

3-2019

Dynamic Legislation

Rebecca M. Kysar

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>



Part of the [Tax Law Commons](#)

UNIVERSITY *of* PENNSYLVANIA

LAW REVIEW

Founded 1852

Formerly
AMERICAN LAW REGISTER

© 2019 *University of Pennsylvania Law Review*

VOL. 167

MARCH 2019

NO. 4

ARTICLE

DYNAMIC LEGISLATION

REBECCA M. KYSAR[†]

To overcome congressional gridlock, lawmakers have developed devices that, under certain conditions, provide easier paths to policy change. Procedural mechanisms may eliminate the threat of filibuster and other barriers to legislating. Laws may prompt

[†] Professor of Law, Fordham University School of Law; Professor of Law, Brooklyn Law School. I thank Julian Arato, Miriam Baer, Chris Beauchamp, Jim Brudney, Aaron-Andrew Bruhl, Steven Dean, Bill Eskridge, Miranda Fleischer, David Gamage, Brian Galle, Jonah Gelbach, Abbe Gluck, Ted Janger, Leandra Lederman, Ethan Leib, Brian Lee, Sabeel Rahman, Alice Ristroph, Adam Rosenzweig, Dan Shaviro, Linda Sugin, Deb Widiss, and workshop participants at Brooklyn Law School, Fordham University School of Law, the Maurer School of Law at Indiana University, the Moritz College of Law at Ohio State University, and the Yale Law School for valuable comments and discussion on the topic and drafts. I also thank Christopher Whelan for superb research assistance.

Congress to act through sunset dates, penalties like sequestration, or other undesirable policy outcomes. Alternatively, the legislative product itself may spontaneously update without further action by Congress, a category I label “dynamic legislation.” For instance, during consideration of recent tax legislation, lawmakers proposed that certain tax cuts be automatically ratcheted down if the bill failed to generate sufficient economic growth and that delayed tax increases not go into effect if revenue hurdles were met.

Of these various tools, I argue that dynamic legislation has the most potential to combat legislative inertia while also meeting the challenges of the democratic process. Specifically, dynamic legislation outperforms the other tools because it leverages the resources of the administrative state without succumbing to excessive deference, it does not impermissibly entrench the current majority, and it is not as susceptible to the pathologies of the political economy and budget processes. Dynamic legislation also provides a mechanism by which Congress can evaluate itself, automatically adjusting laws depending on how well they are performing. Dynamic legislation holds particular promise in areas, like fiscal policy, where these concerns are acute, and where its design is not too costly.

INTRODUCTION	811
I. IS THE STATUS QUO BIAS A PROBLEM?	815
II. POTENTIAL TOOLS IN OVERCOMING THE STATUS QUO BIAS	818
A. <i>Veto Bridges</i>	818
B. <i>Prompting Legislation</i>	821
1. Sequestration.....	822
2. Sunset Provisions	824
3. Prompting Legislation and the Status Quo Bias.....	825
C. <i>Dynamic Legislation</i>	827
III. DEMOCRATIC CONSIDERATIONS.....	831
A. <i>Interaction with the Administrative State</i>	832
B. <i>Entrenchment Concerns</i>	835
1. Veto Bridges and Entrenchment	836
2. Prompting Legislation and Entrenchment.....	837
3. Dynamic Legislation and Entrenchment	841
C. <i>Political Economy and Fairness Concerns</i>	844
1. Veto Bridges and Fairness	844
2. The Political Economy of Prompting Legislation	846
3. The Political Economy of Dynamic Legislation	849
D. <i>Integrity of the Budget Process</i>	851
1. Budgetary Games, Prompting Legislation, and Veto Bridges ..	852
2. Dynamic Legislation and the Budget Process	854

IV. IMPLEMENTATION	855
A. <i>General Principles for Applicability</i>	856
B. <i>Potential Applications</i>	858
1. Pigouvian and Similar Taxes	858
2. Nontraditional Phase-Ins and Phase-Outs	859
3. Countercyclical Laws	861
4. Regionally Targeted Legislation	863
5. Intralegal and Budgetary Measures	864
a. <i>Overall budget constraints</i>	864
b. <i>“Reverse Earmarking”</i>	865
c. <i>Tax “Triggers” and Responsible Tax Cutting</i>	866
CONCLUSION	868

INTRODUCTION

In recent years, Congress has lurched from one fiscal or budget crisis to another. Expiring tax laws, government shutdowns, debt ceiling limits, and sequesters have created an atmosphere of legislative chaos, requiring congressional action to avoid dire consequences. On the precipice of each cliff, real costs have ensued from the anticipation that Congress will fail to reach a deal.¹ Future crises seem inevitable, as the nation’s debt repeatedly approaches the ceiling, clashes over annual spending levels increase, sequestration continues to loom, and temporary tax policies once again take hold.²

Yet these events are of Congress’s own making, a direct and foreseeable product of the legal mechanisms it has created. Why then does Congress keep setting itself up for failure, creating games of chicken that have the potential

1 In 2011, for instance, a ratings agency downgraded American bonds for the first time, citing the brinksmanship over fiscal policy as evidence that America’s political institutions have become too dysfunctional to meet ongoing fiscal and economic challenges. STANDARD & POOR’S, UNITED STATES OF AMERICA LONG-TERM RATING LOWERED TO ‘AA+’ ON POLITICAL RISKS AND RISING DEBT BURDEN; OUTLOOK NEGATIVE 3 (2011); see also Zachary A. Goldfarb, *S&P Downgrades U.S. Credit Rating for First Time*, WASH. POST (Aug. 6, 2011), https://www.washingtonpost.com/business/economy/sandp-considering-first-downgrade-of-us-credit-rating/2011/08/05/gIQAqKefXI_story.html [<https://perma.cc/JXS2-E547>].

2 As of this writing, congressional leaders enacted a stopgap measure to fund the government but only for a short period, ensuring another fiscal clash. Fourth Continuing Appropriations for Fiscal Year 2018, Federal Register Printing Savings, Healthy Kids, Health-Related Taxes, and Budgetary Effects, Pub. L. No.115-120, 132 Stat. 28 (2018). On the tax side, Congress recently enacted temporary tax cuts, many of which expire in 2025. Act of Dec. 22, 2017, Pub. L. No. 115-97, 131 Stat. 2054 (codified as amended in scattered sections of 26 U.S.C.). This will likely set up another fiscal cliff similar to the one in 2012, which was created, in part, by the expiring Bush tax cuts. See David Kamin, *Basing Budget Baselines*, 57 WM. & MARY L. REV. 143, 146 (2015).

to end catastrophically.³ In designing these mechanisms, Congress recognizes its limited capacity to respond to evolving circumstances. The legislative process contains a status quo bias, making congressional response to changing social, technological, environmental, economic, and foreign policy conditions challenging. Other factors have combined with constitutional design to create a system of government that, in the view of many, is hopelessly gridlocked. To compensate for the status quo bias in lawmaking, lawmakers have developed devices that aim to provide paths to legislative change, such as prodding Congress into action by threatening policy cliffs or crises.

Although scholars have long addressed extracongressional means of addressing this status quo bias, such as judicial expansion of the common law, dynamic statutory interpretation, and agency delegation,⁴ only recently has focus shifted to these congressional tools.⁵ Assuming it is possible to achieve, locating the solution to legislative inertia within the lawmaking body itself, as opposed to the judiciary or agencies, is preferable from the perspective of institutional competence and separation of powers. Yet, as the legislative crises

³ See DANIEL SHAVIRO, TAXES, SPENDING, AND THE U.S. GOVERNMENT'S MARCH TOWARDS BANKRUPTCY 121-22 (2006) (describing fiscal gap politics as involving, in game theory terms, games of chicken).

⁴ See generally GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1985) (proposing that courts sunset statutes to overcome legislative inertia); WILLIAM N. ESKRIDGE JR., DYNAMIC STATUTORY INTERPRETATION 9-11 (1994) (theorizing about the judicial updating of laws through the interpretation of statutes against a backdrop of changing contexts, norms, and public values); Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 2, 2-7 (2014) (setting forth a descriptive and normative account of agencies as the primary updaters of statutes); Jeffrey Shuren, *The Modern Regulatory Administrative State: A Response to Changing Circumstances*, 38 HARV. J. ON LEGIS. 291, 292 (2001) (contending that the modern function of the regulatory state is to allow a means for the federal government to respond to evolving circumstances).

⁵ In prior work, I have explored and critiqued several of these congressional tools, including temporary legislation and the reconciliation process. Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007, 1007-08 (2011) (arguing for a presumption against temporary legislation, especially in the context of tax legislation); Rebecca M. Kysar, *Reconciling Congress to Tax Reform*, 88 NOTRE DAME L. REV. 2121, 2144-48 (2013) [hereinafter Kysar, *Reconciling Congress*] (critiquing the reconciliation process as an agent for tax reform); Rebecca M. Kysar, *Tax Law and the Eroding Budget Process*, 81 LAW & CONTEMP. PROBS. 61, 61 (2018) [hereinafter *Budget Process*] (arguing that subjecting the budget process to partisan wrangling challenged fundamental aspects of the budget process itself); Rebecca M. Kysar, *The Sun Also Rises: The Political Economy of Sunset Provisions in the Tax Code*, 40 GA. L. REV. 335, 338-39 (2006) [hereinafter Kysar, *Sun Also Rises*] (arguing that sunset provisions "do not function as 'good government' tools in the tax legislative arena"). For other notable works on temporary legislation, see Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 248-49 (2007), making a positive case for the use of sunsets, and George K. Yin, *Temporary-Effect Legislation, Political Accountability, and Fiscal Restraint*, 84 N.Y.U. L. REV. 174, 193-94 (2009), defending temporary legislation as fostering political accountability and fiscal restraint. In an important article, David Kamin discusses congressional tools that overcome the less general (but related) problem of "policy drift" in the legislative process. Like myself, Kamin supports the promise of dynamic legislation but for substantive policy reasons largely apart from my own, which are grounded in democratic process. David Kamin, *Legislating for Good Times and Bad*, 54 HARV. J. LEGIS. 149, 202-04 (2017).

of the past decade demonstrate, the tools that Congress most often employs can have devastating effects. It thus seems wise to explore Congress's entire arsenal of anti-status quo devices, including those that are less often exercised.

The congressional anti-status quo devices can be divided into three main categories.⁶ Procedural mechanisms—like the reconciliation process—may eliminate barriers to legislating. I label these mechanisms “veto bridges” as an antonym to the often used “veto gates,” which refer to those points in the legislative process that can derail legislative proposals.⁷ Laws may also prompt Congress to act through sunset dates or penalties like sequestration or other undesirable policy outcomes. I identify this category as “prompting legislation.” Finally, the legislative product itself may automatically update without further action by Congress through the use of what I call “dynamic legislation.”⁸ This type of legislation spontaneously adjusts legal rules to future circumstances based on predetermined, external criteria.

I contend that it is this last category—dynamic legislation—that has the most untapped potential from a democratic process perspective.⁹ Specifically,

⁶ This typology largely tracks and benefits from David Kamin's categorization for congressional devices against policy drift. Kamin, *supra* note 5, at 171-82. There are, however, differences between them, and I have departed from Kamin's terminology in order to highlight these differences and also to connect the categories with the legislative process literature.

⁷ See McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3, 11 (1994) (using the number of veto gates that need “passing” as one factor impacting “degree of difficulty for changing a policy bargain”); see also William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1444-46 (2008) (naming and describing nine such veto gates).

⁸ I use the term “dynamic legislation” to relate the concept to “dynamic statutory interpretation,” William Eskridge's famous theorizing of the interpretive process as a means through which the courts and agencies assist in the adaptation of law to evolving circumstances, norms, and public values. See ESKRIDGE, *supra* note 4, at 5-6 (“My initial and primary goal is to advance a thesis: that statutory interpretation is *dynamic* . . . as a description of what courts and agencies do . . .”). Dynamic legislation also aims to achieve updating of policy, but does so through means intrinsic, rather than extrinsic, to the law and Congress. Kamin refers to dynamic legislation as “automatic-adjustment mechanisms.” Kamin, *supra* note 5, at 171 (describing an “automatic-adjustment mechanism” as one that updates a legal framework for a “new set of conditions”).

⁹ Tax is an area that currently employs dynamic legislation; however, the full potential of this device has not been realized even in that context. Some, for instance, have argued that the tax code needs to take better account of inflation. See, e.g., Daniel Halperin & Eugene Steuerle, *Indexing the Tax System for Inflation*, in UNEASY COMPROMISE: PROBLEMS OF A HYBRID INCOME-CONSUMPTION TAX 347 (Henry J. Aaron, Harvey Galper, and Joseph A. Pechman eds., 1988); Michael C. Durst, *Inflation and the Tax Code: Guidelines for Policymaking*, 73 MINN. L. REV. 1217, 1220 (1989) (arguing that the rejection of indexation “may reflect a failure to recognize the full economic and political significance of inflation's effects”); Reed Shuldiner, *Indexing the Tax Code*, 48 TAX L. REV. 537, 538-39 (1993) (describing problems that may arise as a result of failing to properly account for inflation). Tax brackets could also be adjusted annually to take into account not only inflation, as is the case now, but also inequality and regional differences. Leonard E. Burman et al., *The Rising-Tide Tax System: Indexing (at Least Partially) for Changes in Inequality* 1-2 (June 5, 2006) (unpublished manuscript), <http://aida.wss.yale.edu/~shiller/behmacro/2006-11/burman-rohaly-shiller.pdf> [https://perma.cc/HA84-25RN]; see also David Albouy, *The*

I argue that dynamic legislation outperforms the other anti-status quo devices because it leverages the resources of the administrative state without succumbing to excessive deference, does not impermissibly entrench the current majority, and is not as susceptible to the pathologies of the political economy and budget processes. Democratic considerations, in other words, weigh in favor of dynamic legislation as a preferred tool against legislative inertia. This Article thus builds the case that dynamic legislation has much to offer *categorically*. It therefore departs from the scant scholarship that exists on the topic, which has traditionally judged dynamic legislation from the standpoint of the particular policies at issue.¹⁰

From a practical perspective, each of the aforementioned tools have limitations. Veto bridges are unenforceable and nonsubstantive in nature. Prompting legislation disrupts planning by private and public actors. Dynamic legislation is often costly to design, requiring information upfront.¹¹ The impact of these limitations is context specific, but dynamic legislation holds the most potential in areas where quantitative indices can be developed to minimize its design costs. It also will be desirable when the area of law presents acute concerns in the democratic categories outlined above—criteria in which dynamic legislation performs favorably.

Notably, fiscal policy shares all of these qualities. This partially explains why this area already contains a greater degree of dynamic legislation than other areas. Several features of the tax code, for instance, are indexed to inflation.¹² Recently, during consideration of the 2017 tax bill, lawmakers proposed that the bill's tax cuts be automatically ratcheted down if the bill

Unequal Geographic Burden of Federal Taxation, 117 J. POL. ECON. 635, 635-36 (2009) ("Indexing the tax code to local costs would eliminate federal tax differences across cities that vary in productivity but exacerbate them across cities that vary in quality of life."); Louis Kaplow, *Regional Cost-of-Living Adjustments in Tax/Transfer Schemes*, 51 TAX L. REV. 175, 177 (1996) (analyzing the efficiency of tax adjustments based on regional differences); Michael S. Knoll & Thomas D. Griffith, *Taxing Sunny Days: Adjusting Taxes for Regional Living Costs and Amenities*, 116 HARV. L. REV. 987, 989 (2003) ("[T]he failure to adjust individuals' tax liabilities for different regional living costs misallocates capital and labor throughout the economy . . ."). I suggest other possible reforms below. See *infra* notes 223-250 and accompanying text.

¹⁰ See, e.g., Daniel Shaviro, *The More it Changes, the More it Stays the Same? Automatic Indexing and Current Policy*, in *THE TIMING OF LAWMAKING* 64, 85 (Frank Fagan & Saul Levmore eds., 2017) (stating that one should judge dynamic legislation on the basis of the "meta-policy" at issue). For sources exemplifying this approach, see sources cited *supra*, note 9.

¹¹ See David Kamin, *In Good Times and Bad: Designing Legislation that Responds to Fiscal Uncertainty* 22 (Hutchins Ctr. on Fiscal & Monetary Policy at the Brookings Inst., Working Paper No. 7 (2014)) (making a similar proposal in the Social Security context).

¹² See Rev. Proc. 2016-55, 2016-45 I.R.B. 707 (updating the tax rate tables and various credits and deductions to take inflation into account).

failed to generate sufficient economic growth,¹³ and that other tax increases be turned off if a revenue hurdle was met.¹⁴

Other areas of fiscal policy also use dynamic legislation to some extent. For instance, certain unemployment insurance benefits are keyed off a state's overall unemployment level. Some features of Social Security are indexed for inflation, and Medicare premiums are tied to health care costs to an extent. Even still, dynamic legislation is underutilized in these and other contexts. The design features of dynamic legislation could be particularly useful in designing Pigouvian taxes because they could be calibrated to the cost of current negative externalities as they reveal themselves.¹⁵ Phase-ins and phase-outs that adjust according to varying circumstances, rather than dates on the calendar, hold promise, as do countercyclical and regionally targeted laws. Finally, laws could be tied to one another or, like the 2017 tax proposals, to a budgetary goal. Notably, many of these examples show that dynamic legislation also provides a mechanism by which Congress can evaluate itself, automatically adjusting laws depending on how well they are performing.

In Part I, I first address the antecedent question of whether the current level of status quo bias in lawmaking is desirable. In Part II, I lay out possible tools that Congress can use to overcome the status quo bias—veto bridges, prompting legislation, and dynamic legislation—and their effectiveness at achieving that goal. In Part III, I examine democratic considerations, including those relating to interaction with the administrative state, entrenchment, the political economy, and the budget process. Across all of these categories, I argue that dynamic legislation outperforms the other tools. Finally, in Part IV, I consider in what circumstances dynamic legislation should be employed and offer suggestions for its implementation.

I. IS THE STATUS QUO BIAS A PROBLEM?

Before addressing solutions to the status quo bias in American lawmaking, one may rightfully ask if there even is a problem. After all, the Constitution's many hurdles to lawmaking are part of its contemplated design, intentionally

¹³ Jacob Pramuk, *Senate GOP Rushes to Change Tax Bill as Setback Hits Hours Before Vote*, CNBC (Nov. 30, 2017), at <https://www.cnbc.com/2017/11/30/parliamentarian-says-revenue-trigger-in-gop-tax-plan-will-not-work-under-rules-of-senate.html> [<https://perma.cc/MY6Z-JRRV>].

¹⁴ Jonathan Curry, *Senate Republicans Contort Tax Bill to Fit Byrd Rule Box*, TAX NOTES (Nov. 16, 2017), <https://www.taxnotes.com/editors-pick/senate-republicans-contort-tax-bill-fit-byrd-rule-box> [<https://perma.cc/P59V-EL2B>].

¹⁵ Pigouvian taxes are corrective taxes that cause parties to internalize the marginal social costs of an activity that are not already included in the activity's market costs (i.e. externalities). Ideally, the taxes would be precisely set to these externalities. A.C. PIGOU, *THE ECONOMICS OF WELFARE* 192-96 (4th ed. 1932).

balancing between policy stability and the whims of majority rule.¹⁶ Veto gates like bicameralism and the executive veto collectively weigh heavily in favor of maintaining the status quo.¹⁷

Yet much of today's legislative stalemate can be attributed to dynamics wholly apart from constitutional design. Supermajority rules, for instance, are absent from the Constitution yet contribute significantly to congressional stalemate.¹⁸ Additionally, the committee system is an extraconstitutional culprit of congressional gridlock, adding yet another combination of decisionmakers who must reach consensus.¹⁹

Nonetheless, from a normative perspective, it might seem that the status quo bias in lawmaking is not problematic. For instance, because we follow majority rule, we should respect existing laws since they represent the preferences of the majority.²⁰ Stable law also encourages investment and facilitates planning.²¹ There are, however, circumstances where we may wish to depart from allegiance to the status quo.

