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SHOWCASE PANEL IV: A FEDERAL SUNSET LAW

THE FEDERALIST SOCIETY 2011 NATIONAL LAWYERS CONVENTION

PANELISTS:

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PROF. WILLIAM N. ESKRIDGE, JR.
MR. PHILIP K. HOWARD
PROF. THOMAS W. MERRILL
HON. JEFFREY S. SUTTON, MODERATOR
JUDGE SUTTON: My name is Jeff Sutton. I sit on the United States Court of Appeals for the Sixth Circuit, and I'm fortunate to moderate the final showcase panel of the 2011 Convention. Our topic is a federal sunset law. More specifically, should Congress pass a general federal sunset law providing that most—or at least many—federal laws expire after, say, twenty years unless both houses of Congress and the President reenact the law?

The concept of a general federal sunset law is relatively new; the concept of a statute that comes with an expiration date is not. The Sedition Act of 1798 contained a clause terminating the Act in 1801—after the 1800 election and after, as it turned out, President Adams left office. Perhaps a little more legitimately, our first national banks contained sunset provisions. The First Bank of the United States was chartered in February 1791. The charter lasted twenty years. In 1811, Congress debated whether to renew the charter, and the measure failed by one vote in the House. The charter expired. In April 1816, Congress chartered the Second National Bank of the United States, the one at issue in *McCulloch v. Maryland*. It, too, had a twenty-year expiration date, and Congress did not renew the charter again. However, after the charter expired in 1836, the bank continued for five years as a private institution and then, in 1841, went bankrupt.

There was not a third national bank, but relatedly, in 1913, Congress passed the Federal Reserve Act of 1913. It did not have a sunset provision and, as of yet, has not gone bankrupt. So the concept of a sunset provision is not new, but the idea behind a general federal sunset provision that applies to most laws is relatively new.

We have a terrific group of panelists to discuss the topic. None of them needs a flattering introduction, and none of them wants one. I asked. Let me briefly identify them in the order in which

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3. Id. at 192.
4. 22 Annals of Cong. 826 (1811).
7. §7, 3 Stat. at 269.
they will speak: Professor Tom Merrill, the Charles Evans Hughes Professor of Law at Columbia, who has written many articles and books; Philip Howard, a partner at Covington & Burling, who has written many articles and books; Professor William Eskridge, the John A. Garver Professor of Jurisprudence at Yale, who has written many articles and books; and the Chief Judge of the Seventh Circuit, Frank Easterbrook, who has written many articles and books, and even a few opinions.

Professor Merrill.

PROFESSOR MERRILL: Thank you very much, Judge.

Sunset provisions come in various forms. They can apply to entire statutes, to particular statutory provisions, to agency regulations and programs, or to administrative agencies themselves. Thomas Jefferson, in a letter to James Madison, even proposed that the Constitution include a sunset provision that would require adopting a new one in nineteen years, which Jefferson regarded as a single generation. Thankfully, that sunset provision was not adopted.

In addition to taking various forms, sunset provisions also result from different motivations. Modern sunset provisions date to the late 1960s and were inspired by a political scientist, Theodore Lowi, who authored a book with the intriguing title, The End of Liberalism. The "liberalism" Lowi wanted to end is more accurately described as interest group pluralism. Lowi wanted to replace interest group pluralism with a kind of progressive populism. One reform he proposed to promote this transformation was what he called a "tenure of statutes" act, which would put a termination date on all statutes creating federal administrative agencies. Such a reform, he argued, would help break up the capture of administrative agencies by interest groups. As an agency's termination date approached, he argued, the agency would have to justify its existence to the legislature, and a hopelessly captured agency would inevitably fall short.

Shortly afterwards, Common Cause—a moderately influential reform group at the time—seized upon Lowi's idea, changed the name from "tenure of statutes act" to "sunset law," and began

lobbying legislatures to adopt it. Several proposals for general sunset laws were introduced in Congress, but ultimately none were enacted. A bill called the Sunset Act of 1978, cosponsored by Senators Ed Muskie of Maine and Charles Percy of Illinois, survived the Senate but died in the House. The Sunset Act would have provided a general ten-year sunset provision for every federal agency program.

Common Cause had much more success at the state level. Starting with Colorado in 1976, by 1981 Common Cause had persuaded thirty-six states to adopt some type of sunset-review statute. After that, the phenomenon waned, and by 1990 a significant number of the thirty-six states had abandoned sunset review, either formally by repealing their laws or informally by ceasing to actively pursue sunset review. Since 1990, interest has continued to diminish, to the point where one cannot find a more current tally of the states, if any, that still engage in sunset review.

As the 1970s turned into the 1980s, the motivation for adopting sunset provisions began to shift. Concern that government agencies were pawns of corporations gave way to concern that they were bloated bureaucracies wasting taxpayers' money. Lowi's desire to recapture government from interest groups and return it to the people gave way to the goals of the deregulation movement. As a result, the sunset provision was reconceived as a device for eliminating unnecessary agencies and their regulations. This appears to be the primary motivation for most of the sunset laws enacted by the states around this time.

