SUNSET PROVISIONS IN THE TAX CODE: A CRITICAL EVALUATION AND PRESCRIPTIONS FOR THE FUTURE

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In this Note, the author argues that sunset provisions associated with tax legislation are, in their current form, the product of political maneuvering designed to bypass budgetary constraints and are exploited as a means of enacting what is, in reality, permanent legislation. The use of sunsets in this manner has lead to considerable uncertainty regarding the future of their associated tax provisions. This uncertainty, in turn, has created opportunities for legislators to extract rents from lobbyists, generated inefficiencies for both taxpayers and the government, and increased overall tax code complexity. These problems can be minimized, however, if sunsets are used in a more principled manner. This Note argues that sunset clauses in tax legislation can be made more efficient by limiting both the occasions in which sunsets are employed as well as the procedures used to implement them. First, sunsets should only be used in conjunction with certain kinds of tax incentives: The incentives should be simple, of limited duration, and provide diffuse rather than concentrated benefits. Second, sunsets should only be implemented through a limited set of congressional budgetary procedures: They should only be included as part of the reconciliation process for enacting fiscal legislation if the underlying bill increases rather than decreases revenue, and if Congress enacts and adheres to a revenue-neutral, pay-as-you-go set of budgetary rules. These changes, both substantive and procedural, will increase overall efficiency in the use of sunset provisions in tax legislation.

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INTRODUCTION

Sunset provisions, seldom used prior to 2000, have become increasingly frequent addendums to modern tax legislation. A "sunsetting" tax law is in effect for a specified period of time, most commonly ten years or less, after which time the law simply expires. The majority of the tax cuts enacted in 2001, 2002, and 2003 will expire before 2011. Proponents of sunset clauses claim that their temporary nature forces legislatures to periodically consider the efficacy of their legislation, leading to increased governmental efficiency. Opponents argue that sunsets are merely a ruse used by the majority party to minimize the estimated costs of tax-reducing legislation. Although there has been some discussion about the Bush administration's use of sunsets as applied to specific provisions of the 2001, 2002, and 2003 tax cuts,[1] there has been little discussion of the pros and cons of the use of sunsets generally. Other commentators have discussed the historical development of sunset provisions as evidence of their shortcomings,[2]

[1] William G. Gale & Peter R. Orszag, *An Economic Assessment of Tax Policy in the Bush Administration, 2001–2004*, 45 B.C. L. REV. 1157, 1164, 1183–86 (2004) [hereinafter Gale & Orszag, *Economic Assessment*] (analyzing economic effects and repercussions of most recent tax cuts). *See generally* Cheryl D. Block, *Pathologies at the Intersection of the Budget and Tax Legislative Processes*, 43 B.C. L. REV. 863 (2002) (evaluating political gimmickry associated with budget rules); William G. Gale & Peter R. Orszag, *Sunsets in the Tax Code*, 99 TAX NOTES 1553 (2003) [hereinafter Gale & Orszag, *Sunsets*] (giving rough overview of estimated cost of current sunsets in tax code); Rebecca M. Kysar, *The Sun Also Rises: The Political Economy of Sunset Provisions in the Tax Code*, 40 GA. L. REV. 335 (2006) (evaluating sunset provisions through case studies rather than through lens of effective tax policy).

[2] *See, e.g.*, Michael W. Evans, *The Budget Process and the "Sunset" Provision of the 2001 Tax Law*, 99 TAX NOTES 405, 406–07 (2003) (detailing legislative history behind use of sunsets in taxation legislation); Richard C. Kearney, *Sunset: A Survey and Analysis of*

but have not discussed methods by which the advantages of sunsets can be maximized while minimizing the costs. This Note addresses this scholarly gap by providing such analysis.

In this Note, I argue that sunset provisions used in tax legislation are the product of political maneuvering designed to bypass budgetary constraints and are exploited as a means of enacting permanent legislation under the guise of an ostensible expiration date. As currently used, sunset provisions create great uncertainty as to the future existence or repeal of the associated tax provisions, providing opportunities for legislators to extract rents from lobbyists, generating inefficiencies for both taxpayers and the government, and increasing overall tax code complexity. I also argue that it is possible to use sunset clauses to create temporary tax incentives that stimulate short-term economic growth. However, these tax incentives should be of limited duration, be simple enough not to significantly increase complexity while they are in force, and provide diffuse rather than concentrated benefits. Lastly, I argue that sunsets will be used more efficiently if the reconciliation process for enacting fiscal legislation is only used for revenue increases rather than revenue decreases, and if Congress enacts and adheres to a revenue-neutral, pay-as-you-go set of budgetary rules.

Part I of this Note begins with a brief history of the use of sunset clauses in legislation generally, and then describes the developments in congressional procedure that resulted in the recent proliferation of sunsetting tax legislation. The historical and legislative background of sunsets indicates that their recent proliferation in tax legislation was not motivated by reasoned tax policy, but rather by a desire to finesse budget rules and mask the cost of extensive tax cuts. Part II analyzes whether sunsets can be used in conjunction with tax legislation to create sound tax policy. This analysis evaluates the efficiency and complexity of sunsets and concludes that sunset provisions attached to tax *cuts*, as opposed to tax *increases*, are more susceptible to interest group capture and economic inefficiency. Attachment of sunset provisions to tax increases still raises compliance and complexity issues, but these concerns are not as severe as those associated with tax cuts. Sunsets in their current form are an irresponsible means to minimize inefficiency and compliance costs. Part III considers how to ensure

the State Experience, 50 PUB. ADMIN. REV. 49, 50–51 (1999) (collecting data about efficiency of state-run sunset programs intended to increase agency oversight); Chris Mooney, *A Short History of Sunsets?*, LEGAL AFF., Feb. 2004, at 67, 67, 69–71 (describing shortcomings of George W. Bush's sunset legislation); Dan R. Price, *Sunset Legislation in the United States*, 30 BAYLOR L. REV. 401, 403 (1978) (providing overview of early state-adopted sunset provisions).

that sunset provisions are used only when their benefits outweigh the costs caused by the uncertainty they engender and their susceptibility to interest group capture.

I
The Historical Background of Sunset Provisions in Tax Legislation

The modern concept of sunsetting originated from the idealistic political reform movement of the 1970s, which sought to reform an American government considered bloated, inefficient, and beholden to special interests.[3] In order to catalyze legislative oversight, political theorist Theodore Lowi suggested in 1969 that every law creating federal agencies be subject to a time limit.[4] Lowi believed that federal agencies frequently catered to special interests dictated by lobbyists, thereby undermining the democratic process.[5] Lowi proposed a five- to ten-year limit on the life of all congressional acts, hypothesizing that as the sunset approached, the pressure of legislative review would diminish the effect of interest group politicking.[6]

The Bush administration made extensive use of sunsets in enacting legislation after the September 11 attacks. Responding to national sentiment, Congress passed the USA PATRIOT Act.[7] Those PATRIOT Act provisions that increased government power to investigate, detain, and search possible terrorists were scheduled to sunset after four years.[8] The explanation for the sunset was that the PATRIOT Act was emergency legislation and therefore should be repealed when the danger was no longer imminent.[9] However, many academics doubted such a sunset would ever occur, arguing that few legislators would support the elimination of any previously enacted national security measures.[10] This commentary proved to be well-

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[3] *E.g.*, Mooney, *supra* note 2, at 67–68.

[4] Theodore J. Lowi, The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority 309 (1969); *see also* Melissa J. Mitchell, *Cleaning Out the Closet: Using Sunset Provisions to Clean Up Cluttered Criminal Codes*, 54 Emory L.J. 1671, 1696–97 (2005) (providing brief overview of history of sunset provisions in America).

[5] *See* Lowi, *supra* note 4, at 287 ("The corruption of modern democratic government began with the emergence of interest-group liberalism as the public philosophy.").

[6] Kysar, *supra* note 1, at 351–52 (summarizing Lowi's key points).

[7] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

[8] Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 Am. J. Int'l L. 237, 253 (2002).

[9] Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. Pa. L. Rev. 675, 696 (2004).

[10] Mooney, *supra* note 2, at 70.

founded; the major provisions of the PATRIOT Act were overwhelmingly renewed by the Senate,[11] approved by more than a two-thirds majority of the House,[12] and affirmed by President Bush on March 9, 2006,[13] making several of the provisions permanent law.

Sunsets did not play a major role in tax legislation until 2001, when the Bush administration made extensive use of sunset provisions while drafting the Economic Growth and Tax Reconciliation Act of 2001 (EGTRRA).[14] The history behind the inclusion of sunset provisions in both EGTRRA as well as the follow-up tax cuts in 2002[15] and 2003[16] is discussed in the following section.

A. Previous Uses of Sunset Clauses in Tax Legislation

Prior to the Bush administration, sunset clauses in the tax code applied to a relatively minor set of tax provisions known collectively as "the extenders." These ostensibly temporary provisions include the targeted jobs credit, the exclusion for employer-provided educational assistance, and the orphan drug credit.[17] A well-known extender is the research and development credit, which reduces taxes by up to twenty percent of qualified research expenses.[18] Despite bipartisan support for the majority of these provisions, they are periodically extended rather than made permanent.[19] Two reasons prevent the extender tax credits from becoming permanent provisions. First, labeling the provisions as temporary reduces revenue loss estimates for their enactment. In the 1990s, legislators were compelled to follow pay-as-you-go (PAYGO) rules with respect to satisfying budget

[11] Sheryl Gay Stolberg, *Senate Passes Legislation to Renew Patriot Act*, N.Y. TIMES, Mar. 3, 2006, at A14. The Senate voted eighty-nine to ten in favor of renewal. *Id.*

[12] Sheryl Gay Stolberg, *Patriot Act Revisions Pass House, Sending Measure to President*, N.Y. TIMES, Mar. 8, 2006, at A20. The bill passed 280 to 138. *Id.*

[13] Press Release, Office of the Press Secretary, Fact Sheet: Safeguarding America: President Bush Signs Patriot Act Reauthorization (Mar. 9, 2006) (on file with New York University Law Review), *available at* http://www.whitehouse.gov/news/releases/2006/03/print/20060309-7.html.

