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NAVIGATING THE MULTIPLE STREAMS: THE STRATEGIC USE OF SUNSET PROVISIONS

by

DAVID WALL

A master's thesis submitted to the Graduate Faculty in Political Science in partial fulfillment of the requirements for the degree of Master of Arts, The City University of New York

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This manuscript has been read and accepted for the Graduate Faculty in Political Science in satisfaction of
the thesis requirement for the degree of Master of Arts.

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ABSTRACT

Navigating the Multiple Streams: The Strategic Use of Sunset Provisions

by

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Despite its long standing and historical use, temporary legislation had been a legislative tool largely ignored by scholars for many years. For the most part, temporary legislation had been used to serve specific functions within American politics and, being used in such a limited role, had avoided scrutiny. This changed in the early 2000s, following an exponential increase in the use of temporary legislation in the form of sunset provisions during the G.W. Bush administration. Scholars would debate whether or not this increased use was a good thing or not, arguing for and against a preference of temporary legislation over its “permanent” cousin. It is in these accounts that we find specific reasons that explain the use of temporary legislation: to comply with Congressional rules, to address temporary crises, to promote deliberative discourse, and to encourage fiscal restraint. However, these scholars brushed over the strategic uses of temporary legislation, leaving it under-explained and under-theorized. The goal of this paper is to expand on their work, diving deeper into the strategic uses of temporary legislation, sunset provisions in particular, and using the work of John Kingdon to provide some theoretical grounding to these observations. To achieve this goal this paper details a historical analysis of temporary legislation in the United States and a content analysis of the Congressional Record, searching specifically for provisions within the Jobs and Growth Tax Relief Reconciliation Act of 2003.

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Navigating the Multiple Streams: The Strategic Use of Sunset Provisions

Temporary legislation, that is legislation that is designed to expire on a certain date, has been a tool used by American lawmakers since the founding of the republic. However, despite its long history within American politics, temporary legislation was a seldom used tool for centuries. It wasn't until the early 2000's under the G.W. Bush administration that temporary legislation became a regular fixture in the legislative docket. Today, few bills are proposed that do not include at least one temporary provision. As such, this increased use of temporary legislation has drawn the attention of political scholars in recent years. A variety of explanations have been put forward for why temporary legislation is used, and why it should be preferred over permanent legislation (legislation that has no definitive terminal point). These include the need to comply with Congressional rules, the addressing of temporary crises, to encourage fiscal constraint, to promote deliberation, to increase political accountability, and to encourage consensus forming. Yet, throughout the analyses of temporary legislation, there has been little said of the strategic uses of this legislative form.

In March of 2021, Congress passed President Joe Biden's American Rescue Plan Act (ARPA) – a \$1.9 trillion relief package aimed at providing economic stimulus to a country reeling from the COVID-19 pandemic. This legislative package included multiple temporary provisions, the vast majority of them targeted at easing the economic strain put upon American citizens and businesses by the disruptive pandemic. However, not every provision in the ARPA was so narrowly targeted at dealing with the COVID-19 pandemic.

Take, for example, the expansion of the Child Tax Credit (CTC). The expanded CTC increased the tax benefit for families with children under the age of 18 and made those benefits fully refundable, meaning families would receive a cash return rather than an offset of tax burdens. These changes were projected to lift over three million children from poverty, reducing child poverty in the USA by one fourth. A laudable effort, to be sure, but not one particularly concerned with the COVID-19 pandemic.

Yes, children in poverty are more likely to suffer the externalities of the pandemic than those children out of poverty, but children in poverty are more likely to suffer generally than those non-poor children. The expansion of the CTC was a Democratic priority pushed through the ARPA that ostensibly was a response to the COVID-19 pandemic, but in reality served more to further Democratic aims. Yet, this provision was also made temporary, carrying with it a sunset date of December 2021. Why, then, would Democrats make temporary a policy priority that has such tangible material benefits for the American public?

I find the current explanations for the use of temporary legislation insufficient to explain the CTC as it was structured in the ARPA. Child poverty is a perennial problem for human civilization and was definitively not a result of the COVID-19 pandemic; therefore it could not be a temporary response to a sudden crisis. Because the ARPA was passed on a party-line basis (and its extension will rely on an equally partisan vote, more on this to follow), it cannot be said that the temporary nature of the CTC expansion promoted deliberation or consensus building. The notion that temporary legislation encourages fiscal constraint is a significant point of contention in the literature, and so may not be applicable generally speaking. As far as the CTC is concerned, the economic benefits of lifting three million children out of poverty surely outweigh the costs, so whatever argument for fiscal constraint here must include a total reckoning of a broader economic picture. That goes beyond the scope of this paper, but is a curious question for further research.

Finally, to be sure, the CTC was structured as temporary to assist with keeping the ARPA in compliance with Congressional rules. This has the greatest explanatory power of all the alternative explanations, but if we end our analysis here we blind ourselves to important considerations. First and foremost, there is no rule that would require that the CTC specifically be made temporary. Congressional rules that apply to spending and tax cuts demand only that these be made deficit neutral, which is to say that they do not add to deficit spending. The CTC expansion could have been made permanent if it were

offset by an increase in taxes or revenues elsewhere in the ARPA. Yet, this decision was clearly not taken by the authors of this legislation. Why?

It is possible, of course, that advocates of the expanded CTC could not leverage enough votes to create a permanent expansion. It may have been the case that the architects of the ARPA took the best deal they could get. However, even the truncation of a time horizon for a provision that ideally would have been permanent to a one-year time horizon for practical legislative reasons leaves unanswered questions. Why only one year? If elements within the regime were not in favor of this provision to begin with, why structure the provision to expire on an election year when inter-party negotiations might be most problematic? The strategic use of temporary legislation can provide us with an answer to this question.

Temporary legislation's strategic use comes in the form of agenda setting. I contend that legislators use temporary legislation to avoid costly efforts to bring issues to the fore of a given agenda, taking advantage of built in renewal points to return particular issues for reconsideration without expending further resources to do so. Further, I contend that legislators are cognizant of power changing hands and use temporary legislation to bind the agendas of incoming administrations that they deem their political opponents. By setting renewal points to emerge during the terms of their opponents, legislators can exert control over an agenda by forcing consideration of items high on their own list of priorities while simultaneously crowding out the priorities of their rivals.

Using John Kingdon's Multiple Streams Framework, I will analyze these strategic uses to see how temporary legislation is a tool through which political actors take command of the policy and politics streams. I will start by briefly going over the history of temporary legislation and the Congressional rules that condition their use in American politics. Following this, I will delve into the existing literature on the subject, outlining what previous authors have noted as the primary uses of temporary legislation to demonstrate the gap in the literature. In this section I will also discuss Kingdon's work and how it can be

applied to show the strategic uses of temporary legislation. Later, I will dive into the Jobs and Growth Tax Relief Reconciliation Act of 2003 (JGTRRA) to study the ways in which the temporary legislation was used to influence the agenda during the G.W. Bush administration to influence and constrict the future Obama administration. Finally, I will briefly discuss the ARPA and the Build Back Better Act (BBBA), focusing specifically on the CTC, to note some observations of these strategies playing out in contemporary legislation.

The History of Temporary Legislation

Temporary legislation predates the founding of the American republic, tracing its roots all the way back to the Roman Republic in the form of special tax and troop levies in times of crisis. As a legal concept, the use of temporary legislation was well established by the time of the founders, and was taken into consideration by them when guiding the fledgling nation. To go over the history of temporary legislation year by year would not well inform us of the nature of the legal mechanism, and indeed might serve to obfuscate the overall purpose of this paper, which is to better understand the uses of temporary legislation. Rather, an overview of the history might better serve to map the trajectory of temporary legislation, observing how it was once seen and used in American history to where we have arrived today. By tracking the evolution of temporary legislation, through concrete examples, we might be able to observe a clearer evolutionary path, allowing us to better understand its implementation today.

All of the bills analyzed in this section, in essence, provide for some kind of governmental action over a predetermined period of time, at the end of which this governmental action would cease. While perhaps not written or even intended as such, these laws would expire at the end of their specified periods. This is the essence of temporary legislation – those laws that are in effect for a specific period, after which the law ceases to apply. While each individual law might address a particular policy arena or a serve a specific function, they are all unified under the umbrella of “temporary legislation”.

In this section I will briefly review five key examples of temporary legislation that demonstrate its use in American history. Those examples are the Alien and Sedition Acts of 1798, the Congressional Act of 1803, the National Defense Authorization Act, sunset legislation, and the Patriot Act. By reviewing these examples I will develop broad categories of temporary legislation, thus allowing for a focused analysis on one kind of temporary legislation moving forward: the sunset provision.

The first debate over temporary legislation in American history begins at the very origins of the republic. Famously, in 1789 to 1790 Thomas Jefferson and James Madison debated in their personal correspondence the right for future generations to rule themselves and not be bound by the legislating of generations that preceded them. Jefferson's argument being that all legislation should only be in effect for the length of time equivalent to a generation (19 years by his estimation) before expiring and requiring reenactment. Madison, for his part, argued that against the practicality of such an arrangement, stating it would naturally devolve into chaos with future generations being forced to deal with the burdens of determining the righteousness of previous generations and taking action on extending current legislation or crafting new, more suitable legislation (Letter to Thomas Jefferson [4 February]).

Ultimately, Madison's practical argument won the day, and while temporary legislation was not mandated by the US Constitution, its use went undeterred. Of the earliest examples of temporary legislation signed into law were the Alien and Sedition Acts of 1798, which imposed restrictions on new immigrants to the US and gave new powers of imprisonment and deportation to the executive branch. Of this set of laws, two acts were proposed as temporary, with sunset dates ranging from two to three years. In particular, the Alien Friends Act, which allowed for the imprisonment and deportation of dangerous immigrants, and the Sedition Act, which criminalized making "false statements" critical of the federal government, would expire in 1800 and 1801 respectively. Following the election of Thomas Jefferson in 1800, these laws (passed by President John Adams, Jefferson's predecessor) were allowed to expire (Costly, Constitutional Rights Foundation).

Only a couple of years later, in 1802, massive fires devastated the city of Portsmouth, New Hampshire. The city's vital seaport was not spared from the destruction, and its loss threatened the commercial health of the young United States. To ease the damage done to commercial merchants operating out of Portsmouth, the federal government passed the Congressional Act of 1803, which would provide relief to these merchants by suspending bond payments for several months. This Congressional act is the earliest example of disaster relief in the US, and one of the first examples of the use of temporary legislation to address a crisis. After the allotted months had passed, the Act was no longer in effect and in essence had "expired" (History of FEMA, FEMA.gov).