The legislative process, at times, fails to reflect the preferences of lawmakers and constituents. This breakdown is due to various phenomena such as cycling problems, strategic behavior, and the inability to gauge the intensity of legislative preferences.²² Condorcet's paradox, for instance, illustrates that,

¹⁶ See, e.g., THE FEDERALIST NO. 73, at 441-42 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (characterizing the separation of the executive from the legislature as "additional security against the [enactment] of improper laws," the threat of which overcomes "[t]he injury which may possibly be done by defeating a few good laws").

¹⁷ William Eskridge Jr., *Vetogates and American Public Law*, 31 J.L. ECON. & ORG. 756, 756-760 (2012).

¹⁸ Michael J. Teter, *Congressional Gridlock's Threat to Separation of Powers*, 2014 WIS. L. REV. 1097, 1107-08 (detailing the rise of the filibuster and its contribution to gridlock).

¹⁹ Aaron Andrew-Bruhl, *Using Statutes to Set Legislative Rule: Entrenchment, Separation of Powers and the Rules of Proceedings Clause*, 19 J.L. & POL. 345, 355 (2003). Other extraconstitutional hurdles stymie lawmaking, such as getting support from the Rules Committee to place the bill on the legislative calendar. *Id.*

²⁰ CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 163 (1993).

²¹ This point was not lost on the Framers. THE FEDERALIST NO. 62, at 378 (James Madison) (Clinton Rossiter ed., 1999). ("But a continual change even of good measures is inconsistent with every rule of prudence and every prospect of success. The remark is verified in private life, and becomes more just, as well as more important, in national transactions.").

²² Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1545-46 (1988); see also KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 95 (2d ed. 1963) ("It was in this context that Condorcet discovered that pairwise majority comparisons might lead to . . . an indeterminacy in the social choice."); JON ELSTER, NUTS AND BOLTS FOR THE SOCIAL SCIENCES 124-34 (1989) (describing the strategic behavior in the collective action problem); WILLIAM RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF CHOICE 137 (1982) ("[A]ny system of voting can be manipulated to produce outcomes advantageous to the manipulators or at least different from outcomes in the absence of manipulation.").

under certain conditions, the order in which decisions are made, as opposed to majority preferences, determines the outcome of majority voting.²³

Collective action problems may also prevent legislators from voting for their primary preferences if others defect from a common goal. For instance, suppose each member of Congress prefers deficit reduction. Constituents may punish individual members if they vote to take away desirable but costly benefits unless other members also vote to do the same. It is thus in every member's interest to vote in favor of deficit reduction. Still, individual members may defect from that common goal if they suspect others of potentially doing so. In this case, deficit reduction is not achieved even though it would reflect aggregate preferences.

Other phenomena may lead to laws remaining on the books even though they diverge from current legislative preferences. Increased polarization in American politics may create a bias for existing policies, rather than new, more preferable ones, by impeding compromise deals.²⁴ In this environment, politicians may disagree only for the sake of disagreement so that they may differentiate themselves from the other party, rather than because of policy preferences.²⁵

Congress also has limited resources and time, which constrains its agenda. Even though congressional preferences on many issues may have shifted, Congress only has the ability to address a subset of these issues. Additionally, each veto gate in the legislative process creates an opportunity for the policy proposal to die without sufficient advocacy.

Interest group dynamics may also stymie the ability of the legislative process to gauge preferences accurately. Public choice scholars describe the legislative process as a marketplace of policies, with different types of legislation producing varying levels of supply and demand.²⁶ Interest groups are advantaged over the diffuse public because of their greater ability to coordinate among themselves, and they are generally more motivated. This increased motivation is a result of their relatively small numbers resulting in a group's membership experiencing a greater proportion of harm and benefit as compared to the public. Interest groups are an important factor in ensuring that the policy issue stays on the congressional agenda at each veto gate. We should therefore expect a greater

²³ Assuming that Congress would prefer Policy A over Policy B, Policy B over Policy C, and Policy C over Policy A, majority rule results in no clear, stable outcome. Policy A will win if it faces the victor of a vote between Policy B and Policy C. Policy C, however, will become law if Congress first chooses between Policy A and Policy B. *See generally*, ARROW, *supra* note 22, at 3.

²⁴ Kamin, *supra* note 5, at 160.

²⁵ *Id.* The work of Nolan McCarty, Keith T. Poole, and Howard Rosenthal uses NOMINATE scores to measure polarization in Congress and has shown a widening chasm between the two political parties. NOLAN MCCARTY ET. AL., *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* 15-34 (2008).

²⁶ *See* Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 373-74 (1983) (laying out how influence factors play out when looking at different homogenous groups).

supply of private-regarding, as opposed to public-regarding legislation, even though the public would prefer the latter.²⁷

It may also be relevant to look at the *degree* of legislative stalemate to conclude that current levels are unacceptable, since they are out of line with historical norms. Political scientists have tried to quantify this trend. Sarah Binder has measured Congressional productivity regarding legislation on significant issues, concluding that congressional gridlock has basically doubled since the 1940s.²⁸ Three-quarters of these issues are now subject to gridlock, according to Binder, whereas this number was as low as twenty-seven percent in the postwar, Great Society Congress.²⁹ Although measures of gridlock at the time of the Founding have not been conducted, it is fair to say that gridlock has dramatically increased in the past few decades.

All of this is not to say, of course, that the status quo should always be overturned. Sometimes, existing law reflects the best policy, and there are also costs to changing course. This discussion, however, aims to question the argument that the current level of policy stasis in U.S. lawmaking is preferable from either a normative or a constitutional perspective. Still, even skeptics of the above analysis may support the use of congressional tools since they do not require extracongressional interference with the lawmaking process. Congress surely has the insight and power to cure ills it perceives of itself. The remainder of this Article is devoted to analyzing the efficacy of those tools and their effects upon the democratic process.

II. POTENTIAL TOOLS IN OVERCOMING THE STATUS QUO BIAS

In this Part, I will describe in detail the potential tools that Congress can use to overcome the status quo bias in lawmaking—veto bridges, prompting legislation, and, lastly, dynamic legislation.

A. *Veto Bridges*

As discussed above, the status quo bias in American lawmaking results partially from Congress's own internal procedures. Congress, however, has also devised internal mechanisms that make lawmaking *easier*. These “veto bridges” may reverse “veto gates” previously erected by Congress or may

27 WILLIAM N. ESKRIDGE, PHILIP P. FRICKEY, ELIZABETH GARRETT & JAMES J. BRUDNEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 47-48 (5th ed. 2014).

28 SARAH BINDER, *POLARIZED WE GOVERN* 10 (2014), https://www.brookings.edu/wp-content/uploads/2016/06/BrookingsCEPM_Polarized_figReplacedTextRevTableRev.pdf [https://perma.cc/4Q3J-GR6M].

29 *Id.*

otherwise create shortcuts to lawmaking.³⁰ Because veto bridges are congressional procedures governing lawmaking, they are a subset of a category of legislative rules. Article I vests “all legislative powers” in the House and Senate,³¹ and under the Rulemaking Clause states that each body “may determine the Rules of its Proceedings.”³² Aside from making their own rules, each house has the power to unilaterally change or waive them, even when such rules are enacted through statutes.³³

Fast track processes are the most powerful of the veto bridges, establishing streamlined procedures for considering legislation. There are examples of fast track in a number of subject matters, including trade promotion authority, unfunded mandates, nullification of agency regulations, and the closure of military bases, among many others.³⁴ Here, I largely examine one such process, reconciliation, because its importance has risen in recent years.³⁵

³⁰ For discussions of congressional procedures reforming the lawmaking process, see generally Aaron Andrew-Bruhl, *Return of the Line Item Veto? Legalities, Practicalities, and Some Puzzles*, 10 U. Pa. J. Const. L. 447, 449 (2008) [hereinafter Andrew-Bruhl, *Return of the Line Item Veto?*], exploring expedited rescissions, and Andrew-Bruhl, *supra* note 19, discussing fast track trade processes. Barbara Sinclair’s work on “unorthodox lawmaking” is also relevant since these rules set up alternative lawmaking procedures. See generally BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (2012) (recognizing the important phenomenon of legislation that occurs outside the traditional path of lawmaking). Beth Garrett’s work on framework laws also discusses many of these processes about lawmaking. See generally Elizabeth Garrett, *Conditions for Framework Legislation*, in THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 294, 307-18 (Richard W. Bauman & Tsvi Kahana eds., 2006). The budget process has also historically been an area of procedural innovation. See ALLEN SCHICK, THE FEDERAL BUDGET 142-49 (3d ed 2007) (focusing on the budget reconciliation process); CHARLES H. STEWART III, BUDGET REFORM POLITICS: THE DESIGN OF THE APPROPRIATIONS PROCESS IN THE HOUSE OF REPRESENTATIVES, 1865-1921 (1989) (detailing the appropriations process); Allen Schick, *A History of Reconciliation*, 49 CONG. Q. ALMANAC 116 (1993); Charles Tiefer, *How to Steal a Trillion: The Uses of Laws about Lawmaking in 2001*, 17 J.L. & POL. 409 (2001) (discussing the legislative innovations that allowed for the passage of a controversial tax cut in George W. Bush’s administration). Authors have also addressed the modern day realities of the modern congressional process from the statutory interpretation perspective. See Lisa Bressman & Abbe Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I*, 65 STAN. L. REV. 901, 911 (2013) (“A study of drafting ‘reality’ has obvious significance for evaluating canons that are intended to reflect or affect Congress.”); Lisa Bressman & Abbe Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part II*, 66 STAN. L. REV. 725, 762 (2014) (“Our own research is consistent with our respondent’s accounts of the increasingly unorthodox legislative process.”).

³¹ U.S. CONST. art. I, § 1.

³² *Id.* at § 5.

³³ For an exploration of expedited rescissions, see Andrew-Bruhl, *supra* note 19, and Andrew-Bruhl, *Return of the Line Item Veto?*, *supra* note 30; see also Rebecca M. Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 CORNELL L. REV. 519, 553-62 (2009).

³⁴ See Andrew-Bruhl, *supra* note 19, at 346 n.9 (providing a detailed list of fast track statutes and session laws).

³⁵ Other procedural mechanisms allow for a streamlined lawmaking process. Under unanimous consent agreements, amendments are restricted and debate is limited. CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., RS20668, HOW MEASURES ARE BROUGHT TO THE HOUSE FLOOR: A

Reconciliation allows bills to pass without being subject to filibusters or nongermane amendments.³⁶ Originally created by the Congressional Budget Act of 1974 (the “Budget Act”) as a modest means to reconcile the first budget resolution with the now eliminated second resolution, reconciliation has since evolved into a versatile tool to enact complex, controversial budget-related legislation such as large tax cuts and health care reform.³⁷ Such legislation would not have passed without the reconciliation process because it lacked supermajority support.³⁸

Are veto bridges strong or weak devices in overcoming the status quo? In one sense, they are extremely effective since they have the ability to tear down strong veto gates that Congress has erected. They also help to coordinate congressional action. On the other hand, because legislative rules are not externally enforceable,³⁹ their scope is often in flux. For instance, in 2001, Senate Republicans successfully enacted some of the country’s largest tax cuts in history through the reconciliation process.⁴⁰ The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) sunsetted the cuts so that they did not violate the “Byrd rule,” which prohibits reconciliation legislation from increasing deficits beyond the budget window period (a ten-year period, at the time of enactment).⁴¹ This procedure was controversial at the time since many

BRIEF INTRODUCTION 5 (2012); VALERIE HEITSHUSEN, CONG. RESEARCH SERV., 96-548, THE LEGISLATIVE PROCESS ON THE SENATE FLOOR: AN INTRODUCTION 7 (2014). Under a closed rule in the House, there can be no amendments to a bill on the floor, and in recent years, the House has increasingly used such rules. See Michael Doran, *The Closed Rule*, 59 EMORY L.J. 1363, 1398-1400 (2010); Sabrina Siddiqui, *House Republicans Adopted Record Number of Closed Rules in 2013*, HUFFINGTON POST (Jan. 6, 2014), http://www.huffingtonpost.com/2014/01/06/congress-closed-rules_n_4546762.html [<https://perma.cc/L7V7-MRWD>] (“Republicans adopted 19 closed rules during the government shutdown in October, the most in a single week . . .”).

³⁶ See Congressional Budget Act of 1974 § 310(e)(2), Pub. L. No. 93-344, 88 Stat. 297, 316 (“Debate in the Senate on any reconciliation bill or resolution reported under subsection (c), and all amendments thereto and debatable motions and appeals in connection therewith, shall be limited to not more than 20 hours.”); Anita Krishnakumar, Note, *Reconciliation and the Fiscal Constitution: The Anatomy of the 1995–96 Budget “Train Wreck,”* 35 HARV. J. ON LEGIS. 589, 590 (1998) (arguing that reconciliation does not significantly impel budgetary reform).

³⁷ See Krishnakumar, *supra* note 36, at 590. (“In recent years particularly, reconciliation has become the centerpiece of the congressional budget process . . .”); Kysar, *Reconciling Congress*, *supra* note 5, at 2122-39 (tracing the evolution of the reconciliation process).

³⁸ Because of the circumvention of the filibuster and the need to garner the votes of more moderate Senators, however, reconciliation tends to produce more extreme, and hence less stable, legislation. Kysar, *Reconciling Congress*, *supra* note 5, at 2144-45.

³⁹ The judiciary views the interpretation, application, and enforcement of legislative rules as wholly within the congressional realm, unless fundamental rights or constitutional restraints are concerned. Kysar, *supra* note 33, at 553-62.

⁴⁰ Kysar, *Sun Also Rises*, *supra* note 5, at 370.

⁴¹ Fitting the tax cuts within the budget window was the original impetus for the sunsets; the sunsets were shortened even further to lower revenue losses from the bill. See *id.*, at 375-78.

saw reconciliation as a vehicle for deficit reduction.⁴² Reconciliation, however, was again used for tax cuts in the Jobs and Growth Tax Relief Reconciliation Act of 2003 (JGTRRA), which were also sunsetted to reduce the bill's revenue losses.⁴³ Collectively and commonly referred to as the "Bush tax cuts," these were two of the largest tax cuts in American history.⁴⁴

Several years later when Democrats regained control of Congress, each house imposed points of order against reconciliation bills that increased the deficit, essentially foreclosing the use of reconciliation for unpaid-for tax cuts.⁴⁵ The House then reversed itself again in 2011 when it changed hands to the Republicans and lifted the prohibition against deficit-increasing reconciliation measures. It instead implemented a rule against using reconciliation to increase net spending.⁴⁶ In each instance, a simple majority in each house decided the current scope of reconciliation, exposing its boundaries as quite unstable.⁴⁷ The general trend seems to be toward allowing reconciliation in a wide variety of contexts, including passing health reform⁴⁸ and, more recently, complex tax reform.⁴⁹

The flexibility of veto bridges is thus perhaps their greatest strength and greatest challenge. On the one hand, veto bridges are powerful instruments that are increasingly employed to overcome procedural hurdles. On the other hand, the contestability over their fluid boundaries makes their availability unpredictable and, at times, their deployment contentious. Their endogeneity also means they can be easily evaded and, as a constitutional matter, can be changed by a simple majority in one house.

B. Prompting Legislation

Prompting laws are a category of laws that are designed to induce Congress to act at a later date. Prompting legislation attempts to move Congress towards a particular substantive result through the threat of

⁴² ALLEN SCHICK, *THE FEDERAL BUDGET: POLITICS, PROCESS, POLICY* 142-49 (3d. ed. 2007).

⁴³ Mark Abbott & Patrick Sullivan, *Focus on Congress*, 99 TAX NOTES 1357 (2003).

⁴⁴ Jonathan Weisman & Naftali Bendavid, *Obama Eyes \$300 Billion Tax Cut*, WALL ST. J. (Jan. 5, 2009), <https://www.wsj.com/articles/SB123111279694652423>.

⁴⁵ H.R. Res. 6, 110th Cong. § 402-03 (2007); S. Con. Res. 21 § 203, 110th Cong. (submitted as amended on May 8, 2007).

⁴⁶ H.R. Res. 5, 112th Cong. § 2(d)(1) (2011).

⁴⁷ Each of these changes was made via the budget resolution, which is filibuster-proof.

⁴⁸ Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

⁴⁹ Act of Dec. 22, 2017, Pub. L. No. 115-97, 131 Stat. 2054 (codified as amended in scattered sections of 26 U.S.C.). For an overview of some of the procedural tactics discussed by Republicans to fit the tax legislation through reconciliation, see Kysar, *Budget Process*, *supra* note 5, at 61; see also David Kamin & Rebecca Kysar, *Temporary Tax Laws and the Budget Baseline*, 157 TAX NOTES 125, 129 (2017), which discusses how Republicans could use a "current policy" baseline approach to comply with the requirements of reconciliation.

undesirable outcomes. Sequestration and temporary legislation are the two primary subcategories of prompting legislation.

1. Sequestration

Sequestration is a process that is employed to reduce spending by cancelling certain budgetary programs within specified parameters. Sequestration places caps on programs and expenditures and removes any excess above such caps.⁵⁰ The sequestered funds can ratably come from all of public spending or according to weighted formulas that advantage certain types of spending over others.⁵¹

Congress first experimented with sequestration by adopting the Gramm-Rudman-Hollings Act (GRH) in 1985.⁵² GRH was a response to the massive deficit increases that followed the enactment of the 1974 Budget Act.⁵³ Specifically, GRH threatened to sequester spending that failed to meet annual deficit targets by automatically imposing an expenditure ceiling “across the board,” on both domestic and defense spending.⁵⁴ In the end, GRH failed to accomplish its goal of deficit reduction. Lawmakers circumvented sequestration by engaging in budget gimmicks and shifting the deficit targets.⁵⁵

Eventually, lawmakers found GRH’s deficit targets and enforcement mechanisms unworkable in light of a recession that began in 1990.⁵⁶ Dissatisfied with GRH’s effectiveness, Congress turned to spending caps and offset requirements in the Budget Enforcement Act of 1990 (BEA).⁵⁷ The BEA required that direct spending and revenue legislation be revenue neutral,

⁵⁰ KAREN SPAR, CONG. RESEARCH SERV., R42050, BUDGET ‘SEQUESTRATION’ AND SELECTED PROGRAM EXEMPTIONS AND SPECIAL RULES 2-3 (2012).

⁵¹ Christopher D. Dodge, *Doomed to Repeat: Why Sequestration and the Budget Control Act of 2011 Are Unlikely to Solve Our Solvency Woes*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 835, 837 (2012).

⁵² Balanced Budget and Emergency Deficit Control Act of 1985 (BBEDCA), Title II of Pub. L. No. 99-177, 99 Stat. 1038, 1069-70.

⁵³ Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CAL. L. REV. 595, 621 (1988).

⁵⁴ *Id.* at 631; see also STANLEY E. COLLENDER, THE GUIDE TO THE FEDERAL BUDGET: FISCAL 1993, at 21 (1992) (noting that certain federal programs, such as Social Security and tax expenditures, were exempted from “across the board” sequestration).

⁵⁵ Dodge, *supra* note 51, at 850-51; Christina S. Ho, *Budgeting on Autopilot: Do Sequestration and the Independent Payment Advisory Board Lock-In Status Quo Majority Advantage?*, 50 TULSA L. REV. 695, 718-19 (2015) (describing how Congress “contracted around” GRH using “privileged reconciliation rules”).

⁵⁶ See Alan J. Auerbach, *Federal Budget Rules: The U.S. Experience*, 15 SWED. ECON. POL’Y REV. 57, 61 (2008) (“[T]he combination of declining target deficits and a recession that began in the summer of 1990 led to a budget crisis when policies producing very large deficit cuts would have been required to stay on the prescribed deficit path.”).

⁵⁷ Budget Enforcement Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388-575.

and that any increases to the deficit be “paid for” through tax increases or spending decreases (collectively, these rules are known as pay-as-you-go or PAYGO rules).⁵⁸ If, in total, such legislation increased the deficit during a congressional session, sequestration would take effect.

The BEA rules expired in 2002, and they never triggered a sequester. As the nation’s fiscal outlook improved in the late nineties, Congress found ways to circumvent the sequester. For instance, in order to pay for the re-enactment of certain temporary tax expenditures⁵⁹, Congress repealed a revenue-losing provision. Shortly thereafter, Congress reinstated that provision but without an offsetting revenue increase.⁶⁰ Other evasion tactics, such as advance appropriations, timing delays for government obligations, emergency exceptions, and special directives allowed spending to escape the consequences of the rules.⁶¹ Statutory PAYGO rules, enforced through the threat of sequestration, were again reinstated in 2010.⁶² These rules have also never resulted in sequestration.