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

[15] Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, 116 Stat. 21 (codified as amended in scattered sections of 26 U.S.C.).

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

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

[18] Kysar, *supra* note 1, at 358; *see also* 26 U.S.C. § 41 (2000) (establishing research and development credit).

[19] Julie Hirschfield Davis, *"Temporary" Breaks Keep Tax Writers and Lobbyists in Perpetual Motion*, CONG. Q. WKLY., Feb. 2, 2002, at 293; *see* Gale & Orszag, *Sunsets*, *supra* note 1, at 1554 (stating that extenders were usually extended each time they were set to expire).

requirements.[20] These rules required revenue offsets, i.e., revenue neutrality, within the specified budget window for every new tax cut.[21] Tax cuts enacted for a short period of time demand less severe offsetting revenues,[22] making them easier to fit within a specified budget. Second, uncertainty regarding the extender renewal process creates uncertainty in the legislative process, benefiting both lobbyists, who "thrive on confusion and uncertainty,"[23] and legislators who can exploit the uncertainty to extract rents. Given the presumption against permanent tax breaks created by the budget rules, interest groups are willing to engage in extensive lobbying to maximize the chances that their pet extender gets renewed.[24]

The narrow focus of extenders helps to explain why they continue to be continually renewed temporary provisions rather than permanent legislation. Since they affect specific niche areas, interest group efforts are likely to coalesce in support of their renewal. In 2001, with the passage of EGTRRA, sunsets became an integral component of not just the extender provisions, but of general tax legislation. Many key provisions of EGTRRA are set to sunset in 2010, meaning that these tax laws will revert to pre-passage conditions in 2011.[25] The EGTRRA sunsets, however, serve different purposes than the sunsets in the extender provisions. The next section describes the unique procedural rules that govern most tax bills and concludes that sunset provisions are a response to those procedural rules.

B. The Congressional Budget Act of 1974

The Congressional Budget Act of 1974[26] created procedural restrictions on how Congress considers bills and amendments with fiscal consequences.[27] The Act established procedures for how

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20 PAYGO "required revenue decreases to be offset by: (1) increases in revenues . . . or (2) decreases in spending, so there would be no net increase in the deficit." John W. Lee, *Class Warfare 1988–2005 over Top Individual Income Tax Rates: Teeter-Totter from Soak-the-Rich to Robin-Hood-in-Reverse*, 2 HASTINGS BUS. L.J. 47, 86 n.150 (2006).

21 STANLEY E. COLLENDER, THE GUIDE TO THE FEDERAL BUDGET: FISCAL 1993, at 26 (1992).

22 Kysar, *supra* note 1, at 360–61; *see also infra* notes 26–40 and accompanying text (discussing reconciliation process).

23 Jones, *supra* note 17, at 1587 (internal quotation marks omitted).

24 *Id.* (calling uncertainty associated with extenders "music to the ears of Washington's tax lobbying community").

25 Depending on the specific provision, some sunsets occur prior to 2010. *See, e.g.*, Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 431, 115 Stat. 38, 66 (codified as amended in scattered sections of 26 U.S.C.) ("This section shall not apply to taxable years beginning after December 31, 2005.").

26 Pub. L. No. 93-344, 88 Stat. 297.

27 Evans, *supra* note 2, at 406.

Congress generates the framework from which substantive decisions on revenue and spending are made.[28] From this framework, known as a budget resolution, individual Senate committees make the changes in the law necessary to satisfy the specified budget. The process of making these changes is known as "reconciliation."[29]

The modern federal budget process consists of two budget "packages," one dealing with discretionary spending programs requiring annual appropriations, and another dealing with direct spending programs.[30] Tax legislation falls under the second category. Statutory rules require that the budget resolution set revenue and spending levels for the following fiscal year and at least the next four fiscal years.[31] Although Congress is required to use a budget window of at least five years, it is statutorily authorized to extend this window and has recently adopted a longer, ten-year budget.[32] This budget window takes into account total government revenues and spending. In deficit years, the budget resolution might call for an increase in revenues; in years of surplus, the resolution might authorize additional spending.[33]

The Budget Act of 1974 had a significant effect on how reconciliation legislation, the legislation implementing the budget resolution, was considered by the Senate. Typically, senators have the right to limitlessly debate (filibuster) and amend any legislation under consideration, with debate ending only when sixty senators are in favor of so doing.[34] As a result, in order for controversial measures to pass the Senate, a supermajority of sixty votes, rather than a simple majority of fifty-one, is required. This is especially significant when the Senate is equally or close to equally politically divided, and when partisan issues are discussed. If no party has a supermajority, the minority party can stifle a bill's enactment via filibuster. Additionally, senators commonly attach unrelated amendments to bills, enabling passage of interest group legislation wholly irrelevant to the subject matter cov-

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28 Block, *supra* note 1, at 872–74. Discretionary spending programs require annual appropriations which Congress debates and reauthorizes yearly, whereas direct spending programs (also known as mandatory spending), e.g., payments for social security, remain in effect until repealed. *Id.* at 874.

29 ALLEN SCHICK, RECONCILIATION AND THE CONGRESSIONAL BUDGET PROCESS 1–8 (1981).

30 Block, *supra* note 1, at 874.

31 2 U.S.C. § 632(a) (2000).

32 Block, *supra* note 1, at 875; *see, e.g.*, H.R. Con. Res. 68, 106th Cong. (1999) (enacted).

33 Block, *supra* note 1, at 875.

34 *See* S. COMM. ON RULES & ADMIN., STANDING RULES OF THE SENATE, R. XXII, S. DOC. NO. 106-15, at 16 (2d Sess.2000) (describing senatorial procedural rules).

ered by the bill itself.[35] Prior to the Budget Act of 1974, senators could include amendments to reconciliation legislation only to appease a legislator of the minority party.[36]

The Budget Act of 1974 imposed key restrictions on senators' ability both to filibuster and to amend reconciliation legislation. First, the Act limited floor debate to twenty hours,[37] preventing filibuster. Because filibuster is not possible, a supermajority is not needed to pass reconciliation legislation, reducing the number of votes required to pass a controversial measure from sixty to fifty-one.[38] Second, the Act limits fiscal legislation amendments to those that are germane.[39] Germaneness, although not specifically defined, has been characterized as imposing a more restrictive standard than simple relevancy.[40] Both of these restrictions were intended to expedite the budget-making process and improve governmental efficiency.

In the late 1970s and 1980s, the federal deficit grew at an alarming rate. The Budget Act of 1974 was enacted during what was at the time the largest deficit increase, by percentage, in American history.[41] Throughout the 1980s, the primary focus of the budget debate was on how to reduce the federal deficit through decreasing spending and increasing taxes.[42] Most major tax bills enacted between 1980 and 1993 were reconciliation bills that increased taxes, and there was no serious criticism of using reconciliation as part of an overall strategy to reduce the deficit.[43] Given the economic climate of American politics prior to 1995, the question of whether or not legislation that was tax *cutting*, as opposed to tax *increasing*, could be enacted via reconciliation procedures never arose.

In the mid-1990s, with the budget deficit replaced by a surplus, a sharp debate arose regarding the propriety of implementing tax cuts (as opposed to increases) via the reconciliation process.[44] In 1996, two years after gaining control of Congress, Republicans created a budget

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35 ELLEN GREENBERG, THE HOUSE AND SENATE EXPLAINED 25 (1996) ("If the bill is about cows, the legislative rider can be about chickens.").

36 Evans, *supra* note 2, at 406.

37 2 U.S.C. § 641(e)(2) (2000).

38 Evans, *supra* note 2, at 407.

39 2 U.S.C. § 688(d)(2).

40 FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE 854 (1992).

41 According to the U.S. Department of the Treasury, U.S. debt on December 31, 1975 was $577 billion, a 17% increase from the year before. The previous highest increase was from 1970–1971, when U.S. debt increased by 9%. U.S. BUREAU OF PUB. DEBT, HISTORICAL DEBT OUTSTANDING—ANNUAL 1950–2005, http://www.treasurydirect.gov/govt/reports/pd/histdebt/histdebt_histo4.htm (last visited Jan. 12, 2007).

42 Evans, *supra* note 2, at 407.

43 *Id.*

44 *Id.* at 407–08.

resolution that cut taxes by $796 billion over ten years, offset by equivalent spending cuts.[45] The Democratic leader, Senator Tom Daschle, raised a point of order[46] objecting to the resolution on the grounds that "enforcing deficit *reduction* . . . is the sole reason for . . . [the] vehicle we call reconciliation."[47] Daschle argued that unless reconciliation bills were limited to those that reduced the deficit, the congressional majority could characterize its top agenda items, regardless of content, as reconciliation bills, thereby stripping the minority of its rights of unlimited debate and amendment.[48] Daschle's appeal was overruled, with the presiding officer unequivocally stating, "If [Senator Daschle's] question is, can the budget resolution direct the creation of a reconciliation bill which lowers revenues, the answer is yes."[49] Although the budgetary issues of this specific legislation were resolved via the Balanced Budget Act of 1997, procedural questions remained, triggering questions about the application of the Byrd rule.[50]

C. The Byrd Rule

It was increasingly common in the 1980s for senators on committees drafting reconciliation bills to include individual, special-interest provisions.[51] Such provisions did not violate the germaneness provision of the Budget Act of 1974 since they were not amendments and were not subject to filibustering. The Senate responded to this by unanimously approving the Byrd rule,[52] a point of order against extraneous[53] provisions that could only be overruled by a supermajority of

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45 *Id.*

46 A point of order is an objection made by a member of Congress who believes a Senate rule is being violated. Another member may argue against the objection. GREENBERG, *supra* note 35, at 69. The presiding officer (in the Senate, the majority leader) rules on the point of order with the help of the Senate Parliamentarian, a nonelected, nonpartisan expert on Senate procedure. *Id.* at 8.

