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ARTICLES

THE SUN ALSO RISES: THE POLITICAL ECONOMY OF SUNSET PROVISIONS IN THE TAX CODE

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I. INTRODUCTION

In the ancient tale of his journey home, Ulysses hears of an island of Sirens whose sweet songs lure men to their deaths.[1] To pre-empt his future self from succumbing to the merciless songstresses, Ulysses binds himself to the mast and orders his crew to seal their ears with wax.[2] Long has it been documented in political science and legal academic literature that political pressures to solicit votes and campaign contributions, like the Sirens' song, can steer lawmakers from their anticipated path.[3] In recognition of this reality, these scholars have explored the ways in which government bodies have elected to precommit themselves, in the manner of Ulysses, to a course of action in furtherance of agreed upon objectives.[4] Predictably, however, legislators also use tools to loosen the ties that bind. This is the tale of one such unmasting.

Historically, sunset provisions were hailed as a legislative panacea to the ills of modern government. Political theorists fashioned these tools as an effective means to dislodge entrenched interest groups,[5] to arm legislators with flexible, responsive tools when new needs and problems arose, to transform bloated and stagnant governments, and to ensure restrained lawmaking in the face of temporary trouble.[6] According to their proponents, sunset provisions overcame these significant governance problems by providing for the automatic cessation of a public law or body upon the date of the sunset unless reauthorized by the legislature.[7]

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[1] HOMER, THE ODYSSEY 272-73 (Robert Fagles trans., Penguin Books 1999).

[2] *Id.* at 276-77.

[3] *See, e.g.*, Theodore P. Seto, *Drafting a Federal Balanced Budget Amendment That Does What It Is Supposed to Do (and No More)*, 106 YALE L.J. 1449, 1465-66 (1997) (discussing public choice theory).

[4] *See, e.g.*, JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 88-174 (2000) (discussing precommitment devices in politics, especially in context of constitutional law).

[5] For the purposes of this Article, an interest group is "any group that, on the basis of one or more shared attitudes, makes certain claims upon other groups in the society for the establishment, maintenance, or enhancement of forms of behavior that are implied by the shared attitudes." DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION 33 (1967).

[6] *See* AM. ENTER. INST. FOR PUB. POLICY RESEARCH, ZERO-BASED BUDGETING AND SUNSET LEGISLATION 25 (1978) (giving several reasons for enactment of sunset legislation).

[7] *See id.* at 5 ("Typically, sunset legislation sets a date on which either budget authority

Over the past three decades, Congress has employed sunset provisions to discrete sections of tax legislation.[8] Rather significantly, however, Congress recently attached far-reaching sunset provisions to nearly the entirety of major tax acts. In 2001, Congress enacted the largest tax cut in twenty years, the Economic Growth and Tax Relief Reconciliation Act (EGTRRA),[9] with astonishing swiftness. EGTRRA includes a sunset provision pursuant to which every provision in the Act expires on or before December 31, 2010, at which time the law reverts to its previous state.[10] Two years later, Congress passed the third largest tax cut in history, the Jobs and Growth Tax Relief Reconciliation Act (JGTRRA),[11] and again sunsetted nearly the entire act.[12] As originally enacted, seven of JGTRRA's eight tax cuts were scheduled to sunset between 2004 and 2008.[13] The use of sunset provisions on this grand scope is noteworthy, but the significance of the recent sunsets in the tax code can only be fully understood by examining the political forces compelling their enactment. Significantly, the new tax sunset provisions were constructed in response to fiscal controls in the budget process rather than to meet the historical objectives of sunsets, such as the impartment of legislative flexibility or the assurance of restrained lawmaking.

This Article evaluates sunset provisions through a series of case studies in the tax code and aims to enrich the underdeveloped academic field of the politics and processes of tax policy rather than

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or a program expires automatically unless reauthorized.").

[8] *See* Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501, 562 (1998) (describing Congress's use of "extenders" in certain areas since the 1970s).

[9] Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (codified as amended in scattered sections of 26 U.S.C.).

[10] *Id.* § 901(a).

[11] Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, 117 Stat. 752 (codified as amended in scattered sections of 26 U.S.C.).

[12] *Id.* § 303.

[13] *Id.* The reduced capital gains rates and the dividend relief provisions expire on December 31, 2008; other provisions, however, such as the expanded 10% bracket, sunset in 2004. *See, e.g.*, *id.* § 104(a) (amending Internal Revenue Code to decrease 10% bracket amount from $14,000 to $12,000 in 2004, rather than in 2008). In addition to the patchwork of termination dates, the provisions of both acts are phased-in gradually at varying rates. *See generally* JGTRRA, Pub. L. No. 108-27, 117 Stat. 752 (2003); EGTRRA, Pub. L. No. 107-16, 115 Stat. 38 (2001).

follow the traditional model for tax law review articles, which analyzes the substance of tax policy. This evaluation will identify particular pathologies associated with the use of sunsets and attempts to make the case that sunset provisions fail to meet their stated objectives. Its conclusions can be abstracted from the tax context in order to arrive at a general appraisal of sunset provisions; such a discussion is particularly critical given Congress's heightened use of sunset provisions.[14]

Through examination of the political context surrounding sunset provisions, this Article contends that these provisions do not function as "good government" tools in the tax legislative arena, as envisioned by such prominent theorists as Thomas Jefferson and Theodore Lowi, but instead act as apparatuses that underestimate the revenue costs of legislation or fit the legislation within predetermined budget constraints. Sunset provisions have thus been employed to avoid checks on legislative behavior in the budget process, and their story conspicuously illustrates the extent to which this process can supplant tax policy concerns in the drafting of tax legislation.[15] This Article maintains that sunset provisions, post-enactment, further alter the budget process by reducing the reliability of revenue estimates and by creating substantial obstacles to the re-enactment of certain budget rules, namely the pay-as-you-go provisions.

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[14] For instance, recent legislative proposals sunset federal entitlement programs as a matter of course. *See, e.g.*, Family Budget Protection Act of 2004, H.R. 3800, 108th Cong. § 303 (2d Sess. 2004) (proposing sunset of spending authority for discretionary spending program in 2010); *see also Budgeting in Congress: How the Budget Process Functions: Hearing Before the H. Comm. on the Budget*, 109th Cong. 6 (2005) (statement of Bill Frenzel, Guest Scholar) (stating that sunset review of entitlement programs should be mandated), *available at* http://www.house.gov/budget/hearings/frenzelstmnt062205.pdf; *Tax Reform and Simplicity—Must a Good Tax Code Be a Simple One?*, TAX NOTES TODAY, July 8, 2005, LEXIS, 2005 TNT 137-32 (quoting Bill Niskanen from Cato Institute as proposing that "[we are] better off" with automatic sunset provisions).

[15] *See* Nancy C. Staudt, *Constitutional Politics and Balanced Budgets*, 1998 U. ILL. L. REV. 1105, 1117 (stating that balanced budget amendment, although restricting legislative choice, is justified over long-term because rent-extraction opportunities make deficit spending desirable in short-run); *see also* FRED S. MCCHESNEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 170 (1997) ("The one unambiguous solution for reducing rent extraction is reducing the size of the state itself and its power to threaten, expropriate, and transfer."); DENNIS C. MUELLER, PUBLIC CHOICE II 243 (1989) (stating that federal budget is "rent" because it is "up for grabs" to rent-seeking entities).

This Article also argues that sunset provisions function as rent-extracting mechanisms—a capacity not predicted by the supporters or the opponents of the sunset reform movement in the 1970s.[16] The continual termination of certain tax benefits and burdens creates occasions for politicians to more easily extract votes and campaign contributions from parties affected by the threatened provision.

To be clear, the ambition of this Article is not to condemn interest group activity in general. Rather, it concludes that sunset provisions amplify the inefficient social outcomes produced by certain types of interest group activity.[17] For instance, the recurrent threat of legislative sunsets has the potential to shift benefits from a poorly organized majority with diffuse interest to a highly organized minority by creating occasions for rent-extraction that reward only repeat and well-connected players,[18] thus increasing the risk for legislative market failure.[19] This occurs because political battles for tax benefits are costly affairs that demand organization and funds. Sunset provisions restage such battles again and again, therefore requiring more and more of such resources. The insights of Mancur Olsen and James Wilson support the thesis that bills providing concentrated benefits and distributed costs will stimulate more interest group activity than bills with distributed benefits and costs.[20] Because of the gains legislators derive from interest group activity, this dynamic may lead to more legislation with concentrated benefits and distributed costs than is socially optimal.[21]

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[16] *See* MARK R. DANIELS, TERMINATING PUBLIC PROGRAMS: AN AMERICAN POLITICAL PARADOX 31-32 (1997) (noting that Garry Brewer, Peter de Leon, and Robert P. Biller encouraged idea of sunsets in 1970s).

[17] Interest group activity can, of course, be of value. For instance, competition among interest groups can produce information that allows the legislature to assess proposed or existing tax subsidies. *See generally* Garrett, *supra* note 8 (describing benefits of interest group competition in context of PAYGO rules).

[18] *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 283-85 (1962); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 53-54 (1965).

[19] Legislative "market failure" occurs when groups excluded from the bargaining process find themselves bearing the costs of benefits conferred on others. In such a case, the legislative market fails to account for external costs. A.C. Pritchard, *Government Promises and Due Process: An Economic Analysis of the "New Property,"* 77 VA. L. REV. 1053, 1067 (1991).

[20] *See generally* OLSON, *supra* note 18; JAMES WILSON, POLITICAL ORGANIZATIONS (1973).

[21] *See* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 59 (2d ed. 1995).

The inherent nature of sunset provisions, whereby sustained organizational efforts and the expenditure of resources are necessary while the provision is threatened, may magnify such distortion across time, entrenching the status quo; and, for various reasons, sunset provisions increase the amount of rent available for extortion, thereby further affecting the competitive advantage of certain interest groups. In the context of legislation with concentrated benefits and costs, sunset provisions also lead to legislative market failures by providing little or no resolution of a policy choice in order to continually extract rents from opposing interest groups who are in repeated competition with one another.

Moreover, the availability of sunset provisions may shape tax legislation from the outset to benefit only those groups that can participate in this long-term extraction of rents and have the concentration of interests that motivates such participation. Additionally, economic waste results from interest group activities by requiring the expenditure of an interest group's resources for the achievement of its desired allocation of wealth, thereby reducing any gains from such allocation.[22] The sunset provisions' threat to renewal simply creates more of this transactional waste.

Finally, this Article contends that sunset provisions do not fulfill their historical objectives of dislodging entrenched interest groups and of targeting and removing obsolete laws. Through the example of the "kill the code" proposals of the 1990s, this Article revisits and rejects the democratic rationales for sunsets. This Article also discusses the fallout from the use of sunsets in the recent tax acts to answer the question of whether we are better with or without the ability to sunset legislation. This Article concludes by arguing that the inherent attributes of sunset provisions lend themselves to being mere devices that assist congressional misbehavior. Hence, the formulation of sunset legislation that avoids the aforementioned pathologies is unlikely.

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[22] *See* Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 36-45 (1990) (noting economic criticisms of interest group activity).

II. POLITICAL CONSTRAINTS IN THE BUDGET PROCESS

This Part provides a basic overview of the budgetary process, focusing on its role as a source of political constraint on legislative behavior. This background information is helpful in understanding the interaction between tax legislation and the budget process. Tracking the changes in the budgetary landscape reveals the fundamental goals of federal budgetary legislation and the various political tensions involved in reducing the federal deficit, thereby making evident the specific pressures on Congress to develop avoidance techniques like sunset provisions.

A. BUDGET RULES AS PRECOMMITMENT DEVICES

Public choice theory tells us that interest group influence can lead to mounting deficits through excessive legislation, as well as to the enactment of undesirable laws with diffuse but significant costs that benefit only a narrow part of the population.[23] Lawmakers engage in such dealmaking because they can extract "rents" from these interest groups.[24] In formulating the federal budget, legislators face ample opportunities to solicit votes and contributions through the provision of goods, services, and tax cuts.[25]

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[23] Seto, *supra* note 3, at 1465-66.

[24] *See id.* (noting "[l]egislators are assumed to be motivated by self-interest").

[25] *See, e.g.*, *id.* (noting effect of self-motivated legislators); *see also* James M. Buchanan, *Procedural and Quantitative Constitutional Constraints on Fiscal Authority*, *in* THE CONSTITUTION AND THE BUDGET 80, 80-84 (W.S. Moore & Rudolph G. Penner eds., 1980) (reviewing proposals for constitutional fiscal restraints and discussing views on fiscal restraints within historical context); Enrico Colombatto & Jonathan R. Macey, *Path-Dependence, Public Choice, and Transition in Russia: A Bargaining Approach*, 4 CORNELL J.L. & PUB. POL'Y 379, 397 (1995) (discussing power of independent judiciary and executive veto to control interest group influences on legislation). *See generally* TOWARD A THEORY OF THE RENT-SEEKING SOCIETY (James M. Buchanan et al. eds., 1980) (addressing current state of rent-seeking through compilation of articles and suggesting need for reform through collective action aimed at institutional structure); GORDON TULLOCK, THE ECONOMICS OF SPECIAL PRIVILEGE AND RENT SEEKING (1989) (discussing problems with measuring rent-seeking, suggesting ways these problems may be overcome, and analyzing theory of rent-seeking and ways in which theory needs improvement); Z.A. Spindler, *Constitutional Design for a Rent-Seeking Society: Voting Rule Choice*, 1 CONST. POL. ECON. 73 (1990) (discussing effect of rent-seeking on constitutional choice and suggesting optimal decision rule may be unanimity or individual rule, not majority rule).

Congressional members also confront a collective action problem—it is rational for members to rely upon the efforts of others or to defect from a balanced budget goal when other members do the same.[26] In so doing, lawmakers abscond from "their primary preferences [for deficit containment] to satisfy conflicting subsidiary ones."[27] The budgetary process is replete with, and indeed comprised of, precomittment devices that at least attempt to reduce congressional overspending and to overcome coordination difficulties.[28]

B. FORMULATION OF THE BUDGET

Prior to the enactment of the Budget Act of 1974,[29] there were few mechanisms that demanded Congress's consideration of the impact of fiscal legislation upon the entire federal budget.[30] The Act created budget committees in the Senate and the House so that spending and tax decisions could be conducted in a more unified and methodical manner.[31] The annual budget process begins with the President's submission of a budget request to Congress, which lists the Administration's funding and policy priorities and provides an economic forecast for the upcoming fiscal year.[32]

The Office of Management and Budget (OMB) assists the President in this process by gathering and amending the budget requests of each federal agency to arrive at spending, revenue, and borrowing predictions for the federal government.[33] The President's

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[26] Elizabeth Garrett, Response, *A Fiscal Constitution with Supermajority Voting Rules*, 40 WM. & MARY L. REV. 471, 473 (1999).

[27] *Id.* at 474.

[28] *See, e.g.*, Saikrishna Bangalore Prakash, *Deviant Executive Lawmaking*, 67 GEO. WASH. L. REV. 1, 15 n.94 (1998) (arguing that Congress restrains itself from rent-seeking and accompanying deficits by delegating some budget enforcement to President).

[29] Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified as amended in scattered sections of 2 U.S.C.).

[30] Under prior law, Congress rarely had to make trade-offs between legislative policies. Philip G. Joyce & Robert D. Reischauer, *Deficit Budgeting: The Federal Budget Process and Budget Reform*, 29 HARV. J. ON LEGIS. 429, 431 (1992).

[31] Congressional Budget and Impoundment Control Act of 1974 §§ 101-102.

[32] ALLEN SCHICK, THE FEDERAL BUDGET: POLITICS, POLICY, AND PROCESS 74 (Brookings Institute Press rev. ed., 2000).

[33] 2 U.S.C. § 602 (2000). The agencies typically begin preparing highly specific operational statements at least a year and a half before they are to take effect. SCHICK, *supra* note 32, at

budget is only a request, and agencies cannot rely on the executive's recommendations in the management of their programs.[34] The level of a President's involvement in the budget process varies significantly, and Presidents with passive budgetary styles traditionally delegate the bulk of formulating and negotiating tasks to the OMB.[35]

In the Budget Act of 1974, Congress created the Congressional Budget Office (CBO) as a general source of information for macroeconomic and budgetary matters so that it would not have to rely upon the OMB.[36] Typically, Congress extensively modifies the President's budget.[37] After consultation and securing of the majority party's support, the budget chairs draft a budget resolution proposal that, in recent years, has typically been ratified along party lines.[38] The House and Senate must pass the resolution by a majority vote once they reach a conference agreement.[39] Notably, however, the resolution does not have the force of law,[40] and its impact varies from year to year. The concurrent budget resolution allocates spending authority and sets amounts for revenue, outlay, surplus, and deficit for a specified number of years.[41] Although the budget resolution authorizes both discretionary and direct spending, the processes for each are quite divergent.[42] With few exceptions, discretionary appropriations are made for a single year.[43] In contrast, direct

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74. Agencies compensate for the uncertainty created by the long period of time before the budget's approval by using past budgets as a baseline and by projecting higher costs than expected. *Id.* OMB begins to review the agencies' requests after their submission in early fall. *Id.* at 89. OMB examiners recommend changes to the director who then makes budget decisions. *Id.* After an appeals process, agencies conform their budgets to the final decisions issued by OMB. *Id.*

[34] SCHICK, *supra* note 32, at 75.

[35] For instance, George H.W. Bush gave primary responsibility for major budget policies to his OMB director, and arguably as a result, the President never received recognition for making the first real effort to reduce the deficit. *Id.*

[36] Joyce & Reischauer, *supra* note 30, at 431-32.

[37] *See* Cheryl D. Block, *Pathologies at the Intersection of the Budget and Tax Legislative Process*, 43 B.C. L. REV. 863, 873 (2002) (noting that Congress exercises independent discretion in altering President's budget).

[38] SCHICK, *supra* note 32, at 119-20.

[39] *Id.* at 123-25.

[40] Block, *supra* note 37, at 874.

[41] SCHICK, *supra* note 32, at 32.

[42] *Id.* at 50.

[43] *Id.* at 52.

spending programs, such as tax legislation and entitlements, are created through permanent legislation.[44]

The budget resolution functions as a basic structure within which Congress makes detailed decisions about the generation and spending of revenue.[45] Points of order, which can be waived only by meeting special voting requirements, enforce the allocations the budget resolution sets forth.[46] Importantly, the budget resolution also puts forth reconciliation directives that instruct the relevant committee to recommend changes in the laws in order to meet the results set out in the resolution.[47] When these results are incorporated into a bill, Congress considers them under accelerated reconciliation procedures.[48]

The length of time covered by a resolution has varied considerably, often in line with the political preferences of the controlling party. For example, the scope of the 2000 budget resolution was lengthened from five to ten years because Republicans wished to inflate the size of the tax cuts they had accomplished.[49] Conversely, when constituents became protective of the Social Security surplus, a year later Republicans returned to the five-year model to lower the estimated cost of new tax cuts.[50] Part VI.A discusses the current Administration's strategic use of budget windows to accommodate sunset repeal.[51]

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[44] *Block*, *supra* note 37, at 874.

