TEMPORARY-EFFECT LEGISLATION, POLITICAL ACCOUNTABILITY, AND FISCAL RESTRAINT

George K. Yin*

The proper duration of legislation has become highly controversial as a result of the enactment of many temporary tax laws during the George W. Bush administration. The prevailing view is that inclusion of an expiration date or "sunset" feature in legislation permits the cost of the legislation to be misrepresented and allows its proponents to escape the discipline intended by the congressional budget process. Under this view, fiscal discipline is preserved through enactment of so-called permanent legislation.

This Article challenges that view and shows that, barring estimation error, the legislative process accounts completely for the costs of "temporary-effect" legislation but not permanent legislation. Consequently, enactment of temporary-effect rather than permanent legislation would promote more political accountability and may result in greater fiscal restraint. In addition, when temporary-effect legislation expires, the legislative process fully takes into account the cost of any extension. Extension of such legislation, therefore, competes with, and potentially displaces, adoption of other legislation. By contrast, the cost of continuing permanent programs largely disappears in the legislative process, and therefore continuation of such programs produces little or no crowding-out effect. This Article also addresses whether other features of the legislative process could overcome the problems associated with the budget accounting of permanent legislation and responds to criticisms of temporary-effect legislation.

 Edwin S. Cohen Distinguished Professor of Law and Taxation and Class of 1966 Research Professor, University of Virginia. E-mail: gyin@virginia.edu. I thank Rosanne Altshuler, Alan Auerbach, Tom Barthold, Len Burman, Michael Doran, Beth Garrett, Ruth Mason, Katie Pratt, Dan Shaviro, Nancy Staudt, David Weisbach, Randy Weiss, and participants at the New York University, Loyola-Los Angeles, University of Pennsylvania, and University of California, Los Angeles tax policy colloquiums, the Harvard Law School Colloquium on Tax Research, and the University of San Diego Law School faculty workshop for their comments, and Tim Knox, Alison Mueller, Kent Olson, and the University of Virginia law library staff for their excellent research assistance. All remaining errors are mine. I delivered portions of this Article as a lecture at the George Washington University and University of Virginia law schools and also as the Sugarman Lecturer at the Case Western Reserve University Law School.

Introduction

As the first wave of baby boomers begins to retire in large numbers, the United States faces an enormous fiscal challenge. Under one realistic scenario, by 2030, the cost of Social Security, Medicare, Medicaid, and interest on the national debt will be about 19.3% of gross domestic product (GDP), which is more than the average annual level of all federal revenue over the last fifty years.[1] If this level of revenue were to continue, there would therefore be no money left to finance any other activity of the federal government, including (1) discretionary defense spending, which has averaged about five percent of GDP during the past forty years; (2) discretionary spending for nondefense activities, such as education, housing, transportation, law enforcement, and environmental programs, which has ranged between three and four percent of GDP over the last forty years; and

[1] *See* Cong. Budget Office, The Long-Term Budget Outlook 2 tbl.1-1, 5 tbl.1-2, 41, 43 fig.5-2 (2007) [hereinafter CBO, Long-Term Outlook], *available at* http://www.cbo.gov/ftpdocs/88xx/doc8877/12-13-LTBO.pdf (providing projections under "alternative fiscal scenario" under which current law would be continued except that tax provisions due to expire at end of 2010 would be extended, estate and gift tax would continue in effect as constant share of GDP, individual alternative minimum tax (AMT) would be indexed to inflation, and physician payment rates would grow with Medicare economic index). Over the last fifty years, federal revenue has ranged between 16.1% and 20.9% of GDP with an average of 18.1%. *Id.* at 41. The Congressional Budget Office's (CBO) alternative scenario projects a roughly constant level of revenue as a percentage of GDP between now and 2030, one that is consistent with the historical average. *Id.* at 4, 5 tbl.1-2. Both the CBO projections and this Article were prepared prior to the financial institution crisis and economic downturn beginning at the end of 2008 and the passage of the economic stimulus legislation in early 2009, which have caused the nation's fiscal situation to deteriorate significantly. *See* Cong. Budget Office, The Budget and Economic Outlook: Fiscal Years 2009 to 2019, at 1–2 (2009), *available at* http://www.cbo.gov/ftpdocs/99xx/doc9957/01-07-Outlook.pdf (projecting $1.2 trillion deficit, or 8.3% of GDP, for FY 2009 before consideration of economic stimulus package in 2009); Letter from Douglas W. Elmendorf, Director, Cong. Budget Office, to Rep. Nancy Pelosi, Speaker of the House (Feb. 13, 2009), *available at* http://www.cbo.gov/ftpdocs/99xx/doc9989/hr1conference.pdf (estimating $787 billion ten-year cost of the American Recovery and Reinvestment Act of 2009, H.R. 1, 111th Cong. (2009) (enacted)).

(3) spending for all other mandatory programs, such as federal employee and military retirement programs, food stamps, unemployment compensation, and veterans' benefits, which has averaged just under three percent of GDP over the last twenty years.[2] Overall, although "[s]ignificant uncertainty surrounds long-term fiscal projections, . . . under any plausible scenario, the federal budget is on an unsustainable path."[3]

This dramatic shift in the nation's spending by the year 2030 is a consequence of gradual changes over the last half-century. Between 1962 and 2007, spending on mandatory entitlement programs like Social Security, Medicare, and Medicaid grew faster than the economy, increasing from 4.9% to 10.6% of GDP.[4] At the same time, spending on discretionary programs, including both defense and nondefense expenditures, declined relative to the economy, decreasing from 12.7% to 7.6% of GDP.[5]

Federal spending is also carried out through special provisions in the tax law, such as exclusions, deductions, and credits, which are generally referred to as "tax expenditures."[6] Although there are difficulties in measuring the amount of such spending, since at least 1981 when the Treasury Department first began to estimate the "outlay-equivalent" cost of tax expenditures, such spending appears to have grown faster than either mandatory or discretionary spending during the periods in which a comparison is feasible.[7]

---

2 *See* CBO, LONG-TERM OUTLOOK, *supra* note 1, at 37–39.

3 *Id.* at 1.

4 OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2009: HISTORICAL TABLES 137 tbl.8.4 (2008).

5 *Id.* Since 1952, total federal spending as a percentage of GDP has remained fairly constant, generally hovering around twenty percent of GDP each year. *See id.* at 24 tbl.1.2.

6 STANLEY S. SURREY, PATHWAYS TO TAX REFORM 31–33 (1973); STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES 1–6 (1985).

7 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-690, TAX EXPENDITURES REPRESENT A SUBSTANTIAL FEDERAL COMMITMENT AND NEED TO BE REEXAMINED 36 fig.8 (2005) [hereinafter GAO, TAX EXPENDITURES], *available at* http://www.gao.gov/cgi-bin/getrpt?GAO-05-690. The statement in the text is based on a comparison of the growth rates of the three forms of spending over three periods—1982 to 1986, 1988 to 2002, and 1993 to 2002—during which tax rates (which affect the measurement of tax expenditures) and the Treasury Department's identification of tax expenditures both remained fairly constant. *See id.* at 28, 31, 36. For more details, see *infra* app. tbls.A & B. In performing its analysis, the Government Accountability Office (GAO) totaled the Treasury Department's outlay-equivalent estimates of tax expenditures during these periods. Such results must be interpreted with caution because they do not take into account interactions between tax expenditures or possible behavioral responses of taxpayers to the repeal of an expenditure. *See* GAO, TAX EXPENDITURES, *supra*, at 3, 19–21; Leonard E. Burman, Christopher Geissler & Eric J. Toder, *How Big Are Total Individual Income Tax Expenditures, and Who Benefits from Them?*, 98 AM. ECON. REV. 79, 83 (2008) (estimating that

There are many explanations for these changing levels of mandatory and discretionary spending and tax expenditures. This Article describes the potentially influential role played by one important but widely misunderstood aspect of the legislative process: the budget rules. Under those rules, the budget consequences of legislation are estimated for only a limited period of time, generally referred to as the "budget window period." But the legal effect of "permanent" legislation, meaning laws without an explicit expiration date, may extend well beyond such period (and, for budget accounting purposes, such legislation is assumed to continue forever). As a result, the legislative process fails to account for the complete costs of programs enacted through permanent legislation, including most mandatory entitlement programs and tax expenditures.[8] In contrast, because discretionary spending programs are generally approved through laws whose budget effect does not extend past the budget window period—what I refer to as "temporary-effect legislation"[9]—

---

after interactions are taken into account, cost of all nonbusiness income tax expenditures is eight percent more than mere sum cost of each individual provision); Rosanne Altshuler & Robert D. Dietz, *Tax Expenditure Estimation and Reporting: A Critical Review* 27–30 (Nat'l Bureau of Econ. Research, Working Paper No. W14263, 2008), *available at* http://ssrn.com/abstract=1248924 (providing examples where sum total of tax expenditures may overstate or understate proper figure). In addition, the GAO limited its analysis to federal *income* tax expenditures and disregarded expenditures relating to other taxes. *See* GAO, TAX EXPENDITURES, *supra*, at 7 n.6. There are also important data limitations in measuring tax expenditures not present when measuring traditional spending. Altshuler & Dietz, *supra*, at 3 n.5. For an explanation of how outlay-equivalent tax expenditures are measured, see GAO, TAX EXPENDITURES, *supra*, at 8, 96–98. For the difficulty identifying what tax provisions constitute tax expenditures, see *infra* note 14. According to the Joint Committee on Taxation, during the thirty-five years in which it has attempted to measure tax expenditures, Congress's use of such expenditures has accelerated, and "[t]heir magnitude illustrates the enormous importance of tax expenditures today, relative to actual non-defense discretionary appropriations." STAFF OF JOINT COMM. ON TAXATION, 110TH CONG., A RECONSIDERATION OF TAX EXPENDITURE ANALYSIS 4, 6 (Comm. Print 2008) [hereinafter JCT, TAX EXPENDITURES], *available at* http://www.jct.gov/x-37-08.pdf.

8 The focus of this Article is on the budget accounting treatment of *deficit-increasing* changes in the law, such as spending increases or tax cuts. There is a symmetrical failure in the legislative process to account for the complete budgetary impact of permanent legislation that *reduces* deficits, such as spending cuts or tax increases. Although the budget rules are neutral with respect to deficit-increasing and deficit-reducing legislation, the actions of legislators may not be. Legislators may make strategic use of the incomplete information provided by the legislative process to place their decisionmaking in the best light.

9 I use the term "temporary-effect," rather than "temporary," to recognize that some temporary legislation may have long-term budget effects. For example, in 2004, Congress approved an 85% reduction in the taxation of certain foreign earnings repatriated to the United States as a dividend during approximately a one year period following enactment of the law. Although this legislation was temporary, with an expiration date no later than approximately two years following enactment, the cost of the legislation was estimated to continue throughout (and presumably beyond the end of) the ten-year budget window period. *See* STAFF OF JOINT COMM. ON TAXATION, 109TH CONG., GENERAL EXPLANATION

barring estimation error, cost estimates of these programs when they are adopted reflect their full budgetary impact.

This difference under the budget rules not only tends to favor spending (including tax expenditures) through permanent rather than temporary-effect legislation but also may help to explain why permanent programs have grown so fast. Under one model of electoral representation and the democratic process, elected officials tailor their policy decisions partly in anticipation of how their choices will be represented to and interpreted by voters at the time of reelection.[10] This model does not assume that voters closely monitor or even understand the merits of the policy choices as they are being made by the elected officials. Rather, it simply assumes the existence of an auditable record, in the form of recorded votes, that can be revealed to and evaluated by voters, presumably with the assistance of the incumbent's challenger and other activists, at the time of the incumbent's reelection campaign. Under this model, elected officials naturally have an incentive to make choices that can be portrayed at reelection to voters in as favorable a light as possible. By revealing only a fraction of the cost of permanent deficit-increasing changes, the budget rules allow lawmakers voting in favor of such changes to appear to have approved a bargain—a program whose benefit (as reflected in its complete cost) is greater than the cost the lawmaker is on record as having approved. All else being equal, this result should ordinarily bias decisionmaking in favor of such changes and may even encourage lawmakers to approve larger programs than would be the case if the spending decision could not be presented in that light.[11]

OF TAX LEGISLATION ENACTED IN THE 108TH CONGRESS 307–11 (Comm. Print 2005) [hereinafter JCT, GENERAL EXPLANATION: 108TH CONGRESS], *available at* http://www.jct.gov/s-5-05.pdf (describing new repatriation provision); *id.* app. tbl. at 555 (showing estimated revenue loss from new provision continuing into last year of budget window period).

[10] *See* R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 5–6, 11, 60–64 (1990) [hereinafter ARNOLD, LOGIC] (describing "controlled agent" model); R. Douglas Arnold, *Can Inattentive Citizens Control Their Elected Representatives?*, *in* CONGRESS RECONSIDERED 409–14 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 1993) [hereinafter Arnold, *Inattentive Citizens*] (same); Bernard Manin et al., *Elections and Representation*, *in* DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 29, 40–41 (Adam Przeworski et al. eds., 1999) (describing "accountability" view). Other views of the electoral process envision voters as taking a more active role in monitoring and directing their representatives when policy choices are made or as basing their electoral decisions more on the promised future actions of the candidates than on their past recorded ones. *See* Arnold, *Inattentive Citizens*, *supra*, at 402–06 (describing "standard control" model); Manin et al., *supra*, at 29–30 (describing "mandate" view).

[11] One can imagine circumstances in which the understated costs of permanent legislation revealed in the legislative process might be viewed in a negative light, such as a signal of a lack of accomplishment by the elected official. Of course, lawmakers could still point

The budget rules provide one other important advantage to permanent legislation. Because permanent programs have no explicit expiration date, they automatically continue in effect in the absence of contrary congressional action, and the budget rules ignore the cost of continuation in that circumstance.[12] In contrast, extension of a temporary program requires legislative action, which causes the cost of continuation to be revealed and counted against any overall budget constraint to which Congress may be subject at that time. This means that approval of an extension may displace or "crowd out" the adoption of a new spending program or tax expenditure. Continuation of a permanent program does not have the same effect since the cost of continuation is not counted against the overall budget constraint. Thus, lawmakers generally would be free in that situation to do both—approve a new spending program *and* "extend" the permanent program through legislative inaction. For this additional reason, adoption of temporary-effect legislation increases political accountability and may enhance fiscal restraint.[13]

The budgetary implications of temporary-effect and permanent legislation are widely misunderstood. For example, many analysts sharply criticized the inclusion of "sunset" provisions, phase-ins, and delayed effective dates in major tax cuts adopted in 2001 and 2003 because of their *irresponsible* budgetary impact. According to these critics, the practices resulted in a misrepresentation of the true costs of the legislation under the congressional budget accounting rules, something that would not have occurred if the legislation had been permanent. This Article takes precisely the opposite position.

A prime illustration referenced by critics is the 2001 legislation enacting a delayed-effect and temporary repeal of the estate tax.[14]

---

to the substance of what was accomplished quite apart from its revealed cost. Further, because of their information advantages, lawmakers would generally have the ability to reveal the "true" (higher) cost of spending decisions in the event that it were in their interest to do so.

[12] The cost of continuing a permanent program may nevertheless play a "shadow" role that influences legislative decisions. *See infra* text accompanying notes 109–11.

[13] There are other legislative process explanations for the change in entitlement and discretionary spending patterns. *See* W. Mark Crain & Timothy J. Muris, *Legislative Organization of Fiscal Policy*, 38 J.L. & ECON. 311, 330–31 (1995) (attributing change to balkanized committee structure in Congress for approving mandatory, but not discretionary, spending); Dhammika Dharmapala, *The Congressional Budget Process, Aggregate Spending, and Statutory Budget Rules*, 90 J. PUB. ECON. 119, 135 (2006) (attributing change to free rider problem created by budget process for interest groups lobbying for discretionary spending).

[14] The budget accounting issues described in this Article apply equally to tax cut legislation, such as repeal of the estate tax, and tax expenditures, and this Article uses both types of legislation as illustrations. For the difficulty differentiating between the two, see JCT, TAX EXPENDITURES, *supra* note 7, at 29–33, Bruce Bartlett, *The End of Tax Expendi-*

These features of that legislation enabled an eighty percent reduction in its estimated cost for budget purposes. Examples like this have caused critics to propose banning the inclusion of such legislative features in certain circumstances or estimating the budget effects of such legislation as if the legislation were immediately effective and also permanent.

This Article challenges the position of these critics and explains why fiscal restraint may be enhanced with greater use of temporary-effect legislation, such as legislation with sunsets, and less use of permanent legislation.[15] The Article does not, however, advocate a specific policy change that would require Congress to pass only temporary-effect legislation. Even though implementing such a change might be fairly straightforward,[16] it is extremely unlikely that Congress would ever tie its own hands in this manner. Moreover, although the Article responds to the most prominent objections to temporary-effect legislation,[17] there remain possible concerns not yet addressed. Instead, the Article simply tries to demonstrate the fiscal advantages of approving as temporary-effect legislation any spending increases or tax cuts that Congress decides to adopt.[18] This objective

tures as We Know Them?, 92 TAX NOTES 413, 414–17 (2001), Boris I. Bittker, *Accounting for Federal "Tax Subsidies" in the National Budget*, 22 NAT'L TAX J. 244 (1969), J. Clifton Fleming, Jr. & Robert J. Peroni, *Reinvigorating Tax Expenditure Analysis and Its International Dimension*, 27 VA. TAX REV. 437, 495–500 (2008), Douglas A. Kahn & Jeffrey S. Lehman, *Tax Expenditure Budgets: A Critical View*, 54 TAX NOTES 1661, 1662–65 (1992), Julie Roin, *Truth in Government: Beyond the Tax Expenditure Budget*, 54 HASTINGS L.J. 603, 610–13 (2003), and Victor Thuronyi, *Tax Expenditures: A Reassessment*, 1988 DUKE L.J. 1155, 1163–70 (1988).

15 Although this Article supports the temporary nature of recent tax cut legislation, it is not an endorsement of the legislation itself.

16 For example, under current House and Senate rules, all committee reports must generally include estimates of the cost of proposed changes during the current fiscal year and five succeeding ones. 110TH CONG., RULES OF THE HOUSE OF REPRESENTATIVES, R. XIII(3)(d)(2)(A), at 26 (2008), *available at* http://www.rules.house.gov/ruleprec/110th.pdf; STANDING RULES OF THE SENATE, S. DOC. NO. 110-9, R. XXVI(11)(a)(1), at 37 (2007), *available at* http://rules.senate.gov/senaterules/. As a result, neither the House Ways and Means Committee nor the Senate Finance Committee typically permits consideration of a proposal in a legislative markup session unless the proponent can also provide a cost estimate of the change. If Congress were inclined to implement a temporary-effect limitation through congressional rule, this procedure could easily be amended to bar consideration of legislative proposals unless they also include certification that they have no significant budget effect beyond the budget window period.

17 *See infra* Part IV.

18 The argument contained in this Article should not be confused with a position that was popular during the 1970s favoring the "sunsetting" of programs and agencies in order to facilitate their legislative review and to realize cost savings. For a variety of reasons, that effort proved to be quite unsuccessful with little or no increased scrutiny or cost savings achieved. *See infra* note 283. By contrast, this Article argues that temporary-effect legislation may enhance fiscal restraint because of the manner in which its costs are accounted for in the legislative process. There is no assumption that such legislation and

is especially important given the widespread disagreement with this view.[19]

Part I provides background on the congressional process of approving tax and spending legislation and describes how the budget consequences of such legislation are determined. Part II then explains, principally through two pairs of examples involving familiar federal programs, why increased use of temporary-effect legislation enhances political accountability and may lead to greater fiscal restraint. Part III considers whether there are other possible ways, short of an explicit preference for temporary-effect legislation, to overcome the problems associated with the accounting treatment of permanent legislation. It explores both existing aspects of the budget process and possible changes to the process to incorporate the use of long-term budget estimates. Part IV responds to the principal objections raised against temporary-effect legislation. Among other things, the discussion questions the validity of common perceptions that an increase in temporary-effect legislation would (1) lead to more spending increases and tax cuts, (2) be a boon to lobbyists and increase other legislative transaction costs such as campaign contributions, and (3) have a detrimental effect on long-term investment incentives.

I
Spending and Tax Legislation and Its Budget Consequences

This Part provides background on the budget accounting treatment of spending and tax programs approved by Congress. Part I.A explains the principal differences between discretionary spending, mandatory spending, and tax expenditures, and Part I.B describes the budget accounting consequences of such spending.

---

the potential expiration of programs will spur increased scrutiny of the programs by the legislature.

19 For the general importance of studying how budgetary aggregates are determined, see Allen Schick, *Why Study Microbudgeting?*, *in* The Budget Puzzle: Understanding Federal Spending 1, 1–4 (1994). For some advantages and potential disadvantages of increased transparency in the budget process, see Elizabeth Garrett & Adrian Vermeule, *Transparency in the U.S. Budget Process*, *in* Fiscal Challenges: An Interdisciplinary Approach to Budget Policy 77–80 (Elizabeth Garrett, Elizabeth A. Graddy & Howell E. Jackson eds., 2008).

A. Discretionary Spending, Mandatory Spending, and Tax Expenditures

The Constitution gives to Congress—the most politically accountable branch of government—the power of the purse, subject to an "appropriations" requirement.[20] The majority of spending programs are funded through an annual appropriations process in which the appropriations committees in Congress review and approve the amount of spending for the forthcoming year.[21] These programs are generally referred to as "discretionary spending" because of Congress's regular exercise of discretion in approving such funding.[22]

Another important class of spending programs, generally referred to as "mandatory spending" or "entitlement programs," are approved outside of the regular annual appropriations process.[23] Examples of entitlement programs include Social Security, Medicare, Medicaid, food stamps, veterans' benefits, and federal-employee and military-retirement programs. Funding for these programs is generally open ended, with the amount of spending in a given year determined by the number of eligible claimants in the year and the amount each claimant is entitled to receive.[24] In general, such programs are also "permanent" in the sense that funding continues unless and until Congress changes the law to provide otherwise.[25] A hybrid class of programs,

---

[20] U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."). "An appropriations act is a law passed by Congress that provides federal agencies legal authority to incur obligations and the Treasury Department authority to make payments for designated purposes." ROBERT KEITH, CONG. RESEARCH SERV., INTRODUCTION TO THE FEDERAL BUDGET PROCESS, at CRS-21 (2008), *available at* http://budget.house.gov/crs-reports/98-721.pdf.

[21] *See* STAFF OF S. COMM. ON THE BUDGET, 105TH CONG., THE CONGRESSIONAL BUDGET PROCESS: AN EXPLANATION 6 (Comm. Print 1998) [hereinafter CONGRESSIONAL BUDGET PROCESS] ("Most of the actual operations of the Federal Government are funded by discretionary spending.").

[22] WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 419 (3d ed. 2001).

[23] CONGRESSIONAL BUDGET PROCESS, *supra* note 21, at 5. This class of spending is also sometimes referred to as "direct spending." *Id*. Because the term "direct spending" is sometimes used confusingly also to refer to any spending other than that carried out through the tax system (i.e., any spending other than tax expenditures), *see* ALLEN SCHICK, THE FEDERAL BUDGET: POLITICS, POLICY, PROCESS 172 (3d ed. 2007), this Article generally eschews use of this term.

[24] ESKRIDGE, FRICKEY & GARRETT, *supra* note 22, at 420; SCHICK, *supra* note 23, at 209, 212. The spending for some entitlement programs, such as Social Security, is provided through a permanent appropriation included in the authorizing legislation. Funding for other programs, such as Medicaid, is carried out through the annual appropriations process, but the authorizing legislation effectively mandates the appropriation, leaving the appropriations committees with little or no discretion over the amount of funding. KEITH, *supra* note 20, at CRS-7, 19; SCHICK, *supra* note 23, at 57–58, 60–61, 212.

[25] KEITH, *supra* note 20, at CRS-7 to -8; SCHICK, *supra* note 23, at 61.

such as farm subsidies, transportation projects, and federal subsidies for children's health insurance, are approved for multiple-year periods but not permanently.[26]

Federal spending is also carried out through the enactment of tax expenditures. In general, these are "revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability."[27] Tax expenditures are approved by the tax committees in Congress and are not subject to the appropriations requirement. Like entitlements, tax expenditures generally set out eligibility conditions for receiving certain tax benefits, with the total amount of revenue forgone in a given year being open ended and dependent on both the number of eligible taxpayers and the amount of tax savings each taxpayer is entitled to receive.[28] Until recently, almost all tax provisions, including most tax expenditures, were also approved on a "permanent" basis. One example is the provision authorizing the deduction of most interest on home mortgage loans.[29] Because the provision is "permanent," unless the law is changed in the future, homeowners will continue to be entitled to reduce their tax liabilities by deducting the interest on their home mortgages.[30]

---

[26] *See, e.g.*, Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, §§ 1103(a), 1104(a), 122 Stat. 923, 941–42 (authorizing farm payments for five-year period); Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 1101(a), 119 Stat. 1144, 1153–56 (2005) (authorizing payments out of Highway Trust Fund for five years); Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4901(a), 111 Stat. 251, 558 (authorizing federal payments for children's health insurance for ten years). In early 2009, the Children's Health Insurance Program (CHIP) was reauthorized for an additional four and a half years through FY 2013. Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. No. 111-3, § 101, PL 111-3 (Westlaw) (authorizing funding through FY 2013). Although the law therefore provided only a temporary extension of this program, it was approved under a special budget rule that accounted for its cost as if the extension were permanent. *See infra* text accompanying notes 37, 62; *see also* CONG. BUDGET OFFICE, COST ESTIMATE: H.R. 2—CHILDREN'S HEALTH INSURANCE PROGRAM REAUTHORIZATION ACT OF 2009, at 3–4 (2009), *available at* http://www.cbo.gov/ftpdocs/99xx/doc9985/hr2paygo.pdf (explaining application of special baseline rule). Thus, references in this Article to permanent legislation apply equally to the temporary extension of the CHIP program.

[27] Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 3(a)(3), 88 Stat. 297, 299. As noted, the specific identification of a "tax expenditure" is not without controversy. *See supra* note 14.

[28] *See* GAO, TAX EXPENDITURES, *supra* note 7, at 18 ("From a budgetary perspective, most tax expenditures are comparable to mandatory spending for entitlement programs, in that no further action is required to provide resources for tax expenditures.").

[29] *See* I.R.C. § 163(h)(3) (2006).

[30] For the general similarity between entitlement spending and tax expenditures, see SCHICK, *supra* note 23, at 172.

B. Accounting for the Costs of Spending and Tax Programs

For over thirty years, budget law has required Congress to keep track of the costs of new spending and tax programs it approves each year.[31] The purpose is not exactly the same as budgeting by a household or private firm because Congress has budgetary options not available to most households and firms. Rather, the budget law requirement accomplishes at least two other goals: First, it potentially allows Congress, in allocating the nation's fiscal resources, to make smarter decisions by comparing the projected cost of possible new programs with their anticipated benefit. Second, it allows the public to scrutinize what Congress has done to make sure the legislature's priorities are consistent with its own.[32]

The cost of proposed new spending and tax legislation for budget accounting purposes is the difference between the amount of government revenues or outlays that would occur with the legislation and the amount that would occur without the legislation. The latter amount is known as the "baseline." It is determined by applying current law to the economic and other variables that are projected to occur over the budget period being considered. Thus, for example, the baseline cost of a tax program such as the credit for research and experimental activities (R&E credit)[33] is determined by applying the terms of current law to estimates of the expected amount and timing of expenditures qualifying for the credit, the tax situations and likely participation rates of those taxpayers eligible to claim the credit, and other factors.[34] Importantly, projected macroeconomic changes to the

---

[31] *See* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 403, 88 Stat. 297, 320. As noted, current House and Senate rules generally require that all committee reports include appropriate cost estimates of the proposed legislative changes. *See supra* note 16.

