
RESPONSE

THE ROLE OF LAWMAKERS, LOBBYISTS, AND SCHOLARS IN THE NORMATIVE EVALUATION OF TIMING RULES

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In response to Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007 (2011).

INTRODUCTION

Professor Rebecca Kysar has written an interesting and informative article on the disadvantages of temporary legislation, or legislation that expires by default, when compared with lasting legislation, or legislation that does not expire by default. The article aspires to move the underlying ideological preferences of lawmakers toward lasting legislation,¹ and represents a needed counterweight to recent scholarship that has advocated temporary legislation, or has at least viewed it less critically. Professor Kysar advocates a policy presumption against temporary legislation and in favor of lasting legislation.²

Professor Kysar's appeal to lawmakers is most forceful with respect to tax policy. She notes that internal congressional rules are easily outmaneuvered, and that budgetary rules therefore do not meaning-

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¹ Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007, 1065 (2011) (explaining that "this Article . . . seeks to change underlying congressional norms").

² *Id.* at 1068.

fully constrain lawmakers.³ Thus, any long-term budgetary advantage of confining tax cuts and expenditures within the budget window is illusory. Moreover, Professor Kysar notes that temporary tax legislation often produces post-expiration effects that are socially costly,⁴ and that temporary tax legislation may lead to higher levels of rent-seeking.⁵ All of this leads her toward a conclusion that benevolent legislators interested in minimizing social cost should prefer lasting tax legislation to temporary tax legislation.⁶

She likewise concludes that the social cost of temporary legislation in policy domains other than taxation is likely to be greater than the social cost of lasting legislation, and that legislators should therefore presume to legislate permanently across the board.⁷

The analysis that leads to this conclusion details how the law and economics literature on temporary legislation has understated its costs and overstated its benefits. *Lasting Legislation* is heavy on criticism of temporary legislation, but perhaps given the scholarly optimism in favor of temporary legislation, this criticism may be partly characterized as pushback. Elsewhere, Fagan has shared some of Professor Kysar's views on temporary tax legislation,⁸ and our Response accordingly focuses on her critique of the "information-producing" and "flexibility" functions of temporary legislation found in Parts III and IV of *Lasting Legislation*.⁹

The legislative universe is vast and cannot efficiently conform to a singular presumption in favor of temporary or lasting legislation. The

³ See *id.* at 1024-25 (noting that legislators interpret or circumvent budget rules in order to satisfy "the political appetite for government spending and tax cuts").

⁴ See *id.* at 1039 (noting that the costs of temporary tax cuts can extend beyond the budget window because cuts can change taxpayer behavior that occurs after the statute's sunset date). For a comparison of the social welfare implications of post-expiration effects for both temporary and lasting legislation, see Frank Fagan, *After the Sunset: The Residual Effect of Temporary Legislation*, 33 EUR. J.L. & ECON. (forthcoming 2012) (manuscript at 12-15), available at <http://www.springerlink.com/content/d153517753681100/fulltext.pdf>.

⁵ Kysar, *supra* note 1, at 1051 ("[T]emporary legislation, through continual threats of expiration, allows congressional members to extract more rents from interest groups than does lasting legislation.").

⁶ *Id.* at 1068.

⁷ *Id.* at 1066-67 (advocating a stronger presumption against tax cuts, and a weaker presumption for emergencies and experimental situations).

⁸ See Frank Fagan, *Temporary Versus Permanent Legislation* 158-73 (June 9, 2011) (unpublished Ph.D. dissertation, European Doctorate in Law and Economics, Erasmus University Rotterdam School of Law, University of Bologna Department of Economics) (on file with authors).

⁹ See generally Kysar, *supra* note 1, at 1041-65.

timing of a legal intervention impacts social welfare according to prevailing political conditions, and those conditions are not uniform across time and policy domains.¹⁰ By drawing upon the theoretical ambiguities that arise when evaluating temporary versus permanent legislation outside of a well-defined policy context, our Response reasons that any presumption in favor of one timing rule over the other deserves a more nuanced and less broad application than the blanket presumption presented in *Lasting Legislation*.

