

ARTICLE

Temporary Legislation

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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, intertemporal allocation of political control within the legislature, the ability of concentrated interests both to lobby for rents and to have rents extracted from them by legislators, the production and aggregation of information and expertise in the policymaking 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,

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¹ US Const Art I, § 7.

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.² 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 decisionmaking 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 future political dynamics. From an informational perspective, temporary legislation provides concrete advantages over its permanent cousin by specifying windows of opportunity for policymakers 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 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 1970s and early 1980s, for most of United States history, temporary legislation has been a readily accepted and even embraced legislative tool.³ More recently, controversial tempo-

² See, for example, notes 27–39.

³ 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, 444

rary statutes have given temporary legislation something of a black eye in the media,⁴ 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 than eschewed even as an exception.⁵

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.

I. A HISTORY OF TEMPORARY LEGISLATION

Most discussions of temporary legislation treat it as a relatively rare and modern innovation in lawmaking.⁶ The reality is that temporary legislation has an extensive historical pedigree both in the United

(2003) (arguing that sunset provisions raise none of the “special problems of public choice, aberrational majorities, partisanship, or imperfect psychological heuristics”); Eric A. Posner and Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L J 1665, 1676–77 (2002) (arguing that sunsets and legislative entrenchment are permissible and constitutionally indistinguishable); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 Georgetown L J 491, 505–07 (1997) (arguing that “majoritarian precommitment” is unproblematic in contrast to “cross-temporal entrenchment”).

⁴ 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 2006. See USA Patriot Improvement and Reauthorization Act of 2005, Pub L No 109-177, 120 Stat 192 (2006). 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 No 103-322, 108 Stat 1796 (1994), codified at 18 USC § 1033 et seq (2000). Despite proposals to amend the law and make the legislation permanent, the statute was allowed to lapse. See Assault Weapons Ban and Law Enforcement Protection Act of 2003, HR 2038, 108th Cong, 1st Sess (May 8, 2003), in 150 Cong Rec H 4618-02 (June 21, 2004).

⁵ For an effort to model some of the insights and analysis in this article, see Frank J. Fagan, *The Economic Rationale of Sunset Clauses* 11–32 (unpublished manuscript 2005).

⁶ Consider 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).

States and internationally. While not providing a comprehensive historical survey of temporary legislation, this Part illustrates some of its varied uses. On its own, the historical tradition proves little about the normative desirability of temporary legislation. However, the historical evidence does serve two important interests. 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 to 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 before, during, and after the founding era. In the Federalist Papers, “temporary” political concerns tend to be treated pejoratively—like factions or majoritarian passions.⁷ 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, § 8, clause 12 of the U.S. Constitution, which re-

⁷ 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. Federalist 10 (Madison), in *The Federalist* 56, 56–57 (Wesleyan 1961) (Jacob E. Cooke, ed). Similarly, in Federalist 27, Hamilton draws a parallel between factions and “temporary views.” Speaking of representatives, Hamilton notes that

[T]hey 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 (Hamilton), in *The Federalist* 171, 172 (emphasis added). Hamilton’s concluding remarks in Federalist 85 echo the 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.

Federalist 85 (Hamilton), in *The Federalist* 587, 590 (emphasis added).

stricts appropriations of funds for the military to two-year periods.⁸ In Federalist 26, Hamilton made two primary arguments in favor of the restriction, both turning on the role of the status quo in the legislative process.⁹ 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; 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.¹⁰

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 a 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:¹¹

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.¹²

Because temporary legislation terminates at the sunset without some affirmative legislative action, continuing a policy originally enacted as temporary legislation requires multiple stages of legislative process in subsequent time periods. In Hamilton’s view, these subsequent stages of procedure 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.

⁸ US Const Art I, § 8, cl 12.

⁹ Federalist 26 (Hamilton), in *The Federalist* 164, 168 (cited in note 7). See also Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U Chi L Rev 519, 541 (2003) (discussing the Founders’ decision to mandate sunset provisions in this context).

¹⁰ Federalist 26 (Hamilton) at 168 (cited in note 9) (emphasis omitted).

¹¹ For a helpful discussion of the information-producing and democracy-triggering features of constitutionally specified congressional procedures, see Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U Chi L Rev 361, 380–417 (2004).

¹² Federalist 26 (Hamilton) at 168 (cited in note 9).

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.¹³ For example, a single permanent statute providing for a 10 percent annual increase in military spending produces the same level of spending as a sequence of temporary one-year statutes each increasing spending by 10 percent. However, Hamilton's intuition seems to be that recurrent 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. The repeal of permanent legislation is surely more difficult or costly than merely allowing legislation to sunset. Yet Hamilton seems primarily concerned with legislative measures that are clearly inconsistent with the public interest. For this class of legislation, it is not obvious that repeal is particularly unlikely. Moreover, temporary legislation may be easier to enact than permanent legislation, or may produce less-intensive review and deliberation during the renewal debates, or both. 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 termination to both information in legislative deliberation and democratic safeguards.¹⁴ 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

¹³ See, for example, *id.* ("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.").

¹⁴ Another, 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 noted 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." Federalist 58 (Madison), in *The Federalist* 391, 391 (cited in note 7). In this sense, the initial allocation of Representatives was something akin to a temporary gap-filling measure. See Federalist 55 (Madison), in *The Federalist* 372, 375 (cited in note 7) ("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.

first several Congresses. By the mid-1770s, most colonial legislatures had standing committees to report on the renewal of temporary laws.¹⁵ Indeed, during the Constitutional Convention, Madison argued that laws of temporary duration would become the norm in certain circumstances.¹⁶ 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.¹⁷ The terms of the debate trace many of the precise issues discussed later in this Article. While some members of Congress thought the sunset provision was 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 provision would allow the president or a single house to block a repeal.¹⁸ At least one representative, Thomas Tudor Tucker of South Carolina, thought that virtually all statutes should contain sunsets.¹⁹ 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."²⁰ A more controversial example of early temporary legislation is the Sedition Act of 1798.²¹ Of course, these assorted references do not suggest

¹⁵ 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). For overviews of early legislative process in the United States, see Donald S. Lutz, *The Colonial and Early State Legislative Process*, in Kenneth R. Bowling and Donald R. Kennon, eds, *Inventing Congress: Origins and Establishment of the First Federal Congress* 49, 59 (Ohio 1999) ("For example, by the 1770s virtually every colonial legislature had a regularly recurring select committee to reply to the governor's speech, one to audit the public accounts, and one to report on temporary laws that needed to be renewed."); Joseph Cooper and Cheryl D. Young, *Bill Introduction in the Nineteenth Century: A Study of Institutional Change*, 14 Legis Stud Q 67, 69 (1989); Ralph Volney Harlow, *The History of Legislative Methods in the Period before 1825* 58–66 (Yale 1917) (documenting the growing need for standing committees in the legislatures).

¹⁶ See Max Farrand, 2 *The Records of the Federal Convention of 1787* at 587 (Yale 1911) ("As to the difficulty of repeals, it was probable that in doubtful cases the policy would soon take place [sic] of limiting the duration of laws so as to require renewal instead of repeal.") (paraphrasing Madison's position). See also Robert W. Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 Harv L Rev 569, 587–88 (1953) (discussing the brief debate during the Constitutional Convention on the effect of a presidential veto on the repeal of statutes).

¹⁷ See Nelson, 70 U Chi L Rev at 540 (cited in note 9).

¹⁸ Id at 540–41.

¹⁹ See id at 541 (quoting Tucker on his view that nothing could justify a perpetual law except "circumstances which would render a law equally necessary now, and on all future occasions").

²⁰ George Washington, Fourth Annual Address (Nov 6, 1792), in James D. Richardson, ed, 1 *A Compilation of the Messages and Papers of the Presidents* 117, 118–19, 121 (Bureau of National Literature 1897).

²¹ See Sedition Act of July 14, 1798, 1 Stat 596 (1798) (providing that the law have force only until March 3, 1801).

that temporary legislation was necessarily the norm in early American legislatures, but they do show that temporary legislation was a readily utilized tool of the early legislatures, 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.²² In an exchange of letters between Jefferson and James Madison, the two confronted the desirability of an entire constitution that would sunset at the turn of each generation.²³ 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.²⁴

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

²² See Letter from James Madison to Thomas Jefferson (Feb 4, 1790), quoted in Marvin Meyers, ed, *The Mind of the Founder: Sources of the Political Thought of James Madison* 232–34 (Bobbs-Merrill 1973) (criticizing Jefferson's proposal as politically infeasible). See also Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 Nw U L Rev 145, 163 n 90 (1998); Elaine Spitz, *Majority Rule* 92–93 (Chatham House 1984); Calabresi, *Common Law for the Age of Statutes* at 59 (cited in note 6) ("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 sunset laws. *Id.* at 60.

²³ See Letter from James Madison to Thomas Jefferson (Feb 4, 1790) (cited in note 22); Letter from Thomas Jefferson to James Madison (Sept 6, 1789), in Paul Leicester Ford, ed, 5 *The Writings of Thomas Jefferson* 115, 121–22 (GP Putnam's Sons 1895). See also Klarman, 85 *Georgetown L J* at 497 n 33 (cited in note 3); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 *Va L Rev* 747, 780 n 144 (1991) (arguing that an intragenerational constitution would only be desirable if less ambiguous than the present Constitution); Posner and Vermeule, 111 *Yale L J* at 1671 (cited in note 3) (discussing Madison's view that expiring legislation would lead to violent struggles for power as the expiration date neared); Klarman, 93 *Nw U L Rev* at 163 (cited in note 22) (discussing an intragenerational constitution and the problem of continuity).

²⁴ Letter from Thomas Jefferson to James Madison (Sept 6, 1789) (cited in note 23).

sunsetting constitutional provisions.²⁵ On the former issue, Madison seems clearly correct. On the latter, he is far more vulnerable, as discussed below. For current purposes, 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.²⁶

B. Federal, State, and International Applications

Beyond the context of the founding era, temporary legislation has been used extensively by both federal and state legislatures. To name only a handful of applications, temporary legislation has been used in immigration policy,²⁷ taxation of life insurance,²⁸ election law,²⁹ agricultural policy,³⁰ judicial rules,³¹ international trade policy,³² internet taxa-

²⁵ See Calabresi, *A Common Law for the Age of Statutes* at 59–60 (cited in note 6) (“Instead of a system designed to achieve continuity and change in a modern, statutory world, we would have a system that gives us change and little continuity.”).

²⁶ For a related discussion, see Philip Hamburger, *The Constitution's Accommodation of Social Change*, 88 Mich L Rev 239, 259–65 (1989) (discussing the Framers' view on permanence in the context of constitution drafting).

