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## ARTICLE

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### LASTING LEGISLATION

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*This Article argues that, due to certain pathologies of the legislative process, legislation enacted with sunset provisions lacks benefits hailed in recent scholarship while also harming the political process and its output. Proponents have argued that such “temporary legislation” enhances fiscal responsibility because official-cost estimates reflect the full cost of the legislation. The cost estimates, in other words, relay the entirety of expenses to Congress upon each sunset date. In contrast, when enacting nontemporary legislation, the theory goes, Congress receives official costs only for the duration of the budget window, or the length of time set forth in the annual budget resolution, as the relevant period within which Congress makes spending and revenue decisions.*

*This theory is flawed. Many factors—shifting baselines, exceptions to the revenue offset or “pay as you go” rules, costs that temporary legislation engenders beyond the budget window, and the ability of lawmakers to consider the full cost of legislation—thwart the theoretical fiscal restraint of temporary*

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*legislation. Nor do sunset provisions tend to provide lawmakers with enhanced information or flexibility, as proponents of temporary legislation have argued; instead, lawmakers likely will be unable to determine the appropriateness of the sunset, or its most effective scope and length. Furthermore, “pro-temporary legislation” scholars understate the costs of such legislation because temporary legislation increases rents from interest groups, entrenches current majoritarian preferences, and produces planning conundrums for public and private actors alike. Accordingly, this Article recommends a policy presumption against temporary legislation and in favor of legislation that does not expire by its own terms, or “lasting legislation.” This presumption should be stronger in the context of provisions made temporary due to budgetary constraints, where the identified concerns are more likely to arise, and weaker in emergency or experimental situations, where the identified concerns are less likely to exist.*

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## INTRODUCTION

This Article sets forth a view of the legislative process that accounts for the endogenous nature of the rules that govern it—that is to say, the enforcement of the rules governing the proposal, debate, and

adoption of legislation depends largely upon powers vested within, rather than without, Congress.<sup>1</sup> Although Congress may adopt mechanisms—budget rules, for example—with lofty ambitions to legislate in the public interest and to promote fiscal responsibility, Congress is all but unfettered in its ability to sidestep these mechanisms when it sees fit.<sup>2</sup> The endogenous nature of these rules, moreover, is not merely of academic interest in view of the constant and intense political pressures on Congress to spend overly and unwisely. Indeed, the endogeneity of the legislative process<sup>3</sup> causes these political pressures to operate on hydraulics: although the pressures may be blocked at one channel, their power can still be exerted via another route.

This starting point—that Congress governs the legislative process, if at all, through inherently weak, self-enforced rules—has substantial implications for the scholarly debate over “temporary legislation.” Specifically, this Article finds implausible recent claims that legislation enacted with sunset provisions,<sup>4</sup> or temporary legislation, encourages fiscal restraint and deliberative decisionmaking. Instead, the endogenous model outlined above predicts that, when encouraged by political pressures, legislators can elude the sunset provisions’ restraints on their behavior—a prediction borne out time and again by experience. But temporary legislation is worse than ineffective: such legislation creates serious political-economy concerns, entrenchment problems, and planning disruptions. For these reasons, this Article recommends a policy presumption against temporary legislation in

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<sup>1</sup> See Rebecca M. Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 CORNELL L. REV. 519, 553-62 (2009) (exploring the endogenous nature of legislative rules through an analysis of Supreme Court and lower federal court case law).

<sup>2</sup> See, e.g., Ittai Bar-Siman-Tov, *Lawmakers as Lawbreakers*, 52 WM. & MARY L. REV. 805, 808 (2010) (arguing that Congress lacks the ability and incentives to enforce the “law of congressional lawmaking” upon itself).

<sup>3</sup> Some scholars have argued that legislators enact rules behind a Rawlsian “veil of ignorance” that forces them to formulate rules in the interests of society, rather than in their own. See, e.g., Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717, 739 (2005); Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 403-05 (2001). Specifically, legislators adopt rules without identifying who precisely will benefit or suffer from them—that is, in something like an “original position.” Vermeule, *supra*, at 399. Although normatively attractive, this account lacks descriptive power. Because legislative rules are endogenous, they are subject to change and easily evaded by legislators.

<sup>4</sup> I use the term “sunset provisions” to mean those clauses that cause legislation to expire by its own terms. This definition is derived from *Black’s Law Dictionary*, which defines a “sunset law” as a “statute under which a governmental agency or program automatically terminates at the end of a fixed period unless it is formally renewed.” BLACK’S LAW DICTIONARY 1574 (9th ed. 2009).

most cases, replaced with a presumption in favor of legislation that does not expire by its own terms, or “lasting legislation.”<sup>5</sup>

Troublingly, however, Congress has escalated the use of temporary legislation; sunset provisions allow members of Congress to enact low-cost legislation and to avoid triggering rules that attempt to enforce budget constraints. At the beginning of the most recent century, for example, more than one hundred sunset provisions threatened tax legislation with automatic cessation, including some of the largest tax cuts in American history.<sup>6</sup> In comparison, only a decade prior, in the early 1990s, less than two dozen relatively inconsequential tax provisions were set to expire.<sup>7</sup>

Due to economic pressures and legislative rules that substantially favor the (apparent) low revenue costs of temporary legislation, the use of sunset provisions in the tax context is rampant.<sup>8</sup> The consequences of Congress’s increasing reliance on temporary legislation soon became clear at the end of 2010, when legislators renewed important pieces of tax legislation, such as the estate-tax repeal and the tax-rate reductions on dividends and capital gains.<sup>9</sup> Evaluation of

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<sup>5</sup> I have chosen “lasting legislation” as the label for legislation that does not expire by its own terms, as opposed to the more common term, “permanent legislation,” in order to highlight that such legislation need not continue indefinitely and, indeed, the legislature is unlikely to conceive of it as such.

<sup>6</sup> See STAFF OF JOINT COMM. ON TAXATION, 111TH CONG., LIST OF EXPIRING FEDERAL TAX PROVISIONS, 2009–2020 (Comm. Print 2010) (listing 251 expiring provisions). Sixty-nine provisions were due to expire in 2010 alone. *Id.* at 14-26.

<sup>7</sup> See STAFF OF JOINT COMM. ON TAXATION, 102D CONG., DESCRIPTION OF TAX PROVISIONS EXPIRING IN 1991 AND 1992 (Comm. Print 1991) (listing fifteen expiring provisions); STAFF OF JOINT COMM. ON TAXATION, 101ST CONG., DESCRIPTION OF TAX PROVISIONS EXPIRING IN 1990 (Comm. Print 1990) (listing eighteen expiring provisions).

<sup>8</sup> Shortly after the palpable rise in sunset provisions, I critiqued their impact on the budget process and the political economy. See Rebecca M. Kysar, *The Sun Also Rises: The Political Economy of Sunset Provisions in the Tax Code*, 40 GA. L. REV. 335, 339 (2006) (arguing that sunset provisions do not function as “good government” tools); see also William G. Gale & Peter R. Orszag, *Sunsets in the Tax Code*, 99 TAX NOTES 1553, 1554-57 & fig.1 (2003) (describing the prevalence of sunsets in tax legislation, especially in tax cuts from the past several years); Elizabeth Garrett, Comment, *Accounting for the Federal Budget and Its Reform*, 41 HARV. J. ON LEGIS. 187, 196-98 (2004) (providing examples of the effects of sunset provisions on budget rules and fiscal policy decisions); Elizabeth Garrett & Adrian Vermeule, *Transparency in U.S. Budget Process* (discussing the role of transparency in principal-agent relationships and the positive and negative aspects of accountability), in FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY 68, 77-80 (Elizabeth Garrett et al. eds., 2008) [hereinafter FISCAL CHALLENGES]; Manoj Viswanathan, Note, *Sunset Provisions in the Tax Code: A Critical Evaluation and Prescriptions for the Future*, 82 N.Y.U. L. REV. 656, 658 (2007) (arguing that sunset provisions are used to enact lasting legislation under the guise of temporary legislation).

<sup>9</sup> Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296 (to be codified at 26 U.S.C.).

temporary legislation, therefore, remains essential, especially in light of recent scholarship arguing strongly in its favor.<sup>10</sup> Despite the heightened use of sunset provisions and these new defenses asserting their utility, this Article concludes that lasting legislation remains the preferred route to prudent lawmaking.

Part I of this Article provides a brief historical overview of sunset provisions, focusing on their most recent incarnation in the Internal Revenue Code (the “Code”). It then details the lack of external enforcement of legislative rules, concluding that the ensuing easy evasion of such rules in the budget process has caused the rise in temporary legislation.<sup>11</sup> For instance, sunset provisions reduce the cost of tax legislation, preventing a member of Congress from challenging the legislation as readily under “pay as you go” (PAYGO) rules, which

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<sup>10</sup> See Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 298 (2007) (“Normatively, temporary legislation should not be globally eschewed, and at least in specific policy domains such as responses to newly recognized risk, there should be a presumptive preference in favor of temporary legislation.”); George K. Yin, *Temporary-Effect Legislation, Political Accountability, and Fiscal Restraint*, 84 N.Y.U. L. REV. 174, 187-94 (2009) (proposing presumption in favor of legislation that has a temporary effect on the nation’s budget); see also WILLIAM E. SCHEUERMAN, LIBERAL DEMOCRACY AND THE SOCIAL ACCELERATION OF TIME 142 (2004) (observing that sunsets can help with “legislative obsolescence”); Martin A. Sullivan, *False Alarms and Real Problems with Budget Gimmicks*, 99 TAX NOTES 1129, 1132 (2003) (arguing that temporary provisions are not immune from repeal or expiration and that they must be “paid for” in the future when and if extended); Bruce Ackerman, *Sunset Can Put a Halt to Twilight of Liberty*, Op-Ed., L.A. TIMES, Sept. 20, 2001, at B15 (arguing that the PATRIOT Act be temporary); Frank J. Fagan, *The Economic Rationale of Sunset Clauses* 25 (Summer 2005) (unpublished Master’s thesis, European Master in Law & Economics) (on file with author) (positing that sunset provisions allow policymakers to adjust efficiently to changing environments); cf. Neal Katyal, *Sunsetting Judicial Opinions*, 79 NOTRE DAME L. REV. 1237, 1244-47 (2004) (advocating for the use of prospective declarations by courts that some of their opinions will sunset). Professors Gersen and Yin refer to temporary legislation as temporary and temporary-effect legislation, respectively. See, e.g., Gersen, *supra*, at 247-48; Yin, *supra*, at 174. This Article uses the term “temporary legislation” to describe legislation that expires by its own terms or employs sunset provisions. This Article thus describes advocates in support of such provisions as “pro-temporary legislation” scholars. For earlier pro-temporary legislation arguments, see STEPHEN BREYER, REGULATION AND ITS REFORM 365-68 (1982), which noted that sunset provisions call for agency-by-agency regulatory reform, but may not always succeed. See also Bruce Adams, *Sunset: A Proposal for Accountable Government*, 28 ADMIN. L. REV. 511, 519-21 (1976) (indicating that sunset provisions should incentivize government officials to evaluate the relevant program); Lewis Anthony Davis, *Review Procedures and Public Accountability in Sunset Legislation: An Analysis and Proposal for Reform*, 33 ADMIN. L. REV. 393, 407-08 (1981) (listing the qualities of effective sunset legislation); Dan R. Price, *Sunset Legislation in the United States*, 30 BAYLOR L. REV. 401, 418-19 (1978) (describing sunset legislation as a way to offer a “governmental reform system” that “average citizens can understand” and that would improve political accountability).

<sup>11</sup> See *infra* notes 36-54 and accompanying text.

are legislative rules that require spending decreases or tax increases to offset revenue-reducing legislation.<sup>12</sup>

One predominant argument advanced recently in support of sunset provisions is that the legislative process accounts completely for the costs of temporary legislation but fails to do so for lasting legislation because the extension of temporary legislation requires congressional action. At the point of extension, the argument goes, Congress takes into account the full cost of the temporary program. This characteristic is said to be in contrast to lasting legislation, the estimated costs of which are provided upon its single enactment only for the duration of the budget window,<sup>13</sup> and thus requires no further congressional action to continue the legislation's effects.

A central problem with this argument for temporary legislation is that it assumes a proper functioning of background budget constraints. To evaluate the theory in a more realistic scenario, Part II first explores several features of our byzantine budget process. It asserts that the pro-temporary legislation view depends on the erroneous assumptions that the baseline estimate from which the legislation's costs are measured will always treat temporary laws as temporary, that the length of budget windows will be constant, and that legislators will faithfully apply PAYGO rules to temporary legislation. Unfortunately, nothing binds Congress to such procedural commitment devices, and, indeed, as will be shown, Congress has regularly deviated from them precisely in the manner posited.<sup>14</sup>

Part II then demonstrates that temporary legislation often has economic effects beyond the budget window, even though such legis-

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<sup>12</sup> H.R. Res. 5, 112th Cong. § 2(d) (2011) (providing PAYGO provisions for the House); S. Con. Res. 21, 110th Cong. § 201 (2007) (setting forth the PAYGO "point of order" for the Senate budget process).

<sup>13</sup> The budget window is the length of time covered by the annual budget resolution, which in turn is the structure within which Congress makes spending and revenue decisions. See Cheryl D. Block, *Pathologies at the Intersection of the Budget and Tax Legislative Process*, 43 B.C. L. REV. 863, 874 (2002) ("[T]he budget resolution serves as a fiscal blueprint or framework within which Congress makes its substantive decisions . . ."). The length of the budget window has historically changed as a result of political preferences. See Kysar, *supra* note 8, at 345 (noting that Republicans periodically modified the scope of the 2000 budget, switching between five and ten years). For a discussion of the appropriate length of budget windows, see Alan J. Auerbach, *Budget Windows, Sunsets, and Fiscal Control*, J. PUB. ECON. 87, 99-100 (2006), which noted, "[A]n optimal budget rule is one that places less weight on years further in the future, over and above normal discounting. This reflects two factors: policies announced for the future may not take effect and, if they do, that their impact will be felt more by those whom budget rules are intended to protect."

<sup>14</sup> See *infra* Section II.A.

lation has a formal end date.<sup>15</sup> In such cases, temporary legislation suffers from the same purported defect as lasting legislation in that the budget process will not account for costs beyond the budget window. Although pro-temporary legislation scholars have maintained that temporary legislation can provide an official revenue estimate equivalent to its full cost and presumably allows Congress to make smarter decisions, there is currently no external enforcement mechanism to make Congress fully consider this estimate. Thus, even if accurate and complete cost information regarding temporary legislation is available, there is no guarantee that the estimate will inform Congress's decisionmaking. On the other hand, if Congress does have incentives to consider the costs of legislation, then Part II demonstrates that Congress will likewise have the means to consider the *full* cost of lasting legislation, not just its officially stated cost within the budget window.

Part III then asks whether sunset provisions afford congressional members an opportunity to review outdated policies and to enact legislation that addresses only temporary concerns, which are two strengths commonly attributed to temporary legislation. That Part answers the question in the negative, albeit with qualifications. It contends that the breadth and aim of sunset provisions generally cast too large a net to capture only problematic policies. Moreover, it also suggests rejection of efforts to limit temporary legislation to policies of uncertain or temporary significance, due to research that countervails behaviorist justifications for such usage.<sup>16</sup> Part III then concludes that interest-group pressures often prevent lawmakers from utilizing information about the temporary legislation in question.

Although one can lodge many of these same critiques against lasting legislation, temporary legislation has substantial, underacknowledged disadvantages, which this Article describes in Part IV. Specifically, the continuous threat of expiration allows Congress to extract more rents from interest groups through the use of sunset provisions

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<sup>15</sup> Professor Yin acknowledges this possibility; hence he limits his proposal, which favors sunsets, to “temporary-effect” legislation as opposed to merely “temporary” legislation. Yin, *supra* note 10, at 178 n.9. This Article argues that a surprisingly high percentage of temporary legislation produces costs beyond the budget window.

<sup>16</sup> See, e.g., BETTER REGULATION TASK FORCE, ANNUAL REPORT 2000–2001, at 19 (2001) (U.K.) (recommending the consideration of sunset clauses in “[r]ules made under the ‘precautionary principle,’ where there are significant scientific uncertainties and more information might lead to a different solution”); Gersen, *supra* note 10, at 268 (“In recent years, experimental economists and cognitive psychologists have highlighted the plethora of cognitive biases that can affect the ways in which individuals perceive and make decisions about risk.”).

that require those groups repeatedly to return to the congressional floor to achieve their goals. Additionally, because continuation of expiring policies commands significant legislative resources, temporary legislation raises concerns of entrenchment of prior generations' policies, interfering with a future Congress's ability to set its own agenda while also creating an atmosphere of legislative uncertainty that disrupts the planning activities of citizens and government actors.

In light of these concerns, Part V of this Article recommends a policy preference against temporary legislation and in favor of lasting legislation, while identifying particular contexts in which this preference should be strongest and those in which it should be weakest. The problems with temporary legislation are more likely to occur where legislators employ sunset provisions for revenue concerns, rather than for deliberative or other traditional policy functions, typically in the tax-cutting context. In contrast, sunset provisions enacted in emergencies or for experimental purposes may avoid many of the provisions' harmful tendencies. For instance, a clearly demarcated crisis situation will make it less necessary for a future legislature to revisit the issue, hence avoiding entrenchment concerns somewhat; and will make it easier for the legislature to set an appropriate and more certain sunset date, thereby allaying planning concerns. Additionally, once a crisis event ends, interest groups may also disband, reducing political-economy considerations. It is possible, however, that interest groups will successfully lobby for continued benefits beyond those necessitated by the emergency; thus, legislators should still exercise caution in such usage of temporary legislation.

## I. BACKGROUND

### A. *History of Temporary Legislation*

Temporary legislation has a long history in American lawmaking, dating back to the Founding Era.<sup>17</sup> Since then, the legislature has applied sunset provisions both narrowly and widely to legislation, government programs, and agency actions. In *Federalist No. 26*, for example, Alexander Hamilton supported the constitutional restriction of military appropriations to two-year periods to ensure that there would

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<sup>17</sup> In prior work, I have traced the use of sunset provisions and will thus do so only briefly here, focusing particular attention upon recent developments. See Kysar, *supra* note 8, at 350-52 (sunset provisions in the Sedition Act of 1798); see also Gersen, *supra* note 10, at 250-55 (sunset provisions present in the Federalist Papers and enacted by the First Congress).



be renewed deliberation regarding status quo funding and to protect against the public's short-lived passions.<sup>18</sup> Under Hamilton's view, the additional actions required to reenact temporary legislation would protect society from unwise or outdated policy.<sup>19</sup>

Thomas Jefferson also argued famously in favor of sunset provisions in his correspondence with Madison during the French Revolution, going so far as to propose that all laws, including the Constitution, "naturally expire[] at the end of 19. [sic] years."<sup>20</sup> Madison would later advocate during the Constitutional Convention for the employment of sunset provisions in cases of difficult policy decisions.<sup>21</sup>

Many decades later, while serving as a Securities and Exchange Commission director in the Roosevelt Administration, William O. Douglas, influenced by the work of the prominent political theorist Theodore J. Lowi, would argue that agency capture provided a different rationale for the sunseting of agencies.<sup>22</sup> This view would influence a series of government reforms in the latter half of the twentieth century. Advocacy groups, such as Common Cause, promoted sunset provisions as a means of dislodging entrenched interest groups.<sup>23</sup> Building upon Justice Brandeis's famous description of transparency rules as "the best disinfectant," a Common Cause branch president suggested, "My God, we've done sunshine, how about sunset?"<sup>24</sup> By the early 1980s, thirty-five states had enacted sunset laws that man-

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<sup>18</sup> THE FEDERALIST NO. 26, at 168 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

<sup>19</sup> See Gersen, *supra* note 10, at 251 (remarking that Hamilton believed these "subsequent stages of procedure" acted as a safeguard for the democratic process).