Temporary legislation is likely to maximize social welfare when the legislature is addressing new risks,¹¹ when a change in social norms is causing compliance to increase,¹² when interest groups are concealing important information from lawmakers,¹³ when a regulated technology is undergoing rapid transformation,¹⁴ and in other scenarios that the literature has yet to develop. Lasting legislation is likely to maximize social welfare when social norms are not changing, when a policy domain is transparent, when technological advance is slow, and in other scenarios—also undeveloped. Some of the underlying assumptions that favor either temporary or lasting legislation can be readily questioned, however, and timing-rule policy recommendations will benefit greatly from empirical support.¹⁵ Before addressing this point further, we first emphasize the importance of normatively evaluating temporary versus lasting legislation from the broader criterion of wealth maximization, or some other form of joint-welfare maxi-

¹⁰ See Fagan, *supra* note 4 (manuscript at 2) (noting that, in addition to an uncertain legal environment given exogenously, the optimal choice of a timing rule can depend upon how the initial enactment itself impacts the longer-term legal environment); see also Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543, 558-61 (2007) (noting that the optimal timing of legislation depends on political conditions and that the timing of a legal intervention can be as important as its content); Barbara Luppi & Francesco Parisi, *Optimal Timing of Legal Interventions: The Role of Timing Rules*, 122 HARV. L. REV. F. 18, 18-20 (2009), http://www.harvardlawreview.org/media/pdf/luppi_pariis.pdf (same); Francesco Parisi, Vincy Fon & Nita Ghei, *The Value of Waiting in Lawmaking*, 18 EUR. J.L. & ECON. 131, 136-41 (2004) (noting that lawmakers cannot know ahead of time which type of law will be most appropriate in various regulatory domains).

¹¹ Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 269-71 (2007).

¹² Fagan, *supra* note 4 (manuscript at 13-14).

¹³ See *infra* text accompanying notes 16.

¹⁴ BETTER REGULATION TASK FORCE, ANNUAL REPORT 2000-2001, at 19 (2001) (U.K.).

¹⁵ Cf. Gersen, *supra* note 11, at 266 (explaining that a theoretical comparison of the aggregate transactions costs of temporary and permanent legislation is “painfully detailed and frustratingly sparse on clear normative implications”); Gersen & Posner, *supra* note 10, at 589 (“The proper use of timing rules depends on context, and so one cannot at a high level of abstraction say whether the current system is optimal or not.”).

zation. *Lasting Legislation* appears to advance a normative position that favors the demand side of the legislation market, that is, the public and interest groups. We instead should consider the joint welfare of all of the stakeholders who are involved in the selection of a timing rule.

I. THE IMPORTANCE OF EMPLOYING A BROAD NORMATIVE CRITERION

Four players are involved in the timing-rule game: lawmakers, lobbyists, interest groups, and the public. Each has a wide range of interests. Following *Lasting Legislation*, we want to focus on the lawmaker's rents, the lobbyist's fees, the interest group's legislation, and the public's information.¹⁶ We can compare two legislative scenarios: two pieces of five-year temporary legislation and a single piece of ten-year lasting legislation. In the first scenario, the lawmaker receives two rents, the lobbyist receives two fees, the interest group receives ten years of legislation, and the public receives a potential piece of information at sunset review. In the second scenario, the lawmaker receives one rent, the lobbyist receives one fee, the interest group receives ten years of legislation, and the public receives no potential piece of information.