[32] Eskridge, Frickey & Garrett, *supra* note 22, at 431; Keith, *supra* note 20, at CRS-16. Since 1974, the congressional budget process serves the important role of coordinating revenue and spending decisions previously resolved by Congress in a much more fragmented manner. *Id.* at CRS-1 to -2. The specific budget estimates of new legislation play a formal role in helping to determine whether Congress has complied with its budget resolution, its "overall blueprint for the nation's fiscal policy." William G. Dauster, *The Congressional Budget Process*, *in* Fiscal Challenges, *supra* note 19, at 7.

[33] I.R.C. § 41.

[34] The above description is drawn from *CBO Role and Performance: Enhancing Accuracy, Reliability, and Responsiveness in Budget and Economic Estimates: Hearing Before the H. Comm. on the Budget*, 107th Cong. 4–12 (2002) (statement of Dan L. Crippen, Director, Cong. Budget Office) [hereinafter Crippen Testimony] (explaining procedure CBO follows in making budget projections), Staff of Joint Comm. on Taxation, 109th Cong., Overview of Revenue Estimating Procedures and Methodologies Used by the Staff of the Joint Committee on Taxation, 9–10, 12–13, 18–19 (Comm. Print 2005) [hereinafter JCT, Revenue Estimating], *available at* http://www.jct.gov/x-1-05.pdf (describing "revenue baseline," "budget window," and behavioral effects on these values),

economy over the budget period are incorporated into these baseline assumptions.[35] In addition, baseline estimates are generally of "current law," which includes scheduled changes in the law.[36] Baseline estimates therefore generally assume that permanent laws will continue forever but that temporary laws will expire as scheduled.[37]

The baseline cost of a program may be projected to increase over time even in the absence of any expansion or change to the program. This is because baseline estimates are required by statute to assume that "laws providing or creating direct spending and receipts . . . operate in the manner specified in those laws . . . and funding for entitlement authority is . . . adequate to make all payments required by those laws."[38] Thus, for example, if, due to anticipated economic or demographic changes, participation in a tax or entitlement program is expected to increase in the future, the baseline cost estimate of the program must reflect that increase.[39]

The estimation process is then repeated, but under the assumption that current law is modified by the new legislation being considered. The repeat process does not simply apply the terms of the modified law to the same assumptions incorporated into the baseline; rather, the estimated budgetary consequences of the law as modified

KEITH, *supra* note 20, at CRS-8 to -9 (describing CBO's role in budget enforcement and estimation process), and Michael D. Bopp, *The Roles of Revenue Estimation and Scoring in the Federal Budget Process*, 56 TAX NOTES 1629, 1629–34 (1992) (delineating difference between revenue estimation and scoring).

35 JCT, REVENUE ESTIMATING, *supra* note 34, at 9.

36 CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2008 TO 2018, at 99 (2008) [hereinafter CBO, FY 2008–2018 OUTLOOK], *available at* http://www.cbo.gov/ftpdocs/89xx/doc8917/01-23-2008_BudgetOutlook.pdf.

37 2 U.S.C. § 907(a) (2006); CBO, FY 2008–2018 OUTLOOK, *supra* note 36, at 68, 99. There are several exceptions to this general rule. Under section 257(b) of the Balanced Budget and Emergency Deficit Control Act of 1985, 2 U.S.C. § 907 (amended 1997), the baseline must disregard the scheduled expiration of certain mandatory spending programs established on or before August 5, 1997. In addition, the baseline assumes the extension of expiring excise taxes, the proceeds of which are dedicated to a trust fund. *Id.* § 907(b)(2)(c); CBO, FY 2008–2018 OUTLOOK, *supra* note 36, at 99. The baseline treatment of expiring mandatory spending programs established after August 5, 1997 is determined after consultation with the Congressional Budget Committees. CBO, FY 2008–2018 OUTLOOK, *supra* note 36, at 68. Finally, the baseline cost of discretionary spending programs is increased each year by the rate of inflation. *Id.* at 73. For criticism of how budget baselines are constructed and manipulated, see Timothy J. Muris, *The Uses and Abuses of Budget Baselines*, *in* THE BUDGET PUZZLE, *supra* note 19, at 41, 41–78.

38 2 U.S.C. § 907(b)(1).

39 SCHICK, *supra* note 23, at 66. Because the baseline cost of tax and entitlement programs must incorporate anticipated changes in the programs not attributable to legislated changes, and baseline estimates of discretionary spending programs increase each year by the rate of inflation, *see supra* note 37, the baseline is sometimes described as a "current policy" baseline. *See* Muris, *supra* note 37, at 43 (describing various approaches to calculating baseline, including "current policy" approach).

take into account the anticipated microeconomic behavioral responses to the modification.[40] For example, if the proposed change in law is to double the rate of the R&E credit, the estimator might anticipate a higher participation rate than is used in the baseline, an increase in the amount of qualifying expenditures, and other changes. The *macroeconomic* factors incorporated into the baseline, however, are not assumed to change as a result of the proposed change in law.[41]

The difference between the budget consequences of the law with and without the proposed modification is the cost or revenue estimate of the proposed legislation. The estimates are presented as specific dollar figures for each of a finite number of fiscal years into the future, termed the "budget window period."[42] In general, the budget window period has consisted of either five or ten fiscal years.

The estimates represent the expected cash-flow changes to the government, that is, the changed number of dollars estimated to flow either into or out of the government during a particular fiscal year as a result of the legislation being considered. For tax changes, this means that the actual timing of tax payments to the government as a result of factors, such as withholding and estimated tax obligations, and tax return filing dates, must be taken into consideration.

II
The Budget Accounting Treatment of Temporary-Effect and Permanent Legislation in the Legislative Process

This Part describes how the costs of temporary-effect and permanent legislation are accounted for in the legislative process and explains why greater use of the former type of legislation, but not the latter, would promote political accountability and may enhance fiscal restraint. Part II.A reviews and critiques the position articulated by many analysts that the use of temporary-effect legislation is fiscally irresponsible. It explains how this criticism results from an understandable but mistaken focus on the costs of legislation estimated to arise within the budget window period. Parts II.B and II.C illustrate this principle by describing why the budget accounting treatment of temporary-effect legislation is preferred both at the time policy choices are first adopted and when they are continued. Part II.D

[40] JCT, Revenue Estimating, *supra* note 34, at 18; Edward D. Kleinbard & Patrick Driessen, *A Revenue Estimate Case Study: The Repatriation Holiday Revisited*, 120 Tax Notes 1191, 1192–94 (2008).

[41] Crippen Testimony, *supra* note 34, at 10; JCT, Revenue Estimating, *supra* note 34, at 9; Schick, *supra* note 23, at 71–72, 177.

[42] JCT, Revenue Estimating, *supra* note 34, at 3.

explains how passage of permanent legislation permanently distorts the information provided by the budget process even though the legislation itself turns out to be only temporary. Finally, Part II.E summarizes the discussion.

A. The Erroneous Focus on the Costs Estimated To Arise Within the Budget Window Period

This Section reviews and critiques the widespread criticism of temporary-effect legislation. It shows how the criticism results from an understandable but mistaken focus on the costs of legislation estimated to arise within the budget window period.

1. Budget Targets and the Resulting Focus on the "Official Cost" of Legislation

Congress typically agrees each year to a limit on the amount that new legislation passed that year may be projected to cost or raise in revenue during the budget window period. The specific budget targets, along with the mechanisms for ensuring compliance with them, are set out in congressional budget resolutions or ad hoc budget agreements. The limits apply to any form of new legislation, including laws affecting new or existing discretionary spending, mandatory spending, or tax programs.[43] Given this limitation, it is natural for political debate to center on whether legislative practices and budget accounting rules result in an accurate measurement of the costs of proposed legislation estimated to arise *within the budget window period*. This cost is referred to in this Article as the "official cost" of the legislation.

Supporters of legislation have long used various techniques to reduce the official cost of legislation and thereby enhance its likelihood of approval. One technique is to delay the starting effect of legislation until late in the budget window period or gradually phase in that effect. Because this technique has the potential disadvantage of delaying the realization of benefits produced by the legislation,[44] lawmakers sometimes employ an alternate technique of allowing the legislation to be immediately effective but then terminating or "sunsetting" its effect prior to the end of the budget window period. By using either or both of these techniques, supporters can reduce the

[43] *See* Schick, *supra* note 23, at 120.

[44] Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. Chi. L. Rev. 501, 529–30 (1998).

official cost of legislation to a fraction of what it would have been had the legislation been in effect throughout the budget period.[45]

TABLE 1
COMPARISON OF OFFICIAL COST ESTIMATES OF PROPOSED PERMANENT AND TEMPORARY LEGISLATION

	Projected Cost of Legislation ($ Billions)										
	Fiscal Years										
Type of Legislation	1	2	3	4	5	6	7	8	9	10	Total
1. Permanent legislation	40	40	40	40	40	40	40	40	40	40	400
2. Permanent, gradual phase-in	4	8	12	16	20	24	28	32	36	40	220
3. Permanent, delayed effect until year six	0	0	0	0	0	40	40	40	40	40	200
4. Temporary, sunset after year five	40	40	40	40	40	0	0	0	0	0	200
5. Temporary, combined methods	0	0	0	4	12	24	40	0	0	0	80

Table 1 illustrates the potential effects of these different techniques. The example assumes a piece of legislation that is estimated to cost $40 billion per year in each of the ten years in the budget window period. Thus, the official cost of the legislation, that is, the amount taken into account in the legislative process, would be $400 billion if the legislation were fully enacted on a permanent basis beginning in year one (see line 1). A variety of techniques, however, could be used to reduce this official cost, such as a gradual phase-in of the legislation (line 2), full enactment of the law but with effect delayed until year six (line 3), full enactment in year one but with a sunset at the end of year five (line 4), or a combination of these methods (line 5). As shown by line 5, these techniques can be used to reduce the official cost to a small fraction of what it would have been had the legislation been fully in effect for the entire period.

Although these techniques have been used for a number of years, the extent and frequency of their use in the tax area grew dramatically beginning in 2001. In that year, Congress approved major tax cut legislation, virtually all of whose provisions expired nine months before the end of the budget window period.[46] In addition, it phased in or

[45] JCT, REVENUE ESTIMATING, *supra* note 34, at 12 (describing strategies to reduce official cost of legislation).

[46] *See* Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 901, 115 Stat. 38, 150 (sunsetting legislation after December 31, 2010). The pertinent

delayed the effect of many of the provisions. These two steps significantly reduced the estimated total cost of the legislation over the budget window period.[47]

A good example is the repeal of the estate tax included as part of the 2001 legislation. Due to the very gradual phase-in of the repeal and the sunset of the repeal as of December 31, 2010, the provision was estimated to cost about $138 billion over the ten-year budget window period, or roughly one-fifth of the estimated cost had the repeal been in effect throughout the period.[48]

Much the same occurred in 2003, when Congress passed another major tax cut.[49] In that year, the President proposed some important tax law revisions, including a change in the taxation of dividend income, which were estimated to cost over $700 billion during the applicable ten-year budget window period.[50] Congressional consideration of the President's proposal, however, resulted in an agreement to pass tax cuts costing no more than $350 billion over ten years, about half of what the President had proposed to spend.[51] Instead of simply leaving out about half of the President's proposals, or making

---

budget window for this legislation closed the last day of FY 2011 (Sept. 30, 2011), but almost all of its provisions were sunset as of the end of calendar year 2010. *See* H.R. Con. Res. 83, 107th Cong. §§ 101, 103(a), 104(a) (2001) (containing FY 2002 congressional budget resolution setting revenue targets and authorizing reconciliation bill for periods through end of FY 2011); STAFF OF JOINT COMM. ON TAXATION, 107TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 107TH CONGRESS 308–21 (Comm. Print 2003) [hereinafter JCT, GENERAL EXPLANATION: 107TH CONGRESS], *available at* http://www.jct.gov/s-1-03.pdf (showing laws effective through end of calendar year 2010).

47 In a rough way, the effect of the techniques can be demonstrated by examining the estimated cost of the legislation in the second, ninth, and tenth fiscal years (FY 2003, 2010, and 2011) following passage of the 2001 Act. The estimated costs were $90.6 billion (for the second fiscal year following passage), $187 billion (ninth), and $129.5 billion (tenth). JCT, GENERAL EXPLANATION: 107TH CONGRESS, *supra* note 46, at 321. The difference between the second- and ninth-year estimates reflects in part the delayed effective dates or phased-in nature of a number of the provisions. The difference between the ninth- and tenth-year estimates reflects in part the effect of the sunset at the end of calendar year 2010.

48 *Id.* at 314–15. The full ten-year cost of repeal was estimated to be over $660 billion. *See* MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS 181, 183 (2005) (describing estimate provided by JCT Chief of Staff to House Ways and Means Committee).

49 *See* Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, 117 Stat. 752.

50 *See* STAFF OF JOINT COMM. ON TAXATION, 108TH CONG., ESTIMATED BUDGET EFFECTS OF THE REVENUE PROVISIONS CONTAINED IN THE PRESIDENT'S FISCAL YEAR 2004 BUDGET PROPOSAL 1 (Comm. Print 2003), *available at* http://www.jct.gov/x-15-03.pdf (showing $726 billion estimated cost through FY 2013 for "economic growth" provisions); Alex M. Brill, *Individual Income Taxes After 2010: Post-Permanence-ism*, 60 NAT'L TAX J. 347, 351–52 (2007).

51 Andrew Taylor, *Concessions to Moderates Imperil Early GOP Tax Cutting Accord*, 61 CQ WKLY. 866, 866 (2003).

all of the cuts roughly half as deep, Congress instead turned to phase-ins and sunsets to pass almost all of the President's package while still complying with the tighter budgetary constraint.[52]

Many analysts sharply criticized these practices. According to these critics, the practices enabled the Bush administration and congressional supporters "to hide the true budgetary costs" of the policy changes and thereby "avoid the constraints imposed by the budget rules."[53] As one observer stated, in describing the "Enron-style accounting" that caused "the official budget projections [to be] universally seen as unreliable and even fraudulent," the "[2003] bill's true cost . . . will be close to double its 'official' cost."[54] To prevent these misrepresentations, some have suggested barring the practice of phasing in or sunsetting legislation in certain circumstances[55] or estimating the costs of legislation with such features as if the legislation

---

[52] *See* JCT, General Explanation: 108th Congress, *supra* note 9, at 533 (showing slight phase-in and sunsets of both dividend and capital gain changes). The final congressional bill included $20 billion of aid to the states so that the estimated cost of the tax cuts was actually only $330 billion over ten years. *Id.* at 534; Brill, *supra* note 50, at 353 n.11.

[53] William G. Gale & Peter R. Orszag, *Sunsets in the Tax Code*, 99 Tax Notes 1553, 1557 (2003); *see also* Cheryl D. Block, *Budget Gimmicks*, *in* Fiscal Challenges, *supra* note 19, at 39, 56–57 (criticizing sunsetting of tax cuts as "creating an artificially rosier projection of the revenue reduction's long-term economic impact"); Elizabeth Garrett, *Accounting for the Federal Budget and Its Reform*, 41 Harv. J. on Legis. 187, 196 (2004) (asserting that expiring provisions allow lawmakers "to mask the long-term cost of tax reduction bills" and to "obscure the reality of fiscal decisions"); Rebecca M. Kysar, *The Sun Also Rises: The Political Economy of Sunset Provisions in the Tax Code*, 40 Ga. L. Rev. 335, 339 (2006) (arguing that sunset provisions "act as apparatuses that underestimate the revenue costs of legislation" and are used to "avoid checks on legislative behavior in the budget process"); Manoj Viswanathan, Note, *Sunset Provisions in the Tax Code: A Critical Evaluation and Prescriptions for the Future*, 82 N.Y.U. L. Rev. 656, 658 (2007) (describing sunset provision as "product of political maneuvering designed to bypass budgetary constraints"); Editorial, *Sleight of Hand on Capitol Hill*, N.Y. Times, May 18, 2003, § 4, at 12 (criticizing "fundamental dishonesty" of $350 billion price tag placed on 2003 legislation); Editorial, *Winners, Losers, and Gimmicks*, Wash. Post, May 15, 2003, at A28 (characterizing design and estimated cost of 2003 legislation as "phony" and "a charade"). Rebecca Kysar's criticism, *supra*, at 391, goes even further and asserts that what is at stake in the sunset debate "is the relevance of the congressional budget process." Martin Sullivan disagreed with this onslaught of criticism, pointing out that temporary provisions must be paid for when extended in the future. *See* Martin A. Sullivan, *False Alarms and Real Problems with Budget Gimmicks*, 99 Tax Notes 1129, 1132 (2003) (using analogy of leasing provision with option to buy).

[54] Press Release, Ctr. on Budget and Policy Priorities, Senate Appears Poised to Approve Tax Cut with Actual Cost of $660 Billion (May 15, 2003), http://www.cbpp.org/5-15-03tax-pr.pdf (internal quotation marks omitted).

[55] *Cf.* Rudolph G. Penner & C. Eugene Steuerle, *Budget Rules*, 57 Nat'l Tax J. 547, 557 (2004) (noting proposal to bar use of sunsets in certain circumstances but explaining that "there are legitimate sunsets and illegitimate sunsets [and it] is difficult to use rules to differentiate one from the other").

were in effect throughout the budget window period.[56] Another idea is to impose a sixty-vote requirement in the Senate before certain temporary tax cuts may be considered by that body.[57]

2. *Focus on the "Official Cost" of Legislation Is Mistaken*

Critics are surely correct that the motivation behind many of the delayed effective dates, phase-ins, and sunsets of recent tax legislation has been a desire to shrink the official cost of legislation taken into account for budget purposes.[58] Since budget rules provide consequences that depend upon that official cost, political advantage can be gained by manipulating this amount. For the same reason, as we have seen, opponents of the legislation have generally focused on that same amount.[59]

---

[56] *See* DANIEL N. SHAVIRO, TAXES, SPENDING, AND THE U.S. GOVERNMENT'S MARCH TOWARD BANKRUPTCY 144, 219 (2007) (proposing disregard of sunsets for budget accounting purposes in certain circumstances); William G. Gale, *Building a Better Budget*, 4 AM. OUTLOOK 25, 27 (2001), *available at* http://www.brook.edu/views/articles/gale/200105.pdf (contending that temporary changes should be scored as permanent); Elizabeth Garrett, *Budget Magic Tricks*, 18 THE WORLD AND I 54, 59 (2003), *available at* ProQuest, Document No. 370375841 ("Revenue-loss projections for temporary tax provisions, the extenders which never expire, should be based on the assumption that they are de facto permanent. Only if there is an independent reason for a provision to expire . . . should revenue estimates reflect the temporary status."); Garrett, *supra* note 53, at 197 (setting forth same idea but acknowledging potential implementation difficulties); Sullivan, *supra* note 53, at 1133 (setting forth idea as "suggestion for discussion"); *cf.* Kysar, *supra* note 53, at 391 (official revenue estimates should be augmented by estimated post-sunset costs—but presumably only through end of budget window—multiplied by likelihood that extension will occur).

[57] Gale & Orszag, *supra* note 53, at 1559.

[58] *See id.* at 1553 ("Recent sunsets have been motivated by the desire to manipulate budget rules and hide the likely costs of new tax cuts.").

[59] Critics have pointed out the significance of budget consequences falling outside the budget window. *See* Elizabeth Garrett, *Rethinking the Structures of Decisionmaking in the Federal Budget Process*, 35 HARV. J. ON LEGIS. 387, 403 (1998) (expressing concern that "new tax provisions or entitlement programs can be drafted so that most of the revenue is lost outside the budget window"). But the concern often is expressed in the context of some manipulation that caused costs that normally would have fallen within the window period to fall outside it. Thus, the principal concern still seems to be the misrepresentation of budgetary consequences within the window period. *See* S. 568, 109th Cong. § 107(a) (2005) (providing for new point of order in House and Senate with respect to proposed legislation if CBO certifies that in general, discounted present value of cost of legislation in ten years following ten-year budget window is estimated to be 150% or greater than discounted present value of cost during window period); SCHICK, *supra* note 23, at 171 (describing how Congress can misrepresent budget effect within budget window period); Leonard E. Burman, William G. Gale & Peter R. Orszag, *The Administration's Savings Proposals: Preliminary Analysis*, 98 TAX NOTES 1423, 1434 (2003) (explaining how conversion of traditional to Roth IRAs is portrayed under budget rules as revenue-raiser within budget window period that "[can] be used to finance other spending programs or tax cuts" even though it is revenue-loser if long-term costs are taken into account); Leonard E. Burman, *Roth Conversions as Revenue Raisers: Smoke and Mirrors*, 111 TAX NOTES 953,

But from the broader perspective of promoting greater fiscal responsibility, which is one of the goals of the congressional budget rules,[60] both proponents and opponents of the recent legislation have overlooked the real budgetary impact of the legislative practices. The budget process should provide a mechanism that conveys to lawmakers the true cost of their legislative activity before they act. This information not only enables lawmakers to make more informed decisions but also permits the public to hold lawmakers accountable for their choices. But the "true cost" of legislation is not necessarily its official cost used for budget purposes; rather, the true cost includes the budgetary consequences of the legislation throughout the period the legislation remains in effect. Since the official cost incorporates only the budget consequences falling within the budget window period, it systematically understates the true cost of any deficit-increasing legislation extending beyond that period.[61] Thus, when proponents of permanent legislation go on record as having approved the official cost of such legislation, they escape responsibility for the full budgetary impact of their action. By contrast, barring estimation error, the official cost of legislation not extending beyond the end of the budget period *is* its true cost, and lawmakers who support such legislation must therefore internalize the full budgetary consequences of their choice.

These observations mean that at least from the standpoint of promoting political accountability and fiscal restraint, legislation whose effect extends beyond the end of the budget period, such as permanent legislation, generally should be disfavored, whereas legislation whose effect ends no later than the end of the budget period, such as

953–54 (2006) (same); Gale, *supra* note 56, at 26 (worrying that out-year cost will not be represented adequately within budget window period); Garrett, *supra* note 44, at 528 (worrying that greater revenue losses fall outside budget period than within it). I discuss later certain legislative process features designed to prevent long-term deficit increases. *See infra* Part III.B.

60 *See* Eskridge, Frickey & Garrett, *supra* note 22, at 428–29 (explaining that processes in Congressional Budget Act of 1974 were designed in part to respond to President's criticism that Congress "lacked the discipline to formulate comprehensive and responsible fiscal policy"); Schick, *supra* note 23, at 20 (explaining that although Congressional Budget Act of 1974 did not require balanced budgets, Congress expected new rules to reduce deficits).

61 One possible but highly unusual exception to this statement would be if legislation were estimated to cost the government money (or reduce revenues) within the budget window period but then to reverse that effect in later periods. Another exception would be if legislation, although extending beyond the budget window period, were estimated to have little or no budgetary impact after such period. In that case, since official cost estimates do not incorporate present value principles, it is possible that the official cost would overstate the true cost.

temporary-effect legislation, generally should be favored.[62] The following two Sections illustrate the application of this principle both at the time policy choices are first adopted and when they are later continued.

B. *Initial Adoption of Policy Choices: Comparing the Estate Tax Repeal and the Medicare Prescription Drug Legislation*

The more transparent budget accounting consequences of temporary-effect rather than permanent legislation when policy choices are first adopted are starkly illustrated by comparing the passage of the estate tax repeal in 2001 and the Medicare prescription drug legislation in 2003. The legislation repealing the estate tax gradually phased it out until 2010, when the tax is scheduled to be repealed completely.[63] As it is a temporary measure, however, expiration of the repeal means that the tax will be revived and returned to its pre-2001 state beginning on January 1, 2011. The very slow phase-out of the tax as well as the sunset of full repeal on December 31, 2010—or nine months prior to the end of the budget window period—resulted in a significant reduction in the official ten-year cost of the change.[64] Critics have pointed to the design of this change as one of the most egregious enacted in recent years.[65] Senator Kent Conrad, who was

---

62 Temporary entitlement programs that the baseline assumes will be continued, *see supra* note 37, are treated for budget purposes like permanent programs. When changes are made to such programs, the estimated cost of the change is projected throughout the budget window period even if there is a scheduled expiration for the change prior to the end of the period. Later extensions of the change, however, are then estimated to have no cost because the baseline assumes that the change was permanent. Thus, like permanent programs and in contrast to temporary tax provisions, the estimated cost of these temporary entitlement programs does *not* reflect the true cost of the legislation (including costs incurred beyond the end of the budget window period). It is therefore incorrect to claim that temporary tax and entitlement programs are treated alike for budget accounting purposes. *See Perspectives on Renewing Statutory PAYGO: Hearing Before the H. Comm. on the Budget*, 110th Cong. 18 n.10 (2007) [hereinafter PAYGO Testimony] (statement of Peter R. Orszag, Director, Cong. Budget Office) (explaining that cost of extending a temporary entitlement program beyond budget window period is generally incorporated into baseline even though legislative process is never charged for that cost). *But see id.* at 78 (statement of Robert Greenstein, Executive Director, Center on Budget and Policy Priorities) ("[E]xpiring entitlement programs that are assumed to continue in the baseline receive no overall advantage relative to expiring tax-cut provisions."); JAMES HORNEY & RICHARD KOGAN, CTR. ON BUDGET & POLICY PRIORITIES, KEY ARGUMENT AGAINST APPLYING PAY-AS-YOU-GO TO TAX CUTS DOES NOT WITHSTAND SCRUTINY 5 (2007), http://www.cbpp.org/3-22-07bud.pdf (same).

63 Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, §§ 501, 901(a), 115 Stat. 38, 69, 150.

64 *See supra* note 48 and accompanying text.

65 *See, e.g.*, Garrett, *supra* note 53, at 196 (describing change as "extreme example" of recent sunset provisions).

then ranking member of the Senate Budget Committee and an opponent of the 2001 legislation, was particularly upset with the early termination of the 2001 changes, including the repeal of the estate tax. He stated that the sunsetting of the 2001 Act provisions was equivalent to "ripp[ing] off the last page of the calendar and . . . making believe 2011 doesn't exist . . . . [T]his has serious implications for the fiscal integrity of the budget."[66]

Enactment of the Medicare prescription drug legislation in 2003[67] also faced budget limitations. Early on, the President and congressional supporters agreed that this legislative effort should cost no more than $400 billion over the ten-year budget window.[68] To fit within that constraint, many changes were made to the final legislation, including creation of a "doughnut hole" in the benefit structure to remove any federal subsidy for an intermediate level of prescription drug spending and addition of a delay in the basic benefit until January 1, 2006, with only limited transitional assistance provided prior to that time.[69] Importantly, however, unlike most of the tax laws passed in 2001 and 2003, the effect of the new Medicare prescription drug law was not sunset. Rather, it was enacted as a permanent change in the law.[70]

---

66 Glenn Kessler & Juliet Eilperin, *Hill Negotiators Reach Deal on Tax Cut; Package Offers Refunds This Year: $300 for Singles, $600 for Families*, WASH. POST, May 26, 2001, at A1 (quoting Sen. Conrad criticizing decision to terminate tax cuts in 2010).

67 Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, §§ 101–111, 117 Stat. 2066, 2071–2176.

