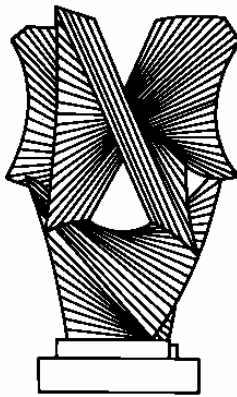


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Temporary Legislation

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*Jacob E. Gersen**

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INTRODUCTION

An overwhelming portion of legislation enacted by the United States Congress is actually what might be termed *temporary legislation*--statutes containing clauses limiting the duration of their own validity. In modern legislation, these provisions are often termed "sunset" clauses, but for many years they were simply known as "duration" clauses and virtually ignored by courts and commentators alike. Even scholars of other arcane elements of legislative process tend to skip duration clauses as legally irrelevant, substantively unimportant, or both.

In form, temporary legislation merely sets a date on which an agency, regulation, or statutory scheme will terminate unless affirmative action satisfying the constitutional requirements of bicameralism and presentment is taken by the legislature.¹ In function however, temporary legislation differs systematically from permanent legislation in significant ways that implicate core problems of institutional design, inter-temporal allocation of political control within the legislature, the ability of concentrated interest both to lobby for rents and to have rents extracted from them by legislators, the production and aggregation of information and expertise in the policy-making process, and the transaction costs of enacting and maintaining public policy. Temporary and permanent laws differ only in their respective default rules; but given the magnitude of transaction costs in legislatures, the import of that difference is remarkable. Both because temporary legislation constitutes so significant a portion of the overall legislative docket and because of the far-reaching impact on law and politics, more extensive and nuanced analysis of temporary legislation is critical. This Article represents the first systematic attempt to analyze the historical, legal, and political implications of temporary legislation.

Temporary legislation was a core legislative tool of both colonial legislatures and the early Congresses of the United States. Even a casual survey of historical statutes reveals a steady diet of temporary legislation in contexts as varied as the legislative veto, bankruptcy law, terrorism policy, and the independent counsel statute, to name only a few prominent examples. Against this historical backdrop, it is something of a puzzle that we have so few positive accounts of why legislators do or even might rely on temporary legislation. To fill this void, I emphasize the distributive and informational advantages of using temporary rather than permanent enactments; that is, I suggest the answer is part politics and part policy. For example, temporary legislation advantages the Legislature relative to the Executive, and allocates agenda control and decision-making authority between current and future period majorities in Congress. Yet, these broad effects are not necessarily uniform, and legislative judgments about when to use temporary measures are inevitably products of ambiguous estimates of political dynamics in the future. From an informational perspective, temporary legislation provides concrete advantages over its permanent cousin by specifying windows of opportunity for policy-makers to incorporate a greater quantity and quality of information into legislative judgments. By redistributing the decision costs of producing legislation, temporary measures also facilitate experimentation and adjustment in public policy.

These last benefits of temporary legislation suggest a significant potential for broader use of temporary measures in policy contexts dominated by uncertainty. Because, temporary legislation reduces background uncertainty and mitigates certain forms of cognitive bias, it is likely to provide far more advantages than drawbacks as a legislative response to newly recognized risks. The legislative response to domestic terrorism risk is perhaps the most

¹ U.S. Const, art I, sec 7.

prominent recent example, and therefore provides a useful case study as to both the benefits and pitfalls of temporary measures in the domain of new risk legislation.

Despite the somewhat controversial status of sunset legislation in the United States during the 1970's and early 1980's, for most of American history, temporary legislation has been a readily accepted and even embraced legislative tool.² More recently however, controversial temporary statutes have given temporary legislation something of a black-eye in the media,³ but these high profile pieces of legislation are a comparatively small part of the temporary legislation story. On balance, the historical, analytic, and empirical evidence in this Article counsels that temporary legislation has a potential political dark-side, but within certain well-specified policy domains, temporary legislation should be embraced as the rule rather eschewed even as an exception.

The Article proceeds as follows. Part I provides a historical sketch of temporary legislation, emphasizing the significant heterogeneity in the use of temporary measures. Part II turns from description to positive analysis by focusing on the political and informational impact of legislation that expires automatically. Part III turns from theory to empirics, using legislation enacted in the aftermath of September 11, as a case study in the use of temporary measures to respond to newly recognized risks. A brief conclusion follows.

I. A HISTORY OF TEMPORARY LEGISLATION

Most discussions of temporary legislation treat it as a relatively rare and modern innovation in lawmaking.⁴ The reality is that temporary legislation has an extensive historical pedigree both in the United State and internationally. While not providing a comprehensive historical survey of temporary legislation, this illustrates some of the varied uses of temporary legislation. On its own, the historical tradition proves little about the normative

² In recent literature temporary legislation is generally referenced as the constitutionally unproblematic cousin of entrenched legislation. See John O. McGinnis and Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385 (2003) (arguing certain forms of legislative entrenchment are constitutionally troubling); Eric Posner and Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L. J. 1665 (2002) (arguing that both sunsets and legislative entrenchment are constitutionally unproblematic); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L. J. 491 (1997).

³ For example, both the Bush administration's tax cuts and the USA Patriot Act were temporary measures that produced extensive controversy, both for their substantive provisions and for their temporary nature. The temporary tax cuts were extended, but not made permanent. Debate on renewal of the USA Patriot Act was particularly intense. After a short-term renewal of three months in late 2005, most of the provisions were finally renewed in March 2007. See USA Patriot Improvement and Reauthorization Act of 2005 (signed by President on March 9, 2005). Roughly contemporaneously, temporary legislation banning certain assault weapons was allowed to sunset. Section 110105 of the Violent Crime Control and Law Enforcement Act of 1994, was a sunset provision terminating provisions ten years after the initial enactment. See Pub-L 103-322, 108 Stat. 1796, 103d Cong., 2d Sess. (2004). Despite proposals to amend the sunset provision and make the legislation permanent, the statute was allowed to lapse. See A bill to reauthorize the assault weapons ban, and other purposes, H.R. 2038, 108th Cong., 1st Sess. (May 8, 2003).

⁴ Consider John C. Roberts and Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773, 1808 (2003) ("Sunset provisions that give legislation a definite life span usually reflect either a slim majority on a controversial measure, or a solution to a problem that legislators are not sure will work."); GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 59 (Harvard 1982) ("Some statutes recently passed have had expiration dates written into them. But that is still an occasional phenomenon."); STEPHEN G. BREYER, REGULATION AND ITS REFORM 365 (Harvard 1982) ("Congress has occasionally inserted sunset provisions into laws creating new regulatory agencies, such as the Federal Energy Administration, which was to have expired on June 30, 1976." (emphasis added)).

desirability of temporary legislation. However, historical evidence does make two contributions to the analysis. First, it helps undermine the notion that temporary legislation is a new, peculiar, or particularly suspect legislative tool. Throughout American history temporary legislation has played an important role in the legislative docket, and if anything, historical documents suggest a bias in favor of temporary legislation. Second, the history of temporary legislation provides a basic descriptive backdrop for positive analysis. Even an impressionistic reading of the historical evidence demonstrates that legislators rely on temporary measures for diverse reasons, ranging from pragmatic to institutional and strategic. Thus, the ultimate questions become why legislators rely on temporary legislation in certain time periods and policy contexts and how those decisions ought to be normatively evaluated.

A. Founding Era

Temporary legislation was utilized and actively discussed both before, during, and after the founding era. In the Federalist Papers “temporary” political concerns tend to be treated pejoratively—like factions or majoritarian passions.⁵ However, temporary legislation was a regular component of the legislative process and certainly not inherently objectionable to most prominent founders. Indeed, on one view, temporary legislation is a sensible cure for temporary passions. The most extensive treatment of temporary legislation in the Federalist Papers concerns Article I, section 8, clause 12 of the U.S. Constitution which restricts appropriations of funds for the military to two year periods.⁶ In Federalist 26, Hamilton addressed the proposed restriction,⁷ making two primary arguments in favor of the restriction, both turning on the role of the status quo in the legislative process. First, Hamilton argued that temporary legislation produces what might be termed deliberative benefits.

The legislature of the United States will be obliged, by this provision, once at least in every two years, to deliberate upon the propriety of keeping a military force on foot;

⁵ For example, Madison argues in Federalist 10 that the republican form of government is a partial shield against the willingness of citizens to sacrifice justice on the basis of “temporary” or “partial” views. Similarly, in number 27, Madison draws a parallel between factions and “temporary views.” Speaking of representatives, Madison notes that

they will be less apt to be tainted by the spirit of faction, and more out of the reach of those occasional ill-humors, or *temporary prejudices* and propensities, which, in smaller societies, frequently contaminate the public councils, beget injustice and oppression of a part of the community, and engender schemes which, though they gratify a *momentary* inclination or desire, terminate in general distress, dissatisfaction, and disgust.

Federalist 27 (Madison), THE FEDERALIST PAPERS 174, 175 (Clinton Rossiter, ed.) (Mentor 1961). Hamilton's concluding remarks in the Federalist echo Madison's negative vision of temporary views and temporary factions.

No partial motive, no particular interest, no pride of opinion, *no temporary passion or prejudice*, will justify to himself, to his country, or to his posterity, an improper election of the part he is to act. Let him beware of an obstinate adherence to party.

Federalist 85 (Hamilton), THE FEDERALIST PAPERS, at 520 (Clinton Rossiter, ed.).

⁶ U.S. Const., art. I, sec. 8, cl. 12: (“To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years”).

⁷ Federalist 26 (Hamilton), THE FEDERALIST at 168. See also Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 541 (2003) (discussing Founders views of the restriction to two year appropriations of military spending).

to come to a new resolution on the point; and to declare their sense of the matter, by a formal vote in the face of their constituents.⁸

Hamilton urged that the appropriations sunset would force legislators to reconsider the need for a standing military, and incorporate information about changing circumstances into legislative deliberations. Of course, the logic of deliberative benefits extends well beyond the context of military appropriations and constitutes one more general justification for temporary legislation. Second, and related, Hamilton sought to link the legislative procedures entailed in the production of temporary legislation to traditional democratic safeguards.⁹

As often as the question comes forward, the public attention will be roused and attracted to the subject, by the party in opposition; and if the majority should be really disposed to exceed the proper limits, the community will be warned of the danger, and will have an opportunity of taking measures to guard against it.¹⁰

Because temporary legislation terminates at the sunset without some affirmative legislation action, continuing a policy enacted as temporary legislation requires multiple stages of legislative process in subsequent time periods. In Hamilton's view, these subsequent stages of deliberation and voting provide additional opportunities for opposition groups to sound public alarms against unwise policy. Temporary legislation provides both an opportunity to incorporate new information into the policy process and a check against the continuation of unwise policy, even absent new information.

Throughout Federalist 26, Hamilton highlights the powerful role of the status quo in legislative process, drawing an implicit distinction between two substantively identical policies, one produced by a series of temporary measures and the other by a single permanent enactment.¹¹ For example, a single permanent statute providing for a ten percent annual increase in military spending produces the same level of spending as a sequence of temporary one year statutes each increasing spending by ten percent. However, Hamilton's intuition seems to be that coalitions creating policy contrary to the public interest will be more difficult to sustain over time than a one-time coalition creating a permanent statute. The assumption is perfectly plausible, but by no means obviously correct, either theoretically or empirically. One puzzle is why Hamilton thinks a future legislature is so unlikely to repeal legislation that is contrary to the public interest. Hamilton is correct that the repeal of permanent legislation is more difficult or costly than allowing legislation to sunset. However, Hamilton seems concerned primarily with legislative measures that are clearly inconsistent with the public interest. For this class of legislation, it is not clear that repeal is particularly unlikely. Moreover, temporary legislation may be easier to enact than permanent legislation and/or produce less intensive review and deliberation during the renewal debates. If so, temporary legislation could theoretically be more likely to produce ongoing legislation that contradicts the public interest. Nonetheless, Hamilton's view constitutes an important early fixed point in the debate over temporary legislation, linking the default rule of policy

⁸ Federalist 26 (Hamilton), THE FEDERALIST PAPERS at 168, 171.

⁹ For a helpful discussion of the information-producing and democracy-triggering features of congressional procedures, see Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. Chi. L. Rev. 361 (2004).

¹⁰ Federalist 26 (Hamilton), THE FEDERALIST PAPERS at 172.

¹¹ Federalist 26 (Hamilton), THE FEDERALIST PAPERS at 172 (“An army, so large as seriously to menace those liberties, could only be formed by progressive augmentations; which would suppose, not merely a temporary combination between the legislature and executive, but a continued conspiracy for a series of time.”).

termination to both information in legislative deliberation and democratic safeguards.¹² On this view, the democratic pedigree of temporary legislation is at least as strong as permanent legislation, and assuming Hamilton is correct, potentially even stronger.

Outside the constitutional context, temporary legislation was utilized and apparently readily accepted in colonial legislatures and the first several Congresses. By the mid 1770's, most colonial legislatures had standing committees to report on the renewal of temporary laws.¹³ Indeed, during the Constitutional Convention, Madison argued that laws of temporary duration would become the norm in certain circumstances.¹⁴ In the first Congress, one debate centered on whether the Impost Act should contain a sunset provision, with Madison's proposal to include a sunset ultimately winning.¹⁵ The terms of the debate trace many of the precise issues discussed later in the paper. While some members of Congress thought the sunset unnecessary because a future Congress could always repeal the statute, Madison argued that a revenue law of unlimited duration offended the notion of Republicanism, and Elbridge Gerry argued that an act lacking a sunset would allow the President or a single House to block a repeal.¹⁶ At least one representative, Thomas Tudor Tucker of South Carolina, thought that virtually all statutes should contain sunsets.¹⁷ Soon thereafter, in President Washington's address to Congress in 1792, he noted simply that "[v]arious temporary laws will expire during the present Session. Among these, that which regulates trade and intercourse with the Indian Tribes, will merit particular notice."¹⁸ Perhaps more controversially, the Sedition Act of 1798 is another example of early temporary legislation.¹⁹ Of course, these assorted references do not suggest that temporary legislation

¹² A second, somewhat less important discussion of temporary law in the Federalist Papers is contained in the responses of both Hamilton and Madison to concerns that the number of Representatives in the House would be too few in number. They emphasized that the initial allocation was merely a temporary one that would be adjusted as populations grew. As Madison notes in Federalist 58, "The number which is to prevail in the first instance is declared to be temporary. Its duration is limited to the short term of three years." THE FEDERALIST PAPERS at 356 (Clinton Rossiter, ed.). In this sense, the initial allocation of Representatives was something akin to a temporary gap-filling measure. See Federalist 55 (Hamilton or Madison), THE FEDERALIST PAPERS at 341, 343 ("The true question to be decided then is, whether the smallness of the number, as a temporary regulation, be dangerous to the public liberty?"). However, both passages suggest that temporary legislation was commonly accepted.

¹³ David M. Gold, *Rites of Passage: The Evolution of the Legislative Process in Ohio, 1799-1937*, 30 CAP. U. L. REV. 631, 631-32 (2002) (regularly recurring select committees existed "to report on the renewal of temporary laws"). For overviews of early legislative process in the United States, see Donald S. Lutz, *The Colonial and Early State Legislative Process*, in INVENTING CONGRESS: ORIGINS AND ESTABLISHMENT OF THE FIRST FEDERAL CONGRESS 49 (Kenneth R. Bowling & Donald R. Kennon, eds., (1999)); Joseph Cooper & Cheryl D. Young, *Bill Introduction in the Nineteenth Century: A Study of Institutional Change*, 14 LEGIS. STUD. Q. 67, 69 (1989) (evolution of bill introduction in House); RALPH VOLNEY HARLOW, THE HISTORY OF LEGISLATIVE METHODS IN THE PERIOD BEFORE 1825 (1917).

¹⁴ See 2 M. Farrand, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 587 (1911). See also *INS v Chadha*, 462 U.S. 919, 954 n. 18 (1983) (discussing Madison's suggestion during 1787 convention that laws of limited duration requiring renewal rather than repeal would avoid problem of presidential veto of Congressional repeals); Robert W. Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569, 587-88 (1953) (discussing brief debate during Constitutional Convention on the effect of Presidential veto on the repeal of statutes).

¹⁵ See Nelson, 70 U. CHI. L. REV. at 540.

¹⁶ Nelson, 70 U. CHI. L. REV. at 541.

¹⁷ See Nelson, 70 U. CHI. L. REV. at 541 (discussing Tucker's views).

¹⁸ President George Washington, Fourth Annual Message (Nov. 6, 1792), available at <http://teachingamericanhistory.org>.

¹⁹ Act of July 14, 1798, § 4, 1 Stat. 596 (1798) (law to remain valid through March 3, 1801).

was necessarily the norm in early American legislatures, but they do clearly show that temporary legislation was a readily utilized tool of the early Congresses, whose utilization was consonant with the views of prominent founders.

Indeed, going far beyond acceptance of temporary statutes, at one point Thomas Jefferson crafted a normative argument in favor of a temporary or intragenerational constitution.²⁰ In an exchange of letters between Thomas Jefferson and James Madison, the two confronted the desirability of an entire constitution that would sunset at the turn of each generation.²¹ Jefferson argued that no generation had the normative authority to bind another generation to its constitution or laws.

