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Ghosting in Tax Law: Sunset Provisions and Their Unfaithfulness

by ALLI SUTHERLAND*

Introduction

Sunset provisions, a special type of legislation with a built-in expiration date, were once heralded as a cure to the ills of inefficient government, a legislative device capable of eliminating obsolete and antiquated statutes, and of keeping stodgy regulatory bureaucracies efficient and effective.¹ However, what was once a weapon for good government has morphed into a misleading, smoking gun in recent years. Under the Bush Administration, sunset provisions were reduced to an enticement that assisted legislators in approving the passage of controversial legislation, knowing the impacts would be temporary.² President Trump's new Tax Act reflects similar ideals embraced in the new controversial tax code overhaul with billions of American dollars at stake.³ Sunset provisions have become a dangerous political maneuver in today's politics as they are used to runaround procedural requirements to pass permanent legislature masked as temporary. This Note will analyze the possibility that sunset provisions, special temporary legislature measures intended to expire, could be challenged in the courts. Specifically, this Note will highlight the viability of a Due Process Clause of the Fourteenth Amendment against sunset provisions. Such a claim could serve to protect individuals from sham legislation passed by lawmakers who never intended the provisions to take place. This administrative runaround is fundamentally unfair to the public and therefore should be restrained through the judicial process.

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1. Rebecca M. Kysar, *The Sun Also Rises: The Political Economy of Sunsets Provisions in the Tax Code*, 40 GA. L. REV. 335, 337 (2006).

2. *Id.* at 338.

3. Kenneth Vogel & Jim Tankersy, *With Billions at Stake in Tax Debate, Lobbyist Play Hardball*, N.Y. TIMES, (Dec. 15, 2017), <https://www.nytimes.com/2017/12/15/us/politics/lobbyist-s-tax-overhaul-congress.html>.

Part I of this note will look at the recently passed Tax Cuts and Jobs Act by the Trump Administration.⁴ Further, Part I of this Note will highlight the major changes in the new legislation, compare it to the Trump Administration's stated goals, and analyze how effective the administration was in achieving said goals. This will also serve as a first introduction to sunset provisions, which can be found in the Tax Act.

Part II of this Note will give an overview of what sunset provisions are and how they came to be used in tax legislation.

Part III will take a look at the use of sunset provisions during the Bush Administration. They will be viewed in two different and critical pieces of legislation: U.S.A. Patriot Act and the Bush Tax Cuts. The continued existence of both, today, helps to highlight the reality that sunset provisions are political and legislative runarounds never intended to come to pass.

Part IV introduces some procedural rules that place restraints on the passage of tax legislation, namely the Byrd Rule, and how the congressional restrictions may be encouraging and enabling sunset provisions.

Part V discusses the constitutional challenge a taxpaying citizen may have grounds to raise against the validity of sunset provisions. This Note will argue against the lack of sunset provisions application. When the sunset provisions do not expire, but are permitted to become permanent legislature without proper procedural measures, taxpayers are deprived of procedural due process. The untrustworthy legislation is the deprivation and results in an inability to plan for the future.

Finally, in Part VI, the argument from Part V will be taken and applied to an actual sunset provision in the new Tax Act.

I. The Tax Cuts and Jobs Act—Fulfilled Goals or Empty Promises

On December 22, 2017, President Donald J. Trump signed H.R. 1, otherwise known as the Tax Cuts and Jobs Act, into law.⁵ The sweeping tax overhaul bill represents the most far-reaching overhaul of the U.S. tax system since 1986.⁶ The Tax Cuts and Jobs Act significantly changes how the U.S. taxes individuals, partnerships, and businesses.⁷ Some of the Act's distinguishing features include "reducing the corporate tax rate to its lowest point since 1939 and cutting individual taxes for most households next

4. H.R. 1, 115th Cong. (2017).

5. H.R. 1.

6. Louise Radnofsky, *Trump Signs Sweeping Tax Overhaul Into Law*, WALL ST. J., (Dec. 22, 2017), <https://www.wsj.com/articles/trump-signs-sweeping-tax-overhaul-into-law>.

7. *Id.*

year.”⁸ The bill will reduce most income tax rates for individuals and modify the tax brackets for those taxpayers; increase the standard deduction and child tax credit; reduce the alternative minimum tax (“AMT”) for individuals; eliminate personal exemptions; repeal individual mandates of the Affordable Care Act (“ACA”); and reduce the number of estates impacted by the estate tax.⁹

While signing the bill, President Trump said, “. . . we are very proud of it . . . I consider this very much a bill for the middle class, and for jobs.”¹⁰ House Speaker Paul Ryan (R-Wis.) told reporters, “This is one of the most important pieces of legislation that Congress has passed in decades to help the American worker, to help grow the American economy. This is a profound change . . . that is going to put our country on the right path.”¹¹ Despite this praise, not everyone shared the President’s and Speaker of the House’s optimism and enthusiasm. House Minority Leader, Nancy Pelosi (D-Calif.) tweeted “there are few things more disturbing than hearing the swell of cheers from the @HouseGOP as they raise taxes on 86 million middle class families.”¹²

President Trump initially laid out four simple goals for the tax reform: (1) tax relief for middle class Americans: to let people keep more money in their pockets and increase after-tax wages to achieve the American dream; (2) simplify the tax code: to reduce headaches Americans face when preparing their taxes, in addition to letting everyone keep more of their money; (3) grow the American economy: discourage corporate inversions, add a huge number of new jobs, and make America globally competitive again; and (4) does not add to the national debt and deficit, which is considered already too large.¹³ President Trump’s proposed tax plan had very little detail as to how it planned to achieve these goals, and what it did

8. Radnofsky, *supra* note 6; *see also* H.R. 1

9. CONG. BUDGET OFFICE, RECONCILIATION RECOMMENDATIONS OF THE SENATE COMMITTEE ON FIN. (Nov. 26, 2017), <https://www.cbo.gov/publication/53348>.

10. Eileen Sullivan & Michael Tackett, *In Signing Sweeping Tax Bill, Trump Questions Whether He Is Getting Enough Credit*, N.Y. TIMES (Dec. 22, 2017), <https://www.nytimes.com/2017/12/22/us/politics/trump-tax-bill.html>.

11. Tim Haines, *Paul Ryan: “Profound” Change to Tax System, Americans Will See Larger Paychecks Beginning in February*, REALCLEAR POL. (Dec. 19, 2017), https://www.realclearpolitics.com/video/2017/12/19/paul_ryan_with_tax_bill_passage_americans_will_see_larger_paychecks_in_february.html.

12. Nancy Pelosi (@NancyPelosi), TWITTER (Dec. 19, 2017, 11:37 AM), <https://twitter.com/NancyPelosi/status/943203740466798593>.

13. U.S. DEPT. OF THE TREASURY, H. COMM. ON WAYS AND MEANS & S. COMM. ON FINANCE, UNIFIED FRAMEWORK FOR FIXING OUR BROKEN TAX CODE (Sept. 27, 2017), [https://www.treasury.gov/press-center/press-releases/Documents/Tax-Frame work.pdf](https://www.treasury.gov/press-center/press-releases/Documents/Tax-Frame%20work.pdf).

say was extremely vague.¹⁴ Few of these goals managed to manifest themselves in the official signed Tax Cuts and Jobs Act.

The first stated goal was to provide tax relief to the American middle class.¹⁵ This is evidenced through the cuts made to the individual tax rates, which drops the top individual tax rate to 37 percent, cuts income tax rates, doubles standard deduction, and eliminates personal exemptions.¹⁶ These tax rate changes for individuals contain a sunset provision—set to expire at the end of 2025.¹⁷ The Act keeps the previous seven income brackets, but lowers tax rates—a deviation from President Trump’s originally planned four income brackets.¹⁸ February 2018 was the first time employees saw the changes reflected in their paychecks. One public school employee in Pennsylvania saw an extra \$1.50 in her weekly paycheck courtesy of the Republican tax bill.¹⁹ Speaker Paul Ryan celebrated this achievement through a tweet, as a highlight of a major feature of the \$1.5 trillion tax cut.²⁰ According to the Tax Policy Center’s analysis of the bill, the top one-percent of earners will receive an average tax cut of \$51,000, or about 650 times more than what the woman in Pennsylvania received.²¹ Considering the tax cut will cost the country \$1.5 trillion over the next ten years, it begs the question: where did that money go?²² The answer, according to the Tax Policy Center, is to corporations and wealthy people.²³ While there are plenty of people and companies reporting to see a meaningful change in their pay because of the tax bill, it has yet to be widely seen or understood. Three months after signing the Act into law, hundreds of thousands of U.S.

14. For example, the tax plan claims to be already paid in full by “reducing or eliminating more deductions and loopholes available to the very rich.” H.R. 1, 115th Cong. (2017).

15. *Id.*

16. *Id.* See also Kimberly Amadeo, *Trump’s Tax Plan and How It Affects You*, THE BALANCE (Jan. 16, 2018), <https://www.thebalance.com/trump-s-tax-plan-how-it-affects-you-4113968>.

