1. Introduction

Legislatures are inherently limited. Apart from the difficulties posed by collective choice that judicial and administrative lawmaking can largely circumvent, legislatures face additional difficulties adjusting their laws when adjustment is needed or desired. At the very least, repeals or amendments must be placed on the legislative agenda and thus face opportunity cost comparisons across other legislative actions. Unfavorable cost comparisons can slow or indefinitely suspend legislative adjustment. Meanwhile the initial enactment will continue to govern. To the contrary, when legislation is passed temporarily, it can provide more substantive flexibility than permanent legislation. Precise rules need not be codified to govern for an indefinite duration by default, and can instead be adjusted periodically. Moreover, temporary legislation forces itself onto the legislative agenda at expiration; the legislature must decide to extend the provision in its current form, extend it in a different form, or let it expire completely.

Early law and economics studies that addressed the optimal levels of statutory and judge-made law such as Ehrlich and Posner (1974) were not so much interested in normatively prescribing one type of law over the other. They were more interested in specifying a set of conditions where one type of law would simply perform better. Thus they concluded that statutory law should be favored when legal precision is greatly valued, and that judge-made law should be favored when legal flexibility is greatly valued.

The analysis contained in this book is related to that work in both content and approach. In content, permanent legislation is similar to the statutory law of Ehrlich and Posner (1974); temporary legislation is its more flexible alternative. In approach, this book is less interested in advocating greater use of temporary or permanent legislation at the expense of the other, and is more interested in specifying the sets of conditions where one type of legislation will simply perform better with respect to social welfare maximization.
Law and economics first examined temporary legislation in the early 1980s, a time in which sunsets were being pushed by American advocacy groups in an effort to limit the size of the central governments of the late 1970s. Judge Calabresi, in a book entitled *A Common Law for the Age of Statutes* (1982), was critical of the sunset movement, and perhaps rightly so, since sunsets failed to reduce the size of government as intended. Most were simply rubber-stamped by the legislature for extension as soon as they expired. Accordingly, the prevailing view within law and economics continued to deduce that legislative lawmaking, temporary or not, promoted entrenchment of legal rules and reduced legal flexibility. The prevailing view would eventually associate legislative lawmaking with slow economic growth (La Portal et al., 2008).

As the use of sunsets for legislative oversight began to wane, the scholarship began to pay less and less attention to what it understood as a short-lived (and ill-advised) government accountability movement. Then in the early 2000s, the American legislature began passing tax cuts and credits temporarily, and no longer were sunsets simply rubber-stamped. The scholarship responded theoretically with Garrett (2004) and Kysar (2006) criticizing the practice, and Yin (2009) supporting it. Public-economics scholarship weighed in as well, detailing the optimal length of the budget window for avoiding the socially suboptimal use of sunsets (Auerbach 2006, Dharmapala 2006).

Also amid controversy, normatively charged legislation such as the Violent Crime Control and Law Enforcement Act of 1994 (gun control) and portions of the USA PATRIOT Act of 2001 (domestic surveillance) were passed temporarily as a way to reduce opposition. By the mid-2000s, it was clear that the contemporary use of temporary legislation was being pushed beyond legislative oversight and into areas rich with strategic considerations between political parties, as seen in taxation, and between the legislature and citizens, as seen in socially controversial policy domains.

Yet a further strategic interaction can be induced with temporary legislation between the legislature and a special interest group. Gersen (2007) provided a case study of the temporary passage of the Terrorism Risk Insurance Act of 2002 to illustrate, and chapter 4 models this interaction referencing that case study throughout. Gersen (2007) is of special note as it is the first systematic and contemporary examination of temporary legislation. The article
demonstrates with considerable detail that temporary legislation has a historical pedigree that stretches back at least to the American founding era. Further, its use then bears resemblance to its use now. With respect to taxation, the American constitution limited all appropriations for raising and supporting armies to a term no longer than two years. Trade with Indian tribes was regulated temporarily as well, and likely involved organized interests similar to those of a modern special interest group. Gersen (2007) documents a continued usage of temporary legislation well into the nineteenth and twentieth centuries. The sustained attention that temporary legislation has finally received today seems well deserved.