68 *See* 1 PUBLIC PAPERS OF THE PRESIDENTS: GEORGE W. BUSH 83 (2003) (offering $400 billion commitment to Medicare reform in 2003 State of the Union Address); H.R. Con. Res. 95, 108th Cong. § 401 (2003) (enacted) (setting forth $400 billion reserve fund for Medicare prescription drug legislation over ten-year period); Rebecca Adams, *Lawmakers Mindful of Ticking Clock Scramble To Repair Medicare Rift*, 61 CQ WKLY. 999, 1000 (2003) (noting "$400 billion limit that Republicans have set" for Medicare prescription drug program).

69 *See* CONG. BUDGET OFFICE, A DETAILED DESCRIPTION OF CBO'S COST ESTIMATE FOR THE MEDICARE PRESCRIPTION DRUG BENEFIT 3, 6–7, 26–27 (2004) [hereinafter CBO, DETAILED DESCRIPTION], *available at* http://www.cbo.gov/ftpdocs/56xx/doc5668/07-21-Medicare.pdf; SCHICK, *supra* note 23, at 134–35 (describing how size of doughnut hole was determined by budget considerations).

70 Although there is no specific expiration date for the program, the legislation contains a "soft budget trigger," which may stimulate changes to the program should its costs prove to be greater than anticipated. If the Medicare trustees determine in two consecutive years that general revenues will be needed to finance over forty-five percent of the Medicare program during the forthcoming seven years, the President is required to submit proposed legislation to the Congress to respond to the warning, and the legislation would be considered under fast-track procedures. Medicare Prescription Drug, Improvement, and Modernization Act of 2003, §§ 801–804, 117 Stat. at 2357–64. The trustees issued a warning in both 2006 and 2007 that prompted the Bush administration to propose curative legislation in early 2008, but Congress turned off the trigger for the balance of the 110th Congress without acting on the administration's proposal. 154 CONG. REC. H7133 (daily ed. July 24,

As it turns out, much controversy surrounded the Congressional Budget Office's (CBO) $395 billion ten-year official cost estimate of the final Medicare legislation.[71] Shortly after enactment, it was alleged that the Bush administration had withheld information from Congress that would have shown the estimated cost of the bill to be over $100 billion more than the CBO's estimate.[72] In 2005, the CBO increased its estimate of the prescription drug portion of the legislation by $41 billion, citing a variety of factors.[73] Thus, it appears that for innocent and perhaps some not-so-innocent reasons, Congress passed the legislation without the benefit of a fully informed official cost estimate.

But the inaccuracy of the official estimate pales in comparison to the real budgetary implications of this legislation. The true cost of the Medicare prescription drug benefit, meaning the present value of all future costs obligated by the new program, has been estimated by the Medicare trustees to be *$17.2 trillion*.[74] Thus, enactment of the

2008) (approving H.R. Res. 1368, 110th Cong. (2008) ("[S]ection 803 [of the Medicare Prescription Drug Act] shall not apply during the remainder of the 110th Congress.")). In early 2009, Congress once again turned off the trigger for the entire 111th Congress. 155 CONG. REC. H6, H9, H20 (daily ed. Jan. 6, 2009) (approving H.R. Res. 5, 111th Cong. § 3(e) (2009) ("Section 803 [of the Medicare Prescription Drug Act] shall not apply during the 111th Congress.")).

71 CBO, DETAILED DESCRIPTION, *supra* note 69, at viii tbl.1; Letter from Douglas Holtz-Eakin, Director, Cong. Budget Office, to Rep. William M. Thomas, Chairman, Comm. on Ways and Means (Nov. 20, 2003), *available at* http://www.cbo.gov/ftpdocs/48xx/doc4808/11-20-MedicareLetter.pdf.

72 Editorial, *Bad Medicare Math*, WALL ST. J., Mar. 17, 2004, at A16; Editorial, *Medicare Analyst Confirms Boss's Threat; Says He Was Ordered To Withhold Unfavorable Cost Estimate*, SEATTLE TIMES, Mar. 13, 2004, at A4; *cf. Board of Trustees 2004 Annual Reports: Hearing Before H. Comm. on Ways and Means*, 108th Cong. 17, 26–29 (2004) (statement of Douglas Holtz-Eakin, Director, Cong. Budget Office) (describing difference between CBO and administration estimates).

73 Letter from Douglas Holtz-Eakin, Director, Cong. Budget Office, to Rep. Joe Barton, Chairman, Comm. on Energy & Commerce (Mar. 4, 2005), *available at* http://www.cbo.gov/ftpdocs/61xx/doc6139/03-04-BartonMedicare.pdf. The prescription drug portion of the legislation was originally estimated to cost about $552 billion (net of premiums from beneficiaries and transfers from states) over ten years. This amount was reduced by estimated cost savings (principally to the Medicaid program) and increased revenues resulting from the legislation to bring the estimated cost of the bill to about $395 billion over ten years. *Id.* at 1; CBO, DETAILED DESCRIPTION, *supra* note 69, at viii tbl.1. The March 2005 revision increased CBO's estimate of the prescription drug benefit (net of premiums and state transfers) by $41 billion, from $552 billion to $593 billion. Letter from Douglas Holtz-Eakin to Joe Barton, *supra*, at app. (comparing CBO's March 2005 Medicare Prescription Drug Baseline and CBO's Estimate for Medicare Modernization Act).

74 BDS. OF TRS. OF THE FED. HOSP. INS. & FED. SUPPLEMENTAL MED. INS. TRUST FUNDS, 2008 ANNUAL REPORT 124 tbl.III.C23 [hereinafter 2008 MEDICARE TRUSTEES REPORT]. The entire present value cost of the program is estimated to be $21.8 trillion, but it is financed by a combination of beneficiary premiums, state transfers, and general reve-

Medicare law represented a huge new financial commitment by the federal government. Even if Congress and the public had been provided with the revised CBO estimate of the legislation's cost, that prediction still would have represented less than four percent of the full budgetary consequence of the congressional action.[75] Therefore, the budget process, which is intended to provide information to Congress to aid it in making responsible choices about the nation's priorities and to the public so it can scrutinize those choices effectively, failed in the case of the Medicare legislation.[76] Far more important than the specific estimating controversy in that case was the continuing effect of the change in law beyond the end of the budget window period.

Contrast the case of estate tax repeal. Because of its sunset prior to the end of the budget window period, the true cost of this change is equal to its official cost (barring estimation error).[77] Congress therefore acted with full knowledge of the law's budgetary implications and subjected itself to full scrutiny from the public for its choice. Because budget estimating baselines generally take termination dates seriously, Congress will be confronted with additional costs should it decide to extend the scheduled 2010 repeal beyond that time.[78] Assuming that any extension does not continue in effect beyond the budget window period at the time of the extension, Congress will again be presented with an official cost estimate equal to its true cost.

nues. *Id.* at 125 tbl.III.C24. The present value of the portion of the benefit that will have to be financed by general revenues, which is directly analogous to the CBO's original $552 billion official cost estimate of the net increase in spending resulting from the prescription drug program, *see supra* note 73, is $17.2 trillion. 2008 MEDICARE TRUSTEES REPORT, *supra*, at 125 tbl III.C24. The present value estimates do not reflect other aspects of the prescription drug legislation, including the mandated reductions in Medicaid spending. *Id.* at 125–26.

75 The calculation is as follows: $593 billion (CBO's March 2005 revised estimate of the cost of the prescription drug benefit net of premiums and state transfers, not including anticipated cost savings from Medicaid) divided by $17.2 trillion (the estimated present value of the cost of the program to be funded by general revenues, also not including estimated Medicaid cost savings) equals 3.4%. *See supra* notes 73–74.

76 *Cf.* Howell E. Jackson, *Counting the Ways: The Structure of Federal Spending*, *in* FISCAL CHALLENGES, *supra* note 19, at 185, 211 (suggesting that limits of traditional budget analysis may have contributed to "spike in Medicare obligations in 2003").

77 More precisely, if the true cost of legislation is measured as equal to the *present value* of all future costs required by the legislation, then the official cost of any legislation not extending beyond the end of the budget window period actually overstates its true cost because official cost estimates are not expressed in present value terms. JCT, REVENUE ESTIMATING, *supra* note 34, at 12. In this Article, I generally ignore this distinction.

78 If it had been enacted in 2008, an extension of the scheduled 2010 repeal of the estate and gift tax would have cost $668 billion during the years 2009 to 2018. CBO, FY 2008–2018 OUTLOOK, *supra* note 36, at 104 tbl.4-9. For discussion of a proposal of the George W. Bush administration to change the budget rules to eliminate this consequence, see *infra* text accompanying notes 107–08.

To critics like Senator Conrad, one might ask whether, from the standpoint of promoting political accountability and fiscal restraint, it would have been preferable for Congress to have "revealed" and "paid for" the cost of the change in the final fiscal year of the budget window period (2011) in the course of approving a *permanent* repeal of the estate tax, which would have concealed the cost of that change for all years beyond that period?

TABLE 2
COMPARISON OF "OFFICIAL COST," TRUE COST, AND UNACCOUNTED-FOR COSTS OF PERMANENT AND TEMPORARY MEDICARE LEGISLATION

	($ Billions)		
Type of Legislation	Official Cost (Ten Years)	True Cost	Unaccounted-for Costs
1. Permanent legislation	400	17,200	16,800
2. Temporary legislation expiring at end of year ten	400	400	0
3. Temporary legislation expiring at end of year five	200	200	0
4. Temporary legislation with delayed effective date and phase-in	80	80	0

Table 2 illustrates the important difference in the budget accounting treatment of permanent and temporary-effect legislation. The Table compares the budget accounting of the Medicare legislation as enacted and as it would have been had the legislation been enacted, like the estate tax repeal, as a temporary measure expiring no later than the end of the budget window period. As enacted, there is approximately $16.8 trillion in unaccounted-for costs (line 1)—costs not taken into account in the legislative process and for which, therefore, no member of Congress is on record as having favored.[79] In contrast, had the Medicare legislation been enacted in a variety of temporary ways with expiration no later than the end of the ten-year

[79] The actual amount of unaccounted-for costs is slightly less than this because the $17.2 trillion present value estimate does not take into account the anticipated savings from Medicaid, whereas the original $400 billion cost estimate included the expected savings. *See supra* notes 73–74. An exact apples-to-apples comparison would show an official ten-year cost estimate of $552 billion without taking into account the Medicaid savings, a $17.2 trillion true cost also exclusive of such savings, and therefore about $16.6 trillion in unaccounted-for costs. *See supra* notes 73–74.

budget window period, in the same manner as estate tax repeal, there would not have been any unaccounted-for costs (lines 2 through 4).[80]

The example highlights the flaw in how the budget process accounts for the cost of permanent legislation. The problem is not simply an absence of transparency, as important as that factor is in facilitating political accountability.[81] Rather, since the official cost of legislation is limited to estimates of budget consequences only through the budget period, the information that is provided is biased in one direction to understate the complete impact of any deficit-increasing legislation extending beyond such period, such as permanent legislation.[82] This distortion prevents full accountability of lawmakers who support the legislation and may bias their decisionmaking.[83] By contrast, the budget accounting treatment of temporary-effect legislation does not contain the same defect.

C. Continuation of Policy Choices: Comparing the R&E Tax Credit and the IRA Deduction

The different budget accounting treatment of temporary-effect versus permanent legislation is also important when policy choices are continued. This effect is illustrated by considering two tax programs, the R&E tax credit and the deduction for Individual Retirement Account (IRA) contributions. In 1981, Congress approved a new

---

80 Because the hypothetical temporary Medicare prescription drug law would have been a post-1997 temporary entitlement program, the statement in the text assumes that the Congressional Budget Committees would have permitted the baseline to respect its termination date in the same manner in which the baseline respects the termination date of temporary tax provisions. *See supra* note 37.

81 *See* Arnold, Logic, *supra* note 10, at 28 (explaining importance in accountability model of voters knowing absolute and, especially, relative magnitude of costs of policy choices); John Dunn, *Situating Democratic Political Accountability*, *in* Democracy, Accountability, and Representation 329, 335–39 (Adam Przeworski, Susan C. Stokes & Bernard Manin eds., 1999) (explaining how accountability model breaks down in absence of good information); Elizabeth Garrett, *Accountability and Restraint: The Federal Budget Process and the Line Item Veto Act*, 20 Cardozo L. Rev. 871, 876, 924 (1999) ("[V]oters cannot hold any political actor responsible for decisions of which voters themselves are unaware."); *cf.* Alberto Alesina & Roberto Perotti, *Fiscal Discipline and the Budget Process*, 86 Am. Econ. Rev. 401, 403 (1996) ("Lack of transparency helps to create confusion and ambiguity on the real state of public finances, by hiding as much as possible of the current and future tax burdens, overemphasizing the benefits of spending, and underestimating the extent of current and future government liabilities.").

82 See *supra* note 61 for possible qualifications.

83 In addition to making approval of a spending program potentially look more attractive than it really is, understated costs may inhibit accountability by reducing the salience of the decision to voters. *See* Arnold, Logic, *supra* note 10, at 65 ("Citizens are more likely to have preferences about an issue when they see relatively large costs or benefits for themselves . . . .").

R&E tax credit to provide an incentive for certain research activity.[84] The credit was (and continues to be) tricky to design, since Congress wanted the credit to induce new research activity and not simply to reward research that would have occurred without the credit.[85] Because of this difficulty, and to give it the "opportunity to evaluate the operation and efficacy of the new credit,"[86] Congress provided that the credit would sunset at the end of 1985, after being in effect for four and a half years. The credit was estimated to cost roughly $3.3 billion over that period, or a little over $700 million per year.[87]

Also in 1981, Congress liberalized the rules for the IRA deduction by increasing the maximum allowable contribution to $2000 per year (from $1500) and allowing persons covered by another qualified retirement arrangement to make deductible contributions.[88] The original IRA deduction enacted in 1974 was intended to provide a retirement savings incentive to only those persons not otherwise covered by a qualified plan.[89] When it was originally enacted, the IRA deduction was estimated to cost approximately $355 million per year.[90] The 1981 expansion was estimated to cost a little over $8 billion over the next five years, or roughly $1.6 billion per year.[91] In contrast to the R&E credit, this expansion of the IRA deduction, like its initial enactment, was a permanent addition to the tax law.

As it turns out, the revenue estimates made in 1981 for both of these two provisions were significantly in error. In the case of the R&E credit, the lack of extensive experience with a credit of this sort, uncertainty regarding the type of behavioral response it might induce, and other factors caused the estimate to be only about half of the actual cost of the credit (as determined in hindsight).[92] An error of about the same magnitude was made for the IRA expansion.[93] Here, economists could draw upon the experience and data from the

---

[84] The R&E credit was enacted as part of the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 221, 95 Stat. 172, 241–47.

[85] For some of the design difficulties, see generally Martin A. Sullivan, *The Research Credit: A Perfect Example of an Imperfect Code*, 85 TAX NOTES 128 (1999).

[86] STAFF OF JOINT COMM. ON TAXATION, 97TH CONG., GENERAL EXPLANATION OF THE ECONOMIC RECOVERY TAX ACT OF 1981, at 121 (Comm. Print 1981) [hereinafter JCT, GENERAL EXPLANATION: 1981 ACT].

[87] *See id.* at 137.

[88] Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 311, 95 Stat. 172, 274; COMM. ON WAYS AND MEANS, PRIVATE PENSION TAX REFORM, H.R. REP. NO. 93-807, at 7, 32, 41–42 (1974).

[89] *See* H.R. REP. NO. 93-807, at 4, 7, 11, 32, 41–42.

[90] *Id.*

[91] JCT, GENERAL EXPLANATION: 1981 ACT, *supra* note 86, at 205.

[92] Emil M. Sunley & Randall D. Weiss, *The Revenue Estimating Process*, 51 TAX NOTES 1299, 1308 (1991).

[93] *Id.* at 1307–08.

existing IRA program.[94] What they failed to anticipate, however, was the extent to which the program would be mass-marketed by interested financial institutions once the deduction became, in effect, a universal one.[95]

Despite use of the best data and analysis, the possibility of erroneous budget estimates is not particularly surprising. Some determinations are inherently uncertain, and the conditions under which the estimates must be prepared are not ideal.[96] Budget law also does not permit the use of confidence intervals or other techniques commonly employed by economists to express the uncertainty of their conclusions.[97] The important point, though, is the contrast between how the R&E credit and the IRA deduction have been accounted for over the years.

The R&E credit has proven to be extremely popular and has remained in effect, with some changes, for virtually the entire period since 1981. After its initial four-year term, the life of the credit has been regularly extended, generally in one- or two-year increments.[98] Indeed, even though there is no suggestion that its initial temporary term was in any sense a budgetary gimmick, the credit is often pointed to as the poster child for fiscally irresponsible "sunset" provisions.[99] Yet by adopting the credit as a temporary measure and then extending

94 *Id.* at 1308.

95 *Id.* at 1307–08.

96 In 2007, seventeen economists on the staff of the Joint Committee on Taxation had to handle 7800 revenue estimate requests. EDWARD D. KLEINBARD, JOINT COMM. ON TAXATION, INSIDE THE JCT REVENUE ESTIMATING PROCESS 3 (2008), http://www.jct.gov/Inside_Revenue_Estimating.pdf. To put that number in perspective, one analyst asserted fifteen years ago that "550 revenue estimates is too heavy a burden for the Joint Committee's 10 estimators to shoulder in one year." Bopp, *supra* note 34, at 1646. For the growth in revenue estimate requests over the years, see JCT, REVENUE ESTIMATING, *supra* note 34, at 7 fig.1. For a description of the practical difficulties encountered in estimating the revenue impact of one recent controversial provision, see Kleinbard & Driessen, *supra* note 40, at 1194–96.

97 Alan J. Auerbach, *Public Finance in Theory and Practice*, 46 NAT'L TAX J. 519, 520 (1993).

98 The credit lapsed for one year, from July 1, 1995 to June 30, 1996, and the most recent extension expires on December 31, 2009. *See* Tax Extenders and Alternative Minimum Tax Relief Act of 2008, Pub. L. No. 110-343, Div. C, § 301(a), 122 Stat. 3861, 3865–66 (extending credit through end of 2009). For a brief description of the legislative history of the credit, see STAFF OF JOINT COMM. ON TAXATION, 110TH CONG., DESCRIPTION OF REVENUE PROVISIONS CONTAINED IN THE PRESIDENT'S FISCAL YEAR 2009 BUDGET PROPOSAL, 245 n.427 (Comm. Print 2008) [hereinafter JCT, PRESIDENT'S FY 2009 BUDGET PROPOSAL], *available at* http://www.jct.gov/s-1-08.pdf.

99 *See, e.g.*, Jill Barshay, *"Temporary" Tax Breaks Usually a Permanent Reality*, 61 CQ WKLY. 2831, 2832 (2003) ("The poster child of extenders is [the R&E credit], which has the most active business lobbying muscle behind it . . . ."); Block, *supra* note 53, at 57 (noting that R&E credit is "among the most notorious examples of the extender game"); Pat Jones, *New Day May Dawn for Sunset Tax Provisions*, 66 TAX NOTES 1587, 1587–88 (1995)

it only in short-term increments, Congress has had to take its cost into account in the legislative process for every one of its over twenty-five years of existence, a period far longer than that of any budget window thus far.[100] As a result, legislators have had to struggle regularly with finding an acceptable offsetting change to "pay for" an extension of the credit. Where no offset has been found, extension has potentially displaced new spending initiatives or tax expenditures in the same manner in which the continuation and expansion of discretionary spending programs compete with and may displace one another.[101] Moreover, as experience with and data about the credit have accumulated, the estimates of the cost of continuing the credit—currently equal to about $8 billion per year, or more than ten times the cost estimated in 1981—could be expected to be more and more accurate.[102] Thus, because of the temporary nature of the credit, Congress has been confronted by, and has had to take into account in the legislative process, current and increasingly accurate information relating to the cost of continuing the program.

Contrast the budget accounting treatment of the IRA deduction, which has also proven to be extremely popular and has remained in effect since 1981, with some important changes.[103] Unlike the case of the R&E credit, the cost of continuing the IRA program—now esti-

(highlighting "financial rewards" of extenders for lobbyists, among other factors, to explain "the extenders' phoenix-like history").

100 Cost estimates of proposed changes to Social Security are sometimes made over a seventy-five-year period, although these proposals and estimates generally are considered outside of the normal congressional budget process. *See* H.R. REP. NO. 98-25, pt. 1, at 65 (1983) (showing reliance upon seventy-five-year estimates provided by "intermediate II-B assumptions" in connection with legislation amending Social Security and Medicare).

101 *See* SCHICK, *supra* note 23, at 4 ("Budgeting is an allocative process in which there never is enough money to allocate."); Bopp, *supra* note 34, at 1633 ("[For discretionary spending,] Congress must apportion scarce amounts of budget authority among a more-than-ample number of candidate programs, often providing less budget authority to some than they might like."); Garrett, *supra* note 59, at 399–400 (describing competitive funding process applicable to discretionary spending and to *new* tax expenditures and entitlement spending—including extensions of expiring provisions—but not to spending increases resulting from mere continuation of entitlement programs or tax expenditures). Because Congress may feel compelled to "do something" every year, extension of the R&E credit also may substitute for new tax and spending programs that would be enacted if the credit were a permanent part of the law and did not need to be extended. I thank Len Burman for pointing this out to me.

102 *See* JCT, PRESIDENT'S FY 2009 BUDGET PROPOSAL, *supra* note 98, at 315 (estimating $40 billion cost of permanent extension of credit over next five fiscal years, or about $8 billion per year). The estimated cost of permanent extension over the next ten fiscal years is $108 billion, or almost $11 billion per year. *Id.*

103 The principal changes have been the introduction of income eligibility limits for deductions by active participants in qualified plans, increases in the contribution limits generally to $5000 per year, and addition of the Roth IRA. I.R.C. §§ 219(b), (g), 408A (2006).

mated to be about $19 billion per year,[104] many times the cost of the original program or the 1981 expansion—has largely disappeared from the legislative radar screen.[105] Except for the small, short-term cost estimates provided at the time the program was first started and when changes were approved, lawmakers have not been forced to face its fiscal implications. Nor will they be required to do so in the future unless and until they decide to change the program, at which point they will encounter only the estimated budgetary consequence of the change and not of continuing the underlying program itself. By approving the IRA program as a permanent change in the law, Congress modified the baseline to incorporate its cost in all subsequent years, including any growth in costs resulting from increased participation in the program or other factors not due to legislated changes.[106] Thus, enactment of the program as a permanent measure makes any continuation of the program beyond the initial budget window period appear to be cost free.

A proposal made by the George W. Bush administration to change the baseline so that it disregards the temporary nature of the 2001 and 2003 tax cuts demonstrates how important this budget accounting difference is.[107] If the baseline were changed in the manner urged by the administration to treat the tax cuts as if they had initially been enacted as permanent law, it would effectively eliminate the cost of continuing the cuts in the legislative process and thereby facilitate extension of the tax cuts beyond 2010. As explained by then–CBO Director Peter Orszag, this change in the baseline rules would be a form of bait-and-switch and would substantially undermine the integrity of the legislative process: "[S]coring expiring provisions as entailing no budgetary cost after their expiration, but then assuming their extension in the baseline, would cause the costs of

---

104 The estimated five-year cost of individual retirement plans as a tax expenditure is $94 billion, or about $19 billion per year. Staff of Joint Comm. on Taxation, 110th Cong., Estimates of Federal Tax Expenditures for Fiscal Years 2007–2011, at 34 (Comm. Print 2007) [hereinafter JCT, Estimates of Tax Expenditures FY 2007–2011], *available at* http://www.jct.gov/s-3-07.pdf. Tax expenditure estimates differ from revenue estimates principally because the former do not take into account possible behavioral responses of taxpayers to the change in law. *Id.* at 20–21. In addition, this tax expenditure estimate, because it is for only five years, largely disregards the projected increase in revenue when retired taxpayers make taxable withdrawals from their retirement accounts.

105 But see *infra* text accompanying notes 109–10 for a possible, limited crowding-out effect caused by the continuation of permanent programs.

106 *See supra* text accompanying notes 38–39 (discussing inclusion in baseline of projected future increases).

107 Office of Mgmt. & Budget, Analytical Perspectives, Budget of the United States Government, FY 2009, at 222 (2008), *available at* http://www.whitehouse.gov/omb/budget/fy2009/pdf/spec.pdf.

extending those provisions to "disappear" from the process—which would substantially undermine its integrity."[108]

Although Director Orszag was correct to criticize the Bush administration's proposal, the reason he articulated applies equally well to show why the current budget accounting treatment of *permanent* legislation substantially undermines the legislative process. Permanent legislation is scored as entailing no budgetary cost after the end of the budget window period, even though the baseline assumes the legislation will continue forever. Thus, the costs of such legislation after the end of the budget period "disappear" from the legislative process in exactly the same manner as Director Orszag's example, with the same deleterious effect on the integrity of that process.

Finally, although the cost of continuing a permanent program currently plays no formal role in the legislative process, it does have a "shadow" role. If the cost of continuation is large enough, it affects the overall budgetary situation of the country and may therefore influence legislative decisions.[109] For example, assuming that the Medicare prescription drug program continues as first enacted, one could anticipate a deteriorating fiscal situation partly attributable to that program that might eventually cause future legislatures to limit the size of that program, curtail other spending, or raise taxes. In the same way, it could be argued that enactment of temporary-effect laws creates a "rosy scenario" because the baseline used to project the country's future fiscal outlook generally takes the temporary nature of the law seriously (and therefore generally assumes expiration of temporary laws).[110] If this rosy scenario is taken seriously by lawmakers, it may reduce somewhat their willingness to exercise fiscal restraint.[111]

Both of these effects mitigate to some extent the disparate budget accounting treatment of permanent and temporary-effect legislation. There remains, however, a key difference between the two types of laws: Extension of a temporary law requires legislative action whereas continuation of a permanent one does not. However influential any shadow information provided to lawmakers may be, this difference in the legislative process forces lawmakers to make choices

---

108 PAYGO Testimony, *supra* note 62, at 18 (statement of Peter R. Orszag, Director, Cong. Budget Office).

109 *See* SCHICK, *supra* note 23, at 32 ("It is highly probable that even in the absence of [budget] rules, big deficits would have deterred Congress and the president from establishing new entitlements and impelled them to seek savings in old ones.").

110 CBO, FY 2008–2018 OUTLOOK, *supra* note 36, at 5. For exceptions to this statement, see *supra* note 37.

111 For this reason, the CBO regularly constructs an alternative scenario that tries to present a realistic estimate of the future for policymakers. CBO, LONG-TERM OUTLOOK, *supra* note 1, at 3 fig.1-1.

when a temporary law is extended but not when a permanent law is simply allowed to continue. To be able to hold their representatives accountable, voters must be able to trace policy effects back to specific legislators. When permanent programs are simply continued without any recorded vote, it leaves the record of decisionmaking incomplete.[112] The Bush administration's effort to change the baseline rules supports the view that the existence of action-forcing events and the budget accounting consequences of those events have real effects in legislative decisionmaking.