Jumping forward over a century and a half later we find the National Defense Authorization Act (NDAA), first passed in 1961. This bill provides for the annual budget and expenditures of the US Department of Defense through an authorization act and an appropriation bill. These authorizations and appropriations are only valid for one fiscal year, and every subsequent year must be renewed. If this authorization is allowed to lapse, the appropriation would expire and funding of the Department of Defense would cease. The NDAA continues to be renewed annually to this day (Barkley, Investopidea.com).

A decade later, in the 1970s, there emerged a new kind of temporary legislation, the "sunset legislation" aimed at regulating government as opposed to conditioning the act of governing. A push for government accountability in the post-Watergate era spurred legislators to find ways to regulate government agencies that were seen to have grown bloated and corrupt. Spearheaded by the advocacy group Common Cause, sunset law would seek to subject all federal programs to a four year term limit, at the end of which a strict review process would be undertaken to determine if the program ought to continue or expire (Mooney, legalaffairs.com).

At the federal level, these sunset laws failed. However, at the state level, they found some success in being adopted. The first sunset law was passed by Colorado in 1976. By 1980, 34 states had passed

similar legislation. These sunset laws set up formal review processes for state regulatory agencies and licensing bodies, threatening these agencies with termination if they failed to justify their existence. However, many of these agencies proved to be too popular with local constituencies and interest groups to terminate outright, and the burden of proof shifted from the agencies defending their existence to regulators justifying their termination. Ultimately, the cost of reviewing an agency quickly outweighed the amount saved from a successful termination, and the sunset laws were abandoned by practically every state that had enacted them by the mid-1980s (Mooney, legalaffairs.com).

Twenty years later, a more modern application of temporary legislation comes into frame. Following the terrorist attacks on September 11, 2001, and the subsequent anthrax attacks only a week later, Congress and the G.W. Bush administration moved to create extraordinary national defense powers to protect a nation that appeared to be under siege. On October 26, 2001, the Patriot Act was passed into law, expanding the surveillance abilities of law enforcement, expanding the definition of terrorist activities, increasing the penalties for terrorist acts, and facilitating the communication between intelligence agencies. So broad were the powers given to law enforcement and the intelligence community that many feared government overreach. However, these same critics acknowledged the danger the country appeared to face, and determined that these powers may be justified for the time being. Thus a compromise was reached, and the provisions within the Patriot Act were given expiration dates beginning in December 2005 (Toner and Lewis, NYTimes.com).

Over time, certain provisions within the Patriot Act would be modified, extended, or left to expire. In 2005, President G.W. Bush extended most of these provisions for another six years (Lichtblau, NYTimes.com). By 2011, President Barack Obama allowed all but three provisions to expire, extending these final three provisions until 2015 in the PATRIOT Sunsets Extension Act of 2011 (Mascaro, LATimes.com). In 2015, these three provisions were allowed to expire by Congress, but President Obama had them reinstated in the USA Freedom Act until 2019 (Steinhauer and Weisman, NYTimes.com). Finally, in 2019, despite President Donald Trump's objection, the final provisions of the then-Patriot Act

(now USA Freedom Act) were finally allowed to expire permanently (McKinney, EFF.org). Here, the use of the sunset provision allowed for the spirit of legislation, once intended to apply for a limited period to address specific national security concerns, to live on through repeated, albeit piecemeal, extension.

If we look at examples of temporary legislation throughout American history, we can see some classifications of temporary legislation that emerge. The “legacy” version of temporary legislation, that which is policy oriented, is aimed only at setting policy in a given policy arena for a limited period of time. This is what the founders had envisioned when they considered temporary legislation at the end of the 18th century, and what we might consider the Alien and Sedition Acts of 1798 to be. Then there is “crisis legislation”, or temporary legislation enacted to deal with a particularly pressing problem or event. The Congressional Act of 1803 can be categorized as this kind of temporary legislation. There is the “fiscal regulatory” kind of temporary legislation, or that kind of temporary legislation that sets policy to expire for budgetary reasons. The NDAA is an example of such temporary legislation. There is also the “institutional reform” kind of temporary legislation, also known as sunset legislation, which emerged in the 1970s.

Finally there is the “sunset provision”, as found in the Patriot Act, the kind of temporary legislation in which parts of laws, or individual provisions, are designated to expire on a given date. The sunset provision can take a variety of shapes, be it policy oriented, fiscally-minded, or regulatory in nature. The only prerequisite for a sunset provision be that it form part of a larger bill, which may or may not expire in of itself. The sunset provision is the most familiar shape of temporary legislation in our contemporary era, and we have seen its proliferation in this form over the past twenty years. As such, going forward the use of the umbrella term “temporary legislation” will be preferred over any particular specification of temporary legislation when making reference to the mechanism, except for where specific laws or provisions are being referenced. In that case, the appropriate classification (sunset provisions, crisis legislation, etc.) will be preferred.

It is with this contemporary form of temporary legislation, the sunset provision, on which I will focus my analysis. Given the malleability of this kind of temporary legislation, the sunset provision has found its way into practically every policy arena, thus facilitating its proliferation. It may come as no surprise that this proliferation begins in the post 9/11 era of American history, thus far characterized by a gridlocked legislature and an increasingly polarized body politic. Without getting too far drawn into a “chicken before the egg” argument, it might be safe to say that rules within Congress generally, though primarily in the Senate, have made legislating practically impossible without either party holding a supermajority in Congress. The era of bipartisan legislating has passed. So, in order to get anything done, legislators are forced to find workarounds, loopholes in the rules that would allow them to pass anything during their administrations.

What explains previous evolutions of the uses of temporary legislation can be as broad reaching as evolving perceptions of the function of government or as narrowly tailored to achieve specific, contemporary goals. Each individual evolution would merit a study in its own right, and as such fall outside the scope of this paper. However, as this paper focuses on the sunset provision, the changes that created an environment suitable for the proliferation of such provisions does merit some attention.

It would be easy to pin expanded use of the sunset provision on political hyperpolarization. The increasing distance between the Republican and Democratic parties (and indeed between the right and left wings of American politics) is indeed a major contributor to the need for legislative tricks and workarounds. Without such methods, it stands to reason no legislation could ever pass without significant Congressional majorities. These majorities would also be conditioned by increasingly gerrymandered districts, voter suppression, and shifting socioeconomic demographics as these factors decrease inter-party competition while amplifying intra-party competition. That is to say, the two major parties in the US are (in theory) becoming more extreme and less willing to compromise.

These political factors are important to consider, but again, a focus on these elements requires a deep unpacking that easily cycles through itself into the before mentioned “chicken vs. egg” argument that could feasibly trace its history all the way back to Reconstruction. Understanding the political reality of hyperpolarization is not as important (in this instance) as is being aware of it. It is the backdrop on which Congressional rules, particularly Senate rules, play an important role in explaining how the sunset provision became the legislative tactic a la mode. In particular, the Senate filibuster, the budget reconciliation process, and the Byrd Rule are key to understanding the increased popularity of the sunset provision.

The Senate filibuster is a rule dating back to 1806 which took away the ability of Senators to hold a simple majority vote in order to move away from the “previous question” – meaning the ending of the debate over legislation in order to hold a vote (Gold 49). This made it so that the minority in the Senate could theoretically keep debate open indefinitely, thus preventing a vote on any given legislation. The first Senate filibuster occurred over thirty years later when Whig Senators filibustered an attempt to expunge a censure of President Andrew Jackson in 1837 (Binder, Brookings.edu). In 1917, at the behest President Woodrow Wilson, the Senate adopted rules on cloture which would allow Senators, through a 2/3rds majority vote of Senators present, to end debate on any issue (“About Filibusters and Cloture”, Senate.gov). This was an attempt to weaken the power of the filibuster, if not kill it outright, though in practice it did little to condition its use.

In 1970, due to an increase in filibusters against Civil Rights legislation, the Senate adopted a two track system in order to keep legislative business flowing (Byrd 203). This two track system would allow the majority leader, with either a unanimous vote or the approval of the minority leader, to bring a second issue to the Senate floor at a designated time and date. This allowed the Senate to effectively consider two issues at once, thus making filibusters more politically viable, given that those Senators invoking the filibuster would no longer be bringing the entire Senate to a halt. Further, in 1975, the Senate revised the cloture rule, now requiring that 3/5ths of all Senators to invoke cloture, rather than 2/3rds of

Senators present. These rule changes made it so that the Senate filibuster could be invoked and sustained by the minority more easily and consistently, thus creating a practical two thirds majority vote to pass any legislation. These rules, with some notable changes with regards to nominees, are still in place today, thus imposing the practical requirement of a 60-vote majority in order to pass legislation.

In the light of such rules, certain efforts were made in order to create loopholes through which legislation might still flow. The most prominent of these being the rules for budget reconciliation, a process introduced in the Congressional Budget and Impoundment Control Act of 1974. This bill allowed for the creation and passing of a budget reconciliation bill – a bill that deals specifically with federal spending, revenues, and debt – by a simple majority vote with the Vice President acting as the tie-breaking vote in a 50-50 Senate. In effect, this allowed Senators to pass legislation that would circumvent the Senate filibuster. As a result, amendments and provisions not directly related to the federal budget were frequently included in reconciliation bills. These abuses prompted Senator Robert Byrd of West Virginia to propose a Senate rule in 1985 that would allow Senators to challenge provisions within and amendments to reconciliation bills.

The Byrd Rule, as it came to be known, stated that any provision or amendment deemed extraneous to the reconciliation process was prohibited. To invoke the Byrd Rule, any Senator could raise a point of order against a certain provision or amendment to test it against six criteria in order to determine if it was extraneous to the reconciliation process or not. These six criteria are: 1) the provision or amendment must produce a change in outlays or revenues; 2) must not produce changes in outlays or revenues which are merely incidental to the non-budgetary components of said provision or amendment; 3) must be inside the jurisdiction of the committee that submitted the provision or amendment; 4) must not increase outlays or decrease revenues if the provision or amendment fails to the Senate reporting committee's reconciliation instructions; 5) must not increase outlays or decrease revenues during the fiscal year after the years covered by the reconciliation bill; and 6) must not contain recommendations

regarding Social Security trust funds. Any provision within or amendment to a reconciliation bill that does not meet these criteria would be dropped (Slaughter, house.gov).

The Byrd Rule also prohibited reconciliation bills, in their entirety, from increasing the federal deficit after a ten year period. In other words, reconciliation bills were limited in their effect to ten years. The Byrd Rule could be suspended with a 2/3rds majority vote (Slaughter, house.gov).

In its totality, these rules and procedures make it so that legislation could be passed in the Senate with a simple majority vote so long as it was a budget related item, included in a reconciliation bill, and could pass the Byrd Rule. Given that a key element of the Byrd Rule is that they be limited to a ten year period, any provision within a reconciliation bill would naturally be limited to a ten year expiration timeline. Notably, however, if a given provision within a reconciliation bill were to be deficit neutral, this provision could theoretically be permanent (Slaughter, house.gov).

