ARTICLE

INTEREST GROUPS AND THE PROBLEM WITH INCREMENTALISM

SAUL LEVMORE[†]

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. The conventional view, however, pays little attention to interest groups. Step-by-step change poses a serious problem when it rearranges 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 see to it that they also be regulated. The laws that emerge on the incrementalist's path therefore may not mark progress toward socially desirable or democratic outcomes. Examples of incrementalist laws include environmental standards, smoking bans, disability accommodations, and minimum-age legislation. Nearly all law, however, can be seen as incrementalist, just as most tradeoffs can be described as sliding on slippery slopes. The incrementalism problem is most striking when a prior regulatory step is costly to reverse from the perspective of those who must comply. The problem is alleviated when there is real learning from experience; it is exacerbated when advocates of change implement a divide-and-conquer strategy to separate defending interests. Compensation policies or even moratoria on certain kinds of regulation could possibly decrease wasteful rent seeking and minimize the interest-group problem.

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

INTRODUCTION

It is easy to encourage lawmakers to be moderate, or incrementalist. The case for incrementalism—under which regulation can provide for experimental stopping points that do not necessarily portend further movement along a slippery slope—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 when systems are regarded as beyond repair or bad habits need to be broken with shoves rather than nudges. The presence of multiple sources of law and interactive lawmaking may also encourage incrementalism. Since legislatures, courts, executive officers, administrative agencies, and even voters interact, incremental lawmaking is often the strategy most respectful of each player's role. In this stew, each cook is told to fear that drastic action will spoil the broth.

Leading commentators encourage incrementalism.[1] Most of the encouragement is directed at judges, but the arguments used in favor

[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, 519-22 (2008) (contrasting the "optimal search" approach, which "recommends considerable innovation" in the hunt for a "successful" policy, with the Burkean approach, which "favors incremental change that is regularly evaluated empirically"); Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 362-66 (2006) (describing judicial minimalism as constraining judges to shallow and narrow changes in law). Most of the cases discussed in

of incrementalism are equally 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 toward far-reaching change. For present purposes, however, 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 a smoking ban in limited areas with the aim of eventually prohibiting all firearms or smoking in all public places.

The conventional view of incrementalism pays little attention to interest groups.[2] There is a serious problem with piecemeal change, however, when it rearranges the constellation of supporters and opponents of further moves and gives organized interest groups reason to realign themselves in response to the incremental change. I begin with such matters as the prohibition of smoking in restaurants (while smoking 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). One can almost freely substitute, however, the imposition of progressively more exacting fuel-economy standards on automobile manufacturers and the establishment of incentives to achieve targeted reductions in the production of heat-trapping gases.[3] Incrementalism is everywhere—though certainly not

---

this Article deal with legislation and regulation, although some of the changes, such as disability accommodations, came about through judicial action.

The argument advanced here also applies to judicial decisions, for they, too, are influenced by interest groups—in litigation as well as in appointment and confirmation. The type of influence, however, is different. Stare decisis also changes the argument as applied to courts: legislatures are not bound by any such principle. 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) (discussing the impact of doctrines such as standing and stare decisis on court decisions); Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309 (1995) (arguing that the standing doctrine prevents opportunistic litigants from controlling the critically important path of legal decisions). For the most part, the incrementalism problem in judicial decisionmaking is left for another day.

[2] For example, two recent discussions of incrementalism do not discuss the effects of interest groups. *See* Susan Block-Lieb & Terence C. Halliday, *Incrementalisms in Global Lawmaking*, 32 BROOK. J. INT'L L. 851, 855 (2007); James M. Donovan, *Baby Steps or One Fell Swoop?: The Incremental Extension of Rights Is Not a Defensible Strategy*, 38 CAL. W. L. REV. 1, 3-4 (2001).

[3] As we will see, the last example represents a serious incrementalism problem. Fuel-economy standards, however, do not, because they resemble minimum-age legis-

everywhere alike. There is little reason to be confident that the laws that emerge on the incrementalist's path represent progress toward socially desirable or democratic outcomes—though I will make the realistic assumption in most of the examples here that we are uncertain about the location of the social optimum. Part I describes representative cases and explores what I call the "incrementalism problem." This problem is especially interesting when a prior regulatory step is irreversible from the perspective of those who must comply. Part II suggests that a common defense of incrementalism—that policymakers learn from experience and therefore from small, prior steps—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 to solve the incrementalism problem. Compensation could push interest groups to form coalitions that can optimally defend against the divide-and-conquer strategy that is at the core of the incrementalism problem. This is an offshoot of the claim that, in a world with overachieving interest groups, we need organized groups to oppose one another in order to obtain desirable results.[4] This coalition-formation, or power-politics, approach to incrementalism, however, proves difficult to implement. One problem is specifying the conditions that trigger compensation; virtually every proposed law can be framed as embedded in a larger picture such that *every* law becomes a sly incrementalist move. Another problem becomes apparent when the focus shifts from power politics to rent seeking (i.e., resource-consuming activity undertaken to gain a profit or government-sponsored advantage). 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

---

lation and other regulation that does not divide and conquer *different* groups. *See infra* Section III.C.

[4] One commentator describes this claim:

> 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 benefitted group and could put the tax on them. Thus, two lobbying groups would be opposing each other and the outcome presumably would be improved.

