The Future of Anti-Poverty Legislation

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The era of big-government COVID relief is over. The initial pandemic-relief legislation, followed by two years of Democratic control in Washington, seemed to herald the expansion and modernization of the U.S. safety net. But sustained reform proved elusive. Now that this window of opportunity has closed, it's time to step back and take stock. For those who focus on anti-poverty programs, one question persists: The next time there is such an opportunity to strengthen anti-poverty programs through legislation, how should federal law change?

This Article suggests the answer to that question lies in lessons from recent experience, including, but not limited to, the COVID-19 pandemic. Crisis-induced lawmaking often arises after little deliberation or careful research. It can be ill-timed and badly targeted. When Congress lurches from crisis to crisis, legislation—and the programs that legislation creates—can go for years without being updated. As those laws drift, they become less effective, especially when it comes to alleviating poverty.

How can the federal law that governs and structures social assistance in the United States become more dynamic? This Article answers that question by proposing that legislators incorporate legislative triggers and indexing—what we call "automatic fiscal policies"—to make means-tested programs more responsive to changing economic and social circumstances. Legislating in ways that promote automatic fiscal policies makes anti-poverty programs more responsive not only to economic downturns, but also to more gradual changes such as the changing nature of work, regional economic fluctuations, and climate change. This Article envisions a future of anti-poverty legislation where anti-poverty programs are dynamic—not succumbing to policy drift and primed to withstand and adapt to future challenges.

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INTRODUCTION

More Americans became unemployed in 2020 than at any time since 1939.[1] Yet, despite the heaviest job losses since the Great Depression, poverty went down in 2020—thanks to a historic level of government assistance.[2] The $5 trillion in federal spending came in various forms: stimulus checks sent directly to American households, loans to businesses, funding to state and local governments, and a significant expansion of safety-net and anti-poverty programs.[3] That last category saw important, albeit temporary, innovations in how the federal government funds and structures, among other things, food assistance, health insurance, unemployment insurance (UI), and tax credits.[4] Politicians and commentators, not to mention President Biden himself, suggested that the pandemic had empowered a political coalition that would reshape the American welfare state as earlier coalitions had done with the New Deal and the Great Society.[5]

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1. Sarah Chaney Cambon & Danny Dougherty, *Job Losses in 2020 Were Worst Since 1939, with Hispanics, Blacks, Teenagers Among Hardest Hit*, WALL ST. J. (Jan. 8, 2021, 2:17 PM), https://www.wsj.com/articles/job-losses-in-2020-were-worst-since-1939-with-hispanics-blacks-teenagers-among-hardest-hit-11610133434.

2. Ben Casselman & Jeanna Smialek, *U.S. Poverty Fell Last Year as Government Aid Made Up for Lost Jobs*, N.Y. TIMES (Sept. 14, 2021), https://www.nytimes.com/2021/09/14/business/economy/census-income-poverty-health-insurance.html. More specifically, the Supplemental Poverty Measure (SPM), which accounts for the impact of government programs, declined in 2020. *See id.* Although a different measure of poverty, the Official Poverty Measure (OPM), increased, this latter measure does not account for the impact of some major government programs and has long been criticized by researchers as inaccurate. *See id.*; *see also infra* notes 294, 307, and accompanying text (discussing shortcomings of the OPM and the development of the SPM).

3. *See* Alicia Parlapiano, Deborah B. Solomon, Madeleine Ngo & Stacy Cowley, *Where $5 Trillion in Pandemic Stimulus Money Went*, N.Y. TIMES (Mar. 11, 2022), https://www.nytimes.com/interactive/2022/03/11/us/how-covid-stimulus-money-was-spent.html.

4. *See* Andrew Hammond, Ariel Jurow Kleiman & Gabriel Scheffler, *How the COVID-19 Pandemic Has and Should Reshape the American Safety Net*, 105 MINN. L. REV. HEADNOTES 154, 163 (2020).

5. *See, e.g.*, Greg Iacurci, *How Biden's $3.5 Trillion Economic Plan Compares to LBJ's Great Society and FDR's New Deal*, CNBC (Oct. 2, 2021, 9:00 AM), https://www.cnbc.com/2021/10/02/how-bidens-economic-plan-compares-to-the-great-society-and-new-deal.html [https://perma.cc/7XDD-YCAQ]; Ashraf Khalil & Alan Fram, *COVID Relief Bill Could Permanently Alter Social Safety Net*, AP (Mar. 12, 2021, 12:31 AM), https://apnews.com/article/covid-19-relief-bill-social-safety-net-3bff45f1be9d5f7eb8cd7c14a51c6732 [https://perma.cc/79YQ-7CES]; Ed Kilgore, *Biden Didn't Have the Power or Luck to Become FDR or LBJ*, N.Y. MAG.: INTELLIGENCER (Jan. 22, 2022), https://nymag.com/intelligencer/2022/01/biden-didnt-have-the-power-or-luck-to-become-fdr-or-lbj.html. Part of this rhetoric may have been part and parcel of a new presidential administration. *See, e.g.*, *Joe Biden Was a Boring Candidate. He Now Draws Comparisons to FDR*, ECONOMIST (May 1, 2021), https://www.economist.com/united-states/2021/05/01/joe-biden-was-a-boring-

That social policy prognostication proved premature. The urgency of the pandemic, along with Democratic control of both Congress and the White House, seemed to herald long-overdue expansion and modernization of the U.S. safety net. Yet sustained reform proved elusive.[6] The biggest tool to reduce child poverty in decades, a fully refundable Child Tax Credit, simply expired.[7] States rejected billions of dollars to fight unemployment and food insecurity.[8] What would have been historic investments in our childcare infrastructure cratered in the Senate.[9] While some reforms, such as structural improvements to the Supplemental Nutrition Assistance Program, will persist past the COVID-19 crisis, many of the other legislated changes will not last. With the return of divided government, that brief period of social policy experimentation is behind us.[10] Now is the time to step back and conduct a postmortem on these reform efforts. For those who think the federal government is indispensable in anti-poverty efforts, one question sticks out: The next time there is an opportunity to strengthen anti-poverty programs, what should Congress do?

This Article uses the pandemic policy response as a springboard to outline the future of anti-poverty legislation. The COVID-19 pandemic offers myriad lessons for crisis lawmaking. First among them is that America's most vulnerable

candidate-he-now-draws-comparisons-to-fdr; Jamelle Bouie, *Joe Biden Knew He Was onto Something Long Before We Did*, N.Y. TIMES (Mar. 12, 2021), https://www.nytimes.com/2021/03/12/opinion/biden-covid-plan.html (describing the American Rescue Plan as "an F.D.R.-size piece of legislation," and quoting President Biden in one interview claiming "I'm kind of in the position F.D.R. was," and in another stating that the pandemic is "probably the biggest challenge in modern history" and "may not dwarf but eclipse what F.D.R. faced").

6. *See* Jonathan Weisman, *From Cradle to Grave, Democrats Move to Expand Social Safety Net*, N.Y. TIMES (Nov. 1, 2021), https://www.nytimes.com/2021/09/06/us/politics/democrats-biden-social-safety-net.html.

7. *See* Grace Segers, *The Democrats' Failure of the Year: Letting the Expanded Child Tax Credit Die*, NEW REPUBLIC: THE SOAPBOX (Dec. 30, 2022), https://newrepublic.com/article/169611/policy-failure-child-tax-credit [https://perma.cc/VY9A-UDVU].

8. *See* Andy Sullivan, *Insight: COVID-19 Still Rages, but Some U.S. States Reject Federal Funds to Help*, REUTERS (Nov. 2, 2021, 4:32 PM), https://www.reuters.com/world/us/covid-19-still-rages-some-us-states-reject-federal-funds-help-2021-11-02/; Blake Farmer, *As Some States Forego Federal Pandemic Benefits, Workers Weigh Their Options*, MARKETPLACE (June 23, 2021), https://www.marketplace.org/2021/06/23/as-some-states-forego-federal-pandemic-benefits-workers-weigh-their-options/ [https://perma.cc/Z7L6-TNT5]; Scott McFetridge, *States Scale Back Food Stamp Benefits as Prices Soar*, PBS NEWSHOUR (Apr. 15, 2022, 4:21 PM), https://www.pbs.org/newshour/nation/states-scale-back-food-stamp-benefits-as-prices-soar [https://perma.cc/NGG5-RL9R].

9. *Compare* Andrea Shalal, *Yellen, Harris Urge Childcare Investments to Boost Overall U.S. Economy*, REUTERS (Sept. 15, 2021, 5:58 PM), https://www.reuters.com/business/finance/yellen-harris-argue-that-investment-child-care-benefits-overall-economy-2021-09-15/ (quoting then-Treasury Secretary Janet Yellen describing the Biden Administration's childcare legislation as "the single most important thing we can do to build a stronger economy over the next several decades"), *with* Lauren Camera, *Child Care Advocates Bemoan Lack of Funding in Budget Reconciliation Deal*, U.S. NEWS & WORLD REP. (Aug. 3, 2022, 4:03 PM), https://www.usnews.com/news/education-news/articles/2022-08-03/child-care-advocates-bemoan-lack-of-funding-in-budget-reconciliation-deal [https://perma.cc/7VYV-FEGP] (quoting one advocate pointing out that "[f]ifty years after the veto of the child care development act, we saw the House finally pass comprehensive child care legislation and now we are looking at a version of that bill scaled down by the Senate with zero dollars for child care").

10. *See* Tarini Parti & Natalie Andrews, *Biden, House GOP to Start 2023 with Scant Ties, Tension*, WALL ST. J. (Dec. 18, 2022, 5:30 AM), https://www.wsj.com/articles/biden-house-gop-to-start-2023-with-scant-ties-tension-11671358289.

households should not have to rely as much on elected officials—acting under urgent circumstances—to make sure their needs are met during a major crisis. COVID-19 relief checks and expanded UI provided support to forestall severe deprivation for many. But for too many others, support faltered too soon or started too late.[11] UI expansions were on, then off, then on—then off.[12] Those who relied on those benefits were whipsawed by an inconsistent Congress. A new food assistance program for children who were missing out on school meals during closures was plagued by uneven and unwilling implementation that left too many kids hungry for too long.[13] The COVID-19 pandemic was not unique in this regard; Congress's response to the Great Recession followed similar patterns.[14]

As we consider how the federal government's ad hoc approach to national crises failed many vulnerable Americans during the pandemic, we connect these issues to a broader problem of legislative inertia in anti-poverty policy. Congress responded sporadically during the pandemic, but legislative inaction undermines safety-net policies during normal times as well. Consider, for instance, how inflation erodes the value of public benefits over time,[15] or how changing family structures leave certain children ineligible for vital support.[16] Congress often fails to update the statutory scheme of means-tested programs and, as a result, fails to adequately protect poor Americans from changing economic and social circumstances. Broadly speaking, laws often remain static in the face of changes that justify governmental action. Some scholars have referred to this as the problem of "policy drift."[17]

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11. We have previously written about the government's approach to shoring up the safety net during the COVID-19 pandemic, describing both its shortcomings and its strengths. *See* Hammond et al., *supra* note 4, at 165–66, 174–77.

12. *See id.* at 174–75.

13. *See* LAUREN BAUER, KRISTA RUFFINI & DIANE WHITMORE SCHANZENBACH, HAMILTON PROJECT, BROOKINGS, THE CASE FOR AND CHALLENGES OF DELIVERING IN-KIND NUTRITION ASSISTANCE TO CHILDREN 7–8, 10 (2023), https://www.hamiltonproject.org/wp-content/uploads/2023/02/20230301_ES_THP_Nutrition.pdf [https://perma.cc/48E9-XLG6] (discussing state-level delays in delivering Pandemic Electronic Benefits Transfer to children).

14. *See infra* note 115 and accompanying text.

15. *See* Daniel J. Galvin & Jacob S. Hacker, *The Political Effects of Policy Drift: Policy Stalemate and American Political Development*, 34 STUD. AM. POL. DEV. 216, 217 (2020).

16. *See* Jacob Goldin & Ariel Jurow Kleiman, *Whose Child Is This? Improving Child-Claiming Rules in Safety-Net Programs*, 131 YALE L.J. 1719, 1743–44 (2022) (detailing how family-based tax credits exclude children cared for by unrelated individuals or extended family members).

17. *See, e.g.*, Jacob S. Hacker, *Privatizing Risk Without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States*, 98 AM. POL. SCI. REV. 243, 246 (2004). Policy drift "occurs when a policy or institution is not updated to reflect changing external circumstances, and this lack of updating causes the outcomes of the policy or institution to shift." Galvin & Hacker, *supra* note 15, at 217. Through policy drift, policymakers can achieve legislative goals—such as shrinking the safety net—via inaction rather than action. Jacob S. Hacker & Paul Pierson, *After the "Master Theory": Downs, Schattschneider, and the Rebirth of Policy-Focused Analysis*, 12 PERSPS. ON POL. 643, 655 (2014) [hereinafter Hacker & Pierson, *After the "Master Theory"*]; *see also* David Kamin, *Legislating for Good Times and Bad*, 54 HARV. J. ON LEGIS. 149, 151–52 (2017) (defining policy drift as "the problem of policies remaining in place even as evolving conditions justify updating and fine-tuning those policies—with the result running contrary to the interests of most in the country" (citing Jacob S. Hacker & Paul Pierson, *Winner-Take-All-Politics: Public Policy, Political*

The problem of policy drift for anti-poverty programs has become especially pressing in recent years. Families' budgets are stretched thin by the rapid inflation that followed the pandemic. New crises seem poised to follow the last. The threat of another recession looms.[18] Climate disasters strike with increasing frequency and potency.[19] Of course, Congress has well-worn methods to address such developments: it may pass new legislation, rely on delegations to administrative agencies, or devolve authority to state and local governments. Yet while these tools are important, we argue that they are insufficient to protect poor Americans from policy drift. Anti-poverty programs must be designed to accommodate and respond to changing circumstances, whether gradual or emergent.[20]

Changing circumstances often hit poor Americans the hardest for two main reasons. First, those most reliant on the safety net are often the most vulnerable to the ill effects of policy drift. Poor Americans tend to have more precarious financial, housing, and employment situations, which expose them to greater risks from economic shocks, public health crises, and natural disasters.[21] Indeed, certain economic trends are practically defined by their effects on vulnerable individuals, such as worker dislocation, when workers are laid off due to economic or global conditions beyond their control. Similarly, without assets or private sources of support, crises push marginally low-income households into poverty and

Organization, and the Precipitous Rise of Top Incomes in the United States, 38 POL. & SOC'Y 152, 170 (2010))).

18. *See* Jeanna Smialek, *Soft Landing Optimism Is Everywhere. That's Happened Before.*, N.Y. TIMES (July 27, 2023), https://www.nytimes.com/2023/07/27/business/economy/fed-economy-soft-landing.html (noting that "while [economic] data today are unquestionably looking sunnier, [recession] risks still cloud the outlook").

19. *See generally* Andrew Hammond, *On Fires, Floods, and Federalism*, 111 CALIF. L. REV. 1067 (2023) (analyzing the challenges of climate adaptation for welfare programs).