The third phase of Congressional experimentation with sequestration occurred with the Budget Control Act of 2011 (BCA).⁶³ BCA directed Congress to enact \$1.2 trillion in spending cuts and to cut discretionary programs by more than \$1 trillion over a decade-long period. Sequestration was the penalty for Congress failing to achieve these goals, resulting in \$1.2 trillion of across-the-board cuts in domestic and defense spending.⁶⁴ Congress failed to meet the initial deadline of January 15, 2012 to pass the necessary spending cuts. Sequestration was thus triggered and scheduled to take effect at the beginning of January 2013 but was delayed by Congress until

⁵⁸ COLLENDER, *supra* note 54, at 26.

⁵⁹ Tax expenditures are defined as “revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability.” Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. § 622(3) (2012). They are labeled “expenditures” because they are economically equivalent to government spending. For a discussion of the increasingly divergent treatment of tax expenditures in economics and the law, see Linda Sugin, *The Great and Mighty Tax Law: How the Roberts Court Has Reduced Constitutional Scrutiny of Taxes and Tax Expenditures*, 78 BROOK. L. REV. 777, 787-92 (2013). See also Linda Sugin, *Invisible Taxpayers*, 69 TAX L. REV. 617, 645-46 (2016) (analyzing, in the taxpayer standing context, tax expenditures as tax law rather than economically equivalent direct spending programs).

⁶⁰ Cheryl D. Block, *Pathologies at the Intersection of the Budget and Tax Legislative Process*, 43 B.C. L. REV. 863, 866 (2002).

⁶¹ CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2004-2013, 114 (2003) (“To comply with the letter of the law while boosting discretionary spending above the statutory limits, lawmakers used a number of approaches—including advance appropriations, delays in making obligations and payments, emergency designations, and specific directives.”).

⁶² Statutory Pay-As-You-Go Act of 2010, Pub. L. No. 111-139, 124 Stat. 8.

⁶³ Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240.

⁶⁴ Dodge, *supra* note 51, at 837.

it began in March of that year.⁶⁵ Sequestration will continue until Congress meets or repeals the deficit reducing directives of the BCA.

2. Sunset Provisions

Sunset provisions, or laws that expire by their own terms without further action by Congress, are another category of prompting legislation. Temporary legislation has long been a part of American history. The Framers advocated for the use of sunset provisions to overcome the stickiness of legislation on both deliberative and democratic grounds.⁶⁶ Congress's increasing use of it post-2000, especially in the tax area, has spurred recent interest in the subject by legal scholars.⁶⁷

Good government reform groups advocated for using comprehensive sunset provisions to reduce the capture of agencies by interest groups in the latter half of the twentieth century. Although their efforts never succeeded at the federal level, thirty-five states enacted sunset review of agencies and other governmental entities.⁶⁸ This experiment by the states, however, was widely considered a failure since periodic review was costly but ineffective at dislodging interest groups.⁶⁹

Congress has regularly employed sunset provisions for legislation. Appropriations are made on an annual basis, and economic stimulus bills are also sometimes sunsetted.⁷⁰ In the 1990's, an anti-assault weapons act and the independent counsel statute enacted to investigate President Clinton's

⁶⁵ SPAR, *supra* note 50, at 1.

⁶⁶ THE FEDERALIST NO. 26 (Alexander Hamilton) (defending the two-year restriction on military appropriations); Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 6 THE WORKS OF THOMAS JEFFERSON 3, 9 (Paul Leicester Ford ed., 1904) (arguing for the sunset of all laws, including the Constitution, after nineteen years).

⁶⁷ See, e.g., Gersen, *supra* note 5; Kysar, *Lasting Legislation*, *supra* note 5; Jason Oh, *Pivotal Politics of Temporary Legislation*, 100 IOWA L. REV. 1055 (2015); Yin, *supra* note 5. The non-U.S. literature on sunset provisions has also grown in recent years. See generally FRANK FAGAN, LAW AND THE LIMITS OF GOVERNMENT: TEMPORARY VERSUS PERMANENT LEGISLATION (2013) (suggesting that legislatures pass temporary legislation to reduce opposition from constituents, test new proposals, and delay decision-making to future legislatures); ANTONIOS KOUROUTAKIS, THE CONSTITUTIONAL VALUE OF SUNSET CLAUSES: AN HISTORICAL AND NORMATIVE ANALYSIS (2016) (arguing that sunset provisions have long-standing historical roots and constitutional value in terms of separation of powers); SOFIA RACHORDAS, CONSTITUTIONAL SUNSETS AND EXPERIMENTAL LEGISLATION: A COMPARATIVE PERSPECTIVE (2015) (arguing that sunset provisions are valuable in light of uncertainty surrounding new policies); Ittai Bar-Siman-Tov, *Temporary Legislation, Better Regulation, and Experimental Governance: An Empirical Study*, 12 REG. & GOVERNANCE 192 (2018) (arguing that empirical evidence suggests temporary legislation is becoming increasingly common and may be a useful tool for policy termination).

⁶⁸ See THEODORE J. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY 309-10 (1969).

⁶⁹ Kysar, *Sun Also Rises*, *supra* note 5, at 354-55.

⁷⁰ Kamin, *supra* note 11, at 23.

transgressions both contained sunset provisions to win over opponents concerned about the controversial nature of the bills.⁷¹ The antiterrorism legislation known as the USA PATRIOT ACT also contained widespread sunset provisions in the face of libertarian objections.⁷²

In the tax context, Congress has re-enacted a package of temporary provisions, known as extenders, every year since the 1970s. The biggest extenders were made permanent in 2015, but several dozen remain.⁷³ Many of these provisions were originally sunsetted in order to review their efficacy or to address transitory conditions,⁷⁴ but Congress continued to sunset them year after year chiefly because it would have been too costly to make them permanent.⁷⁵ As mentioned above, budget reasons were also the motivation behind the sunset provisions in the Bush tax cuts.⁷⁶ Most recently, the 2017 tax bill sunsetted most of the provisions affecting individuals in order to comply with budget rules and pressures.⁷⁷

3. Prompting Legislation and the Status Quo Bias

The track record of prompting legislation in overcoming the status quo bias is weak. The threat of sequestration under GRH proved too severe to be effective and thus was abandoned. The statutory PAYGO rules resulted only in congressional circumvention.⁷⁸ The BCA sequester was intended to serve as motivation to construct a deficit reduction deal but instead now functions as the new status quo.⁷⁹

Both GRH and BCA attempted to spur legislative action and failed in doing so. Specifically, these acts sought to overcome negotiation breakdowns and collective action difficulties to implement legislation that would eliminate or reduce the deficit. Blame could be placed on the unrealistic goals they attempted to meet, but could these sequesters have been designed differently such that a compromise plan could have been achieved?

⁷¹ Kysar, *Sun Also Rises*, *supra* note 5, at 356-57.

⁷² *Id.* at 357.

⁷³ JOINT COMM. ON TAX'N, 114TH CONG., ESTIMATED BUDGET EFFECTS OF DIVISION Q OF AMENDMENT #2 TO THE SENATE AMENDMENT TO H.R. 2029 (2015).

⁷⁴ *Id.* at 358.

⁷⁵ David Kamin, *Drawing the Line on Tax Extenders*, HILL (Dec. 24, 2013), <https://thehill.com/blogs/congress-blog/economy-budget/193904-drawing-the-line-on-tax-extendere> [<https://perma.cc/7QMK-CV2Q>].

⁷⁶ See *supra* notes 40-41 and accompanying text.

⁷⁷ H.R. 1, 115th Cong. (2017).

⁷⁸ See Auerbach, *supra* note 56, at 62 (arguing that the PAYGO rules enacted by Congress were ineffective because Congress later evaded their requirements).

⁷⁹ The Bipartisan Budget Act of 2013, Pub. L. No. 113-67, 127 Stat. 1165, 1166 (2013). The Bipartisan Budget Act of 2013 reduced the deficit by \$23 billion, but this can hardly be seen as the grand compromise intended by BCA, which aimed to reduce the deficit by \$1.2 trillion.

I would argue that sequesters fail unconditionally because of the near impossibility of designing the proper amount of cuts. On the one hand, sequestration has to be severe enough that lawmakers view the policy path of avoiding the sequester as more favorable. On the other hand, if sequestration is too severe, lawmakers will devise circumvention techniques or will simply repeal the law.⁸⁰ The experience with GRH and BEA suggests these laws erred too far in the direction of severity and BCA's threat was not severe enough. It is hard at the outset to predict which side of the razor's edge the sequester amount will fall. For instance, contemporaneous scholarship contended that the GRH sequesters might prove to be an insufficient threat.⁸¹ Later, in the face of a recession, the sequester cuts were seen by lawmakers as decidedly too harsh.⁸² Because of these design difficulties, the use of sequesters to overcome the status quo bias will ultimately fail.

Sunset provisions have a mixed record of prompting action. In one sense, Congress often acts at the sunset date. Congress has repeatedly revisited the package of extenders to renew them year after year and continually renews annual appropriations. It also moved to extend the Bush tax cuts and later to permanently enact a portion of them.

Nonetheless, it is far from clear that sunset provisions do their job of enhancing the deliberative process as envisioned by their advocates.⁸³ Although Congress often acts at the sunset date, sunsets sometimes do little but give lawmakers an opportunity to evade budget rules and to extract rents from interest groups.⁸⁴ In such cases, the renewals are similar in result to Congressional inaction since they are moving Congress no closer to its policy preferences. Perhaps more troubling is the arbitrariness of the sunset. Unlike the sequester or dynamic legislation, sunset provisions prompt Congress to act not when substantive goals have been met or when conditions have changed but only at a certain date, often chosen due to budget process pressures or the congressional calendar. As a result, sunset provisions are overly broad, threatening cessation of still-favorable laws.⁸⁵

Finally, as a categorical matter, prompting legislation, whether it be in the form of sunsets or sequesters, often fails to overturn the status quo bias because, by definition, Congress still has to act at the point of provocation.

⁸⁰ See STEVE SHEFFRIN, *MARKETS AND MAJORITIES* 241-42 (1996) (citing alleged failures of the political process in responding to severe sequestrations, in which legislatures circumvent the original restriction rather than solve the underlying problem).

⁸¹ Raphael Thelwell, *Gramm-Rudman-Hollings Four Years Later: A Dangerous Illusion*, 50 PUB. ADMIN. REV. 190, 196 (1990).

⁸² See Auerbach, *supra* note 56, at 61; Dodge, *supra* note 51, at 853-54 (describing the "delicate balancing game" of setting the appropriate levels of annual deficit caps).

⁸³ Gersen, *supra* note 5, at 266; Kysar, *Lasting Legislation*, *supra* note 5, at 1041-46.

⁸⁴ See *infra* notes 182-214 and accompanying text.

⁸⁵ See CALABRESI, *supra* note 4, at 61-62 (criticizing sunset provisions on these grounds).

Although the chances that Congress does indeed act may be increased due to the unfavorable outcome it faces, a breakdown in negotiations, collective action difficulties, a constrained agenda, or other dynamics that contributed to the status quo bias initially may still be in place at that later time. Congress may, therefore, end up with a poorer policy outcome than if the prompting legislation did not exist.

Prompting legislation also poses practical problems. The uncertainty they create disrupts the planning activities of public and private actors, increasing compliance costs and distorting investment decisions. We saw these problems acutely when parties were forced to plan around the sunsets of the Bush tax cuts.⁸⁶

C. Dynamic Legislation

Dynamic legislation overcomes the status quo bias by adjusting policy outcomes in accordance with certain criteria, without further action by Congress.⁸⁷ Dynamic legislation aims to conform law to evolving conditions in order to maintain a previously agreed upon policy. It thus differs from legislation that changes in response to arbitrary markers, like dates. Legislation might, for instance, be phased in by the calendar,⁸⁸ but this

⁸⁶ An example illustrating the morbid humor of tax lawyers and economists involves the estate tax repeal, which was in effect for only one year. Many began to refer to the sunsetted law as the “Throw Momma from the Train Act of 2001,” after a well-known movie of that era. See, e.g., Paul Krugman, *Reckonings; Bad Heir Day*, N.Y. TIMES (May 30, 2001), <https://www.nytimes.com/2001/05/30/opinion/reckonings-bad-heir-day.html> (offering up the name because of the possible incentives that arrive from having a law that greatly changes the amount an estate is taxed upon inheritance depending on when exactly the original owners passes away).

⁸⁷ Dynamic legislation could be characterized as a type of unorthodox lawmaking, akin to those types of legislation that do not follow “ordinary” frameworks and procedures. See SINCLAIR, *supra* note 30; Abbe R. Gluck, Anne Joseph O’Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789 (2015).

⁸⁸ Traditional phase-ins and “sunrise” legislation will present different dynamics. The primary difference is that the lawmaking body, using those instruments, is able to impose the consequences of lawmaking upon later generations without itself being affected, thereby presenting democracy concerns. See Daniel E. Herz-Roiphe & David Singh Grewal, *Make Me Democratic, But Not Yet: Sunrise Lawmaking and Democratic Constitutionalism*, 90 N.Y.U. L. REV. 1975, 2003-04 (2015) (relaying such concerns in the context of sunrise laws while also exploring the ability of such mechanisms to function as democracy-enhancing veil of ignorance rules); see also Frank Fagan & Saul Levmore, *Legislative Sunrises: Transitions, Veiled Commitments, and Carbon Taxes*, in THE TIMING OF LAWMAKING, *supra* note 10, at 130, 143 (exploring the democratic deficiencies of sunrise laws). Dynamic legislation generally takes effect immediately and thus does not present these concerns as a categorical matter. The nontraditional phase-ins that I suggest in Part V are contingent upon actual events transpiring rather than the mere passage of time. Accordingly, their intent is not necessarily to delay imposition of costs and benefits so that they fall on a future generation, and democratic concerns should thus not be nearly as acute in that context. Indeed, Levmore generally carves out transition rules from the category of democratically suspect sunrise laws since these exist to ensure efficient and effective implementation rather than to shift benefits and/or burdens across generations. *Id.* at 140-41.

legislation would not be dynamic under my categorical framework. This is because it is not intended to preserve the policy bargain by adjusting to current circumstances but instead exists to shift costs and benefits into the future.

It also should be noted that nearly all law contains some degree of dynamic features. For instance, under the Controlled Substances Act, different categories of drugs face different restrictions, and the DEA can petition for a drug's addition or removal based on whether it meets the standards outlined in the statute—for instance, whether there is a currently accepted medical use for the substance.⁸⁹ Although application of this standard will change over time, its dynamism arises primarily from an external body applying current facts to the law, rather than from the law updating itself without congressional action. It therefore would fall outside my definition of dynamic legislation.

Relatedly, we could also conjecture that dynamic legislation will be more prevalent in the contexts of rules (as opposed to standards). Standards are inherently dynamic because they generate different results as circumstances change. For instance, the reasonable person standard of care in negligence law evolves with social, economic, and technological changes. Rules will be more likely to require a dynamic mechanism because they do not have this built-in flexibility.⁹⁰

One can press on the definition further, however, by asking what precisely “updating” means. Here, I do not mean updating that results from the application of a fixed concept to one’s particular circumstances but rather due to evolving and external inputs, like macroeconomic aggregates. For instance, the miscellaneous itemized deduction limitation in the tax code allows certain deductions only to the extent they exceed two percent of the taxpayer’s adjusted gross income. This is functionally equivalent to a rate increase on top earners. Although the computed limitation is dynamic in that it varies according to the taxpayer’s adjusted gross income, the legislation itself is not updating in light of broader data—just the computed dollar amount from the exercise of the taxpayer’s individual circumstances at a given time. If the law made a rate increase to the top brackets contingent upon the Gini coefficient (a common measure of income distribution) exceeding a certain threshold, this would be an example of dynamic legislation since the law itself is updating based on ensuing macroeconomic data—i.e. the degree of income inequality at the time.

To the extent it has been employed, dynamic legislation has been very successful at overcoming the status quo bias. Portions of the tax code, for

⁸⁹ Controlled Substances Act, 21 U.S.C. §§ 811(a) & 812(b) (2012).

⁹⁰ This would help explain why we see more dynamic legislation in those parts of the tax law that are rules-based, e.g. brackets and the amounts of deductions and exemptions. Thanks to Aaron-Andrew Bruhl for this point.

instance, automatically adjust to take into account inflation. These inflation-adjusted provisions include the rate brackets, the standard deduction, the personal exemption, the earned income credit, and the phase-out of itemized deductions and personal exemptions.⁹¹ Inflation indexing of the tax code began in 1981 after a period of high inflation, which moved taxpayers into higher brackets.⁹² Indexing became a way to protect against this type of unlegislated tax increase.

Another prominent instance of indexing in the legal system is in the entitlement area. Social Security monthly benefits, as well as the annual upper limit on wages subject to the Social Security tax, are both indexed for inflation. Another aspect of computing these benefits—the “average indexed monthly earnings”—is indexed for societal wage growth during one’s career, up until the age of 60.⁹³ Medicare also contains automatic adjustments. Medicare premiums for medical insurance and prescription drug insurance generally must cover twenty-five percent of the cost of the program and thus rise or fall with health care costs.⁹⁴ Physician reimbursement in the Medicare system also used to automatically adjust to a fiscally sustainable path in accordance with a formula that took into account increases in doctors’ costs, enrollment, and real gross domestic product per capita.⁹⁵ Unemployment insurance has a countercyclical feature built into it, which triggers additional benefits when a state’s unemployment level reaches a certain amount.⁹⁶

Commodities are another area in which Congress has used automatic provisions. In 2014, for instance, Congress enacted income support relief for farmers, called the Price Loss Coverage and Agriculture Risk Coverage programs.⁹⁷ These federal subsidies assist farmers when crop prices fall below a certain level, and the amount of benefits paid varies inversely with the average prices in a growing season. These programs are location-specific, using the yields and prices of commodities in particular counties.⁹⁸

⁹¹ Rev. Proc. 2016-55, 2016-45 I.R.B. 707. Inflation indexing is also used in the Affordable Care Act (ACA). The excess of premium growth over income growth is also a factor in calculating thresholds in the individual mandate, thus taking into account increases in health care costs. *See, e.g.,* Rev. Proc. 2017-36, 2017-21 I.R.B. 1251 (calculating indexing adjustments for ACA provisions).

⁹² Stephen J. Entin, *Tax Indexing Turns 30*, TAX FOUND. (March 11, 2015), <https://taxfoundation.org/tax-indexing-turns-30> [<https://perma.cc/T73X-HFYE>].

⁹³ DANIEL SHAVIRO, MAKING SENSE OF SOCIAL SECURITY REFORM 13 (2000).

⁹⁴ *See, e.g.,* Kamin, *supra* note 11, at 35 (“Medicare has a significant automatic-adjustment trigger that raises or lowers premiums depending on the trajectory of health costs . . .”).

⁹⁵ *Id.* at 34. Kamin also notes that Congress has overridden these limitations more often than not. *Id.* This method was repealed by the Medicare Access and CHIP Reauthorization Act of 2015, Pub. L. No. 114-10, 129 Stat. 87, 89.

⁹⁶ *See* Kamin, *supra* note 5, at 171-72 (discussing the “automatic-adjustment mechanisms” of the federal unemployment insurance system).

⁹⁷ Agricultural Act of 2014, Pub. L. No. 113-79, 128 Stat. 649 §§ 1116 & 1117.