A third rationale for sunset laws—what can be called experimentalism—also emerged in the 1970s and continues to this day. Sunset provisions can serve as a mechanism for

13. Id.
16. Id.
18. Id. at 50.
convincing those who are skeptical about the merits of a proposed law or program to try it out on a temporary basis. A sunset provision turns a proposal for a new agency or program into an experiment that can be revisited in a few years, after experience has accumulated, making the merits of the idea easier to assess. A series of research and development tax credits adopted in the 1990s, as well as the USA PATRIOT Act adopted shortly after the 9/11 terrorist attacks, included sunset provisions to garner the votes of some who questioned the proposals’ value.20

A fourth and relatively recent motivation for sunset provisions carries enormous political ramifications: the use of sunset provisions to bring tax legislation into compliance with congressional budget resolutions. Both the 2001 and 2003 Bush tax cuts included ten-year sunset provisions to reduce Congressional Budget Office estimates of their costs to the levels required by budget resolutions.21 This has greatly affected current politics, to the general advantage of the Democrats. Congressional Republicans generally favor continuation of the tax cuts, while the Democrats and the current White House generally favor repealing the cuts, at least for higher-income taxpayers. Yet in order to prevent taxes from reverting to levels prevailing before the Bush tax cuts, the congressional Republicans must convince President Obama to sign new legislation delaying or modifying the restoration of pre-Bush-level taxes. This has given the Democrats the upper hand in the bargaining, since doing nothing yields a result more congenial to their preferences. Here we see how sunset provisions can alter the balance of political forces in important and often unseen ways.

Finally, some commentators support sunset provisions as a means to clear the books of obsolete laws.22 These commentators

argue that, over time, statute books get filled up with outmoded provisions that are rarely enforced but can have a chilling effect and perhaps lead to prosecutorial abuse.\textsuperscript{23} Professor—now Judge—Guido Calabresi argued that judges should exercise a general power to sunset laws based on desuetude.\textsuperscript{24} The extent to which obsolete laws present a widespread social problem is debatable; in any event, this particular rationale for sunset provisions has yet to generate much political support.

Are sunset laws a good or bad idea? Unfortunately, hard evidence of sunset provisions' practical efficacy is scarce. The most comprehensive study, done by political scientist Richard Kearney in 1990, examined state sunset laws passed in response to the Lowi–Common Cause initiative starting in 1976.\textsuperscript{25} The study indicated that sunset laws, when first adopted, achieved moderate success in eliminating dubious occupational licensing commissions, such as those devoted to overseeing massage therapists, lightning rod salesmen, and sprinkler and irrigation fitters.\textsuperscript{26} However, he found that larger agencies were uniformly successful in justifying their continued existence by mustering interest group testimonials and compiling elaborate studies suggesting that they do good deeds.\textsuperscript{27} Kearney was cautiously optimistic in citing evidence that sunset laws improve legislative oversight of agencies. But the fact that by 1990 states had begun to repeal sunset laws and had ceased actively pursuing sunset review made him less optimistic about the future.\textsuperscript{28}

At the federal level, one can find examples of both failure and success. The Commodity Futures Trading Commission (CFTC), created in 1974, provides an example of failure.\textsuperscript{29} Because of the

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\item See, e.g., David S. Ardia, \textit{Reputation in a Networked World: Visiting the Social Foundations of Defamation Law}, 45 HARV. C.R.-C.L. L. REV. 261, 304-05 (2010) (asserting that defamation laws are obsolete and that such laws serve only to chill speech); Jeremy C. Smith, Comment, \textit{The USA PATRIOT Act: Violating Reasonable Expectations of Privacy Protected by the Fourth Amendment Without Advancing National Security}, 82 N.C. L. REV. 412, 450 (2003) (lamenting that the electronic monitoring provisions of the USA PATRIOT Act both lend themselves to abuse and are not checked by the sunset provision in section 224).
\item GUIDO CALABRESI, \textit{A COMMON LAW FOR THE AGE OF STATUTES} (1982).
\item Kearney, supra note 17.
\item Id. at 50.
\item Id.
\item Id. at 56.
\item See, e.g., Mark D. Young, \textit{A Test of Federal Sunset: Congressional Reauthorization of the Commodity Futures Trading Commission}, 27 EMORY L.J. 853 (1978) (describing how the reauthorization process allowed the CFTC to continue intact despite its many problems).
\end{enumerate}
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controversy that surrounded establishing the CFTC, and the salience the sunset idea enjoyed at the time, the mandate for the CFTC included a sunset provision.\textsuperscript{30} During the sunset review four years later, witness after witness excoriated the agency for its pathetic performance: the agency was disorganized, slow, and had overlooked major commodity trading scandals.\textsuperscript{31} The SEC smelled blood and argued that the major functions of the CFTC should be transferred to the SEC.\textsuperscript{32} The Treasury Department in turn claimed that it should be in charge of futures trading and Treasury bonds.\textsuperscript{33} Nevertheless, the CFTC rallied. The commissioners testified at great length about their activities and promised to do better in the future.\textsuperscript{34} Both the OMB and the GAO contributed ponderous studies concluding that the agency’s real problem was inadequate funding.\textsuperscript{35} Most interestingly, the various brokers and dealers regulated by the CFTC all came forward in support of reauthorization.\textsuperscript{36} In the end Congress agreed to reauthorize the agency with only minor changes to its mandate.\textsuperscript{37} In subsequent years, reauthorization of the CFTC has become routine.\textsuperscript{38}

On the other hand, the independent counsel provisions of the Ethics in Government Act of 1978 provide an example of sunset success.\textsuperscript{39} This Act, which originated as part of the post-Watergate reforms in the 1970s, contained a five-year sunset provision.\textsuperscript{40} It was reauthorized multiple times, usually with the

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\item \textsuperscript{31} Young, supra note 29, at 862-66.
\item \textsuperscript{32} Id. at 870-71.
\item \textsuperscript{33} Id. at 878-79.
\item \textsuperscript{34} Id. at 872.
\item \textsuperscript{35} Id. at 873, 880-81.
\item \textsuperscript{36} Id. at 897 & n.216.
\item \textsuperscript{38} While the CFTC has been reauthorized every time it has come up for renewal, such reauthorization has not been without its bickering. See Roberta S. Karmel, The Future of the Securities and Exchange Commission as a Market Regulator, 78 U. Cin. L. REV. 501, 514 & n.77 (2009) (characterizing CFTC reauthorization hearings as "costly and time consuming").
\end{itemize}
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enthusiastic support of congressional Democrats. In 1988 the Act’s constitutionality was challenged in *Morrison v. Olson.* Justice Scalia cogently explained why appointing unaccountable prosecutors to investigate executive officials is bad policy, but he could not persuade any of his colleagues to join his opinion. Nevertheless, after Ken Starr’s investigations of the Whitewater and Monica Lewinsky scandals, Democrats suddenly had a change of heart. Had the Act lacked a sunset provision, Congress probably could not have mustered the will to repeal the Act, because voting for repeal could have been characterized as voting against the investigation of executive wrongdoing. But with the sunset provision, Congress found it easy to let the law lapse by doing nothing, which occurred in 1999. There has been no significant effort to revive it since then.