If all sunset provisions were structured in such a way, we might be able to end our analysis here and say simply that, due to the practical 60-vote threshold for passing legislation in the Senate and the Byrd Rule requirements in the budget reconciliation process, the use of sunset provisions is attributable to these Senate rules. However, not all sunset provisions are structured to have ten year lifetimes. Often times the expiration dates on sunset provisions, even within reconciliation bills, appear arbitrary. While the history of temporary legislation and an analysis of Senate rules give us one piece of the puzzle, we must dig deeper for a more complete understanding. The following section explores other possible explanations for the use of temporary legislation, as well as my own contribution to this debate.

Scholarly Observations of Temporary Legislation

While temporary legislation has not been of particular interest to political scholars in the past, in recent years this has started to change. This is almost exclusively to do with the increased use of sunset provisions during the G.W. Bush administration. The scholarly work singularly focused on temporary legislation (in the USA, anyway) was produced between the years 2007 and 2011 and all reference

legislation passed during the G.W. Bush era. Surely, the increased use of sunset provisions under President G.W. Bush piqued the attention of scholars in that era.

Works by Jacob Gersen, George Yin, and Rebecca Kysar provide a scholarly foundation, classification, and analysis of temporary legislation on which I will build my argument. Broadly, these works outline the uses of temporary legislation in American politics and argue either for or against their continued use. While arguments over the superiority of temporary legislation over lasting legislation, and vice-versa, are not particularly interesting to me or my argument, but the categorization of temporary legislation is vital. The observed applications of temporary legislation are the pieces to the puzzle of why temporary legislation is employed with increasing regularity, and having them accounted for in the scholarly work will help set the stage for what I consider a missing piece.

That missing piece is the strategic use of sunset provisions to capture and control the agendas of rival politicians. I will bring in the work of John Kingdon on the multiple policy streams to provide theoretical grounding to my argument that the sunset provision has been, and continues to be, a strategic weapon used by politicians to condition rival administrations. In this review of the literature I will lay out each author's observations and, briefly, their core arguments. I will follow this review with an exploration of Kingdon's work before adding my own contribution to the categorization of the uses of temporary legislation.

Temporary Legislation (2007)

Jacob Gersen's Temporary Legislation is a systemic historical and legal analysis of temporary legislation both in the US and abroad to attempt to explain the reasons this particular legislative tool is employed and to vaunt its superiority over permanent legislation. Gerson does not make the assertion that the use of temporary legislation has been on the rise. Quite the opposite, Gerson notes that temporary legislation has always been used by legislators, only that it has gone ignored by political scientists until recently. Further, Gerson notes that there are even fewer positive accounts of temporary legislation.

Gerson wishes to fill this gap by providing a positive account of temporary legislation, emphasizing its distributive and informational advantages as observed through his analysis (Gerson 248). Gerson's primary argument is that temporary legislation is superior to permanent legislation and should be embraced despite the bad reputation it had been accruing in "recent years" (read: the G.W. Bush era). The areas in which Gerson estimates that temporary legislation is superior to permanent legislation are in the dissemination of information, the facilitation of experimentation, the mitigation of cognitive bias, and the reduction of uncertainty.

Gerson uses his historical analysis of temporary legislation to establish two points, 1) that temporary legislation is not some rare or esoteric device, and indeed had been consistently used in a wide variety of contexts both domestically and internationally, and 2) that temporary legislation's democratic pedigree is noteworthy. Gerson is successful in demonstrating temporary legislation's historic use in the US and abroad. He lays out the long history of temporary legislation well, dispelling any notion that the legislative tool is in any way new or rare. Arguing that temporary legislation's democratic pedigree, as Gerson puts it, is noteworthy is something of an odd argument. I'm unsure what he really means by this. If he means that temporary legislation has a long and storied history as used in the USA legislature, then I fail to see how this is very different from his first point. If he means that temporary legislation has shown itself, historically, to be more democratic than permanent legislation, or that it somehow produces more democratically favorable outcomes, this bar is not cleared by his analysis. From his phrasing (Gerson 261), my interpretation is that he means the former and is therefore redundant. Whatever his meaning, in meeting the overall goal of this article, this section is successful in demonstrating the long historical use of temporary analysis, but not much else.

Gerson goes on to differentiate temporary legislation from permanent legislation. The most obvious difference between the two legislative forms is in their formal default rules for policy continuation (Gerson 261). That is, temporary legislation has a defined terminal date, permanent legislation does not. Gerson explores in this section what effects this formal difference produces between

the two legislative forms. According to Gerson, temporary legislation allocates transaction costs differently, produces advantageous informational distributions, and more broadly distributes decision-making authority (Gerson 216).

Gerson theorizes that transaction costs of temporary legislation may be higher in the aggregate due to the repeated increased costs of renewal or extension in the sunset period, that being the years immediately prior to the expiration of a given temporary law. However, Gerson claims these higher and repeated costs are offset by the initial lowered cost of enactment, theorizing that temporary legislation is not inherently more costly to produce than permanent legislation (Gerson 263). Indeed, temporary legislation ought to cost less to enact than permanent legislation. All things being equal, the maintenance costs of permanent and temporary legislation ought to be equal in periods between enactment and renewal.

The net effect of these aggregate costs, Gerson admits, is ambiguous (Gerson 266). Much depends on the time period of temporary legislation, the costs of enactment, maintenance and reenactment. In total, Gerson admits that the allocation of transaction costs seems to favor permanent legislation, but reiterates that he does not believe it is clear that temporary legislation is more or less costly than permanent legislation.

In his review of transaction costs of temporary legislation vs. permanent legislation, Gerson touches on the political uses of temporary legislation. Gerson notes that it is possible for legislatures to transfer the costs of temporary legislation to future ones through future-period expiration dates – those being the dates at which temporary legislation would expire being set for a period outside the current legislature's term limit. In effect, this is a measure of exercising agenda control. Gerson expands more on this in a later section of this article.

In explaining the benefits of temporary legislation to the distribution of information, Gerson invokes arguments of staged decision-making, error cost uncertainty, cognitive bias, and asymmetric

information. These arguments are not necessarily targeted at explaining why temporary legislation is utilized, but rather to explain why temporary legislation is superior to permanent legislation. In unpacking staged decision-making, Gerson pinpoints the primary strength of temporary legislation in the distribution of information as the continuous integration of new information into the policy process.

According to Gerson, the great strength of temporary legislation is its ability to force a staged decision-making process (Gerson 266). Because temporary legislation forces considerations of that legislation at at least two points, enactment and renewal, then there are at least two stages at which this legislation can be considered and reconsidered. This allows multiple opportunities for lawmakers to consider common problems with the distribution of information, such as error cost uncertainty, cognitive bias, and asymmetric information. If any of these problems with the distribution of information are present in the enactment of temporary legislation, Gerson argues that at the reenactment point, new information can be brought into the discourse thus better informing lawmakers and allowing for necessary changes to the existing legislation before reenactment.

While not identified as a particular reason why temporary legislation might be employed in-of-itself, the advantages identified by Gerson could serve as one explanation as to why temporary legislation is used. If the benefits of temporary legislation to dissemination of information as observed by Gerson are true, then a reasonable legislature might employ temporary legislation to take advantage of those benefits. The problem with this analysis is the reliance on a reasonable legislature. Many of the benefits Gerson attributes to the staged decision-making process compelled by temporary legislation depend on lawmakers prioritizing the integration of accurate information into legislation. This ignores the strategic advantages conferred by informational asymmetries and the incentives politicians might have to preserve those asymmetries. Gerson might be right in saying that temporary legislation could resolve problems with the dissemination of information, and indeed it might serve his overall thesis that temporary legislation is superior to permanent legislation, but it does not necessarily explain why temporary legislation would be employed by legislators.

In particular, Gerson's examination of asymmetric information is particularly dubious. Gerson's argument is that legislators and lobbyists (and presumably activists, though Gerson does not mention them) may have more information about a given issue than the other, and so would have better, albeit incomplete, insight into the crafting of legislation dealing with that issue. If a temporary law is passed with incomplete information, then the renewal stage forces yet another interaction between lobbyists and lawmakers to better understand the issue at hand (Gerson 272). The repeated interactions between lawmakers and lobbyists would presumably improve the exchange of information, thus allowing lawmakers to amend and improve temporary legislation at each renewal point.

He compares this process to the venture capital "staged financing" model in which investors have the opportunity to abandon an investment a predetermined time periods. This triggers the revelation of information that could serve to better align the incentives of entrepreneurs with those of investors by creating performance penalties (Gerson 272). Gerson does not go as far as saying these processes are identical, but uses the staged financing model as proof that staged decision-making has the benefit of improving the dissemination of information, and therefore may resolve informational asymmetries.

Again, this ignores the strategic advantages of informational asymmetries and the incentives they confer to politicians who benefit from them. While the investor might want to extract new information from the entrepreneur, and thus would pull out of a staged financing model to protect their own finances, the politician might choose to remain ignorant of information in the hands of lobbyists in order to continue supporting popular or beneficial legislation.

Take for example the Credit for Clean Coal Investment (Internal Revenue Code § 48A) which provides \$800 million for the production of coal products. Politicians who represent coal producing regions (i.e. West Virginia) would logically support such subsidies as they would be popular with localized special interests and beneficiaries of the coal industry. If we apply Gerson's staged decision-making model here, we might presume that climate activists would plead their case to these politicians at

every renewal point of this legislation, bringing to light new information about the dangers of coal to the environment and the net negative this would produce for the country as a whole. A reasonable politician might take this information and revise their position on this legislation. However, this is not the reality. Take, for example, Senator Joe Mansion of West Virginia, who adamantly supports these subsidies (Brown 2021) and has continuously fought to protect them from significant reform. New information about climate change has not significantly shifted his position on these laws despite pressure from the green energy lobby. While theoretically, temporary legislation might help change the opinions of legislators through the revelation of new information from private interest groups, this is not a universal truth and in practice might be the exception rather than the rule. As such, it seems unreasonable to claim that the informational advantages that temporary legislation provides, insofar as they can correct the biases and asymmetries inherent in the legislative process, may be a reason for the employment of such a tool by legislators.

Gerson also touches on the technocratic reasons for the employment of temporary legislation, such as filling the gaps to existing laws, a symmetric response to temporary problems, and for experimental purposes (Gerson 273). These uses do present tangible evidence of reasons why politicians choose to employ temporary legislation. They mirror some of the categories I identified in the history section of this paper. That Congress would, for example, pass a relief bill to address a natural disaster is perhaps not surprising. Gerson's outlining of these technocratic uses of temporary legislation constitute much of what is already known about the legislative tool. Again, Gerson dedicates the majority of this section in an attempt to explain temporary legislation's superiority over permanent legislation, using these technocratic uses of the tool as settings in which to demonstrate its superiority in disseminating information throughout the decision-making process and its superior flexibility and versatility.