On similar ground it may be proved that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation.... Every constitution, then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force and not of right.²²

On its own terms, Jefferson's defense of a temporary constitution extends beyond the constitutional context to any "perpetual law." Madison's response was mainly a pragmatic one, suggesting first that it is difficult to identify the point at which one generation ends and another begins, and second that negotiation and lobbying in the transition period would bring instability and factionalism. In essence, the powerful benefits of *continuity* and *stability* would be sacrificed by sunseting constitutional or legal provisions.²³ On the former issue, Madison seems clearly correct. On the second issue, Madison is far more vulnerable as discussed below. For current purposes however, the existence of the debate is as important as its ultimate resolution. The idea of temporary law, even of constitutional magnitude was clearly part of the founders' constitutional and legislative vocabulary.²⁴

B. Federal, State, and International Applications

Beyond the context of the founding, temporary legislation has been used extensively by both Federal and state legislatures. To name only a handful of applications, temporary

²⁰ See *Letter from James Madison to Thomas Jefferson (Feb. 4, 1790)*, in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 230, 232 (Marvin Meyers, ed.) (1973); see also Michael Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 163 n. 90 (1998) (discussing Jefferson's notion of intra-generational constitution and continuity); ELAINE SPITZ, MAJORITY RULE 92-93 (1984) (same); CALABRESI, COMMON LAW FOR THE AGE OF STATUTES at 59 ("The American progenitor of sunset laws was no less a titan than Thomas Jefferson, who argued that all statutes and all constitutions should last no longer than nineteen years."). Judge Calabresi also suggests that Justice Hugo Black was a proponent of some sunset laws. *Id.* at 60.

²¹ See *Letter from Thomas Jefferson to James Madison (Sept. 6, 1789)*, reprinted in 5 THE WRITINGS OF THOMAS JEFFERSON 115-16, 121-22 (P. Ford ed.) (1895); *Letter from James Madison to Thomas Jefferson (Feb. 4, 1790)*, in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 230, 232 (Marvin Meyers, ed.) (1973); see also Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L. J. 491 (1997); Klarman, *The Puzzling Resistance to Political Process Theory* 77 VA. L. REV. 747, 780 n. 144 (1991); Posner and Vermeule, 111 YALE L. J. at 1671 (discussing Madison's view); Klarman, 93 NW. U. L. REV. at 163 (discussing intragenerational constitution and problem of continuity).

²² *Letter from Thomas Jefferson to James Madison (Sept. 6, 1789)*, reprinted in 5 THE WRITINGS OF THOMAS JEFFERSON 115-16, 121-22 (P. Ford ed.) (1895); *Letter from James Madison to Thomas Jefferson (Feb. 4, 1790)*, in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 230, 232 (Marvin Meyers, ed.) (1973) Nineteen years was the assumed length of a generation.

²³ See CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES at 59-60.

²⁴ For a related discussion, see Philip Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 263 (1989) (discussing view of framers that constitution contrasts to "temporary laws").

legislation has been used in immigration policy,²⁵ taxation of life insurance,²⁶ portions of the Voting Rights Act,²⁷ agricultural policy,²⁸ judicial rules,²⁹ international trade policy,³⁰ internet taxation,³¹ Congressional responses to judicial decisions,³² bankruptcy law,³³ energy policy,³⁴ telecommunications policy,³⁵ government reform,³⁶ and tax policy.³⁷ A quick search through

²⁵ See Henry Pratt Fairchild, *The Immigration Law of 1924*, 38 Q. J. ECON. 653 (1924) (discussing use of temporary legislation in immigration policy enacted in 1921 and reenacted with virtually no changes to continue through 1924 and giving rise to “permanent” legislation in 1924) (temporary measure initially enacted and extended gave rise to Immigration Act of 1924 whose production was accompanied by extensive legislative debate and consideration); see also Howard Chang, *Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 U. PA. L. REV. 1147, 1151-52, n. 18 (1997) (discussing temporary quota acts). See also H.R. Rep. 87-1086 on Pub. L. 87-301, Immigration and Nationality Act--Amendments, 87th Cong., 1st Sess. (Aug. 30, 1961) (proposal to make permanent a temporary law (section 4 of Public Law 85-316, as amended, 8 U.S.C. § 1205), relating to nonquota immigrant status for eligible orphans”).

²⁶ See George E. Lent, *A More Permanent Formula for the Taxation of Insurance*, 27 J. INS. 63, 64 (1960) (discussing use of temporary legislation or stop-gap measures in the 1950's for taxation of life insurance).

²⁷ See Jennifer Denise Rogers, *Miller v. Johnson: The Supreme Court “Remaps” Shaw v. Reno*, 56 LA. L. REV. 981, 986 (1996) (portions of Voting Rights Act enacted as temporary legislation and other sections permanent).

²⁸ See Theodore Saloutos, *New Deal Agricultural Policy: An Evaluation*, 61 J. AM. HIST. 394, 403, (1974) (view that Agricultural Adjustment Act was temporary legislation to deal with temporary market conditions); J. Roland Pennock, “Responsible Government,” *Separated Powers, and Special Interests: Agricultural Subsidies in Britain and America*, 56 AM. POL. SCI. REV. 621, 625-26 (1962) (permanent legislation---Agricultural Adjustment Act of 1938---suspended during war and thereafter in favor of a series of temporary laws and extenders). See also Pub. L. 87-521, Soil Bank---Hay---Conservation Reserve Acreage, H.R. Rep. No. 87-1951, 87th Cong., 2d Sess. (June 28, 1962) (discussing bill to make permanent a temporary law enacted during the previous year authorizing the Secretary of Agriculture to permit hay harvesting on conservation reserve acreage under certain disaster conditions).

²⁹ Wallace Mendelson, *Mr. Justice Frankfurter on the Distribution of Judicial Power in the United States*, 2 MIDWEST. J. POL. SCI. 40, 47 (1958) (temporary legislation authorizing removal from state court to federal courts suits against federal revenue collection); James D. Barnett, *The Delegation of Legislative Power by Congress to the States*, 2 AM. POL. SCI. REV. 347, 364 (1908) (process acts of 1789, reenacted in 1792, forms of writs and execution in circuit courts should be same as used in each state) (temporary law).

³⁰ Tim Matthewson, *Jefferson and Haiti*, 61 J. SOUTH. HIST. 209, 240 n. 79 (1995) (noting enactment, but not renewal, of temporary law forbidding trade with San Domingo).

³¹ See Unanimous Consent Request H.R. 1828, at 148 Cong. Rec. S14160-01, 108th Cong., 1st Sess. (Nov. 6, 2003) (discussing the “supposedly temporary law” enacted in 1998 and subsequently extended prohibiting states from taxing internet access fees).

³² See L. Scott Gould, *The Congressional Response to Duro v. Reina: Compromising Sovereignty and the Constitution*, 28 U.C. DAVIS L. REV. 53 (1994) (temporary legislation changing definition of Indian later made permanent by Pub. L. 102-137, 105 Stat. 646 (1991)); see also Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil rights Act*, 69 FORDHAM L. REV. 479, 571 (2000) (discussing same).

³³ Dan Keating, *Good Intentions, Bad Economics: Retiree Insurance Benefits in Bankruptcy*, 43 Vand L. Rev. 161, 162-63 (1990) (temporary law enacted addressing payment of retiree medical benefits when corporation files for bankruptcy; permanent law later enacted as Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No 100-334, 102 Stat. 610, codified as amended at 11 USC § 1114 (1988) (stop gap changed to permanent measure)).

³⁴ See Federal Energy Administration Act of 1974, Pub. L. 93-275, §30, 88 Stat. 96, 93d Cong., 2d Sess. (May 10, 1974) (“The Act shall terminate June 30, 1976.”); The Federal Energy Administration Amendment Act Amendments of 1976, Pub. L. 94-385, §112(a), 90 Stat. 1127, 94th Cong., 2d Sess. (Aug. 14, 1976) (“The Act shall terminate December 31, 1977.”)

³⁵ Section 11 of the Communications Act of 1934, as amended, requires the Federal Communications Commission to review all of its regulations applicable to providers of telecommunications service in every even-numbered year, beginning in 1998, to determine whether the regulations are no longer in the public interest due to meaningful economic competition between providers of the service and whether such regulations should be repealed or modified. 47 U.S.C. § 4761. Section 202(h) of the Telecommunications Act

the Statutes at Large reveals sunset provisions throughout each volume. State legislatures have relied equally on temporary legislation both historically and relatively recently, enacting temporary legislation to control the payments of colonial rents,³⁸ to regulate of slavery,³⁹ in welfare policy,⁴⁰ in the riot acts,⁴¹ tax policy,⁴² bankruptcy policy,⁴³ physician assisted suicide,⁴⁴ and even policies on allowing cameras in courtrooms.⁴⁵

Nor is the use of temporary legislation unique to the United States. Prominent historical examples can be found in English history. For example, a political fight between Burke and Lord Clare in 1755 concerned the use of temporary legislation on the free importation of Irish butter.⁴⁶ Early statutes governing fraudulent transfers were initially enacted as temporary law.⁴⁷ So too were the original bankruptcy statutes, both in England and in the

of 1996 also requires the Commission to review its broadcast ownership rules biennially as part of the review conducted pursuant to section 11.

³⁶ For example, Title VI of the Ethics in Government Act authorized the appointment of an Independent Counsel, but section was temporary law enacted for a five year initial term. *See* Pub. L. 95-521, Title VI, §598, 92 Stat. 1873, (Oct. 26, 1978). The provision was reauthorized several times. *See, e.g.,* Independent Counsel Reauthorization Act of 1994, Pub. L. 103-270, §2, 108 Stat. 832 (June 30, 1994). The provision was ultimately allowed to sunset.

³⁷ *See* Pat Jones, *New Day May Dawn for Sunset Tax Provisions*, 66 TAX NOTES 1587 (1995) (discussing use of sunsets in tax legislation and noting renewal process decreases credibility of lobbyists but maintains steady clientele); *see also* Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501, 562-63 (1998).

³⁸ Charles A. Baker, *Property Rights in the Provincial System of Maryland: Proprietary Policy*, 2 J. SOUTHERN HIST. 43, 48-49 (1936) (temporary law enacted in 1717 providing for payments of quitrents repeatedly reenacted until 1733 when lower house rejected and failed to reenact thereafter).

³⁹ *See* Bernard H. Nelson, *Confederate Slave Impressment Legislation, 1861-1865*, 31 J. NEGRO. HIST. 392, 397 (1946) (South Carolina first enacted temporary legislation allowing for impressment of slaves during the 1861 legislative session as compromise prior to enacting permanent legislation allowing impressment in 1864).

⁴⁰ *See* Robert Guhde and Husain Mustafa, *Budget Making in Ohio: A Test of the Process Model*, 34 WEST. POL. Q. 578, 584 (1981) (noting Controlling Board for administering certain state welfare funds originally created by temporary law and ultimately made permanent).

⁴¹ *See* James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 334-35 (1990) (noting all Riot Act's but Connecticut's were enacted as temporary legislation and allowed to expire after terms of one to three years).

⁴² *See* William G. McLoughlin, *Isaac Backus and the Separation of Church and State in America*, 73 AM. HIST. REV. 1392, 1395 (1968) (tax exemption laws in Massachusetts were temporary requiring renewal every five years during 1700's and noting targeted political lobbying over duration of exemptions for different religious groups in 1930's).

⁴³ Peter J. Coleman, *The Insolvent Debtor in Rhode Island 1745-1828*, 23 WILLIAM & MARY Q. 413, 414 (1965) (1756 Act of General Assembly of Rhode Island enacting temporary legislation that became basis for system of bankruptcy relief).

⁴⁴ *See* George J. Annas, *Physician-Assisted Suicide--Michigan's Temporary Solution*, 20 OHIO ST. U. L. REV. 562, 564-65 (1994) (discussing temporary Michigan law governing assisted suicide).

⁴⁵ Jay C. Carlisle, *An Open Courtroom: Should Cameras Be Permitted in New York State Courts?*, 18 PACE L. REV. 297, 298 (1998) (use of temporary legislation for experimental period examining use of cameras in courtrooms in New York).

⁴⁶ *See* P.T. Underdown, *Edmund Burke, the Commissary of his Bristol Constituents, 1774-1780*, 73 ENGL. HIST. REV. 252, 254-55 (1958) (discussing political fight between Burke and Lord Clare in 1755 over the renewal of temporary legislation regarding free importation of Irish Butter and salted provisions).

⁴⁷ *See* Douglas C. Michael, *The Past and Future of Kentucky's Fraudulent Transfer and Preference Laws*, 86 KY. L. J. 937, 939 (1998) (1571 Statute of Elizabeth dealing, in part, with fraudulent transfers originally enacted as a temporary law but extended soon after enactment); *see* 13 Eliz c 5 (1571).

United States.⁴⁸ England had no formal bankruptcy law for several centuries after the commercial expansion of the crusades.⁴⁹ No formal bankruptcy discharge existed until the Statute of 4 Anne,⁵⁰ which contained an explicit sunset, intended to last for only three years,⁵¹ but which was continued several times before finally being repealed in 1732.⁵² In the United States, the first federal bankruptcy statute was enacted in 1800 and was also temporary legislation intended to last only five years.⁵³ The Act was repealed after only three years, two years prior to its natural sunset.⁵⁴

Even in more recent history, temporary legislation has found extensive use outside the United States. Again, just by way of example, temporary legislation has been used to formulate duties on oil in El Salvador,⁵⁵ draft education policy in Italy,⁵⁶ address agrarian disorder in Britain,⁵⁷ to expel ethnicities from Turkey,⁵⁸ and for economic adjustment policy in Japan.⁵⁹ Although other examples abound, my point here is merely that both domestically and abroad, historically and more recently, temporary legislation is woven into a broad swath of law, sometimes for good and sometimes for ill.⁶⁰ Temporary legislation was never, nor is it

⁴⁸ See generally Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L. J. 325 (1991) (discussing the historical development of bankruptcy law discharge).

⁴⁹ Tabb, 65 AM. BANKR. L. J. at 327.

⁵⁰ 4 Anne, c 17 (1705).

⁵¹ Tabb, 65 AM. BANKR. L. J. at 333.

⁵² See Statute of 5 George 2, c. 30 (1732). See also Tabb, 65 AM. BANKR. L. J. at 333 n. 47; Jay Cohen, *The History of Imprisonment for Debt and its Relation to the Development of Discharge in Bankruptcy*, 3 J. LEG. HIST. 153, 156 (1982).

⁵³ Tabb, 65 AM. BANKR. L. J. at 345; see also Bankruptcy Act of 1800, ch 19, § 64, 2 Stat. 19 (1800) (repealed 1803):

And be it further enacted, That this act shall continue in force during the term of five years, and from thence to the end of the next session of Congress thereafter, and no longer: Provided, that the expiration of this act shall not prevent the complete execution of any commission which may have been previously thereto issued.

⁵⁴ An Act To repeal an act entitled “An act to establish a uniform system of bankruptcy throughout the United States,” 2 Stat. 238, ch 6, 8th Cong., 1st Sess. (1803). Apparently, the Act inspired widespread outrage because of its perceived favor of mercantile over agricultural interests and small dividends paid to creditors, that it was repealed prior to the natural sunset. After the Act’s repeal, apparently little federal intervention occurred until the Bankruptcy Act of 1841, which contained no sunset provision but met same fate of repeal as the 1800 Act. See Tabb, 65 AM. BANKR. L. J. at 349-50; Bankruptcy Act of 1841, ch 9, 5 Stat. 440 (1841) (repealed by An Act to Repeal the Bankrupt Act, ch 82, 5 Stat. 614, 27th Cong., 3d Sess. (1843); see also Bankruptcy Reform Act of 1999-S 625, S Rep 106-49 n. 2 (May 11, 1999).

⁵⁵ Peter R. Odell, *Oil and State in Latin America*, 40 INTL. AFFAIRS 659, 664 (1964) (discussing duties on the product local oil refiners collected on the basis of temporary law requiring renewal every 60 days in El Salvador).

⁵⁶ E.C. Longobardi, *Higher Commercial Education in Italy*, 35 J. POL. ECON. 39, 80 (1927) (temporary law suspending educational employment guarantees).

⁵⁷ See Charles Townshend, *Martial Law: Legal and Administrative Problems of Civil Emergency in Britain and the Empire, 1800-1940*, 25 HISTORICAL J. 167, 168 (1982) (“Special temporary legislation was still repeatedly used there, [in 1800’s] primarily to deal with agrarian disorder.”).

⁵⁸ See Vahakn N. Dadrian, *The Historical and Legal Interconnections Between the Armenian Genocide and the Jewish Holocaust: From Impunity to Retributive Justice*, 23 YALE J. INTL. L. 503, 521 (1998) (discussing use of temporary laws by Turkey expel Armenians).

⁵⁹ See Brian Ike, *The Japanese Textile Industry: Structural Adjustment and Government Policy*, 20 ASIAN SURV. 532, 539 (1980) (discussing use of temporary adjustment laws for the Japanese textile industry that were either extended or reenacted for twenty years).

⁶⁰ Note also that temporary legislation is discussed by prominent political theorists as well. See Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L. J. 1725, 1765 (1996) (arguing that Montesquieu claimed legislative powers entailed power to enact, amend, or abrogate permanent or temporary laws), citing Baron de Montesquieu, *The Spirit of the Laws* 151 (Thomas Nugent trans.) (Hafner 1949).

now, an infrequently used legislative oddity invoked only in peculiar policy contexts.

C. Temporary Legislation and Sunset Legislation

Temporary legislation bears a family resemblance---but is not identical to---a generation of statutes known as “sunset legislation” enacted by many state legislatures in the 1970's and early 1980's.⁶¹ Sunset legislation played a major role in the regulatory reform movement of the 1970's that was partially spearheaded by Common Cause, and which was highly critical of the expanding bureaucracy and the regulatory regimes it administered.⁶² The first state-level sunset legislation was enacted in 1976 and subsequently half the states passed some version of sunset legislation.⁶³

The motivating intuition for this generation of sunset legislation was that periodic review of regulatory agencies increases democratic accountability by threatening to terminate agencies if they fail the review⁶⁴ and produces more effective and efficient regulation by terminating unneeded agencies and regulations.⁶⁵ Whether sunset reviews actually increase bureaucratic accountability is contestable,⁶⁶ but it is clear that general sunset legislation fell quickly out of favor after the flood of state action in the late 1970's. The statutes imposed significant administrative costs both on agencies that were forced to prepare for review and

⁶¹ See generally Keith E. Hamm & Roby D. Robertson, *Factors Influencing the Adoption of New Methods of Legislative Oversight in the United States*, 6 LEGIS. STUD. Q. 133, 139-40 (1981) (discussing advent of sunset legislation in the United States).