²⁷ See Henry Pratt Fairchild, *The Immigration Law of 1924*, 38 Q J Econ 653, 658 (1924) (noting the urgent enactment of a one-year law intended to stem the flow of “new” immigration). See also Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 U Pa L Rev 1147, 1151–52 n 18 (1997) (referring to the temporary nature of the 1921 Act); Immigration and Nationality Act—Amendments, HR Rep No 87-1086, 87th Cong, 1st Sess 1 (1961), reprinted in 1961 USCCAN 2950 (proposing to make permanent a temporary law relating to nonquota immigrant status for eligible orphans).

²⁸ See George E. Lent, *A More Permanent Formula for the Taxation of Insurance*, 27 J Insur 63, 64 (1960) (noting the use of temporary legislation or stopgap measures in the 1950s for taxation of life insurance).

²⁹ See Jennifer Denise Rogers, *Miller v. Johnson: The Supreme Court “Remaps” Shaw v. Reno*, 56 La L Rev 981, 986 n 30 (1996) (noting that portions of the Voting Rights Act were enacted as temporary legislation).

³⁰ See Theodore Saloutos, *New Deal Agricultural Policy: An Evaluation*, 61 J Am Hist 394, 403 (1974) (noting that the 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 Polit Sci Rev 621, 625–26 (1962) (discussing permanent legislation—the Agricultural Adjustment Act of 1938—that was suspended during war and thereafter in favor of a series of temporary laws and extenders). See also Conservation Reserve Hay Harvesting in Disaster Situations, HR Rep No 87-1951, 87th Cong, 2d Sess 1835 (1962), reprinted in 1962 USCCAN 1835 (discussing a 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).

³¹ See Wallace Mendelson, *Mr. Justice Frankfurter on the Distribution of Judicial Power in the United States*, 2 Midwest J Polit Sci 40, 47 (1958) (discussing a temporary measure allowing removal to federal court of cases against federal revenue collectors); James D. Barnett, *The Delegation of Legislative Power by Congress to the States*, 2 Am Polit Sci Rev 347, 364–65 (1908) (discussing the “process law,” first enacted in 1789, requiring the “forms of writs and executions” in federal courts to mirror those of the local state's highest court).

³² See Tim Matthewson, *Jefferson and Haiti*, 61 J S Hist 209, 240 n 79 (1995) (noting the enactment, but not renewal, of a temporary law forbidding trade with San Domingo).

tion,³³ congressional responses to judicial decisions,³⁴ bankruptcy law,³⁵ energy policy,³⁶ telecommunications policy,³⁷ government reform,³⁸ and tax policy generally.³⁹ A quick search through the Statutes at Large reveals sunset provisions throughout each volume. State legislatures have relied equally on temporary legislation, both historically and recently, enacting temporary legislation to control the payments of colonial rents,⁴⁰ to regulate slavery,⁴¹ to govern welfare policy,⁴² in the

³³ See 108th Cong, 1st Sess, in 149 Cong Rec S 14171 (Nov 6, 2003) (Sen Lautenberg) (discussing a “supposedly temporary law” enacted in 1998 and subsequently extended that prohibited states from taxing internet access fees).

³⁴ See L. Scott Gould, *The Congressional Response to Duro v. Reina: Compromising Sovereignty and the Constitution*, 28 UC Davis L Rev 53, 63 (1994) (discussing congressional use of a temporary law to reverse the effects of a Supreme Court decision). 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).

³⁵ Dan Keating, *Good Intentions, Bad Economics: Retiree Insurance Benefits in Bankruptcy*, 43 Vand L Rev 161, 162–63 (1990) (describing a 1986 stopgap law, later enacted as permanent legislation, mandating continued payment of retiree medical benefits after a corporation files for bankruptcy).

³⁶ See Federal Energy Administration Act of 1974, Pub L No 93-275, 88 Stat 96, 115 (1974), codified at 15 USC § 764 note (Supp 1974) (“The Act shall terminate June 30, 1976.”); The Federal Energy Administration Amendment Act Amendments of 1976, Pub L No 94-385, 90 Stat 1125, 1132 (1976), codified at 15 USC § 761 (1976) (“The Act shall terminate December 31, 1977.”).

³⁷ 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 services 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 USC § 161 (2000). Section 202(h) of the Telecommunications Act of 1996 requires the Commission to review its broadcast ownership rules biennially as part of the review conducted pursuant to § 11. 110 Stat 56, 111–12 (1996).

³⁸ For example, Title VI of the Ethics in Government Act authorized the appointment of an Independent Counsel, but the section was enacted for a five-year initial term. See Title VI of the Ethics in Government Act, Pub L No 95-521, Title VI, § 598, 92 Stat 1824, 1873 (1978), codified at 28 USC § 598 (1982). The provision was reauthorized several times. See, for example, Independent Counsel Reauthorization Act of 1994, Pub L No 103-270, 108 Stat 732, 732 (1994), codified at 28 USC § 599 (1994). The provision was ultimately allowed to sunset.

³⁹ See Pat Jones, *New Day May Dawn for Sunset Tax Provisions*, 66 Tax Notes 1587, 1587 (1995) (discussing the use of sunsets in tax legislation). 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) (“Since the late 1970s, a group of tax provisions has formed a package of ‘extend-ers’ that Congress has enacted temporarily and extended periodically.”).

⁴⁰ Charles A. Barker, *Property Rights in the Provincial System of Maryland: Proprietary Policy*, 2 J S Hist 43, 48–49 (1936) (discussing a temporary law enacted in 1717 that provided for payments of quitrents and repeatedly reenacted until 1733 when the lower house rejected and failed to reenact it thereafter).

⁴¹ See Bernard H. Nelson, *Confederate Slave Impressment Legislation, 1861–1865*, 31 J Negro Hist 392, 397 (1946) (noting that South Carolina first enacted temporary legislation allowing for impressment of slaves during the 1861 legislative session as a compromise prior to enacting permanent legislation allowing impressment in 1864).

⁴² See Robert Guhde and Husain Mustafa, *Budget Making in Ohio: A Test of the Process Model*, 34 W Polit Q 578, 584 (1981) (noting that the Controlling Board for administering certain

riot acts,⁴³ in tax policy,⁴⁴ in bankruptcy policy,⁴⁵ on physician-assisted suicide,⁴⁶ and even in policies on cameras in courtrooms.⁴⁷

Nor is the use of temporary legislation unique to the United States. Prominent historical examples can be found in English history. To take one arcane example, a political fight between Edmund Burke and Lord Clare in 1755 concerned the use of temporary legislation governing the free importation of Irish butter.⁴⁸ Early statutes governing fraudulent transfers were initially enacted as temporary law.⁴⁹ So too were the original bankruptcy statutes, both in England and in the United States.⁵⁰ No formal bankruptcy discharge existed in England until the Statute of 4 Anne,⁵¹ which contained an explicit sunset, initially terminating the law after only three years,⁵² but which was continued several times before finally being repealed in 1732.⁵³ In the United States, the first federal bankruptcy statute was enacted in 1800

state welfare funds was originally created by temporary law and ultimately made permanent).

⁴³ 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 that all Riot Acts but Connecticut's were enacted as temporary legislation and allowed to expire after terms of one to three years).

⁴⁴ See William G. McLoughlin, *Isaac Backus and the Separation of Church and State in America*, 73 Am Hist Rev 1392, 1395 (1968) (noting that Massachusetts tax exemption laws in the early 1700s required renewal every five years).

⁴⁵ See Peter J. Coleman, *The Insolvent Debtor in Rhode Island 1745–1828*, 23 Wm & Mary Q 413, 414 (1965) (describing the 1756 Act of the General Assembly of Rhode Island that enacted temporary legislation and became the basis for a system of bankruptcy relief).

⁴⁶ See George J. Annas, *Physician-Assisted Suicide—Michigan's Temporary Solution*, 20 Ohio N U L Rev 562, 564–65 (1994) (discussing a temporary Michigan law governing assisted suicide).

⁴⁷ See Jay C. Carlisle, *An Open Courtroom: Should Cameras Be Permitted in New York State Courts?*, 18 Pace L Rev 297, 298 (1998) (describing a 1987 law authorizing an experimental period to examine the use of cameras in courtrooms in New York).

⁴⁸ See P.T. Underdown, *Edmund Burke, the Commissary of his Bristol Constituents, 1774–1780*, 73 Engl Hist Rev 252, 254–55 (1958).

⁴⁹ See Douglas C. Michael, *The Past and Future of Kentucky's Fraudulent Transfer and Preference Laws*, 86 Ky L J 937, 939 (1998) (detailing the 1571 Statute of Elizabeth dealing, in part, with fraudulent transfers originally enacted as a temporary law but extended soon thereafter). See also Statute of 13 Eliz ch 5 (1571).

⁵⁰ See Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Am Bankr L J 325, 333, 345 (1991) (explaining that the Statute of 4 Anne, like the Bankruptcy Act of 1800, was initially intended as a “temporary or trial measure”).

⁵¹ Tabb, 65 Am Bankr L J at 333 (noting that the Statute of 4 Anne, ch 17 (1705) “enacted the first provision enabling an honest and cooperative bankrupt to obtain a discharge from prebankruptcy debts”).

⁵² See Tabb, 65 Am Bankr L J at 333 (cited in note 50).

⁵³ See Statute of 5 Geo 2, ch 30 (1732) (incorporating the Statute of 4 Anne, ch 17). See also Tabb, 65 Am Bankr L J at 333 n 47 (cited in note 50) (explaining that the Statute of 4 Anne was incorporated in the Statute of 5 Geo 2); Jay Cohen, *The History of Imprisonment for Debt and Its Relation to the Development of Discharge in Bankruptcy*, 3 J Legal Hist 153, 156 (1982) (explaining that the 1705 Act, “like much legislation of the time, contained a ‘sunset’ provision”).

and was also temporary legislation intended to last only five years.⁵⁴ The Act was repealed after only three years, two years prior to its natural sunset.⁵⁵

Temporary legislation has found extensive and ongoing use outside the United States as well. For example, temporary legislation has been used to formulate duties on oil in El Salvador,⁵⁶ to draft education policy in Italy,⁵⁷ to address agrarian disorder in Britain,⁵⁸ to expel ethnic groups from Turkey,⁵⁹ and for economic adjustment policy in Japan.⁶⁰ 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.⁶¹ Temporary legislation was never, nor is it now, an infrequently used legislative oddity invoked only in peculiar policy contexts.

⁵⁴ Tabb, 65 Am Bankr L J at 345 (cited in note 50) (noting that the Act was intended “as only a temporary measure of five years”). See also Bankruptcy Act of 1800, 2 Stat 19, 36 (1800):

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.

⁵⁵ See An Act to Repeal an Act Entitled “An Act to Establish a Uniform System of Bankruptcy throughout the United States,” 2 Stat 238 (1803). Apparently, the Bankruptcy Act of 1800 inspired widespread outrage because of its perceived favor of mercantile over agricultural interests and the small dividends paid to creditors. After the Act’s repeal, little federal intervention occurred until the Bankruptcy Act of 1841, which contained no sunset provision but met the same fate of repeal as the 1800 Act. See Tabb, 65 Am Bankr L J at 349–50 (cited in note 50); Bankruptcy Act of 1841, 5 Stat 440 (1841), repealed by An Act to Repeal the Bankruptcy Act, 5 Stat 614 (1843). See also Bankruptcy Reform Act of 1999, S Rep No 106-49, 106th Cong, 1st Sess 2 (1999) (describing the history of twentieth-century bankruptcy law).