⁹⁸ *Id.*

The challenge of dynamic legislation is the up front costs in its design.⁹⁹ In order to devise successful dynamic legislation, Congress needs to study various conditions that might activate the subsequent policy change and how policy should respond to such conditions. There are, however, ways to ameliorate the design difficulties inherent in dynamic legislation through, for instance, the use of indexing. Indeed, we would expect dynamic legislation to be least costly to design when the conditions to which it is responding are easily quantifiable. I take up the question of design in more detail in my discussion of implementing dynamic legislation below.¹⁰⁰

One might ask however, if, in addition to posing design costs, dynamic legislation might also be more difficult to enact in the first place. The legislature must decide how future circumstances affect current policy, and it may be difficult to form a coalition behind this task.¹⁰¹ Leaving the course of the law unenumerated may be the only way to gain the requisite votes. In order to enact prompting legislation, on the other hand, Congress need only come to an agreement on what the law should *not* be.¹⁰²

Although this is a valid point, it is not necessarily the case. Instead, it might be that setting the course of legislation to sail on a particular course will garner increased support for the policy at issue. If there is consensus behind a policy, it is difficult to see why that policy preference should not be protected against fluctuating circumstances. Suppose, for instance, that a representative supports the current tax rate structure in part because it is favorable to his base—low and middle-income constituents. Inflation indexing that rate structure helps to ensure that current law continues that distribution of the tax burden by giving it the advantage of legislative inertia.

Lawmakers might also favor dynamic legislation since it will adjust expectations in favor of the current policy. Rather than allowing changing conditions to steadily erode the law, dynamic legislation helps to bake expectations regarding anticipated benefits into the policy baseline. For instance, since social security benefits are currently indexed for inflation and for wage growth, slowing the rate of these increases to Social Security benefits is framed as a cut to the entitlement.¹⁰³ This framing helps lawmakers who are in favor of entitlement protection. Overall it is difficult to conclude that dynamic

⁹⁹ See Kamin, *supra* note 11, at 22 & 25 (discussing the intensive information gathering and decisionmaking required of policymakers at the outset of both setting up triggers generally and of indexing specifically).

¹⁰⁰ See *infra* notes 218–222 and accompanying text.

¹⁰¹ Shaviro, *supra* note 10, at 67–68.

¹⁰² See David Kamin, *Legislating Crisis*, in *THE TIMING OF LAWMAKING*, *supra* note 10, at 34, 41 (making a similar point in the context of formulating default rules for crises).

¹⁰³ Shaviro, *supra* note 10, at 68.

legislation is inherently more controversial to enact than ordinary legislation and may, in some instances, facilitate agreement among lawmakers.

It should also be noted that dynamic legislation cannot solve gridlock in every instance, and its success in overcoming the status quo bias may depend on the source of gridlock. For instance, if Congress cares about controlling policy but has little information about the future, it may choose to overcome the status quo bias through sunsets or other prompting legislation. If Congress wishes to control policy but has more information about the future, dynamic legislation will be a viable option. If Congress, on the other hand, wishes to relinquish control over policy, delegation to agencies (a noncongressional anti-status quo device discussed below¹⁰⁴) will be more likely. We can summarize the conditions in Table 1.

Table 1: Conditions for Selection of Anti-Status Quo Devices

	<i>Congress has little information about the future</i>	<i>Congress has more information about the future</i>
<i>Congress cares about controlling policy</i>	sunsetting or other prompting legislation	dynamic legislation
<i>Congress does not care about controlling policy</i>	delegation to agency	no clear prediction

We might then ask what is the point in comparing the various devices if they accomplish different goals. Part of this project, however, argues that Congress uses prompting legislation too often, even when it has information.¹⁰⁵ In that case, dynamic legislation might be a better option given its democratic advantages, and we might consider deploying the use of prompting legislation in narrower contexts, for instance confining temporary legislation to experimentation and emergencies.

III. DEMOCRATIC CONSIDERATIONS

The anti-status quo devices have democratic consequences because they impact the agenda of future congresses, interest group activity, the budget process, and the ability of Congress to control delegation to the executive branch. This part explores these dynamics.

104 See *infra* notes 106, 117, & 119 and accompanying text.

105 For instance, in the recent 2017 tax legislation, Congress sunsetted many portions of the act in order to fit the bill through the budgetary constraints of reconciliation, not because it lacked information to continue the desired policies.

A. Interaction with the Administrative State

Delegation to the administrative state is another way in which Congress overcomes the inertia bias in lawmaking¹⁰⁶ and is perhaps the most examined anti-status quo device in the literature.¹⁰⁷ Congress delegates gap-filling authority to agencies, which, in turn, update the body of rules over time. Straight delegation to agencies remains necessary when Congress cannot foresee problems that need to be addressed. But if Congress can predict such issues, or at least their outlines to a sufficient degree to guide the agency, the question thus becomes which of the aforementioned congressional tools can best leverage the resources of the administrative state while also minimizing its costs. Here, I contend that dynamic legislation has clear advantages over temporary legislation, which is also used to minimize agency delegation.¹⁰⁸

A primary cost of delegation to agencies is, of course, congressional relinquishment of substantial lawmaking authority to the executive branch.¹⁰⁹ This shift of power poses constitutional concerns.¹¹⁰ It also creates legal and practical dilemmas as Congress attempts to offset this transfer of power through oversight hearings, the power of the purse, the creation of independent agencies, enhanced judicial review, and statutory reversal of agency action, among others.¹¹¹ These mechanisms, however, only go so far in restoring congressional preferences over policy. They also may considerably delay the administrative process.

These considerations are even more acute as the executive power has expanded in recent years.¹¹² Why, though, does Congress reallocate its authority to the executive branch in the first place? One answer might be that Congress delegates broadly in times of policy agreement with the President. Many such delegations were enacted in the New Deal and Great Society eras, when congressional preferences converged with those of the President.¹¹³ The delegating statutes remain in effect, however, long after those preferences

106 William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L. J. 523, 533 (1992).

107 See, e.g., *id.* ("[I]n the modern administrative state most 'lawmaking' is accomplished by agencies under the authority of statutory delegations.").

108 Here, I primarily compare dynamic legislation with temporary legislation, since sequesters and veto bridges are not used to minimize agency delegations.

109 Eskridge & Ferejohn, *supra* note 106, at 533.

110 See, e.g., *id.* at 534-39 (discussing the nondelegation doctrine and outlining possible impacts of the shift of power).

111 *Id.* at 539-40 (examining these compensatory mechanisms and evaluating some of their problems and impacts).

112 See, e.g., Charlie Savage, *Shift on Executive Power Lets Obama Bypass Rivals*, N.Y. TIMES (Apr. 22, 2012), <http://www.nytimes.com/2012/04/23/us/politics/shift-on-executive-powers-let-obama-bypass-congress.html>.

113 Eskridge & Ferejohn, *supra* note 106, at 539.

diverge.¹¹⁴ As these delegations accumulate, Congress finds itself ceding more and more authority to the President.

Pages and pages of scholarly work have been written to justify the rise of the regulatory state, including as a response to the complexity of the modern world, the relative expertise of the regulatory agencies, and the limited ability of Congress to act quickly to changing circumstances and information.¹¹⁵ Although these reasons may justify each individual delegation, when viewing the delegations in their entirety, we see a system that bestows upon the President a great deal of control.¹¹⁶ The risk of this choice is that the constitutional separation of powers no longer adequately safeguards against an overreaching President. Moreover, with the near demise of the nondelegation doctrine, the judicial branch is unlikely to prevent the ceding of too much legislative authority.¹¹⁷ Indeed, under *Chevron* deference, the judiciary may exacerbate the problem.¹¹⁸ It is instead up to Congress to police its legislative domain.

Although repealing previous authorizations is unrealistic, Congress may wish to narrow future rulemaking discretion. The challenge for Congress is to retain its lawmaking jurisdiction while also crafting a legal apparatus that remains current. One statutory-based solution to this dilemma is to attach a sunset provision to a delegating statute.¹¹⁹ That way, the statute will not remain on the books long after congressional and executive preferences have deviated from one another. It will, however, be difficult for Congress to set the appropriate sunset length. At the outset, Congress will not be able to predict when that divergence will take place. Congress also has to act again in order to effectuate its continued preferences. Assuming Congress prefers continuation of the sunsetted policy more than reversion to the underlying permanent policy, as may often be the case,¹²⁰ Congress will spend its limited time and resources on revisiting policy simply to keep the other branch in check.

¹¹⁴ *Id.*

¹¹⁵ See generally BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR* (1981); DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWER* (1999); JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938); JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* (1997); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985).

¹¹⁶ Eskridge & Ferejohn, *supra* note 106, at 534.

¹¹⁷ See Cass R. Sunstein, *Nondelegation Canon*, 67 U. CHI. L. REV. 315, 315 (2000) ("It is often said that the nondelegation doctrine is dead.").

¹¹⁸ See Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 511-26 (1989) (criticizing *Chevron* deference as worsening the delegation problem by empowering the President, rather than Congress, as the "control center of domestic public policy making").

¹¹⁹ See Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 726-28 (2012) (exploring how sunset provisions can maintain separation of powers by "reset[ting] the legislative baseline").

¹²⁰ See *infra* notes 155-163 and accompanying text.

Dynamic legislation would be a better solution to this institutional dilemma because it would cabin executive discretion while also allowing that discretion to evolve in light of changing circumstances.¹²¹ It would do so without necessarily slowing down the administrative process. For instance, Congress delegated to the Environmental Protection Agency (EPA) the power to regulate “any air pollutant[s] . . . which may reasonably be anticipated to endanger public health or welfare.”¹²² The EPA’s implementation of this statute has been notoriously political, particularly with regard to carbon dioxide and other greenhouse gases implicated in climate change. One way to cabin the EPA’s regulatory (and deregulatory) power would be to delegate findings of certain current external indicia, like carbon consumption, atmospheric conditions, temperature changes, sea levels, and other carbon reduction efforts by developing nations. These findings could then be compiled to form an index, which, in turn, could automatically increase or decrease certain statutory requirements.¹²³

Dynamic legislation may also be a way to delegate in areas where Congress has traditionally been reluctant to do so. Jim Hines and Kyle Logue, for instance, have noted that the Department of the Treasury has little authority over substantive policy compared with other agencies and have criticized Congress’s unwillingness to delegate in the tax area.¹²⁴ They thus suggest, among other ideas, that Congress should delegate the power to set tax rates in order to leverage agency expertise and nimbleness.¹²⁵ Their proposal is interesting, but it implicates important questions about whether Congress should delegate its power to tax given its unique constitutional role over taxation and the desirability of locating decisions over tax policy to a more accountable body.¹²⁶

We need not make conclusions as to the precise degree of desirable delegation. For our purposes, I explore this scenario only to point out that dynamic legislation gives Congress the option to ratchet delegation up or down,

121 David Kamin makes a similar point but with regard to using automatic triggers that turn policy on and off, in conjunction with delegation. Kamin, *supra* note 11, at 29.

122 42 U.S.C. § 7521(a)(1) (2012).

123 Richard Lazarus has put forth a comparable proposal. Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1228 (2009).

124 James R. Hines Jr. & Kyle D. Logue, *Delegating Tax*, 114 MICH. L. REV. 235, 253 (2015). For a discussion of the strategic considerations that cause the executive branch to not heavily regulate in the tax area, see Daniel J. Hemel, *The President’s Power to Tax*, 102 CORNELL L. REV. 633 (2017).

125 Hines and Logue, *supra* note 124.

126 Article I of the Constitution gives Congress the power to tax and the House of Representatives specifically the power to originate revenue bills. U.S. CONST. art. I, §§ 7-8. For background on the Origination Clause and Congress’s special constitutional role over tax policy, see generally Rebecca M. Kysar, *The ‘Shell Bill’ Game: Avoidance and the Origination Clause*, 91 WASH. U. L. REV. 659 (2014), and Rebecca M. Kysar, *On the Constitutionality of Tax Treaties*, 38 YALE J. INT’L L. 1 (2013).

if it so desires. In the tax context, for instance, Congress might design a law that affords some rate-setting discretion to the Treasury, Federal Reserve, or other body, but cabins that discretion through formulas or indices.¹²⁷ In times of sharp unemployment rises or decreases, the rate-setting body could reduce or increase taxes, but only by a correlating percentage within a specified range.

One important strategic advantage that dynamic legislation would have over straight agency delegation is its staying power. Congressional members may appreciate that policies set by dynamic legislation would not be subject to the whims of the current President. The stability that dynamic legislation provides would also be beneficial from a private planning perspective. Rather than question if federal policy will continue after a presidential transition, those affected by the policy would have more assurance in the government's commitment to that policy.

B. *Entrenchment Concerns*

Due to the fact that anti-status quo devices impose consequences on later congresses, it becomes relevant to question whether they impermissibly entrench those subsequent bodies. Under democratic and constitutional principles, current governments cannot bind future governments.¹²⁸ As a manifestation of this principle, governments must be able to repeal the laws of their predecessors so that each government can remain reactive to the preferences of its current constituents.¹²⁹ The entrenchment principle "implicates the very reach of government power and the nature of democratic accountability."¹³⁰ Frustratingly, however, the parameters of entrenchment are ill-defined.

In an attempt to formalize the concept, Eric Posner and Adrian Vermeule have defined entrenchment in its "de jure" sense as "the enactment of either statutes or internal legislative rules that are binding against subsequent

¹²⁷ Hines and Logue themselves mention such a possibility—not as a response to these concerns, but as part of the new system's design. They dismiss it for not affording enough discretion to the rate-setting body. Hines & Logue, *supra* note 124, at 263-64.

¹²⁸ See John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773 (2003); see also Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379, 381-82, 391-93 (1987) (tracing objections to legislative entrenchment to "the temporal nature of the legislature's mandate from the citizenry" and American rejection of legislative supremacy); John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 444 (2003) (objecting to entrenchments but not sunset provisions).

¹²⁹ See Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 881 (2011); see also Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1665 (2002) ("When cashed out in terms of constitutional doctrine, the principle means that legislatures may not enact . . . statutes or rules that bind the exercise of legislative power, by a subsequent legislature, over the subject matter of the entrenching provision.").

¹³⁰ Serkin, *supra* note 129, at 881.

legislative action in the same form.”¹³¹ Under this definition, none of the anti-status quo devices discussed here entrench. Indeed, no legislative devices would truly entrench Congress (only the Constitution would, by requiring supermajorities for its amendment).¹³²

But if we expand the notion of entrenchment to include those acts that are not simply legally binding upon subsequent legislatures, as Posner and Vermeule use the term, but also those acts that functionally bind such legislatures, then entrenchment issues become more concerning. These occurrences are entrenchment in its “de facto” sense.¹³³ It is important to note that de facto entrenchment will also capture permissible acts—indeed, it *primarily* captures such acts. Many actions taken by a current government, after all, will affect the decisions and decision-making capacity of future governments. For instance, all statutes are harder to repeal because of the status quo bias, yet they do not all impermissibly entrench.¹³⁴

1. Veto Bridges and Entrenchment

The entrenchment qualities of veto bridges are complex. As legislative rules, each house has purview over them as a matter of constitutional law, and this is most likely the case even when enacted in statutory form.¹³⁵ The House adopts a new set of rules, which is passed by a simple majority, at the start of each Congress.¹³⁶ The Senate’s rules, by contrast, exist in perpetuity and contain the restriction that they only be changed by a two-thirds supermajority in Rule XXII.¹³⁷ The supermajority requirement thus is sometimes said to entrench the Senate’s rules.

The continuing body theory of the Senate, which is based on the fact that two-thirds of the Senate body continues from one term to the next, is invoked to justify this type of entrenchment since there is no future Senate to bind.¹³⁸

¹³¹ Posner & Vermeule, *supra* note 129, at 1667; *see also* Adrian Vermeule, *Superstatutes*, NEW REPUBLIC (Oct. 26, 2010), <https://newrepublic.com/article/78604/superstatutes> [<https://perma.cc/WJ4P-6AN9>] (introducing and explaining a distinction between “de jure” and “de facto” entrenchment).

¹³² *See* Andrew-Bruhl, *supra* note 19, at 374 (“In our system, entrenched legislation is a rare creature, for it is almost universally regarded as impermissible.”). *But see* Posner & Vermeule, *supra* note 129, at 1673-93 (arguing against this view).

¹³³ Vermeule, *supra* note 131.

¹³⁴ *Id.* The decision to spend government funds now also denies later generations the opportunity to do so. Yet this would also not be considered impermissible.

¹³⁵ For a thorough analysis of Congress’s power over its rules vis-à-vis the other branches, *see* Andrew-Bruhl, *supra* note 19, at 359-70.

¹³⁶ JUDY SCHNEIDER, CONG. RESEARCH SERV., RL30725, THE FIRST DAY OF A NEW CONGRESS: A GUIDE TO PROCEEDINGS ON THE HOUSE FLOOR 9-10 (2017).

¹³⁷ Standing Rules of the Senate, S. DOC. NO. 113-18 (2013), R. XXII at 15.

¹³⁸ Aaron-Andrew P. Bruhl, *Burying the ‘Continuing Body’ Theory of the Senate*, 95 IOWA L. REV. 1401, 1444-56 (2010).

Aaron Bruhl has argued, however, that the continuing body theory does not reflect the institutional reality of the Senate and that it is insufficient to justify the binding of the Senate against itself.¹³⁹ Recent Senate practice supports Bruhl's views. In 2011, the Senate Majority Leader Harry Reid (D-Nev) used the "nuclear option" to prevent Republicans from forcing votes on amendments after a bill was moved to final passage.¹⁴⁰ In 2013, a simple majority, again under the leadership of Reid, invoked the nuclear option to end filibusters on executive branch nominees and judicial nominees other than to the Supreme Court.¹⁴¹ Republicans extended this precedent to Supreme Court nominees during the confirmation hearings of Justice Gorsuch in 2017.¹⁴²

Entrenchment with regard to legislative rules thus presents a mixed picture. There seems to be some support for the belief that Senate rules are entrenched, although in recent years, the fragility of the filibuster, as made evident in the changing boundaries of reconciliation¹⁴³ and the executive appointment contexts, calls into question this view. Moreover, because each house can change legislative rules and because the rules generally are outside of judicial enforcement, the current legislative body maintains a great deal of liberty over their content.

2. Prompting Legislation and Entrenchment

Both main types of prompting legislation cause de facto entrenchment issues. This is because sequestration and sunsets require legislative action just to avoid the imposition of unfavorable policies. They thus have the potential to crowd out Congressional action on other policy choices. GRH was initially criticized as illegitimately entrenching the preferences of the enacting Congress.¹⁴⁴ Paul Kahn argued that the Act contained an implicit restriction that any repeal be expressly stated.¹⁴⁵ This is a somewhat

¹³⁹ *Id.* at 1408.

¹⁴⁰ Alexander Bolton, *Reid Triggers 'Nuclear Option' to Change Senate Rules, End Repeat Filibusters*, HILL (Oct. 7, 2011), <https://thehill.com/homenews/senate/186133-reid-triggers-nuclear-option-to-change-senate-rules-and-prohibit-post-cloture-filibusters> [<https://perma.cc/U5BT-465Z>].

¹⁴¹ See Jeremy W. Peters, *In Landmark Vote, Senate Limits Use of the Filibuster*, N.Y. TIMES (Nov. 21, 2013), <http://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html> ("Under the change, the Senate will be able to cut off debate on executive and judicial branch nominees with a simple majority rather than rounding up a supermajority of 60 votes . . .").

¹⁴² Matt Flegenheimer, *Senate Republicans Deploy 'Nuclear Option' to Clear Path for Gorsuch*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html>.

¹⁴³ See *supra* notes 41–49 and accompanying text.

¹⁴⁴ See Paul Kahn, *Gramm-Rudman and the Capacity of Congress to Control the Future*, 13 HASTINGS CONST. L.Q. 185, 187–88 (1986) ("The kind of control of the legislative function that Gramm-Rudman intends can only be accomplished constitutionally through the amendment process, not by statute.").

¹⁴⁵ *Id.* at 202 n.61.

implausible reading of the statute. To the contrary, sequestration, as illustrated by the many examples of Congress evading its consequences over the years, does not legally entrench. As Posner and Vermeule have written, the "brute fact, one that Kahn cannot quite get around, is that Gramm-Rudman did not entrench itself. A simple majority vote of any later Congress sufficed to raise the deficit caps or repeal them *pro tanto*, and in fact Congress has done just that on several occasions."¹⁴⁶ From a present-day perspective, sequestration is criticized for its *inability* to bind future congresses.¹⁴⁷

Kahn also argued that GRH violated *de facto* entrenchment in other ways. First, the substance of Congress's future legislative decisions would be altered because of the command to examine them in light of the deficit. Second, "by changing the effect of legislative inertia," GRH modified the course of legislative judgment since repeal can be blocked by a minority.¹⁴⁸ But Posner and Vermeule are correct to say that these arguments can be lodged against all statutes.¹⁴⁹ Kahn's objection is based on the fact that GRH changed the status quo. Existing legislation, however, usually has some effect upon how current issues are framed, and it always must be repealed by an affirmative act.