47 142 CONG. REC. 11,938 (1996) (emphasis added).

48 Evans, *supra* note 2, at 408.

49 142 CONG. REC. 11,940 (1996) (statement of Sen. Inhofe).

50 Evans, *supra* note 2, at 408.

51 *Id.*

52 131 CONG. REC. 28,968–74 (1985).

53 2 U.S.C. § 644(b)(1) (2000). "Extraneous" was defined as meeting any of the following standards:

> (A) [the provision] does not produce a change in outlays or revenues . . . ;
> (B) [in the case of a provision that increases outlays or decreases revenues] the net effect of provisions reported by the committee . . . is that the committee fails to achieve its reconciliation instructions;
> (C) [the provision] is not in the jurisdiction of the committee with jurisdiction over [the] title . . . ;
> (D) [the provision] produces changes in outlays or revenues which are merely incidental to the non-budgetary components of the provision. . . .

sixty votes.[54] The Byrd rule was intended to prevent special-interest provisions unrelated to the budget from getting the benefit of the streamlined reconciliation process.[55] "The Byrd rule has had a significant impact on the Senate's consideration of reconciliation bills,"[56] with invocation of the rule occurring fifty-five times between 1985 and 2003, forty-two of which were successful.[57] In addition, the rule likely dissuaded many senators from proposing other extraneous provisions.[58]

In 1987, the Byrd rule was amended to include subsection (E), which has been of critical importance in the tax cuts passed during the George W. Bush administration. In response to worries that some provisions in reconciliation bills would have an effect outside of the period covered by the bill, subsection (E) added another definition of "extraneous." If a provision "increases . . . net outlays, or if it decreases . . . revenues during a fiscal year after the fiscal years covered by [the] reconciliation bill," the provision would be extraneous.[59] In other words, reconciliation bill provisions were only allowed to increase spending during the budget period covered by the reconciliation bill. Subsection (E) was seldom invoked, but as the economy improved and the budget deficit turned into a surplus, questions arose regarding the applicability of subsection (E) to tax cuts.

The first successful invocation of subsection (E) with respect to a tax law occurred in 1999.[60] Despite Democratic objections, the Republican Congress passed a budget resolution requesting a tax cut and instructing the House Ways and Means and Senate Finance Committees to report reconciliation legislation to effectuate its implementation.[61] The Finance Committee anticipated a Byrd rule objection, and thus added two provisions to the reconciliation bill: The first, section 1501, called for sunset on the last day covered by the bill (December 31, 2009); the second, section 1502, restored all the tax

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[54] Evans, *supra* note 2, at 409.

[55] *See* Donald B. Tobin, *Less Is More: A Move Toward Sanity in the Budget Process*, 16 ST. LOUIS U. PUB. L. REV. 115, 132 (1996) ("In order to stop the abuse of the reconciliation process, the Senate passed the 'Byrd Rule,' which was designed to stop the Senate from considering extraneous matters on the reconciliation bill." (footnotes omitted)).

[56] Evans, *supra* note 2, at 410.

[57] ROBERT KEITH, CONG. RESEARCH SERV., THE BUDGET RECONCILIATION PROCESS: THE SENATE'S "BYRD RULE" 9 (2004), *available at* http://www.rules.house.gov/archives/RL30862.pdf.

[58] Evans, *supra* note 2, at 410.

[59] 2 U.S.C. § 644(b)(1)(E) (2000).

[60] The first time subsection (E) was successfully invoked in *any* legislation was in an amendment to reduce the cost of student loans, proposed by Senator Ted Kennedy. *See* 143 CONG. REC. 12,555 (1997).

[61] H.R. Con. Res. 68, 106th Cong. §§ 104, 105 (1999) (enacted).

cuts one day later.[62] The debate regarding the applicability of the Byrd rule therefore focused on section 1502. Democrats argued a literal violation, since section 1502 necessarily decreased revenues outside of the budget window.[63] Republicans, on the other hand, argued that refusal to waive the Byrd rule in this instance would create instability in the tax code.[64] Calling the provisions of the Budget Act "antiquated" and "drawn to function in an era of deficits" rather than surpluses, Republican Senator William Roth moved to waive the Byrd rule.[65] Voting occurred mostly along party lines, with three Republicans voting with forty-five Democrats, resulting in a final tally of fifty-one in favor of waiving, and forty-eight against.[66] Since sixty votes were required to waive the Byrd rule, section 1502 was stricken. Although the 1999 tax bill was eventually vetoed,[67] the precedent establishing the Byrd rule's application to tax-cutting reconciliation legislation had been set, and the use of sunsets in general tax-cutting legislation emerged.

In summary, the 1995 combination of a budget surplus and a politically divided Congress catalyzed Senate Republicans to propose promulgating tax-cutting legislation via reconciliation procedures. As a result, the Senate was forced to rule on the validity of this approach, and concluded that although the reconciliation process was an appropriate mechanism by which to enact tax cuts, subsection (E)—which renders provisions extraneous if they decrease revenues outside of the fiscal years covered by the reconciliation bill—also applied.[68] Therefore any tax cut passed through the reconciliation process must necessarily expire at the end of the fiscal period in question.

D. Putting Theory into Practice: Sunsets in the 2001 Tax Cut

Cutting taxes was at the forefront of George W. Bush's legislative agenda.[69] However, there were still considerable objections from Democrats about the characterization of tax cuts as reconciliation legislation.[70] Such objections became even more pronounced given that

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62 Evans, *supra* note 2, at 411.

63 *Id.*

64 *See* 145 CONG. REC. 18,172–73 (1999) (asserting that no tax relief could ever be permanent without waiver).

65 *Id.* at 18,173.

66 *Id.* at 18,178.

67 Evans, *supra* note 2, at 411.

68 *Id*. at 412.

69 *E.g.*, Richard W. Stevenson, *Bush to Propose Broad Tax Cut in Iowa Speech*, N.Y. TIMES, Dec. 1, 1999, at A1 ("Gov. George Bush will lay out the centerpiece of his economic agenda on Wednesday, calling for sweeping cuts in income tax rates . . . .").

70 Evans, *supra* note 2, at 412.

the Senate was deadlocked with fifty Democrats and fifty Republicans, with Vice President Cheney breaking ties. The procedural debate over including tax cuts in reconciliation legislation escalated when Republican Senator Pete Domenici proposed an amendment instructing the Finance Committee to report a reconciliation bill that reduced the total level of revenues between fiscal years 2001 and 2011 by $1.6 trillion.[71] Against Democratic objections, including Senator Byrd's, that reconciliation legislation was not the appropriate vehicle through which to enact such major tax cuts, the Domenici amendment was approved fifty-one to forty-nine, with one Democrat voting in favor of the amendment.[72]

By that vote, the Senate had not only reaffirmed that the reconciliation process could be used to protect tax-cutting legislation but, by including a sunset provision, had also implicitly acknowledged that, as a reconciliation bill, the tax cut would be subject to the Byrd rule.[73] As such, to satisfy subsection (E), proponents of the tax cut opted to sunset the bill's provisions at the end of 2010 rather than attempt to collect sixty votes to waive the Byrd rule.[74] The majority party grasped the infeasibility of garnering sixty votes for such a contentious tax cut in the politically divided Senate.

Several of the protections given to the 2001 tax cut—bestowed on it because of its status as reconciliation legislation—had significant impact. Although conjecture about a counterfactual world can be misleading, it is worthwhile to note how EGTRRA's characterization as a reconciliation bill affected its passage. Given that the time for debate was fixed, it is not surprising that the twenty hours allotted expired long before all the amendments had been discussed.[75] Interestingly, many amendments, including Senator Daschle's alternative tax cut bill, received more than forty votes, demonstrating that the bill's opponents might have been able to garner the votes necessary to sustain a filibuster had they been given the procedural opportunity to do so.[76] It is likely that congressional Republicans were only able to enact EGTRRA because it was passed as reconciliation legislation.

It is important to note that the sunset provisions featured so prominently in the 2001 and subsequent tax cuts were not enacted as a consequence of reasoned tax policy principles, but were appended only to satisfy procedural requirements. Republicans desired to use

71 *Id.* at 412.
72 147 CONG. REC. 5663 (2001). The Democratic defector was Senator Zell Miller.
73 Evans, *supra* note 2, at 414.
74 *Id.*
75 *Id.*
76 *Id.*

the reconciliation process to protect tax cuts from the ordinary rules of limitless Senate debate. Democrats objected, arguing that if tax cuts could be characterized as reconciliation, the limitations associated with the Byrd rule applied. Consequently, Republicans, favoring the use of the reconciliation process, did so knowing the tax laws must necessarily sunset for the laws to be Byrd rule-compliant. Whether or not sunsetting tax laws are or can be sound tax policy is the major focus of this Note, and is discussed at length in Part II.