Gordon Tullock, *Rent Seeking and Tax Reform*, CONTEMP. POL'Y ISSUES, Oct. 1988, at 37, 46. 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).

regulation beyond a specified limit. Again, the problem is more apparent than the solution. A brief conclusion follows and suggests 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 positive aim is to develop a tool of analysis; the incrementalism problem and its possible solutions can help us to understand the path of lawmaking and the role of interest groups in forging that path. The normative aim is to argue against 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 mandates wheelchair-accommodating ramps in all commercial buildings, which would require substantial retrofitting.[5] Owners of these buildings are

[5] The actual progression of the law has been complex. Congress first passed the Architectural Barriers Act of 1968, which requires accommodations for people with disabilities in all new federally funded construction. Pub. L. No. 90-480, 82 Stat. 718 (codified as amended at 42 U.S.C. §§ 4151–4156 (2006)). A variety of other regulations culminated in the Americans with Disabilities Act of 1990, which requires "reasonable accommodation" of 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 (codified as amended at 42 U.S.C. §§ 12101–12201, 12203–12213 (2006) (amended 2008); 47 U.S.C. §§ 225, 611 (2006)). The latter category is a broad one that includes most places in which commercial activity is undertaken. *See* 42 U.S.C. § 12181(7) (2006) (defining "public accommodation" to include, among other things, hotels, theaters, bakeries, and laundromats). The courts largely determine what accommodation is reasonable.

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 (detailing complex requirements for ramps, stairs, elevators, drinking fountains, and many other features of new structures). For a detailed discussion of the 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).

The Fair Housing Act (FHA) regulates residential buildings. 42 U.S.C. §§ 3601–3619 (2006). In 1988, the FHA was amended to include people with disabilities. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 42 U.S.C. §§ 3601–3619, 3631 (2006)). Under the FHA, landlords must

opposed, if only because compliance will 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 "commercial buildings" category, 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 lawmakers will eventually require them to modify their properties at significant cost and with a very small prospect of offsetting revenues.

In the most straightforward version of what I will call the "incrementalism problem," the accommodation advocates consider only the benefits—not the costs—of accommodations and aim to push the law as far as they can. Perhaps they favor government-mandated access

---

allow disabled tenants to make adjustments to unit and common spaces. 42 U.S.C. § 3604(f)(3)(A). In addition, all new residential buildings with four or more units must be made handicapped-accessible. *Id.* § 3604(f)(3)(C).

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 incrementally. *See* California Fair Employment and Housing Act, ch. 992, 1988 Cal. Stat. 3138 (codified as amended at CAL. GOV'T CODE §§ 12900–12996 (West 2009)). For an overview of the California enactment, see generally Michael L. Murphy, John H. Fanning Labor Law Writing Competition Winner, *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 that have been renovated or otherwise modified. The ambiguity reflects the pattern of existing law, in which the rules for new construction apply to the modification of older buildings, whereas the owners of untouched older buildings must simply remove architectural barriers that can readily be eliminated. It also suggests, however, that courts or agencies can choose to be more or less aggressive in declaring which buildings must be modified.

ramps wherever there are stairs and no lifts. 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 fell swoop—in dramatic rather than incremental fashion—then 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.[6] If the advocates begin with large commercial buildings, where the cost-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 unlikely to generate sympathy. If successful here, the advocates can turn their attention and political resources to other structures, stores, or residential buildings.[7] In this next step, the property owners directly affected by the previous step 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.[8] A ramp

[6] The question why new construction has been regulated more readily than old buildings or retailers remains. A few explanations can be offered. 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 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.

[7] 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.

[8] Competition is probably the key to recognition. In 2009, for example, United Parcel Service (UPS) supported legislation that would put employees of FedEx, its direct competitor, under the jurisdiction of the National Labor Relations Act; it had previously operated under the Railway Labor Act. *See* Alex Roth, *FedEx and UPS Clash over Legislation*, WALL ST. J., July 20, 2009, at B1 (noting that regulation under the National Labor Relations Act would make it easier for FedEx employees to unionize); Press Release, FedEx, Railway Labor Act, *available at* http://ir.fedex.com/releasedetail.cfm?ReleaseID=388559 ("FedEx Express has been correctly covered by the [Railway Labor Act] since our first day of operation in 1973."). 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. We can think of the reaches of the Railway Labor Act and of the National Labor Relations Act as having been incrementally altered.

requirement will not raise the marginal cost of products in stores, but it might push some stores out of business and raise rents in already regulated commercial buildings. The incrementalism problem is that a legal intervention might be both socially inefficient and democratically disfavored yet come about because advocates can nudge the law to that end step-by-step, taking advantage of uncoordinated opponents. The advocates might do this without any grand design, but the problem is more obvious when there is a strategy. An early target of regulation may not plan or be expected to turn against its competitors, but it will not labor to protect its competitors from 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.[9] Then there are slippery slopes, such that the final resting point of a 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 each of these sources of unease is that law can be path dependent in a way that is troubling even to citizens who do not have idealistic expectations of the law.[10]

This somewhat stylized tale of mandated investments, which may or may not be socially efficient, involves strategic behavior by advo-

---

[9] Many well-known voting paradoxes arise out of preferences that cannot be aggregated in a way guaranteed to be consistent and to meet other seemingly simple requirements of democratic decisionmaking. *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 by making the trades possible for him, all the members suffer. They are, in fact, *worse* off than if they had voted sincerely or naively."). The problem 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 the 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 judicial context. *See* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 823-31 (1982) (examining the decisionmaking processes of the Supreme Court from a public-choice perspective and concluding that inconsistency is inevitable in such an institution).

[10] 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." (emphasis omitted)).

cates 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, as well as the quest for solutions to it, normally requires that the *optimal* regulation be identified.