⁶² For an overview of the sunset movement, see Lewis Anthony Davis, *Review Procedures and Public Accountability in Sunset Legislation: An Analysis and Proposal for Reform*, 33 ADMIN. L. REV. 393 (1981); Dan R. Price, *Sunset Legislation in the United States*, 30 BAYLOR L. REV. 401 (1978); Bruce Adams, *Sunset: Proposal for Accountable Government*, 28 ADMIN L. REV. 511 (1976). For a discussion in the risk context, consider STEPHEN BREYER, REGULATION AND ITS REFORM 364-68 (1982) (arguing for a “high noon” variant of sunset review); see also Lloyd N. Cutler, *Book Review: Regulatory Mismatch and Its Culture: Regulation and its Reform*, 96 HARV. L. REV. 545 (1982) (reviewing Breyer's book). The idea of judicial sunset---treatment of obsolete statutes as common law precedents---was also advocated by Calabresi. See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 59-64 (1982) (discussing sunsets as response to statutory obsolescence); Abner Mikva, *Book Review: The Shifting Sands of Legal Topography: A Common Law for the Age of Statutes*, 96 HARV. L. REV. 534, 537-38 (1982) (reviewing Calabresi's argument and arguing for greater legislative than judicial responsibility for sunseting statutes).

⁶³ Sunset provisions debated during this era were of two major types. First, some statutes contained specific sunset clauses that required periodic review in order to continue the legal validity of a regulatory agency. Second, general sunset statutes were proposed that would require review of all agencies with responsibility for a class of regulation. Senator Kennedy introduced legislation in 1979 that would have set a year-by-year sequential schedule for presidential and congressional review of functional clusters of agencies, whereby the President would send his recommendations to Congress and if the appropriate congressional committees did not act within one year, the proposals would automatically be discharged for a privileged vote on the floor of each house. See Cutler, 96 HARV L. REV. at 553.

⁶⁴ See James C. Clingermayer, *Administrative Innovations as Instruments of State Legislative Control*, 44 WEST. POL. Q. 389, 392 (1991) (discussing sunset provisions as part of structure increasing legislative control of bureaucracy). In this sense, sunset legislation was very much a part of the trend in scholarship criticizing the growth of executive agencies and the supposed lack of legislative oversight or democratic accountability. See, e.g., THEODORE LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 109-10 (W.W. Norton 1979); Carl McGowan, *Congress, Courts, and Control of Delegated Power*, 77 COLUM. L. REV. 1129 (1977).

⁶⁵ For a discussion of these issues, see Mark B. Blicke, *The National Sunset Movement*, 9 SETON HALL LEG. J. 209 (1985); William Lyons and Patricia K. Freeman, *Sunset Legislation and the Legislative Process in Tennessee*, 9 LEG. STUD. Q. 1 (1984); CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES at 59-62.

⁶⁶ See Lyons and Freeman, 9 LEG. STUD. Q. at 1 (discussing legislative perceptions of sunsets).

on reviewing committees and were perceived to provide uncertain or few benefits.⁶⁷ At the federal level, sunset review was fiercely debated, but never passed in a general review form.

Properly understood, sunset legislation is merely one subset of the broader class of temporary legislation. Both temporary legislation and sunset legislation enact programs for finite time periods, but the generation of sunsets enacted in the late 1970's sought to increase legislative oversight, bureaucratic responsiveness, and regulatory efficiency. Temporary legislation is both a more general and a less inherently ambitious legislative tool. Moreover, the sunset legislation movement was extremely bureaucracy centered, emphasizing agency drift and regulatory obsolescence for which the stated cure was greater legislative oversight and ultimately less regulation. The implicit assumption is that the less democratically accountable bureaucracy is consistently up to no good, while the democratically responsive legislature seeks ways to control it. Yet, the reality is far more complex and nuanced. Temporary legislation is a far more general tool than the sunset legislation movement would suggest. Thus, while some portion of the debate over sunset legislation during this time period is relevant to the current task, the old debate about sunset legislation is also radically under-inclusive because sunset legislation in its 1970's-1980's form represents only one subset of the temporary legislative form.

In summary, the historical survey of temporary legislation underlines two claims. First, temporary legislation has been used in a wide variety of contexts, both domestically and internationally. The scope of temporary legislation's influence is significant. Second, temporary legislation's democratic pedigree is extensive. The legislative form was used throughout U.S. history, was discussed and often embraced by the founding generation, and was even predicted by Madison to become the norm in legislative enactments. If anything, the democratic pedigree is actually stronger than that of permanent legislation. Thus, although modern temporary measures have sometimes been met with skepticism, the historical record contains no evidence to support a background presumption against temporary legislation.

II. CONCEPTUALIZING TEMPORARY LEGISLATION

Having dispensed with the notion that temporary legislation is a rarely used modern legislative oddity, the Article now turns to more conceptual issues. Given the diversity of contexts in which temporary legislation was used historically, the question becomes how precisely---in theory and in practice---temporary legislation differs from permanent legislation. Formally, the two legislative forms differ only in their default rules for program continuation. Whereas the default rule for permanent legislation is that the statute's legal validity continues in perpetuity, the default rule for temporary legislation is that legal validity terminates at the sunset date. Of course, these are *merely* defaults. Temporary legislation can be extended and permanent legislation can be repealed. The key question for this section is what effects this change in default rule produces, if any.

The initial discussion highlights three related implications. First, temporary legislation allocates transaction costs differently than permanent legislation. As a result, temporary legislation may produce a different (but not unambiguously higher or lower) probability of policy continuation or result in legislation with different substantive provisions because

⁶⁷ See CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES at 62 ("It is little wonder, then, that sunset laws have been disappointing in those jurisdictions that have tried them. Only trivial regulations, which one may guess, would have been repealed even without the complex sunset structure, have in fact been abolished.").

legislators perceive (accurately or not) temporary and permanent legislation differently. Second, temporary legislation produces a different distribution of error costs than permanent legislation. In contexts where initial policy judgments are likely to be inaccurate, temporary legislation has certain advantages over permanent legislation. In contrast, when initial decisions are likely to be correct, the opposite is true. Third, temporary legislation allocates decision-making authority inter-temporally within Congress and across branches of government. As a result, temporary legislation provides certain advantages to the current period legislative majority, but not without significant risks to their legislative program. Put differently, the choice between temporary and permanent legislation is a choice about the allocation of different types of political costs and risks across branches and over time.

Before proceeding to the core analysis, I want to make one clarification. Absent any probability of repealing a permanent statute or extending a temporary statute, temporary and permanent legislation differ only in the stream of benefits they produce (if otherwise substantively equivalent). To wit, assume a private or public actor receives some benefit from a legislative package. If all the benefits from the legislation are realized immediately or within a single time period, then the value of a generic piece of legislation can be represented by v . If the legislation produces identical benefits in future time periods in addition to the current time period, and does so with certainty, the current period value of the legislation is equal to $v + \delta(v) + \delta^2(v) + \dots + \delta^n(v)$ where δ is a discount factor. If the benefits accrue with certainty for an infinite period of time, the current period value is represented simply as $\frac{v}{1-\delta}$. When there is neither a probability of repeal nor a probability of extension, temporary legislation simply provides a stream of benefits for a discrete time period rather than an infinite time period. If all the other characteristics of the legislation are held constant, then the value of temporary legislation will be strictly less than the value of otherwise identical permanent legislation. In this simple case, how much less depends solely on the length of the temporary period and the value of the discount factor.⁶⁸ As long as interest groups are rational, this difference should only manifest as a difference in the current period value of legislation. Thus, a first conclusion is if private interests are willing to pay only for the anticipated benefits of legislation, then the price of temporary legislation should be lower than the price of permanent legislation. One possibility therefore is that temporary legislation is less profitable for legislators to produce. However, it could also be that legislators can offer a greater volume of temporary legislation and increase overall gains, even if the price of a specific piece of legislation falls. A series of short-term legislative deals may provide greater aggregate benefits to legislators than a single long-term deal, even if the benefit received from each package is lower. Of course, in the real world there is both an unknown probability that a permanent statute will be repealed and an unknown probability that a temporary statute will be extended, as the historical discussion demonstrates. As a result, somewhat more nuanced analysis is required to make any meaningful headway.

A. Transaction Costs

Temporary and permanent legislation produce different distributions of transaction costs in two ways. First, temporary and permanent legislation *allocate* transaction costs differently between the current period legislature and future period legislatures. Second, the two

⁶⁸ If temporary legislation is enacted for a relatively long initial time period, the difference in benefits is likely to be relatively modest.

legislative forms may produce a different overall *magnitude* of aggregate transaction costs. Each of these effects is loosely related to efficiency concerns. For example, if temporary legislation entails systematically higher aggregate transaction costs than permanent legislation, then temporary legislation would be less normatively attractive from an efficiency perspective. However, the more basic conceptual point is that the choice between temporary and permanent legislation involves a tradeoff between at least two different types of legislative costs, as illustrated below. The higher transaction costs of temporary legislation during the sunset year may be partially, if not entirely offset by lower relative transaction costs in the time periods prior to the sunset. One commonly held intuition is that temporary legislation is more “costly” to produce than permanent legislation because it involves multiple periods of legislative action. In reality, there is neither theoretical nor empirical evidence to support that claim. The overall cost of producing a given piece of legislation consist of initial *enactment* costs, realized only in time periods when legislation is enacted, and *maintenance* costs, realized in periods after enactment, deriving from efforts to repeal, amend, or avoid any changes to legislation. It is true that temporary legislation will involve multiple rounds of enactment costs and permanent legislation will not. However, any claim that temporary legislation is more costly than permanent legislation must account for variation in both types of legislative costs. As the analysis suggests, neither temporary nor permanent legislation is inherently more costly for legislators to produce.

In a world where the costs of legislation are concentrated solely in enactment time periods such that maintenance costs are always zero, the only difference between temporary and permanent legislation is how enactment costs are structured. Temporary legislation involves two rounds of enactment costs---one in the initial time period and one in the sunset period---while permanent legislation involves only a single round. If all per period enactment costs are identical for temporary and permanent legislation, then the aggregate costs of temporary legislation will be greater than the aggregate costs of permanent legislation simply because the first period costs are equivalent and reenactment costs of temporary legislation are positive. At first glance, the assumption that enactment costs are equal for temporary and permanent legislation seems unrealistic. However, both temporary and permanent legislation must meet the same procedural requirements specified either by the Constitution or internal House and Senates rules. To the extent that a substantial portion of enactment costs consist of negotiating veto-gates and procedural hurdles, the enactment costs of both legislative forms could actually be quite similar, making the equality assumption somewhat more plausible.

Still, variation in enactment costs is a more plausible assumption, in which case temporary legislation's initial enactment costs are almost certainly less than permanent legislation's. The allocative effect remains the same: temporary legislation allocates enactment costs to the sunset period while permanent legislation concentrates them in the initial time period. Any aggregate effect depends on the degree of difference between costs in the initial time period, and the factor by which future period costs are discounted. Without discounting, temporary legislation is cheaper if the sum of the initial and sunset period costs are less than the enactment costs of permanent legislation in the first time period. With discounting, temporary legislation is less costly than permanent legislation if the sum of initial period enactment costs and discounted future period enactment costs of temporary legislation is less than the single period enactment costs of permanent

legislation.⁶⁹ Theoretically therefore, neither permanent nor temporary legislation involves inherently higher aggregate transaction costs. If temporary legislation is enacted for a relatively short term---e.g., three years---even if temporary legislation's initial enactment costs are somewhat lower than permanent legislation's, the discount factor would have to be extremely low (discount rate high) to make temporary legislation less costly. Thus, still focusing exclusively on enactment costs, when temporary legislation is enacted for short initial time periods, it is likely, but not necessarily more costly than permanent legislation.

That said, while these preliminary observations are intriguing, any meaningful comparison has to account for both enactment and maintenance costs. Maintenance costs are a fairly general term, picking up all the costs incurred in non-enacting time periods. First, from the above discussion, recall that if enactment costs vary, then enactment costs in the initial time period will be lower for temporary legislation than for permanent legislation. Second, in the sunset time period, permanent legislation's maintenance costs will be less than temporary legislation's (re)enactment costs. It is almost always easier to block the repeal of legislation than to pass new legislation. As a result, continuing permanent legislation is less costly in the sunset year than reauthorizing temporary legislation. Third, in time periods after the first sunset term, if temporary legislation is extended in identical form at the sunset, then the analysis for years after the first sunset and prior to the second sunset is identical to the analysis for years prior to the initial sunset. The important remaining comparison is therefore of maintenance costs in years after enactment but prior to the sunset.

For relatively short-term temporary legislation, the maintenance costs of temporary legislation should be less than those of permanent legislation during the initial term. If temporary legislation terminates of its own accord after three years, why expend political resources to repeal the legislation in the second year? The reenactment can be blocked in the sunset year using less political resources than those necessary to repeal the statute early. Although the historical record does contain instances where short-term temporary legislation was repealed,⁷⁰ they seem to be relatively rare. For longer-term legislation that is formally temporary---e.g., a ten year initial term---the maintenance costs of temporary and permanent legislation should be roughly equivalent early in the term. As long as the sunset is significantly far in the future, and therefore the time horizon sufficiently distant, affected interests should act as though temporary legislation is permanent, and lobby for repeal or continuance accordingly. Thus, the difference in maintenance costs between temporary and permanent legislation will generally be greatest for very short-term statutes, smallest for very long-term statutes, and somewhere in between for statutes with intermediate initial terms. Admittedly, the boundary lines between these categories are difficult to draw with any degree of rigor. And, the difference will also depend on the factor by which future costs and benefits are discounted. Nonetheless, the basic conceptual point remains. The maintenance costs of temporary legislation will be less than or equal to the maintenance costs of permanent legislation either for short-term legislation or when longer-term legislation approaches the sunset year. The maintenance costs of temporary legislation should be roughly equivalent to permanent legislation as long as the initial duration is long and the

⁶⁹ The aggregate transactions costs for temporary legislation when maintenance costs are zero are $c_{\text{temp}} = c_0^e + \delta^k (c_k^e)$ where k is the period of the sunset/reenactment. The value of the second term could be quite small in current period value terms either if the discount factor is low or if the sunset year k is far in the future.

⁷⁰ Consider the repeal of the Bankruptcy Act of 1800 after only three years of its initial five year term.

specific time period in question is far from the sunset.

Combining the analysis, the net effect on aggregate transaction costs is extremely ambiguous, turning on the duration of the initial time period of temporary legislation, the discount factor, the difference between initial enactment costs of temporary and permanent legislation, and the difference between the reenactment costs of temporary legislation and maintenance costs of permanent legislation in the sunset year. On net, it will sometimes be the case that temporary legislation is more (or less) costly than permanent legislation, but in general, it is not at all clear that either legislative form produces higher aggregate transaction costs.⁷¹ But my goal here is only to demonstrate that temporary legislation is not obviously more costly than permanent legislation. While the analysis does not demonstrate that temporary legislation is clearly superior to permanent legislation, it does show that temporary legislation is not clearly inferior---at least along the transaction cost dimension.

All of which is at once painfully detailed and frustratingly sparse on clear normative implications. That said, the ambiguity about aggregate costs does not extend to the allocation of transaction costs. Temporary legislation increases the costs born by future period legislatures in the sunset year, while reducing the maintenance costs born by future legislatures in years close to the sunset. These inter-temporal dynamics have important side-effects for legislators and implicate the allocation of political power and the distribution of errors in the formation of public policy. By requiring that future period legislatures reenact policy, the current period majority exercises agenda control, transfers decision-costs to the future, and makes current period legislative bargains vulnerable to changes in legislative preferences.

B. Information

Most discussions of temporary legislation or sunset legislation tend to focus on terminating unnecessary statutes or regulations and controlling administrative agencies. Although I do not want to downplay the importance of interbranch dynamics in temporary legislation, I do want to emphasize the *informational effects* of temporary legislation. As should be abundantly clear by now, temporary legislation involves multiple stages of legislative action to sustain a particular public policy. This form of “staged decision-making” produces three types of informational effects. First, because staged decision procedures facilitate the integration of new information into the policy process, they generally increase the probability that an optimal public policy will be selected by legislators. Second, when cognitive bias distorts either legislative or citizen perceptions of actual probabilities, staged decision procedures allow short-term biases to diminish. As a result, in contexts where cognitive bias is likely to predominate, a strong presumption in favor of temporary legislation may be justified. Third, staged decision procedures help compensate for asymmetric information in politics.

⁷¹ Note also that the above discussion focuses on the costs of obtaining and maintaining legislation. But, the analysis could be just as easily focus on the costs of avoiding and abandoning bad legislation. In that case, the analysis is simply the exact opposite of the earlier discussion. It is easier to get rid of temporary legislation than permanent legislation. But, at least anecdotal evidence indicates it is easier to avoid permanent legislation initially than to avoid otherwise equivalent temporary legislation.

1. Error Costs

The first and clearest informational effect of temporary legislation is the reduction of error costs when initial policy decisions have a significant probability of being incorrect. Staged decision mechanisms provide information at time $t+k$ that from a Bayesian perspective is weakly superior to the information set available when legislation is first enacted. If policy outcomes are entirely determined by the available information set, then a staged decision procedure, in which the information available in successive stages is superior to the initial information set, is more likely to select the optimal policy than a single stage enactment. As a result, in policy domains of judgment aggregation, as opposed to preference aggregation---where there is a correct decision to be made conditional on the underlying state of the world---using temporary legislation instead of permanent legislation increases the probability of selecting optimal policy. Put differently, when initial decisions are likely to be wrong, staged-decision procedures facilitate the correction of errors, and this is particularly likely to be the case in policy contexts dominated by uncertainty.