20. Concepts such as "poor" and "poverty" are often ill-defined. Opinions will also differ regarding what constitutes an "anti-poverty" program. Throughout this Article, we use the terms poor and poverty to refer not only to people living below the federal poverty threshold, but also to people who are vulnerable to falling below the threshold. Adopting a specific poverty measure is not necessary for this discussion; any reasonable measure of deprivation will do. This includes a relative measure defining poverty relative to a certain standard of living in a particular place (for example, defining poverty as living below half of the median income in a certain geographic location). *See* JOHN ICELAND, POVERTY IN AMERICA: A HANDBOOK 22–38 (3d ed. 2013) (discussing different approaches to measuring poverty). Relatedly, we use the term "anti-poverty" to describe government transfer programs—whether cash or in-kind—that are intended to support people living in and near poverty as well as to prevent people from falling into poverty. Some of the programs we discuss might more typically be considered "safety-net" programs. For instance, UI goes to many households that are not in immediate danger of falling into poverty. Letter from Phillip L. Swagel, Dir., Cong. Budget Off., to Richard Neal, Chairman, Comm. on Ways & Means, U.S. House of Reps. (July 1, 2020), https://www.cbo.gov/system/files/2020-07/56447-CBO-UI-letter.pdf [https://perma.cc/97EP-VZ2F] (noting that "41 percent [of those receiving UI benefits] will be in the upper half of the distribution of household earnings"). Even so, in a broad sense, one of the goals of UI is to prevent poverty. We use the term anti-poverty to encompass this broader meaning.

21. *See, e.g.*, SHARON PARROTT, CTR. ON BUDGET & POL'Y PRIORITIES, RECESSION COULD CAUSE LARGE INCREASES IN POVERTY AND PUSH MILLIONS INTO DEEP POVERTY: STIMULUS PACKAGE SHOULD INCLUDE POLICIES TO AMELIORATE HARSHEST EFFECTS OF DOWNTURN 11–14 (2008), https://www.cbpp.org/sites/default/files/atoms/files/11-24-08pov.pdf [https://perma.cc/S2NX-BTP8] (discussing housing instability and unemployment during recessions); Hammond et al., *supra* note 4, at 155, 159–61.

push already-poor households into deep poverty.[22] This disproportionate risk was illustrated recently during the COVID-19 pandemic, when low-income Americans bore the brunt of the pandemic.[23] Second, although American government is often quite responsive to the needs of wealthier individuals and business groups, it is much less responsive when it comes to the needs of poor people.[24] For both of these reasons, policy drift is often regressive.

To help address the problem of policy drift as it affects poor people, this Article calls for expanding the use of legislative features that automatically adjust safety-net programs based on external conditions—what we refer to as "automatic fiscal policies." This Article focuses on two types of automatic fiscal policies: triggers and indexing. Triggers cause safety-net programs to expand in scope, size, or duration when certain conditions are met.[25] One example of such a trigger is the Unemployment Compensation Extended Benefits program.[26] Under the Extended Benefits program, the length of UI benefits increases when unemployment reaches a certain threshold.[27] By comparison, indexing provisions automatically adjust policies incrementally by linking some numerical element in the policy to an external index. Inflation adjustments are a common example of such indexing.[28] Social Security benefits, Supplemental Security Income (SSI), Supplemental Nutrition Assistance Program (SNAP) benefits, and the Earned Income Tax Credit (EITC) all automatically adjust for inflation.[29] We explain how policymaking can employ triggers and indexing to better respond to the changing needs of low-income Americans by making them more consistent across federal programs, targeting state-specific needs, adapting programs to respond to noneconomic crises, and improving the data on which the mechanisms rely.

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22. *See* PARROTT, *supra* note 21, at 1, 3–6.

23. *See* Hammond et al., *supra* note 4, at 155, 158–63.

24. *See generally, e.g.*, MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 124–61 (2012) (concluding that policy outcomes correspond to the policy preferences of wealthy Americans and not those of middle-class and low-income Americans); LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE (2008) (reaching similar conclusions).

25. *See, e.g.*, Olivier J. Blanchard & Lawrence H. Summers, *Automatic Stabilizers in a Low-Rate Environment*, 110 AEA PAPERS & PROC. 125, 125 (2020) (referring to such mechanisms as "semiautomatic stabilizers").

26. *See* JULIE M. WHITTAKER & KATELIN P. ISAACS, CONG. RSCH. SERV., RL33362, UNEMPLOYMENT INSURANCE: PROGRAMS AND BENEFITS 13–15 (2019), https://sgp.fas.org/crs/misc/RL33362.pdf [https://perma.cc/SZ2P-B2DU] (describing the Unemployment Compensation Extended Benefits program).

27. *See id.* at 13.

28. *See generally* DAWN NUSCHLER, RANDY ALISON AUSSENBERG, DAVID F. BURRELLI, EVELYNE P. BAUMRUCKER, BENJAMIN COLLINS, MARGOT L. CRANDALL-HOLLICK, CASSANDRIA DORTCH, JIM HAHN, ELICIA J. HERZ, KATELIN P. ISAACS, ALISON MITCHELL, UMAR MOULTA-ALI, CHRISTINE SCOTT, SCOTT SZYMENDERA & JULIE M. WHITTAKER, CONG. RSCH. SERV., R42000, INFLATION-INDEXING ELEMENTS IN FEDERAL ENTITLEMENT PROGRAMS (2013), https://sgp.fas.org/crs/misc/R42000.pdf [https://perma.cc/V6R4-87N7] (summarizing indexing elements in federal entitlement programs, including Social Security, Medicare, Medicaid, Supplemental Security Income (SSI), Earned Income Tax Credit (EITC), Child Tax Credit, UI, Supplemental Nutrition Assistance Program (SNAP), and Child Nutrition Program, among others).

29. *Id.* at 6–13 tbl.1.

Finally, we consider and rebut various objections to expanded use of automatic fiscal policies in safety-net programs. Commentators have raised concerns about accountability, entrenchment, and epistemic limitations in designing automatic fiscal policies. We argue that these policies, and especially triggers and indexing, would make our safety net more accountable to the electorate by allowing Congress to precisely dictate how the government should respond to changing circumstances. Meanwhile, we are not persuaded by concerns about entrenchment because Congress would be free to amend automatic provisions just like with any other statute. And although designing responsive triggers and indexes requires detailed study, and even some guesswork, we are confident that, in many instances, Congress would be capable of doing so. Moreover, if designed carefully and prudently, it is likely that automatic fiscal policies would improve the status quo, despite the ex ante limitations on knowledge. We also anticipate and respond to two other potential lines of criticism: that automatic fiscal policies are politically unrealistic, and that they could be effectively undone by the appropriations process. We believe that, while these concerns are warranted, they do not negate the advantages of automatic fiscal policies.

In contrast to other scholarship on automatic policymaking, this Article focuses on how automatic fiscal policy affects people living in poverty. It considers the implications of these legislative mechanisms for anti-poverty programs, the rights of low-income people, and governments' responsibilities to low-income households. Because this Article focuses on anti-poverty policy, its focus is narrower than that of the literature that looks at the general implications of "dynamic legislation."[30] At the same time, our focus is simultaneously narrower and broader than that of the economic literature on "automatic stabilizers." It is narrower in the sense that we are focused primarily on triggers and indexing, whereas the literature on automatic stabilizers encompasses any provisions that increase spending or decrease taxes during recessions without action from policymakers.[31] Yet our focus is broader. The economic literature often takes a macroeconomic perspective,[32] whereas we also focus on legal or political considerations.

30. *See generally, e.g.*, Kamin, *supra* note 17; Rebecca M. Kysar, *Dynamic Legislation*, 167 U. PA. L. REV. 809 (2019). We rely on and apply Kysar's working definition of that term, namely "legislation [that] spontaneously adjusts legal rules to future circumstances based on predetermined, external criteria." *Id.* at 813.

31. Automatic stabilizers are programs that expand during an economic downturn, injecting more money into the economy when it is most needed. *See* Vivien Lee & Louise Sheiner, *What Are Automatic Stabilizers?*, BROOKINGS (July 2, 2019), https://www.brookings.edu/articles/what-are-automatic-stabilizers/ [https://perma.cc/86KK-TBWY]; Heather Boushey, Ryan Nunn, Jimmy O'Donnell & Jay Shambaugh, *The Damage Done by Recessions and How to Respond*, *in* RECESSION READY: FISCAL POLICIES TO STABILIZE THE AMERICAN ECONOMY 11, 11 (Heather Boushey et al. eds., 2019). Automatic stabilizers also contract during an economic expansion, removing money from the economy to avoid overheating. *Id.* Progressive taxes and safety-net programs, such as food stamps and UI, are automatic stabilizers because they expand or contract as the economy fluctuates.

32. *See generally, e.g.*, Alan J. Auerbach & Daniel Feenberg, *The Significance of Federal Taxes as Automatic Stabilizers*, 14 J. ECON. PERSPS. 37 (2000).

This Article makes two principal contributions. First, this Article connects a scholarly literature from law with another from social science—specifically, public law's insights into legislative design, on the one hand, with the social science literatures on anti-poverty programs and automatic stabilizers. We bridge those literatures with an analysis of how the federal government's response to the pandemic did not lead to lasting changes to anti-poverty programs, despite many optimistic predictions. Second, this Article provides a playbook of sorts for lawmakers to strengthen various anti-poverty programs through automatic fiscal policies. In doing so, we enlist an eclectic set of examples and illustrations from health law to tax law, food assistance to unemployment insurance, in a range of contexts, including the COVID-19 pandemic, the Great Recession, and the climate crisis.

This Article proceeds as follows. Part I begins by explaining how the federal response to the COVID-19 pandemic highlights the inadequacies of the lawmaking status quo. Part I then sketches how Congress typically responds to changing economic and social circumstances, whether through new legislation, delegation to agencies, or devolved authority to state and local government. We also explain why those avenues are inadequate for anti-poverty programs. Part II, the heart of this Article, enumerates the intricacies and advantages of automatic fiscal policies in anti-poverty programs. We explain why triggers and indexing are better suited to address policy drift compared to other kinds of automatic and semi-automatic legislative mechanisms. In particular, we examine sunset clauses, forced funding cuts, and what Professor David Kamin refers to as "soft alarms" (which attempt to prompt Congress to act through providing information),[33] and conclude that these mechanisms are ill-suited to anti-poverty legislation.[34] Perhaps most importantly, sunset clauses and forced funding cuts are more likely to cut funding on which transfer programs rely. Soft alarms, meanwhile, may fail to overcome the legislative inertia that leads to policy drift in the first place. Part III anticipates and attempts to answer objections to our proposals and acknowledges some of the limitations of automatic fiscal policies.

I. OUR UNRESPONSIVE SAFETY NET

This Part mounts a critique of the typical ways in which Congress responds to changing circumstances. We begin with a focus on COVID-19 pandemic legislation, showing how status quo lawmaking failed poor American households. We explain why the COVID-19 pandemic was not unique, but rather emblematic of crisis-induced lawmaking. We then explain the three ways in which Congress typically responds to changing circumstances: Congress may pass new legislation itself (often in response to a crisis); it may rely on delegations to federal administrative agencies; or it may devolve authority to state and local governments.

33. Kamin, *supra* note 17, at 176.
34. *See infra* Section II.A.

Although these approaches are important, they are insufficient to address the evolving needs of poor households in a timely and effective manner.

A. THE LIMITS OF PANDEMIC LAWMAKING AS ANTI-POVERTY LAWMAKING

The COVID-19 pandemic seemed to herald lasting reform of U.S. safety-net programs.[35] The pandemic highlighted glaring holes in the safety net, there was unified government, and President Biden made safety-net reform a chief legislative priority.[36] Yet the permanent change that many predicted never materialized.[37] This Section considers several important changes that Congress made to safety-net programs—including the Medicaid program, the Child Tax Credit, UI, and food assistance programs—and shows that all these changes have proven short-lived.

The first important set of changes is to the Medicaid program. As part of the Families First Coronavirus Response Act, Congress provided additional federal funding for Medicaid in exchange for states' temporarily ceasing to involuntarily disenroll anyone from Medicaid during the official "Public Health Emergency" (PHE).[38] Primarily as a result of this "continuous enrollment" provision,[39] millions of Americans gained Medicaid coverage during the PHE, helping to drive

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35. Disasters, whether domestic or international, often have a way of motivating long-term change. However, at the national level, solidarity and federal leadership are also key to shepherding sustained policy change. In addition to the other factors identified herein, it's possible that the Trump Administration's anti-solidarity leadership style during the COVID-19 pandemic may have undermined the chance for permanent reforms. *See* Nicole Huberfeld, *Federalism, Leadership, and COVID-19: Evolving Lessons for the Public's Health*, *in* COVID-19 AND THE LAW: DISRUPTION, IMPACT AND LEGACY 153, 156–58 (I. Glenn Cohen et al. eds., 2024).

36. *See* Press Release, The White House, President Biden Announces the Build Back Better Framework (Oct. 28, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/28/president-biden-announces-the-build-back-better-framework/ [https://perma.cc/V8KS-GKED].

37. We have written elsewhere (together and apart) enumerating, contextualizing, and critiquing the U.S. government's response to the COVID-19 pandemic. *See generally* Hammond et al., *supra* note 4; Ariel Jurow Kleiman, Gabriel Scheffler & Andrew Hammond, *Americans Need a Stronger Safety Net, Not Just Stimulus Checks*, REGUL. REV. (Jan. 11, 2021), https://www.theregreview.org/2021/01/11/kleiman-scheffler-hammond-americans-need-stronger-safety-net-not-just-stimulus-checks/ [https://perma.cc/LQR7-LVF2]; Andrew Hammond, Ariel Jurow Kleiman & Gabriel Scheffler, *Legislating a More Responsive Safety Net*, *in* COVID-19 AND THE LAW: DISRUPTION, IMPACT AND LEGACY, *supra* note 35, at 179. For our writings apart, see generally, for example, Ariel Jurow Kleiman, *Revolutionizing Redistribution: Tax Credits and the American Rescue Plan*, 131 YALE L.J.F. 535 (2021); Gabriel Scheffler, *Equality and Sufficiency in Health Care Reform*, 81 MD. L. REV. 144 (2021); and Lindsay F Wiley, Ruqaiijah Yearby & Andrew Hammond, *United States: Legal Response to Covid-19*, *in* THE OXFORD COMPENDIUM OF NATIONAL LEGAL RESPONSES TO COVID-19 (Jeff King & Octavio Ferraz eds., 2022).

38. Pub. L. No. 116-127, § 6008, 134 Stat. 178, 208–09 (2020); Jennifer Tolbert & Meghana Ammula, *10 Things to Know About the Unwinding of the Medicaid Continuous Enrollment Provision*, KFF (June 9, 2023), https://www.kff.org/medicaid/issue-brief/10-things-to-know-about-the-unwinding-of-the-medicaid-continuous-enrollment-requirement/ [https://perma.cc/Y9QB-4PXA]. *See generally* Nicole Huberfeld & Sidney Watson, *Medicaid's Vital Role in Addressing Health and Economic Emergencies*, *in* ASSESSING LEGAL RESPONSES TO COVID-19, at 103 (2020), https://www.courthousenews.com/wp-content/uploads/2020/08/covid-legal-responses.pdf [https://perma.cc/HJ7D-HJ9A] (describing how Medicaid helps states respond during a PHE).