<sup>20</sup> Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *reprinted in* 6 THE WORKS OF THOMAS JEFFERSON 3, 9 (Paul Leicester Ford ed., 1904).

<sup>21</sup> See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 587 (Max Farrand ed., 1911) (recording Madison's argument that the renewal of sunseting legislation—rather than the repeal of lasting legislation—would be more effective in cases involving difficult policy decisions).

<sup>22</sup> See, e.g., WILLIAM O. DOUGLAS, GO EAST, YOUNG MAN, THE EARLY YEARS: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS 294 (1974) ("After [ten years, an agency] is likely to become a prisoner of bureaucracy and of . . . inertia . . . This is why I told FDR over and over again that every agency he created should be abolished in ten years.")

<sup>23</sup> See Kysar, *supra* note 8, at 351 (citing THEODORE J. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY 309-10 (1969)). Lowi argued that the annual appropriations process did not sufficiently guard against excesses of interest-group activity; historically, opposition from congressional members to appropriations was "disregarded or ruled out of order." LOWI, *supra*, at 310.

<sup>24</sup> Chris Mooney, *A Short History of Sunsets*, LEGAL AFF., Jan.-Feb. 2004, at 67, 68 (quoting Craig Barnes).

dated periodic review of government agencies and other entities.<sup>25</sup> The vast majority of these broad sunset provisions were eventually abandoned after lobbying pressures produced reviews that were costly and of questionable utility.<sup>26</sup> Although similar attempts to enact widespread sunsets at the federal level failed,<sup>27</sup> Congress did occasionally employ sunset provisions to garner support for controversial legislation and to address various problems identified as temporary.<sup>28</sup>

Since the 1970s, Congress has applied sunset provisions to certain tax provisions, collectively known as “extenders.”<sup>29</sup> Congress renews the vast majority of extenders upon the sunset date or shortly thereafter on a retroactive basis.<sup>30</sup> Indeed, the popular research and development

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<sup>25</sup> COMMON CAUSE, THE STATUS OF SUNSET IN THE STATES: A COMMON CAUSE REPORT i (1982).

<sup>26</sup> See Kysar, *supra* note 8, at 354-57, for a summary of the rise and fall of state sunset provisions. See also AM. ENTER. INST. FOR PUB. POLICY RESEARCH, ZERO-BASE BUDGETING AND SUNSET LEGISLATION 31-35 (1978) (listing common arguments against sunset provisions). A *New York Times* article reported that Colorado’s sunset law cost the state \$212,000 to review its agencies, while saving the state only \$6810 upon the termination of three small agencies. *Facing Facts: High-Priced Sunset*, N.Y. TIMES, Apr. 26, 1978, at A24.

<sup>27</sup> See Vern McKinley, *Sunrises Without Sunsets: Can Sunset Laws Reduce Regulation?*, 18 REGULATION, no. 4, 1995, at 57, 59-60 (noting as an example the failed passage of the Sunset Act of 1977).

<sup>28</sup> For instance, provisions in the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 8, 15, 18, 22, 31, 42, 49, and 50 U.S.C.), which gave expanded enforcement tactics to the executive, were subject to a four-year sunset provision, *id.* § 224, 115 Stat. at 295, due to concerns for individual rights. In a similar example, the Violent Crime Control and Law Enforcement Act of 1994, which banned assault weapons, contained a ten-year sunset provision in order to appease libertarian concerns. Pub. L. No. 103-322, § 110105, 108 Stat. 1796, 2000 (codified as amended at 18 U.S.C. § 922 (2006)). Congress has also used sunset provisions to address temporary problems. See, e.g., Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, § 301, 116 Stat. 21, 33-40 (codified as amended at I.R.C. § 38 (2006)) (expanding work opportunity tax credit to benefit New York City employees in the World Trade Center area following the September 11 terrorist attacks but setting a termination date of December 31, 2006).

<sup>29</sup> See Kysar, *supra* note 8, at 358 (describing several well known tax extenders and their purposes).

<sup>30</sup> See Jill Barshay, “Temporary” Tax Breaks Usually a Permanent Reality, CONG. Q. WKLY., Nov. 15, 2003, at 2831 (noting only one extender provision had expired in the twenty-five years that Congress had employed them); Ed Kleinbard, Speech to the American Bar Association (May 7, 2009) (noting that the “entire herd of ‘extenders’ is paraded through the legislative process as a unit . . . [a]nd just as good cowboys do not lose many yearlings, it is virtually unheard of for an ‘extender’ to get separated from the rest of the herd and not get renewed”), as quoted in Ryan J. Donmoyer, *Bailout of U.S. Banks Give British Rum a \$2.7 Billion Benefit*, BLOOMBERG.COM (June 26, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=amp5wXx35fk>. Out of the forty-one tax extenders due to expire in 2007, eleven provisions either expired

(R&D) credit has been temporarily extended numerous times since its inception approximately thirty years ago, typically on a one-year basis.<sup>31</sup>

Beginning in 2001, Congress began to sunset important pieces of tax legislation in whole. For instance, all provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), which contained a phased-in repeal of the estate tax, had a sunset date of December 31, 2010.<sup>32</sup> Two years later, Congress applied staggered sunset dates to most of the Jobs and Growth Tax Relief Reconciliation Act of 2003 (JGTRRA).<sup>33</sup> For instance, JGTRRA's reduction of the dividend and capital-gains rates were scheduled to last until 2009, while the increased child-tax credit and the marriage-penalty relief provisions were scheduled to sunset at the end of 2004.<sup>34</sup> EGTRRA and JGTRRA comprise two of the largest tax cuts in the history of the United States.<sup>35</sup>

The proliferation of temporary legislation reflects both process (i.e., budgetary rules) and substance (i.e., fiscal pressures).<sup>36</sup> PAYGO rules require revenue offsets for new revenue-decreasing legislation,

or were made permanent, and of the twenty-one provisions that were due to expire in 2008, only five expired. Compare STAFF OF JOINT COMM. ON TAXATION, 110TH CONG., LIST OF EXPIRING FEDERAL TAX PROVISIONS, 2007–2020 (Comm. Print 2008), with STAFF OF JOINT COMM. ON TAXATION, 111TH CONG., LIST OF EXPIRING FEDERAL TAX PROVISIONS, 2008–2020 (Comm. Print 2009).

<sup>31</sup> See Subcommittee on Contracting and Technology Hearing on Helping Small Business Innovators Through the Research and Experimentation Tax Credit: Hearing Before the H. Comm. on Small Bus., 111th Cong. 5 (2009) (statement of Rep. Nye, Chairman, H. Subcomm. on Contracting & Tech.) (“Perhaps the greatest shortcoming in the R&D credit is its lack of permanence. In the nearly three decades since its inception, the incentive has never been cemented. Instead, it has been reauthorized 1 year at a time, often at the last minute, retroactively, and after the credit has expired.”).

<sup>32</sup> Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 901(a), 115 Stat. 38, 150.

<sup>33</sup> Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, §§ 107, 303, 117 Stat. 752, 755-56, 764. Most provisions of both JGTRRA and EGTRRA were extended by the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296 (to be codified at 26 U.S.C.).

<sup>34</sup> See Fortney Pete Stark, *JEC Report Decries “Short-Sighted” GOP Tax-Cutting Strategy*, TAX NOTES TODAY, May 27, 2003, available at LEXIS, 2003 TNT 102-20 (describing the bill's conference agreement).

<sup>35</sup> See Jonathan Weisman & Naftali Bendavid, *Obama Eyes \$300 Billion Tax Cut*, WALL ST. J., Jan. 5, 2009, at A1 (comparing EGTRRA and JGTRRA to a proposed tax cut by President Obama).

<sup>36</sup> A report issued by an independent organization within the IRS, established to advance the interests and rights of taxpayers, enumerates the categories of budget rules, including PAYGO rules. See 1 NAT'L TAXPAYER ADVOCATE, 2008 ANNUAL REPORT TO CONGRESS 401-03 (2008).

such as mandatory spending or tax cuts.<sup>37</sup> When a congressional colleague fails to provide a revenue offset under an internal PAYGO rule, opposing legislators may enforce the PAYGO rule as they do other procedural rules of Congress: by raising a “point of order.”<sup>38</sup> If sustained, the point of order will serve to strike the revenue-decreasing legislation from the bill. The point of order may be waived according to the procedural rules of each house of Congress, usually by a simple majority of the Rules Committee in the House or by three-fifths of all members in the Senate.<sup>39</sup> Violations of statutory PAYGO rules can result in sequestration, or a reduction in direct-spending programs, after the Office of Management and Budget (OMB) determines that the legislation decreases revenues.<sup>40</sup> Sunset provisions reduce the cost of revenue-decreasing legislation and, in this manner, require smaller offsets under the PAYGO rules. The House and Senate budget committees calculate the cost of legislation for purposes of the PAYGO rule in a manner consistent with a now-expired provision of the Balanced Budget and Emergency Deficit Control Act of 1985.<sup>41</sup> These estimates ignore sunset provisions for spending programs with current-year

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<sup>37</sup> For materials cataloging the House and Senate PAYGO rules, see *infra* note 39.

<sup>38</sup> A point of order is a procedure that allows a member of Congress to contest an action or a proposed action as a violation of the relevant house’s rules, practices, or procedures. See BLACK’S LAW DICTIONARY 1195 (8th ed. 2004) (defining a point of order as a “request suggesting that the meeting or a member is not following the applicable rules and asking the chair to enforce the rules”).

<sup>39</sup> See NAT’L TAXPAYER ADVOCATE, *supra* note 36, at 401 & n.24. The House originally adopted its internal PAYGO rule on January 5, 2007, as part of H.R. Res. 6, 110th Cong. § 405 (2007). The House adopted the current form of the rule on January 5, 2011. H.R. Res. 5, 112th Cong. § 2(d) (2011). Unlike the Senate and statutory rules, the House rule applies only to direct spending and excludes tax cuts. *Id.* The Senate has had an internal PAYGO rule since 1993 but adopted the current form of the rule in May 2007 as part of the 2008 budget resolution. See S. Con. Res. 21, 110th Cong. § 201 (2007) (adopting a PAYGO point of order). See generally ROBERT KEITH, CONG. RESEARCH SERV., RL 34300, PAY-AS-YOU-GO PROCEDURES FOR BUDGET ENFORCEMENT 4 (2007) (explaining the background of PAYGO rules in Congress).

<sup>40</sup> Statutory Pay-As-You-Go Act of 2010, Pub. L. No. 111-139, § 5, 124 Stat. 8, 15 (to be codified at 2 U.S.C. § 900 et seq.). This law replaced previous statutory PAYGO rules that were in effect from 1986 but expired in 2002. See Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, tit. XIII, § 13101, 104 Stat. 1388, 1388-581 to 1388-582 (amending the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, tit. II, 99 Stat. 1037).

<sup>41</sup> See H.R. Res. 5, 111th Cong. § 2(j) (2009) (requiring that the budgetary effect be measured against “baseline estimates” from the Congressional Budget Office, “consistent with section 257 of the Balanced Budget and Emergency Deficit Control Act of 1985”); S. Con. Res. 21, 110th Cong. § 201(a) (2007) (requiring the same consistency with the Balanced Budget and Emergency Deficit Control Act of 1985 as the House).

costs greater than \$50 million, but not for other programs.<sup>42</sup> For purposes of estimation in the tax-cutting context, the committees assume sunset provisions take effect even though, for the most part, temporary tax cuts do not expire but instead are routinely renewed.<sup>43</sup> Because of the budgetary estimation practices, a proponent of temporary legislation will often face a lower risk of sequestration or of a colleague raising a point of order against the legislation.

Reconciliation, part of the budget process, also induces legislators to use sunset provisions.<sup>44</sup> The Congressional Budget Act of 1974 initiated this streamlined alternative lawmaking process, offering Congress a fast track for passing deficit-reducing legislation.<sup>45</sup> Generally, a reconciliation bill receives the benefit of special procedural rules that limit debate and thereby eliminate the threat of a filibuster. Under this process, Congress passes a budget resolution that sets forth a limitation on spending—a so-called “section 302 spending allocation”—for each category of revenue and spending.<sup>46</sup> Any provision that exceeds the allocation must be packaged with a revenue-raising measure.<sup>47</sup> Again, points of order enforce the procedural rules that set forth the mechanics of this process. Because sunset provisions reduce the cost of revenue-decreasing legislation, they require smaller offsets to meet the section 302 spending allocations. In estimating costs for purposes of

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<sup>42</sup> See 2 U.S.C. § 907(b)(2)(A)(i) (2006) (“No program . . . with estimated current year outlays greater than \$50,000,000 shall be assumed to expire in the budget year or the outyears.”).

<sup>43</sup> See Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1090 (2003) (“Time-bound emergency legislation is often the subject of future extensions and renewals . . .”).

<sup>44</sup> Note that reconciliation can be used in conjunction with PAYGO rules. In such cases, there is even greater incentive to use temporary legislation.

<sup>45</sup> See Congressional Budget Act of 1974, Pub. L. No. 93-344, § 310(c), 88 Stat. 297, 315-16 (detailing the reconciliation process). For a discussion of the reconciliation process, see generally Elizabeth Garrett, *Rethinking the Structures of Decisionmaking in the Federal Budget Process*, 35 HARV. J. ON LEGIS. 387 (1998), Philip G. Joyce & Robert D. Reischauer, *Deficit Budgeting: The Federal Budget Process and Budget Reform*, 29 HARV. J. ON LEGIS. 429 (1992), Anita S. Krishnakumar, *Reconciliation and the Fiscal Constitution: The Anatomy of the 1995-96 Budget "Train Wreck,"* 35 HARV. J. ON LEGIS. 589 (1998), and James A. Miller & James D. Range, *Reconciling an Irreconcilable Budget: The New Politics of the Budget Process*, 20 HARV. J. ON LEGIS. 4 (1983).

<sup>46</sup> See BILL HENIFF, JR., CONG. RESEARCH SERV., RS 20144, ALLOCATIONS AND SUBDIVISIONS IN THE CONGRESSIONAL BUDGET PROCESS 1-2 (2003) (detailing the workings of Congressional Budget Act section 302 in the budgetary process); see also Congressional Budget Act of 1974, § 302, 88 Stat. at 308-09 (requiring an estimated budget allocation with budget resolutions).

<sup>47</sup> ROBERT KEITH & BILL HENIFF, JR., CONG. RESEARCH SERV., RL 33030, THE BUDGET RECONCILIATION PROCESS: HOUSE AND SENATE PROCEDURES 15, 40-41, 68 (2005).

reconciliation, the budget committees look to Congressional Budget Office (CBO) and Joint Committee on Taxation (JCT) estimates, which use the principles of the Balanced Budget and Emergency Deficit Control Act of 1985, as do the PAYGO rules.<sup>48</sup> Like the PAYGO rules, sunset provisions reduce the threat of points of order, at least where the sunset date occurs prior to the end of the budget window.

Although the original intent of the reconciliation process was to provide an easier path to enact deficit-reducing legislation, in 2001, Republicans won a procedural battle by passing one of the largest tax cuts in history, EGTRRA, through the reconciliation process in order to avoid a filibuster. This successful action set a strong congressional precedent for use of the reconciliation process to pass deficit-increasing legislation. Two years later, a section 302 spending allocation of \$350 billion, demanded by centrist legislators, would inspire congressional Republicans to sunset provisions in JGTRRA, thus enacting deeper tax cuts than would have been possible had the cuts been permanent.<sup>49</sup>

Another aspect of the reconciliation process, the Byrd Rule, further encourages the use of sunset provisions. Senator Robert Byrd introduced this rule to guard against senators adding unrelated provisions to the reconciliation bill.<sup>50</sup> The Byrd Rule allows senators to raise a point of order against extraneous provisions, which can be waived only by three-fifths of the Senate.<sup>51</sup> The Byrd Rule lists several categories of extraneous provisions, including reconciliation bills that de-

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<sup>48</sup> See *Issues in Reinstating a Statutory Pay-As-You-Go Requirement: Hearing Before the H. Comm. on the Budget*, 110th Cong. 12 n.16 (2007) [hereinafter *Hearing Before the H. Comm. on the Budget*] (statement of Peter R. Orszag, Director, Congressional Budget Office) (“The Budget Committees determine all estimates used to enforce Congressional budget procedures. To assist the Budget Committees, CBO analyzes the spending or revenue effects of specific legislative proposals. For proposals that would amend the Internal Revenue Code, CBO is required by law to use estimates provided by the Joint Committee on Taxation.”); NAT’L TAXPAYER ADVOCATE, *supra* note 36, at 403 (noting that PAYGO uses estimates consistent with the 1985 Act).

<sup>49</sup> See Charles E. Grassley, *Senate Clears Jobs and Growth Package with Dividend Exclusion*, TAX NOTES TODAY, May 15, 2003, available at LEXIS, 2003 TNT 103-58 (referencing statements by moderate senators emphasizing that the cost of JGTRRA must not exceed \$350 billion); Stark, *supra* note 34 (noting that the true cost of the 2001 tax cut is greater than its official cost because of the use of phase-ins and sunset provisions); see also MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH 186-205 (2005) (detailing attempts to meet the budget resolution of \$1.35 trillion, including the sunset of some of the tax cuts).

<sup>50</sup> See Michael W. Evans, *The Budget Process and the “Sunset” Provision of the 2001 Tax Law*, 99 TAX NOTES 405, 408-10 (2003) (describing the reasoning behind the Byrd Rule).

<sup>51</sup> 2 U.S.C. § 644(e) (2006).

crease revenues beyond the budget window.<sup>52</sup> Because sunset provisions eliminate costs outside the budget window,<sup>53</sup> senators can employ them as safeguards against invocation of the Byrd Rule.<sup>54</sup> For instance, the conference committee sunsetted the entirety of EGTRRA before the end of the budget window to avoid the Byrd Rule.<sup>55</sup>

Finally, apart from the budget rules, financial constraints also spur legislators to reduce the estimated costs of legislation. To appease constituents and their fellow lawmakers, members of Congress may employ sunset provisions to reduce costs. The success of this strategy necessarily depends upon whether the threat of sunseting appears legitimate. If so, lawmakers and constituents will accept the reduced costs that accompany a shortened time frame of legislation.

### B. *The Endogeneity of Legislative Rules*

In view of the previously discussed budget rules and fiscal pressures, it is unsurprising that legislators have employed sunset provisions with increasing frequency in the United States, particularly in the tax-cutting context, where revenue concerns are significant. But this account of the rise of sunsets has an important implication: the political drivers of recent sunset provisions often differ markedly from their originally conceived purposes, most prominently those aimed at continuing legislative oversight and engagement.<sup>56</sup> To understand this evolution of sunset provisions, it is helpful to situate the budget process within a larger legal context.

Legislative rules or internal rules that attempt to structure congressional lawmaking and organization primarily govern the budget

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<sup>52</sup> *Id.*

<sup>53</sup> This assumes that the sunset period is shorter than the budget window and any costs of the legislation also do not extend beyond the budget window. Section II.B will discuss the latter point in detail.

<sup>54</sup> See Auerbach, *supra* note 13, at 99 (“[S]unsets . . . can be understood as optimal responses by governments seeking to satisfy their own spending and borrowing objectives.”).

<sup>55</sup> See Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 901(a), 115 Stat. 38, 150 (stating that the Act’s provisions will not apply to any year after 2010).