17. H.R. 1, 115th Cong. (2017). See U.S. TREASURY, *supra* note 13.

18. Amadeo, *supra* note 16. See also U.S. TREASURY, *supra* note 13.

19. Emily Stewart, *Paul Ryan Tweets—Then Deletes—Brag About Public School Worker Who Saw \$1.50 Pay Raise*, VOX (Feb. 3, 2018), <https://www.vox.com/policy-and-politics/2018/2/3/16968502/paul-ryan-costco-tax-bill-tweet-twitter>.

20. *Id.*

21. TAX POLICY CENTER, DISTRIBUTIONAL ANALYSIS OF THE CONFERENCE AGREEMENT FOR THE TAX CUTS AND JOBS ACT (Dec. 18, 2017), <http://www.taxpolicycenter.org/publications/distributional-analysis-conference-agreement-tax-cuts-and-jobs-act/full>.

22. Thomas Kaplan, *Federal Budget Deficit Projected to Soar to Over \$1 Trillion in 2020*, N.Y. TIMES (Apr. 9, 2018), <https://www.nytimes.com/2018/04/09/us/politics/federal-deficit-tax-cuts-spending-trump.html>.

23. *Id.*

employers still do not know if they qualify for the newly created tax breaks.²⁴ The Internal Revenue Service planned on issuing guidelines on the new Act by June 2018, which would hopefully will give some clarity as to where the \$415 billion in tax savings was going.²⁵ Guidance finally came in October 2018, but as was predicted, the terms and functionality remain vague.²⁶ Senator Ryan's celebration of the Pennsylvanian woman's pay increase reveals an important, sobering truth about the new Tax Act: it disproportionately benefits wealthy people and corporations.²⁷ It is not the most flattering message to the American public who was told the Tax Act was for their benefit. The American middle class was not what the Trump Administration had in mind while drafting the law—the tax cuts for individuals' tax breaks sunset in 2025 while the cuts for corporations' tax cuts are permanent.²⁸ This means the tax cuts, a promise the Trump administration made, are only good for less than a decade, while the businesses can reap the benefits indefinitely.

The second stated goal of the Act, to simplify the tax code, made some headway in its final form—eliminating personal exemptions.²⁹ Before the Act, taxpayers could subtract from their gross income \$4,150 for each dependent the taxpayer claimed. As a result of this change, some families with multiple children or dependents will end up paying higher taxes despite the Act's increased standard deductions from \$13,000 to \$24,000.³⁰ The Tax Policy Center estimates for the 2018 tax year, the number of taxpayers who itemize their deductions (meaning their amount of deductible income for the year was greater than the standard deduction) will fall from 46.5 million to 19.3 million.³¹ The Act also eliminated most itemized deductions, such as moving expenses (except for military families) and alimony payments.³² It

24. Ben Steverman, *No One's Sure Who Qualifies for this \$415 Billion U.S. Tax Deduction*, BLOOMBERG POL. (Mar. 12, 2018), <https://www.bloomberg.com/news/articles/2018-03-12/no-one-s-sure-who-qualifies-for-this-415-billion-tax-deduction>.

25. *Id.*

26. *Id.*; I.R.S. Pub. 5307 (10-2010).

27. See, e.g., Greg Leiserson, *Presentation: U.S. Inequality and Recent Tax Changes*, WASHINGTON CENTER FOR EQUITABLE GROWTH (Feb. 22, 2018), slides 6, 8 and 9, <http://equitablegrowth.org/research-analysis/presentation-u-s-inequality-and-recent-tax-changes/>.

28. H.R. 1, 115th Cong. (2017).

29. *Id.*

30. *Id.*

31. TAX POLICY CENTER, T18-0001 - IMPACT ON THE NUMBER OF ITEMIZERS OF H.R.1, THE TAX CUTS AND JOBS ACT (TCJA), BY EXPANDED CASH INCOME LEVEL, 2018 (Jan. 11, 2018), <https://www.taxpolicycenter.org/model-estimates/impact-itemized-deductions-tax-cuts-and-jobs-act-jan-2018/t18-0001-impact-number>.

32. Damian Paletta & Erica Werner, *Republicans Reach Compromise Tax Plan, Expanding Tax Cuts for the Wealthy*, WASH. POST (Dec. 13, 2017), <https://www.washingtonpost.com/business/economy/republicans-reach-compromise-tax-plan-expanding-tax-cuts-for-the-wealthy/>; see H.R.

did keep, however, deductions for charitable contributions, retirement savings, and student loan interest.³³ This is a far cry from the simplified version President Trump set out to create. From the offset, what was intended to simplify the tax code may actually end up hurting more taxpayers financially, as the loss of certain exemptions may create higher tax liability. The act received negative attention during its creation as many taxpayers did not want their deductions to go away, simplicity be damned.

The third stated goal, to grow the American economy, is unclear in application. The tax plan clearly helps businesses more than individuals, as evidenced by the permanent business tax cuts, which were more substantial than the individual rates.³⁴ Certain corporate employers, such as Walmart, United States' largest private employer, and Starbucks have said they will raise wages, give bonuses, increase benefits and reinvest the money back into the employees.³⁵ However, rather than putting those savings towards employees, a majority of corporations are taking their earnings and using them for more distributions to shareholders, such as Wells Fargo, meaning the corporate tax savings are only experienced by a specific group of people.³⁶

Among individuals, the Act will help higher-income families the most.³⁷ The Tax Foundation said those in the 95 percent to 99 percent highest income earners range would receive a 2.2-percent increase in after tax income, while those in the 20 percent to 80 percent income range would receive a 1.7-percent increase.³⁸ Broken down even further, this means Americans in the lowest earning fifth of the population would see their

1 (SEC. 11048 & 11049), 115TH CONG. (2017).[2017/12/13/4f9ca66c-e028-11e7-bbd0-9dfb2e37492a_story.html?utm_term=.da97c1bcb8a4](https://www.congress.gov/bills/115/11048/versions/1/html/2017/12/13/4f9ca66c-e028-11e7-bbd0-9dfb2e37492a_story.html?utm_term=.da97c1bcb8a4).

33. Alexander Bolton & Scott Wong, *Negotiators Strike Deal in Principle on Tax Bill*, THE HILL (Dec. 13, 2017), <http://thehill.com/policy/finance/364699-negotiators-strike-deal-in-principle-on-tax-bill>.

34. See H.R. 1, 115TH CONG. (2017).

35. John W. Schoen, et al., *Few Large US Companies Say They'll Use Tax Savings to Boost Wages*, CNBC Survey Finds, CNBC (Jan. 18, 2018), <https://www.cnbc.com/2018/01/17/few-large-companies-say-theyll-use-tax-savings-to-boost-wages-cnbc-survey-finds.html>.

36. See Amadeo, *supra* note 15. See also Michael Corkery, *Walmart's Bumpy Day: From Wage Increase to Store Closings*, N.Y. TIMES (Jan. 11, 2018), <https://www.nytimes.com/2018/01/11/business/walmart-wages-tax-cuts.html>; Lisa Baertlein, *Starbucks to Boost Pay, Benefits after U.S. Lowers Corporate Taxes*, REUTERS (Jan. 24, 2018), <https://www.reuters.com/article/us-starbucks-tax/starbucks-to-boost-pay-benefits-after-u-s-lowers-corporate-taxes-id-USKBN1FD1CD>; Henry Grabar, *All It Took was Wells Fargo to Raise Wages by a Buck-Fifty as \$3.7 Billion in Tax Cuts*, SLATE (Dec. 21, 2017), <https://slate.com/business/2017/12/wells-fargo-tiny-raise-after-huge-tax-cut.html>.

37. Pete Kasperowicz, TAX FOUNDATION: *GOP Tax Bill costs \$448 billion in Dynamic Analysis*, WASH. EXAM'R (Dec. 18, 2017), <https://www.washingtonexaminer.com/tax-foundation-gop-tax-bill-costs-448-billion-in-dynamic-analysis/article/2643794>.

38. Kasperowicz, *supra* note 36.

income increase by a miniscule 0.4 percent.³⁹ The biggest increase, 2.9 percent, would go to the top-earning fifth, and the rest of the population would see a boost in the 1.2 percent to 1.9 percent range.⁴⁰ This actually makes the country's progressive income tax more regressive—tax rates are lowered for everyone, but are lowered the most for the highest income taxpayers.