Here, as elsewhere, identification of the optimal regulation 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 only the questions of the social optimum and of boundaries. I suggest that we first get a sense of the problem of incrementalism and then see whether it can be solved in a way that minimizes the risk of creating a social problem when none 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 regulating *X*, then *Y*, and finally *Z*, and the social optimum is likely to be *W*, *A* may look to start with the group that not only can be divided and conquered but also 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* using *X*'s own political power. Power politics may be such that *W*, *X*, and *Y* end up being regulated in that order, when in fact either *W* alone, or perhaps *W* and then *X* only, should have been regulated. In most of what follows, examples are constructed to emphasize the problem of too much regulation. It should be understood, however, that there may instead, or also, be a danger of the wrong regulation. For example, smoking bans may have been imposed on restaurants before bars not because there is more secondhand smoke in restaurants or because a cost-benefit calculus suggested that the restaurant ban was the superior "investment." Rather, smoking bans may have been imposed because advocates perceived that restaurant owners, once regulated, would be better at overcoming their collective action problem—in order to bring about the regula-

tion of bars—than would bar owners. Once regulated, each group would likely favor the extension of the ban to the other inasmuch as they are rivals for patrons. If 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.[11] In any event, let us posit that existing single-family homes and small shops will definitely escape regulation 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 result from the divide-and-conquer strategy. Store owners, 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 might 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 a single party owned all of the structures in a jurisdiction, 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.

---

[11] Market solutions normally involve change over time, so 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.

For example, 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. However, *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 one thousand items within the calendar year. If this creates too great 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; *X* and *Y* can overcome this problem, to a degree, with more bargaining.

The property owners who fear governmental regulation are less able to solve their problem in 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,[12] 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 a competitive 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. If the government were a benevolent monopolist, there would be no incrementalism problem because the government would have no reason to hide its regulatory intentions or

[12] *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 unlikely to enforce serious restrictions on legislative second thoughts because of their undemocratic nature).

cost-benefit analyses.[13] 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.[14] 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 in which the advocates have a unitary goal, whereas 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.[15] Re-

---

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

[14] This is one application of the analysis in an article by Eric Posner, Kathryn Spier, and Adrian Vermeule. *See* Eric A. Posner, Kathryn E. Spier & Adrian Vermeule, *Divide and Conquer* 38-39 (Univ. of Chi., Law & Econ., Olin Working Paper No. 467, 2009), *available at* http://ssrn.com/abstract=1414319 (asserting that the divide-and-conquer strategy is ubiquitous, that it is normatively hard to assess unless we know the social optimum, and that a fairly common "solution" is to impose a kind of equal-treatment rule, the success of which will depend on context). Note that the equal-treatment rule suggested by Posner, Spier, and Vermeule 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.

[15] 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.

It should be noted that the incrementalism exercise undertaken here introduces 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, 183-89 (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, S423-33 (2002) (arguing that every instance of privatization may have transaction-cost and interest-group explanations; without a great deal

gardless of whether the 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 had moved step-by-step to include all buildings, especially if they had 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 in legislated law, are desirable.[16]

B. *Irreversibility*

Not all instances of incrementalism are alike. The prospect of smoking bans—imposed by government order rather than by entrepreneurial decision—in aircraft, restaurants, hotels, offices, shops, and bars presents a different story from 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 them one at a time when they could not have defeated them all at once. But one difference between the cases is that ramps represent a kind of irreversible, sunk cost, whereas smoking bans can be reversed.[17] In theory, if advocates move on to bars af-

---

of evidence to determine the actual origin, further government interventions that disturb the status quo are hard to evaluate).

[16] A note of caution in the other direction is also appropriate. Incrementalism may produce the wrong results even when there is no collective action problem among interest groups. Defenders may underinvest 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 different degrees, 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 of a problem with respect to incrementalist proposals than to more drastic ones.

[17] 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 objects to it. *See, e.g.*, Nicholas A. Danella, Note, *Smoked Out: Bars, Restaurants, and Restrictive Antismoking Laws as Regulatory Takings*, 81 NOTRE DAME L. REV. 1095, 1112-13 (2006) (reporting

ter establishing 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 who have invested in an irreversible fashion. It is thus probable that the incrementalism problem is relatively serious in the case of disability accommodations because the divide-and-conquer strategy is likely to be successful given 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 in which compliance costs are essentially upfront, nonrefundable investments and cases in which there are ongoing costs is less impressive if there is an endowment effect with respect to regulation. For instance, once smoking is banned, 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; thus, the problem of incrementalism remains more remarkable when 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.

---

sales declines of thirty percent or more in bars subject to smoking bans). *But see* Lainie Rutkow et al., *Banning Second-Hand Smoke in Indoor Public Places Under the Americans with Disabilities Act: A Legal and Public Health Imperative*, 40 CONN. L. REV. 409, 442 (2007) ("[P]eer-reviewed evaluations of the economic impact of smoking bans have definitively refuted this claim. . . . [I]f anything, many restaurants and bars experience neutral or positive economic effects after smoking bans are implemented." (footnote omitted)).

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 such 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 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 to the point advanced in the text.

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 any other required improvement) 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 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 in which *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 have been 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 un-

funded 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;[18] 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 compensation for the loss incurred at 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.

This kind of legislative bundling 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 rather than 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 in power politics (i.e., the notion of pitting organized interests against one another).[19]

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 require that all burdensome regulations provide compensation.[20] Virtually all legal systems provide for something like fair market value compensation for the complete taking of private property for public use,[21] but no legal system constitutionalizes or legislates compensation for the burdens ac-

---

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

[19] *See infra* Part III.

[20] *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 57 (1985) (arguing that compensation should be paid if "the government remove[s] any of the incidents of ownership [or] diminish[es] the rights of the owner in any fashion . . . no matter how small the alteration and no matter how general its application").

[21] *See, e.g.*, DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 169 (2002) ("The basic legal standard for determining what constitutes just compensation is well established: the owner is entitled to the fair market value of the property taken . . . .").

companying mundane regulations, even when they fall on a narrow set of people or entities. Compensable regulatory takings are rare because of valuation difficulties, because it is too difficult to tax or otherwise to raise money from those who benefit from regulation, and because it is too difficult to establish a baseline from which such takings are measured.[22] Still, it is worth noting that if all regulatory burdens were compensated—or at least those that were not means of combating criminality, negligence, or nuisance—there would not be an incrementalism problem because there would be no reason for a property owner to object to socially efficient regulations.[23] 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,[24] to encourage only efficient government interventions,[25] to diminish incentives to engage in political activity at the expense of dispersed interests or single owners,[26] and perhaps to provide insurance to losers.[27] In this Article, however, the notion is to prevent and to reverse inefficient regulation 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.