To draw general conclusions about the practical efficacy of sunset provisions would require significantly more data than these episodic examples. However, a political science approach might explain why the sunset provision worked with respect to the Ethics in Government Act but failed in the CFTC context. The Ethics in Government Act created no permanent bureaucracy; independent counsels came and went. Moreover, the statute addressed an intermittent problem, executive wrongdoing, around which no interest groups were likely to coalesce. In other words, no institutional presence would argue for the independent counsel’s continued existence. In this context, the fate of the independent counsel idea was determined solely by the perceptions of the political parties about its benefits and costs. The independent counsel’s position was perpetuated through reauthorization as long as one political party, the Democrats, found its existence to be advantageous. But once the Democrats realized that an independent counsel is a double-edged sword, partisan support for the statute collapsed.

In contrast, the CFTC is a standing bureaucracy. This means that there has always been a permanent institutional presence in

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43. *Id.* at 697–734 (Scalia, J., dissenting).
44. See Rappaport, *supra* note 39, at 1595 (noting that Congress did not reenact the law).
support of reauthorization. Also, there are many interest groups
that have a stake in the agency's perpetuation. They too can be
counted to weigh in on the side of reauthorization. These
institutional forces mean that the political parties would have to
reach an extraordinarily strong consensus in support of sunset
for the agency. That is likely to be a rare event.

Because of the scarcity of data regarding sunset provisions' practical efficacy, examining comparable legal phenomena might help assess the claim that sunset provisions reduce unnecessary regulatory activity. The major environmental statutes provide a potential source of additional data. The Clean Air Act and the Clean Water Act do not contain sunset provisions, but they were drafted to require reauthorization; both Acts contained hard deadlines that required legislative renewal. These did not threaten programs with termination unless they were renewed, but they forced Congress to revisit the basic policy issues at periodic intervals. The effect of these reauthorization exercises has been to greatly magnify the length and complexity of these laws. The original Clean Air Act of 1963 took up ten pages in the Statutes at Large. The 1970 Amendments took up thirty-eight pages. The 1977 revision, made necessary by the reauthorization requirement, ballooned to 112 pages. The fourth iteration, adopted in 1990, again made necessary by reauthorization, expanded to 313 pages. During each revision of the Act, Congress was faced with more specific controversies that had arisen under the previous versions of the Act. The need for reauthorization provided an irresistible temptation to weigh in on these controversies by drafting more detailed statutory directives. Like layers of sedimentary rock, each version of the Act built upon the framework adopted before, but added new mandates and new instances of micromanagement until the final product became a regulatory

46. 77 Stat. at 392-401.
monstrosity. This gives us another reason to worry about sunset provisions, at least as applied in a regulatory area with strong, entrenched interests. Forcing the legislature to revisit and reenact the authorizing legislation in such a context can lead to micromanagement by the legislature rather than an honest assessment of the need for continued regulation. But again, to test this hypothesis would require greater empirical data than are currently available.

Thank you.

MR. HOWARD: Thank you. I’m here, I’m told, to take the pro side of sunset laws, so I thought I would describe the problem before I propose what I feel are the solutions.

There are four problems with the current state of American positive law, in my view. The first is that there’s a natural tendency of law to pile up over the decades. This is not a problem that our Founders foresaw. They had checks and balances to keep Congress from making too many laws in order to preserve the field of freedom. They didn’t really anticipate, other than the Jeffersonian comment Professor Merrill referred to earlier, that after two hundred years, and particularly the last fifty or sixty years, the law would pile up like sediment in the harbor until everyone was more or less paralyzed.

It turns out that it’s much more difficult to repeal a law than it is to pass it in the first place, because, once enacted, an army of special interests surrounds each law. Exhibit A would be the Davis–Bacon Act signed into law by Hoover—requiring union wages on federal contracts—and the farm subsidies from the New Deal. They actually do expire every five years, but it’s not even on the table to take them off the table; they keep being reenacted. And so, over time, the laws have piled up and we don’t have a mechanism for dealing with the issue.

The second problem is that all laws have unintended consequences, and the more specific they are—and laws have

51. Perhaps the most (in)famous of these is the Agricultural Adjustment Act, the second iteration of which functions as a residual statute for modern agricultural subsidies. Agricultural Adjustment Act of 1938, ch. 30, 52 Stat. 31; see also Food, Conservation, and Energy Act of 2008, Pub. L. 110–234, § 1602, 92 Stat. 923, 1001 (suspending portions of the 1938 Act between 2008 and 2012).
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become dramatically more specific over the course of our lifetime—the more quickly they become obsolete. Consider something like special education laws. We would all probably be in favor of a law that requires education for special-needs children, but the people who passed the law did not contemplate where we are today: that twenty percent of the K-12 budget in this country is used for special education, but less than one half of one percent of school budgets is used for gifted children, and almost nothing for pre-K education. Is that a reasonable allocation of our educational priorities? I don’t think so, but no one is even asking the question. The law was passed with an open-ended mandate, and everyone accepts it as a state of nature.