II
Evaluating Sunset Provisions in Tax Legislation

The three traditional criteria for evaluating tax laws are equity, efficiency, and simplicity.[77] These are not independent criteria, and they have some level of interconnectedness; however, it is still helpful to consider each criterion individually. Equity refers to the general principle that those with a greater ability to pay should pay more, and those with identical abilities to pay should pay equally.[78] If two taxpayers are identically situated except for the fact that taxpayer A has twice the income of taxpayer B, equity demands that taxpayer B should not pay more taxes than taxpayer A. But how much more taxpayer A should pay is informed by personal philosophies of fairness, personhood rights, and economic autonomy. Although equity is an important consideration, especially for evaluating the distributional effects and consequences of a particular tax, equity is better suited to analyzing specific provisions of tax laws rather than the general forms that they might take. Since a sunset is the latter, this Note will focus on evaluating sunsets vis-à-vis efficiency and simplicity.

In its simplest form, the efficiency criterion requires that a tax interfere with economic behavior as little as possible.[79] Thus, under a completely efficient system of taxation, a taxpayer's behavior would be identical to that of a perfectly functioning market. Many taxes are enacted with the express purpose of changing behavior;[80] however,

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77 Michael J. Graetz & Deborah H. Schenk, Federal Income Taxation 27–31 (5th ed. 2005).

78 Susan Pace Hamill, *An Argument for Tax Reform Based on Judeo-Christian Ethics*, 54 Ala. L. Rev. 1, 7 (2002) (defining vertical and horizontal equity in reference to tax policy).

79 Graetz & Schenk, *supra* note 77, at 27. Graetz and Schenk note that this definition is somewhat nonsensical, since society needs government to function, and government must somehow be funded. However, "under certain idealized circumstances, a market allocation yields maximum total consumer satisfaction, given a distribution of wealth." *Id.*

80 *See, e.g.*, David J. DePippo, *I'll Take My Sin Taxes Unwrapped and Maximized, with a Side of Inelasticity, Please*, 36 U. Rich. L. Rev. 543, 545–49 (2002) (discussing history of "sin taxes").

this is arguably done to correct for an imperfectly functioning market. For example, a tax on cigarettes might lower cigarette consumption to its socially optimal level, given that smokers may not take into account the negative externalities of their decisions, including the detriment to public health.

Evaluating the simplicity of a tax provision is equivalent to evaluating its complexity. This is not necessarily separate from equity and efficiency concerns.[81] If a tax law is difficult to understand, it will require spending time and money to ensure compliance, raising efficiency concerns. This also raises equity concerns due to the increased ability of those with money to manage their assets to minimize tax liability. Generally, complexity is divided into three categories: rule, compliance, and transactional complexity.[82] Rule complexity refers to the problems of understanding and interpreting the law, including statutes, administrative rulings, and case law.[83] Compliance complexity refers to the difficulty involved in complying with the law: keeping records, filling out forms, and the government expenditure required to administer the law.[84] Transactional complexity is concerned with the problems arising from taxpayers structuring their transactions to minimize tax liability.[85] To the extent that these transactions are performed merely to reduce tax burdens, they are also inefficient, since the resources expended on conducting the transactions could be put to more socially beneficial uses.

The uncertainty associated with sunset provisions makes them susceptible to criticisms on both efficiency and simplicity grounds, regardless of the tax law they happen to be sunsetting. A discussion of the specific characteristics of sunset provisions that create inefficiency and complexity follows.

A. Efficiency Concerns with Uncertainty in the Continued Existence of Sunsetting Legislation

Any law enacted by Congress has some probability of getting overturned; however, this baseline probability of statute repeal is

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[81] James Alm, *What Is an Optimal Tax System?*, *in* TAX POLICY IN THE REAL WORLD 371 (Joel Slemrod ed., 1999).

[82] GRAETZ & SCHENK, *supra* note 77, at 30–31.

[83] *Id.* at 30 ("The tax which each individual is bound to pay ought to be certain, and not arbitrary. The time of payment, the manner of payment, and the quantity to be paid ought to be clear and plain to the contributor, and to every other person." (quoting 2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 426 (2d ed. 1778)).

[84] *Id.*

[85] *Id.* at 31.

fairly low.[86] This is especially true of tax cuts. Many of today's costliest tax breaks were relatively insignificant when first enacted. For example, current law excludes employer-provided health care from an employee's gross income.[87] This exclusion is estimated to have cost the United States government $90.6 billion in lost revenue in 2006;[88] in 1967 the exclusion cost $6.64 billion in inflation-adjusted dollars.[89] The deduction for interest paid on home mortgages is similar: The corresponding revenue lost in 1967 was $12.62 billion in inflation-adjusted dollars;[90] in 2006, $69.4 billion.[91] Given the enormous cost of these provisions, one would expect Congress to reassess whether or not they are sound tax policy. But because American taxpayers consider these tax cuts to be entitlements,[92] Congress does not dare to question them. Therefore, it is reasonable to assume that any tax cut in existence for more than a few years, especially one benefiting many taxpayers, becomes exceedingly difficult to revise.

Tax cuts without sunset provisions attached are likely to live on untouched,[93] whereas there is less certainty associated with the continued existence of sunsetting tax cuts. As illustrated from the continual renewal of the extender tax provisions,[94] these laws are frequently the subject of interest group politicking and therefore get revised much more frequently. The 2001 and 2003 tax cuts were sunsetted to ensure their passage—the sunsets were a "means to an end."[95] Indeed, soon after each tax cut was enacted, Republican

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86 As stated by Judge Guido Calabresi, "[G]etting a statute enacted is much easier than getting it revised." GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 6 (1982).

87 26 U.S.C. § 106 (2000 & Supp. III 2003).

88 JOINT COMM. ON TAXATION, 109TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2006–2010, at 39 tbl.1 (2006) [hereinafter FEDERAL TAX EXPENDITURES].

89 CONG. BUDGET OFFICE, TAX EXPENDITURES: CURRENT ISSUES AND FIVE-YEAR BUDGET PROJECTIONS FOR FISCAL YEARS 1982–1987, at 26 (1981). These numbers are in inflation-adjusted 2006 dollars. The number cited by the census is $1.1 billion, which equates to $6.64 billion today. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CONSUMER PRICE INDEX, ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt (last visited Jan. 30, 2007) (noting that by comparing average CPI indexes, $1 in 1967 is worth $6.04 today).

90 CONG. BUDGET OFFICE, *supra* note 89, at 18. $1.9 billion in 1967 dollars equates to $12.62 billion today. *See* BUREAU OF LABOR STATISTICS, *supra* note 89.

91 FEDERAL TAX EXPENDITURES, *supra* note 88, at 33 tbl.1.

92 For a discussion of how tax benefits transition from windfalls to entitlements, see, *infra*, notes 120–26 and accompanying text.

93 *See supra* note 86.

94 *See supra* Part I.A.

95 Mooney, *supra* note 2, at 71.

leaders, along with President Bush, began clamoring to repeal the sunsets.[96]

Sunsets in tax legislation are frequently repealed, i.e., the provision never sunsets, making it difficult for taxpayers to arrange their financial affairs. A simplified example illustrates this point.[97] Assume a recently enacted tax cut decreases the top marginal tax rate from 60% to 40% in year 1, but at the end of year 10, sunsets back to the original rate of 60%. Let Annie be a New York City resident with an adjusted gross income of $100,000 who, after spending annual fixed costs on food, housing, et cetera, derives maximal utility from her post-tax dollars by funding her daughter's private education. In year 1, her daughter is to enroll in first grade. Letting Annie's annual fixed costs be $30,000, in years 1 through 10, when the lower marginal tax rate is in effect, Annie will have $30,000 to spend on her daughter's tuition.[98] In years 11 and 12, when the tax rate will revert to 60%, Annie will have only $10,000 to spend.[99] In total, Annie will then have $320,000 to spend on twelve years of tuition,[100] allowing her to afford a school charging approximately $26,700 in annual tuition.[101]

The preceding calculations assume that the tax cut will indeed sunset at the end of year 10. On the other hand, if Annie knows with certainty that the tax cut will be extended, i.e., the sunset will be repealed, her tax rate will not change between years 10 and 11, and she will have $360,000 total, or $30,000 a year, to spend on her daughter's tuition.[102] However, taxpayers are unlikely to know the probability of the sunset occurring. While an extension of the tax cut is possible, it is by no means a certainty. This uncertainty has the consequence of creating inefficient outcomes. If Annie is risk averse and assumes that the tax cut will indeed sunset at the end of year 10, she

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96 *Id.* ("Before the ink was dry, the supporters of the bill were calling for [the tax cuts] to be made permanent.").

97 For the purposes of this example, assume that the top marginal tax rate applies to all of Annie's adjusted gross income (AGI), inflation is negligible, money borrowed can be repaid in year 12 with no interest, tuition costs are time invariant, and that once enrolled Annie's daughter cannot transfer schools.

98 An AGI of $100,000 with a tax rate of 40% leaves $60,000 in post-tax dollars. Since Annie has $30,000 in annual fixed costs, she has $30,000 ($60,000 – $30,000) left to spend on her daughter's tuition.

99 An AGI of $100,000 with a tax rate of 60% leaves $40,000 in post-tax dollars. Since Annie has $30,000 in annual fixed costs, she has $10,000 ($40,000 – $30,000) left to spend on her daughter's tuition.

100 (10 × $30,000) + (2 × $10,000) = $320,000.

101 $320,000 ÷ 12 = $26,700.

102 $360,000 ÷ 12 = $30,000.

will have $40,000[103] that she wishes she could have spent on her daughter's education that will be inefficiently allocated.