⁵⁶ See Peter R. Odell, *Oil and State in Latin America*, 40 Intl Affairs 659, 664 (1964) (discussing a temporary law in El Salvador, renewable every sixty days, imposing duties on the products of local oil refineries).

⁵⁷ See E.C. Longobardi, *Higher Commercial Education in Italy*, 35 J Polit Econ 39, 80 n 34 (1927) (describing a temporary law allowing dismissal of professors for incompatibility with “the general policy of the government”).

⁵⁸ See Charles Townshend, *Martial Law: Legal and Administrative Problems of Civil Emergency in Britain and the Empire, 1800–1940*, 25 Hist J 167, 168 (1982) (describing temporary “coercion” laws meant to keep down agrarian insurrections).

⁵⁹ 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 the use of temporary laws by Turkey to expel Armenians).

⁶⁰ See Brian Ike, *The Japanese Textile Industry: Structural Adjustment and Government Policy*, 20 Asian Surv 532, 539 (1980) (discussing the use of temporary adjustment laws for the Japanese textile industry that were either extended or reenacted for twenty years).

⁶¹ Note that temporary legislation is occasionally discussed by prominent political theorists as well. See, for example, Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L J 1725, 1765 (1996) (noting that Montesquieu claimed that legislative powers entailed the power to enact, amend, or abrogate permanent or temporary laws).

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 1970s and early 1980s.⁶² Sunset legislation played a major role in the regulatory reform movement of the 1970s that was partially spearheaded by Common Cause, and which was highly critical of the expanding bureaucracy and the regulatory regimes it administered.⁶³ The first state-level sunset legislation was enacted in 1976 and subsequently half the states passed some version of sunset legislation.⁶⁴

This generation of sunset legislation sought to produce more effective and efficient regulation by terminating unneeded agencies and regulations after periodic review.⁶⁵ Whether sunset reviews actually

⁶² See Keith E. Hamm and Roby D. Robertson, *Factors Influencing the Adoption of New Methods of Legislative Oversight in the U.S. States*, 6 *Legis Stud Q* 133, 139–40 (1981) (discussing the advent of sunset legislation in the United States).

⁶³ For an overview of the sunset movement, see generally Lewis Anthony Davis, *Review Procedures and Public Accountability in Sunset Legislation: An Analysis and Proposal for Reform*, 33 *Admin L Rev* 393 (1981) (describing the purpose of sunset laws and advocating their increased use); Dan R. Price, *Sunset Legislation in the United States*, 30 *Baylor L Rev* 401 (1978) (evaluating the then-current “Sunset Movement” in light of the history of sunset legislation); Bruce Adams, *Sunset: A Proposal for Accountable Government*, 28 *Admin L Rev* 511 (1976) (advocating the use of sunset legislation to control unruly bureaucrats). For a discussion in the risk context, consider Breyer, *Regulation and Its Reform* at 364–68 (cited in note 6) (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, 552–53 (1982) (expressing skepticism over the likelihood of Congress adopting Breyer’s sunset review proposal). The idea of judicial sunset—treatment of obsolete statutes as common law precedents—was also advocated by Calabresi. See Calabresi, *A Common Law for the Age of Statutes* at 59–64 (cited in note 6) (discussing sunsets as a 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 rather than judicial responsibility for sunset statutes).

⁶⁴ 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 (cited in note 63).

⁶⁵ See James C. Clingermayer, *Administrative Innovations as Instruments of State Legislative Control*, 44 *W Polit Q* 389, 392 (1991) (discussing sunset provisions as part of a structure increasing legislative control of the 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, for example, Theodore Lowi, *The End of Liberalism: The Second Republic of the United States* 309–10 (Norton 1979) (“The purpose [of sunset legislation] is to provide an institutional means for facing up to the basic problem of juridical democracy—the absence of rule of law and the absence of real legislative power to

increase bureaucratic accountability is contested,⁶⁶ but it is clear that general sunset legislation of this sort fell quickly out of favor after the flood of state action in the late 1970s. The statutes imposed significant administrative costs both on agencies that were forced to prepare for review and 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 1970s 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 was that the less democratically accountable bureaucracy is consistently up to no good; the democratically responsive legislature must constantly seek ways to control it. The reality is far more complex and nuanced. 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 underinclusive because sunset legislation 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 noteworthy. The legislative form was

impose it."); Carl McGowan, *Congress, Courts, and Control of Delegated Power*, 77 Colum L Rev 1119, 1133-39 (1977) (discussing means by which Congress can control agencies). For a discussion of these issues, see Mark B. Blickle, *The National Sunset Movement*, 9 Seton Hall Leg J 209, 209 (1985) ("The passage of sunset laws marks an attempt by state legislatures to confront the unfettered growth of governmental agencies."); William Lyons and Patricia K. Freeman, *Sunset Legislation and the Legislative Process in Tennessee*, 9 Leg Stud Q 1, 151 (1984) ("The research to be presented here assesses the impact in the context of sunset legislation, a widely adopted oversight mechanism."); Calabresi, *A Common Law for the Age of Statutes* at 59-62 (cited in note 6) ("The main thrust of the sunset movement has been primarily toward regulatory statutes and agencies.").

⁶⁶ See Lyons and Freeman, 9 Leg Stud Q at 155-56 (cited in note 65) (arguing that Tennessee legislators' increased use of sunset legislation resulted in increased agency review).

⁶⁷ See Calabresi, *A Common Law for the Age of Statutes* at 62 (cited in note 6) ("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.").

used throughout U.S. history, was discussed and often embraced by the founding generation, and was even predicted by Madison to become the norm for controversial legislative enactments. 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, this 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 policy 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 Part 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 legislators perceive (accurately or not) temporary and permanent legislation differently. Second, temporary legislation produces informational differences compared to permanent legislation, and these differences implicate error costs, cognitive bias, and the effects of asymmetric information. 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 decisionmaking authority intertemporally 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 its legislative program. Put differently, the choice between temporary and permanent legislation is a choice about the allocation of different types of political costs and political risks across branches and within branches 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). 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 simply $v/(1 - \delta)$. 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 reality, 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, a somewhat more nuanced analysis is required to make any meaningful headway.

A. Transaction Costs

Temporary and permanent legislation produce distributions of transaction costs that differ 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 early intuition was that temporary legislation is more “costly” to produce than permanent legislation because it involves multiple periods of legislative action.⁶⁹ In reality, there is neither theoretical nor empirical evidence to support that claim.

The overall cost of producing a given piece of legislation consists of initial *enactment* costs, realized only in time periods when legislation is enacted, and *maintenance* costs, realized only in periods after enactment, deriving from efforts to repeal, amend, or avoid any changes to existing 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 (along this dimension) 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 the reenactment costs of temporary legislation are positive. At first glance, the assumption that enactment costs are equal for temporary and permanent legislation might seem unrealistic. However, both temporary and permanent legislation must meet the same procedural requirements specified either by the Constitution or internal House and Senate rules. To the extent that a substantial

⁶⁹ See text accompanying note 22–26.

portion of enactment costs consists of negotiating vetogates 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 realistic 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 then 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.⁷⁰ Theoretically, therefore, neither permanent nor temporary legislation involves inherently higher aggregate transaction costs. If temporary legislation is enacted for a relatively short term—for example, three years—even if its initial enactment costs are somewhat lower than those of 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 probably, 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" is a fairly general term, picking up all the costs incurred in nonenacting time periods. First, from the above discussion, recall that if enactment costs vary, then enactment costs in the initial time period will almost certainly 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 certainly easier to block the repeal of legislation than to pass new legislation. As a result, continuing permanent legislation is less costly in the sun-

⁷⁰ The aggregate transactions costs for temporary legislation when maintenance costs are zero are equal to initial enactment costs plus enactment costs in the sunset period multiplied by δ^k where k is the period of the sunset and 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.

set 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,⁷¹ they seem to be relatively rare. For longer-term legislation that is formally temporary—for example, 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 precision. 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 specific time period in question is far from the sunset.

Combining the analyses, 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

⁷¹ Consider the repeal of the Bankruptcy Act of 1800 after only three years of its initial five-year term. See notes 50–55.

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.⁷² While the analysis does not demonstrate that temporary legislation is clearly less costly than 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 borne by future-period legislatures in the sunset year, while reducing the maintenance costs borne by future legislatures in years close to the sunset. These intertemporal 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

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 decisionmaking” 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 may 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 pro-

⁷² Note also that the above discussion focuses on the costs of obtaining and maintaining legislation. But the analysis could 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 that it is easier to avoid permanent legislation initially than to avoid otherwise-equivalent temporary legislation.

cedures help compensate for some forms of asymmetric information in politics.

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 available when legislation is first enacted. If policy outcomes are entirely determined by the available information set, then a staged decision procedure is more likely to select the optimal policy than a single-stage enactment.⁷³ As a result, in policy domains of judgment aggregation—where there is a correct decision to be made conditional on the underlying state of the world—as opposed to preference aggregation, 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, 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 noninformational factors. In contexts where policy decisions are likely to be correct initially, temporary legislation imposes a second round of enactment costs merely to maintain the optimal policy,⁷⁴ provides a ready-made opportunity for opponents of the legislation to terminate it, and yields little marginal in-

⁷³ The argument is a variant of various learning arguments in other fields. See, for example, Kenneth W. Abbott and Duncan Snidal, *Pathways to International Cooperation*, in Eyan Benvenisti and Moshe Hirsch, eds, *The Impact of International Law on International Cooperation: Theoretical Perspectives* 50, 51 (Cambridge 2004) (noting that states must frequently move by stages into a cooperative solution to international problems); Barbara Koremenos, *Loosening Ties That Bind: A Learning Model of Agreement Flexibility*, 55 *Intl Org* 289, 292–98 (2001) (developing a model of contract negotiation in which uncertainty can lead to a multistage agreement).

⁷⁴ But recall the ambiguous effects of temporary legislation on aggregate transaction costs. See Part II.A.

crease 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.⁷⁵

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.⁷⁶ Accompanying this line of research in behavioral law and economics⁷⁷ has been a call to craft institutions that compensate for the potential biases that affect decisionmaking by citizens and politicians.⁷⁸ As a general rule, these prescriptions for governmental reform focus on the relative allocation of decisionmaking responsibility among the branches of government.⁷⁹

⁷⁵ 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.