The section that follows is the most pertinent to my argument. Here Gerson delves deeply into the political uses of temporary legislation. He theorizes that politics is likely the dominant reason legislators rely on temporary legislation (Gerson 279). He states that the expiration of legislation certainly constrains

the discretion of committee agendas, noting that in 1992, 56% of committee chairs faced significant agenda constraints due to expiring legislation (Gerson 281). Gerson sees this as a sort of trade-off, where past lawmakers might set the agenda for future committee chairs, but those future committee chairs then can influence the substantive terms of the expiring statutes. Again, this argument is in service of elevating temporary legislation above the permanent variety, but the observation is an astute one. It pinpoints a strategic tradeoff that I will explore further in my analysis of temporary legislation later in this paper. Ultimately, Gerson concludes this section noting that whether a government is united or divided and how likely turnover is in the next election will influence the perceived pay-offs to legislators for the use of temporary legislation (Gerson 285), an indication that temporary legislation is employed strategically with elections in mind.

The final section of Gerson's article is a case study of the Terrorism Risk Insurance Act (TRIA 2002) which was introduced as a backstop for insurance industry losses from domestic terrorism. This bill was set to expire in 2005 and was a kind of experimental legislation observed by Gerson in previous sections. A "wait and see" strategy was adopted so that more information could be gathered before making the policy a permanent one. Instead, the policy was criticized as unnecessary and many of the benefits of temporary legislation ultimately went unrealized. Gerson concludes his article by stating that temporary legislation is a long standing staple of American legislators, and that it produces significant informal and distributive benefits that affect the selection of optimal public policy and the distribution of power in government. As such, Gerson finds that temporary legislation should not be eschewed, and indeed should be preferred in specific policy domains, such as responses to newly recognized risks (Gerson 298).

As far as proving this position, Gerson's evidence is flimsy and his theory is not well developed. I found the arguments in this paper fairly unfocused, shifting between explanations for the uses of temporary legislation, justifications for doing so, and arguments over why temporary legislation is superior to permanent legislation. The article overall feels somewhat reactionary to an increasingly hostile

political environment that had evolved due to an abuse of sunset provisions during the G.W. Bush administration. However, Gerson makes some very astute observations about temporary legislation's ability to control the legislative agenda and the circumstances under which legislators might employ this tool strategically. Unfortunately, he dedicates only one paragraph to theorizing these effects. While throughout the paper he emphasizes that there are strategic political uses for temporary legislation, this is the section he dedicates the least time to. As such, he provides fertile ground for further exploration of the topic. More on that to follow.

Temporary-Effect Legislation, Political Accountability, and Fiscal Restraint (2009)

George Yin's *Temporary-Effect Legislation, Political Accountability, and Fiscal Restraint* is another piece dedicated to the protection of what he calls "temporary-effect legislation" and the promotion of its superiority over permanent legislation. Yin uses the term "temporary-effect" to differentiate the kind of legislation he refers to from other forms of temporary legislation that ostensibly expire at a given date, but have effects that produce far-reaching and long-term consequences (Yin 178). Ultimately, this distinction is unduly narrow, as his arguments in favor of temporary legislation mirror broader claims made by Gerson, and further, to limit one's analysis of this work in such a way that it only applies to temporary legislation that suits Yin's argument would render it self-reinforcing and meaningless. Seemingly, Yin makes this distinction to insulate his claim that temporary legislation is more fiscally responsible than permanent legislation from criticism, as if to say "if you ignore this kind of temporary legislation, which is really permanent legislation in disguise, then temporary legislation is the more fiscally responsible tool." Because this distinction is self-serving and rather meaningless, and to avoid confusion, I will default to the more general term "temporary legislation" as opposed to Yin's "temporary-effect legislation" throughout my review of his work.

Yin focuses on the impact of budget rules on legislation as a potential explanation for the use of temporary legislation, using this explanation to dismiss the claim that temporary legislation is employed

to obfuscate the true cost of legislative items. He argues that electoral accountability biases politicians towards spending, and that budget rules that limit spending forces these politicians to utilize temporary legislation to accomplish these spending goals. In doing so, the true cost of legislation is revealed by regular reenactment, thus forcing politicians to reckon with these policies in a meaningful way, increasing political accountability, and promoting fiscal restraint. In other words, Yin argues for the use of temporary legislation for fiscal and accountability reasons while lashing out against the criticism that temporary legislation obscures more than it illuminates.

As far as providing explanations as to why temporary legislation is employed by legislators, Yin's greatest contribution is in outlining Congressional rules that might force their usage. Observations of the ten year budget window, the budget reconciliation process, the Byrd Rule, and PAY-GO rules paint a clear picture as to why temporary legislation may be favored over permanent legislation where spending is concerned. For the sake of brevity, I will not rehash Yin's explanations of these rules given that I have already provided an overview of them in the history section of this paper. PAY-GO, according to Yin, requires changes to tax law and entitlement spending be made deficit-neutral for up to ten years. Yin notes that there is an easy work around to this rule, which is to pass permanent entitlement spending in tandem with tax increases that last only ten years. Further, the PAY-GO rules are largely covered by the budget window, reconciliation process, and Byrd Rule anyway, and so may be unnecessary. In total, however, these rules taken holistically provide mechanical evidence as to why temporary legislation may be employed by legislators. Yin argues in favor of these rules as they make it practically impossible to create permanent spending laws, encourage the use of temporary legislation, and promote fiscal restraint (Yin 183, 185). Yin argues that permanent legislation systematically underestimates the true cost of deficit increasing legislation (Yin 194), which is why temporary legislation, that is constantly revised thus exposing the true cost of legislation, should be preferred.

Yin argues that temporary legislation is made more stable by sunset provisions, as they produce renewal points at which laws can be modified or changed as needed (Yin 233). However, he

acknowledges that such provisions might be fiscally irresponsible if they serve only to reduce the official cost of legislation in order to overcome the high hurdle of Congressional budget rules. Such laws that, once enacted, lead to unaffordable and permanent spending are theoretically possible (Yin 234). Yin continues, however, to say that the point of expiration here serves as a cure. Should these laws be allowed to expire, disaster can be averted. Further, these laws can also be revised at their renewal point, thus averting further deficit-increasing effects.

Nearly the entirety of Yin's article is dedicated to demonstrating why temporary legislation is superior to permanent legislation in promoting fiscal responsibility. Little is said with regards to the uses of temporary legislation throughout the article. However, what is explained paints a clear picture for how Congressional rules condition the use of temporary legislation.

Yin does make mention of the strategic uses of temporary legislation, however. He references Thomas Jefferson's letter to James Madison in this section, referencing Jefferson's argument about the ability of future generations to govern themselves. Madison's response, being that the debate over reenactment of past laws would place an undue burden on future generations, is of primary concern to Yin. He notes, as did Gerson, that prior legislators could strategically crowd the agenda for future legislators, forcing them to expend limited legislative time on the consideration of expiring legislation (Yin 250). He goes a step further than Gerson, noting that this increased use of legislative time also has the effect of crowding out new proposals (Yin 251). However, Yin does not see this as a uniform negative effect. He believes that crowding out new proposals is ultimately good for fiscal restraint, as it prevents new spending from coming into effect. While Yin does acknowledge some of the problems that an overcrowded agenda might create for future generations, he believes that fiscal responsibility outweighs these potential drawbacks, and thus this perceived problem with temporary legislation is negligible.

Unlike Gerson, Yin barely acknowledges the strategic uses of temporary legislation. The vast majority of his article is dedicated to promoting fiscal responsibility and lauding temporary legislation as

one of the finest tools for doing so. What time is dedicated to addressing the strategic use of temporary legislation is done so as a means of dismissing its effects. It is an acknowledgement of a use so as to prevent criticism for ignoring it in a paper that is solely focused on promoting a particular legislative tool. The strategic use of temporary legislation, in Yin's estimation, is a bug, not the feature, and should be ignored or accepted as a necessary evil in the pursuit of fiscal restraint. This is a shortsighted and seemingly biased estimation of the strategic use of temporary legislation, and leaves significant room for further expansion on the subject.

Lasting Legislation (2011)

Rebecca Kysar in her article, *Lasting Legislation*, takes the opposite stance to Gerson and Yin, defending the use of what she calls "lasting legislation" – meaning permanent legislation. To avoid confusion, I will continue to use the term "permanent legislation" to refer to legislation with no defined end point as this is in keeping with terminology used by previous scholars and to avoid confusion – though it should be noted that there is nothing particularly wrong with the term "lasting legislation", and indeed it may more accurately describe the kind of legislation that Kysar and others mean when they say "permanent legislation".

Kysar's article takes aim at claims made by Gerson and Yin, challenging the notion that the increased use of the sunset provision is not novel, and taking umbrage with claims lauding temporary legislation's ability to encourage fiscal responsibility and deliberative decision-making. Most importantly, Kysar sets out to show that the rules that govern the legislative process do not necessarily condition the legislation that it produces. As Kysar puts it, political pressure in this legislative process operate on hydraulics – "when pressure is blocked at one channel, power can still be exerted through another route" (Kysar, 1009). In other words, Congress may adopt mechanisms to legislate in the public interest and promote fiscal responsibility, but it can still easily sidestep these mechanisms when it sees fit (Kysar 1009). As a result, Kysar finds it implausible that temporary legislation encourages fiscal restraint and

deliberative decision-making, and even goes a step further claiming temporary legislation is worse than ineffective, causing political-economy concerns, entrenchment, and planning disruptions. Kysar does make a carve-out for certain uses of temporary legislation on her analysis. She notes that temporary legislation used for revenue concerns is more likely to cause problems than temporary legislation employed for emergency or experimental purposes. Therefore, the focus of this piece is aimed at challenging the notion that temporary legislation can truly be used for the purposes of fiscal restraint and deliberative decision-making.

This claim has significant implications for my analysis. As mentioned previously, the crafting of legislation to comply with Congressional rules has significant value in explaining the use of temporary legislation, so a claim that these rules can be side-stepped has important ramifications for that explanation. Importantly, it should be noted, Kysar is not saying here that these rules can be ignored when crafting legislation. Rather, Kysar's noted sidestepping of the rules might perhaps be more accurately described as a side-stepping of the spirit of the rules. As I will review in the paragraphs to follow, Kysar's observations of temporary legislation's failure to comply with Congressional rules put in place to encourage fiscal responsibility is not an observation that those rules were not taken into account at all. Rather, that the laws passed that ostensibly comply with those rules fail to comply with the intent of the rules – that being the promotion of fiscal responsibility. If this is true, then a compliance with the rules itself is a strategic act – as Kysar put it, a hydraulic exertion of political power. I will dive deeper into this later in this section.