D. Passage of Permanent Legislation Permanently Distorts Budget Process Information

This Section shows how adoption of a permanent program permanently distorts the information provided by the budget process even if the program itself, as a result of subsequent congressional action, turns out to be only temporary (or, indeed, never goes into effect). Although this phenomenon is derivative of effects already discussed, the consequence is so counterintuitive as to merit a brief, separate discussion. The impact is also very important: It means, for example, that the $16.8 trillion of unaccounted-for costs previously identified with the passage of the Medicare prescription drug program has permanently distorted budget accounting by that amount, even if the program itself is curtailed or repealed in the future.[113]

The permanent distortion of budget process information is illustrated by considering legislation affecting a tax law provision concerning the allocation of interest expense between domestic- and foreign-source income. In general, the amount of foreign tax credit that may be claimed by a U.S. taxpayer is limited by the amount of the taxpayer's foreign-source income.[114] In 2004, for purposes of calculating the foreign tax credit, Congress liberalized the amount of interest expense that taxpayers may allocate against their domestic-source, rather than their foreign-source, income.[115] The effect of the change was generally to increase the foreign-source income of taxpayers, thereby increasing their permissible amount of foreign tax credits and reducing their U.S. income tax liabilities.

---

112 *See* ARNOLD, LOGIC, *supra* note 10, at 71–72 (noting importance of traceable effects); Arnold, *Inattentive Citizens*, *supra* note 10, at 403, 413 (explaining importance of roll call votes in accountability models); Garrett, *supra* note 81, at 926–27 (explaining greater salience to voters of action-forcing events—in form of exercise of line-item veto—which garner more publicity than other modes of achieving same consequences).

113 *See supra* note 79 and accompanying text.

114 I.R.C. § 904(a) (2006).

115 American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 401(a), 118 Stat. 1418, 1488–91 (adding new I.R.C. § 864(f) effective for taxable years beginning after 2008).

The initial effect of the 2004 change, however, was deferred until 2009, thereby reducing its estimated cost during the ten-year budget window period (FY 2005 to 2014) to about $14 billion.[116] Congress passed this change as part of tax legislation estimated to be revenue neutral over the forthcoming budget window period.[117] Thus, the $14 billion tax cut resulting from the change in the interest-allocation rule was effectively paid for by an estimated $14 billion tax increase during the same ten-year period.

In 2008, prior to this change going into effect, the House of Representatives approved a bill delaying its effect for ten years, until FY 2019.[118] Because the baseline for FY 2009 to 2018, however, assumed that the new liberalized interest-allocation law would be in effect as a result of the 2004 legislation, the ten-year delay in this tax cut was estimated to raise about $30 billion in revenues.[119] This revenue increase, in turn, was used to finance $30 billion in tax cuts in the bill, consistent with a revenue-neutral rule in effect in 2008.[120]

TABLE 3
ESTIMATED BUDGET EFFECTS OF 2004 LEGISLATION AND 2008 HOUSE BILL RELATING TO INTEREST-ALLOCATION RULES

	Estimated Revenue Effect ($ Billions)		
	FY 2005–2014	FY 2009–2018	Net Effect FY 2005–2018
1. Change to interest-allocation rules	–14	30	16
2. Offsetting tax increases	14	0	14
3. Offsetting tax cuts	0	–30	–30
4. Net revenue effect for budget purposes	0	0	0

116 JCT, GENERAL EXPLANATION: 108TH CONGRESS, *supra* note 9, app. tbl. at 553.

117 *See id.* at 563 (showing ten-year net revenue effect of only $213 million for American Jobs Creation Act of 2004).

118 Renewable Energy and Job Creation Act of 2008, H.R. 6049, 110th Cong. § 402 (as passed by House, May 21, 2008), 154 CONG. REC. H4367, H4383, H4400 (daily ed. May 21, 2008). This version of the bill was not approved by the Senate. Subsequently, however, Congress passed the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 3093, 122 Stat. 2654, 2912 (2008), which delayed the effect of § 864(f) for two years until 2011.

119 STAFF OF JOINT COMM. ON TAXATION, 110TH CONG., ESTIMATED REVENUE EFFECTS OF H.R. 6049, THE "RENEWABLE ENERGY AND JOB CREATION ACT OF 2008," SCHEDULED FOR CONSIDERATION BY THE HOUSE OF REPRESENTATIVES ON MAY 21, 2008, at 7 (Comm. Print 2008), *available at* http://www.jct.gov/x-46-08.pdf.

120 *See id.* at 7 (showing estimated ten-year net revenue effect of only $148 million for entire bill).

Table 3 summarizes the net budget accounting effect of these amendments to the interest-allocation rules. If the 2008 House bill had been enacted into law, the two changes would have been treated as raising net revenues of $16 billion ($14 billion revenue loss from 2004 legislation plus $30 billion revenue increase from 2008 bill) (line 1). This revenue increase would, in turn, have financed net tax cuts in those two years of $16 billion (the net effect of a $14 billion tax increase in 2004 and a $30 billion tax cut in 2008) (lines 2 and 3), consistent with a policy permitting only revenue-neutral changes in both years (line 4). *But the interest-allocation rules would not have been changed at all*—taken together, the 2004 and 2008 legislation would have left the law (through the end of FY 2018) precisely where it was prior to 2004. Thus, the estimated $16 billion increase in revenues resulting from the "changes" to those rules cannot be an accurate reflection of the budget impact of the legislation. Moreover, this misrepresentation can continue indefinitely. For example, if the 2008 House bill had been passed delaying the effect of the 2004 amendments until 2019, Congress could later delay the change for another ten years (FY 2019 to 2028) and thereby "raise" another $30 billion (or more) in revenues.[121] This amount could then be used to pay for $30 billion in additional tax cuts or spending increases under a policy of budget neutrality.[122]

The reason for the misrepresentation in the above example is the permanent nature of the 2004 change to the interest-allocation rules. As a permanent change, the legislation amended the baseline for all succeeding years, even though Congress was charged with just a small portion of the cost of the change—the $14 billion loss in revenues estimated to arise during the forthcoming ten years. Thus, when the House delayed the change in 2008 for ten years, it effectively was

[121] *Cf.* SCHICK, *supra* note 23, at 68–69 (explaining how Congress can enact temporary cost-saving legislation and then take credit for additional savings each time temporary legislation is continued).

[122] An even more dramatic example of the same misrepresentation concerns the special allowance for "domestic production activities" enacted by Congress in 2004. *See* American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 102(a), 118 Stat. 1418, 1424 (adding new I.R.C. § 199). Because the allowance was phased in beginning in 2005, the change had an estimated ten-year cost of $76.5 billion. JCT, GENERAL EXPLANATION: 108TH CONGRESS, *supra* note 9, app. tbl. at 546. The Treasury Department recently indicated, however, that repeal of this provision beginning in 2008 would raise revenues of $258 billion through 2017. U.S. DEP'T OF TREASURY, OFFICE OF TAX POLICY, APPROACHES TO IMPROVE THE COMPETITIVENESS OF THE U.S. BUSINESS TAX SYSTEM FOR THE 21ST CENTURY 48 tbl.3.1 (2007), *available at* http://www.ustreas.gov/press/releases/reports/hp749_approachesstudy.pdf. Thus, under current budget accounting rules, enactment of limited tax relief for domestic production activities for three years, 2005 to 2007, is estimated to *increase* revenues by $181.5 billion, money that, under a budget-neutrality policy, could be used to finance spending increases or tax cuts.

credited with an amount for which it was never charged in the first place. This example shows how enactment of permanent legislation permanently distorts the information provided by the budget process even when the legislation itself turns out to be only temporary or, in this case, never goes into effect at all.

E. Summary

For several reasons, greater use of temporary-effect legislation promotes political accountability and may enhance fiscal restraint. First, if policy choices are initially adopted as temporary measures, the budget process provides complete information about the cost of the change (barring estimation error), and lawmakers must internalize that cost in determining whether to support the measure. The process fails to do this for permanent measures; indeed, it systematically understates the complete cost of those changes and therefore permits supporters to avoid full responsibility. Second, when policy choices are continued, an extension of temporary-effect legislation requires congressional action that reveals the cost of continuation and potentially crowds out adoption of other spending or tax cuts. In contrast, a decision to allow a permanent law to continue does not require any congressional action and therefore does not have the same effect in the legislative process. Finally, the passage of permanent legislation permanently distorts the information provided by the budget process even though, due to subsequent congressional action, the legislation itself turns out to be only temporary (or, indeed, never goes into effect at all).

III
An Exploration of Budget Process Alternatives

This Part considers whether there are other possible ways, short of a preference for temporary-effect legislation, to address the problems associated with the budget accounting treatment of permanent legislation. Part III.A explains that requiring long-term budget estimates, which would eliminate the need for both a budget window and a temporary-effect preference, would not be feasible in the legislative process. Parts III.B and III.C describe why other existing budget-control tools, including the Byrd Rule, a Senate point of order against legislation producing long-term deficits, and a rule known as pay-as-you-go, or PAYGO, do not adequately address the problem. Part III.D summarizes.

A. The Infeasibility of Long-Term Budget Estimates in the Legislative Process

As a result of the fact that the budget window period is finite, typically five or ten years, Congress is not confronted with the full budgetary consequences of its actions when it approves legislation having long-term effects. A way to address this deficiency without restricting legislative options is to open up the window to match the potentially unlimited duration of legislation by providing long-term budget estimates. Rather than requiring lawmakers to conform their practices to those of the cost and revenue estimators, it is more sensible to require the estimators to conform their practices to the legislative preferences of lawmakers. Possible ways to implement such an infinite-horizon window are to employ present-value accounting, accrual accounting, or generational accounting.

Under present-value accounting, all future budget consequences of legislation, no matter when they are expected to occur, would be estimated and then discounted to present value. By using this approach, lawmakers would be able to compare and reveal to the public the complete budget implications of their choices. There would no longer be a budget window.[123]

Present-value accounting would be very difficult to implement. An estimator would need to project far into the future the change in both macroeconomic and microeconomic parameters that might affect the estimated cash-flow budget consequences of a legislative proposal.[124] Those estimates would then have to be discounted to present value. The longer into the future the budget effect is projected to occur, the greater the sensitivity of the resulting present-value estimate to slight modifications in the assumed rate of economic growth, projected change in other macroeconomic factors, and discount rate. The CBO has shown, for example, that slight changes in the assumed discount rate, rate of growth of the economy, or health care costs can have a dramatic effect on the size of projected long-term fiscal imbalances.[125] In addition, small adjustments in the analysis of the specific

---

123 *See* Garrett, *supra* note 53, at 189, 191–92 (supporting switch to present-value accounting in budget process, including its use in implementing budget enforcement rules).

124 As noted, macroeconomic projections are included in the calculation of the baseline, although they are not assumed to change as a result of a particular legislative proposal. *See supra* text accompanying notes 35, 41. For baseline purposes, the CBO currently provides macroeconomic projections for only ten years. JCT, REVENUE ESTIMATING, *supra* note 34, at 9.

125 CONG. BUDGET OFFICE, MEASURES OF THE U.S. GOVERNMENT'S FISCAL POSITION UNDER CURRENT LAW 10–11 (2004), *available at* http://www.cbo.gov/ftpdocs/57xx/doc5771/08-31-MeasuringFinancialPosition.pdf; *see also* CBO, LONG-TERM OUTLOOK, *supra* note 1, at 26 fig.2.4 (estimating that Medicare and Medicaid spending, as percentage of

factors affecting the cost of a new program can greatly affect the present-value estimate. Between their 2005 and 2006 annual reports, for example, the Medicare trustees reduced the estimated present-value cost of the Medicare prescription drug benefit by *$2.4 trillion* as a result of new assumptions relating to the anticipated growth in drug costs, potential cost savings to be derived from the program, and enrollment rates.[126] Furthermore, if use of an infinite-horizon window also causes reversal of the current practice of disregarding the possible macroeconomic effects of proposed legislation, there would be additional uncertainty in the estimate.[127]

The usual way in which an economist presents results with this degree of uncertainty is to use confidence intervals or to provide a range of results based on varying assumptions.[128] But budget rules currently do not permit such practices; rather, they require the presentation of point estimates.[129] If budget rules were amended to allow a more nuanced presentation of estimates, it is unclear how such information would be understood and used in the legislative process and whether it would result in improvement in the quality of decisionmaking.[130]

The high degree of uncertainty surrounding an estimate would place a budget estimator in the untenable position of having to defend

GDP, after 75 years would range over 30%, given 2.5% variance in growth of health care spending); 2008 MEDICARE TRUSTEES REPORT, *supra* note 74, at 71–76 (performing sensitivity analysis on Medicare spending); Peter A. Diamond & Peter R. Orszag, *Accrual Accounting for Social Security*, 41 HARV. J. ON LEGIS. 173, 182 (2004) (noting that seventy-five year actuarial imbalance is "extremely sensitive" to even small changes in future assumptions).

[126] BDS. OF TRS. OF THE FED. HOSP. INS. & FED. SUPPLEMENTAL MED. INS. TRUST FUNDS, 2005 ANNUAL REPORT 112 (providing $23.5 trillion cost estimate); BDS. OF TRS. OF THE FED. HOSP. INS. & FED. SUPPLEMENTAL MED. INS. TRUST FUNDS, 2006 ANNUAL REPORT 115–17 (providing $21.1 trillion estimate and reasons for difference).

[127] One reason macroeconomic parameters are held constant in forming budget estimates is the relatively short period (typically five or ten years) for which the estimate is made. An infinite-horizon window removes this justification for ignoring the possible macroeconomic effects of proposed legislation.

[128] *See* CONG. BUDGET OFFICE, QUANTIFYING UNCERTAINTY IN THE ANALYSIS OF LONG-TERM SOCIAL SECURITY PROJECTIONS 32 tbl.6, 34 tbl.8 (2005), *available at* http://www.cbo.gov/ftpdocs/68xx/doc6873/11-16-MonteCarlo.pdf (showing range of possible outcomes of Social Security financing and sources of uncertainty); CONG. BUDGET OFFICE, THE UNCERTAINTY OF BUDGET PROJECTIONS: A DISCUSSION OF DATA AND METHODS 1–2 (2007), *available at* http://www.cbo.gov/ftpdocs/78xx/doc7837/03-05-Uncertain.pdf (describing construction of "fan" chart showing range of possible baseline projections).

[129] JCT, REVENUE ESTIMATING, *supra* note 34, at 13.

[130] *See* Crippen Testimony, *supra* note 34, at 31–32 (doubting feasibility of including uncertainty factors in budget estimating process); Diamond & Orszag, *supra* note 125, at 182 ("[T]he more sensitive a measure is to reasonable variations in assumed parameters, the more important it is to provide a range of estimates rather than just a point estimate. And the budget process needs a point estimate to function.").

the indefensible.[131] Given the contentious nature of the legislative process, a change to present-value accounting would increase the suspicion, if not the reality, of political manipulation.[132]

A more important problem with present-value accounting is its failure to distinguish between likely and unlikely future budget effects. Present-value accounting would simply determine the present-value budget consequences of all proposed legislative changes. Congress might therefore be able to "pay for" an increase in current spending with a tax increase proposed to occur many years into the future. One can easily imagine "nonserious" proposals being adopted to achieve a particular budgetary goal.[133]

Even if nonserious proposals could somehow be identified and disregarded, present-value accounting might encourage precisely the type of legislative decisionmaking that greater fiscal discipline is intended to prevent. If Congress can "pay for" an increase in current spending with a "serious" tax increase to be imposed on future generations, Congress has arguably accomplished the same end as deficit spending. Fiscal restraint is important in part because it matters who must pay to, and who will receive from, the government, and these issues are simply ignored by present-value accounting.[134]

---

131 *Cf.* Crippen Testimony, *supra* note 34, at 10–11 (describing how CBO's choice among highly uncertain future policy directions affecting estimate would result in "chorus of controversy" because "[t]here is no objective way to make the choice"); Auerbach, *supra* note 97, at 523 (referring to uncertainty in providing macroeconomic effects of legislation).

132 *See* DANIEL SHAVIRO, DO DEFICIT$ MATTER? 130 (1997) (asserting that long-term estimates "could be manipulated . . . by result-oriented policymakers and econometric researchers"); Bopp, *supra* note 34, at 1648 ("[T]he revenue estimating process is not immune from charges of politicization.").

133 *See, e.g.*, Alan J. Auerbach, *Budget Windows, Sunsets, and Fiscal Control*, 90 J. PUB. ECON. 87, 88 (2006) (noting 1997 proposal to resolve Social Security imbalance by tax increase in year 2045); Diamond & Orszag, *supra* note 125, at 177, 185 (describing similar hypothetical "massive tax rate increase scheduled for the years 2150 and beyond" as solving Social Security problems but also as a "gimmick[ ]" and "having no credibility"); Howell E. Jackson, *Accounting for Social Security and Its Reform*, 41 HARV. J. ON LEGIS. 59, 85–86 (2004) (describing 1997 Social Security proposal as "irresponsible recommendation[ ]"); SHAVIRO, *supra* note 132, at 5–6, 234 (describing nonserious tax proposals, including large tax imposed on all newborns to be collected when they reach age seventy). Daniel Shaviro has proposed disregarding scheduled future tax increases or spending cuts if they are "discontinuous," that is, if they do not follow naturally from such changes scheduled to occur at an earlier time. SHAVIRO, *supra* note 56, at 110–11.

134 *See* LAURENCE J. KOTLIKOFF, GENERATIONAL ACCOUNTING: KNOWING WHO PAYS, AND WHEN, FOR WHAT WE SPEND 20–21 (1992) (noting importance to fiscal discipline and policy of asking who will pay for current spending); SHAVIRO, *supra* note 132, at 6, 121–22 (explaining importance of which generation pays and receives); Auerbach, *supra* note 133, at 88 ("[A] budget window that is too long . . . allows the shifting of fiscal burdens to those whom budget rules aim to protect.").

An alternative to present-value accounting is accrual accounting, which would require taking into account the future budget effects of government rights and obligations that have currently accrued.[135] "Accrual" as used in accounting recognizes transactions when the economic event occurs, based upon how fixed or certain the event is, rather than when the cash flow from the transaction occurs.[136] Thus, accrual-accounting principles might be one way to separate serious from nonserious proposals scheduled to occur in the future.

However, it is not clear how accrual concepts would be applied in the legislative process. Since all laws can be changed in the future, the government's right to receive a future payment (as a result of a tax or fee scheduled to be applied in the future) or obligation to make a future transfer (as a result of a benefit scheduled to be provided in the future) are in some sense uncertain until they actually arise. Even a senior citizen's right to receive Social Security payments from the government is not invulnerable to legislative change.[137] If one must look beyond the letter of the law and the possibility of future legislative change to matters such as the general understanding of the legislators when they passed the law, their "commitment" to the law, the political climate, and so forth, it is not clear that accrual-accounting principles would be of much assistance. In addition, accrual accounting suffers from the same measurement difficulties presented by present-value accounting, is potentially more manipulable than present-value accounting because of the judgment needed to determine which future

[135] *See* Jackson, *supra* note 76, at 200–09 (urging greater use of accrual principles in federal budget process); *cf.* Jackson, *supra* note 133, at 64–65 (proposing use of accrual accounting for Social Security); Daniel N. Shaviro, *Accrual Accounting and the Fiscal Gap*, 41 HARV. J. ON LEGIS. 209, 209–10 (2004) (endorsing same idea). The current federal budget is calculated mostly on a cash basis, but there are a few programs or activities, the most significant being certain credit programs and interest on the national debt, that are accounted for using accrual principles. CONG. BUDGET OFFICE, COMPARING BUDGET AND ACCOUNTING MEASURES OF THE FEDERAL GOVERNMENT'S FISCAL CONDITION 2–3 (2006), [hereinafter CBO, FISCAL CONDITION] *available at* http://www.cbo.gov/ftpdocs/77xx/doc7701/12-07-FiscalMeasures.pdf.

[136] EARL K. STICE & JAMES D. STICE, FINANCIAL ACCOUNTING: REPORTING & ANALYSIS 179 (7th ed. 2006).

[137] *See* Flemming v. Nestor, 363 U.S. 603, 610–11 (1960) (concluding that right to receive Social Security payments did not constitute property right whose deprivation would violate Due Process Clause of Fifth Amendment); Robert L. Clark, *Liabilities, Debts, Revenues, and Expenditures: Accounting for the Actuarial Balance of Social Security*, 41 HARV. J. ON LEGIS. 161, 165–66 (2004) (describing legislative changes to reduce Social Security benefits); Jackson, *supra* note 133, at 79 ("Social Security benefits do not constitute binding obligations on the part of the federal government."). Apart from the possibility of legislative change, there are also technical difficulties in identifying exactly when Social Security benefits should be viewed as accruing. *Id.* at 81, 106.

rights and obligations have currently accrued, and fails to consider exactly who would be affected by the legislative decisions.[138]

A final way to implement an infinite-horizon window is to use generational accounting. This method was developed to reveal the budget implications of current tax and spending policies on each generation.[139] As applied to the budget consequences of new legislation, it would take present-value accounting one step further by allocating the present value of future budget effects of the legislation among different age cohorts.[140] Projections of the lifetime income of those cohorts would also be made in order to ascertain the lifetime average tax (or transfer) rate to be expected by each generation.[141] In theory, generational accounting would allow lawmakers to see not only the total budget implications of their decisions but also the distributive effect across generations.[142]

Generational accounting analysis of legislation potentially would provide useful information to lawmakers,[143] but the practical difficulties of implementation make it infeasible as part of the legislative process. Furthermore, generational accounting also is susceptible to some of the same problems as present-value and accrual accounting in needing to differentiate between serious and nonserious proposals

---

138 *Cf.* Diamond & Orszag, *supra* note 125, at 182 n.31 (arguing that accrual measures are more susceptible to manipulation than cash-flow measures). The Financial Report of the U.S. Government, which presents the financial statements of the country using accrual-accounting principles, previews some of the potential difficulties that would arise if budget consequences were determined using accrual-accounting principles. *See* U.S. DEP'T OF TREASURY, FY 2007 FINANCIAL REPORT OF THE UNITED STATES GOVERNMENT 49 n.1.B (2007), *available at* http://www.gao.gov/financial/fy2007/07frusg.pdf. Among other things, the balance sheet generally excludes (1) the government's ownership of public lands and other natural resources because of the difficulty of valuation, (2) the income expected from future tax receipts because of the absence of any legally enforceable claim until the taxable event occurs, and (3) the present value of future Social Security and Medicare benefit payments because those liabilities are not viewed as currently accrued. *See id.* at 45 & 108 nn.23–24 (explaining omission of "stewardship land" and "heritage assets"); *id.* at 50–51 (explaining accounting only of taxes already levied); *id.* at 53 (explaining omission of liability for future benefit payments not yet due); *see also* CBO, FISCAL CONDITION, *supra* note 135, at 6–7 (describing balance sheet and exclusions).

139 KOTLIKOFF, *supra* note 134, at 22.

140 *Id.* at 23–27.

141 SHAVIRO, *supra* note 132, at 123.

142 For additional details about generational accounting, see JAGADEESH GOKHALE & KENT SMETTERS, FISCAL AND GENERATIONAL IMBALANCES: NEW BUDGET MEASURES FOR NEW BUDGET PRIORITIES 10–15 (2003), Alan J. Auerbach, Jagadeesh Gokhale & Laurence J. Kotlikoff, *Generational Accounting: A Meaningful Way To Evaluate Fiscal Policy*, 8 J. ECON. PERSP. 73 (1994), and Alan J. Auerbach, Jagadeesh Gokhale & Laurence J. Kotlikoff, *Generational Accounts: A Meaningful Alternative to Deficit Accounting*, *in* 5 TAX POLICY AND THE ECONOMY 55, 55–92 (David Bradford ed., 1991).

143 *See* Auerbach, *supra* note 97, at 521–22 (arguing that generational accounting, while imperfect, "would represent an improvement over current practice").

and to prevent results from being manipulated through slight changes in underlying assumptions. Finally, although generational accounting specifically considers the questions of which generation will pay and receive, it ignores one further question: Which generation should decide those questions? If Congress were to pass legislation providing both additional benefits and additional taxes on a future generation of people who are not part of the political process today, the distributional effect of the legislation might be considered generationally neutral. Still, there is a question of whether such decisionmaking might be better left for the future generation to resolve.[144]

Despite these difficulties, one could imagine using one or more of these three approaches in a more limited way in the legislative process to supplement rather than supplant the use of cash-flow point estimates over a finite budget window period. If used as an "information supplement" like the current analyses prepared by various government offices, many of the problems identified could be finessed by presenting a range of conclusions based on varying assumptions.[145] But it is unclear how much impact such reports have on legislative decisionmaking.[146] And if the supplemental analysis were given any

[144] For discussion of the impact of a temporary-effect preference on the ability of each generation to control its own agenda, see *infra* Part IV.D. For a broader critique of the concept of generational accounting, see Neil H. Buchanan, *Social Security, Generational Justice, and Long-Term Deficits*, 58 TAX L. REV. 275, 307–08, 310–15 (2005). *See generally* Michael Doran, *Intergenerational Equity in Fiscal Policy Reform*, 61 TAX L. REV. 241 (2008) (describing difficulty of assessing fiscal policy on basis of intergenerational equity).

[145] Examples of current "information supplements" are the long-term budget projections prepared by the CBO, the Office of Management and Budget (OMB), or the Government Accountability Office (GAO). *See generally* CBO, LONG-TERM OUTLOOK, *supra* note 1; OFFICE OF MGMT. & BUDGET, ANALYTICAL PERSPECTIVES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2009, at 187–96 (2008); U.S. GOV'T ACCOUNTABILITY OFFICE, THE NATION'S LONG-TERM FISCAL OUTLOOK (2006), *available at* http://gao.gov/new.items/d061077r.pdf.

[146] The principal problem with such reports is their lack of timeliness and determinacy. *Cf.* Garrett, *supra* note 81, at 932 ("Information can affect legislative outcomes best when it is available as lawmakers formulate policies."). For example, in early 2003, when there was considerable interest in Congress in understanding and taking into account the potential macroeconomic effects of proposed tax legislation (sometimes referred to as "dynamic scoring"), the CBO issued a report analyzing the macroeconomic effects of the Bush administration's FY 2004 budget proposals. CONG. BUDGET OFFICE, AN ANALYSIS OF THE PRESIDENT'S BUDGETARY PROPOSALS FOR FISCAL YEAR 2004, at 16–32 (2003) [hereinafter CBO, FY 2004 BUDGET PROPOSALS], *available at* http://www.cbo.gov/ftpdocs/41xx/doc4129/03-31-AnalysisPresidentBudget-Final.pdf; *see also* CONG. BUDGET OFFICE, HOW CBO ANALYZED THE MACROECONOMIC EFFECTS OF THE PRESIDENT'S BUDGET (2003), *available at* http://www.cbo.gov/ftpdocs/44xx/doc4454/07-28-PresidentsBudget.pdf (describing methodology used in that budget analysis). Unfortunately, by the time the report was issued, the legislative process already had begun to move away from some of the President's proposals in a significant way. In addition, the report presented the results generated by nine different macroeconomic models that reached differing conclusions. CBO, FY 2004 BUDGET PROPOSALS, *supra*, at 18 fig.1, 19 fig.2. Thus, the report concluded

"bite," perhaps by the creation of a point of order in the event that legislative changes have a negative impact (determined on a net present-value basis) on the government's fiscal situation,[147] then all of the earlier questions raised would return. The analysis would once again face issues such as the validity of underlying assumptions, the potential for political manipulation, the seriousness of proposals, the question of accrual (in the case of accrual accounting), and the proper allocation of burdens and benefits among age cohorts (in the case of generational accounting).