---

[22] *See, e.g.*, Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 610-15 (1984) (arguing 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); Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L.J. 110, 111 (2002) ("When one examines American compensation law, however, one finds that . . . there is little guidance about how to measure just compensation in regulatory takings cases."); Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1438 & n.110, 1441 (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").

[23] Incrementalism could still 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. Advocates might thus slide things past voters by proceeding incrementally. This, however, would be a different kind of incrementalism problem.

[24] *See* DANA & MERRILL, *supra* note 21, at 35 ("[C]osts [of uncompensated takings] . . . include . . . the foregone investment caused by fear of such losses on the part of property owners more generally.").

[25] *See id.* at 41-42 (discussing efficiency as a basic justification for compensation).

[26] *See id.* at 39 ("Takings result from a deliberate decision by political majorities to take the property of a minority.").

[27] *See id.* at 38 ("Compensation . . . performs roughly the same function as mandatory insurance . . . .").

It might be that the regulation undertaken in the first step was efficient, and now, the promise of compensation generates a coalition that not only defeats incremental regulation but also reverses the earlier, desirable law. In any event, takings law is more a reference point than a source of rules applicable to 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 store owners 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. The store owners, however, might back out or relax their efforts in the face of compromise legislation that 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.

If the promise to gain retroactive compensation is not credible, then the parties might agree to enforceable contracts. The targets of the second step of regulation might simply 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—for example, the expenses incurred to install the ramps previously required. Alternatively, they might 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 store owners 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. This example assumes that legislation rarely will compensate for the step-one mandates and burdens but not for the step-two regulation, though that risk could also be minimized by contract.

I have hardly exhausted the possibilities here, but it is clear that the problem of incrementalism is greater, though not insoluble, when 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 is efficient (or right or fair) to ban smoking everywhere, then we should celebrate the ability of advocates to get us closer 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.[28] In turn, advocates for the proposed regulation might say, first, that *every* good law occupies a compromise position between unattractive extremes, such 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 to 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

[28] For a catalogue of path-dependent accounts, see Volokh, *supra* note 10, at 1033-34, 1051-52, 1052 n.71. Volokh tells several stories in which small, incremental steps may lead to larger regulations that are 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 be highly objectionable. *Id.* at 1033. Registration might "create political momentum" for gun control. *Id.* (emphasis omitted). Registration might reconfigure the opposition to gun control if fewer people own guns as a result. *Id.* For example, registration may lower the cost of confiscation, which could be a principal point of opposition to confiscation. *Id.* at 1033-34. 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 1034.

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 will raise the specter of the slippery slope and argue, among other things, that registration will make complete confiscation easier.[29] Confiscation of all firearms in the hands of private citizens is anathema to most audiences.[30] Advocates might then claim that easy ownership of assault weapons and pocket-size handguns cannot possibly survive cost-benefit analysis; opponents will 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 leads to a dramatic reduction in violent crime, then there might be more support for further restrictions; if licensing instead 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, opponents might respond to the argument about learning from regulation by extracting a promise from advocates, however unenforceable, that if, for example, a ban on fully automatic weapons does not produce an *x* percent improvement in some stated measure, then they must forswear a ban on semiautomatic weapons and perhaps even agree to rescind the first step—the ban on fully automatic weapons. The promise might be slightly more convincing if the experimental ban were legislated with a sunset provision. Similarly, consider a ban on smoking in bars that is opposed, in part, by bar owners who fear a reduction in patronage and claim more generally that tourism and convention business will wilt. Advocates who argue 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

---

[29] *Id.* at 1033-34.

[30] *See, e.g.*, Jon S. Vernick et al., *Public Opinion Polling on Gun Policy*, HEALTH AFF., Winter 1993, at 203 (reporting that sixty-four percent of poll respondents opposed a total gun ban); Marjorie Connelly, *Public Supports Stricter Gun Control Laws*, N.Y. TIMES, Aug. 26, 1999, http://partners.nytimes.com/library/national/082699poll-watch.html (last visited Jan. 15, 2010) ("The poll found only about a third of the public endorsed a ban on the sale of all handguns, with 61 percent opposed . . . .").

five percent. One way to advance the rescission promise is 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, 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 the law ought to be revoked if the benefits of a regulation fall short of some stated expectation. Perhaps this is because data rarely influence the most passionate advocates and interest groups, whose positions usually reflect very strong preferences rather than the 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 cafés or other unregulated locations and might propose that the ban ought to be extended to new venues. Owners of bars do not internalize the nation's healthcare costs, and the American Medical Association—a surprisingly late-arriving advocate for smoking bans[31]—does not take responsibility for local tax revenues or the profits of tavern keepers.[32]

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 the frequency of use and 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

---

[31] *See* Alan Blum & Howard Wolinsky, *AMA Rewrites Tobacco History*, 346 LANCET 261, 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.").

[32] Both groups might care about the health of employees in bars and restaurants, but such employees might self-select. It is interesting that neither advocates nor opponents of smoking bans produce evidence of the sentiments of the employees. *See generally* H. Tang et al., *Changes of Knowledge, Attitudes, Beliefs, and Preference of Bar Owner and Staff in Response to a Smoke-Free Bar Law*, 13 TOBACCO CONTROL 87 (2004) (concluding that the popularity of California's smoke-free bar law increased over time, "even among bar owners and employees").

note the importance of more accessible public transportation in bringing disabled employees to accommodating workplaces.