[45] *Id.* at 108. Republicans and Democrats have very different goals in mind in formulating this structure, and because of party-line voting, it has become increasingly difficult to obtain the requisite majority in getting the budget resolution through the House and Senate. *Id.* at 109, 118. Party leaders use dealmaking and other pressure tactics to get the resolution passed and, in so doing, they have increasingly shaped the content of the resolution. *Id.* at 118. Indeed, Elizabeth Garrett has argued that the role budget reforms play in strengthening party leadership helps to explain why procedural constraints are adopted in the first place. *See generally* Elizabeth Garrett, *The Congressional Budget Process: Strengthening the Party-In-Government*, 100 COLUM. L. REV. 702 (2000).

[46] *See, e.g.*, 2 U.S.C. § 641(d)(1) (2000) (stating that it is not in order for Congress to consider legislation that would cause budget outlays to exceed those outlined in resolution); *see also* SCHICK, *supra* note 32, at 134 (discussing section 302 restrictions for budget resolutions).

[47] SCHICK, *supra* note 32, at 105, 108.

[48] *See id.* at 127-28 (noting Senate allows only twenty minute debate).

[49] *Cf. id.* at 108 ("Because tax cuts are scored against the baseline, the longer the period covered by the resolution, the bigger the reported size of the cuts.").

[50] *Id.*

[51] *See infra* notes 325-346 and accompanying text.

C. OTHER FISCAL CONTROLS: GRAMM-RUDMAN-HOLLINGS AND THE BUDGET ENFORCEMENT ACT OF 1990

James M. Buchanan and other conservative economists posited that the 1974 Budget Act's institutional shift in responsibility from the executive branch to the legislative branch led to increases in the budget deficit and inflation by placing the responsibility of the costs of programs upon those who receive credit for the programs' benefits.[52] Additionally, according to these theorists, legislators also engaged in extended negotiation and "logrolling" to enact spending projects because of the Act's creation of a zero-sum game and of annual threats to existing programs.[53] The Budget Act exacerbated these conditions by forcing Congress to abandon its piecemeal approach to spending decisions in favor of a comprehensive budget process readily visible to the public, thereby creating more opportunities for congressional members to exchange political favors.

Congress responded to the assertions of these economists by adopting the Gramm-Rudman-Hollings Act (GRH) in 1985.[54] Generally, GRH imposed procedural controls on the traditional budget process that made it more difficult to pass a deficit-increasing budget.[55] GRH mandated that the congressional budget resolution either keep the projected deficit within the statutory maximum, or, in some years, to even reduce the deficit.[56] Under GRH, the failure to achieve a prescribed maximum deficit triggered sequestration, which exacted payment by imposing comprehensive spending reductions.[57]

Congressional members, however, quickly became dissatisfied with the severe deficit targets and the enforcement mechanisms

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[52] *See* Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CAL. L. REV. 595, 621 (1988) (noting that 1974 Act and reconciliation approach led to backdoor spending).

[53] *Id.* at 620.

[54] Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (codified as amended at 2 U.S.C. §§ 900-908, 922 (1994)).

[55] *See* STANLEY E. COLLENDER, THE GUIDE TO THE FEDERAL BUDGET: FISCAL 1993, at 18 (1992) ("GRH [was] enacted with reducing the deficit as [its] almost only purpose.").

[56] *Id.*

[57] *Id.* Certain federal programs, such as Social Security benefits, as well as tax expenditures are exempted from the "across the board" reduction in spending imposed by sequestration. *Id.* at 21.

demanded by GRH.[58] Instead, they turned to the reduction of spending as a means to contain the budget.[59] The Budget Enforcement Act of 1990 employed spending caps and offset requirements rather than deficit measures.[60] Generally, the Act subjected discretionary spending to spending caps.[61] In contrast, direct spending and revenue legislation were governed by pay-as-you-go (PAYGO) rules.[62] PAYGO rules required that new increases to the deficit in a fiscal year be "paid for" either by increasing revenues or by reducing other areas of direct spending.[63] If the offset requirements were not met, the President was forced to execute a sequester.[64]

D. CIRCUMVENTION TECHNIQUES

Public choice theory posits that congressional members will find budgetary constraints undesirable.[65] Predictably then, political actors have discovered methods of circumventing the budgetary rules and procedures. Because these techniques have been extensively examined elsewhere in the academic literature,[66] this discussion will be succinct.

PAYGO and other budget rules require estimates of the revenue effects of pending legislation.[67] Thus, the revenue estimate for a tax

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[58] *See id.* at 23 (noting increased pressure on Congress and White House under GRH rules).

[59] *Id.* at 19.

[60] *Id.*

[61] *See id.* at 23-26 (describing appropriations caps).

[62] *See id.* at 26 (describing PAYGO rules).

[63] *Id.*

[64] Garrett, *supra* note 8, at 511. The PAYGO rules expired in 2002. Block, *supra* note 37, at 868. As argued in Part VI.A, the sunset provisions in the recent tax acts have created political obstacles to their re-enactment. *See infra* notes 325-346 and accompanying text.

[65] *See* Seto, *supra* note 3, at 1465-66 (discussing public choice theory).

[66] *See generally* Block, *supra* note 37 (discussing congressional misbehavior regarding PAYGO rules); Michael D. Bopp, *The Roles of Revenue Estimation and Scoring in the Federal Budget Process*, TAX NOTES TODAY, Sept. 24, 1992, LEXIS, 92 TNT 194-108 (describing possibility of political influences on revenue estimation figures); Michael J. Graetz, *Paint-by-Numbers Tax Lawmaking*, 95 COLUM. L. REV. 609 (1995) (discussing how Congress mistakenly overemphasizes certain aspects of budgeting process to its detriment).

[67] *See* Graetz, *supra* note 66, at 672 (noting that central role of revenue estimation was enhanced under PAYGO rules).

provision is a primary determinant of its legislative future.[68] Because revenue estimates incorporate highly contestable predictions of taxpayer behavior, they are open to a substantial degree of manipulation by political actors.[69] The enormous uncertainty involved in determining the impact of a tax provision upon taxpayer behavior often produces widely disparate estimates among the various governmental revenue-estimating entities.[70] Thus, the corresponding elasticity factor chosen by the government body may be incorrect.[71] Moreover, in addition to making mistakes in calculations, these entities have been accused of choosing revenue estimates on partisan grounds or because of special interest influence.[72]

The pressure of creating government programs that fit within the confines of the political and legal demands of the budgetary process has, not surprisingly, inspired legislators to create innovative techniques that alter revenue estimates and therefore avoid the enforcement mechanisms of the budget rules. For instance, a recent article by Professor Cheryl D. Block illustrates Congress's ability to bypass PAYGO by simply directing the OMB to reset sequester amounts.[73] In order to "pay for" the re-enactment of extenders in 1999, Block recounts how Congress repealed installment reporting for accrual method taxpayers.[74] Shortly thereafter, Congress "repealed the repeal," but without an offsetting revenue increase.[75] In essence, Congress avoided a sequester by simply zeroing-out the sequester balance.[76]

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[68] *Id.*

[69] *See id.* (noting Congress's tendency to enact "complex and indefensible legal rules" just to make revenue estimates fit their needs).

[70] Bopp, *supra* note 66. In total, four government bodies, divided between the legislative and executive branches, participate in the budget process: the Congressional Budget Office (CBO) and the Joint Committee on Taxation (JCT) serve the former branch while the Office of Management and Budget (OMB) and the Office of Tax Analysis (OTA) provide information to the latter. *Id.* The General Accounting Office (GAO) determines when the President needs to order sequestration under the Budget Enforcement Act. *Id.* JCT and OTA are the primary revenue estimators for the government. *Id.*

[71] *Id.*

[72] *Id.*

[73] Block, *supra* note 37, at 869.

[74] *Id.* at 866.

[75] *Id.*

[76] *Id.*

In his article *Paint-by-Numbers Tax Lawmaking*, Professor Michael J. Graetz identifies many instances in which budget pressures constrain tax policymakers to simply "mak[e] the revenue numbers 'come out right,' " thereby usurping the "traditional normative concerns of taxation—fairness, economic efficiency, and simplicity."[77] Congress, for example, drafts tax legislation so that revenue losses occur outside the budget window.[78] The Roth IRA exemplifies this "back-loaded" technique.[79] Unlike the traditional IRA, contributions to a Roth IRA are not deducted when made.[80] Instead, revenue losses are postponed until the retiree withdraws the tax-exempt savings.[81] Thus, the Roth IRA provision only cost $1.8 billion during the first five years of its enactment but was estimated to lose in excess of $20 billion over the first ten-year period.[82] Congress can also take advantage of cash-flow budget window estimating by using "speed-up[s]," which "simply move[ ] revenues that would otherwise be collected in a later year to an earlier year."[83] Such timing proposals also occur outside the context of tax legislation. For example, a common technique is the sale and subsequent lease-back of government assets in order to generate revenues quickly and to spread costs over a number of years.[84]

III. SUNSET PROVISIONS: FROM SEDITION ACT TO PATRIOT ACT

Congress's desire to circumvent various aspects of the budgetary process has led to the use of sunset provisions in recent tax legislation in a manner reminiscent of the aforementioned budgetary games. In order to understand the significance of this development, it is valuable to first appreciate the historic basis for sunset provisions, which, like the budget rules, were themselves envisioned as precommitment devices.

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[77] Graetz, *supra* note 66, at 673.

[78] Elizabeth Garrett, *Accounting for the Federal Budget and Its Reform*, 41 HARV. J. ON LEGIS. 187, 190-91 (2004).

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.* at 191.

[83] Graetz, *supra* note 66, at 675.

[84] Garrett, *supra* note 78, at 193.

A. RATIONALES FOR SUNSET PROVISIONS

Sunset legislation subjects government laws and bodies to periodic review under threat of automatic cessation at a predetermined date unless the activity is reauthorized.[85] Sunsets can be comprehensive or selective in their scope and have been applied to statutes, administrative actions, tax preferences, agencies, and government programs.[86] Legal scholars and politicians have long advocated the use of sunset laws. Thomas Jefferson was an early proponent of the sunset system.[87] During the five years he lived in Paris directly prior to the French Revolution, Jefferson periodically sent letters to James Madison on the topic of political upheaval. Just before his return to the States, Jefferson wrote:

> [N]o society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation . . . . The constitution and the laws of their predecessors extinguished them in their natural course, with those whose will gave them being . . . . Every constitution, then, and every law, naturally expires at the end of 19 years.[88]

The Federalist-controlled Congress famously took up Jefferson's suggestion, although perhaps not his noble justifications, when it enacted the Sedition Act of 1798 to insulate Federalist President John Adams from Republican censure.[89] The Act, by its own terms, expired once Adams' presidency ended.[90]

Jefferson envisioned sunsets as the means to align the law of men with that of nature.[91] As the government grew in size, however, certain individuals began to see the practical potential of sunset

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[85] *See* Vern McKinley, *Sunrises Without Sunsets: Can Sunset Laws Reduce Regulation?*, REGULATION, Fall 1995, at 57 (discussing effect of sunset laws on regulation).

[86] *Id.*

[87] Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 6 THE WORKS OF THOMAS JEFFERSON 3, 8-9 (Paul Leicester Ford ed., 1904).

[88] *Id.*

[89] Sedition Act of 1798, ch. 74, 1 Stat. 596 (1798) (expired 1801).

[90] *Id.* § 4.

[91] Letter from Thomas Jefferson to James Madison, *supra* note 87, at 8-9.

legislation. For example, while serving as director of the Securities and Exchange Commission, William O. Douglas proposed to President Roosevelt a ten-year sunset for regulatory agencies, reasoning that "[t]he great creative work of a federal agency must be done in the first decade of its existence if it is to be done at all. After that it is likely to become a prisoner of bureaucracy . . . ."[92] Although Douglas' plan did not come to fruition,[93] a few decades later other scholars and government reformers would support and expound upon his observation that agencies may become politically entrenched and captured by those they regulate.[94]

The modern conception of sunset laws arose out of the government reform period in the latter half of the twentieth century. Theodore J. Lowi, a political theorist, sparked the renewed interest in sunset provisions in his 1969 book *The End of Liberalism*.[95] Lowi advocated the use of legislative sunsetting as a means to transform stagnant governments.[96] Lowi identified the main threat to democratic government as the dominance of interest-group liberalism, an ideology that "merely reflects the realities of power and rationalizes them into public policies."[97] Lowi thought that because interest group liberalism encouraged operation in informal, closed door environments, it led to results favoring interest groups and therefore created public cynicism towards, and distrust of, our democratic institutions.[98] Lowi met pluralists with the charge that the presence of oligopolies and imperfect competition, resulting from agency alignment with salient interests, silences many voices in the democratic process.[99] Absence of an oligopsony and the breakdown

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[92] WILLIAM O. DOUGLAS, GO EAST, YOUNG MAN: THE EARLY YEARS; THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS 297 (1974).

[93] Douglas described Roosevelt's reaction to his proposal as follows: "Roosevelt would always roar with delight at [the sunset proposal], and of course never did do anything about it." *Id.*

[94] *See generally* Alan Rosenthal, *Legislative Review and Evaluation—The Task Ahead*, 45 STATE GOV'T 42 (1972) (arguing that legislature must undertake periodic review of agencies charged with executing their directives in order to ensure implementation of its bills and laws).

[95] *See* THEODORE J. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY 309 (1969) (proposing use of sunset provisions).

[96] *See id.* (suggesting that use of sunset provisions is "only effective way to get substantive evaluation of a program and an agency").

[97] *Id.* at 287.

[98] *Id.* at 296-97.

[99] *See id.* (suggesting that pluralists' notion of "group" is overstated).

of the bargaining process, Lowi argued, means that group interactions do not necessarily lead to "an ideal equilibrium."[100]

To meet these problems, Lowi proposed a Tenure-of-Statutes Act that would set a "Jeffersonian" five- to ten-year limit on the life of every act of Congress.[101] Lowi hypothesized that as the sunset fell on the act, the pressure of legislative review would rupture the agency's established relationship with interest groups.[102] Lowi argued that the normal appropriations process did not provide comprehensive review of the fundamental aspects of government programs, stating that congressional members who ask substantive questions about the program are either "disregarded or ruled out of order."[103] Furthermore, according to Lowi, the Tenure-of-Statutes Act would reserve statutory interpretation and evaluation to the legislative branch rather than the judiciary.[104]

Inspired by Lowi's solution to agency capture, other thinkers in the 1970s encouraged the use of sunsets to free government resources currently being used to address obsolete or superceded policies.[105] These theorists saw a direct relationship between "a government's capacity for pursuing innovative policies during periods of economic stagnation" and "its capacity for terminating outdated government organizations, policies, and programs."[106] Sunset legislation would bolster the latter in pursuit of the former.[107] These ideas became very influential in the mid-to-late 1970s during a period of fiscal hardships and pervasive doubt about the efficacy of government programs.[108]

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[100] *Id.* at 297.

[101] *Id.* at 309.

[102] *Id.*

[103] *Id.* at 310.

[104] *See id.* ("Those who prefer formulation and evaluation of laws by democratic institutions rather than by courts should strongly favor statutory tenure.").

[105] DANIELS, *supra* note 16, at 31-32.

[106] *Id.* at 32.

[107] *Id.*

[108] During this period, policymakers embraced zero-base budgeting (ZBB), a management technique that requires budget items to be assessed and justified with a baseline of zero governmental expenditures. Julie Roin, *The Consequences of Undoing the Federal Income Tax*, 70 U. CHI. L. REV. 319, 334 n.70 (2003). Like sunsets, ZBB was projected to reduce deficits by eliminating ineffective and unnecessary programs. Elizabeth Garrett, *Rethinking the Structures of Decisionmaking in the Federal Budget Process*, 35 HARV. J. ON LEGIS. 387, 392-93 (1998); AM. ENTER. INST., *supra* note 6, at 3.

B. THE ENACTMENT OF SUNSET PROVISIONS

During his presidency, Jimmy Carter pushed for bureaucratic reform and championed Lowi's ideas as a means of streamlining government into a more efficient system tailored to current needs and problems. In his second State of the Union address, Carter pronounced that the nation "need[ed] to enact a . . . [sunset] law that when government programs have outlived their value, they will automatically be terminated."[109]

Members of Common Cause, a government reform lobbying group, agreed with Carter and drafted the nation's first comprehensive sunset law in 1976 for the state of Colorado.[110] The Colorado law mandated formal reviews of government agencies, regulatory boards, and licensing commissions every six years.[111] If the legislature did not affirmatively continue the existence of the government entity after the review period, the entity was abolished.[112] The sunset law required that the Colorado General Assembly hold public hearings in which the threatened government agency had the burden of proving a demonstrated public need for its continuation.[113] The public hearing format was intended to allow citizens an opportunity to participate in the sunset determination.[114] By the early 1980s, thirty-five states had adopted broad sunset laws.[115] The popularity of the sunset regime during this time period was perhaps due to widespread belief that interest groups disrupted the democratic process. In 1973, seventy-four percent of Americans believed that "special interests get more from government than the people do."[116]

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[109] Jimmy Carter, President of the United States, Second State of the Union Address to Congress (Jan. 23, 1979), *in* PUBLIC PAPERS OF THE PRESIDENT OF THE UNITED STATES: JIMMY CARTER 105-06 (1980).

[110] FED'N OF ROCKY MOUNTAIN STATES, INC., THE NATION'S FIRST "SUNSET LAW": AUTOMATIC TERMINATION OF REGULATORY AGENCIES 6-7 (1976).

[111] Bruce Adams, *Sunset: A Proposal for Accountable Government*, 28 ADMIN. L. REV. 511, 525 (1976).

[112] *See id.* (providing that if terminated, agency is granted one-year grace period to wind up affairs).

[113] FED'N OF ROCKY MOUNTAIN STATES, INC., *supra* note 110, at 2.

[114] *See id.* at 3-4 (stating that purpose of hearings is to elicit testimony from variety of sources, including those affected by agency).

[115] COMMON CAUSE, THE STATUS OF SUNSET IN THE STATES, at i (1982).