39. *E.g.*, Tolbert & Ammula, *supra* note 38.

the United States' uninsured rate to a historic low.[40] However, this marked expansion in coverage was never intended to be permanent and is already eroding.[41] The Consolidated Appropriations Act, 2023 delinked the PHE from the continuous enrollment requirement, giving states the option to resume disenrolling people from Medicaid in April 2023, while imposing some limited guardrails intended to protect current enrollees.[42] The end of continuous enrollment is projected to cause between 7.8 and 24.4 million Americans to lose Medicaid coverage, either because they were no longer eligible or (more disturbingly) because of administrative barriers to reenrolling.[43]

Another monumental change that Congress made to the safety net during the pandemic was the expanded Child Tax Credit, enacted in 2021 via the American Rescue Plan Act (ARPA).[44] Absent ARPA's temporary reforms, a taxpayer must work and earn at least $2,500 in a year in order to receive the Child Tax Credit.[45] ARPA removed this earning threshold—for 2021 only—so that a family could receive full benefits even with zero earnings.[46] Congress also increased the credit amount in 2021 from $1,000 to $3,000 per child ($3,600 for children under age six).[47] In 2021, for the first time, U.S. families received something akin to a European-style universal child allowance.[48] The expanded credit lifted 2.9 million children out of poverty in 2021 and drove child poverty to a record low.[49]

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40. AIDEN LEE, JOEL RUHTER, CHRISTIE PETERS, NANCY DE LEW & BENJAMIN D. SOMMERS, OFF. OF THE ASSISTANT SEC'Y FOR PLAN. & EVALUATION, U.S. DEP'T OF HEALTH & HUM. SERVS., NATIONAL UNINSURED RATE REACHES ALL-TIME LOW IN EARLY 2022, at 1 (2022), https://aspe.hhs.gov/sites/default/files/documents/15c1f9899b3f203887deba90e3005f5a/Uninsured-Q1-2022-Data-Point-HP-2022-23-08.pdf [https://perma.cc/967A-DPDR]; *see also* Tolbert & Ammula, *supra* note 38.

41. *See, e.g.*, Tolbert & Ammula, *supra* note 38; Jennifer Tolbert, Bradley Corallo, Patrick Drake & Sophia Moreno, *What Do the Early Medicaid Unwinding Data Tell Us?*, KFF (May 31, 2023), https://www.kff.org/policy-watch/what-do-the-early-medicaid-unwinding-data-tell-us/ [https://perma.cc/74A6-EVB7] (noting that as of May 2023, over half a million Medicaid enrollees have already been disenrolled in twelve states, with nearly 250,000 in Florida alone); Megan Messerly, *Thousands Lose Medicaid in Arkansas: Is This America's Future?*, POLITICO (June 14, 2023, 4:30 AM), https://www.politico.com/news/2023/06/13/medicaid-insurance-coverage-arkansas-00101744 [https://perma.cc/UKL4-25J2] (noting that 140,000 enrollees have lost Medicaid coverage in Arkansas from April 2023 to June 2023).

42. Pub. L. No. 117-328, § 5131, 136 Stat. 4459, 5949–53; *see also* Tricia Brooks, *Unwinding Wednesday #15: Congress Proposes to End Medicaid Continuous Coverage Protection in Early 2023; Adds Transparency and Accountability Requirements*, GEO. UNIV. HEALTH POL'Y INST.: CTR. FOR CHILD. & FAMS. (Dec. 20, 2022), https://ccf.georgetown.edu/2022/12/20/congress-proposes-to-end-medicaid-continuous-enrollment-protection-in-early-2023/ [https://perma.cc/ZS62-J939] (summarizing these provisions).

43. Tolbert & Ammula, *supra* note 38.

44. Pub. L. No. 117-2, § 9611, 135 Stat. 4, 144–50 (2021) (codified at I.R.C. § 24).

45. I.R.C. §§ 24(d)(1), 24(h)(6), 32(a)(1) (2021).

46. I.R.C. § 24(i)(1).

47. I.R.C. § 24(i)(3).

48. *See generally, e.g.*, UNICEF, UNIVERSAL CHILD BENEFITS IN EUROPE AND CENTRAL ASIA (2020), https://www.unicef.org/eca/media/13446/file/UCB%20in%20Europe%20and%20Central%20Asia%20English%20.pdf [https://perma.cc/CH4V-EX9Q].

49. Kalee Burns & Liana E. Fox, *The Impact of the 2021 Expanded Child Tax Credit on Child Poverty* 7 (U.S. Census Bureau, SEHSD Working Paper No. 2022-24, 2022), https://www.census.gov/library/working-papers/2022/demo/SEHSD-wp2022-24.html [https://perma.cc/V9AL-R2YC]; CHUCK MARR, KRIS COX, SARAH CALAME, STEPHANIE HINGTGEN, GEORGE FENTON & ARLOC SHERMAN, CTR.

This change, too, proved temporary. Congressional Democrats were taking a gamble by enacting a temporary expansion of the Child Tax Credit. Once enacted, the hope was that American voters would see the merits of universal cash support, paving the way to make the reform permanent. To that end, the Biden Administration's Build Back Better Act (BBBA) would have made permanent the expanded Child Tax Credit.[50] Despite abundant research documenting the expansion's positive effects,[51] voters remained skeptical that the BBBA would benefit them directly and also feared that it would worsen inflation.[52] When blocking the BBBA's passage in the Senate, Senator Joe Manchin cited the bill's cost, opposition to climate change provisions, and a commitment to adding work requirements to the expanded Child Tax Credit.[53] Throughout 2022, congressional Democrats attempted to secure permanent expansion of the Child Tax Credit in other ways, but adequate support never materialized.[54]

Other pandemic safety-net changes were also short-lived. In April 2020, Congress modified UI programs to better support workers who lost income during the pandemic.[55] Perhaps most notably, for the first time, Congress provided benefits to nonemployee workers, who were traditionally excluded from UI coverage, including independent contractors, "gig" workers, and misclassified workers.[56] Since the Great Recession, experts have called for expanding UI coverage to include these workers, who make up a growing share of the domestic

ON BUDGET & POL'Y PRIORITIES, YEAR-END TAX POLICY PRIORITY: EXPAND THE CHILD TAX CREDIT FOR THE 19 MILLION CHILDREN WHO RECEIVE LESS THAN THE FULL CREDIT 1 (2022), https://www.cbpp.org/sites/default/files/11-15-22tax.pdf [https://perma.cc/3KSV-T6Z9].

50. Press Release, The White House, *supra* note 36.

51. *See* Burns & Fox, *supra* note 49, at 7; STEPHEN ROLL, YUNG CHUN, LAURA BRUGGER & LEAH HAMILTON, SOC. POL'Y INST., WASH. UNIV. ST. LOUIS, HOW ARE AMERICAN FAMILIES USING THEIR CHILD TAX CREDIT PAYMENTS? 1 (2021), https://cpb-us-w2.wpmucdn.com/sites.wustl.edu/dist/a/2003/files/2021/09/CTC-National-Analysis.pdf [https://perma.cc/FJH9-P62C] (finding that most families used the Child Tax Credit to buy food and other basic necessities).

52. Alexandra Hutzler, *More Voters Think Biden's Build Back Better Act Will Make Inflation Worse Not Better: Poll*, NEWSWEEK (Nov. 22, 2021, 10:40 AM), https://www.newsweek.com/more-voters-think-bidens-build-back-better-act-will-make-inflation-worse-not-better-poll-1651921 [https://perma.cc/4ZFJ-MB9D].

53. *See* Kelly Anne Smith, *Biden's Build Back Better Plan Is Dead. Now What?*, FORBES (Mar. 2, 2022, 1:12 PM), https://www.forbes.com/advisor/personal-finance/build-back-better-plan-dead/; Andrew Prokop, *Two Ways to Read Manchin's "No" on Build Back Better*, VOX (Dec. 19, 2021, 2:30 PM), https://www.vox.com/2021/12/19/22845122/manchin-build-back-better-psaki [https://perma.cc/2N7C-5K6D]; Alicia Adamczyk, *Joe Manchin Reiterates That He Won't Support Enhanced Child Tax Credit Without a Work Requirement*, CNBC (Jan. 4, 2022, 7:26 PM), https://www.cnbc.com/2022/01/04/manchin-wont-support-enhanced-child-tax-credit-without-work-requirement.html [https://perma.cc/G5PP-LT7Y].

54. *See* Segers, *supra* note 7.

55. *See* Hammond et al., *supra* note 4, at 174–75.

56. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 2102, 134 Stat. 281, 313–15 (2020) (codified at 15 U.S.C. § 9021); Letter from John Pallasch, Assistant Sec'y, U.S. Dep't of Labor, to State Workforce Agencies, at I-3 (Apr. 5, 2020), https://www.dol.gov/sites/dolgov/files/ETA/advisories/UIPL/2020/UIPL_16-20.pdf [https://perma.cc/4A8F-MSEU] (providing guidance on the Pandemic Unemployment Assistance (PUA) program).

workforce.[57] Although Congress did so in response to the pandemic, the additional coverage ended in September 2021.[58]

Food assistance program changes shared a similar fate. The federal government, in partnership with states, provides food support through several different programs, including SNAP (sometimes called food stamps), the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), and the National School Lunch Program, among others.[59] Congress legislated numerous temporary reforms to nutrition programs during the pandemic, including suspending all SNAP work requirements and time limits for childless adults through the end of the COVID-19 emergency declaration.[60] Similar to the Great Recession, Congress also increased SNAP benefits for all food stamp beneficiaries by 15%.[61] That increase ended in September 2021.[62]

But nutrition programs also provide a notable exception to the pattern of temporary legislation. SNAP benefits are delivered to all recipients via the Electronic Benefit Transfer (EBT) system.[63] During the pandemic, Congress authorized the creation of "Pandemic EBT" to support children missing free or reduced-price meals due to school closures.[64] The federal government funded states and territories to provide additional SNAP-like payments to families with children who were eligible for, but not receiving, school meals. Later rounds of pandemic legislation strengthened Pandemic EBT by extending it to summer months and expanding it for children in schools with reduced hours as well as children in

57. *See, e.g.*, Jason Furman, Chairman, Council of Econ. Advisers, The Economic Case for Strengthening Unemployment Insurance, Remarks Before the Center for American Progress 4 (July 11, 2016) (transcript available at https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160711_furman_uireform_cea.pdf [https://perma.cc/8CXE-XYH2]); André Dua, Kweilin Ellingrud, Bryan Hancock, Ryan Luby, Anu Madgavkar & Sarah Pemberton, *Freelance, Side Hustles, and Gigs: Many More Americans Have Become Independent Workers*, MCKINSEY & CO. (Aug. 23, 2022), https://www.mckinsey.com/featured-insights/sustainable-inclusive-growth/future-of-america/freelance-side-hustles-and-gigs-many-more-americans-have-become-independent-workers#/ [https://perma.cc/WKP7-RHUW].

58. *See* American Rescue Plan Act of 2021, Pub. L. No. 117-2, §§ 9011–9018, 9021–9022, 135 Stat. 4, 118–20 (providing for PUA benefits through September 2021).

59. *See FNS Nutrition Programs*, U.S. DEP'T AGRIC., https://www.fns.usda.gov/programs [https://perma.cc/TSH3-9KTH] (last visited Oct. 14, 2023).

60. Families First Coronavirus Response Act, Pub. L. No. 116-127, § 2301(a), 134 Stat. 178, 187–88 (2020) (codified at 7 U.S.C. § 2011). Legal challenges to the Trump Administration's efforts to tighten time limits and work requirements in the SNAP program were working their way through federal court when the pandemic began. *See, e.g.*, District of Columbia v. U.S. Dep't of Agric., 444 F. Supp. 3d 1 (D.D.C.), *appeal dismissed as moot*, No. 20-5136, 2020 WL 9596420 (D.C. Cir. Nov. 5, 2020).

61. *See* Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 702(a), 134 Stat. 1182, 2092 (2020) (codified at 7. U.S.C. § 2011).

62. American Rescue Plan Act of 2021 § 1101(a) (codified at 7 U.S.C. § 2011).

63. *What Is Electronic Benefits Transfer (EBT)?*, U.S. DEP'T AGRIC.: FOOD & NUTRITION SERV. (May 24, 2023), https://www.fns.usda.gov/snap/ebt [https://perma.cc/RW97-GA2B].

64. Families First Coronavirus Response Act § 1101(d) (codified at 7 U.S.C. § 2016); *see also* Memorandum from Jessica Shahin, Assoc. Adm'r, Supplemental Nutrition Assistance Program (SNAP) & Cindy Long, Deputy Adm'r, Child Nutrition Programs, to SNAP State Agencies & Child Nutrition State Agencies (Jan. 29, 2021), https://fns-prod.azureedge.us/sites/default/files/resource-files/Pandemic-EBT-state-plans-2020-2021-schools-child-care-cover-memo.pdf [https://perma.cc/5558-YY69]; Hammond et al., *supra* note 4, at 166–67 (discussing Pandemic EBT).

childcare facilities.[65] In December 2022, Congress enacted a permanent Summer EBT program, modeled on Pandemic EBT, for the first time providing nutrition support to families during summer months when schools are closed.[66] Furthermore, Summer EBT overcomes some earlier food assistance programs' exclusions of certain U.S. territories, including Puerto Rico, and federally recognized tribes.[67] Congress paid for Summer EBT by ending other pandemic food assistance increases earlier than originally planned.[68] So long as Congress does not repeal it, Summer EBT will be one of the few exceptions to the general rule of pandemic relief failing to lead to permanent changes in U.S. safety-net programs.

In January 2023, just shy of three years from the start of the COVID-19 pandemic, the House of Representatives once again had a Republican majority.[69] Rapid inflation was top of mind for voters across the political spectrum.[70] Meanwhile, the end of lockdown and a reopening economy meant the end of pandemic-era concerns regarding childcare and unemployment. Aside from the new summer food assistance benefit for children, most of the changes described herein were not made permanent. When the 118th Congress opened, the window for structural reform to safety-net programs in the United States had closed.

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This recent history shows that Congress missed an opportunity to fashion a more dynamic safety net that would better withstand future crises. The safety net is—for the most part—no more responsive today than it was before the pandemic. Although the temporary expansions described above provided vital assistance

65. Families First Coronavirus Response Act § 1101 (codified at 7 U.S.C. § 2011), *amended by* Consolidated Appropriations Act, 2021 § 721 and American Rescue Plan Act of 2021 § 1108.