This benefit of temporary legislation is straightforward, but it is also subject to a significant caveat. If legislative deliberations on temporary legislation are of systematically lower quality than deliberations on permanent legislation, then the benefit may be undermined. That is, if legislators give scant consideration to temporary measures precisely *because* they are not permanent, then better information may matter little. Even if the aggregate quantity and quality of information is superior in staged procedures, legislators could still be less likely to effectively utilize the better information. To state the obvious, policy outcomes are the result of many non-informational factors. In contexts where policy decisions are likely to be correct initially, temporary legislation merely imposes a second round of enactment costs simply to maintain the optimal policy,⁷² provides a ready-made opportunity for opponents of the legislation to terminate it, and yields little marginal increase in the probability of choosing a correct policy outcome. Thus, along this dimension, the value of temporary legislation depends critically on the degree of uncertainty in the legislative process. When uncertainty in a policy domain is high, temporary legislation produces informational benefits that aid in the selection of optimal policy.⁷³

2. Cognitive Bias

A second major informational benefit of temporary legislation is the mitigation of certain forms of cognitive bias. In contexts where private citizens or legislators misperceive risk, temporary legislation allows long-term policy commitments to be delayed, which will allow some but not all forms of cognitive bias to diminish. 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.⁷⁴

⁷² But recall the ambiguous effects of temporary legislation on aggregate transaction costs. See section~.

⁷³ On the other hand, when the probability of choosing optimally in the first period is high, entrenchment may be an ideal strategy. Where initial decisions have a high probability of being correct, entrenched legislation minimizes long-term decision costs without producing a high error rate. However, when initial decisions may be wrong, entrenchment trades optimal policy for low decision costs, or so it would appear.

⁷⁴ For an overview, see BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed.) (Cambridge 2000); Christine Jolls, Cass R. Sunstein, and Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

Accompanying this line of research in behavioral law and economics⁷⁵ has been a call to craft institutions that compensate for the potential biases that affect decision-making by citizens and politicians.⁷⁶ As a general rule, these prescriptions for governmental reform focus on the relative allocation of decision-making responsibility among the branches of government.⁷⁷ That is, significant scholarship on risk and institutions simply extends the fight over whether the Executive, Judiciary, or Legislature is most capable of avoiding poor decisions and creating effective or efficient regulation.⁷⁸ This Article takes a more intermediate approach to institutional design and risk regulation. Less ambitious institutional prescriptions can help compensate both for known biases and for strategic challenges in the demand for risk regulation. In this capacity, temporary legislation can help compensate for a variety of pitfalls in the regulation of risk.⁷⁹

New risks in particular often pose distinctive challenges for legislators and policymakers. The policy environment is dominated by uncertainty, and both ordinary citizens and experts often overestimate and overreact to newly recognized risks.⁸⁰ The seriousness of risks that are readily “available” is often overestimated.⁸¹ Availability is a somewhat fluid concept in the literature. However, typically, scholars refer to the “availability heuristic,” which involves estimating the probability or sometimes seriousness of a risk on the basis of whether it is readily available cognitively. If individuals use availability as a heuristic for evaluating risk, recently realized risks may produce over-reaction or at least over-estimation of the relevant probabilities.⁸² Risks that conjure vivid images like plane crashes, risks that have recently occurred, or risks that are newly recognized by society all tend to be readily available. When risks are seen as nonvoluntary or catastrophic, the danger of overestimation is even greater.⁸³ Because the seriousness of new risks is often overestimated by the public, politicians may

⁷⁵ See generally CASS R. SUNSTEIN, *RISK AND REASON* (Cambridge 2002). In applied contexts, see Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486 (2002); Cass R. Sunstein and Timur Kuran, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999).

⁷⁶ Consider Rachlinski and Farina, 87 CORNELL L. REV. at 549; Jeffrey J. Rachlinski, *The “New” Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739 (2000); Jeffrey J. Rachlinski, *The Wages of Risk: A Review of Dealing with Risk: Why the Public and the Experts Disagree on Environmental Issues*, 6 CORNELL J. L. & PUB. POL’Y 673 (1997).

⁷⁷ See Rachlinski and Farina, 87 CORNELL L. REV. at 593 (arguing for allocating primary decision-making responsibilities in the bureaucracy and relying on Congress rather than the Judiciary for primary oversight and review). Indeed, the actual suggestions for reform are sometimes modest. Id. at 591 (“in terms of optimal institutional design, American government has gotten it pretty much right”).

⁷⁸ Much of this work also speaks to Clayton P. Gillette and James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027 (1990) (arguing that courts have important comparative advantages in dealing with risk relative to administrative agencies).

⁷⁹ The flavor of this analysis is very much in keeping with some of Professor Rachlinski’s efforts to link analysis of institutional structure to cognitive biases in the decision-making of government actors. Consider Rachlinski and Farina, 87 CORNELL L. REV. at 549; Rachlinski, 85 CORNELL L. REV. at 739; Rachlinski, 6 CORNELL J. L. & PUB. POL’Y at 637. See also Paul Slovic, Baruch Fischhoff and Sarah Lichtenstein, *Regulation of Risk: A Psychological Perspective*, in REGULATORY POLICY AND THE SOCIAL SCIENCES (Roger Noll, ed.) (Cal. 1985).

⁸⁰ See SUNSTEIN, *RISK AND REASON* at 33-35; HOWARD MARGOLIS, *DEALING WITH RISK: WHY THE PUBLIC AND THE EXPERTS DISAGREE ON ENVIRONMENTAL ISSUES* (Chicago 1996). See generally JUDGMENT UNDER UNCERTAINTY (Daniel Kahneman, Paul Slovic and Amos Tversky, eds.) (Cambridge 1982).

⁸¹ See Amos Tversky and Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COG. PSYCH. 207 (1973).

⁸² See Cass R. Sunstein, *What’s Available? Social Influence and Behavioral Economics*, 97 NW. U. L. REV. 1295 (2003).

⁸³ See PAUL SLOVIC, *THE PERCEPTION OF RISK* (Earthscan 2000); Daniel Kahneman and Amos Tversky, *Choice, Values, and Frames* (Cambridge 2000); Slovic et al, *Regulation of Risk*.

face intense pressure to respond with legislation,⁸⁴ a dynamic often characterized as a biased demand for regulation, resulting in legislation or regulation founded on information that is preliminary at best and poor quality at worst.⁸⁵ While political reaction to public pressure is understandable, deferring action until more information exists and public pressure is less intense could produce more reasonable or at least more reasoned legislation. Professors Noll and Krier considered this dynamic more than a decade ago and suggested that procedural tools like cumbersome administrative procedures or delegation to the bureaucracy serve as a partial guard against the influence of biased demands in the policy process.⁸⁶ They suggested that “[d]etailed regulatory procedures administered by a resource-poor agency thus allow politicians to lash themselves to the mast while waiting out the temporary siren calls for immediate overreaction...” (internal quotations omitted).⁸⁷ Noll and Krier highlighted the potential for cumbersome procedures to compensate for or avoid biased demands for legislation.

My analysis of temporary legislation suggests a somewhat different prescription. In many contexts, politicians are either unable or unwilling to resist public pressure for action. When new risks emerge that scare the public, Congress does and perhaps should respond. Thus, for a wide range of risks, it may be all but inevitable that politicians will strike when the iron is hot. Moreover, deferring action in the short-term is not a globally correct prescription for legislators responding to new risks. The demand for legislation could be biased downward prior to the realization of a new risk. If citizen demand is typically biased downward, then reacting to citizen pressure may produce fewer policy errors than ignoring pleas for action. Empirically, it is true that new policy initiatives are often enacted in the immediate aftermath of realized or recognized risks.⁸⁸ However, there is scant evidence as to whether this results in systematically good or bad legislation. Unfortunately, the choice is traditionally sketched in terms that are too stark: act or bind one's hands. The collection of legislative tools is more diverse than this framing suggests. Temporary legislation in this context provides a somewhat more pragmatic approach to new risk that is sensitive to potential biases in the demand for regulation, while also taking account first, of the political reality faced by legislators, and second, the possibility that action is needed and entirely justified. Temporary legislation therefore does not de-bias individual beliefs in a way that permanent legislation does not. Rather, temporary legislation simply forestalls long-term institutional commitments, allowing any overreaction to new risks to diminish. Temporary legislation is akin to an institutional compensation mechanism for the effects of biased beliefs rather than a tool for eliminating bias from those beliefs.⁸⁹ All of which suggests a background

⁸⁴ See Risa Palm, *Demand for Disaster Insurance: Residential Coverage*, in *Paying the Price: The Status and Role of Insurance Against Natural Disasters in the United States* (Howard Kunreuther and Richard J. Roth Sr., eds.) (Joseph Henry 1998); Risa Palm and John Carroll, *ILLUSIONS OF SAFETY: CULTURE AND EARTHQUAKE HAZARD RESPONSE IN CALIFORNIA AND JAPAN* (Westview 1998); HOWARD KUNREUTHER, *DISASTER INSURANCE PROTECTION: PUBLIC POLICY LESSONS* (Wiley & Sons 1978).

⁸⁵ See Sunstein and Kuran, 51 *STAN. L. REV.* at 698, 703.

⁸⁶ See Roger Noll and James Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, 19 *J. LEGAL STUD.* 747, 774-75 (1990) (developing prescriptions from research in cognitive psychology for risk policy).

⁸⁷ Noll and Krier, 19 *J. LEGAL STUD.* at 774. The overuse of this metaphor notwithstanding, it remains somewhat apt in the context of risk regulation. For a recent treatment, see JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* (Cambridge 2000).

⁸⁸ In the context of natural hazard risk, see THOMAS A. BIRKLAND, *AFTER DISASTER: AGENDA SETTING, PUBLIC POLICY, AND FOCUSING EVENTS* (Georgetown 1997).

⁸⁹ Sunsets have also been advocated in recent years to avoid regulatory “stickiness” or to force agencies to justify ongoing regulations. See Jeffrey J. Rachlinski and Cynthia R. Farina, *New Theories of the Regulatory State:*

presumption in favor of temporary rather than permanent legislation in policy contexts dominated by cognitive bias.

3. *Asymmetric Information*

A final informational benefit of temporary legislation and staged decision procedures is the improvement of incentives for accurate information revelation when asymmetric information dominates relations between legislators and private interests. While legislators have access to information and expertise in many policy areas, in certain contexts private interests lobbying for or against legislation/regulation have better information than legislators, and face incentives to conceal information that is detrimental to their political interests. Under these circumstances, temporary legislation should create stronger incentives for accurate information revelation because staged decision procedures ensure repeated interaction between affected interests and legislators. When interactions are repeated, the failure to accurately reveal information in earlier time periods can be sanctioned by legislators. This logic is consistent with models from political science that suggest repeated interactions between lobbyists and legislators generally ensure honest claims by lobbyists. An admittedly superficial but nonetheless useful view is that permanent legislation entails discrete one-time interactions, whereas temporary legislation entails repeated interactions. The real world is more complicated of course, but there is no question that temporary legislation produces repeated interaction in a way that permanent legislation does not necessarily entail. The magnitude of this benefit will therefore be greatest in policy areas where legislator-lobbyist interactions would otherwise be discrete.

Additionally, note that staged decision procedures are utilized as compensation mechanisms for conditions of uncertainty in many other fields. For example, in venture capital markets where investment decisions regarding new technologies are often made under conditions of extreme uncertainty and asymmetric information, staged financing is a common tool.⁹⁰ Roughly speaking, staged financing gives investors an option to abandon the project at pre-specified time periods which, in turn, triggers the revelation of certain information and aligns the incentives of the entrepreneur with those of the investors by creating performance penalties. Of course, staged financing and temporary legislation are clearly not identical tools. The point is simply that staged decision procedures are also a relatively common mechanism for responding to informational challenges in the private sector.⁹¹

Cognitive Psychology and Optimal Government Design, 87 CORNELL L. REV. 549, 605 (2002); Robert W. Hahn, *Achieving Real Regulatory Reform*, 1997 U. CHI. LEGAL F. 143, 156.

⁹⁰ My thanks to Curtis Milhaupt for suggesting this example. For a useful treatment of this contracting form in the context of venture capital markets, see Ronald J. Gilson, *Engineering a Venture Capital Market: Lessons from the American Experience*, 55 STAN. L. REV. 1067, 1076 (2003) (discussing staged procedures as a response to the challenges of uncertainty, information asymmetry, and agency costs in venture capital markets). The three central problems of financial contracts---uncertainty, information asymmetry, and opportunism in the form of agency costs---are each present in extreme forms in the venture capital context. *Id.* at 1076. For example, because the portfolio company tends to be at an early stage of development and the quality of managerial decision making is relatively unknown, uncertainty about future performance is exacerbated. *Id.* at 1076-77.

⁹¹ A similar parallel argument might be derived from revocable lines of credit in bank financing. See George G. Triantis, *Financial Contract Design in the World of Venture Capital*, 68 U. CHI. L. REV. 305, 306 (2001). There are, of course, differences between staged financing in the venture capital context and temporary legislation. One key difference is that the use of bench-marking and milestones might be more difficult to specify for legislators *ex ante*. Therefore, the staged process in venture capital contracts may provide more specific information than in

4. Technocratic Applications

Having surveyed the informational benefits of temporary legislation in theory, I now turn to a more targeted discussion of technocratic applications that make use of these benefits in practice. As discussed throughout the paper, temporary legislation produces strategic or political benefits for legislators and private interests. However, at least some of the time, the motivation for adopting temporary measures appears to be more benign. Indeed, temporary statutes are often an appropriate match to specific policy challenges. These uses of temporary legislation are what might be termed pragmatic or technocratic, and manifest in at least three contexts. Temporary legislation can be used to fill gaps in existing law, as a symmetric response to policy problems that are themselves perceived to be temporary, or as experimental or information-producing legislation.

First, temporary legislation is sometimes used to fill gaps in existing law or as placeholder legislation that is enacted to cover interim time periods while the legislature considers permanent legislation. For example, in the late 1980's Congress enacted temporary legislation targeting the payment of retiree medical benefits by corporations that had filed for bankruptcy.⁹² The "stop-gap" measure was ostensibly enacted so that some legislation was in force while Congress deliberated on a long-term policy solution.⁹³ Stop-gap legislation does just that---plugs up holes in existing statutory schemes on a short-term basis on the assumption that a more permanent policy judgment will be made soon thereafter.⁹⁴ Temporary regulations or interim rules are often used for similar reasons by administrative agencies. Agencies sometimes issue temporary regulations and proposed regulations simultaneously. The temporary regulations take force immediately while the proposed regulations proceed through ordinary notice and comment procedures, which avoids the pitfalls of retroactive rulemaking.⁹⁵ Many temporary tax regulations are said to be "interpretive rules" and therefore exempt from the notice and comment requirements of the APA.⁹⁶ Similarly, agencies often issue interim rules after formal rules have been vacated by courts. While some commentators have argued that temporary regulations should have a

most temporary legislation contexts. However, for an innovative discussion of bench-marking and milestones in the context of government and democratic theory, see Michael C. Dorf and Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

⁹² See Dan Keating, *Good Intentions, Bad Economics: Retiree Insurance Benefits in Bankruptcy*, 43 VAND. L. REV. 161, 162-63 (1990) (temporary law enacted addressing payment of retiree medical benefits when corporation files for bankruptcy) (stop gap changed to permanent measure).

⁹³ *Id.* at 162. Ultimately, the temporary legislation was made permanent. See Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No 100-334, 102 Stat. 610 (codified as amended at 11 USC § 1114 (1988)).

⁹⁴ See, e.g., changes to guidelines for officer promotion and retirement in the U.S. Coast Guard, Pub. L. 88-130, S. Rep. No 88-476, 88th Cong., 1st Sess. (Aug. 30, 1963) ("This portion of the bill would be temporary law effective for 3 years, by which time, it is predicted, the permanent promotion system will be able to operate effectively by itself to control the flow of promotions."). See Pub. L. 88-130, 77 Stat. 174, 88th Cong., 1st Sess. (Sept. 24, 1963).

⁹⁵ See generally *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204 (1988).

⁹⁶ See Thomas M. Merrill and Kathryn Tongue Watts, *Agency Rules With the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 573 (2002) (discussing temporary tax rules as interpretive rulemaking). See also Marshall J. Berger, *Book Review: Defining Administrative Law--A Review of An Introduction to Administrative Justice in the United States by Peter L. Strauss*, 60 GEO. WASH. L. REV. 268, 273-74 (1991) (noting temporary tax regulations generally qualify as interpretive rules). See also John F. Coverdale, *Chevron's Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings After Mead*, 55 ADMIN. L. REV. 39, 69-70 (2003) (noting no taxpayer has successfully challenged temporary tax regulations on the grounds that the regulations failed to satisfy notice and comment requirements in the APA).

lesser status and receive less deference from the courts,⁹⁷ most courts give temporary regulations full legal status and due deference.⁹⁸ Thus, in both the legislative and regulatory contexts, temporary measures are sometimes simple tools for policy-makers.

Second, temporary legislation is sometimes enacted to respond to social problems that are themselves believed to be temporary. For example, New Deal agricultural policy was temporary legislation enacted as a symmetric response to what legislators believed to be short-term market conditions.⁹⁹ Legislation addressing capacity shortfalls in the market for terrorism insurance was enacted under a similar logic.¹⁰⁰ Unlike the stop-gap case, where temporary legislation is merely a placeholder for a more appropriate and deliberate permanent legislative response, this latter use of temporary legislation constitutes an ultimate legislative judgment about the proper policy. Such legislation is crafted in a temporary form so that the structure of the policy response aligns symmetrically with the structure of the policy problem.