[116] Adams, *supra* note 111, at 511 (quoting Louis Harris, The Emerging Shape of Politics for the Rest of the 1970s, Remarks to the National Conference of State Legislatures (Oct. 7,

By the end of the decade, perhaps stirred by the poor fiscal climate, nearly as many Americans viewed the government as bloated and inefficient.[117] In addition to combating agency capture, sunset laws were seen as a tool to streamline government programs.[118] With the promise of legislative oversight, they created incentives for efficiency and axed those programs that did not produce the desired results.[119]

As originally conceived, sunset provisions were intended to shift the burden upon those individuals seeking renewal of government programs and agencies such that "legislative inertia [would] no longer serve the dead hand of the past."[120] A 1981 report by the Council of State Governments noted, however, that " '[i]n practice, . . . often the burden of proof ha[d] been on sunset audit agency staff to demonstrate that regulation was not necessary.' "[121] By and large, agencies strongly and successfully defended themselves against sunset review.[122] The same special interest advocates who prevailed in the initiation of the government programs also won in the review stages.[123] In one instance, intense lobbying pressure caused North Carolina to repeal its sunset law altogether.[124] The North Carolina state legislature, succumbing to the protests of lawyers and physicians regarding the Sunset Commission's criticisms of their professional boards, stripped the Sunset Commission of its staff and repealed the sunset law's termination requirement.[125]

Logrolling and a general lack of public participation exacerbated the interest group problem.[126] As time wore on, the agencies became

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1975)).

[117] *See id.* (citing study in which 72% of public did not feel that they received good value from tax dollars).

[118] Chris Mooney, *A Short History of Sunsets*, LEGAL AFFAIRS, Jan.-Feb. 2004, at 67.

[119] *Id.*

[120] GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 60 (1982).

[121] Mooney, *supra* note 118, at 68 (quoting DOUG ROEDERER & PATSY PALMER, COUNCIL OF STATE GOVERNMENTS, SUNSET: EXPECTATION AND EXPERIENCE 6 (1981)). For a different perspective on the success of state sunset legislation, see DANIELS, *supra* note 16, at 31-40 (noting potential of sunsets for spurring legislation).

[122] Mooney, *supra* note 118, at 68.

[123] *See id.* (noting that development of constituencies provides considerable staying power to laws).

[124] COMMON CAUSE, *supra* note 115, at 29.

[125] *Id.*

[126] *See* COMMON CAUSE, *supra* note 115, at 29 (indicating that one-third of states surveyed

entrenched and powerful entities whose legislated demise became politically unfeasible.[127] Consequently, the sunset process became rather inefficient.[128] For instance, Colorado reported that in 1978 the state spent $212,000 to review thirteen agencies, leading to the cessation of three small agencies for a savings of just $6,810.[129] By 1990, a dozen states had either repealed their sunset laws or indefinitely discontinued the process.[130] Now, instead of enacting general sunset laws, states by and large employ sunset provisions aimed at particular laws as well as institute performance audits of government agencies.[131]

At the federal level, Congress introduced a series of comprehensive sunset bills during the late 1970s.[132] These proposals largely mirrored the state sunset acts in that they required episodic review of government programs under the threat of automatic termination.[133] The Sunset Act of 1977, sponsored by Senator Muskie (D-Me), progressed furthest among the proposals.[134] The Act would have subjected nearly all federal programs to a five-year review cycle, terminating the budget authority of those programs that Congress did not affirmatively continue.[135] Senator Muskie championed the bill on the floor of Congress, opining that the legislation would free resources from inefficient, "deadwood" programs.[136] The bill headed the Congressional agenda and was heavily supported by President Carter.[137] The bill, however, never left committee; legislators who favored agency oversight did not

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reported that only licensed professionals attend public hearings on sunset issues); ROEDERER & PALMER, *supra* note 121, at 9 (noting that only regulated professions or industries get involved in sunset reviews).

[127] *See* Mooney, *supra* note 118, at 68 (explaining that few established agencies "were actually sunsetted out of existence").

[128] *Id.*

[129] *Id.* A thorough analysis of the review would, of course, have to take into account other benefits of the review process, such as ensuring high performance of the continued agencies.

[130] Richard C. Kearney, *Sunset: A Survey and Analysis of the State Experience*, 50 PUB. ADMIN. REV. 49, 50 (1999).

[131] *Id.* at 50-51.

[132] AM. ENTER. INST., *supra* note 6, at 13.

[133] *See id.* at 14 (describing systematic evaluation required by Muskie Bill).

[134] McKinley, *supra* note 85, at 59.

[135] AM. ENTER. INST., *supra* note 6, at 14.

[136] McKinley, *supra* note 85, at 59.

[137] Mooney, *supra* note 118, at 68.

necessarily back the automatic expiration of those agencies and the bill's inflexible evaluation structure.[138] Opponents also contended that sunset termination, as part of a political process, would occur only when programs had weak constituencies, not weak performance measurements.[139] Other members were dismayed that biased players determined the act's scope.[140]

In his influential book, *A Common Law for the Age of Statutes*, Guido Calabresi criticized the sunset law as "a mechanical doctrine linked solely to time" and argued that its overbroad application gives a great weapon to antiregulators.[141] According to Calabresi, periodic review would not be effective because it would either cost too many resources or result in the failure to re-enact still effective laws.[142] Despite these warnings and the states' unsatisfactory experience with the sunset laws, the federal government has employed sunset provisions in several contexts. In 1994, Congress enacted the "Anti-Crime Act," which banned the manufacture, sale, and possession of particular assault weapons.[143] Given the controversial nature of the bill, its drafters inserted a ten-year sunset clause to garner support.[144] Similarly, when Congress enacted the independent counsel statute to investigate presidential misconduct, it attached a five-year sunset provision to the statute in order to assuage opponents who were concerned about the practical and constitutional ramifications of the interference with executive branch decisions.[145]

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[138] *Id.*

[139] Congressional members were also concerned about the great increase in the workload of Congress, the federal agencies, and OMB. AM. ENTER. INST., *supra* note 6, at 33.

[140] Committee members deleted the tax expenditures title, in which the sunset review process was applied to any provision of the Internal Revenue Code of 1954 that allowed taxpayers "special treatment" in computing their income tax liability. S. REP. NO. 95-326 at 10 (1977). This action resulted in a written dissent by four senators, who cited the high level of dissatisfaction with the tax expenditure system as evidence of the committee's pandering to certain interests in rejecting the tax expenditures title. *Id.* at 51.

[141] CALABRESI, *supra* note 120, at 61.

[142] *Id.* at 62.

[143] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended at 18 U.S.C. § 922 (2000)).

[144] *Id.* § 110105.

[145] *See* Bruce Ackerman, *Sunset Can Put a Halt to Twilight of Liberty*, L.A. TIMES, Sept. 20, 2001, Metro Section at 15 (arguing sweeping changes to surveillance authority should end in two years). After three re-enactments, this statute was allowed to sunset in 1999 as a result of the investigation of President Clinton. Abraham Dash, *The Office of Independent Counsel*

Congress has recently employed sunset provisions for legislation enacted in response to national emergencies. After the attacks on the United States in September 2001, Congress passed antiterrorist legislation known as the USA PATRIOT Act,[146] the provisions of which dramatically bolstered the investigatory tools of law enforcement authority[147] and expanded the Attorney General's power to detain and deport noncitizens with certified links to terrorist organizations.[148] Because civil libertarians in both political parties were concerned about the encroachment of federal power upon individual rights, many provisions of the USA PATRIOT Act were made subject to a four-year sunset provision so that the legislature could revisit the issue while in a noncrisis mode.[149]

IV. MINI-SUNSETS IN THE TAX CODE

A. THE TAX EXTENDERS

Sunset provisions in the tax code are nothing new. Since the late 1970s, Congress has enacted temporary tax provisions known as "extenders." One of the first and most well-known extenders is the research and development (R&D) credit, enacted in 1981,[150] which reduces taxes by up to twenty percent of qualified research expenses.[151] During deliberation over the R&D credit, some congressional members and business executives doubted the credit's ability to provide incentives to increase investment.[152] As a

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and the Fatal Flaw: "They are Left to Twist in the Wind," 60 MD. L. REV. 26, 26 (2001).

[146] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 18 U.S.C.).

[147] *See, e.g.*, *id.* § 213, 18 U.S.C. § 3103a(b) (Supp. II 2002) (allowing delay of required notice of execution of warrant in certain circumstances).

[148] *Id.* § 412.

[149] *Id.* § 224(a). Some commentators do not see any logic to which provisions have sunsets. A former GOP Congressman has observed, "Many of the parts that are more controversial are not sunsetted." Mooney, *supra* note 121, at 69.

[150] Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 241 (codified as amended in scattered sections of 26 U.S.C.).

[151] I.R.C. § 41 (2005).

[152] *See* JOINT COMM. ON TAX'N, GENERAL EXPLANATION OF THE ECONOMIC RECOVERY TAX ACT OF 1981, at 121 (1981) (stating that sunset allows Congress to evaluate efficiency credit).

compromise, the bill was made temporary so that its effectiveness could be tested.[153] Congress has also used extender status as a means to address short-term problems. The solar power credit,[154] for example, was sunsetted in order to give temporary assistance to a new industry.[155] After the 9/11 terrorist attacks, the work opportunity tax credit,[156] which is itself an extender provision, was temporarily expanded to target employees in New York City working in or relocated from the World Trade Center and its surrounding areas.[157] The original purposes behind the sunset provisions of these extenders, which were enacted either to give lawmakers an opportunity to re-evaluate the effectiveness of the underlying tax provision or to combat interim needs and difficulties, seem largely consistent with the historic rationales of sunset legislation. Nevertheless, the legislative pattern of perpetually re-extending most temporary tax provisions suggests that other political forces have entered the fray.

B. THE SUN NEVER SETS ON EXTENDERS

A number of extenders, including the work opportunity tax credit,[158] the welfare-to-work tax credit,[159] the above-the-line deduction for teacher classroom expenses,[160] and the expensing of "Brownfields" environmental remediation costs,[161] will expire at the end of 2005. Renewal of these extenders remains likely despite their cost in revenue.[162] According to the Congressional Research Service,

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[153] *See, e.g.*, Economic Recovery Tax Act of 1981 § 121(a)(i)(4) (terminating subsection's provisions as of Dec. 31, 1986).

[154] I.R.C. § 48(a) (2005).

[155] *See* Representative Shelley Moore Capito, Testimony before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means (June 12, 2001) (transcript available at http://waysandmeans.house.gov/legacy/src/107cong/6-12-01/6-12capi.htm) ("Clearly, energy tax credits have been historically used to encourage a broad range of energy investment.").

[156] I.R.C. § 51 (2005).

[157] Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, § 301, 116 Stat. 21, 33-40 (2002) (repealed 2004).

[158] I.R.C. § 51 (2005).

[159] *Id.* § 51A.

[160] *Id.* § 62(a)(2)(D).

[161] *Id.* § 198.

[162] In 2003, the cost of the extender provisions was estimated at $7 billion over the

as of 2003, Congress had allowed only one extender provision to terminate over the quarter-century period that the extenders have been in use.[163] When extenders do lapse, congressional members typically reach a compromise during the next session whereby the extension is applied retroactively.[164]

1. Fuzzy Math. One may conclude that Congress's recurring decision not to make the extenders permanent results from the controversial nature of the provisions.[165] Although this may explain the transience of certain provisions, contentious debate does not surround the enactment of the majority of extender provisions. The R&D credit, for example, receives widespread bipartisan support.[166] In 1999, the year of the research credit's last expiration date, a bill proposing permanent enactment was introduced in both the Senate and the House.[167] The House bill's cosponsors included sixteen Republicans and ten Democrats from the thirty-nine members of the House Ways and Means Committee.[168] Among the backers of the Senate bill were five Republicans and seven Democrats from the Senate Finance Committee.[169] In both houses, the committee chairs as well as the ranking minority members of the originating

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following ten years. Joint Committee on Taxation, *JCT Scores House Extenders Bill*, TAX NOTES TODAY, Nov. 24, 2003, LEXIS, 2003 TNT 226-55. To give an idea of the cost breakdown, the JCT estimated that the ten-year cost of extending the work opportunity credit would cost $312 million and the extension of the welfare-to-work credit would cost $115 million. *Id.*

[163] *See* Jill Barshay, *'Temporary' Tax Breaks Usually a Permanent Reality*, CONG. Q. WKLY., Nov. 15, 2003, at 2831 (noting "corporate deduction for group legal services provided to employees" expired in 1993). At least one more can be added to the list. In 2004, the expansion of the work opportunity credit expired. Job Creation and Worker Assistant Act of 2002, Pub. L. No. 107-147, § 301, 116 Stat. 21, 33-40 (2002).

[164] Barshay, *supra* note 163, at 2833.

[165] Only a small minority of extenders have achieved permanent status; for example, the health care deduction for the unemployed was made permanent in 1996. Health Insurance Portability and Accountability Act of 1996 § 311, I.R.C. § 162 (Supp. 1997).

[166] This, of course, does not imply that the R&D credit has no policy critics. *See generally* David L. Cameron, *Research Tax Credit: Statutory Construction, Regulatory Interpretation and Policy Incoherence*, 9 COMP. L. REV. & TECH. J. 63 (2005) (discussing problems and concerns relating to calculation and application of R&D credit).

[167] S. 680, 106th Cong. (1999); H.R. 835, 106th Cong. (1999).

[168] The cosponsors included "such notable members of the House leadership as Reps. Richard K. Armey, R-Texas, Tom Delay, R-Texas, J.C. Watts, R-Okla., Richard A. Gephardt, D-Mo., and David E. Bonior, D-Mich." Martin A. Sullivan, *News Analysis—The Research Credit: A Perfect Example of an Imperfect Code*, 85 TAX NOTES 128, 135 (1999).

[169] *Id.*

committees supported permanent enactment of the R&D credit.[170] In fact, Tax Analysts could not identify a single member of Congress, aside from one Florida Representative, who did not support the credit.[171] Indeed, temporary extension of the credit has continually won out over other more salient or less costly tax measures.[172] Why, then, has the R&D credit not been permanently enacted but instead temporarily extended twelve times since its 1981 enactment?[173]

With budgetary concerns in mind, lawmakers employ sunset provisions not only to test the provision but to reduce estimations of revenue costs. The PAYGO rules of the 1990s increased this tendency by requiring revenue offsets within the relevant budget window for every new tax expenditure.[174] Under PAYGO and the demands of the budget reconciliation process, tax expenditures enacted for a short period of time will quite obviously demand lesser offsetting revenues. According to the Brookings Institute, permanent enactment of the extenders in place from 1996 until 2001 would have cost more than $22 billion in the tenth year.[175] Although some extender provisions, such as the low-income housing credit, have been made permanent, "[e]fforts to do the same for the others [have run] into a revenue roadblock."[176] For instance, permanent extension of the R&D credit has largely failed because doing so would create an on-budget deficit.[177] In 1999, many popular proposals making the R&D credit permanent did not survive once Congress decided to require offsets for the extenders bill.[178] Instead,

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[170] *See id.* (discussing political popularity of R&D credits).

[171] *Id.*

[172] In 1999, for instance, the R&D credit was extended while popular provisions such as the elimination of the marriage penalty and pension reforms were vetoed. *Id.* at 128.

[173] *See* Joint Comm. on Taxation, *JCT Analyzes Tax Provisions Expiring in 2005 and 2006*, TAX NOTES TODAY, Mar. 14, 2005, LEXIS, 2005 TNT 48-13 (discussing federal tax provisions that expire in 2005 and 2006).

[174] *See supra* notes 60-64 and accompanying text.

[175] Robert Greenstein et al., *CBPP Analysis of New Tax Cut Law*, TAX NOTES TODAY, May 29, 2003, LEXIS, 2003 TNT 103-27.

[176] Pat Jones, *Week in Review: New Day May Dawn for Sunset Tax Provisions*, 66 TAX NOTES 1587, 1588 (1995).

[177] *Id.*

[178] The 1999 extenders bill was "fully offset" for the year 2000 "and part of 2001." Heidi R. Glenn, *Extenders Bill Begins to Inspire Head-Scratching*, 85 TAX NOTES 1618, 1619 (1999). For a brief discussion of the political haranguing over whether the bill should be "paid for," see Ryan Donmoyer et al., *Senate, House Taxwriters Already Negotiating Compromise Extenders Bill*, TAX NOTES TODAY, Oct. 27, 1999, LEXIS, 1999 TNT 207-1.

the credit was sunsetted after five years.[179] Earlier in the year, the Deputy Secretary of Treasury, Stuart Eizenstat, warned that "broader budget constraints . . . may prevent a permanent extension of the research credit."[180] Eizenstat also stated that the length of a tax extender's renewal depended on the extent to which offsets are required.[181] The congressional path of the 1999 R&D extension comports with his observation.[182] If the Senate had required full offsets for the 1999 extenders bill rather than partial offsets, an eighteen-month extension of the research credit would likely have resulted, instead of the enacted five-year extension.[183]

The budget process has affected the certainty of the credit in other ways. A provision incorporated from the House proposal prevented taxpayers from claiming the credit for research done between October 1, 2000 and September 30, 2001.[184] Taxpayers, however, could file amended returns after the start of the government's next fiscal year, October 1, 2001, to receive refunds for the credit.[185] The House Ways and Means Committee adopted this "budgeting quirk" to delay "the cost [of the credit's extension] to the fisc."[186] Budgeting gimmicks such as these led one lobbyist to observe that "[w]hat you're seeing is the sausage-making."[187]

The experience of the research credit illustrates how Congress sunsets tax credits to reduce estimates of the costs of such credits. Professor Michael J. Graetz has demonstrated that Congress also chooses to sunset revenue-raising provisions in order to generate revenue gains upon later extensions.[188] Professor Graetz cites the

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[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *See* Ryan Donmoyer, *Senate Taxwriters Struggle with Research Credit Delay*, TAX NOTES TODAY, Oct. 19, 1999, LEXIS, 1999 TNT 201-1 (explaining possible renewal lengths of "research credit and other extenders").

[183] *See id.* (explaining rationale behind five-year extension versus eighteen-month extension).

[184] Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170, § 502(d)(1), 113 Stat. 1860, 1920 (1999).

[185] *Id.*

[186] *Id.*

[187] Robert MacMillan, *Senate Tax Cuts No Longer Permanent*, NEWSBYTES, July 28, 1999, *available at* 1999 WL 4128604.

[188] *See* Graetz, *supra* note 66, at 676 (discussing use of creative budget scorekeeping in federal tax law).