In other settings, drastic changes might be more instructive than incremental ones. A single month or year in which smoking was banned everywhere in one jurisdiction, in all eating and lodging establishments within it, 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 on one or two jurisdictions as proving grounds.[33]

Learning through incrementalism seems most likely where the social or political optimum is widely understood to be in a specified range such that there is little support for either endpoint of what might otherwise be a slippery slope. Consider cases of minimum-age regulation. Countries differ as to the appropriate minimum ages for drinking alcohol, driving, voting, and other rights and privileges;[34] apart from a few reconstructed prohibitionists, however, no one seriously espouses the notion that these minima ought to 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 mistook eighteen-year-olds for 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

---

[33] *See* Listokin, *supra* note 1, at 483, 533-39 (describing the value of high-variance experiments, especially when they are reversible). But reversibility for Listokin is not limited to compliance costs and is not at all focused on its role in creating or blocking political coalitions. *Id.* at 533-34.

[34] *Compare, e.g.*, U.S. CONST. amend. XXVI ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."), *with* Costituzione della Repubblica Italiana [COST.] art. 56(1) (Italy) (setting the minimum voting age for Senate elections at twenty-five).

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 policy driven by cost-benefit analysis would consider driving age as well as drinking age, 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, McDonald's employs many high-school students and sells food to a young audience, so 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 lesson 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 minimum age increased, lawmakers might return to the minimum age of eighteen or even try seventeen because of interest-group pressure. The rhetoric or heartfelt arguments 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 would be a case in which 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 of exactly when it is desirable. My aim is simply to show that incrementalism comes with baggage and that the baggage is heaviest when there is irreversibility. We can now add the observation that larger, more 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 at step one, then that group would have no reason to join in a common defense against further regulation at step two (unless the second step threatens additional costs on the interest group burdened earlier). Indeed, it might favor the regulation of its competitors at step two, either to raise their marginal costs or to 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. This compensation could be provided at step one, but that is the stuff of a very broad takings law. By contrast, it could be offered as part of a legislative package at step two. Compensation could come from the interest group at risk at step two, when that group seeks a defensive alliance, or it could come from the government if the allied groups succeed in obtaining 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. Thus, they may be deterred from overreaching with their strategic incrementalism. A more straightforward idea is 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 on the political

process, and especially on power politics involving interest groups, where the larger question is which rules of engagement 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 questions are (1) when to provide compensation and (2) whether to do so in a discretionary or mandatory fashion. In time, the discussion shifts away from power politics and toward the question of inefficiency, or rent seeking. At times, the analysis tracks that which is appropriate to a discussion of takings law, 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.[35] 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 *others* 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 to discourage government interventions and to craft them one way or the other. 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 to set these considerations aside because they are associated with all government interventions, rather than solely those that reflect incrementalism, they

[35] If this be not so, then incrementalism is but a small problem in a larger, more 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 to 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.

come into play when compensation is an ingredient in a suggested antidote to the incrementalism problem.

B. *Power Politics*

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;[36] 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.[37] 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 those rules could be altered by legislation. There is also the question 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 the outcome that would obtain if 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 de-

[36] *See* WILLIAM N. ESKRIDGE, JR., ET AL., CASES AND MATERIALS ON LEGISLATION 57 tbl.1.1 (4th ed. 2007) (charting the costs and benefits of various legislative processes); MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 251-54 (2009) (discussing the "demand side" of legislative goods).

[37] *See* Tullock, *supra* note 4, at 46 (proposing the notion that if interest groups were pitted against one another, the allocation of resources would be more efficient).

sirable outcomes, but a pragmatic optimist is prepared to look for a second-best power-politics process. Finally, another interesting possibility is that it may be easier for voters or public-spirited lawmakers to assess the strength of interest groups than 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, where the hope must also be that competition between advocates will produce the right result.

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, as to which the opposition was dispersed, though perhaps no more so than the advocates.[38] Following a period during which airlines agreed to nonsmoking sections, legislation proceeded incrementally over the course of a decade, first by prohibiting smoking on domestic flights under two hours, then on those shorter than six hours, and finally, in 2000, on all domestic flights.[39] 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 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.[40] In some jurisdictions, bans began with office buildings, where secondhand smoke was seen as a matter of employment conditions; there, again, the losers would

---

[38] *See* Steven A. Mirmina, *Aviation Safety and Security—Legal Developments*, 63 J. AIR L. & COM. 547, 558-59 (1998) (charting the history of nonsmoking sections and smoking bans on airlines).

[39] *See id.*; *see also* 49 U.S.C. § 41706(a) (2006) (prohibiting smoking on all domestic flights).

[40] 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. Ch. 310, 1994 Cal. Stat. 2055 (codified as amended at CAL. LAB. CODE § 6404.5 (West 2003)). Some of California's cities 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, CAL., CODE § 8.12.040(A)–(B) (2009), *available at* http://www.municode.com/Resources/gateway.asp?pid=16235&sid=5.

have been dispersed employees not championed by any organized business interest.[41] An idealist might say that, in incrementalist fashion, the 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. Imagine again that restaurant owners lose on their own at step one, but then bar owners, when threatened at 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 (and the increase in highway speed limits after they were reduced)[42] and the vo-

---

[41] *See, e.g.*, Act of July 5, 1989, ch. 244, sec. 5, § 1399-o, 1989 N.Y. Laws 2328, 2329-34 (codified as amended at N.Y. PUB. HEALTH LAW § 1399-o (McKinney 2002 & Supp. 2009)) (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, and so forth, when hosting private functions organized for the promotion and sampling of tobacco products. N.Y. PUB. HEALTH LAW § 1399-q (McKinney 2002 & Supp. 2009). This law amended the prior law, which in 2003 had banned smoking in most indoor areas open to the public. *Cf.* Act of Mar. 26, 2003, ch. 13, sec. 4, § 1399-q, 2003 N.Y. Laws 109, 113-14 (codified as amended at N.Y. PUB. HEALTH LAW § 1399-q (McKinney 2002 & Supp. 2009)).

[42] For example, in Florida,

> 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.