<sup>56</sup> See Kysar, *supra* note 8, at 350-57, 404 (cataloguing sunset-provision purposes, such as preventing the entrenchment of outmoded and inefficient programs and curtailing the capture of regulatory agencies by special interests). Another historical purpose of sunset provisions has been one of “intrinsic necessity,” such as the use of time limits to reward innovation of intellectual property. See Fagan, *supra* note 10, at 11-13.

process.<sup>57</sup> Each house adopts its own set of legislative rules, upon which few constitutional limitations exist,<sup>58</sup> and over which each house retains enormous flexibility and can unilaterally change or waive at any time.<sup>59</sup> Generally, legislative rules are enforced only within Congress by points of order, which are issued upon violations of the rules.<sup>60</sup> According to Supreme Court precedent, each house's authority over its legislative rules derives both from the Rulemaking Clause of the Constitution, which states that "[e]ach House may determine the Rules of its Proceedings,"<sup>61</sup> and from separation-of-powers con-

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<sup>57</sup> Congress may enact legislative rules through statutes rather than resolutions. The former procedure, of course, requires the other house's approval and the President's signature. Because of this external participation, some have argued that the Rules of Proceedings Clause of the Constitution, art. I, § 5, cl. 2, may bar the enactment of legislative rules through statutes. See, e.g., Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 430 (2004) ("[I]t is plausibly the best reading of the Rule of Proceedings Clause that the power of each house to 'determine the rules of its proceedings' is exclusive as well as permissive . . ."). Statutes that enact legislative rules generally contain clauses whereby each house retains the ability to change the rules unilaterally. See, e.g., Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, § 555, 121 Stat. 735, 774 (enacting internal rules of the Senate "with full recognition of the constitutional right of the Senate to change those rules at any time, in the same manner, and to the same extent as in the case of any other rule of the Senate."). The courts treat these provisions as endogenous and therefore unreviewable.

<sup>58</sup> See, e.g., U.S. CONST. art. I, § 4, cl. 2, amended by U.S. CONST. amend. XX, § 2 (mandating a minimum annual assembly of Congress); *id.* art. I, § 7, cl. 1 (requiring the origination of revenue bills in the House of Representatives); see also Vermeule, *supra* note 57, at 430 (reviewing constitutional limitations upon legislative rules).

<sup>59</sup> See Rules of the House of Representatives, Rule XV, § 1(a), H.R. Doc. No. 110-162, at 662 (2009) (providing that two-thirds of members voting may suspend a rule because a quorum is present); Standing Rules of the Senate, Rule V, § 1, as reprinted in S. Doc. No. 110-1, at 5 (2008) (providing that no suspension of a rule generally may take place without one day's notice in writing or immediately upon the unanimous vote of the Senate); Stanley Bach, *Legislating: Floor and Conference Procedures in Congress* (noting each house of Congress "is always free" to amend, waive, or repeal its own rules, even when enacted by statute), in 2 ENCYCLOPEDIA OF THE AMERICAN LEGISLATIVE SYSTEM 701, 702 (Joel H. Silbey ed., 1994).

<sup>60</sup> See Michael B. Miller, Comment, *The Justiciability of Legislative Rules and the "Political" Political Question Doctrine*, 78 CALIF. L. REV. 1341, 1346 (1990) ("A rule is not binding if it is not invoked; the rules have absolutely no effect unless a member brings them into play.")

<sup>61</sup> U.S. CONST. art. I, § 5, cl. 2; see also, e.g., United States v. Ballin, 144 U.S. 1, 6-9 (1892) (interpreting the Rulemaking clause to prohibit judicial review of a House rule concerning the constitutional "Quorum to do Business" requirement); Field v. Clark, 143 U.S. 649, 672 (1892) (holding that the Court could not question Congress's attestation that the bill presented to the President for signature was identical to the one it passed). Lower federal courts also have held that legislative rules are nonjusticiable. See Kysar, *supra* note 1, at 557-60 (canvassing lower federal court case law denying justiciability of legislative rules).



cerns. Courts seldom review legislative rules and often capitulate to Congress when they do.<sup>62</sup> Indeed, no federal court has ruled upon the substance of a legislative rule regulating the enactment of legislation.<sup>63</sup> Nor has any federal court overturned a legislative rule unless the rule infringed upon individuals' constitutional rights or ran afoul of other constitutional limitations.<sup>64</sup>

Because they lack external enforcement mechanisms, legislative rules can be described as endogenous to the lawmaking process.<sup>65</sup> Not surprisingly, waivers and violations of the rules are common.<sup>66</sup> Their instability becomes even more apparent after consideration of their use as a quasi-precommitment device.<sup>67</sup> Especially in the budget context, legislators may anticipate difficulty in future self-discipline; for this reason, they may create legislative rules that bind them to a committed path of fiscal responsibility, lest they be later tempted by the demands of consti-

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<sup>62</sup> See, e.g., *United States v. Richardson*, 418 U.S. 166, 176-80 (1974) (holding that a taxpayer did not have standing to force publication of the budget of the Central Intelligence Agency); *Texas Ass'n of Concerned Taxpayers, Inc. v. United States*, 772 F.2d 163, 167 (5th Cir. 1985) (holding that Congress's interpretation of a constitutional provision concerning the internal operation of Congress is "a nonjusticiable political question"); *Gregg v. Barrett*, 771 F.2d 539, 543 (D.C. Cir. 1985) (reasoning that separation of powers permitted the court to refuse to decide questions of legislative rules, under the "equitable discretion" doctrine); *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1175 (D.C. Cir. 1983) (declining to review the House's distribution of its committee seats); *Harrington v. Bush*, 553 F.2d 190, 195-97, 214 (D.C. Cir. 1977) (holding that a Representative did not have standing to challenge the method of appropriations for the Central Intelligence Agency, due to concerns about the "intrusion of the courts into the proper affairs of the coequal branches of government"); *Consumers Union of U.S., Inc. v. Periodical Correspondents' Ass'n*, 515 F.2d 1341, 1345-46 (D.C. Cir. 1975) (denying judicial review of congressional allocation of press passes).

<sup>63</sup> John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773, 1791 (2003).

<sup>64</sup> See John C. Roberts, *Majority Voting in Congress: Further Notes on the Constitutionality of the Senate Cloture Rule*, 20 J.L. & POL. 505, 533 (2004) (describing federal courts' lack of interference with "purely internal" House or Senate rules that do not raise constitutional concerns).

<sup>65</sup> Kysar, *supra* note 1, at 561.

<sup>66</sup> See, e.g., *id.* at 542-51 (listing deficiencies of and defections from a legislative rule that requires disclosure of special interest legislation).

<sup>67</sup> See *id.* at 528 (describing certain legislative "earmark" rules as "akin to precommitment devices . . . in weak form"). For other descriptions of legislative rules as precommitment devices, see, for example, Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501, 512 n.43 (1998), which states that supermajority and other institutional requirements "can operate as precommitment devices to avoid collective action problems that reduce Congress's ability to achieve preferred policy outcomes." See also, e.g., Garrett, *supra* note 3, at 751 (identifying precommitment as a goal of some legislative rules); Nancy C. Staudt, *Constitutional Politics and Balanced Budgets*, 1998 U. ILL. L. REV. 1105, 1117 (labeling a balanced-budget amendment as a precommitment tool).

tudents or interest groups offering votes and rents in exchange for tax cuts or spending. However, unlike Jon Elster's conception of precommitment devices—which require an external force to bind the wavering individual<sup>68</sup>—legislative rules are self-governing and, accordingly, legislators easily evade them. Nonetheless, Congress initially put them into place with the goal of tempering later pressures to spend or reduce revenues excessively; for that reason, they are a quasi-precommitment device. Because these pressures become so great, however, and because of the endogeneity of budget rules, defection is common.

Legislators can and will interpret budget rules in a manner that benefits their current desires for deficit-increasing legislation—for instance, by allowing tax cuts to pass through the reconciliation process.<sup>69</sup> At other times, pressures to spend or to cut taxes force creative circumvention of the letter of some rules, if not their spirit. For example, the use of the EGTRRA sunset provisions failed to trigger the technical language of the Byrd Rule since that rule prohibited extraneous legislation that increased deficits *beyond* the budget window.<sup>70</sup>

Although it is true that Congress, at times, enlists the assistance of the Executive Branch in effectuating its long-term budget goals, it has been able to override enforcement mechanisms of that branch. For instance, the statutory PAYGO rules of the 1990s required that legislators offset any tax cuts or increases in entitlement spending with accompanying tax increases or spending cuts.<sup>71</sup> If Congress did not meet these requirements, a presidential order for mandatory seques-

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<sup>68</sup> See Jon Elster, *Don't Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment*, 81 TEX. L. REV. 1751, 1759-60 (2003) (concluding that "the individual can enlist others in the effort to bind himself" while "[b]y contrast, there is nothing external to society" to bind society in its entirety). For the foundational works in precommitment theory, see JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (1979); JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* (2000); THOMAS C. SCHELLING, *Ethics, Law, and the Exercise of Self-Command*, in CHOICE AND CONSEQUENCE 83, 96-107 (1984); THOMAS C. SCHELLING, *The Intimate Contest for Self-Command*, in CHOICE AND CONSEQUENCE 57, 76-82 (1984).

<sup>69</sup> See *supra* notes 44-49 and accompanying text (describing the streamlined reconciliation procedures). After the Senate Parliamentarian, the advisor for interpretations of Senate procedure, expressed doubts about the use of reconciliation for tax cuts, party leaders promptly fired him in an unprecedented event. Charles Tiefer, *How to Steal a Trillion: The Uses of Laws About Lawmaking in 2001*, 17 J.L. & POL. 409, 412 (2001).

<sup>70</sup> See *supra* notes 50-55 and accompanying text (explaining the procedural requirements of the Byrd Rule).

<sup>71</sup> Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-580, tit. XIII, § 13101, 104 Stat. 1388, 1388-574 to 1388-583 (codified as amended at 2 U.S.C. § 900-903 (2000)).

tration—an automatic reduction in certain nonexempt categories of mandatory spending—would be issued.<sup>72</sup> Sequestration, however, was never ordered while the PAYGO rules were in effect.<sup>73</sup> Instead, Congress discovered ways to avoid sequestration. For instance, in order to enact EGTRRA without triggering sequestration, a conference report required the entity responsible for PAYGO accounting, the OMB, to zero out PAYGO balances in 2001 and 2002.<sup>74</sup> In total, when statutory PAYGO rules were in effect, Congress enacted seven laws that altered PAYGO balances.<sup>75</sup> These examples illustrate the fragility of the budget process, which again stems from the endogeneity of legislative rules and the political appetite for government spending and tax cuts.<sup>76</sup>

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<sup>72</sup> *Id.*

<sup>73</sup> *Hearing Before the H. Comm. on the Budget, supra* note 48, at 5 (statement of Peter R. Orszag, Director, Congressional Budget Office).

<sup>74</sup> H.R. REP. NO. 107-350, at 114 (2002) (Conf. Rep.); *see also* Block, *supra* note 13, at 866 (discussing Congress's avoidance of a 1999 sequester using a similar technique).

<sup>75</sup> The seven laws are the following: Reduction of Preexisting PAYGO Balances, Pub. L. No. 107-312, § 1, 116 Stat. 2456, 2456 (2002); Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, § 102, 115 Stat. 2230, 2342; Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 2, 114 Stat. 2763, 2763-64; Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, §§ 1001(a)–(c), 113 Stat. 1501, 1536-37; Balanced Budget Act of 1997, Pub. L. No. 105-33, § 10213, 111 Stat. 251, 712; Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 4001, 110 Stat. 3009, 3009-500; and Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 14003(c), 107 Stat. 312, 685.

<sup>76</sup> The assignment of responsibility to the OMB of calculating deficits for the purpose of sequestration is a result of a Supreme Court decision. In *Bowsher v. Synar*, the Court held unconstitutional the triggering of sequestrations by an official accountable to Congress for separation-of-powers reasons. 478 U.S. 714, 726-27 (1986). Congress can direct the OMB, in determining whether to order sequestration, to use certain estimates such as those produced by CBO or the Budget Committees, “as long as the estimates [are] embedded in the enacted legislation,” either explicitly or by reference. *Hearing Before the H. Comm. on the Budget, supra* note 48, at 12 (statement of Peter R. Orszag, Director, Congressional Budget Office); *see also* *Hershey Foods Corp. v. USDA*, 158 F. Supp. 2d 37, 41 (D.D.C. 2001) (holding that Congress can “incorporate by cross-reference in its bills” without violating the Presentment Clause). That being said, the President can still veto any legislation containing this effective waiver of PAYGO, as with any other legislation passed by Congress.

## II. THE BUDGET PROCESS AND TEMPORARY LEGISLATION

### A. Budget Rules

#### 1. The Instability of Baseline Estimates

It is against this background of endogenous budget rules that we must examine potential benefits of temporary legislation. Recently, Professor George Yin has argued that Congress should favor temporary legislation—or at least such legislation that has only temporary budgetary effects—because it enhances fiscal restraint at the federal level.<sup>77</sup> This restraint, he argues, is due to the legislative process's complete reckoning for the costs of temporary legislation, in contrast to the incomplete accounting for lasting legislation.<sup>78</sup> Yin notes that extension of temporary legislation requires affirmative action by Congress; at such point of action, Congress must account for the full cost of the temporary program within overall budget constraints.<sup>79</sup> When enacting lasting legislation, on the other hand, Congress typically only has the estimated costs generated during the budget window, usually a five- or ten-year period. Because the legislation need not be reconsidered for its effects to continue, Yin argues, Congress does not consider costs outside of this period.<sup>80</sup> For this reason, the theory goes, the official cost of the legislation underestimates its full cost since legislators will ignore any forgone revenues beyond the budget window.<sup>81</sup>

To illustrate Yin's argument, assume that Congress wishes to enact a tax cut with an estimated cost of \$2 billion per year for the next twenty years. Party leaders, however, have also agreed upon a budget constraint of \$10 billion for the assumed budget-window period of ten years. There are two legislative options, as shown in Table 1 below: Option #1, a \$2 billion-per-year tax cut that sunsets after Year 5, or Option #2, a lasting tax cut half the size of the one originally contemplated. Ignoring time-value-of-money issues, each produces an official-cost estimate of \$10 billion over the budget window period of ten years. From the vantage point of a twenty-year horizon, however, the full cost of the lasting tax cut is \$20 billion whereas the full cost of the

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<sup>77</sup> See Yin, *supra* note 10, at 181 ("This Article challenges the positions of [sunset] critics and explains why fiscal restraint may be enhanced with greater use of temporary-effect legislation, such as legislation with sunsets, and less use of permanent legislation.").

<sup>78</sup> *Id.* at 192-94.

<sup>79</sup> *Id.* at 193.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

temporary legislation remains consistent with the official cost of only \$10 billion. This means that the official-cost estimate for the permanent legislation fails to take into account \$10 billion of costs.

**Table 1: Illustration of Yin’s Thesis: Comparison of Official Cost, Full Cost, and Unaccounted-for Cost of Temporary and Lasting Tax-Cut Legislation<sup>82</sup>**

	Full Cost					Official Cost			Unaccounted-for Cost (Full – Official Cost)
	Years 1-5	Years 6-10	Years 11-15	Years 16-20	Years 1-20	Years 1-10	Years 11-20	Years 1-20	
<b>Option #1</b>									
<u>Year 1:</u>									
Tax Cut with Five-Year Sunset	10	0	0	0	10	10	N/A	10	0
<u>Year 6:</u>									
Five-Year Extension of Sunset	N/A	10	0	0	10	10	N/A	10	0
<b>TOTAL</b>									<b>0</b>
<b>Option #2</b>									
<u>Year 1:</u>									
Lasting Tax Cut (half as large)	5	5	5	5	20	10	N/A	10	10
<b>TOTAL</b>									<b>10</b>

In this example, if the legislature pursues Option #1, it can renew the five-year sunset at the end of Year 5. The temporary legislation would again produce equality between the official-cost and full-cost estimates of \$10 billion over the next ten years. Alternatively, if the legislature had initially passed a lasting tax cut, it would not need to extend the legislation in Year 6. Both options fit within the budget constraint of \$10 billion for the years in which legislation is passed. Option #1, however, produces full costs of \$20 billion and no unaccounted-for costs, whereas Option #2 produces full costs of \$20 billion and unaccounted-for costs of \$10 billion.

<sup>82</sup> This example is loosely derived from a hypothetical scenario in Yin’s article, which aims to illustrate why temporary-effect legislation enhances fiscal restraint. See Yin, *supra* note 10, at 237-39, 237 tbl.4.

Yin's thesis—that temporary legislation produces accurate official-cost estimates and lasting legislation does not—suffers from a reliance upon the stability of the baseline estimate.<sup>83</sup> The official cost of legislation is the difference between the amount of government revenues that occurs with the enactment of the legislation and the baseline (or the amount that would occur in the legislation's absence). For Yin's thesis to hold, the baseline estimates must assume that "permanent laws will continue forever but that temporary laws will expire as scheduled."<sup>84</sup>

The history of temporary legislation, however, demonstrates why this assumption is unwarranted. Not only are baseline estimates endogenous and therefore subject to manipulation by Congress, but the political pressures for spending and tax cuts are great. We can therefore expect—and have indeed already witnessed<sup>85</sup>—intentional alteration of the baseline to lower the perceived costs of temporary legislation.

Typically, the baseline accepts current law as fixed; because the baseline assumes temporary provisions expire as scheduled, revenues are projected to increase at the sunset date (in the case of sunseting tax cuts). Accordingly, making permanent or extending the temporary provisions of EGTRRA and JGTRRA would eliminate or delay the increase in revenues, and instead such legislation would be scored as a revenue loss.<sup>86</sup> Confronted with the costs of renewing the temporary provisions of EGTRRA and JGTRRA, President George W. Bush proposed in his 2006–2009 Presidential Budgets that the baseline would no longer assume that current law would expire according to its terms.<sup>87</sup> He proposed that the baseline should instead assume that such tax cuts were permanent, despite their adoption as "temporary." When compared against this baseline, a permanent extension of the tax cuts would be scored with zero costs because the shifted baseline already assumed that the temporary cut would become permanent. Moreover, a

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<sup>83</sup> For a critique of baseline estimates, see Timothy J. Muris, *The Uses and Abuses of Budget Baselines*, in *THE BUDGET PUZZLE: UNDERSTANDING FEDERAL SPENDING* 41 (John F. Cogan et al. eds., 1994).

<sup>84</sup> Yin, *supra* note 10, at 186.

<sup>85</sup> This point will be illustrated in the following discussion.

<sup>86</sup> See Cheryl D. Block, *Budget Gimmicks* (describing the maneuver), in *FISCAL CHALLENGES*, *supra* note 8, at 39, 58.

<sup>87</sup> See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, ANALYTICAL PERSPECTIVES: BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2009, at 222 (2008) [hereinafter OMB, ANALYTICAL PERSPECTIVES 2009], available at <http://www.gpoaccess.gov/usbudget/fy09/pdf/spec.pdf>; OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, MAJOR SAVINGS AND REFORMS IN THE PRESIDENT'S 2008 BUDGET 203 (2007), available at <http://www.gpoaccess.gov/usbudget/fy08/pdf/savings.pdf>; Block, *supra* note 86, at 58.

temporary extension of the cut would result in an apparent *increase* in revenues because the failure to permanently extend the tax cut would now be scored as a revenue gain over the assumed baseline.<sup>88</sup>

Then—CBO Director, Peter Orszag, criticized this perhaps shocking manipulation of the baseline by arguing that “scoring expiring provisions as entailing no budgetary cost after their expiration, but then assuming their extension in the baseline, would cause the costs of extending those provisions to ‘disappear’ from the process—which would substantially undermine its integrity.”<sup>89</sup> Despite such criticisms, two years later, Orszag, as OMB Director for President Barack Obama, incorporated several of the EGTRRA and JGTRRA tax cuts permanently into the baseline in the President’s 2010 and 2011 Budgets, with expiring provisions enacted subsequent to Obama taking office.<sup>90</sup> Although the Obama Administration justifies such baseline treatment

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<sup>88</sup> See OMB, ANALYTICAL PERSPECTIVES 2009, *supra* note 87, at 222 (recognizing that not extending EGTRRA and JGTRRA in the baseline “raises inappropriate procedural road blocks to extending them at current rates”).

