

Edited by  
Frank Fagan and Saul Levmore

# THE TIMING OF LAWMAKING



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# Introduction

**Eric A. Posner\***

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Lawmaking bears a complex relationship with time. Lawmakers control when a law is enacted, when it takes effect, and how long it remains in effect, and whether it will apply to future acts only, as is usually the case, or to past acts as well. Lawmakers also take into account time when deciding whether to create law in the first place – whether to enact a law now or wait until later – and what sorts of law to create. It is tempting, as Martha C. Nussbaum notes in Chapter 11, to give weight to past laws because people have ordered their lives around them, and because they may reflect deeply held values – they have ‘passed the test of time’ – but also to disregard the past because it embodies the judgments of past generations who operated under conditions of ignorance relative to our own understanding and whose values we no longer share.<sup>1</sup> The major political-legal debate in the United States reflects this ambivalence. In constitutional law, conservatives seek to ground the law in founding-era understandings, while liberals seek to emancipate the law from the fetters of that age.

To fix ideas, consider a unitary legislative body that seeks to maximize a political ‘outcome’ of some sort, given a set of ideological or other preferences, over time, which we divide into a series of arbitrary periods. In any period, the legislature may pass a law that, with some probability, creates a new outcome that the legislature prefers to the status quo. However, the legislature also must incur a cost when it enacts the law. The cost is a one-time, fixed amount that it incurs when the law is enacted in a given period; it is not sustained anew if a law enacted in period  $t$  remains in place in period  $t+1$ . In any given period, the

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\* My thanks to Frank Fagan and Saul Levmore for helpful comments.

<sup>1</sup> In other instances past laws may appear to embody outdated norms, but nonetheless remain desirable for static utilitarian reasons when properly understood, as Mark Ramseyer suggests in his discussion of Japanese inheritance law in Chapter 14.



legislature must decide whether to pass the law (if the law does not already exist), or to repeal or revise the law (if it does), or to do nothing.

As noted by Parisi, Fon, and Ghei,<sup>2</sup> the legislature's decision resembles an investment decision made by a profit-maximizing agent. When the legislature passes a law, it incurs an immediate cost, but obtains a return over time. If the legislature faces no uncertainty, then it passes the law at time 0 if the discounted flow of benefits over time exceeds the cost at time 0. However, legislatures, like investors, do face uncertainty, which makes the decision procedure more complex. If information is gained over time, then the legislature may do better by waiting until a future time than by passing the law at time 0. If the legislature waits, it may learn that the law would do more harm than good. There is an option value in delay.

Legislatures, like investors and other contractors, thus face a tradeoff between flexibility and commitment. Consider again the investor. An investor who commits his money to an investment will receive a positive expected return, but he loses the opportunity to make more money if he discovers a better investment opportunity after he has sunk his cash in the first. An investor who holds on to his cash so as to be able to seize a great opportunity loses the chance to make money on a more conservative investment while taking the risk that the great opportunity never materializes. A legislature similarly loses an opportunity to pass law Y if it uses its resources to pass X.

Investors manage their risks by buying a range of investments – effectively trading off liquidity and return. Legislatures do something similar, but their behavior takes a different form. The problem for the legislature is that it wants to induce action by citizens (paying taxes, avoiding antisocial behavior, etc.). This is where commitment comes in. If the legislature cannot commit to maintain the laws that it passes, then it will not induce as much action as it wants – especially when it seeks to induce long-term investments, for example in pollution-reducing equipment. But if it over-commits, then it will be unable to change laws that prove to be harmful, or that become harmful as the underlying conditions change.

Legislatures and other political institutions have developed numerous devices that reflect different degrees of commitment. I list a few below, from maximal flexibility to maximal commitment.

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<sup>2</sup> Parisi, et al. (2004). See also Gersen and Posner (2007); Luppi and Parisi (2009).

- **Wait-and-see.** The legislature does not enact the law at time 0; observes behavior at time 1; and then passes a retroactive law at time 2. In a variant of wait-and-see, the legislature could try to force itself to act at time 2 by (at least in theory) imposing deadlines on itself so as to manufacture a crisis as David Kamin discusses in Chapter 2.
- **Delayed legislation.** The legislature enacts a law at time 0 that goes into effect at time 2 (not time 1) if certain conditions are satisfied or the legislature refrains from engaging in a designated, low-cost action that halts it.
- **Sunset.** At time 0 the legislature enacts a law that lasts during period 1 and then terminates. The legislature may renew the law at time 2, incurring a cost to do so.
- **Normal legislation.** The legislature enacts a law at time 0 that lasts indefinitely. The legislature may repeal the law at time 2 if it produces unsatisfactory effects at time 1.
- **Contingent legislation.** Same as normal legislation, but the legislature provides in the law that it exerts force only if the conditions prevail under which it produces the desired effect.
- **Entrenched legislation.** The legislature passes a law at time 0 that is subject to an entrenchment mechanism, which itself may vary in strength. The entrenchment mechanism could forbid repeal, allow repeal only if a designated supermajority votes in favor of repeal, allow repeal only after a certain period of time has passed, etc.