Kysar also demonstrates a historical retelling of the trajectory of temporary legislation. By her estimation, outside of the philosophical debates of the founders, little temporary legislation was passed until the 1970s, when it saw its resurgence in the form of sunset legislation (Kysar 1015, 1016). From there, temporary legislation again fell out of favor as it was found to be ineffective and unwieldy until the early 2000s, when temporary legislation (and the sunset provision specifically) grew in use exponentially (Kysar 1017). Kysar reviews Congressional rules, such as PAY-GO, the Byrd Rule, and the budget

reconciliation process, as mechanisms that force the usage of temporary legislation, not as a means of fiscal restraint, but rather as a means of simple compliance and obfuscation to further certain political aims (Kysar 1018-1021). Ultimately, Kysar's historical analysis here feels as something of an afterthought, included primarily to contest Gerson's claim that temporary legislation is a long-standing legislative tool. I don't find Kysar's historical argument too convincing, though her analysis of Congressional rules is a useful contribution to the discourse of temporary legislation which she builds on in the coming sections.

In particular, Kysar analyses budget rules. Important to her analysis is the endogeneity of Congressional rules. She notes that, while a variety of rules, like PAY-GO and the Byrd Rule, exist and in theory would impose restrictions on lawmakers when producing legislation, in practice are easily manipulated or ignored. This is because of the endogeneity of Congressional rules – with no codified federal or judicial regulations or external enforcement mechanisms; Congress is expected to enforce these rules themselves. As with the self-enforcement of any rule, the results from the self-enforcement of these rules are uneven, and waivers and violations are common (Kysar 1023).

Kysar also challenges the assertions that these rules enhance fiscal restraint and produce a complete reckoning for the cost of temporary legislation, and assertions that permanent legislation is systematically underestimated by budget baseline estimations. This, she argues, relies too heavily on the notion that the baseline estimate is stable – in other words that permanent legislation lasts forever and temporary legislation expires as expected. This assumption is unwarranted, according to Kysar. Kysar cites the Bush tax cuts (EGTRRA and JGTRRA) as examples how the baseline can be manipulated. Typically, the baseline estimate of tax cuts included in the EGTRRA and JGTRRA would have assumed their expiration at their stated expiration dates, causing revenues to increase following this sunset date. However, this would have resulted in the renewal of these tax cuts to score as a revenue loss, thus putting it in violation of Congressional rules that restrict deficit spending without an offset. To avoid this, the Bush Administration proposed that these temporary provisions be considered permanent, assuming the

eventual renewal as a given (Kysar 1028). Thus, the baseline would assume zero cost at the point of renewal, allowing the extension of or the making permanent this revenue reducing legislation without the necessary revenue increasing offset. In this way the baseline is manipulated and the Congressional rules are circumvented (Kysar 1032).

Kysar then addresses the supposed advantages temporary legislation has over permanent legislation in promoting deliberative decision-making. The first problem with this claim is that legislation need not be temporary in order to be revised or amended. Permanent legislation can be repealed and amended at Congress's discretion. Where temporary legislation might have an advantage is at the renewal points when debates over expiration, extension, or amendment are forced. However, Kysar notes that temporary legislation only has this advantage if the original legislation is incorrect and requires amendment before renewal, or should be allowed to expire full stop. Additionally, if given temporary legislation is correct, Congress incurs additional costs for maintaining the status quo at these renewal points (Kysar 1042). As I noted in my critique of Yin, Kysar also claims that individuals can willfully ignore new information, so that when debate over temporary legislation restarts at a renewal point, there is no guarantee that the advent of new information will make any difference in the continuation of a given policy (Kysar 1045). The practical results of these effects on deliberative decision-making is that good legislation is unduly limited by increased renewal costs, while harmful legislation isn't guaranteed to be revised by dishonest lawmakers.

Next, Kysar unpacks the various disadvantages of temporary legislation when compared to permanent legislation. First she explores the impacts temporary legislation has on the political-economy. In particular, Kysar observes how temporary legislation might negatively affect rent-seeking of politicians and interest groups when considering temporary legislation. As interest groups reward politicians for their efforts through campaign donations and heuristic support (rents), through the continual threat of expiration politicians could feasibly extract rents from interest groups at each renewal point, thus incentivizing them to pursue temporary legislation in lieu of permanent legislation (Kysar 1051). This

does not mean that permanent legislation does not offer a similar mechanism to politicians, as the threat of repeal or amendment of permanent legislation may provide the same opportunities. However, permanent legislation requires a political act on the part of politicians in order to extract these rents. Temporary legislation, by contrast, has these acts built into their structure in the form of renewal points. Therefore, the cost for politicians to extract new rents from interest groups is higher with permanent legislation than with temporary legislation, making these rent extractions less palatable (Kysar 1052).

Kysar accuses temporary legislation as a means of entrenchment (Kysar 1056). This is because allowing legislation to expire usually resolves with legislation returning to a previous state. If a legislature is forced to consider the expiration of a piece of legislation, and allows it to do so due to agenda concerns, this raises significant entrenchment concerns (Kysar 1058). Because temporary legislation may be easier to enact, as it might facilitate compromise, then a legislature runs the risk of overburdening the legislative agenda, creating even greater risk of entrenchment (Kysar 1059). Kysar admits that permanent legislation is not without its own entrenchment concerns, but that these concerns carry with them certain benefits that make these concerns justifiable. Temporary legislation, she concludes, lacks these sufficient benefits (Kysar 1063).

Finally, Kysar outlines the ways in which temporary legislation raises planning concerns when determining a legislative agenda. Temporary legislation complicates planning as it forces legislatures to consider expiration and renewal at the renewal point. In effect, it acts as a precommitment device that binds future legislatures to past obligations. In doing so, temporary legislation stifles planning activities, decreases a law's durability, and increases compliance burdens for coming administrations (Kysar 1063, 1064).

Ultimately, Kysar concludes her article by advocating strongly for permanent legislation, citing the various shortcomings and misinterpretations of temporary legislation's effects on both mechanical policy-making and supposed regulatory advantages (Kysar 1066). She does set aside areas in which

temporary legislation may be appropriate, those being in dealing with crises, temporary emergencies, and experimentation, but finds that in most other cases permanent legislation is preferable (Kysar 1067).

Kysar's unpacking of the various shortcomings of temporary legislation is illuminating for my analysis. Her observations of the ways in which temporary legislation fails to meet the expectations of its proponents in the areas of fiscal responsibility and deliberative decision-making help to clarify understandings of why temporary legislation is used. If temporary legislation does not materially restrict or regulate government spending, then claims that temporary legislation is employed for this purpose are unfounded. If the deliberative decision-making advantages that temporary legislation offers are easily circumvented for political gain, then the claim that temporary legislation is employed for this reason are equally specious. Ruling out these rationales for the purposes of understanding temporary legislation's mechanical use is important to consider, and allows my analysis to further drill down on the strategic elements of why temporary legislation is enacted.

Kysar also did admirable work in exploring the strategic use of temporary legislation. While not explicitly laying out that temporary legislation is used primarily for strategic reasons, by outlining its ability to crowd legislative agendas and bind future administrations she demonstrates this exact use case. However, this element of her article is not the focus of her article and is does not garner sufficient attention to theoretically justify this use case. Further, her observations are not significantly different from those also made by Gerson and Yin, though they are portrayed in a different light. Still, moving forward with the observations of this use case by all three authors serves to inform the discussion and allows me to move forward with my own arguments.

Agendas, Alternatives, and Public Policy (1984)

In his book, *Agendas, Alternatives, and Public Policy*, John Kingdon considers the reasons why some subjects rise on a government agenda while others are neglected. For Kingdon, the agenda-setting process narrows the set of subjects that could conceivably occupy the attention of a legislature. Multiple

agendas can exist at any given time, and items can exist on one agenda or, conceivably, all of them. Items rise and fall on a given agenda through an interaction between participants and the policy streams. According to Kingdon, there are three policy streams – the problem stream, the policy stream, and the political stream (Kingdon 196, 197).

The problem stream is a means by which government officials learn about conditions and the ways in which these conditions can be defined as problems (Kingdon 197). Indicators, such as focusing events and feedback to these events, are used to assess the magnitude of a given condition. Large magnitudes attract the attention of government officials, and with sufficient feedback, can come to define these conditions as problems (Kingdon 197). However, problems can fade from public view as the conditions that highlight the problem change or become obfuscated (Kingdon 198). In the problem stream, the continuous recognition of problems is critical to the setting of an agenda. It falls to political entrepreneurs to constantly invest in highlighting conceptions of problems and bringing them to the attention of government officials.

The political stream operates on its own set of dynamics and rules that exist alongside problem recognition. Swings in the national mood, the coming of new administrations, ideological distribution, and interest group activity all play a role in determining what items make their way through the political stream. It is not difficult to imagine that a conservative administration has different priorities to a liberal or progressive one. The interest groups that hold sway over differing administrations also impacts the ability of political entrepreneurs to have their cases heard (Kingdon 198, 199). Consensus in this stream is developed through bargaining and compromise, rather than persuasion as is done in the problem stream. With this in mind, in the political stream, interest groups may be more effective in blocking agenda items rather than setting the agenda themselves (Kingdon 199).

Kingdon explains the policy stream as a stage on which a selection process comparable to theories of evolution takes place. Many ideas float around in the policy “primeval soup”, but only the

“fittest” make it onto the agenda (Kingdon 200). While the origins of policy in this stream are somewhat haphazard and chaotic, their selection is not. Kingdon explains that for policy to rise on the agenda, certain criteria must be met. Those are the policy’s technical feasibility, congruence with a community’s values, and anticipation of future constraints (Kingdon 200). Those policies that meet these criteria are more likely to survive, and so policy entrepreneurs must seek to push for their issues in many ways and in many forms. Here Kingdon differentiates between policy entrepreneurs, those individuals who push for particular policy considerations, and policy inventors, those individuals who create policy alternatives. The political entrepreneur is more likely to find success in the policy stream as they have the ability to repurpose and recombine policy objectives to suit the criteria for consideration, thereby softening the system for future consideration, while policy inventors continuously fabricate new rigid alternatives, usually starting from scratch that may or may not fit these criteria (Kingdon 201).

Each stream lives a life of its own, operating on separate time horizons that afford particular windows of opportunity for items to rise and fall on a given agenda. However, there are times when these three streams can be joined, when items that feature on all three agendas have the greatest opportunity to make headway (Kingdon 202). This complete linkage of all three streams forms a single policy package. Even partial couplings, the joining of two streams rather than all three, also improve the chances that an agenda item will rise out of streams for consideration and onto the decision agenda.