<sup>89</sup> *Hearing Before the H. Comm. on the Budget, supra* note 48, at 10 (statement of Peter R. Orszag, Director, Congressional Budget Office). Some have argued that this alteration to current baseline practices is justified because current baseline calculations favor spending over tax cuts. See, e.g., JAMES HORNEY & RICHARD KOGAN, CTR. ON BUDGET AND POLICY PRIORITIES, KEY ARGUMENT AGAINST APPLYING PAY-AS-YOU-GO TO TAX CUTS DOES NOT WITHSTAND SCRUTINY 1 (2007), available at <http://www.cbpp.org/files/3-22-07bud.pdf> (quoting former OMB Director Rob Portman as stating that “there is a bias [in the baseline rules], in my view, for spending and a bias against tax relief. Why? Because we assume that programs go out indefinitely on the spending side. . . . Whereas on the tax side, we assume the tax relief would not continue.” (alterations in original)). Generally, entitlement provisions and tax provisions are treated the same for purposes of calculating the baseline. There is a special rule that provides for continuity in the baseline of temporary programs with annual outlays of more than \$50 million that were enacted prior to 1997. *Id.* at 1, 5. This advantage for spending increases is generally offset, however, by the fact that the CBO scores new entitlement programs, even if temporary, as if they were permanent (that is, for every year of the budget window, including those past the program’s sunset date). *Id.* at 5-6.

<sup>90</sup> See DEP’T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION’S FISCAL YEAR 2010 REVENUE PROPOSALS app. (2009), available at <http://www.treasury.gov/resource-center/tax-policy/Documents/grnbk09.pdf> (“Most of the tax reductions enacted in 2001 and 2003 expire on December 31, 2010. The Administration’s baseline projection of current policy continues all of these expiring provisions except for repeal of estate and generation-skipping transfer taxes.”); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, ANALYTICAL PERSPECTIVES: BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2011, at 170 n.5 (2010) [hereinafter OMB, ANALYTICAL PERSPECTIVES 2011], available at [http://www.whitehouse.gov/omb/budget/Analytical\\_Perspectives](http://www.whitehouse.gov/omb/budget/Analytical_Perspectives) (“[T]he Budget, in the current policy baseline, assumes continuation of the 2001 and 2003 tax cuts as amended through June 2009 . . . . Among other changes, this continues two amendments made to these tax cuts . . . [which] expand child tax credit refundability and the earned income tax credit for married couples.”).

because it follows current policy, as opposed to current law, it even assumes tax cuts that it does not support within the baseline. Thus, when the administration fails to support the Bush tax cuts for high-end taxpayers, it scores this policy stance as a revenue increase.<sup>91</sup>

Importantly, the Congressional Concurrent Budget Resolution for Fiscal Year 2010 follows this practice of current policy baselines by also granting authority to the Chairman of the House Budget Committee to exclude the billions of dollars of budgetary effects ensuing from the extension of the EGTRRA, JGTRRA, and alternative-minimum-tax relief provisions.<sup>92</sup> This effectively adjusts the baseline for all purposes of House business to assume current policy continues rather than expires. Finally, under current statutory PAYGO rules and proposals, discussed below in subsection II.A.2, the baseline assumes temporary tax legislation to be permanent. Because these proposed changes to the calculation of the baseline do not apply to new temporary tax cuts, the permanence of any such future tax cuts would not be assumed within the baseline. This would start anew the process whereby the baseline is shifted in order to fail to account for the costs of permanent extension.

To continue with the above hypothetical and to illustrate the effects of a baseline shift, let us again assume that Congress wishes to enact a tax cut costing \$2 billion per year for twenty years, but is constrained by a cap of \$10 billion in tax cuts during the budget window. How would Yin's thesis, which ignores sunsets in the baseline, fare under Bush's or Obama's budget? As illustrated in Table 2 below, temporary legislation would no longer have a budgetary advantage over lasting legislation; the unaccounted-for cost in both scenarios would be \$10 billion because the official costs of the temporary legislation for Years 6–15 would be reduced to zero due to the alteration of the baseline. In essence, Congress would not confront the full costs of renewing temporary legislation because the official costs would be measured through an accounting fiction in which the temporary legislation had somehow already been renewed, thereby leading to the incorporation of renewal costs within the budget baseline *even at the time that the renewal decision is on the table*. That is, the costs of deciding to

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<sup>91</sup> See OMB, ANALYTICAL PERSPECTIVES 2011, *supra* note 90, at 187-88 tbl.14-3 (forecasting that failing to extend the 20% rate for upper-income taxpayers will have a positive effect on revenues). The Administration does not contend that this revenue increase can be used to pay for tax cuts under PAYGO rules, but instead that it "must be devoted to deficit reduction." *Id.* at 182 n.7.

<sup>92</sup> S. Con. Res. 13, 111th Cong. § 421 (2009).



renew would appear to be zero because the basis on which costs are estimated would assume that the renewal had already occurred.<sup>93</sup>

**Table 2: Comparison of Official Cost, Full Cost, and Unaccounted-for Cost of Temporary and Lasting Tax-Cut Legislation with Baseline Assuming Permanence of Temporary Legislation**

	Full Cost					Official Cost			Unaccounted-for Cost (Full – Official Cost)	
	Years 1-5	Years 6-10	Years 11-15	Years 16-20	Years 1-20	Years 1-10	Years 11-20	Years 1-20		
<b>Option #1</b>										
<u>Year 1:</u>										
Tax Cut with Five-Year Sunset	10	0	0	0	10	10	N/A	10	0	
<u>Year 6:</u>										
Five-Year Extension of Sunset with Baseline Change	N/A	10	0	0	10	0	N/A	0	10	
<b>TOTAL</b>									<b>10</b>	
<b>Option #2</b>										
<u>Year 1:</u>										
Lasting Tax Cut (half as large)	5	5	5	5	20	10	N/A	10	10	
<b>TOTAL</b>									<b>10</b>	

Although the CBO has yet to alter the baseline in this manner, history suggests this possibility is far from remote. Indeed, we have previously seen examples of Congress—driven by political pressures—directing the scoring practices of the CBO in an aggressive manner by, for example, demanding that the CBO set the PAYGO balance to zero

<sup>93</sup> One could argue that in Option #2, Congress might approve another tax cut in Year 6, given its willingness to approve a temporary tax cut in that time frame under Option #1. In such a case, the initial “advantage” of temporary legislation has not been eliminated. Because of the endowment effect, however, it will be much easier politically to argue for extension of expiring tax cuts than to enact new tax cuts in Year 6. See *infra* note 95 and accompanying text. Additionally, if Congress enacts an additional tax cut as temporary under Option #2 in Year 6, the above discussion still applies such that any baseline shift will reduce the budgetary advantage for that piece of legislation.

in order to avoid sequestration under PAYGO.<sup>94</sup> Such pressures are not simply of historical interest: it is possible that the public will view an expiration of the EGTRRA and JGTRRA tax cuts as the largest tax *increase* in history,<sup>95</sup> thereby providing Congress with strong political incentives to reduce the perceived cost of making such cuts permanent. Indeed, these same pressures have caused the OMB under Presidents Bush and Obama to calculate its baseline in an unprecedented manner. Furthermore, the statutory rules that governed the manner in which the CBO calculated baseline estimates have expired, thereby giving the CBO more flexibility in constructing its baseline.<sup>96</sup>

To reiterate, the problems identified above arise in the tax legislative process due to the endogeneity of the rules governing the proposal and adoption of legislation. Put differently, the foxes are guarding the henhouse. And because Congress can alter the budget rules without interference from the other branches, it is likely that budget pressures, coupled with a popular preference for tax cuts, will someday cause the CBO to assume permanence of temporary tax cuts in its baseline projection, thereby creating the convenient fiction that subsequent renewal of tax cuts is costless.

In fact, such pressures have already induced the House Budget Committee to effectively do this for purposes of House PAYGO rules, as discussed below in subsection II.A.2. This development not only signals a trend in altering budget rules to accommodate the reenactment of temporary tax cuts but also drastically reduces the significance of the CBO's baseline on congressional decisions regarding such reenactment. Currently, PAYGO rules function as the primary budgetary mechanism through which lawmakers are forced to consider a proposal's costs as measured against the baseline. Moreover, in addition to estimates from the CBO, executive-branch estimates of the costs of legislation, particularly if they are formalized in the OMB, may affect how legislators and their constituents view the costs of proposed legisla-

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<sup>94</sup> See *supra* notes 73-76 and accompanying text (discussing examples of zeroing out PAYGO balances).

<sup>95</sup> See Kysar, *supra* note 8, at 391 (discussing the view that taxpayers may process the expiration of the tax cuts as a tax increase due to the "endowment effect"—the phenomenon that people place greater value on that which they have rather than on that which they do not have).

<sup>96</sup> The CBO currently chooses to create its baseline calculations by following the now-expired provisions of the Balanced Budget and Emergency Deficit Control Act of 1985 and the Congressional Budget and Impoundment Control Act of 1974. CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2010 TO 2020, at 99 (2010), available at <http://www.cbo.gov/ftpdocs/108xx/doc10871/01-26-Outlook.pdf>.

tion. For instance, under the George H. W. Bush Administration, the OMB estimated that a reduction in capital-gains tax rates would increase revenues due to the churning of long-term assets.<sup>97</sup> The CBO, however, estimated a reduction in revenues from such a policy change, initially causing the legislation to fail PAYGO requirements.<sup>98</sup> Nonetheless, the dispute between estimates raged for years until Congress eventually reduced capital-gains rates.<sup>99</sup> Similarly, one can think of the change in baseline estimates advanced by the past two administrations as at least partially incorporated into the official-cost estimate of legislation. Because this change significantly reduces the official cost of renewing temporary legislation, it seriously challenges the conclusion that temporary legislation leads to fiscal prudence more readily than does lasting legislation.

## 2. PAYGO Forgone

As discussed above,<sup>100</sup> each house currently has an internal PAYGO rule,<sup>101</sup> and Congress has recently enacted a statutory PAYGO rule that the executive branch can enforce with mandatory sequestration.<sup>102</sup> Current trends indicate that Congress will continue to exempt many expiring tax provisions from PAYGO's reach, further showing that the endogeneity of these rules undermines any fiscal prudence instilled by sunset provisions.

The PAYGO rules of the House and Senate forbid consideration of direct-spending legislation and, in the case of the Senate, revenue legislation that results in deficit increases or surplus reductions, as measured over both a six-year period and an eleven-year period.<sup>103</sup> Like other legislative rules, the strength of the PAYGO rules is tenuous. House rules are especially weak because they are not self-

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<sup>97</sup> ALLEN SCHICK, *THE FEDERAL BUDGET: POLITICS, POLICIES, PROCESS* 170 (3d ed. 2007).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> See *supra* notes 71-76 and accompanying text (discussing the statutory PAYGO rules of the 1990s and 2000s, and noting Congress's successful efforts to avoid sequestration while the PAYGO rules were in effect).

<sup>101</sup> See *supra* note 39 for a discussion of the PAYGO rules for each house.

<sup>102</sup> See Statutory Pay-As-You-Go Act of 2010, Pub. L. No. 111-139, § 5(b), 124 Stat. 8, 15 ("If the annual report . . . shows a debit on either PAYGO scorecard for the budget year, OMB shall prepare and the President shall issue and include in that report a sequestration order that, upon issuance, shall reduce budgetary resources of direct spending programs by enough to offset that debit . . .").

<sup>103</sup> H.R. Res. 5, 112th Cong. § 2(d) (2011); S. Con. Res. 21, 110th Cong. § 201 (2007).

enforcing—that is, they require a representative to raise affirmatively a point of order—and because the House commonly waives its rules.<sup>104</sup> Waiver standards in the Senate are stricter, requiring a three-fifths vote after a point of order has been raised, although recently the Senate has supported waiver of its PAYGO rules for temporary tax legislation.<sup>105</sup> The rules rely on the Budget Committee’s budgetary estimates, as measured against the CBO baseline estimates.<sup>106</sup> As discussed above, however, the Congressional Concurrent Budget Resolution for Fiscal Year 2010 provided that the Chairman of the House Budget Committee could ignore the majority of the sunset tax cuts for purposes of providing estimates for House rules.<sup>107</sup> Accordingly, PAYGO did not apply to, and offsets were not required for, these temporary provisions.

Current statutory PAYGO rules enacted at the beginning of 2010 also exclude many expiring tax cuts. They incorporate within the baseline trillions of dollars of spending and revenue reductions, including making permanent many of the EGTRRA and JGTRRA tax cuts, as well as the costs of extending alternative-minimum-tax relief and permanently reenacting the estate-tax exemption at 2009 levels.<sup>108</sup>

Arguably, Congress could just as easily exempt lasting tax cuts from PAYGO rules. The mechanics of a sunset provision, however, make it more likely as a political matter to obtain an exemption from PAYGO for temporary legislation. First, due to the endowment effect—the cognitive phenomenon by which people place greater value on that

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<sup>104</sup> For instance, the House Rules Committee, with approval from a simple majority of the House, often adopts special ad hoc rules for consideration of certain legislation (particularly budgetary legislation), which waive any points of order, including those under the PAYGO rule. An affirmative vote of two-thirds by the representatives may also suspend all House rules, allowing no points of order. Rules of the House of Representatives, Rule XV, H.R. Doc. No. 110-162, at 662-81 (2009).

<sup>105</sup> See Bob Cusack & Mike Soraghan, *House Leaders Reject Senate’s AMT Fix*, THE HILL (Dec. 7, 2007, 11:42 AM), <http://thehill.com/homenews/news/13830-house-leaders-reject-senates-amt-fix> (“Senate Democratic leaders, fearful of a public backlash if they didn’t pass the AMT fix, reluctantly agreed Thursday to waive pay-as-you-go rules and passed their measure 88–5.”).

<sup>106</sup> *Id.*; see also S. Con. Res. 21, 110th Cong. § 201(a)(5)(A) (2007) (requiring that estimates “use the baseline surplus or deficit used for the most recently adopted concurrent resolution on the budget”).

<sup>107</sup> See S. Con. Res. 13, 111th Cong. § 421(a) (2009) (permitting the Chairman to “exclude from his evaluation the budgetary effects of [legislative] provisions if such effects would have been reflected in a baseline adjusted for current policy”).

<sup>108</sup> See H.R.J. Res. 45, 111th Cong. § 7 (2010) (providing for adjustments of estimates of budgetary effects of PAYGO legislation for current policy in four areas of the budget).

which they have than on an identical item which they do not have<sup>109</sup>—the public may feel entitled to the benefits that current tax law bestows, creating too much political pressure to refuse reenactment.<sup>110</sup> Indeed, I have previously argued that, in 2002, Congress let lapse the prior statutory PAYGO rules so that permanent extension of the EGTRRA tax cut would be easier.<sup>111</sup> Second, it may appear more legitimate to exempt current law, rather than future law, from new legislative rules simply to preserve the “status quo.”

To conclude, sunset provisions escape characterization as tools of fiscal responsibility through shifting baselines and exceptions to the revenue-offset or PAYGO rules.<sup>112</sup> These phenomena disaffirm the purported fiscal prudence of temporary legislation.

### B. *Effects of Temporary Legislation Beyond the Budget Window*

A second fundamental problem with the defense of sunseting is that temporary legislation often will have economic effects beyond the budget window, notwithstanding a sunset date. To be sure, Yin condones only temporary legislation “whose budget effect does not extend past the budget window period,” or “temporary-effect legislation.”<sup>113</sup> This Article contends, however, that temporary-effect legislation may be rarer than expected.

One example of this phenomenon in the tax context is the temporary § 965 dividend.<sup>114</sup> This dividend allowed U.S. corporations a one-time opportunity to receive a deduction for eighty-five percent of “repatriated” dividends received from their foreign subsidiaries

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<sup>109</sup> See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 674 (1999) (describing an endowment effect as when “an individual comes to possess an item, [and then] instantaneously (or nearly so) values that item more than she did prior to possessing it”).

<sup>110</sup> See *supra* note 95 and accompanying text (explaining that because of the endowment effect, the public may view an expiration of the EGTRRA and JGTRRA tax cuts as representing a particularly large tax increase, thereby motivating Congress to lower the perceived cost of maintaining them permanently).

<sup>111</sup> See Kysar, *supra* note 8, at 384 (arguing that the sunset provisions contributed to the executive branch’s refusal to support the continuation of the PAYGO rules that applied to tax cuts).

<sup>112</sup> The manipulation of other budget rules is less politically costly than repealing outright the PAYGO rules because the latter are more transparent and known to the public.

<sup>113</sup> Yin, *supra* note 10, at 178. Yin also explains that permanent legislation, the long-term costs of which budgetary estimates do not account for, stands in contrast to temporary-effect legislation, the budgetary effect of which is confined to the budget window. *Id.*

<sup>114</sup> I.R.C. § 965 (2006).

against the normal income tax imposed on such dividends, so long as the dividends were invested domestically.<sup>115</sup> Although § 965 did not technically have a sunset date, its effect was limited in duration; the deduction was available for the first tax year beginning after October 22, 2004, or, alternatively at the taxpayer's election, for the taxpayer's last tax year beginning prior to that date.<sup>116</sup>

For the first prospective tax year of § 965's effects, the JCT estimated that § 965 would increase revenues by \$2.8 billion, as measured against the baseline.<sup>117</sup> Although temporary in design, the JCT estimated that the provision would produce long-term revenue losses for every year thereafter in the ten-year budget window, totaling \$3.3 billion.<sup>118</sup> The pattern of revenue losses makes it likely that the JCT would have estimated losses as continuing beyond the budget window if so required.<sup>119</sup>

The JCT arrived at its projection by using dynamic estimates, which account for changes in taxpayer behavior after enactment of the proposed legislation.<sup>120</sup> The up-front revenue gains were due to taxpayers repatriating their foreign earnings when, without the provision, they had no intention of so doing.<sup>121</sup> These gains were offset somewhat by losses from those taxpayers who would have repatriated their earnings regardless of the enactment of § 965, although at a higher tax rate.<sup>122</sup> The future losses of revenues were those that would have been received from this latter group of taxpayers over the rest of the budget-window period.<sup>123</sup> Additionally, such losses were amplified

<sup>115</sup> *Id.* § 965(a)(1).

<sup>116</sup> *Id.* § 965(f).

<sup>117</sup> Edward D. Kleinbard & Patrick Driessen, *A Revenue Estimate Case Study: The Repatriation Holiday Revisited*, 120 TAX NOTES 1191, 1191 (2008).

<sup>118</sup> *Id.* at 1191.

<sup>119</sup> *See id.* at 1197 (explaining the JCT's process for determining and updating its estimate); Yin, *supra* note 10, at 178 n.9 (describing the § 965 dividend as an example of temporary legislation that may not be temporary-effect legislation because it still could have long-term budget effects that continue throughout a ten-year budget window).

<sup>120</sup> *See* Kleinbard & Driessen, *supra* note 117, at 1193 (stating that JCT revenue estimates are dynamic because they incorporate taxpayer reactions to change).

<sup>121</sup> *See id.* at 1199 ("The JCT staff referred internally to this . . . as 'induced' dividends, because section 965 induced taxpayers to pay the dividends when those taxpayers otherwise would have been expected . . . to keep the funds permanently reinvested offshore.").

<sup>122</sup> *Id.* at 1199-200.

<sup>123</sup> *Id.* Note also that JCT staff is forbidden from accounting for the time-value-of-money benefits from receiving revenues earlier rather than later (and vice versa). *Id.* at 1200-01.

by the JCT's conclusion that taxpayers would expect future temporary "tax holidays,"<sup>124</sup> similar to § 965, and would keep earnings offshore indefinitely. In this way, the JCT spread out \$1 billion of additional costs over the budget-window period to reflect the inability of the United States to tax such earnings in the meantime.<sup>125</sup> Later, the head of the JCT described this estimate of future taxpayer behavior as "very conservative."<sup>126</sup> The § 965 example underscores that there are many cases in which temporary legislation will face the same critique as lasting legislation—namely, that the budget process does not account for costs that occur beyond the budget window.