The fourth stated goal to reduce the nation's deficit is almost guaranteed to fail. Since March 2018, the United States continues to post its biggest deficit since 2012 and as of November 2018 the Congressional Budget Office estimates the deficit would rise to \$955 billion under the President's budget.⁴¹ The Act increases the deficit by \$1 trillion over the next ten years, according to a study by the Senate Joint Committee on Taxation.⁴² According to the Treasury's data, revenue for the country fell 9 percent while the nation's spending continues to rise.⁴³

The data underscore concerns by some economists that the tax cuts enacted this year could increase the U.S. government's debt load which has surpassed \$20 trillion. The tax changes are expected to reduce federal revenue by more than \$1 trillion over the next decade while a \$300 billion spending deal reached by Congress in February has the potential to push the deficit even higher.⁴⁴

As of now, the tax bill remains highly unpopular according to opinion polls.⁴⁵ In December 2017, a poll by *The New York Times* found only 37 percent of participants approved of the bill.⁴⁶ Nevertheless, President Trump celebrated the achievement, blaming the negative press on "Fake News" and

39. See TAX POLICY CENTER, *supra* note 20.

40. *Id.*

41. Sarah McGregor, *U.S. Posts Biggest Budget Deficit Since 2012*, BLOOMBERG POLITICS (Mar. 12, 2018), <https://www.bloomberg.com/news/articles/2018-03-12/u-s-posts-biggest-budget-deficit-since-2012-as-tax-income-falls>; CONG. BUDGET OFFICE, AN ANALYSIS OF THE PRESIDENT'S 2019 BUDGET (May. 2018, revised August 2018), <https://www.cbo.gov/system/files?file=2018-08/53884-apb2019.pdf>.

42. *Macroeconomic Analysis of The "Tax Cut And Jobs Act" as Ordered Reported by The Senate Committee on Finance on November 16, 2017*, JOINT COMMITTEE ON TAX'N, 115TH CONG. (2017).

43. McGregor, *supra* note 40.

44. *Id.*

45. Sheryl Gay Stolberg, *After a Chaotic Start, Congress Has Made a Conservative Mark*, N.Y. TIMES (Dec. 24, 2017), <https://www.nytimes.com/2017/12/24/us/politics/congress-2017-conservative-courts-taxes-trump.html>.

46. Bob Bryan, *The GOP Tax Law Hits an Important Milestone in New Poll*, BUS. INSIDER (Feb. 20, 2018), <http://www.businessinsider.com/poll-gop-tax-law-favorability-approval-trump-2018-2>.

maintained that insider polls were strong.⁴⁷ It is clear the administration has its own agenda separate from its public statement and goals—one that is perpetuated by the unfaithful sunset provisions contained within them.

As briefly touched upon earlier, the Tax Cuts and Jobs Acts also includes critical sunset provisions, meaning certain aspects of the law are set to expire in 2025 unless Congress chooses to renew the law.⁴⁸ For example, under the new tax law, individual rates will be lowered, but those cuts are set to expire in 2025.⁴⁹ The largest cut by far in the new tax law, which benefits corporations, will not expire.⁵⁰ One highlight of the sunset provisions this note will explore is the treatment of estate taxes by the Act.⁵¹ Trump had hoped to revoke the estate tax entirely which he disparagingly referred to as the “death tax” in his initially proposed tax plan.⁵² The new Tax Act could not entirely repeal the estate tax.⁵³ Although the estate tax is tentatively planned to sunset, the estate tax exemption amount was doubled to \$11.2 million, which minimizes the estates that qualify to be taxed, and effectively eliminates the estate tax for many.⁵⁴

II. Sunset Provisions

Sunset provisions, discussed in the follow section, are nothing new, so it is not surprising to find them within the new Tax Act.

“Sunlight” and “transparency” are two hallmarks of lawmaking in democracy. “Sunset” is another democratic marker, meaning the time has come for the sun to set on the law. When a statute contains such a provision, it means that after a certain number of

47. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 24, 2017), https://twitter.com/realDonaldTrump?ref_src=twsrc%5Etfw&ref_url=https%3A%2F%2Fwww.nytimes.com%2F2017%2F12%2F24%2Fus%2Fpolitics%2Fcongress-2017-conservative-courts-taxes-trump.html (deleted).

48. H.R. 1, 115th Cong. (2017).

49. *Id.* See also Eileen Sullivan & Michael Tackett, *In Signing Sweeping Tax Bill, Trump Questions Whether He is Getting Enough Credit*, N.Y. TIMES (Dec. 22, 2017), <https://www.nytimes.com/2017/12/22/us/politics/trump-tax-bill.html>.

50. See H.R. 1. See also *Tax Cuts and Jobs Act: Overview of Provisions that Sunset (Expire)*, MAXWELL, LOCKE & RITTER (Jan. 11, 2018), <https://www.mlrpc.com/articles/tax-cuts-jobs-act-overview-provisions-sunset-expire/> (individual rate changes are set to sunset as part of the reconciliation process while corporate cuts under the tax plan are permanent, demonstrating that the administration values corporations over individuals).

51. See H.R. 1. See also Julie Garber, *An Overview of Federal Estate Tax Laws: What You Should Know About Taxes When You Plan Your Estate*, THE BALANCE (Jan. 23, 2018), <https://www.thebalance.com/overview-of-current-federal-estate-tax-laws-3505641>.

52. U.S. TREASURY, *supra* note 12.

53. H.R. 1, 115th Cong. (2017).

54. *Id.*

years (two, four, five, and ten years are commonly used), the statute or specific segment of the statute expires unless Congress chooses to renew the law.⁵⁵

The provisions like this in the new Tax Act means the changes are not permanent unless Congress agrees to either extend the Act or make it law, permanently.

The history of sunset provisions in American law stretches all the way back to the writing of Thomas Jefferson. Jefferson believed laws with sunset provisions derived from natural law, writing to James Madison, “every constitution . . . and every law naturally expires at the end of 19 years.”⁵⁶ One of the earliest examples of American law containing a sunset provision is the Sedition Act of 1798. The act was designed to protect President John Adams from public criticism and contained a provision requiring the law to terminate once Adams left office.⁵⁷ When the next president, Thomas Jefferson, took office, he simply took no action and the law “sunsetting” and expired.

“The contemporary concept of sunset provisions dates from the idealistic political reform movement of the 1970’s.”⁵⁸ The provision sought to transform the American government that was generally “considered bloated, inefficient, and obligated to special interests.”⁵⁹ Political theorist Theodore Lowi “proposed the idea of legislative sunseting as a way to shake up stagnant governmental bureaucracies.”⁶⁰ Lowi saw the problem with American government as “agencies ended up catering to the established interests of groups with whom they conducted regular business.”⁶¹ As a means to combat this, Lowi suggested a “tenure of statutes act” that would set a “Jeffersonian limit of from five to ten years” on the life of every law creating a federal agency.⁶² The objective was to act as a catalyst to effective legislative oversight and possible reorganization of agencies that had grown too large for the political structure.⁶³ This would entail a radical change to a

55. HOWARD BALL, *THE U.S.A. PATRIOT ACT 241* (ABC-CLIO, 2004).

56. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 1 *THE FOUNDERS’ CONSTITUTION*, 2, 23 (Univ. of Chi. Press, 1987) <http://press-pubs.uchicago.edu/founders/documents/v1ch2s23.html> (nineteen years was a long time for Jefferson and Madison’s era).

57. Sedition Act of 1798, Ch. 74, 1 Stat. 596 (1798).

58. Chris Mooney, *A Short History of Sunsets*, *LEGAL AFF.* (Jan. 2004) http://www.legalaffairs.org/issues/January-February-2004/story_mooney_janfeb04.msp.

59. *Id.*

60. *Id.* See generally THEODORE J. LOWI, *THE END OF LIBERALISM* (1969).

61. Mooney, *supra* note 59.

62. *Id.*

63. *Id.*

government still grappling with Cold War tensions and ensuing conflict overseas.

Lowi's idea of sunset provisions started to gain traction in post-Watergate America.⁶⁴ "By setting a termination date on a particular law, a sunset provision is supposed to shift the burden of proof onto those seeking the law's extension."⁶⁵ However, once the law is in effect for several years, it regains the old problem it was trying to fix. After a few years in effect the law had the potential to amass "considerable staying power as the political constituents and interests dedicated to its continued existence developed."⁶⁶

Americans are notorious for this dislike of taxes; the tax code is rife with sections that were not intended to be permanent changes, but once people were given a benefit, such as a deduction, it was hopeless to try to take such a significant tax saving device away.⁶⁷ Take for example, the recent success of graduate students at American colleges to retain the decades old tuition shield, which was threatened by a proposed version of the Tax Act. Many universities waive tuition for graduate students in exchange for their work as teaching assistances and researchers.⁶⁸ According to Steven Bloom, the Director of Government Relations at the American Council on Education, the House's tax bill, as it was proposed in November, slashed \$65 billion in tax benefits for higher education.⁶⁹ Graduate students would be hit the hardest by the repeal of the tuition waiver, which critically shielded their tuition from taxation. The tuition waiver provision functioned essentially as a way to make graduate education more affordable and accessible to the graduate students whose research is considered to provide "crucial knowledge and skills needed to drive the nation's economy."⁷⁰ An analysis by the University of California, Berkeley found the proposed Tax Plan would raise taxes for graduate students by 61 percent for those who are campus teaching assistants and 31 percent for those who are research assistants if the annual tuition waiver became taxable.⁷¹ For private

64. *Id.*

65. *Id.*

66. *Id.*

67. *See, e.g.*, I.R.C. § 2523 (2012) (the marital deduction for gifts to a spouse is a huge tax loss and exists purely policy).