1990 gas tax increase and the personal exemption phaseouts, among others, as examples of this strategy.[189] Because the "baseline" estimate of receipts to the fisc is that of the pre-revenue-raising world, the "revenue loss from the expiration of the tax does not 'score' for revenue estimating purposes and the additional revenues from the extension can thus be spent on other revenue losing enactments."[190]

2. Rent-extraction. At the time of its original enactment, the R&D credit was ostensibly sunsetted so that Congress could review its inventive approach: calculating the amount of the credit as the excess of qualified research expenditures over a base amount rather than as a simple percentage of all expenditures.[191] Far from proving ineffective, the credit's incremental structure has won over economists and lawmakers for its ability to provide tax assistance only to those research projects that would not have been undertaken in the absence of a credit.[192] In effect, the structure of the credit creates a larger incentive than a flat credit could offer.[193] Moreover, in contrast to many other tax subsidies, market inefficiencies justify the credit's existence.[194]

Because of the widespread legislative support for the credit, it is unlikely that Congress has sunset the credit in order to review its performance. The need to reduce revenue loss estimates at least partially unravels the mystery behind the sunset, and a list of the beneficiaries of the credit may provide further insight into the story of the extenders. The principal recipients of the research credit are large U.S. manufacturing corporations;[195] in 1999, firms with more than five thousand employees conducted eighty-eight percent of

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[189] *See id.* (providing some "[r]ecent examples of this phenomenon").

[190] *Id.*

[191] Sullivan, *supra* note 168, at 131.

[192] However, the credit's implementation has been criticized. *Compare id.* at 130 (noting that economists approve of credit because it may induce efficient level of research investment), *with* Cameron, *supra* note 166, at 150-52.

[193] *See* Sullivan, *supra* note 168, at 131 (noting that incremental credit produces larger overall incentive effect).

[194] *See id.* at 130 (noting that in absence of such credit, private sector may invest less in research than is economically efficient).

[195] *Id.* at 135.

privately funded research.[196] The manufacturing sector claimed seventy-four percent of all research credits in 1995.[197]

In many cases, the R&D credit cuts millions of dollars from the tax returns of a single corporation.[198] As of 2003, over eighty-five trade and professional associations and over 1,000 corporations comprised the R&D Credit Coalition, the credit's primary supporting organization.[199] These business entities are more than willing to invest in lobbying activities and campaign donations to ensure continuance of this large tax savings.[200] Fred McChesney articulates the transaction as follows:

> [P]ayments to politicians often are made, not for particular political favors, but to avoid particular political disfavor, that is, as part of a system of political extortion or, rent extraction. . . .
>
> . . . Because the state, quite legally, can (and does) take money and other forms of wealth from its citizens, politicians can extort from private parties payments *not* to expropriate private wealth. . . .
>
> In that sense, rent extraction—receiving payments not to take or destroy private wealth—is "money for nothing" in the words of the song.[201]

Rent extraction is particularly prevalent in the tax legislative process because Congress frequently changes the tax laws favoring

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[196] *See* Raymond M. Wolfe, *U.S. Industrial R&D Performers Report Increased R&D in 1999; New Industry Coding and Size Classifications for NSF Survey*, DIVISION OF SCIENCE RESOURCES STUDIES DATA BRIEF, May 17, 2001, at 2 (reporting R&D funding levels for 1999 by industry and firm size).

[197] *Id.*

[198] Sullivan, *supra* note 168, at 135.

[199] Letter from R&D Credit Coalition to Bill Thomas, Chairman, Comm. on Ways & Means, U.S. House of Representatives et al. (Apr. 2, 2003), http://www.ipc.org/3.0$Industry/3.3$Gov$Relations/2003$RD$Cred$Ltr.pdf.

[200] For another example of possible interest group influence in the extender context, see generally JOEL FRIEDMAN ET AL., CTR. ON BUDGET & POLICY PRIORITIES, CONGRESSIONAL LEADERSHIP PUSHES FOR EXTENDING EXPIRING TAX BREAKS, BUT IGNORES EXPIRING UNEMPLOYMENT BENEFITS (2003), http://www.cbpp.org/11-25-03ui.pdf (arguing that House was willing to extend benefits to corporations but not to laid-off workers).

[201] MCCHESNEY, *supra* note 15, at 2-3.

particular groups.[202] The story of a certain California family illustrates this transactional model in a particularly transparent manner. In the 1970s, the Gallos, the owners of the largest winemaking company in the world, contributed to the campaigns of U.S. Senator Cranston, who in turn sponsored a 1978 amendment that would allow the Gallo family—and only the Gallo family—to defer its estate tax payment.[203] This tailored tax provision saved the wine dynasty millions of dollars.[204] The proposed overhaul of the tax code in 1986, however, threatened the provision's continuance.[205] To encourage Senator Bob Dole's support of a second Gallo wine amendment, the family donated $20,000 to Dole's political action committee in one day.[206] The Gallos continually contributed to Dole throughout the next decade—$381,000 to his campaign and at least $890,000 to two Dole-sponsored foundations—thereby easily becoming one of his top ten career donors.[207]

This story illustrates that rent extraction works when an interest group's benefit is jeopardized. Lobbyists can demand payments when legislation is pending, and campaign contributions rise with the amount of tax legislation voted on each year.[208] Sunsets ensure cyclical endangerment of the interest group's benefits. At each termination date, politicians and lobbyists can extract more rent. One lobbyist was quite candid about this arrangement:

> 'Who wants to lose a client?' . . . 'With the extenders, you know you always have someone who will help pay the mortgage. You go to the client, tell them you're going to fight like hell for permanent extension, but tell them it's a real long shot and that we'll really be lucky just to get

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[202] *See, e.g.*, *id.* at 45 (stating that elements of 1986 Tax Reform Act are results of most obvious rent extraction in recent political history).

[203] George Lardner Jr., *A Little Bit for Everyone in H.R. 11409; There's a Little Little Bit for Everyone in the Tax Bill as 95th Is Closing*, WASH. POST, Oct. 7, 1978, at A1.

[204] Frontline, So You Want to Buy a President?, Ernest Gallo, http://www.pbs.org/wgbh/pages/frontline/president/players/gallo.html (last visited Nov. 3, 2005).

[205] *See* MCCHESNEY, *supra* note 15, at 64 (stating that Gallos "faced a major wealth-reducing provision concerning generation skipping transfer taxes").

[206] Steve Weinberg, *Dollars by the Barrel*, COLUM. JOURNALISM REV., May-June 1996, at 69.

[207] *Id.*

[208] Sullivan, *supra* note 168, at 136.

> a six-month extension. Then you go to the Hill and strike a deal for a one-year extension. In the end, your client thinks you're a hero and they sign on for another year.'[209]

Rational interest groups will continue to engage in the lobby for extenders until the campaign contribution costs and lobbying expenditures outweigh the discounted present value of the threatened provisions' benefits. And with exceptions such as the work opportunity credit,[210] extenders generally provide advantages to a narrow sector of the population while diffusing revenue costs across the general public.[211] This supports the idea that, in the extender arena, organized, well-resourced minority groups compete even more effectively than usual because sunsets require intense lobbying efforts year after year. For instance, the efforts required to sustain the mobilization of a diffuse majority over an extended period of time are substantial, especially when compared with the small cost of the sunsetted provision to each individual. Of course, even laws that are not threatened by sunset may be endangered by repeal and, hence, require lobbying efforts to sustain them over time; however, repeal, unlike a lapse after sunset, requires affirmative action by Congress and, thus, endangerment to the status quo is greater in the sunset context.

After no less than ten extensions of the R&D credit over the past two decades, however, its existence may seem guaranteed. Why, then, do entities keep paying to ensure the credit's renewal? First, the lobbyists who represent them are complicit in the sunsetting game. Second, by either requiring offsets to tax expenditures or demanding sequesters, the budget rules create competition between interests in tax benefits and thus guarantee the possibility, although at times remote, of lapse, especially if interest group activity on behalf of the threatened provision ceases. Third, a small number of

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[209] Jones, *supra* note 176, at 1587.

[210] 26 U.S.C. 51 (2000).

[211] The R&D credit, for example, costs each taxpayer just $24 annually. Martin A. Sullivan, *Joe Sixpack in Gucci Gulch: The Cost of Other People's Tax Breaks*, TAX NOTES TODAY, June 1, 1999, LEXIS, 1999 TNT 104-3. Such an amount is not great enough to sustain an opposition movement, which would involve overcoming the difficulties of organizing a large number of individuals. Sullivan, *supra* note 168, at 129.

extenders have been made permanent,[212] so interest groups may retain some hope that impermanence can be overcome.

In addition to providing the chance to extract money and votes, sunsetting of the extenders also creates a regular legislative tax vehicle. Such an occurrence allows congressional members not only to espouse their particular goals of tax policy to their constituents, but also generates an occasion to engage in political payoffs. Legislators grasp the opportunity to engage in vote-trading to pass their own projects because no single-subject rule applies to the majority of federal lawmaking. Continual sunsetting of extenders demands that the legislature vote upon new laws when each sunset date arises. Because new tax legislation creates regular forums for logrolling, the bills enacting these provisions contain credits, deferrals, and deductions aimed at narrow sets of constituents. For example, Congress overwhelmingly passed a $21.4 billion extenders bill, the Tax Relief Extension Act of 1999,[213] by a House vote of 418-2 and with unanimous support in the Senate.[214] The bill extended a hodgepodge of expiring provisions, providing seventy-six percent of its benefits to corporate and business taxpayers by one estimate.[215] Additionally, although corporations produced only fifteen percent of the non-social security budget surplus in 1999, they received sixty-two percent of these tax benefits, which largely come out of these surpluses.[216] Senate Finance Committee Chairman Bill Roth (R-Del.) pushed through the most salient illustration of logrolling, the inclusion of poultry waste as a qualified electricity source for purposes of the alternative energy tax credit.[217] Not surprisingly, the poultry farming business comprises the "linchpin of the

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[212] *See* Barshay, *supra* note 163, at 2832 (noting permanent enactment of deductions for charitable donations of publicly traded stock and low-income housing credit).

[213] Pub. L. No. 106-170, §§ 500-512, 113 Stat. 1860, 1918-25 (codified as amended in scattered sections of 26 U.S.C.).

[214] Senate Finance Committee, *Finance Committee Report Description of Tax Relief Extension Bill*, TAX NOTES TODAY, Oct. 28, 1999, LEXIS, 1999 TNT 208-6.

[215] Sheldon D. Pollack, *Tax Policy in the 1990s: On the Road to Nowhere*, TAX NOTES TODAY, Dec. 27, 1999, LEXIS, 1999 TNT 247-81.

[216] Ryan J. Donmoyer, *Businesses Feed on the Surplus as Extenders Are Completed*, 85 TAX NOTES 975, 976 (1999).

[217] *Roth's "Peep" Bill to Extend, Expand Electricity Production Credit*, TAX NOTES TODAY, Apr. 30, 1999, LEXIS, 1999 TNT 83-56.

[Delaware] economy,"[218] the state where Senator Roth faced a tough election the next year.[219]

Additionally, the 1999 extenders bill included a rider preserving the confidentiality of advance pricing agreements, a nonexpiring provision that cannot properly be considered an extender.[220] House Ways and Means Committee Chairman Bill Archer (R-Tex.) quietly placed this provision, supported by multinational corporations, into the bill just prior to its adoption.[221] Thomas F. Field, president of Tax Analysts, expressed dismay over the lack of congressional debate on the nondisclosure provision and believed that "[a] lot of people were blindsided by the midnight adoption of this proposal as part of the extenders bill."[222] Sunsets of tax provisions necessitate an annual tax bill. As a result, legislators have an occasion to push a particular tax agenda and benefit from their constituents who encourage them through campaign contributions and votes. These scenarios are problematic in that they bolster the competitive advantages of an organized minority, thereby increasing the likelihood of a reduction in social welfare due to the greater costs imposed on the poorly organized majority. In other words, sunset provisions may create a greater occurrence rate of the classic scenario of legislative market failure.

3. Poor Planning. According to many tax experts, the risk of termination diminishes the intended benefits of the extender provisions by complicating tax planning.[223] For example, many economists argue that the R&D credit would produce far more incentives to invest in new technologies and science if companies

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[218] Jamie Smith Hopkins et al., *Avian Flu in Del. Apparently Contained: Tests Show No Spread from Chicken Farm in Southern Part of State*, BALT. SUN, Feb. 10, 2004, at A1.

[219] *See* Cris Barrish & Patrick Jackson, *Roth Is Stunned—His Polls Predicted Victory*, NEWS J., Nov. 10, 2000, at 1A (noting that independent polls never showed Roth with more than three percent lead and showed opponent with double-digit lead early in race).

[220] Press Release, Congressional Press Releases, Roth, Archer File Agreement on Legislation Aiding Americans with Disabilities and Tax Extenders (Nov. 18, 1999), *available at* http://www.senate.gov/~finance/106-262.htm.

[221] *See* Sindhu G. Hirani, *International Taxes: Witnesses Suggest Changes, Provide Input on International Rules Before Ways and Means*, INT'L BUS. & FIN. DAILY, July 2, 1999 (reporting that corporate representatives testified on behalf of changes Rep. Archer supported).

[222] Barton Massey, *Shielding APAs—Was There Fair Debate of Policy Concerns?*, TAX NOTES TODAY, Dec. 27, 1999, LEXIS, 1999 TNT 247-3.

[223] *See, e.g.*, Sullivan, *supra* note 168, at 135-36 ("Everybody recognizes that temporary extensions of the research credit diminish its effectiveness.").

could rely on its existence.[224] The acts of one Congress, however, are not binding on a later Congress. Thus, repeal or revision are always possibilities, regardless of the existence of sunset provisions. Nonetheless, since the sunsets, unlike repeal or revision of laws, do not require affirmative action by Congress for the change to occur, one could argue that they reduce the effectiveness of a tax credit more so than *permanent* legislation by increasing the chance of legislative change, the exact odds of which cannot be ascertained.[225] Additionally, Congress often does not achieve "seamless" renewal of the extender provisions but instead retroactively re-enacts the provisions.[226] Such retroactive renewals impose large administrative costs that reduce the incentive effects of a given law.[227] For example, in her testimony at a Finance Committee Hearing on the complexity of the tax code, the President of Tax Executives Institute stated that some of her organization's members had to reissue numerous W-2s when the educational assistance exclusion in section 127 was re-enacted retroactively several months after expiration.[228] At times, Congress fails to extend expiring provisions and allows them to lapse for a short period of time. For example, the R&D credit does not apply to qualified expenses incurred between June 30, 1995 and July 1, 1996 because of a failure to extend the credit.[229]

The above discussion illustrates, however, why the list of temporary tax measures keeps growing in spite of the uncertainty and administrative costs these measures create. Sunsetting tax provisions imparts the significant political advantages of rent-extraction and of obscuring the cost of permanent renewal from the budget rules. Lawmakers do not face opposition to these provisions from their colleagues since most stand to benefit from logrolling. The constituents who absorb the costs of the legislation do not object

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[224] *See generally id.* (arguing that although R&D credits are efficient, estimates of their effectiveness should be reduced to take into account negative effect of uncertainty of credits' availability).

[225] *See* Betty M. Wilson, *TEI Testimony at Finance Committee Hearing on Tax Code Complexity*, TAX NOTES TODAY, Apr. 27, 2001, LEXIS, 2001 TNT 82-58 ("[T]hese provisions cannot effectively serve their legislative purpose if taxpayers are unable to know whether they will remain in effect from year to year.").

[226] *See id.* (calling extenders "on-again, off-again" provisions).

[227] *Id.*

[228] *Id.*

[229] *See* Cameron, *supra* note 166, at 66 n.7 (listing history of extension of R&D credit).

to this arrangment because each individual is affected only minimally. Jill Barshay described congressional complicity and constituent passivity surrounding the extenders as follows:

> Scant media attention is focused on the opaque process of renewing these tax cuts. No hearings or markups have been held in recent years. Debates are rarely heard on the merits of the individual provisions. Committee aides quietly ready the extensions behind closed doors and slip them into unrelated legislation near the end of each legislative session.
>
> Often the only time these provisions make news is when a lawmaker finds that his pet extender has been left out. As a result, they rarely are.[230]

To be sure, not all extender provisions are summarily renewed without legislative scrutiny.[231] For the most part, however, experience has fulfilled early predictions that a sunset date will not effectively spur Congress to re-evaluate the tax provision.[232] As outlined above, there are simply too many political forces working against genuine assessment. Expectedly, the vast majority of extender provisions have been extended without fuss.[233]

V. THE NEW SCOPE OF SUNSETS IN THE CODE

A. THE BACKDROP TO EGTRRA'S SUNSET

In spite of the closeness of the 2000 presidential election and a razor thin Republican edge in the Senate,[234] Congress enacted one of

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[230] Barshay, *supra* note 163, at 2832.

[231] *See* Mary L. Heen, *Reinventing Tax Expenditure Reform: Improving Program Oversight Under the Government Performance and Results Act*, 35 WAKE FOREST L. REV. 751, 798 (2000) (stating that review process of expiring employment tax credit has produced some information about credit's performance).

[232] *See, e.g.*, Michael J. McIntyre, *Improving the Legislative Process: Cutoff Dates for Tax Benefits*, 3 TAX NOTES 5, 5-9 (1975) (analogizing to congressional experience with five-year amortization provisions for pollution control facilities).

[233] *See* Heen, *supra* note 231, at 791 (describing congressional reluctance to review tax provisions or allow them to expire).

[234] Michael W. Evans, *The Budget Process and the 'Sunset' Provision of the 2001 Tax Law*,

the largest tax cuts in history, the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), with record-breaking swiftness. For nearly two decades, numerous politicians, lobbyists, and think tanks had mobilized and orchestrated the forces necessary for the Act's most prominent feature—the costly repeal of the tax on the largest of America's estates.[235] In addition to the masterful political maneuvering that rallied support for the substance of the tax cuts, however, the enactment of EGTRRA required deft manipulation of budget rules and, hence, a sacrifice.

1. The Initial Debate over Reconciliation. Shortly after entering office, President Bush announced a tax cut proposal with an estimated cost of $1.62 trillion.[236] With many Democrats and even a few Republicans expressing dismay over such a large revenue loss, the Republicans quickly began negotiating numbers to garner the votes needed to pass the tax cut.[237] The Constitution, of course, requires a majority in both houses to pass a bill.[238] To preserve the Senate's status as the deliberative body of Congress and protector of minority rights, Senate rules traditionally have allowed unlimited debate on legislation.[239] Since its inception, Senators have used this freedom to delay debate or block legislation, a tactic known as a filibuster that can only be broken by cloture, a three-fifths (60) majority vote.[240] The tax cut needed at least fifty-one Senate votes; the achievement of this was not certain considering that, at the time, the Senate was evenly divided between the two parties, with Vice President Cheney's vote as the tie breaker.[241] The possibility of a filibuster made the likelihood of passage even more remote. Furthermore, in the Senate, amendments ordinarily do not need to be relevant to the subject matter of the bills being debated.[242]

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99 TAX NOTES 405, 412 (2003).