In addition to the literature specific to temporary legislation, Gersen and Posner (2007) and Luppi and Parisi (2009) have examined the family of legislative tools to which temporary legislation belongs. Temporary legislation is one of several other types of timing rules that permit legislators to specify the actual days that a statute will be in effect. There are delay timing rules, which allow a statute to be enacted today but come into force at a later date. There are deferment, anticipatory, and conditional timing rules under which a statute might be enacted but come into force only if certain specified conditions are met. Each type of timing rule has its own set of strategic considerations, and the theoretical literature is growing.

The principal inquiry of this book is what role the choice of temporary legislation plays in the maximization of social welfare. We begin by examining the choice of temporary versus permanent legislation when law leaves residual effects. We introduce the concept of residual effects in order to aggregate the various theories that purport that law influences behavior independently of its continued codification. For example, law can be expressive, and thereby change existing levels of social sanctioning. If the law is repealed or expires, sanctioning levels may continue to be influenced by the previous legal environment. Similarly, law can inform or create focal points that change organizational or coordinative behavior. Again, if repealed or expired, the behavior may continue to be influenced by the previous legal environment. Other examples include temporary protective tariffs that leave behind new markets or consumer tastes, and lobbies or coalitions that form around a temporary legislative agenda, only to remain intact to pursue other policies once the temporary legislation expires.
In chapter 2 we focus on the residual compliance effect of temporary legislation, and find that it can decrease total legislation costs. Because temporary legislation can, for example, change the state of social norms and lead to increased compliance, legislators can minimize legislation costs with a series of temporary enactments. At each moment of reenactment, passage is less costly since the law has had some time to change the state of social norms and induce further compliance independent of formal enforcement. In controversial policy domains, temporary legislation may be easier to enact in its future instances because it has had time to update social sanctioning levels throughout a population. In addition, the temporary nature of the legislation makes the law easier to pass at its initial stage because the public perceives it to last for a shorter length of time than permanent legislation. Both of these reasons help explain the use of temporary timing rules for controversial policies such as gun control and domestic surveillance. Chapter 2 examines and compares the compliance effects of temporary and permanent legislation in the short to medium term, and specifies the conditions for each legislative type to maximize social welfare.

Even when the choice of temporary legislation may be socially efficient from a short- to medium-term transactions cost perspective, legislators may still prefer permanent legislation. While permanent legislation may offer larger material benefits to legislators, an important reason why legislators may prefer higher cost permanent legislation is that they may be interested in leaving a legacy of statutory rules or normative influence that extends beyond their careers. Chapter 3 examines this possibility, paying special attention to legislators’ ability to generate long-term normative influence. The chapter models the creation of long-term normative influence dynamically, where at its extreme endpoint, a person involuntarily complies absent formal enforcement such as fines or incarceration, or informal enforcement such as pride, guilt, approval, or disapproval. It is likely that the legislator has a less ambitious compliance effect in mind while choosing to legislate permanently, and the model thus explains various degrees of normative legacy for the legislator, including those less impactful than involuntary compliance. Importantly, the model emphasizes that legislators can create and foster an expressive effect of law directly. Contemporary law and economics has largely attributed the expressive effect (i.e. norm creation and updates in social sanctioning levels) to the law itself, or
broadly to the state. In some cases, however, legislators play a very direct role in creating or changing normative behavior. The model emphasizes that role.