66. *See* Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, § 502, 136 Stat. 4459, 5990–94 (codified at 42 U.S.C. § 1762); *see also* FOOD RSCH. & ACTION CTR., SUMMER AND PANDEMIC EBT PROVISIONS IN THE CONSOLIDATED APPROPRIATIONS ACT, 2023, https://frac.org/wp-content/uploads/Summer-and-Summer-Pandemic-EBT-and-Electronic-Benefits-Transfer-Program-Provisions-in-the-Omnibus-1.pdf [https://perma.cc/P3PH-2ZWD] (last visited Oct. 15, 2023) (summarizing legislation); Zoë Neuberger & Katie Bergh, *Permanent Summer Grocery Benefits Are a Big Win for Children in Low-Income Families, Despite Disappointing Tradeoffs*, CTR. ON BUDGET & POL'Y PRIORITIES: OFF THE CHARTS (Dec. 20, 2022, 1:27 PM), https://www.cbpp.org/blog/permanent-summer-grocery-benefits-are-a-big-win-for-children-in-low-income-families-despite [https://perma.cc/M88R-VA2L] (pointing out that Summer EBT "would be the first new *permanent* federal food assistance program of this magnitude in nearly 50 years").

67. Consolidated Appropriations Act, 2023 § 502(c) (codified at 42 U.S.C. § 1762) (including tribes as well as American Samoa, Puerto Rico, and the Northern Mariana Islands, even though federal law excludes each of those three territories from SNAP).

68. *See* Neuberger & Bergh, *supra* note 66 (noting that temporary emergency SNAP benefits were ended early to pay for the Summer EBT program).

69. *See, e.g.*, Melissa Quinn, *The Legislation the New House GOP Majority Is Taking Up in Its First Full Week in Power*, CBS NEWS (Jan. 12, 2023, 8:35 AM), https://www.cbsnews.com/news/house-bills-republican-majority-abortion-irs-funding-weaponization-federal-government/ [https://perma.cc/TB9U-GXFY].

70. *See* Anthony Salvanto, Fred Backus & Jennifer De Pinto, *CBS News Poll: Inflation, Cooperation and . . . Investigation? Americans on What the New Congress Should – and Shouldn't – Deliver*, CBS NEWS (Jan. 8, 2023, 9:30 AM), https://www.cbsnews.com/news/cbs-news-poll-inflation-cooperation-and-investigation/ [https://perma.cc/N2GG-EU7K].

during the pandemic, they did little to protect poor households from future disasters, let alone the more gradual and ongoing erosion of the safety net caused by policy drift. Additionally, as we will show next, while Congress's response to the pandemic was impressive in several ways, it also failed to adequately protect poor Americans from the pandemic and its economic repercussions. In this respect, although the COVID-19 pandemic was a highly unusual event, we argue that the inadequacy of Congress's response to it was not atypical.

In this Article, we are concerned with the question of how to make the safety net more *responsive*, as opposed to more generous. The issues of responsiveness and generosity overlap, yet they are distinct.[71] A more responsive safety net will tend to be *temporarily* more generous during certain emergency circumstances. It will also tend to better *maintain* its generosity by updating its benefit levels in response to evolving external conditions, such as unemployment rates or inflation.

Below, we argue that Congress's traditional tools to respond to changing circumstances—passing new legislation, relying on delegations, and devolving authority to state and local governments—are insufficient. To build a more responsive safety net that protects vulnerable households from crises, volatility, and economic shifts, Congress must enact and strengthen automatic fiscal policies.

B. HOW CONGRESS RESPONDS TO CHANGE

Congress typically responds to changing circumstances in three ways: Congress may pass new legislation itself; it may rely on delegations to federal administrative agencies; or it may devolve authority to states and local governments. This Section argues that, although these approaches have important roles to play, they are insufficient to address the evolving needs of poor households.

1. Crisis-Induced Legislation

The recent failure of the 117th Congress to build on pandemic-related changes to anti-poverty programs is not exceptional. It's structural. Congress often struggles to pass legislation.[72] Part of this is by design: the Constitution sets up an onerous process for enacting new legislation, on the theory that the disadvantages of hindering beneficial legislation are outweighed by the prevention of the tyranny

71. A more generous safety net will, all else equal, be better at addressing policy drift because it will render people less vulnerable, even if it fails to adapt to changing circumstances. But in principle, a safety net could be minimal and responsive, or generous and unresponsive. Moreover, even those who support a limited safety net might still prefer that it respond adequately to changing circumstances, which may make some of the reforms we discuss more politically feasible than permanent expansions to the safety net. *See infra* Section III.D.

72. For just a few works from political science on congressional gridlock, see generally THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK (2006); DAVID W. BRADY & CRAIG VOLDEN, REVOLVING GRIDLOCK: POLITICS AND POLICY FROM JIMMY CARTER TO GEORGE W. BUSH (2d ed. 2018); KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING (1998); and Sarah Binder, *Legislating in Polarized Times*, *in* CONGRESS RECONSIDERED 189 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 11th ed. 2017).

of majority rule.[73] In recent years, the accretion of legislative procedures and political polarization have exacerbated this inertia.[74]

In addition to this generalized legislative inertia, political scientists have shown that Congress is often more responsive to the interests of the wealthy than those of the poor.[75] The erosion of campaign finance restrictions in the United States has resulted in unprecedented levels of money pouring into political campaigns[76] and led members of Congress to spend more and more time fundraising.[77] The waning of congressional capacity has rendered members of Congress increasingly reliant on lobbyists and other outside groups for legislative expertise.[78] The majority of members of Congress are millionaires[79] with vastly different perspectives and life experiences than poor Americans.[80] At the same time,

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73. Kysar, *supra* note 30, at 816 n.16 (observing "the separation of the executive from the legislature as 'additional security against the [enactment] of improper laws,' the threat of which overcomes '[t]he injury which may possibly be done by defeating a few good laws'" (alterations in original) (quoting THE FEDERALIST NO. 73, at 442–43 (Alexander Hamilton) (Clinton Rossiter ed., 1961))).

74. *See id.* at 816–17.

75. *See generally* CHRISTOPHER WITKO, JANA MORGAN, NATHAN J. KELLY & PETER K. ENNS, HIJACKING THE AGENDA: ECONOMIC POWER AND POLITICAL INFLUENCE (2021); LAWRENCE LESSIG, THEY DON'T REPRESENT US: RECLAIMING OUR DEMOCRACY (2019); JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS (2010).

76. *See* Karl Evers-Hillstrom, *Most Expensive Ever: 2020 Election Cost $14.4 Billion*, OPENSECRETS (Feb. 11, 2021, 1:14 PM), https://www.opensecrets.org/news/2021/02/2020-cycle-cost-14p4-billion-doubling-16/ [https://perma.cc/MV5G-ABTJ].

77. *See* Lee Drutman, *Yet Another Retiring Member of Congress Complains About the Misery of Fundraising*, VOX: POLYARCHY (Jan. 8, 2016, 12:30 PM), https://www.vox.com/polyarchy/2016/1/8/10736402/congress-fundraising-miserable [https://perma.cc/ZG66-Y9X5]; Planet Money, *Welcome to Congress. Now Start Calling Strangers to Ask for Money*, NPR (Jan. 9, 2013, 12:38 PM), https://www.npr.org/sections/money/2013/01/09/168958774/welcome-to-congress-now-start-calling-strangers-to-ask-for-money [https://perma.cc/MKC7-37YT] (reporting on a PowerPoint slide used by the Democratic Congressional Campaign Committee to incoming freshmen members urging them to spend four hours on "call time" every day they are in Washington).

Although grassroots, small-donor fundraising is becoming increasingly common, it continues to be overshadowed by "megadonor" funding. According to the Brennan Center for Justice:

> [B]ig donors are still responsible for the lion's share of campaign money. In 2020, small donors gave a record-breaking $4 billion to federal races. This sum, donated by at least 20 million people, only amounts to 23 percent of federal election funding. They were outspent by a much smaller number of megadonors — "mega" indicating contributions over $10,000 — who collectively gave $5 billion.

Faces of Small Donor Public Financing 2021, BRENNAN CTR. FOR JUST. (Mar. 11, 2021), https://www.brennancenter.org/our-work/research-reports/faces-small-donor-public-financing-2021 [https://perma.cc/9Q55-9ZFC].

78. *See* Molly E. Reynolds, *The Decline in Congressional Capacity*, *in* CONGRESS OVERWHELMED: THE DECLINE IN CONGRESSIONAL CAPACITY AND PROSPECTS FOR REFORM 34, 35–37 (Timothy M. LaPira et al. eds., 2020); *see also* Lee Drutman & Timothy M. LaPira, *Capacity for What? Legislative Capacity Regimes in Congress and the Possibilities for Reform*, *in* CONGRESS OVERWHELMED: THE DECLINE IN CONGRESSIONAL CAPACITY AND PROSPECTS FOR REFORM, *supra*, 13, 13–15.

79. Karl Evers-Hillstrom, *Majority of Lawmakers in 116th Congress Are Millionaires*, OPENSECRETS (Apr. 23, 2020, 9:14 AM), https://www.opensecrets.org/news/2020/04/majority-of-lawmakers-millionaires/ [https://perma.cc/V8K5-UAD2].

80. *See* NICHOLAS CARNES, WHITE-COLLAR GOVERNMENT: THE HIDDEN ROLE OF CLASS IN ECONOMIC POLICY MAKING 2–3, 12–13 (2013).

poor Americans are less likely to participate in political life than the rich for a range of reasons: they have more limited resources, they are more likely to have chronic medical conditions, and they are more likely to have negative interactions with government programs and institutions.[81]

Rather than legislating in response to gradual changes, Congress tends to enact legislation in "fits and starts," with long periods of stasis followed by dramatic changes.[82] The perception of a crisis often prompts legislative action.[83] Consider, for example, how the Great Recession spurred the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, and within it the formation of the Consumer Financial Protection Bureau (CFPB).[84]

In contrast, gradual, low-salience changes often fail to spur congressional action. There are many possible reasons for this stop-and-go policymaking pattern. One is the status quo bias that comes from having multiple points in the lawmaking process where legislation can be stopped, often called "veto gates."[85] Another is the Senate's supermajority voting rules.[86] Yet another is simply that members of Congress have limited time and therefore must reserve it for the matters they perceive to be the most urgent.[87] Relatedly, the regular tinkering required to keep policies up-to-date with changing social and economic forces fails to garner the positive media and voter attention that might spur policymakers to act.

When a high-profile crisis hits, Congress may deviate from its default inaction by passing major domestic legislation. Most recently, in response to the COVID-19

81. *See, e.g.*, JACOB M. GRUMBACH, LABORATORIES AGAINST DEMOCRACY: HOW NATIONAL PARTIES TRANSFORMED STATE POLITICS 182–83 (2022); JAMILA MICHENER, FRAGMENTED DEMOCRACY: MEDICAID, FEDERALISM, AND UNEQUAL POLITICS 10 (2018) (discussing "well-documented racial and economic health disparities," and noting "mounting evidence that health can affect both electoral participation and democratic representation"); Sarah K. Bruch, Myra Marx Ferree & Joe Soss, *From Policy to Polity: Democracy, Paternalism, and the Incorporation of Disadvantaged Citizens*, 75 AM. SOCIO. REV. 205, 207 (2010) (discussing research finding that people who receive means-tested benefits are more likely to have negative experiences with government, which dampens political participation).

82. Kamin, *supra* note 17, at 157 (describing this phenomenon of "punctuated equilibrium" (citing BRYAN D. JONES & FRANK R. BAUMGARTNER, THE POLITICS OF ATTENTION: HOW GOVERNMENT PRIORITIZES PROBLEMS 5 (2005))).

83. *See* JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 20 (2d ed. 2011) (discussing how policy windows open when a particular societal problem aligns with policy opportunities and a conducive political environment).

84. Pub. L. No. 111-203, § 1011, 124 Stat. 1376, 1964 (2010) (codified at 12 U.S.C. § 5491) (establishing the CFPB); § 1021, 124 Stat. at 1979–80 (codified at 12 U.S.C. § 5511) (providing the purpose and objectives of the CFPB).

85. *See* Kamin, *supra* note 17, at 159–60; Galvin & Hacker, *supra* note 15, at 219, 224 (explaining how the existence of "veto points" contributes to policy drift by "prevent[ing] significant reforms from advancing through the legislative process").

86. *See* Hacker & Pierson, *After the "Master Theory*,*" supra* note 17, at 647 (citing supermajority requirements as an example of a procedural rule that may contribute to policy drift); Kamin, *supra* note 17, at 160; Jonathan S. Gould, Kenneth A. Shepsle & Matthew C. Stephenson, *Democratizing the Senate from Within*, 13 J. LEGAL ANALYSIS 502, 505 (2021).

87. JONES & BAUMGARTNER, *supra* note 82, at 7 ("Decision makers, like all people, often ignore important changes until they become severe or until policy entrepreneurs with an interest in the matter highlight such changes.").

pandemic, Congress enacted six major pieces of legislation between March 2020 and March 2021.[88] As we explained above, this legislation made important—but largely temporary—changes to existing safety-net programs, including bolstering cash transfers, food assistance, health insurance, housing assistance, and job-related support.[89] This support proved essential in staving off the worst effects of the pandemic: researchers estimate that the Coronavirus Aid, Relief, and Economic Security (CARES) Act alone prevented twelve million Americans from falling into poverty and, by one measure, led to a record-setting overall decline in poverty in 2020.[90]

While the scale of Congress's pandemic response was remarkable, its methods were not. Congress often relies on existing safety-net programs when responding to crises. The financial crisis and housing crash in 2008 and 2009 precipitated the deepest recession in decades.[91] Congress reacted to that economic crisis with similarly sweeping changes to safety-net programs in the American Recovery and Reinvestment Act of 2009 (ARRA).[92] ARRA created a Temporary Assistance for Needy Families (TANF) emergency fund, as well as increased and extended SNAP benefits, EITC payments, and UI.[93] Researchers have found that these expanded safety-net programs provided significant protection against poverty in the wake of the Great Recession.[94] Similarly, following Hurricane Katrina in 2005, Congress passed legislation to improve access and increase existing benefits for people affected in Louisiana and Mississippi.[95]

88. Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020, Pub. L. No. 116-123, 134 Stat. 146; Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020); Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020); Paycheck Protection Program and Health Care Enhancement Act, Pub. L. No. 116-139, 134 Stat. 620 (2020); Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020); American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4.

89. *See supra* Section I.A.

90. *See* Jason DeParle, *Vast Federal Aid Has Capped Rise in Poverty, Studies Find*, N.Y. TIMES (Sept. 14, 2021), https://www.nytimes.com/2020/06/21/us/politics/coronavirus-poverty.html; CBPP STAFF, CTR. ON BUDGET & POL'Y PRIORITIES, ROBUST COVID RELIEF ACHIEVED HISTORIC GAINS AGAINST POVERTY AND HARDSHIP, BOLSTERED ECONOMY 4 (2022), https://www.cbpp.org/sites/default/files/2-24-2022pov_1.pdf [https://perma.cc/M693-U2K9].

91. *See* Boushey et al., *supra* note 31, at 11.