[235] *See generally* MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH (2005) (providing insightful and comprehensive history of estate tax repeal movement).

[236] John E. Mulligan, *How Handful of Moderates Won on Budget: Bipartisan Senate Group Finds Power in the Middle*, SEATTLE TIMES, Apr. 9, 2001, at A10.

[237] *See id.* (describing Senate fight over tax cut).

[238] U.S. CONST. art. I, § 7, cl. 2.

[239] Evans, *supra* note 234, at 406.

[240] *Id.*

[241] *Id.* at 412.

[242] *Id.* at 406.

Senate Republicans were thus also concerned that Democrats would deface any measure from the Finance Committee by inserting their own agenda into the tax bill.[243]

Met with these formidable challenges, Senate Republicans pressed for the use of the reconciliation process, a process historically used to consider bills that reduce the deficit through tax increases, for the tax cut.[244] In stark contrast to the ordinary legislative process in the Senate, under the Budget Act, debate upon a reconciliation bill is limited to twenty hours, thus preventing a filibuster.[245] Additionally, certain procedural rules strike extraneous amendments from the reconciliation bill.[246] Reconciliation would provide clear, even necessary, advantages to ensuring enactment of the tax cut, essentially requiring only a bare majority of votes as opposed to the sixty needed for cloture.[247] The application of the reconciliation process to tax cuts was dubious, however, despite past Republican attempts to use it in this manner.

The reconciliation process relaxes the Senate procedural requirements in order to facilitate the passage of tax and spending legislation in conformity with the congressional budget resolution.[248] The process was conceived primarily, if not solely, as a tool to reduce deficits through the enforcement of the earlier budgetary decisions of Congress.[249] Between 1980 and 1993, most tax bills were reconciliation bills, and their status as such was not questioned because they provided for tax increases, not tax cuts.[250] As the deficits lifted in the mid-1990s and the legislature began to propose tax cuts, however, heated debate surrounded the scope of the

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[243] *See* William M. Welch, *Finance Panel Oks Revised Tax-Cut Plan*, USA TODAY, May 16, 2001, at 8A (discussing failed Democratic efforts to add amendments in finance committees).

[244] *See* Evans, *supra* note 234, at 412-14 (detailing controversy over applying reconciliation process to tax cut bills).

[245] *Id.* at 407.

[246] *Id.* (noting Budget Act permits only "germane" amendments).

[247] *Id.*

[248] *See id.* at 406 (stating that reconciliation permits "mid-course correction" (citation omitted)).

[249] *See id.* (explaining that Congress used reconciliation to make consistent "budget resolution with reality by turning overall budget targets into the concrete changes in law necessary to achieve them").

[250] *Id.* at 407.

reconciliation process.[251] Shortly after the Republicans regained control of Congress in 1994, they proposed an ambitious plan that, although balancing the budget, would reduce taxes by close to $250 billion over a seven-year period.[252] The reconciliation bill was passed without protests from Democrats regarding its categorization, but was vetoed by the President.[253] Two years later, the Republicans fashioned a budget resolution calling for reconciliation legislation that would cut taxes by more than three times the amount of the previous proposal and offset the costs by a corresponding decrease in spending.[254] On the floor of the Senate, Senator Daschle raised a point of order against the practice of passing tax cuts in a reconciliation bill.[255] Senator Daschle admonished his colleagues for using the "highly privileged vehicle" of reconciliation, a vehicle that exists only to enforce deficit reduction, to pass legislation "devoted solely to worsening the deficit."[256]

Senator Domenici met the charge by saying that because the tax cut fit within the strict definition of germaneness, no bars to the reconciliation process existed.[257] "Healthy debate" was ensured, Domenici contended, because the Republicans had separated the reconciliation bills into "manageable issues."[258] He also cited as precedent a 1975 tax cut with attached reconciliation instructions.[259] Senator Hollings dismissed the latter argument, stating that in 1975, Senator Long had mistakenly attached instructions for the then-new reconciliation process to an amendment that was for a tax revenue act clearly outside of reconciliation.[260] The Senate never resolved this debate over the reconciliation issue; instead, the

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[251] *See id.* at 407-12 (providing comprehensive overview of reconciliation controversy in Senate).

[252] Alissa J. Rubin, *Finance Committee Republicans Divided over Tax Cut Bill*, 53 CONG. Q. WKLY. REP. 3058, 3058 (1995).

[253] Evans, *supra* note 234, at 410.

[254] H.R. Con. Res. 178, 104th Cong. (1996).

[255] 142 CONG. REC. S5415 (daily ed. May 21, 1996) (statement of Sen. Daschle).

[256] *Id.*

[257] *See id.* at S5416 (statement of Sen. Domenici).

[258] *Id.*

[259] *Id.*

[260] *See id.* at S5419 (statement of Sen. Hollings) (discussing Sen. Long's view and history of reconciliation).

Balanced Budget Act of 1997 was enacted.[261] Over the next few years, the Senate Republicans continued to push for the expansion of reconciliation and eventually gained the Senate's approval.[262] Other procedural rules, however, ensured that their victory was not absolute.

2. The Byrd Rule. In the 1980s, Senators abused the reconciliation process by adding unrelated provisions to a reconciliation bill, thus evading the traditional Senate rules allowing unlimited debate.[263] In response, Senator Byrd drafted a Budget Act amendment that allowed Senators to raise a point of order to provisions that were extraneous to the reconciliation bill.[264] The Senate easily passed the Byrd amendment in 1985.[265] The rule could only be waived by three-fifths of senators and applied in six different circumstances—the relevant one being when a reconciliation bill decreases revenues beyond the budget window.[266]

This particular provision became at issue in 1999 when Republicans tried once again to enact tax cuts through the reconciliation process.[267] Congress had passed a budget resolution instructing the Ways and Means and Finance Committees to report a reconciliation bill reducing revenues by not more than $9.2 billion over the next ten years.[268] To ward off a Byrd rule point of order, the Senate Finance Committee sunsetted the tax cut on September 30, 2009 so its costs would be within the prescribed ten-year budget window.[269] The Committee, however, restored the tax cut one day later.[270] When the tax cut came before the Senate, Senator Moynihan raised the Byrd rule point of order because, in spite of the

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[261] Evans, *supra* note 234, at 408.

[262] *Id.* at 410.

[263] *Id.*

[264] *Id.* at 406.

[265] *Id.*

[266] *See* Evans, *supra* note 234 (explaining mechanics of Byrd rule as codified in Congressional Budget Act of 1974, 2 U.S.C. § 644 (2000)). The prong of the Byrd rule at issue was enacted because "[c]oncerns had arisen about the use of provisions that increased revenue . . . during the period covered by the reconciliation bill, but had the opposite effect afterwords." *Id.*

[267] *Id.*

[268] H.R. Con. Res., 106th Cong. §§ 104-105 (1999).

[269] *Senate Democrats' Release on Byrd Rule and the GOP Tax Bill*, TAX NOTES TODAY, July 28, 1999, LEXIS, 1999 TNT 145-27.

[270] *Id.*

one-day lapse, the bill would decrease revenues outside of the budget window.[271] Senator Roth responded by arguing that a Senate rule requiring such gimmickry, especially in a time of surplus, could not be a good one.[272] Only fifty-one Senators voted to waive the Byrd rule, and as a result, the Senate struck the provision that reinstated the tax cuts on October 1.[273] After the vote was cast, Senator Breaux (D-La) lamented the resultant sunset:

> [N]o matter what type of tax bill ultimately comes back to this body after the conference, we cannot make it a permanent tax cut. . . .
>
> I think from a policy standpoint this is terrible policy. We literally are telling all the businesspeople . . . and employees in this country [that] . . . no matter what the law is today, it is going to fall off a cliff and go poof in 10 years.[274]

Senator Breaux's predictions about the future of tax policymaking, although seemingly melodramatic at the time they were made, may be accurate in retrospect. The Senator finished his floor speech by stating that the real problem was enacting tax cut legislation in the reconciliation scenario.[275] Nonetheless, in 1999, the Senate accepted the use of reconciliation for tax cuts and would do so again during debate over the 2000 tax cuts.[276] At the same time, however, the sunset made clear that the Byrd rule would operate on such tax bills, and a momentary eclipse would not be enough to avoid its application.[277] Just as Mother Nature ordains, the sun would inevitably have to set.

B. EGTRRA

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[271] 145 CONG. REC. S9479 (daily ed. July 28, 1999) (statement of Sen. Moynihan).

[272] *See id.* (statement of Sen. Roth) (noting that Byrd rule "was written to bar creative accounting provisions" and not "to hinder refunds of a budget surplus").

[273] Evans, *supra* note 234, at 411.

[274] 145 CONG. REC. S9484 (daily ed. July 28, 1999) (statement of Sen. Breaux).

[275] *Id. at* S9485.

[276] Evans, *supra* note 234, at 410-12.

[277] *Id.*

Even though Senate Republicans narrowly gained approval for the use of the reconciliation process for tax cuts a few times between 1996 and 2000, controversy again arose over this issue during the 2001 floor debates of EGTRRA. On February 15, 2001, Senator Byrd predicted Republicans would use the same tactic and again admonished the Senate's past "abuse[ ]" and "distort[ion]" of reconciliation, reminding his fellow Senators that the "process was established as an optional procedure to enhance Congress's ability to change current law in order to bring revenue and spending levels into conformity with the targets of the budget resolution."[278]

Weeks later, on April 2, 2001, Senator Conrad warned Republicans that the abuse of the reconciliation process would one day extend to spending if they opened the "floodgates" at this point.[279] A few days later, Senator Domenici offered a budget resolution with an amendment containing reconciliation instructions for the tax cuts,[280] and he, along with Senator Gramm, kicked off a three-hour debate on the reconciliation point, speaking in favor of using the process for tax cuts and relying heavily on the neutral language of the Budget Act and the late 1990s precedents of doing so.[281] Senators Conrad and Byrd also drew upon past Senate Acts to justify their position against reconciliation—from the Roman Senate's defiance of their emperor Augustus' attempt to squelch their debate to the Republican Senate that garnered enough support to pass Reagan's massive tax cuts without the crutch of reconciliation.[282] Senator Byrd responded to the other side's textual argument by stating that even if the original Budget Act did not distinguish between tax increases and tax cuts, "several amendments to the . . . Act have made it quite clear that the purpose of reconciliation was for deficit reduction."[283]

That evening, the Senate adopted the reconciliation amendment.[284] No Republican, however, contested that the Byrd rule, including the provision requiring that bills not reduce revenues

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[278] 147 CONG. REC. S1534, S1532 (daily ed. Feb. 15, 2001) (statement of Sen. Byrd).
[279] 147 CONG. REC. S3264 (daily ed. Apr. 2, 2001) (statement of Sen. Conrad).
[280] 147 CONG. REC. S3498 (daily ed. Apr. 5, 2001) (statement of Sen. Domenici).
[281] *Id.* at S3500 (statement of Sen. Domenici).
[282] *Id.* at S3503, S3501.
[283] *Id.* at S3505 (statement of Sen. Byrd).
[284] *Id.* at S3516.

outside the budget window, would apply to the reconciliation Act.[285] Moreover, the Senate Republicans knew that they could not acquire the three-fifths vote to waive the Byrd rule, a sum equal to that necessary to pass the tax cuts without reconciliation.[286] Thus, with little protest or discussion, Senator Charles Grassley proposed an amendment sunsetting all provisions of the Act at the end of the budget window—September 30, 2011—with no objections on the Senate floor.[287] The conference committee incorporated a modified version sunsetting all provisions on December 31, 2010.[288]

Some provisions in EGTRRA, however, were sunsetted without regard to the Byrd rule in a direct attempt to lower the revenue losses from the Bill. The budget resolution set a limit of $1.35 trillion on the ten-year cost of tax cuts, and adherence to this number became important in obtaining votes from centrist Senators.[289] Thus, the alternative minimum tax relief provisions expired in 2006, and the college tuition deduction terminated in 2005.[290] In addition, many of the provisions in EGTRRA, such as the repeal of the estate tax, were slowly phased in to shrink the costs of the Bill.[291]

Almost immediately after EGTRRA's enactment, Senate Republicans advocated proposals to repeal the sunset provision;[292] however, none of these measures have yet to pass.[293] In spite of this, one cannot really say that the Republicans gambled with the future by passing the sunsetted tax cut. Without reconciliation, the tax bill would have failed. Of course, a more modest tax cut may have garnered the sixty votes needed to break a filibuster, thus deeming the reconciliation process, and hence the sunset, unnecessary. As

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[285] Evans, *supra* note 234, at 414.

[286] *Id.*

[287] *Id.*

[288] Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 901(a), 115 Stat. 38,150 (2001).

[289] *See* GRAETZ & SHAPIRO, *supra* note 235, at 189-90 (describing attempts to meet that figure in order to gain passage by the Senate Finance Committee).

[290] *Id.*

[291] *Id.*

[292] *Id.* at 204.

[293] A provision repealing the sunsets likely demands sixty Senate votes in its favor. If not included in a reconciliation bill, such a provision would need sixty votes to break a filibuster. If inside the reconciliation process, sixty votes would still be needed to waive the Byrd rule.

discussed in Part VII.A, however, in addition to avoiding budget rules, congressional members may also reap political benefits from the sunset provisions.[294] The availability of these benefits may partly explain why sunset repeal has not yet been attained.

A striking aspect of the story of EGTRRA's sunsets is that congressional budget rules, rather than the sunset provisions themselves, are its focus. The sunset provisions were enacted as a direct consequence of the Republicans' choice to use the reconciliation process. The Republicans' previous experience with reconciliation in 1999 meant that the party likely expected that a sunset would again be required when it made the decision in 2001 to pursue reconciliation. That the sunsets were not a surprise to the Senate, and indeed were regarded as inevitable, highlights the interplay between the budgetary process and tax legislation, with the former compelling a certain variant of the latter.

Budgetary concerns poured over into, and deeply affected, the substance of the Tax Act. Even after the sunsets were incorporated into the proposed Tax Act, they remained separate from the tax legislative process. During the floor debates over EGTRRA, critique of the sunset provisions was largely confined to the propriety of employing such devices to estimate revenue effects,[295] rather than their effects on taxpayer behavior and the economy in general. Perhaps because congressional members viewed the provisions as

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[294] *See supra* notes 360-373 and accompanying text.

[295] *See, e.g.*, 147 CONG. REC. H2647 (daily ed. May 23, 2001) (statement of Rep. Stark). Representative Stark stated:

> The bill has gimmicks that artificially reduce the cost of the bill in the 10-year budget window, but blow away the ranch dramatically after the 10-year period. These gimmicks include delayed effective dates, long phase-ins and sunsets. Very few provisions of the Senate bill are fully effective at all times during the budget window.

Id. Similarly, Senator Corzine stated:

> The conference report is not intellectually honest. It cynically includes a variety of provisions designed to hide its true costs. . . . Some are sunsetted after a few years. And all are eliminated after 9 years. . . . These are nothing more than deceptive inventions to shoehorn tax provisions that far exceed $1.35 trillion, the limit agreed to in the in the [sic] budget resolution. These deceptions are intended to divert the American people from the real costs of the legislation. Ultimately, they will only reinforce the public's cynicism about politics.

147 CONG. REC. S5783 (daily ed. May 26, 2001) (statement of Sen. Corzine).

simply a byproduct of the budget process, they could not debate the sunsets from the vantage point of traditional tax policy concerns.

C. JGTRRA

Thus far, the story of sunset provisions in the code by no means tracks the originally conceived purposes for sunsets. The tax sunsets have not been used to shake up alignments with interest groups or to rid the code of obsolete provisions. The legislature, lured by the payoffs from creating repeat players, did not critically evaluate the extender provisions at their sunset dates. By and large, neither did Congress remove the sunsets from legislation that performed well. Budget pressures forced many of these popular laws into the tax purgatory of permanently temporary status. In the late 1990s, the debate over reconciliation showed that the legislative desire to evade budget rules could spur sunsets on widespread tax legislation, and the legislative history of EGTRRA dramatically confirms this as reality.

The sunsets of the 2002 tax cut were intentionally employed to provide only temporary incentives to boost a post-9/11 economy[296] and thus seemed like a return to the traditional rationales behind sunset legislation. In the President's 2004 budget proposal, the Administration opposed permanent enactment of the 2002 tax incentives, such as the bonus depreciation provision.[297] Nonetheless, Congress included the extension of bonus depreciation in the Jobs and Growth Tax Relief Reconciliation Act of 2003 (JGTRRA).[298] When passed, JGTRRA expanded the bonus depreciation from thirty percent to fifty percent of the cost of property and extended the provision for an additional fifteen months.[299]

Whatever one's assessment of the validity of the sunsets in the 2002 legislation, a year later, budget forces would again result in the expiration of an entire tax act. In 2003, the Byrd rule loomed in the

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[296] William G. Gale & Peter R. Orszag, *An Economic Assessment of Tax Policy in the Bush Administration, 2001-2004*, 45 B.C. L. REV. 1157, 1185 n.76 (2004).

[297] *Id.*

[298] Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, § 201, 117 Stat. 752, 755-57 (2003).

[299] *Id.*

background. Also, as in 2001, a group of moderate Senators would affect the substance of the 2003 act by demanding a more modest tax cut than was proposed from the outset.

At the beginning of 2003, the Bush Administration proposed a "Jobs and Growth" tax cut with a "ten-year cost of $726 billion, or $994 billion with added interest."[300] The exclusion of dividend income was the key, and most expensive, component of the plan.[301] A small coalition of moderate Senators—Olympia Snowe (R-Me), George V. Voinovich (R-Oh), John Breaux (D-La), and Max Baucus (D-Mont)—concerned over costs of the possible war in Iraq and the rising federal deficit, stated that they would support tax cut legislation, but if enacted through reconciliation, only up to a cost of $350 billion.[302] The Senate budget resolution was thus drafted to conform to this specification. The two Republican Senators were essential to passing a budget plan, and another year without agreement on the budget would have been politically dangerous for the Republicans.[303] Thus, upon entering into the House-Senate conference, Senator Grassley, the Chairman of the Senate Finance Committee, announced that he and Senate Republican leaders had committed to a $350 billion limit on tax cuts in a reconciliation bill.[304]

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[300] Rep. Fortney Pete Stark, *JEC Report Decries 'Short-Sighted' GOP Tax Cutting Strategy*, TAX NOTES TODAY, May 28, 2003, LEXIS, 2003 TNT 102-20.

[301] *See id.* (noting that exemption of dividend income alone cost almost $400 billion).

