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“Lasting Legislation”

Rebecca Kysar

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http://www.law.columbia.edu/center_program/Tax_Policy
LASTING LEGISLATION

Rebecca M. Kysar

Abstract

This Article argues that, due to certain failings and pathologies of the legislative process, legislation enacted with sunset provisions lacks benefits hailed in recent scholarship, while also harming the political process and its output. Proponents have argued that such “temporary legislation” enhances fiscal responsibility because official cost estimates reflect the full cost of the legislation; the cost estimate, in other words, relays the entirety of expenses to Congress upon each sunset date. In contrast, when enacting non-temporary legislation, the theory goes, Congress is provided with official costs only for the duration of the budget window, or the length of time set forth in the annual budget resolution as the relevant period within which Congress makes spending and revenue decisions.

This account is flawed. Many factors—shifting baselines, unstable budget windows, exceptions to the revenue offset or “pay as you go” rules, costs that temporary legislation engenders beyond the budget window, and the ability of lawmakers to consider the full cost of legislation—thwart the theoretical fiscal restraining effect of temporary legislation. Nor do sunset provisions tend to provide lawmakers with enhanced information or flexibility, as proponents of temporary legislation have argued; instead, lawmakers likely will be unable to determine the appropriateness of the sunset, as well as such provision’s most effective scope and length. Furthermore, pro-temporary legislation scholars understate the costs of such legislation: temporary legislation increases rents from interest groups, entrenches current majoritarian preferences, and produces planning conundrums for public and private actors alike. Accordingly, this Article recommends a policy presumption against temporary legislation in most cases and in favor of legislation that does not expire by its own terms, or “lasting legislation.”