68. Teresa Watanabe, *Graduate Students at USC, UCLA, Caltech Join National Protest Against GOP Bill They Say Will Significantly Hike Their Taxes*, L.A. TIMES (Nov. 29, 2017), <http://www.latimes.com/local/education/la-essential-education-updates-southern-graduate-students-at-usc-ucla-caltech-1511917761-htmlstory.html>.

69. *Id.*

70. *Id.*

71. Vetri Velan, *How Does the Tax Cuts and Job Act Affect Ph.D. Students?* (Nov. 4, 2017) (working paper) https://drive.google.com/file/d/10dIZsw1aj9Ls_fi7ITXQvXi7ngOI0Cv-/view.

institutions, such as MIT, taxes could more than triple.⁷² Throughout the entire University of California system, 23,000 graduate students received \$250 million in tuition benefits in the 2015 to 2016 tax year.⁷³ Increased taxes would discourage Americans from seeking advanced degrees at a time when the country badly needs a better educated workforce.⁷⁴ Graduate students were lucky; their nationwide walk-outs, protests, and social media presence had some sort of impact in Washington. The final Act kept the tuition waiver, permitting graduate students to let out a sigh of relief as their tuitions remain safe, for now.

At first glance, sunset provisions might seem to represent a victory for the bills' adversaries, a compromise that will force Congress to rethink the law in a few years when cooler heads (and perhaps a new president or new political party), might prevail. But it would be a mistake to view the sunset provisions in the Tax Act this way, as evidenced by the tax bills of the Bush era and the U.S.A. Patriot Act.⁷⁵ It is clear the Republican Party, all things being equal, would have preferred to do without such provisions. However, the inclusions of the sunset provisions helped get the legislation through Congress, much like the new Tax Act. And history has shown, there is little reason to believe the sun will ever set on this new Tax Act.

III. Sunset Provisions in the Bush Era

Sunset provisions have a long history in American democracy, but they really made their name and made a lasting impact in legislation during the Bush era. Following the 9/11 terrorist attack, sunset provisions became part of one of the most controversial pieces of legislation in history—the U.S.A. Patriot Act, the piece of law colloquially known as “the law that allows the government to spy on you.”⁷⁶

The Bush administration used sunset provisions to get skeptical legislators to sign on to controversial bills. In September 2001, when Attorney General John Ashcroft was lobbying for what would become the Patriot Act, Bruce Ackerman . . . argued in the *Los Angeles Times* that any such legislation should include a sunset provision requiring it to lapse after two years because “[i]t

72. Velan, *supra* note 72.

73. *Id.*

74. Emily Sullivan, *University Graduate Students Walk Out to Protest Tax Plan that Hurts Them*, NPR (Nov. 29, 2017), <https://www.npr.org/2017/11/29/567169910/university-graduate-students-walk-out-to-protest-tax-plan-that-hurts-them>.

75. See *infra* Part III.

76. BALL, *supra* note 55, at 241.

is one thing to pass emergency legislation; quite another to make it a permanent part of our law.”⁷⁷

In the war against terrorism, when traditional civil liberties were being placed at risk, it was rational to take pause. The proposed two year termination clause would simply recognize the proposal as an emergency measure that deserves sober second-thoughts before it became a permanent part of the country’s legal tradition.

The U.S.A. Patriot Act was controversial for many reasons. It was during a high pressure time in which legislators pushed for the act to be passed quickly.⁷⁸ The country had just experienced a terrorist attack at home like never before. President George W. Bush signed the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism” Act on October 26, 2001.⁷⁹ The Act was a piece of rushed legislation meant to strengthen governmental security controls. Key to how the Act managed to get passed so quickly was the compromise of sunset provisions.⁸⁰ What seemed to an unforgivable invasion on the American public’s privacy was pacified to a certain degree by putting an expiration date on the law. Once the Act was passed, however, the Bush Administration mimicked identical behavior to its treatment of the Bush Era tax cuts and immediately took action to try to prevent the repeal of an act that the administration benefitted from.⁸¹ The first Bush tax cut, passed in 2001, sunsetted at the close of 2010 which led to a year in which the United States did not have an estate tax until the Obama Administration signed one back into law.⁸² These sunset provisions were meant to be safeguards to protect the system from radical new legislation by placing a time limit on the law and forcing policy and law makers to reevaluate the measures taken. Such safeguards were immediately undermined and show how the provisions were never meant to be effective in the first place.

77. Mooney, *supra* note 60. See also Bruce Ackerman, *Sunset Can Put a Halt to Twilight of Liberty*, L.A. TIMES (Sept. 20, 2001), <http://articles.latimes.com/2001/sep/20/local/me-47757>.

78. BALL, *supra*, note 55, at 50.

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

80. BALL, *supra* note 55, at 50–51.

81. *Id.*

82. Emily Horton, *The Legacy of the 2001 and 2003 “Bush” Tax Cuts*, CENTER ON BUDGET AND POLICY PRIORITIES (Oct. 23, 2017), <https://www.cbpp.org/research/federal-tax/the-legacy-of-the-2001-and-2003-bush-tax-cuts>; Scott Greenberg, *Looking Back at the Bush Tax Cuts, Fifteen Years Later*, TAX FOUND. (June 7, 2016), <https://taxfoundation.org/looking-back-bush-tax-cuts-fifteen-years-later/>.

On June 1, 2015, parts of the Patriot Act expired, following lack of Congressional approval and staying true to the sunset extension from President Obama.⁸³ However, the following day the USA Freedom Act was passed, which restored and renewed the expired parts of the USA Patriot Act through 2019.⁸⁴ This Act, which only took days to pass through the legislative process—a remarkable feat for a political machine that is highly criticized for its slow or consistent inaction—is still dragging itself up from the dead, thanks to strings attached to the Act by sunset provisions. These provisions were meant to control and shorten the life of the Act, but rather the Act seems to exist in perpetuity. The Republicans learned an important lesson through their successes with the Patriot Act; a lesson legislatures have not forgotten as highlighted by the presence of sunset provisions in the new Tax Act.

President Trump is following the example set by the Bush Administration by placing sunset provisions in the new Tax Act. Prior to 2000, sunset provisions were hardly seen in modern tax legislation but “have become frequent addendums to enacting new tax legislature.”⁸⁵

In the late 1990s, the federal government ran a budget surplus for several consecutive years.⁸⁶ The budget surplus was hailed as “one of the supreme budgetary accomplishments in American history,” but it opened up debate for policymakers as to what to do with the surplus.⁸⁷ It was decided the surplus would be used to fund tax cuts and President Bush signed the Economic Growth and Tax Reconciliation Act of 2001 into law.⁸⁸

The 2001 tax bill consisted of several large tax cuts for individuals and households. Overall the bill significantly reduced the total level of federal revenue collections. In order to make such a large tax cut politically palatable and conform to procedural rules in the Senate, Congress designed the bill such that most of the provisions were set to expire on December 31, 2010.⁸⁹

83. Associated Press, *Obama Signs Last Minute Patriot Act Extension*, FOX NEWS (May 27, 2011), <http://www.foxnews.com/politics/2011/05/27/senate-clearing-way-extend-patriot-act.html>.

84. Erin Kelly, *Senate Approves USA Freedom Act*, USA TODAY (June 2, 2015), <https://www.usatoday.com/story/news/politics/2015/06/02/patriot-act-usa-freedom-act-senate-vote/28345747/>.

85. Manoj Viswanathan, Note, *Sunset Provisions in the Tax Code: A Critical Evaluation and Prescriptions for the Future*, 82 N.Y.U. L. REV. 656, 657 (2007).

86. Allen Schick, *A Surplus. If We Can Keep It: How the Federal Budget Surplus Happened*, BROOKINGS INSTITUTION (Dec. 1, 2000), <https://www.brookings.edu/articles/a-surplus-if-we-can-keep-it-how-the-federal-budget-surplus-happened/>.

87. *Id.*

88. Greenberg, *supra* note 82.

89. *Id.*

Both the Bush tax cuts and the Trump administration's tax cuts impact the deficit because both result in a revenue decrease coinciding with taxing decrease.⁹⁰ The tax cuts, despite the negative deficit impact, were passed with sunset provisions because the legislation lacked the necessary sixty votes from the Senate.⁹¹ Sunset provisions have proven to be the key for parties that lack the necessary majority and the requisite votes to otherwise pass legislation. With sunset provisions, these laws can exist in perpetuity, using the simple majority to continuously pass, impacting the deficit, without the procedurally required super majority.

Once the date of expiration arrived, however, the laws did not sunset as their original manifestation dictated. In 2010, President Obama extended the cuts for another two years, seeking to avert a sudden and dramatic tax increase on American families in the middle of an economic recovery during the recession period.⁹² The final matter of President Bush's Tax Act was settled in 2012 when Congress decided which cuts would be made permanent and which would expire, known as the "fiscal cliff" deal.⁹³ The deal made permanent the vast majority of the Bush tax cuts. One estimate found that 82 percent of the Bush tax cuts were made permanent in 2012, meaning a meager 18 percent actually expired, or sunset, as originally intended.⁹⁴ Despite initial opposition from many Democrats, the fiscal cliff deal passed with large bipartisan majorities in both the House and the Senate, and avoided a significant increase on the tax burden of households making under \$250,000.⁹⁵ With the new Tax Act, when the time comes for the law to sunset, the actuality of such seems less than optimistic. It will likely depend on how the economy is doing at the time. The recent projections for the nation's deficit and high interest payments paint a dreary picture for the future and the ability of the country to overcome such daunting fiscal setbacks.