[302] *See Senate Clears Jobs and Growth Package with Dividend Exclusion*, TAX NOTES TODAY, May 29, 2003, LEXIS, 2003 TNT 103-58 (referencing letter from Senators to Majority Leader Frist and Minority Leader Daschle stating that because of "international uncertainties and debt and deficit projections . . . any growth package . . . enacted through reconciliation . . . must be limited to $350 billion in deficit financing over 10 years").

[303] Charles Davenport, *Does Snowe Melt?*, 99 TAX NOTES 478, 479 (2003).

[304] On April 11th, Senator Grassley stated on the Senate floor:

> In order to get the necessary support, we made an agreement with Senators Snowe and Voinovich. Let me be clear, without this agreement, the budget resolution conference report would not pass the Senate today. There would be no budget and no growth package without our agreement. That is why the leadership supports my efforts.
>
> The agreement is simple. It relates to the revenue number for the growth package. I agreed that I would not return from the conference on the growth package with a number greater than $350 billion in revenue reductions. This means that, at the end of the day, the tax cut side of the growth package will not exceed $350 billion over the period of the reconciliation instruction.

149 CONG. REC. S5296 (daily ed. Apr. 11, 2003) (statement of Sen. Grassley).

Meanwhile, members of the House also balked at the cost of the President's tax cut proposal, and in the end approved a reconciliation tax cut of $550 billion.[305] The agreement that emerged from conference, however, basically preserved Grassley's commitment. Although it allowed reconciliation tax cuts of up to $550 billion, tax cuts of more than $350 billion would be "out of order" and would thus require sixty Senate votes if the bill was to proceed.[306] Significantly, the House, Senate, and conference budget plans approved *total* tax cuts of more than $1 trillion.[307] That so much drama surrounded the cap of *reconciliation* tax cuts reflects the critical importance of this procedure during times of a slim voting majority.

Some provisions in the original House "Jobs and Growth" tax plan were terminated at the end of 2005 to reduce the cost of the legislation,[308] but the main fixtures of the tax cuts—the dividend and capital gains rate reductions—were scheduled to last until 2012.[309] The conference agreement limited the tax cut to $350 billion, "adopting the tighter constraint of the Senate version but more of the features of the House version."[310] In order to retain the substance of the House version with a cost of $200 billion less, the termination dates were moved significantly forward.[311] The increased child tax credit and the marriage penalty provision were set to expire at 2004 instead of 2005, and the dividend and capital gains tax cuts lapsed after 2008.[312] The conference version of JGTRRA, complying with the letter—if not the spirit—of the demands of the Voinovich contingency, was passed in the Senate

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[305] *See* Davenport, *supra* note 303, at 478 (noting that House members insisted on $550 billion tax cut when "conference on 2004 congressional budget resolution began").

[306] *Id.* at 478-79.

[307] *Id.* at 478.

[308] These included the increased child tax credit and the marriage penalty relief provision. Stark, *supra* note 300. The former, however, has since been extended through 2009 and the latter through 2008. Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, § 101, 118 Stat. 1166, 1167-68 (codified as amended in scattered sections of 26 U.S.C.A.).

[309] Stark, *supra* note 300.

[310] *Id.*

[311] *See id.* (noting that conference agreement allows "generous capital income tax cuts of the House bill" to fit within the Senate's budget constraints by "sunsetting the House cuts sooner").

[312] *Id.*

shortly after House approval, with Vice President Cheney casting the tie-breaking vote.[313] President Bush signed the bill into law on May 28, 2003.[314]

Notably, Senator Snowe voted against the bill, stating that it "relie[d] on artificial 'sunsets' to mask the true size of the tax cuts" and thus "represent[ed] neither sound fiscal nor economic policies and could balloon Federal budget deficits even further."[315] Senator Snowe characterized the bill as "a trillion-dollar tax cut masquerading as a $350 billion tax cut."[316] Similar critiques of the sunsets resounded throughout the floor debates in both Houses. As in 2001, congressional members derided the sunsets, along with the phase-ins, as "Enron-style" accounting gimmicks.[317] Senator Baucus cited the "yo-yo" effect of the new tax cut and indicted his Republican colleagues, arguing that "[i]f accounting gimmicks and financial statement manipulations were intolerable for corporate America, then why not for the Congress?"[318]

Similar critiques had been voiced over the sunset provisions in the 2001 tax cuts,[319] but perhaps past experience provoked a much higher degree of condemnation in 2003. The Democrats believed that the Republicans had every intention of making their "temporary" tax cuts permanent. Within weeks of EGTRRA's passage, the Republicans had offered numerous sunset repeal proposals.[320] Surely they would make similar attempts for the new tax cuts. Unlike the 2001 sunsets, the dates of the JGTRRA sunset

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[313] *Senate Approves Tax Reconciliation Act*, TAX NOTES TODAY, June 5, 2003, LEXIS, 2003 TNT 108-77.

[314] *Id.*

[315] *Id.* (reporting statement of Senator Snowe).

[316] *Id.*

[317] *See, e.g.*, *House Passes GOP's Jobs and Growth Bill*, TAX NOTES TODAY, May 22, 2003, LEXIS, 2003 TNT 99-98. Mr. Blumenauer stated:

> We should reject the Enron-style accounting used in this tax bill, which distorts the true costs and intent of the tax cut package. The Republican estimate of "only" $550 billion was accomplished by putting in unrealistic "sunsets" to various tax provisions. The tax cuts they have every intention of making permanent will increase deficits by over $1.1 trillion if in place over the next 10 years.

Id.

[318] 149 CONG. REC. S7085 (daily ed. May 23, 2003) (statement of Sen. Baucus).

[319] *See supra* note 295 and accompanying text.

[320] *See supra* note 292 and accompanying text.

provisions were not directly compelled by Senate procedural rules,[321] but were used to comply with the demands of certain Congressional members to lower the projected revenue loss of the tax cut.[322] If not for the 2001 chain of events, it is doubtful that the Republicans would be so emboldened to employ the sunset provisions in such an aggressive manner. One seemingly innocuous Senate procedural rule had created conditions that would likely change the drafting of tax legislation for the foreseeable future. Budget pressures had spurred the use of expiring tax provisions in the past, but sunsets on this scale of tax legislation, the first and third largest tax cuts in the history of the United States, were unprecedented.

VI. FURTHER ALTERATION OF THE BUDGET PROCESS

The story of sunset provisions demonstrates that the response to budget rules and pressures can dramatically reshape tax legislation. Legal scholars have explored this phenomenon in other contexts,[323] but before the 2001 and 2003 tax cuts, perhaps no one could have contemplated that Congress would sunset entire tax acts as a reaction to budget pressures. The lure of laxity in the reconciliation process, when coupled with the Byrd rule, led to a far-reaching sunset provision, the likes of which had never been seen before in the Code. In turn, this paved the way for the employment of staggered sunset provisions, the purpose of which was to reduce the revenue costs of an enormous tax act. The presence of these sunsets no doubt has its own consequences, affecting tax planners and taxpayers in myriad ways.[324] The next part of the story, however,

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[321] The Byrd rule, of course, lurked in the background. If earlier sunsets had not already been in place, the Byrd rule would have compelled a ten-year sunset in order to keep the legislation's costs within the budget window.

[322] *See supra* note 302 and accompanying text.

[323] *See generally* Block, *supra* note 37 (examining "pay-as-you-go" provision's effect on federal tax budget policy); Garrett, *supra* note 8 (considering budget rules that shape tax legislation such as "pay-as-you-go"); Graetz, *supra* note 66 (discussing how distributional and revenue numbers are used and misused in tax legislative process); Charles E. McLure, Jr., *The Budget Process and Tax Simplification/Complication*, 45 TAX L. REV. 25 (1999) (analyzing complexity of tax code as function of budget process changes in the 1970s and 1980s).

[324] *See, e.g.*, Leslie J. Daniels, *Practical Impact of the Sunset Provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001 on Retirement, Estate and Gift Tax Planning and Need for Reform*, TAX NOTES TODAY, Aug. 8, 2002, LEXIS, 2002 TNT 153-82 (exploring

suggests that the interaction between the budgetary process and tax legislation is not unidirectional; the sunset provisions in the recent tax cuts have reduced the reliability of revenue estimates and created political obstacles to the re-enactment of certain budgetary procedural rules. In these ways, the sunset provisions of EGTRRA and JGTRRA have further altered the budget process.

A. PLAYING WITH PAYGO

In 2002, many longstanding budget process rules expired, and the debate over their re-enactment has proven more controversial than anticipated. Notably, the PAYGO rules created by the Budget Enforcement Act of 1990 have not been resurrected. These rules required that any increases in entitlement spending or tax cuts be paid for through offsetting spending cuts or tax increases.[325] The President's 2005 and 2006 Budgets called for the reinstatement of PAYGO rules but only as applied to spending increases, not tax cuts.[326] Given that a major cause of the budgets' shortfall[327] is the proposal to make permanent the recent tax cuts, the presence of the sunset provisions has led to the executive branch's failure to support PAYGO rules in the context of tax cuts. Indeed, the early Bush Administration, prior to knowing that the tax cuts would be terminated, supported the continuation of the historical PAYGO rules.[328] To be sure, the threat of offset requirements has never been unmanageable. Congress has often found a way to avoid triggering sequestration under PAYGO. For example, to prevent sequestration stemming from the 2001 tax cut, the 2002 Defense Appropriations conference report simply instructed the OMB director to set PAYGO

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effect of sunsets on retirement, estate, and gift tax planning).

[325] *See supra* note 63 and accompanying text.

[326] OFFICE OF MGMT. AND BUDGET, THE EXECUTIVE OFFICE OF THE PRESIDENT, THE BUDGET FOR FISCAL YEAR 2006, *available at* www.whitehouse.gov/omb/budget/fy2006/pdf/budget/outlook.pdf [hereinafter BUDGET FOR FISCAL YEAR 2006]; OFFICE OF MGMT. AND BUDGET, THE EXECUTIVE OFFICE OF THE PRESIDENT, THE BUDGET FOR FISCAL YEAR 2005, 42-43, *available at* http://www.whitehouse.gov/omb/budget/fy2005/pdf/budget/fiscal.pdf [hereinafter BUDGET FOR FISCAL YEAR 2005].

[327] *See* ROBERT GREENSTEIN & RICHARD KOGAN, CTR. ON BUDGET & POLICY PRIORITIES, ANALYSIS OF THE PRESIDENT'S BUDGET 1 (2002), *available at* http://www.cbpp.org/2-2-04bud.pdf (asserting that "President's budget would make [serious budget] problems worse").

[328] BUDGET FOR FISCAL YEAR 2005, *supra* note 326, at 35.

balances at zero for 2001 and 2002.[329] Such circumvention, however, is not always politically feasible.

The revenue growth caused by the economic incentive effects of certain tax cuts is arguably a justification for asymmetric PAYGO rules. Even if one were to accept this reasoning, however, it is unlikely that it can be extended to all tax cuts. Hence, the proposal's general exclusion of tax cuts is overly broad. Furthermore, the lack of required offsets for tax cuts would significantly encourage legislators to fit social programs into tax legislation as tax expenditures, even when this approach would be more inefficient than entitlement programs.[330]

The Administration's main agenda item, the repeal of the sunset provisions in the 2001 and 2003 tax acts, affects its budget policy in other areas. The President's 2005 Budget proposed a change in the budget rules so that the cost of extending the 2001 and 2003 tax cuts, totaling $936 billion through 2014, would be incorporated in the CBO's budget baseline.[331] The Administration's proposal would effectively compel CBO to calculate the costs of extending the tax cuts—permanently or temporarily—as zero and would thus make re-enactment of the cuts more likely. The Administration contends that treating tax-cut extensions under the baseline is necessary to accord with CBO's similar treatment of entitlement programs.[332] Upon the enactment of temporary entitlement programs, however, CBO ignores the sunset date and accounts for the ten-year costs of the programs.[333] In contrast, CBO recognized the termination dates

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[329] H.R. REP. NO. 107-350, at 118 (2002).

[330] Additionally, if social programs are squeezed into nonrefundable tax credits, a taxpayer whose income is below the minimum amount taxed receives no federal subsidy whatsoever. For instance, many have argued that the nonrefundable child care credit serves as an inadequate proxy for federal child care services to the poor because of this reason. Moreover, the increased use of tax expenditures may further complicate the code and may disproportionately benefit rich taxpayers because of the progressive tax rates. *See, e.g.*, Jonathan Barry Forman, *Using Refundable Tax Credits to Help Low-Income Families*, 35 LOY. L. REV. 117, 130-33 (1989) (proposing to make Child and Dependent Care Credit refundable); Sharon C. Nantell, *The Tax Paradigm of Child Care: Shifting Attitudes Toward a Private/Parental/Public Alliance*, 80 MARQ. L. REV. 879, 937, 939-41 (1997) (noting that I.R.C. § 21 clearly disadvantages poor while benefitting moderate and upper-income families).

[331] *See* BUDGET FOR FISCAL YEAR 2005, *supra* note 326, at 378, *available at* http://www.whitehouse.gov/omb/budget/fy2005/tables.pdf (showing effect of proposals on receipts).

[332] GREENSTEIN & KOGAN, *supra* note 327, at 5.

[333] *Id.*

of the 2001 and 2003 tax cuts as legitimate for accounting purposes,[334] and subsequent inclusion of the cuts in the budget baseline therefore amounts to tax cuts without reckoning. Quite clearly, adoption of this proposal and the Administration's position on PAYGO rules would ease any extension of the tax cuts. Both proposals, however, fail to address increases to the deficit stemming from the extensions of the tax cuts. Indeed, Alan Greenspan spoke strongly in favor of requiring revenue offsets for permanent extensions of the tax cuts and a return to the comprehensive PAYGO rules of the 1990s in order to stem deficits.[335]

The possible repeal of the 2001 and 2003 sunsets has recently elevated the debate over PAYGO to one of the most contentious issues surrounding congressional budget procedure.[336] Congress has failed to re-enact statutory PAYGO requirements since their termination in the fall of 2002, although the Senate has a form of internal PAYGO rules.[337] Many Republican members expressly stated that their opposition to comprehensive PAYGO rules derived solely from the deleterious effect such rules would have on even a temporary re-enactment of the 2001 and 2003 tax acts.[338] Indeed some proposed compromises between the two houses have

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[334] *Id.*

[335] Timothy Catts, *Greenspan Calls for Tax Cut Offsets as Senate Mulls Reconciliation Options*, TAX NOTES TODAY, Feb. 26, 2004, LEXIS, 2004 TNT 38-1.

[336] Robert Keith & Bill Heniff, *CBO Examines Congressional Pay-Go Rules*, TAX NOTES TODAY, Apr. 1, 2005, LEXIS, 2005 TNT 62-33.

[337] H.R. Con. Res. 95, 108th Cong., § 505 (2003).

[338] *See, e.g.*, 150 CONG. REC. H1038 (daily ed. Mar. 11, 2004) (statement of Rep. Portman). Representative Portman stated:

> We feel strongly that the tax relief that was enacted over the last 3 years has now turned this economy around and we are beginning to see growth. So we would hate to subject those to the kinds of pay-go rules that would not have permitted, during the time when the economy was in bad shape, for us to begin to get some economic stimulus and growth.

Id.; *see also* Richard A. Oppel Jr., *Bush Plans for Tax Cuts Barely Avert House Setback*, N.Y. TIMES, Mar. 31, 2004, at A18 (reporting that Senator Snowe, after meeting with President Bush regarding PAYGO issue, stated that "[t]he president wants to make sure that these tax cuts are extended"); Richard A. Oppel Jr., *House Republicans Defeat an Effort to Limit Tax Cuts*, N.Y. TIMES, Mar. 26, 2004, at A16 (stating that comprehensive PAYGO rules have "met stiff resistance from the White House and Republican leaders in Congress, who acknowledge that the rules would make it very difficult to extend most of the Bush tax cuts").

specifically exempted extensions of the 2001 and 2003 tax cuts from the PAYGO rules.[339]

The Administration and Republican legislators further pursued this strategy by mounting a campaign against "arcane" Senate budget rules, blaming them for the uncertainty caused by the sunset provisions. In one floor debate, Representative Johnson even indicted the Byrd rule as threatening the durability of marriage:

> [M]arriage penalty relief is only temporary. Why? Because of an arcane Senate rule that prevented permanent tax cuts. . . . Should we not help make marriages permanent, not temporary? Instead of this tax relief lasting through the diamond anniversaries of weddings, marriage penalty relief will sunset on the aluminum anniversary of this bill.[340]

Far from arcane, the Byrd rule has been invoked fifty-five times between 1998 and 2003, forty-two of which were successful in either striking or barring consideration of extraneous material.[341]

President Bush stated the following in a speech at Presidential Hall on February 19, 2004: "The Congress put [the "death" tax] on its way to extinction. However, it comes back to life in 2011. It's hard to explain the rules of the Senate that allow that to happen, but it does. It just doesn't make sense."[342] The sunsets of the estate tax repeal have been particularly unpopular with taxpayers and are consequently effective tools to taint the public's taste for the budget rules. After all, the repugnance in lifting a tax burden just because someone was "fortunate" enough to die before 2011 seems clear. Yet there is more to the story than simply "arcane" budget rules. While

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[339] *See* Timothy Catts, *Budget Negotiators Agree on Resolution, Pay-Go Rules*, TAX NOTES TODAY, May 19, 2004, LEXIS, 2004 TNT 97-2 (noting exemptions would include bills protected by reconciliation).

[340] *House Votes to Make Marriage Penalty Relief Permanent*, TAX NOTES TODAY, June 27, 2002, LEXIS, 2002 TNT 124-58 (reporting statement of Representative Johnson).

[341] ROBERT KEITH, THE BUDGET RECONCILIATION PROCESS: THE SENATE'S "BYRD RULE" 2 (Cong. Research Serv., CRS Report for Congress Order Code RL 30862, Feb. 19, 2004), *available at* http://www.rules.house.gov/archives/RL30862.pdf.

[342] President George W. Bush, Remarks by the President on the Economy, Presidential Hall, Eisenhower Office Building (Feb. 19, 2004), http://www.whitehouse.gov/news/releases/2004/02/20040219-4.html.

on the Senate floor, Senator Domenici offered the following explanation of the sunsets in the tax cuts:

> Today there is much talk about the tax bill, and people are saying that the tax bill, since many of the tax proposals do not go on forever, is jiggering the Tax Code. I should remind everyone that the tax bill . . . is done under a reconciliation instruction. . . . Therefore, we are bound by the law not to pass permanent tax law changes. So it is not anybody trying to play with the Tax Code. It is the law that says, if you want the benefit of the Budget Act under reconciliation, which means no filibuster and minimal amendments, then you cannot make the tax changes permanent. In other words, it gives you a benefit, and it is a safeguard of permanency not being available at the same time.[343]

Without this context of the reconciliation process, the rules at issue exist in a vacuum, appearing to serve no purpose but to produce arbitrary end-dates for legislation.