⁷⁶ For an overview, see generally Cass R. Sunstein, ed, *Behavioral Law and Economics* (Cambridge 2000). See also Christine Jolls, Cass R. Sunstein, and Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 Stan L Rev 1471, 1473 (1998). For recent scholarship on the interaction of cognitive bias and culture, see generally Dan M. Kahan, et al, Book Review, *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 Harv L Rev 1071 (2006).

⁷⁷ See Cass R. Sunstein, *Risk and Reason: Safety, Law, and the Environment* 29 (Cambridge 2002) (explaining that cost-benefit analysis is needed to offset poor intuitions about risk in the policymaking context). For applied contexts, see Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 Cornell L Rev 486, 494–507 (2002) (discussing the heuristic biases inherent in expert decisionmaking processes); Timur Kuran and Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 Stan L Rev 683, 715–35 (1999) (discussing how individual determinations concerning risk analysis impact societal perspectives and vice-versa).

⁷⁸ Consider Jeffrey J. Rachlinski and Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 Cornell L Rev 549, 593 (2002) (arguing that the cognitive psychological model implies that regulatory policy “should be primarily the domain of administrative agencies”); Jeffrey J. Rachlinski, *The “New” Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 Cornell L Rev 739, 745–63 (2000) (acknowledging criticism of “behavioral decision theory” but arguing for its utility in certain circumstances); Jeffrey J. Rachlinski, Book Review, *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 Policy 673, 683–94 (1997).

⁷⁹ See Rachlinski and Farina, 87 Cornell L Rev at 593 (cited in note 78) (arguing for allocating primary decisionmaking responsibilities in the bureaucracy and relying on Congress

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.⁸⁰ This Article takes an 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 guard against a variety of pitfalls in the regulation of risk.⁸¹

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.⁸² The seriousness of risks that are readily “available” is often overestimated as well.⁸³ Availability is a somewhat fluid concept in the literature. However, scholars typically refer to the “availability heuristic,” which involves estimating the probability or sometimes seriousness of a risk on the basis of whether it is cognitively readily available. If individuals use availability as a heuristic for evaluating risk, recently realized risks may produce overreaction or at least overestimation of the relevant probabilities.⁸⁴ 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,

rather than the judiciary for primary oversight and review). Indeed, the actual suggestions for reform are sometimes modest. See, for example, *id.* at 590–91 (“[I]n terms of optimal institutional design, American government has gotten it pretty much right.”).

⁸⁰ Much of this work also speaks to Clayton P. Gillette and James E. Krier, *Risk, Courts, and Agencies*, 138 U Pa L Rev 1027, 1042–99 (1990) (arguing that courts have important comparative advantages in dealing with risk relative to administrative agencies).

⁸¹ The flavor of this analysis is very much in keeping with some of Rachlinski’s efforts to link analysis of institutional structure to cognitive biases in the decisionmaking of government actors. Consider Rachlinski and Farina, 87 Cornell L Rev at 549 (cited in note 78); Rachlinski, 85 Cornell L Rev at 739 (cited in note 78); Rachlinski, 6 Cornell J L & Pub Policy at 686–88 (cited in note 78). See also Paul Slovic, Baruch Fischhoff, and Sarah Lichtenstein, *Regulation of Risk: A Psychological Perspective*, in Roger Noll, ed., *Regulatory Policy and the Social Sciences* 241, 256–59 (California 1985) (considering temporary measures as a means of mitigating cognitive biases).

⁸² See Sunstein, *Risk and Reason* at 33–35 (cited in note 77) (explaining this response as a function of heuristic biases); Howard Margolis, *Dealing With Risk: Why the Public and the Experts Disagree on Environmental Issues* (Chicago 1996) (arguing that known heuristics account for some of the discrepancy between lay and expert evaluations of risk). See generally Daniel Kahneman, Paul Slovic, and Amos Tversky, eds, *Judgment Under Uncertainty* (Cambridge 1982).

⁸³ See Amos Tversky and Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 Cog Psych 207, 230 (1973) (explaining that “availability provides a mechanism by which occurrences of extreme utility (or disutility) may appear more likely than they actually are”).

⁸⁴ See Cass R. Sunstein, *What’s Available? Social Influences and Behavioral Economics*, 97 Nw U L Rev 1295, 1301 (2003) (“[E]arlier events will have a smaller impact than later ones.”).

the danger of overestimation is even greater.⁸⁵ Because the seriousness of new risks is often overestimated by the public, politicians may face intense pressure to respond with legislation,⁸⁶ 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.⁸⁷ 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. 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.⁸⁸ 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.”⁸⁹

The 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 on new risks may produce fewer policy errors than ignoring pleas for action.

⁸⁵ See generally Paul Slovic, ed, *The Perception of Risk* (Earthscan 2000) (compiling articles on fear and perceived risk); Daniel Kahneman and Amos Tversky, *Choice, Values, and Frames* (Cambridge 2000); Slovic, Fischhoff, and Lichtenstein, *Regulation of Risk* (cited in note 81).

⁸⁶ See Risa Palm, *Demand for Disaster Insurance: Residential Coverage*, in Howard Kunreuther and Richard J. Roth, Sr., eds, *Paying the Price: The Status and Role of Insurance against Natural Disasters in the United States* 51, 52–53 (Joseph Henry 1998) (describing the effect of heuristic biases on the decision to purchase disaster insurance); Risa Palm and John Carroll, *Illusions of Safety: Culture and Earthquake Hazard Response in California and Japan* 91 (Westview 1998) (speculating that recent earthquake losses in the San Fernando Valley affected beliefs about earthquake risk); Howard Kunreuther, *Disaster Insurance Protection: Public Policy Lessons* 205–06 (Wiley 1978).

⁸⁷ See Kuran and Sunstein, 51 *Stan L Rev* at 703 (cited in note 77) (cataloging cases in which public demand for swift and costly government action resulted in regulations the net benefit of which “may well have been negative”).

⁸⁸ See Roger G. Noll and James Krier, *Some Implications of Cognitive Psychology for Risk Regulation*, 19 *J Legal Stud* 747, 774–75 (1990).

⁸⁹ *Id.* at 774 (internal quotations omitted). The overuse of this metaphor notwithstanding, it remains somewhat apt in the context of risk regulation. For a recent treatment, see generally Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (Cambridge 2000).

Empirically, it is true that new policy initiatives are often enacted in the immediate aftermath of realized or recognized risks.⁹⁰ However, there is scant evidence as to whether this results in systematically good or bad legislation. 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 of both the political reality faced by legislators and the possibility that action is entirely justified. Temporary legislation therefore does not debias individual beliefs in a way that permanent legislation fails to do. 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.⁹¹ All of which suggests a background presumption in favor of temporary rather than permanent legislation in policy contexts thought to be 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 (or 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 legis-

⁹⁰ In the context of natural hazard risk, see Thomas A. Birkland, *After Disaster: Agenda Setting, Public Policy, and Focusing Events* 49–73 (Georgetown 1997) (assessing the influence of natural disasters on congressional and media agendas).

⁹¹ Sunsets have also been advocated in recent years to avoid regulatory “stickiness” or to force agencies to justify ongoing regulations. See Rachlinski and Farina, 87 Cornell L. Rev. at 605 (cited in note 78); Robert W. Hahn, *Achieving Real Regulatory Reform*, 1997 U. Chi. Legal F. 143, 156 (arguing that despite their arguably greater cost, sunset provisions “can benefit the public by inducing agencies to ask serious questions about the quality and costs of the services they are trying to deliver”).

lators in future time periods. This logic is consistent with models from political science that suggest repeated interactions between lobbyists and legislators generally ensure honest claims by lobbyists.⁹² 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.⁹³ Roughly speaking, staged financing gives investors an option to abandon the project at prespecified time periods, which in turn triggers the revelation of certain information and better aligns the incentives of the entrepreneur with those of the investors by creating performance penalties. Staged financing and temporary legislation are not obviously identical tools, but staged decision procedures are a relatively common mechanism for responding to informational challenges.⁹⁴

⁹² See Susanne Lohmann, *Information, Access, and Contributions: A Signaling Model of Lobbying*, 85 Pub Choice 267, 269 (1995); David Austen-Smith, *Information and Influence: Lobbying for Agendas and Votes*, 37 Am J Polit Sci 799, 800–01 (1993) (arguing that staging changes the incentives of would-be lobbyists in favor of honest information revelation).

⁹³ 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, 1078–81 (2003). 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 decisionmaking is relatively unknown, uncertainty about future performance is exacerbated. Id at 1076–77.

⁹⁴ A similar 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, 309 (2001). One key difference between staged financing in the venture capital context and temporary legislation is that the use of benchmarking 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 most temporary legislation contexts. However, for a discussion of benchmarking and milestones in the context of government and democratic theory, see generally Michael C. Dorf and Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum L Rev 267 (1998).

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 this Article, 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 might be termed technocratic, and manifest in at least three contexts: 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 measures.

First, temporary legislation is sometimes used to fill gaps in existing law or as placeholder legislation enacted to cover interim time periods while the legislature considers permanent legislation. For example, in the late 1980s, Congress enacted temporary legislation targeting the payment of retiree medical benefits by corporations that had filed for bankruptcy.⁹⁵ The stopgap measure was ostensibly enacted so that some legislation was in force while Congress deliberated on a long-term policy solution.⁹⁶ Stopgap legislation does just that—it plugs holes in existing statutory schemes on a short-term basis on the assumption that a more permanent policy judgment will be made soon thereafter.⁹⁷ Temporary regulations or interim rules are often used for similar reasons by administrative agencies. Indeed, 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, thereby avoiding the pitfalls of retroactive rulemaking.⁹⁸ Similarly, agencies often issue interim rules after formal rules have

⁹⁵ See Keating, 43 Vand L Rev at 162–63 (cited in note 35).

⁹⁶ 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 (1988), codified at 11 USC § 1114 (2000).

⁹⁷ See, for example, An Act to Amend the Provisions of Title 14, United States Code, Relating to the Appointment, Promotion, Separation, and Retirement of Officers of the Coast Guard, S Rep No 88-476, 88th Cong, 1st Sess 1 (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 also Pub L No 88-130, 77 Stat 174 (1963) (approving the amendment to the provisions of Title 14).

⁹⁸ See generally *Bowen v Georgetown Univ Hospital*, 488 US 204, 208–09 (1988) (holding that the power to issue retroactive orders will not be assumed absent an affirmative grant).

been vacated by courts.⁹⁹ Though whether temporary regulations should receive less deference from the courts is unclear,¹⁰⁰ most courts give temporary regulations full legal status and due deference.¹⁰¹ Thus, in both the legislative and regulatory contexts, temporary measures are sometimes simple tools for policymakers.

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.¹⁰² Legislation addressing capacity shortfalls in the market for terrorism insurance was enacted under a similar logic.¹⁰³ Unlike the stopgap 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 duration of 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 policymaking process. Although promising, this specific use of

⁹⁹ See Kristina Daugirdas, Note, *Evaluating Remand without Vacatur*, 80 NYU L Rev 278, 279 (2005).