The third problem that occurs is that we have limited resources. Budget priorities change, and yet the budgets are cast in legal concrete. People get elected to Congress or become governors and find that the great majority, eighty to ninety percent of the budget, is actually preset; it’s not even voted on most of the time because of these laws passed in previous generations, which don’t come up for reconsideration.

Finally, over time, there is a lack of coherence to law when it piles up. I don’t think it’s too much of an overstatement to say that American federal laws and regulations more closely resemble a junk pile than a code for the conduct of our society. I’m not a “deregulator.” I think government regulation has a very important role in our society, but you have to be sympathetic to Senator Cornyn when he points out that there are eighty-two separate federal programs to improve teacher quality.

I recently had one of my researchers count the number of words of binding federal law and regulation: 140 million words

and counting. These laws and regulations are highly specific.\textsuperscript{58}

So, what we have is something that might be characterized as democracy by dead people. We have all these laws and regulations written by people who are no longer with us. Of course, our Founders are also no longer with us, but they didn’t give us highly specific laws that told us how to spend our money; they gave us general principles about the conduct of society. The laws and regulations we’re talking about dictate the budget, dictate priorities, dictate virtually everything important about the conduct of our society. So, in my view, the goal of a spring cleaning, or sunsetting, is absolutely vital to solving many of the problems on the table, but the solution is not even on the agenda. Everyone treats anything that has gone through the democratic process as if it’s one of the Ten Commandments, except it’s more like one of the ten \textit{million} commandments.

So what’s the solution? First, no “procedure” is a solution. The experience with sunset laws, which are one of the solutions, is that they depend on who is applying them. Texas has apparently done a pretty good job; it has eliminated fifty-four agencies and consolidated twelve since the law was passed in 1978.\textsuperscript{59} The law says that all departments expire every dozen years.\textsuperscript{60} In most states, sunset laws have not worked at all. The legislatures just reauthorize all the laws periodically and nothing comes up for any substantive debate. Now one could put in a little more of an action-forcing mechanism by doing what Judge Calabresi had suggested, which is to give federal courts the power. But as Professor Merrill said, nobody took him up on that idea. And I suppose you could make it a constitutional requirement to have sunset laws, but then we get into all kinds of questions of standing. If you think we have too much litigation now, imagine everybody suing to try to overturn some statute they didn’t like.

It’s very hard to have effective action-forcing mechanisms for sunset laws, but there are examples of successes. England recently adopted some sunset laws.\textsuperscript{61} Most German provincial


\textsuperscript{60} TEX. GOV’T CODE ANN. § 325.015 (West 2011).

\textsuperscript{61} Into the Sunset: Time Limits on Government Agencies, ADAM SMITH INST., http://www.adamsmith.org/80ideas/idea/4.htm, ("In the United Kingdom in 2001, for
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states have sunset laws, which seem to work sort of practically. So there are examples, and I have painfully gone through, in the last few days, several thick notebooks of all of them. They are not useless, but they're also not ultimately efficacious because of their dependence on our public values. If we actually think it's important to set new priorities, then a sunset law will work. Things will come up for debate again, and we will actually change the way laws work. But if it's not a priority of the public or of our political leaders, then sunsetting won't work.

There are other, smaller provisions that have the effect of working as sunsets. Senator Warner has proposed something called a PAYGO provision, which would, in his proposal, apply only to regulations. Basically, this provides that you can't adopt a new regulation unless you get rid of an old one. England adopted a similar program last year, called “One-In, One-Out,” which has a wonderful acronym, “OIOO.” That's actually worked; they claim that it's working. It's only a year old, but there is a political will to try to keep the number of regulations down.

Chris DeMuth, back around 1980, proposed a regulatory budget idea that would actually make Congress have not only its affirmative spending budget but a regulatory budget, where it would calculate how much regulations were requiring private entities to spend, budget the money, and allocate it. It was actually quite sensible, at least conceptually, but there are many practical problems involved. I was prepared to promote that idea until I heard him this morning say it was completely impractical and would never work. So thirty years later, I guess Chris has reconsidered.

example, the passage through Parliament of a controversial anti-terrorism measure was eased when the government announced that the new powers it gave to the police and other agencies would be subject to a sunset limitation and review."

64. Id.
The final variation on the theme, which is the one I plan to promote and that, I think, makes the most sense given where we are today, might be called a sunset “law” rather than sunset “laws.” I think we need a major recodification of the laws of the United States, at least those that have budgetary implications.

Laws aren’t working the way they should, and it’s not mainly because we’re addressing the wrong goals; it’s because the laws are out of date. The Clean Air Act is very old; it’s very clunky. As one example, we could replace hundreds—perhaps even thousands—of pages of rules under that act with a carbon tax. OSHA has thousands of rules that tell everybody exactly what to do, including a rule that says stairwells shall be lit by either natural or artificial illumination. That’s really helpful. [Laughter] Most of OSHA’s rules—not all of them, but most of them—could probably be encompassed within a general regulatory principle: “Facilities and equipment shall be reasonably suited for the use intended, in accord with industry standards.” This would give a measure of authority to inspectors to go in and have arguments about that and issue tickets, and would substitute these very thick rulebooks with a dispute resolution mechanism. We could go down the line looking at the regulations of all the other federal agencies.

You can open up any volume of the Code of Federal Regulations, almost any volume of the U.S. Code, and ask the question, “Is this a public priority?” Often the answer will be “yes.” And secondly, “Is this the sensible way of doing it?” The answer to that will almost always be “no.” No one tasked with writing the legal system, the statutory and regulatory system that we have today, would design it this way. It doesn’t work very well. It’s crippling our society economically, or at least hindering it, not for reasons stated by the Republican candidates and, again, not because they’re addressing the wrong goals, but because our system is way too specific. It’s a version of central planning.