90. Catherine Rampell, *Reader Response: Why Are the Bush Tax Cuts Expiring in the First Place*, *ECONOMIX* (Aug. 12, 2010), <https://economix.blogs.nytimes.com/2010/08/12/reader-response-why-are-the-bush-tax-cuts-expiring-in-the-first-place/>

91. *Id.* See also *infra* Part IV.

92. Lori Montgomery, Shailagh Murray & William Branigin, *Obama Signs Bill to Extend Bush-Era Tax Cuts for Two More Years*, *WASH. POST* (Dec. 17, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/16/AR2010121606200.html>.

93. Joseph Bishop-Henchman, *Details of the Fiscal Cliff Tax Deal*, *TAX FOUND.* (Jan. 1, 2013), <https://taxfoundation.org/details-fiscal-cliff-tax-deal>.

94. Chye-Ching Huang, *Budget Deal Makes Permanent 82 Percent of President Bush's Tax Cuts*, *CENTER ON BUDGET AND POL'Y PRIORITIES* (Jan. 3, 2013), <https://www.cbpp.org/research/budget-deal-makes-permanent-82-percent-of-president-bushs-tax-cuts>.

95. Greenberg, *supra* note 82.

A distinct difference between the Bush Era tax cuts and President Trump's Tax Act is that the nation was running a surplus during President Bush's tenure, while today it has amassed a staggering deficit.⁹⁶ As mentioned earlier, the U.S. continues to post its largest deficit in history, with interests payments projected to hit one trillion dollars per year in as little as one decade.⁹⁷ Interest payments on the deficit will become greater than what the country spends each year on the military or Medicaid.⁹⁸ Adjusted, the country has never had interest payments so high.⁹⁹ The staggering deficit and projected interest payments highlight the damage unchecked sunset provisions can cause. Individual tax rates must rise again at the end of the Act because of the impact the reduced rates have on the deficit. Allowing the rate reductions to become permanent, overriding the sunset provisions, and without any revenue producing or deficit cutting measures somewhere else in the tax code, will exacerbate the nation's debt and deficit problem, harming all of America. The sunset provisions need to take effect. There is a reason why the deficit can only be impacted so much by spending laws and the ineffectiveness of sunset provisions undermines the legislative process.

IV. Constitutionality of Sunset Provisions ("Byrd Rule" and Congressional Budget Restraints)

Why even have laws that expire? Like with the Patriot Act, one answer is laws with expiration dates allow hastily passed legislation to get a second look before the it becomes permanent legislation with huge ramifications, like the infringement of U.S. citizen's privacy by the government. Sunset provisions can also be a powerful political move to circumvent the Byrd rule and the reconciliation process.

Perhaps a more satisfying answer for those who wish to look beyond the political games is an obscure parliamentary rule known as the Byrd Rule. The Byrd Rule was first adopted in 1985 and named after the late Senator Robert C. Byrd.¹⁰⁰ It allows senators during the reconciliation process to block a piece of legislation if it significantly increases the federal deficit more than 10 years in the future.¹⁰¹

96. Kaplan, *supra* note 21.

97. Maya MacGuineas, *America's Debt Crisis is Coming – Interest Payments Will Hit a Trillion Dollars a Year*, MSN (Mar. 17, 2018), <https://www.msn.com/en-us/news/financenews/americas-debt-crisis-is-coming-interest-payments-will-hit-a-trillion-dollars-a-year/ar-BBKhrf>.

98. *Id.*

99. *Id.*

100. Rampell, *supra* note 91.

101. *Id.*

Any senator can raise a procedural objection to legislation that affects the deficit more than a decade into the future. If the objection is sustained, whatever provision is at fault for raising the deficit ten years into the future is eliminated from legislation unless a sixty vote majority says otherwise.¹⁰²

Reconciliation is a special tool, much like the Byrd Rule and sunset provisions, that makes legislation easier to pass in the Senate.¹⁰³ Regular bills require a supermajority of sixty votes in favor to pass, while a reconciliation bill only needs a simple majority.¹⁰⁴ The Byrd Rule places specific limits on reconciliation bills.¹⁰⁵ Reconciliation bills have a 20-hour time limit, thus retaining the major benefits of a limited debate so that it cannot be filibustered on the Senate floor; amendments to a reconciliation bill must be germane (which is not normally the case in the Senate); and, finally, amendments to a reconciliation bill on the Senate floor cannot increase the deficit; they must either lower the deficit or be deficit-neutral.¹⁰⁶

Since reconciliation bills are considered to be an expedited procedure in the Senate, the Byrd Rule is aimed at preventing the use of reconciliation to move a legislative agenda unrelated to spending or taxes and, to some extent, protecting the intended purpose of the reconciliation process as a tool to reduce the deficit.¹⁰⁷ The Byrd Rule prohibits inclusion of “extraneous” measures in reconciliation, which are defined in detail by the rule.¹⁰⁸ The definition notably includes measures that worsen the deficit when a committee has not achieved its reconciliation target, as well as measures that increase deficits for any fiscal year outside the reconciliation window.¹⁰⁹ As of late 2018, Congress had used reconciliation twenty-five times since 1980—only four bills were vetoed and the remaining twenty-one have been enacted.¹¹⁰ Congress has primarily used the reconciliation process for legislation that reduces the deficit through cuts in mandatory spending or

102. *Id.*

103. H.R. COMM. ON THE BUDGET DEMOCRATIC CAUCUS, REPORT ON THE BUDGET RECONCILIATION: THE BASICS (Comm. Print 2018), <https://democrats-budget.house.gov/publications/fact-sheet/budget-reconciliation-basics>.

104. *Id.*

105. *Id.*

106. *Id.*

107. H.R. COMM. ON RULES MAJORITY OFFICE, CHAIRWOMAN LOUISE M. SLAUGHTER, SUMMARY OF BYRD RULE, (Comm. Print) https://archives-democrats-rules.house.gov/archives/byrd_rule.htm.

108. *Id.*

109. *Id.*

110. H.R. COMM. ON THE BUDGET DEMOCRATIC CAUCUS, REPORT ON THE BUDGET RECONCILIATION: THE BASICS (Comm. Print 2018).

increases in revenues.¹¹¹ However, since the early 2000s, Republican Congresses began to routinely use reconciliation to increase the deficit, enacting major tax cuts without offsetting the revenue loss in 2001, 2003, and 2006.¹¹²

Much like the Republicans from the Bush Era tax cuts, today's Republican party knew they did not have the sixty votes needed to get the tax cuts locked in forever. So instead, they opted to push legislation that required only a simple majority (reconciliation), which equated to tax cuts that affect the deficit for ten years, rather than in perpetuity.¹¹³ Rules like this enables the enactment of sunset provisions to get around Congressional restraints for how tax law affects the deficit and how a party can push through legislation that is not fully supported.¹¹⁴ Again, this reflects the importance of sunset provisions being taken seriously, rather than undermined by politicians who wish to circumvent procedural requirements. Their inefficacy not only harms Americans who place trust in the democratic legislative process, but also undermines important safeguards in place to protect the dignity of the republic.

V. Constitutional Questions of “False Legislature”

A. Standing—Who Will Be Harmed? Class Issue: Taxpayers and Tax Planners

“If exploiting a tax loophole is as much of an art as it is a science, then the tax planning profession is poised for a creative renaissance.”¹¹⁵ The painfully vague language of the new Tax Act leaves ripe opportunities for planning professions to have their own day in the sun playing the system.¹¹⁶ “[P]atrons of the new Tax Act are the affluent Americans who can afford advice from the nation's more ingenious accountants, tax lawyers, and financial advisors.”¹¹⁷ The most vulnerable area for exploitation is the 20 percent deduction for pass-through businesses (i.e., partnerships, LP's,

111. *Id.*

112. ROBERT KEITH CONG. RESEARCH SERV., RS22098, DEFICIT IMPACT OF RECONCILIATION LEGISLATION ENACTED IN 1990, 1993, 1997, AND 2006 2–3 (2006).

113. Viswanathan, *supra* note 87, at 666.

114. *Id.* at 667.

115. Ben Steverman & Patrick Clark, *Here's the Trump Tax Loophole Your Accountant Can Blow Wide Open*, BLOOMBERG (Feb. 5, 2018), <https://www.bloomberg.com/news/articles/2018-02-05/here-s-the-trump-tax-loophole-your-accountant-can-blow-wide-open>.

116. *Id.*

117. *Id.*

LLP's, and LLC's) whose income are taxed as the owner's personal income.¹¹⁸ Innovative tax payers have been known to try to push the envelope.