¹⁰⁰ See Thomas W. Merrill and Kristin E. Hickman, *Chevron's Domain*, 89 Georgetown L J 833, 906–07 (2001); Juan F. Vasquez, Jr. and Peter A. Lowy, *Challenging Temporary Treasury Regulations: An Analysis of the Administrative Procedure Act, Legislative Reenactment Doctrine, Deference, and Invalidity*, 3 Hous Bus & Tax L J 248, 267–81 (2003).

¹⁰¹ See, for example, *Cinema '84 v Commissioner of Internal Revenue*, 294 F3d 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 Commissioner of Internal Revenue*, 78 F3d 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 American Corp v Commissioner of Internal Revenue*, 89 TC 765, 776 (1987) (entitling temporary tax regulations to the same weight as final regulations). But see *Kikalos v Commissioner of Internal Revenue*, 190 F3d 791, 796 (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 Michael Asimow, *Public Participation in the Adoption of Tax Regulations*, 44 Tax Law 343, 343–44 (1991) (discussing increased reliance on temporary regulations by the Treasury Department starting in the 1980s).

¹⁰² See Saloutos, 61 J Am Hist at 403 (cited in note 30) (discussing the view that the Agricultural Adjustment Act was enacted as temporary legislation to deal with temporary market conditions).

¹⁰³ See Part III for an extended discussion.

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 policymakers. Even extremely useful information produced may still be 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 from 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.¹⁰⁴ As a result, one critical empirical question is whether temporary statutes result in meaningful reconsideration in successive stages of reauthorization or simply get extended 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 that 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.¹⁰⁵ 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.

By way of illustration, consider a handful of policy contexts. First, a growing list of tax benefits is enacted for short-term time periods.¹⁰⁶ The extenders are “tax provisions that expire, forcing congressional reconsideration every few years.”¹⁰⁷ Legislative treatment of temporary tax provisions varies widely. For example, despite the development of

¹⁰⁴ See Part II.C.

¹⁰⁵ Future empirical work might examine whether the statutory outcomes and legislative process of temporary legislation differ consistently across policy contexts.

¹⁰⁶ See Heidi Glenn, *Expiring Provisions Never Die, They Just Become “Extenders,”* 73 Tax Notes 1009, 1009 (1996) (noting that “the roster of extenders keeps growing”).

¹⁰⁷ Garrett, 65 U Chi L Rev at 567 (cited in note 39). Because sunset tax provisions do not give rise to the same expectations of permanence, they may mitigate problems associated with transition policy in the tax realm. See Michael Doran, *Legislative Compromise and Tax Transition Policy*, 74 U Chi L Rev (forthcoming 2007) (describing a debate between those for and against transitional relief after tax preferences change).

extensive evidence that the targeted job tax credit had little or no influence on employer hiring, the credit was extended and made permanent.¹⁰⁸ Better quality information in the subsequent stage of legislative decisionmaking 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.¹⁰⁹ Neither automatic renewal nor automatic termination of temporary legislation appears to be the norm.¹¹⁰

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 authorized only a few years at a time, and the appropriations and reauthorizations often contain a mix of minimal, modest, and extensive amendments.¹¹¹ 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 1986.¹¹² Other legislative programs are reauthorized with nothing more than a change in the date of program termination.¹¹³ 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 an-

¹⁰⁸ See Garrett, 65 U Chi L Rev at 567 (cited in note 39) (describing the process of making the temporary law permanent, then temporary again, effecting only minor changes to the law).

¹⁰⁹ Id at 562 (arguing that while information cannot “dictate the content of congressional deliberation,” it can enable discussion of relevant issues).

¹¹⁰ 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, 1206 (2000) (describing the effect of the extender).

¹¹¹ See Endangered Species Act of 1973, Pub L No 93-205, 87 Stat 884, 903 (1973), codified at 16 USC § 1542 (Supp 1973). See generally William W. Stelle, Jr., *Major Issues in the Reauthorization of the Endangered Species Act*, 24 Envir L 321 (1994); Laura Spitzberg, *The Reauthorization of the Endangered Species Act*, 13 Temple Envir L & Tech J 193 (1994) (discussing legislative proposals for the reauthorization of the Endangered Species Act and speculating as to the likely outcome).

¹¹² Superfund Amendments and Reauthorization Act of 1986, Pub L No 99-499, 100 Stat 1613 (1986).

¹¹³ See generally Ann R. Klee and Ernie Rosenberg, *The Moribund State of CERCLA Reauthorization*, 13 Nat Resources & Envir 451, 451 (1999) (arguing that the reauthorization of Resource Conservation Recovery Act, Clean Water Act, Endangered Species Act, and Comprehensive Environmental Response, Compensation and Environmental Liability Act (CERCLA) generally produces significant program reform, but sometimes produces virtually no changes because of underlying politics).

nual basis, but others are obviously fiercely contested. This dynamic is only exacerbated by budget rules that may require setoffs for new spending programs, further highlighting the importance of congressional rules and procedures for analyzing temporary legislation.¹¹⁴

Finally, Congress recently considered bills that seek to alter the USA PATRIOT Act, which, as originally enacted, terminated many of its provisions at the end of 2005.¹¹⁵ The Security and Freedom Ensured (SAFE) Act of 2003 would have altered some of the more contentious provisions of the USA PATRIOT Act.¹¹⁶ However, other proposals would have made temporary portions of the USA PATRIOT Act permanent.¹¹⁷ 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. Congress does not systematically rubber stamp sunset legislation for renewal, nor does Congress automatically integrate new information into the policy process in a purely technocratic manner. Sunset statutes sometimes receive little legislative attention, but they sometimes receive consideration that is every bit as intense as deliberation on permanent legislation.¹¹⁸

A second challenge to the informational 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 produce better information, some statutes seek to elicit information about how

¹¹⁴ See Elizabeth Garrett, *Rethinking the Structures of Decisionmaking in the Federal Budget Process*, 35 Harv J Leg 387, 403–04 (1998) (arguing that the current bifurcated budget process limits the ability to escape the discipline of offset requirements and the probability that legislators with a short time horizon will approve budgets whose long-term costs outweigh the benefits).

¹¹⁵ See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act)*, Pub L No 107-56, 115 Stat 272, 285 (2001) (sunsetting approximately half the powers in the USA PATRIOT Act at the end of 2005).

¹¹⁶ See Security and Freedom Ensured Act of 2003, S 1709, 108th Cong, 1st Sess (Oct 2, 2003), in 149 Cong Rec S 12377-87 (Oct 2, 2003) (proposing limits on roving wiretaps and the authority to delay notice of search warrants).

¹¹⁷ See 108th Cong, 1st Sess, in 149 Cong Rec E776-04 (Apr 11, 2003) (Rep Udall) (“[S]ome are proposing that Congress make permanent some or all of the provisions of the ‘USA PATRIOT Act’ now scheduled to expire at the end of 2005.”). Ultimately, Congress adopted the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub L No 109-177, 120 Stat 192 (2006).

¹¹⁸ 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). See Edmund Andrews, *Senate Approves 2-Year Extension of Bush Tax Cuts*, NY Times A1 (May 12, 2006) (renewing the Bush Administration’s tax cuts until 2010); Sheryl Stolberg, *Effort to Renew Weapons Ban Falters on Hill*, NY Times A1 (Sept 9, 2004) (explaining how the lobbying of the National Rifle Association and election year politics resulted in a failure to extend the ban).

private parties would behave under a new legislative regime. Unfortunately, in order for such information to be accurate, private parties must respond to the temporary legislation as though it were 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 overrespond to the legislation and try to derive all potential benefits prior to the sunset. For example, a temporary tax benefit—such as 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 underresponsive 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 underresponsiveness may bias the information that temporary legislation produces. The irony 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 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 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 information 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. Temporary legislation is no magic bullet for informational challenges in the legislature. But, the theoretical benefits of temporary legislation are genuine 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 intrabranched and interbranch 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.¹¹⁹ This strain of literature models regulation or legislation as a good demanded by private interests and supplied by legislators for a negotiated price.¹²⁰ Within this framework, parties to the agreement (legislators and private interests) face challenges related to the non-simultaneity of performance.¹²¹ 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.”¹²² If Congress is unable to guarantee that

¹¹⁹ See William M. Landes and Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J L & Econ 875, 877–79 (1975) (arguing that enforcing bargains between legislators and private interests increases the durability of legislation). For a general overview, see Robert D. Tollison, *Public Choice and Legislation*, 74 Va L Rev 339, 345–46 (1988) (summarizing Landes and Posner's argument and arguing that Congress's control of the judiciary's budget is the key to understanding the dynamic). For a more recent discussion of durability, see Jonathan R. Macey, Winstar, *Bureaucracy and Public Choice*, 6 S Ct Econ Rev 173, 176–81 (1998) (discussing legislative durability in the context of the Supreme Court's decision in *United States v Winstar Corp.*, 518 US 839 (1996)). 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, 1047–54 (2003).

¹²⁰ See, for example, Macey, 6 S Ct Econ Rev at 176 (cited in note 119) (noting that public choice theory views regulation as a commodity like any other).

¹²¹ *Id.* at 177 (noting that the delay in exchange of “goods” between Congress and interest groups is a significant problem in public choice theory).

¹²² *Id.* at 178.

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, William Landes and Richard Posner argue that an independent judiciary facilitates the credibility of durable legislative bargains.¹²³ High costs of producing legislation also decrease the probability that statutes will be repealed, and both the internal organization of Congress (committee structure and vetogates) and delegation to administrative agencies can be understood as methods of insulating current-period deals from future-period legislatures,¹²⁴ a point to which I return below.

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.¹²⁵ 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.¹²⁶ 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.¹²⁷

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-

¹²³ Landes and Posner, 18 J L & Econ at 875–77 (cited in note 119).

¹²⁴ See Macey, 6 S Ct Econ Rev at 178 (cited in note 119) (arguing that because the credibility of congressional promises depends on its ability to deliver durability, Congress has a strong incentive to solve this problem).

¹²⁵ See, for example, 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 (cited in note 119) (“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?”).

¹²⁶ To be fair, some additional nuance is addressed in pockets of the literature. See generally, for example, Mark Crain and Robert D. 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).

¹²⁷ See Heidi Glenn, 73 Tax Notes at 1010 (cited in note 106) (reporting that in the tax realm extenders tend to be the result of insufficient revenue or experimentation). Tax extenders are treated more extensively below in the context of rent extraction rather than rent seeking.

period deals may be undone by future legislative coalitions.¹²⁸ Indeed, long-term bargains may 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.¹²⁹ It is conceivable that 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.¹³⁰ 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 one way or another. 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. 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 two strategic dynamics.

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

¹²⁸ 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.").

¹²⁹ See Landes and Posner, 18 *J L & Econ* at 883 (cited in note 119) (explaining that the maximum price that an interest group will be willing to pay depends in part on the possibility of "adverse judicial rulings").