Table 3 illustrates this principle. Using our previous example, assume that Congress wishes to enact a tax cut costing \$2 billion per year for twenty years but is constrained by an overall cap of \$10 billion in tax cuts during the budget window of ten years. Assume further that dynamic scoring of the five-year temporary version of this tax cut produces \$10 billion in costs inside the budget window, but \$5 billion in costs outside the budget window due to changes in taxpayer behavior arising from the tax cut. This is also the case upon a five-year extension of the sunset. In this instance, the unaccounted-for cost of the temporary legislation equals that of lasting legislation. Of course, these unaccounted-for costs need not rise to the levels produced by the lasting legislation, as in this example, but they need not be lower either. A generalized comparison is unattainable without specific knowledge of the future costs at issue.

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<sup>124</sup> *Id.* at 1200.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

**Table 3: Comparison of Official Cost, Full Cost and Unaccounted-for Cost of Temporary and Lasting Tax-Cut Legislation Where Temporary Legislation Produces Costs Beyond Budget Window**

	Full Cost					Official Cost			Unaccounted-for Cost (Full – Official Cost)
	Years 1-5	Years 6-10	Years 11-15	Years 16-20	Years 1-20	Years 1-10	Years 11-20	Years 1-20	
<b>Option #1</b>									
<u>Year 1:</u>									
Tax Cut with Five-Year Sunset	10	0	5	0	15	10	N/A	10	5
<u>Year 6:</u>									
Five-Year Extension of Sunset	N/A	10	0	5	15	10	N/A	10	5
<b>TOTAL</b>									<b>10</b>
<b>Option #2</b>									
<u>Year 1:</u>									
Lasting Tax Cut (half as large)	5	5	5	5	20	10	N/A	10	10
<b>TOTAL</b>									<b>10</b>

The example of § 965 is not an outlier. Indeed, the JCT estimates that many expiring provisions have costs well outside their expiration date and throughout the budget window. For instance, in the last JCT report analyzing legislation addressing the extenders, the JCT scored approximately thirty-five percent of the extenders as having budget effects throughout the ten-year budget window despite having sunset provisions primarily of one or two years in length.<sup>127</sup> Other JCT reports

<sup>127</sup> STAFF OF THE JOINT COMM. ON TAXATION, 110TH CONG., ESTIMATED BUDGET EFFECTS OF THE “TAX EXTENDERS AND ALTERNATIVE MINIMUM TAX RELIEF ACT OF 2008” SCHEDULED FOR CONSIDERATION ON THE SENATE FLOOR ON SEPTEMBER 23, 2008 (Comm. Print 2008), available at <http://www.jct.gov/x-69-08r.pdf>. Such provisions include: (1) tax-free distributions from IRAs to certain public charities, (2) R&D tax credit, (3) fifteen-year straight-line cost recovery for certain retail investments, (4) basis adjustment to S-corporations making charitable contributions of property, (5) credit for mine-rescue-team training, (6) credit for holders of qualified zone academy bonds, (7) accelerated depreciation for business property on Indian reservations, (8) increased rehabilitation credit, (9) tax incentives for investment in the District of Columbia, (10) abatement of incentive-stock option alternative minimum tax (AMT) liability, (11) recovery-period adjustment for farming business machinery and



affirm the prevalence of this trend.<sup>128</sup> Although the JCT did not project outside of the budget window, it is likely that the costs do not simply disappear at the end of the budget window given that they generally continue eight to nine years after the sunset date. A more robust and dynamic analysis of taxpayer behavior may produce even higher rates of temporary legislation with effects beyond the budget window.<sup>129</sup>

In sum, temporary legislation in many instances inflicts costs outside the budget window, which will not always outweigh the unaccounted-for costs of lasting legislation. When they do, however, the enactment of lasting legislation is preferred from the standpoint of accurate cost estimation.

### C. *Estimating Full Costs*

As the prior analysis illustrates, opportunities for manipulation created by the endogeneity of budget rules call into question the superiority of temporary legislation over lasting legislation in producing official-cost estimates that match full costs. Such endogeneity mutes the ability of the rules to emit signals that effectively constrain pressures to spend. Congress can change or waive the rules to pursue current policy, ignoring official-cost estimates, and there is little, if any, external enforcement of them. For this reason, a leading economist has concluded

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equipment, (12) tax treatment of mental health and substance use disorder benefits; (13) special allocation of private-activity-bond financing, (14) low-income housing credit allocation, (15) increase in rehabilitation credit, (16) credit to holders of Midwestern tax-credit bonds, (17) penalty-free withdrawals from retirement plans for qualified disaster-recovery-assistance distributions, (18) tax-exempt bond financing and low-income housing tax relief for Hurricane Ike areas, (19) expensing of qualified disaster expenses, and (20) relaxation of mortgage-revenue-bond limitations for presidentially declared disasters.

<sup>128</sup> A recent JCT report exploring various policy options in energy taxation identified at least four tax credits with a one- or two-year sunset provision that had budget effects for the entirety of a five-year budget window. STAFF OF THE JOINT COMM. ON TAXATION, 111TH CONG., TAX EXPENDITURES FOR ENERGY PRODUCTION AND CONSERVATION 110 tbl.9 (Comm. Print 2009), available at <http://www.jct.gov/publications.html?func=startdown&id=3554>. These provisions are the following: (1) manufacturer credit for energy-efficient homes; (2) hybrid-vehicle tax credit; (3) alternative-fuel-vehicle credit; and (4) refined-coal credit.

<sup>129</sup> One should note that, to the extent temporary legislation produces costs that the relevant budget scorekeeper estimates as occurring beyond the budget window, some of their purposes fade. For instance, such legislation would trigger the Byrd Rule. See *supra* notes 51-55 and accompanying text. It is not always the case, however, that the official cost will account for costs beyond the budget window.

that although the U.S. budget rules may have produced “some success at deficit control,” such conclusions are “highly tentative.”<sup>130</sup>

On the other hand, if Congress does have incentives to consider the costs of legislation, then worthy of critical examination is the assumption that, in enacting lasting legislation, Congress will necessarily ignore costs outside the budget window. Indeed, Congress may take into consideration the full cost of lasting legislation, as well as the official-cost estimates.<sup>131</sup> First, interest groups—at least when competing for scarce governmental resources—may have incentives to highlight to Congress the full costs of lasting legislation beyond the budget window, even when budget scorekeepers do not.<sup>132</sup>

Second, if the projected costs of lasting legislation are sufficiently daunting, legislators (on pain of political retribution) may well take into account such costs even if, falling outside the budget window, they are not officially scored.<sup>133</sup> Good-government reform groups often analyze the CBO’s estimates, sometimes offering their own long-term projections.<sup>134</sup> Constituent concerns and ideological views may also drive legislators to protect the fiscal health of the country.

Historically, congressional members have analyzed an estimate of the costs of legislation *outside* the budget window in a variety of contexts, including consideration of the Bush tax cuts.<sup>135</sup> Indeed, the sun-

<sup>130</sup> Alan J. Auerbach, *Federal Budget Rules: The US Experience*, 15 SWEDISH ECON. POL’Y REV. 57, 81 (2008).

<sup>131</sup> This is a possibility that Yin recognizes but underappreciates. See Yin, *supra* note 10, at 204-05 (acknowledging the “shadow” role of continuing costs in permanent legislation).

<sup>132</sup> See Garrett, *supra* note 67, at 504-05 (arguing that budgetary offset requirements create competition among interest groups that ultimately results in the production of information, leading to enhanced legislative deliberation and accountability).

<sup>133</sup> See SCHICK, *supra* note 97, at 32 (“Shifts in public opinion impact the budget by weakening or strengthening fiscal discipline in the White House and Congress. . . . It is highly probable that even in the absence of [budget] rules, big deficits would have deterred Congress and the president from establishing new entitlements and impelled them to seek savings in old ones.”).

<sup>134</sup> See, e.g., GUY “ROLAND” KING & DONALD N. MUSE, CRITIQUE OF CONGRESSIONAL BUDGET OFFICE COST ESTIMATE FOR THE “SMALL BUSINESS HEALTH FAIRNESS ACT OF 2005” (H.R. 525), available at [http://www.realtor.org/small\\_business\\_health\\_coverage.nsf/docfiles/CritiqueofCBO.pdf/\\$FILE/CritiqueofCBO.pdf](http://www.realtor.org/small_business_health_coverage.nsf/docfiles/CritiqueofCBO.pdf/$FILE/CritiqueofCBO.pdf) (finding fault with the CBO’s estimates of the people who would benefit from an act concerning coverage of certain health plans); Nicholas Loris, *CBO Grossly Underestimates Costs of Cap and Trade*, THE FOUNDRY (June 22, 2009, 4:25 PM) <http://blog.heritage.org/2009/06/22/cbo-grossly-underestimates-costs-of-cap-and-trade> (listing analysis problems that led the CBO to underestimate the costs of a climate-change bill).

<sup>135</sup> See STAFF OF S. BUDGET COMM., 109TH CONG., COST OF BUSH TAX CUTS EXPLODES OUTSIDE FIVE-YEAR BUDGET WINDOW (Comm. Print 2005), available at

set provisions of JGTRRA show that Congress's concerns extend beyond the formal budget process's constraints. The JGTRRA tax provisions were made temporary, in part, to reduce the costs of the legislation as agreed upon by the legislators in light of a growing deficit, rather than simply to comply with PAYGO or the Byrd Rule.<sup>136</sup> For these reasons, interest groups, constituents, and political ideology may spur congressional members to heed the full costs of legislation and to downplay misleading official costs—thus reconciling, to an extent, the accounting differences between temporary and lasting legislation.

It is also possible, however, that given the pressures to spend and reduce taxes, Congress pays attention only to those estimates that violate congressional norms. It is reasonable to conclude that, in addition to restrictions formally put into place in the official budget process, informal processes such as those enumerated above may generate such norms. Both sets of norms, however, may not be of equal strength or of much strength at all.

### III. THE INFORMATION-PRODUCING AND FLEXIBILITY FUNCTIONS OF TEMPORARY LEGISLATION

#### A. *Deliberation and Temporary Legislation*

In addition to the theory that sunset provisions enhance fiscal responsibility, pro-temporary legislation scholars also tout their information-producing functions, as well as the flexibility they offer to legislators when dealing with temporary or uncertain problems. Both theory and experience with sunset provisions call into question these purported benefits.

Default rules can be seen to differentiate temporary legislation from lasting legislation. The former terminates without further legislative action, while the latter indeterminably remains in effect. Some

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[http://budget.senate.gov/democratic/charts\\_taxcuts.html](http://budget.senate.gov/democratic/charts_taxcuts.html) (using CBO data to illustrate the \$1.8 trillion ten-year cost of the Bush tax cuts, including costs five years outside the budget window); see also CONG. BUDGET OFFICE, ADDITIONAL INFORMATION ON THE ESTIMATED BUDGETARY AND ECONOMIC EFFECTS OF S. 2611 (2006), available at <http://www.cbo.gov/ftpdocs/72xx/doc7208/s2611.pdf> (estimating costs outside the ten-year budget window in response to a request from senators considering the Comprehensive Immigration Reform Act of 2006); STAFF OF S. BUDGET COMM., 109TH CONG., COST OF AMT REFORM EXPLODES OUTSIDE FIVE-YEAR BUDGET WINDOW (Comm. Print 2005), available at [http://budget.senate.gov/democratic/charts\\_taxcuts.html](http://budget.senate.gov/democratic/charts_taxcuts.html) (using CBO data to estimate costs of AMT reform beyond the budget window).

<sup>136</sup> See Kysar, *supra* note 8, at 378-82 (chronicling the debates over and passage of JGTRRA and highlighting the Act's sunset provision).

scholars have argued that this difference saves the legislature transaction costs when it wishes to enact new policy; sunset provisions are advantageous when the initial policy is likely to be incorrect.<sup>137</sup> The legislature, this argument runs, may use better information revealed during the interim period between enactment and sunset.<sup>138</sup> There are, however, several problems with this account.

First, lasting legislation, of course, need not be permanent. Indeed, I have labeled legislation that does not expire by its own terms as “lasting” rather than “permanent” to highlight this distinction. Congress can repeal or amend lasting legislation that had been enacted based upon poor information, thereby providing the flexibility benefits that advocates of temporary legislation tout. To provide a recent example, Congress enacted legislation in 1993, as part of the Immigration and Nationality Act (INA), codifying the Department of Health and Human Services’s travel ban upon HIV-positive foreign nationals.<sup>139</sup> Subsequently, in 2008, Congress amended the INA to lift the ban, reflecting a new scientific consensus about the lack of health risks associated with such travel.<sup>140</sup>

Additionally, if the initial policy is correct, then lasting legislation will be the appropriate course of action. Otherwise, Congress will incur unnecessary transaction costs in an effort simply to maintain the status quo by reenacting the legislation at sunset.<sup>141</sup> Accordingly, to

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<sup>137</sup> See, e.g., Gersen, *supra* note 10, at 271 (contending that temporary legislation provides a more “pragmatic approach to new risk[s]” inherent in legislation); Fagan, *supra* note 10, at 19 (arguing that, as opposed to permanent legislation, sunset provisions “may reduce the cost” of an erroneous policy decision when new, better policy options arise).

<sup>138</sup> See Gersen, *supra* note 10, at 266-67; Fagan, *supra* note 10, at 19.

<sup>139</sup> National Institutes of Health Revitalization Act of 1993, Pub. L. No. 103-43, § 2007, 107 Stat. 122, 210 (1993); see also 139 CONG. REC. S1761-67 (daily ed. Feb. 18, 1993) (chronicling the debate on the merits of a ban on the immigration of HIV-positive foreign nationals).

<sup>140</sup> See Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, Pub. L. No. 110-293, § 305, 122 Stat. 2918, 2963 (2008) (striking the language prohibiting immigration of those with AIDS).

<sup>141</sup> It could be argued, however, that temporary legislation actually functions as a type of penalty default rule and thus enhances deliberation. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 95-97 (1989) (recommending that a court can justifiably invalidate a contract—as a type of penalty default rule—when the contracting parties strategically shift contract costs to the courts by leaving out key terms ex ante). By returning Congress to a less desirable policy position, a sunset provision may prompt Congress to take action. However, unlike the Ayres and Gertner proposal, which applies only when parties at-

use sunset provisions optimally, the legislature must foresee whether faulty information underlies the legislation or whether intervening events will occur that would necessitate revised policy—perhaps an unlikely scenario.<sup>142</sup>

In many cases where sunset provisions are hypothesized to be useful—that is, when incorrect policy influences legislation—legislators may ignore superior information that arises before or at the sunset date and instead succumb to preformed policy preferences.<sup>143</sup> Such willful ignorance of superior information may result from the failure of deliberation to sway congressional members. This lack of success may in turn be due, in part, to the influence of interest groups.<sup>144</sup> As mentioned above, the experience with sunsets at the state level in the 1970s and early 1980s, as well as that of the tax extenders, suggests that sunset provisions do not function as an effective means of policy review. Instead, interest groups continue to coalesce at each sunset date in order to advance their interests.<sup>145</sup> This arrangement proves lucrative to lobbyists and congressional members, who benefit from the re-

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tempt to shift costs onto courts, a presumption in favor of temporary legislation would be overly broad since it prompts Congress to act in all types of situations.

<sup>142</sup> The ability to foresee conditions that will make a law obsolete is, of course, not impossible. For instance, portions of the New Deal were temporary because legislators were contending with problems perceived as temporary. See, e.g., Theodore Saloutos, *New Deal Agricultural Policy: An Evaluation*, 61 J. AM. HIST. 394, 403 (1974) (noting the temporary nature of the Agricultural Adjustment Act of 1933, which decreased crop production to combat deflation because of the assumption that “the Depression was going to end”). However, the difficulty in correctly identifying such situations is compounded by the challenge in defining the scope and length of the sunset provision. See *infra* Sections III.B-C.

<sup>143</sup> See Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1550 (1988) (“The antonym of deliberation is the imposition of outcomes by self-interested and politically powerful private groups; republicans emphasize that deliberative processes are often undermined by intimidation, strategic and manipulative behavior, collective action problems, adaptive preferences, or—most generally—disparities in political influence.”).

<sup>144</sup> See *id.* (highlighting the role of interest groups, or “politically powerful private groups,” in political outcomes). Economic critiques of interest-group influence highlight the disconnect between the preferences of constituents and the goals of enacted legislation. This incongruence may be attributed to “strategic and manipulative behavior,” “cycling problems,” and the lack of a mechanism to gauge intensity of preferences, among other factors. *Id.* at 1545-46. But cf. Fagan, *supra* note 10, at 27 (arguing that more legislators will vote on a law “[i]f elections occur between a law’s enactment and review,” thus “reducing the probability of legislative capture, decreas[ing] errors in objective facts upon which the law is based, and decreas[ing] errors of representing the subjective values of citizens”).

<sup>145</sup> See *infra* Section IV.A (exploring this phenomenon in greater depth).

peated provision of rents upon each sunset.<sup>146</sup> Although scholars are correct to point out that, at times, temporary legislation receives intense legislative attention,<sup>147</sup> such attention may simply be the product of lobbying efforts rather than deliberation over new information.<sup>148</sup>

Some also suggest that, because of the necessity of legislative action upon the sunset date, temporary legislation produces repeated interactions between interest groups and legislators, which in turn incentivize the former to provide better information to the latter.<sup>149</sup> But continuous relationships are a double-edged sword: frequent interaction 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.<sup>150</sup> When the consequences of legislative pro-

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<sup>146</sup> See *infra* Section IV.A (discussing incentives that public interest groups give to legislators in the form of campaign contributions, votes, or other benefits called “rents”).

<sup>147</sup> See, e.g., Gersen, *supra* note 10, at 276-77 (noting that while many pieces of temporary legislation command limited lawmaker attention, budget rules requiring “setoffs for new spending programs” may lead to increased scrutiny of temporary legislation); see also Mary L. Heen, *Reinventing Tax Expenditure Reform: Improving Program Oversight Under the Government Performance and Results Act*, 35 WAKE FOREST L. REV. 751, 798-801 (2000) (stating that the threat of sunset for employment tax credit produced more information about its performance).

<sup>148</sup> Whether the product of such lobbying efforts is to be embraced as representing an equilibrium of political power or rejected as unsupported by reason and deliberation invokes the classic debate between pluralists and republicans—a debate in which this Article does not attempt to engage. Compare Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 875-76 (1987) (characterizing pluralism as the political theory wherein “legislative outcomes simply reflect the equilibrium of private political power”), with Sunstein, *supra* note 143, at 1544, 1547-49 (describing republicanism as the view that laws should be developed through deliberation and be supported by reason, not through blind acceptance of the products of politics).

<sup>149</sup> See, e.g., Gersen, *supra* note 10, at 271-72 (citing political science models that support the hypothesis that lobbyists are more honest in repeated, rather than isolated, interactions with legislators).