One can imagine many other variations, but this will suffice. Three design features require further comment. One feature is the degree of contingency explicitly built into a law. A legislature that anticipates that certain contingencies may enhance or undermine the desired effect of a law can try to state those contingencies in the text of the statute, so that the law adjusts automatically, or simply retain the discretionary power to revise the law in light of those contingencies. The choice will depend on the legislature's confidence that it can anticipate most of the relevant contingencies and on the cost of legislative revision. Given a degree of desired flexibility, the legislature can achieve it through a highly contingent statute or a weakly entrenched statute.

For example, as Frank Fagan discusses in Chapter 1, a lawmaker concerned about climate change can make future regulatory rules contingent on observable climate change parameters, like the amount of carbon dioxide in the atmosphere. An investor who is thinking about building a power plant can make his own projections and invest accordingly. Indexing and related techniques ensure, as Daniel Shaviro puts it in

Chapter 3, ‘policy continuity’ despite changing circumstances. To maintain a certain ‘real’ policy constant (for example, financial support for the elderly) one must change the ‘nominal’ policy (the actual payment amount in the public pension) in light of changed circumstances (inflation). One might be able to do this through carefully drafted legislation that relies on indices, but indices work poorly.<sup>3</sup> The problem is that one needs an index to the ‘world,’ not just to a particular element like price. Everything changes, which means that the nominal legislation will quickly deviate from the desired solution to the underlying social problem; by holding constant just one piece of reality, the index may fail to maintain continuity along the relevant dimensions. For this reason, Fagan notes that lawmakers will use contingent rules when they believe that they can anticipate and address a sufficient level of relevant contingencies, or when the expected value of a contingent device exceeds the expected value of its non-contingent alternative.

The second feature is retroactivity. Imagine a rational and symmetrically informed legislature and agent, and consider two legal approaches, P and R. Under P, the legislature enacts a law at time 0, which states that an act is prohibited at time 1, but at time 2 the legislature could pass another law immunizing that act. Under R, the legislature does not enact a law at time 0 or 1, but at 2 may pass a law that retroactively imposes liability on anyone who engages in the relevant act at time 1. With strong assumptions about rationality, risk-neutrality, and the like, these two approaches are functionally identical. When the agent decides whether to engage in the act at time 1, it must make a prediction about whether the act will be permitted as of time 2, either through retroactive immunity or the failure to impose retroactive punishment. In practice, political institutions try to avoid strong and explicit forms of retroactivity. A function of the law is to create a predictable environment that elicits desired behavior by agents; if retroactivity is common, that value will be lost. Indeed, it is quite common for legislatures to forecast changes in the law by delaying implementation until long after enactment; this gives people time to adjust. As Anthony Niblett shows in Chapter 13, courts, too, will often delay implementation of a new rule even though the court presents that new rule as merely an interpretation of existing law. However, by the same token retroactivity can be appealing because it preserves flexibility, and legislatures accomplish it usually indirectly – for example, by imposing new taxes and regulations rather than formally expropriating

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<sup>3</sup> Most indices actually require discretion by the index manager; they are a form of delegation to third parties. See Rauterberg and Verstein (2013).

assets – or, as Jacob Gersen and Jeannie Suk (Chapter 7) show in the context of sexual consent, by enabling potential plaintiffs to exercise a retroactive discretion.

Retroactive laws are often criticized as expropriations. This is a mistake. All laws (or nearly all laws) create winners and losers; the losers can always complain that the law expropriated from them. In a sufficiently predictable environment, agents can purchase insurance against retroactive laws; the insurance premium is now functionally an expropriation, but it is not much different from the type of expropriation created by a prospective law that constrains agents or reduces the value of earlier investments. This has led some commentators to suggest that those injured by explicit retroactive laws – like takings – should not be compensated.<sup>4</sup> The problem with this argument is that retroactive law creates uncertainty that is not typically insurable; the compensation requirement reduces uncertainty about the value of one's investments – and that alone is its value. The norm that a law is prospective – and indeed that the law will usually go into effect not immediately but after a delay – is another device for reducing uncertainty faced by agents about the legal environment in which they operate.

The third design feature is that of entrenchment. There is an old question whether a legislature that operates by majority rule can pass a statute that requires a supermajority for it to be repealed, or that even blocks repeal. After all, couldn't a legislature avoid an entrenchment device by enacting a normal statute, by majority rule, that repeals the entrenchment? Courts have been skittish about enforcing formal entrenchments, but the fact is that legislatures do this all the time. They use internal parliamentary rules that create various degrees of entrenchment.<sup>5</sup> Constitutions also entrench themselves in a manner that is generally respected by legislatures and courts, at least in advanced countries.

