons. Advocates will agitate for a higher drinking age of twenty or twenty-one, with the conviction that the new restriction will reduce accidents. Of course, every categorical removal of drinkers–-or drivers–-will reduce the number of unwanted drivers. It might be that a ban on drinking applied to everyone under eighteen and then to twenty-five-year-olds as well would reduce fatalities as much as a prohibition attached to everyone under nineteen. Moreover, a cost-benefit driven policy would consider driving ages as well as drinking ages, though the private and social cost of an incrementally higher driving age will strike most lawmakers as greater than the cost of a year without alcohol. The latter is especially difficult to quantify. In any event, advocates rarely seem interested in experiments that would illuminate cost-benefit calculations of this kind. Mothers Against Drunk Driving (MADD) is likely to attach little value to the utility some people get from drinking. Similarly, McDonalds employs many high-school students and sells food to a young audience; it benefits from a low driving age and is unlikely to internalize the benefits of higher driving ages as it wields its political power.

Then there is the more obvious possibility that the learning-from-regulation will be that a drinking age of nineteen rather than eighteen does indeed significantly decrease fatalities. If so, there will be pressure to raise the age further to twenty, and so on, until the returns from doing so seem modest. If there were no evidence of a declining return as the age was increased, lawmakers might return to the minimum age of eighteen, or even try seventeen because of interest group pressure, and the rhetoric or heartfelt argument would include the point that it is unfair to restrict the freedom of eighteen-year-olds when the benefit is no greater than doing the same for other ages. Lawmakers may simply look for some political equilibrium where no organized interest has an enormous stake in the result. If so, this is a case where the learning-from-regulation argument offers significant support for incrementalism, though perhaps not for reasons normally contemplated.

In sum, useful experiments come in disparate sizes, in the sense that one does not always wish for a variable to move in small steps. The argument for limiting law to modest experiments must be based on asymmetrical error costs or irreversibility. But this is not the place for a full exploration of the distribution of error costs or for a conclusion as to when incrementalism is the best means of experimentation. Incrementalism has been lauded with no specification as to

exactly where it is desirable. My aim is simply to show that incrementalism comes with baggage, and that the baggage is heaviest where there is irreversibility. We can now add the observation that larger, dramatic changes do not necessarily impose greater and more irreversible costs, because useful experiments come in several sizes.

III. **Compensation and Interest Group Politics**

A. Undercompensation and Overcompensation

The discussion in Part I emphasized the importance of irreversibility in understanding the problem with incrementalism. If irreversible costs were imposed on one interest group in step one, then that group would have no reason to join in a common defense against further regulation in step two. Indeed, it might favor the regulation of its competitors in step two, either to raise their marginal costs or drive some out of business. But it was suggested that seemingly irreversible regulations could indeed be reversed, at least from the perspective of the directly burdened party, if compensation were retroactively provided. If a property owner must retrofit a building with an access ramp costing $300,000, and the ramp brings in new business with a present value of $50,000, then compensation of $250,000 will leave the owner as well off as before. Even if competing owners are not required to construct ramps, there will be neither envy nor competitive disadvantage in either direction. This compensation could be provided in step one, but that is the stuff of a very broad takings law, or it could be offered as part of a legislative package in step two. Compensation could come from the interest group at risk in step two, when that group seeks a defensive alliance, or it could come about because the allied groups push the government to provide retroactive compensation. Either way, the prospect of compensation might encourage a burdened party to join forces in opposing further regulation. If the government, or an advocacy group, is thus stopped in its incrementalist path, we might say, or wish, that the advocates (and more passive government constituents if they bear the financial burden of compensation) are penalized for pushing too far past the social optimum, and are thus perhaps deterred from overreaching with their strategic incrementalism. A more straightforward idea was that interest groups that were once divided are now encouraged to form the alliance they ought to have formed in the first place in order to defend against the overachieving advocates.

These perspectives are overly simplistic. The possibility of compensation complicates everything about incrementalism, the political process, and lawmaking. In this Part, the focus is first on political process, and especially power politics involving interest groups, where the larger question is the rules of engagement that are most likely to produce good laws. If there is an incrementalism problem, and if compensation is part of the solution needed to align interest groups in a way that produces good law, then the important question is when to provide compensation and whether to do so in discretionary or mandatory fashion. In time, the discussion looks not at power politics but rather at the question of inefficiency, or rent-seeking, which is to

say resource-consuming activity undertaken to gain a profit or government-sponsored advantage. At times the analysis tracks that which is appropriate to a discussion of takings law or retroactivity or both; the novelty of the discussion here is preserved by focusing on the case for and against incrementalism.

In the interest of reducing the number of balls in the air, I adhere to the remarkably and absurdly simplifying assumption that compensation will be correctly calculated. If this be not so, then incrementalism is but a small problem in a larger, distressing picture of government regulation and takings. When compensation is known to be ungenerous, affected parties can be expected to litigate and lobby to avoid having property or business interests regulated or condemned; if voluntary purchases by the government, in the shadow of expected regulation or eminent domain proceedings, are also ungenerous, then private property owners will expend resources to forestall government projects. On the other hand, where compensation in excess of the private owner's valuation is expected, there will be a push to have one's property taken, or one's business regulated–-if the regulation is severe enough that it amounts to a compensable taking. At the same time, if payments required of the government affect its inclination or ability to regulate or undertake projects (as will surely be the case if the beneficiary of the government's action is made to pay in one form or another), then we can expect a reduction in interventions. Correspondingly, if the government can capture gains from beneficiaries while it undercompensates losers, we can expect more intervention, unless the losers who could not extract more compensation are somehow relatively adept at blocking the government's interventions. All this complexity can be avoided with the assumption of accurate compensation.