Another, more valid, entrenchment argument, however, could be made against the sequestration device. What Kahn, Posner, and Vermeule overlook is the burden of action that sequestration places upon Congress in order to avoid the occurrence of sequestration. It is not the fact that GRH altered the substance of Congress's decisionmaking or that Congress had to mobilize to repeal it (which it, in fact, did). It is the affirmative actions that Congress must undertake to avoid sequestration, which burden its already crowded legislative agenda.

By definition, sequestration is an undesirable outcome. It thus differs from ordinary legislation in that the status quo is less likely to reflect the current majority's preferences (and therefore it is more entrenching). Under GRH and BCA, Congress had to either meet certain goals through deficit-reducing legislation, engage in budgeting gimmicks, or repeal the legislation in order to avoid sequestration. Although deficit reduction may have been an important goal of the prior Congress, changing conditions may make this no longer the case, as was true in the latter years of GRH. Penalizing Congress

¹⁴⁶ Posner & Vermeule, *supra* note 129, at 1696.

¹⁴⁷ See Dodge, *supra* note 51, at 855 ("The GRH lacked any mechanism that would stop future Congresses from avoiding sequestration by amending the act to raise deficit caps or repeal the caps altogether."); Ho, *supra* note 55, at 739 ("Any Member who wishes to act in contravention of the BCA need only muster the support in Congress to waive, suspend, change the parameters, or even change the critical statutory language . . . in order to achieve their policy objective.").

¹⁴⁸ Kahn, *supra* note 144, at 205.

¹⁴⁹ See Posner & Vermeule, *supra* note 129, at 1696-97.

for failing to address deficit reduction at a time when it no longer cares about it arguably entrenches the priorities of the enacting Congress.

On the other hand, if deficit reduction is still a priority of the subsequent Congress, it could be reasoned that the sequestration threat allows the current majority to actualize that goal. As I have argued above, however, sequestration is a poor mechanism to prompt deficit reduction because the sequestration levels are either too harsh or too lenient.¹⁵⁰ When compromise is difficult, as was the case under BCA, the sequestration threat may not prove harsh enough to overcome the political costs in achieving deficit reduction.

Scholars have also criticized sunset provisions for creating entrenchment concerns.¹⁵¹ A typical entrenchment provision, according to Posner and Vermeule, “forbids the later legislature to *prevent* a statute from remaining in force by an affirmative repeal, while the sunset clause forbids the later legislature to *allow* a statute to remain in force by declining to repeal.”¹⁵² Essentially, sunset provisions require Congress to act in order to keep a law on the books that they may not wish to terminate. Indeed, one study has found that committee chairs regard temporary legislation as encroaching upon the time they could devote to other matters.¹⁵³

The counter-argument to this claim is that permanent legislation also entrenches since future congresses must expend precious legislative resources to repeal or amend existing legislation. It could be argued that current lawmakers are respecting the prerogatives of future lawmakers when they choose to sunset a law by freeing them from the benefits and burdens of the law.¹⁵⁴

There is a plausible response to this—that temporary legislation causes more entrenchment problems than permanent legislation because a future

¹⁵⁰ See *supra* notes 81–82 and accompanying text.

¹⁵¹ See, e.g., Kysar, *Lasting Legislation*, *supra* note 5, at 1056–59 (“To the extent that sunset provisions allow an earlier legislature to terminate a statute, causing the law to revert to its prior incarnation (when the legislature at that time may not wish it to terminate), sunset provisions can fairly be characterized as entrenchment mechanisms.”); Posner & Vermeule, *supra* note 129, at 1676–77 (arguing that sunsets and legislative entrenchment are constitutionally indistinguishable); Yin, *supra* note 5, at 248–52 (arguing that sunset provisions may “potentially present[] a ‘deader hand’ problem”). But see Yair Listokin, *Learning Through Policy Variation*, 118 YALE L.J. 480, 536 (2008) (arguing that sunset clauses enhance efficiency by making the reversibility of policy choices easier, hence distinguishing them from entrenchment devices); McGinnis & Rappaport, *supra* note 128, at 444 (contrasting sunset provisions from entrenching provisions on the grounds that “[s]unset provisions raise none of the special problems of public choice, aberrational majorities, partisanship, or imperfect psychological heuristics,” but noting that “an excessive use of sunset provisions might impose undue costs on future legislatures”).

¹⁵² Posner & Vermeule, *supra* note 129, at 1676.

¹⁵³ See Christine DeGregorio, *Leadership Approaches in Congressional Committee Hearings*, 45 W. POL. Q. 971, 978 (1992) (finding that almost 56% of committee chairs felt that the “reauthorization imperative” raised by expiring temporary legislation detracted from time that could be devoted to other matters).

¹⁵⁴ See Fagan & Levmore, *supra* note 88, at 142–43 (setting forth this view and critiques of it).

majority will wish for the continuation of policies rather than repeal. This is because lawmakers will likely prefer the policies of the immediately prior Congress rather than those from several congresses back. The sunset provision essentially restores the law to an older, ostensibly less desirable policy.¹⁵⁵

The politics surrounding EGTRRA are an illustration of the hypothesis that older policy tends to be further removed from the current preferences of the median voter. EGTRRA raised the estate tax exclusions, in phased-in increases, from \$1 million in 2002 to \$3.5 million in 2009.¹⁵⁶ The estate tax was completely repealed in 2010,¹⁵⁷ but this repeal was sunsetted after just one year,¹⁵⁸ at which point the estate tax exclusion would return to the 2000 level of \$675,000. Instead of letting the sunset take effect, Congress set the exclusion amount at \$5 million per year.¹⁵⁹ Because this high exemption meant that only .06% of estates were subject to the estate tax,¹⁶⁰ this policy decision represents an outcome that is much closer in ideology to total repeal than the \$675,000 exemption amount, which reached 2.16% of estates when it was in effect in 2000.¹⁶¹

The entrenchment concerns of sunsets hinge on whether the policy preferences of the directly prior generation of lawmakers are superior to the ones of further distant generations. If this is the case, then the lawmakers' need to renew or make permanent the legislation potentially "detracts from the ability of the new legislature to set its own agenda" as compared to a world where the lawmakers had to do nothing to keep the preferable policies in place.¹⁶² This is an empirical question that is difficult to answer affirmatively, but it seems likely considering that sunsets are often employed *precisely because* the threat of reversion to the prior policy is undesirable. Moreover, the public may have grown accustomed to the benefits of the sunsetted legislation because of endowment effects. If this is the case, then letting the sunsetted provision lapse will be an undesirable policy outcome.

Still, sunset provisions could be said to reduce entrenchment concerns by creating more opportunities for the future majority to let lapse the policies of the enacting Congress and also because it provides a legislative vehicle to which a future Congress may attach its own agenda items.¹⁶³ As compared with permanent legislation, however, the entrenchment qualities of

¹⁵⁵ See Yin, *supra* note 5, at 248-52.

¹⁵⁶ 26 U.S.C. § 2010(c) (2006).

¹⁵⁷ 26 U.S.C. § 2210 (2012).

¹⁵⁸ See 26 U.S.C. § 1 note (2006) (Effective and Termination Dates of 2001 Amendment) (providing that specified 2001 amendments to the Tax Code would not apply after December 31, 2010).

¹⁵⁹ 26 U.S.C. § 2010(c) (2012).

¹⁶⁰ JOINT COMM. ON TAX'N, HISTORY, 114TH CONG., PRESENT LAW, AND ANALYSIS OF THE FEDERAL WEALTH TRANSFER TAX SYSTEM 25 (2015).

¹⁶¹ *Id.*

¹⁶² Yin, *supra* note 5, at 251.

¹⁶³ Kysar, *Lasting Legislation*, *supra* note 5, at 1060.

temporary legislation seem less justifiable. By requiring affirmative repeal, permanent legislation, after all, signals to the public that the government's commitments and policies are relatively stable. The entrenchment features of permanent legislation thus can be said to have benefits and may even be essential to implementation of the current majority's preferences. Overall, it cannot be stated with certainty that temporary legislation produces more entrenchment concerns than permanent legislation, although it seems likely to be the case. The entrenchment it does produce, however, lacks independent, normative justification.

3. Dynamic Legislation and Entrenchment

Scholars have expressed entrenchment concerns with regard to dynamic legislation, but overall dynamic legislation fares well in this category.¹⁶⁴ In their article arguing against the entrenchment of legislation, Professors John C. Roberts and Erwin Chemerinsky contend that the dangers of entrenchment outweigh the stability advantages it fosters. For instance, temporary majorities may entrench their radical policies; entrenched policies cannot adapt to changing voting preferences, socio-economic conditions, or available budgetary resources; and errors may not be corrected.¹⁶⁵

Yet, dynamic legislation is designed precisely to combat many of these problems. For instance, dynamic legislation can be used to fluctuate with available funds or socio-economic indicators. As a result, dynamic legislation is intended to dovetail with consensus rather than hamper it. Although such legislation may admittedly not function as intended, the ability to repeal it should largely combat the dangers identified by Roberts and Chemerinsky.

In some circumstances, dynamic legislation may largely track vacillations in legislative preferences or other conditions but not do so perfectly. In this situation, it may be the case that dynamic legislation actually discourages the legislature from updating policy. This arguably occurs because, due to the law's automatic updates, the deviation between the status quo and legislative preferences may not be enough to incite Congress to action.¹⁶⁶

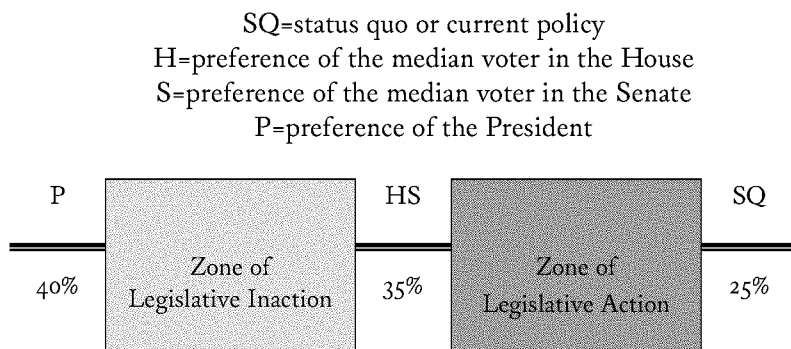
¹⁶⁴ Kamin touches upon entrenchment and concludes that indexing, one type of dynamic legislation, presents entrenchment concerns. Kamin, *supra* note 11, at 24. In a later piece, Kamin is less pessimistic with regard to dynamic legislation, concluding that all legislative devices "involve entrenchment of one sort or another." Kamin, *supra* note 5, at 171.

¹⁶⁵ Roberts & Chemerinsky, *supra* note 128, at 1809-13.

¹⁶⁶ See Kamin, *supra* note 11, at 26 ("Even as the mechanisms make policy more responsive in terms of the specific information measured and the specific response triggered, it could make the political system as a whole less responsive in other ways.").

One way to think about whether legislative action is likely to occur is to model the preferences of the relative actors.¹⁶⁷ For instance, assume the status quo or current top tax rate is 25%. In our hypothetical, the preferences of the relevant pivotal players have, however, shifted leftward due to increased inequality in society. For simplicity's sake, let's assume that both the median voter in the Senate and in the House prefer a tax rate of 35% while the President prefers a rate of 40%. Further assume for simplicity's sake that any legislation will be implemented through the reconciliation process, which cannot be filibustered, thus rendering the preferences of the 60th Senator irrelevant to the model. This dynamic can be illustrated as in Figure 1.

Figure 1: Zones of Legislative Action and Inaction



In the context of ordinary legislation, if a rate between the preferences of the pivotal voters is proposed—between 35% and 40%—legislative inaction will occur since Congress will not go along with a higher rate even though the President would.¹⁶⁸ If the proposed rate falls below 35% and above 25%, however, the interests of the House, Senate, and President are aligned to pass legislation raising the rate.

The danger with dynamic legislation, some may argue, is that automatic updating brings the status quo closer to the policy preferences of the relevant actors. Say, for instance, that the tax rate has been indexed for inequality by keying it to the Gini coefficient. Because of a rise in the Gini coefficient, the current tax rate is now 36%. This results in no legislative action. Is this entrenching? Surely not, because the current preferences of the legislative actors are reflected in the status quo. In this scenario, there are few, if any, policy

¹⁶⁷ The model herein is similar to that used by Eskridge and Ferejohn, among others. Eskridge & Ferejohn, *supra* note 106, at 529-32.

¹⁶⁸ KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING 38 (1998).

choices left outside of the status quo that would appease the Senate, House, and President. A lower rate would prove unfavorable to the President, and a higher rate would prove unfavorable to the median voter in the Senate and House.

What if, however, the tax rate only rises to 34%? The model would predict legislative action to occur. If so, entrenchment is also not a problem since the current government will update the legislation according to its wishes—to 35%. There is, however, an argument that the 34% rate is close enough to the wishes of the legislature that it fails to act. Perhaps inaction occurs because the legislative agenda is so crowded or relations between parties are so strained that only the most noxious policies can be overturned. A world without dynamic legislation, as discussed above, would produce a status quo rate of 25%, which may be low enough to spur legislative action. Thus, so the argument goes, dynamic legislation has the potential to entrench old preferences because it tracks preferences as they evolve, just not well enough.¹⁶⁹

This argument may have some validity, but as illustrated, its application is narrow. For there to be an arguable entrenchment problem, the automatic mechanism would have to produce a policy outcome that is just inside of the zone of legislative action, on the boundary between action and inaction. Outside the zone of legislative action results in no entrenchment problem and deeper inside the zone (rightward in the above chart) is sufficient to overturn the status quo.

Additionally, legislative inaction may occur regardless of where on the chart the status quo lies. If a crowded legislative agenda is the primary factor behind legislative inaction, the saliency of the lower rate may spur policy change. But the same collective action or negotiation difficulties may result in gridlock no matter if the rate is 25% or 34%. Entrenchment may, therefore, be a factor in only a *subset* of those already narrow cases where the policy outcome lies just inside the zone of legislative action.

On balance, it seems that dynamic legislation offers an opportunity to *combat* entrenchment by relieving the legislature from having to constantly refresh policies in light of changing conditions. This allows the legislature to focus its energies on implementing other preferences. If dynamic legislation is well designed, it is more likely to update legislation in accordance with current preferences rather than entrenching policies by adjusting them to an undesirable, but tolerable level.

In short, as with all types of legislation, dynamic legislation has features that could contribute to the entrenchment of the current legislature's preferences, but these are less objectionable than those presented by prompting legislation. A related critique may be that dynamic legislation reduces the opportunity for Congress to deliberate because of its ability to

¹⁶⁹ Part of this advantage is definitional. I am assuming that dynamic legislation is and can be designed to track policy preferences.

track policy preferences over time. Deliberation, however, is not costless. If Congress had to deliberate every extant law on the books, this overly robust process would *harm* democratic values since the current Congress would not have the space to create its own agenda. Dynamic legislation thus represents a tradeoff between deliberation for deliberations' sake and efficiently tracking policy preferences. The compromise is likely superior from the perspective of later congresses who are freed from woodenly revisiting the preferences of prior congresses with whom they are in agreement.

C. *Political Economy and Fairness Concerns*

Aside from entrenchment, the anti-status quo devices might arguably present other democratic concerns, like those relating to interest group activity, fairness, and democratic accountability. These are explored below.

1. Veto Bridges and Fairness

Veto bridges are part of the body of rules Congress uses to govern itself. In theory, they should be neutral and procedural. In practice, however, they have been manipulated by a simple majority and hence suffer from accusations of unfairness. This manipulation occurs because veto bridges are powerful tools in advancing a partisan agenda. For instance, as discussed above, the reconciliation process has seesawed between applying only to tax cuts and only to tax increases.¹⁷⁰ These tactics widen the partisan divide by sowing distrust among the parties, thereby potentially *worsening*, rather than easing, general legislative gridlock over the long haul.¹⁷¹

Congressional rules, like all rules of procedure, invoke the Rawlsian concept of the "veil of ignorance."¹⁷² Veil of ignorance rules are adopted without the knowledge of who will profit or lose from them, in something akin to an "original position" and are thus said to represent a fair outcome.¹⁷³

¹⁷⁰ See *supra* notes 45–46 and accompanying text.

¹⁷¹ See, e.g., JOHN B. GILMOUR, STRATEGIC DISAGREEMENT: STALEMATE IN AMERICAN POLITICS 5 (1995) (identifying increased party polarization as a contributing factor to gridlock).

¹⁷² See JOHN RAWLS, A THEORY OF JUSTICE 136–37 (1971) (positing that principles of justice should be chosen behind a "veil of ignorance" such that "no one knows . . . his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like"); Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717, 718 (2005) (making the comparison in the context of "framework legislation" or the laws that govern congressional procedure); Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399, 399 (2001) (identifying certain constitutional provisions, primarily in the congressional arena, as veil of ignorance rules).

¹⁷³ See RAWLS, *supra* note 172, at 136–42 (using this original position, whereby those in charge of formulating societal rules know nothing about their position in society, as a tool to eradicate the distorting effects of knowledge of existing beneficiaries).

Because congressional rules are meant merely to define the rules of the lawmaking game, in theory, their procedural focus should prevent them from allocating costs and benefits to parties that are identifiable at the outset.

In practice, however, veto bridges deviate from veil of ignorance rules and the qualities that impart fairness. A rule drafted in general terms allows lawmakers to be ignorant of who falls within its scope, thus leading to unbiased policymaking.¹⁷⁴ In reality, the rules operate in specificity, thus conferring benefits and burdens on specific groups. For instance, the reconciliation process benefitted tax cutters, typically conservatives, when its scope was redefined to encompass revenue-decreasing legislation and to exclude tax increases. Parallel experiences with PAYGO rules, whereby the dominant party has crafted specific exemptions from their scope, further exemplify this tendency to tamper with a rule's otherwise general scope.¹⁷⁵

Moreover, even where rules are drafted generally, that generality may be under-enforced due to the endogeneity of the legislative rules. Thus, a simple majority may interpret rules in their favor without recourse. For instance, even prior to legislative rules expressly allowing reconciliation to reach tax cuts, Republicans obtained this result through interpreting the existing reconciliation language to allow temporary tax cuts.¹⁷⁶ The procedural advantages offered by reconciliation are simply too great, tempting the majority to engage in one-sided applications of its rules.

Durability further enhances the Rawlsian veil effect of a rule;¹⁷⁷ here, too, veto bridges fall short. A rule's longevity obscures its long-term effects, thus forcing the lawmaker to draft a rule fairly, without knowing whether she reaps the statute's benefits or bears its burdens. The ruling party, however, routinely alters veto bridges to its benefit because there is so much at stake.¹⁷⁸ Unlike the arduous path to constitutional amendment, or even

¹⁷⁴ See Vermeule, *supra* note 172, at 412 ("The generality requirement . . . is said to produce veil effects that deprive decisionmakers of the information needed to pursue selfish or partial interests.").

¹⁷⁵ Kysar, *Lasting Legislation*, *supra* note 5, at 1033-35.

¹⁷⁶ See SCHICK, *supra* note 42.

¹⁷⁷ See Vermeule, *supra* note 172, at 415-16 (discussing the relationship between durability and fairness in the constitutional context).

¹⁷⁸ This observation comports with the work of Sarah Binder and Douglas Dion, who conclude that partisan calculus is a large driver of procedural change. SARAH A. BINDER, *MINORITY RIGHTS, MAJORITY RULE: PARTISANSHIP AND THE DEVELOPMENT OF CONGRESS* 9-12 (1997); DOUGLAS DION, *TURNING THE LEGISLATIVE THUMBSCREW: MINORITY RIGHTS AND PROCEDURAL CHANGE IN LEGISLATIVE POLITICS* 14-18 (1997); see also Andrew-Bruhl, *Return of the Line Item Veto?*, *supra* note 30, at 482-83 (discussing the partisan theory in the context of expedited rescission). Binder and Douglas also do not find support for the idea that majorities refrain from inflicting harm upon minorities for fear that the reciprocity of the rules will punish them when they are no longer in the majority. See BINDER, *supra*, at 9-10, 203-05; DION, *supra*, at 17, 248-50; see also Andrew-Bruhl, *Return of the Line Item Veto?*, *supra* note 30, at 484 (agreeing with Binder and Douglas in the context of expedited rescission).

to statutory revision, a simple majority of just one house can alter legislative rules, thus reducing their staying power. Recent developments in the Senate regarding the nuclear option and the reconciliation process make majoritarian rule changes much less controversial than in the past. Accordingly, legislative rules are now more volatile.