Trump and Congressional Republicans have said that middle-class Americans and small businesses will be the biggest beneficiaries under the \$1.5 trillion tax cut.¹¹⁹ But, the strategies under consideration to take advantage of the 20 percent pass-through deduction show how top earners could ultimately reap the biggest gains.¹²⁰

Confusions over different interpretations of what a term really means in so far as what will be excluded creates opportunities to work around the service's definition or to re-cast businesses in ways that arguably fall outside the excluded categories. In October of this year, the Service finally published some guidance as to what some of those broad and vague languages mean, but the discussion is far from comprehensive.¹²¹

Obviously, not all strategies will work. The IRS could shut down some of the discussed loopholes by putting out regulations and force tax planners to improve in new, riskier ways to get around the rules. The middle class American, the alleged top priority for the new tax law, is hurt in multiple ways by this. For one, there is the lack of accessibility to tax planners.¹²² Second, those who can afford to hire innovative tax planners to tackle the new law's loopholes and vagueness, will be the taxpayers who are already in the highest income brackets. Those who can afford an advisor or have the brains to take up the mammoth task of self-teaching and understanding the complex system are equally harmed by the uncertainty.¹²³ They have no guarantee the sunset provisions will be respected and therefore their tax planning—their ability to provide for their family's future—is stuck in limbo. Savings can be lost, and entire estate plans ruined, all because the legislative safeguards, meant to protect the system, have historically been unreliable. The plan to prevent harm by the system has been nullified by the unfaithfulness of the legislature to respect sunset provisions.

The emphasis on all of this is money. Lawyers are expensive. Litigation is expensive. Working in a niche particularized field only adds to the expenses. Therefore, only those who hail from the wealthy will be the ones who can primarily benefit from these loopholes as they are the ones

118. *Id.*

119. *Id.*

120. *Id.*

121. I.R.S. Pub. 5307 (10-2010).

122. Steverman, *supra* note 115.

123. *Id.*

with the means to exploit the system. Sure, an average American can attempt some of these strategies on her own, but unguided, the likelihood of success is low and the risk very high if the Service rejects the technique. Once again, this highlights the favoritism of the new Tax Act, giving preferential treatment to wealthy Americans.

In terms of how the Courts have viewed the wealthy, wealth has not been recognized by the Supreme Court as a suspect classification.¹²⁴ Groups and categories recognized as such get the benefit of a stricter standard used by the Court in determining whether legislation is targeted at disadvantaging a group, and whether it infringes upon that group's Fourteenth Amendment Equal Protection rights.¹²⁵ Groups who do fall into this classification get heightened scrutiny, either as intermediate or strict scrutiny.¹²⁶ The court looks at three key criteria for identifying "suspect classifications" that will trigger the heightened scrutiny analysis. First, whether the group has an immutable characteristic—a feature of identity that is not chosen but born with; the second is to look for historic discrimination; the third and last is to consider political exclusion and political powerlessness.¹²⁷ Examples of groups that qualify as suspect classifications include race, national origin, and ethnicity.¹²⁸

The Court in the 1950s hinted at the possibility of distinctions based on wealth or poverty as suspect classifications, but backed away from that view quickly.¹²⁹ The Supreme Court closed that possibility when it held, "poverty, standing alone, is not a suspect classification."¹³⁰ Today, class, wealth, and race are often used to reference the same overarching political structure. In *San Antonio Independent School District v. Rodriguez*, the Supreme Court expressly held: Poverty is not a suspect classification and discrimination against the poor should only receive rational basis review—a very easy standard to meet for the party who is committing the alleged discrimination.¹³¹ A hypothetical plaintiff who wishes to raise constitutional issues against sunset provisions will not get recognition by the Court as a suspect classification. A court will likely find sunset provisions are not a violation of Equal Protection Clause (after receiving rational basis review, practically any reason given to the court will be satisfied, since wealth or

124. Henry Rose, *The Poor as a Suspect Class Under the Equal Protection Clause: An Open Constitutional Question*, 34 NOVA L. REV. 407, 408 (2010).

125. *Id.* See also, U.S. CONST. amend. XIV.

126. Rose, *supra* note 127, at 410.

127. *Id.* at 420.

128. *Id.* at 408.

129. *Id.* at 411–12.

130. *Harris v. McRae*, 448 U.S. 297, 323 (1980).

131. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18 (1973).

class is not recognized as a suspect classification). Therefore, the provisions have a better chance of standing in court if brought under a due process issue and challenge how sunset provisions function procedurally.

B. Constitutional Claims: Due Process, Unfairness and Chilling Effect

As outlined above, there is a fundamental unfairness at play when Congress acts to nullify the effect of sunset provisions and takes those protections away from the American people. The nullification of sunset provisions also draws distinct class differences between those who can benefit from gaming the system and those who cannot afford to do something about it. In a way, the undermining of sunset provisions has created a chilling effect on challenging these kinds of legislation.

In the legal context, a chilling effect is the inhibition or discouragement of the legitimate exercise of natural and right to speech by threat of legal sanctions.¹³² It can be caused by legal actions such as the passing of a law, the decision of a court, or the threat of a lawsuit. Because of this danger, the Supreme Court “grants special protection against laws that ‘chill’ protected speech, most prominently via the overbreadth doctrine.”¹³³ Defended by the court system, the overbreadth doctrine “permits litigants whose own conduct is not constitutionally protected to challenge a law on the ground that it chills the exercise of free speech rights by persons not before the court.”¹³⁴ The Supreme Court first referred to the “chilling effect” in the constitutional context in *Wieman v. Updegraff*.¹³⁵ Since then, the phrase has been used when dealing with issues with free speech and other individual rights guaranteed by the Constitution.¹³⁶

Due Process rights derive from the Fifth and Fourteenth Amendments which “provide that neither the federal or state government can deprive a person of life, liberty, or property without due process of law.”¹³⁷ “The Supreme Court’s interpretation of these two clauses of the have given rise to

132. Brandice Canes-Wrone & Michael C. Dorf, *Measuring the Chilling Effect*, 90 N.Y.U. L. REV. 1095 (2015).

133. *Id.* at 1095.

134. *Id.* at 1096.

135. *Id.* at 1098. See *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952) (opining on the challenged statute, “[t]o thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources”).

136. *Id.*

137. Erwin Chemerinsky, *Procedural Due Process Claims*, 16 TOURO L. REV. 871 (2000) (based on a transcript of remarks given at the Practising Law Institute program on Section 1983 Civil Rights Litigation); see U.S. CONST. amend. V. See also U.S. CONST. amend. XIV.

two particular doctrines, substantive due process and procedural due process.”¹³⁸ As Erwin Chemerinsky explains:

Substantive due process concerns whether the government has an adequate reason for taking away a person’s said life, liberty, or property. While procedural due process . . . concerns whether the government has followed adequate procedures in taking away a person’s life, liberty, and property.¹³⁹

Substantive due process asks the question of whether the government’s deprivation of a person’s life, liberty, or property is justified by a sufficient purpose.¹⁴⁰ Procedural due process, by contrast, asks whether the government has followed the proper procedures when it takes away life, liberty, or property.¹⁴¹

Sunset provisions are often not enforced because lawmakers utilize them in the first place to avoid budget constraints. The provisions’s non-enforcement is a perfect example of a situation in which a person has been denied a form of governmental procedure. It follows then the person has deprived them both of property, and the due process that is owed. The analysis that follows is that of procedural due process and its requirements.

“All procedural due process questions can be broken down into three sub-issues,” with the first being whether there has been a deprivation.¹⁴² If yes, then the second question is whether it was a deprivation of life, liberty, or property.¹⁴³ Finally, if so, what procedures are actually required.¹⁴⁴ After analyzing these questions, a due process deprivation will be found “[o]nly if the procedures of the government are inadequate.”¹⁴⁵

Thus, taxpayers have a potential cause of action against the unrealized sunset provisions in tax legislation as a matter of procedural due process. Taxpayers are prevented from planning for the future because they do not know whether they can trust the legitimately passed laws. Their property, a government provided and secured benefit, and their ability to control their financial planning (recognized by the Supreme Court as a right to property in *Goldberg v. Kelly*) are in jeopardy.¹⁴⁶

138. Chemerinsky, *supra* note 137, at 871.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. Chemerinsky, *supra* note 137, at 871

146. *Goldberg v. Kelly*, 397 U.S. 254 (1970); Chemerinsky, *supra* note 137, at 880.

When there is a deprivation, the loss suffered is typically obvious and occurs in three ways: life, liberty, or property.¹⁴⁷ Two questions typically follow the analysis: (1) “what is the mental state required in order to have a deprivation” and (2) “are the existence of state procedures sufficient to prevent finding of a deprivation.”¹⁴⁸ In regards to mental state, case law illustrates that in emergency situations, it must shock the conscious of the court.¹⁴⁹ Otherwise, in nonemergency situations deliberate indifference or recklessness is sufficient to state a claim under due process.¹⁵⁰ Since the ineffectiveness of sunset provisions is not an emergency, and the “sunsets” of these provisions are set for 2015, less than ten years away, the hypothetical plaintiff bringing a procedural due process charge against the government would want to allege deliberate indifference and recklessness, but not negligence.¹⁵¹

When the courts look to the existence of sufficient state procedures to prevent a deprivation, the issue is “often referred to as the *Parratt v. Taylor* issue.”¹⁵² Luckily, *Parratt* only applies in limited circumstances which will not be applicable to this discussion.¹⁵³ While it may have been thought by commentators and lower courts that *Parratt* could be extended very broadly, “potentially to all constitutional claims because the Bill of Rights is applied to state and local governments by the due process clause of the Fourteenth Amendment,” it was rejected by the Supreme Court.¹⁵⁴ It is safe to say, then, that there has been a deprivation by the government of the taxpayers through the runaround of constitutional congressional budget restraints via sunset provisions. These provisions permit tax laws, which have no intent to actually go into law, to pass. Thereby, depriving taxpayers of security, not only in their personal and family finance planning, but also of the fundamental democratic process they can trust.