Unfortunately, much complexity remains. Compensation may be perfect, or even generous, but a property owner will recognize that she is sometimes better off if the government regulates or takes the property of <u>others</u> and allows her property to flourish because of the new government project or regulation. In these cases, we must again be anxious about the incentives to encourage or discourage government interventions, and to craft them one way or the other. And then from the government's perspective, even if compensation were perfectly calculated, there will always be budget constraints and governments usually cannot collect from those who will benefit from the legal intervention. Though I try also to set these considerations aside, because they are associated with all government interventions rather than solely those that reflect incrementalism, they come into play when compensation is an ingredient in a suggested antidote to the incrementalism problem.

B. <u>Power Politics</u>

Thus far, compensation has been used to undo irreversibility and, in turn, to reduce the incrementalism problem. It can, however, play a more important role if we make assumptions about the desirable constellation of interest groups. A starting point of public choice theory is that a well-organized interest group is likely to overachieve at the expense of dispersed interests, or losers. The academic literature emphasizes the obvious problem of a group's gaining too

much of something;[26] there is, however, an additional problem with regard to the form of government activity. For example, it is not simply that the military budget will be larger because of the efforts of well-organized contractors, but also that it is likely to be organized around particular pieces of new equipment or military bases that benefit particular interests but may be suboptimal.

A suggested antidote to this process problem is to set well-matched interest groups against one another.[27] For example, if teachers' salaries were to be funded by a tax on milk, or milk subsidies required a reduction in the education budget, or perhaps both, then dairy farmers and public school teachers might lobby and even present useful information to the legislature. A fair fight might allow unattached legislators to resolve the matter in the public's interest. A skeptic might wonder why interest groups would abide by the rules of battle, inasmuch as they can be altered by legislation. And then there is also the question of why well-matched opponents should be expected to leave a desirable result on the battlefield. But a guarded optimist could think that there will be pressure to abide by the rule of well-matched opponents, and that the outcome of such a battle is likely to be superior to one in which either organized interest was able to operate at the expense of a dispersed, disorganized interest. A true optimist might look to campaign finance reform, education, and a free press to make interest group activity useless when not directed toward helping the polity find socially desirable outcomes, but a pragmatic optimist is prepared to look for a second-best power politics process. Finally, another interesting possibility is that it is easier for voters or public-spirited lawmakers to assess the strength of interest groups than it is to locate social optima more directly. Even an enlightened lawmaker may be unsure where to ban smoking; the same lawmaker may do well to leave it to associations representing owners of different kinds of establishments and to the American Cancer Society to bargain for the "optimal" ban or to battle for votes in one City Council after another in order to set the rules. The case for arranged battle is not unlike that in favor of the adversary system in litigation.

With this in mind, we can revisit the history of smoking bans. Advocates may not have been terribly well organized when they began investing in political activity, but an early target was airline cabins where the opposition was dispersed, though perhaps no more so than the advocates.[28] Following a period during which airlines agreed to no-smoking sections, legislation proceeded incrementally over the course of a decade, first by prohibiting smoking on domestic flights of under two hours, then on those shorter than six hours, and then on all domestic flights.[29] The airlines had little reason to fight these bans because smokers could not migrate to unregulated close substitutes. At the local level, smoking bans did not follow a single path, but a

[26] See William N. Eskridge, et. al., **Cases and Materials on Legislation: Statutes and the Creation of Public Policy** 57 (4th ed. 2007) (charting the costs and benefits of various legislative processes); Maxwell Stearns & Todd Zywicki, **Public Choice Concepts and Applications in Law** 251-54 (2009) (discussing the "demand side" of legislative goods).

[27] See Tullock, supra note 3.

[28] See Steven A. Mirmina, Aviation Safety and Security - Legal Developments, 63 **J. Air L. & Com.** 547, 558-59 (1998).

[29] See id.; see also 49 U.S.C. § 417063 (2006) (banning, in 2000, smoking on all domestic flights).

ban on pipes and cigars in some venues was followed by a more complete ban on smoking in restaurants, which was often followed by a proposal to extend the ban to bars, then to hotels, then to parks and beaches in some jurisdictions, and, in several jurisdictions, to all indoor places except private residences.[30] In some jurisdictions bans began with office buildings, where second-hand smoke was seen as a matter of employment conditions, and there again the losers would have been dispersed employees, not championed by any organized business interest.[31] An idealist might say that, in incrementalist fashion, law found its way to the social optimum, which varies across disparate jurisdictions. An optimistic public choice theorist might say that although we are uncertain of the optimal intervention, at least similarly empowered interest groups were eventually pitted against one another and, apparently, equilibrium was reached. We might think of this as politically optimal, or at least as reflecting the best we can expect of power politics in the real world.

I return now to the idea of reversal through compensation, and imagine again that restaurant owners lose on their own in step one but then bar owners, when threatened in step two, induce restaurant owners, and perhaps unregulated hotel owners as well, to join in the defense. The coalition succeeds, in this hypothetical, in preserving smoke-friendly drinking establishments and also in reversing the ban on smoking in restaurants. Indeed, this reversal was "promised" to the restaurant owners as the reward for their participation in this round of power politics. If the reversal seems implausible, consider the reversal of regulations regarding motorcycle helmets in some states, the increase in highway speed limits after they were reduced, and the volatility of depreciation schedules in the Internal Revenue Code;[32] reversals are not

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[30] California, for example, pursued aggressive regulation of smoking in public places. It passed the Smoke-Free Act in 1994, prohibiting smoking in all places of employment. **Cal Lab Code** § 6404.5 (1994). California's cities can and have passed yet more stringent local laws. The city of Calabasas, for example, prohibits smoking in all indoor and outdoor areas of the city, except for a handful of designated smoking areas. **Calabasas Code** § 8.12 (2009), available at http://www.municode.com/Resources/gateway.asp?pid=16235&sid=5.