In summary, the lack of generality and durability in veto bridges means that they are often perceived as unfairly advantaging one party over the other, which is what procedural rules are designed to guard *against*.¹⁷⁹ Instead of being created behind a veil of ignorance where winners now could just as easily become losers later, the fluid boundaries of veto bridges and their temporality mean that their beneficiaries and benefactors are largely identifiable at the outset. The rules are unlikely to be applied equally to future, unknown legislative participants and thus can be easily manipulated. The perception of gamesmanship in the context of reconciliation, has created distrust among congressional members, causing greater and greater aggressiveness in the process by the ruling party.¹⁸⁰ Arguably, the distrust sewn by this discord has destabilized Senate rules generally.

2. The Political Economy of Prompting Legislation

In prior work, I have discussed the political economy effects of one category of prompting legislation—sunset provisions—and concluded that, categorically, such provisions increase rents from interest groups.¹⁸¹ Specifically, I argued that sunset provisions allow legislators to extract such rents at the sunset date by threatening an unfavorable outcome.¹⁸² This phenomenon helps to explain why legislators and lobbyists enact temporary legislation and continue to reenact it time and time again.

One critique of this assessment is that lawmakers and lobbyists can also extract rents by threatening to repeal or amend nonsunsetted, or permanent, legislation.¹⁸³ Yet the threat of letting a sunset expire is greater because it requires no action as opposed to the complex machinery necessary to repeal or amend a law. Although temporary legislation undoubtedly transfers fewer

¹⁷⁹ See Vermeule, *supra* note 172, at 412; see also Andrew-Bruhl, *supra* note 19, at 379-80 (analogizing procedural rules to constitutional rules as a means to protect against the whims of the ruling majority).

¹⁸⁰ See Kysar, *Reconciling Congress*, *supra* note 5, at 2154-55; *supra* notes 42-49 and accompanying text.

¹⁸¹ See Kysar, *Lasting Legislation*, *supra* note 5, at 1051; see also Kysar, *Sun Also Rises*, *supra* note 5, at 393-94.

¹⁸² Kysar, *Sun Also Rises*, *supra* note 5, at 394. Rent extraction is defined by threats of political disfavor rather than promises of rewards. See FRED MCCHESENEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 75 (1997) (identifying and explaining the rent extraction phenomenon).

¹⁸³ See Yin, *supra* note 5, at 243-44.

benefits to interest groups than permanent legislation because of its limited duration, campaign finance laws encourage lawmakers to advocate for temporary legislation by limiting the amount of contributions a lawmaker can receive in a given time period.¹⁸⁴ Because the demand for legislative product is likely limited within the legislator's particular constituency, each lawmaker will be motivated to preserve future demand by sunseting legislation in the current term.¹⁸⁵ These phenomena may explain why, for instance, there were only forty-four expiring tax provisions prior to the McCain–Feingold campaign finance reform law, and over two hundred such provisions afterwards.¹⁸⁶ As campaign finance limits became more prevalent, so did the legislators need to spread out rent extraction over time. Lobbyists may also be complicit in this arrangement. They are incentivized to prefer sunsets, which assure them continued employment.¹⁸⁷

Additionally, interest groups may value recurrent temporary deals more than permanent legislation for various reasons. Interest groups avoid lobbying disclosure requirements, and hence public scrutiny, if their contributions are staggered instead of bunched in a particular time period. Relative valuation is also important; if interest groups have a higher cost of capital than lawmakers, as may be the case with many business interests, the parties are more likely to decide upon temporary legislation.¹⁸⁸ Moreover,

¹⁸⁴ This effect may be muted in a post-*Citizens United* world. Daniel Hemel has posited that Congress's recent move to make permanent certain temporary tax breaks, known as tax extenders, can be explained, at least in part, by the curtailment of campaign finance restrictions in *Citizens United*. Daniel Hemel, *The Twilight of Tax Sunsets*, UNIV. CHI. L. SCH. FAC. BLOG (Dec. 29, 2015), <http://uchicagolaw.typepad.com/faculty/2015/12/the-twilight-of-tax-sunsets.html> [<https://perma.cc/E633-92XR>]. Nonetheless, campaign finance laws still limit the amounts individuals and groups can give to candidates, PACs, and party committees and thus should still work, at the margins, to advantage temporary over permanent legislation. I would conjecture that the move to permanency reflects Congress's frustration at having to revisit the same policy matters, exhausting the attention they can pay to other legislative priorities. Over time, this dynamic worsens. Much of the 2017 tax legislature was sunsetted, and we can expect Congress to enact new temporary provisions to meet budgetary pressures.

¹⁸⁵ See Kysar, *Lasting Legislation*, *supra* note 5, at 1053 (noting that because of campaign finance laws, lawmakers can capture more benefits from repeated contributions under temporary legislation).

¹⁸⁶ Hemel, *supra* note 184.

¹⁸⁷ This is supported by anecdotal evidence from a lobbyist, who said the following:

Who wants to lose a client? . . . With [temporary tax provisions], you know you always have someone who will help pay the mortgage. You go to the client, tell them you're going to fight like hell for permanent extension, but tell them it's a real long shot and that we'll really be lucky just to get a six-month extension. Then you go to the Hill and strike a deal for a one-year extension. In the end, your client thinks you're a hero and they sign on for another year.

Pat Jones, *New Day May Dawn for Sunset Tax Provisions*, 66 TAX NOTES 1587, 1587 (1995) (internal quotation marks omitted).

¹⁸⁸ Cf. Hemel, *supra* note 184 (making a similar point about relative discount rates).

corporations may pay more for temporary deals since agency costs may lead shareholders to overemphasize short term earnings as a proxy for evaluating managerial performance.¹⁸⁹ The availability of temporary legislation in these contexts will increase interest group activity at the margins, as compared to a world without temporary legislation.

Finally, permanent legislation carries real risks, which decreases its value to the interest group. For instance, a legislator may breach his or her duties to the interest group because of competing demands or opportunities; the legislator may lose office, or the legislative coalition may change.¹⁹⁰ Although an interest group may prefer durability in the law, it is unlikely that lawmakers will be able to ensure the law's survival beyond a short-term horizon in many contexts.¹⁹¹ Under these circumstances, the interest group will not pay for the long-term benefit or will discount it by the probability it will not survive. In fact, sunsets might arise precisely because one group expects political instability in the future period that will upset any agreed upon bargain. The interest group itself may also be unable to use future benefits due to changing circumstances or identity.¹⁹² The interest group may thus prefer a series of temporary deals rather than a permanent one.

This view of the political economy explains the continual renewal of sunsetted tax provisions; lawmakers and lobbyists benefit from repeated extraction of rents, and interest groups pay up because they may value the temporality of certain benefits. Sequestration functions in a manner similar to sunsets; lawmakers use the looming threat of sequestration to continually extract benefits from interest groups. Rather than facing arbitrary reallocation of federal resources, sequestration spurs interest groups into action, who advocate for maintaining their particular benefit. In both cases,

189 See Lucian Arye Bebchuk & Marcel Kahan, *A Framework for Analyzing Legal Policy Towards Proxy Contests*, 78 CALIF. L. REV. 1071, 1102-03 (1990) (criticizing corporate management's increase in short-term earnings in order to appease shareholders who "lack perfect information").

190 See Richard L. Doernberg & Fred S. McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 MINN. L. REV. 913, 945-52 (1987) (describing this phenomenon in the tax context).

191 Saul Levmore discusses how laws are more valuable to interest groups if they are more durable. This does not necessarily mean, however, that a series of short-term deals will not be preferable for the reasons mentioned above. Levmore also readily acknowledges that, in fact, lawmakers cannot commit to the durability of most law, with the exception of certain spending projects and programs "that are less vulnerable to the winds of change." Saul Levmore, *Interest Groups and the Durability of Law*, in THE TIMING OF LAWMAKING, *supra* note 10, at 171, 194.

192 John Macey had made a similar point: interest groups should favor narrowly tailored legislation over broad constitutional provisions because the future beneficiaries of the latter are unclear. See Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 246-47 (1986) (illustrating that "even special interest groups that might benefit from some specific, discrete legislative wealth transfers are likely to object to general constitutional provisions" (emphasis added)).

prompting legislation threatens to disrupt the existing allocation of government resources and hence is ripe for rent extraction opportunities. It provides, in the classic phrasing of Fred McChesney, “money for nothing.”¹⁹³

3. The Political Economy of Dynamic Legislation

Dynamic legislation typically does not afford the same rent-extraction opportunities as prompting legislation. By definition, prompting legislation overturns the legislative status quo bias through the threat of undesirable outcomes, thus lending itself perfectly to rent extraction. Dynamic legislation, on the other hand, overcomes the status quo bias through spontaneous adjustments. If an interest group benefits from the dynamic legislation, a lawmaker could threaten its repeal or modification, but this threat would be no more forceful than with ordinary legislation, requiring navigation through the entire lawmaking apparatus.

Another way in which dynamic legislation is undesirable to interest groups is its relative lack of specificity concerning its future beneficiaries. Prompting legislation contains triggering events that likely advantage one party over the other. Sequestration, for instance, penalizes those who wish to maintain current spending levels. Sunsetting tax cuts, on the other hand, penalize those who want to maintain current tax cuts. The mechanism in prompting legislation of undesirable outcomes means it is likely known which interests will be harmed. Prompting legislation is *designed* to punish particular groups.

Dynamic legislation, in contrast, does not require subsequent congressional action and thus reduces the opportunities for lawmakers to extract rents. Indeed, the goal of dynamic legislation is to create an evolving set of laws that *minimize* the need for later congressional action. In other words, dynamic legislation attempts to preserve the pre-existing political bargain and shifts the burden of action onto advocates of change. This feature makes it more resilient to rent extraction.

By way of example, consider inflation and its effect on our tax system. The tax code calculates income using a progressive rate schedule by applying increased tax rates to brackets denominated in dollar amounts. So, for instance, assuming there is a tax bracket of 10% on the first \$10,000 of income, and 25% on the rest, a taxpayer with \$20,000 of income will pay tax of \$3,500. If, over time, these brackets are not adjusted for inflation, the tax burden will be larger than the year before, a phenomenon known as “bracket creep.”¹⁹⁴ Eventually,

¹⁹³ MCCHESENEY, *supra* note 182; see also DIRE STRAITS, *Money for Nothing*, on BROTHERS IN ARMS (Vertigo 1988) (describing rock musicians as earning “[m]oney for nothin”).

¹⁹⁴ DONALD W. KIEFER, CONG. RESEARCH SERV., 83-115, THE EFFECTS OF INDEXATION ON TAX REVENUES AND DISTRIBUTIONAL EFFECTS OF THE U.S. INDIVIDUAL INCOME TAX SYSTEM 5 (1983).

the erosion of the brackets through inflation makes a rate cut politically necessary. Congress can then use this must-pass legislation as a vehicle to reallocate the tax burden to certain private parties.¹⁹⁵ This dynamic bore out in practice, as Congress responded to bracket creep through discretionary tax cuts, which, in turn, gave lawmakers the opportunity to reward special interests.¹⁹⁶ In the 1981 Economic Recovery Tax Act, Congress addressed bracket creep by including automatic inflation adjustments of the tax brackets, as well as the personal exemption,¹⁹⁷ and thus, through dynamic legislation, removed the discretion to threaten or reward interest groups.¹⁹⁸

Of course, it is possible that interest groups may be able to draft dynamic legislation keyed to indicators specific to their circumstances, thus ensuring that their benefits will be maintained down the line and in accordance with the group's future needs. Compared to ordinary legislation, so the argument would go, this feature may be undesirable since, on balance, it may produce more deals between lawmakers and interest groups. For instance, Congress currently provides an excise tax exemption for wooden arrows designed for use by children that consist of all natural wood that measures 5/16 of an inch or less in diameter, and are not suitable for use with a bow that has a maximum draw weight of thirty pounds or more.¹⁹⁹ Drafted narrowly to benefit a company called Rose City Archery, the precise nature of the legislation ensures its scope is that of the company and no other. Suppose, however, that the lawmakers drafted the law to update automatically, perhaps pegging the size of the tax relief inversely to the company's market share of the industry. Such an arrangement may increase the value of the legislative deal to Rose City since it allocates the tax relief according to the company's needs at a given time.

Still, the ability to craft benefits that will follow the characteristics and requirements of an interest group over time is a narrow critique of dynamic

¹⁹⁵ Dynamic legislation can decrease special interest benefits in idiosyncratic ways. For instance, the standard deduction dilutes the value of the itemized deductions, such as the mortgage interest deduction, which benefits interest groups like the real estate industry. This is because taxpayers can claim the standard deduction without regard to their circumstances. Indexing the standard deduction for inflation, as is the case under current law, ensures that the standard deduction continues to dilute itemized deductions, perhaps at an increasing rate, thus harming the special interests that benefit from the itemized deductions. See Alan L. Feld, *Silent Tax Changes: The Political Economy of Indexing for Inflation* 16-17 (Bos. Univ. Sch. of Law, Law & Econ. Working Paper No. 15-35, 2015), <https://www.bu.edu/law/files/2015/12/FeldA09212015paper.pdf> [<https://perma.cc/7WA2-2QMC>] (noting that the standard deduction was 57.8% of the average itemized deductions in 2010 for AGIs between \$40,000 and \$50,000, compared to 50.2% in 1990 for the same AGI interval).

¹⁹⁶ See *id.* at 10 (stating that discretionary adjustments "allow for selective cuts in the rates").

¹⁹⁷ See Lawrence M. Axelrod, *Chain, Chain, Chain: Taxes and Chained CPI*, 139 TAX NOTES 461, 461 (2013).

¹⁹⁸ See Feld, *supra* note 195, at 12 (arguing that automatic adjustments take away the power of legislators to "provide targeted benefits for supporters and friends").

¹⁹⁹ 26 U.S.C. § 4161(b)(2)(B) (2012).

legislation since many types of dynamic legislation will not present this result. In contrast, prompting legislation, by its very nature, tends to exploit interest groups due to its threats to the status quo. Additionally, dynamic legislation, even if drafted narrowly, also carries the significant risk that any particular interest group will eventually fall outside its scope (thereby increasing the cost of the legislation relative to its benefits) or, alternatively, that others will fall inside the scope (thereby benefitting its competitors). The evolutive character of dynamic legislation may mean that, compared with ordinary legislation, the legislative benefits are *less* valuable to interest groups. The time-limited nature of temporary legislation, in contrast, minimizes the risk that legislative benefits will go unused by the intended party.

It could also be argued that dynamic legislation shields lawmakers from accountability since they do not have to act for the law to change.²⁰⁰ Thus, voters may unfairly attribute the policy changes of dynamic legislation to prior generations of lawmakers. The flipside of this argument, however, is that the *failure* to automatically adjust policy may allow lawmakers to skirt public judgment for the consequences of that failure. In other words, when compared with dynamic legislation, which generally preserves the distribution of costs and benefits through evolving circumstances, static legislation represents a deviation from that bargain for which lawmakers should be held responsible. For instance, not updating our progressive tax rate structure to reflect inflation would allow for the slow but steady increase of taxes without public notice. Moreover, this would impact most acutely taxpayers in the middle brackets, thereby undoing the status quo distribution of the tax burden.²⁰¹ This difference in framing what constitutes a policy change means that static legislation, even more so than dynamic legislation, can be criticized for protecting current lawmakers against public accountability.

D. Integrity of the Budget Process

One often overlooked criterion for evaluating the democratic function of lawmaking tools is their interaction with the budget process. Budgeting is an essential aspect of the democratic process, allowing for expression of lawmakers' decisions over government spending and investment.²⁰² It ensures that information on long-term budget impacts and various policy trade-offs are made available to voters and lawmakers. It coordinates decisionmaking

²⁰⁰ See Kamin, *supra* note 11, at 22 (arguing that, on balance, dynamic legislation shields current lawmakers from direct accountability).

²⁰¹ See Feld, *supra* note 195, at 11-12.

²⁰² See PRESIDENT'S COMM'N ON BUDGET CONCEPTS, REPORT OF THE PRESIDENT'S COMMISSION ON BUDGET CONCEPTS 11 (1967); see also Block, *supra* note 60, at 899-904 (2002) (discussing the democracy-oriented goals of the budget process).

both within the current Congress and across different congresses. The budget rules assist Congress in abiding by their budgeting choices, through tools like PAYGO, spending caps, and other points of order.²⁰³

Along the budgeting axis, dynamic legislation has a distinct advantage over prompting legislation because it does not require later action from Congress. In this manner, it limits the opportunity for Congress to defect from budgetary constraints it has previously imposed on itself. A bit of background on budget rules, and their application to temporary legislation, helps to understand why this feature of dynamic legislation is so important.

1. Budgetary Games, Prompting Legislation, and Veto Bridges

Gamesmanship plagues the budgetary system. This is because budget rules serve as very weak precommitment devices and can be avoided at a later point in time.²⁰⁴ Budget rules exist because lawmakers have a primary goal of budgetary responsibility when they are conceived, at Time 1, but lawmakers also know that, at the time of the rule's application, Time 2, they will face pressures from their constituents to deliver costly legislative benefits. They thus collectively agree upon a set of rules that impose costs upon them when they deviate from the path of fiscal discipline. Yet unlike true precommitment devices, which require a binding force external to the tempted,²⁰⁵ these rules can be evaded at Time 2.

Later pressure to deliver legislative benefits is great, and lawmakers can and do interpret the rules in manners that allow them to escape their penalties at that later point in time. The more times the legislature has to apply the rules in order to effectuate policy, the more likely it is that it

²⁰³ Block, *supra* note 60, at 901.

²⁰⁴ For a discussion of legislative rules as precommitment devices, see Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501, 512-13 n.43 (1998), in which she describes supermajority requirements, among other legislative rules as "operat[ing] as precommitment devices to avoid collective action problems that reduce Congress's ability to achieve preferred policy outcomes"; see also, e.g., Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717, 751 (2005), identifying precommitment as the driving force behind some legislative rules; and Nancy C. Staudt, *Constitutional Politics and Balanced Budgets*, 1998 U. ILL. L. REV. 1105, 1117 (1998), calling a balanced-budget amendment a precommitment tool.

²⁰⁵ See Jon Elster, *Don't Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment*, 81 TEX. L. REV. 1751, 1759-60 (2003) (noting that "the individual can enlist others in the effort to bind himself" while "[b]y contrast, there is nothing external to society" to bind society in its entirety). For the foundational works in precommitment theory, see JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 36-111 (1979); JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* (2000) (expanding on the ideas Elster presented in the title essay of *ULYSSES AND THE SIRENS*); Thomas C. Schelling, *Ethics, Law, and the Exercise of Self-Command*, in *CHOICE AND CONSEQUENCE* 83, 96-107 (1984); Thomas C. Schelling, *The Intimate Contest for Self-Command*, in *CHOICE AND CONSEQUENCE* 57, 76-82 (1984).

will engage in evasion of the rules by orchestrating and arbitraging differences in the budgetary treatment of its actions. Prompting legislation requires several layers of congressional action and thus increases the likelihood of budgetary gamesmanship.