Taken together, chapters 2 and 3 provide the theoretical analysis of the strategic interaction between legislators and citizens. Chapter 4 turns to the strategic interaction between legislators and a special interest group. Sometimes a special interest group possesses information that legislators desire for lawmaking. This was the circumstance surrounding the Terrorism Risk Insurance Act of 2002 detailed in Gersen (2007). While special interest groups will not reveal that information if it is not in their interest to do so, legislators may induce revelation with new legislation. Chapter 4 examines the conditions under which a special interest group will reveal in spite of the fact that the legislation is enacted temporarily. In some cases, a special interest group will not reveal and simply wait for the legislation to expire, but in others, temporary legislation can induce revelation, especially when the special interest group receives reputation benefits from revealing. It normatively follows that legislators should increase reputation benefits to special interest groups when legislator and special interest group interests are unaligned, as long as the cost structure of temporary legislation is superior to the cost structure of permanent legislation. Chapter 4 presents an additional finding. Generally, most of the current literature on timing rules supposes that temporary legislation introduces uncertainty and curtails private investment. To the contrary, chapter 4 provides the conditions for which temporary legislation can introduce certainty. Generally, when the legislature is pursuing a policy objective, a temporary timing rule can demonstrate that the legislature is serious about getting the policy right, and therefore signals the certainty of a particular legal environment regardless of the temporary status of the governing legislation.

The final chapter of Part I takes up a special case of temporary legislation, viz. temporary taxation. Temporary taxation highlights the use of temporary legislation to facilitate a strategic interaction between a current legislature and a future legislature. While most of the literature on temporary taxation has condemned its use because it increases rent extraction and introduces uncertainty for private investors, our analysis demonstrates that both of those reasons are normatively ambiguous with respect to social welfare. Nonetheless temporary taxation is socially inefficient because legislators use
Law and the limits of government

temporary taxation as a reelection strategy, and in the process, externalize political costs onto their opponents and social costs of debt service onto the public. The public finance literature, namely Auerbach (2006), suggests that the length of the budget window should be set so as to minimize the strategic use of sunsets. However, that study fails to adequately account for the routine circumvention of budgetary offset requirements by the American legislature. Because of circumvention, legislators will continue to externalize costs at any length of the budget window. Our normative prescription therefore involves constitutionally stipulating that temporary tax cuts or spending increases and their offsets take immediate effect.

Part II addresses the theory contained in Part I with empirical study using data from the 110th American Congress (2007–09). Chapter 6 compares the probabilities that temporary or permanent legislation become law. It also compares those probabilities within a variety of policy domains that are assumed to vary in their ability to generate residual effects. The analysis finds that temporary legislation more easily becomes law in general, and that the probability exhibits variance across policy domains. For example, temporary bills that originate in the Judiciary committee are more likely to become law than temporary bills that originate in the Veterans Affairs committee. This suggests that certain policy domains are more favorable for temporary legislation than others, perhaps according to their capability to generate cost-reducing residual effects, and provides support for the theory set out in chapter 2. It should be noted that because no two bills are substantively alike, we compare the average passage probability of temporary bills with the average passage probability of permanent bills. Because of the limitation, there is a possibility that our data does not perfectly account for the fact that substantive provisions can drive passage probability, as can temporal restrictions. Nonetheless, the model helps formalize the intuition found in the existing literature, i.e., that temporary legislation passes more easily. In addition, the interaction between substance and temporal restrictions is somewhat mitigated by controlling for the bill’s committee of origin.

Chapter 7 tests whether or not the age of the legislation’s sponsor explains the choice of a temporary versus permanent timing rule. Chapter 3 purports that older legislators value leaving a statutory legacy or normative influence to future generations more so than younger legislators. Thus older legislators are more likely to sponsor
permanent legislation than temporary legislation. The study finds moderate support for this theory, and offers some qualified evidence.

In sum, the book examines the choice of temporary versus permanent legislation within three strategic settings. Chapters 2 and 3 examine the interaction between legislators and citizens, chapter 4 between legislators and a lobby, and chapter 5 between current legislators and future legislators. The empirical chapters 6 and 7 primarily focus on the interaction between legislators and citizens, though they do present implications relevant for the relationship between legislators and interest groups that are narrower than the general citizenry.