B. The Existing Rules in the Legislative Process Are Inadequate To Prevent Legislation Increasing Long-Term Deficits

This Section describes two existing features of the legislative process—the "Byrd Rule" and a point of order adopted by the Senate in 2007—that are designed to prevent Congress from approving legislation that increases long-term deficits. It explains why these mechanisms are unlikely to be as effective in achieving that end as a preference in favor of temporary-effect legislation. The Section begins with some background about the Byrd Rule and reconciliation bills, explains some of the reasons why this rule does not adequately prevent legislation that increases long-term deficits, and briefly describes and critiques the new Senate point of order to accomplish the same end.

1. Background on the Byrd Rule and Reconciliation Legislation[148]

The Byrd Rule—named after West Virginia Senator Robert Byrd, its original proponent—potentially prevents Senate consideration of portions of a reconciliation bill or conference report deemed to be extraneous to the underlying bill. Among other things, the rule may prevent Senate consideration of provisions causing spending increases or revenue decreases in a fiscal year after the budget period

---

that "[t]he overall macroeconomic effect of the proposals in the President's budget is not obvious." *Id.* at 16. For a summary of the principal issues raised by the use of dynamic scoring in the budget process, see Alan J. Auerbach, *Dynamic Scoring: An Introduction to the Issues*, 95 AM. ECON. REV. 421 (2005).

[147] *See* Honest Government Accounting Act of 2003, S. 1915, 108th Cong. § 8(b) (making this proposal); SHAVIRO, *supra* note 56, at 143–44, 219–20 (endorsing idea). For discussion of current rules that attempt to incorporate analyses of long-term budget consequences into the legislative process, see *infra* text accompanying notes 148–207.

[148] The following background information is taken from ROBERT KEITH, CONG. RESEARCH SERV., THE BUDGET RECONCILIATION PROCESS: THE SENATE'S "BYRD RULE" (2008), *available at* http://budget.house.gov/crs-reports/RL30862.pdf; ROBERT KEITH & BILL HENIFF JR., THE BUDGET RECONCILIATION PROCESS 1–2 (2006); Dauster, *supra* note 32, at 26–34.

covered by the reconciliation bill. The rule creates a point of order against the offending provision, and a supermajority of senators (at least three-fifths of the Senate) is needed to waive the point of order once it is raised.[149] Provisions that are removed from reconciliation legislation as a result of a Byrd Rule objection are sometimes referred to as "Byrd droppings."[150]

To appreciate the role of the Byrd Rule, it is necessary to understand the nature and significance of reconciliation legislation. A reconciliation bill is a special category of legislation prepared pursuant to reconciliation instructions included in a congressional budget resolution. The instructions direct one or more committees to craft legislative proposals that achieve certain budgetary targets. Once the committee work is complete, the proposals are bundled together, and the resulting bill is classified as "reconciliation" legislation to be considered by the full body.

The significance of the "reconciliation" designation is that it privileges the legislation with certain procedural advantages when it is considered on the Senate floor. Unlike most legislation, reconciliation bills must be debated in the Senate under fixed time limits, thereby eliminating the possibility of a filibuster.[151] In addition, any amendments to a reconciliation bill are subject to a "germaneness" requirement that does not exist for most other legislation.[152] These two deviations from normal Senate procedure significantly weaken the ability of a minority group of senators to block reconciliation legislation that they oppose. Ordinarily, there is no similar significance to the reconciliation designation in the House. The House Rules Committee, normally controlled by majority party leadership, generally sets the rules of debate for all legislation considered by the House.[153]

The purpose of the reconciliation process has been the subject of some controversy. Between 1980 and 1993, the process was used exclusively for deficit reduction purposes, with the reconciliation instructions directing the formation of legislation carrying out

---

149 KEITH, *supra* note 148, at CRS-4 to -5 (describing current features of Byrd Rule as of March 20, 2008); *see also id.* at CRS-3 fig.1 (listing "the laws and resolutions that have established and revised the Byrd rule").

150 David Baumann, *Byrd Brains*, GOVERNMENTEXECUTIVE.COM (Apr. 18, 2005), http://www.governmentexecutive.com/dailyfed/0405/041805ol.htm.

151 *See* KEITH & HENIFF, *supra* note 148, at 2 ("[D]ebate in the Senate on any reconciliation measure is limited to 20 hours (and 10 hours on a Conference report) . . . .").

152 *Id.* ("[A]mendments [to a reconciliation bill] must be germane and not include extraneous matter.").

153 *Id.* For example, in May 2006, in considering the reconciliation conference report, the House passed by majority vote a resolution which waived all points of order against consideration of the report. H.R. Res. 805, 109th Cong., 152 CONG. REC. H2354 (daily ed. May 10, 2006).

spending cuts, tax increases, or both.[154] Beginning in 1995 and continuing through 2001, the Senate vigorously debated whether reconciliation could be used for tax *cut* legislation.[155] Those opposed to such use argued that the fast-track procedures provided to reconciliation legislation were intended only to facilitate the exercise of fiscal responsibility, meaning deficit reduction.[156] Ultimately, this view did not prevail, and the reconciliation process was used in 2001, 2003, and 2005 to pass tax cut legislation that became law.[157] Both the House and the Senate reversed this conclusion in 2007 and adopted rules that would limit use of reconciliation legislation only for deficit-reduction purposes.[158]

Beginning in the early 1980s, a similar controversy developed concerning the inclusion of "extraneous" material in reconciliation bills. To take advantage of the fast-track procedures, committees began including provisions in their reconciliation recommendations that were completely unrelated to the budgetary objective assigned to them.[159] Senator Byrd objected to these practices in order to preserve the deliberative character of the Senate in considering all legislation, other than the budget-related legislation authorized by reconciliation, under the normal Senate rules of debate.[160] As a result, the practice was curbed, and the Byrd Rule was codified in 1985. As originally enacted, the Byrd Rule applied only to certain actions, such as the

---

154 *See* KEITH & HENIFF, *supra* note 148, at 22, 23 tbl.2 (summarizing fiscal effects of reconciliation directives). The reconciliation process was first authorized by the Congressional Budget Act of 1974, Pub. L. No. 93-344, § 310(c), 88 Stat. 297, 315–16, and its modern usage originated in 1980. KEITH & HENIFF, *supra* note 148, at 4–6.

155 Michael W. Evans, *The Budget Process and the 'Sunset' Provision of the 2001 Tax Law*, 99 TAX NOTES 405, 407 (2003).

156 *See id.* at 407–08, 412–14 (recounting Senate debates on scope of reconciliation process in 1996 and 2001); *see also* KEITH, *supra* note 148, at CRS-17 (describing "controversy in the Senate regarding the appropriateness of using reconciliation procedures under circumstances that worsened the federal government's fiscal posture" in FY 2000 and 2001).

157 The reconciliation legislation authorized by the 2005 budget resolution was not passed until 2006. Estimated tax cuts (of $292 billion) were first included in reconciliation legislation in 1997. STAFF OF JOINT COMM. ON TAXATION, 105TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN 1997 app. tbl. at 545 (Comm. Print 1997) [hereinafter JCT, GENERAL EXPLANATION: 1997 LEGISLATION], *available at* http://www.jct.gov/s-23-97.pdf. However, a separate reconciliation bill in the same session included a greater amount ($424 billion) of estimated spending reductions, so that the two bills together provided for deficit reduction. CONG. BUDGET OFFICE, BUDGETARY IMPLICATIONS OF THE BALANCED BUDGET ACT OF 1997, at 3 (1997), *available at* http://www.cbo.gov/ftpdocs/3xx/doc302/bba-97.pdf.

158 *See* H.R. Res. 6, 110th Cong. § 402 (2007) (enacted) (adding House rule against reconciliation legislation that would increase deficit or reduce surplus); S. Con. Res. 21, 110th Cong. § 202 (2007) (enacted) (adding similar Senate point of order).

159 Evans, *supra* note 155, at 408.

160 131 CONG. REC. 28,968 (1985) (statement of Sen. Byrd); KEITH, *supra* note 148, at CRS-2; KEITH & HENIFF, *supra* note 148, at 79.

inclusion in reconciliation bills of provisions not producing *any* change in revenues or outlays.[161] These were the most obvious cases in which provisions unrelated and extraneous to the underlying budgetary purpose of a reconciliation bill had been included in the bill. In 1987, in response to concerns that reconciliation legislation reduced deficits during the budget window period but had the opposite effect after such time, the Byrd Rule was amended also to treat as "extraneous" any provision that

> increases, or would increase, net outlays, or . . . decreases, or would decrease, revenues during a fiscal year after the fiscal years covered by [the] reconciliation bill or reconciliation resolution, and such increases or decreases are greater than outlay reductions or revenue increases resulting from other provisions in such title in such year.[162]

The meaning of this last addition to the Byrd Rule was also debated during the 1995 to 2001 period, when the possible inclusion of tax cuts in reconciliation legislation was considered. In 1999, advocates of permanent tax cuts included in a reconciliation bill provisions that both sunset the tax cuts on the last day of the budget window period and revived the same cuts the very next day.[163] A Byrd Rule objection was raised based on the claim that the bill reduced revenues after the budget window period.[164] This objection was upheld, and the second provision was stricken from the bill, thereby leaving only the tax cuts with an expiration date.[165] Since that time, the general understanding has been that tax cuts or spending increases extending beyond the budget window period of a reconciliation bill are potentially "extraneous" under the Byrd Rule and subject to the point of order.[166] Concern about the Byrd Rule was one of the reasons why the tax cuts in the 2001 Act were sunset.[167]

---

161 Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 20,001, 100 Stat. 82, 390–91 (1986).

162 Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, 101 Stat. 754, 784–85. The specific practice opposed was the shifting of spending or revenue between the budget window period and the post-window period, thereby achieving budgetary targets within the window period but no real deficit reduction. 145 CONG. REC. 18,172 (1999) (explanation of Sen. Roth); Evans, *supra* note 155, at 410.

163 Evans, *supra* note 155, at 411; Ryan J. Donmoyer, *Roth's Tax Bill Would Sunset 2009—For at Least a Minute, Anyway*, TAX NOTES TODAY, Document No. 1999-25291 (July 28, 1999), *available at* 1999 TNT 144-2 (Westlaw).

164 Evans, *supra* note 155, at 411 (describing objection of Sen. Moynihan).

165 *Id.* (noting that vote to waive Byrd Rule fell nine votes shy of required sixty).

166 *Id.* at 414.

167 JCT, GENERAL EXPLANATION: 107TH CONGRESS, *supra* note 46, at 171–72 (explaining that sunset provision was added "[t]o ensure compliance with the Budget Act," specifically with Byrd Rule). The Senate version of the 2001 reconciliation bill sunset all of the tax cuts as of September 30, 2011, the last day of the budget window period. STAFF OF

2. *Inadequacies of the Byrd Rule*

As described above, the original purpose of the Byrd Rule was to ensure that the normal Senate rules of debate would apply to legislation not carrying out the limited objective of a reconciliation bill, and the limitations inherent in the Byrd Rule are natural consequences of that objective. Although this purpose is carried out in a way that to some extent overlaps a general policy preference for temporary-effect legislation and against permanent legislation, for several reasons, the Byrd Rule is an inadequate substitute for such a preference.

First, the rule applies only to reconciliation bills and conference reports. Since reconciliation bills must originate from instructions included in the current budget resolution, this means that in any congressional session in which a budget resolution is not adopted, there is no legislation introduced in that session that would qualify as a reconciliation bill and be subject to the Byrd Rule. This is not an uncommon occurrence; Congress has failed to pass a budget resolution four times since 1998.[168]

Even in a year in which a budget resolution is passed, the inclusion of reconciliation instructions is optional. Although, in general, major spending and tax changes have occurred pursuant to reconciliation instructions,[169] there have been important exceptions. For example, the 1981,[170] 1984,[171] and 1986[172] tax acts, as well as the 2003

S. Comm. on Fin., 107th Cong., Restoring Earnings To Lift Individuals and Empower Families (RELIEF) Act of 2001: Technical Explanation of Provisions Approved by the Committee on May 15, 2001, at 158 (Comm. Print 2001); *see also* 147 Cong. Rec. 9173, 9571–9611 (2001) (showing Senate approval of House bill with September 30, 2011 sunset provisions). This sunset was a direct result of the Byrd Rule concern. The final version of the legislation, however, sunset the cuts nine months prior to that time in order to help reduce the official cost of the legislation. *See supra* note 46 and accompanying text (explaining calculation of official cost). The sunset of the cuts included in the 2003 and 2005 reconciliation bills cannot fairly be attributed to Byrd Rule concerns because the sunsets occurred well before the end of the applicable budget window periods.

168 Keith & Heniff, *supra* note 148, at 21. The resolutions not adopted would have been for FY 1999, 2003, 2005, and 2007. Robert Keith, Cong. Research Serv., The "Deeming Resolution": A Budget Enforcement Tool, at CRS-4 (2008), *available at* http://wikileaks.org/wiki/CRS-RL31443.

169 *See* Schick, *supra* note 23, at 122, 142 ("A [budget] resolution that does not contain reconciliation merely accommodates the status quo . . . ."); Dauster, *supra* note 32, at 27 (characterizing reconciliation bills as "the dominant means for Congress to make fiscal policy").

170 Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172.

171 Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494. This Act originated from a reconciliation bill by the House, but the Senate dropped that designation and the final legislation was not enacted pursuant to reconciliation. Keith, *supra* note 148, at CRS-7 n.11.

172 Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085.

Medicare prescription drug legislation,[173] were all major bills passed outside of reconciliation.[174] More importantly, legislation not making large aggregate changes in fiscal policy may nevertheless contain individual provisions having significant long-term budget effects.[175]

The 2003 Medicare prescription drug bill provides a good (and ironic) illustration of the optional nature of reconciliation. During consideration of the budget resolution passed in 2003, significant discussion revolved around whether the prescription drug legislation should be included in the reconciliation instructions.[176] The ultimate decision not to include it was partially due to concerns that granting fast-track procedures to a major new spending initiative would set a bad precedent and facilitate future expansions in government spending.[177] The irony is that by avoiding the use of reconciliation, supporters also precluded the application of the Byrd Rule, the one protection that might have curtailed the huge increase in future government spending authorized by the legislation.[178]

Nevertheless, even if a Byrd Rule objection had been available to challenge the Medicare legislation, it might have been ineffective because the legislation apparently had supermajority support in the

---

[173] Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, §§ 101–111, 117 Stat. 2066, 2071–76; *see also supra* notes 67–70 and accompanying text (discussing budget concerns of legislation).

[174] *See* KEITH & HENIFF, *supra* note 148, at 3 tbl.1 (listing budget reconciliation acts for FY 1981 to 2005 and omitting mention of 1981, 1984, and 1986 tax acts and Medicare prescription drug bill).

[175] *See, e.g.*, *supra* notes 114–20 and accompanying text (describing two such provisions included in overall deficit-neutral American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418).

[176] *See infra* note 177.

[177] By 2003, the Senate had resolved that tax cut legislation could be included in a reconciliation bill. *See supra* notes 154–57 and accompanying text. But there had yet to be a determination that reconciliation could be used for spending increases, and the Republican leadership did not want to set that precedent. Emily Pierce, *Frumin Caught in Middle of Tax Battle*, ROLL CALL, Mar. 4, 2003, at 1; Andrew Taylor, *Budget Panels' Disparate Plans Threaten United GOP Front*, 61 CQ WKLY. 608, 611 (2003). Democratic Senator Kent Conrad, who opposed allowing reconciliation to be used for tax cuts, previously had warned Republicans that the procedure could be used for spending increases if his position on tax cuts were defeated. 147 CONG. REC. 5227 (2001) (statement of Sen. Conrad); Kysar, *supra* note 53, at 376.

[178] Some might argue that only reconciliation legislation in the Senate needs Byrd Rule protection because nonreconciliation legislation can be filibustered. Thus, a determined minority can potentially block all legislation in the Senate—reconciliation legislation if a Byrd Rule objection is applicable (waivable only if there are at least sixty votes) and all other legislation if a filibuster is used (overcome by a cloture vote, also requiring at least sixty votes). But there is an important political difference between raising a Byrd Rule point of order and filibustering a bill. The former can easily be characterized as acting fiscally responsible, whereas the latter submits itself to charges of obstructionism. Philip G. Joyce, *Congressional Budget Reform: The Unanticipated Implications for Federal Policy Making*, 56 PUB. ADMIN. REV. 317, 324 (1996).

Senate.[179] By contrast, a supermajority of House members did *not* support the legislation.[180] Indeed, in order to secure a very slim majority in favor of the Medicare conference report, House leadership had to keep the voting process open for several hours beyond the normal period.[181] Thus, a further inadequacy of the Byrd Rule is its failure to provide a separate procedural restriction to House consideration of potentially objectionable legislation, a restriction that could be overcome only with supermajority support.[182] A Byrd Rule objection in the House might have forced Congress to include a sunset feature in the final Medicare legislation.

Another shortcoming of the Byrd Rule relates to the manner in which a violation is determined. Under current practice, unless a waiver motion is first considered, the Senate Parliamentarian must rule on a Byrd Rule objection.[183] A successful appeal of the Parliamentarian's ruling requires at least sixty votes.[184] Thus, the initial ruling by the Parliamentarian can be critical in determining which side of a Byrd Rule controversy must find supermajority support. If the Parliamentarian erroneously fails to sustain a proper objection, the proponents of the objection, and not those attempting to circumvent the Byrd Rule, would be obligated to gain at least sixty supporters.[185] The potentially critical role of the Parliamentarian has sometimes gen-

---

[179] The Senate approved its version of the bill by a 76 to 21 vote, 149 CONG. REC. 16,708 (2003), and the conference report by a 54 to 44 vote, 149 CONG. REC. 31,814 (2003). In debating the conference report, however, a motion to waive budget points of order was approved by a 61 to 39 vote, 149 CONG. REC. 31,164 (2003), and a motion to invoke cloture to end a filibuster against the bill was approved by a 70 to 29 vote, 149 CONG. REC. 31,151 (2003); *see also Legislative Legacy of 2003: Congress Hands Bush Big Wins*, 61 CQ WKLY. 3094, 3121–22 (2003) (describing failed Senate efforts to filibuster bill or sustain Budget Act point of order).

[180] The final House vote in favor of the conference report was 220 to 215. 149 CONG. REC. 30,854 (2003).

[181] For a good description of the late-night events, see BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 177–80 (3d ed. 2007).

[182] A supermajority condition would be very unusual in the House, where the organizational structure is designed generally to allow the majority party to have its way. Thus, for example, points of order in the House are ordinarily waived by majority vote. SCHICK, *supra* note 23, at 155, 158; *see also supra* note 153 (discussing House's waiver of all points of order in considering 2006 reconciliation conference report).

[183] SCHICK, *supra* note 23, at 146–47. As a technical matter, Byrd Rule objections are ruled on by the presiding officer of the Senate who expresses the views of the Parliamentarian. FLOYD M. RIDDICK & ALAN S. FRUM, RIDDICK'S SENATE PROCEDURE, S. DOC. NO. 101-28, at 505 (2d Sess. 1992).

[184] RIDDICK & FRUM, *supra* note 183, at 505.

[185] In 1993, the Parliamentarian twice ruled that a Byrd Rule point of order was not well taken, and the appeal of the ruling failed because it did not garner sixty votes. *See* 139 CONG. REC. 19,764, 19,767 (1993) (raising objection against § 13,631(b) of reconciliation bill); *id.* at 19,780, 19,783 (raising objection against § 1106(a) of reconciliation bill).

erated great controversy, with one Parliamentarian reportedly being fired for failing to rule in the manner desired by Senate leadership.[186]

When resolution of a Byrd Rule question turns on a determination of budget levels, the law requires the Parliamentarian to look to the Senate Budget Committee for assistance.[187] This procedure has not always resulted in an accurate assessment of whether a Byrd Rule violation exists. A key condition of the Byrd Rule is the requirement that out-year budget effects be determined on a *net* basis after all provisions with such effects are considered. Only legislation producing either a net increase in outlays or a net reduction in revenues after the budget window period violates the Byrd Rule.[188]

The potential significance of this requirement is illustrated by Congress's consideration of the 2005 reconciliation conference report, passed in May 2006. The budget resolution directed reconciliation legislation effecting a $70 billion tax cut over a five-year budget window period from FY 2006 to 2010.[189] The conference agreement included two tax cuts, dealing with the proposed tax rate for capital gains and dividends, which were estimated to produce significant revenue losses in FY 2011 and 2012, the first two years after the end of the budget period.[190] To prevent this Byrd Rule violation, the conferees agreed to add a provision liberalizing the ability of taxpayers to convert their traditional IRA accounts into Roth IRA accounts after 2009.[191] This change, along with certain others, was estimated to raise enough revenue in FY 2011 and 2012 to offset the estimated losses in those years from the dividend and capital gain changes.[192] But the

186 SCHICK, *supra* note 23, at 149 box 6-2; Norman Ornstein, *Three Names Hold the Answer to Bush's Success*, ROLL CALL, Jan. 29, 2003, at 1; Mark Preston & Lauren W. Whittington, *Senate Leaders Push Dove Out: Parliamentarian Drew Lott's, Domenici's Ire*, ROLL CALL, May 7, 2001, at 1. For a description of the behind-the-scenes lobbying of the Parliamentarian, see Pierce, *supra* note 177.

187 KEITH & HENIFF, *supra* note 148, at 80.

188 *See supra* note 162 and accompanying text.

189 H.R. Con. Res. 95, 109th Cong. § 202(b) (2005) (enacted). The reconciliation legislation became the Tax Increase Prevention and Reconciliation Act of 2005, Pub. L. No. 109-222, 120 Stat. 345 (2006).

190 STAFF OF JOINT COMM. ON TAXATION, 109TH CONG., ESTIMATED REVENUE EFFECTS OF THE CONFERENCE AGREEMENT FOR THE "TAX INCREASE PREVENTION AND RECONCILIATION ACT OF 2005," at 1 (Comm. Print 2006) [hereinafter JCT, TIPRA REVENUE ESTIMATE], *available at* http://www.jct.gov/x-18-06.pdf; Wesley Elmore, *Parliamentary Maneuvering Delays Tax Reconciliation Conference*, 110 TAX NOTES 1020, 1020 (2006).

191 Tax Increase Prevention and Reconciliation Act § 512, 120 Stat. at 365–66.

192 JCT, TIPRA REVENUE ESTIMATE, *supra* note 190, at 2. Thus, the offset helped to negate the potential Byrd Rule violation caused by the dividend and capital gain changes. ROBERT KEITH, CONG. RESEARCH SERV., BUDGET RECONCILIATION LEGISLATION IN 2005–2006 UNDER THE FY2006 BUDGET RESOLUTION, at CRS-41 (2006), *available at*

Roth IRA conversion provision was also estimated to produce revenue losses in later years and an overall revenue loss.[193] Thus, the provision on its own clearly violated the Byrd Rule.

Despite this, the Chair of the Senate Budget Committee refused to identify to the Parliamentarian any provision, including the Roth IRA conversion provision, as extraneous for purposes of the Byrd Rule.[194] Because official budget estimates project at most ten fiscal years into the future, the Chair apparently took the position that the budget effects of the bill beyond that time were not known and therefore could not be the basis for a Byrd Rule violation.[195] Although the bill provided for an overall tax cut, it contained some miscellaneous revenue-raising provisions, and it was *conceivable* that the out-year revenue losses produced by the IRA conversion provision (and other tax cuts) would be matched or exceeded by out-year revenue increases produced by the revenue-raising provisions in the bill, thus avoiding a Byrd Rule violation.[196] Of course, under such a head-in-the-sand interpretation of the Byrd Rule, the inclusion of a few revenue-increasing provisions in a large overall tax cut bill would be enough to insulate the entire bill from a Byrd Rule challenge.[197]

---

http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-9824; Wesley Elmore, *Senate Budget Chair Not Opposed to Controversial Revenue Raiser*, 111 TAX NOTES 15, 15 (2006).

[193] JCT, TIPRA REVENUE ESTIMATE, *supra* note 190, at 2 (showing figures for FY 2014 and 2015); 152 CONG. REC. S4392–93 (daily ed. May 11, 2006) (statement of Sen. Bingaman); *id.* at S4416–17 (statement of Sen. Baucus); *id.* at S4438–40 (statement of Sen. Baucus); *see also* JOEL FRIEDMAN & ROBERT GREENSTEIN, CTR. ON BUDGET & POL'Y PRIORITIES, JOINT TAX COMMITTEE ESTIMATE SHOWS THAT TAX GIMMICK BEING DESIGNED TO EVADE SENATE BUDGET RULES WOULD INCREASE LONG-TERM DEFICITS 4–5 (2006), *available at* http://www.cbpp.org/4-25-06tax.pdf (providing evidence of long-term revenue losses from Roth conversion provision); Burman, *supra* note 59, at 953 (estimating that Roth conversion provision reduces federal revenue by at least $14 billion in present value terms).

[194] 152 CONG. REC. S4443 (daily ed. May 11, 2006) (statement of Sen. Gregg).

[195] *See id.* at S4431 (statement of Sen. Levin) (criticizing Chair's position); *id.* at S4440 (Sen. Baucus) (same); Elmore, *supra* note 192, at 15 (quoting critics of Chair's position).

[196] *But cf.* 152 CONG. REC. S4440 (daily ed. May 11, 2006) (statement of Sen. Baucus) (introducing into record projections by Finance Committee's Democratic staff contradicting this position).

[197] The Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38, which was estimated to reduce revenues by $1.35 trillion over ten years, contained a single revenue-increasing provision (section 656, dealing with prohibited allocations of stock in an S corporation employee stock ownership plan (ESOP)) estimated to raise $80 million over the same period. *See* JCT, GENERAL EXPLANATION: 107TH CONGRESS, *supra* note 46, at 320–21 (showing estimated revenue gain from S corporation ESOP provision and overall estimated revenue loss from bill). It is a wonder that the same head-in-the-sand attitude did not overcome the Byrd Rule objection to that bill. Indeed, because it is at least *possible* for a revenue-reducing provision within the budget window to become a revenue-increasing one outside the window, the same head-in-the-sand view could be used to circumvent a Byrd Rule objection in all cases.

The end result was that the addition of a new tax cut provision to a preexisting tax cut bill already in violation of the Byrd Rule somehow was found to eliminate the violation. As the favorable vote on final passage of the bill was only 54 to 44,[198] the assessment was critical. This recent experience illustrates how much successful enforcement of the Byrd Rule depends on highly uncertain long-term budget estimates.

Finally, the Byrd Rule is not self-enforcing; some senator must be aware of a violation and willing to raise the point of order. With this requirement, clear violations of the rule have passed undetected. For example, the 1997 tax reconciliation bill contained several major and permanent tax cut provisions, including enactment of the child credit, education credits, and Roth IRA, as well as changes to the traditional IRA, capital gains, and the estate and gift tax, without any Byrd Rule objection being raised.[199]

3. Senate Point of Order Against Legislation Increasing Long-Term Deficits

In 2007, as part of the congressional budget resolution approved that year, the Senate adopted a new point of order that may be used to block Senate consideration of any legislation resulting in a net increase in the deficit of over $5 billion in any one of the four successive ten-year periods beginning ten years after the end of the fiscal year for which the budget resolution is adopted.[200] Thus, for example, for the 2007 resolution relating to the budget for FY 2008, the pertinent ten-year periods covered by the point of order are FY 2018 to 2027, 2028 to 2037, 2038 to 2047, and 2048 to 2057.[201] At least sixty votes are required either to waive the point of order or to overturn a ruling of the Chair with respect to it. The point of order expands and replaces a similar point of order adopted by the Senate in 2005 that applied only to long-term spending proposals.[202]

---

198 152 CONG. REC. S4446 (daily ed. May 11, 2006).