Furthermore, the Bush Administration's strategic use of budget windows has perhaps diminished public outcry over the rising deficits. In the President's 2005 Budget, the Administration promised that the deficits would be cut in half in five years.[344] This short budget window was itself inspired by the sunset provisions. Only showing deficit numbers for a five-year period omits a large portion of the Administration's costly proposal to make the tax cuts permanent. Congress has also followed suit. Both 2005 budget panels drafted proposals that cover only five years in order to avoid 2010, the date when most of the tax cuts expire.[345] In so doing, "Congress will not have to overtly rebuff Bush's [and the public's]

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[343] 149 CONG. REC. S7089, S7105 (daily ed. May 23, 2003) (statement of Sen. Domenici).

[344] President George W. Bush, State of the Union Address, United States Capitol, Wash., D.C. (Jan. 20, 2004), http://www.whitehouse.gov/news/releases/2004/01/200402120-7.html.

[345] Jonathan Weisman, *Some GOP Lawmakers Aim To Scale Back Bush Tax Cuts*, WASH. POST, Mar. 2, 2004, at A4.

calls to extend all the tax cuts, but also will not have to cover the costs of such an extension."[346]

In summary, proponents of the recent tax cuts have used the threat of sunsets to loosen budget constraints, such as PAYGO, which were enacted to reduce deficit-spending. In effect, the looming sunsets in the tax acts have created the political conditions necessary to bar re-enactment of strict budgetary constraints for legislators, conditions which will, in turn, prove helpful in enacting future tax cuts. These phenomena illustrate the complex relationship between tax legislation and the budgetary process and the strong influences each has upon the other.

B. HIDDEN COSTS

The aggressive use of sunsets in the 2001 and 2003 tax acts illustrates the new heights to which Congress will go to control budget rules and revenue estimates. Because the sponsors of these bills wish to extend or make permanent their provisions, opponents argue that the official revenue tables do not account for the "true cost" of the tax cuts.[347] According to these critics, congressional members such as Senator Voinovich should never have voted to pass the act since its costs are far greater than the amount the centrists insisted upon.[348] For instance, JGTRRA, the official cost of which is estimated at $350 billion, would incur revenue losses from $807 billion to $1.09 trillion through 2013 if the sunsets never occur.[349] Even a supporter of the bill, House Speaker Dennis Hastert, concurs in this assessment, stating that "[t]he $350 [billion] number takes us through the next two years, basically. But also it could end up being a trillion-dollar bill, because this stuff is extendable. . . . It's not a bad fight to have."[350]

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[346] *Id.*

[347] *See Economic Analysis: False Alarms and Real Problems with Budget Gimmicks*, TAX NOTES TODAY, May 26, 2003, LEXIS, 2003 TNT 103-2 (suggesting that tax package will cost far more than estimated $350 billion).

[348] *See id.* (suggesting Voinovich can no longer claim to be "deficit hawk" after signing tax package).

[349] William G. Gale & Peter R. Orszag, *Sunsets in the Tax Code*, 99 TAX NOTES 1553, 1553 (2003).

[350] *See* Mark Wegner & Richard E. Cohen, *Hastert Salutes 'Trillion-Dollar' Tax Bill, Looks*

In this sense, the 2001 sunsets differed from the 2003 sunsets in that the latter expired faster and thus perhaps more radically underestimated revenue costs.[351] The costs "hidden" by the sunset provisions are substantial. The Brookings Institution estimates that removing all sunsets in the tax code would amount to a revenue loss of $2 trillion over the next ten years or $2.3 trillion if added interest payments are taken into account.[352] This comports with estimates produced by the Congressional Research Service.[353] Because the revenue losses escalate with time, the cost of removing sunsets would equal 2.4 percent of GDP.[354] In comparison, "the 75-year actuarial shortfall in the Social Security Trust Fund is 0.73 percent of GDP."[355] Should CBO simply assume that the sunsets will be repealed in compiling their budget estimates? A resounding 'yes' would likely be the Democrats' answer to this question, but in so doing, the party essentially admits that it will have no political traction in the tax policy arena for years to come. In reality, however, the tax cuts may not be permanently enacted. Indeed, if the 2004 Presidential election had produced a different outcome, then most of the tax cuts—aside from those provisions aimed at the middle class such as the child tax credit increase and the marriage penalty relief—would not have a chance of permanence. Thus, the accounting of sunsets, in some sense, reflects reality, and in this manner, sunsets differ from "true" budget gimmicks.

CBO must follow current law in estimating the budget outlook. Prior enactment, however, increases the likelihood of re-enactment. First, the interest groups that initially supported the provision may remain poised and organized while the sunset is in place. The cost

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to Medicare Debate, CONG. DAILY, May 23, 2003, *available at* 2003 WLNR 13652870 (quoting House Speaker Hastert).

[351] DEM. STAFF OF H.R. COMM. ON THE BUDGET, 108TH CONG., SUPPORT THE DEMOCRATIC JOBS AND ECONOMIC GROWTH PLAN AND OPPOSE REPUBLICAN TAX CUTS 1 (2003), *available at* http://www.house.gov/budget$democrats/congressional$budgets/fy2004/thomas$taxcuts.pdf.

[352] Gale & Orszag, *supra* note 349, at 1553.

[353] *See* Gregg Esenwein, *CRS Updates Report on Extending Recent Tax Cuts*, TAX NOTES TODAY, June 21, 2005, LEXIS, 2005 TNT 118-34 (discussing effects of extending EGTRRA and JGTRRA).

[354] *See* William G. Gale & Peter R. Orszag, *An Economic Assessment of the Tax Policy in the Bush Administration, 2001-2004*, 45 B.C. L. REV. 1157, 1183-84 (2004) (noting effect over time of extending temporary tax cuts).

[355] Gale & Orszag, *supra* note 349, at 1553.

of most tax provisions usually falls upon a disengaged public, so renewal is more likely. Moreover, from a process perspective, the tax cut has previously made its way through "vetogates" and thus may have a procedural advantage over unenacted bills.[356] Second, by changing the baseline from "tax cut" to "tax increase," the status quo is now a world *with* the tax cuts. Cognitive psychology research suggests that people are loss-averse, and entitlement to a right or object creates an "endowment effect, that is, a greater valuation stemming from the mere fact of endowment."[357] Taxpayers will likely view the lapse of these provisions as a tax increase because taxes will rise upon the sunset dates. On the other hand, it may be politically feasible for the Democrats to avoid such attacks by highlighting that they did not affirmatively raise taxes; a sunset requires no further votes to take effect.

The solution is to multiply the costs outside of the sunset dates by the probability of re-enactment and add these to the official revenue estimates of the sunsetted act. Unfortunately, no one can effectively predict the likelihood of sunset removal. Analogy to the extenders may place such a probability at nearly 100 percent;[358] the extenders were narrow and rather innocuous provisions, however, and thus easy targets for vote-trading. In contrast, the large scope of the recent tax acts and their controversial nature, along with possible growing concern over the deficit, means that Congress will not sleep through the floor debates on the issue of extension.

Calculations of the budget effects of legislation have historically been challenging and subject to gaming. However, the existence of the current sunset provisions in the tax code may cause underestimation of a bill's impact by trillions of dollars—an amount that potentially renders revenue estimates meaningless. Furthermore, as discussed in Part VI.A, sunsets create laxity towards budget rules.[359] At stake in this debate, then, is the relevance of the congressional budget process.

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[356] *See* Eskridge, *supra* note 21, at 62.

[357] Cass Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175, 1179-81 (1997).

[358] Indeed, many scholars have predicted permanent enactment of the 2001 and 2003 cuts because of the experience with the extenders. *See, e.g.*, Garrett, *supra* note 78, at 196 (suggesting existence of political commitment to extend tax provisions).

[359] *See supra* notes 325-346 and accompanying text.

VII. OTHER IMPLICATIONS OF THE 2001 AND 2003 SUNSET PROVISIONS

A. EFFECTS ON THE POLITICAL ECONOMY

In his classic work *The Logic of Collective Action*, Mancur Olson theorized that individuals with much at stake will coalesce around common interests, forming small groups and thereby overcoming collective action problems.[360] Through campaign contributions and lobbyists, these groups seek legislative votes favorable to their interests from politicians.[361] The extenders' story lends support for the aspect of Olson's theory that states lawmakers can also act as captors by creating legislation benefitting certain groups that requires votes and money to sustain. By directly creating opportunities to extract rents, the sunsets in the 2001 and 2003 tax cuts may have provided some benefits for congressional members. Only six months after EGTRRA became law, Congress debated and narrowly rejected The Death Tax Elimination Act of 2001 (H.R. 8).[362] Subsequent attempts to make permanent the estate tax repeal,

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[360] *See* OLSON, *supra* note 18, at 2, 36, 53-54, 167 (explaining that small groups, as opposed to large ones, will work to achieve common interests).

[361] *See* Linda R. Cohen et al., *Shakedown at Gucci Gulch: A Tale of Death, Money and Taxes* 5, 16 (USC-Caltech Ctr. for the Study of Law & Politics, Working Paper No. 22,2003), *available at* http://lawweb.usc.edu/cslp/papers/cslp-wp-022.pdf (discussing interest groups' relation to political processes). Cohen, McCaffery, and McChesney argue that Congress failed to compromise on the estate tax issue in order to create interest groups, and therefore to create rent-extracting opportunities. *Id.* at 5. The authors name this phenomenon "ex ante rent extraction." *Id.* This Article supports the thesis that sunset provisions, including those in EGTRRA, provide opportunities for rent extraction but expresses no opinion on whether the estate tax issue was initially pursued to create interest groups.

[362] *See Senate Debates, Shelves Bill To Make Estate Tax Repeal Permanent*, TAX NOTES TODAY, June 27, 2002, LEXIS, 2002 TNT 124-57 (noting that needed vote of sixty "yeas" was not met). During 2002, the House passed a number of amendments that would have removed some or all of EGTRRA's sunsets. The Tax Relief Guarantee Bill, H.R. 586, 107th Cong. (2002), would have made the entire act permanent. The Permanent Death Tax Repeal Act of 2002, H.R. 2143, 107th Cong. (2002), Marriage Penalty Tax Bill, H.R. 4019, 107th Cong. (2002), and Retirement Savings Security Act of 2002, H.R. 4931, 107th Cong. (2002), would have repealed the sunset provisions for the estate tax repeal and marriage penalty benefits. The Senate failed to enact any of these bills. *See* http://thomas.loc.gov/bss/d107query.html (last visited Sept. 23, 2005).

along with other provisions in EGTRRA and JGTRRA, have been unsuccessful.[363] The looming presence of the sunset provisions, as well as the patchwork created by the phase-ins, creates significant instability in this area of law. Certain groups promise political support and campaign contribution to avoid elimination of provisions, namely the estate tax repeal and the lower dividend rates, from which they benefit.[364]

Lowi assumed a level playing field among proponents and opponents of the laws under review;[365] it takes a large amount of resources, however, to lobby on behalf of legislation. Sunset provisions are problematic because they demand the expenditure of resources by interested parties on a continual basis (until, of course, the law is sunsetted). Thus, the well-connected and well-resourced players have a significant advantage, which increases across time, in the competition over sunsetted legislation. Indeed, the expansive use of sunset provisions may lead to more tax legislation that, from the outset, benefits such well-financed players, because legislators will want to engage those interest groups that can contribute upon each sunset date. Moreover, the recurrent threat of extinction produces more transactional waste.

Tax expenditures can easily be tailored to benefit a small segment of the population at the cost of the entire tax-paying public. Moreover, "tax politics tends to be dominated by interest groups that seek favors for themselves and that, through a norm of logrolling, almost never oppose favors for each other."[366] Hence, the tax legislative context in particular is susceptible to "client politics."[367] Sunset provisions only exacerbate this tendency by demanding

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[363] *See* Blanche Lark Christerson, *Planning in an Uncertain Planning Environment*, *in* UNDERSTANDING ESTATE, GIFT & FIDUCIARY INCOME TAX RETURNS 2004, at 9, 11 (Practicing Law Institute ed., 2004) (discussing congressional inability to make sunset provisions permanent); *see also* Esenwein, *supra* note 353 (noting multiple bills introduced to Congress that would make tax cut provisions permanent).

[364] *See generally* Cohen, *supra* note 361 (describing political role of interest groups in legislative action, including repeal of estate tax provision).

[365] *See supra* notes 95-104 and accompanying text.

[366] DANIEL SHAVIRO, WHEN RULES CHANGE: AN ECONOMIC AND POLITICAL ANALYSIS OF TRANSITION RELIEF AND RETROACTIVITY 86-87 (2000).

[367] J.Q. WILSON, THE POLITICS OF REGULATION 368-69 (1980) (defining "client politics" as the likely result "when the benefits of a prospective policy are concentrated but the costs widely distributed").

sustained lobbying effort—a criterion that the general public generally cannot fulfill due to collective action, free-rider, and other organizational and coordination difficulties. Where sunset provisions are present, market failures are hence more likely to ensue in the form of an over-supply of legislation with concentrated benefits and distributed costs. Additionally, sunset provisions, by providing for termination, produce legislation that reflects no policy commitment. In this manner, legislators avoid "incur[ring] the wrath of opposing interest groups" in the case of legislation with concentrated benefits and costs, instead providing hope to each group.[368] Thus, legislators can extract rents from both groups upon each sunset date, without regard to the most socially optimal policy choice.[369]

It could be argued that sunset provisions do not necessarily increase the resources expended by a particular interest group. For instance, instead of paying $10,000 to obtain a provision that produces ten years of benefits, interest groups will simply pay $1,000 for each year that the benefit is enacted. This view, however, may not be entirely accurate. First, because a politician may retire or be voted out of office, interest groups may pay a premium for short-term contracts. This is to avoid duplicative payments in the event that an interest group provides rents to receive a long-term benefit only to find its supporter no longer in a position of influence.[370] Because of the complex web of contracts amongst congressional actors in the tax-writing process, the riskiness involved in long-term contracts is pronounced.[371] Second, because of the recently enacted campaign finance rules, political contributions are limited on an annual basis.[372] By providing annual opportunities to reengage the legislature rather than demanding the totality of rent upfront,

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[368] *See* Eskridge, *supra* note 21, at 59.

[369] *See* Cohen, *supra* note 361 (arguing that Congress uses issues, like the estate tax repeal, that have opposing interest groups in order to extract rents).

[370] Richard L. Doernberg & Fred S. McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 MINN. L. REV. 913, 947-49 (arguing that rent extraction can partly explain the increasing prevalence of short-term legislative deals in the tax context). Such a premium presumably must be reduced by the increased transaction costs involved in short-term deals.

[371] *Id.*

[372] *See* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 2 U.S.C. (Supp. II 2004)).

sunset dates increase the amount an interest group can contribute to obtain a benefit. Indeed, the value of this benefit must not be overlooked in determining the possible causes for the rise in sunsetted legislation. Sunset provisions were implemented to avoid budgetary limitations, and they may also be used to indirectly avoid campaign finance limitations. It could certainly be argued that this interaction creates more risk of legislative market failure. By increasing the amount of rent available for extraction, sunset provisions further skew the economy for legislation to favor well-resourced interest groups.

Furthermore, once lobbyists and fundraisers are mobilized, not only will congressional members directly benefit, but as discussed in Part VI.B, "tax cuts will have a leg up on spending increases in future budget debates."[373] In this manner, the existence of the sunset provisions may provide subtle benefits to legislators whose constituents support future tax cuts.

B. SUNSET ON TAX POLICY

The sunset provisions in the 2001 and 2003 tax cuts were enacted in response to budget rules and to lower estimates of revenue loss resulting from the tax cuts. The political motivations behind the enactment of the new sunsets in the code indicate a dramatic transformation of the tax legislative process by demonstrating the tremendous and growing influence the budget process has in shaping tax legislation. The story of the sunsets in the code suggests that when budgetary and tax legislative processes intersect, budgetary concerns can, and often do, supplant debate over the achievement of traditional tax policy goals. The existence of a closely divided Congress that made relevant budget reconciliation pressures resulted in the 2001 and 2003 sunset provisions and hence foreclosed any meaningful debate over the practical impact of such provisions.

Critics indict the sunset provisions as "the worst kind of tax policymaking because burdens are placed on taxpayers solely to accommodate political concerns that mean nothing to anybody

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[373] Martin A. Sullivan, *Economic Analysis: False Alarms and Real Problems with Budget Gimmicks*, TAX NOTES TODAY, May 29, 2003, LEXIS, 2003 TNT 103-2.

outside of Washington."[374] The sunset provisions, they argue, create uncertainty.[375] Uncertainty hurts economic performance by diminishing the incentive effects of the tax cut.[376] In addition, uncertainty creates economic waste by increasing planning, administration, and compliance costs.[377] In reality, taxpayers must always discount for the possibility of repeal or other legislative changes. The tax code, after all, is not etched in stone. Nonetheless, an expiration date provides an opportunity for legislators to remove a tax benefit without affirmatively acting and thus may increase the possibility of legislative change. Regardless, it is unarguable that sunset provisions complicate the Code.

If the use of sunsets had been forbidden or not yet discovered, the substantive tax provisions in EGTRRA and JGTRRA would likely have differed significantly from their current incarnations. The revenue outlays for the cuts, of course, would have been much less on a per year basis. In this manner, a nonsunsetted EGTRRA or JGTRRA may have been more fiscally sustainable, assuming that the sunsets do not actually occur. This reduction in revenue losses could have been achieved in various ways. For example, Congress could have simply lowered the reduction in the capital gains rate. A slightly higher but permanent tax rate may spur capital investment to a greater extent than a slightly lower capital gains rate whose fate is uncertain. Nonsunsetted tax cuts may also have addressed a narrower scope of issues in an attempt to meet target revenue goals. Instead of containing a range of provisions that arguably do not produce their intended impacts on the economy because they are short-lived, nonsunsetted tax cuts may have targeted a smaller number of permanent tax provisions which do alter taxpayer behavior in their intended manners.[378]

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[374] *Id.*

[375] *See* Gale & Orszag, *supra* note 354, at 1184 ("The extensive use of sunsets creates uncertainty with regard to expectations about future tax policy.").

[376] *See* Sullivan, *supra* note 373 (stating that taxpayers faced with uncertain tax laws will fail to take into account possibility of future changes, and that tax cut may be more windfall than incentive to save).

[377] *See id.* (noting that this diminishes potential benefit of tax cut).

[378] Of course, one could predict that Congress, if prohibited from using sunsets, would simply shift its revenue games to other techniques, such as phase-ins, which may also negatively alter taxpayer incentives.