Temporary legislation is a good example of the budgetary system's inherent weakness. As discussed above, the sunset provisions of the Bush tax cuts were borne out of the reconciliation process. In prior work, I critiqued the sunsets of the Bush tax cuts, along with other sunsets in the tax code, for engaging in fiscal illusion since they would likely be renewed without full accounting of their costs.²⁰⁶ In fact, this ploy is precisely what ended up happening. When a portion of the Bush tax cuts were made permanent in the American Taxpayer Relief Act of 2012, Congress specifically exempted that law from statutory PAYGO despite the law increasing the deficit by nearly \$4 trillion.²⁰⁷ History repeated itself in 2015 when Congress permanently enacted a subset of the perpetually expiring tax provisions, the so-called tax "extenders." Just as it did with the Bush tax cuts, Congress exempted the extenders from PAYGO, thus never paying for the \$622 billion worth of tax cuts.²⁰⁸

This gamesmanship occurred because of several dynamics. First, the political impetus to extend the cuts was enormous; once the populace was used to low tax rates, it was hard to take them away. Since there was nothing to hold Congress to its rules, it bent them under the weight of such pressure when they reconsidered the sunsets. Second, contrary to the prediction of pro-sunset scholars,²⁰⁹ Congress and other actors eroded the stability of the budget baseline (or the starting point for measuring the costs of legal change²¹⁰). This erosion, in turn, allowed for immunity from the PAYGO rules.²¹¹ Many of the major new provisions in the 2017 tax act

²⁰⁶ See Kysar, *Lasting Legislation*, *supra* note 5, at 1026-41 ("The JGTRRA tax provisions were made temporary, in part, to reduce the costs of the legislation as agreed upon by the legislators in light of a growing deficit.").

²⁰⁷ JOINT COMM. ON TAX'N, 113TH CONG., ESTIMATED REVENUE EFFECTS OF THE REVENUE PROVISIONS CONTAINED IN AN AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R.8, THE "AMERICAN TAXPAYER RELIEF ACT OF 2012," AS PASSED BY THE SENATE ON JANUARY 1, 2013 (2013).

²⁰⁸ The Consolidated Appropriations Act, 2015, Pub. L. No. 114-113 § 1001, 129 Stat. 3035 (2015).

²⁰⁹ Pro-sunset scholars argue that temporary legislation actually enhances fiscal restraint because there is a thorough reckoning of its costs upon each legislative reenactment, unlike permanent legislation, which continues without legislative action even though it incurs costs beyond the budget window. See Yin, *supra* note 5, at 180. This argument, however, depends upon consistent application of the budget baseline, an assumption that has not borne out in practice. See Kamin & Kysar, *supra* note 49, at 129-30 ("Although Republicans have called for the current policy baseline to be used in the context of the tax extenders already in place, they have notably failed to do so for any new temporary tax cuts that are enacted with tax reform.").

²¹⁰ See Kamin, *supra* note 2, at 147 ("The budget baseline . . . is the starting point of the legal regime with budgetary effect.").

²¹¹ See Kysar, *Lasting Legislation*, *supra* note 5, at 1026-35 (predicting this outcome).

are temporary, and we can expect Congress to again erase the costs of extension as those sunsets approach.

The story of congressional experience with sequestration is similar in many ways to that of temporary legislation. In these cases, budget rules that Congress created were later circumvented when Congress found the pressure to deliver legislative benefits too great. In the early 2000s, for instance, sequestration was repeatedly avoided because Congress ordered the OMB to zero out or reduce PAYGO balances.²¹²

2. Dynamic Legislation and the Budget Process

In contrast to the other anti-status quo devices, dynamic legislation reduces budgetary gamesmanship because it does not require multiple stages of congressional action. The point of dynamic legislation, after all, is to *minimize* the need for later congressional action. Dynamic legislation accordingly does not provide as many opportunities that tempt Congress to defect from its budgetary goals at subsequent points in time. To be sure, we can anticipate some budgetary gimmicks upon the bill's original enactment. For instance, Congress could delay the automatic adjustment period beyond the budgetary window if so doing would reduce the bill's costs. But the gaming opportunities presented by dynamic legislation are diminished since, unlike prompting legislation, it does not require Congress to act consistently over time.²¹³

Although dynamic legislation does not readily lend itself to budget gamesmanship, it does present estimating difficulties because of its conditional nature. To some extent, however, the Congressional Budget Office and the other estimators have experience with such an undertaking. For instance, revenue estimators currently assume certain changes in the consumer price index ("CPI") when scoring inflation-indexed tax legislation.²¹⁴ These assumptions infuse the revenue estimate with a degree of uncertainty, but one that does not jeopardize the usefulness of the revenue-estimating exercise.

Although the estimators at the Congressional Budget Office ("CBO") and Joint Committee on Taxation ("JCT")²¹⁵ will have less experience with new indices that Congress relies upon or creates, the sorts of challenges they present are not insurmountable and, in many senses, are less serious than

²¹² H.R. REP. NO. 107-350, at 114 (2002) (Conf. Rep.); *see also* Block, *supra* note 60, at 866 ("Congress simply directed the OMB . . . to change the sequester balance to zero.").

²¹³ *See* Kamin & Kysar, *supra* note 49, at 126 (identifying the inconsistent application of the budget baseline between enactment and renewal of temporary tax provisions as the source of budget gamesmanship in that context).

²¹⁴ *See* Christopher J. Puckett, *Is the Experiment Over? The OMB's Decision to Change the Game Through a Shortening of the Forecast*, 11 GEO. J. POVERTY LAW & POL'Y 169, 183-85 (analyzing the factors considered by CBO when estimating Medicare costs).

²¹⁵ *See* SCHICK, *supra* note 42.

those typically faced by the estimators. CBO and JCT routinely incorporate behavioral changes that generate budgetary savings or costs into their revenue estimates. For instance, CBO and JCT revenue estimates include changes in crop output based on new agricultural policies, differences in the take-up rate of certain government benefits due to alterations to those benefits, and modifications to capital gains realizations in response to variations in the capital gains rate—all uncertain variables. The revenue estimators have even recently begun to incorporate changes in behavior that have macroeconomic effects, a notoriously complex and difficult modeling exercise.²¹⁶ Moreover, prompting legislation also poses revenue-estimating problems, since the likelihood of sequester or sunset is indeterminate. Scoring dynamic legislation may be less of a challenge than these categories since the range of legislative outcomes it produces may, in fact, be narrower, avoiding the policy cliffs that prompting legislation produces.

Importantly, dynamic legislation could be harnessed to *improve* upon the budget process. Congress could automatically adjust a law, scaling up or down its benefits and burdens, to meet a certain revenue target. For instance, many times Congress wishes to enact revenue neutral legislation. As circumstances play out, however, legislation may start losing (or raising) revenues. Congress could instead enact automatic adjustments of the law's provisions to ensure that revenue neutrality is maintained over time. In contrast to most budget rules, which can be overcome by a simple majority vote in a single house, Congress would only be able to circumvent this type of constraint through the Article I lawmaking apparatus. I revisit this possibility below when I discuss implementation of dynamic legislation.²¹⁷

To summarize, although dynamic legislation presents some challenges for the budget process, it does not present as many occasions for pernicious budgetary gamesmanship as the other anti-status quo devices. Notably, it also presents opportunities to meet budgetary goals in a more effective manner than normal budget rules.

IV. IMPLEMENTATION

The above discussion has shown the democratic advantages of dynamic legislation. Other considerations, however, might counsel in favor of employing prompting legislation or veto bridges in certain situations. There may be legitimate reasons to use prompting legislation or veto bridges—such as sunsets in times of experimentation or emergencies—that override the democratic

²¹⁶ See S. Con. Res. 11, 114th Cong. (2015) (requiring CBO to incorporate macroeconomic effects into its cost estimates for major legislation).

²¹⁷ See, e.g., *infra* note Part IV.B.5.a.

disadvantages of the tool. Some tools may also be better at others depending on the particular cause of the gridlock in question. Additionally, the devices may be used in conjunction with one another. For instance, the legislature could enact dynamic legislation through the reconciliation process if bipartisan consensus cannot be achieved. Dynamic legislation could also be sunsetted on an experimental basis, giving the government an opportunity to assess its effectiveness as a new lawmaking tool. The choice is not necessarily one or the other, but democratic considerations tend to support the use of dynamic legislation, all else being equal. This next section will explore the circumstances in which the use of dynamic legislation is particularly promising.

A. *General Principles for Applicability*

As a categorical matter, dynamic legislation will likely have greater application when (a) it can be designed with low costs and (b) the law presents problems in the aforementioned areas where dynamic legislation excels—institutional interaction with the administrative state, entrenchment, the political economy, and the budget process.

As for the former, we can expect dynamic legislation to be more easily crafted when the external indicia to which it responds can be quantified. The drafting process is simplified if the law changes in accordance with formulas or multipliers rather than fact-specific ranges of circumstances. Better yet is if the various aspects along which the law is changing are not only quantifiable but are able to be compiled into one index. Ever changing law also risks costly implementation, but the interpretation and application of the evolving legal landscape will be simpler if legal changes respond to clear numerics.

If the automating mechanisms are easily quantifiable, it may also be more likely that Congress can reach consensus on the law. This is because of the obvious and somewhat circular point, that more easily quantifiable mechanisms mean there is less doubt with regard to their validity in the first place. For instance, if climate change risk can be quantified and rolled into a single index this likely means that scientific knowledge has coalesced around the legitimacy of certain environmental indicators and their impact.

Quantifiability, however, may also meaningfully and positively influence political compromise since it can reduce the amount of uncertainty in the direction that the law will take. Lawmakers who fear that the law will develop into unanticipated iterations can be somewhat assuaged if a numeric range cabins that evolutive path.

That being said, quantifiability is a helpful but by no means sufficient condition to the enactment of dynamic legislation. First, deciding upon the makeup of the index may prove vexing. In the inflation context, for instance, a longstanding debate still exists between which measure of

inflation should be used, and just recently Congress switched to an alternative measure in the tax context.²¹⁸

Even if an index is developed and agreed upon, there is still the need to apply that index to policy. How should, for instance, carbon tax rates respond to fluctuations in a climate change index? Drafting a policy response to each variation of the index at first seems like a daunting task. In many cases, however, policy responses will often be calibrated proportionately to such changes so that Congress need only determine the relationship between a single metric—or metrics within a specified range—and the policy impact. The policy choice, in these instances, really looks no less complex than ordinary legislation.

Dynamic legislation will also be most desirable in those contexts where it outperforms other anti-status quo devices. For instance, if a category of legislation is expected to produce political economy concerns because of outsized interest group influence, then the ability of dynamic legislation to reign in this influence, or at least not exacerbate it compared to prompting legislation, will be particularly valuable. Due to its insusceptibility to budgetary gamesmanship, dynamic legislation will also be worthwhile to pursue in an area of law that interacts heavily with the budgetary process. Moreover, we can expect dynamic legislation to pay off in legislative contexts that present challenges to delegating policy to the administrative state.

We can expect that certain areas of law will be more or less conducive to the employment of dynamic legislation, depending on whether they share the aforementioned features. Notably, fiscal legislation has many of these characteristics. First, at the risk of stating the obvious, fiscal policy is an area of law whose features are heavily quantifiable. We can automatically adjust these features with relative ease because the inputs are quantifiable, and they interface quite naturally with indices for this reason as well.

In addition to presenting relatively low design costs, fiscal policy also interacts problematically with the political economy, the administrative state, and the budget process, meaning that the benefits that dynamic legislation can provide along these axes are substantial. For instance, collective action problems may mean that interest groups are able to secure tax benefits at the expense of the general public.²¹⁹ As mentioned above, the interface of fiscal policy and the administrative state presents special difficulties since there may be constitutional, historical, and normative reasons for favoring less delegation in this area.²²⁰ Finally, fiscal policy interacts heavily with the budget process. The strong political pressures to deliver benefits through the

²¹⁸ See Act of Dec. 22, 2017, Pub. L. No. 115-97, § 11002, 131 Stat. 2054, 2059 (converting cost-of-living adjustments to chained CPI from CPI).

²¹⁹ See James Q. Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 357, 369 (1980).

²²⁰ See *supra* notes 126–127 and accompanying text.

tax code makes this interaction dysfunctional, causing lawmakers to game PAYGO and budget reconciliation rules in the name of tax cuts.²²¹

Perhaps because of these characteristics, this area of the law already contains automatic features. For instance, many federal tax provisions are indexed for inflation, as previously discussed.²²² Still, there is much more room for experimentation and implementation of dynamic legislation in the fiscal policy and other contexts, as will be discussed below. One particularly promising aspect of dynamic legislation, which the below examples help illustrate, is that it allows Congress to adjust laws automatically to take into account whether they are meeting expectations. In this manner, dynamic legislation can function as a means for Congress to self-evaluate.

B. *Potential Applications*

1. Pigouvian and Similar Taxes

One area where dynamic legislation should be considered is in the Pigouvian tax context. Under economic theory, markets fail when parties do not bear the full costs of their actions, thereby producing negative externalities. Governments can impose Pigouvian taxes in the amount of such externalities, which then cause the parties to internalize the costs of their actions.²²³ The parties are then able to make an economically efficient decision, weighing an action's full costs upon the world against its benefits.

Of course, assessing the social costs of the activity, and hence the correct level of taxation, still poses design challenges. Dynamic legislation could address one aspect of this complexity—the social costs of an activity, or the information used to calculate them, may not be static. A unit of pollution may impact society differently from year to year. In that case, a tax assessed on the pollution itself may be correct initially but may then deviate from the socially optimal level if the social harm per unit increases or decreases. For instance, new information may indicate that the climate is more sensitive to carbon dioxide emissions than previously thought. Dynamic legislation, perhaps coupled with delegation to a regulating entity, could dynamically adjust the tax rates to account for these changes.²²⁴

²²¹ See *supra* notes 205–214 and accompanying text.

²²² States have also employed automatic adjustments in the tax context. See David Gamage, *Preventing State Budget Crises: Managing the Fiscal Volatility Problem*, 98 CALIF. L. REV. 749, 802–04 (2010) (“In . . . the property tax systems of twenty-two states . . . the amount of revenue raised is held constant as the economy cycles, with tax rates automatically adjusted so as to maintain the revenue targets.”).

²²³ See generally JONATHAN GRUBER, *PUBLIC FINANCE AND PUBLIC POLICY* (5th ed. 2015).

²²⁴ See Kamin, *supra* note 5, at 251–53 (making a similar suggestion in this context).

Many in the environmental field challenge the idea that setting tax rates equal to the social costs of the pollution is sufficient since this will not necessarily result in the reduction of emissions. The argument is that the tax must also be greater than the marginal cost of abatement, otherwise the polluting firm will not reduce emissions.²²⁵ Dynamic legislation could also be employed to address this challenge by dynamically adjusting the tax in response to whether current activities or behaviors, in this case emissions, exceed or fall short of a target level. Dynamic legislation, in this case, leverages the additional information that the implementation of the tax would provide—the cost of abatement.

One carbon tax proposal, for instance, would create an initial tax, coupled with a standard growth rate for the tax that would be applicable during a control period.²²⁶ Emission targets could be set for certain time intervals. If the targets were unmet, the imposition of a higher growth rate for the tax would be triggered, which would turn off once emissions fell below the target.²²⁷

2. Nontraditional Phase-Ins and Phase-Outs

One promising application would be to use dynamic legislation to phase in legislative changes. There is an old adage that legal reforms produce winners and losers. Phase-ins can mitigate the negative impact upon certain parties. Typically, phase-ins work by gradually implementing policies as time passes. Rather than make the transition contingent on dates, however, one could employ dynamic legislation to make the provisions contingent upon the occurrence of external events. This type of phase-in could be particularly useful where new policies present uncertainties as to how they will interact with the real world. One could design the legislative phase-in so that the change is ratcheted up only after certain events occur or if there is evidence that the change is generating the desired effects.²²⁸

²²⁵ See DAVID M. DRIESEN, *THE ECONOMIC DYNAMICS OF ENVIRONMENTAL LAW* 69-70 (2003) (“[A] system designed to use economic incentives to improve environmental quality must establish tax rates exceeding the marginal cost of reductions.”).

²²⁶ See Gilbert E. Metcalf, *Cost Containment in Climate Change Policy: Alternative Approaches in Mitigating Price Volatility*, 29 VA. TAX REV. 381, 391-92 (2009) (noting that under “the Responsive Emissions Autonomous Carbon Tax (REACT) . . . [a]n initial tax and standard growth rate for the tax is set for the first year of a control period.”).

²²⁷ *Id.*; see also Larry Karp & John Livernois, *Using Automatic Tax Changes to Control Pollution Emissions*, 27 J. ENV'T'L. ECON. & MGMT. 38 (1994) (noting that an “iterative procedure which adjusts the tax when emissions exceed or fall short of the target” could be used to overcome the problem of lack of information about abatement costs).

²²⁸ Charles Whitehead has made a similar suggestion in the regulatory context—that new regulation on the financial markets be phased in to accommodate unanticipated consequences. Regulators could use the information provided at the initial phase-in stage to then change the regulation if necessary. This protects against significant adverse outcomes that would arise if the

For instance, central to a recent tax reform proposal was a cash flow destination-based tax, which would have turned the current corporate income tax into essentially a consumption tax.²²⁹ The plan was border adjusted, meaning that it excludes exports and taxes imports without deduction for costs.²³⁰ Controversially, the plan may have impacted prices on imports. Under economic models, the value of the dollar should, however, correspondingly increase, making the tax neutral vis-à-vis American consumers and importers.²³¹ Skepticism in the business and investment community regarding the currency adjustments, however, turned out to be a major political obstacle to its enactment.²³²

One way to assuage those nervous about relying on untested models would be to phase in the tax, not simply across time, but to peg its introduction to the dollar adjustment. The tax rate could be designed such that it increases by a specified percentage for every x% increase in the dollar. This transition rule would minimize any negative effects on consumers and importers because the lower rate would cap the impact on consumer prices, perhaps appeasing critics to a sufficient degree to allow for enactment of the tax.²³³

Tom Merrill and David Schizer's petroleum fuel price stabilization plan (PFSP) also proposes dynamic phase-ins. The PFSP would set a floor of

regulation was finalized at the outset. See Charles K. Whitehead, *The Goldilocks Approach: Financial Risk and Staged Regulation*, 97 CORNELL L. REV. 1267, 1273 (2012).

229 See HOUSE TAX REFORM TASK FORCE, A BETTER WAY, OUR VISION FOR A CONFIDENT AMERICA: TAX 27-29 (2016), https://www.novoco.com/sites/default/files/atoms/files/ryan_a_better_way_policy_paper_062416.pdf [<https://perma.cc/UEZ6-3Z6B>].

230 *Id.* at 28 (“[V]alue-added taxes (VATs) . . . include ‘border adjustability’ This means that the tax is rebated when a product is exported to a foreign country and is imposed when a product is imported from a foreign country.”).

231 See Alan J. Auerbach & Douglas Holtz-Eakin, AM. ACTION F., *The Role of Border Adjustments in International Taxation* (2016), <https://www.americanactionforum.org/research/14344> [<https://perma.cc/MS28-UK28>] (“An export subsidy would also strengthen the dollar as a result of the surge in demand for exports, which would partially reduce this demand surge by raising the cost of . . . goods abroad.”).

232 See Richard Rubin, *What We Know About Border Adjustment and How It Would Work*, WALL ST. J. (Jan. 29, 2017), <https://www.wsj.com/articles/what-we-know-about-border-adjustment-and-how-it-would-work-1485723571> [<https://perma.cc/Z37E-MAWZ>] (noting that “large retailers, oil refiners and some conservative groups” worry that taxing imports will cause prices to go up).

233 To be sure, this feature would present design difficulties. First, an economic slowdown may occur, thus impeding the dollar's increase. Alternatively, the dollar may increase for reasons other than the tax. Accordingly, it may be difficult to parse out if appreciation due to the border adjustment has in fact occurred. It may also be necessary to “back-date” the currency adjustment since the dollar will adjust once the border adjustment proposal looks plausible, perhaps necessitating averaging mechanisms. Still, a rough justice rule could suffice here. No matter what contributes to the dollar appreciation, if it occurs, it will go a long way to assuaging the fear of importers. A second problem occurs if you phase in the tax's exclusion for exports. This may harm exporters who would have a difficult time selling their goods abroad. Phasing in only the import side while also providing full exclusion for exports immediately would, however, generate substantial revenue losses.