¹³⁰ 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.").

sunsetting statutes.¹³¹ 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.¹³² Thus, within the legislature, temporary legislation entails an intertemporal 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 interbranch 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.¹³³ Delegation creates a risk that the bureaucracy will alter policy (bureaucratic drift),¹³⁴ 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

¹³¹ See Christine DeGregorio, *Leadership Approaches in Congressional Committee Hearings*, 45 W Polit Q 971, 978 (1992), quoting an aide on the House Interior Committee:

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.

¹³² See *id.* at 978 (arguing that statutory expirations both constrain discretion of committee chairs and provide ready-made opportunities to affect policy). See also Jack L. Walker, *Setting the Agenda in the U.S. Senate: A Theory of Problem Selection*, 7 Brit J Polit Sci 423, 443 (1977) (discussing the role of reauthorization proceedings in Senate committees).

¹³³ For helpful overviews of the delegation literature, see generally David Epstein and Sharyn O'Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers* (Cambridge 1999); D. Roderick Kiewiet and Mathew D. McCubbins, *The Logic of Delegation: Congressional Parties and the Appropriations Process* (Chicago 1991) (exploring the history and theory of delegation and delegation mechanisms). On bureaucratic drift particularly, see Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 Va L Rev 431, 439 (1989) (discussing how agencies can shift policy outcomes away from the legislative intent).

¹³⁴ See, for example, David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 Cardozo L Rev 731, 732 (1999) (arguing that Congress has evaded its constitutional duty by delegating "legislative" powers to the executive).

gives greater power to Congress as an institution relative to the bureaucracy.¹³⁵ 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 intrabranched and the interbranch effects of temporary legislation are 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. 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.¹³⁶ 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.

¹³⁵ On congressional oversight of the bureaucracy, see generally David Epstein and Sharyn O'Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 Am J Polit Sci 697 (1994) (discussing the tradeoff, in the context of delegation, between informational gains from agency expertise and distributive losses from bureaucratic drift); McCubbins, Noll and Weingast, 75 Va L Rev 431 (cited in note 133) (discussing the problem of assuring agency compliance with the desires of the political coalition enacting and overseeing legislation). See also Terry M. Moe, *The Politics of Bureaucratic Structure*, in John E. Chubb and Paul E. Peterson, eds, *Can the Government Govern?* 267, 285–323 (Brookings 1989); Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J L Econ & Org 243, 243 (1987); Randall L. Calvert, Mark J. Moran, and Barry R. Weingast, *Congressional Influence Over Policy Making: The Case of the FTC*, in Mathew D. McCubbins and Terry Sullivan, eds, *Congress: Structure and Policy* 493, 494 (Cambridge 1987); Morris P. Fiorina, *Legislator Uncertainty, Legislative Control, and the Delegation of Legislative Power*, 2 J L Econ & Org 33, 36–47 (1986) (examining the effect of uncertainty as to a law's consequences in the decision of Congress to delegate authority); Mathew D. McCubbins and Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 Am J Polit Sci 165, 165 (1984).

¹³⁶ See Epstein and O'Halloran, *Delegating Powers* at 187 (cited in note 133).

This is so not because temporary legislation produces a shorter duration of legislation, but because any institutional conditions that decrease the ability of legislators to “guarantee” long-term legislation will reduce the desirability of permanent legislation to private interests. Legislators are virtually never in a position to guarantee permanent legislation over the long term because 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, a greater proportion of interests should favor temporary measures as legislative time horizons decrease. For example, in the context of tax policy, legislators have increasingly preferred short-term deals because of changes in legislative organization and an increase in the number of interest groups.¹³⁷ 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.¹³⁸ 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.¹³⁹

Other external political conditions produce similar effects. For example, divided government could 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.¹⁴⁰ This is correct, but only partially so. It is true that

¹³⁷ Doernberg and McChesney, 71 Minn L Rev at 914 (cited in note 130) (arguing that changes in stability of the committee system have increased the rate of change in, and decreased durability of, tax laws).

¹³⁸ Id at 948–49 (presenting turnover statistics on the House Ways and Means Committee and Senate Finance Committee).

¹³⁹ See Elizabeth Garrett, *Term Limitations and the Myth of the Citizen-Legislator*, 81 Cornell L Rev 623, 687 (1996) (arguing that term limits decrease the durability of legislation and therefore reduce the value of a legislative bargain between private interests and legislators, but noting that legislator inexperience may limit the decreasing effect). See also Linda Cohen and Matthew Spitzer, *Term Limits*, 80 Georgetown L J 477, 508 (1992) (arguing that term limits should make interest group legislation more likely because of time horizon effects).

¹⁴⁰ See W. Mark Crain and Timothy J. Muris, *Legislative Organization of Fiscal Policy*, 38 J L & Econ 311, 321 (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.

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 should affect the payoffs to legislators from utilizing temporary legislation.

Related to many of these issues is the possibility that short-term legislation produces clear welfare losses from rent-related activities.¹⁴¹ Yet, holding the substance of 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 may be able to seek rents from temporary legislation although they would have been priced out of the high-end 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, as Madison feared, or because there are two periods of legislative enactments rather than one, 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 piece of the temporary legislation puzzle.¹⁴²

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 legis-

¹⁴¹ See, for example, John W. Lee and 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 Envir L & Policy Rev 613, 636 (2002) (“Public Choice analysis would also suggest that the structure of extenders, i.e., bills extending sunset dates of tax provisions, offers greater opportunities for rent-seeking by legislators.”) (internal quotation marks omitted).

¹⁴² On rent extraction, see generally Fred S. McChesney, *Money for Nothing: Politicians, Rent Extraction, and Political Extortion* (Harvard 1997). See also Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J Legal Stud 101, 102 (1987).

lation, 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 NEW 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 the applied context of domestic terrorism risk. This approach has weaknesses; nonetheless, domestic terrorism 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 other more traditional problems in the risk regulation literature.

The Terrorism Risk Insurance Act of 2002 (TRIA)¹⁴³ was one of several responses to the newly recognized risk of domestic terrorism in the United States. The USA PATRIOT Act and an initial airline-assistance package¹⁴⁴ 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 varied. A comparison of the legislation's stated purpose and the actual economic reality suggests TRIA may have been unnecessary.¹⁴⁵ On necessity grounds, by the time TRIA was enacted, the reinsurance market had already significantly recovered from the shock of September 11. And, many of the articulated justifications for TRIA do not withstand close scrutiny.¹⁴⁶ Nonetheless, the legislative response to ter-

¹⁴³ Terrorism Risk Insurance Act of 2002, Pub L No 107-297, 116 Stat 2322 (2002).

¹⁴⁴ See Air Transportation Safety and System Stabilization Act, Pub L No 107-42, 115 Stat 230 (2001), codified in various section of title 49 (Supp 2002).

¹⁴⁵ For an overview and discussion of some of these issues, see generally Jeffrey Manns, Note, *Insuring Against Terror?*, 112 Yale L J 2509 (2003) (arguing that TRIA developed from the exaggerations of rent-seeking interest groups); Anne Gron and Alan O. Sykes, *Terrorism and Insurance Markets: A Role for the Government as Insurer?*, 36 Ind L Rev 447 (2003) (arguing that TRIA probably came too late to address short-term market distortion and will likely result in long-term market distortions); Saul Levmore and Kyle D. Logue, *Insuring Against Terrorism—and Crime*, 102 Mich L Rev 268 (2003) (arguing that federal intervention in the terrorism-insurance market for property coverage was unnecessary because the market would have been able to provide coverage); Anne Gron and Alan O. Sykes, *A Role for the Government?*, Regulation 44 (Winter 2002/2003) (questioning whether government intervention in the insurance market was warranted).

¹⁴⁶ See Jeffrey E. Thomas, *Exclusion of Terrorist-Related Harms from Insurance Coverage: Do the Costs Justify the Benefits?*, 36 Ind L Rev 397, 403–04 (2003) (explaining that private insur-

rorism risk illustrates many of the strengths and weaknesses of temporary legislation as a political strategy.

Even setting aside the devastating loss of life from September 11, 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 and \$60 billion.¹⁴⁷ 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 its losses at between \$700 and \$900 million.¹⁴⁸ Kemper estimated its pretax losses at \$360 million gross and \$60 to \$80 million net of reinsurance.¹⁴⁹ 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, industry solvency could be called into question."¹⁵⁰ As a result, the industry suggested that coverage for terrorism risk would likely be dropped or offered at significantly higher prices when existing obligations were rewritten.

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.¹⁵¹ Primary insurance companies sell insurance directly to individuals or firms and are regu-

ers and reinsurers are excluding terrorist-related harms from their policies in part because of government insurance). See generally 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) (discussing the legal accountability of disaster relief organizations).

¹⁴⁷ See Protecting Policyholders from Terrorism: Private Sector Solutions, Hearings before the Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises of the House Committee on Financial Services, 107th Cong, 1st Sess 42 (2001) ("Terrorism Insurance Hearings") (statement of David B. Mathis, Chairman and CEO, Kemper Insurance Companies) (providing the estimate while acknowledging that the final damage would "not be known for some time").

¹⁴⁸ See *id.* at 44 (statement of Constantinos Iordanou, Senior Executive Vice President, Group Operations and Business Development, Zurich Financial Services Group).

¹⁴⁹ *Id.* at 42 (statement of David B. Mathis).

¹⁵⁰ America's Insurance Industry: Keeping the Promise, Hearing before the House Committee on Financial Services, 107th Cong, 1st Sess 194 (2001) (statement of Dean R. O'Hare, Chairman and CEO, the Chubb Corporation).

¹⁵¹ For helpful introductory treatments, see generally Kenneth S. Abraham, *Insurance Law and Regulation* (Foundation 4th ed 2005); Robert H. Jerry, III, *Understanding Insurance Law* (Matthew Bender 3d ed 2002); Kenneth S. Abraham, *Distributing Risk: Insurance, Legal Theory, and Public Policy* (Yale 1986).

lated almost exclusively by state governments.¹⁵² Reinsurance companies essentially sell insurance to primary insurance companies.¹⁵³ 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 policies being issued when current policies expired would exclude terrorism risk.¹⁵⁴ However, regulatory approval from state insurance commissioners was required to allow the primary insurance industry to exclude terrorism risk from its coverage. 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.¹⁵⁵ 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.¹⁵⁶ The federal government ultimately enacted TRIA, which shared 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 predictably plummeted in Manhattan, many public venues in far less visible areas faced similar challenges. Tampa International Airport spent \$292,269 for a \$50 million policy.¹⁵⁷ Gwinnett County, Georgia, paid more for terrorism insurance than for

¹⁵² See 15 USC § 1012 (2000) (giving regulatory authority over insurance practices to the states).

¹⁵³ Just as firms purchase insurance to share risk, primary insurance companies purchase reinsurance to share risk. For example, a company might sell a property/casualty policy to a firm for losses above \$500,000 with a maximum policy payout of \$10 million. However, rather than bearing all that risk, the primary insurance company generally purchases reinsurance for various layers of risk (for example, losses above \$5 million but less than \$10 million).