Now let us relax our assumption that the legislature is a unitary institution with (as political scientists put it) a well-defined ideal point and a discount rate. A legislator, unlike the typical investor, must make a collective decision involving other legislators with dissimilar goals. The members of a legislature – the legislators – have conflicting interests, and time can play a role in how they compromise, as discussed by Saul Levmore in Chapter 8. Their main goal is to be re-elected, and immediately this might make us worry about what their effective discount rate is.

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<sup>4</sup> See Kaplow (1986).

<sup>5</sup> Posner and Vermeule (2002).

An investor discounts over time, but we assume that his payoff smoothly declines at an exponential rate as time passes. A legislator's discount rate, by contrast, may resemble a step function, with the steps taking place at each election. At the same time, the legislator may attempt to please constituents who have normal discount rates. How exactly this all works out is hard to tell. But it will have an important impact on how legislators think about the timing of legislation.

The temporal dimension of legislation interacts with the collective nature of the legislature in interesting ways. Legislators must compromise. While they often compromise by enacting a law that gives its proponents and opponents less than they want – a weak or moderate rather than strong law or no law at all – they can also compromise over a temporal dimension. Rather than enact a substantively moderate law that lasts indefinitely, legislators may agree on a strong law that sunsets. This may make sense when the public good created by the law is indivisible – when there is no ‘moderate’ version or offsetting payoffs cannot be arranged. Legislators can also compromise in the opposite direction – by delaying enactment. As Frank Fagan and Saul Levmore suggest in Chapter 6, delay can create a kind of veil of ignorance that could facilitate legislation by concealing or muddying the distributive effect of the outcome across legislators.<sup>6</sup> And along the lines of David Kamin (Chapter 2), it is conceivable that a legislature can attempt to force itself to act at politically propitious times by subjecting itself to deadlines or just allowing problems to worsen until further inaction is politically unsustainable. As Tom Ginsburg and Eric Alston note in Chapter 5, a related idea plays a role in constitutional transitions. Opposing groups agree to interim constitutions or transitional provisions in order to force action later when opposition is dulled. In Chapter 10, Saul Levmore notes that propitious times may exist only in the present, as is the case with first-mover advantages to legislation, and discusses various devices that provide incentives for action.

I said that legislators face an opportunity cost when they pass legislation – if they pass X, they cannot pass Y. This is the problem of legislative capacity. In most countries, the problem of capacity is addressed through the administrative state. The lawmaker delegates to the executive branch or independent civil service, or both, the power to make and revise regulations. The capacity problem is thus turned into an agency problem. The regulator's interests typically deviate from those of the legislatures. The headache of anticipating how laws will affect

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<sup>6</sup> See Vermeule (2001).

behavior and revising them in light of experience becomes the headache of anticipating how regulators will behave and monitoring them. As Daniel Farber notes in Chapter 4, a recurrent problem is that the legislature demands that a regulator do X, and the regulator, lacking the authority to refuse, simply delays. Legislatures anticipate this recalcitrance by employing deadlines to force agencies to act, but deadlines are extremely crude devices. A regulator that objects to a mandate to regulate may comply with the deadline but cheat along other margins by issuing a weak rule, or failing to enforce it vigorously. Indeed, it turns out that courts do not enforce regulatory deadlines very often because courts, like the legislature itself, do not possess practical means for forcing the agency to act. Adam Samaha's discussion of self-executing versus non-self-executing statutes in Chapter 9 provides a further wrinkle on this problem. Statutes that specify fallback rules may force stronger agency action, but they do so at the expense of reduced legislative capacity.

Regulators face their own timing problems – and these are the same sorts of timing problems that legislatures must address when they pass laws, including whether regulations should be prospective or retroactive, issued with significant advance notice or sprung upon the public, subject to sunsets or not. Under the Administrative Procedure Act, regulators enjoy broad discretion. This raises the question whether they might, just because they have more flexibility than legislatures, also face greater skepticism when they attempt to commit themselves. Regulators can withdraw or change regulations more easily than legislatures can repeal or change laws. Might this apparently welcome flexibility reduce their ability to commit themselves to policies? This is a topic for further research.

Lastly, I turn to courts. Courts play a peculiar role in our system. When they make law, they (usually) purport to interpret existing law. The effect is that the new law is applied retroactively (with certain exceptions, discussed by Anthony Niblett in Chapter 13, and illustrated most famously in American law by *Brown v. Board of Education*, in which the court announced a new rule but put off enforcing it). The exception for legislatures is the norm for courts. But lawmaking by courts is itself exceptional – ‘interstitial’ is the word normally used. Courts and legislatures engage in retroactive lawmaking despite the apparent unfairness because pure prospective lawmaking is not practical. And courts make law when parties are sufficiently organized to bring claims, which raises a further timing issue for parties themselves (Frank Fagan, Chapter 12).

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## PART I

### Timing Devices