199 JCT, GENERAL EXPLANATION: 1997 LEGISLATION, *supra* note 157, at 512–18; KEITH, *supra* note 148, at CRS-32 to -33 (showing absence of Byrd Rule objection to deficit-increasing effect in out-years of provisions in 1997 tax reconciliation bill).

200 S. Con. Res. 21, 110th Cong. § 203 (2007) (enacted); H.R. REP. NO. 110-153, at 104 (2007). This point of order was retained by the Senate in substantially the same form in its budget resolution approved in 2008. S. Con. Res. 70, 110th Cong. § 311 (2008) (enacted).

201 Although the budget window period adopted by Congress in 2007 was only five fiscal years, budget estimates can generally be made for a ten-year period. Thus, the point of order was intended to apply to the four successive ten-year periods immediately following the end of the period during which budget estimates are generally available.

202 H.R. Con. Res. 95, 109th Cong. § 407 (2005) (enacted).

It is too early to tell what effect, if any, this new point of order will have on congressional decisionmaking.[203] Like the Byrd Rule and a preference in favor of temporary-effect legislation, the purpose of the point of order is to curb adoption of legislation increasing long-term deficits. Its scope is broader than the Byrd Rule since it is not limited to reconciliation legislation. On the other hand, by applying only to legislation with a particular deficit-increasing effect, determined like the Byrd Rule on a *net* basis, during any one of four ten-year periods extending fifty years into the future, the point of order will likely encounter even more daunting implementation difficulties than the Byrd Rule. It seems doubtful that estimates of the long-term budget effects of proposals increasing and decreasing the deficit can be made with sufficient precision to carry out the point of order.[204] To be effective, the point of order would require all budget estimates to be made for a fifty-year period. Any resulting uncertainty in those estimates may lead to the same haphazard enforcement experience as has occurred with respect to the Byrd Rule. In addition, both the point of order and the Byrd Rule restrict only those actions undertaken by the Senate, both potentially allow consideration of nonserious offset provisions designed to take effect only in the distant future, and both leave open the question of whether representatives in a current Congress should be deciding tax and spending policies for future generations (even assuming that the legislation does not produce any "net" increase in the deficit in future years).

Perhaps the greatest weakness of both the Byrd Rule and the new point of order, however, is their lack of transparency. As illustrated by the Byrd Rule experience, the operation of both mechanisms is quite arcane and probably well understood only by a handful of budget and legislative procedure experts operating within Congress.

---

[203] The new point of order failed an early test. In 2008, Congress approved the Post-9/11 Veterans Educational Assistance Act of 2008, Pub. L. No. 110-252, §§ 5001–5003, 122 Stat. 2357, 2357–58 (2008), authorizing a new, permanent entitlement program providing education benefits to post-9/11 veterans at an estimated initial ten-year cost of $61 billion, including a $12 billion cost in the final year of the budget window period. CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: AN UPDATE 15, 56 (2008), *available at* http://www.cbo.gov/ftpdocs/97xx/doc9706/09-08-Update.pdf. Yet no objection was raised invoking the new point of order.

[204] Even ten-year estimates have been criticized as "wild-ass guesses." Bill Ghent, *Budget Writers Lean Toward 10-Year Estimate*, CONGRESS DAILY, Mar. 4, 2003, *available at* 2003 WLNR 13668473 (quoting former Sen. Nickles). For descriptions of some of the difficulties encountered in making budget estimates, see Crippen Testimony, *supra* note 34, at 6, and Andrew Taylor, *Medicare Bill's True Cost a Study in Guesswork*, 61 CQ WKLY. 2616, 2616–17 (2003). The new point of order requires the CBO to provide the necessary long-term estimates only "to the extent practicable," thereby providing Congress with an easy reason for ignoring the constraints of the rule. S. Con. Res. 21 § 203(a); S. Con. Res. 70 § 311(a).

A violation of either rule is therefore potentially easy to obfuscate, especially since enforcement of each rule depends on highly imprecise long-term budget estimates. As James Buchanan and Richard Wagner explained, a successful budget constraint rule

> must be relatively simple and straightforward, capable of being understood by members of the public. Highly sophisticated rules that might be fully understood only by an economists' priesthood can hardly qualify . . . . Secondly, an effective rule must be capable of offering clear criteria for adherence and for violation. Both the politicians and the public must be able readily to discern when the rule is being broken.[205]

By comparison, if Congress were to adopt a preference in favor of temporary-effect legislation, it could do so quite simply. A rule might effectively bar Congress from passing laws that increase the deficit unless it knows and can reveal to the public the complete estimated cost of the change.[206] The clarity of this objective would greatly facilitate its monitoring and enforcement through the political process.[207]

C. *The Pay-as-You-Go Rule Complements but Does Not Substitute for a Preference in Favor of Temporary-Effect Legislation*

This Section explains why a budget rule known as pay-as-you-go, or "PAYGO," which was reinstated by Congress in 2007, complements but does not substitute for a preference in favor of temporary-effect legislation.[208] The rule requires most changes to the tax law and enti-

---

[205] JAMES M. BUCHANAN & RICHARD E. WAGNER, DEMOCRACY IN DEFICIT: THE POLITICAL LEGACY OF LORD KEYNES 176 (1977); *see also* Rudolph G. Penner, *Can Congress Use Budget Rules To Improve Tax Policy?*, 113 TAX NOTES 377, 377 (2006) ("If the rules are so complex that no one understands them, it is impossible for the public and the media to know whether Congress is behaving responsibly or irresponsibly."); Penner & Steuerle, *supra* note 55, at 556 ("If there is a good substantive reason for suspending a rule, that should ideally be determined in a vigorous transparent debate.").

[206] See *supra* note 16 for one specific way in which such a preference might be implemented by congressional rule.

[207] Professors Garrett and Vermeule have argued that opacity in the budget process is sometimes helpful to reduce the influence of interest groups. Garrett & Vermeule, *supra* note 19, at 75–80. This possible reason to avoid increased transparency would not seem applicable to the present situation because interest groups probably already have the information being hidden from the public. For example, an interest group promoting a particular tax expenditure is likely to recognize its potential long-term value as a permanent feature of the law even though only a fraction of its cost is revealed to the public.

[208] Prior to 2007, there were two different PAYGO rules used by Congress, and each had been modified several times. One was a statutory rule enacted as part of the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 13,101(a), 104 Stat. 1388, 1388-574 to 1388-601 (1990), extended in 1993 and 1997 and allowed to lapse at the end of FY 2002. *See* Pub. L. No. 107-312, 116 Stat. 2456 (2002) (setting all remaining PAYGO balances to zero). The other was an internal procedural rule adopted by the Senate in the

tlement programs to be, in the aggregate, at least deficit neutral for the forthcoming fiscal year and for certain limited time periods up to ten years into the future.[209] In common parlance, the rule requires that any changes to such programs pay for themselves and not be debt financed as measured over such periods. Thus, for example, the rule mandates that any tax cut approved by Congress must be offset by a tax increase or an entitlement spending cut of equal or greater magnitude.[210]

Reinstatement of a PAYGO requirement was a top priority of congressional Democrats leading up to the 2006 elections because of concerns about the long-term fiscal gap.[211] To be sure, like a preference in favor of temporary-effect legislation, adoption of PAYGO represented just a modest step toward budget restraint, since the rule applies only to the cost of *new* legislation dealing with PAYGO programs and not to the continuing and escalating costs of maintaining existing programs.[212] Still, PAYGO supporters, attributing some part of the improved budget situation during the late 1990s to a prior PAYGO rule in effect during that time, argued that the revival of

1993 congressional budget resolution, *see* H.R. Con. Res. 64, 103d Cong. § 12(c) (1993) (enacted), and still technically in effect in 2007 but in significantly weakened form. H.R. Con. Res. 95, 108th Cong. § 505 (2003) (enacted); H.R. REP. NO. 108-71, at 122–23 (2003); *see* ROBERT KEITH & BILL HENIFF JR., CONG. RESEARCH SERV., PAYGO RULES FOR BUDGET ENFORCEMENT IN THE HOUSE AND SENATE, at CRS-4 to -5 (2005), *available at* http://www.llsdc.org/attachments/wysiwyg/544/CRS-RL32835.pdf (explaining that 2003 modification to Senate PAYGO rule excluded from consideration any changes included in congressional budget resolution); Dauster, *supra* note 32, at 14 (same). The House's 2007 PAYGO rule was adopted as part of the Rules of the House for the 110th Congress. H.R. Res. 6, 110th Cong. § 405 (2007) (enacted). The Senate's 2007 PAYGO rule was adopted as part of the 2007 congressional budget resolution and continued in 2008. S. Con. Res. 21 § 201; H.R. REP. NO. 110-659, at 130 (2008); H.R. REP. NO. 110-153, at 102–03 (2007). Both 2007 rules resemble the Senate PAYGO rule prior to its weakening. In 2009, the House amended its PAYGO rule to exclude from the restriction certain legislation designated as an "emergency." H.R. Res. 5, 111th Cong. § 2(j)(1) (2009) (enacted).

209 In general, programs subject to the PAYGO rule include all tax provisions other than the Social Security portion of the payroll tax and most spending programs funded outside of the normal annual appropriations process, including most entitlement programs such as Medicare, Medicaid, and food stamps. The rule does not apply to discretionary spending programs funded through annual appropriations, the cost of which has at times been subject to separate budgetary limitations, or to Social Security, which has its own dedicated funding source.

210 SCHICK, *supra* note 23, at 167.

211 *See* OFFICE OF THE HOUSE DEMOCRATIC LEADER NANCY PELOSI, A NEW DIRECTION FOR AMERICA 25 (n.d.), http://www.speaker.gov/pdf/thebook.pdf (last visited June 5, 2008) (vowing to "restore 'Pay As You Go' budget discipline"). In the same document, the House Democrats promised to make both the deduction for college tuition and the R&E credit permanent features of the tax law, *id.* at 1, 13, again illustrating the failure to understand the contradictory relationship between permanent legislation and fiscal restraint.

212 Also, like a temporary-effect preference, PAYGO does not attempt to constrain the cost of discretionary spending programs. *See supra* note 209.

PAYGO would help to restore fiscal responsibility in the legislative process.[213]

By requiring deficit-neutral outcomes for up to ten years, PAYGO does not restrain the long-term budget impact of legislation. Nevertheless, it might be reasonable to infer that legislation satisfying this requirement for ten years would continue to be deficit neutral beyond that point.[214] In fact, however, the budget accounting rules enable Congress to avoid that result if it wishes. Indeed, so long as there is no effective limitation on the long-term budget consequences of legislation, it is very simple for a determined Congress to avoid both long-term *and* short-term budget restraint while still appearing to comply with the terms of PAYGO.[215]

To understand how, consider again the earlier example involving the budget accounting treatment of changes to the interest-allocation rules and showing how passage of permanent legislation permanently distorts the information provided by the budget process.[216] Congress can easily use this distorted information to circumvent the goal of PAYGO. Thus, in the example, despite the existence of a budget-neutral rule consistent with a PAYGO requirement in all applicable years, the end result was the permissible approval by Congress of net tax cuts or spending increases—an outcome clearly in violation of PAYGO's purpose. Since PAYGO is silent regarding the budget effects of legislation outside the budget window period, the rule does nothing to prevent this type of manipulation. Indeed, if Congress were to follow a strategy of passing only *permanent* spending increases (or tax cuts) while also passing only *temporary* spending cuts (or tax increases), it could easily make a mockery of the PAYGO limitation.[217]

A further weakness of PAYGO is its vulnerability to political reversal. At the end of 2007, for example, faced with what it perceived to be a "must-pass" piece of legislation cutting the alternative minimum tax on individuals (AMT) and unable to agree on an appro-

---

213 *E.g.*, 153 CONG. REC. H71–72 (daily ed. Jan. 5, 2007) (statement of Rep. Spratt); Steven T. Dennis & Chuck Conlon, *Costly AMT Rewrite an Opening Challenge to Anti-deficit Goals*, 64 CQ WKLY. 3107, 3108 (2006) (quoting comments of former CBO Director Rudolph Penner); Meg Shreve, *House Approves Budget Reform*, 114 TAX NOTES 10, 12 (2007) (quoting comments of Sen. Conrad).

214 SHAVIRO, *supra* note 56, at 59–60.

215 Professor Garrett has noted that there may be a tendency for permanent tax and spending legislation, even though estimated to be deficit neutral over some fixed period of years, to produce increases in the deficit over time. Garrett, *supra* note 59, at 403. As described in the text accompanying this note, however, this outcome need not arise merely as a result of natural causes or chance.

216 *See supra* text accompanying notes 114–22.

217 Auerbach, *supra* note 97, at 521.

priate offset, Congress waived the PAYGO restriction and passed the tax cut without offset.[218] Congress took a similar action in early 2008 when it passed "economic stimulus" legislation, consisting of a combination of tax cuts and spending increases, again without any budgetary offset.[219] Congress has bypassed its PAYGO restriction in other legislation in 2008 and early 2009, raising considerable doubt that it will be an effective tool for achieving fiscal restraint.[220] In 2009, the House expressly watered down its PAYGO rule by allowing an exception for legislation designated as "emergency."[221]

To be sure, because budget rules are endogenous to the legislative process, there is some doubt whether *any* rule can produce results different from what would have transpired without the rule.[222] Most

[218] The House vote to suspend its rules, including the PAYGO rule, and to concur in the Senate amendment cutting the AMT without offset, was 352 to 64. 153 CONG. REC. H16,895, H16,899 (daily ed. Dec. 19, 2007). No objection was raised in the Senate, so there was no formal vote taken to waive the PAYGO restriction.

[219] The House vote to suspend the rules and pass the bill without offset was 385 to 35. 154 CONG. REC. H508–09 (daily ed. Jan. 29, 2008). Again, no Senate objection was raised.

[220] *See* Brian Friel, *Dog Days*, NAT'L J., June 14, 2008, at 22, 27 (anticipating future areas in which PAYGO may be waived); Josh Rogin, *War Supplemental Set To Clear*, 66 CQ WKLY. 1698, 1698 (2008) (describing failure to offset cost of new, permanent entitlement program providing education benefits for veterans); Jeremy Scott, *Winners and Losers in Farm Bill Compromise*, 119 TAX NOTES 1298, 1300 (2008) (describing failure to offset increased spending in farm bill). Far more dramatic examples are the passage at the end of 2008 and in early 2009 of two very costly laws, the Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, Div. A, 122 Stat. 3765, and the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, PL 111-5 (Westlaw), without any budget offset. *See* STAFF OF JOINT COMM. ON TAXATION, 110TH CONG., ESTIMATED BUDGET EFFECTS OF THE TAX PROVISIONS CONTAINED IN AN AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 1424, SCHEDULED FOR CONSIDERATION ON THE SENATE FLOOR ON OCTOBER 1, 2008, at 13 (Comm. Print 2008), *available at* http://www.jct.gov/x-78-08.pdf (showing estimated net ten-year cost of over $110 billion for tax cuts in Emergency Economic Stabilization Act); Letter from Douglas W. Elmendorf to Nancy Pelosi, *supra* note 1 (estimating ten-year cost of American Recovery and Reinvestment Act to be $787 billion); Letter from Peter R. Orszag, Director, Cong. Budget Office, to Rep. Barney Frank, Chairman, H. Comm. on Fin. Servs. (Sept. 28, 2008), *available at* http://www.cbo.gov/ftpdocs/98xx/doc9829/09-28-HonorableFrank.pdf (concluding that version of Emergency Economic Stabilization Act to be considered by House (prior to addition of tax cuts by Senate) "would likely entail some net budget cost . . . substantially smaller than $700 billion").

[221] *See supra* note 208. One critic of this change termed it "laughable" and "an abomination." 155 CONG. REC. H18 (daily ed. Jan. 6, 2009) (statement of Rep. Goodlatte) ("The rule appears to be that spending can be designated as emergency spending if it is necessary, unforeseen, or temporary in nature. I would suspect that the majority believes that all of their spending priorities are necessary.").

[222] *Cf.* Alan J. Auerbach, *The U.S. Fiscal Problem: Where We Are, How We Got Here, and Where We're Going*, *in* NBER MACROECONOMICS ANNUAL 1994, at 155–61 (Stanley Fischer & Julio J. Rotemberg eds., 1994) (questioning effectiveness of budget rules); Buchanan & Wagner, *supra* note 205, at 174–75 (doubting efficacy of congressional budget rules and expressing need for constitutional limitations).

analysts, however, have concluded that budget rules do affect policy outcomes, and the limited empirical evidence is consistent with that view.[223] One reason they may play an exogenous role to some extent is the practical difficulty of changing the rules once they are in place.[224]

A preference for temporary-effect legislation might be more resistant than PAYGO to political challenge because of the different timeframe in which the rules operate. PAYGO limits what Congress can do in the immediate future and therefore conflicts, perhaps irreconcilably, with short-term legislative priorities dictated by political exigencies. As illustrated by the recent experience with legislation passed in 2008 and early 2009, PAYGO prevents Congress from using

---

[223] *See* PAYGO Testimony, *supra* note 62, at 14 (statement of Peter R. Orszag, Director, Cong. Budget Office) (concluding that PAYGO budget rule "probably exert[s] an influence, and possibly an important one, on budgetary outcomes"); SCHICK, *supra* note 23, at 34 (explaining how budget "rules are important because they make it easier or harder for politicians to take corrective action"); SHAVIRO, *supra* note 56, at 142–43 (concluding that "budget rules can potentially make a difference" if there is "widespread support for fiscal responsibility"); Dauster, *supra* note 32, at 34–35 (attributing many policy decisions, including "the magnitude of the government's role in the economy," to rules of budget process); Penner, *supra* note 205, at 377 (concluding that budget rules "can nudge Congress into behaving better than they would otherwise"); *cf.* Jackson, *supra* note 76, at 185, 189–97 (explaining "great political salience" of numbers produced by federal budget process). Others have examined the empirical evidence of the importance of budget rules. *See* Alesina & Perotti, *supra* note 81, at 404–05 (reviewing experience in other countries); Alan J. Auerbach, *Federal Budget Rules: The U.S. Experience* 22 (Nat'l Bureau of Econ. Research, Working Paper No. 14,288, 2008), *available at* http://ssrn.com/abstract=1261474 (concluding that "[budget] rules did have some effects"); *see also* James M. Poterba, *Do Budget Rules Work?*, *in* FISCAL POLICY: LESSONS FROM ECONOMIC RESEARCH 53 (Alan J. Auerbach ed., 1997) (surveying empirical literature on budget institutions and fiscal policy). Also, there is ample anecdotal evidence that budget rules seem to affect congressional decisionmaking. For example, Allen Schick has described how cost estimates determine the shape of legislation and not vice versa. SCHICK, *supra* note 23, at 71–72, 74 ("As scoring has become more important, it has moved from the end of the process to the beginning. Legislation is framed so as to affect the score, and scorekeepers estimate the cost of alternatives before they are introduced."). The fact that both the AMT tax cut and the R&E credit continue to be extended only in limited-year increments and not made a permanent part of the law shows that the budget rule requirements to reveal and "pay for" such changes have some effect, at least over the applicable budget window period. The waiver of PAYGO in 2007 to allow a one-year AMT tax cut, but not permanent repeal of that tax, suggests that there may be limits on how far Congress is willing to deviate from its rules. *See id.* at 81, 170–71 ("PAYGO . . . has significantly affected congressional behavior."). The Byrd Rule also appears to have affected legislative outcomes. *See* KEITH, *supra* note 148, at CRS-18 to -20 (describing changes to legislation in order to comply with Byrd Rule). For the possibility that Congress might prefer to enact short-term legislation in order to increase the amount of rents it can extract from interest groups, see *infra* text accompanying notes 243–57.

[224] *See* Alesina & Perotti, *supra* note 81, at 404 ("[S]ince it is relatively costly and complex to change [budget] institutions, the [institutions] have to become very unsatisfactory before a consensus is reached for changing them. Thus, at least in the short to medium run, budget institutions can be considered exogenous.").

spending and tax policy as a fiscal stabilizer by, for example, passing tax cuts or spending increases during periods of economic downturn.[225] PAYGO is also unforgiving to the extent its effect would cause complete loss of the legislative moment for action. Finally, PAYGO is arguably unnecessary since the budget effects of legislation within the budget window period are revealed to the legislators and to the public.[226] Thus, legislators can be held politically accountable for the choices that they make, whether those choices result in increases, decreases, or no change in the deficit.

In contrast, a temporary-effect preference places limits only on what Congress can do in the more distant future and is therefore less likely to conflict with legislative priorities. Furthermore, such a constraint offers greater flexibility than PAYGO. Passage of legislation with long-term budget effects would still be possible—it would just have to be implemented through a series of limited-term enactments rather than a single, permanent one. Finally, unlike PAYGO, there is no transparency "backup," in the form of political accountability, in the event that a temporary-effect preference is not carried out. Because the cost of legislation beyond the budget window period is not revealed, voters cannot effectively constrain the choices of their representatives through the normal political process.

In summary, PAYGO and a temporary-effect preference represent complementary budget restraint tools: The former tries to limit the budget consequences of legislation within the budget window period, and the latter accomplishes the same end for later periods. PAYGO, however, does not replace the need for a temporary-effect preference. Indeed, the purpose of PAYGO can be easily circumvented in the absence of an effective limitation on the long-term budgetary consequences of legislation. In that sense, a temporary-effect preference may be more critical than PAYGO. It is also likely to be more successful than PAYGO in resisting political objection.

D. Summary

This Part has explained why other aspects of the budget process, including possible changes in the way in which cost estimates are determined, would not remedy the problems associated with the

---

225 *See supra* note 220.

226 The budget consequences of the financial bailout legislation are an exception to this general rule, given the unusual difficulty in predicting the budget consequences of the bill. *See* Letter from Peter R. Orszag to Barney Frank, *supra* note 220, at 2 ("Th[e] lack of specificity regarding how the [Secretary of Treasury's authority under the bill] would be implemented and even what types of assets would be purchased makes it impossible at this point to provide a meaningful estimate of the ultimate impact on the federal budget . . . .").

budget accounting treatment of permanent legislation. In particular, it has shown that a change to long-term budget estimates would not be feasible in the legislative process and that existing budget-control mechanisms, including the Byrd Rule, a Senate point of order against legislation producing long-term deficits, and PAYGO, do not adequately address the problem.

IV
Responses to Criticisms of Temporary-Effect Legislation

This Part addresses four possible criticisms of temporary-effect legislation. Although far from conclusive, the discussion suggests that three criticisms—that temporary-effect legislation would (1) lead to more deficit-increasing changes, (2) be a boon to lobbyists and increase legislative transaction costs such as campaign contributions, and (3) be harmful to long-term investment incentives—may be misguided. In addition, a fourth criticism, relating to the detrimental impact temporary-effect legislation would have on agenda control, may be muted if the fiscal advantages of such legislation are taken into account.

At the outset, it is useful to recognize the similar practical impact of permanent and temporary-effect legislation. The caricature of so-called permanent legislation as avoiding much of the uncertainty and distortions that might arise if, instead, laws were changed every year, is contradicted to some extent by actual experience. For example, the history of permanent tax laws in this country is one of very frequent change. Following passage of the Tax Reform Act of 1986, House Ways and Means Committee Chair Dan Rostenkowski famously hung a "Gone Fishing" sign outside his committee's doors to signal his desire to resist further changes to the tax law.[227] Yet during the twenty years following that Act, Congress passed one hundred additional acts making nearly 15,000 further changes to the tax laws, an average of more than two changes each day.[228] If one focuses just on amendments to the nominally permanent tax rate structure (that is, rates and size of applicable brackets) since 1950, there have been at least sixteen changes in each of the individual income tax, corporate tax, and capital gains preference rate structures, representing an

[227] Gary Klott, *Rostenkowski Opposes Big '87 Tax Changes*, N.Y. Times, Oct. 22, 1986, at D2.

[228] President's Advisory Panel on Fed. Tax Reform, Simple, Fair, & Pro-growth: Proposals To Fix America's Tax System 16 (2005).

average of one change every four years in each rate structure.[229] There is also some evidence that laws outside of the tax area have similarly changed quite frequently.[230]

At the same time, temporary-effect legislation could be enacted in a way that would provide considerable stability and predictability if Congress were to give priority to those attributes. A temporary-effect rule simply requires Congress to pass laws whose budget effect does not extend beyond the end of the budget window period. In most cases, Congress could comply with this rule by including a sunset provision in legislation to take effect as of the end of the pertinent budget period, such as after five or ten years. Then, in each year after initial enactment, with the law still scheduled to be in effect for the remaining term of the initial budget period, Congress could extend the law for one more year. By taking explicit, "early" action on a future expiration, Congress would keep the law in effect for the length of the budget window period each year and send an especially strong message of an intention for stability in the law. In addition, during its scheduled term, a temporary law is likely to be more stable than a nominally permanent one, since those desiring modification or repeal of the law would probably find it less costly to let the term run out than to mount the effort necessary to change it prior to expiration.[231]

In the end, then, many of the pragmatic and other differences between permanent and temporary-effect laws may be controlled by the manner and frequency of legislative change. If so, the principal difference between two types of laws may simply be the budget accounting consequences detailed in Part II of this Article.

---

[229] For changes in the corporate tax, see Jack Taylor, *Corporate Income Tax Brackets and Rates, 1909–2002*, 23 SOI BULLETIN 284, 288–89 (2003), *available at* http://www.irs.gov/pub/irs-soi/02corate.pdf, which lists sixteen changes between 1950 and 2002. For changes in the individual income tax, see TAX FOUND., FEDERAL INDIVIDUAL INCOME TAX RATES HISTORY: INCOME YEARS 1913–2008 (2008) [hereinafter INDIVIDUAL INCOME TAX RATES], *available at* http://www.taxfoundation.org/files/federalindividualratehistory-20080107.pdf, which lists sixteen changes between 1950 and 2008. For changes in the capital gains preference, see LEONARD E. BURMAN, THE LABYRINTH OF CAPITAL GAINS TAX POLICY: A GUIDE FOR THE PERPLEXED 26 tbl.2-4 (1999), which lists twenty changes in effective maximum tax rate or length of required holding period between 1950 and 1998. Certain of these changes were quite minor.

[230] *Cf.* David J. Shakow, *The Flood of Tax Legislation*, 71 TAX NOTES 521, 522 & tbl. (1996) (finding comparable growth in both tax and nontax legislation between 1949–1950 and 1993–1994 Congresses).

[231] *See* Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 265 (2007) (arguing that few political resources would be spent repealing short-term temporary legislation).

A. Would Greater Use of Temporary-Effect Legislation Lead to Enactment of More Deficit-Increasing Changes in the Law and Less Fiscal Restraint?

One budget-related objection to greater use of temporary-effect legislation is a "camel's nose under the tent" concern. The worry is that once a change in law has been made, no matter how short its initial scheduled effect, it gains an important impetus for continuation into the future.[232] It becomes, in some sense, "locked in" for continuation. From this perspective, inclusion of a sunset feature in deficit-increasing legislation may be fiscally irresponsible if, by reducing the official cost of the legislation, it helps to overcome the high hurdle of initial enactment and leads to unaffordable, permanent changes in the law.[233]

The validity of this concern depends on what transpires upon the expiration of the legislation first enacted with only a temporary effect. A lapse of the law at that point would generally curtail its budget impact altogether. Further, as we have seen in connection with the R&E credit, a continuation of the expiring legislation in only *temporary* increments would have the positive consequence of forcing legislators to confront repeatedly the estimated (and continually updated) cost of maintaining the program. So long as the budget effects of the initial enactment and any extension of the law do not extend beyond the applicable budget window period at the time of the change, a temporary renewal of expiring legislation does not produce any unaccounted-for costs and therefore does not undermine political accountability.