FLA. STAT. § 316.211(3)(b) (2009). This section amended the prior Florida law, which had required all motorcyclists to wear protective headgear. Act of June 16, 1971, ch. 71-135, § 316.287, 1971 Fla. Laws 431, 543 (codified as amended at FLA. STAT. § 316.211(3)(b)).

At the federal level, states were initially required to lower their highway speed limits to fifty-five miles per hour in order to receive certain federal funds. Emergency Highway Energy Conservation Act, Pub. L. No. 93-239, § 2(b), 87 Stat. 1046, 1046-47 (1974), *repealed by* National Highway System Designation Act of 1995, Pub. L. No. 104-

latility of depreciation schedules in the Internal Revenue Code;[43] reversals are not terribly uncommon, especially if we think of deregulation as reversal. If restaurant smoking were to be permitted once more, then one could argue 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.[44]

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, which would hold the polluters 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, bounded only by the statute of limitations.[45] Both applications of the logic suffer from the

59, § 205(d)(1), 109 Stat. 568, 577. The law was modified by Congress in the late 1980s to increase the limit to sixty-five miles per hour on certain roads, *see* Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 174, 101 Stat. 132, 218, but then repealed in 1995, returning the issue completely to the states, *see* National Highway System Designation Act § 205(d)(1). Since that time many states have raised their speed limits, though uniformity is still lacking. *See, e.g.*, Robert E. King & Cass R. Sunstein, Essay, *Doing Without Speed Limits*, 79 B.U. L. REV. 155, 158-62 (1999) (examining the federal maximum speed limit's effect on Montana's legislative effort to replace speed limits with a law requiring drivers to operate their vehicles at a "reasonable" speed). For example, the current speed limit on interstate highways in Idaho is seventy-five miles per hour. IDAHO CODE ANN. § 49-654(2)(c) (2008). In Illinois, the limit is sixty-five miles per hour. 625 ILL. COMP. STAT. 5/11-601 (2008).

[43] *See generally* John P. Steines, *Income Tax Allowances for Cost Recovery*, 40 TAX L. REV. 483 (1985) (reviewing the history of accelerating and tightening depreciation deductions as well as the related investment tax credit).

[44] Note that this reversal-by-compensation strategy is applied here even though a smoking ban, unlike a ramp requirement, does not represent an irreversible investment. *See supra* note 17 (discussing the irreversibility of a ramp requirement).

[45] If this argument is fashioned as a takings claim, then we need some baseline understanding of property rights and smoking rights. As a tort claim, it is unconvincing because the primary wrongdoers are the smokers (or tobacco companies) and not the owners of facilities in which secondhand 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 or otherwise working against improvements in law. *See* Louis

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 had a collective action problem or a misapprehension about the path of regulation not interfered.

If mandatory compensation for regulatory reversals can improve power politics, there remains the question whether it is feasible. Law has struggled with the question how to define and compensate regulatory takings, and it has struggled with rules that might be regarded as arbitrary.[46] Compensation for burdensome regulations only if reversed, or only for those reversed after subsequent, incrementally more severe regulations are voted on, presents considerable difficulties. No legal

---

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) (elaborating 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 to accelerate it.

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

[46] The Supreme Court has stated that

> [t]he 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 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, 123-24 (1978) (alteration in original) (citation omitted) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)). 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 taking will be found if the governmental action imposes "a permanent physical occupation of property," irrespective of whether the regulation secures a public policy benefit or "has only minimal economic impact on the owner." *Id.* at 434-35. Similarly, there is *Lucas v. South Carolina Coastal Council*, which holds that a taking may be found when the state deprives a property owner of "all economically beneficial uses of the land." 505 U.S. 1003, 1019 (1992) (emphasis omitted).

system calculates and awards damages arising out of a regulation like a smoking ban when there is a safety claim and when 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 depreciation schedules, necessarily reverse prior law. Some might view a regulatory regime requiring elevators rather than access ramps as a regulatory reversal, while others might view it as a further step in the regulatory trajectory. 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. For example, lawmakers required passive-restraint systems in automobiles on the way to requiring airbags.[47] Once airbags were required, auto-engaging seatbelts were no longer mandatory.[48] If this were to be regarded as a reversal, so that compensation for the passive-restraint step would be required, then the airbag regulation might have taken a less efficient form in order to avoid the compensation requirement.[49]

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, yet each new burden also raises the barrier against 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.

---

[47] *See* 49 C.F.R. § 571.208, subsecs. S4.1.4, S4.1.5.3 (2008) (mandating that passive-restraint systems be installed in all cars manufactured after September 1, 1989, and mandating airbag installation in all cars manufactured after September 1, 1997).

[48] *See id.* § 571.208, subsec. S4.1.5.3 (permitting the passive-restraint requirement to be met with airbags alone).

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

In short, compensation is in theory a tool with which to alleviate the incrementalism problem, especially when irreversibility is present. Once we move away from the easiest cases, however, it is as difficult to identify regulatory reversals (as well as to assess net damages) as it is to pinpoint problems with incrementalism. A respectable case can surely be made for compensation following regulatory reversals—with an eye toward getting the power politics right in the first place—as it is comparable to the argument for compensating all apparent regulatory takings. But the argument is almost surely too complicated: execution is too difficult, and there remains the question 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, can a government, or another interest group, 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.[50] It can require airlines to provide the seats for these marshals, though it could have advanced the cause of security and the economic health of the airlines by buying tickets for the marshals.[51] A government that requires airbags, smoke alarms, or vaccinations can presumably offer to supply them as well.

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 ses-

[50] *Cf.* 49 C.F.R. § 1544.223(b) (2009) (requiring commercial carriers to provide seats for federal air marshals).