Lasting Legislation generally argues that the first scenario is more socially costly than the second. To do so, it implicitly views rents and fees as social costs, and would find that one rent and one fee is better than two rents and two fees. The first issue with this argument is that it sidesteps the reasonable view that the magnitude of rents and fees for five years of legislation is less than the magnitude of rents and fees for ten years of legislation. Under the assumptions of microeconomic theory, though somewhat rigid, the rents and fees would be the same. That is, 5×2 would equal 10×1 . *Lasting Legislation* rightly points to the rigidity of the assumptions one must make to arrive at this conclusion. Nonetheless, while the individual rents and fees for two pieces of temporary legislation may not equate to the rents and fees for one piece of lasting legislation, they certainly are less. Professor Kysar herself acknowledges, "To be sure, it seems reasonable to conclude that interest groups will value temporary legislation less than lasting legislation due to its shorter duration."¹⁷ Indeed, if interest groups are

¹⁶ Though the public may be thought of as an interest group, following Kysar, *supra* note 1, at 1045, we treat it separately in order to consider joint welfare under the assumption that the public and an interest group are faced with divergent interests. For an explanation of group terminology, see MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 7 (2d prtg. 1971).

¹⁷ Kysar, *supra* note 1, at 1052-53.

paying for legislation in rents and fees, then they will pay less of them for legislation of less value.

But what of a piece of five-year legislation that is extended twenty times? Are the rents and fees substantially greater, or is 5×20 equal to 100×1 ? More interestingly, what exactly is the difference in rents and fees, how do we measure the contributing factors to that difference, and what are the policy implications thereof? The underlying assumptions that lead to opposing conclusions on the difference can be battered back and forth, and the question should begin to settle with the arrival of empirical research. Our immediate contention therefore sidesteps this playing court.

We begin with the assumption that the value that an interest group assigns to any piece of legislation, irrespective of how long it lasts, is at least equal to or greater than the interest group's outlay of rents and fees. Otherwise, if the outlay of rents and fees is greater than the value assigned to the legislation, the interest group will not expend its resources on rents and fees. This means that whether the interest group expends its resources on a five-year piece of legislation twenty times, or on a hundred-year piece of legislation once, it will nevertheless experience a net gain—at each enactment and at each extension. Otherwise, the interest group will not transact.¹⁸ *Lasting Legislation* contends that lawmakers and lobbyists are able to increase aggregate rents and fees with multiple extensions. This may be true. Because interest groups always receive a net gain, however, the material difference between multiple extensions and a single enactment involves the legislative consumer surplus. Under temporary legislation, lawmakers and lobbyists capture a greater portion of that surplus; under lasting legislation, the lion's share goes to interest groups.

For this reason, an argument for a legal presumption in favor of lasting legislation at least needs to explain why it is less normatively desirable to transfer wealth away from interest groups and toward legislators and lobbyists. *Lasting Legislation* frames the issue as an agency relationship in which agent-legislators rationally pursuing their own interests “exploit the information asymmetries between themselves

¹⁸ For example, see RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 88 (reprt. 1983), which demonstrates the concept of consensual transacting with the example of a greengrocer: “If A sells a tomato to B for \$2 . . . we can be sure that the utility to A of \$2 is greater than the utility of the tomato to him, and vice versa for B. Likewise, if an interest group trades rents and fees for a legislative extension, we can be sure that its utility of the extension is greater than its utility of the rents and fees.”

and voters,”¹⁹ and impose traditional agency costs. It seems to us that the proper relationship to consider is between agent legislators and principal (nonvoter) interest groups. The additional layer of voters-as-principal may be subject to exploitation, but not through the means suggested in *Lasting Legislation*—namely, lawmaker rents and lobbyist fees paid by (nonvoter) interest groups. At best, *Lasting Legislation* finds that temporary legislation is more socially costly because legislators and lobbyists employ their capital in socially inferior modes than do interest groups.

Perhaps a counterargument might claim that because legislators and lobbyists capture a greater portion of the legislation consumer surplus under temporary legislation, temporary legislation raises legislation market barriers and promotes undesirable market concentration. The problem with this argument is that it ignores the competitive effects that take place within the supply side. If, in fact, legislators and lobbyists can more easily capture rents and fees, then barriers to entry into lawmaking and lobbying are likely to decrease. Preliminary empirical work in this area suggests just that: younger legislators prefer to legislate temporarily while older legislators prefer to legislate permanently.²⁰ One can easily imagine a normative argument in favor of empowering a greater number of legislators and potential entrants. Competition within their ranks distributes power across the legislature more broadly and exerts an upward pressure on legislator turnover.