\$3.50-\$4.00 per gallon of gas and would assess a fuel levy if the price of gas fell below that threshold.²³⁴ The levy would rise as world oil prices fell and, conversely, would fall as prices rose. One version of the plan employs a traditional phase-in, raising the price threshold over time.²³⁵ However, another variation adopts a type of nontraditional phase-in by providing that the threshold trail any upward movements of the retail price, until the threshold is set to the desired level.²³⁶

3. Countercyclical Laws

In times of economic downturn, lawmakers and regulators can employ tools to assist in stabilizing the economy. Monetary policy is the most often employed countercyclical measure largely because the Federal Reserve can quickly adjust interest rates in response to economic conditions. Post-Great Recession, however, many economists have questioned whether monetary policy alone is a sufficient response, especially in the face of dramatic downturns.²³⁷ There might be a floor, for instance, to which interest rates can be lowered without harmfully impacting the dollar or creating future bubbles.²³⁸ Fiscal policy, such as increased spending and tax cuts, may then be necessary. Other advantages to fiscal policy are that they are often faster acting and can be crafted to reach specific recipients.²³⁹

Still, economists and others often distrust countercyclical fiscal measures because of design difficulties.²⁴⁰ In order to be effective and not

²³⁴ Thomas Merrill & David M. Schizer, *Energy Policy for an Economic Downturn: A Proposed Petroleum Fuel Price Stabilization Plan*, 27 YALE J. ON REG. 1, 5, 32 (2010). The PFSP essentially stabilizes oil prices so that they will not decline below a floor. This incentivizes consumers and manufacturers to commit to investments in new behavior and technology.

²³⁵ *Id.* at 9-10.

²³⁶ *Id.* at 10.

²³⁷ See Jonathan S. Masur & Eric A. Posner, *Should Regulation Be Countercyclical?* 7 (Coase-Sandor Inst. for Law & Econ., Working Paper No. 782, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2866464 (“[T]he Federal Reserve’s ability to stimulate the economy by lowering interest rates is limited. In a severe economic downturn, even lowering interest rates to zero might not be enough to effectively stimulate the economy.”).

²³⁸ See *Summers Testimony on Fiscal Stimulus*, WALL ST. J. (Jan. 16, 2008), <https://blogs.wsj.com/economics/2008/01/16/summers-testimony-on-fiscal-stimulus>, [hereinafter *Summers Testimony*] (reprinting Former Treasury Secretary Lawrence Summers’s testimony before the Joint Economic Committee in which he stated that “full reliance on monetary policy could easily mean lowering interest rates to levels that would be problematic for the dollar, commodity prices, future asset bubbles and moral hazard”).

²³⁹ *Id.*

²⁴⁰ See J. Bradford DeLong and Laura D. Tyson, *Discretionary Fiscal Policy as a Stabilization Policy Tool: What Do We Think Now That We Did Not Think in 2007?* 2 (April 5, 2013) (unpublished manuscript), <http://www.imf.org/external/np/seminars/eng/2013/fiscal/pdf/tyson.pdf> [<https://perma.cc/ZY4X-EBDT>] (“Legislatures are, by design, institutions that find it very difficult to make decisions quickly Fiscal policies that take effect this year as a result of decisions made

counterproductive, fiscal stimulus must be “timely, temporary, and targeted.”²⁴¹ Dynamic legislation can be utilized to achieve all three of these factors, and so could be employed in the countercyclical context, both in the tax and spending areas. First, dynamic legislation can be designed to immediately spring into life once a measure of economic weakness occurs, thus ensuring that the legislative response is timely. Possible triggers could be the unemployment rate, negative economic growth, or when the federal funds rate is at or near 0%.²⁴² Dynamic legislation can also phase out as those conditions improve to ensure it is temporary. Finally, fiscal policy generally allows for targeted relief—for instance to the middle and lower classes—in a way that monetary policy cannot. Dynamic legislation might offer the ability to target measures even further. For instance, it could be used to deliver benefits to those regions most affected by the downturn. Regional provisions are discussed below.²⁴³

Recent scholarship has focused on how the legal system might respond to macroeconomic conditions. Zachary Liscow has proposed that bankruptcy rules be “counter-cyclical,” prescribing that bankruptcy judges consider the employment effects of their cases based on the unemployment rate.²⁴⁴ Although interesting, this proposal suffers from the critique that it stretches the institutional competence of the judiciary, which may be ill-equipped to make judgments concerning the economy at large. A Congress-centered approach that sets countercyclical measures into motion upon the presence of certain indicators as is proposed herein, does not face this structural critique.

by a legislature last year based on information from two or three years ago would seem to guarantee sub-optimal economic outcomes.”).

²⁴¹ *Summers Testimony*, *supra* note 238.

²⁴² Masur and Posner consider each of these triggers in the context of countercyclical regulation. *See* Masur & Posner, *supra* note 237, at 26–28.

²⁴³ *See infra* notes 246–248 and accompanying text.

²⁴⁴ Zachary Liscow, *Counter-Cyclical Bankruptcy Law: An Efficiency Argument for Employment-Preserving Bankruptcy Rules*, 116 COLUM. L. REV. 1461, 1461 (2016) (proposing “to systematize what is currently an ad hoc trade-off by making bankruptcy law explicitly counter-cyclical—that is, placing more weight on preserving employment during times of high unemployment”). For other work suggesting that the law should take into account macroeconomic factors, see Zachary D. Liscow & William A. Woolston, *How Income Taxes Should Change During Recessions*, 70 TAX L. REV. 627 (2017) (recommending maximizing social welfare by subsidizing nonemployment and subsidizing employers for hiring, as opposed to employees); Yair Listokin, *Law and Macroeconomics: The Law and Economics of Recessions* (Yale Law & Econ. Research Paper No. 559, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2828352 (positing that the law should promote spending in times of recessions); Yair Listokin, *A Theoretical Framework for Law and Macroeconomics* (Yale Law & Econ. Research Paper No. 567, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2860283 (exploring the situations in which the law should respond to macroeconomic concerns). *Cf.* Masur & Posner, *supra* note 237 (cautioning that countercyclical regulation be adopted on an experimental basis given the uncertainty in underlying empirical assumptions).

4. Regionally Targeted Legislation

Another area where dynamic legislation could be effectively employed is legislation targeted to regions.²⁴⁵ Fine tuning federal policy in this manner might generate positive welfare effects. Take, for instance, the fact that federal taxes are assessed on nominal incomes, without regard to cost of living differences between areas. This policy discourages taxpayers from working and living in higher-paying cities. Although salaries and property values adjust to make up for the federal tax disparity, the non-neutrality between tax bills in locales results in an inefficient employment distribution. Indexing taxes to local wages, however, would neutralize most of this distortion.²⁴⁶

Automatically tying federal benefits to the specific needs of a region could also be beneficial from fairness and budgetary standpoints. In the countercyclical context, for instance, extensions of federal unemployment insurance are automatically triggered if state unemployment conditions exceed a certain threshold.²⁴⁷ This type of program has the potential to engender fairness by ensuring the residents of the neediest states receive benefits. It also saves costs by narrowly tailoring benefits and by allowing those benefits to be calculated with administrative ease.

Extending regional automatic mechanisms to other spending programs could produce similar benefits. Suppose, for instance, that Congress adopted measures to address the opioid epidemic, which is a nationwide crisis with varying and fluctuating degrees of severity across regions.²⁴⁸ It could decide to allocate funds on a continuing basis according to the extent of the crisis at the state level, using factors such as overdose and addiction rates. Other crises could be addressed in a similar manner. Ongoing disaster preparedness funds, for instance, could be distributed to states in accordance with their climate-related risks. Or funds for adult education could be distributed to those states hit hardest by the overall decline in manufacturing jobs.

Dynamic legislation allows Congress to adapt federal policy to regional needs. The political events of the twenty-first century suggest widespread frustration that the federal government has failed to address the fact that the

²⁴⁵ See, e.g., Reuven S. Avi-Yonah et al., *Bridging the Red-Blue Divide: A Proposal for U.S. Regional Tax Relief*, (Univ. of Mich. Public Law Research Paper No. 620), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249010 (exploring fiscal equalization mechanisms and recommending federal tax relief to corporations who invest in poorer locations in the U.S.).

²⁴⁶ See generally Albouy, *supra* note 9; Kaplow, *supra* note 9; Knoll & Griffith, *supra* note 9.

²⁴⁷ Stephen Bingham, *Replace Welfare for Contingent Workers with Unemployment Compensation*, 22 FORDHAM URB. L.J. 937, 952 (1995). Some would contend that the threshold is set too high, thus preventing access to the program by those in need, but this is not a criticism of the automatic mechanism per se. See *id.*

²⁴⁸ See, e.g., *Drug Overdose Death Data*, CTRS. FOR DISEASE CONTROL & PREVENTION <https://www.cdc.gov/drugoverdose/data/statedeaths.html> [<https://perma.cc/728R-3Q7W>] (providing overdose statistics by state).

rewards and strains of the modern economy fall unevenly across states, creating winners and losers. We can expect that the complexities of challenges like globalization, the displacement of jobs by technology, and climate change will continue to have varied, regional effects. Rather than employing blunt instruments, the federal government would benefit states by using carefully crafted remedies. With dynamic legislation, Congress can do so without needing to continually revisit the law and without ceding control over policy to the executive branch.

5. Intralegal and Budgetary Measures

a. *Overall budget constraints*

One most naturally thinks of dynamic legislation as allowing for the law to adjust based on external factors. Dynamic legislation, however, can also be used so that the law responds to changes within other parts of the legal system. This would create interesting opportunities to coordinate broad social policies across areas of law by tying them together. For instance, health care policy could be adjusted, not only for current health care costs, but also for current entitlement commitments and tax expenditures in the area.

Intralegal measures might be especially powerful when used in conjunction with an overall budget constraint. In contrast to internal budget rules, the budgetary constraint could be built into the substance of the law. Congress thus would find it much less easy to evade. For instance, in the early 1980s, proposed legislation would have limited the amount of revenue lost to tax expenditures to no more than thirty percent of the net revenues collected in the fiscal year.²⁴⁹ The mechanism, however, was a procedural rule, enforced by a point of order, against any budget resolution that contained tax expenditures exceeding thirty percent of the recommended level for net revenue set forth in the resolution. Congress could thus easily evade the rule due to its procedural status.

One could imagine, however, this budget constraint, or something similar, embedded within the substantive statute. For instance, the prior year's revenues could dictate the total level of tax expenditures available to taxpayers. If revenue benchmarks are met, then the tax expenditures could be automatically granted in whole.

In the Social Security context, David Kamin has suggested that benefits and taxes be automatically adjusted if the system is projected to become insolvent.²⁵⁰ On the tax side, for instance, the payroll tax rates could be

²⁴⁹ Tax Expenditure Limitation and Control Act of 1981, S. 193, 97th Cong.

²⁵⁰ Kamin, *supra* note 11, at 32.

automatically increased (or decreased if the projections improve). On the spending side, benefits could be automatically reduced, perhaps hitting only new beneficiaries or those with higher lifetime earnings. To develop this further, it is also possible that the spending and tax changes be tied to one another. For instance, suppose lawmakers are committed to solvency but can tolerate only so much in benefit cuts. The tax increases could be structured such that they make up any shortfall in the system's solvency after taking into account the savings produced by the benefit cuts.

On a more ambitious level, David Scott Louk and David Gamage have argued that default budget policies, which are triggered if legislators do not pass a budget, could cure the games of chicken and negotiating failures that have come to define the “new fiscal politics.”²⁵¹ A default budget at the federal level could be implemented, they suggest, by updating the prior year's budget to reflect changes in population and the economy, assigning an agency the task of adjusting taxes and spending based on predetermined formulas.²⁵²

b. “Reverse Earmarking”

Some states have experimented with tying revenues to budgetary constraints. At the federal level and in most states, the gas tax is calculated on a per unit (typically gallon) basis, not as a percentage of purchase price. As a result, gas tax revenues do not increase as gasoline prices rise. Indeed, in the current era, increasing fuel efficiency and inflation have devastated revenues from the gas tax, both at the federal and state levels. In response, some states have begun indexing the gas tax rate to inflation or to a percentage of the price of gas.²⁵³ In a more unorthodox move, Nebraska adjusts the gas tax to the state's transportation spending in an attempt to ensure adequate revenues for transportation projects.²⁵⁴ Nebraska's gas tax is analogous to the practice of earmarking, which dedicates revenues to a specific purpose, but differs in important respects. Earmarking is pursued in order to guarantee steady sources of funding for the program at issue, but it is criticized for reducing the legislature's flexibility in establishing funding priorities.²⁵⁵ A tax like the Nebraska gas tax—let's call it “reverse earmarking”—allows the government to first ascertain its spending priorities in certain areas and then

²⁵¹ David Scott Louk & David Gamage, *Preventing Government Shutdowns: Designing Default Rules for Budgets*, 84 U. COLO. L. REV. 182, 185-86 (2015).

²⁵² *Id.* at 246-47.

²⁵³ RICHARD C. AUXIER, REFORMING STATE GAS TAXES: HOW STATES ARE (AND ARE NOT) ADDRESSING AN ERODING TAX BASE 9 (2014), <http://www.taxpolicycenter.org/sites/default/files/alfresco/publication-pdfs/413286-Reforming-State-Gas-Taxes.PDF> [<https://perma.cc/HVM8-9NFX>].

²⁵⁴ *Id.*

²⁵⁵ For a positive defense of earmarking, see generally Susannah Camic, *Earmarking: The Potential Benefits*, 4 PITT. TAX. REV. 55 (2006).

adjust the tax accordingly to fund those priorities. This type of mechanism could ensure funding of specific government activities without forcing the government's hand as to spending levels *ex ante*.

States have also capped tax rates to maintain a static amount of revenue from year to year. This is done at the property tax level in response to concerns that local governments were receiving extra revenues as property values increased.²⁵⁶ These automatically adjusting rates generate the same amount of revenues from year to year even though the value of the tax base has changed. Reverse earmarking is essentially a less libertarian version of this mechanism, instead adjusting tax rates based on current government spending.

c. *Tax "Triggers" and Responsible Tax Cutting*

States have also recently experimented with so called tax "triggers," which phase in tax cuts or other tax reform measures when the state meets pre-established fiscal targets, such as growth in revenues.²⁵⁷ The triggers are justified on the basis of promoting fiscal responsibility, although the states' experiences on this front have been mixed. For instance, in 2014, Oklahoma tied tax cuts to estimated revenues as opposed to actual revenues, causing tax cuts to be triggered even though the state's deficits were rapidly increasing.²⁵⁸ The legislature was then forced to repeal the trigger so that a second round of tax cuts did not go into effect.²⁵⁹ In contrast, in 2014 the District of Columbia enacted tax cuts that were triggered when actual, realized revenue exceeded budgeted revenue. Revenues, in fact, increased, and the tax cuts went into effect in 2018.²⁶⁰

Triggers have the potential to allow governments some degree of predictability in their revenue stream while also letting an increase in revenues be designated for tax relief,²⁶¹ allowing for a phenomenon that we might call "responsible tax cutting." Triggers could also assist in achieving consensus over broader tax reform. For instance, if agreement cannot be reached over appropriate revenue offsets for tax cuts, the cuts might be

²⁵⁶ Gamage, *supra* note 222, at 802-04.

²⁵⁷ Richard C. Auxier, *A Tale of Two Tax Triggers*, TAX POL'Y CTR. (May 17, 2017), <http://www.taxpolicycenter.org/taxvox/tale-two-tax-triggers> [<https://perma.cc/S9XU-2UUD>].

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* Some legislators have argued in favor of delaying the cuts and spending the additional revenue on education. Peter Jamison, *D.C. Council is Urged to Consider Delaying Landmark Tax Cuts*, WASH. POST (Apr. 27, 2017), https://www.washingtonpost.com/local/dc-politics/dc-council-to-consider-delays-to-landmark-tax-cuts/2017/04/27/24c14390-2af6-11e7-b605-33413c691853_story.html [<https://perma.cc/894V-7SFZ>].

²⁶¹ Jared Walczak, *Designing Tax Triggers: Lessons from the States*, TAX FOUND. (Sept. 7, 2016), <https://taxfoundation.org/designing-tax-triggers-lessons-states> [<https://perma.cc/8YCL-VKNN>].

delayed until revenue goals are attained.²⁶² Experience with the triggers, however, underscores that they must be carefully designed—a lesson that can be extended to all dynamic legislation. In addition to accounting for actual revenues, triggers should account for actual revenue growth rather than the effects of inflation or a temporary rebound in revenues.²⁶³ They should, for instance, be based on multi-year estimates of revenues and spending.²⁶⁴

During the 2017 debate over tax reform, revenue triggers were explored. Senate deficit hawks proposed to roll back the tax cuts in TCJA if the law's deficit impact turned out to be worse than advertised.²⁶⁵ It is important, however, that any such triggers not be used in a symbolic fashion to justify unaffordable tax cuts.

Collectively, these examples show that states, as laboratories of democracy,²⁶⁶ have already begun experimenting with dynamic legislation in the budgeting context. The federal government can benefit from their experiences. Indeed, recent federal tax proposals seem to suggest that automatically adjusting budget-related measures are spreading to the national arena, although caution should be exercised in their design.²⁶⁷

²⁶² Indeed, the District of Columbia's triggers came about as part of a large tax reform package when the D.C. Council did not adopt all of the proposed revenue offsets. Auxier, *supra* note 257.

²⁶³ See Walczak, *supra* note 261.

²⁶⁴ See MICHAEL MAZEROV & MARLANA WALLACE, REVENUE 'TRIGGERS' FOR STATE TAX CUTS PROVIDE ILLUSION OF FISCAL RESPONSIBILITY 1 (2017), <https://www.cbpp.org/sites/default/files/atoms/files/2-6-17sfp2.pdf> [<https://perma.cc/T7Q6-UFZ5>] (arguing that without the information gathered from such estimates "policymakers cannot responsibly evaluate the tax cuts' impact on state services"). Particular care should also be taken so that the trigger mechanism does not become an antistimulus measure during an economic downturn, though all static tax rates pose this danger. Walczak, *supra* note 261.

²⁶⁵ The Senate Parliamentarian scuttled this plan, ruling that the trigger did not meet Byrd Rule requirements because it did not have a budgetary impact. Pramuk, *supra* note 13. In one version of the tax bill, certain delayed tax increases were repealed if revenues turned out to be higher than expected. Problematically, this "reverse trigger" was designed such that the tax increases could be turned off even if revenues were well below the level "to avoid unsustainable deficits or even fully make up for this legislation's tax cut up until that point." David Kamin, *The Senate's Revenue-Trigger Giveaway to Businesses*, MEDIUM (Nov. 22, 2017), <https://medium.com/whatever-source-derived/the-senates-revenue-trigger-giveaway-to-businesses-97b73a624ec1> [<https://perma.cc/B4Y3-KLZU>]. In general, reverse triggers may exacerbate the tendency for lawmakers to engage in short-termism in fiscal planning. This could be combated by ensuring that tax increases also take effect if there are revenue shortfalls (by employing traditional triggers). Additionally, this experience cautions that correctly setting the trigger level of revenues is essential.

²⁶⁶ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

²⁶⁷ One could ask why dynamic legislation is underutilized if it has the benefits I contend exist. These examples, however, show governments are beginning to experiment with this category of legislation.

CONCLUSION

In summary, this Article has argued that, along democratic axes, dynamic legislation categorically outperforms other devices—such as reconciliation, sequestration, and sunsets—that Congress uses to temper the status quo bias in American lawmaking. Dynamic legislation allows Congress to retain some control over policy by avoiding or narrowing delegation to agencies, without expending resources on frequently updating the law. Dynamic legislation frees later congresses to effectuate their agenda, rather than to simply race against changing environs to keep original legislative bargains in place. Dynamic legislation also has the potential to function like a veil of ignorance rule—bestowing benefits and burdens upon unknown constituencies—and thus reduces interest group activity. Finally, by removing the need for future congressional actions, dynamic legislation reduces opportunities for budgetary gamesmanship. Dynamic legislation may even improve upon the budget process by statutorily pegging policy to revenue goals.

As a result of these benefits, Congress should make more frequent and creative use of dynamic legislation, especially in areas of law that present democratic concerns and where the availability of quantitative measures reduces design costs, such as fiscal policy. Although our laws will never entirely be on autopilot, dynamic legislation equips Congress with a tool to better maintain its legislative intent across time.