It is worthwhile to note that the inefficiency illustrated in the preceding example of a sunsetting tax law is independent of the change in law affected by the sunset. This inefficiency is not created by the law itself, but rather by the uncertainty in the future existence of the law. If Annie knew with 100% certainty that the sunset would go into effect as enacted, the result would be an efficient allocation of all her $320,000 in available money. If Annie knew with 100% certainty that the sunset would be repealed, the result would still be an efficient allocation of all her available money (in this scenario, $360,000). When the future of the law is uncertain, however, there exists the possibility that Annie will either allocate too little or too much for her daughter's tuition.

B. The Transitory Nature of Sunsetting Tax Laws

The previous section dealt with the inefficiencies associated with enacting an ostensibly temporary tax provision whose renewal was uncertain. That analysis focused on the uncertainty of renewal as opposed to the temporary nature of the provision itself. Although uncertainty in the status of renewal is problematic, so too are provisions intended to be in effect for a limited duration. This section considers problems linked to temporary tax provisions generally, independent of the uncertainty accompanying the provision's renewal or repeal.

Even if a tax cut is intended to be in effect for only a short period of time, it is politically challenging to allow the cut to expire. Although a temporary measure might be justified, e.g., as a catalyst for economic growth in a particular area, such a provision will invariably result in disgruntled taxpayers lamenting the end of the tax cut from which they benefited. A tax cut that was originally perceived as a windfall becomes an entitlement.[104] Although the tax cut might have outlived its usefulness, in the minds of taxpayers its repeal becomes a tax increase rather than a return to the status quo. Politicians will therefore be wary of repealing the tax cut, even though that might be optimal tax policy. As a result, inefficiencies are created.

103 Her tax rate will remain at 40%, giving her $30,000 instead of $10,000 in post-tax dollars. Since she will have this rate for two years, she will have ($30,000 – $10,000) × 2 = $40,000 inefficiently allocated.

104 *See infra* notes 120–26 and accompanying text (describing political difficulty of repealing home-mortgage interest deduction—which was intended to be temporary—due to homeowners' support for deduction).

Many factors contribute to the transformation of tax cuts from government-conferred benefits to personal entitlements. It is understandable how some government benefits became perceived more as rights than privileges.[105] But some government benefits, such as the home-mortgage interest deduction, are perceived as fundamental rights for no reason other than that they have been benefits for long periods of time. The reason for this is that people do not treat out-of-pocket costs and opportunity costs equivalently.[106] People are especially averse to losses, meaning that they value items already in their possession more than they would value an equivalent item *not* in their possession. People are twice as bothered by economic loss as they are pleased with an equivalent economic gain.[107] A taxpayer is not necessarily a rational actor when appraising the value of certain tax benefits. As a result, the public might exert unjustified pressure on legislators to maintain wasteful tax breaks where that benefit could potentially be conferred in more efficient ways.

The impact of treating a tax cut as an entitlement rather than as a windfall is apparent when considering the dramatic increase of revenues lost due to tax expenditures. Tax expenditures are tax breaks enacted to encourage specific activities that the government has, for one reason or another, seen fit to subsidize.[108] Some well known tax expenditures have already been mentioned, including the exclusion of employer-provided health care and the deduction for interest paid on home mortgages.[109] Although most tax expenditures are not enacted to be temporary measures, the growth in cost from inception often far exceeds original estimates and should, one might expect, invite reconsideration of their existence. The deductions for employer-provided health care and interest paid on home mortgages have grown increas-

105 *See* Goldberg v. Kelly, 397 U.S. 254, 261, 263 (1970) (holding that in order to satisfy due process requirements, fair hearing must be given prior to termination of welfare benefits because recipient is dependent on benefits for survival). *But see* Mathews v. Eldridge, 424 U.S. 319, 340–41, 349 (1976) (holding that fair hearing need not be given in terminating disability payments because benefits not conditioned on financial need).

106 Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175, 1179 (1997).

107 Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1338–39 (1990).

108 *See* Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 706 (1970) (defining tax expenditures as "provisions of the federal income tax system which represent government expenditures made . . . to achieve various social and economic objectives").

109 *See supra* notes 87–91 and accompanying text. Tax expenditures are not limited to individuals. Many expenditures, such as the research and development credit and the tax credit for orphan drug research, are directed at corporations. *See* FEDERAL TAX EXPENDITURES, *supra* note 88, at 30 tbl.1, 39 tbl.1.

ingly costly,[110] but there have been no serious attempts to repeal them. This is because once the tax expenditure begins to benefit more taxpayers, it becomes more difficult to repeal. The largest tax expenditures have experienced the most rapid growth, implying that once they "reach some threshold size they become less vulnerable to cutbacks."[111] Temporary tax cuts are susceptible to the same ossification into entitlements[112] that plague tax expenditures. In a sense, a positive feedback system results: The more costly a tax expenditure becomes, the more difficult it becomes politically to advocate for its repeal. Rather than receive *more* scrutiny, the most expensive tax cuts receive less.

This is in contrast to direct spending institutions, where increased expenditures result in increased scrutiny from the public.[113] Usually there are one or more governmental institutions that have the same general goal as the one supported by the tax expenditure. For example, the Department of Housing and Urban Development (HUD) promotes goals similar to the home-mortgage interest deduction,[114] and the Department of Health and Human Services (DHHS) promotes goals similar to the exclusion of employer-provided health benefits.[115] HUD's 2007 budget is $33.5 billion,[116] roughly one-third the total cost of the home-mortgage interest deduction. These institutions and their programs, funded by direct allocation of funds from the federal budget, employ inspectors general who investigate allegations of wrongdoing, provide regular audits even in the absence of wrongdoing, and make recommendations to agency heads on how to restructure government programs to increase efficiency and accounta-

110 *See supra* notes 87–91 and accompanying text.

111 CHRISTOPHER HOWARD, THE HIDDEN WELFARE STATE 36 (1995).

112 *See supra* notes 105–07 and accompanying text.

113 In light of growing criticism of the Aid to Families with Dependent Children (AFDC) program, President Clinton, in his 1995 State of the Union address, promised to "end welfare as we know it." Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 80 (Jan. 24, 1995).

114 "HUD's mission is to increase homeownership, support community development and increase access to affordable housing free from discrimination." U.S. Dep't of Hous. & Urban Dev., HUD's Mission, http://www.hud.gov/library/bookshelf12/hudmission.cfm (last visited Jan. 12, 2007).

115 The Department of Health and Human Services (DHHS) "is the United States government's principal agency for protecting the health of all Americans and providing essential human services, especially for those who are least able to help themselves." U.S. Dep't of Health & Human Serv., HHS: What We Do, http://www.hhs.gov/about/whatwedo.html/ (last visited Jan. 12, 2007).

116 U.S. DEP'T OF HOUS. & URBAN DEV., FISCAL YEAR 2007 BUDGET SUMMARY app. A at 16 (2006), *available at* http://www.hud.gov/about/budget/fy07/fy07budget.pdf.

bility.[117] In addition, government institutions are frequently discussed in the media, giving them an additional level of public scrutiny.[118] In contrast, the corresponding tax expenditure provisions, save for an annual estimate of revenue lost and a minimal amount of auditing done by the Internal Revenue Service,[119] are subject to virtually no oversight.

The factors previously discussed behind the lasting nature of popular tax expenditures imply that temporary tax provisions have the same potential for permanence. Even though a particular tax cut might be enacted as a temporary provision, ending the benefit will become hugely unpopular politically. For example, the home-mortgage interest deduction was included as part of the original 1913 income tax, but Congress did not intend the deduction to encourage homeownership,[120] but rather allowed deductions for all interest payments. By 1986, however, when the deduction for other forms of interest was disallowed via the Tax Reform Act, the home-mortgage interest deduction survived.[121] Although supporters of the deduction claim that owning a home is part of the American dream,[122] the rates of homeownership have changed marginally over the past forty years, while the revenue loss due to the deduction has skyrocketed. In 1965 the homeownership rate was 63.4%; in 2006 it was 68.9%.[123] During

117 *See* Kathleen Clark, *Toward More Ethical Government: An Inspector General for the White House*, 49 MERCER L. REV. 553, 560 (1998) (detailing powers of inspectors general).

118 Between December 31, 2005, and January 20, 2006, the *New York Times* ran 213 articles discussing either HUD or DHHS (94 and 109, respectively). I gathered this information through a Westlaw search for the following terms/phrases: (HUD or "Department of Housing and Urban Development") and (DHHS or "Department of Health and Human Services") (on file with author). During that same time period, the corresponding tax expenditures were mentioned forty times (sixteen and twenty-four, respectively). I gathered this information through a Westlaw search for the following terms/phrases: (("Home Mortgage Interest" w/4 Deduction) or (Mortgage /4 Tax /4 Expenditure) or (Mortgage /3 Deduction)) and ((Employer! /5 "Health Insurance" /5 Exclusion) or (Employer! /5 "Health Insurance" /5 Deduction)) (on file with author).

119 In 2003, the percentage of individual tax returns audited was 0.54%. GRAETZ & SCHENK, *supra* note 77, at 73.

120 Roberta F. Mann, *The (Not So) Little House on the Prairie: The Hidden Costs of the Home Mortgage Interest Deduction*, 32 ARIZ. ST. L.J. 1347, 1351–52 (2000).

121 *See* 26 U.S.C. § 163(h)(1)–(3) (2000) (disallowing "personal interest deductions" but allowing "qualified residence interest deductions").

122 *See* The President's Radio Address, 1 PUB. PAPERS 216 (Feb. 27, 1993) (stating that homeownership is "an essential part of the American dream we're working hard to restore"); Remarks on Arrival in Appleton, Wisconsin, 1 PUB. PAPERS 1188 (July 27, 1992) ("I believe that those on welfare, what they really want is a piece of the American dream: homeownership, a good job, opportunities for their children, and strong, loving families.").