Now that there is a deprivation, the analysis continues to whether it was a deprivation of life, liberty, or property. The analysis requires looking at “the Constitution, federal statutes, state constitutions, and state laws to determine whether there is a reasonable expectation.”¹⁵⁵ It involves asking

147. Chemerinsky, *supra* note 137, at 872.

148. *Id.* at 872–75.

149. *Id.* at 875.

150. *Id.* at 874.

151. *Id.* at 874–75.

152. Chemerinsky, *supra* note 137, at 875.

153. *Id.* at 877.

154. *Id.* at 876–78 (The Supreme Court said *Parratt* applies only if the individual is seeking solely a post deprivation remedy; applies only to random and unauthorized acts by government officials; does not apply if what is involved is an official government policy; and only applies in the procedural due process context.).

155. Chemerinsky, *supra* note 137, at 882.

whether somebody has a property interest or whether there is a reasonable expectation to continued receipt of a benefit.¹⁵⁶ In *Goldberg v. Kelly* the Supreme Court “held welfare benefits owed to a government employee are property, and that therefore the government must provide due process before it can terminate receipt of benefits.”¹⁵⁷ In *Board of Regents of State Colleges et. al. v. Roth*, the Supreme Court held there was no reasonable expectation to continued receipt of property when the employment contract was year-to-year and the contract was explicit that the plaintiff should have no expectation the contract would be renewed.¹⁵⁸ In *Paul v. Davis* the court recognized a reputation by itself was not liberty or property interest.¹⁵⁹ In a Federal Circuit Court case, *Stone v. Federal Deposit Insurance Corporation*, the court held the government must provide due process to employees before employees are discharged when given the employee is given a reasonable expectation the job would be theirs.¹⁶⁰ If it is reasonable to expect notice and a hearing before being fired, it seems more than reasonable to expect the same to apply to sunset provisions. Although there is a democratic process, new tax acts can and will be passed, so there should be an equal democratic treatment and analysis of the sunset provisions that are overridden by their non-enactment. Consideration should be given to the deficits created in the budget that get remedied through the sunset provisions and carry over to the restraints on the new tax measures that get passed.

Due process claims, while viable, can also be undermined depending on the government’s actions. The Supreme Court in *Bishop v. Wood* made clear the government can (and in *Bishop* they did) defeat the plaintiff’s due process claim because the government prevented expectation of continued receipt of the benefit.¹⁶¹ To combat such a claim by the government concerning sunset provisions and their impact a plaintiff should “look at all the circumstances, in arguing the government’s actions have created a reasonable expectation to continued receipt of the benefit.”¹⁶²

The final question is to ask what procedures are required once a deprivation of life, liberty, or property has been established. “The key case

156. *Id.*

157. *Id.* at 880; *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).

158. *Board of Regents of State Coll. v. Roth*, 408 U.S. 564, 577–78 (1972).

159. *Paul v. Davis*, 424 U.S. 693, 701 (1976) (explaining that reputation alone is insufficient by itself to invoke the procedural protection of the Due Process Clause) (reaffirmed in *Siegert v. Gilley*, 500 U.S. 226 (1991)).

160. *Stone v. F.D.I.C.*, 179 F.3d 1368, 1374 (Fed. Cir. 1999) (holding that government employment is a property interest therefore a person has to be given notice and a hearing before being fired); *Chemerinsky*, *supra* note 137, at 882.

161. *Bishop v. Wood*, 426 U.S. 341 (1976).

162. *Chemerinsky*, *supra* note 137, at 882.

defining what types of procedures are required is *Mathews v. Eldridge*.¹⁶³ The court faced the issue of “whether the government had to provide a pre-termination hearing before cutting off the plaintiff’s Social Security Disability benefits.”¹⁶⁴ In the case, the court established a three-part balancing test which it used to determine what procedures were needed when there has been a “deprivation of life, liberty, or property.”¹⁶⁵ The test considers (1) “the importance of the interest to the individual”; (2) “ability of additional procedures to increase the accuracy of the fact finding”; and (3) the “government’s interest in administrative efficiency ...”¹⁶⁶ Under this test, courts are granted enormous discretion, rather than confined to bright-line rules.¹⁶⁷ Therefore, it is for the court itself to determine what procedures are required.¹⁶⁸ This makes this determination entirely a matter of fact, rather than law.¹⁶⁹ Therefore, once the government created an expectation to a right, it falls to the courts to make a factual determination of what due process requires.¹⁷⁰ The same concept can be applied to other fundamental rights, such as liberty, leaving it entirely to the courts to decide through Constitutional interpretation.¹⁷¹

Applying the *Mathews v. Eldridge* test, the taxpayer’s interest, as an individual, is high because it concerns the taxpayer’s income. There is no additional procedure available to the taxpayer because they are deprived of additional procedure through the sunset provisions that do not kick in. In theory the government should have a high interest in administrative efficiency. However, due to recent IRS under-funding, continual disregard for procedural rules, record high deficit, and an administration that has shown its preference for catering towards the wealthy, administrative efficiency may not be as important as it once was.¹⁷² Regardless, it is ultimately up to the court to make the determination, as the discretion lays in the judge’s hands.

163. *Id.* at 888.

164. *Id.*; *Mathews v. Eldridge*, 424 U.S. 319, 323 (1976) (determining “whether the Due Process Clause of the Fifth Amendment requires that, prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing.”).

165. *Mathews*, 424 U.S. at 335; Chemerinsky, *supra* note 137, at 888.

166. Chemerinsky, *supra* note 137, at 888.

167. *Id.* at 889.

168. *Id.* at 890.

169. *Id.* See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). (Supreme Court held issue of what procedures are required is a matter of United States constitutional law).

170. *Loudermill*, 470 U.S. at 541.

171. *Vitek v. Jones*, 445 U.S. 480, 489 (1980).

172. ROBERT REICH, *SAVING CAPITALISM* 68 (Vintage 2016).

Procedurally, there are political constraints in the budget process, such as the Byrd Rule and reconciliation process previously discussed.¹⁷³ “Budget rules and pressures determined the presence of sunset provisions in the recent tax cuts, as well as in the tax extenders.”¹⁷⁴ Post-enactment sunset provisions “influence[s] the budget process by reducing the reliability of revenue estimates and by impeding the re-enactment of certain budget rules.”¹⁷⁵ While there is procedure, it has simply not been met.¹⁷⁶

If sunset provisions were determined to be a violation of procedural due process, taxpayers and members of the public could challenge the legislation in court in a very meaningful and real way. Rushed legislation, such as the Tax Cuts and Jobs Act, which was passed because it contained sunset provisions, could be struck down for failing to follow procedural requirements when the provisions do not, in fact, sunset. American citizens may use these means to hold law makers accountable to their constitutional duty—to make and pass laws that greatly impact society.

The Note will now analyze a number of cases in which a procedure was in place, but was not followed, and how the court treated them. The ultimate beneficial outcome would be for the Supreme Court to find sunset provisions, in their current use and abuse, as unconstitutional and eliminate them.

C. Case History

Two Supreme Court cases illustrate the points argued in the previous subsections. Here, the Court addressed laws legitimately passed but not enforced. The first is *Poe v. Ullman*, which involved patients and a doctor challenging the constitutionality of a state statute as a violation of the Fourteenth Amendment.¹⁷⁷ The statute prohibited the use of contraceptive devices and providing medical advice about the use of such devices.¹⁷⁸ The Supreme Court held that the mere existence of a state penal statute constituted insufficient grounds to support the adjudication of the proceedings and dismissed the action.¹⁷⁹ *Poe* also described a Connecticut birth control statute that had been reduced to nonuse as “dead words of . . . written text.”¹⁸⁰ Following *Poe*, commentators expressed optimistic views

173. Kysar, *supra* note 1, at 342.

174. *Id.* at 397.

175. *Id.*

176. *Id.*

177. *Poe v. Ullman*, 367 U.S. 497 (1961).

178. *Id.*

179. *Id.*

180. *Id.* at 502.

that desuetude would soon be introduced into the jurisprudential mainstream.¹⁸¹ However, *Griswold* “invalidate[d] the contraception statute on the basis of a newly minted “right to privacy” derived from the Due Process Clause”¹⁸² Neither *Poe* nor *Griswold* embraced the concept of desuetude and demonstrated how the Court treats cases involving laws that have fallen into disuse.