[31] See **N.Y. Pub Health Law § 1399-O** (banning smoking in all enclosed workplaces). The present law, however, exempts (1) private homes and automobiles, (2) hotel and motel rooms, (3) retail tobacco businesses, (4) private clubs, (5) cigar bars, (6) outdoor areas of restaurants and bars, and (7) enclosed rooms in restaurants, bars, convention halls, etc., when hosting private functions organized for the promotion and sampling of tobacco products. This law amended the prior law, which in 2003 had banned smoking in most indoor areas open to the public.

[32] See, e.g., FL ST 316.211(3)(b) (". . . a person over 21 years of age may operate or ride upon a motorcycle without wearing protective headgear securely fastened upon his or her head if such person is covered by an insurance policy providing for at least $10,000 in medical benefits for injuries incurred as a result of a crash while operating or riding on a motorcycle.") This section amended the prior Florida law, which had required all motorcyclists to wear protective headgear. At the federal level, states were required to lower their highway speed limits to 55 miles per hour in order to receive certain federal funds. 23 U.S.C. §154. Repealed by Pub. L. No. 104-59, § 205 (1996).

The law was modified by Congress in the late 1980s to increase the limit on certain roads, but then repealed in 1995, returning the issue completely to the states. Since that time many states have raised their speed limits, though uniformity is still lacking. For example, the current speed limit on interstate highways in Idaho is 75 miles per hour. ID ST 49-654. In Illinois the limit is 65 miles per hour. 625 ILCS 5/11-601. See Robert E. King & Cass R. Sunstein, Doing Without Speed Limits, 79 **B.U. L. Rev.** 155 (1999) (tracing the history of speeding laws in the United States, including the brief flirtation by the federal government with uniformly regulating speed limits nationwide).

terribly uncommon, especially if we think of deregulation as reversal. If restaurant smoking were to be permitted once more, then one might argue that it had become apparent that the earlier ban on smoking in restaurants was the product of a divide-and-conquer strategy, eventually revealed to have been an instance of the incrementalism problem.[33]

Reversal through compensation, or compensation in the event of regulatory reversal, can be justified by thinking about behavior in the shadow of retroactive lawmaking. For example, following a tightening of pollution laws, there is the provocative argument that polluters can be encouraged to anticipate (rather than battle) more demanding environmental laws by holding them liable for injuries that would have been avoided had they abided by the standards subsequently set. Similarly, advocates of smoking bans-–though much harder to identify than emitters of particular pollutants–-should perhaps compensate the restaurant owners if the ban is reversed. The argument will seem a strange one, especially because its logic also suggests that when the same smoking ban was first instituted, the restaurant owners should themselves have owed damages for failing to ban smoking in the years prior to the ban, limited only by the statute of limitations.[34] Both applications of the logic suffer from the problem of identifying who, exactly, ought to pay. But this is not the place to puzzle over the literature on retroactivity, and I prefer instead to emphasize that selective compensation might continue to be favored on the instrumentalist ground that it encourages the earlier losers, here the restaurant owners, to form a coalition with those later threatened, here the bar owners, exactly as they might have done in the earlier time period except that a collective action problem or a misapprehension about the path of regulation interfered.

If mandatory compensation for regulatory reversals can improve power politics, there is the question of whether it is feasible. Law has struggled with the question of how to define and compensate regulatory takings, and it has struggled with rules that might be regarded as arbitrary.[35] Compensation for burdensome regulations only if reversed, or only for those reversed

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[33] Note that this reversal by compensation strategy is applied here even though the smoking ban, unlike a ramp requirement, does not represent an irreversible investment.

[34] If this argument is fashioned as a takings claim, then we need some baseline understanding of property rights and smoking rights. As a torts claim, it is unconvincing because the primary wrongdoers are the smokers (or tobacco companies) and not the owners of facilities in which second-hand smoke is experienced. Still, there remains the idea developed in the retroactivity, or legal transitions, literature that retroactive liability will discourage parties with superior information about desirable legal change from lobbying and otherwise working against improvements in law. See Louis Kaplow, An Economic Analysis of Legal Transitions, 99 **Harv. L. Rev.** 509, 551-52 (1986) (showing that transition rules, including retroactivity, can enforce the legal system's goals); Saul Levmore, Changes, Anticipations, and Reparations, 99 **Colum. L. Rev** 1657, 1658-59 (1999) (continuing the argument that parties with information can be encouraged to anticipate legal change through retroactive liability and other means). A major problem with this argument is that it raises the stakes associated with change and might actually lead interest groups to block progress rather than accelerate it.

Note that the description in the text passes over the puzzle of why choice was so rarely offered in the absence of legal intervention. Why, in other words, are nonsmokers so powerful politically and yet so weak in the marketplace that they could rarely be satisfied by entrepreneurs who sorted them by offering nonsmoking environments?