123 Hous. & Household Econ. Statistics Div., U.S. Census Bureau, Housing Vacancy Survey: Historical Table 14, http://www.census.gov/hhes/www/housing/hvs/historic/histt14.html (last visited Jan. 16, 2007). Although increasing, the rate of homeownership is not attributable to the home-mortgage interest deduction more than it is to any other factor,

that same time period the revenue lost due to the home-mortgage interest deduction grew by a factor of 5.5.[124] Although decreasing or eliminating the home interest deduction makes fiscal sense,[125] few politicians would support such a repeal.[126]

C. *Complexity Costs Associated with Temporary Provisions*

According to Judge Learned Hand, a taxpayer has the right to "arrange his affairs [such] that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes."[127] Incorporating sunsets in tax provisions not only makes it difficult for taxpayers to structure their economic affairs to minimize liability but also increases the cost of compliance as well. President George W. Bush's Advisory Panel on Federal Tax Reform stated that "Frequent changes in the tax code, which often add to or undo previous policies, as well as the enactment of temporary provisions, result in uncertainty for businesses and families. This volatility is harmful to the economy and creates additional compliance costs."[128] Sunset provisions may cause rule, compliance, and transactional complexity.

Rule complexity refers to the difficulty associated with understanding the law.[129] This is especially important since the American taxation system is one of self-assessment, where taxpayers are responsible for paying the taxes they owe and the government performs random audits of these individual assessments.[130] Sunset provisions by definition involve a change in the tax law. Any change in the law requires additional resources to be spent on understanding how to file

e.g., the changing demographics of America. William T. Mathias, *Curtailing the Economic Distortions of the Mortgage Interest Deduction*, 30 U. MICH. J.L. REFORM 43, 60 (1996).

124 *See supra* notes 90–91 and accompanying text.

125 *See* PRESIDENT'S ADVISORY PANEL ON FED. TAX REFORM, SIMPLE, FAIR, AND PRO-GROWTH: PROPOSALS TO FIX AMERICA'S TAX SYSTEM 72 (2005) [hereinafter PRESIDENT'S ADVISORY PANEL], *available at* http://www.taxreformpanel.gov/final-report (showing that more than 70% of tax filers do not benefit from deduction and that homeownership rates in United States are comparable to countries that do not utilize deduction).

126 *See, e.g.*, Congressman Neil Abercrombie, Fighting to Save the Home Mortgage Interest Deduction, http://www.house.gov/abercrombie/pdf/Home%20Mortgage%20Rate%20Interest%20Deduction%20e-neil.pdf (last visited Jan. 16, 2007) (claiming home-mortgage interest deduction is "one of the most important factors" allowing families to buy homes, and predicting "an economic tsunami" if deduction is repealed).

127 Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934). Judge Hand also stated that "a transaction, otherwise within an exception of the tax law, does not lose its immunity, because it is actuated by a desire to avoid, or, if one choose [sic], to evade, taxation." *Id.*

128 PRESIDENT'S ADVISORY PANEL, *supra* note 125, at xiii.

129 *See supra* note 83 and accompanying text.

130 Michael J. Stepek, *The Tax Reform Act of 1986: Simplification and the Future Viability of Accrual Taxation*, 62 NOTRE DAME L. REV. 779, 791–92 (1987).

one's taxes. If the law changes drastically from one year to the next, as it supposedly will from 2010 to 2011, taxpayers will be required to relearn how to file their taxes. This concern is distinct from the concept illustrated previously with Annie and her private school–bound daughter.[131] In that example, Annie was assumed to have complete knowledge of the details of the tax law, which were, in that stylized example, quite simple. But tax provisions are not always as straightforward as a simple change in the marginal rate of taxation. For example, the 2001 tax cut increased the exemption level of the Alternative Minimum Tax (AMT) for both married couples and individuals,[132] but these exemptions sunsetted on December 31, 2005.[133] Although a taxpayer's income or structure of assets might not change from 2005 to 2006, it is possible that she will be subject to an entirely separate method of taxation. Additionally, the AMT is "one of the most complicated tax provisions to comply with and administer."[134]

Sunset provisions may also affect the costs of compliance. Compliance complexity refers to the ease with which the law can be followed once it is understood.[135] With sunset provisions, the status of the law is in limbo, meaning that taxpayers, being risk averse, will likely maintain the forms and records required for both the pre- and post-sunset law. For example, the research and development credit was officially off the books between October 1, 2000, and October 1, 2001, preventing taxpayers from claiming the credit for any research done during that time.[136] Yet taxpayers later were allowed to file amended returns to retroactively receive refunds for the credit.[137] If the status of a law is prone to frequent changes, taxpayers are likely to maintain extraneous documentation. An additional cost of compliance is the administrative cost of running the Internal Revenue Service. Every change in the law requires retraining revenue agents so

131 *See supra* notes 97–103 and accompanying text.

132 The pre-EGTRRA exemption levels were $33,750 and $45,000 for singles and married couples, respectively; the post-EGTRRA exemption level was $35,750 and $49,000. Gale & Orszag, *Economic Assessment*, *supra* note 1, at 1233 tbl.1A.

133 David Cay Johnston & Carl Hulse, *With Tax Break Expired, Middle Class Faces a Greater Burden for 2006*, N.Y. TIMES, Apr. 16, 2006, § 1, at 24. Following their sunset, these exemptions were reinstated with the passage of the Tax Increase Prevention and Reconciliation Act of 2005, Pub. L. No. 109-222, § 301, 120 Stat. 345, 353 (2006).

134 Leonard E. Burman, William G. Gale, Jeffrey Rohaly & Matthew Hall, Urban-Brookings Tax Policy Ctr., Key Points on the Alternative Minimum Tax (Jan. 21, 2004), http://www.brookings.edu/views/op-ed/gale/20040121amt.htm (calling AMT "notoriously and pointlessly complex," creating "complicated interactions with the regular income tax").

135 *See supra* note 84 and accompanying text.

136 Kysar, *supra* note 1, at 361–62.

137 *Id.*

that they can effectively perform their duties of oversight. Although this cost is difficult to quantify, it is clear that the expense increases the more the law changes.

Transactional complexity is the expense associated with taxpayers arranging their assets and transactions in order to minimize overall tax liability.[138] Sunsets make such arrangements problematic, for much of the planning that goes into effective portfolio management occurs over a period of years, rather than months. For example, before the 2001 tax cut was enacted, the estate tax had an exemption of $675,000, with the value of the estate above that amount taxed at a rate of 60%.[139] The 2001 tax cut increased the exemption to $1 million and decreased the rate of taxation to 50% in 2002.[140] Over the next seven years, the tax cut implemented a gradually increasing exemption amount up to $3.5 million and a gradually decreasing rate of taxation down to 45%.[141] In 2010, the entire tax cut will be repealed.[142] Minimizing potential estate tax liability is done through methods such as the marital deduction, outright gifts, and trust funds,[143] all used over several years. A sunset of the tax cut would require additional asset shifting, whereas a repeal of the sunset would obviate the need for such preparation. As a result, tax planning becomes excessively complicated.

D. The Societal Cost of Interest Group Politicking

Sunset provisions adversely affect the democratic process by encouraging interest group politicking and legislative capture. Since sunsets are attached to specific provisions, uncertainty regarding their repeal encourages the formation of focused interest groups dedicated to the promotion of specific agendas. Interest groups are most likely to form when the consequences yield concentrated benefits and diffuse costs.[144] Because the benefited group is relatively small, it is able to overcome the usually prohibitive transaction costs associated with group organization and can effectively lobby for the congressional

138 *See supra* note 85 and accompanying text.

139 Gale & Orszag, *Economic Assessment*, *supra* note 1, at 1233 tbl.1A.

140 *Id.*

141 *Id.*

142 *Id.*

143 *See generally* MARTIN M. SHENKMAN, ESTATE PLANNING AFTER THE 2001 TAX ACT: GUIDING YOUR CLIENTS THROUGH THE CHANGES (2002) (describing tax-planning techniques that take 2001 tax cuts into account).

144 *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 44 (1965) (detailing relationship between concentration of benefits and costs in provoking groups to act in their common interest).

action it desires.[145] The diffuse costs, however, are passed to the rest of the public.

These concepts are illustrated by the lobbying efforts involved with the research that qualifies for the research and development credit. The nature of the credit makes it a perfect candidate for congressional rent extraction[146] through interest group politicking. It is an extremely valuable credit, yet only applies to a few large corporations capable of conducting the qualifying research. Although the credit is valued at over $2 billion,[147] its narrow applicability keeps it out of the public eye. In addition, the corporations involved have disposable income to spend on influencing politicians. Since the credit is eternally scheduled to sunset, members of the tax-writing committee who must reconsider the credit solicit contributions from coalitions, lobbyists, and large corporations.[148] The technical details of the structure of the credit are written in consultation with experts paid for by the credit's beneficiaries.[149] Because the credit benefits a concentrated group (the research corporations) with the cost of the credit widely distributed over the general public, politicians have an incentive to renew the research credit rather than make it permanent. The money is in the treatment, not in the cure.

The estate tax has characteristics similar to those of the research and development credit. EGTRRA gradually increases the exemption amount and decreases the taxation rate until 2010, when the exemption amount and tax rate revert to their pre-2001 levels.[150] The estate tax affects only the richest 1–2% of citizens.[151] Graetz and Shapiro argue that the diminished popularity of the estate tax was the result of lobbyists focusing on the American public rather than on Washington legislators.[152] However, independent of the machinations that led to the reduction of the estate tax in the 2001 tax bill, the legislative climate following the tax cut created a fertile environment for rent extraction. Indeed, soon after EGTRRA was enacted, a pro-

[145] *See id.* at 46 (discussing increasing costs of organization as group size increases).