There are plenty of laws that exist on the books, but are actively not enforced. They may not be enforced for a variety of reasons. The rule may simply be from an older time and driven by outdated societal understandings. The law may be forgotten. The democratic process for the law’s repeal may be too cumbersome and therefore easier for the legislature to keep the rule on the books with the unspoken understanding that it is never meant to be enforced. Some traditionally unenforced laws are rather silly, such as a California law which forbids consuming a frog that died during a frog-jumping competition.¹⁸³ Others are more serious and can include serious ramifications such as fines and criminalization for lifestyle choices.

One example of such a law, which made its way up to the Supreme Court, is *Lawrence v. Texas*.¹⁸⁴ *Lawrence* concerned a man who was criminally prosecuted under a Texas statute, forbidding two persons of the same sex from engaging in certain intimate sexual conduct.¹⁸⁵ The Court ruled the statute unconstitutional as a violation of Due Process.¹⁸⁶ The law failed the rational basis analysis as applied by the Court.¹⁸⁷ The Court pointed to history and a pattern of non-enforcement of the law to support its decision.¹⁸⁸ At the time of the decision, only thirteen remaining states possessed laws prohibiting the conduct at issue and only four enforced the laws against homosexual conduct.¹⁸⁹ The pattern of non-enforcement with respect to consenting adults acting in private confirmed the holding of *Casey*: that the Due Process Clause protects personal decisions relating to marriage,

181. Note, *Desuetude*, 119 HARV. L. REV. 2209, 2218 (2006). Desuetude is a legal doctrine in which a law is considered outdated and therefore should be null in effect.

182. *Id.* at 2219.

183. CAL. FISH & GAME CODE § 6883 (Deering 2018) (other obscure state laws include a New York law criminalizing two or more people congregating in public while wearing a disguise), N.Y. PENAL LAW § 240.35(4) (Consol. 2010).

184. *Lawrence v. Texas*, 539 U.S. 558 (2003).

185. *Lawrence*, 539 U.S. at 559.

186. *Id.*

187. *Id.*

188. *Id.* at 560.

189. *Id.*

procreation, contraception, family relations, childrearing, education, and class-based legislation directed at homosexuals.¹⁹⁰

Lawrence serves as an example of the doctrine of desuetude. If there is a criminal law on the books, but is not actively enforced for any length period as a matter of Due Process, the law should fall into destitute. The law at some point must have had some form of democratic approval, but absence of enforcement over time suggests that approval for such a law has lapsed, and the law should not be applied absent some reactivation by the Legislature. In *Lawrence*, no one had been prosecuted under the law, so the law will be blocked under Due Process absent renewed legislative support.

The doctrine of desuetude, never popular or adopted by the courts, is a concept that tends to reside in the criminal law realm.¹⁹¹ One of its more optimistic hopes was the call for the self-correction mechanism desuetude provides.¹⁹² “Desuetude the obscure doctrine by which a legislative enactment is judicially abrogated following a long period of nonenforcement currently enjoys recognition in the courts of West Virginia but nowhere else.”¹⁹³ Desuetude means the condition or state into which anything falls when one ceases to use or practice it.¹⁹⁴ While it could be argued that sunset provisions fit into this category, and the idea invoking the doctrine of desuetude may be appealing to fight the sunset provisions in tax codes, it has not gained traction.

VI. Hypothetical: What Happens if the Sunset Provisions Were to Go Into Effect?

Now, consider how the requirements for procedural due process would look in practice if the sunset provisions for the estate tax were to go into effect. A procedural due process claim against the sunset provision for the estate tax would take shape as follows:

First, the deprivation. A hypothetical plaintiff will want to allege intent with the following argument: The Trump administration intentionally passed the Tax Act with its sunset provisions with the intent that the sunset provisions would not actually sunset, relying on the Bush administration and its treatment of sunset provisions. It is not a negligence claim, but is deliberate indifference and recklessness for the security of the American taxpayers.

190. *Lawrence*, 539 U.S. at 560; *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992).

191. Note, *Desuetude*, *supra* note 183, at 2209.

192. *Id.*

193. *Id.* *State v. Donley*, 216 W. Va. 368, 373–74 (2004).

194. *Desuetude*, THE OXFORD ENGLISH DICTIONARY 540 (2d ed. 1989).

Second, life, liberty and property. The Supreme Court in *Goldberg v. Kelly* held that welfare benefits are property, therefore, the government must provide due process before it can terminate receipt of benefits.¹⁹⁵ *Goldberg* shows the importance of the interest and determines whether the interest is a liberty or property interest.¹⁹⁶ “If the interest or benefit is significant enough, then there is a liberty or property interest.”¹⁹⁷ *Goldberg* also highlights the important question of “whether a significant or reasonable expectation to continued receipt of benefits existed.”¹⁹⁸ If the government has taken affirmative steps to provide a benefit, thus giving a person a reasonable expectation of continued receipt of the benefit, then a property or liberty interest exists.¹⁹⁹

One modern instance where a sunset provision actually came to realization is the Economic Growth and Tax Relief Reconciliation Act of 2001 (“EGTRRA”). The EGTRRA arose out of the failure of previous Congressional attempts to vote to repeal the federal estate tax, which ultimately failed after a presidential veto.²⁰⁰ EGTRRA emerged from these failures and reduced the estate tax rate over the ensuing decade with a one-year long cessation of tax in 2010 and a return to the pre-Bush era tax cut levels under the Tax Relief, Unemployment, Insurance Reauthorization, and Job Creation Act of 2010 (the 2010 Act).²⁰¹ Consequently, the volume of transfer tax work for estate planners exploded after 2010 and prior to the enactment of the 2012 Act, as affluent taxpayers were reactive to changes in wealth transfers and income taxes.²⁰² Currently, capital gains are taxable only upon the non-gratuitous disposition of appreciated assets.²⁰³ There is no recognition of capital gain at the time of the gift, meaning no current capital gains tax on the gift.²⁰⁴ Current law simply provides a deferral of capital gains taxation in the case of gifts. Similarly, when appreciated

195. *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).

196. Chermerinsky, *supra* note 138, at 880.

197. *Id.*

198. *Id.*

199. *Id.*

200. See Economic Growth and Tax Relief Reconciliation Act of 2001, 107 P.L. 16, 115 Stat. 38.

201. See B. Douglas Bernheim et al., *Do Estate and Gift Taxes Affect the Timing of Private Transfers?*, 88 J. P. ECON. 2617 (2004) (examining “time series and cross-sectional variation to identify the effects of estate and gift taxation on the timing of private transfers [and finding] that the timing of transfers is responsive to applicable gift and estate tax rates”).

202. *Id.*

203. See I.R.C. § 1222 (2012).

204. See I.R.C. § 2503 (2012) (this does not mean the gifter is totally tax exempt). See I.R.C. § 2501 (2012) (for imposition of gift tax).

property is held until death and bequeathed, no capital gain is recognized.²⁰⁵ Instead, recipient of the property receives a stepped-up basis equal to the fair market value at the date of death.²⁰⁶

With a current top estate tax rate of 40 percent, the lost income tax revenue is often offset by the estate tax revenue. Therefore, an integral part of estate tax planning is determining which approach is most tax-efficient: removal from a client's gross estate versus holding the property until death to seize the basis step-up.²⁰⁷

Uncertainty is inherent in the estate planning profession. Both state and federal laws are constantly evolving as are the family dynamics and economic circumstances that drive individual estate disposition wishes.²⁰⁸ The "death tax" did not get repealed per the initial goal of the proposed tax plan as it never made the final cut. However, the exemption amount was doubled, which essentially had the effect of nearly repealing the tax as only the estates of the uber-wealthy will reach the \$11.2 million threshold. This amount though, will reverse to the old rates come 2025.²⁰⁹ This means that if the law properly sunsets, taxpayers who thought they fell within the exempt amount are suddenly deprived of their \$5.6 million gross estate exemption. Since there has been a deprivation, and that deprivation was of property, there must be a process in which to give the taxpayers due process. The process is in place, but not enforced or respected. Therefore, the judiciary should either declare sunset provisions unconstitutional all together or order the legislature to actually enforce such provisions.

Conclusion

Long term tax planning is essential for confidence in the future. The new Tax and Jobs Act was a major shake-up for the country. It also appears to be riddled with unfairness for a majority of Americans in the long run in terms of the deficit it is set to create. Compensation for such spending issues could come in the form of lost benefits, causing another deprivation for taxpayers. The legislature is accountable to the rules and to how they impact the country's economics. This should be done through the enforcement of sunset provisions. The runaround the legislature gets away with by not

205. See I.R.C. § 102 (2012).

206. See § 2503.

207. Kevin T. Keen, *The Only Thing Certain Is Uncertainty: The Future of Estate Planning without the Federal Estate Tax*, 51 REAL PROP. TR. & EST. L.J. 129 (2016).

208. *Id.* at 141.

209. H.R. 1, 115th Cong. (2017).

allowing sunset provisions to kick in harms citizens and shows disrespect for the country's constitutional system.