Thus, the one case of concern would be if deficit-increasing legislation, initially enacted as a temporary measure, were to be *permanently* extended upon expiration. Of course, that is precisely one of the scenarios that a preference against permanent legislation is intended to prevent. In addition, it is not clear why permanent extension of expiring legislation would be likely to occur in view of the initial decision to enact the measure as a temporary law. Since the

232 *See, e.g.*, Gale & Orszag, *supra* note 53, at 1553 ("[A]llowing sunsets to take effect is likely more difficult than forgoing new tax cuts in the future."); Kysar, *supra* note 53, at 390 ("Prior enactment . . . increases the likelihood of re-enactment.").

233 *See* PAYGO Testimony, *supra* note 62, at 79 (statement of Robert Greenstein, Executive Director, Center on Budget and Policy Priorities) ("Sunsetting a tax cut after a few years can make the cost appear lower when the tax cut is first considered, making it possible to pass larger tax cuts than would otherwise be possible."); SCHICK, *supra* note 23, at 178 box 7-2 ("[Sunsets] enable Congress to cram more tax cuts into law than would be feasible if the revenue loss were permanent."); Chris Mooney, *A Short History of Sunsets*, LEGAL AFF., Jan./Feb. 2004, at 67, 67 ("[I]nclusion of [sunset] provisions helped to get the laws through Congress . . . .").

"camel's nose under the tent" concern is premised to some extent on the assumption that the legislature initially found the cost of a permanent provision to be too expensive, it is not obvious why that legislative concern would not reappear at the time of extension.[234] Indeed, a permanent extension of a temporary provision encounters a potential budget accounting disadvantage not present at the time of initial enactment: Unless policymakers are willing to permit a gap in the continuation of the legislation, the extension cannot employ a phase-in or delayed-effect feature to reduce the cost of permanent extension. Thus, the official cost of a permanent extension of an expiring provision will reflect the full budgetary cost in each of the years included in the budget window period at the time of extension.

Experience thus far has borne out these observations. If extended at all, expiring tax cuts have almost always been continued in only temporary increments. For example, despite the overwhelming support in Congress for its being made a permanent part of the tax law,[235] the R&E credit continues to be extended only in short-period increments, presumably in part because of the budgetary cost of a permanent extension.[236] The same can be said for the very popular tax cuts to limit the scope of the AMT.[237] In addition, although

[234] One possible reason why costs initially considered too high might be viewed as acceptable at a later point is changed circumstances. For example, the nation's budgetary situation may have improved during the interim. But this arguably is a reason in favor of temporary-effect legislation—it may be better than permanent legislation at responding to changed circumstances.

[235] For example, ninety-eight senators supported a 2001 amendment offered by Senator Hatch to make the R&E credit permanent. 146 CONG. REC. 14,202–03, 14,209 (2000). More recently, the PACE-Finance Act, S. 2199, 109th Cong. (2006), which would have made the R&E credit permanent along with certain other changes, had a filibuster-proof sixty-one cosponsors in the Senate during the 109th Congress. THOMAS (Library of Congress), S. 2199 Bill Summary, http://thomas.loc.gov/ (select "Search Multiple, Previous Congresses," then "Search Bill Summary & Status," then search Bill Number "S.2199" for 109th Congress) (last visited Apr. 29, 2008). The Bush administration also regularly recommended that the credit be made permanent. *See* DOMESTIC POLICY COUNCIL, OFFICE OF SCI. & TECH. POLICY, AMERICAN COMPETITIVENESS INITIATIVE: LEADING THE WORLD IN INNOVATION 13 (2006), *available at* http://www.whitehouse.gov/stateoftheunion/2006/aci/aci06-booklet.pdf.

[236] David L. Cameron, *Research Tax Credit: Statutory Construction, Regulatory Interpretation and Policy Incoherence*, 9 COMP. L. REV. & TECH J. 63, 66–67 (2004); Wesley Elmore, *Research Credit Popular but Will It Be Renewed?*, 112 TAX NOTES 1017, 1019 (2006).

[237] The specific tax cuts involve a temporary increase to the amount of income exempted from the AMT and the temporary ability of taxpayers to use nonrefundable personal credits to reduce AMT liability. The cuts prevent what otherwise would be a large increase in the number of taxpayers subject to the AMT. The most recent one-year cuts were enacted by the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, Div. B, §§ 1011, 1012, PL 111-5 (Westlaw), the Tax Extenders and Alternative Minimum Tax Relief Act of 2008, Pub. L. No. 110-343, Div. C, §§ 101–102, 122 Stat. 3765, 3863,

many of the major tax cuts enacted in 2001 and 2003 have been extended, only certain relatively minor ones have been extended on a permanent basis, suggesting that the political dynamic preventing permanent cuts initially has continued to exist at the time of extension.[238] Finally, some tax cuts, notably the repeal of the estate tax, have had difficulty gaining any extension at all.[239] With each year of delay, permanent extension of such expiring provisions becomes that much less likely, because the addition of one more year in the budget window period increases the official cost of such extension.[240] The extension

and the Tax Increase Prevention Act of 2007, Pub. L. No. 110-166, §§ 2–3, 121 Stat. 2461, 2461, extending the tax cuts through 2007, 2008 and 2009, respectively. For the reason for the cuts, see H.R. REP. NO. 110-431, at 31–32 (2007). For a brief summary of prior legislative changes to the AMT, see STAFF OF JOINT COMM. ON TAXATION, 110TH CONG., PRESENT LAW AND BACKGROUND RELATING TO THE INDIVIDUAL ALTERNATIVE MINIMUM TAX 5–6 (Comm. Print 2007), *available at* http://www.jct.gov/x-38-07.pdf.

238 Temporary extensions of the 2001 and 2003 tax cuts were included in the Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, § 101, 118 Stat. 1166, 1167–68, and the Tax Increase Prevention and Reconciliation Act of 2005, Pub. L. No. 109-222, § 102, 120 Stat. 345, 346 (2006). The Pension Protection Act of 2006, Pub. L. No. 109-280, §§ 811–812, 1304(a), 120 Stat. 780, 996–97, 1109–10, permanently extended certain of the provisions enacted in 2001 relating to the saver's credit, qualified tuition program, and retirement savings programs. The Holocaust Restitution Tax Fairness Act of 2002, Pub. L. No. 107-358, § 2, 116 Stat. 3015, 3015, made permanent a very minor provision enacted in 2001 allowing an income tax exclusion for restitution payments received by Holocaust victims.

239 *See* PUB. CITIZEN & UNITED FOR A FAIR ECON., SPENDING MILLIONS TO SAVE BILLIONS: THE CAMPAIGN OF THE SUPER WEALTHY TO KILL THE ESTATE TAX 6 (2006), *available at* http://www.citizen.org/documents/EstateTaxFinal.pdf (noting failed Senate attempts in 2002, 2003, and 2005 to achieve permanent repeal of the estate tax); Meg Shreve, *Senate Approves Budget Resolution*, 114 TAX NOTES 1179, 1180–81 (2007) (noting failed 2007 estate tax votes); Jonathan Weisman, *Some GOP Lawmakers Aim To Scale Back Bush Tax Cuts*, WASH. POST, Mar. 2, 2004, at A4 (reporting that Republican lawmaker abandoned efforts to eliminate estate tax in favor of rate cuts). Certain tax cuts, such as the additional depreciation allowance for certain qualified property generally acquired after September 10, 2001 and before January 1, 2005 (commonly referred to as "bonus depreciation"), have been allowed to expire. I.R.C. § 168(k)(2)(A), (k)(4)(B)(iii) (2006) (requiring eligible property generally to be placed in service prior to January 1, 2005).

240 For example, a permanent extension in 2008 of the scheduled 2010 repeal of the estate and gift tax was estimated to cost about $668 billion over the ten-year period 2009 to 2018. *See supra* note 78. But that period included two years, 2009 and 2010, in which the baseline already reflected either a reduced estate tax (2009) or a fully repealed one (2010). STAFF OF JOINT COMM. ON TAXATION, 110TH CONG., HISTORY, PRESENT LAW, AND ANALYSIS OF THE FEDERAL WEALTH TRANSFER TAX SYSTEM 2 (Comm. Print 2007), *available at* http://www.jct.gov/x-108-07.pdf. Thus, if the same extension were passed in 2010, it would likely cost perhaps $200 billion more because those two years would be replaced in the budget window period by two others, 2019 and 2020, in which the baseline assumes a more comprehensive estate tax.

of popular, expiring spending increases to entitlement programs has also been carried out in just temporary increments.[241]

TABLE 4
COMPARATIVE BUDGET EFFECTS OF TEMPORARY AND PERMANENT LEGISLATION, UPON ENACTMENT AND EXTENSION ($ BILLIONS)

	A	B	C	D	E	F	G	H
	Yrs. 1–5	Yrs. 6–10	Yrs. 11–15	Yrs. 16–20	Official Cost Yrs. 1–10	Official Cost Yrs. 6–15	True Cost Yrs. 1–20	Unaccounted-For Costs
Year One Legislation								
1. Temporary tax cut (through year five)	10	0	0	0	10	N/A	10	0
2. Permanent tax cut (half as large)	5	5	5	5	10	N/A	20	10
Year Six Legislation								
3. Temporary extension (through year ten)	N/A	10	0	0	N/A	10	10	0
4. Permanent extension	N/A	10	10	10	N/A	20	30	10
5. New permanent tax cut (half as large)	N/A	5	5	5	N/A	10	15	5

Table 4 shows why a temporary-effect preference enhances fiscal restraint even though it initially appears to allow a larger tax cut than would have been permissible if the cut had been a permanent one. The example concerns a possible tax cut that is estimated to cost $2 billion per year in each of the twenty years included in the example. Assume that in year one, there is an agreed budget constraint of $10 billion for the forthcoming ten years, the budget window period. This budget constraint is too tight to permit permanent enactment of the full tax cut in year one since that change would be estimated to cost $20 billion ($2 billion per year × 10 years). As shown on lines 1 and 2, two alternatives for the legislature would be to approve the full tax cut but with a sunset after year five ($10 billion = $2 billion per year × 5 years) (line 1) or a permanent tax cut that is only one-half the size of the original one ($10 billion = $1 billion per year × 10 years) (line 2). Either choice produces an official cost estimate of $10 billion over the budget window period (column E, lines 1 and 2). But the true cost of the permanent cut (through year twenty) is actually $20 billion ($1 billion per year × 20 years) whereas the true cost of the temporary one

[241] *See* Drew Armstrong, *Medicare Patch Habit Too Painful To Break*, 66 CQ WKLY. 1595, 1595–96 (2008) (describing likelihood of short-term congressional solution); Drew Armstrong, *Physician Payment Bill Stalls in Senate*, 66 CQ WKLY. 1774, 1774 (2008) (describing five short-term measures since 2002 to prevent automatic cuts in Medicare physician rates mandated by Balanced Budget Act of 1997).

is only $10 billion (column G, lines 1 and 2). Hence, the permanent tax cut, even though appearing to be one-half as large as the temporary one, actually costs twice as much as the temporary one through year twenty. The permanent change produces $10 billion in unaccounted-for costs through that year, whereas the temporary change produces none (column H, lines 1 and 2).

At the end of year five, the temporary cut expires, and thus the legislature considers its options in year six. Assume, once again, that there is an agreed budget constraint of $10 billion for the forthcoming ten years (years six to fifteen), the budget period. One option is to extend the expiring provision for another five years, through year ten ($10 billion = $2 billion per year × 5 years) (line 3). Another option is to permanently extend the expiring tax cut (line 4). Note, however, that the official cost of the permanent extension is again $20 billion ($2 billion per year × 10 years) (column F, line 4), more than the assumed budget constraint of $10 billion. Therefore, for the same reason that a full permanent tax cut was not passed in year one, a permanent extension of the temporary tax cut is not feasible in year six. Finally, if the legislature initially passed a permanent tax cut in year one, then there is nothing that needs to be extended in year six. In that case, the legislature could pass a new permanent tax cut in year six (line 5) whose official cost ($10 billion) would fit within the assumed budget constraint (column F, line 5).

There are therefore two possible ways for the legislature to pass tax cuts while complying with the assumed budget constraints in years one and six. The legislature could agree to a temporary tax cut in year one followed by a temporary extension of the cut in year six (lines 1 and 3) or a permanent tax cut, initially half as large, in year one followed by another permanent tax cut in year six (lines 2 and 5). Either combination results in a total official cost estimate of $20 billion, the total assumed budget constraint for the two years in which legislation is passed (columns E and F, compare the sum of lines 1 and 3 with the sum of lines 2 and 5). But the first combination results in true costs of $20 billion and no unaccounted-for costs (columns G and H, lines 1 and 3), whereas the second combination produces true costs of $35 billion and unaccounted-for costs of $15 billion (through year twenty) (columns G and H, lines 2 and 5).

The example shows that the passage of temporary legislation potentially restrains spending in two ways. First, upon initial enactment, the temporary law in fact costs less than a permanent one after costs during post–budget window periods are taken into account. Second, extension of the temporary law displaces new spending, an effect that does not occur if the law had initially been enacted as a permanent measure. Thus, from the standpoint of achieving fiscal restraint, the first combination of outcomes (initial temporary law plus temporary extension of law) is preferable.

In conclusion, enactment of temporary-effect legislation should result in greater fiscal restraint even if the temporary feature initially appears to allow adoption of a larger deficit-increasing change than would have been the case had the legislation been permanent. One possible problem is if temporary-effect legislation is later extended permanently, but in practice this has occurred only rarely, as expected.[242] Moreover, a preference against permanent legislation is designed to prevent exactly that outcome.

B. *Would a Preference in Favor of Temporary-Effect Legislation Be a Boon to Lobbyists and Increase Campaign Contributions?*

Another criticism of temporary-effect legislation is that it increases the private-sector costs of influencing legislative outcomes, including expenditures incurred by interest groups, amounts paid to lobbyists, and campaign contributions and other benefits provided to legislators. For example, in an application of the interest-group theory of the legislative process, Professors McCaffery and Cohen contended that the recent passage of a temporary repeal of the estate tax resulted from an effort by the members of Congress to maximize their returns from the private sector.[243] Key to this thesis is the passage of temporary legislation and the avoidance of permanent "sensible compromises" in order to help "string along" the issue as long as possible.[244] Thus, the McCaffery-Cohen study implies that the more temporary legislation that is passed, the greater the "stringing along" opportunities, and the more transaction costs the private sector will incur.

Others have made similar claims. For example, current House Ways and Means Committee Chair Charles Rangel, when he was ranking member of that committee, referred to temporary tax provisions as "Republican fundraising" and stated that "[a]s long as [the temporary laws] keep coming back, [interest groups] need to keep contributing."[245] Still others attribute the temporary nature of laws

---

[242] *See supra* text accompanying notes 235–41.

[243] Edward J. McCaffery & Linda R. Cohen, *Shakedown at Gucci Gulch: The New Logic of Collective Action*, 84 N.C. L. Rev. 1159, 1164–65 (2006).

[244] *See id.* at 1165–66, 1179, 1197, 1200 ("[I]n [our] model, Congress, given a lucrative issue, does not want to do anything permanent. They want to string the issue along."); *id.* at 1212–13, 1225–26 ("We believe that [our model] alone explains what Congress has and has not done with regards to estate tax repeal.").

[245] Barshay, *supra* note 99, at 2831 (quoting Rep. Rangel).

more to efforts by lobbyists to maintain continuing flows of business for themselves rather than to efforts by lawmakers to increase their fundraising.[246]

In very general terms, the interest-group theory of the legislative process conceptualizes legislation as carrying out a transfer of benefits from one group (typically thought to be large, disorganized, and with diffuse interests, such as taxpayers generally) to some other group (small, focused, and easily organized, such as persons or firms having some common, special interest).[247] Enactment of a tax provision benefiting only a small group and paid for by a slight increase in general tax rates would be a common example. Under this theory, the role of a legislator is somewhat analogous to that of a broker.[248] Like a broker, a legislator is compensated for her actions in an indirect way, in the form of campaign contributions and other benefits, as a result of pairing up the two principals or groups and facilitating a transfer between them. Unlike a broker, however, the legislator actually creates the product or medium for carrying out the transfer by proposing and passing legislation. A legislator also does not merely serve as an intermediary between a willing buyer and willing seller; rather, the legislator forces the transfer upon an unwilling transferor for the benefit of a very willing transferee.[249] The more legislative product generated by a legislator, the greater the potential return received, with the process potentially being initiated by either the transferee-beneficiary or the legislator herself.

In analyzing whether temporary-effect legislation increases private-sector legislative costs under this model, three important features of the market for legislation should be kept in mind. First, there

[246] Jones, *supra* note 99, at 1587. For similar arguments, see Kysar, *supra* note 53, at 392–95, and Viswanathan, *supra* note 53, at 678–80, describing how sunset provisions increase rent extraction by legislators. *Cf.* Gersen, *supra* note 231, at 280–81 (presenting theoretical arguments why, from public choice perspective, legislators and private interests might prefer enactment of temporary to long-term legislation). For an earlier account considering the possibility that temporary laws increase the rent-seeking opportunities of legislators, see John W. Lee & W. Eugene Seago, *Policy Entrepreneurship, Public Choice, and Symbolic Reform Analysis of Section 198, the Brownfields Tax Incentive: Carrot or Stick or Just Never Mind?*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 613, 636 (2002).

[247] *E.g.*, DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 23 (1991); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3–4, 10–11 (1971). This theory is considered at this point in the Article because it was the basis for the McCaffery-Cohen study.

[248] Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 343–44 (1988).

[249] Presumably, one part of legislative strategy is to avoid taking responsibility for the "unwilling" part of the transaction.

is likely to be a limited supply of legislative product, not only because there are a finite number of legislators to create the product, but also because of limits on legislative time. The amount that private-sector groups are willing to pay to influence legislative outcomes presumably is a function of the credibility of the legislative product, and that credibility may in turn depend on the time spent by a legislator promoting the product both inside and outside the formal legislative process. Second, in contrast to the limited supply of the product, demand for it on the part of interest groups may well be quite open ended. Even a casual examination of the Internal Revenue Code reveals the multitude of areas the tax law has already addressed, and it is not difficult to imagine the many existing or new areas in which there would be interest in legislation on the part of at least some private-sector interest groups. Finally, the value of temporary-effect legislation should ordinarily be less than that of identical legislation adopted as a permanent measure.[250] The value of legislation is a function of many factors, but an important one is the duration of the law.[251] Thus, although the long-term value of a law will be discounted to take into account the risk of subsequent amendment or repeal, changes to the Constitution are generally viewed as having the greatest value,[252] followed by permanent legislation and then temporary legislation.

With this background, what would be the consequence on overall private-sector legislative costs if, hypothetically, a constitutional amendment were adopted to bar the passage of anything other than limited-term laws?[253] In that case, because the legislative product would be less valuable, the costs incurred to influence the shape and fate of that product should also be reduced.[254] Under the interest-group theory of the legislative process, the amount paid by a private-sector group to support or block a piece of legislation should be a function of the benefit (or harm) produced by the legislation to that group.[255] If temporary-effect legislation is less beneficial (or harmful) than permanent legislation, then the private-sector payments should

---

250 Fred S. McChesney, Money for Nothing: Politicians, Rent Extraction, and Political Extortion 88 (1997); *cf.* Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L.J. 1665, 1690 (2002) (discussing argument that legislation with entrenchment features protecting its continuity is more valuable to interest groups than ordinary legislation without such features).

251 Landes & Posner, *supra* note 247, at 878–79, 888–89.

252 *Id.* at 889, 892.

253 This hypothetical is offered not as a proposal but simply as a way to focus the issues. A temporary-effect preference could be implemented in a variety of different ways, and this Article does not make any specific proposal concerning implementation.

254 Gersen, *supra* note 231, at 262.

255 McChesney, *supra* note 250, at 12–13.

be less. Thus, the amendment might result in a reduction in private-sector legislative costs by forcing the fixed number of legislators to spend their limited amount of time producing less valuable products. Legislative time devoted to extending for a limited term an expiring provision such as the R&E credit would crowd out time that a legislator could spend promoting a more valuable product, such as a permanent, new tax credit, in exactly the same manner that the budgetary cost of extending the R&E credit may preclude adoption of new tax provisions.

There may be some offsetting effects. For example, temporary-effect legislation should be easier to pass than identical permanent legislation, perhaps because of its lower value, and this might allow the volume of legislation to increase. This offset would be limited, however, because passing any legislation, no matter how short its effective duration, entails some fixed amount of legislative time. Legislators might also try to enhance the value of their product by changing its substance, such as by proposing deeper or broader tax cuts that would attract increased private-sector interest and contributions. But this strategy would encounter budget limitations, particularly if increased use of temporary-effect legislation resulted in greater budget constraints being placed on the legislature. Finally, legislators who, prior to the amendment, were not producing at maximum capacity might increase their time spent generating legislative product and devote less time to leisure or public-spirited legislative activities. Even if this were to occur, however, there is no reason to expect any *increase* in total legislative transaction costs as a result of the amendment.

The amendment might also have demand-side consequences. For example, because of the reduced *cost* of legislation, greater numbers of private-sector groups might find it cost-effective to participate in the legislative process, thereby enhancing competition.[256] On the other hand, the reduced *value* of legislation might discourage some private-sector groups with certain levels of fixed costs from participating because of the smaller stakes involved. It is unclear how these changes might affect total private-sector transaction costs. For example, increased competition and a greater number of participants may result in more legislative stalemates, with the consequence of fewer "premiums" being paid for successful legislative outcomes (or credible threats of such outcomes).

Some have suggested that because of rules like campaign finance laws that place limits on how much legislators can receive at one time

256 Gersen, *supra* note 231, at 285.

from private-sector groups, passage of temporary-effect legislation may provide a favorable "smoothing" effect.[257] By approving a temporary rather than permanent law, the legislature could be viewed as passing up receipt of private-sector benefits in the current session (which benefits would, in any event, exceed permissible contribution limits to some extent) in exchange for assuring a continuing flow of such benefits in the future (when extensions of the expiring legislation would need to be considered). But this position overlooks the potentially unlimited demand for legislative product in the future session. There is no reason for a legislature to place artificial restrictions on what it can produce in a current session (by restricting itself to passing temporary-effect legislation) in order to preserve demand for its product in the future if it knows that there will be more-than-sufficient demand at that later time. This is particularly true given the existence of short-term election cycles. A legislator who passes up the receipt of benefits in a current session in order to ensure a continuing flow in the future may not survive long enough in the legislature to realize those future benefits. Thus, a "stringing along" strategy makes sense only if there is an expected shortfall in demand in the future, but there is no reason for legislators to think that this would be the case—and they are probably too short-term oriented to employ such a strategy even if they did.

A final, possible technique of legislators to enhance the amount of benefits they obtain from the private sector might be to increase their use of threatened, but ultimately unexecuted, legislative actions. For example, legislators might threaten to increase the taxes of certain persons, firms, or industries, and then eventually back off of their proposals in whole or in part.[258] One advantage of this approach is that there may ultimately be little or no budget impact to the legislative action. Indeed, the existence of severe budget constraints might help

---

257 Kysar, *supra* note 53, at 394–95; McCaffery & Cohen, *supra* note 243, at 1179; Viswanathan, *supra* note 53, at 680.

258 *Cf.* Jeffrey H. Birnbaum, *When Higher Taxes Loom, Lobbyists Realize Profit Potential*, WASH. POST, Mar. 21, 2005, at E1 (describing why, because of large deficits, congressional staff report detailing possible tax-increase proposals is "hottest marketing tool" of tax lobbyists). Professor McChesney has described this practice as a form of political extortion whereby legislators end up receiving "money for nothing." MCCHESNEY, *supra* note 250, at 2–3, 20–44, 61–66. One recent example of this strategy might have been proposals to increase the taxes paid by certain private-equity fund managers. *See* Jeffrey H. Birnbaum, *Buyout Firms To Avoid a Tax Hike; Reid Passes Word Senate Won't Act*, WASH. POST, Oct. 9, 2007, at A1 (describing millions of dollars of lobbying fees incurred to block such legislative proposals); Landon Thomas, Jr., *Hedging Their (Political) Bets*, N.Y. TIMES, Oct. 3, 2007, at H1 (describing increased campaign contributions resulting from interest in same issue).

to make the threatened action more credible.[259] But this strategy is simply a variation of earlier ones because the making of credible threats uses up legislative time that could otherwise be used to promote legislative favors. Moreover, even if that were not true and a credible threat could be made relatively costlessly through, for example, the mere sponsorship of a bill or issuance of a press release, it is not clear why legislators would prefer to threaten temporary, as opposed to permanent, action. The latter would presumably present a more harmful outcome to the interested groups and therefore should generate greater returns to forestall the threatened action.

In summary, under the interest-group theory of the legislative process, greater use of temporary-effect legislation may reduce the amount of transaction costs incurred by the private sector to influence legislative outcomes and therefore not present a windfall to lawmakers and lobbyists. The reason is that the temporary nature of legislation depresses the value of the legislative product and therefore the amounts private-sector groups would be willing to pay. Since legislative time is limited, time spent passing and extending temporary legislation crowds out time that could be devoted to passing permanent legislation, a more valuable product. Other supply- and demand-side consequences of greater use of temporary-effect legislation may offset this effect to some extent but seem unlikely to result in any increase in overall legislative costs.

C. What Impact Would Greater Use of Temporary-Effect Legislation Have on Economic Incentives for Investment?

Tax policy may increase the incentive to invest by reducing the after-tax cost of an investment. Tax policy may also cause changes in the timing of investment patterns.[260] One concern with greater use of temporary-effect legislation in the tax area is that it will introduce increased uncertainty in, and thereby undermine the effectiveness of, intended tax incentives, particularly legislation to promote long-term investment or to alter behavior that involves significant commitments.[261]

---

[259] Professor Staudt has argued that a balanced budget mandate would reduce the rents available to legislators through the political process because it would constrain their ability to pass out legislative favors, Nancy C. Staudt, *Constitutional Politics and Balanced Budgets*, 1998 U. ILL. L. REV. 1105, 1132–33, but the exact opposite might be true if the mandate increased the credibility of legislative threats.

[260] Robert E. Hall & Dale W. Jorgenson, *Tax Policy and Investment Behavior*, 57 AM. ECON. REV. 391, 392 (1967) ("[T]ax policy is highly effective in changing the [amount,] timing[,] . . . [and] composition of investment.").

[261] Some tax policies are adopted explicitly as temporary measures to stimulate some short-term objective, such as economic activity that might counteract a business downturn.

The economics literature indicates that, at least in theory, greater uncertainty may increase or decrease the level of investment. If investment is reversible, then greater uncertainty over whether favorable conditions will continue may spur investment before the conditions change.[262] If the conditions prove to be short-lived and the investment is no longer attractive in subsequent periods, the reversibility of the investment would allow an economic actor to change course without significant cost. The opposite may be true, however, if an investment is irreversible.[263] In that case, economic actors may prefer to delay their investment until uncertainty is reduced in order to avoid the detrimental consequences of maintaining an investment under unfavorable conditions.