The third technocratic use of temporary law is experimental or information producing legislation. Recall that in policy environments dominated by uncertainty, temporary legislation generally produces lower error costs than permanent legislation. Experimental temporary legislation tends to implement policy on a short-term basis as a means of generating information that can be subsequently incorporated into the policy-making process. For example, in New York, temporary legislation was used to create an experimental policy allowing cameras in courtrooms.¹⁰¹ Although promising, this specific use of temporary legislation is also subject to several criticisms. First, as noted above, the mere availability of superior information does not ensure the information will be utilized by policy-makers. Even extremely useful information produced may still be information largely ignored. Second, in contexts where legislation is intended to gather information about private responses to the legislation itself, private actors may treat temporary legislation differently than permanent legislation, thereby undermining the policy experiment. Thus, the background presumption that temporary legislation is superior on informational grounds requires several caveats.

First, the mere fact that a superior information set is available in the second stage of legislative action does not necessarily imply that better information will be used in the policy process.¹⁰² As a result, one critical empirical question is whether temporary statutes result in meaningful reconsideration in successive stages of reauthorization or simply get extended

⁹⁷ See Michael Asimow, *Public Participation in the Adoption of Tax Regulations*, 44 TAX LAW 343, 343-44 (1991).

⁹⁸ See, e.g., *Cinema '84 v C.I.R.*, 294 F.3d 432, 438 (2d Cir. 2002) ("The fact that a Treasury regulation is 'temporary' does not diminish its legal effect."); *E. Norman Peterson Marital Trust v C.I.R.*, 78 F.3d 795, 798 (2d Cir. 1996) ("Until the passage of final regulations, temporary regulations are entitled to the same weight we accord to final regulations."); *Nissho Iwai Am. Corp v Commissioner*, 89 T.C. 765, 776 (1987) (temporary tax regulations entitled to same weight as final regulations). But see *Kikalos v C.I.R.*, 190 F.3d 791 (7th Cir. 1999) (suggesting but not holding that temporary regulations might be due less deference than permanent regulations satisfying notice and comment requirements). For a general discussion of this issue in the tax context, see Asimow, 44 TAX LAW at 343-44 (discussing increased reliance on temporary regulations by the Treasury Department starting in the 1980's).

⁹⁹ See Theodore Saloutos, *New Deal Agricultural Policy: An Evaluation*, 61 J. AM. HIST. 394, 403, (1974) (discussing view that Agricultural Adjustment Act was temporary legislation to deal with temporary market conditions).

¹⁰⁰ See section ___ for an extended discussion.

¹⁰¹ Jay C. Carlisle, *An Open Courtroom: Should Cameras Be Permitted in New York State Courts?*, 18 PACE L. REV. 297, 298 (1998) (use of temporary legislation for experimental period examining use of cameras in courtrooms in New York).

¹⁰² See section ___.

with little or no deliberation. If temporary statutes are always extended with little deliberation, or virtually never extended, then the theoretical informational benefits are unlikely either to explain or justify the use of temporary legislation. Lacking a comprehensive empirical study of temporary and permanent legislation, I note simply that the anecdotal evidence indicates neither extreme position is tenable. Temporary legislation is sometimes repealed prior to the natural sunset, sometimes allowed to sunset without extension, sometimes extended with little legislative process, sometimes extended with significant committee and floor activity, and sometimes amended to be permanent legislation.¹⁰³ At present, the most that can be said is that the nature and quality of second-stage legislative deliberations seem to vary significantly not only across statutes, but also over time for a given statute.

Just by way of illustration, consider a handful of policy contexts. First, a growing list of tax benefits are enacted for short-term time periods.¹⁰⁴ The extenders are “tax provisions that expire, forcing Congressional reconsideration every few years.”¹⁰⁵ Legislative treatment of temporary tax provisions varies widely.¹⁰⁶ For example, despite the development of extensive evidence that the targeted job tax credit had little or no influence on employer hiring, the credit was extended and ultimately made permanent.¹⁰⁷ Better quality information in the subsequent stage of legislative decision-making was largely ignored or—equally likely—trumped by political considerations. On the other hand, the temporary tax example rebuts the assertion that Congress simply rubber stamps renewals without meaningful legislative deliberation. For example, Congress refused to extend the exclusion for employer-provided group legal services, which expired in 1992, but made permanent the low-income tax housing credit.¹⁰⁸ Neither automatic renewal nor automatic termination of temporary legislation appears to be the norm.¹⁰⁹

Second, many environmental statutes are subject to periodic reauthorization and therefore, are essentially temporary legislation. For example, appropriations for the Endangered Species Act are generally allocated only a few years at a time, and the appropriations and reauthorizations often contain a mix of minimal, modest, and extensive amendments.¹¹⁰ The historical evidence on reauthorization proceedings in such areas is entirely mixed. Sometimes reauthorization involves extensive changes, as evidenced in the Superfund Amendments and Reauthorization Act of 1986.¹¹¹ Other legislative programs are reauthorized with nothing more than a change in the date of program termination.¹¹²

¹⁰³ Future empirical work might examine whether the statutory outcomes and legislative process of temporary legislation differ consistently across policy contexts.

¹⁰⁴ See Glenn, 73 TAX NOTES at 1010.

¹⁰⁵ Garrett, 65 U. CHI. L. REV. at 567.

¹⁰⁶ Id.

¹⁰⁷ Id.

¹⁰⁸ Id at 562.

¹⁰⁹ Some temporary tax provisions might reasonably be termed experimental or information-producing. See Heidi Glenn, *Hatch-Jeffords Bill Would Create Alternative Energy Tax Extenders*, 87 TAX NOTES 1206 (May 29, 2000).

¹¹⁰ See Endangered Species Act of 1973, Section 15, Pub. L. 93-205, 87 Stat. 884, 93d Cong., 1st Sess. (Dec. 28, 1973). See generally William W. Stelle, Jr., *Major Issues in the Reauthorization of the Endangered Species Act*, 24 ENV L. 321 (1994) (discussing 1994 reauthorization debate); Laura Spitzberg, *The Reauthorization of the Endangered Species Act*, 13 TEMPLE ENV. L. & TECH. J. 193 (1994).

¹¹¹ Pub. L. 99-499, 100 Stat. 1613 (1986).

¹¹² See generally Ann R. Klee and Ernie Rosenberg, *The Moribund State of CERCLA Reauthorization*, 13 NAT RESOURCES & ENV 451, 451 (1999) (arguing reauthorization of Resource Conservation Recovery Act, Clean Water Act, Endangered Species Act, and the Comprehensive Environmental Response, Compensation and

Additionally, note that all discretionary spending, approximately one-third of the Federal budget is subject to annual appropriations and thus is functionally similar to temporary legislation. No doubt some of these temporary measures receive little sustained attention on an annual basis, but others are obviously fiercely contested. This dynamic is only exacerbated by budget rules that require set-offs for new spending programs, further highlighting the importance of congressional rules and procedures for analyzing temporary legislation.¹¹³

Finally, Congress recently considered bills that seek to alter the USA Patriot Act, which as enacted terminates many of its provisions at the end of 2005.¹¹⁴ The Security and Freedom Ensured (SAFE) Act of 2003 would have altered some of the more contentious provisions of the USA Patriot Act.¹¹⁵ However, other proposals would have made temporary portions of the USA Patriot Act permanent.¹¹⁶ One might favor either of these positions on ideological grounds, but the example provides no evidence that important legislation will be either renewed or terminated without significant legislative consideration. The simple point is that Congress does not systematically rubber stamp sunset legislation for reauthorization, nor does Congress automatically integrate new information into the policy process in a purely technocratic manner. Sunsetting statutes sometimes receive little legislative attention, but they sometimes receive consideration that is every bit as intense as deliberation on permanent legislation.¹¹⁷

A second challenge to the informational/experimental rationale applies only to a subset of temporary legislation that is specifically designed to elicit information about how private parties would respond to the specific piece of legislation *if it were permanent*. Unlike research into a specific scientific problem, for which time and resources alone should be adequate to produce better information, some statutes seek to elicit information about how private parties would behave under a new legislative regime. Unfortunately, in order for information to be accurate, private parties must respond to the temporary legislation as though it is permanent, ignoring the legislation's temporary nature. In at least two contexts this assumption is probably unrealistic. First, if the legislation provides a benefit, private actors may over-respond to the legislation and try to derive all potential benefits prior to the sunset. For example, a temporary tax benefit---e.g. the temporary suspension of the capital gains tax---could compress behavioral changes into the temporary time period. As a result, the observed level of behavioral adjustment would be an inaccurate indicator of how private parties would respond to permanent legislation. Similarly, private parties might be under-responsive to temporary legislation if the legislation requires costly changes to behavior and parties perceive that the legislation is unlikely to be extended after the sunset. Thus, both over- and under-responsiveness may bias the information that temporary legislation produces. The irony of course is that legislation will be extended precisely when it should not be (when the observed level of behavioral response is overstated), and terminated precisely when it should be extended (when the observed level of behavioral response is

Environmental Liability Act (CERCLA) generally produces significant program reform, but sometimes produces virtually no changes because of underlying politics).

¹¹³ See Elizabeth Garrett, *Rethinking the Structure of Decision-Making in the Federal Budget Process*, 35 HARV. J. LEG. 387 (1998).

¹¹⁴ See Pub. L. 107-56, 115 Stat. 272 (H.R. 3162), § 224, 107th Cong., 1st Sess. (2001) (sunsetting approximately half the powers in the USA Patriot Act at the end of December 31, 2005).

¹¹⁵ See S 1709, 108th Cong., 1st Sess. (Oct. 2, 2003).

¹¹⁶ See Speech of Mark Udall (D-Co), in 149 Cong. Rec. E776, 108th Cong., 1st Sess. (Apr. 12, 2003).

¹¹⁷ Other examples of debates on temporary legislation from the more recent Congresses include the Bush Administration's tax cuts (voted to extend) and the Assault Weapons Ban (allowed to sunset).

understated). As a result, temporary legislation will likely fare better as an information producing tool when the measure itself does not directly affect private incentives for behavioral change but rather simply allows external information like scientific research to develop during the interim time period.

Overall, the informational benefits of temporary legislation's staged decision procedures turn on the presence and nature of uncertainty in the policy process. When initial uncertainty is high, staged procedures allow new information to be integrated into the policy process. In such contexts, temporary legislation will generally be superior to permanent legislation along the informational dimension. When cognitive bias is present, temporary legislation provides a compensation mechanism to allow certain forms of bias to diminish. And, when the information environment is dominated by asymmetries and the interaction between legislators and private interests would otherwise be discrete, temporary legislation creates stronger incentives for the accurate revelation of information than otherwise equivalent permanent legislation. In practice, temporary legislation is used for a range of technocratic ends, most of which turn on the role of information in the policy process. Temporary legislation is no magic bullet for informational challenges in the legislature. But, in practice, the theoretical benefits of temporary legislation appear to be real and potentially significant, particularly in the context of legislation addressing new risk.

C. Politics and Public Choice

Beyond the differential effects of temporary and permanent legislation on transaction costs and information in the policy process, the two legislative forms also have important implications for the allocation of political power, costs, and risk, both within Congress over time and across branches of government. Although information may be one reason to rely on temporary legislation, politics is likely to be the dominant one. Thus, a normative evaluation of temporary legislation requires focusing on the political implications of temporary legislation. First, temporary legislation affects the power of agenda control--shifting some degree of control from a future legislature to the current period majority. Second, temporary legislation increases the risk of legislative drift as a threat to the current period majority's policies. Third, temporary legislation allocates greater power to Congress relative to administrative agencies, thereby reducing the risk of bureaucratic drift as a threat to the current majority's policies. Lastly, both the intra-branch and inter-branch effects of temporary legislation depend on background institutional and political conditions.

Before turning directly to these issues, I want to address a portion of the public choice literature that focuses on the "durability" of legislation.¹¹⁸ This strain of literature assumes that regulation or legislation is a good demanded by private interests and supplied by legislators for a negotiated price.¹¹⁹ Within this framework, parties to the agreement

¹¹⁸ See William M. Landes and Richard A. Posner, *The Judiciary in an Interest-Group Perspective*, 18 J. L. & ECON. 875 (1975) (arguing that an independent judiciary that enforces current period legislative bargains and increases the durability of legislation and the value of bargains between legislators and private interests). For a general overview, see Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 345-46 (1988) (providing overview of public choice work on legislation). For a more recent discussion of durability, see Jonathan R. Macey, Winstar, *Bureaucracy and Public Choice*, 6 SUP. CT. ECON. REV. 173, 176-81 (1998) (discussing legislative durability in the context of the Supreme Court's decision in *Winstar*). For a similar argument in the context of state law, see Donald J. Kochan, *State Laws and the Independent Judiciary: An Analysis of the Effects of the Seventeenth Amendment on the Number of Supreme Court Cases Holding State Laws Unconstitutional*, 66 ALB. L. REV. 1023 (2003).

¹¹⁹ See Macey, 6 SUP. CT. ECON. REV. at 176.

(legislators and private interests) face serious challenges related to the non-simultaneity of performance.¹²⁰ That is, “even after an interest group has succeeded in achieving enactment of a particular statute, there can be no promise that future legislators will not renege on the previously agreed upon legislative deal.”¹²¹ If Congress is unable to guarantee that legislative deals will be durable, Congress's ability to bargain effectively with private interests will be undermined. A variety of legislative mechanisms support the durability of legislative deals. For example, Landes and Posner argued that an independent judiciary facilitates the credibility of durable legislative bargains.¹²² High costs of producing legislation also decrease the probability that statutes will be repealed, and both the internal organization of Congress (committee structure and veto-gates) and delegation to administrative agencies can be understood as methods of insulating current period deals from future period legislatures, a point to which I return below.¹²³

Note that this literature either assumes or concludes that both private interests and legislators have a fairly straightforward preference for durable or long-term legislative bargains.¹²⁴ However, this position suffers from two weaknesses, one theoretical and one empirical. The empirical weakness is that in practice, the duration of legislation exhibits widespread heterogeneity. A substantial body of legislation relies either on explicit sunsets, relatively frequent legislative reauthorizations, or short-term appropriations to fund regulatory regimes.¹²⁵ While some portion of the literature argues that private or interest group legislation is more likely to be long-term than is public-interest legislation, many uses of short-term legislation---for example, the tax extenders---are hard to explain in this framework.¹²⁶ The theoretical weakness is that there is no reason to think that either legislators or private interests should exhibit a clear preference for long-term legislation. Private interests recognize that current period deals may be undone by future legislative coalitions.¹²⁷ Indeed, long-term bargains incorporate a greater risk of legislative defection. However, this risk of future repeal or policy adjustment will simply be incorporated into the price interests are willing to pay for legislation in the current period. If the deal is for credible long-term legislation, this value will rise. If the agreement is for a short-term measure, the value will fall. In either case, the private interest group will pay only a price that reflects the anticipated probability of future termination, nullification, or repeal.¹²⁸ It is conceivable that

¹²⁰ Id at 177.

¹²¹ Id at 178.

¹²² Landes and Posner, 18 J. L. & ECON. at 875-77.

¹²³ Macey, 6 SUP. CT. ECON. REV. at 178.

¹²⁴ See, e.g., id at 180 (“The bottom line is that Congress and interest groups structure the administrative process in order to permit interest groups to preserve the benefits of the prior deals they have struck in the face of recalcitrant bureaucrats.”). See also, Tollison, 74 VA. L. REV. at 344 (“Perhaps the most basic issue related to the demand for legislation is how to explain why laws persist over time. That is, why is the work of one legislature not overturned by the next legislature?”).

¹²⁵ To be fair, some additional nuance is provided by the literature. See, e.g., Mark Crain and Robert Tollison, *The Executive Branch in the Interest-Group Theory of Government*, 8 J. LEGAL. STUD. 555 (1979) (arguing that as legislative tenure increases, demand for constitutional protection decreases because legislators and members of subsequent legislatures can protect normal legislation).

¹²⁶ See Heidi Glenn, *Expiring Provisions Never Die, They Just Become “Extenders,”* 73 Tax Notes 1009, 1010 (1996). Tax extenders are treated more extensively below in the context of rent-extraction rather than rent-seeking.

¹²⁷ See John A. Ferejohn and Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INTL. REV. L. & ECON. 263, 266 (1992) (“Except in the rare case of a constitutional amendment, today's legislature cannot prevent a future legislature's majority from overturning its wishes.”).

¹²⁸ See Landes and Posner, 18 J. L. & ECON. at 883.

the costs of negotiating a series of short-term legislative packages are greater than the costs of negotiating a single long-term durable bargain, but that conclusion is not at all obvious, as the discussion of transaction costs demonstrated. The former will involve multiple periods of organizing and negotiating, but also lower per-period prices for legislation. No doubt there is a minimum benefit that an interest must receive in order to incur the transaction costs of organizing and negotiating a bargain. However, above this floor, the likely durability of the legislation will simply be incorporated into the current period price.¹²⁹ This is not to say that specific interests will not prefer short- or long-term legislation. But, there should be no global preference across groups in favor of either permanent or temporary legislation. Moreover, because temporary legislation is frequently extended and permanent legislation is often amended and sometimes repealed, there is no necessary correlation between a temporary or permanent default rule and the actual duration of legislation. The temporary default produces many effects, but shorter duration is not obviously one of them. That said, the public choice literature correctly focuses attention on the risk to policies enacted by the current period majority and the interaction between the temporary legislative form and strategic dynamics within Congress over time and across branches of government.

First, temporary legislation transfers the power of agenda control from the Congressional leadership in future Congresses to the current period legislature. Statutory expirations constrain the discretion of committee chairs by mandating that certain items be placed on the committee's agenda. For example, in 1992, approximately 56 percent of committee chairs faced significant agenda constraints because of sunseting statutes.¹³⁰ Given that one of the major benefits of committee chairmanship is agenda control, temporary legislation's effect is apparently quite significant. On the other hand, by ensuring that specific legislation will be reconsidered in the future, temporary legislation simultaneously allows future committee chairs to influence the substantive terms of the statute.¹³¹ Thus, within the legislature, temporary legislation entails an inter-temporal tradeoff between agenda control and legislative drift---the risk that future legislatures will change the substance of legislation.