I think we need to do what Justinian did a long time ago and Napoleon did not so long ago and, at least in one area, what

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69. Id.
70. Philip K. Howard, One Nation, Under Too Many Laws, WASH. POST, DEC. 12, 2010,
the Uniform Commercial Code did maybe half a century ago, which is to impose a sunset law. We need to go and look at everything and take a decade and have a whole series of commissions in different areas and rationalize this incredibly complicated, uncoordinated, expensive, and often counterproductive system of law that we’ve built up mainly over the last half century, and make some sense of it.

Thank you.

PROFESSOR ESKRIDGE: I really appreciate the opportunity to be on today’s panel. As two of the panelists have already remarked to you, I’ve been outed as an intruder panelist. The panelist who was supposed to be addressing you was Judge Guido Calabresi, the famous uncle of Steven Calabresi, a founder of the Federalist Society. I feel very guilty that I’m going to deprive you of that experience, but I shall try to be illuminating.

I’m going to tell the story of one statute, and I think it suggests some points that might be generalized, very cautiously, exactly as Tom and Philip would suggest. This is the story of one of our more famous sunsetting statutes that has not been mentioned, and that is the Voting Rights Act of 1965. It was adopted in the wake of some very tense interactions between civil rights demonstrators and southern sheriffs, and in light of the fact that millions of Americans were formerly disenfranchised, particularly Americans of color in the South. The original statute, passed in 1965, had a number of provisions; I’m going to focus on three. Section 2 of the Act, as is well-known, barred as a matter of federal statutory law electoral and voting practices that discriminated explicitly based upon race. A second provision, Section 4, suspended, but only in the South, all literacy tests, which were one of the mechanisms by which voters of color were excluded and where white voters were usually not excluded, however illiterate. Finally, Section 5 of the statute created a mechanism for preclearing electoral changes, again, largely limited to the South, either through the Department of Justice
or through the district court of the District of Columbia.\textsuperscript{75}

The Voting Rights Act is not a long statute—yet it is one of the most aggressive, innovative, and regulatory statutes in the recent history of the United States. It had a five-year sunset attached to it,\textsuperscript{76} and it's arguable that the sunset was one of the features that allowed the statute makers to escape the southern filibuster and other points of opposition. This possibility illustrates one way that sunset provisions might contribute to greater, rather than less, federal regulatory intervention: sunsets may facilitate progress of aggressive legislation through the many vetogates that the Framers and Congress have constructed to make the legislative process more difficult.

In any event, the Act came up for reauthorization in 1970,\textsuperscript{77} 1975,\textsuperscript{78} 1982,\textsuperscript{79} and then again in 2006,\textsuperscript{80} and I think each reenactment is somewhat instructive. When the Voting Rights Act came up for reauthorization in 1970, it was a very different political environment. Lyndon Johnson was not President; Richard Nixon was. The Congress looked very different in 1970, in part because of the Voting Rights Act. Representing southern states in Congress were more moderate Democrats and integrationist Republicans, and fewer openly segregationist Democrats. Nonetheless, it was far from clear that the Act was going to be reauthorized; the Nixon Administration was dragging its feet, as were many representatives and senators.

But it ultimately did get reauthorized; indeed, it was significantly expanded. Section 4 was expanded in the 1970 version to suspend literacy tests outside the South, an important move toward statutory abolition of literacy tests.\textsuperscript{81} Section 5 preclearance was also liberalized, with an implicit congressional endorsement of the liberal interpretation that had been adopted

\textsuperscript{75} Id. \S 5, 79 Stat. at 439.
\textsuperscript{76} 42 U.S.C. \S 1973b(a).
\textsuperscript{81} Pub. L. No. 91-285, \S 4, 84 Stat. 314, 315 (expanding the literacy test suspension nationwide, subject to specified statutory conditions); see also id. \S 6 (adding new \S 201, which implemented the nationwide suspension of literacy tests).
by the U.S. Supreme Court in 1969.82 The 1970 reauthorization preempted state residency requirements for the electors choosing the President and Vice President.83 In one of the boldest exercises of federal voting rights authority, the 1970 Act authorized eighteen year olds to vote in all state as well as federal elections.84 As this account makes clear, sunsetting not only failed to reduce the extraordinary federal regulation of state voting law, but dramatically (and in one instance unconstitutionally) expanded federal regulation.

The phenomenon of sunset-induced expansion continued when the Voting Rights Act again came up for reauthorization in 1975. With virtually no objection from southern representatives, Section 4's nationwide literacy test prohibition became permanent.85 So, by statute, literacy tests were preempted from 1975 on. A new section was also added in 1975—Section 203—which now extends the vote dilution protections of the Act to language minorities and imposes affirmative requirements on communities with language minorities to assist them in effectuating their right to vote.86 The 1970 Act was revised to provide detailed rules for implementing the federal requirement that eighteen year olds could vote.87

The 1975 reauthorization provided for its own sunset after seven years.88 One feature of sunsetting, of course, is that you can make the expiration date anytime you want. So the next time it came up for reauthorization was during the Reagan Administration in 1982. Moderately conservative Republicans controlled the Senate, and of course President Reagan was a conservative Republican in the White House. So you would think

82. Id. § 5, 84 Stat. 315 (expanding § 5); Allen v. State Bd. of Elections, 393 U.S. 544 (1969).
83. Id. § 6, 84 Stat. 317–18 (creating a new § 202, preempting state residency requirements for election of President and Vice President).
84. Id. § 6, 84 Stat. 318–19 (adding a new Title III to assure 18-year-olds the right to vote in all elections). The state election requirement was invalidated in Oregon v. Mitchell, 400 U.S. 112 (1970) but then reimposed through the Twenty-Sixth Amendment.
86. Id. §§ 203, 301, 89 Stat. 400, 401, 404–05 (adding new substantive as well as enforcement provisions for allowing bilingual and non-English speaking voters to participate).
87. Id. § 407, 84 Stat. 314 (amending Title III in the wake of the Twenty-Sixth Amendment).
88. Id. § 101, 89 Stat. 400, 400.
that this would have been an occasion for deregulation.