When temporary timing rules are viewed as means for wealth transfer, their byproduct informative effects are understood as unambiguously welfare-improving. Early signaling models of lobby activity recognize the social value of information transmitted through lobbying.²¹ Later research goes further, showing that regulatory capture can enhance welfare since capture may entail closer relationships between rent-seekers and interest groups, thereby promoting higher levels of informal interaction that produces hard-to-get and socially val-

¹⁹ Kysar, *supra* note 1, at 1053.

²⁰ See Fagan, *supra* note 8, at 155-56 (finding that younger legislative sponsors are more likely to include temporal restrictions in their legislative proposals).

²¹ See, e.g., Jan Potters & Frans van Winden, *Lobbying and Asymmetric Information*, 74 PUB. CHOICE 269, 286 (1992) (observing that “lobbying messages from an interest group to a policymaker may be informative *even* if there is a substantial conflict of interest”); Eric Rasmusen, *Lobbying When the Decisionmaker Can Acquire Independent Information*, 77 PUB. CHOICE 899, 910 (1993) (proposing that “[I]obbying raises welfare when the politician’s investigation costs are higher, the politician is more certain of the electorate’s views, and the issue is less important . . .”).

uable information.²² *Lasting Legislation* treats rent-seeking and lobbying activity as a net social cost under any set of conditions. Instead, we should be interested in understanding under what set of conditions a temporary timing rule, versus a permanent timing rule, will produce benefits from repeated lobbying efforts that outweigh the sum of their attendant transactions cost plus any socially costly externalities—unless of course, there is a strong normative preference for having interest groups realize the legislation consumer surplus.

II. THE IMPORTANCE OF EMPIRICAL RESEARCH

Much of the criticism found in *Lasting Legislation* can be used to develop a theoretical model that can serve as the backbone to empirical study. For example, based upon the criticisms set forth in Parts III and IV (“The Information-Producing and Flexibility Functions of Temporary Legislation” and “Disadvantages of Temporary Legislation”),²³ we can construct a simple cost-benefit model of temporary versus lasting legislation.

Using a notation analogous to Gersen and Posner’s, and Luppi and Parisi’s,²⁴ Congress enacts a permanent law, revisable with repeal, that creates a public benefit B_π with probability p in exchange for cost C_π and lawmaking cost k with certainty. Thus, the public’s value of their action is $pB_\pi - C_\pi - k$.²⁵ Congress enacts a temporary law, extendable with reenactment, that creates a public benefit B_π with probability p and an information benefit I with probability q in exchange for cost C_τ and lawmaking cost k with certainty. Thus, the public’s value of their action is $pB_\tau + qI - C_\tau - k$. When *Lasting Legislation* attacks the information-producing function of temporary legislation, it essentially argues that either the probability of receiving the information benefit is sufficiently low, or that the magnitude of the information benefit is sufficiently low.

The article first argues that the information benefit may not occur at all since the legislature may not foresee that “faulty information underlies the legislation or whether intervening events will occur that would necessitate revised policy—perhaps an unlikely scenario.”²⁶ In-

²² Cary Coglianese et al., *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 336-41 (2004).

²³ Kysar, *supra* note 1, at 1041-65.

²⁴ Gersen & Posner, *supra* note 10, at 558; Luppi & Parisi, *supra* note 10, at 22.

²⁵ That k is costly to the public might be predicated upon the assumption that time is taken away from developing other potentially beneficial legislation.

²⁶ Kysar, *supra* note 1, at 1043.

deed, if the legislature believes that correct (i.e., complete) information underlies its initial long-term legislative action, it is highly unlikely to legislate temporarily. However, a policy presumption in favor of lasting legislation seems of little value in this scenario. The legislature cannot foresee any error and will presumably legislate permanently with or without a presumption.