The second major political implication of using temporary rather than permanent legislation relates to inter-branch dynamics between Congress and the Executive. The choice of whether to delegate or produce policy using casework is often framed as a tradeoff between legislative drift and bureaucratic drift, and the choice between permanent and temporary legislation can be understood on largely the same terms.¹³² Delegation creates a

¹²⁹ See Richard L. Doernberg and Fred S. McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 MINN. L. REV. 913, 946 (1987) ("As with any contract, the parties generally get what they pay for: long-term deals will cost more, because they involve performance over a greater period.").

¹³⁰ See Christine DeGregorio, *Leadership Approaches in Congressional Committee Hearings*, 45 WEST. POL. Q. 971, 978 (1992) ("In a lot of ways we are not the masters of our own fates. Things come to us that something must be done about. Right now it is the Price-Anderson Act. It's going to expire. There is a whole industry out there, and there are safe energy groups that don't want to see it expire. So, that's our agenda and it's big.") (quotation from the House Interior Committee).

¹³¹ See DeGregorio, 45 WEST. POL. Q. at 978 (arguing that statutory expirations both constrain discretion of committee chairs and provide ready-made opportunities to affect policy); see also J.L. Walker, *Setting the Agenda in the U.S. Senate: A Theory of Problem Selection*, 7 BRIT. J. POL. SCI. 423 (1977) (discussing role of reauthorization proceedings in Senate committees).

¹³² For helpful overviews of the delegation literature, see DAVID EPSTEIN AND SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* (Cambridge 1999); D. RODERICK KIEWIET & MATTHEW D. MCCUBBINS, *THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS* (Chicago 1991). On

risk that the bureaucracy will alter policy (bureaucratic drift),¹³³ while casework creates a risk that a future legislative coalition will alter policy (legislative drift). As noted above, future legislators may have different policy preferences than those of the current Congress, and therefore attempt to undo previous legislative outcomes. Traditionally, delegation to the bureaucracy has been understood as one potential mechanism for insulating policies from changes in the legislative tide. Whereas delegation gives greater power to administrative agencies relative to Congress, temporary legislation gives greater power to Congress as an institution relative to the bureaucracy. Indeed, this point was one of the core claims of the sunset legislation movement. Sunsetting authorizing statutes or agencies was supposed to increase Congressional control of the bureaucracy thereby increasing democratic responsiveness.¹³⁴ As a result, a policy program enacted using temporary legislation is more susceptible to legislative drift, but less susceptible to bureaucratic drift than---for example---delegation via permanent legislation. Thus, both delegation and temporary legislation can be understood as ways of compensating for different threats or political risks to enacted policy.

However, both the intra-branch and the inter-branch effects of temporary legislation are heavily dependent on background institutional conditions. For example, just as decisions about delegation will be a function of the degree of difference between policy preferences of committee and floor medians, and between Congressional preferences and Executive preferences, so too will decisions about temporary legislation. For example, delegation is said to be more desirable when the median committee preference is further from the Congressional floor median than from the bureaucracy's ideal point because bureaucratic influence will move policies toward committee preferences, whereas casework would move policies toward the floor median.¹³⁵ Temporary legislation is marginally less desirable in this context because it ensures that another round of legislation must get through a floor vote, which in turn moves the legislation back toward the floor median. As a result, less temporary legislation should be produced by "outlier committees." Similarly, the degree of political stability will affect the relative desirability of temporary legislation. Within Congress, if majority coalitions are unstable, then temporary legislation is particularly risky. The sunset guarantees that the legislation will be reconsidered and because coalitions are unstable, the future period majority is likely to have preferences quite different from the current period majority. In this environment, political insulation should be preferred by those in control.

The desirability of temporary legislation also depends on legislative time horizons. Any conditions that shorten legislative time horizons should increase the use of temporary legislation, all else equal. This is so not because temporary legislation produces a shorter

bureaucratic drift particularly, see Matthew McCubbins, Roger Noll, & Barry Weingast, *Structures and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 439 (1989).

¹³³ See, e.g., David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731 (1999).

¹³⁴ On Congressional oversight of the bureaucracy, see generally Mathew D. McCubbins, Roger G. Noll & Barry Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); Mathew D. McCubbins, Roger G. Noll, and Barry Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243 (1987); Morris Fiorina, *Legislator Uncertainty, Legislative Control, and the Delegation of Legislative Power*, 2 J. L. ECON. & ORG. 33 (1986); Terry Moe, *The Politics of Bureaucratic Structure*, in *CAN THE GOVERNMENT GOVERN* (John Chubb and Paul Peterson, eds.) (1985); David Epstein and Sharyn O'Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POL. SCI. 697 (1984); Mathew McCubbins and Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984). See also Randall Calvert, Mark Moran, and Barry Weingast, *Congressional Influence Over Policy Making: The Case of the FTC*, in *CONGRESS: STRUCTURE AND POLICY* (Mathew McCubbins & Terry Sullivan, eds.) (1987).

¹³⁵ See EPSTEIN & O'HALLORAN, *DELEGATING POWERS* at ___.

duration of legislation---the above discussion should have adequately dispensed with that claim. Rather, any institutional conditions that decrease the ability of legislators to “guarantee” long-term legislation will reduce the desirability of permanent legislation to private interests. Of course, as should be abundantly clear by now, legislators are virtually never in a position to guarantee permanent legislation over the long-term. Future legislatures can always amend or repeal legislation. Yet, as either political turnover increases, internal rules limit the role of seniority in Congress, or external constraints like term limits shorten time-horizons, the ability of legislators to protect legislation is diminished on the margin. Whereas ordinarily certain interests would prefer temporary legislation and others permanent legislation, as legislative time horizons decrease, a greater proportion of interests should favor temporary measures. For example, in the context of tax policy, Doernberg and McChesney argue that legislators have increasingly preferred short-term deals because of changes in legislative organization and an increase in the number of interest groups.¹³⁶ As the effects of seniority on legislation diminished, it became more difficult for legislators to create stable long-term tax deals. Turnover on Congressional committees with jurisdiction over tax policy has increased in both houses, as has the frequency of short-term tax deals.¹³⁷ Similarly, term limits shorten legislative time horizons and decrease the durability of legislation by increasing turnover, thereby reducing the value of long-term legislative bargains between interests and legislators.¹³⁸

External political conditions produce similar effects. For example, Professors Crain and Muris argue that divided government should produce short-term legislation because laws are less likely to survive beyond the current time period when bureaucrats from the other party can exert control over policy implementation.¹³⁹ This is correct, but only partially so. It is true that divided government should produce more temporary legislation than united government, but not because bargains can only be enforced in the short-term. On the contrary, it is because temporary legislation allows Congress to exercise greater control over the policy in the long-term thereby mitigating the increased risk of bureaucratic drift associated with divided government. Nonetheless, whether government is united or divided, and how likely turnover is in the next election are important background variables that do affect the payoffs to legislators from utilizing temporary legislation.

Related to many of these issues is the claim that short-term legislation produces a clear increase in welfare losses from rent-related activities.¹⁴⁰ Yet, holding the substance of

¹³⁶ See Doernberg & McChesney, 71 MINN. L. REV. at 914 (arguing that changes in stability of the committee system has resulted in an increasing rate of change and decreased durability of tax laws).

¹³⁷ Id at 948-49.

¹³⁸ See Elizabeth Garrett, *Term Limitations and the Myth of the Citizen-Legislator*, 81 CORNELL L. REV. 623, 687 (1996) (arguing term limits decrease the durability of legislation and therefore reduce the value of a legislative bargain between private interests and legislators, but noting legislator inexperience may limit the decreasing effect); see also Linda Cohen and Matthew Spitzer, *Term Limits*, 80 GEO. L. J. 477, 508 (1992) (arguing term limits should make interest group legislation more likely).

¹³⁹ See W. Mark Crain and Timothy J. Muris, *Legislative Organization of Fiscal Policy*, 38 J. L. & Econ. 311 (1995) (“If the same party controls the legislative and executive branches and this control is secure, demands from pressure groups increase because policy agreements have a multiple-term time horizon. In contrast, divided government or reversals in party control tend to discourage interest-group demands because once enacted, laws are less likely to survive beyond the term of the regime currently in power.”).

¹⁴⁰ See, e.g., John W. Lee & W. Eugene Seago, *Policy Entrepreneurship, Public Choice, and Symbolic Reform Analysis of Section 198, The Brownfields Tax Incentive: Carrot or Stick or Just Never Mind?*, 26 WM. & MARY ENV. L. & POLY REV. 613, 636 (2002) (“Public Choice analysis would also suggest that the structure of extenders, i.e. bills extending

legislation constant, a temporary measure actually produces less benefit to an interest than does otherwise equivalent permanent legislation. Temporary measures could produce less rent seeking in the aggregate because the prize for winning a statute is less valuable. On the other hand, if temporary legislation is generally cheaper for private interests to obtain, then smaller interest groups that would otherwise be unable to enter the pricey market for legislation may engage in rent-seeking for temporary legislation when they could not have entered the market for permanent legislation. Temporary legislation therefore produces greater competition in the market for legislation, which could---but will not necessarily---produce net social welfare losses. Simultaneously, temporary legislation democratizes or at least increases diversity in the market for legislation. As a result, widespread use of temporary legislation could result in greater welfare losses, but not because rent-seeking increases near the sunset, or because there are two periods of legislative enactments, but because more interest groups are able to enter the market for legislation in the first place. To say the least, such back of the envelope calculations are highly speculative. Nonetheless, rent-seeking and rent-extraction by legislators are an important component of the temporary legislation puzzle.¹⁴¹

In sum, temporary legislation produces a fairly wide range of political effects. Among these, temporary legislation transfers agenda control from the future to the current period legislature, makes it easier for future period legislatures to repeal or amend substantive legislation, thereby increasing the threat of legislative drift while decreasing the threat of bureaucratic drift, and advantages Congress relative to the bureaucracy. However, the relative desirability of temporary legislation is a function of internal institutional conditions within Congress, external institutional conditions in the Executive, and the degree of underlying political stability both within and outside the legislature.

III. TEMPORARY LEGISLATION AND TERRORISM RISK

Having offered a basic characterization of temporary legislation and provided some initial analysis of its implications for politics and policy, I now turn to a more local exploration of temporary legislation in an applied context. To explore the dynamic of temporary legislation in practice, this section focuses on an admittedly non-traditional form of risk: domestic terrorism risk. This approach has several weaknesses, not the least of which is the fact that the topic is a controversial and justifiably emotional issue. Moreover, it remains to be seen whether terrorism risk is best understood as a unique form of risk or simply one type of a larger class of risks that are managed by government agencies. Nonetheless, the risk is perhaps the most recent example of a newly recognized risk, and one characterized by enormous uncertainty. As such, understanding the political response promises to help elucidate our understanding of other more traditional problems in the risk regulation literature.

The Terrorism Risk Insurance Act of 2002 (TRIA),¹⁴² was one of several responses to

sunset dates of tax provisions, offers greater opportunities for rent-seeking by legislators.”) (internal quotations omitted).

¹⁴¹ On rent extraction, see generally FRED S. MCCHESENEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION (1997); Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987) (arguing legislators systematically extract rents in addition to distributing them).

¹⁴² Pub. L. 107-297, 116 Stat. 2322 (Nov. 26, 2002), codified in scattered portions of the U.S. code. See 15 USCA §§ 6701, 1610, 1606 (2003); 12 USCA § 248 (2003).

the newly recognized risk of domestic terrorism in the United States. The USA Patriot Act and an initial airline-bailout package were two prominent others. TRIA produced a temporary backstop for insurance industry losses from domestic terrorism for a period of three years. Preliminary views on the wisdom of TRIA vary. A comparison of the legislation's stated purpose and the actual economic reality suggests TRIA may have been either unnecessary or unwise.¹⁴³ On necessity grounds, by the time TRIA was enacted, the reinsurance market had already significantly recovered from the shock of September 11. On wisdom grounds, many of the articulated justifications for TRIA do not withstand close scrutiny.¹⁴⁴ Nonetheless, the legislative response to terrorism risk illustrates many of the strengths and weaknesses of temporary legislation as a political strategy. Despite controversy over the substance of much of the terrorism risk legislation, the application provides a useful recent test case for temporary legislation.

By any account, the losses suffered on September 11 were astounding. Even setting aside the devastating loss of life, in financial terms the event constituted the largest single loss-event in U.S. insurance history. Early estimates put the insured losses at between \$30-60 billion.¹⁴⁵ By way of comparison, Hurricane Andrew in 1992, one of the prior record holders for single-event insurance industry losses, yielded roughly \$19 billion of insured losses. The Northridge Earthquake, the third largest insurance loss event caused roughly \$12 billion in insured losses. Aggregate losses were significant, but at the individual firm level obligations from the event, net of reinsurance, varied widely. For example, Zurich Financial Services estimated their losses at between \$700-900 million.¹⁴⁶ Kemper estimated their pre-tax losses at \$360 million gross and \$60-80 million net of reinsurance.¹⁴⁷ Despite the magnitude of the losses, the public stance of the insurance industry was a unified commitment to pay the losses from September 11, while urging future government innovation to help pay for future attacks.

What concerned most insurers and reinsurers was the possibility of multiple catastrophic loss events within the same year. As one witness put it during a congressional hearing, "I remind the Committee that we are currently in Hurricane Season. If we fall prey to a catastrophic hurricane[,] another wave of terrorist acts, or any other calamitous event,

¹⁴³ For an overview and discussion of some of these issues, see Jeffrey Manns, *Insuring Against Terror?*, 112 YALE L. J. 2509 (2003); Anne Gron Alan O. Sykes, *Terrorism and Insurance Markets: A Role for the Government as Insurer*, 36 IND. L. REV. 447 (2003); Saul Levmore & Kyle D. Logue, *Insuring Against Terrorism---and Crime*, 102 MICH. L. REV. 268 (2003); Anne Gron and Alan O. Sykes, *A Role for the Government?*, Regulation (2002/2003).

¹⁴⁴ See generally, Jeffrey E. Thomas, *Exclusion Of Terrorist-Related Harms From Insurance Coverage: Do The Costs Justify The Benefits?*, 36 IND. L. REV. 397 (2003); Robert A. Katz, *A Pig in a Python: How the Charitable Response to September 11 Overwhelmed the Law of Disaster Relief*, 36 IND. L. REV. 251 (2003).

¹⁴⁵ See Testimony of David B. Mathis, Chairman of the Board and Chief Executive Officer, Kemper Insurance Companies, before the House Financial Services Committee, Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises (Oct. 24, 2001) (representing Kemper and American Insurance Association).

¹⁴⁶ See Statement of Constantinos ("Dinos") Iordanou, Senior Executive Vice President of Zurich Financial Services Group, before the House Financial Services Committee, Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises (Oct. 24, 2001).

¹⁴⁷ Statement of David B. Mathis, Chairman of the Board and Chief Executive Officer, Kemper Insurance Companies, before the House Financial Services Committee, Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises (Oct. 24, 2001) (representing Kemper and American Insurance Association).

industry solvency could be called into question.¹⁴⁸ As a result, the industry suggested coverage for terrorism risk would likely be dropped or offered at significantly higher prices when existing obligations were re-written. The bottom line is that insured losses from September 11 were significant, but the industry was financially able and generally willing to meet existing obligations.

Understanding the legislative response requires a quick overview of the distinction between insurance and reinsurance, and each market's relation to federal and state government.¹⁴⁹ Primary insurance companies sell insurance directly to individuals or firms and are regulated almost exclusively by state government officers.¹⁵⁰ Reinsurance companies essentially sell insurance to primary insurance companies, but is largely unregulated by either the federal or state governments.¹⁵¹ Because primary insurers rely heavily on reinsurance to function, if reinsurance is not available for a certain class of risk, primary insurers may be unwilling or unable to offer primary coverage to individuals or firms.

This precise dynamic occurred in the Fall of 2001. First, reinsurers made clear that future policies, being issued when current policies expired either at the end of the year or in June of 2002, would exclude terrorism risk.¹⁵² However, in order for the primary insurance industry to exclude terrorism risk from its coverage, regulatory approval from state insurance commissioners was required, which the industry quickly sought. The worst-case scenario for primary insurers was the loss of reinsurance for terrorism risk and the refusal of state regulators to approve either a rate increase or a terrorism exclusion. Ultimately, forty-five states approved temporary exclusions for terrorism risk on the recommendation of the National Association of Insurance Commissioners (NAIC), which supported an exclusion until federal legislation was passed.¹⁵³ However, both New York and California, two of the handful of states where terrorism risk was assumed to be highest, initially refused to approve an exclusion.¹⁵⁴ The federal government ultimately enacted TRIA which shared excess risk between the insurance industry and the federal government.

In early 2002, insurance that covered terrorism risk was difficult to find and quite expensive. While premiums for terrorism insurance skyrocketed and availability plummeted in Manhattan, many public venues in far less visible areas faced similar challenges. Tampa

¹⁴⁸ Testimony of Dean R. O'Hare, Chairman and CEO of The Chubb Corporation before the House Financial Services Committee *4 (Sept. 26, 2001).

¹⁴⁹ For helpful introductory treatments, see KENNETH S. ABRAHAM, *INSURANCE LAW AND REGULATION* (Yale 2000); ROBERT H. JERRY, III, *UNDERSTANDING INSURANCE LAW* (Bender 2d 1996); KENNETH S. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* (Yale 1986).

¹⁵⁰ See McCarran-Ferguson Act, 59 Stat. 33 (Mar. 9 1945), 15 USCA §§ 1011-1015 (2003) which gives regulatory authority over insurance practices to the states.