Under some conditions, the literature suggests that increased uncertainty in tax incentives may actually *increase* investment even though the investment is irreversible.[264] The key assumptions are that (1) unlike change in the general case, a change in tax policy is likely to "revert to the mean," and (2) a change in tax policy occurs in discrete periods in which the incentive is either in a "high" state or a "low"

Studies have shown that these policies can have a powerful effect on investment but that the timing of the stimulus may not always be optimal. *See* Alan J. Auerbach & Kevin A. Hassett, *Fiscal Policy and Uncertainty*, 5 INT'L FIN. 229, 231–36 (2002) (finding that tax policies may have positive effect but are mistimed); Christopher L. House & Matthew D. Shapiro, *Temporary Investment Tax Incentives: Theory with Evidence from Bonus Depreciation*, 98 AM. ECON. REV. 737, 762–63 (2008) ("[T]here are strong incentives to alter the timing of investment in response to temporary tax subsidies."). Such intentionally short-term measures generally would not be affected by a temporary-effect preference. This Section principally considers the impact on *long-term* investment incentives if these policies are nevertheless adopted with an explicit expiration date in order to comply with a temporary-effect preference.

262 Andrew B. Abel, *Optimal Investment Under Uncertainty*, 73 AM. ECON. REV. 228, 231–32 (1983); Richard Hartman, *The Effects of Price and Cost Uncertainty on Investment*, 5 J. ECON. THEORY 258, 262–65 (1972).

263 *See* AVINASH K. DIXIT & ROBERT S. PINDYCK, INVESTMENT UNDER UNCERTAINTY 6–7 (1994) (arguing for new model when investments are irreversible); Robert S. Pindyck, *Irreversibility, Uncertainty, and Investment*, 29 J. ECON. LITERATURE 1110, 1110–12 (1991) (arguing that investment rules and models may be incorrect "when investments are irreversible and decisions to invest can be postponed"); Robert S. Pindyck, *Irreversible Investment, Capacity Choice, and the Value of the Firm*, 78 AM. ECON. REV. 969, 982–83 (1988) ("[I]n markets with volatile and unpredictable demand, firms should hold less capacity than they would if investment were reversible . . . .").

264 Kevin A. Hassett & Gilbert E. Metcalf, *Investment with Uncertain Tax Policy: Does Random Tax Policy Discourage Investment?*, 109 ECON. J. 372, 388 (1999) ("[W]hen tax policy follows a stationary and discrete jump process . . . , increasing uncertainty can . . . speed[ ] up the time to investment, and increas[e] the amount of capital purchased . . . ."); *see also* Auerbach & Hassett, *supra* note 261, at 243 (discussing Hassett and Metcalf's findings); Kevin A. Hassett & R. Glenn Hubbard, *Tax Policy and Investment*, *in* FISCAL POLICY, *supra* note 223, at 339, 370–71 (same).

state.[265] For example, consider tax depreciation rules or investment tax credits. The permissible rule for each is typically bounded by substantive rules of tax policy—possible tax depreciation rules, for instance, generally range from expensing or immediately deducting all capital costs (the most favorable) to write-offs based on economic depreciation principles (the least favorable). Therefore, if an incentive currently exists that is favorable, as determined by this permissible range of rules, then any change in the incentive is most likely to result in a less favorable rule (reversion to the mean). In addition, the incentive generally applies in discrete steps—the depreciation rule or investment credit in a given year typically applies only to property placed in service in that year.[266] Under these conditions, greater uncertainty regarding the duration of an existing incentive is likely to spur investment even if the investment is irreversible, because delay is likely to mean reduction or loss of the investment incentive, a "use it or lose it" effect. Conversely, greater assurance that the incentive is permanent and will continue to be available for investments made in future years is not likely to trigger the same response.[267]

Thus far, the discussion has assumed that enactment of temporary-effect legislation would increase uncertainty relative to adoption of permanent laws. As explained in the introduction to this Part, however, that assumption may not be correct.[268] The key is to compare the expected duration of incentives when enacted through permanent or temporary-effect laws. If history shows, for example, that permanent tax rates commonly change every five years or so, then legislation establishing tax rates for a temporary period of at least five years may be perceived to be as certain or more certain than the permanent enactment. Experience can also lend increased certainty to nominally short-term legislation. For example, one-year incentives that have been continually extended, such as the R&E credit,[269] may be perceived to be and have the practical effect of a permanent provision. The use of a "grandfather" feature in legisla-

[265] *See* Hassett & Metcalf, *supra* note 264, at 372–73 ("Tax parameters, unlike most prices, tend to remain constant for a few years, and then change abruptly to new values. In addition, the jump that occurs is likely to be mean-reverting . . . .").

[266] *See, e.g.*, I.R.C. § 168(k) (2006) (creating special depreciation incentive, commonly referred to as "bonus depreciation," only for certain property placed in service between September 10, 2001 and September 11, 2004).

[267] The effectiveness of the incentive may or may not be desirable when all associated costs are considered. *See* David S. Bizer & Kenneth L. Judd, *Taxation and Uncertainty*, 79 AM. ECON. REV. 331, 335–36 (1989) (finding welfare loss produced by certain random tax policies); *see also* Hassett & Hubbard, *supra* note 264, at 371 (discussing Bizer and Judd's findings).

[268] *See supra* notes 227–31 and accompanying text.

[269] *See supra* note 98 and accompanying text.

tion, such as is common with respect to depreciation rules and investment tax credits,[270] also can reduce the uncertainty of tax incentives even though they are temporary. Regardless of whether the law changes from one year to the next, an economic actor making an investment in the current year can be assured of a certain level of tax benefits if there is a grandfather feature in the provision.[271]

It may be helpful to examine the experience with respect to the R&E credit, since that case arguably represents the worst-case scenario from the standpoint of temporary-effect legislation and investment policy. The credit has been kept in the law for over twenty-five years through a series of very short-term extensions,[272] even though the purpose of the credit is to stimulate long-term and perhaps largely irreversible investment. Although some early studies questioned the effectiveness of the credit, more recent studies have shown at least a moderate level of success for the program.[273] Proper evaluation of the

---

270 *See supra* note 266 (describing grandfathered depreciation benefits for certain property placed in service prior to September 12, 2004).

271 The only qualification under a temporary-effect rule is that the grandfathered benefits could not continue beyond the end of the budget period. This would not ordinarily be a problem for most investment tax incentives because the tax benefits are usually structured to occur early in the productive life of the investment.

272 *See supra* note 98 and accompanying text.

273 For older studies that concluded that the R&E credit was fairly unsuccessful, see U.S. Gen. Accounting Office, Tax Policy and Administration: The Research Tax Credit Has Stimulated Some Additional Research Spending 3 (1989), *available at* http://archive.gao.gov/d26t7/139607.pdf ("[S]pending stimulated by the [R&E] credit was well below the credit's revenue cost . . . ."); Robert Eisner, Steven H. Albert & Martin A. Sullivan, *The New Incremental Tax Credit for R&D: Incentive or Disincentive?*, 37 Nat'l Tax J. 171, 181 (1984) (concluding that their research is "unable to detect . . . a positive impact of the credit on total R&D expenditures"). For later studies showing a greater level of success, see Bronwyn H. Hall, Effectiveness of Research and Experimentation Tax Credits: Critical Literature Review and Research Design 24 (1995), *available at* http://elsa.berkeley.edu/users/bhhall/papers/BHH95%20OTArtax.pdf ("[R&E] tax credits have a tax revenue loss that is [only] slightly larger than the amount of induced [R&E]."); Philip G. Berger, *Explicit and Implicit Tax Effects of the R&D Tax Credit*, 31 J. Acct. Res. 131, 167 (1993) ("[The R&E] credit induced $1.74 of additional spending per revenue dollar forgone during 1982–85 . . . ."). Very recent studies are mixed. *Compare* Robert D. Atkinson, *Expanding the R&E Tax Credit To Drive Innovation, Competitiveness and Prosperity*, 32 J. Tech. Transfer 617, 619 (2007) ("[A]lmost all scholarly studies conducted since the early 1990s, including newer analyses conducted in the last 5 years, have found that the credit is an effective tool and that at minimum it produces at least one dollar of research for every tax dollar forgone."), *with* Gregory Tassey, *Tax Incentives for Innovation: Time To Restructure the R&E Tax Credit*, 32 J. Tech. Transfer 605, 613–14 (2007) (concluding that credit "has exhibited modest impact at best"). For summaries and potential shortcomings of additional studies of the effectiveness of the credit, see Cong. Budget Office, Federal Support for Research and Development 23–27 (2007), *available at* http://www.cbo.gov/ftpdocs/82xx/doc8221/06-18-Research.pdf, and JCT, President's FY 2009 Budget Proposal, *supra* note 98, at 260–61 & n.453.

effectiveness of the credit is hampered by the absence of a counterfactual experience—the credit has never been a permanent part of the law—as well as by the design of the incentive, which amount is determined in part by the level of increase in qualified spending from prior amounts. Nevertheless, the fact that there has been some success for the program under these worst-case conditions (perhaps because the history of extension and the popularity of the program have caused it to be perceived as a permanent program) is some indication that concerns about the harmful effects of temporary-effect legislation on long-term investment incentives are overstated.

A temporary-effect preference would also potentially increase the uncertainty of tax provisions not intended as investment incentives but rather performing an income-support, redistribution, or other purpose. An example would be the $1000 tax credit for each qualifying child of a taxpayer.[274] This type of tax provision serves a function analogous to entitlement spending, which would also be affected by the temporary-effect preference. Increased uncertainty in government spending programs may increase savings and investment because of a heightened concern about future disposable income on the part of program beneficiaries.[275]

Finally, the effectiveness of incentives is also affected by the larger budgetary consequences of the change in law. If a permanent change in law is understood to be fiscally unsustainable, investors will build in risk premiums to take that expectation into account and to discount the "certainty illusion." Conversely, if one effect of greater use of temporary-effect laws is to improve the perceived fiscal sustainability of all laws, then the decrease in uncertainty should enhance the effectiveness of all economic incentives. Temporary-effect laws may also be viewed in a positive light because they create realistic benchmarks for the reexamination of policy direction.

D. Would a Temporary-Effect Preference Enhance the Ability of Each Generation To Decide Its Own Policies?

One argument against enactment of permanent legislation is that it is countermajoritarian. Like legislative entrenchment devices gen-

---

274 I.R.C. § 24 (2006).

275 Richard Hartman, *Uncertainty in Future Government Spending and Investment*, 100 Q.J. ECON. 1339, 1346 (1985) (concluding that in some circumstances, increased uncertainty can increase investment and savings). Again, the overall result may or may not be desirable after all offsetting effects are taken into account, such as harm to the reliance interest on the part of the beneficiaries. Strong reliance interest is sometimes given as justification for permanent entitlement programs. *See* SCHICK, *supra* note 23, at 306–07 (arguing that ending permanent entitlement programs would lead to widespread social insecurity).

erally, permanent legislation arguably enables the majority of one period to impose its will, in the form of legislated policy preferences, upon the majority of a subsequent period.[276] Although a subsequent legislature can in theory amend or reverse prior legislation, supermajority requirements in the legislative process may make this difficult as a practical matter and allow the later majority's will to be thwarted.[277] Under this view, a temporary-effect preference might help to reduce this dead-hand problem by automatically terminating a prior legislature's policies and giving each generation a freer hand in setting its own agenda.

Thomas Jefferson famously raised this argument with James Madison in supporting the adoption of a temporary constitution that would allow each generation to craft its own foundational principles.[278] Although Madison responded with largely pragmatic concerns, including the possibility that a temporary rule might lead to anarchy,[279] he had just one year earlier successfully sponsored an amendment making the country's first tariff act a temporary measure.[280] In that debate, Madison made an argument similar to Jefferson's: Madison claimed that the need for the tariff might not be present in a later period (or at least not to the same extent) and that if the law were "made perpetual," then it would continue even though its purpose had ceased.[281] In contrast, if it were made temporary, then

---

[276] *See, e.g.*, David Dana & Susan P. Koniak, *Bargaining in the Shadow of Democracy*, 148 U. PA. L. REV. 473, 533 (1999) (criticizing entrenchment devices because "[i]f majority rule means anything, it means rule by the current majority and not by a majority of the past"); Jackson, *supra* note 76, at 196 n.17 (noting countermajoritarian flavor of mandatory entitlement programs); *cf.* ELAINE SPITZ, MAJORITY RULE 88–96 (1984) (explaining temporal dimension to principle of majority rule); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 504–05 (1997) (discussing problems of "cross-temporal majorities").

[277] Given supermajority requirements in order to change existing law, the failure to repeal such law may not necessarily constitute acquiescence by the later majority. *Cf.* THOMAS HOBBES, LEVIATHAN 176 (J.C.A. Gaskin ed., Oxford Univ. Press 1998) (1651) (arguing that sovereign may repeal laws that trouble it).

[278] Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 392, 392–97 (Julian P. Boyd ed., 1958).

[279] Letter from James Madison to Thomas Jefferson (Feb. 4, 1790), *in* 13 THE PAPERS OF JAMES MADISON 18, 19–21 (Charles F. Hobson & Robert A. Rutland eds., 1981).

[280] The Daily Advertiser (May 18, 1789), *reprinted in* 10 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 693, 693 (Charlene Bangs Bickford, Kenneth R. Bowling & Helen E. Veit eds., 1992) [hereinafter DOCUMENTARY HISTORY OF FIRST FEDERAL CONGRESS]; Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 540–41 (2003) (describing debate regarding proposed sunset provision and concern that later Congresses would be unable to repeal law).

[281] 1 ANNALS OF CONG. 360–61 (Joseph Gales ed., 1789); Cong. Reg. (May 15, 1789), *reprinted in* DOCUMENTARY HISTORY OF FIRST FEDERAL CONGRESS, *supra* note 280, at 679, 682.

the later legislature could take appropriate action, "commensurate with what the public debts and contingencies required."[282]

However, when practical constraints in the legislative process are taken into account, it is less clear whether a temporary-effect preference would give later legislatures greater control over their agendas. Because it is easier to enact limited-term laws than permanent ones, a temporary-effect preference would increase the number of laws that could be passed by a legislature and that could potentially be made applicable in the future. True, the laws passed would all contain sunset features, which would facilitate a change in policy if desired by a later legislature. But *all* of the laws, both those to be extended and those allowed to expire, would need to be considered by the later legislature, and this mass of legislative business could well fill up its agenda even more than if all of the initial legislation had been permanent.

TABLE 5
WORKLOAD OF PERIOD TWO LEGISLATURE DEPENDING ON WHETHER PERIOD ONE LEGISLATURE PASSES ALL PERMANENT OR ALL TEMPORARY LAWS

	Type of law passed by period one legislature		
	All Temporary	All Permanent	Difference
1. Laws passed by period one legislature	120	100	20
2. Period one policies continued by period two legislature (95% × (line 1))	114	95	19
3. Laws repealed or allowed to expire by period two legislature (5% × (line 1))	6	5	1
4. Extension bills addressed by period two legislature	114	0	114
5. New bills considered by period two legislature	?	?	?

Table 5 illustrates the potential difficulty faced by the later legislature. It assumes that the period one legislature passes either 120 temporary laws or 100 permanent laws, reflecting the greater ease of passing the former type of law. The example also assumes that all of

282 DOCUMENTARY HISTORY OF FIRST FEDERAL CONGRESS, *supra* note 280, at 682. Madison explained that a majority of the later legislature would not necessarily be sufficient to repeal the perpetual revenue law if the president decided to veto the repeal bill. *Id.* at 679, 682.

the temporary laws expire at the time of the period two legislature, which decides to continue 95% of the first legislature's policies (line 2).[283] Thus, the period two legislature must deal with either six "expiration bills" or five "repeal bills," depending upon whether the period one laws were all temporary or permanent (line 3). As Table 5 shows, however, if all period one legislation were temporary, the period two legislature would also have to consider 114 extension bills that would not be on its legislative agenda had all of the period one legislation been permanent (line 4). Even after taking into account the greater ease of dealing with an expiration rather than repeal bill, as well as the nineteen additional policies adopted in period one that the period two legislature would not have to address in new legislation, the 114 extension bills would no doubt impinge upon the period two legislature's ability to consider and pass new legislation. Thus, there is a third possible "crowding-out" effect of temporary-effect legislation: Increased use of such legislation may be favorable if it displaces both the budgetary cost of new proposals[284] and the legislative transaction costs accompanying consideration of those proposals,[285] but it may be unfavorable if it detracts from the ability of the new legislature to set its own agenda.[286]

[283] In theory, the expiration of existing laws might facilitate increased review by the period two legislature and therefore result in a different proportion of policies continued in the two scenarios. This was the theory of the sunset movement that became popular during the 1970s out of a desire to increase legislative oversight over bureaucratic drift and regulatory obsolescence. *See* THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 309–10 (2d ed. 1979) (supporting "guillotine effect" of termination dates in agency enabling acts in order to facilitate legislative review); Lewis Anthony Davis, *Review Procedures and Public Accountability in Sunset Legislation: An Analysis and Proposal for Reform*, 33 ADMIN. L. REV. 393, 393 (1981) (advocating sunset laws as way to "promote and encourage program evaluation"). The results of that effort, however, were dismal: Due to both resistance on the part of entrenched interests and limits on the legislature's ability to conduct reviews, very little change in policy occurred despite the existence of sunsets. *See* Mark B. Blickle, *The National Sunset Movement*, 9 SETON HALL LEGIS. J. 209, 225–27 (1985) (describing unsuccessful North Carolina experience); Mooney, *supra* note 233, at 68 (reporting that Colorado sunset law had "led to the termination of just three small agencies, a savings of $6,810," and that Alabama legislature was so disinterested in sunset resolutions that it delegated task of voting on them to its "young pages"). Hence, the example in Table 5 assumes no difference in the percentage of policies continued by the period two legislature in the two scenarios. If expiration of existing laws did inspire increased scrutiny by the later legislature, the effect on that legislature's agenda would be ambiguous. Time spent reviewing prior law would no doubt cut into the legislature's consideration of new policies, but the review itself would presumably constitute part of the legislature's new agenda.

[284] *See supra* note 101 and accompanying text.

[285] *See supra* text accompanying note 255.

[286] *See* Gersen, *supra* note 231, at 281 ("[T]emporary legislation transfers the power of agenda control from . . . future Congresses to the current-period legislature.").

Increased use of temporary-effect legislation would present a further problem for the later legislature. Although expiring laws terminate more easily than permanent ones, the adoption of a *replacement* for an expired law encounters many of the same hurdles as the adoption of a replacement for a permanent law. A sunset provision in a law merely facilitates an end to the policy adopted by the prior generation, but in the absence of a replacement policy put into effect by the current generation, the sunset causes the law to revert back to the policy adopted two generations back. If it is true that the more recent a policy, the more likely it is to be preferred by a given generation, then greater use of expiring laws may foist, by default, less-preferred policies on that generation. For example, if repeal of the estate tax expires at the end of 2010 without replacement, the law reverts back to the policy adopted for the period *prior to* 2001.[287] In short, temporary-effect legislation potentially presents a "deader hand" problem.

Although he did not explain it in this way, this aspect of temporary legislation potentially explains the different attitudes Madison expressed toward such laws. He could support a temporary feature in the nation's first tariff act because expiration of the law would simply eliminate the tariff altogether—a return to a blank slate or state of nature, if you will. But in many other cases, including the vast majority of cases today, expiration of a law does not return the country to a state of nature but rather simply to a policy state adopted by an even earlier legislature.[288] Thus, Madison legitimately could have been worried about the adverse consequences of temporary laws in the general case.

There is, however, one very important way in which a temporary-effect preference may assist later generations to determine their own policies, and that is by reducing the debts and budget constraints imposed on them by prior generations. A choice of policy direction encumbered by massive obligations already committed by earlier generations is really no choice at all. Thus, to the extent a temporary-effect preference reduces the transfer of these intergenerational debts, it should have a positive effect on agenda control by later generations.[289]

---

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

[288] Professor Klarman seems to have been thinking of a case like the expiration of the first tariff act when he argued that expiring legislation "simply . . . stack[s] the deck in favor of nonregulation." Klarman, *supra* note 276, at 505 n.66. In reality, in most situations today, expiring legislation stacks the deck in favor of an earlier state of regulation.

[289] *See* SCHICK, *supra* note 23, at 3 ("Nowadays, the budget often appears to be a limiting process, imprisoned in old commitments that narrow the options available to the gov-

E. Summary

This Part has addressed four criticisms of temporary-effect legislation. Although far from certain, the conclusions reached in each area may be quite surprising. First, temporary-effect legislation should result in greater fiscal restraint even if it initially appears to allow larger deficit-increasing changes in the law. Second, increased use of temporary-effect legislation may reduce the amount of private-sector costs incurred in influencing legislative outcomes because the temporary nature of the law depresses its value—and this effect likely would not be offset by the consequences of other possible changes in the legislative process. Third, temporary-effect legislation probably could be designed in a way that would reduce or eliminate its potentially harmful effects on long-term investment incentives. Finally, absent budget considerations, temporary-effect legislation may hamper the ability of each generation to set its own agenda and determine its own policies. But if such legislation improves the budgetary outlook faced by future generations, it would permit the choices of those generations to be more meaningful.

Conclusion

The proper duration of legislation has become highly controversial as a result of the enactment of many temporary tax laws during the George W. Bush administration. The prevailing view is that inclusion of an expiration date or "sunset" feature in legislation permits the cost of the legislation to be misrepresented and allows its proponents to escape the discipline intended by the congressional budget process. Under this view, fiscal discipline is preserved through enactment of so-called permanent legislation, which is accounted for correctly.

This Article has challenged that view and shown that, barring estimation error, the legislative process accounts completely for the costs of "temporary-effect" legislation but not permanent legislation. Consequently, enactment of temporary-effect rather than permanent legislation would promote political accountability and may result in greater fiscal restraint. In addition, when temporary-effect legislation

ernment. . . . In some years, the budget appears to crowd out genuine choice and forces tomorrow's opportunities to give way to yesterday's decisions."); Spitz, *supra* note 276, at 94–95 (explaining importance of providing meaningful choices to future majorities); C. Eugene Steuerle, Defining Our Long-Term Fiscal Challenges 2 (2007), *available at* http://www.urban.org/UploadedPDF/901037_Steuerle_FiscalChallenges.pdf ("Each generation must regain the right to decide spending and tax priorities based on the nation's current needs, not on past anticipation. We need budget slack—that is, wiggle room for new policy—between *future* government revenues and *current* spending commitments for the future.").

expires, the cost of any extension is fully taken into account in the legislative process. Extension of such legislation, therefore, competes with, and potentially displaces, adoption of other legislation. By contrast, the cost of continuing permanent programs largely disappears in the legislative process, and therefore continuation of such programs produces little or no crowding-out effect. These features of the legislative process may help to explain why discretionary spending programs, which are generally enacted as temporary-effect legislation, have grown much more slowly than either mandatory entitlement programs or tax expenditures, both of which are generally enacted as permanent legislation. The features also demonstrate the fiscal advantages of enacting as temporary-effect legislation any future spending increases or tax cuts.

APPENDIX

Table A contains the data used by the Government Accountability Office (GAO) to compare the amount of discretionary outlays, mandatory outlays, and tax expenditure outlay equivalent estimates for FY 1981 to 2004.

TABLE A
DISCRETIONARY OUTLAYS, MANDATORY OUTLAYS, AND TAX EXPENDITURE OUTLAY EQUIVALENT ESTIMATES, FY 1981–2004[290]

Fiscal Year	Total Discretionary Outlays in Constant 2004 Dollars (in Billions)	Total Mandatory Outlays and Net Interest in Constant 2004 Dollars (in Billions)	Sum of Tax Expenditure Outlay Equivalent Estimates in Constant 2004 Dollars (in Billions)
1981	571.7	687.6	501.2
1982	566.5	729.5	544.1
1983	588.0	757.3	598.8
1984	609.0	758.3	618.3
1985	646.4	824.9	676.7
1986	666.2	838.5	728.6
1987	657.7	829.0	702.7
1988	666.6	861.3	524.7
1989	675.4	905.1	549.2
1990	667.0	1002.6	534.6
1991	684.8	1015.7	532.8
1992	668.6	1062.0	551.2
1993	660.7	1065.7	561.7
1994	649.2	1103.6	600.3
1995	639.9	1140.3	622.3
1996	613.8	1184.2	620.0
1997	619.7	1193.6	650.2
1998	617.7	1231.3	738.7
1999	631.7	1247.8	785.5
2000	665.5	1271.1	825.0
2001	686.7	1283.5	908.1
2002	762.4	1325.5	944.2
2003	841.8	1361.0	883.5
2004	895.4	1396.8	852.5

Tax expenditure estimates are affected by both the number and size of specific expenditure items as well as by structural features of

[290] This data is reflected in GAO, TAX EXPENDITURES, *supra* note 7, at 36 fig.8.

the tax law, including particularly the applicable tax rates.[291] The measurement of a tax expenditure is the difference in *tax liability* under the law with and without the expenditure provision.[292] Hence, a change in applicable tax rates, which affects the calculation of tax liabilities, has a direct effect on the measurement of tax expenditures even without any change in the expenditure item itself. In addition, the calculation of an outlay-equivalent tax expenditure involves a further "gross-up" adjustment, which is dependent upon applicable tax rates.[293] For this additional reason, tax rates play an important role in the resulting measurement of outlay-equivalent tax expenditures.

In an attempt to control for the effect of changes in tax rates and therefore focus on changes in the expenditure items themselves, Table B compares the rate of growth of these three forms of spending during three periods, FY 1982 to 1986, 1988 to 2002, and 1993 to 2002, when the highest marginal individual and corporate income tax rates remained fairly constant.[294] In addition, because the classification and calculation of tax expenditures changed in FY 2003, the comparison of the latter two periods ends with FY 2002.[295]

TABLE B
DISCRETIONARY OUTLAYS, MANDATORY OUTLAYS, AND TAX EXPENDITURE OUTLAY EQUIVALENT ESTIMATES, RATE OF GROWTH, FY 1982–1986, 1988–2002, AND 1993–2002

	Rate of Growth (Percent)		
Fiscal Year	Discretionary Outlays	Mandatory Outlays	Tax Expenditure Outlay Equivalent Estimates
1982–1986	17.59	14.93	33.91
1988–2002	14.36	53.89	79.95
1993–2002	15.40	24.37	68.10

291 *Id.* at 28.

292 JCT, ESTIMATES OF TAX EXPENDITURES FY 2007–2011, *supra* note 104, at 20.

293 GAO, TAX EXPENDITURES, *supra* note 7, at 97.

294 The top marginal individual income tax rate remained at 50% between 1982 and 1986, ranged from 28% to 39.6% between 1988 and 2002, and ranged from 38.6% to 39.6% between 1993 and 2002. INDIVIDUAL INCOME TAX RATES, *supra* note 229. The top corporate income tax rate remained at 46% between 1982 and 1986, ranged from 34% to 35% between 1988 and 2002, and remained at 35% between 1993 and 2002. There was a slightly higher "bubble" rate for certain corporations beginning in 1984. Taylor, *supra* note 229, at 288–89. This attempt to control for the effect of changes in tax rates is rough since the measurement of outlay-equivalent tax expenditures is generally affected by changes in the *average* marginal tax rate and not merely the highest marginal tax rate.

295 GAO, TAX EXPENDITURES, *supra* note 7, at 31, 36.

As can be seen, the rate of growth of the tax expenditure outlay equivalent estimates exceeded that of the other two forms of spending in each of the periods examined. As previously noted, because of measurement difficulties and uncertainty in definitions, these estimates of tax expenditures must be interpreted with caution.[296]

[296] *See supra* notes 7 and 14.