¹⁵⁴ Most contracts were due to expire either at the start of the year or in June 2002. See James Toedtman, *Balking on Terrorism Insurance: Industry Wants U.S. to Cover Payment Costs*, *Newsday* A49 (Sept 27, 2001).

¹⁵⁵ See Frank Vinluan and Bill Kosen, *Terrorism Insurance Dries up for Owners of High-Profile Sites*, *Seattle Times* F1 (May 19, 2002) (reporting that NAIC guidelines limited coverage of terrorism-related damages to incidents causing less than \$25 million and fewer than fifty deaths).

¹⁵⁶ 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 the Insurance Services Office was an exclusion for a terrorist act causing more than \$25 million in damages and applying only to commercial policies. *Id.*

¹⁵⁷ Ted Jackovics, *TIA Buys Terrorism Insurance*, *Tampa Trib* 1 (Dec 7, 2001). This is an ambiguous observation, however. 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.

its entire property insurance bill in the previous year.¹⁵⁸ 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 that was offered at almost triple the price of the mall's previous "all risk" policy.¹⁵⁹ Even much less visible properties faced similar challenges. Property insurance for Ralph Wilson Stadium in Erie County, New York, jumped from \$52,000 to \$395,000.¹⁶⁰ Utility companies had difficulty finding adequate coverage,¹⁶¹ and similar shortfalls were also experienced globally.¹⁶² In New York, the challenges were severe, as they were for other so-called trophy properties.¹⁶³ Faced with growing customer frustration about 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.¹⁶⁴ While there was disagreement within Congress about the proper scope of legislation, a broad consensus emerged that some form of federal response was

¹⁵⁸ 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-Constr 1JJ (Jan 1, 2002) (noting that the premium per dollar of coverage increased by a factor of about eight).

¹⁵⁹ Dee DePass, *Megamall Battles Terrorism Insurance*, Star Trib (Minneapolis, Minn) 1D (Mar 1, 2002). The Simon Property Group, owner of the mall, later settled with its mortgage company by purchasing a \$100 million policy. Robert Harley, *Mall Giant Buys \$375m Terrorism Insurance Policy*, Austl Fin Rev 62 (April 2, 2002).

¹⁶⁰ Patrick Lakamp, *Terrorism Insurance Cost Skyrockets after 9/11*, Buffalo News A1 (May 21, 2002) (reporting that the increased premiums for terrorism insurance also contributed to the doubling of the Niagara Frontier Transportation Authority's annual insurance bill).

¹⁶¹ See Jackie Spinner, *Lack of Terrorism Insurance Puts Utilities at Risk*, Wash Post E1 (Aug 1, 2002) (quoting a representative of the Potomac Electric Power Company: "The market is being unreasonable because it can be unreasonable").

¹⁶² Australia experienced the same early capacity problems for public venues. See Michael Owen-Brown, *Companies Withdraw Terrorism Insurance*, Courier Mail (Queensland) 3 (Dec 19, 2001) (speculating that the withdrawal of terrorism reinsurance would stymie development); Samantha Maiden, *Terrorism Insurance Protection Set to Go*, Advertiser (Canberra) 13 (Dec 29, 2001) (explaining that the Australian government would not be delving into an indemnification scheme in the near future). The Insurance Council of Australia proposed a pool coverage system in which insurers would contribute a percentage of premiums to a pool that the government would guarantee after claims reached a \$1 billion limit. Id. Approximately 40 percent of Australian companies had terrorism coverage excluded when policies were renewed. See Richard Salmons, *September 11 Takes Its Toll on Terrorism Insurance Cover*, The Age (Melbourne) C2 (Apr 10, 2002).

¹⁶³ See Peter Grant, *Lack of Terrorism Insurance Snarls Deal*, Wall St J B2 (Jan 31, 2002) (discussing the difficulty of obtaining terrorism insurance on a property adjacent to Grand Central Terminal).

¹⁶⁴ The coalition's membership was relatively 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 Coalition to Insure Against Terror, *Who We Are*, online at <http://insureagainstterrorism.org/who.html> (visited Nov 11, 2006).

justified. As one congressional aide speaking on the need for legislation put it, “[t]he sky may not have fallen . . . ‘but it’s beginning to rain.’”¹⁶⁵

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 the economy. Federal intervention was needed not to bail out the insurance industry, but to protect the long-term health of America’s economy.¹⁶⁶ However, terrorism insurance 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 227-193.¹⁶⁷ But the scene in the Senate was chaotic as legislators raced to pass legislation before the pending December 31 policy renewal deadline.¹⁶⁸ The

¹⁶⁵ Nick Anderson, *Terrorism Insurance Bill Revived*, LA Times 9 (Aug 19, 2002) (quoting a congressional aide).

¹⁶⁶ See White House, Background Briefing by Senior Administration Officials on Terrorism Insurance, 2001 WL 1219090, *1 (Oct 15, 2001):

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, [and] 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.” Alison Beard, *Government Urged to Act as Companies Look to Drop Terrorism Insurance: Property Insurers Seek Safety Net to Cover Any Potential Losses*, Fin Times (London) 26 (Oct 16, 2001). Said Maurice Greenberg, 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.” Scott Bernard Nelson, *Terrorism Insurance Laws Called Critical*, Boston Globe D2 (Jan 11, 2002) (quoting Greenberg at a gathering of the Greater Boston Chamber of Commerce).

¹⁶⁷ See Roll Call Vote No 464 on HR 3210, 107th Cong, 1st Sess (Nov 19, 2001), in 147 Cong Rec H 8629–30 (Nov 29, 2001). See also Terrorism Risk Insurance Act of 2002, HR 3210, 107th Cong, 1st Sess, in 147 Cong Rec H 7717 (Nov 1, 2001); Committee on Financial Service, Terrorism Risk Protection Act, HR Rep No 300(1), 107th Cong 1st Sess 16–22 (2001); Ways and Means Committee, Terrorism Risk Protection Act, HR Rep No 300(2), 107th Cong, 1st Sess 12–13 (2001); Rules Committee, Terrorism Risk Protection Act, HR Rep No 304, 107th Cong, 1st Sess 1–3 (2001).

¹⁶⁸ 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.” 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 5 percent of gross premiums written. See Terrorism Insurance Act, S 1744, 107th Cong, 1st Sess, in 147 Cong Rec S 12161 (Nov 29, 2001). Senator Hollings proposed that

Senate recessed without passing legislation, thanks in large part to related political wrangling over tort reform.¹⁶⁹

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,¹⁷⁰ the spring brought new momentum in the Senate for a legislative package,¹⁷¹ along with more political maneuvering.¹⁷² Ultimately, the Senate passed legislation in mid-June.¹⁷³ The summer produced only negotiations until President Bush set a deadline for legislation of Friday, October 5,¹⁷⁴ 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.¹⁷⁵ Ultimately, the final version of TRIA passed the House on November 14,

insurers pool resources to pay the first \$50 billion in claims after which the government would pay 90 percent of claims. See National Terrorism Reinsurance Fund Act, S 1743, 107th Cong, 1st Sess, in 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 Terrorism Risk Insurance Act of 2001, S 1751, 107th Cong, 1st Sess, in 147 Cong Rec S 12247 (Nov 30, 2001).

¹⁶⁹ See *Flubbing Terrorism Insurance*, Hartford Courant A10 (Dec 31, 2001).

¹⁷⁰ See *Terrorism Insurance: In the post-9/11 World, It May Be Essential in Some Places, But the Coverage Need Not Come from the Federal Government*, Cleveland Plain Dealer B8 (Apr 11, 2002) (arguing that market stabilization left the insurance industry with little need for government intervention).

¹⁷¹ See Joseph B. Treaster, *Senate Takes up Terrorism Insurance Again*, NY Times C1 (Apr 30, 2002) (quoting Senator Schumer as saying that "[s]entiment 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 Courant E2 (June 8, 2002) (quoting Senator Daschle as saying that "[w]e need to stop playing games with this critical issue").

¹⁷² In mid-June, lawmakers reached agreement to allow debate on a terrorism insurance bill cosponsored by Senators Dodd and Schumer. See Terrorism Risk Insurance Act of 2002, 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 \$10 billion to a cap of \$100 billion. See S 2600 at 15–18. See also Elaine S. Povich, *Senate to Debate Bill on Terrorism Insurance*, Newsday A34 (June 13, 2002) (reporting that both Republicans and Democrats were pushing for a quick resolution).

¹⁷³ See Vote No 157 on S 2600, 107th Cong, 2d Sess (June 7, 2002), in 148 Cong Rec S 5669 (June 18, 2002).

¹⁷⁴ 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).

¹⁷⁵ 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).

2002,¹⁷⁶ was approved by the Senate 81-11 on November 19,¹⁷⁷ and was signed by the President on December 16.¹⁷⁸ 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 provided a federal backstop for insurance industry losses stemming from terrorist loss events, and incorporated a mix of mandatory and discretionary payback provisions. TRIA was explicitly temporary legislation, enacted with an initial three-year term.

The need for and substance of terrorism insurance legislation has been analyzed elsewhere, and I have no interest in replicating that debate.¹⁷⁹ Suffice it to say that, at very least, the need for federal legislation was uncertain, and some commentary has suggested that TRIA raised potential problems of market displacement and moral hazard.¹⁸⁰

¹⁷⁶ The conference report passed by a voice vote. Conference Report on HR 3210, Terrorism Risk Protection Act, 107th Cong, 2d Sess, in 148 Cong Rec H 8809 (Nov 14, 2002).

¹⁷⁷ See Vote No 252 on HR 3210, 107th Cong, 2d Sess, in 148 Cong Rec S 11530 (Nov 19, 2002).

¹⁷⁸ See 148 Cong Rec S 11804 (Dec 16, 2002), enacted as Pub L No 107-297, 116 Stat 2322 (2002), codified at 15 USC § 6701 (Supp 2003).

¹⁷⁹ TRIA met with some skepticism, and 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. 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 (cited in note 145) (describing insurance crises as part of the larger "insurance cycle"). Indeed, the insurance industry was well capitalized after September 11 and had adequate reserves to meet existing obligations. Still, these capital reserves were not earmarked for terrorism risk. 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 and no additional fees or premiums were charged for the coverage. 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." *Terrorism Insurance: Bill Would Cushion Blow of Future Attacks*, Columbus Dispatch 10A (Dec 8, 2001) (quoting a 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." Treaster, *Senate Takes Up Terrorism Insurance Again*, NY Times at C1 (cited in note 171) (quoting J. Robert Hunter, director of insurance for the Consumer Federation of America).