Budget pressures, however, made the enactment of the sunset provisions a near-inevitability. Thus, they were written into the code without regard to these critiques. During the floor debates over EGTRRA and JGTRRA, controversy over the sunset provisions centered around the revenue estimating problems they created.[379] Legislative critiques of the provisions' efficiency and fairness were confined largely to postenactment debates over sunset repeal bills.[380] Many scholars have decried the extent to which traditional tax policy is crowded out by the budget process,[381] but a blanket critique of the predominance of budget concerns overlooks the importance of placing limits on congressional overspending. However, reducing the deficit by curtailment of tax legislation may, in the end, prove inefficient if, for instance, the particular form of the tax provisions resulting from the confines of budget rules greatly distort decisionmaking. In the case of the sunset provisions, however, it is unnecessary to delve into this cost-benefit analysis. As this Article illustrates, the sunset provisions, although inspired by the budget process, impede the achievement of fiscal responsibility in the government. Thus, traditional tax policy is forsaken for nothing in return.

VIII. THE "KILL THE CODE" MOVEMENT

Budget rules and pressures determined the presence of sunset provisions in the recent tax cuts, as well as in the tax extenders. This Article, however, also examines the effect of sunset provisions upon the budget process. Post-enactment, their use influences the budget process by reducing the reliability of revenue estimates and by impeding the re-enactment of certain budget rules. One could argue, however, that sunset provisions provide useful legislative functions when they do not interact or interfere with the budget process. In rebuttal of this argument, this Article demonstrates another danger in sunset provisions—the creation of rent-extracting opportunities. Nonetheless, the democratic benefits of sunset

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[379] *See supra* notes 308-313 and accompanying text.
[380] *See supra* notes 315-318 and accompanying text.
[381] Graetz, *supra* note 66, at 672-73.

provisions may outweigh their negative effects on the budget process and on the economy for legislation. Through exploration of another sunset proposal, this Part argues that sunset provisions likely do not fulfill their proclaimed democratic functions. Although this proposition has been suggested throughout this Article, discussion of a sunset law whose creation was not propelled by budget concerns or the desire to extract rents provides a means to explore this hypothesis in a concrete and succinct manner.

A. THE ATTACK ON THE CODE

In the mid-1990s, the federal income tax came under strong attack. During the 1996 presidential campaign, candidate Steve Forbes proposed to scrap the current tax structure and erect a flat tax.[382] Supporters of this proposal promised that under a flat tax, the average tax return would be the size of a postcard.[383] The leaders of the tax reform movement argued that in its current form, the code had become unwieldy in its complexity,[384] a proposition with which few would disagree. Many condemned the Internal Revenue Code as difficult to administer, arguing that it cost over $150 billion to comply with its provisions.[385] One Senator captured public frustration with the code by stating that "[i]t has been amended and added to and jiggered with over the years and years to where it just does not make any sense."[386]

In addition to the code's "obsoleteness" and "complexity," other tax reformers argued that the code was riddled with special interest preferences and should therefore be scrapped altogether. In the 1990s, Steve Forbes repeatedly argued that interest group influence created the need for a new code:

> Passing laws against lobbyists is sort of like passing laws against mosquitoes. Washington attracts mosquitoes the

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[382] James Surowiecki, *A Cut Too Far*, NEW YORKER, Apr. 21, 2003, at 68.

[383] ROBERT E. HALL & ALVIN RABUSHKA, THE FLAT TAX 52 (2d ed. 1995).

[384] *Id.*

[385] *See, e.g.*, *Senate Continues Debate on Budget Resolution*, TAX NOTES TODAY, Apr. 8, 1998, LEXIS, 98 TNT 67-34 (relaying Senator Brownback's dissatisfaction with Internal Revenue Code).

[386] *Id.*

> way swamps attract mosquitoes. Special interests go there. Don't we need to drain the swamp first to get the mosquitoes out of the way. And don't we have to get rid of the tax code first?[387]

Thus, the main complaints lodged against the tax code aligned perfectly with the functions that sunset provisions were historically designed to fulfill—to shed inefficient laws and to dislodge interest groups from the public infrastructure.

In the summer of 1998, the tax reform movement peaked when the House of Representatives approved the Tax Code Termination Act, a proposal that would have sunset the Internal Revenue Code in its entirety on December 31, 2001.[388] The bill, however, never made it out of the Senate Finance Committee, largely because the proposal did not provide for a replacement tax system; rather, it only generally mandated that "any new Federal Tax system" be "simple and fair."[389] What would have happened if this bill, or the similar proposals that followed, had become law? This section briefly explores this hypothetical, focusing on whether the sunset provision in the Tax Code Termination Act could have accomplished its intended purposes.

B. DISLODGEMENT OF INTEREST GROUPS?

Advocates for "kill the code" legislation argue that the code has become subservient to special interest influences. Historically, however, sunset provisions have not been effective at dislodging

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[387] On the Issues, *Steve Forbes on Government Reform*, http://www.issues2000.org/Celeb/Steve$Forbes$Government$Reform.htm.

[388] Tax Code Termination Act, H.R. 3097, 105th Cong. (1998). There have been numerous other proposals to "kill the code." *See, e.g.*, H.R. 2483, 105th Cong. (1997) (proposing to terminate Internal Revenue Code of 1986); *see also* Date Certain Tax Code Replacement Act, H.R. 4199, 106th Cong. § 2 (2000) (explaining that purpose of bill is to "set a date certain for replacing the Internal Revenue Code of 1986"); Heidi Glenn, *Largent Bill Would Sunset Tax Code in 2001*, TAX NOTES TODAY, Sept. 18, 1997, LEXIS, 97 TNT 181-6 ("Tax Code Termination Act would sunset the federal income tax code on December 31, 2001.").

[389] Tax Code Termination Act, H.R. 3097, § 3(a).

entrenched interest groups. After enactment of widespread sunset legislation at the state level in the 1970s, it became apparent that the same special interest groups who succeeded in the initiation of the government programs also triumphed during the review process.[390] The state experience serves as a reminder that interest groups do not simply disappear once a sunset is declared. Indeed, the presence of a sunset simply provides more opportunities for legislators to extract greater rent from interest groups. The story of the tax extenders,[391] in which tax provisions are renewed year after year in part so that legislators can solicit campaign contributions and votes upon the sunset date, is further evidence that a new tax code would succumb to special interest influence.

Sunsets are most likely to be ineffective at removing interest group influence when a law, as opposed to an agency, is terminated. In such a case, the same legislative body that enacted the corrupted law will, by and large, be in charge of drafting its replacement. Indeed, certain legislative institutions exist so that a lawmaker can signal to interest groups that she will protect their tax benefits for years to come. For instance, "incumbency reinforced with a strong seniority system and a stable committee structure"[392] serves this function. This structure increases the value of the deal to the interested party, which in turn allows the lawmaker to extract more rents. Because various mechanisms serve to entrench relationships between legislators and interest groups, the Tax Code Termination Act would likely have had little impact on interest group dynamics, aside from creating another occasion for legislators to extract greater rents and possibly carving out political space in which new interest groups can lobby.

Steve Forbes suggested that simply "drain[ing] the swamp" would dry up the special interest "mosquitoes."[393] The examples explored in this Article, however, show that nothing will prevent the

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[390] *See, e.g.*, COMMON CAUSE, *supra* note 115, at 28-31 (indicating that one-third of states surveyed indicated that only licensed professionals attend public hearings on sunset issues); *see also* Donald L. Martin, *Will the Sun Set on Occupational Licensing?*, 53 STATE GOV'T 63, 67 (1980) (arguing that sunsets have failed in occupational licensing context because of inadequate review and strong lobbying).

[391] *See supra* notes 325-345 and accompanying text.

[392] Garrett, *supra* note 8, at 545.

[393] *Steve Forbes on Government Reform*, *supra* note 387.

mosquitoes from returning while the new code is being formulated. In *The End of Liberalism*,[394] Lowi rejected the thinking of his political theory predecessors, the optimistic pluralists, who theorized that interest groups would emerge on all sides of an issue and that legislative safeguards would ensure rational allocation between the groups' needs.[395] It is ironic, then, that Lowi's solution to the capture by interest groups—sunset provisions—creates further domination by advantaged factions.

C. OVERCOMING OBSOLESCENCE?

In *Federalist Paper No. 62*, James Madison wrote: "It will be of little avail to the people . . . if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood. . . ."[396] The tax reformers of the mid-1990s thought that the Internal Revenue Code had fallen irreparably into the state that Madison had cautioned against. Instead of identifying its particular weaknesses, however, the reformers believed that the entire code should be scrapped. Although the sunset would rid the code of obsolete provisions, its scope would be overbroad and would target efficient aspects of the tax law as well. This crudeness in application is one of the main defects of sunset laws—one that, at best, neutralizes the gains from eradicating ineffective laws and bodies. If the sunset provision is more narrowly tailored than that in the Tax Code Termination Act, a review process could theoretically overcome this problem by providing an opportunity to sort out the "sunset worthy" provisions. Interest group activity, however, may preclude meaningful evaluation upon sunset by ensuring ineffective laws survive scrutiny at the review stage.

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[394] THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 51 (2d ed. 1979).

[395] *See generally* W. BINKLEY & M. MOOS, A GRAMMAR OF AMERICAN POLITICS (1949); R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956). These theorists were influenced by the ideas of James Madison, who argued that the structural features of the legislature would deter capture by factions. William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 280-81 (1988); *see, e.g.*, THE FEDERALIST NO. 51 (James Madison).

[396] THE FEDERALIST NO. 62, at 367 (James Madison) (John D. Lewis ed., 1967).

Unfortunately, the imprecise application of sunset provisions also accounts for its popularity with legislators. As one presidential pollster quipped, "[The Tax Code Termination Act] is a dodge by the Republicans who can't get together on a tax plan, so maybe they can get together on an anti-tax plan."[397] The sunset proposal allowed legislators to avoid definitive positions on tax provisions. They did not have to decide whether to back a flat tax or whether to maintain progressive taxation and popular incentive provisions such as the mortgage interest and charitable contribution deductions.[398] Thus, the sunset bill was able to net a more diverse group of sponsors, such as House Majority Leader Richard K. Armey, a proponent of a flat tax, and Representative W.J. Tauzin, a supporter of a national sales tax.[399] Indeed, the stark simplicity of the sunset proposal is likely the reason it received so much attention in the populace: "[I]t is an easy concept to grasp. People love the idea that they will not have to deal with the tax code . . . [which] is big and scary."[400] In this manner, congressional members who supported the Termination Act received accolades for their adherence to "fundamental tax reform" without having to articulate the shape of such reform.

IX. CONCLUSION: AN APPRAISAL OF SUNSETS

The story of sunset provisions in the code chronicles how these "good government" reform devices are, in actuality, rent-extracting mechanisms that encourage budgetary sophistry. First, sunset provisions evade political constraints in the budget process whose purpose is to safeguard against congressional over-spending. The sunset provisions of the extenders and, much more dramatically, the 2001 and 2003 tax cuts were enacted to underestimate the revenue losses of the provisions to which they apply. Second, sunset provisions further reduce the reliability of revenue loss estimates. Moreover, the existence of sunset provisions in the recent tax acts

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[397] Thomas B. Edsall, *GOP's Tax Code Termination Act Hits Snag; Poll Shows Majority Swayed by Democratic Criticism That Plan Is Reckless*, WASH. POST, Mar. 15, 1998, at A4.

[398] *Id.*

[399] *Id.*

[400] Clarissa C. Potter, *Keynote Presentation: Big Tax Reform, Little Tax Reform*, 13 ST. JOHN'S J. LEGAL COMMENT. 128, 134-35 (1998).

has created political conditions under which re-enactment of important budget rules, such as the PAYGO provisions, is very unlikely while sunset repeal is on the table.

Third, sunset provisions threaten the continuance of tax benefits and thus allow legislators more possibilities to extract financial and electoral contributions from the recipients of those benefits. Therefore, politicians have an incentive to perpetually endanger provisions that provide rent-extracting opportunities. The case of the tax extenders—in which many popular provisions, such as the R&D credit, were never made permanent—supports this hypothesis. Both EGTRRA and JGTRRA contain core provisions advantaging a narrow group of individuals and entities. These groups vie for the extension of benefits in their interest while legislators, by collecting rents, make the most out of the disagreement over the permanent enactment of the tax cuts.

The story of the sunset provisions in EGTRRA and JGTRRA signals an impending crisis in the budget and tax legislative processes. While sunset provisions have been in the code for nearly two decades, the tax extenders "were almost a legislative afterthought."[401] In contrast, "[t]he tax cuts of the past three years . . . have made the expiring tax provisions one of the central long-term fiscal policy questions facing the nation."[402] To put the extenders in perspective, from 1996 until 2001 it would not have cost more than $22 billion in the tenth year to make permanent all of the termination provisions.[403] After enactment of the 2003 Act, it would cost more than $430 billion in the tenth year to repeal the sunset provisions.[404] Rent extraction may produce correspondingly greater instances of legislative market failure in the case of the recent tax acts although their high public visibility, in contrast to the extenders, may mobilize groups with diffuse interests.

The sunset provisions in the tax code—the use of which departs significantly from both historic rationales for sunsets and the tax policy concerns of equity, efficiency, and simplicity—have also

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[401] Gale & Orszag, *supra* note 349, at 1559-60.

[402] *Id.*

[403] Robert Greenstein et al., *CBPP Analysis of New Tax Cut Law*, TAX NOTES TODAY, May 29, 2003, LEXIS, 2003 TNT 103-27.

[404] *Id.*

created other negative consequences. Such provisions complicate the code and produce tax planning difficulties. Many blame the dominance of the budget process in the formulation of tax legislation as the reason for the enactment of ill-conceived sunset provisions in the recent tax acts. Yet these political constraints in the budget process serve a valuable function in diminishing legislative tendency to overspend. It may be contended that legislators will always devise ways to get around the budget rules. This may be so, but it does not prove that the public will be better off without them. Indeed, the considerable extent to which such evasion occurs, as evidenced by the enactment of the recent tax sunsets, indicates that Congress will not exercise discretion without constraints on its behavior.

Of course, the true problem is not budget rules but congressional misbehavior. Legislators act in their own self-interest by extracting rents and by pleasing certain constituents without concern for the social welfare costs of doing so. This Article contends that sunset provisions, at least in the tax legislative context, inherently facilitate and even dramatically increase such misuses. Proponents of sunset provisions argue that to forbid sunset provisions in all contexts would eliminate an important democratic tool—one that greatly assists legislators in maintaining a relevant, narrowly tailored repertoire of public bodies and laws. This Article, however, suggests that sunsets are largely ineffective at dislodging interest groups and at targeting and removing ineffective laws. Even assuming sunset provisions can be initially drafted to achieve salutary ends, the example of the tax extenders highlights the fact that the benign forces producing a sunset may not be the same as those that sustain it.

It can be further argued that a temporal element already exists in our government to ensure against stagnation; the public elections of our congressional representatives serve the same supposed function of sunset provisions. "Vetogate" theory identifies legislative procedural bias toward the status quo,[405] and thus casts doubt upon the ability of the electoral process to serve as a proxy for sunset

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[405] *See, e.g.*, ESKRIDGE & FRICKEY, *supra* note 21, at 44-45 (explaining vetogates as procedural doors that bills must pass through).

provisions. Nonetheless, sunsets, while arguably disrupting the status quo through termination dates,[406] create asymmetric results that favor narrow sets of well-resourced constituents in so doing, as discussed in Part VII.A, thereby also distorting the "will of the people."

The political pressures leading to the dramatic transformation of sunsets in the tax code starkly reveal the points of vulnerability in the legislative process. Three decades ago, neither the advocates of sunset legislation nor its opponents predicted that sunsets could be used to extract rent nor their effect upon the budget process. Indeed, Lowi lobbied for sunset legislation as a means to reduce undesirable aspects of interest group activity.[407] In actuality, sunset provisions do not shake up interest group alignment—upon the nearing of the sunset date, interest groups will simply re-engage legislators. Thus, sunset provisions further politicize the legislative process rather than reduce problematic forces in the political economy.

Sunset provisions have confused the budget process and have created greater possibility for social inefficiencies from a political economic perspective without contributing to the coherence of the Code. Because the tax legislative arena, more so than other areas of law, is notoriously susceptible to interest group pressures,[408] perhaps sunsets in the tax code should be limited directly. It could be argued that enactment of a meaningful review process upon sunset dates could cure some of the defects of sunset legislation. Such a solution, however, would expend enormous resources by requiring untargeted review for all laws and may do little to combat

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[406] This Article has offered evidence questioning the ability of sunset provisions to disrupt the status quo. *See, e.g.*, *supra* notes 355-378 and accompanying text.

[407] *Id.*

[408] As Kyle D. Logue has stated:

> [T]he real world tax code is more likely to be shaped by interest group politics than by academic research. To put the point in standard public choice terms, the well-organized and interested few (namely, those taxpayers who tend to benefit from a particular tax subsidy and who tend therefore to lobby in favor of its enactment and against its repeal) can be expected to win out over the poorly organized and dispersed taxpaying general public whose overall tax burden will have to go up to pay for the various tax subsidy provisions.

Kyle D. Logue, *Legal Transitions, Rational Expectations, and Legal Progress*, 13 J. CONTEMP. LEGAL ISSUES 211, 256 (2003).

the continual extraction of rents by legislators from interested parties.[409] Another possible solution is to tie the end dates of legislation to previously agreed-upon benchmarks.[410] Nonetheless, the subjectiveness involved in applying benchmarks may still leave room for rent-extraction. Additionally, genuine appraisal of sunset provisions will not ameliorate the alarming problems of sunsets that are activated by their interaction with the budget process.

Through this Article, the author hopes to have shifted the burden of proof for permitting sunset provisions onto proponents for their use. Although this Article focuses primarily on examples in the Tax Code, many of the pathologies discussed are endemic to sunset provisions generally. Thus, the problems associated with their use will likely surface in other contexts, casting doubt upon the legitimacy of sunset provisions as legislative tools.

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[409] *See* Mary L. Heen, *Reinventing Tax Expenditure Reform: Improving Program Oversight Under the Government Performance and Results Act*, 35 WAKE FOREST L. REV. 751, 813-15 (2000) (suggesting that enactment of certain extenders in spite of substantive critiques of such provisions was possibly due to strong lobbying).

[410] *See, e.g.*, Daniel L. Doctoroff, *NYC Official Testifies at Finance Committee Hearing on Community Rebuilding after Katrina*, TAX NOTES TODAY, Sept. 28, 2005, LEXIS, 2005 TNT 189-50 (suggesting "soft sunsets" for tax provisions enacted in response to tragedy).