The decision agenda is set differently from the three streams. Kingdon defines the decision agenda as a list of subjects in the position to force an authoritative decision, such as legislation. When all three streams come together into a complete package, and partial couplings to a lesser extent, then the odds of a given issue rising on the decision agenda increases (Kingdon 203). Policy windows, or opportunities for policy advocates to push for their desired proposals, are vital for moving packages of the three streams up the decision agenda (Kingdon 203).

This basic framework is vital for understanding the nuances of how a legislative agenda is set. It is clear that for a policy position to make its way onto a decision agenda, navigating the nuances of the three streams is costly and difficult. Significant effort and a certain degree of luck is required in order to first create a complete package that satisfies the requirements of the problem, political, and policy streams. Even if such a package could be put together, raising an item on the decision agenda requires even more luck and resources to convert a policy proposal into administrative action. Temporary legislation serves as a tool that helps to navigate and circumvent these streams, and further to make even more costly the rise of new agenda items. It is for these reasons that politicians favor temporary legislation, and further, in a hyperpartisan environment, have come to rely on it.

Navigating the Multiple Steams: Theorizing The Strategic Use of Temporary Legislation

As noted by the authors in the previous section, it is well observed that temporary legislation has the effect of impacting a policy agenda by forcing policy considerations at predetermined renewal points. However, that politicians might use temporary legislation for this explicit purpose is not well theorized. In this section, I will draw on Kingdon's multiple streams theory to present a possible explanation as to why politicians might favor temporary legislation for this exact purpose. It is my contention that one of temporary legislation's primary uses is to circumvent the typical agenda setting process, taking advantage of complete packages and policy windows to put forward a kind of legislation that will continuously remain on the decision agenda. In doing so, these politicians avoid the need to return to the multiple streams in order to make changes to this particular policy, and further to occupy precious space on the decision agenda in order to prevent other policy items from rising on it. This strategy is further exacerbated by increasing hyperpartisanship, which makes consensus forming in the policy stream increasingly difficult, thus necessitating such a strategy.

To begin an overview of the resource intensive work necessary to survive in the multiple streams is warranted. Survival in the problem stream depends primarily on a policy entrepreneur's ability to

convince others that certain conditions rise to the level of being a problem that merits consideration. Here, the regular lobbying of interest groups, specialists, and allied politicians is necessary in both formal governmental arenas as well as the public arena. Policy entrepreneurs must be both persistent and astute in producing the kind of regular and necessary feedback that converts a condition into a problem, and then raising that problem onto the decision agenda. Further, these efforts must be made continuously until a focusing event catches the attention of the necessary officials and the public. One can imagine the enormous amounts of resources required in order to maintain these efforts, often times yielding little by way of results.

Survival in the problem stream might be resource intensive, but this issue is exacerbated by survival in the political stream. The political stream, operating by its own internal dynamics, makes it so that problems identified through the policy stream might not ever make it to a decision agenda, no matter how dire that problem may be. If the national mood is not receptive to a problem, or an incoming administration prioritizes other problems over a given problem, then the resources expended in the problem stream to elevate a given issue may all be for naught. Survival in the political stream depends on a policy entrepreneur's ability to form consensus. Even if a problem is positioned favorably in the problem stream, if a political entrepreneur is unable to gain consensus around this problem, then that issue remains only viable in one stream. As Kingdon noted, for a policy to rise to the decision agenda, it requires a near complete package. As such, if a policy entrepreneur is not successful in gaining political consensus around a given problem, then the resources expended in highlighting this problem may be wasted.

This is an important consideration especially in hyperpartisan environments, in which political consensus may be impossible. If the political stream, which is dependent on consensus forming, is blocked, a complete package is all but impossible to form. As a result, policy entrepreneurs will need to focus on creating a partial coupling in the policy stream if they are to make any headway on raising an item to the decision agenda.

Survival in the policy stream might be the least difficult for the skilled policy entrepreneur. To meet the criteria of technical feasibility, congruence with community values, and anticipation of future constraints is resource intensive to be sure. Making a complicated problem applicable to a large community, while remaining technically feasible and cognizant of potential constraints requires a longstanding project supported by skilled and learned individuals – no small feat in any environment. Still, meeting these criteria is an attainable goal for the skilled policy entrepreneur. However, as with the political stream, the policy stream is also negatively impacted by hyperpartisan environments, especially where that hyperpartisanship is the result of extreme, divergent ideologies.

While what is technically feasible and ostensibly aware of future constraints can be planned for by skilled policy entrepreneurs, crafting policy that meets the values of two divergent communities is an enormous hurdle to get over. How does one satisfy two diametrically opposed communities at once? Hypothetically, there could come such a skilled policy entrepreneur that finds a way to frame policy in such a way that it straddles the values of these divergent communities, and in doing so might be able to produce a partial coupling. However, the increased burden placed on policy entrepreneurs, and indeed the necessity of once-in-a-generation skill, makes survival even in the policy stream very unlikely under such conditions.

These considerations taken into account, it is clear that the amount of resources and skill necessary to create a complete package is extreme. Further, in hyperpartisan environments, it may be impossible to achieve such a package. In such environments, it might be expected that only partial couplings could be achieved at best. As such, moving items onto a decision agenda prove to be exacting in ways that sap policy entrepreneurs and their allies of political capital in ways that make for future policy endeavors unappealing or impossible. Would that there was a way to circumvent navigating these streams so to arrive directly to the decision agenda in one fell swoop.

Enter temporary legislation. It must be said that all policy, even temporary legislation, must navigate these streams at least once in order to arrive to the decision agenda the first time. Indeed, temporary legislation is not a means for avoiding the expending of significant resources to arrive on the decision agenda. However, temporary legislation has the distinct advantage of having only to arrive on the decision agenda one time. Once the necessary actions have been taken, and luck has favored a given policy entrepreneur, temporary legislation could be passed. Now, however, for these same policy entrepreneurs to force reconsideration of a policy, expand upon it, or repeal it, temporary legislation serves as a useful mechanism to avoid expending resources a second time. Further, temporary legislation provides greater leeway in both the policy and political streams. If a condition has risen to the level of a problem that has captured officials attention, but the feasibility of a solution is in question and there is little consensus around ideal solutions, it might be possible that a less than ideal solution could be proposed. In such a circumstance, the political stream might be made more malleable by political entrepreneurs compromising on the ideal in order to gain consensus on some action, and further could agree to a less than ideal solution that is perhaps more technically feasible to ensure survival in the policy stream. If this new, less than ideal complete package arrives on the decision agenda, then passing temporary legislation circumvents the need for these same policy entrepreneurs to navigate the multiple streams again and instead jump directly to the decision agenda to push for reform and renewal.

This stands in stark contrast with passing and amending of permanent legislation. To enact permanent legislation, resources must be expended in the multiple streams to an even greater degree than with temporary legislation. Achieving consensus on permanent legislation would be much more difficult if that consensus required significant compromise on an ideal solution. Further, what solutions are available might not be considered technically feasible, further reducing the probability of survival in the multiple streams. Even if permanent legislation survives the multiple streams, makes it onto the decision agenda, and ultimately passes into law, any efforts to repeal or amend this legislation would require equally difficult and costly endeavors. For permanent legislation to face such changes, a new problem

would need to be identified, promoted, have a consensus formed around it, with a feasible solution proposed. In other words, another complete package would need to be created.

With temporary legislation, they are the renewal points that force the reconsideration of a given policy, and do not require additional resources be expended by policy entrepreneurs as they can simply wait for the renewal point to approach before a decision must be taken on this item. Certainly, resources must be expended in order to achieve a particular aim, but to have a subject considered is no longer an issue, it is a given. Politicians could use this particular strategy to ensure that policy windows, while perhaps not sufficiently wide enough to pass ideal legislation, do not go unutilized by passing less than ideal, temporary legislation so that the issue is guaranteed to be revisited at a later day. Additionally, even if the renewal point does not coincide with a sufficiently wide policy window, temporary legislation can be extended in its less than ideal form for reconsideration at a later date – hopefully one that coincides with the right kind of policy window.

Alongside the use of temporary legislation to circumvent the multiple streams, temporary legislation could also be utilized strategically to block these same streams. As Kysar noted in her analysis, it is not unreasonable to believe that a politician might use temporary legislation to crowd the decision agenda, thus making it impossible for new items to rise on it. If the decision agenda is replete with expiring legislation that consumes the limited attention of government officials, having even the strongest of complete packages make it to consideration is a difficult endeavor. Items are regularly shelved in favor of dealing with “more pressing” issues, and if a piece of temporary legislation’s expiration is sufficiently pressing, it would take away attention from new issues on the agenda.

In this way, politicians could condition the agendas of incoming administrations, forcing them to spend valuable resources considering expiring legislation rather than pressing for their own policy priorities. This might be an especially valuable tool in hyperpartisan environments, where ideologically opposed politicians might aim to ensure their continued control of the agenda beyond the transfer of

power, thus preventing their opponents from addressing their own priorities and governing competently, thereby hurting them in future elections.

In the following section, I test this theory on the JGTRRA. I will observe the various sunset provisions within this legislation and examine how these were structured to either circumvent the multiple streams and advance policy positions in the future, as well as how these provisions conditioned future administrations' control of the decision agenda. Specifically, I will examine sunset provision expiration dates, as I expect these will be illuminating in my determination of what strategic method was employed by the lawmakers who crafted this legislation. To make this determination I examine the Congressional record, performing a content analysis of search results in which I use the appearance of sunset provisions in Congressional mentions as a metric to indicate Congressional consideration of such provisions. This analysis consists of online searches of the Congressional Record for mentions of particular provisions in the proceedings and debates of the US Congress. If the number of mentions of a given provision is highest in the session prior to its sunset date, when compared to the session before this and immediately after, then this will indicate whether or not the threat of expiration commands control of the Congressional agenda. I will take mentions of sunset provisions within the administration that passed such temporary legislation as a means to circumvent the multiple streams to further enactment or facilitate reform (the particular outcome will be noted in my observations). I will take mentions of sunset provisions in successive administrations to that which passed such temporary legislation as a means to retain control of the legislative agenda now that power has changed hands.

I expect mentions in the Congressional Record of a given provision in the year prior to the provision's expiration will be at their zenith, indicating an increased use of Congressional resources and an advanced position of the provision on the decision agenda. The year prior was chosen as opposed to the year of expiration because many provisions are set to expire on January 1st of a given year, meaning that consideration of extension or expiration would have occurred primarily in the year before a given sunset date.