[146] The term "rent extraction" refers to the ability of legislators to extract payments ("rents"), in some form or another, in exchange for favorable legislation. Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101, 102–03 (1987).

[147] FEDERAL TAX EXPENDITURES, *supra* note 88, at 30 tbl.1 (figure cited is estimated revenue lost for 2006).

[148] Martin A. Sullivan, *The Research Credit: A Perfect Example of an Imperfect Code*, 85 TAX NOTES 128, 135 (1999).

[149] *Id.*

[150] *See supra* notes 139–42 and accompanying text.

[151] MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH 3 (2005).

[152] *Id.* at 3–4.

posal to eliminate the estate tax altogether was supported by a majority of the Senate.[153] But since a supermajority of sixty votes was required to waive the provisions of the Byrd rule affecting revenues outside of the budget window,[154] the proposal failed. Yet it is the *chance* of repeal that catalyzes interest groups to contribute to politicians. If the mission had no chance of success, interest groups would not bother to expend lobbying money. As long as uncertainty exists, politicians have the ability to extract rents.[155]

To be sure, even in a world devoid of sunsets, interest group lobbying still occurs. It is possible that the money spent by interest groups on lobbying for occasional, permanent changes in the tax law is roughly equivalent to the money spent on the frequent extensions of the continually expiring sunsetted laws. However, there are two reasons why sunsets enable more rent extraction than would otherwise occur. First, lobbying groups will pay a premium for short-term influence, given that the politicians to whom they are contributing may not be in a position of influence in the future.[156] Any long-term "contract" for political favor will necessarily be discounted to the extent that the legislator might, in the future, lack power to advocate for the lobbying group's agenda.[157] Second, new campaign finance legislation limits the annual contribution amount that politicians are allowed to receive, making it preferable for politicians to receive smaller annual payments than larger, occasional ones.[158]

The preceding examples of the estate tax and research and development credit illustrate the rent-extracting issues associated with sunsets generally. Their temporary nature creates uncertainty, and with this uncertainty comes interested parties who have much to gain from the sunset's repeal. In a perfect world, advocates who lobby on behalf of the public would oppose the lobbying efforts of the concentrated few who benefit from sunset clauses being repealed or extended. However, the concentrated few invariably have more resources at their disposal. This fact, combined with the collective action problem

153 Carl Hulse, *Effort to Repeal Estate Tax Ends in Senate Defeat*, N.Y. TIMES, June 13, 2002, at A1. The voting was fifty-four in favor of abolishing the estate tax and forty-four opposed. *Id.*

154 *See supra* Part I.C.

155 For a particularly cynical view on the estate tax provision, see Edward J. McCaffery & Linda R. Cohen, *Shakedown at Gucci Gulch: The New Logic of Collective Action*, 84 N.C. L. REV. 1159, 1172–79 (2006). The authors state that Congress intentionally failed to resolve the estate tax situation in order to create the possibility of rent extraction.

156 Richard L. Doernberg & Fred S. McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 MINN. L. REV. 913, 947–49 (1987).

157 *Id.*

158 Kysar, *supra* note 1, at 394–95.

of getting a disinterested public to care about laws that have minor direct effects on their personal tax liability, results in both transactional waste and congressional capture. Legislators are able to extract rents from sunset date to sunset date, without regard to what is actually the optimal policy choice.[159]

III
Toward Improved Use of Sunsets in Tax Legislation

The preceding section focused on the negative consequences associated with attaching sunset provisions to tax legislation. These inefficiencies manifest themselves in a variety of settings. Interest group politicking caused by uncertainty over renewal leads to suboptimal tax policy and undermines the democratic process in Congress.[160] Even sunsetting tax cuts with a broad beneficiary base can be problematic since popular support in favor of the tax cut will grow the longer the cut is in existence.[161] Ostensibly temporary provisions, therefore, may be in effect longer than is optimal due to public outcry at letting the sunset take effect. Additionally, the uncertainty of sunset provisions leads to inefficiency as taxpayers are unable to plan their financial affairs around the existence (or nonexistence) of tax laws with sunset provisions attached.[162] Lastly, changes in laws create complexity through the increased costs of compliance by taxpayers and administration by the government.[163] From this discussion follows the inevitable question: Can sunsets ever be sound tax policy?

A. Using Sunsets with Tax Increases

Because sunsets did not come into prominence until 2001, the discussion of the ills of sunsets, although general, has been based upon specific examples enacted during the Bush administration.[164] The sunsets included in those provisions were largely attached to tax *cuts*, as opposed to increases. Indeed, much of the criticism leveled against

159 *See* McCaffery & Cohen, *supra* note 155, at 1226 (noting that Congress will "repeatedly vot[e]" and "reject[ ] sensible compromises" in order to keep issue alive, so as to prolong rent-extracting opportunities).

160 *See supra* Part I.A (noting that interest groups benefit from uncertainty surrounding renewal process in promoting their pet extender tax credits).

161 *See supra* notes 105–12 and accompanying text (explaining how government benefits come to be considered rights rather than privileges, making them more difficult to repeal).

162 *See supra* notes 97–103 and accompanying text.

163 *See supra* Part II.C.

164 *See, e.g.*, Kysar, *supra* note 1 (critiquing 2001 and 2003 tax cuts' sunset provisions); Mooney, *supra* note 2 (focusing chiefly on PATRIOT Act and 2001 and 2003 tax cuts' sunset provisions).

sunset provisions is exacerbated by their being attached to provisions reducing a taxpayer's tax burden rather than increasing it. A sunset clause attached to a provision *increasing* taxes would not be in danger of becoming an entitlement; therefore, the provision is unlikely to develop a broad base of support during the time it is in effect. As a result, when the date of the sunset approaches there will likely be little fuss, with the statute expiring with a whimper rather than a bang.

One potential benefit of attaching a sunset clause to a provision increasing taxes would be the greater ease with which such legislation could get enacted. Stipulating that a tax hike is merely temporary might be the metaphorical spoonful of sugar needed to help assuage public animosity toward the legislation. It is also possible that taxpayers might, after a few years of being encumbered with the increased tax burden, accept the provision as any other displeasing aspect of life, thereby negating the need for the sunset at all. Rather than be included only because of budget rules and procedural requirements, sunset clauses might be used for the purpose Lowi envisioned—periodically evaluating the efficacy of a provision.[165]

With respect to interest group politicking, a sunset provision attached to a tax increase that affected a small number of taxpayers would still catalyze lobbying. Since the costs would be concentrated, the affected group would coalesce, overcome transaction costs, and lobby, enabling legislators to extract rents.[166] However, with an end date of the sunset in place, it is possible that the lobbying efforts would be less costly than in the concentrated benefit situation. The lobbyists would advocate only that Congress follow its own law in letting the tax increase expire. In other words, since the tax increase as enacted would only be temporary, it is unlikely that legislators would be able to indefinitely extract rents. Legislators could threaten to push back the expiration date for a tax hike, but doing so would implicate notions of fairness that might be politically infeasible.

Although sunset provisions could be successfully incorporated into tax-increasing legislation, it is unclear what would prompt such use. The budget rules that inspired the current plethora of sunsets were the consequence of congressional Republicans using the reconciliation process to enact legislation that sharply divided the Senate. The Byrd rule prevented changing net revenues outside of the fiscal

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165 *See supra* notes 4–6 and accompanying text (describing Lowi's philosophy on sunsets).

166 JAMES Q. WILSON, POLITICAL ORGANIZATIONS 334 (1995). Wilson divides political activity into four categories: distributed costs and distributed benefits, concentrated costs and concentrated benefits, concentrated costs and distributed benefits, and distributed costs and concentrated benefits. *Id.* at 332–37.

period in question and, as a consequence, the majority of provisions were given expiration dates. With a tax *increase*, there would be no analogous Byrd rule problem. A bill enacted via reconciliation will be barred if it "increases . . . net outlays, or . . . decreases . . . revenues during a fiscal year."[167] A tax increase would not invoke subsection (E) and therefore a sunset would not need to be included.

In summary, sunsets used in conjunction with tax increases are likely to have fewer inefficiencies and be less vulnerable to criticism than sunset provisions attached to tax cuts. Because the Byrd rule does not require a sunset in the case of tax increases, sunset provisions associated with a tax increase are more likely to be a part of clearly planned tax policy. However, sunsets associated with tax increases should be employed to create as little uncertainty as possible so that taxpayers will be able to effectively manage their assets and the government will be able to effectively administer the provisions.

B. Using Sunsets with Tax Cuts

As the preceding section illustrates, a sunset provision attached to a tax cut has a greater chance of being bad tax policy. When associated with tax legislation, sunsets are created for two main purposes. One, to create opportunities for legislators to extract rents, as illustrated by the extenders; and two, as a consequence of the Byrd rule, to prevent tax cuts from becoming permanent. In either situation, tax policy is not the motivating factor behind the creation of the sunset, and it is therefore unlikely that the sunset clause is worth the additional inefficiencies and complexities it creates. However, it is possible that sunsets could be used in conjunction with tax-reducing legislation to advance sound fiscal planning. Rather than being the consequence of legislative gimmickry, temporary tax provisions could be used to implement short-term policies that are tailored to remedy pressing and immediate concerns. However, any such sunsetting tax cut must necessarily balance the harms caused by increased uncertainty and complexity with the benefits of having such legislation be temporary.