¹⁵¹ Just as individuals or firms purchase insurance to share risk, primary insurance companies purchase reinsurance to share risk. For example, a company like State Farm might sell a property/casualty policy to a firm for losses above \$500,000 with a maximum policy payout of \$10,000,000. However, rather than bearing all that risk, the primary insurance company generally purchases reinsurance for various layers of risk (e.g. losses above \$5,000,000, but less than \$10,000,000).

¹⁵² Most contracts were due to expire either at the start of the year or in June 2002. See James Toedtman, *Balking on Terrorism Insurance*, NEWSDAY A49 (Sept. 27, 2001).

¹⁵³ Frank Vinluan and Bill Kosen, *Terrorism Insurance Dries Up for Owners of High-Profile Sites*, SEATTLE TIMES F1 (May 19, 2002).

¹⁵⁴ Jackie Spinner, *N.Y. Calif. Refuse to Exclude Terrorism From Insurance*, WASH. POST. E3 (Jan. 10, 2002). Part of the dispute focused on defining the scope of an exclusion, which in the original request by ISO was an exclusion for a terrorist act causing more than \$25 million in damages and applying only to commercial policies.

International Airport spent \$292,269 for a fifty million dollar policy.¹⁵⁵ Gwinnett County Georgia paid more for terrorism insurance than for its entire property insurance bill in the previous year.¹⁵⁶ The Mall of America in Minnesota had to obtain a temporary restraining order against its mortgage company who wanted to force the mall to obtain terrorism insurance, which was offered at almost triple the price of the mall's previous "all risk" policy.¹⁵⁷ In New York, the challenges were severe, as they were for other so-called trophy properties.¹⁵⁸ Even much less visible properties faced similar challenges. Property insurance for Ralph Wilson Stadium in Erie County jumped by \$52,000 to \$395,000.¹⁵⁹ Utility companies had difficulty finding adequate coverage,¹⁶⁰ and similar shortfalls were also experienced globally.¹⁶¹ Faced with growing customer frustration with capacity and the price of premiums, the insurance industry mobilized to lobby for federal intervention. The Coalition to Insure Against Terrorism publicized the importance of federal action on terrorism insurance.¹⁶² While there was disagreement within Congress about the proper scope of legislation, a broad consensus emerged that some form of federal response was justified. As one congressional aid speaking on the need for legislation put it, "[t]he sky may not have fallen but it's beginning to rain."¹⁶³

The next eighteen months produced political battles about the terms of terrorism insurance legislation. The Bush administration sought to frame the terrorism insurance issue in macroeconomic terms, arguing that the lack of reinsurance for terrorism risk would slow or stop the economy. Federal intervention was needed not to bail out the insurance industry, but to protect the long-term health of America's economy.¹⁶⁴ However, terrorism insurance

¹⁵⁵ Ted Jackovics, *TLA Buys Terrorism Insurance*, TAMPA TRIB. 1 (Dec. 7, 2001). Yet, this is an ambiguous observation. On the one hand, the airport was able to obtain coverage just two months after the attacks. On the other hand, the airport hardly paid a bargain price.

¹⁵⁶ The county purchased \$50 million of coverage for just under \$400,000 from Factory Mutual Insurance Company. See Doug Nurse, *Terrorism Insurance Price Tag: \$390,000*, ATLANTA J. AND CONST. 1JJ (Jan. 1, 2002).

¹⁵⁷ Dee DePass, *Megamall Battles Terrorism Insurance*, STAR TRIB. (Minneapolis, MN) 1D (Mar. 1, 2002). The Simon Property Group, owner of the mall, later settled with its mortgage company purchasing a \$100 million policy. See Robert Harley, *Mall Giant Buys \$375m Terrorism Insurance Policy*, AUSTRALIAN FINANCIAL REV. 62 (April 2, 2002).

¹⁵⁸ See Peter Grant, *Lack of Terrorism Insurance Snarls Deal*, WALL ST. J. B2 (Jan. 31, 2002) (discussing difficulty of obtaining terrorism insurance on a property adjacent to Grand Central Terminal).

¹⁵⁹ Patrick Lakamp, *Terrorism Insurance Cost Skyrockets After 9/11*, BUFFALO NEWS A1 (May 21, 2002).

¹⁶⁰ Jackie Spinner, *Lack of Terrorism Insurance Puts Utilities at Risk*, WASH. POST. E1 (Aug. 1, 2002) (quoting a representative of the Potomac Electric Power Co.: "The market is being unreasonable because it can be unreasonable.").

¹⁶¹ Australia experienced the same early capacity problems for public venues. See Michael Owen-Brown, *Companies Withdraw Terrorism Insurance*, COURIER MAIL 3 (Dec. 19, 2001); Samantha Maiden, *Terrorism Insurance Protection Set to Go*, Advertiser 13 (Dec. 29, 2001). The Insurance Council of Australia proposed a pool coverage system in which insurers would contribute a percentage of premiums to a pool which the government would guarantee after claims reached a \$1 billion limit. See *Costello To Act Over Terrorism Insurance*, SYDNEY MORNING HERALD 5 (Dec. 21, 2001). Approximately forty percent of Australian companies had terrorism coverage excluded when policies were renewed. See Richard Salmomns, *September 11 Takes Its Toll on Terrorism Insurance Cover*, THE AGE (Melbourne) 2 (April 10, 2002).

¹⁶² The coalition's membership was diverse, ranging from the American Banker's Association, to the National Association of Homebuilders, to the National Collegiate Athletic Association, to the Real Estate Roundtable. See <http://insureagainstterrorism.org>.

¹⁶³ Nick Anderson, *Terrorism Insurance Bill Revived*, LA TIMES 9 (Aug. 19, 2002).

¹⁶⁴ See Background Briefing by Senior Administration Officials on Terrorism Insurance, 2001 WL 1219090 *1 (White House) (Oct. 15, 2001):

legislation did not sail smoothly through Congress, taking more than a year to reach the President's desk. The House passed terrorism insurance legislation (HR 3210) at the end of November, 2001 by a vote of 227-193.¹⁶⁵ But, the scene in the Senate was chaotic as legislators raced to pass legislation before the pending December 31 policy renewal deadline.¹⁶⁶ The Senate recessed without passing legislation, thanks in large part to political wrangling over tort reform.¹⁶⁷

The new year brought high profile stories of exorbitant prices for terrorism risk coverage along with capacity shortfalls. While more than a dozen firms were offering terrorism insurance by April 2002 at rates significantly less than those offered earlier in the year,¹⁶⁸ the Spring brought new momentum in the Senate for a legislative package,¹⁶⁹ along with more political maneuvering.¹⁷⁰ Ultimately, the Senate passed legislation in mid-June.¹⁷¹ The summer

One of the things that we have seen that has happened since September 11th is that major reinsurers are no longer providing insurance against terrorist acts for property and casualty insurance. This is a problem because most of these policies expire on 12/31 of this year and once the reinsurance policies expire, it will be difficult for the property and casualty primary insurers to provide coverage. Without coverage against terrorist acts, banks will not lend to new construction; it will be difficult to sell major projects such as new pipelines, new power plants, skyscrapers.

This macroeconomic framing of the terrorism insurance issue was echoed throughout industry commentary, in the media, and in Congress. Consider the following statement by a representative of the National Association for Real Estate Investment Trusts: "The absence of insurance will have a severe impact on our ability to buy, sell and refinance properties." See Alison Beard, *Government Urged to Act as Companies Look to Drop Terrorism Insurance: Property Insurers Seek Safety Net to Cover Any Potential Losses*, FINANCIAL TIMES 26 (Oct. 16, 2001). Said the Chief Executive of American International Group Inc. (AIG), "This is not an insurance problem as much as an economic problem. It may slow down economic growth at a time when economic growth is vital." See Scott Bernard Nelson, *Terrorism Insurance Laws Called Critical*, BOSTON GLOBE D2 (Jan. 11, 2002) (Maurice Greenberg at a gathering of the Greater Boston Chamber of Commerce).

¹⁶⁵ See Roll No. 464, in 147 Cong. Rec. H 8630 (Nov. 29, 2001); see also H.R. 3210, 107th Cong., 1st Sess. (Nov. 29, 2001); H.R. Rep. No. 107-304, 107th Cong., 1st Sess. (Nov. 28, 2001); H.R. Rep. No. 107-300(I), *Terrorism Risk Protection Act*, 107th Cong., 1st Sess. (Nov. 19th, 2001); H.R. Rep. No. 107-300(II), *Terrorism Risk Protection Act*, 107th Cong., 1st Sess. (Nov. 19th, 2001).

¹⁶⁶ As one of Senator Daschle's aides noted, "Everybody and their brother is dropping bills at this point, and everybody is trying to figure out what it means." See Jackie Spinner, *Senate Divides Further on Terrorism Insurance*, WASH. POST. A4 (Dec. 1, 2001). Senator McCain's bill would have provided government loans to cover 80 percent of claims if an individual company's losses exceeded \$10 million or five percent of gross premiums written. See S 1744, *Terrorism Insurance Act*, 107th Cong., 1st Sess, 147 Cong. Rec. S 12161 (Nov. 29, 2001). Senator Hollings proposed that insurers pool resources to pay the first \$50 billion in claims after which the government would pay 90 percent of claims. See S 1743, *National Terrorism Reinsurance Fund Act*, 107th Cong., 1st Sess, 147 Cong. Rec. S 12161 (Nov. 29, 2001). The third major alternative was proposed by Senator Gramm and resembled the White House's initial proposal, requiring insurers to cover the first \$10 billion in losses and requiring the government to pay 90 percent of additional claims for two years with a decreasing share in the program's third year. See S 1751, *Terrorism Risk Insurance Act of 2001*, 107th Cong., 1st Sess, 147 Cong. Rec. S 12247 (Nov. 30, 2001).

¹⁶⁷ See *Flubbing Terrorism Insurance*, HARTFORD COUR. A10 (Dec. 31, 2001).

¹⁶⁸ *Terrorism Insurance*, PLAIN DEALER B8 (April 11, 2002).

¹⁶⁹ Joseph B. Treaster, *Senate Takes Up Terrorism Insurance Again*, NY TIMES C1 (April 30, 2002) (quoting Senator Charles Schumer (D-NY) saying "Sentiment to pass a terrorism insurance bill is growing day by day among the members of both parties."). See also Michael Remez, *Dodd Bill Takes Up Terrorism Insurance*, HARTFORD COUR. E2 (June 8, 2002).

¹⁷⁰ In mid-June, lawmakers reached agreement to allow debate on a terrorism insurance bill co-sponsored by Christopher J. Dodd (D-Conn) and Senator Charles E. Schumer (D-NY). See S 2600, 107th Cong., 2d Sess. (June 7, 2002), in 148 Cong. Rec. S 5472 (June 13, 2002); see also Jackie Spinner, *Senate Gets Ready to Debate Terrorism Insurance Measure*, WASH. POST. E3 (June 13, 2002). The bill, S 2600, required the federal government to pay 90 percent of claims from terrorist actions above \$1 billion to a cap of \$90 billion. See S 2600, 107th Cong.,

produced only negotiations until President Bush set a deadline for legislation of Friday, October 5,¹⁷² and Moody's Investors Service downgraded its ratings on prominent New York properties like Rockefeller Center because of inadequate terrorism insurance coverage on the property.¹⁷³ Ultimately, the final version of TRIA passed the House on November 14, 2002,¹⁷⁴ was approved by the Senate 81-11,¹⁷⁵ and was signed by the President on December 16, 2002.¹⁷⁶ The entire legislative process took approximately fifteen months, not exactly a rapid-fire legislative response, but neither was the legislation permanently derailed. As enacted, TRIA provides a federal backstop for insurance industry losses stemming from terrorist loss events, and incorporates a mix of mandatory and discretionary payback provisions. TRIA is explicitly temporary legislation, enacted with an initial three-year term.

The need for and substance of terrorism insurance legislation has been debated elsewhere, and I have no interest in replicating that debate.¹⁷⁷ Suffice it to say that at very

2d Sess. (June 7, 2002), in Cong. Rec. S 5472. *See also* Elaine S. Povich, *Senate to Debate Bill on Terrorism Insurance*, NEWSDAY A34 (June 13, 2002).

¹⁷¹ *See* Vote No 157, in 148 Cong. Rec. at S 5669 (June 18, 2002).

¹⁷² *See Bush Sets Friday Deadline for Terrorism Insurance Bill*, WASH. POST. A7 (Oct. 2, 2002); Stephen Labaton and Joseph B. Treaster, *Threats and Responses: Bush Tells Congress to Move Quickly on Terrorism Insurance*, NY TIMES A17 (Oct. 2, 2002).

¹⁷³ *See* Dean Starkman, *Moody's Downgrades Securities on Lack of Terrorism Insurance*, WALL ST. J. C14 (Sept. 30, 2002). Fitch Ratings downgraded over \$5 billion in commercial mortgage backed securities because of inadequate terrorism insurance in early October of 2002. *See* Sheila Muto, *Plots and Ploys*, WALL ST. J. B4 (Oct. 9, 2002). Interestingly, Standard & Poor's did not change its ratings on any commercial real estate loans because of a lack of terrorism insurance. *See* Labaton and Treaster, *Threats and Responses*, WALL ST. J. at A17.

¹⁷⁴ The conference report passed by a voice vote. 148 Cong. Rec. H 8809.

¹⁷⁵ *See* Vote No 252, in 148 Cong. Rec. S11530 (Nov. 19, 2002).

¹⁷⁶ *See* 148 Cong. Rec. X 0, enacted as Pub. L. No 107-297, 116 Stat. 2322, 107th Cong., 2d Sess. (Nov. 26, 2002).

¹⁷⁷ TRIA has met with skepticism for three reasons. First, there is at least room for disagreement about the magnitude of the insurance capacity crisis. Major loss events in a segment of the insurance industry often lead to tight markets, in which insurance availability is low and prices are high. After Hurricane Andrew, insurer insolvency was a major problem and ultimately resulted in the current regulatory regime for dealing with hurricane risk in Florida. Property insurance in high risk regions is administered through a hybrid public-private regulatory regime. After the Northridge Earthquake in California, many firms were either insolvent or threatened to stop offering insurance for earthquake risk. A similar hybrid entity emerged in California to manage the problems of insuring natural disasters. Earthquake insurance can currently be purchased from the California Earthquake Authority at subsidized rates. However, short-term market response is a poor indicator of equilibrium or long-term market response. Demand for insurance coverage increases, capital flows into the industry, and tight markets often do not last. *See* Gron and Sykes, 36 IND. L. REV. at 451-55. The insurance industry was well capitalized after September 11 and had adequate reserves to meet existing obligations. As of June 30, 2001, total capital and surplus of the U.S. insurance and reinsurance industry was about \$300 billion. The figures provide a rough indicator of industry capacity to meet existing obligations. At first glance, the figures are reassuring since insured losses were far less than reserves. Yet, this reading is also somewhat misleading. These capital reserves were not earmarked for terrorism risk. Indeed, while terrorism risk was covered in most property insurance prior to September 11--that is to say, terrorism risk was not specifically excluded from policies--the risk was essentially estimated to be zero. No additional fees or premiums were charged for the coverage. While most companies had the ability to pay for insured losses, the losses were still non-trivial for most. Moreover, by the time TRIA was enacted private markets had already started to recover. Soon after September 11, one insurance analyst estimated that it was "close to a 100 percent probability that some reinsurer will fail and be unable to pay claims as a result of this event." *See Terrorism Insurance: Bill Would Cushion Blow of Future Attacks*, COLUMBUS DISPATCH A10 (Dec. 8, 2001) (quoting Morgan Stanley analyst). However, by Spring 2002, at least one group argued that "[m]ore than 75 percent of the largest corporations now have terrorism insurance." *See* Joseph B. Treaster, *Senate Takes Up Terrorism Insurance Again*, NY TIMES C1 (April 30, 2002) (quoting J. Robert Hunter, director of insurance for the Consumer Federation of America).

least, the need for Federal legislation was uncertain given the apparent recovery of the reinsurance market.¹⁷⁸ Additionally, some commentary has suggested that TRIA raises potential problems of market displacement and moral hazard.¹⁷⁹

For current purposes, it is enough to note that TRIA constitutes one of the most recent examples of a temporary legislative response to new risk. Against the backdrop of significant uncertainty, both about the need for legislation, the level of background terrorism risk, and the ability of private markets to effectively manage such risk, TRIA adopted something of a “wait and see” strategy, enacting short-term policy, but also collecting more information before adopting widespread structural policies. To be clear, I am not claiming that this was the dominant or even a major motivation for the temporary form. I note simply that the temporary approach has potential informational advantages in this context. Rather than creating new agencies or adopting permanent regulatory regimes, temporary legislation seems to have allowed politicians to respond to public demands for action, while guarding against a potentially irrational overreaction to new information about a risk. The prescription to avoid permanently creating new agencies and programs in the face of widespread uncertainty may seem mundane. However, the history of risk regulation is dominated by the creation of permanent regulatory regimes that tend to prioritize lesser new risks at the expense of more serious older ones.

In crafting a statutory response to terrorism risk and the related insurance crisis, legislators faced at least three classic problems of decision-making under risk and uncertainty. First, the best estimates of the probability of future terrorism in given regions or the likely magnitude of losses were extremely poor. Whether the estimates were high or low, there was tremendous variance around the probabilities. Indeed, this was part of the insurance industry's refrain: current information is inadequate to price terrorism insurance accurately. While TRIA does not guarantee that estimates of either the probability of attack or the magnitude of potential losses will be better in three years, the estimates will almost certainly not be worse. At very least, the full cost of the September 11 attacks will be estimated, and solidifying that data point will be useful for future decision-making. The historical experience with natural disaster risk provides some reason for modest optimism on

The Consumer Federation was the most consistent critic of federal intervention throughout the legislative process. In July 2002, Warren Buffet reported to shareholders that Berkshire Hathaway was “selling more terrorism coverage than anybody but it does not endanger Berkshire Hathaway.” See *Seizing the Day: Buffett Goes Where Few Will On Terrorism Insurance*, AUSTRALIAN FINANCIAL REV. 49 (July 13, 2002). Historically, Berkshire made significant profits by insuring catastrophic risk and in 2002 joined with Allianz and others to offer terrorism insurance to airlines. Berkshire also participated in Extremus, a new terrorism insurer in Germany. Berkshire wrote terrorism coverage for the Sears Tower in Chicago and for the World Cup Championship. See Holman W. Jenkins, Jr., *How Big Is the Terrorism Insurance Problem?*, WALL ST. J. A13 (Aug. 13, 2002).