92. Pub. L. No. 111-5, 123 Stat. 115.

93. *Id.* § 2101, 123 Stat. at 446 (codified at 42 U.S.C. § 603); § 101, 123 Stat. at 120; § 1002, 123 Stat. at 312 (codified at I.R.C. § 32); § 1007, 123 Stat. at 317 (codified at I.R.C. § 85); *see also* LISA MCCORKELL WITH SARA HINKLEY, INST. FOR RSCH. ON LAB. & EMP., THE GREAT RECESSION, FAMILIES, AND THE SAFETY NET 2 (2018), https://irle.berkeley.edu/wp-content/uploads/2018/12/IRLE-The-Great-Recession-Families-and-the-Safety-Net-1.pdf [https://perma.cc/5GYX-5YBK] (describing changes to safety-net programs under ARRA). In addition to safety-net changes, ARRA also provided all individuals with a $400 tax cut ($800 per family), implemented through a reduction of tax withholding in workers' paychecks. § 36A, 123 Stat. at 309–10.

94. *See* Marianne Bitler & Hilary Hoynes, *The More Things Change, the More They Stay the Same? The Safety Net and Poverty in the Great Recession*, 34 J. LAB. ECON. S403, S432–33 (2016).

95. *See* Andrew Hammond, *Welfare and Federalism's Peril*, 92 WASH. L. REV. 1721, 1749–52 (2017) (discussing TANF and Gulf Coast relief legislation).

Not all major expansions in the safety net are precipitated by a crisis. Two prominent examples—the creation of Medicare and Medicaid in 1965[96] and enactment of the Affordable Care Act in 2010[97]—are perhaps best thought of as part of a long-standing movement within the Democratic Party to achieve universal health insurance coverage, a commitment dating back to at least 1945.[98] Indeed, the recently passed Inflation Reduction Act's temporarily expanded subsidies for the Affordable Care Act exchanges,[99] in particular, could be characterized as part of that steady, if incremental, political project. And some programs must be regularly reauthorized, either as part of a periodic, omnibus legislative deal, such as SNAP in the Farm Bill,[100] or on their own, such as TANF.[101] Yet setting aside the limited examples of gradualism in Medicare and Medicaid and the periodic reauthorization of SNAP and TANF, many of the most important changes in federal anti-poverty policies have been borne of crisis.

Still, while such crisis-induced legislation has proven incredibly beneficial, it suffers from several disadvantages. First, as previous work has shown, crisis-induced legislation often tends to be driven by sympathy rather than careful deliberation or research.[102] As a result, Congress is more likely to craft policies that provide support to wealthy disaster victims rather than directing relief to the most vulnerable groups.[103] Lawmakers may also use crisis lawmaking as an opportunity to direct funds to their powerful constituents—the wealthy,

96. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286.

97. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

98. *See* President Harry S. Truman, Special Message to the Congress Recommending a Comprehensive Health Program (Nov. 19, 1945) (transcript available at https://www.trumanlibrary.gov/library/public-papers/192/special-message-congress-recommending-comprehensive-health-program [https://perma.cc/37LG-9TWV]); *see also* KAISER FAM. FOUND., NATIONAL HEALTH INSURANCE—A BRIEF HISTORY OF REFORM EFFORTS IN THE U.S. 3 (2009), https://www.kff.org/wp-content/uploads/2013/01/7871.pdf [https://perma.cc/69S3-PPJY]; THEODORE R. MARMOR, *The Origins of the Medicare Strategy*, *in* THE POLITICS OF MEDICARE 3, 7 (Routledge 2d ed. 2017) (1970); Jacob S. Hacker & Theda Skocpol, *The New Politics of U.S. Health Policy*, 22 J. HEALTH POL., POL'Y & L. 315, 318 (1997) (comparing Truman and Clinton's health reform efforts). On the other hand, the Great Recession likely did contribute to the enactment of the Affordable Care Act by augmenting public concern about health and economic security. *See* Jacob S. Hacker, *Why Reform Happened*, 36 J. HEALTH POL., POL'Y & L. 437, 438 (2011).

99. Pub. L. No. 117-169, § 12001, 136 Stat. 1818, 1905 (2022) (codified at I.R.C. § 36B); *see also* Katie Keith, *Congress Extends Enhanced ACA Subsidies*, 41 HEALTH AFFS. 1542, 1542 (2022).

100. *See* RENÉE JOHNSON & JIM MONKE, CONG. RSCH. SERV., RS22131, WHAT IS THE FARM BILL? (2023), https://sgp.fas.org/crs/misc/RS22131.pdf [https://perma.cc/28LB-EUTE]; *see also* Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1967–68 (2020) (discussing the Farm Bill as an example of reauthorization); Andrew Hammond, *Litigating Welfare Rights: Medicaid, SNAP, and the Legacy of the New Property*, 115 NW. U. L. REV. 361, 402–05 (2020) (analyzing retrenchment failures in the 2018 Farm Bill).

101. Congress has managed to approve only short-term extensions every year since Fiscal Year 2010. *See* GENE FALK, CONG. RSCH. SERV., R44668, THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) BLOCK GRANT: A LEGISLATIVE HISTORY 11–15 (2022), https://crsreports.congress.gov/product/pdf/R/R44668/19 [https://perma.cc/LB8D-G9XZ] (providing a chronology of every TANF funding authorization).

102. *See* Ellen P. Aprill & Richard Schmalbeck, *Post-Disaster Tax Legislation: A Series of Unfortunate Events*, 56 DUKE L.J. 51, 87 (2006).

103. *See id.*

interest groups, or certain industries.[104] As Ellen Aprill and Richard Schmalbeck have explained, "Because they are packaged as disaster relief and thus seen as a response to tragedies that hurt both rich and poor, [disaster tax relief packages] escape[] the criticisms that have been directed at other tax legislation, such as tax rate cuts on capital gains and dividends."[105] During the COVID-19 pandemic, certain relief provisions directed huge sums of money to wealthy individuals and large businesses.[106] In addition, the pandemic aid packages were subject to limited oversight, which led to billions of dollars of fraud.[107]

Crisis-induced legislation also suffers from problems of timing. Congress tends to operate on its own schedule, which often does not correspond to the needs of the American public. For instance, ARRA was not enacted until February 2009, fourteen months after the start of the Great Recession.[108] Likewise, although Congress acted more quickly to pass the first round of stimulus relief during the COVID-19 pandemic, it did not increase SNAP benefits for all beneficiaries until ten months into the crisis.[109] The delay increased food insecurity for millions of families.[110] Meanwhile, although Congress initially expanded UI benefits, the expansion ended on July 31, 2020, after the virus had already begun surging around the country.[111] Congress did not renew the expansion until December.[112]

Third, because Congress needs to act quickly when enacting crisis-induced legislation, it typically relies on existing social programs, which are not designed to reach certain populations. For instance, during the COVID-19 pandemic, the federal response excluded the same people that U.S. safety-net programs have excluded from the beginning, such as childless adults, immigrant families, and

104. *See id.* at 88–89.

105. *Id.* at 89.

106. *See, e.g.*, Clint Wallace, *The Troubling Case of the Unlimited Pass-Through Deduction: Section 2304 of the CARES Act*, U. CHI. L. REV. ONLINE (June 29, 2020), https://lawreviewblog.uchicago.edu/2020/06/29/cares-2304-wallace [https://perma.cc/2PPB-ERJU].

107. David A. Fahrenthold, *Prosecutors Struggle to Catch Up to a Tidal Wave of Pandemic Fraud*, N.Y. TIMES (Aug. 18, 2022), https://www.nytimes.com/2022/08/16/business/economy/covid-pandemic-fraud.html.

108. Boushey et al., *supra* note 31, at 36.

109. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 701, 134 Stat. 1182, 2092 (2020) (codified at 7 U.S.C. § 2011) (enacted Dec. 27, 2020).

110. *See* Deena Zaru, *Amid 'Unprecedented' Hunger, Advocates Urge Congress to Boost SNAP Benefits in COVID-19 Relief*, ABC NEWS (Dec. 13, 2020), https://abcnews.go.com/Politics/amid-unprecedented-hunger-advocates-urge-congress-boost-snap/story?id=74610702 [https://perma.cc/H4A2-T4LF] ("Since the public health crisis hit the U.S. in March, food insecurity has increased in each state, doubling overall and tripling among households with children . . . .").

111. *See* Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 2104(e), 134 Stat. 281, 319 (2020) (codified at 15 U.S.C. § 9023(e)).

112. *See* Consolidated Appropriations Act, 2021 § 203 (amending 15 U.S.C. § 9023(e)); *see also* Hammond, *supra* note 19, at 1114 ("Congress passed the first four stimulus bills in a six-week period between early March and late April 2020, but then did not pass additional stimulus for eight months (and only then at [the] end of the lame-duck session on December 27th).").

those with weaker ties to the labor market.[113] For instance, Congress authorized the Internal Revenue Service to send COVID-relief checks to millions of households, but the agency struggled to reach people who do not normally file an income tax return.[114] The congressional response to the Great Recession displayed similar patterns. Researchers have found that immigrant families and childless adults were excluded from many of the safety-net expansions during the Great Recession.[115]

Finally, administrative complexity and technological problems endemic to safety-net programs may hamper the speed and efficiency of crisis-induced legislation. Outside of crises, welfare and safety-net systems impose "hassle costs" on claimants, in part to identify the truly needy.[116] In a crisis, these costs increase as states' systems become overwhelmed by increased demand.[117] For instance, during the COVID-19 pandemic, claimants faced network crashes and confusing messaging.[118] Many states' UI systems simply were not equipped to handle a large influx of claims. As a result, many people failed to access benefits.[119] Similarly, states had to quickly deliver food assistance to children through the new Pandemic EBT program. Tennessee delivered the additional Pandemic EBT

113. *See* Krista Ruffini & Abigail Wozniak, *Supporting Workers and Families in the Pandemic Recession: Results in 2020 and Suggestions for 2021*, 2021 BROOKINGS PAPERS ON ECON. ACTIVITY 111, 127–28; David Super, *The Crisis Is Exposing the Harm Structural Attacks on Anti-Poverty Programs Have Done*, BALKINIZATION (May 23, 2020, 11:51 AM), https://balkin.blogspot.com/2020/05/the-crisis-is-exposing-harm-structural.html [https://perma.cc/DQ9Q-BN7Y]; *see also* Hammond et al., *supra* note 4, at 165 (discussing this dynamic specifically in regard to stimulus payments).

114. *See Millions of People May Still Be Eligible for COVID-19 Stimulus Payments, but Time Is Running Out*, U.S. GOV'T ACCOUNTABILITY OFF.: WATCHBLOG (Oct. 11, 2022), https://www.gao.gov/blog/millions-people-may-still-be-eligible-covid-19-stimulus-payments-time-running-out [https://perma.cc/M4AQ-G4HQ].

115. Marianne Bitler, Hilary Hoynes & Elira Kuka, *Child Poverty, the Great Recession, and the Social Safety Net in the United States*, 36 J. POL'Y ANALYSIS & MGMT. 358, 380 (2017) (finding that "income from the social safety net [had] no mitigating effect" on poverty among children of immigrant households during the Great Recession); Robert A. Moffitt, *The Great Recession and the Social Safety Net*, 650 ANNALS AM. ACAD. 143, 148 (2013) (concluding that "for demographic groups served, the Medicaid, TANF, housing, and EITC programs primarily benefit families with children and not childless individuals or families").

116. *See* Brian Galle, *The American Rescue Plan and the Future of the Safety Net*, 131 YALE L.J.F. 561, 566–69 (2021). *See generally* PAMELA HERD & DONALD P. MOYNIHAN, ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS (2018) (developing the concept of administrative burdens in understanding citizens' interactions with government).

117. *See* Galle, *supra* note 116, at 567.

118. *See* Jim Zarroli, *Unemployment Websites Are Crashing Across the Country*, NPR (Mar. 18, 2020, 5:47 PM), https://www.npr.org/2020/03/18/817950024/unemployment-websites-are-crashing-across-the-country [https://perma.cc/24LU-FNWM]; Greg Iacurci, *Many Workers Are Unsure How, or When, They Can Collect Extra Unemployment Benefits*, CNBC (Jan. 11, 2021, 1:34 PM), https://www.cnbc.com/2021/01/11/unemployment-benefits-from-covid-relief-law-confuses-many-workers.html [https://perma.cc/2TC5-BSBV].

119. Ben Zipperer & Elise Gould, *Unemployment Filing Failures: New Survey Confirms That Millions of Jobless Were Unable to File an Unemployment Insurance Claim*, ECON. POL'Y INST.: WORKING ECON. BLOG (Apr. 28, 2020, 7:00 AM), https://www.epi.org/blog/unemployment-filing-failures-new-survey-confirms-that-millions-of-jobless-were-unable-to-file-an-unemployment-insurance-claim/ [https://perma.cc/YN7Z-RU8H].

to households who were already enrolled in SNAP or TANF, but overlooked families who were not already enrolled in either program but still eligible for Pandemic EBT through their school meal eligibility.[120] As a result, Tennessee bungled food assistance to nearly 400,000 children and delayed delivering approximately $60 million in federal funds.[121] Other states required non-SNAP families to apply for the benefits, a process that delayed payments by weeks or months.[122]

In sum, there are significant roadblocks that prevent Congress from adequately responding to national crises as well as more gradual changes that harm poor households. Although crises often spur Congress to act, the resulting ad hoc lawmaking suffers from problems of unequal influence, timing, targeting, and administrative complexity. Outside of crisis times, inaction tends to be the dominant pattern.

2. Delegation to Federal Administrative Agencies

Another tool Congress has for grappling with crises and policy drift is delegation to administrative agencies. Members of Congress are typically (and by necessity) generalists, their staffs are relatively small, and as explained above, they must navigate multiple veto gates to enact legislation.[123] By contrast, agencies are focused on specific issues, are staffed with numerous subject-matter experts, and are not subject to the same aforementioned veto gates when they take action.[124] These factors enable agencies, in some ways, to be more flexible and responsive to changing societal conditions than Congress.[125] For instance, recent work finds that federal agencies frequently revise and update their regulations,

120. *See, e.g.*, Natalie Allison, *Tennessee Could Forfeit $60M in Federal Food Aid for Low-Income Families During Coronavirus Pandemic*, TENNESSEAN (July 31, 2020, 1:23 PM), https://www.tennessean.com/story/news/politics/2020/07/30/tennessee-may-forfeit-60-m-pandemic-ebt-funds-applications-stall/5535427002/.

121. *See id.*; Cathryn Stout, *As Deadline for Summer P-EBT Eligibility Looms, Tennessee Addresses Delays*, CHALKBEAT TENN. (July 30, 2021, 5:07 PM), https://tn.chalkbeat.org/2021/7/30/22602547/tennessee-eligible-pebt-application-saturday-summer-meals [https://perma.cc/7EQ4-WVW7].

122. *See* Tami Luhby, *Millions of Children Are Still Waiting for Pandemic Food Aid as School Year Nears End*, CNN POL. (Apr. 15, 2021, 12:11 PM), https://www.cnn.com/2021/04/15/politics/children-hunger-federal-pandemic-food-aid/index.html [https://perma.cc/C264-PRCN].

123. *See* DAVID H. ROSENBLOOM, BUILDING A LEGISLATIVE-CENTERED PUBLIC ADMINISTRATION: CONGRESS AND THE ADMINISTRATIVE STATE, 1946–1999, at 133–34 (2000) (enumerating reasons why Congress might delegate authority to agencies, including "to alleviate its workload; to avoid a particularly nettlesome political issue; to focus highly specialized administrative expertise on a particular problem; for convenience; or simply because the agencies do not face the constraints of a legislature that is reconstituted every two years").