Lasting Legislation also finds that probability q of receiving an information benefit can be sufficiently low because frequent interactions between interest groups and legislators “may lead to a capture scenario in which the legislator is acting for the interest group rather than a broader constituency, regardless of presented information.”²⁷ We may further interpret this criticism as an increase in C_τ since a portion of the costs associated with those capture benefits may be externalized upon the public. As noted in *Lasting Legislation*, however, frequent interactions can lead to higher, not lower, probabilities of beneficial information production for the public,²⁸ which in turn exerts pressure on interest groups to internalize any external C_τ costs. Thus, whether frequent interactions are beneficial is essentially an empirical question. We note, in addition, that from the perspective of wealth maximization, the scholarship should consider the benefits of all the parties involved—lawmakers, lobbyists, interest groups, and the public. As explained above, *Lasting Legislation* appears to advance a normative position that favors the demand-side of the legislation market, especially interest groups.²⁹

Our preliminary approach to the empirical question of whether frequent interactions are socially beneficial has been to divide and isolate categories of legislation that might exhibit higher or lower values for q .³⁰ For example, temporary legislation that originates from the Natural Resources Committee may be subject to meaningful scrutiny that produces valuable information for the public more frequently. In contrast, temporary legislation that originates from the Financial Services Committee may be subject to meaningful scrutiny that produces valuable information for the public less frequently.³¹ Further theoret-

²⁷ *Id.* at 1044.

²⁸ *See id.* (noting that “continuous relationships are a double-edged sword”).

²⁹ *See supra* text accompanying notes 15-16.

³⁰ *See Fagan, supra* note 8, at 124-28 (examining the impact of temporal restrictions on passage probability while controlling for legislative committee of origin).

³¹ Gersen provides a case study of the Terrorism Risk Insurance Act of 2002, which provided a terrorism insurance backstop enacted with a three-year sunset. Gersen, *supra* note 11, at 286-98 (citing Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322; Terrorism Risk Insurance Extension Act of 2005, Pub. L. No.

ical work based upon those hypothetical empirical findings would address such a difference, and may lead to empirically grounded normative recommendations. For example, it might be that the difference is due to Congress's inability to reward financial services interest groups for disclosure. Thus, in addition to a normative recommendation in favor of temporary natural resources legislation, a further recommendation would include the development of a mechanism for rewarding disclosure for temporary legislation that originates from the financial services committee.³²

In addition to arguing that the probability q of receiving an information benefit can be sufficiently low, such that the value of lasting legislation is greater than that of temporary legislation, *Lasting Legislation* also argues that the magnitude of any received information benefit I can be sufficiently low. Temporary legislation might produce "over- and underresponsiveness, which spoils the information that the legislature considers upon the sunset date."³³ For example, taxpayers may structure their transactions in order to garner tax benefits during the sunset period, or interest groups may choose not to comply with a temporary regulation and simply wait for the temporary regulatory environment to end.³⁴ Indeed, interest groups will react to temporary and lasting legislation in different ways, but their reaction can only be said to produce spoiled or "distorted data"³⁵ in the sense that a reaction to temporary legislation should, but does not, resemble a reaction to lasting legislation. We should instead attempt to positively identify an interest group's reaction to each type of timing rule, illuminate the "distortions," and develop sound policy recommendations that go beyond a blanket presumption in favor of fostering the undistorted data produced by lasting legislation. This task might prove especially worthwhile since, as *Lasting Legislation* notes, temporary and lasting legislation each manifest a predilection toward entrench-

109-144, 119 Stat. 2660). At review, the insurance industry revealed little information of value for determining if the backstop was necessary, presumably because the value of disclosure was insufficient. *Id.* at 295-97. The backstop was extended, albeit with higher triggers. *Id.* at 297-98.

³² Cf. Coglianese et al., *supra* note 22, at 341 (noting the importance of developing new methods for rewarding disclosure in opaque policy domains).

³³ Kysar, *supra* note 1, at 1045.