Instead, exactly the opposite happened in 1982. Not only was the Voting Rights Act reauthorized after a great deal of political drama, but Section 2 was radically expanded—the biggest expansion of Section 2 in the history of the statute—to include the extension of the antidiscrimination rule to voting rules and practices that have a disparate impact on minorities and not just that are targeted against minorities.\textsuperscript{89} Also, Section 5 was amended to override Supreme Court interpretations that had limited the Department of Justice's and the district court's ability to veto some of the non-retrogressive southern changes in voting rules.\textsuperscript{90}

In the 1990s and during the new millennium, the Department of Justice, spurred on in part by the 1982 amendments and in part by partisan pressures, has interpreted the Voting Rights Act even more dynamically than it did in the 1960s and 1970s.\textsuperscript{91} In 2006, a conservative Republican President, a conservative Republican Senate, and a conservative Republican House of Representatives acted virtually unanimously to not only reauthorize this massive federal intervention, but also to further expand Section 5—for example, overruling a series of Supreme Court cases that had interpreted Section 5 more cautiously in light of its original meaning.\textsuperscript{92} At no point in the 2006 legislative process was there serious consideration given to the actual repeal of Section 5 or the Voting Rights Act in Congress.

So what do we learn from this history of the nation's most famous experiment in sunsetting? I want to suggest three tentative hypotheses. (These are not firm conclusions because this is just a case study and not an empirical examination of all sunsetting statutes.)

Point number one is that sunsetting often does not work to reduce the size of government, especially when the agency and


the program that are being reviewed under a sunset provision are characterized by the following features:

- Tom's "army of bureaucrats," where a respected and well-organized department devotes energy and resources to carrying out an important statutory mission.
- Supportive interest groups, which protect the statute against attack and stand ready to support its reauthorization; and
- Bipartisan political support, which often occurs because the statute has been implemented by executive agencies and presidencies of different political parties over the years.

All three of these conditions were met in the case of the Voting Rights Act. Even though there have been cogent academic and regional criticisms of Section 5 of the Act under today's circumstances (when minority voters participate in great numbers), the Act has been entrenched by these various constituencies.

These factors particularly come into play when there are credible—as there are in this case—reliance interests based upon the statute. A whole structure of voting rights law (especially for the South) is now based on the statute. A whole structure of bureaucrats, interest groups, lawyers, whatnot—even law professors—is grounded upon the statute. This is almost an endowment effect. Take out the "almost"; there is an endowment effect that inheres when you have so many groups that are involved in so many of these statutory debates that they've come to rely on it. So that's point number one, that there will very often be conditions, particularly for the big-ticket programs, where sunsetting won't work.

Here's the second point, even more stunning and depressing from the deregulatory perspective: sunsetting can also increase regulatory ambition and agency authority. In other words, sunsetting in many instances, particularly the kind that I've identified, might lead to more than the rolling over of easy-to-criticize programs—programs that go too far. Section 5 is obsolescent; voting practices are actually better today than they were in 1965, and yet it rolled through by virtually unanimous majorities. And—and this is the key point now—the Voting Rights Act was actually liberalized. Its regulatory ambit was expanded. In other words, not only might sunsetting—the opportunity for the Congress to revisit a program—fail to weed out the programs that need to be retired, but it actually might
expand them, for the reasons we have been discussing.

My third point is that, notwithstanding these problems, sunsetting can still serve several useful purposes. To begin with, sunsetting can facilitate experimentation. I think the idea of suspending state literacy tests was a good idea in 1965. Yet it was subject to some powerful normative arguments. For an informed voting public, you may think, literacy tests might be useful: Why shouldn’t the state be able to exclude voters who are, on the whole, unlikely to be well-informed? On the other hand, literacy tests in our history have been administered in discriminatory ways. How discriminatory are such tests in practice? Would suspension of literacy tests degrade the democratic process? These are empirical questions—ones that sunsetting might help us answer by providing time-limited experiments.

This was precisely the pitch made in the 1965 Act. Literacy tests were suspended in the South, and indeed, Armageddon did not come. Elections unencumbered by literacy tests worked fine. Voting worked much better in the South without literacy tests discriminatorily applied—and the anti-democratic features of southern politics were diminished as voters of color flocked to the polls in the ensuing decades. The more they were talked about and the more they were studied, the better the evidence was that literacy tests were not necessary in the South and other parts of the country. Also, a degree of political consensus was achievable on the issue of literacy tests, which I might add had been upheld by the Warren Court. Liberals as well as conservatives had upheld them against federal attack. And yet conservatives as well as liberals, southerners as well as northerners, were able to agree that literacy tests could be retired, permanently, in the 1970s.

Additionally, sunsetting can have a healthy deregulatory purpose; it can end some obsolescent agencies or programs. My friendly suggestion is that sunsetting is not a one-size-fits-all solution. It may work better for some statutory schemes than for others.

