Temporary versus Permanent Legislation

Summary

Over the past three or four years, there has been small but steady output of literature on temporary legislation. Law and economics scholarship first examined temporary legislation in the early 1980s. During that time, "sunset legislation" was being pushed by advocacy groups in an effort to limit the size of the American central government of the late 1970s. Calabresi, in a book entitled *A Common Law for the Age of Statutes*, was critical of the sunset movement, and perhaps rightly so, since it failed to deliver on its promise. Most sunset legislation was simply rubber-stamped for extension as soon as it expired, and the movement itself did little to curb central expansion.

As the use of sunsets for legislative oversight began to wane, the scholarship began to pay less and less attention to what it understood as a short-lived phenomenon. Then in the early 2000s, the American legislature began passing a trickle of tax cuts and credits temporarily, and no longer were sunsets simply rubber-stamped. The scholarship began to respond theoretically with Garrett (2004) criticizing the practice and Yin (2009) supporting it. Today, temporary taxation is shaping electoral outcomes by forcing tax issues onto legislative agendas near election times. The impact of temporary taxation is discussed in chapter 7.

Also amid controversy, legislation that faced strong opposition such as the American Violent Crime Control and Law Enforcement Act of 1994 (gun control) and portions of the USA PATRIOT Act of 2001 (domestic surveillance) were passed temporarily. Temporary passage of domestic surveillance laws also occurred in Germany and Australia around the same time.

Temporary legislation mitigates opposition since 1) temporary legislation is easier to pass because it lasts for a shorter time, and 2) temporary legislation can positively impact social norms leading to increased compliance. This means that lawmakers can optimally time their legal interventions with tem-

porary laws by accounting for positive changes in social norms. For example, over time they can pass a series of temporary extensions which benefit from increased normative compliance, instead of a permanent law up front which does not. This is the theoretical subject of chapter 2. Chapter 5 evaluates the theory with an econometric study using 1025 bills from the 110th U.S. Congress (2009-2010) and finds qualified support.

In some instances, legislators may prefer to legislate permanently even when legislating temporarily appears more efficient in the short- to medium-term. Chapter 3 develops a theory of why legislators prefer more costly permanent legislation by emphasizing their ability to create social norms through lawmaking. While older legislators nearing retirement may not accrue tangible benefits such as a stream of lobby transfers, they choose to legislate permanently because they value leaving a normative legacy. Chapter 6 measures the impact of age on the choice of a permanent timing rule, and finds that older lawmakers prefer permanent laws that originate in certain Congressional committees and not others.

By the mid-2000s, it was clear that the choice of temporary versus permanent legislation considered issues beyond legislative oversight and curbing central expansion. The choice is rich with strategic considerations between current legislatures and future legislatures, as seen in taxation, and between the legislature and citizens, as seen in socially controversial policy domains. Yet a further strategic interaction can be induced with temporary legislation between the legislature and a lobby. Gersen (2007) provides a case study of the temporary passage of the Terrorism Risk Insurance Act of 2002 to illustrate, and chapter 4 models this interaction referencing that case study throughout. It shows that temporary legislation can induce lobbies to reveal information that is useful for future extensions of legislation, and that under certain conditions, temporary legislation and not permanent legislation can actually signal the legislature's commitment to a policy.

In sum, the choice of temporary versus permanent legislation is strategic in nature. This fact is a reflection of the interdependencies between the legislature and citizens, the legislature and a lobby, and a current legislature and a future legislature. In each relationship, the decision to legislate temporarily or permanently depends on the action chosen by the other group. The strategic problem arises because the group's choice of action is not independent; it is affected by the legislature's choice. Throughout this book, an action chosen by citizens, a lobby, or a future legislature is conceptualized as a potential benefit that accrues to the legislature. It takes the form of increased citizen compliance, revealed lobby information, and reduced political opponent popularity.

In exchange for the benefit, the legislature pays a cost, i.e. the transactions cost of either temporary or permanent legislation. Here lies the opportunity for the legislature. Because each type of legislation allocates costs to different points in time, the legislature can wait for something favorable to happen before incurring the full cost of the legislation. In the case of an interaction with citizens, the legislature can wait for the law to manifest an expressive effect. In the case of the interaction with a lobby, the legislature can wait for the law to induce information revelation. And in the case of an interaction with a future legislature, the current legislature can wait for the law to reduce an opponent's popularity. Each of these benefits may not have occurred given a permanent enactment, or even if they did occur, they may not have been possible to accrue unless paid for a with a temporary legislation cost structure. In some circumstances, both the legislature and the other group benefit, and the use of temporary provisions creates possibilities for joint maximization. In other circumstances, those benefits may not occur at all or are outweighed by other costs. Under those conditions, permanent provisions should be used in order to maximize social welfare.