³⁴ *Id.*

³⁵ *Id.* at 1046.

ment,³⁶ which can be confusing since interest groups may not react to temporary legislation as if it is entrenched.³⁷

Theoretically, we can begin by recognizing temporary and permanent enactments as two types of commitment signals to which the interest group can choose to reveal or not reveal information. Signaling models often posit various states of the world in which the signal is sent. For example, if an interest group receives a temporary enactment signal in a state of the world where the legislature is committed to a policy, but its interests are unaligned with those of the interest group, a temporary enactment may signal that the legislature hopes to gather useful information during the temporary period for future lawmaking and is serious about getting the policy right. The interest group would therefore know, from receiving a temporary enactment signal in this state of the world, that waiting for the temporary regulatory environment to end would be an unsuccessful strategy. We would note that, in this scenario, the planning disruptions that *Lasting Legislation* argues are brought on by temporary legislation cannot occur.³⁸ Again, whether temporary or permanent timing rules signal a commitment are empirical questions, and the answers will likely depend on the prevailing political conditions of a particular legal environment.

With respect to an over-responsive taxpayer who takes advantage of a beneficial temporary tax environment, lawmakers might expect that a portion of taxpayers will take advantage of the environment and adjust their estimates accordingly. We agree with Professor Kysar that, to the extent current budget law permits the non-accounting of expected behavior, it is flawed. However, broad policy recommendations such as a presumption in favor of lasting legislation that go beyond tax policy, for example, should be supported by a thorough body of empirical research. Not only does research lessen the need to appeal to the underlying ideological preferences of lawmakers, it safeguards against a blunt overreaction to temporary legislation that may needlessly sacrifice welfare-maximizing benefits in other legislative domains.

CONCLUSION

Lasting Legislation presents a needed counterweight to existing scholarship that normatively recommends temporary legislation *tout*

³⁶ See *id.* at 1056-63.

³⁷ For example, they may be waiting for the legislation to expire.

³⁸ See Kysar, *supra* note 1, at 1063-65.

court. It demonstrates, with a thorough critique, that temporary legislation can quite possibly lead to social welfare loss, and that lawmakers should therefore presume to legislate permanently. Our Response offers two cautions. First, from the perspective of joint-welfare maximization, we should examine the utilities of all the parties involved—the public, the interest groups, the lawmakers, and the lobbyists. *Lasting Legislation* focuses on the utilities of the demand side—that is, the public and the interest groups. By doing so, it too readily sees temporary legislation as more socially costly than lasting legislation. Instead, by taking the utilities of lawmakers and lobbyists into account, the social costs of temporary legislation are revealed to be portions of the legislation consumer surplus. Moreover, timing rules that allow lawmakers and lobbyists to garner portions of that surplus more easily may reduce barriers to lawmaking, thereby promoting normatively desirable effects such as a broader distribution of power throughout the legislature and increased legislator turnover.

Second, because existing theory easily supports conflicting arguments with respect to whether temporary or permanent timing rules maximize welfare, we ought to support our normative recommendations with a thorough body of empirical research. Questions such as whether repeat interactions lead to information revelation, or whether temporary legislation signals a commitment, cannot be answered without making questionable assumptions.³⁹ Professor Kysar makes clear that policy presumptions in favor of temporary legislation require making such assumptions. However, the answer is not a policy presumption in favor of lasting legislation. While the literature's initial approach has been to carve out various legal environments where one type of timing rule is likely to enhance welfare more so than the other,⁴⁰ important questions will remain unsettled until we develop a thorough body of empirical research.

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³⁹ Other ripe empirical questions raised in *Lasting Legislation* include whether “cognitive biases . . . bring overreaction . . . [or] underreaction” when citizens rely upon an availability heuristic to form their demand function for new risk legislation, see Kysar, *supra* note 1, at 1048, and whether temporary legislation increases or decreases general entrenchment levels of legislation, see *id.* at 1056-63.

⁴⁰ See *supra* text accompanying notes 11-14.

Rules, 160 U. PA. L. REV. PENNUMBRA 61 (2011), <http://www.pennumbra.com/responses/11-2011/FaganFaure.pdf>.