<sup>150</sup> See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 144 (2d prtg. 1971) (noting that “the organized and active interest of small groups” can achieve legislative results other than what would be expected under majority rule); David Martimort, *The Life Cycle of Regulatory Agencies: Dynamic Capture and Transaction Costs*, 66 REV. ECON. STUD. 929, 929 (1999) (arguing that regulatory capture arises from the repeated interactions between “political principals, interest groups, and regulatory agencies”); see also MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 155-60 (1955) (arguing that regulatory commissions tend to become heavily influenced by those interest groups that they regulate); Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467, 473-509 (1952) (discussing capture of the Interstate Commerce Commission by railroad-industry interests); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) (discussing industry pursuit of regulation to control market entry and to preserve market dominance). Some have argued that capture theory is more potent in the legislative rather than regulatory context because

posals affect certain interest groups acutely but members of the public diffusely, the former will exert resources—and will be able to do so quite effectively if they are well organized—to capture influence with lawmakers while the public remains inattentive.<sup>151</sup> We can theorize, then, that lawmakers are more attuned to the needs of interest groups the more they interact with them, thereby increasing the risk that an unreliable exchange of information occurs in the sunset scenario.<sup>152</sup>

A final problematic feature of temporary legislation with respect to information gathering is that it may produce over- and underresponsiveness, which spoils the information that the legislature considers upon the sunset date.<sup>153</sup> For instance, taxpayers may attempt to structure their transactions to capture tax benefits during the sunset period of a tax cut. Fearful that the tax cut will not be extended, a large behavioral response to the temporary legislation may not necessarily indicate taxpayer reaction to a lasting tax cut; rather, taxpayer response is simply compressed into a shorter time frame.<sup>154</sup> To illustrate the converse, some have argued that a private party may underreact to temporary (as compared to permanent) environmental regulation if the regulation requires costly alterations in behavior and is unlikely to be extended.<sup>155</sup> These examples illustrate that the sunset mechanism may

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politicians do not guarantee independence or impartiality as agencies do. *See, e.g.*, DAMIEN GERADIN & MICHEL KERF, CONTROLLING MARKET POWER IN TELECOMMUNICATIONS: ANTITRUST VS SECTOR-SPECIFIC REGULATION 113-14 (2003) (asserting that statutory provisions that constrain the political make-up and regulatory discretion of the Federal Communications Commission make it less susceptible to “agency capture”).

<sup>151</sup> *See* OLSON, *supra* note 150, at 141-48 (explaining attempts at regulatory capture by special interest groups).

<sup>152</sup> It is, of course, true that lawmakers are likely not focused only on rent extraction. Indeed, in contrast to earlier strains of public-choice theory, more recent scholarship accepts an expansive view of lawmakers’ preferences to include satisfaction of their ideologies, as well as the accumulation of power and prestige, the presence of which may contribute to meaningful deliberation. *See, e.g.*, Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 66-68 (1990) (criticizing legal scholarship that adopts a narrow view of public-choice theory for ignoring legislative motivations other than extracting rent); *see also* Farber & Frickey, *supra* note 148, at 888-90 (arguing that public-choice theory improperly rejects legislative and voter concern for the public interest). Still, although the rent-extraction model may not present a complete picture of the legislative process, it predicts the tendencies of the interactions between interest groups and lawmakers.

<sup>153</sup> *See* Gersen, *supra* note 10, at 278 (“[O]bserved level of behavioral adjustment would be an inaccurate indicator of how private parties would respond to permanent legislation.”).

<sup>154</sup> *Id.*

<sup>155</sup> *See, e.g., id.*

not only fail to compel legislatures to consider new information but may itself produce distorted data.

### B. *Setting the Scope of Temporary Legislation*

In addition to their questionable effects, sunset provisions may simply fail to target the right legislation.<sup>156</sup> Judge Guido Calabresi, for example, has criticized sunset provisions for their overbreadth, arguing that they threaten expiration of still-beneficial laws.<sup>157</sup> Interest groups who lobby for the scope and length of the sunset provision most favorable to their agenda exacerbate this problem. Indeed, a group of senators heavily criticized the proposed Sunset Act of 1977, which would have subjected all federal programs to a five-year sunset, because interest groups had lobbied successfully to delete tax expenditures from the sunset review.<sup>158</sup>

Perhaps these concerns have inspired scholars to prescribe temporary legislation only in certain scenarios, such as those presenting new or unfamiliar risks.<sup>159</sup> Because new risks are thought more likely to inspire biased perception and overreaction, scholars advocate temporary legislation in uncertain environments to offset the effect of the biases.<sup>160</sup> Specifically, their argument draws upon literature arguing that individuals “often overestimate and overreact to newly recognized risks.”<sup>161</sup> This tendency is due to risk assessment based on whether in-

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<sup>156</sup> It may seem odd that we trust Congress to enact complex legal regimes but not to set the appropriate length or scope of sunset provisions. Agencies, however, often implement statutes, making the difficult regulatory choices in such regimes in the face of changing circumstances. In the sunset-provision context, however, agencies are unable to exercise this advantage by changing the length of sunsets or by setting their scope.

<sup>157</sup> See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 61-62 (1982) (arguing that sunset provisions merely shift the force of inertia to those who oppose regulation, rather than to those in the previous majority who support it).

<sup>158</sup> See S. REP. NO. 95-326, at 10, 51 (1977) (outlining senators' disapproval of deletion, including their belief that the deletion will allow programs with large budgets to avoid sunset review, and the senators' intention to make a floor amendment to bring tax expenditures back within sunset review).

<sup>159</sup> See Gersen, *supra* note 10, at 268-71 (arguing that temporary legislation guards against cognitive bias). Of course, interest groups will continue to exert influence in lobbying for or against use of a sunset, even when their use is relegated to only “new risk” legislation. They will, for example, have a role in setting forth what constitutes a “new risk.”

<sup>160</sup> See Fagan, *supra* note 10, at 25 (“If we assume that legislatures and constituents sometimes irrationally perceive risk, and the basis of this perception is formed rationally within a previous environment . . . then a sunset clause could provide a way out of this temporal mismatch.”).

<sup>161</sup> Gersen, *supra* note 10, at 269.



formation regarding the risk is readily available, a phenomenon known in the behavioralism literature as the “availability heuristic.”<sup>162</sup> For instance, if news coverage of a terrorist attack is imprinted in the minds of citizens, they will, the theory goes, draw upon the availability of published images and stories and overestimate the likelihood and seriousness of future terrorist attacks. Citizens, under this view, will then demand “too much” legislation or regulation based on their irrational risk analysis.<sup>163</sup> Some have suggested that making such legislation or regulation temporary will compensate for the cognitive bias: although congressional members may be forced politically to serve an irrational public, at least the legislation or regulation will be reevaluated when cooler heads prevail.<sup>164</sup>

Scholars have also cited “framing effects” and “escalating commitment” as causes for the “stickiness” of regulatory programs.<sup>165</sup> As to the former, people have been shown to make inconsistent choices based on the format of the option, or the way it is “framed”; they tend to assign more value to losses than to equivalent forgone gains, a tendency which is also referred to as loss aversion.<sup>166</sup> Thus, interest-group beneficiaries of an extant regulatory program will lobby harder than

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<sup>162</sup> See CASS R. SUNSTEIN, *RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT* 33-35 (2002) (defining the “availability heuristic” as the phenomenon in which “people tend to think that events are more probable if they can recall an incident of their occurrence”); see also Cass R. Sunstein, *What’s Available? Social Influences and Behavioral Economics*, 97 NW. U. L. REV. 1295, 1297 (2003) (explaining that the availability heuristic causes people to substitute deeper consideration of actual possibilities with accessible, illustrative examples); Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207, 230 (1973) (observing that individuals perceive an event as being more likely to occur if a similar event has recently occurred or if they have recently seen such an event in a film).

<sup>163</sup> See, e.g., Risa Palm, *Demand for Disaster Insurance: Residential Coverage* (explaining that many individuals, rather than using cost-benefit analyses to make purchase decisions for insurance, instead fall prey to biases that influence their estimates), in *PAYING THE PRICE: THE STATUS AND ROLE OF INSURANCE AGAINST NATURAL DISASTERS IN THE UNITED STATES* 51, 52-54 (Howard Kunreuther & Richard J. Roth eds., 1998).

<sup>164</sup> See Gersen, *supra* note 10, at 271 (arguing that temporary legislation accounts for political realities while simultaneously serving to prevent “long-term institutional commitments”); Fagan, *supra* note 10, at 20-21 (recommending the use of sunset provisions in uncertain environments where error costs may be high).

<sup>165</sup> See Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 603-06 (2002) (arguing that one benefit of sunset provisions is that they permit periodic review of status quo situations to which the public and legislators have grown attached).

<sup>166</sup> See Hanson & Kysar, *supra* note 109, at 674 (describing loss aversion as when a person’s aversion to losses is greater than her attraction to similarly sized gains).

those who oppose reform.<sup>167</sup> Moreover, “escalating commitment” will lead initial advocates of a position to believe irrationally in its continued advantages; otherwise, they would be forced to defend their original decision, a cognitively costly demand. Therefore, the architects and supporters of a regulatory regime may be unwilling to let it go, even when presented with evidence of its looming failure or ineffectiveness.<sup>168</sup> Because sunsets may be structured to shift the status quo to deregulation after a period of time, they are suggested as counterweights to these biases.<sup>169</sup>

Despite the attractive logic behind these uses of sunset provisions, one can contest the initial premise supporting them; cognitive biases do not uniformly bring overreaction but may also lead to underreaction and undersupply of regulation.<sup>170</sup> First, “biased assimilation” causes people to accept wholeheartedly evidence that supports their initial belief while repudiating or downplaying contradictory evidence.<sup>171</sup> This bias has been used to predict a lack of regulation in certain areas. For example, to the extent that there is mixed evidence of global climate change and its predicted effects, such discrepancy may further polarize the public’s views on the topic.<sup>172</sup> Because skeptics will remain skeptical, it is unlikely that regulation on carbon emissions will occur; “the conflicting scientific evidence will likely stifle any response.”<sup>173</sup>

Additionally, a recent study concludes that individuals’ basic values, including those associated with climate change, gun rights, public health, and national security, exert more influence over their risk per-

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<sup>167</sup> See Rachlinski & Farina, *supra* note 165, at 604-05 (noting that framing effects mean that “those who might lose the benefits of an existing program will fight harder than those who stand to benefit from its reform”).

<sup>168</sup> See *id.* at 605 (explaining that people are wary of acknowledging that their initial position was erroneous).

<sup>169</sup> See *id.* (noting that, although sunsets may be “too drastic a solution for many regulatory contexts,” they can help address individuals’ psychological attachment to the status quo).

<sup>170</sup> See Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 634-35 (2003) (describing how cognitive error caused by the availability heuristic could, in the case of a terrorist attack, lead people to fear infringements on civil liberties from increased regulations and thus underregulate).

<sup>171</sup> Jeffrey J. Rachlinski, *The Psychology of Global Climate Change*, 2000 U. ILL. L. REV. 299, 304-05.

<sup>172</sup> See *id.* at 305-06 (using the example of global warming to demonstrate how doubters assign greater weight to studies confirming their own beliefs while believers similarly place greater weight on studies sympathetic to their views).

<sup>173</sup> *Id.* at 306-07.

ceptions than any other factor.<sup>174</sup> For instance, “cultural worldviews accurately predict who is [a] global warming skeptic and who [is] a true believer: hierarchs and individualists tend to dismiss the claim that global warming is occurring and is [a] serious threat to our society, whereas egalitarians and communitarians take the opposite view.”<sup>175</sup> Hierarchs and individualists may simply perceive risk information through their cultural lens, leading them to support any deregulatory efforts. In this manner, cultural polarization over new risks is likely.<sup>176</sup>

Second, even if there is no divergence in evidence, loss aversion may mean that some will *oppose* regulation.<sup>177</sup> Because they are attached to the status quo, “[p]eople are willing to tolerate risks that they already bear, even though they would not otherwise be willing to incur the same risks.”<sup>178</sup> Given that many environmental, health, and safety hazards only become known after a product or activity is already well established within society, individuals may perceive the “new risk” to be the regulatory prospect of banning or taxing the product or activity, rather than the hazard created by the product or activity itself. The decades-long battles by lawmakers to regulate pervasive and harmful substances, such as lead, asbestos, and cigarettes, seem to support this view. Additionally, because people are averse to incurring assured losses, in many instances, this phenomenon will also lead to reduced demand for risk regulation.<sup>179</sup> For example, people will oppose fossil-fuel reduction because it is a certain loss even when it avoids an uncertain environmental loss of equal expected value.

Third, reflecting a “myopia bias,” people tend to place more importance on the avoidance of immediate losses than the avoidance of losses in the future,<sup>180</sup> perhaps due to the previously discussed availability heuristic and their inability to imagine future losses.<sup>181</sup> Again, this bias will influence people to choose to avoid immediate losses

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<sup>174</sup> See Dan M. Kahan et al., *The Second National Risk and Culture Study: Making Sense of—and Making Progress in—the American Culture War of Fact 4* (Oct. 3, 2007) (unpublished manuscript), available at <http://ssrn.com/abstract=1017189>.

<sup>175</sup> *Id.* at 3.

<sup>176</sup> See *id.* at 16 (“[B]ecause of the decisive influence of their worldviews on their risk perceptions, . . . people end up drawn into divisive forms of cultural conflict . . .”).

<sup>177</sup> See Rachlinski, *supra* note 171, at 307 (noting that people are “relatively unwilling to sacrifice benefits they already possess to obtain other benefits”).

<sup>178</sup> *Id.* at 308.

<sup>179</sup> See *id.* at 309 (“People are more willing to gamble to avoid a loss than to obtain a benefit.”).

<sup>180</sup> See David A. Dana, *A Behavioral Economic Defense of the Precautionary Principle*, 97 NW. U. L. REV. 1315, 1324-25 (2003).

<sup>181</sup> *Id.*

over nonimmediate losses of equal expected value, even taking account of the time value of money.<sup>182</sup> Accordingly, this bias may lead to a choice against efficient regulation. Fossil-fuel reduction, for instance, produces immediate economic losses, which are weighed more heavily against future environmental losses of equal expected value.<sup>183</sup> Agency costs and institutional design that incentivize legislators toward short-term goals may exacerbate such a bias as well.

In short, the theory that temporary legislation is needed as a bulwark against these biases is, at the least, overstated. As the above discussion demonstrates, biased assimilation, loss aversion, and myopia bias may result in constituents underreacting to new risk. Hence, these behaviors may result in demand for a level of regulation below what would be efficient.

### C. *Determining the Length of Sunset Periods*

Finally, the improbability that sunset provisions will produce valuable information or flexible lawmaking opportunities can also be traced to the difficulty in choosing an appropriate length for the sunset period. Theoretically, the sunset date should occur when a law begins to produce net costs in light of new information or intervening events.<sup>184</sup> Identifying this point at the time of the sunset's enactment, however, will prove challenging, if not prohibitively costly. In contrast, a legislature can amend or repeal legislation when it no longer produces net benefits.<sup>185</sup> Such actions may impose greater transaction costs than sunseting the law, but these must be weighed against the costs of the sunset provision: the costs of determining the correct sunset date and the other legislative burdens discussed throughout this Article.

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<sup>182</sup> *Id.* at 1325-26.

<sup>183</sup> *See id.* ("In theory at least, the myopia bias can be distinguished from the bias in favor of avoiding sure losses over unsure ones: people may well overweigh immediate sure losses even as against non-immediate sure losses.").

<sup>184</sup> *See Fagan, supra* note 10, at 21-22 ("*Ceteris paribus*, the higher the degree of uncertainty or pace of change, the shorter the sunset clause should be in order to allow the legislature to implement the maximum amount of new policy options. This flexibility should be weighed against the transaction costs of creating new legislation and the transaction costs of periodic review.>").

<sup>185</sup> *See, e.g., supra* notes 139-40 and accompanying text (discussing a congressional amendment to the Immigration and Nationality Act, which lifted a travel ban upon HIV-positive foreign nationals).

## IV. DISADVANTAGES OF TEMPORARY LEGISLATION

The above discussion has questioned the purported advantages of sunset provisions in producing fiscal prudence, better information, and legislative flexibility. Recognizing, however, that lasting legislation lacks many of these characteristics as well, this Part continues a systematic comparison of these two legislative options. In so doing, it finds severe, albeit sometimes nonobvious, disadvantages of temporary legislation relative to lasting legislation.

A. *Political-Economy Concerns*

Prior literature theorizes that temporary legislation may increase interest-group activity. Generally, public-choice theory posits that small groups are successful at obtaining legislation because they are more interested and more easily organized than the general public—each member of which bears only a small cost of the interest-group legislation.<sup>186</sup> Interest groups compensate legislators for their efforts toward enactment of the favored policy through campaign contributions, votes, and other benefits, collectively known as “rents.”<sup>187</sup> Scholars (including myself) have argued that temporary legislation, through continual threats of expiration, allows congressional members to extract more rents from interest groups than does lasting legislation.<sup>188</sup>

One critique of this view is that lawmakers can also continually extract rents from interest groups by repeatedly threatening to repeal or alter lasting legislation.<sup>189</sup> To the extent that lawmakers are extracting rents, however, such threats will not be as forceful as the threat of sunset. It is much easier to let a sunset expire than to repeal or amend

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<sup>186</sup> See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 23 (1991) (explaining how the “free rider” problem allows small interest groups to dominate the political discourse); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975) (discussing the negotiation of legislative “deals” between Congress and interest groups); *supra* notes 149-52 and accompanying text (describing the repeat interactions between interest groups and legislators in temporary-legislation situations).

<sup>187</sup> See Kysar, *supra* note 8, at 392 (“Through campaign contributions and lobbyists, these groups seek legislative votes favorable to their interests from politicians.”).

<sup>188</sup> See, e.g., *id.* at 394-95 (noting that legislators are able to provide hope to interest groups when sunset dates approach and thereby can extract rents from both sides); Edward J. McCaffery & Linda R. Cohen, *Shakedown at Gucci Gulch: The New Logic of Collective Action*, 84 N.C. L. REV. 1159, 1164-65 (2006) (arguing that Congress helps to create interest groups that it can later “shake down” for campaign contributions).

<sup>189</sup> See Yin, *supra* note 10, at 243-44 (suggesting that legislators might “enhance the amount of benefits they obtain from the private sector . . . [by] increas[ing] their use of threatened, but ultimately unexecuted, legislative actions”).

legislation. The former requires no action and the latter requires passage in both houses and the signature of the President, not to mention various internal processes, including committee review, within each house. The sunset can then be a more viable threat, requiring more rents to stave off its expiration. For the same reason, reenacting temporary legislation requires more legislative resources and hence more rents than simply maintaining lasting legislation. The effectiveness of recurring threats for temporary provisions is supported by anecdotal evidence from a lobbyist, who stated the following:

Who wants to lose a client? . . . With [temporary tax provisions], you know you always have someone who will help pay the mortgage. You go to the client, tell them you're going to fight like hell for permanent extension, but tell them it's a real long shot and that we'll really be lucky just to get a six-month extension. Then you go to the Hill and strike a deal for a one-year extension. In the end, your client thinks you're a hero and they sign on for another year.<sup>190</sup>

Lawmakers similarly benefit from this arrangement. When asked by a staff member why tax extenders were not made permanent, one Congress member responded,

Are you kidding me? . . . We couldn't do that! . . . Why, I'd lose all my friends! . . . Who would come visit me and say kind things to me and do nice things for me then, if they didn't have to come back every year to ask for these tax provisions?!<sup>191</sup>

Because tax extenders benefit lobbyists, who can then justify being kept on retainer, and congressional members, who can continue to receive rents, such provisions are particularly susceptible to special interests. One estimate concludes that tax extenders transfer approximately \$30 billion a year to "a few special interests."<sup>192</sup> Indeed, so lucrative is this arrangement that when President Obama proposed in his 2011 budget to make permanent the R&D tax credit, after nearly three decades of its continuous reenactment, Senate Republicans sent him a letter calling instead for extension and improvement of the credit.<sup>193</sup>

To be sure, it seems reasonable to conclude that interest groups will value temporary legislation less than lasting legislation due to its

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<sup>190</sup> Pat Jones, *New Day May Dawn for Sunset Tax Provisions*, 66 TAX NOTES 1587, 1587 (1995) (internal quotation marks omitted).

<sup>191</sup> Martin A. Sullivan, *It Is Time to Make All Tax Extenders Permanent*, 126 TAX NOTES 139, 141 (2010) (alterations in original).