[51] *Cf. id.* § 1544.223(c) (requiring air marshals' seats to be provided free of charge).

sion, buy more vehicles than expected for its own fleet. Moreover, the government might change the tax law regarding net-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.[52]

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 incrementalism problem. That no one—even among those who think that 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 from nineteen to twenty, and finally to twenty-one.[53] 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-

---

[52] *See generally* Julie A. Roin, *Reconceptualizing Unfunded Mandates and Other Regulations*, 93 NW. U. L. REV. 351 (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 the ability of state and local governments 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, for overfunded—mandates when there is . . . some political gain to a claim that the federal government forced certain policies on the states and localities . . . ."). This power might explain why the incrementalism problem does not often arise by dividing and conquering jurisdictions.

[53] Wisconsin, for example, lowered its drinking age to eighteen in 1971. Act of Mar. 22, 1972, § 5, 1971 Wis. Sess. Laws 509, 510 (current version at WIS. STAT. § 125.02(8m) (2009)). Prior to that time, the drinking age had been twenty-one for all wine and spirits. *Id.* It was raised to nineteen in 1984, *see* Act of Nov. 3, 1983, § 5, 1983 Wis. Sess. Laws 786, 787 (current version at WIS. STAT. § 125.02(8m)) (raising the drinking age to nineteen effective July 1, 1984), and to twenty-one in 1986, *see* Act of June 7, 1986, §§ 4, 55, 1985 Wis. Sess. Laws 1484, 1484, 1493 (current version at WIS. STAT. § 125.02(8m)) (adjusting the minimum drinking age to twenty-one and grandfathering in nineteen- and twenty-year-olds). *See* WIS. STAT. § 125.02(8m) (defining the current legal drinking age as twenty-one).

organized political interest.[54] 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 eighteen-year-olds, and, even in college towns, no bar owners would be expected to turn, in a second regulatory step, against *other* bars able to serve nineteen-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 same manner as 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 alcoholic beverages, they might have been expected to seek revenge against the 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.[55] In

---

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

[55] Even in those states with the most frequent changes, there has not been a progression that looks like a divide-and-conquer strategy. Georgia, for example, legislated twenty-one as the minimum age for purchasing alcohol in 1938 (after the end of Prohibition in 1933, *see* U.S. CONST. amend. XXI). *See* Revenue Tax Act to Legalize and Control Alcoholic Beverages and Liquors, No. 297, § 15, 1937–1938 Ga. Laws 103, 118-19 (1938) (current version at GA. CODE ANN. § 3-3-23 (2003 & Supp. 2009)) (prohibiting the sale of alcoholic beverages to minors); *cf.* GA. CODE ANN. § 74-104 (1937) (setting twenty-one as the age of majority). In 1972, Georgia lowered the age of majority to eighteen (this was a period in which drinking ages and voting ages dropped to conform to the age for military conscription). *See* Act of Mar. 10, 1972, No. 862, sec. 1, § 74-104, 1972 Ga. Laws 193, 194-95 (current version at GA. CODE ANN. § 3-3-23). In 1980, Georgia again raised the age of majority, and thus the drinking age, to nineteen. *See* Act of Apr. 13, 1981, No. 732, sec. 22, § 5A-510, 1981 Ga. Laws 1269, 1281-83 (current version at GA. CODE ANN. § 3-3-23). Finally, in 1985, Georgia raised the age to twenty-one (to take effect in 1986) in anticipation of a federal regulation. *See* Act of Apr. 3, 1985, No. 562, sec. 3, § 3-3-23, 1985 Ga. Laws 753, 755-57 (current version at GA. CODE ANN. § 3-3-23). The minimum age was set at twenty for the 1985 transition year. *See id.* Effective dates were always set 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

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 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.[56]

Consider in this regard two kinds of incrementalism in the area of employment-discrimination law. The first concerns a statute that applies to employers with more than *x* employees, but, over time, amendments broaden its reach to employers with fewer employees.[57] 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, regulation, or judicial decision. A statute that permitted employment claims with respect to race and sex might over time add pregnancy, sexual preference, and age as relevant characteristics.[58] This may be

---

legislating an increase in the drinking age without disappointing the expectations of any cohort already old enough to vote.

[56] 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 an incrementalism problem seems unlikely. 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.

[57] *Compare, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b), 78 Stat. 241, 253 (codified as amended at 42 U.S.C. § 2000e(b) (2006)) (defining covered employers covered by Title VII to include those having twenty-five or more employees), *with* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, sec. 2(2), § 701(b), 86 Stat. 103, 103 (codified as amended at 42 U.S.C. § 2000e(b)) (extending the scope of Title VII to employers with fifteen or more employees).

[58] *Compare, e.g.*, Civil Rights Act § 703, 78 Stat. at 255-57 (codified as amended at 42 U.S.C. § 2000e-2) (prohibiting employment discrimination on the basis of "race, color, religion, sex, or national origin"), *with* Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, sec. 1, § 701(k), 92 Stat. 2076, 2076 (codified as amended at 42 U.S.C. § 2000e(b)) (expanding discrimination on the basis of sex to include discrimination based on pregnancy).

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 underinvest 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. If there is neither irreversibility nor shifting coalitions, then there is not 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 applied to employer size than 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" activities rather than too many. One solution to this problem—realigning divided interest groups by promising compensation in the event of a regulatory reversal—appears to be theoretically attractive but exceedingly difficult to design and 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.[59] If interest

[59] Rent seeking can be understood by beginning with the canonical case in which the 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 the position. One famous advance in public-choice theory was the realization that economists 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*

groups know that compensation is available, they will expend resources, or seek economic rents, in attempts to recover their 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 would discourage rent seeking if it could somehow precommit never to subsidize an industry and never to impose licensing requirements or tariffs that protect an industry. Although uncompensated takings surely generate rent-seeking behavior, from a public-choice perspective, it is difficult to understand why scholars pay so much more attention to government takings than to government subsidies or other programs.[60] The two can be

---

Tariffs, Monopolies, and Theft, 5 W. ECON. J. 224, 231-32 (1967) (explaining that welfare loss from monopoly also comes from the resources producers spend successfully or unsuccessfully trying to obtain a monopoly). Consumers who would be willing to 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 those consumers. The public-choice insight is that the social cost of a monopoly is much greater than the aggregated deadweight loss because it includes the cost of wasteful rent-seeking activity. *Id.*; *see also* Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807, 809-15 (1975) (modeling the social costs of monopoly "as the sum of deadweight loss and the additional loss resulting from the competition to become a monopolist"). 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, $0.5x$ 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 profit-maximizing entities competing for the monopoly might generate.