[35] Thus,

> The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the Fifth Amendment's guarantee is designed to bar Government from forcing some people alone to bear public burdens which, in all fairness

after subsequent, incrementally more severe regulations are voted on, presents considerable difficulties. No legal system calculates and awards damages arising out of a regulation like a smoking ban, where there is a safety claim and where net losses to restaurateurs and other property owners are difficult to assess. Similarly, the burden of gun registration or the private cost of a prohibition on small handguns or assault weapons is difficult to calculate. The net losses of an age cohort that was "wrongly" denied the right to engage in an activity are even more difficult to calculate. The compensation solution to the problem of incrementalism seems feasible only for a subset of cases, and it is not a subset particularly rich in reversals.

Moreover, the feasibility issue is not limited to damage assessments. There are significant difficulties in identifying reversals of prior policies. A freeze in the minimum wage, despite inflation, might be a reversal. Many changes in tax law, including changes in rates and in depreciation schedules necessarily reverse prior law. A regulatory regime requiring elevators rather than access ramps might be deemed a regulatory reversal by some and a further step in the regulatory trajectory by others. The problem is real as well as pecuniary because interest groups will have reason to tweak legislation in order to create a regulatory reversal where they would not otherwise have wanted one or, on the other side, to frame legislation so that it is not deemed a reversal in order to avoid the compensation requirement. Thus, lawmakers required passive restraint systems in automobiles on the way to requiring airbags. Once airbags were required, auto-engaging seatbelts were no longer mandatory. If this were to be regarded as a reversal, so that compensation for the passive-restraint step were required, then the airbag legislation might have taken a less efficient form in order to avoid the compensation requirement.[36]

Finally, in many cases the problem of identifying regulatory reversals and that of measuring damages run together and make the compensation solution infeasible. Licensing requirements in any profession may become incrementally more burdensome, and yet each new burden also raises the barrier to new competitors. Clients might be the group most deserving of compensation, but we do not think of them as implicated in the divide-and-conquer problem.

In short, compensation is in theory a tool with which to alleviate the incrementalism problem, especially where there is apparent irreversibility, but once we move away from the easiest cases it is as difficult to identify regulatory reversals, and also to assess net damages, as it

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> and justice, should be borne by the public as a whole, this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.

Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104 at 123 (1978) (internal citations and quotations omitted).

And as for the rules themselves, there is, for example, the permanent physical presence test articulated in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Under this rule a takings will be found if the governmental action imposes a permanent physical occupation of property, irrespective of whether the regulation affects a public policy benefit or the regulation has only a minor economic impact on the property owner. Similarly, there is Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), holding that a takings may be found when the State deprives a property owner of all economically beneficial use of the land.

[36] The law might have given manufacturers a choice, though airbags were superior and though bifurcation might have sacrificed some economies of scale.

is to pinpoint problems with incrementalism. A respectable case can surely be made for compensation following regulatory reversals–-with an eye on getting the power politics right in the first place–-as it is comparable to the argument for compensation for all apparent regulatory takings. But the argument is almost surely too complicated, execution is too difficult, and there remains the question of whether compensation ought to be paid by taxpayers (in which case there will likely be insufficient opposition to a regulatory reversal), by advocates (past or present), or by previous beneficiaries. Compensation might in theory solve the incrementalism problem, but it is a theory unlikely to translate into practice.

C. Discretionary Compensation and Unproblematic Minimum Age Legislation

Nothing stops the political process, including bargaining among interest groups, from producing compensation for some regulatory reversals. Just as a government sometimes buys property rights when it could have achieved its ends by regulating without paying compensation under the Fifth Amendment, so too, as we have assumed, a government, or another interest group, can compensate ramp-builders or other earlier losers even though it need not do so. It is unusual for a government to pay for past compliance with its rules, but not so unusual for it to pay for new regulations–-especially because it can normally substitute direct activity for mandates. Thus, the government can provide air marshals on commercial airline flights, or it can require airlines to provide certified security personnel. It can require airlines to provide the seats for these marshals, or it can advance the cause of security and the economic health of the airlines by buying tickets for the marshals. A government that requires airbags, smoke alarms, or vaccinations can presumably offer to supply them. This point about discretionary compensation will seem more plausible if the likelihood of payment through a kind of logroll is included in the calculus. A government might require airbags at the automakers' expense, but it might in the same legislative breath, or session, buy more vehicles than expected for its own fleet. Moreover, the government might change the tax law regarding operating loss carryovers in a way that benefits these losers. In any event, there are good, if counterintuitive, reasons for unfunded mandates, especially where powerful interest groups are concerned.[37]

It is noteworthy that our experience with discretionary compensation is consistent with the thinking offered here on troubling incrementalism. Following an increase in the drinking age, no political system is likely to compensate those who must now wait longer to drink. Interestingly, step-by-step changes with respect to such minimum age rules are free from the

[37] See Julie Roin, Reconceptualizing Unfunded Mandates and Other Regulations, 93 **Nw. L. Rev.** 351, 354 (1999) (examining the positive attributes of unfunded mandates). An important feature of Professor Roin's discussion is the political power of states (and localities). See id. at 378 ("State and local governments, or the interests that they tax or service, may balance or offset those interest groups that stand to gain from intergovernmental mandates.). In particular, she focuses on their ability to form coalitions as repeat players and to organize in the halls of Congress. See id. at 379 ("Indeed these subordinate governments might lobby for funded--or, of course, overfunded--mandates when there is some political gain to a claim that the federal government forced certain policies on the states or polities . . . ."). This power might explain why the incrementalism problem does not often arise by dividing and conquering jurisdictions.