124. *See* Russell W. Mills & Jennifer L. Selin, *Don't Sweat the Details! Enhancing Congressional Committee Expertise Through the Use of Detailees*, 42 LEGIS. STUD. Q. 611, 611 (2017) ("In contrast to the dramatic growth in the size and influence of the executive branch over the past 40 years, congressional committee staffing levels are at an all-time low.").

125. *See* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L., ECON. & ORG. 81, 95 (1985) (arguing for delegation "as a device for improving the responsiveness of government to the desires of the electorate").

even when they are not required to do so.[126] In addition, despite frequent allegations of "regulatory capture," federal agencies are insulated in important ways from interest group influence and are arguably less susceptible to such influence than Congress.[127]

Yet agencies' ability to address crises and policy drift is limited in several ways. For one thing, although federal agencies may be able to pursue public-interested regulations in the face of industry pressure, that does not mean that they are equally responsive to the interests of the wealthy and the poor. To the contrary, several empirical studies find that businesses exert an outsized influence on the regulatory process, compared to individuals and public interest groups.[128] Scholars have offered various explanations for this imbalance in influence, ranging from regulators' social and cultural biases[129] to the ways that administrative law empowers interest groups.[130]

Furthermore, Congress and the courts have, over the years, saddled agencies with an array of procedural requirements that make it harder for agencies to respond quickly to changing circumstances.[131] These range from the requirement that agencies provide an opportunity for members of the public to comment on proposed rules[132] to the requirement that economically significant regulations be accompanied by a regulatory impact analysis.[133] These requirements mean that major rulemaking efforts often take years, consume a significant amount of agency resources, and require the production of hundreds of pages of analysis and discussion.[134] By some accounts, such impediments even deter agencies from

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126. *See* Wendy Wagner, William West, Thomas McGarity & Lisa Peters, *Dynamic Rulemaking*, 92 N.Y.U. L. REV. 183, 226 (2017).

127. *See* Gabriel Scheffler, *Failure to Capture: Why Business Does Not Control the Rulemaking Process*, 79 MD. L. REV. 700, 704 (2020). *See generally* STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT (2008) (identifying multiple cases of federal agencies promulgating socially beneficial regulations in spite of resistance from interest groups).

128. *See, e.g.*, Simon F. Haeder & Susan Webb Yackee, *Influence and the Administrative Process: Lobbying the U.S. President's Office of Management and Budget*, 109 AM. POL. SCI. REV. 507, 509, 517–18 (2015); Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 102, 125 (2011); William F. West & Connor Raso, *Who Shapes the Rulemaking Agenda? Implications for Bureaucratic Responsiveness and Bureaucratic Control*, 23 J. PUB. ADMIN. RSCH. & THEORY 495, 508 (2012); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 133 (2006); Shu-Yi Oei & Leigh Osofsky, *Legislation and Comment: The Making of the § 199A Regulations*, 69 EMORY L.J. 209, 260 (2019).

129. *See* James Kwak, *Cultural Capture and the Financial Crisis*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 71, 78–79 (Daniel Carpenter & David A. Moss eds., 2014).

130. *See* Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1352–55 (2010).

131. *See* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 360–64 (2019).

132. 5 U.S.C. § 553(b)–(c).

133. Exec. Order No. 12,866, 3 C.F.R. § 638, 645–46 (1994).

134. *See* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1387–90 (1992).

undertaking ambitious and beneficial regulatory efforts.[135] Agencies also necessarily depend on Congress for funding, which subjects them to delays on Capitol Hill.[136]

Finally, agencies have limited legal authority compared to Congress, and in recent years the Supreme Court has curtailed that authority even further. Agencies are, of course, creatures of statute. For an agency to take any action, Congress must have delegated to it the power to take that action.[137] Still, until relatively recently, judicial doctrines such as *Chevron* deference and *Auer* deference empowered agencies by giving them significant latitude in resolving statutory or regulatory ambiguities.[138] In recent years, however, the Supreme Court has done an about-face and has begun to limit agencies' authority on multiple fronts. Although the Court has thus far declined to overturn the doctrine of *Chevron* deference,[139] its recent decisions have conspicuously ignored that doctrine, leading some commentators to question whether *Chevron* deference is still alive.[140] The Supreme Court also recently delimited several constraints on the application of *Auer* deference.[141] Finally, the Supreme Court recently established what it calls the "major questions doctrine," which requires that there be explicit and specific statutory authority for an agency to take an action that has "vast economic and political significance."[142] This doctrine threatens to significantly curtail agencies' ability to address serious new problems.[143]

135. *See, e.g.*, Jerry L. Mashaw & David L. Harfst, *From Command and Control to Collaboration and Deference: The Transformation of Auto Safety Regulation*, 34 YALE J. ON REGUL. 167, 170, 253 (2017).

136. *See, e.g.*, Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1077 (2021) (discussing the centrality of appropriations for agency action); Matthew B. Lawrence, *Subordination and Separation of Powers*, 131 YALE L.J. 78, 98 (2021) ("[T]ime-limited appropriations are the key means through which Congress influences the power it has delegated to the administrative state.").

137. *See, e.g.*, La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.").

138. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (holding that courts should defer to an administering agency's interpretation of an ambiguous statute as long as that interpretation is reasonable); Auer v. Robbins, 519 U.S. 452, 461 (1997) (holding that an agency's interpretation of its own regulation is "controlling unless 'plainly erroneous or inconsistent with the regulation'" (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989))).

139. This could soon change. At the time this Article is going to print, the Supreme Court has agreed to hear two cases—*Loper Bright Enterprises v. Raimondo* and *Relentless v. Department of Commerce*—in January 2024, which both address the question of whether to overrule *Chevron*. Amy Howe, *Justices Grant Four New Cases, Including Chevron Companion Case*, SCOTUSBLOG (Oct. 13, 2023, 3:16 PM), https://www.scotusblog.com/2023/10/justices-grant-four-new-cases-including-chevron-companion-case/ [https://perma.cc/93Y9-TK49].

140. *See, e.g.*, Richard J. Pierce, Jr., *Is Chevron Deference Still Alive?*, REGUL. REV. (July 14, 2022), https://www.theregreview.org/2022/07/14/pierce-chevron-deference/ [https://perma.cc/73JF-XQ9F] (discussing Am. Hosp. Ass'n v. Becerra, 142 S. Ct. 1896 (2022) and Becerra v. Empire Health Found., 142 S. Ct. 2354 (2022)).

141. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019).

142. West Virginia v. EPA, 142 S. Ct. 2587, 2605 (2022) (quoting 84 Fed. Reg. 32,520, 32,529 (July 8, 2019) (to be codified at 40 C.F.R. pt. 60)).

143. *See* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1092–94 (2023).

To sum up, agencies possess certain responsive qualities relative to Congress. However, their substantive and procedural limitations, some of which look to become only more severe in the coming years, make them an insufficient alternative to respond to crises and combat policy drift.

3. Devolution to State and Local Governments

Congress might also devolve greater authority for administering safety-net programs to state and local governments. In theory, at least, these subnational governments can be more responsive than Congress when it comes to the safety net because state and local politics are not always characterized by the same levels of partisanship and gridlock as national politics.[144] States may also be better suited to monitor and address regional economic fluctuations, such as those arising from technological advances or global trade agreements, as well as regional and local disasters. Moreover, states have in the past served as testing grounds for progressive ideas.[145]

Yet state and local governments are hampered in their ability to address major crises and policy drift. For one thing, states have much more limited fiscal capacity to expand the safety net than Congress, because every state except Vermont is required to maintain a balanced budget.[146] Even given additional federal funding, states have sometimes proven unable—or unwilling—to expand safety-net benefits during fiscal crises.[147] During the Great Recession, Congress authorized $5 billion in additional TANF funds through ARRA.[148] Despite the additional federal support, several states reduced TANF benefits or set harsher restrictions during this time period.[149] Researchers have found that, due to this fiscal austerity, TANF failed to protect vulnerable families during the Great Recession.[150] Indeed, the consequences of the 1996 Welfare Reform Act, which dramatically increased states' discretion in administering cash assistance,[151] further cast

144. *See* Heather K. Gerken, *A New Progressive Federalism*, DEMOCRACY, Spring 2012, at 37, 37–38.

145. *Id.* at 48 ("Progressives have long leveraged local population concentrations into political power.").

146. David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2609 (2005); Jared Walczak, *State Strategies for Closing FY 2020 with a Balanced Budget*, TAX FOUND. (Apr. 2, 2020), https://taxfoundation.org/research/all/state/fy-2020-state-budgets-fy-2021-state-budgets/ [https://perma.cc/C2UP-ZYVQ].

147. *See* Nicole Huberfeld, Sarah H. Gordon & David K. Jones, *Federalism Complicates the Response to the COVID-19 Health and Economic Crisis: What Can Be Done?*, 45 J. HEALTH POL., POL'Y & L. 951, 951 (2020) (noting that "many of the states with the deepest needs are poorly equipped to respond to emergencies due to low taxes and distrust of government").

148. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 2101, 123 Stat. 115, 446 (codified as amended at 42 U.S.C. § 603); *see also* Hammond, *supra* note 95, at 1749–50 (discussing ARRA's TANF Emergency Fund).

149. MCCORKELL & HINKLEY, *supra* note 93, at 2.

150. *Id.*

151. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 401, 110 Stat. 2105, 2113 (codified at 42 U.S.C. § 601).

doubt on states' ability to administer a responsive safety net.[152] While fourteen states and D.C. have raised TANF benefits since July 2018, thirty-three states have decreased benefits.[153] Furthermore, the lax reporting in block grants has led to states repurposing funding intended for poor families for other public spending, not to mention outright fraud.[154] Competition between states may play a role here as well. State lawmakers may be loath to enact highly redistributive fiscal systems for fear of repelling business interests.

In addition, federal law sometimes impedes states from making safety-net programs more responsive. For instance, the preemption provisions of the Employee Retirement Income Security Act of 1974 (ERISA)[155] have long hindered state efforts to finance expansions in health insurance coverage.[156] Meanwhile, state tax limits often constrain local governments from increasing property taxes or revenue beyond prescribed limits in ways that undermine local public control of fiscal decisions and prevent local governments from responding effectively to economic crises.[157]

Moreover, the imbalance in lobbying between businesses and public interest groups is arguably even more lopsided in state legislatures than it is in Congress.[158] In many states, being a state legislator is only a part-time job, and legislators have small staffs and limited resources.[159] As a result, states are especially reliant on outside groups for legislative expertise; in fact, reporting by

152. *See* David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541, 588–89 (2008); Jon Michaels, *Deforming Welfare: How the Dominant Narratives of Devolution and Privatization Subverted Federal Welfare Reform*, 34 SETON HALL L. REV. 573, 596–97 (2004).

153. DANILO TRISI & MATT SAENZ, CTR. ON BUDGET & POL'Y PRIORITIES, DEEP POVERTY AMONG CHILDREN ROSE IN TANF'S FIRST DECADE, THEN FELL AS OTHER PROGRAMS STRENGTHENED 15–16 (2020), https://www.cbpp.org/sites/default/files/atoms/files/2-27-20pov.pdf [https://perma.cc/8RC8-96ZY].

154. *See, e.g.*, Neil MacFarquhar, *Mississippi Welfare Scandal Spreads Well Beyond Brett Favre*, N.Y. TIMES (June 21, 2023), https://www.nytimes.com/2022/09/22/us/brett-favre-welfare-mississippi.html; Press Release, U.S. Dep't of Just., Former Executive Director of Mississippi Department of Human Services Pleads Guilty for Conspiring to Defraud the State of Mississippi (Sept. 22, 2022), https://www.justice.gov/opa/pr/former-executive-director-mississippi-department-human-services-pleads-guilty-conspiring [https://perma.cc/CC4F-ATNN]; Tony Romm, *Republican States Are Trying to Use Federal COVID Aid to Cut Taxes*, WASH. POST (July 5, 2022, 6:00 AM), https://www.washingtonpost.com/us-policy/2022/07/05/republicans-tax-cuts-stimulus/.

155. Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 and 29 U.S.C.).

156. *See* Erin C. Fuse Brown & Elizabeth Y. McCuskey, *Federalism, ERISA, and State Single-Payer Health Care*, 168 U. PA. L. REV. 389, 392–93 (2020); Peter D. Jacobson, *The Role of ERISA Preemption in Health Reform: Opportunities and Limits*, 37 J.L., MED. & ETHICS 88, 93 (2009); KENNETH G. DAU-SCHMIDT, MATTHEW W. FINKIN, RUBEN J. GARCIA & JASON R. BENT, LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE 1190 (6th ed. 2021).

157. *See* Ariel Jurow Kleiman, *Tax Limits and the Future of Local Democracy*, 133 HARV. L. REV. 1884, 1922–29 (2020); Andrew Hayashi & Ariel Jurow Kleiman, *Property Taxes During the Pandemic*, 88 TAX NOTES ST. 1461, 1463 (2020).

158. Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 137 (2018) ("Despite the greater number of lobbyists and dollars in state civil society, and its decreasingly parochial nature, recent evidence shows that public interest groups are outmanned by private interests in state lobbying—even more so than at the federal level.").

159. Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 519 (2017).

investigative media outlets in recent years has found that states routinely enact so-called "model legislation" drafted by industry lobbyists or other interest groups.[160] Not coincidentally, this legislation often confers significant benefits on the industry groups that draft it.[161]

Finally, making anti-poverty policy by way of devolution must grapple with not just states, but tribes and territories. Far too often, discussions of federal delegation of anti-poverty policy to state governments tend to ignore the millions of Americans who are members of tribes or residents of the five overseas territories.[162]

For these aforementioned reasons, state devolution is not a consistently plausible replacement for anti-poverty lawmaking at the federal level.

* * *

The government response to the COVID-19 pandemic confirms that crisis-induced lawmaking, while providing vital temporary relief, did not necessarily translate into sustained policy gains for poor people. More broadly, our initial sketch of the three principal ways to strengthen anti-poverty programs—new legislation, delegation to agencies, and devolution to state governments—suggests that, although these options are important, they are insufficient to shore up our nation's safety net in the face of change. Given these deficiencies in status quo lawmaking, how should lawmakers approach anti-poverty legislation? We try to answer that question next.

II. STACKING THE DECK IN FAVOR OF POOR HOUSEHOLDS

This Part moves from the lessons of the recent past to a pitch for the future. The next time a window for meaningful reform opens, Congress should restructure anti-poverty policies to automatically adjust to changing economic and social conditions. This discussion begins by considering two types of automatic fiscal policies: indexes and triggers. It describes how federal law relies on these mechanisms already to respond effectively to changing circumstances. It then argues for expanding these mechanisms to protect the interests of low-income households.