¹⁸⁰ For helpful overviews and discussions, see Gron and Sykes, 36 Ind L Rev at 462 (cited in note 145) (claiming that the risk of moral hazard is slim in the context of terrorism insurance); Manns, 112 Yale L J at 2519 (cited in note 145) (arguing that the prospect of federal disaster insurance could discourage private parties from considering the likelihood of terrorism); Jeffrey R. Brown, Randall S. Kroszner, and Brian H. Jenn, *Federal Terrorism Risk Insurance*, 55 Natl Tax J 647, 651 (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 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. Manns, 112 Yale L J at 2513-14.

For current purposes, it is enough to note that TRIA constitutes one of the most recent examples of a temporary legislative response to a new risk. Against the backdrop of significant uncertainty 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 permanent 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 advantages in this context. Rather than creating new agencies or adopting more 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 new regulatory regimes that emphasize new risks often at the expense of addressing older but more serious ones.

In crafting a statutory response to terrorism risk and the related insurance crisis, legislators faced at least three classic problems of decisionmaking 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 did not guarantee that estimates of either the probability of attack or the magnitude of potential losses would be better in three years, the estimates would almost certainly not be worse. Merely solidifying the full cost of the September 11 attacks was useful for future decisionmaking. The historical experience with natural disaster risk provides some reason for modest optimism on 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 accurately estimated, better estimates of the likely magnitude of losses should help with pricing issues. The multistage decision process could allow legislators to adjust policy in response to new information.

However, TRIA may have fallen into the trap of ignoring the potential for over- or underresponsiveness by private actors to temporary legislation. For example, if insurance firms treated TRIA as tem-

porary, and the information legislators need to craft permanent policy derives primarily from firm behavior, then the information produced may have been 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 have provided other informational benefits not tied directly to behavioral responses.

TRIA also provides a second reason for skepticism about the practical impact of temporary legislation. The timeline of legislative response might lead one to question whether legislators really have difficulty avoiding striking when the iron is hot. If temporary legislation is supposed to avoid long-term errors resulting from quick overreaction, the prescription might seem 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 crisis was supposed to start. 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.”¹⁸¹ On this view, existing institutions like bicameralism and the committee structure already provide adequate safeguards against any danger of a rapid and overzealous legislative response. Perhaps 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.¹⁸² The USA PATRIOT Act demonstrates that legislation can be enacted with remarkable rapidity during times of perceived crisis. The Act was also temporary legislation, and those critical of the legislation may be tempted to condemn the tem-

¹⁸¹ Holman W. Jenkins, Jr., *How Big Is the Terrorism Insurance Problem?*, Wall St J A13 (Aug 14, 2002).

¹⁸² USA PATRIOT Act, Pub L No 107-56, 115 Stat 272 (2001). The substantive provisions of the legislation have proven extremely controversial; however, the Act also contained an explicit sunset clause. 115 Stat at 285 (sunsetting approximately half the powers in the statutes December 31, 2005). Some have argued that the sunset clause was a significant victory for civil rights advocates. See, for example, Neal Devins, *Congress, Civil Liberties, and the War on Terrorism*, 11 Wm & Mary Bill of Rts J 1139, 1146–47 (2003) (cataloging the victories for “civil liberty interests”). The sunset provision may have also increased congressional power in the implementation of the Act. See *id.* at 1147 (arguing that the sunset and the USA 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?*, 112 Yale L J 1011, 1035–38 (2003) (discussing temporary responses to perceived emergencies or crises).

porary legislative form because it arguably 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 are generally less normatively desirable than outcomes produced by statutes without sunsets.¹⁸³

Recall that staged decisionmaking 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 incomplete. 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 required federal backstopping.¹⁸⁴ However, natural disaster risk has not been consis-

¹⁸³ The Homeland Security Act of 2002 (HSA), 6 USC § 101 et seq (Supp 2002), provides an interesting reference point for both TRIA and the USA PATRIOT Act. 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. Of particular relevance to the catastrophic risk case is the relocation of the Federal Emergency Management Agency (FEMA) to DHS. See 6 USC § 238(c)(8) (consolidating the Office of National Preparedness into the DHS's Office of Domestic Preparedness). FEMA is the modern incarnation of the Office of Emergency Protection (OEP), which in the 1950s, 1960s, and 1970s 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 1970s. See Reorganization Plan No 3, 92 Stat 3788 (1978) (transferring administrative responsibilities to FEMA 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. Although there are reasons to question this structural reform, 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* at 110–14 (cited in note 77) (arguing that the Office of Information and Regulatory Affairs should be reinvigorated by a grant of authority to prioritize within and between agencies); Stephen G. Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 50–61 (Harvard 1993) (advocating a superregulatory agency to manage tradeoffs in risks across different regulatory regimes and administrative agencies). Justice Breyer's proposal for a superregulatory agency might actually be inadvertently realized in DHS, albeit in a limited policy area.

¹⁸⁴ This same dynamic was mimicked in the popular press. One article noted: "Underwriters 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." Joseph Bonney, *Risky Business: Ports and Terminal Operators Want Government Action to Provide Terrorism Insurance*, J Comm 30 (June 10, 2002). The article continued: "This is something that is brand new. No one knows

tently insurable in the United States without the assistance of federal or state government at any point in the past fifty years.¹⁸⁵ Natural disaster risk has hardly been an easy case for private markets,¹⁸⁶ and, in reality, terrorism risk was 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

how to charge for the coverage or how to predict the next event.” Id (quoting Toby Edmonds, representing the Coalition to Insure Against Terrorism). 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 help assess the risk.” Elaine S. Povich, *Terrorism Insurance at Impasse: Payback’s the Glitch Stopping Congress*, *Newsday* A15 (July 4, 2002). See also Jackie Spinner, *Putting a Price on ‘What Ifs’: 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 Dodd 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 Courant* C3 (Nov 25, 2001).

¹⁸⁵ 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* 253 (Harvard 2002) (documenting the rise of federal disaster relief and state-level insurance guaranty funds). See generally Kenneth A. Froot, ed, *The Financing of Catastrophe Risk* (Chicago 1999); Kunreuther and Roth, eds, *Paying the Price* (cited in note 86); Howard Kunreuther and Paul K. Freeman, *Managing Environmental Risk through Insurance* (Kluwer 1997). See also generally Kunreuther, *Disaster Insurance Protection* (cited in note 86).

¹⁸⁶ Flood insurance in the United States is provided through of the National Flood Insurance Program (NFIP), originally instituted in 1968. See generally Edward T. Pasterick, *The National Flood Insurance Program*, in Kunreuther and Roth, eds, *Paying the Price* 125, 127–38 (cited in note 86). Earthquake risk has proven no easier for private markets. See generally David A. Moss, *Courting Disaster? The Transformation of Federal Disaster Policy since 1803*, in Froot, ed, *The Financing of Catastrophic Risk* 307 (cited in note 185). Following the Northridge quake’s \$12.5 billion in insured losses, many insurance firms refused to write new coverage and a hybrid public-private entity was formed to write earthquake insurance. See generally Peter J. May, *Addressing Public Risks: Federal Earthquake Policy Design*, 10 *J Policy Analysis & Mgmt* 263 (1991) (advocating the adoption of an insurance-regulatory scheme for earthquakes). See also Ali Asgary and K.G. Willis, *Household Behaviour in Response to Earthquake Risk: An Assessment of Alternative Theories*, 21 *Disasters* 354, 354–65 (1997) (discussing citizen response to and perception of earthquake risk). The situation is remarkably similar in Florida, where in 1992 Hurricane Andrew forced many companies into insolvency and sent many others fleeing the market. See Insurance Institute for Property Loss Reduction and Insurance Research Council, *Coastal Exposure and Community Protection: Hurricane Andrew’s Legacy* 15–19 (IRC 1994) (discussing the aftermath of Hurricane Andrew for property insurance in the South Atlantic region). See also Roman Lyskowski and Steve Rice, eds, *The Big One: Hurricane Andrew* 8–18 (Andrews and 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 Article.

risk.¹⁸⁷ In the 1980s, 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, not unlike the Coalition to Insure Against Terrorism.¹⁸⁸ The request for federal backstopping of terrorism risk was not novel, but rather the latest in a series of efforts to obtain a similar benefit.¹⁸⁹ This is not to say a government backstop is good or bad either for terrorism risk or natural hazard risk. But such facts were surely relevant, and were not emphasized in hearing.

All this is something of an embarrassment for one portion of the theory. TRIA’s staged decision process should have encouraged full and honest information revelation by ensuring repeated interaction among the main players. Still, the interim time period may have allowed 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 allowed more information to be collected and potentially integrated.

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 indicate that temporary legislation often receives extensive consideration during the initial enactment period and in future time periods as well. The 108th Congress considered a range of renewal bills, some of which would simply have extended TRIA for another two or three years and others of which would have offered more substantive amendments,¹⁹⁰ before finally taking a relatively moderate

¹⁸⁷ See the legislative history of Homeowners’ Insurance Availability Act of 2000, HR 21, 106th Cong, 2d Sess, in 145 Cong Rec H 225 (Jan 6, 1999), which in its previous form in the 105th Congress was HR 219, Homeowners’ Insurance Availability Act of 1997, 105th Cong, 1st Sess, in 143 Cong Rec H 146 (Jan 7, 1997), and part of a more comprehensive legislative reform effort in the 104th Congress. See Homeowners’ Insurance Availability Act of 2000, HR Rep No 106-526, 106th Cong, 2d Sess 118 (2000).

¹⁸⁸ See generally Dick Kirschten, *Hyping the Big Quake*, 22 Natl J 11 (1990).

¹⁸⁹ 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.

¹⁹⁰ See Terrorism Risk Insurance Backstop Extension Act of 2004, HR 4634, 108th Cong, 2d Sess, in 150 Cong Rec H 4764 (June 22, 2004) (proposing to extend TRIA through 2007); Terrorism Risk Insurance Program Extension Act of 2004, HR 4772, 108th Cong, 2d Sess, in 150 Cong Rec H 5330 (July 7, 2004) (proposing to extend TRIA through 2008); Terrorism Risk Insurance

path, renewing the insurance program but with somewhat higher triggers and another sunset.¹⁹¹

CONCLUSION

Temporary legislation is a staple of legislatures, both old and modern. As a historical matter, temporary legislation was readily utilized in a broad range of policy domains, both domestically and internationally. The legislative form produces both informational and distributive benefits, which affect the selection of optimal public policy and the distribution of authority in government. As a positive matter, reliance on temporary legislation will vary as a function of political and institutional conditions. Normatively, temporary legislation should not be globally eschewed, and at least in specific policy domains such as responses to newly recognized risk, there should be a presumptive preference in favor of temporary legislation.

Extension Act of 2004, S 2764, 108th Cong, 2d Sess, in 150 Cong Rec S 8687 (July 22, 2002) (proposing to extend TRIA through 2007 and amend the subsection covering group life insurance).

¹⁹¹ Terrorism Risk Insurance Extension Act of 2005, Pub L No 109-144, 119 Stat 2660 (2005).