¹⁷⁸ As one article put it, “So much for predictions that banks and real-estate investors would cease to function, abandon their careers, and head for the hills with a shotgun and 10 years' supply of Campbell's soup.” See JENKINS, WALL ST. J. at A13 (Aug. 17, 2002).

¹⁷⁹ For helpful overviews and discussions, see Gron and Sykes, 26 IND. L. REV. at 262; Manns, 112 YALE L. J. at 2519; Jeffrey R. Brown and Randall S. Kroszner and Brian H. Jenn, *Federal Terrorism Risk Insurance*, Unpublished Manuscript, NBER 9721 (2002). Because federal backstopping provides a cheap means for primary insurers to transfer risk, the demand for private reinsurance for terrorism risk should be depressed, lessening incentives for reinsurance firms to return to the terrorism insurance market. Conceivably, TRIA could prevent rather than facilitate the recovery of the reinsurance market for terrorism risk. While most early commentary has been critical of TRIA, Manns, 112 YALE L. J. at 2513-14, advocates a more positive reading of the legislation by arguing that a backstop or federal reinsurance provides only indirect benefits to organized interests, limiting the effects of rent-seeking.

this front. Especially in the past fifteen years, advances in computer modeling have allowed us to develop upper and lower bounds on damage estimates from different types of natural catastrophes. Adapting these models to the terrorism context is not a trivial task, but nor does it appear to be an insurmountable one. Even if the probability of future terrorism cannot be effectively estimated, better estimates of the likely magnitude of losses will help with pricing issues. The multi-stage decision process will allow legislators to adjust policy in response to new information.

However, TRIA may fall into the trap of ignoring the potential for over- or under-responsiveness by private actors to temporary legislation. For example, if insurance firms treat TRIA as temporary, and the information legislators need to craft permanent policy derives primarily from firm behavior, then the information produced may be largely inaccurate. On the other hand, experience with new financial instruments and better estimates of background risks may still produce useful information for policymakers. As a result, the staged procedure may well provide other informational benefits not tied directly to behavioral responses.

TRIA provides a second reason for skepticism about the practical impact of temporary legislation. On the other hand, the time-line of legislative response might lead one to question whether legislators really have difficulty avoiding striking when the iron is hot. At first glance, the prescription seems poorly suited to the reality of domestic politics in the United States. As the Congressional testimony from TRIA underlines, industry representatives predicted an insurance *crisis* on January 1, 2002. While the House passed a terrorism insurance bill a month before this deadline, the Senate failed to act until the following Summer. Ultimately, TRIA was signed into law almost a year after the supposed start-date of the crisis. One article compared Congress to “paramedics who take a year to get to the scene of an accident.... The patient, meanwhile, long ago got up and limped away.”¹⁸⁰ On this view, existing institutions like bicameralism already provide adequate safeguards against any danger of an overzealous legislative response, and the inherent delay in the legislative process allows information to be incorporated just as I have argued that temporary legislation does. This criticism is plausible, but the rapid enactment of the USA Patriot Act---passed just six weeks after September 11---provides some countervailing evidence.¹⁸¹ The Patriot Act demonstrates that legislation clearly can be enacted with remarkable rapidity during times of perceived crisis. Those critical of the legislation may be tempted to condemn the temporary legislative form because it facilitated the enactment of undesirable legislation. However, there is no reason to think legislators are less capable of evaluating legislation with sunsets than legislation without. Nor is it the case that legislation with sunsets systematically produces outcomes that infringe on civil liberties or is generally

¹⁸⁰ Jenkins, WALL ST. J. A13 (Aug. 14, 2002).

¹⁸¹ *Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act*, Pub. L. 107-56 (H.R. 3162), 115 Stat. 272, 107th Cong., 1st Sess. (Oct. 26, 2001). The substantive provisions of the legislation have proven extremely controversial; however, the Act also contained an explicit sunset clause. See Pub. L. 107-56 (H.R. 3162), § 224 (sunsetting approximately half the powers in the statutes at the end of December 31, 2005. Some have argued the sunset clause was a significant victory for civil rights advocates. See, e.g., Neal Devins, *Congress, Civil Liberties, and the War on Terrorism*, 11 WM & MARY BILL RTS. J. 1139, 1146-47(2003). The sunset provision may also increase Congressional power in the implementation of the Act. See *id.* (arguing that the sunset and the Patriot Act's form constitute something akin to fire alarm oversight). See also Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 111 YALE L. J. 1011, 1035-38 (2003) (discussing temporary responses to perceived emergencies or crises).

less normatively desirable than outcomes produced by statutes without sunsets.¹⁸²

Recall that staged decision-making is also supposed to improve incentives for accurate information revelation and compensate for the existence of asymmetric information. TRIA's enacting process suggests similar asymmetries may have existed, which a staged legislative process should have mitigated, but apparently did not. For example, throughout the Congressional hearings, industry representatives presented testimony that was at best incomplete and at worst misleading. Virtually all testimony argued that terrorism risk is a unique type of uninsurable risk. While other forms of catastrophic risk like natural disaster risk were said to be readily insurable by private markets, terrorism risk uniquely required federal backstopping.¹⁸³ However, natural disaster risk has not been consistently insurable in

¹⁸² The Homeland Security Act of 2002 (HSA) provides an interesting reference point for both TRIA and the USA Patriot Act. *See* Pub. L. 107-296, 116 Stat. 2135, 107th Cong., 2d Sess. (Nov. 25, 2002), codified at 6 USCA § 101-02, 111-13, 121-22, 131 (2003); 50 USCA 401(a) (2003). HSA reorganized much of the federal bureaucracy under the aegis of the Department of Homeland Security (DHS), a new agency charged with managing domestic security risks. The restructuring will surely have diverse effects. However, of particular relevance to the catastrophic risk case is the relocation of the Federal Emergency Management Agency (FEMA), a previously independent regulatory agency, to DHS. *See* HSA, § 430(c)(8). FEMA is the modern incarnation of the Office of Emergency Protection (OEP), which in the 1950's, 1960's, and 1970's was charged primarily with addressing catastrophic risk from nuclear attacks and secondarily with the non-security-related issues from natural disasters. Eventually, as natural disasters gained political prominence and mismanagement of major natural disasters received media attention, the natural disaster and domestic security responsibilities were split. FEMA was created as part of President Carter's bureaucratic reorganization plans in the late 1970's. *See* Reorganization Plan No 3 (1978) (administrative responsibilities transferred from a host of other federal agencies pursuant to Executive Orders 12127 and 12148). For FEMA, the relocation to DHS is a return home of sorts to its domestic security roots. While it is still too early to discern the full effects of the relocation, a few observations are worth highlighting. First, OEP's domestic security responsibilities were split from FEMA's natural disaster responsibilities for a reason. The emphasis on domestic security, while obviously critical, is a poor context for devising more general policies for managing catastrophic risk. Moreover, while there may be significant overlap in the types of disaster-response issues encountered in terrorist attacks and natural disasters, the sets are not coterminous. Challenges outside the overlapping set are likely to be pushed down the political agenda within DHS. On the one hand, the political reaction to terrorism risk was similar to reactions to other new risks. Major policy reforms often follow significant events. In the catastrophe context, *see* THOMAS A. BIRKLAND, *AFTER DISASTER: AGENDA SETTING, PUBLIC POLICY, AND FOCUSING EVENTS* (Georgetown 1997). The important difference is that HSA's response is institutional and this structural response was almost certainly not driven by public pressure. It seems clear citizens wanted some form of political action, but it is much less obvious that ordinary citizens had any opinion about restructuring the bureaucracy. On the other hand, advocates for the reform of risk regulation often argue for creating a single oversight agency that can compare relative risks and benefits across different policy arenas to ensure that the most lives, life-years, or quality-adjusted-life-years are saved by a given level of expenditures. *See* SUNSTEIN, *RISK AND REASON*; STEPHEN G. BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993) (advocating super-regulatory agency to manage tradeoffs in risks across different regulatory regimes and administrative agencies). Justice Breyer's proposal for a super-regulatory agency might actually be inadvertently realized in new agency, albeit in a limited policy area. While, my own intuition is that DHS's primary mission will lead it too far afield to effectively rationalize risk regulation, it is important to recognize the potential benefits. Again, it is simply too soon to discern the long term effects of the structural change. Nonetheless, a real, if tentative concern is that FEMA's move will result in less effective management of non-terrorism related catastrophic risks.

¹⁸³ This same dynamic was mimicked in the popular press. One article noted "[u]nderwriters have hundreds of years of data available on earthquakes and hurricanes, but the magnitude of losses for Sept. 11 were beyond anyone's frame of reference. This is something that is brand new. No one knows how to charge for the coverage or how to predict the next event." *See* Joseph Bonney, *Risky Business: Ports and Terminal Operators Want Government Action to Provide Terrorism Insurance*, *J. Commerce* 30 (June 10, 2002). A vice-president for the American Insurance Association noted that insurance companies can decide how much to charge for homeowners' policies in hurricane-prone areas, for example, because they have 100 years of hurricane data to

the United States without the assistance of federal or state government at any point in the past fifty years.¹⁸⁴ Natural disaster risk has hardly been an easy case for private markets.¹⁸⁵ In reality, terrorism risk was just the latest in a series of attempts to obtain federal backstopping for losses from catastrophic risk. In legislation introduced in the 104th, 105th, and 106th Congresses, insurance interests advocated a similar federal backstop program for natural disaster risk.¹⁸⁶ Even in the 1980's, a coalition of approximately 300 insurance firms known as the "Earthquake Project" was formed specifically to lobby for federal backstopping of industry losses from natural disasters.¹⁸⁷ The request for federal backstopping of terrorism

help assess the risk. See Povich, *Terrorism Insurance at Impasse*, NEWSDAY A15 (July 4, 2002); see also Jackie Spinner, *Putting A Price on 'What If' Actuaries Lack Figures to Fix Premiums for Terrorism Insurance*, WASH. POST. E1 (Oct. 24, 2001) ("Although no one forecast the hurricane or the earthquake, they were, in a sense, predictable. Scientists know that hurricanes and earthquakes happen because they have happened."). Senator Christopher J. Dodd (D-Conn) summarized the dominant position:

Insurance companies insure only those risks that are predictable and quantifiable. Although insurers are in the business of protecting people against future hazards --- such as fires and hurricanes --- those hazards are predictable, at least statistically. Terrorism is not. And what the insurance industry cannot predict, it cannot insure. To ask insurers to insure against unpredictable risks would be to ask them to stop being businesses and instead become gamblers.

Christopher J. Dodd, *Underwrite Terrorism Insurance*, HARTFORD COUR. C3 (Nov. 25, 2001).

¹⁸⁴ For helpful discussions of the history of insurance for natural hazards, see DAVID A. MOSS, *WHEN ALL ELSE FAILS: GOVERNMENT AS THE ULTIMATE RISK MANAGER* (2002); *THE FINANCING OF CATASTROPHIC RISK* (Kenneth A. Froot, ed.) (Chicago 1999); KUNREUTHER AND ROTH, *PAYING THE PRICE*; *Howard Kunreuther & Paul K. Freeman, MANAGING ENVIRONMENTAL RISK THROUGH INSURANCE* (Kluwer 1997); KUNREUTHER, *DISASTER INSURANCE PROTECTION*.

¹⁸⁵ Flood insurance in the United States is provided only because of the National Flood Insurance Program (NFIP), a federal program originally instituted in 1968. See generally, Edward T. Pasterick, *The National Flood Insurance Program*, in *PAYING THE PRICE* (Kunreuther & Roth, eds.) (discussing history and function of NFIP). Individual insurance companies are authorized to write flood insurance policies, but the prices are subsidized at a rate of approximately fifty percent by the federal government. Earthquake risk has proven no easier for private markets. Setting aside the persistent unwillingness of individuals in hazard prone regions to maintain adequate coverage, major quakes have consistently sent firms fleeing the market. The Northridge quake caused over \$12 billion in federal disaster expenditures and \$12.5 billion in insured losses, a figure three times larger than what insurers had received in premiums during the preceding twenty-five years. See David A. Moss, *Courting Disaster? The Transformation of Federal Disaster Policy since 1803*, in *THE FINANCING OF CATASTROPHIC RISK* (Froot, ed.) (discussing history of federal natural disaster policy). Following the earthquake, many insurance firms refused to write new coverage and a hybrid public-private entity was formed to write earthquake insurance. See generally Peter May, *Addressing Public Risks: Federal Earthquake Policy Design*, 10 J. POLY ANAL. & MAN. 263 (1991); see also Ali Asgary and K.G. Willis, *Household Behavior in Response to Earthquake Risk: an Assessment of Alternative Theories*, 21 *DISASTERS* 354 (1997) (discussing citizen response and perception of earthquake risk). The situation is remarkably similar in Florida, where Hurricane Andrew in 1992 forced many companies into insolvency and sent many others fleeing the market. See Insurance Research Council, *Coastal Exposure and Community Protection: Hurricane Andrew's Legacy* (IRC 1994) (discussing aftermath of Hurricane Andrew for property insurance in the South Atlantic region); see also *THE BIG ONE: HURRICANE ANDREW* (Roman Lyskowski & Steve Rice, eds.) (Andrews McMeel 1992). There are many reasons for the current state of affairs in the market for natural disaster insurance, all of which are beyond the scope of this paper. My point is simply that invoking natural disaster risk as an example of an easily insurable catastrophic borders on perverse.

¹⁸⁶ See the legislative history of H.R. 21, The Homeowners' Insurance Availability Act of 2002, 106th Cong., 2d Sess. (Jan. 6, 1999) which in its previous form in the 105th Congress was H.R. 219, and part of a more comprehensive legislative reform effort in the 104th Congress. See H Rep 106-526, 106th Cong., 2d Sess. (Mar. 15, 2000).

¹⁸⁷ See Dick Kirschten, *Hyping the Big Quake*, 22 *NATL J.* 11 (1990) (discussing formation and effort of the Earthquake Project). As part of the effort, the coalition engaged the services of David A. Jewell and Associates Inc., a Washington D.C. public relations firm, the Seattle law firm of Preston, Thorgrimson, Ellison & Holman

risk was not novel, but rather just the latest in a series of lobbying efforts.¹⁸⁸

All this is something of an embarrassment for one portion of the theory. TRIA's staged decision-process should have guarded against such misrepresentation, by ensuring repeated interaction among the main players. On the one hand, the temporary form did little to induce honest information revelation. On the other hand, the interim time period may allow some subset of private claims to be filtered during the temporary legislative period. Rather than allowing plausible but inaccurate claims to justify widespread policy reforms, the temporary form at least allows more information to be collected. For example, despite dire predictions about long-term capacity issues, many scholars think the market is likely to provide a relatively robust response to a high demand for insurance.¹⁸⁹ Overall, the case study suggests a somewhat mixed review of temporary legislation's performance. The temporary legislation approach adopted in both TRIA and the USA Patriot Act seems appropriate in the context of significant uncertainty. However, many of the potential benefits also appear to have gone largely unrealized. The case does however highlight the reality that temporary legislation often receives extensive consideration during the initial enacting period, and also receives substantial deliberation in future time periods as well. The previous Congress considered a range of different renewal bills, some of which would simply extend TRIA for another two or three years and others of which would offer more substantive amendments,¹⁹⁰ before finally taking a relatively moderate path by renewing the insurance program, but with somewhat higher triggers and another sunset. All of which should undermine any lingering concerns that temporary legislation is democratically suspect because future legislatures give scant attention to expiring statutes.

CONCLUSION

This Article has attempted to show that temporary legislation is ubiquitous in both modern and historical legislatures. As a historical matter, temporary legislation has been readily accepted and extensively utilized by legislators, but all but ignored by legal scholars. I have suggested that use and misuse of temporary legislation is best traced to the strategic effects of temporary measures; some normative attractive for democracy, others much less so. Recent legislative responses to new risk illustrate many of the relevant costs and benefits using temporary and permanent law in practice. Locally, in the context of new risk legislation, I conclude that temporary legislation's advantages outweigh its drawbacks. However, the normative status of temporary legislation in other areas will be a function of underlying political conditions and policy concerns. Still, temporary legislation is a critical and heretofore poorly understood method of lawmaking. While work remains, this Article

to devise and implement a legislative strategy; and former Rep. Lloyd Meeds (D-Wash, 1965-79) to direct the lobbying effort.

¹⁸⁸ To be fair, there has been historical disagreement within the insurance industry about the wisdom of a federal backstop for natural disaster risk. One can excerpt portions of testimony by witnesses to create a caricature of the insurance industry, but that is neither necessary nor productive. Still, the evaluation of TRIA--both in the specific applied context of terrorism risk and as a more general institutional response to new risk--should be based on an accurate rather than fictitious account of the historical experience managing catastrophic risk.

¹⁸⁹ See generally Gron & Sykes, 36 IND. L. REV. at 457.

¹⁹⁰ See Terrorism Risk Insurance Backstop Extension Act of 2004, H.R. 4634, 108th Cong., 2d Sess. (June 22, 2004); Terrorism Risk Insurance Program Extension Act of 2004, H.R. 4772, 108th Cong., 2d Sess. (June 7, 2004); A Bill to Extend the applicability of the Terrorism Risk Insurance Act of 2002, S2764, 108th Cong., 2d Sess. (July 22, 2002).

constitutes a first step in the conceptual foundation and empirical effects of temporary legislation.

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