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160. Rob O'Dell & Nick Penzenstadler, *You Elected Them to Write New Laws. They're Letting Corporations Do It Instead*, CTR. FOR PUB. INTEGRITY (Apr. 4, 2019), https://publicintegrity.org/politics/state-politics/copy-paste-legislate/you-elected-them-to-write-new-laws-theyre-letting-corporations-do-it-instead/ [https://perma.cc/PW95-CZ7Z] ("[A]t least 10,000 bills almost entirely copied from model legislation were introduced nationwide in the past eight years, and more than 2,100 of those bills were signed into law.").

161. *See, e.g.*, Morning Edition, *South Dakota Is Among Several States That Are Havens for the Nation's Richest*, NPR (Oct. 5, 2021, 5:32 AM), https://www.npr.org/2021/10/05/1043276623/south-dakota-is-among-several-states-that-are-havens-for-the-nations-richest [https://perma.cc/2DWZ-4P8M].

162. *See* Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 MICH. L. REV. 1639, 1656 (2021); Matthew L.M. Fletcher, *Tribal Disruption and Federalism*, 76 MONT. L. REV. 97, 97–98 (2015).

A. LEGISLATIVE MECHANISMS

1. Automatic Fiscal Policies

Static policies are not a foregone conclusion. Policymakers can design laws to respond automatically to changing circumstances in ways that protect vulnerable households. Although there are various ways that policies might change without congressional involvement, we focus specifically on triggers and indexes as the most promising legislative structures.

Triggers and indexing have much in common. They both change policies automatically by tying them to external data without requiring congressional involvement. Yet they have important differences as well. Triggers prompt discrete changes that are intended to occur infrequently; indexing anticipates more frequent, incremental adjustments.[163] The method of policy adjustment also differs between triggers and indexing. A trigger could change safety-net policies in a number of ways: it could increase or decrease a numerical amount, such as a benefit payment, or it could change categorical eligibility rules, such as imposing or waiving a work requirement. In contrast, indexing typically links a numerical value in the policy to an index of numerical values. As traditionally employed, it's difficult to imagine how indexing could include nonnumerical adjustments.

a. Triggers

Economists have recently advocated the idea of building triggers into spending programs to ensure that these programs respond adequately to economic crises. For instance, Olivier Blanchard and Lawrence Summers recently considered the use of "tax or spending measures triggered by the crossing of some statistical threshold, be it a low output growth rate or a high unemployment rate."[164] Lawmakers can enact such triggers without fundamentally altering tax policies or benefit programs.[165] In the context of safety-net policies, a trigger might automatically increase the amount of benefits or remove some conditional eligibility restriction—for instance, limits on eligibility for able-bodied adults without dependent children (so-called childless adults).

Although discussed in the scholarly literature, such triggers are rarer in real life. One example of such a trigger is the UI Extended Benefits program.[166] Under the Extended Benefits program, the length of UI benefits increases up to an additional thirteen to twenty weeks when the unemployment rate in a state exceeds a

163. As Kamin explains, "These [automatic-adjustment] mechanisms can be set up as a trigger that significantly adjusts the legal framework—in a discontinuous way—under certain conditions. . . . Indexing is another closely related form of automatic-adjustment mechanism. Indexing regularly adjusts policy in more discrete and continuous increments in response to new information." Kamin, *supra* note 17, at 171.

164. Blanchard & Summers, *supra* note 25, at 125. Blanchard and Summers suggest that such policies are especially useful when monetary policy has only a limited stabilizing effect, as when interest rates are near zero. *Id.* at 130.

165. *Id.* at 125.

166. *See* I.R.C. § 3304(a)(11); 20 C.F.R. § 615; *see also* WHITTAKER & ISAACS, *supra* note 26, at 13–15 (describing the Unemployment Insurance Extended Benefits program).

certain threshold.[167] For instance, the program provides an additional thirteen weeks of benefits if a state's "insured unemployment rate" is at least 6%.[168] Perhaps counterintuitively, research finds that the Extended Benefits program has played only a small role in providing support during lengthy periods of high employment, partly because most states have failed to opt into the program's more inclusive (but optional) triggers.[169] States are reluctant to adopt these more inclusive triggers because the joint federal–state funding structure means that states foot half the bill for any program expansions.[170]

Although triggers are even rarer at the state and local level, some property tax systems have automatic features. For instance, in some states, if property values rise by more than a certain amount, the property tax rate automatically adjusts downward.[171] These property tax limits seek to ensure that total tax revenue does not increase by more than a certain percentage of the prior year's revenue. They are an example of an automatic fiscal policy in which taxes adjust in response to changing economic conditions, specifically, increased real estate values.

Generally speaking, however, triggers tend to be quite limited at the state and local level due to balanced-budget requirements. Except for Vermont,[172] all states must offset tax increases or spending cuts to satisfy balanced-budget rules.[173] As a result, most states' rainy-day funds tend to be limited.[174] During recessions, states typically do not have the excess funds available to significantly increase spending programs or cut taxes. Rather, they often have to increase taxes or cut spending in response to recessions, which can slow economic recovery.[175] For these reasons, most program expansions during recent recessions have been funded by the federal government, even when the programs are administered at the state level.

b. Indexing

Other provisions automatically adjust policies incrementally by linking some numerical element in the policy to an external index. Inflation adjustments are a common example of automatic fiscal legislation that adjusts to changing

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167. WHITTAKER & ISAACS, *supra* note 26, at 13.

168. *Id.*

169. Gabriel Chodorow-Reich & John Coglianese, *Unemployment Insurance and Macroeconomic Stabilization*, *in* RECESSION READY: FISCAL POLICIES TO STABILIZE THE AMERICAN ECONOMY, *supra* note 31, at 153, 154, 171.

170. *Id.* at 171.

171. *See, e.g.*, DEL. CODE ANN. tit. 9, § 8002(c) (2023) (imposing a limit on the rate of increase of property tax revenue).

172. *See supra* note 146 and accompanying text.

173. Lee & Sheiner, *supra* note 31.

174. *Id.*

175. *See id.*; Louise Sheiner & Michael Ng, *How Stabilizing Has Fiscal Policy Been?*, *in* RECESSION READY: FISCAL POLICIES TO STABILIZE THE AMERICAN ECONOMY, *supra* note 31, at 49, 62.

economic circumstances.[176] Less commonly, certain programs are indexed to average wages.[177]

Indexing is quite common in federal safety-net programs.[178] Social Security old-age and disability benefits, Supplemental Security Income (SSI), SNAP benefits, and the EITC all automatically adjust for inflation.[179] Inflation indexing is typically based on the Bureau of Labor Statistics's Consumer Price Index, a monthly measure of consumer prices throughout the United States.[180] Indexing benefits in this way ensures that payments continue to reflect the same purchasing power as prices fluctuate. Social Security's indexed benefits illustrate this point. The Social Security Administration announced an 8.7% cost-of-living adjustment (COLA) for Social Security and SSI benefits in 2023, the largest inflation adjustment to the program since 1981.[181] As a result of that indexing mechanism, roughly seventy million Americans will receive more in Social Security and SSI benefits.[182]

Indexing is common outside the safety net context as well. For instance, certain elements of the federal tax system are indexed annually for inflation, including income tax brackets and the standard deduction.[183] Indexing tax-filing inputs ensures that the real value of tax payments doesn't increase over time as the value of money changes.[184] Just as with Social Security benefits, recent increases in the

176. *See generally* NUSCHLER ET AL., *supra* note 28 (summarizing indexing in federal entitlement programs).

177. For instance, the amount of workers' earnings subject to Social Security taxes increases each year based on the average wage index. *See Contribution and Benefit Base*, SOC. SEC. ADMIN., https://www.ssa.gov/oact/cola/cbb.html [https://perma.cc/8ZLD-52UL] (last visited Oct. 19, 2023).

178. Indexing may be somewhat less necessary for short-term benefits calculated as a share of claimants' wages, such as UI. If wages keep pace with the cost of living, wage-based benefits will tick upward appropriately. However, this assumption does not always hold true. *See* Robert Rich, Joseph Tracy & Mason Krohn, *More Workers Find Their Wages Falling Even Further Behind Inflation*, FED. RSRV. BANK DALL. (Oct. 4, 2022), https://www.dallasfed.org/research/economics/2022/1004 [https://perma.cc/8DB8-YP4F] (finding that "[o]ver the past 25 years, on average, 44.6 percent of surveyed workers experienced negative real wage growth over the prior 12 months").

179. NUSCHLER ET AL., *supra* note 28, at 6–13 tbl.1.

180. *See id.* at 2 ("[T]he change in the index[] is the average change in the retail price of a market basket composed of more than 80,000 items purchased by consumers at outlets (e.g., grocery stores and gasoline stations) in 87 urban areas across the nation.").

181. Press Release, Soc. Sec. Admin, Social Security Announces 8.7 Percent Benefit Increase for 2023 (Oct. 13, 2022), https://www.ssa.gov/news/press/releases/2022/#10-2022-2 [https://perma.cc/82VB-5GYK] (noting that "[t]he Social Security Act ties the annual COLA to the increase in the Consumer Price Index as determined by the Department of Labor's Bureau of Labor Statistics"); *Cost-of-Living Adjustment (COLA) Information for 2023*, SOC. SEC. ADMIN., https://www.ssa.gov/cola/ [https://perma.cc/9FNQ-BS3J] (last visited Sept. 4, 2023).

182. Press Release, Soc. Sec. Admin., *supra* note 181.

183. *See* I.R.C. § 1(f) (providing for indexing of income tax brackets); § 63(c)(4) (providing for indexing of the standard deduction).

184. Auerbach & Feenberg, *supra* note 32, at 41 ("Because the system is progressive with respect to nominal income, an individual with a given real income will appear 'wealthier' and face a higher average tax burden." (emphasis omitted)).

tax brackets and the standard deduction demonstrate the responsiveness of indexing.[185]

* * *

By incorporating triggers and indexing into anti-poverty programs, policymakers can ensure that safety-net programs respond appropriately and immediately to crises and adapt to gradual social and economic changes. Triggers address the problems of timing and targeting that affect current crisis responses. In terms of timing, triggers ensure that safety-net programs expand immediately when a crisis begins and remain expanded until a crisis is truly over. Moreover, because they would be enacted outside of crisis periods, triggers can be designed via a thoughtful and transparent deliberative process, rather than rushed under the looming threat of a crisis. This extra time would give policymakers the opportunity to consider how best to target benefits during a crisis, perhaps preventing omission of important groups. And, theoretically, a slower and more transparent process could reduce the risk of benefits inappropriately going to wealthy interests.

Indexing adapts safety-net programs to gradual social and economic change. It ensures that the value of benefits isn't eroded though inaction and that thresholds continue to include the originally intended groups. In all, triggers and indexing would enable a safety net that is less politicized, more responsive, and more protective of vulnerable American households.

2. Prompting Legislation

Not all legislative mechanisms designed to address policy drift would serve the interests of poor American households. This Section describes other legislative mechanisms—what Professor Rebecca Kysar calls "prompting legislation" and what Professor David Kamin refers to as "alarm bells"—that are designed to induce Congress to act.[186] We first briefly describe three such mechanisms—sunset clauses, forced funding cuts, and soft alarms—and explain their rationales. We then argue that such mechanisms are not well-suited to protecting the interests of poor Americans. Forced funding cuts and sunset clauses are unlikely to shore up the safety net because they typically reduce the spending on which the safety net relies, while soft alarms may be ineffective at prompting Congress to respond to changing circumstances.

185. Rev. Proc. 2022-38, 2022-45 I.R.B. 445 (laying out tax brackets and various "inflation-adjusted items for 2023 for various Code provisions"); *id.* at 449 (laying out the same for the EITC).

186. Kysar, *supra* note 30, at 821–22 (defining "prompting legislation" as "a category of laws that are designed to induce Congress to act at a later date," and explaining that "[p]rompting legislation attempts to move Congress towards a particular substantive result through the threat of undesirable outcomes"); Kamin, *supra* note 17, at 175 n.101, 176 (describing "alarm bells" as "not self-adjusting law, as is the case for automatic-adjustment mechanisms" but as "prod[s] of Congress itself—designed by Congress"). While Kysar discusses sequestration and temporary legislation as the main categories of prompting legislation, she does not discuss soft alarms, so our definition of prompting legislation might be slightly broader than the one she has used in the past. *See* Kysar, *supra* note 30, at 821–27.

a. Sunset Clauses

A law with a sunset clause will automatically expire unless the legislature extends the law or repeals the clause itself.[187] A sunset clause is arguably the most prominent type of temporary legislation.[188] Congress regularly uses sunset clauses, often to overcome budgetary restraints.[189] For instance, various tax benefits expire yearly or after some predetermined period.[190]

Sunset clauses can help respond to policy drift by forcing policymakers to periodically review a law's efficacy.[191] Laws that no longer serve their intended purpose can be altered or left to sunset. Additionally, because they force future legislatures to re-approve laws, sunset clauses can theoretically ensure that laws are responsive to the wishes of each current electorate. Some commentators have also suggested that sunset clauses make it easier to enact policy initially or even ease the path to enacting that policy permanently at a later date.[192] In the tax context, sunset clauses enable Congress to enact tax benefits with the expectation that the benefits will persist continuously, but without the full cost of a permanent benefit appearing in the scoring for the bill.[193] At the same time, commentators

187. *See* David Schraub, *Doctrinal Sunsets*, 93 S. CAL. L. REV. 431, 439–40 (2020) (collecting definitions of sunset clauses); *see also* Dan R. Price, *Sunset Legislation in the United States*, 30 BAYLOR L. REV. 401, 415–16 (1978) (discussing the origins of sunset clauses in Colorado and other states).

188. *See* FRANK FAGAN, LAW AND THE LIMITS OF GOVERNMENT: TEMPORARY VERSUS PERMANENT LEGISLATION 4–5 (2013); Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 259 (2007); *see also* Adler & Walker, *supra* note 100, at 1960–64 (arguing that American lawmaking evinces a strong tradition of temporary legislation).

189. *See* David Kamin, *Drawing the Line on Tax Extenders*, HILL (Dec. 24, 2013, 1:00 PM), https://thehill.com/blogs/congress-blog/economy-budget/193904-drawing-the-line-on-tax-extenders [https://perma.cc/K4KW-3WTN] (describing sunsetting tax benefits, called "extenders," as "unpaid-for tax cuts").

190. *See id.*

191. *See* Manoj Viswanathan, Note, *Sunset Provisions in the Tax Code: A Critical Evaluation and Prescriptions for the Future*, 82 N.Y.U. L. REV. 656, 659 (2007) (reviewing arguments in favor of sunset clauses).

192. *Compare* Frank Fagan & Firat Bilgel, *Sunsets and Federal Lawmaking: Evidence from the 110th Congress*, 41 INT'L REV. L. & ECON. 1, 2 (2015) (using data from the 110th Congress to suggest that temporary legislation is more likely to pass than permanent legislation), *and* Frank Fagan, *After the Sunset: The Residual Effect of Temporary Legislation*, 36 EUR. J.L. & ECON. 209, 210 (2013) (arguing that difficult reforms passed temporarily may have similar lasting social effects as permanent legislation), *with* Jason S. Oh, *The Pivotal Politics of Temporary Legislation*, 100 IOWA L. REV. 1055, 1101–02 (2015) (designing a model to measure the uncertainty of renewing temporary legislation, and suggesting that "[g]iven a relatively stable set of pivots, there is little to gain from using temporary legislation"). *See also* Daniel E. Herz-Roiphe & David Singh Grewal, *Make Me Democratic, But Not Yet: Sunrise Lawmaking and Democratic Constitutionalism*, 90 N.Y.U. L. REV. 1975, 1980–81 (2015) (discussing how delayed implementation of statutes can promote democratic values); Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543, 560 (2007) (discussing conditional timing rules that make laws effective only if a particular state of the world obtains where those states are provided for by the legislation ex ante).