Finally, I will take observations from the JGTRRA and apply that analysis to sunset provisions in the ARPA, particularly where the CTC is concerned. This will allow me to hypothesize further about the strategic uses of temporary legislation, the affects of hyperpartisanship on these strategic uses, and what this might tell us about the future of legislation in the USA. The CTC will be focused on because both the JGTRRA and the ARPA include sunseting expansions and accelerations to the CTC, allowing for an easy comparison that will allow for the observation of the evolving use of sunset provisions. Further, the JGTRRA was passed arguably near the beginnings of hyperpolarization in the USA (Theodoridis 2016), providing observers with a marker for a sort of pre-polarized (or at the minimum, newly-polarized) strategic use-case while observations of the ARPA would come up against the backdrop of peak hyperpolarization. The differences between the two use-cases could show both further evidence of the strategic uses of temporary legislation, and also the evolution of these strategic uses.

Strategic Sunset Provisions in the JGTRRA

As has been mentioned in previous sections of this paper, the JGTRRA was an acceleration and expansion of provisions laid out in the 2001 EGTRRA legislation, itself a wide reaching bill that expanded existing tax cuts and implemented new ones. This symbiotic relationship therefore merits a brief explanation of the EGTRRA. The EGTRRA implemented a variety of sunset provisions, all of them set to expire in 2010. Whether this was done for strategic reasons is debatable for two reasons. Both reasons relate to Senate rules, as the Senate filibuster would have prevented the passing of these tax cuts without a super majority, and the Byrd Rule limitation on reconciliation provision to the ten year budget window. It follows, then, that in order to evade the 60 vote filibuster and to stay in compliance with the Byrd Rule, sunset provisions were included in the EGTRRA to last for the maximum period of time. One could say, then, that the use of sunset provisions in the EGTRRA was done purely to evade the filibuster while remaining within Senate rules. Ostensibly, the EGTRRA was intended to be permanent legislation but made temporary to facilitate its passage.

Still, strategic elements as described in the previous section can still be observed here. While a 2010 expiration date is the maximum allowable length of a sunset provision according to the Byrd Rule and the reconciliation process, it also aligns with the midterm elections during a subsequent administration. Having been elected in 2000, the Bush administration would be out of office by 2008 at best, and so whatever administration that followed would have to deal with the fallout of expiring legislation in 2010. As Kysar puts it, allowing these tax cuts to expire in 2010 might not have been perceived as temporary legislation regarding one of the largest tax cuts in American history running its course, but rather as one of the largest tax increases in American history (Kysar 1032). As such, any new administration dealing with these expirations might face pressure to extend these cuts or make them permanent. In a way, this would be a perfect confluence of both strategic use-cases, to evade the multiple streams and remain on the decision agenda at little to no cost, and to bind control of the decision agenda of a political rival. Indeed, the final results bear this out as the Obama administration at first extended these tax cuts in 2010 through 2012 in the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 before ultimately making them permanent in 2012 through the American Taxpayer Relief Act of 2012. It could be speculated that, faced with a difficult choice of “raising taxes” by allowing the EGTRRA to expire or extending the provisions temporarily only to have them pop up on the agenda again, the Obama administration might have reasoned it would be better to make these provisions permanent and simply remove them from the decision agenda while avoiding an unpopular perceived tax increase.

Having discussed the more uniform sunset provisions within the EGTRRA, we can now move on to the more diverse sunset provisions in the JGTRRA. Diverse, here, is in reference to the expiration dates of these given provisions. The JGTRRA is the second part of the “Bush tax cuts” in which certain provisions in the EGTRRA were accelerated, meaning timelines on provision expansion were truncated to institute their benefits sooner. In particular, these provisions include the acceleration of the CTC (sunset

2004), increase in section 179 expensing for small businesses (sunset 2005), reduction in capital gains and dividend tax rates (sunset 2008). These provisions will be the focus of my analysis.

Of these provisions, only the expiration of an increase to small business expensing falls in an off year for federal elections, and only the expiration of the reduction in capital gains and dividend tax rates falls on a guaranteed transition year. In other words, the reduction in capital gains and dividend tax rates is the only provision that expires when a new administration is guaranteed to come to power as, if we count reelection, the Bush administration would end in 2008 and pass the reins of power over to the next administration.

The acceleration of the CTC would increase the credit conferred per child from \$600, as stipulated in the EGTRRA, to \$1000. For reference, the EGTRRA scheduled the increase of the conferred credit to \$1000 by 2010. This acceleration, however, was set to expire in 2004, a presidential election year. The expiration of this acceleration would result in the credit reverting to the EGTRRA stipulated credit, which would have been \$600 in 2004 (“All Info – HR 2 – 108th Congress”, congress.gov). In other words, by accelerating the credit and setting the sunset date for 2004, the Bush administration managed to increase a popular tax credit, accelerate that increase, and set up a debate over legislation in which opponents would have to advocate for a tax increase in an election year. In other words, the CTC was positioned so to take important space on the decision agenda, without expending additional resources, during a time when debate over action would favor the Bush administration. According to a search of the Congressional Record, the CTC was mentioned 1,362 times in the 2003-2004 session, 418 times more than in the 2001-2002 session (944 mentions), and 431 times more than in the 2005-2006 session (931 mentions). This would indicate that the sunset date of this given provision had the effect of increasing Congressional debate, thus expending Congressional resources, at the designated time.

The increase in section 179 expensing for small businesses increases the expensing allowance by small businesses from \$25,000 to \$100,000 until the sunset date of 2005 (“All Info – HR 2 – 108th

Congress”, congress.gov). In other words, small businesses can expense more of their qualifying assets to reduce their overall tax burden, in effect creating a tax cut. Setting the sunset date for 2005 distinguishes this provision from the others in this analysis as it does not fall on a federal election year. This sunset date might have been selected to condition the agenda of a political rival should the Bush administration fail to win reelection. It might also have been selected to keep allowances for small businesses on the decision agenda, thereby extracting rents from small business interest groups in favor of proponents and to the detriment of opponents of this provision. According to a search of the Congressional Record, section 179 was mentioned 75 times in the 2003-2004 session, four more times than in the 2005-2006 session (71 mentions), and 14 times more than the 2001-2002 session (61 mentions). This would appear to confirm my hypothesis that expiration would increase Congressional debate over a given provision, thus expending greater Congressional resources and commanding the decision agenda.

However, there are several factors that complicate this analysis. Largely, these factors concern the off-year selected for the sunset date. This happens to occur at the start of a new session rather than at the end of one, presenting some difficulty in analysis. The years including the debate over the passing of the JGTRRA (2002-2003) and the impending expiration of the provision (2004) are spread over two separate Congressional sessions (2001-2002 and 2003-2004). This makes it difficult to differentiate between debates regarding the JGTRRA overall and the section 179 provision specifically. It could certainly be that the mentions during the 2003-2004 session occurred mostly in 2003 in the lead-up to the passage of JGTRRA. Further, this provision (in its expanded, temporary form) did not exist in 2001-2002, and so questions about whether or not this is a fair comparison have to be entertained. All in all, mentions of section 179 may prove to be a poor measure of strategic uses of temporary legislation.

Reductions in capital gains and dividend tax rates would reduce the net capital gains tax from 10 and 20% to 5% and 15%. This provision would also apply this tax rate to corporate dividend income (“All Info – HR 2 – 108th Congress”, congress.gov). As mentioned before, the selection of a 2008 sunset date would automatically throw extension into an incoming administration’s court. Further, debate over

extension would occur during the incumbent's term, thus allowing that administration to prime the discourse as much in their favor as possible before passing off the reins of power. This would put the incoming administration in the most difficult position, having to expend resources on determining the extension or the expiration of a tax cut after a year of debate coloring the discourse, likely against their favor. Additionally, the timing of this particular sunset date requires additional scrutiny given that the remaining EGTRRA provisions would expire in the session immediately following the expiration of this provision. So, it follows that mentions of this provision are not likely to dissipate in the year following its sunset date due to renewed debates over the overall tax cut package. So, the search will be expanded to include the session two years following expiration to account for this. According to a search of the Congressional Record, capital gains were mentioned 760 times in the 2007-2008 session and 840 times in the 2009-2010 session, 694 times in the 2005-2006 session, and 580 times in the 2011-2012 session. Here, expiration and debate over renewal, which would have occurred both in 2007-2008 and 2009-2010, exceeded mentions in the years before and after in both instances. Here, Congressional debate and the expending of Congressional resources seem to have increased at the provision's renewal points.

The results from this analysis are encouraging. Analysis of the CTC appears to confirm my hypothesis that, due to the agenda setting and resource conserving powers of temporary legislation, sunset provisions can be used strategically to circumvent the multiple streams and arrive to the decision agenda easily. This was indicated by an increased expending of Congressional resources during the Congressional session in which the provision was set to expire. However, while an analysis of an increase in section 179 expensing for small businesses appears to also indicate this is true, intervening factors in the form of Congressional sessions producing overlap with debate over the JGTRRA make the results of my analysis less than reliable in this instance.

An analysis of reductions in capital gains and dividend tax rates presents mixed results. While mentions of the capital gains tax increase in the session of expiration when compared to the session prior, the following session also shows an increase in mentions in the Congressional record. As stated above,

this could well be due to the expiring EGTRRA provisions, which might have inflated mentions of the capital gains tax as well. However, this does not necessarily refute my hypothesis. If, indeed, the mentions of the capital gains tax were included in debates over the EGTRRA because of the expiration of those provisions, then debate is still conditioned by expiring legislation. In effect, the expiring of EGTRRA forced debate over the capital gains tax, so while these debates might not be in reference to the same provision, the effect is ultimately the same where temporary legislation circumvents the traditional route to the decision agenda through the multiple streams to condition the decision agenda of a rival administration (the EGTRRA having been passed by Bush administration and the 2009-2010 session occurring during the Obama administration). This example requires further research, but initial analyses appear to confirm my original hypothesis.

Discussion: The Temporary CTC, the ARPA, and the BBBA

Like the JGTRRA, the ARPA contains a variety of temporary provisions with varying sunset dates. The vast majority of these provisions were targeted at providing relief to the COVID-19 pandemic, such as one time stimulus payments and funds provided to the states to aid with rental assistance. These kinds of provisions fall under more traditional conceptualizations of temporary legislation, that with the intent of addressing a temporary crisis. Therefore, the one to two year expiration timelines for many of these provisions could be explained by this use-case.

However, as explained in the introduction to this paper, the CTC is not necessarily addressing the COVID-19 crisis. Rather, the inclusion of the CTC expansion into the ARPA appears to be an astute use of a policy window. As the country reeled from the COVID-19 pandemic, there was immense pressure on the federal government to provide relief. Further, the election of a new president and the incoming Democratic administration (which favors government spending more so than the Republican alternative), created favorable political conditions for policy entrepreneurs to take advantage of this policy window. So then, the inclusion of the CTC in the ARPA is perhaps not a surprise. However, we should not assume

that its inclusion is a reflection of a need for COVID relief. As it is most likely this provision was introduced through an astute navigating of the multiple streams, its sunset date might have been chosen to continue in that vein, allowing for easy maneuvering of the multiple streams and ensuring a speedy return to the decision agenda.