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 might bemoan the loss of a medium for public television or other noncommercial use, but at least the resource will have gone to the commercial user who values it most highly. On the other hand, if a politician assigns the channel, various broadcasters or other 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 her skills. Rent seeking encompasses such waste. A plausible policy goal, or source of a theory about law, might be to structure rules to minimize rent seeking and thereby reduce social waste.

[60] 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 cost is spread across dispersed taxpayers and citizens, it will activate interest groups. In many settings, this effect is orthogonal to the incre-

equally wasteful in rent-seeking terms. But much as the discussion here considers regulatory reversals and other aspects of incrementalism without reinventing the wheel of takings law, it is widely acknowledged 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 order to minimize 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 $1 million cost. That owner might spend up to $1 million to forestall the regulation or to gain an exemption from it. In a world where regulations are frequently held to amount to takings, constitutional obligations to compensate property owners dominate any incentives to lobby against the regulation. Of course, the compensation requirement itself might decrease advocates' likelihood of success in gaining passage of the regulation such 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 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 to prevent organized beneficiaries from too often getting their way at the

---

mentalism 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* (discussing whether there is a feasible system to recapture gains in real estate value resulting from government action), *in* WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION 15, 15-19 (Donald G. Hagman & Dean J. Misczynski eds., 1978). A proposed road's precise location, once worked out, sends strong signals about the road's likely extension, so that there is more information rather than more dividing and conquering.

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 $1 million 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 $1 million, provided that compensation can be obtained. If the steps are thus decoupled, the rent-seeking potential doubles because there is first a $1 million loss to worry about and then a $1 million gain to pursue. If compensation is either mandated or forbidden, and there is no cheating through other legislation, there is $1 million, rather than $2 million, at stake, and there is less rent-seeking activity. This suggests yet another reason why the compensation solution to the incrementalism problem explored in Sections I.C and III.B above 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.[61] In short, from a rent-seeking perspective, the incrementalism problem is made worse rather than better by guaranteeing compensation for overregulation at the first step, inasmuch as this overregulation is determined by the discretionary step of voting down further regulation at 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 when an earlier safety standard is overruled. There is neither com-

[61] 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 begins 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 such that there would be a package combining the defeat of the proposal to expand retrofitting with 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.

pensation for the victims when the old standard is deemed too lax, nor compensation 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 place discretion in the hands of courts or agencies, if one dares to think that there is less rent seeking in these domains.

IV. DISCLOSE OR DELIMIT

The incrementalism problem has one potential solution that seeks to work within power politics without exacerbating rent seeking and without running into the dangers of overcompensation and undercompensation. The strategy is to force disclosure of information about regulatory goals. At the outset of a campaign, advocates 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—perhaps 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, free-market basis, then hotels in the jurisdiction would be guaranteed freedom from such regulation for five years from the date of enactment of the first ban. 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-or-delimit rule. The advocates may not be an easily identified group, and they may not be the same group that favors 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 a delimitation that interferes with the second group's aims. An optimistic response to this problem—and especially to the strategic behavior problem it 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-or-delimit rule has other weaknesses: it forgoes useful learning from regulation, and it forces the law to stand still even in the face of

technological or other changes that might come about during the prescribed moratorium. Compensation could offset some of these drawbacks, but it is difficult to introduce compensation without making it discretionary and thus inviting rent seeking.

By way of example, imagine that home mortgages are soon regulated so that loans of more than 90% of the value of a property require debtor counseling or extra disclosure on the part of the originating bank. With a disclose-or-delimit approach, advocates of this regulation (including a regulator like the Federal Reserve) must reveal whether they intend to push the rule to cover 80% mortgages, second mortgages, and home-equity loans. Covering 80% 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 90% 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 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-or-delimit rule that included all regulations affecting the subject matter seems absurd because it would force omnibus bills or calculations of a size previously unknown. Yet, a proposal regarding disclosure forms, maximum interest rates, or appraisal requirements might well be closer in political kind to the 90% 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.[62]

But a second example suggests the promise of the disclose-or-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

[62] *See* Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 811-31 (2006) (describing the history of, justifications for, and inconsistent application of the single-subject rule found in many state constitutions and applicable to legislation).

carbon consumption of specified industries, such as steel and automobile manufacturing. The incrementalism "problem," or perhaps blessing, is that aluminum manufacturers and other interests might soon turn on the exempt industries. A disclose-or-delimit rule provides a period during which policymakers cannot extend the tax to these other industries. Similarly, if, instead of a carbon tax, legislation requires aluminum and other manufacturers to 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-or-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 its solutions draw on ideas about constitutional constraints and political reputation. Political reputation might 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, can 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 its 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 environmentally 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, however, in which each promise seems reasonably credible.

CONCLUSION

Incremental regulation can divide interest groups and pit them against one another. The process can be good or bad for the polity. Better laws might emerge from a process that is more transparent, less path dependent, and more likely to bring affected interests to the table all at once. 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 implementing it. 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 decisionmaking. 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 counterweight, though less than usually imagined. The problem is most likely to be 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 regulation 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 disparate groups favor incremental regulation.

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 incremental ones. 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 per-

tains 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. Yet, there is reason to think that we can identify situations in which a proposed change falls short of its advocates' wishes and situations in which 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.