<sup>192</sup> Ryan Grim & Shahien Nasiripour, *The K Street Kickback: The Giveaway that Reid Stripped from the Jobs Bill*, HUFFINGTON POST Feb. 12, 2010, [http://www.huffingtonpost.com/2010/02/12/the-k-street-kickback-the\\_n\\_460652.html](http://www.huffingtonpost.com/2010/02/12/the-k-street-kickback-the_n_460652.html).

<sup>193</sup> *Id.*

shorter duration.<sup>194</sup> However, scholars, including myself, have argued that campaign finance laws, which limit the amount of contributions a legislator can receive at a given time, cause legislators to push their constituents toward temporary legislation, the smoothing effect of which allows for greater contributions.<sup>195</sup> Such an analysis therefore adopts an agency-cost model in which agent-legislators, faced with divergent interests from principal-constituents, can exploit the informational asymmetries between themselves and voters, as well as the costs associated with monitoring legislator behavior, in order to pursue their own interests.<sup>196</sup> Generally, however, under the campaign-finance laws, a lawmaker can capture more benefits from repeated contributions under temporary legislation than from one-time contributions.

Some argue, though, that the proper comparison is between the following two scenarios: (1) continuously sunseting one piece of legislation and (2) continuously enacting lasting legislation.<sup>197</sup> The rationale is that there is possibly unlimited demand for legislative product.<sup>198</sup> If total future demand for legislation is unlimited, a legislator will not restrict legislative product by using temporary legislation in

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<sup>194</sup> See FRED S. MCCHESENEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 88 (1997) (reiterating the benefits of longer term legislation, including better planning ability and reduced transaction costs).

<sup>195</sup> See, e.g., Kysar, *supra* note 8, at 394-95 (maintaining that sunset provisions may also be used to indirectly avoid campaign-finance limitations); McCaffery & Cohen, *supra* note 188, at 1179 (noting that because of campaign-finance limitations, Congress may prefer to get "paid" by lobbyists over the course of many years).

<sup>196</sup> See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308-09 & n.10 (1976) (defining agency costs as consisting of monitoring costs, bonding costs, and losses associated with the agency not working on behalf of the principal). Note that an option to receive money in the future is not economically equivalent to receiving it up front. In addition to time-value-of-money considerations that would require future cash flows to be discounted, a legislator's tenure may be shorter than the ten years required to realize the future rents, thereby further discounting the value of future rents. That being said, high reelection rates drastically reduce this risk. For instance, reelection rates in the House have averaged at approximately ninety-five percent over the past twenty years. See Center for Responsive Politics, *Reelection Rates Over the Years*, OPEN-SECRETS.ORG, <http://www.opensecrets.org/bigpicture/reelect.php> (last visited Jan. 15, 2011) (charting reelection rates from 1964 to 2008). Reelection rates for senators during the same time period are a bit lower at approximately eighty-eight percent. *Id.*

<sup>197</sup> See, e.g., Yin, *supra* note 10, at 243 (noting that legislators can seek rent from the private sector continually by holding out other legislative product for bargaining in future congressional sessions).

<sup>198</sup> See *id.* (commenting on the "potentially unlimited demand for legislative product" in future congressional sessions).

the current term in order to preserve future demand.<sup>199</sup> It is doubtful, however, that demand for legislative product is unlimited among any given legislator's constituency. Instead, each legislator likely has a few groups, either inside or outside her district, whose interests are strong enough to justify the payment of large-scale rents.<sup>200</sup> Even where there is demand, perhaps from less powerful interest groups, it is questionable that this demand can produce rents as high as those that the primary lobbying forces in the relevant district pay.

Even where a legislator does not extract rents in the above manner, interest groups may value the recurrent short-term deals of temporary legislation more than the long-term bargains of lasting legislation. For instance, interest groups may avoid registration under the Lobbying Disclosure Act of 1995 if they do not contribute a threshold amount to a lobbyist during a quarterly period.<sup>201</sup> If the policy pursued by the interest group is controversial to its shareholders or customers, it may wish to engage in temporary deals with lobbyists and lawmakers to avoid drawing attention to the issues involved.

Behavioral phenomena may also lead to an increase in the valuation of temporary legislative deals. In a similar situation, many observers criticize corporate management for overemphasizing short-term earnings.<sup>202</sup> Presumably, this emphasis on the short term occurs because shareholders lack other methods to evaluate corporate leadership and instead focus on available information, such as quarterly earnings.<sup>203</sup> It may also occur due to the myopia bias, discussed

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<sup>199</sup> See *id.* ("There is no reason for a legislature to place artificial restrictions on what it can produce in a current session . . . if it knows that there will be more-than-sufficient demand at that later time.").

<sup>200</sup> For statistics on campaign contributions by legislator, see Center for Responsive Politics, *Congress*, OPENSECRETS.ORG, <http://www.opensecrets.org/politicians/index.php> (last visited Jan. 15, 2011). My original analysis of 2008 data from the site concludes that individual senators received on average only 12.28% of their total political action committee (PAC) donations from PACs donating \$5000 or more. The average senator received approximately seventeen such donations and the median senator received five such donations.

<sup>201</sup> Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, § 4, 109 Stat. 691, 696-97 (codified as amended at 2 U.S.C. § 1603 (2006)).

<sup>202</sup> See, e.g., Lucian Arye Bebchuk & Marcel Kahan, *A Framework for Analyzing Legal Policy Towards Proxy Contests*, 78 CALIF. L. REV. 1071, 1102-03 (1990) (criticizing corporate management's increase in short-term earnings in order to enhance shareholder perception as "socially costly" and "myopic").

<sup>203</sup> See *id.* at 1102 n.107 ("Increasing shareholder support by merely changing shareholder perceptions is, of course, only possible because shareholders lack perfect information.").



above,<sup>204</sup> which causes people to avoid current losses over future losses of equal expected value.<sup>205</sup> Many also believe the market for corporate control, driven by shareholder desire for immediate gratification, forces managers and directors to magnify the importance of short-term performance.<sup>206</sup> These factors thus may lead businesses to discount excessively future financial benefits while overvaluing those in the present. To the extent that this theory is true, we can expect entities to value a long-term bargain less than a series of short-term bargains of the same aggregate length. Thus, emphasis upon short-term profits might lead lawmakers to receive higher rents from temporary rather than lasting legislation, since people seem to place greater value upon the more immediate benefits of temporary legislation.

Another reason that the use of temporary legislation is uncontroversial may be that long-term legislation carries risks. Scholars have previously identified three such risks: (1) breach of the "contract" by the politician responsible for the legislation favoring the private interest, (2) impossibility of performance due to the lawmaker's failure to keep office, and (3) an increase in the number of legislative players who must be appeased.<sup>207</sup> Scholars have offered these factors as a partial explanation for the increasing rate of tax changes; essentially, private interests prefer short-term bargains with lawmakers in order to avoid the greater risk that a long-term bargain will fail.<sup>208</sup> One may extend this theory to predict that private interests will prefer a series of temporary legislative acts rather than lasting legislation (or at least that

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<sup>204</sup> See *supra* notes 180-83 and accompanying text (explaining possible sources of the bias).

<sup>205</sup> See Henry T.C. Hu, *Risk, Time, and Fiduciary Principles in Corporate Investment*, 38 UCLA L. REV. 277, 313 (1990) (describing the belief of some courts that "myopic investors may create pressures on corporations to be correspondingly myopic in their investment behavior").

<sup>206</sup> See John C. Coffee, Jr., *Liquidity Versus Control: The Institutional Investor as Corporate Monitor*, 91 COLUM. L. REV. 1277, 1327 & nn.200-01 (1991) (arguing that shareholders often accept unfavorable proposals, like antitakeover proposals, when linked to short-term "sweeteners," such as large dividends or stock repurchases); Martin Lipton & Steven A. Rosenblum, *A New System of Corporate Governance: The Quinquennial Election of Directors*, 58 U. CHI. L. REV. 187, 210 (1991) (arguing that managers aim to satisfy the short-term goals of investors and thus underinvest in capital expenditures, research and development, and new lines of business); cf. Hu, *supra* note 205, at 314-15, 332-49 (arguing that cognitive biases encourage overinvestment as well as underinvestment).

<sup>207</sup> See Richard L. Doernberg & Fred S. McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 MINN. L. REV. 913, 945-52 (1987) (noting that long-term taxation contracts are risky because the politician may break his promise, a lawmaker may not be in office for the requisite time period, and ancillary contracts require more players to sign onto the law).

<sup>208</sup> *Id.*

they will not resist too strongly legislators' and lobbyists' attempts to foist temporary legislation on them in order to extract greater rents).

Relatedly, actors may be wary of supporting lasting legislation for fear that its costs will outweigh their own ability to utilize long-term benefits, either because they are no longer necessary or because they become antithetical to their future priorities. Jonathan Macey has theorized that interest groups will favor narrowly tailored, private-interest-focused legislation but will not support broad constitutional rules, even where they promote rent-seeking.<sup>209</sup> This result ensues because such constitutional rules may provide short-term benefits to the interest group but may fail to provide benefits in the longer term. By lifting the Rawlsian "veil of ignorance,"<sup>210</sup> temporary provisions become more valuable to players who can be sure that they will use these paid-for benefits.

### B. *Entrenchment Issues*

A maxim in constitutional law holds that "one legislature may not bind the legislative authority of its successors"<sup>211</sup>—that is to say, legislatures may not entrench their statutes. To the extent that sunset provisions allow an earlier legislature to terminate a statute, causing the law to revert to its prior incarnation (when the legislature at that time may not wish it to terminate), sunset provisions can fairly be characterized as entrenchment mechanisms.<sup>212</sup> Yet constitutional law scholars do

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<sup>209</sup> See Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 246-47 (1986) (using examples from the airline industry to illustrate that "even special interest groups that might benefit from some specific, discrete legislative wealth transfers are likely to object to general constitutional provisions").

<sup>210</sup> See sources cited *supra* note 3.

<sup>211</sup> *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES \*84).

<sup>212</sup> Compare Eric A. Posner & Adrian Vermeule, Essay, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1676-78 (2002) (arguing that sunsets and legislative entrenchment are constitutionally indistinguishable), with Yair Listokin, *Learning Through Policy Variation*, 118 YALE L.J. 480, 536 (2008) (justifying the permissibility of sunset provisions and the impermissibility of legislative entrenchment on grounds that "sunsetting . . . enhances efficient policymaking"), and John O. McGinnis & Michael B. Rappaport, Essay, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 444 (2003) (distinguishing sunset provisions from entrenching provisions on the grounds that "[s]unset provisions raise none of the special problems of public choice, aberrational majorities, partisanship, or imperfect psychological heuristics," but noting that "an excessive use of sunset provisions might impose undue costs on future legislatures"). For a general discussion on the entrenchment prohibition, see Julian N. Eule, *Temporal Limits on the Legislative Mandate: En-*

not attack sunset provisions on these grounds even though they bind future majorities by crowding out the legislative agendas of future Congresses.<sup>213</sup> For instance, one study undertaken even prior to the dramatic increase in the use of sunset provisions concluded that temporary legislation significantly constrained the agendas of fifty-six percent of committee chairs.<sup>214</sup>

Specifically, temporary legislation may interfere with the future majority's ability to set its own agenda<sup>215</sup> in the following manner: if the current legislature passes temporary laws, then the future legislature must consider those it wishes to continue and perhaps devote some legislative resources to debating those it would like to let lapse.<sup>216</sup>

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*trenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379, 381, which argues that the prohibition against entrenching enactments relates to a "temporal delegation of authority conferred by periodic elections."

<sup>213</sup> See Gersen, *supra* note 10, at 281-82 (positing that "temporary legislation transfers the power of agenda control from the Congressional leadership in future Congresses to the current-period legislature" since "[s]tatutory expirations constrain the discretion of committee chairs by mandating that certain items be placed on the committee's agenda").

<sup>214</sup> See Christine DeGregorio, *Leadership Approaches in Congressional Committee Hearings*, 45 W. POL. Q. 971, 978 (1992) (reporting that committee chairs in the study felt that the review of expiring legislation, or the "reauthorization imperative," detracted from the time dedicated to other matters in hearings).

<sup>215</sup> Transaction costs of temporary legislation, if higher than those of lasting legislation, may also unduly burden future legislatures. It is difficult, however, to arrive at a general conclusion regarding the costs of each. There are two types of legislative transaction costs: costs incurred when the legislation is enacted, or "enactment costs," and costs arising postenactment from efforts to lobby for or against repeals or amendments, or "maintenance costs." See Gersen, *supra* note 10, at 262-66 (analyzing and comparing the different levels of enactment and maintenance costs for both temporary and permanent legislation).

Initial enactment costs for lasting and temporary legislation may be equal because both types have to meet the same procedural requirements; it is more plausible, however, that temporary legislation has lower initial enactment costs because it tends to incite less political resistance. *Id.* at 263-64. Reenactment costs are greater for temporary legislation since lasting legislation does not result in such costs at all. *Id.* at 263.

As for maintenance costs, it is easier to block repeal of legislation than to renew expiring provisions, especially on a continuous basis. *Id.* at 264. Accordingly, if renewal is the goal at sunset, then lasting legislation is less costly than temporary legislation. *Id.* at 264-65. Opponents of temporary legislation will not fight for repeal when it is far easier to block reenactment at the sunset date; this dynamic is especially true for shorter sunsets, when the opportunity to block reenactment is near and the disadvantages of keeping the legislation are few. *Id.* at 265. Accordingly, some temporary legislation will have lower maintenance costs than lasting legislation. It is therefore difficult to conclude, from a theoretical perspective, which type of legislation is less costly to produce and maintain.

<sup>216</sup> Note that this entrenchment result would also ensue if the legislature did not pass any legislation. The discussion at hand, however, is focused on the choice between lasting and temporary legislation.

If instead the current legislature had passed lasting legislation, the future legislature would need to consider seriously only those provisions it wishes to repeal or amend.

In this manner, the default result of lasting legislation is simply continued legislation. By contrast, the default result of temporary legislation is “delegislation,”<sup>217</sup> an arguably more disruptive consequence due to entrenchment concerns. This is because a sunset provision causes the law to return to its presunset state—that is, to return to the policy choices of prior “generations” of lawmakers.

It is unclear whether a future majority will wish for termination of a past majority’s policy as opposed to continuation. It is plausible that a future majority would favor the policies of the most recent generation of lawmakers over the policies of past generations. If so, the future majority would more often choose continuation over repeal. This hypothesis has some support in the law and economics literature, which theorizes that the common law trends toward efficient outcomes over time.<sup>218</sup> Some economists have applied this theory to statutory law as well.<sup>219</sup>

If a future majority indeed prefers the policies of recent generations, then sunset provisions may more deeply entrench the current majority than lasting legislation by flooding the legislative calendar with bills to reenact the expiring legislation.<sup>220</sup> Moreover, it would be reasonable to assume that temporary legislation is easier to enact because it facilitates legislative compromise.<sup>221</sup> If so, the supply of tem-

<sup>217</sup> The term “delegislation” is used here because sunseting has a valence in favor of the expiration of legislation, given the difficulty to get Congress to act. The legislation itself, however, could have any content—it could be deregulatory legislation that expires. In such a case, the expiration of a sunset provision would lead to reregulation rather than deregulation.

<sup>218</sup> See, e.g., George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65, 65 (1977) (setting forth an early claim that the common law creates efficient rules).

<sup>219</sup> See, e.g., Jürgen Backhaus, *Efficient Statute Law* (showing that statutory law, under certain circumstances, arrives at efficient outcomes), in *ESSAYS IN LAW AND ECONOMICS* 23, 25-28 (Michael Faure & Roger Van den Bergh eds., 1989).

<sup>220</sup> See Yin, *supra* note 10, at 248-52 (discussing whether sunset provisions would “giv[e] each generation a freer hand in setting its own agenda”).

<sup>221</sup> Of course, there are other means to achieve compromise. To illustrate, the estate-tax repeal could have been enacted as a lasting tax cut, with a higher exemption level, rather than as a temporary repeal. Nonetheless, the temporariness was another means by which legislators could win the median voter’s support. The political rhetoric against the “death tax” meant that even temporary repeal was preferable to a compromise on exemption levels. See GRAETZ & SHAPIRO, *supra* note 49, at 5-10, 260-61 (chronicling the events that spurred legislative action to repeal the “death tax” and analyzing why the political movement for repeal was successful).

porary legislation may increase over time, thereby further burdening the legislative calendar.

Such legislative business hence has the potential to “crowd[] out” the agenda of the future legislature.<sup>222</sup> Additionally, when the future legislature permits a law to expire, it will likely have to adopt a new law to avoid the imposition of obsolete policies of prior generations, thus further burdening the new agenda.<sup>223</sup>

Suppose that Congress enacted temporary tax legislation that repealed the estate tax only during 2010, whereas previously the exclusion amount for estates was \$1 million.<sup>224</sup> Further suppose that, close to the sunset date, December 31, 2010, a majority of Congress concluded that a \$3.5 million exclusion amount was the optimal tax. The tax, however, would revert to the original \$1 million exclusion amount if “veto gates,” or procedural obstacles to legislation, prevented amendment. In such a case, assume that the expired legislation, which eliminated the estate tax, is more desirable than the older exclusion amount of \$1 million, since a \$3.5 million exemption level effectively exempts most estates from the estate tax. Given the procedural difficulty of renewing the temporary repeal or enacting new legislation with a \$3.5 million exclusion amount, however, a sunset provision may force the reinstatement of the less desirable outcome.

Moreover, if a majority of Congress prefers the extension of the repeal, as opposed to the older law establishing an exclusion amount of \$1 million, it may find that the sunset date reduces the flexibility it has in deciding *when* to address the issue. For instance, suppose congressional members planned in 2010 to renew the repeal in the fall of that year. In the aftermath of a hypothetical terrorist attack in that year, however, further assume that Congress must also enact complex antiterrorism legislation in that time frame. Because of limited legislative resources, members of Congress may find it difficult to devote sufficient resources to both issues.

Nevertheless, it is difficult to conclude with certainty that temporary legislation impermissibly entrenches the current majority. The

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<sup>222</sup> Yin, *supra* note 10, at 251.

<sup>223</sup> *Id.* at 252.

<sup>224</sup> I abstract this hypothetical, although altered, from current events. See, e.g., I.R.C. § 2010(c) (2006) (raising the estate-tax exclusion amount, in phased-in increments, from \$1 million in 2002 to \$3.5 million in 2009). Compare Economic Growth and Tax Relief Reconciliation Act, Pub. L. No. 107-16, § 501, 115 Stat. 38, 69 (2001) (codified as amended at I.R.C. § 2210 (2006)) (repealing the estate tax in 2010), with *id.* § 901 (sunsetting such repeal after just one year, after which the estate-tax exclusion amount would return to 2000 levels).

entrenchment concerns outlined above are based upon a controversial premise—that the policy preferences of an immediately prior generation are preferable to the ones of generations ago. Even if one agrees that the common law becomes increasingly efficient, many proponents of this view have argued that statutory law is less likely to follow this course because legislators, unlike judges, are less insulated from interest groups.<sup>225</sup> Such groups tend to advocate for their own agenda rather than for the efficient outcome.<sup>226</sup>

Moreover, the prior congressional decision to sunset the laws may be said to reflect the preferences of that generation. Thus, even if the future Congress prefers the policies of the previous Congress, such policies *include* the decision to sunset a law. It may therefore be useful to draw a distinction between temporary legislation intended by the previous Congress to be temporary at the outset and legislation enacted in temporary form solely for budget purposes but intended to be permanently renewed. For example, a short-term stimulus provision, such as a tax holiday, may be less offensive from an entrenchment perspective than the continually renewed R&D credit.