This return came in the form of the BBBA. The BBBA, or the human infrastructure bill as it came to be known colloquially, was part of a grand strategy by the Biden administration to pass sweeping infrastructure spending and a reinforcing of the social safety net in two bills to be negotiated and passed simultaneously. The Infrastructure Investment and Jobs Act (IIJA), colloquially known as the bipartisan infrastructure bill, would cover investments in infrastructure repairs and new physical infrastructure projects, such as bridges and roads, while the BBBA would cover investments in the American worker, such as paid family leave. While the IIJA was able to pass the House and Senate with bipartisan support, the BBBA failed to pass the Senate due to obstruction from conservative Democrats. Part of the BBBA package was an extension of the CTC, and the failure to pass BBBA has resulted in the expiration of the CTC expansion.

Applying the method employed to analyze the JGTRRA, a search of the Congressional Record for mentions of the child tax credit shows that mentions in the 2019-2020 period (516) were greater than mentions in the 2021-2022 period (421). There are a multitude of intervening factors that could result in this decrease in mentions, including but not limited to the ongoing COVID-19 pandemic, the attempted coup-d'etat on January 6th, 2021, the proximity of enactment to expiration, and competing policy priorities. Intervening factors in the form of policy priorities could very easily take precedence over the CTC extension due to the dire nature of the crises they seek to address. The sheer volume of crises in 2021 may have served to force the CTC extension down the decision agenda. This is not to say that the CTC was not debated in this period, only to say that, when weighed against an attempted coup, the extension of a tax cut might fail to command the attention it might have in years prior.

These results could also mean that the impact of this particular strategy is waning. The political realities of the time played a significant role in the failure to extend the CTC. Due to the razor thin margins in the Senate, with an even 50-50 split, passing any legislation through even the reconciliation process is fraught. This is especially true in the hyperpolarized environment of our present day when not a single vote from the opposing party can be counted on. This means that all 50 Democratic senators were needed to pass BBBA, but the hold out from two conservative Democrats meant that BBBA was doomed to fail, being shelved indefinitely and allowing provisions like the CTC to expire. It should be noted that, while the 50-50 split is a difficult tightrope to walk, it is not impossible. The JGTRRA was passed 51-50, with Vice President Cheney serving as the tie-breaking vote. Here, however, three Republicans and two Democrats crossed over, voting nay and yea respectively. Hyperpartisanship was still in its infancy then, but even if the vote had been along party lines the margin for victory would have been tight (51-49, in this instance).

As hyperpartisanship makes it increasingly difficult to secure bipartisan compromise, especially where social spending is concerned, and the need to shore up same-party support becomes of paramount concern, the efficacy of the strategic uses of temporary legislation might become increasingly less potent. If the lack of same-party ideological cohesion continues to threaten the ability for a majority to legislate, the relevance of legislative loopholes, like temporary legislation and the reconciliation process, might wane. This is part of political evolution, and as Congressional rules change, legislative priorities shift, and mathematical realities sink in, newer and more creative legislative workarounds will emerge.

All of this does not mean, however, that the CTC extension was not structured strategically; it might simply mean that this strategy failed. What this means for the evolution of the use of temporary legislation remains to be seen and merits further investigation. Temporary legislation might cycle back into relative obscurity, or a new, creative use of the legislative tool might emerge as a solution to yet more legislative gridlock. Further investigation of the legislative process over time will tell the tale.

Conclusion

Over the past two decades temporary legislation was thrust into the fore of political debate after an explosion in its use. This increase in use was notable for two reasons: 1) it occurred primarily with regards to spending and tax policies, and 2) it was used to seemingly avoid a standing Senate filibuster. The form of temporary legislation favored in this new wave of the legislative tool was the sunset provision. A variety of explanations were attended to in the existing literature, including the need to comply with Congressional rules, the addressing of temporary crises, to encourage fiscal constraint, to promote deliberation, to increase political accountability, and to encourage consensus forming. Several of these explanations hold significant explanatory value, in particular to comply with Congressional rules and to address temporary crises. However, other explanations, such as the forming of consensus and the encouraging of fiscal constraint, fail to explain the modern proliferation of sunset provisions.

Observations by Gerson and Yin that temporary legislation promotes deliberative discourse and fiscal restraint suffer from my own analysis and analysis by Kysar. Kysar demonstrates through her analysis of the EGTRRA and the JGTRRA that temporary legislation was used in exactly the opposite manner as Gerson and Yin hypothesized. Rather than promoting fiscal restraint, the Bush administration used sunset provisions as a means to evade the Senate filibuster to pass otherwise unpopular legislation. Further, the way in which these sunset provisions were calculated allowed the Bush administration to manipulate the price tag of this legislation. If temporary legislation could be used to circumvent rules intended to encourage restraint and accountability, then they could not also be conduits for these goals as well. Further, if the cost calculation of temporary legislation can be so easily manipulated, then arguments in favor of the tool's ability to encourage fiscal restraint are even more dubious.

Through my own analysis of the CTC, it is clear that in a hyperpartisan environment the prospect of temporary legislation encouraging consensus forming is bleak. Quite the opposite, hyperpartisanship in conjunction with a standing Senate filibuster makes it so that sunset provisions become one of increasing

few means of passing legislation. If temporary legislation is necessary to circumvent the need for a bipartisan consensus, then temporary legislation cannot be said to help in the forming of a consensus.

However, temporary legislation's uses to address temporary crises and to comply with Congressional rules are compelling explanations. Historically, temporary legislation has been employed time and again to address natural disasters, pandemics, economic crises, etc. The ARPA, passed in 2021, consisted of a variety of temporary provisions, most of which were targeted at alleviating the economic stress caused by the COVID-19 pandemic. Where Congressional rules are concerned, every author writing on the subject of temporary legislation is sure to mention the filibuster, budget reconciliation, and the Byrd Rule. This collection of rules and processes create a standing Senate filibuster that requires a super majority of Senators to overturn – a tall order even in the most cooperative of circumstances. The reconciliation process offers a remedy to this, allowing for a simple majority vote to pass legislation included in budget reconciliation packages. The Byrd Rule restricts the items that can be included in these packages and enforces certain mechanical necessities such as keeping provisions budget neutral. As such, lawmakers in the past twenty years have resorted to the reconciliation process in order to circumvent the Senate filibuster. Doing so forces these lawmakers to adhere to the Byrd Rule in order to successfully push through legislation in this manner. However, factors such as the timing of sunset dates and the effects of those dates led me to ask what other reasons temporary legislation might be used.

While eluded to by scholars observing temporary legislation, none paid specific attention to the strategic uses of the legislative form. Using Kingdon's multiple streams theory, I hypothesized that the use of sunset provisions could, in part, be explained by a desire to circumvent the multiple streams through which policy is typically formed, thereby saving resources, and keeping specific policies on the decision agenda. Further, by keeping policies on the decision agenda, lawmakers could manipulate this agenda to constrain their political opponents. As a new administration takes power, temporary legislation could be used to force this new administration to consider legislation that is either unfavorable for them to

debate or that runs counter to their priorities. Further, this forced consideration of expiring legislation expends valuable resources for the new administration, primarily in the form of legislative time.

To observe this I searched the Congressional record for mentions of certain provisions in the JGTRRA to see if these increased during the period of these provisions' renewal points. I would search the renewal point period and the prior and subsequent periods as well. These provisions were the acceleration of the CTC, increases in section 179 expensing for small businesses, and reductions in capital gains and dividend tax rates. The sunset dates of these provisions were in 2004, 2005, and 2008 respectively. These dates were of particular interest as they covered both strategic use-cases of sunset provisions. The 2004 and 2005 sunset dates pertained to the cost-saving use case, in which temporary legislation could be used strategically to avoid costly efforts to put legislation onto the decision agenda through the multiple streams. Instead, the threat of expiration would automatically bring these provisions onto the decision agenda without any further effort from policy entrepreneurs. The 2008 sunset date pertained to the constraining use case, in which temporary legislation could be used strategically to bind political opponents and force them to consider legislation that may run counter to their priorities, and at a bare minimum expend that administrations resources.

The results of this analysis were positive. The acceleration of the CTC and increases in section 179 expensing for small business confirmed my hypothesis, though admittedly mentions of the increases in section 179 expensing for small business may prove to be a poor indicator of temporary legislation binding the legislative agenda. Reductions in capital gains and dividend tax rates were mixed. Due to the proximity of a 2008 sunset date to the 2010 sunset dates of the broader EGTRRA, it is possible that mentions of capital gains and dividend taxes would remain high in the subsequent year following the expiration of this particular provision. As such, the period immediately following to the expiration of the capital gains and dividend tax cut did show more mentions of the provision than during the period in which this provision would have expired. However, the period immediately prior the sunset date of this provision showed less mentions of this tax cut. As mentioned previously, the 2010 expiration of the

EGTRRA may have inflated mentions of the capital gains and dividend tax cuts, as in the period following this renewal point showed less mentions of this particular provision than even the 2008 renewal point.

The results to my analysis are encouraging, leading me to believe there is sufficient evidence to appropriately theorize that temporary legislation can be, and has been, used for strategic purposes. Application of Kingdon's multiple streams theory to this analysis helps undergird the strength of this argument by providing a theoretical explanation for why strategic use of temporary legislation would be an advantageous course of action. However, an analysis of more recent legislation might indicate that this strategic use is approaching its decline. Despite the explosion in use during the early 2000s, the efficacy of this strategy appears to be waning. Hyperpartisanship, once an accelerant of the use to temporary legislation, may prove to speed its demise as intra-party ideological cohesion becomes increasingly important and a new hurdle for legislators to overcome. It might be that temporary legislation will undergo a further evolution to suit the needs that stem from this change, or it could be that another legislative form finds favor with lawmakers. Whatever the case, legislating in the USA continues to evolve, and so should our observations of the tools lawmakers employ in the pursuit of their goals.

I will end in returning to the original purpose of this paper, to highlight the underappreciated strategic uses of temporary legislation. More broadly speaking, I wish to advocate for a more complete attending to the strategic methods employed by our lawmakers. In this case, I chose to highlight the strategic uses of temporary legislation due to its increased proliferation over the past twenty years. We should always remain cognizant of not only the normative reasons for the use of a legislative form, but also the strategic reasons. Doing so will allow us to take better stock of our political environments, as well as gain more complete understandings the reasons why political actors make the choices they do. In pinpointing the strategic uses of temporary legislation, it is my hope that future research will continue to delve into the strategic uses of other legislative tools as they evolve into the future.

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