incrementalism problem. That no one-–even among those who think they can distinguish derisible slippery slopes from necessary compromise among interests and values-–regards minimum age legislation as played out on a slippery slope is perhaps a clue rather than an oversight. Minimum age legislation is likely free of the incrementalism problem because it does not divide and conquer defending groups. Advocates did succeed in raising the minimum drinking age from eighteen to nineteen, then nineteen to twenty, and then to twenty-one.[38] But there are a few reasons why this is different from incremental building code changes and smoking bans. First, a single age cohort is generally not a well-organized political interest.[39] Second, to the extent that other interest groups are organized and serve as proxies for others, such as bar owners serving as proxies for eighteen-year olds who wish to drink, these other interests are not divisible. After all, no identifiable set of taverns specializes in serving 18-year olds, and no bar owners would be expected to turn, in a second regulatory step, against other bars able to serve 19-year olds. To the extent that vendors of alcohol are the organized interest in play, minimum age legislation does not present an incrementalism problem because the relevant interest group is not divisible in the manner of restaurants and bars, or owners of new buildings and old buildings.

There is a third and final reason why minimum age legislation, though historically incrementalist, does not run into the incrementalism problem. Even if we think of each age cohort as an interest group, their disorganization could be overcome at the polls if each cohort had millions of voters likely to take their drinking rights seriously. If citizens born in 1960 found in 1979 that they would have to wait another year to purchase drinks, they might have been expected to seek revenge against legislators who raised the minimum age, especially if the age had been raised more than once at the cohort's expense. In fact, legislators enacted multiple, staggered increases in the minimum drinking age in one step, and postponed effective dates so that those old enough to vote had no objection.[40] In short, although a young cohort might wish it had worked against a series of changes long before it attained voting age, there was not another cohort from which it could have been divided and conquered—and certainly not another that would have been expected to turn on it once itself regulated. The incrementalism problem thus

[38] Wisconsin, for example, lowered its drinking age in 1971 to 18 years of age. Prior to that time the drinking age had been 21 for all wine and spirits. It was raised to 19 in 1984, and to 21 in 1986. See W.S.A. 125.02(8m).

[39] I leave aside a hypothetical assault on sixty-five-year olds, who might be well represented by the AARP.

[40] Even in those states with the most frequent changes, there has not been a progression that looks like a divide-and-conquer strategy. Thus, Georgia legislated twenty-one as the minimum age for purchasing alcohol after Prohibition in 1933; in 1972, it lowered the age to eighteen (this was a period in which drinking ages and voting ages dropped to conform to the age for military conscription); in 1980, Georgia again raised the drinking age to nineteen; finally, in 1985, Georgia raised the age to twenty-one (to take effect in 1986) in anticipation of a federal regulation. The minimum age was set at twenty for the 1985 transition year. Effective were always such that no cohort ever lost the ability to purchase alcoholic beverages. Therefore, no two cohorts were divided by the proposed effective dates. The pattern is best described as legislating an increase in the drinking age without disappointing the expectations of any cohort already old enough to vote.

gives us a nice way to understand why minimum age legislation has not seemed as troubling to the slippery slopers as, for example, gun control.[41]

Consider in this regard two kinds of incrementalism in the area of employment discrimination law. One concerns a statute that applies to employers with more than x employees, but over time amendments broaden its reach to employers with fewer and fewer employees. When large employers are targeted in the first step, family-owned businesses and local chambers of commerce stay out of the fray. Indeed, they might regard the legislation as welcome because it increases costs for their most threatening competitors. The second kind of incrementalism involves an expansion of protected classes by statute, agency, or court. A statute that permitted employment claims with respect to race might over time add sex, pregnancy, sexual preference, and age as relevant characteristics. This may be incrementalism, but defenders (and even advocates) are unlikely to divine the order in which these other protected classes will be added. There is no constitutional or natural ordinal ranking of attributes, or classes. As such, they might under-invest in litigation or other defensive tactics. There is a small divide-and-conquer problem to the extent that some employers, and even industries, are more at risk with respect to some attributes than others. But for the most part, the expanded protection affects the same employers, and there is no danger that those who lost in the first round of legislation will favor further regulation in a subsequent round. Where there is neither irreversibility nor shifting coalitions, we do not have an incrementalism problem. By contrast, the expansion of coverage to smaller employers does present an incrementalism problem, though not one made more severe by irreversibility (except that employment rights are rarely withdrawn). Ultimately, it seems that we should be more wary of incrementalism as it applies to employer size than as applied to protected classes of employees.

D. Incrementalism and Rent-Seeking

The discussion thus far has approached the incrementalism problem, and the use of compensation as an antidote, with interest group coalitions, or power politics, in mind. The root of the problem, as identified and discussed in Part I, is that strategic incrementalism can divide and conquer groups. It can then push regulation far beyond the social optimum, or perhaps regulate the "wrong" groups rather than too many. One solution to this problem--a realignment of divided interest groups brought about by the promise of compensation in the event of a regulatory reversal--appears to be theoretically attractive but exceedingly difficult to design and

[41] In the case of gun control, one would not expect the losers in an early step to turn and support more regulation in a subsequent step. But there is the potential for a divide-and-conquer strategy if hunters care mostly about rifles, and only support the absolutist position because they need allies or believe that the slippery slope will consume their passion. In any event, it is not an incrementalism problem of the worst kind because hunters and gun collectors, for example, are not competitors.

In the case of abortion rights, the slippery slope claim is familiar but there seems to be little of an incrementalism problem. Both sides in the debate are well organized. More importantly, voters are well informed and involved, so legislation and judicial decisions seem to reflect a political and legal equilibrium rather than an incrementalist strategy. It is hard to see an interest on either side turning on its competitor.

execute. In this Section, the discussion turns away from the previous focus on divided and then realigned interest groups and toward the problem of interest group activity itself. This problem is often described as one of rent-seeking, an expression that refers to socially wasteful activity undertaken to influence law.[42] If interest groups know that compensation is available, they will expend resources, or rent-seek, in attempts to recover costs, though these costs have passed under the metaphorical bridge.