Finally, there’s much to be said here for democracy. One of the realities you have to confront is that when Congress passes these statutes, however specific or general they are, Congress sets afloat a ship in an ocean that Congress is not necessarily going to control. The steering of the ship is not by members of Congress; it’s mainly by agencies, with judges often playing an important
role as well. So the interaction of agency interpretations, judicial pushback, agency response, and group responses to all of this creates a very, very different statute. There is a genuine danger in our republic where the dynamic lawmaking, which is inherent in our separation of powers, removes important statutory mandates like the Voting Rights Act from the democratic process and from any sense of democratic accountability. People like Tom Merrill and Bill Eskridge—and Guido Calabresi if you wanted to include him—can criticize the way Congress operates. But Congress does have the imprimatur of the Constitution, and also the cachet that derives from the members' democratic accountability to their constituencies. So, if Congress chooses to liberalize the Voting Rights Act, as it has done repeatedly since 1965, the members are often reflecting democratic preferences and can certainly be held accountable to the voters for their decisions.

Thank you.

JUDGE EASTERBROOK: The discussion on this panel so far has concerned sunset clauses in specific statutes. But the general subject of this panel was: What we should think about an across-the-board federal sunset law? In other words, how about something that would be framework legislation, generally applicable the same way the Administrative Procedure Act is generally applicable. Similarly, we have a four-year statute of limitations for every statute that doesn't have its own, and we have generally applicable inverse preemption in the insurance industry under the McCarran–Ferguson Act. All of those framework laws are overridden on occasion, but most of the time they're not. History tells us that the framework laws govern most of the situations within their scope. So learning that sunset clauses may have made the Voting Rights Act worse by making it a must-pass statute that attracts Christmas-tree amendments doesn't necessarily tell us the effect of a comprehensive sunset statute.

Law reviews are just full of lawyers' talk about this subject, and the précis for this panel sets out one of the lines of argument: that a sunset law will promote the cause of classical liberalism by reducing the volume of permanent laws, thus reducing the force of the dead hand in legislation. On this understanding, statutes stick around because the legislature lacks the time needed to revisit them regularly, and, even when it has the time, people
who occupy veto positions—think committee chairs—can block change even when a majority of Congress or a state legislature would like to change.

There’s also a contrary possibility that the same reasons that make laws more likely to expire under a general sunset regime—as the special prosecutor statute eventually did under its statute-specific clause—make it easier to pass laws in the first place. Laws come about when interest groups that gain from statutes can overcome the opposition of those who will lose by the legislation. Sunset laws, if they’re effective—if they actually work at getting rid of laws—would reduce, somewhat, the expected loss from any given proposal, and therefore would reduce the opposition to the interest-group agenda. Bill Eskridge suggested that maybe the Voting Rights Act was in that category; it couldn’t have been passed without the sunset. So we have two potential effects: Sunset laws may get rid of old laws and promote the cause of classical liberalism, but they also may make it easier to enact new laws and promote the cause of interest groups. Which one of these effects predominates? Unfortunately, we have a lot of anecdotes. We have a lot of stories about what happens with specific statutes that did or did not get sunsetted, but very little data.

The difficulty with looking at individual programs such as the independent counsel law or the Voting Rights Act is that some or all of the things that happened at their reauthorization times might have happened without a sunset clause. We don’t know; it’s hard to run the counterfactual. To tell, we need large samples of laws and we need variance across jurisdictions. I went in search of studies of sunset laws. As Tom Merrill recounted, a lot of states have passed sunset laws. It’s not only states; I’m about to describe a sunset law adopted by the World Trade Organization.

It turns out, however, not to be easy to find studies of these things. For roughly every one hundred law review articles in which there is a lot of lawyer’s talk about what could happen, I found about one empirical study that poses the question: What did happen? In fact, I found only three, and I’m now going to describe them for you.

The World Trade Organization adopted a five-year sunset rule for antidumping clauses. I’m sure you’re all acquainted with antidumping clauses; they’re a form of trade barrier in which
corporations in one nation complain that their competitors in other nations are charging too little for their products. Normally, we think that the antitrust laws are going to get prices down; the role of antidumping laws is to get prices up. Treaties allow importing nations to impose limits, quotas, or countervailing duties in the event of dumping, which protects producers at the expense of consumers. These duties tend to stick around and produce pointless burdens, so a sunset was created in the interest of freer trade. There are thousands of these cases, so it turns out that a statistical analysis is possible.

A study found that, at the sunset review, many duties are allowed to expire. In fact, more countervailing duties are allowed to expire than continue. That result is statistically significant, and that sounds encouraging, doesn’t it? But it also turns out that the only duties that are allowed to expire are the unimportant ones. The ones that really injure consumers remain, and on average, they get worse at the five-year review. The net effects are unclear, but this study is not encouraging. This study, like the other two I’m going to mention, was entirely ex post. That is, it asked: What happens to duties that already exist? It did not ask whether the prospect of a five-year sunset makes the adoption of countervailing duties more likely in the first place. This means that we don’t know the full effects even of the WTO sunset clause. This is, I think, the best empirical study of any sunset law, and we just don’t know the full effects.

But here’s another study about regulatory systems. Most states require real estate brokers to be licensed. The stated public rationale for this is that it improves the quality of service. The unstated possibility is that this allows the incumbents to reduce the amount of new competition and jack up their prices. In some states, this licensing scheme is subject to sunset. What is the effect? So far, in every state that’s reviewed these schemes at a sunset time, the program of licensing and the agency that administers the program have been reauthorized one hundred percent of the time. But there is a small effect. In the year of the review, the agency is a little bit more willing to allow new


competition. So maybe they're more sensitive to the public during the year of the review, and consumers get a small benefit maybe one year in five. But the program is there. The dominant force is that the program sticks around and the power of exclusion remains. It's not as good as free competition, but it turns out to be somewhat better for consumers than states that lack sunset review.