Tax-reducing legislation with a sunset provision attached should not have an excessively long period for which the legislation is in effect. Tax cuts that sunset after ten years, for example, have a much lower probability of actually sunsetting. Because congressional elections occur on a much shorter schedule, the composition of Congress can change drastically over a ten-year period. Any law enacted by the current Congress can be repealed by a future Congress, meaning that

[167] 2 U.S.C. § 644(b)(1)(E) (2000).

changing the composition of congressional members creates uncertainty regarding a law's existence. Therefore, the most effective sunset clauses should be attached to legislation intended to be in effect for one or two years at most. Since the composition of Congress is unlikely to change appreciably over this short period of time, it is more likely that the enacted legislation will exist unaltered. Having a tax cut enacted for a short period of time would also reduce the chance that the tax cut will become an entitlement in the mind of the public. A benefit only given in one tax year is likely to be perceived as merely a windfall rather than a privilege. This would allow for expiration of the tax cut to occur with less political fallout. Additionally, since the tax cut would not affect net outlays or revenues outside of the fiscal period in question, this sunset would not have been spawned by Byrd rule issues. This would give the sunset provision legitimacy, with sound tax policy rather than political jousting being the reason for its enactment.

In order to mitigate against interest group lobbying, sunsets should be applied to tax cuts that provide diffuse, rather than concentrated, benefits. Temporary tax legislation with concentrated benefits will invariably spur interest group lobbying to either extend the tax cuts or make them permanent. With diffuse benefits there is a greater chance that legislators will do what makes the most economic sense, rather than what is in their own self-interest. However, if the tax cut in question does provide concentrated benefits, renewal of these provisions should be subject to a higher level of scrutiny than that to which ordinary legislation is subjected. This will mitigate against the effect of interest group lobbying. In other words, there should be a strong presumption that temporary tax cuts are just that—temporary. This is especially true if the purpose of the temporary provision is to provide incentives for behavior that might not otherwise be economically sound. If businesses know that the "temporary" provision is likely to be renewed, they will invest less now than they would have if they knew the provision would not be extended. As a result, temporary tax cuts which aim to catalyze certain behavior undercut this goal by being continually extended.

Finally, any sunset provision must not create an excessive amount of complexity in the tax code. Drastic changes in how taxpayers assess their liabilities create economic inefficiencies.[168] Since sunset clauses involve modification of the laws after a set period of time, there is an increased chance of creating confusion for the public as to the applicable law. Consequently, laws with sunset provisions should be as

[168] *See supra* Part II.A, C.

simple as possible. This is especially important when enacting a short-term provision, since there might only be one or two years for taxpayers to learn how to deal with the new provisions.

In short, there is potential for sunsets to be beneficial components of tax-cutting legislation, provided that the associated tax provisions are enacted for short periods of time and result from reasoned tax policy rather than partisan maneuvering. Additionally, the tax provision being sunsetted should be simple enough to withstand being changed rapidly.

An example of a successfully implemented sunset clause is the bonus depreciation schedule. In an effort to stimulate business in the aftermath of the terrorist attacks of September 11, 2001, Congress allowed taxpayers to deduct 30% of the value of equipment used in a business in the first year that the equipment was purchased.[169] This was later increased to 50% in 2003.[170] Although the goal of the provision can be debated, the provision successfully encouraged businesses to make capital investments.[171] This provision was scheduled to, and did, sunset at the end of 2004. Congress recognized that as the economy recovered, there was less of a need for the bonus depreciation schedule. Similarly, tax credits for those affected by natural disasters could be successfully implemented via a sunset provision. Natural disasters create the need for short-term economic stimulus in the regions affected, something that a sunsetted tax credit could provide. Indeed, Congress enacted such legislation in response to Hurricane Katrina in September 2005.[172]

C. *Budgetary Rules and the Reconciliation Process*

The key problem afflicting the recent use of sunsets is employing their temporary nature to mask the costs of tax legislation that the proposing senators intend to make permanent. As long as sunset clauses exist only as a concession to an opposing minority, the desire to repeal the sunset will continue to exist. With this desire comes the associated uncertainty regarding the life of the provision—even if the minority party can prevent a total repeal of the sunset due to Byrd rule constraints, the majority party can still continually extend the tax provision.

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[169] 26 U.S.C. § 168(k)(1)–(2) (Supp. III 2003).

[170] Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, § 201(a), 117 Stat. 752, 756 (2003) (amending 26 U.S.C. § 168(k)).

[171] Kathleen Pender, *Capitalize on Asset Tax Breaks by 2005*, S.F. CHRON., Jul. 18, 2004, at J1.

[172] *See* Katrina Emergency Tax Relief Act of 2005, Pub. L. No. 109-73, 119 Stat. 2016. The Act created generous rules for deducting casualty losses. § 402.

The simplest way to eradicate this disingenuous behavior would be to prohibit using reconciliation procedures to enact legislation that results in an increased deficit. This, of course, was the argument the Democrats unsuccessfully presented in 1996 when Republicans first attempted to pass deficit-increasing legislation via reconciliation measures.[173] However, had Republicans been unable to use reconciliation legislation to pass the desired tax cuts, the revenue outlays for the cuts would necessarily have been much less, and as a result would have been more fiscally sustainable.[174] Republicans did not take into account how uncertainty reduces the incentive effects of a tax cut by increasing transactional and compliance costs.[175] Allowing the majority party to use the reconciliation process to push through any fiscal legislation, no matter how costly, provided only that the laws sunset at the end of the budget window, is irresponsible.

Congress would also be better served by readopting and actually adhering to the pay-as-you-go (PAYGO) rules that were first codified in 1990.[176] The PAYGO rules required that any new tax legislation enacted by Congress be revenue neutral; that is, the legislation could not lose more money than it raised.[177] The PAYGO rules were in effect from 1990 and periodically extended until 2002.[178] Even when these rules were in effect, however, Congress was able to manipulate them as needed. In 1999 Congress eliminated installment sale reporting,[179] a taxpayer-friendly method of accounting, for certain taxpayers and used the increased revenues to fund, under PAYGO rules, extensions of various expired and expiring tax cuts.[180] However, shortly after modifying the applicability of installment sale reporting, Congress introduced legislation to repeal it.[181] As stated by Block:

> Under PAYGO rules, the retroactive repeal of the installment sale provision lost federal revenue and, absent an offsetting revenue increase, should have triggered a mandatory sequester of govern-

[173] *See supra* notes 44–50 and accompanying text.

[174] Kysar, *supra* note 1, at 396.

[175] *See* Gale & Orszag, *Economic Assessment*, *supra* note 1, at 1184 (arguing that justifications for use of sunsets do not apply to 2001 and 2003 tax cuts).

[176] Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 13204, 104 Stat. 1388, 1388–616 (codified as amended at 2 U.S.C. § 632(b) (2000)).

[177] *Id.*

[178] *See* Balanced Budget Act of 1997, Pub. L. No. 105-33, § 10205, 111 Stat. 251, 702–04 (extending PAYGO rules until 2002); Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, §§ 14001–03, 107 Stat. 312, 683–85 (extending PAYGO rules until 1998).

[179] Ticket to Work and Work Incentives Improvement Act of 1999, Pub. L. No. 106-170, § 536, 113 Stat. 1860, 1936 (disallowing installment reporting for most accrual basis taxpayers).

[180] Block, *supra* note 1, at 866–67.

[181] *Id.* at 866.

> ment funds. No problem. Congress simply directed the OMB, responsible for the sequester, to change the sequester balance to zero. When the dust settled, Congress had agreed to use the repeal of installment reporting for accrual method taxpayers to pay for the cost of other tax cuts, but when the invoice arrived to pay for the tax cuts, Congress never paid the bill.[182]

Since Congress enacted PAYGO, they were empowered to violate it. Having PAYGO rules that are actually followed would force Congress to make decisions about difficult budget questions without passing the buck to future legislative sessions.

Preventing tax cuts from being enacted via reconciliation legislation and requiring PAYGO rules to be followed by Congress would reduce the amount of budgetary handwaving that senators engage in when enacting fiscal legislation. As a result, the budget-making process would be more transparent, with more reliable estimates of revenue generated and lost and, consequently, more certainty in the tax code. Using these procedures to check Congressional discretion would be fiscally sound and would in many instances obviate the need for attaching sunset provisions to tax legislation.

Conclusion

This Note offers an overview of what led to the proliferation of sunsets in recent tax legislation, the factors behind their inefficiencies, and prescriptions for how Congress can better implement sunset provisions to create more effective tax policy. However, as long as Congress remains nearly evenly divided, the majority party will continue to use the reconciliation process to enact tax cuts. These tax cuts will necessarily be of limited duration in order to circumvent Byrd rule constraints prohibiting alteration of net revenues outside of the fiscal window under consideration. If the status quo remains, America will not only continue to have uncertainty with respect to its tax laws, but will grossly underestimate the revenue loss resulting from the sunsetted tax cuts. Consequently, legislators will continue to use this uncertainty to extract rents while spreading the diffuse costs of this legislation to the indifferent public. In addition, congressional gimmickry in altering and enacting budgetary legislation is likely to undermine public faith in our governmental institutions. In short, sunsets will continue to be inefficient mechanisms by which Congress implements tax legislation.

Congress should limit the use of the reconciliation process to legislation which reduces the deficit, and prohibit reconciliation bills that

182 *Id.*

call for deficit increases. With that limitation in place, and the existence of a clearly defined and adhered-to set of pay-as-you-go rules, sunsets might possibly live up to the potential hoped for by political theorists in the 1970s. In order to use sunsets effectively with respect to tax cuts, the cuts should be simple, of short duration, and provide diffuse rather than concentrated benefits to reduce the opportunities legislators have to extract rents. With these safeguards in place, a new day may eventually dawn on the world of sunset clauses and tax legislation.