One way to combat this waste would be to insist on the eradication of discretionary compensation. A government that could somehow precommit never to subsidize an industry and never to impose licensing requirements or tariffs that protected an industry, would be one that discouraged "rent-seeking." Although uncompensated takings surely generate rent-seeking behavior, from a public choice perspective, it is difficult to understand why so much more attention is paid to government takings than to government subsidies or other programs.[43] The

[42] Rent-seeking can be understood by beginning with the canonical case where government has a monopoly to bestow, perhaps in the form of a license. If the monopoly position is worth x dollars to the monopolist, a supplicant, or interest group, would presumably pay as much as (x-1) dollars to acquire this privilege, or position. One famous advance in public choice was to see that economics had underestimated the "problem with monopoly" by focusing only on the deadweight loss caused by the monopolist who sells less of a good, at a price higher than marginal cost, than would sellers in a competitive market. See Gordon Tullock, The Welfare Costs of Tariffs, Monopolies, and Theft, 5 **W. Econ. J.** 224 (1967). Consumers who would pay more than marginal cost might be denied the good because of the monopoly pricing strategy, even though it would be efficient to transfer the good to someone ready to pay more than the marginal cost of producing it. The public choice insight is that the social cost of a monopoly is much greater because we must add to the aggregated deadweight loss that part of rent-seeking activity which is wasteful. Id. See also Richard A. Posner, The Social Costs of Monopoly and Regulation, 83 **J. Pol. Econ.** 807 (1975). The resulting cost could be as great as or even greater than the expected profit from monopoly status. It could exceed the profit, for example, if competition caused one who had invested, say .5x dollars, in quest of the monopoly (worth x dollars) to regard that investment as a sunk cost, such that it was worth spending another x-1 dollars at the margin to acquire the monopoly. In principle, there is no upper limit on the total social loss that might be generated when profit-maximizing entities compete for the monopoly.

If aspiring monopolists simply bid for the license by paying money, then we have a mere transfer payment. In that case, there is no social waste apart from the deadweight loss attributable to monopoly pricing, though we might be offended if the government sold some things in this manner. Thus, if a cable channel is auctioned off to the highest bidder, we may bemoan the loss of a medium for public television or other noncommercial use, but at least the resource has gone to the highest valuing commercial user. On the other hand, if the channel is assigned by a politician, various broadcasters or interests might try to influence the political decision with campaign contributions, outright bribes, personal favors, paid "factfinding" trips, or multiple martini lunches. Some of these involve real waste; the politician is unlikely to value the bloated lunch as much as it costs a supplicant to provide it, and a highly paid job for the politician's family member is unlikely to match that employee with a job well-suited to his or her skills. "Rent-seeking" comprises such waste. A plausible policy goal, or source of a theory about law, might be to structure things to minimize rent-seeking and, therefore, reduce social waste.

[43] Government "givings" also present incrementalism problems, especially if the givings, or benefits, are meant to produce reactions. I limit the discussion here to burdens and will confront givings issues in future work, where judicial rather than legislative decisions are at the forefront. For the present, note that givings necessarily come at a cost, and, unless this burden is spread across dispersed taxpayers and citizens, the cost will activate interest groups. In many settings, this is orthogonal to the incrementalism problem. Thus, if a proposed road imposes costs and benefits, interest groups will line up to avoid one road and enjoy the other. A tax scheme that took from the winners and compensated the losers might work wonders, but in most cases incrementalism is not implicated. See Donald G. Hagman, Windfalls and Their Recapture, in **Windfalls for Wipeouts: Land Value Capture and Compensation** 15, 15-19 (D. Hagman & D. Misczynski eds., 1978). In the example of a proposed road, its precise location, once worked out, sends strong signals about the likely extension of that road, so that there is more information rather than more dividing and conquering.

two can be equally wasteful in rent-seeking terms. But much as the discussion here considered regulatory reversals and other aspects of incrementalism without reinventing the wheel of takings law, it is now taken as a given that governments can subsidize one group at the expense of others. It may simply be too difficult to establish baselines from which unequal subsidies would be barred. Nevertheless, unfunded mandates may be acceptable or even desirable and, at the other extreme, a requirement that mandates be treated as compensable takings might also be acceptable. The worst choice, from the rent-seeking perspective, is one that allows interest groups to lobby for compensation. It is this norm of occasional, discretionary compensation that a legal system would strive to avoid in the interest of minimizing rent-seeking.

Discretionary compensation for regulatory burdens doubles the rent-seeking problem. Consider, for example, a proposal that old buildings be required to incorporate access ramps. An owner might face a one million dollar cost. That owner might spend up to one million dollars to forestall the regulation or to gain an exemption from it. In a world with broad regulatory takings, constitutional obligations to compensate property owners eliminate any incentives to lobby against the regulation. Of course, the compensation requirement itself might cause advocates to be less likely to succeed in gaining passage of the regulation, so that we cannot say whether compensation, even properly measured, is socially efficient. But with discretionary compensation, things are more complicated. The optimistic story is that the expected cost of each ramp decreases because there is some chance of full or partial compensation. If so, the affected property owner will not wish to invest as heavily in preventing the regulation. From a rent-seeking perspective, this is good news. From a power politics perspective, however, it may be unfortunate inasmuch as it is desirable to have someone argue against the regulation at the risk of letting organized beneficiaries too often get their way at the expense of dispersed taxpayers. It is, however, the rent-seeking perspective that is pursued in this Section.