Furthermore, temporary legislation may *reduce* entrenchment concerns. Lasting legislation also entrenches, to an extent, the preferences of the current majority because it is continually in effect until a future Congress expends the resources to repeal it—a costly endeavor. Relatedly, one can also see temporary legislation as decreasing the current majority's influence by creating greater risks that the legislation will be altered through the future majority's failure to reenact, a proposition made likely by the procedural difficulty in passing legislation. Temporary legislation may also provide a means by which the later Congress can pursue its own agenda.<sup>227</sup> For instance, the constant need to pass a tax-extenders bill provides the future Congress with a vehicle to which it can attach other tax items, giving members more opportunities to logroll their preferences.<sup>228</sup>

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<sup>225</sup> See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 560 (7th ed. 2007) (“Although the correlation is far from perfect, judge-made rules [i.e., common law rules] tend to be efficiency-promoting while those made by legislatures . . . tend to be efficiency-reducing.”).

<sup>226</sup> *Id.* at 560-61.

<sup>227</sup> See, e.g., Gersen, *supra* note 10, at 282 (acknowledging that insertion of sunset provisions creates “the risk that future legislatures will change the substance of legislation”).

<sup>228</sup> For example, at the beginning of 2010, Republican senators attached retroactive reenactment of expired extenders to their version of a jobs bill. See Christine Grimaldi, *Grassley to Move Delayed Tax Extenders as Alternative or Amendments to Jobs Bill*, 29 DAILY TAX REP., Feb. 16, 2010, at G-2; see also Grim & Nasiripour, *supra* note 192 (quot-

One could further argue that each generation should be freed from the obligations prioritized by prior generations and that sunset provisions effectuate that result. Congressional commitment to Social Security in the 1930s surely has limited the legislative options available to subsequent Congresses. Although this argument seems intuitively correct, in this case the alternative option—to sunset Social Security after, say, ten years—seems nonsensical. Social Security would not function as a retirement vehicle if people could not rely upon its continuance. A sunset provision would signal that the legislature was not committed to the long-term survival of the legislation, hence dooming it. It is the public's reliance interest (which is necessary to the success of the legislation), not the lack of a sunset, that creates the primary entrenching effect of this hypothetical.

Because both temporary and lasting legislation have entrenching qualities as well as countervailing features, the difficulty lies in determining when the level of entrenchment of each becomes impermissible.<sup>229</sup> Michael Klarman identifies a distinction “between today’s majority exercising sovereignty over the present in a way that unavoidably affects the future and today’s majority seeking direct control over the future in a manner that is unnecessary to implementing its complete control over the present.”<sup>230</sup> Klarman concludes that, because the “burden of inertia in repealing existing legislation is [an] unavoidable consequence of a present generation’s right to control the present,” such entrenchment is permissible.<sup>231</sup> The alternative—a requirement that all legislation be temporary—would simply favor delegislation due to inertia and procedural hurdles, continuing to entrench the current majority as discussed above.

Nonetheless, the two types of legislation may not have equal entrenching qualities. Using Klarman’s distinction, such qualities in lasting legislation appear to be more necessary to implement the current majority’s control over the present. For instance, the entrench-

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ing a senior research associate at the Tax Policy Center as stating that the annual need to reenact extenders can be a “useful political vehicle” to which to add pet projects because “[t]hese are considered must-pass bills”).

<sup>229</sup> Cf. Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. (forthcoming 2011) (manuscript at 8) (on file with author) (arguing that because entrenchment exists along “a continuum,” one must answer the more difficult question of “when should entrenchment be allowed”).

<sup>230</sup> Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 505 (1997); see also CALABRESI, *supra* note 157, at 59-65 (exploring alternative ways in which legislators can identify and remedy laws that need reworking or reconsideration).

<sup>231</sup> Klarman, *supra* note 230, at 505 n.66.

ment qualities in lasting legislation allow the government to make a credible commitment to persons who can then rely on that promise. In this manner, lasting legislation may reduce the costs of some government contracts by promoting stability.<sup>232</sup> The entrenchment features of lasting legislation also make government itself more stable by reducing volatility in the law.<sup>233</sup> Madison seemed to support this view and wrote that, as a sunset date nears, “all the rights depending on positive laws, that is, most of the rights of property . . . become absolutely defunct, and the most violent struggles ensue between the parties interested in reviving, and those interested in reforming the antecedent state of property.”<sup>234</sup>

In contrast, temporary legislation attempts no commitment whatsoever to an intended legislative outcome, other than reversion to prior law. The entrenchment features of temporary legislation, however, do provide benefits. They may allow Congress to control the transition costs of future policy changes. By ascertaining a relatively certain point at which Congress will contemplate a modification to the current legal regime, the objects of the legislation may thus better anticipate the timing of such change.<sup>235</sup> Here again, though, we might distinguish between legislation intended to be truly temporary and legislation enacted in temporary form solely for budget purposes. The latter category presumably does not assist Congress in dampening transition costs since Congress does not intend the legislation to be temporary.

Additionally, the latter category more likely sustains excessive interest-group influence across time since it is not responding to a particular event or emergency around which interest groups can coa-

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<sup>232</sup> See Posner & Vermeule, *supra* note 212, at 1670-73 (discussing the advantages of legislation that results in entrenchment).

<sup>233</sup> *Id.* at 1672.

<sup>234</sup> *Id.* at 1671 (quoting Letter from James Madison to Thomas Jefferson (Feb. 4, 1790), reprinted in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 230, 232 (Marvin Meyers ed., 1973)).

<sup>235</sup> See Gersen, *supra* note 10, at 275 n.107 (“Because sunseting tax provisions do not give rise to the same expectations of permanence, they may mitigate problems associated with transition policy in the tax realm.”). See generally DANIEL SHAVIRO, *WHEN RULES CHANGE* (2000) (combining economics and political science to devise a working framework under which transition policy can best be effectuated in the federal income tax system); Michael J. Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. PA. L. REV. 47 (1977) (exploring how the effective dates of changes in income tax laws impact wealth, and arguing against grandfathered effective dates); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986) (arguing for an efficiency model of legal transitions and contending that the market, not the government, should rectify losses incurred by a party as a result of changes in public policy).



lesce. This problem is compounded by the fact that benefits related to temporary legislation's ability to signal policy change may also accrue problematically to interest groups—at the expense of the public. A primary fear of entrenchment is that a minority group may successfully influence legislation into the future, thereby burdening unorganized majorities.<sup>236</sup> Lasting legislation, however, protects against this prospect to some degree. By making it difficult to identify precisely future beneficiaries and harmed parties, lasting legislation places interest groups in a state akin to the original position, behind the Rawlsian “veil of ignorance.”<sup>237</sup> In contrast, because temporary legislation signals when the policy will change, the ability of private parties to identify the winners and losers will heighten, thus increasing the supply of private-regarding legislation. Moreover, the use of temporary legislation is elective in the sense that current lawmakers and interest groups can choose which legislation has a sunset as well as the length of the sunset period.

To summarize, it is clear that both temporary and lasting legislation produce entrenchment issues. Yet temporary legislation, especially when enacted solely for budget reasons rather than in response to an emergency or crisis, contains entrenchment features perhaps more troubling in nature because such legislation tends to lack the benefits that might otherwise justify such entrenchment.

### C. *Planning Disruptions*

Finally, temporary legislation also complicates planning activities. First, temporary legislation indicates that Congress is not committed to the durability of a policy. Lasting legislation, on the other hand, may function as a precommitment device, such as in our Social Security example discussed above,<sup>238</sup> by binding legislators to future obligations. This ability to precommit is vital to planning the organization of a complex economy and culture, such as our own, throughout a number of years. The coordination of broad social policies—such as social security, health care, and employment—across the economy requires a degree of stability, which varying sunset provisions could disrupt. For instance, it would be difficult to have planned health care reform

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<sup>236</sup> See Posner & Vermeule, *supra* note 212, at 1690 (discussing one scholar's concerns that when “tax policy was temporarily in the hands of powerful pro-business interest groups,” those interest groups had the opportunity to create laws interfering with “the power of future majorities” not yet organized).

<sup>237</sup> See sources cited *supra* note 3.

<sup>238</sup> See *supra* Section IV.B.

without sensing our future commitments to social security. Temporary legislation may therefore stifle legislative ability to engage in long-term planning.

In addition, temporary legislation disrupts the planning activities of those it impacts. Although citizens should always expect some turmoil in the law, unlike repeal or amendment of laws, sunset provisions do not require affirmative action by Congress for the law to change. They thus decrease the durability of the law and increase compliance burdens.<sup>239</sup> For instance, they may incentivize taxpayers to obtain costly tax advice to shift income and deductions between years in avoidance of a sunset date.<sup>240</sup> Temporary provisions also distort investment decisions.<sup>241</sup> Indeed, certain publicly traded corporations identify sunseting tax provisions as material risks to their business. In its annual report to investors, for instance, General Electric disclosed the following warning in the risk factor section of its filing:

[A beneficial tax provision] is scheduled to expire at the end of 2008, has been scheduled to expire on four previous occasions, and each time it has been extended by Congress. If this provision is not extended, the current U.S. tax imposed on active financial services income earned outside the United States would increase, making it more difficult for U.S. financial services companies to compete in global markets.<sup>242</sup>

Some have suggested that, to ameliorate this problem, Congress could vote early to extend temporary legislation, thereby easing the transition for taxpayers and other affected parties.<sup>243</sup> Unfortunately,

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<sup>239</sup> Of course, some areas of law, like taxation, experience immense change even when enacted as lasting legislation. See Yin, *supra* note 10, at 232-33 (discussing the numerous changes to tax legislation since the 1950s); see also Doernberg & McChesney, *supra* note 207, at 923-24 (explaining the accelerating rate of tax reform and change). That is not to say, however, that such legislative change would be no greater with temporary legislation.

<sup>240</sup> NAT'L TAXPAYER ADVOCATE, *supra* note 36, at 405. For instance, concern about the continuation of the AMT "patch" has caused tax advisors to recommend bunching certain expenditures into a year in which the patch is certain to apply, thus ensuring their deductibility. *Id.*

<sup>241</sup> See Edward Kleinbard, *The Congress Within the Congress: How Tax Expenditures Distort Our Budget and Our Political Processes*, TAX NOTES TODAY, May 17, 2009, available at LEXIS, 2009 TNT 94-40 (discussing the underinvestment in alternative energy due to the temporariness of the tax subsidies supporting such energy initiatives). It is unclear whether temporary provisions uniformly increase or decrease investment. See Yin, *supra* note 9, at 244-48. However, none dispute that they distort investment. Of course, both over- and underinvestment will result in inefficiencies.

<sup>242</sup> GENERAL ELECTRIC CO., GE ANNUAL REPORT 2007, at 81 (2007).

<sup>243</sup> See, e.g., Yin, *supra* note 10, at 233 ("By taking explicit, 'early' action on a future expiration, Congress would . . . send an especially strong message of an intention for stability in the law.").

Congress already has tremendous difficulty with renewing the extenders and thereby cannot ensure seamless renewal on time, let alone early.<sup>244</sup> Often Congress passes the extenders, such as the R&D tax credit, late so that they have retroactive effective dates.<sup>245</sup> Such retroactive renewals create heavy administrative costs to taxpayers and may even jeopardize financing arrangements.<sup>246</sup> Furthermore, taxpayers may decide to increase recordkeeping in the hopes that a lapsed temporary provision will be retroactively renewed.<sup>247</sup> One should consider such planning difficulties in the assessment of temporary legislation.

## V. RECOMMENDATION

In light of the aforementioned critiques of temporary legislation, lasting legislation should be the statutory norm. Specifically, this Article aims to attune legislative actors to the problems of temporary legislation so that its passage is cautiously informed and carefully considered. This Article therefore recommends a policy presumption against temporary legislation and in favor of lasting legislation. Recognizing that a legislative rule formalizing such a presumption would itself be endogenous and hence vulnerable to intense congressional pressures to revise any such statement (due to pressures to spend), this Article instead seeks to change underlying congressional norms.<sup>248</sup> It challenges favorable accounts of temporary legislation by construct-

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<sup>244</sup> See Betty M. Wilson, *TEI Testimony at Finance Committee Hearing on Tax Code Complexity*, TAX NOTES TODAY, Apr. 26, 2001, available at LEXIS, 2001 TNT 82-58 (labeling extenders as “on-again, off again” provisions).

<sup>245</sup> See, e.g., David L. Cameron, *Research Tax Credit: Statutory Construction, Regulatory Interpretation and Policy Incoherence*, 9 COMP. L. REV. & TECH. J. 63, 66 n.7 (2004) (listing the legislative history of the R&D tax credit).

<sup>246</sup> See NAT’L TAXPAYER ADVOCATE, *supra* note 36, at 405 (detailing how late-year tax-law changes burden both public and private actors since the IRS may not have time to revise its forms, tax preparation software companies may not be able to update their products, and taxpayers may not be able to adjust their activities to take advantage of tax benefits).

<sup>247</sup> For instance, the R&D tax credit does not apply to expenses incurred between June 30, 1995, and July 1, 1996, because the legislature did not retroactively extend the credit. Cameron, *supra* note 245, at 66 n.7.

<sup>248</sup> In so doing, this Article does not reject the ability of legislative rules to register and reinforce norms but instead posits that due to their endogeneity, legislative rules must be supported by such norms to avoid instability and gamesmanship. One could argue, for example, that Congress enacts legislative rules as statutes, rather than as simple resolutions in each House, as a symbolic indication of strong congressional support of the behavioral limits therein.

ing a model of the legislative process, thereby informing the beliefs of lawmakers and their constituents.<sup>249</sup>

The policy presumption against temporary legislation will be stronger as applied to tax cuts. Sunset provisions enacted in the tax legislative context are typically meant to address revenue concerns rather than to impart legislative flexibility.<sup>250</sup> Hence, temporary tax-relief provisions more readily produce the pathologies in the political process outlined above. Such sunset provisions, lacking a traditional policy justification, do not have a natural end date. This attribute creates substantial uncertainty regarding the sunset date and therefore causes planning disruptions. Lawmakers and lobbyists will also more easily pursue and exploit the continued reenactment of such temporary legislation as a result of the disconnect between the sunset date and any factor external to the budget process, which would otherwise limit the length of renewal. Moreover, because such sunset provisions are not enacted for legislative review or in response to a particular event, it is more likely that the future Congress will not see its role as meaningful at the sunset date and that the enacting Congress will not reap the benefits that entrenchment offers. Nonetheless, the later Congress will expend its precious resources reenacting the legislation, thereby supplanting its own legislative agenda.

At times, however, it may be necessary to employ temporary legislation. In crisis situations,<sup>251</sup> for example, temporary legislation will likely help to build coalitions quickly, to provide a check on a legislature in dealing with hurriedly drafted and enacted legislation, and to return automatically the statutory scheme to the status quo once the emergency has dissipated.<sup>252</sup> Additionally, when Congress intends to legislate in an experimental manner, temporary legislation may be

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<sup>249</sup> Therefore, implicit within this Article's recommendation is the view that the preferences of congressional members encompass their own ideologies and those of their constituents, in addition to the goal of accumulating rents. See *supra* note 152 and accompanying text (positing that public-choice theory must consider the ideological preferences of lawmakers).

<sup>250</sup> Congress makes some tax cuts temporary to respond to emergencies. However, these are vastly overshadowed by tax cuts made temporary for other reasons, such as budgetary or interest-group pressures. See STAFF OF JOINT COMM. ON TAXATION, *supra* note 6, at 2-16 (listing 179 expiring general tax provisions and only 22 expiring disaster-relief tax provisions).

<sup>251</sup> Crisis situations may be natural or manmade, thus including earthquakes, financial downturns, and terrorist acts.

<sup>252</sup> See Fagan, *supra* note 10, at 32-40 (describing the leniency that is afforded to the enactment of temporary, emergency legislation throughout American history).

appropriate.<sup>253</sup> In these instances, the presumption against temporary legislation should be relaxed.<sup>254</sup>

In dealing with a crisis situation, a legislature is more likely to identify better the appropriate breadth and length of the sunset by keying its terms to the emergency event. Emergency sunset provisions are less likely to entrench the legislature since there is less need to renew or revisit the issue—and thus less concern about the crowding out of future policy items. Additionally, a continued coalescence of interest groups will be more difficult to sustain once the emergency passes. Finally, a defined, precipitating factor will create more certainty regarding the sunset date and will therefore ease planning considerations. Nonetheless, the story of the tax extenders should serve as a cautionary tale. Although legitimate pressures may produce temporary legislation, more nefarious forces may lobby successfully for its continuance.<sup>255</sup> Without meaningful review, such legislation, like a phoenix, will be renewed perpetually from the ashes.

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<sup>253</sup> An alternative way of categorizing acceptable uses of temporary legislation is when lawmakers originally intend the legislation to be temporary, as opposed to permanent. See *supra* notes 225-27 and accompanying text.

<sup>254</sup> An example of when Congress used temporary legislation in response to a crisis is the antiterrorist legislation known as the USA PATRIOT Act, passed in response to the attacks on the United States in September 2001, with the goal of expanding the investigatory power of law enforcement, the discretion of authorities to detain and deport suspected terrorists, and the ability of the Treasury Department to regulate suspicious financial transactions. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 8, 15, 18, 22, 31, 42, 49, and 50 U.S.C.). Many of its provisions were subject to a four-year sunset period, *id.* § 224(a), 115 Stat. at 295, because of concerns over civil liberties threatened by the Act.

<sup>255</sup> Perhaps avoiding such failures in the use of sunset provisions, Bruce Ackerman has proposed the adoption of an emergency statute, termed an “emergency constitution,” in which Congress bestows upon the executive the unilateral power to declare an emergency. Bruce Ackerman, Essay, *The Emergency Constitution*, 113 *YALE L.J.* 1029, 1047-49 (2004). This delegation would expire, however, within two weeks of the emergency, unless a majority vote in both houses permits otherwise. *Id.* Reauthorization would then require escalating supermajority votes every two months. *Id.* at 1049. As a framework statute, this type of legislation prescribing sunset provisions would likely be more successful than adding sunset provisions to specific types of legislation at the height of the crisis. *Id.* at 1048-49. Because the legislation is procedural and anticipatory in nature, Congress could adopt it behind a quasi-veil of ignorance, thus reducing the opportunities to sunset with the purpose of extracting rents or other self-dealing. *Id.* at 1048. However, a procedural sunset provision may be overly broad, encompassing inappropriate situations. Moreover, escalating supermajority requirements may require too many legislative resources upon each reauthorization.

## CONCLUSION

In summary, this Article has argued that temporary legislation lacks many of the benefits that recent scholarship claims. Proponents of temporary legislation have contended that it enhances fiscal responsibility because its official-cost estimates reflect the full cost of such legislation, unlike official-cost estimates of lasting legislation, which do not reflect costs beyond the budget window. However, many factors—the endogeneity of the budget process that leads to shifting baselines, PAYGO exceptions, the many costs that temporary legislation engenders beyond the budget window, and the inability of lawmakers to consider the full cost of all types of legislation—thwart the alleged restraining effect of temporary legislation. What is more, sunset provisions tend not to provide lawmakers with enhanced information or flexibility: *ex ante*, lawmakers will likely be unable to determine the appropriateness of the sunset, as well its proper scope and length.

Finally, in addition to lacking the advantages that other scholars assert, sunset provisions have deleterious effects on the public and private sectors. Specifically, their use increases the offer and extraction of rents from interest groups, entrenches current majoritarian preferences, and complicates the planning activities of those affected. For these reasons, this Article advances a policy presumption against temporary legislation and in favor of lasting legislation. Doing so necessarily places trust in most cases (at least compared with the alternative of temporary legislation) in the constitutional process by which our legislature can amend or repeal a law in a deliberative manner. Heretofore, this architecture has ensured a statutory scheme that has adapted over time to remarkably changing environs. It has created lasting, yet living, legislation.