Now, finally, expenditures—thirty states have some form of sunset review of their expenditures. You can think of that as a kind of program-specific, zero-based budgeting exercise at intervals between four years and twelve years, depending on the state. What's the effect of this? Well, once again, programs never end, and agencies never close. But again—just as with real estate brokers—in the year of reauthorization, there's some, though small, reduction in expenditures and some, though small, increase in bureaucratic efficiency. The review process seems to override just a little bureaucratic inertia—not much, but the direction is a good one.

This study made one other interesting finding. Twelve states that have had sunset laws have allowed those laws to sunset. It seems that the only category of laws that sunset laws regularly eliminate is sunset laws themselves. Apparently, even mild belt-tightening leads to powerful opposition.

The bottom line of all of this is unclear. We know that some kinds of sunset laws have some modest benefits ex post; the emphasis must be on "modest." But we don't know the ex ante effects. We don't know whether the prospect of sunset will lead to more, or more intrusive, legislation by reducing the opposition to it. And we do not know the consequences of requiring legislators to spend more of their time on the reauthorization of existing programs. If legislators have to spend more of their time thinking about whether to renew the Voting Rights Act and the Commodity Futures Trading Commission and other things, presumably they have less time for other things, and that could mean less new mischief. But of course, it also could mean having less time and energy to resist and oppose interest groups' proposals for new mischief. It also could lead to

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more delegation. If a legislature’s time is consumed by sunset reviews, one possible response is to delegate more to agencies that rely on staffs and, of course, the interest groups.

One common finding that you can read about in *The Journal of Law & Economics*, which I used to edit, is that administrative delegations regularly provide benefits for interest groups at the expense of the general welfare. You should recall some examples from the regulation panel earlier today, which illustrated how agencies tend to take powers to and beyond their limits. None of the studies I’ve mentioned test for this effect, which should give us all some pause. Perhaps we need a different form of sunset, a rule that agencies must rescind their rules unless, within five years, a cost-benefit study vindicates them. But we don’t know the effect of that either.

So, I have been urging caution, and the uncertainty puts me in mind of Edmund Burke’s maxim, “Don’t talk to me of reform, things are bad enough as they are.”

And there, I shall stop.

**JUDGE SUTTON**: Thanks to all four of you for those excellent presentations. Let me give some of the earlier panelists a chance to respond. Philip has one or two things to add.

**MR. HOWARD**: First, on the idea of caution—I'm not an academic, so I just start where we are, which is a real mess. You can’t approve a power line without seven to ten years of review. You can’t maintain control of the classroom if you’re a teacher because of the way Due Process rules have evolved. The health care system is drowning in bureaucracy. I see a dysfunctional system, in part, as a result of all these laws written in the past.

I take Judge Easterbrook’s point about unintended consequences of sunset laws; I think every point he made is valid. Unfortunately, the tens of thousands of laws on the books have had similar unintended consequences and now they’re sitting there. So the question is: What do you do with it? And we don’t have any debate on the table about how to clean it out.

The idea of an omnibus sunset law, as I said, is not a panacea. But I do think one has to achieve a new public purpose to clean out the law, and that new public purpose should probably be reflected in law.

I also don’t think Professor Eskridge’s excellent recounting of how the Voting Rights Act evolved undercuts the idea of reviewing laws at all. The law was effective, and they decided to
make it more effective and to expand the parts that they found effective. I'm not advocating getting rid of all laws; I'm advocating seeing how they work. Sometimes they might work better—great; let's expand them. Again, I don't think there's a panacea, but I don't think this is an academic or abstract issue in our country now. All these laws are on the books, and they are establishing how our society works day to day. In my view, they're not working very well.

JUDGE SUTTON: Bill, do you want to respond?

PROFESSOR ESKRIDGE: I think the Voting Rights Act, Philip, does have this cautionary story. A lot of people, including me, think that Section 5 is not nearly as justified today as it was in 1965, when only minorities of voters of color were allowed to vote in the South. It's a classic example of what you're complaining about. It's a classic example of Guido Calabresi's obsolescence theory because, today, the voting numbers are pretty comparable for persons of European, African, and Latino ancestry. And indeed, the minority voting numbers in the South, which is the only jurisdiction covered by Section 5, are better than they are in certain parts of California and states outside the South that are not covered by Section 5.96 So, at the very least, it seems to me there needs to be a rethinking of Section 5.

Moreover, I believe every time Congress has revisited Section 5, it has reaffirmed liberal judicial interpretations that expand it. In other words, as the problem is becoming less, Section 5 is getting broader. And in the 2006 reauthorization, there was a big expansion of Section 5 to override Supreme Court cases that had narrowed it.97 So this is a perfect example of a statute that I think is obsolescent in part and where the sunsetting process has actually exacerbated the obsolescence and not solved it.

The irony is that the Roberts Court seems to be on the verge of playing the Guido Calabresi role. Implicitly, the Roberts Court

96. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009) ("[T]he racial gap in voter registration and turnout is lower in the States originally covered by § 5 than it is nationwide."); see also H.R. REP. NO. 109-478, at 12-18 (2006) ("The Committee finds that the number of African-Americans who are registered and who turn out to cast ballots has increased significantly over the last 40 years, particularly since 1982. In some circumstances, minorities register to vote and cast ballots at levels that surpass those of white voters.").

is going to be embracing Guido Calabresi’s theory if they strike down Section 5 as unconstitutional. The Rehnquist and the Roberts Courts both cut back on Section 5 fairly steadily—not in huge ways but they cut back on it—and their cutbacks have basically been overridden by Congress as part of the sunsetting process, so the stakes are now higher. And they’ve suggested in the *Northwest Austin* case, where they engaged in a ridiculous exercise of statutory interpretation, that they are willing to reconsider the constitutionality, and there might indeed be five votes to strike it down.98

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