There is also a pessimistic, and probably more plausible, story. It is that the property owner must first worry about the one million dollar loss the ramp regulation would impose, and then, if the regulation passes or looks likely to pass, the property owner has the chance to recoup the one million dollars, provided that compensation can be obtained. If the steps are unlinked in this way, the rent-seeking potential doubles because there is first a one million dollar loss to worry about and then a one million dollar gain to pursue. If compensation is either mandated or forbidden, and there is no cheating through other legislation, there are one million dollars rather than two million dollars at stake, and less rent-seeking activity. This suggests yet another reason why the compensation explored in Section I.C and Section III.B above, as a solution to the incrementalism problem, may do more harm than good. If compensation accompanies a regulatory reversal, then it will likely double the rent-seeking activity; the reversal is, in the language of this discussion, discretionary.[44] In short, from a rent-seeking perspective, the

[44] The owner of a preexisting commercial building will fight the ramp requirement because there is no other interest group to ally with and because the regulatory burden is serious. I have described the effort to get residential property owners to join in the defense as fruitless. But if incrementalist regulation now moves to burden shops, it is possible that the earlier, regulated property owner can be induced to join in the defense--rather than root for the offense--in the interest of a level, competitive playing field. The inducement might be in the form of a reversal, so

incrementalism problem is made worse rather than better by guaranteeing compensation for over-regulation in the first steps, inasmuch as this over-regulation is determined by the discretionary step of voting down further regulation in a second step.

It is interesting that, as a matter of political practice, we do not find compensation precisely where the problem of incrementalism is most apparent. I resist starting with minimum age legislation because I have already argued that there is, strictly speaking, unlikely to be an incrementalism problem in these settings. It is more interesting, therefore, that we rarely find government-provided compensation where an earlier safety standard is overruled. There is neither compensation for the victims, when the old standard is deemed too lax, nor for the precaution-takers, though the old regulation is regarded as too extreme and costly. There are many possible explanations for this pattern, but a novel one is that we somehow recognize that such compensation would increase rent-seeking. If we are to compensate for the government's past errors, it makes sense to make the compensation nondiscretionary, as the Fifth Amendment may have been intended to operate. Alternatively, we could put it in the hands of courts or agencies, if one dares to think that there is less rent-seeking in these domains.

IV. **Disclose and Delimit**

The incrementalism problem has one potential solution that seeks to work on power politics without exacerbating rent-seeking and without running into the dangers of over- and under-compensation. The strategy is to force information about regulatory goals. Advocates at the outset of a campaign might be required to state their goal, or the import of their cost-benefit analysis, and then be barred from proceeding beyond this point for a specified period of time, which we might imagine to be five years. For example, if a proposal banned smoking in restaurants, advocates would be asked to declare where else they planned to propose bans. If they said that they were working on a proposal for bars but thought that hotels should do as they like on a floor-by-floor and free-market basis, then, for five years from the date of enactment of the first ban, hotels in the jurisdiction would be guaranteed freedom from such regulation. The idea is to avoid the incrementalism problem by fully informing the parties and encouraging them to form coalitions at the outset.

There are obvious problems with this disclose-and-delimit rule. The advocates may not be an easily identified group, and they may not be the same as those who favor the next, incremental step. Indeed, two groups of advocates may have such different aims that one pushes for the first step in order to force the delimitation that interferes with the second group's aims. An optimistic response to this problem--and especially to the strategic behavior problem it

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that there would be a package, combining the defeat of the proposal to expand retrofitting and a reversal of the earlier regulation. If this were about incremental smoking bans, a reversal would be valuable to the previously regulated restaurants. If it is about "irreversible" regulations, like costly ramps, reversal probably requires compensation. If the ramps in question could not have met a cost-benefit test, then the reversal does not eliminate the social cost of the regulation, but from the private party's point of view reversal can be accomplished through compensation. In these settings, it is surely the case that there is double rent-seeking at stake.

raises--is that the disclosure process will simply force other groups to enter the fray at the first step, resulting in the best antidote to the problem of incrementalism. Still, the identification problem is not a small one, and it reconnects with the problem of defining incrementalism itself. The disclose-and-delimit rule has other weaknesses: it gives up on useful learning-from-regulation and it forces law to stand still even in the face of technological or other changes that come about during the prescribed moratorium. Some of these drawbacks could be offset with compensation, but it is difficult to introduce compensation without making it discretionary and thus the cause of rent-seeking.

By way of example, imagine that home mortgages are soon regulated so that loans of more than ninety percent of the value of a property require debtor counseling or extra disclosure on the part of the originating bank. With a disclose-and-delimit approach, advocates of this regulation (including a regulator like the Federal Reserve) must say whether they intend to push the rule to cover eighty percent mortgages, second mortgages, and home equity loans. Covering eighty percent mortgages presents less of a divide-and-conquer issue because the same banks are regulated in both steps, but a push to cover home equity loans surely presents an incrementalism problem. Lenders who expect to specialize in home equity loans would be inclined to join in the defense against the first step's ninety percent regulation if the regulator or other advocate disclosed that inclusion of home equity loans should be expected in a later step. Note that the immediately affected banks might prefer that the regulation extend to home equity lenders, especially once they are themselves regulated, but they are more inclined to be allied in the political process against all the regulation if the coalition can repel the first step. But what about later regulatory proposals regarding interest rates, font size for disclosure materials, and the like? A disclose-and-delimit rule that included all regulations affecting the subject matter seems absurd because it forces omnibus bills or calculations of a size previously unknown. And yet, a proposal regarding disclosure forms, maximum interest rates, or appraisal requirements might well be closer in political kind to the ninety percent rule than the others mentioned above. It is simply difficult to define subjects in a way that allows us to say what is incremental and what is sufficiently unrelated. The problem is akin to, but surely more serious than, that which accompanies a single-subject rule for legislation.[45]

But a second example suggests the promise of the disclose-and-delimit idea. Imagine that the threat of serious climate change generates a proposal for a carbon tax. Political opposition comes from various industries. We might imagine that the first proposal sets a modest carbon tax that exempts, directly or on a pass-through basis, the carbon consumption of specified industries, such as steel and automobile manufacturers. The incrementalist "problem," or perhaps blessing, is that aluminum and other interests might soon turn on the exempt industries. A disclose-and-delimit rule provides a period in which the tax cannot be extended to these other industries. Similarly, if instead of a carbon tax, legislation required aluminum and other manufacturers to

[45] See Michael D. Gilbert, Single Subject Rules and the Legislative Process, 67 **U. Pitt. L. Rev.** 803 (2006) (describing history of, justifications for, and inconsistent application of the single-subject rule found in many state constitutions and applicable to legislation).

switch away from a high-carbon energy source, the switching requirement could not be extended in incremental fashion during the period of delimitation. In both cases, the rule encourages an upfront coalition and a political discussion. The alternative of compensating the aluminum makers for their investments if the switching requirement is reversed may also be workable.

To be sure, interest groups may simply not believe that the disclose-and-delimit (or compensation) rule will be enforced. A future legislature can override a previously enacted rule, and of course there will be rent-seeking losses in the process of convincing this second legislature to do so or not to do so. This is the familiar and difficult problem of governmental precommitment, and the solutions to it draw on ideas about constitutional constraints and political reputation. Political reputation might well do the job, but only if the public perceives that incrementalism has been well defined. This might be so if advocates, or the legislation itself, could specify all the steps that could not be taken for five years. A ban on assault weapons might say: "No further ban, tax, or registration requirement shall be imposed for five years following the effective date of this statute on the firearms defined herein, and no ban, tax, registration requirement, or liability rule shall be imposed on any firearm not defined herein." A proposal to require a safety class or to require hunters to wear blaze orange might then pass because voters perceive that the ambiguity in the delimitation provision should be resolved in favor of safety legislation. In contrast, a proposal to issue hunting licenses only to persons over the age of twenty-one might be understood as a further, incremental ban and, given the law passed earlier, political pressure might make presentation or passage very difficult. In the carbon example, a legislature that violated the moratorium by extending the carbon tax to the automobile industry would probably face political repercussions, but one that did so as part of a package including bailout funds would not. A government that required a particular environment-friendly technology would probably face serious opposition if it sought to renege on a commitment to compensate. Gun control and a carbon tax are more difficult subjects of compensation, whether promised upfront or in the event of a regulatory reversal. In sum, it is difficult to generalize about the credibility of promises to delimit or to compensate. There are settings where each promise seems reasonably credible.

Conclusion

Incremental regulation can divide interest groups against one another, whereas better laws might emerge from a process that is more transparent, less path-dependent, and more likely to bring affected interests to the table at one time. If interested parties with full information would have defeated a proposal, then it is troubling–-though sometimes fortunate–-that a step-by-step approach engineered, or stumbled upon, by advocates of the same proposal might succeed in gaining that which would have failed. The problem is more than a mere voting paradox because the defeat of the all-or-nothing proposal is a stable result. This incrementalism problem negates some of the enthusiasm otherwise attached to moderation in legislation, agency regulation, and even judicial decisions. At the same time, it is difficult to know when

incrementalism is a problem. Irreversibility surely plays some role, and the prospect of learning-from-regulation offers something of a counterforce, though less than usually imagined. The problem is most likely present when the burdened groups are competitors who might turn on one another, and when the advocates are well organized or simply bear few costs.

Even where we are certain that there is troubling incrementalism, it is a difficult problem to solve. Compensation can undo past regulations and bring interest groups together where they were once divided and conquered, but it introduces new misalignments in the world of power politics and, when discretionary, it increases wasteful rent-seeking as well. Compensation may double the problem rather than solve it. Disclosure is another problem-solving tool, but it can do more harm than good where incremental regulation is favored by disparate groups.

One modest conclusion is that the incrementalism problem offers a means of understanding why some slippery slopes seem more troubling than others. Another is that incrementalism has acquired far too good a name. More drastic changes, especially if they do not impose large, upfront, irreversible costs, might well be superior to incrementalism. I have emphasized relatively mundane examples, such as smoking bans and disability accommodations, because the mechanics of incrementalism are most readily observed in familiar, reasonably settled areas. But we have yet to confront incrementalism as it pertains to less settled matters, such as climate change policy and health care reform. These are fields in which some awareness of the problem of incrementalism is more likely to illuminate legal and policy choices than is the rhetoric of the slippery slope.

It is difficult to solve a problem that is barely in the eye of the beholder. One person's incremental change is another's dramatic upheaval. Every law can be described as a step toward another. And yet there is reason to think that we can identify situations where a proposed change falls short of its advocates' wishes, and where an interest opposed to and burdened by this first change would have reason, once it loses, to join the other side and encourage further change. In these situations some skepticism about moderation is in order, and a disclose-or-delimit rule, or even a mandatory retroactive compensation rule, may hold promise.

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