193. *See* MOLLY F. SHERLOCK, CONG. RSCH. SERV., R47252, EXPIRED AND EXPIRING TEMPORARY TAX PROVISIONS (INCLUDING "TAX EXTENDERS") 5 (2022), https://crsreports.congress.gov/product/pdf/R/R47252 [https://perma.cc/5NVJ-XGVM] ("If tax policy is passed under budget reconciliation, lawmakers might make tax provisions temporary . . . to meet fixed revenue targets . . . ."). For example, Congress enacted many sunsetting tax provisions in the 2017 Tax Cuts and Jobs Act in order to meet

often view sunset provisions as conservative legislative mechanisms because they revert policies to their status quo.[194]

b. Forced Funding Cuts

With forced funding cuts, a law might cause program funding to expire without congressional action. Sequestration is one example. Sequestration refers to automatic, across-the-board spending cuts that occur for certain discretionary spending.[195] Sequestration is used to limit future spending, control deficits, and generally force Congress to reach an agreement about spending.[196] In theory, by forcing Congress to revisit spending decisions, a forced funding cut may push policymakers to consider the efficacy of the underlying programs.[197] Like sunset clauses, therefore, forced funding cuts could theoretically lead to laws that are more responsive to current needs and more reflective of the current electorate's wishes.

certain budget restrictions. Pub. L. No. 115-97, 131 Stat. 2054 (2017); *accord* SHERLOCK, *supra*, at 5. Many of these temporary provisions provide more generous itemized deductions or favorable tax treatment of business income. *See* Amir El-Sibaie, *A Look Ahead at Expiring Tax Provisions*, TAX FOUND. (Jan. 18, 2018), https://taxfoundation.org/look-ahead-expiring-tax-provisions/ [https://perma.cc/E7DN-9MXL] (describing temporary provisions in the Tax Cuts and Jobs Act).

194. *See, e.g.*, Kristen Underhill & Ian Ayres, *Sunsets Are for Suckers: An Experimental Test of Sunset Clauses*, 59 HARV. J. ON LEGIS. 101, 107 (2022) (arguing that "the lopsided compromise effects of sunset clauses may produce long-term tendencies toward more conservative legislation").

195. *See Sequestration*, CONG. BUDGET OFF., https://www.cbo.gov/topics/budget/sequestration [https://perma.cc/C998-5E36] (last visited Oct. 23, 2023); PATRICIA A. DAVIS, CONG. RSCH. SERV., R45106, MEDICARE AND BUDGET SEQUESTRATION 1 (2022), https://sgp.fas.org/crs/misc/R45106.pdf [https://perma.cc/82A6-SVVS]; *see also* David Kamin, *Legislating Crisis*, *in* THE TIMING OF LAWMAKING 34, 38–39 (Frank Fagan & Saul Levmore eds., 2017) (identifying sequestration as an example of a law that is designed to prompt further lawmaking by creating a crisis that can be avoided only through subsequent legislative action).

196. *See* KAREN SPAR, PATRICIA A. DAVIS, ELAYNE J. HEISLER, JIM MONKE, SIDATH VIRANGA PANANGALA, BARBARA L. SCHWEMLE, DAVID P. SMOLE, CARMEN SOLOMON-FEARS & JULIE M. WHITTAKER, CONG. RSCH. SERV., R42050, BUDGET "SEQUESTRATION" AND SELECTED PROGRAM EXEMPTIONS AND SPECIAL RULES 1 (2013), https://sgp.fas.org/crs/misc/R42050.pdf [https://perma.cc/6KQV-CA69]; *What Is Sequestration?*, POLITICO: ON CONG. BLOG (July 19, 2012, 2:19 PM), https://www.politico.com/blogs/on-congress/2012/07/what-is-sequestration-129488 [https://perma.cc/3NC4-QNHF].

197. Likewise, members of Congress have in recent years increasingly used the debt ceiling—which prohibits the federal government from borrowing above a specific numerical threshold—to try to extract policy concessions by threatening not to raise the debt ceiling and thereby cause the federal government to default on its debt. Lawrence, *supra* note 136, at 154. Some commentators have defended the debt ceiling as a "useful reminder" to focus Congress's and the public's attention on the government's growing debt. *See* Weekend Edition Saturday, *Congress Has Revised the Debt Ceiling 78 Times Since 1960. An Expert Explains Why*, NPR (Apr. 29, 2023, 8:15 AM), https://www.npr.org/2023/04/29/1172894580/congress-has-revised-the-debt-ceiling-78-times-since-1960-a-financial-historian- [https://perma.cc/TU2S-YKN4]. *But see* Jason Furman & Rohit Kumar, *Don't Raise the Debt Limit—Repeal It*, WALL ST. J. (June 19, 2017, 7:03 PM), https://www.wsj.com/articles/dont-raise-the-debt-limitrepeal-it-1497913431 ("[W]hatever residual value the debt limit may have is far outweighed by the risk that a potential U.S. default poses to the global economic order.").

c. Soft Alarms

Certain laws have a built-in "soft alarm" to prod Congress to act by providing information.[198] For instance, a law might require the President or an agency to report to Congress upon the occurrence of a certain predetermined change or event.[199] Congress can then decide how to respond. Because soft alarms are informational, they are not as powerful as sunset clauses and forced funding cuts. Soft alarms do not, in and of themselves, alter a statute. Yet in theory, soft alarms still can prompt Congress to respond to changing conditions by drawing Congress's attention to an important or urgent problem that requires a legislative solution.[200]

3. Automatic Fiscal Policies Versus Prompting Legislation

In contrast to triggers and indexing, forced funding cuts and sunset clauses are more likely to threaten anti-poverty programs than bolster them. Forced funding cuts cause funding to expire. Because anti-poverty programs redistribute resources to low-income households, they often rely on fiscal outlays. Any mechanism that works by ending funding will threaten such outlays and the downward redistribution that depends on them.[201] Moreover, programs that target low-income Americans face greater risk of losing their funding because they are considered discretionary spending and therefore rely on annual appropriations, compared to Medicare or Social Security's old-age insurance, which are considered mandatory spending.[202]

Like forced funding cuts, sunset clauses cause programs or laws to expire automatically. However, while sunset clauses may theoretically threaten any program or law, the threat of permanent expiration is less potent for programs that benefit well-organized industry groups and wealthy households, which are more likely to be successful in deferring the expiration of their favored provisions.[203] In

198. Kamin, *supra* note 17, at 176.

199. *Id.*

200. *Id.* at 179.

201. It's worth mentioning that certain anti-poverty programs are exempt from the forced funding cuts of sequestration, including SNAP, the EITC, and the Child Tax Credit. *See* SPAR ET AL., *supra* note 196, at 8–9. Many other vital programs, including WIC, Head Start, and rental subsidies, are regularly at risk of being defunded via sequestration. *See* BREAD FOR THE WORLD, THE CONSEQUENCES OF SEQUESTRATION AND TIGHT BUDGET CAPS 1–2, https://www.bread.org/sites/default/files/downloads/sequestration_june15.pdf [https://perma.cc/D8N8-L8QW] (last visited Oct. 23, 2023).

202. *Cf., e.g.*, Andy Sullivan, *Factbox: What's in Republican McCarthy's Debt-Limit Spending Cut Package?*, REUTERS (Apr. 20, 2023, 12:00 PM), https://www.reuters.com/world/us/whats-republican-mccarthys-debt-limit-spending-cut-package-2023-04-19/ (detailing a Republican spending cut proposal, which included adding work requirements to certain anti-poverty programs and did not include cuts to Social Security or Medicare).

203. *See, e.g.*, INST. ON TAX'N & ECON. POL'Y, EXTENSIONS OF THE NEW TAX LAW'S TEMPORARY PROVISIONS WOULD MAINLY BENEFIT THE WEALTHY (2018), https://itep.sfo2.digitaloceanspaces.com/TCJA-extension-final.pdf [https://perma.cc/DKP6-2FHZ] ("[A] proposal to extend the [Tax Cuts and Jobs Act's] temporary tax provisions . . . would be mainly geared towards helping the richest fifth of households.").

contrast, the diffuse population of low-income households lacks the billion-dollar lobbying resources that corporations and the wealthy command.[204]

To see how sunset clauses can have different outcomes depending on the benefitted group, consider the recent example of the expanded Child Tax Credit, described above.[205] In 2021, Congress increased the amount of the credit—even more for younger children—and for the first time provided the credit to nonworking families.[206] The expanded credit lifted 3.7 million children out of poverty, helped improve food security, and allowed recipients to make long-term investments in education.[207] Given these positives, many believed that President Biden and congressional Democrats would be able to overcome this sunset clause and enact a permanent expansion to prevent the credit from expiring.[208] Yet as discussed above, they were not able to do so.[209] The expected groundswell of popular support never materialized, despite the abundant research documenting the positive effects of the expansion.[210]

Compare this result to that of so-called "tax extenders," a collection of temporary tax benefits with sunset clauses that Congress regularly extends.[211] Many of these continually extended provisions reward business taxpayers and provide subsidies for energy production.[212] Several tax extenders provide support to middle-income households, such as the exclusion of discharged debt from a primary residence.[213] However, these provisions comprise the minority of the bunch. Numerous scholars have explained how these "tax extenders" were extended each year in large part due to concerted lobbying by the concentrated interest

204. *See Industries*, OPENSECRETS, https://www.opensecrets.org/federal-lobbying/industries [https://perma.cc/6MS4-9CSA] (last visited Oct. 23, 2023) (providing lobbying amounts by industry, compiled from Senate Office of Public Records data).

205. *See supra* notes 44–54 and accompanying text.

206. *See* American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9611, 135 Stat. 4, 144–45 (codified as amended at I.R.C. § 24); *Child Tax Credit*, U.S. DEP'T TREASURY, https://home.treasury.gov/policy-issues/coronavirus/assistance-for-american-families-and-workers/child-tax-credit [https://perma.cc/BE2K-C8SK] (last visited Oct. 23, 2023).

207. Leah Hamilton, Stephen Roll, Mathieu Despard, Elaine Maag, Yung Chun, Laura Brugger & Michal Grinstein-Weiss, *The Impacts of the 2021 Expanded Child Tax Credit on Family Employment, Nutrition, and Financial Well-Being: Findings from the Social Policy Institute's Child Tax Credit Panel (Wave 2)* 3–4 (Brookings Glob., Working Paper No. 173, 2022), https://www.brookings.edu/wp-content/uploads/2022/04/Child-Tax-Credit-Report-Final_Updated.pdf [https://perma.cc/Y5TM-XSTU].

208. *See, e.g.*, Caitlyn Kim, *'I'm Not Giving Up': Sen. Michael Bennet's Drive to Make the Expanded Child Tax Credit Permanent*, CPR: NEWS (May 16, 2022, 4:00 AM), https://www.cpr.org/2022/05/16/michael-bennet-child-tax-credit-expansion-permanent/ [https://perma.cc/48P3-GVY2].

209. *See supra* note 7 and accompanying text.

210. Segers, *supra* note 7.

211. *See* SHERLOCK, *supra* note 193, at 2. A number of these temporary provisions were made permanent in 2015. *Id.*

212. *Id.* at 16–18 tbl.3 (providing extant, temporary provisions, many of which target business taxpayers); *id.* at 22–23 tbl.A-1 (providing extended temporary energy tax provisions).

213. *Id.* at 16–18 tbl.3; *What Are Tax Extenders?*, TAX POL'Y CTR.: BRIEFING BOOK, https://www.taxpolicycenter.org/briefing-book/what-are-tax-extenders [https://perma.cc/LM32-JYFA] (last visited Oct. 23, 2023).

groups that benefitted from them.[214] Indeed, scholars have argued that policymakers increasingly use sunset clauses in the tax code to extract votes and political contributions from those who stand to benefit from the sunsetting provisions.[215]

Although anecdotal, comparing the recent experience with the expanded Child Tax Credit to that with tax extenders is revealing. Extenders have survived numerous imminent sunsets because beneficiaries spend billions to ensure their continued existence.[216] In contrast, the low- and middle-income households that stood to benefit from a permanently expanded Child Tax Credit lacked resources to invest in the efforts, and the expanded credit was allowed to expire as a result.[217]

Sunset clauses and forced funding cuts typically revert the relevant policy or program to a default position of no program or no funding.[218] Congress must step in to avoid the default. Typically, because low-income people need support during lean times, this default position is worse for them. In contrast, triggers work by expanding safety-net programs in response to a predetermined condition during recessions. Triggers therefore change the default position to one of increased government support. Congress would need to step in to prevent such an expansion from occurring. By changing the default to one of increased support, triggers are far more likely to help poor people than hurt them.

Additionally, sunset clauses and forced funding cuts may be especially harmful to low-income households because they operate independently of economic conditions. Congress typically enacts temporary legislation for budgetary and political reasons, rather than based on considered principles or robust economic

214. *See, e.g.*, Rebecca M. Kysar, *Lasting Legislation*, 159 U. PENN. L. REV. 1007, 1043 (2011); *cf.* Frank Fagan, *The Fiscal Cliff as Reelection Strategy: Rethinking the Temporary Taxation Debate*, 116 W. VA. L. REV. 783, 790 (2014) (arguing that the "assumption that bargaining between the legislature and interest groups is always socially costly is contestable").

215. *See* Rebecca M. Kysar, *The Sun Also Rises: The Political Economy of Sunset Provisions in the Tax Code*, 40 GA. L. REV. 335, 340 (2006). Kysar goes on to argue that "the availability of sunset provisions may shape tax legislation from the outset to benefit only those groups that can participate in this long-term extraction of rents and have the concentration of interests that motivates such participation." *Id.* at 341.

216. *See* HARRY GURAL & FRANK CLEMENTE, AMS. FOR TAX FAIRNESS & PUB. CAMPAIGN, CORPORATE LOBBYING ON TAX EXTENDERS AND THE "GE LOOPHOLE" 4 (2014), https://americansfortaxfairness.org/files/Corporate-Lobbying-on-Tax-Extenders-and-the-GE-Loophole.pdf [https://perma.cc/BFY9-UP2D].

217. One could argue that without the sunset clause, it's likely that the expanded Child Tax Credit never would have existed at all. In this sense, the sunset clause enabled at least one year of expanded support for otherwise ineligible families, as opposed to no support. This is consistent with the literature. *See* Fagan & Bilgel, *supra* note 192, at 2 (using data from the 110th Congress to suggest that temporary legislation is more likely to pass than permanent legislation); *see also* Gersen, *supra* note 188, at 284–85 (arguing that sunset clauses make legislative compromises more likely); Gabriel Scheffler, *The Ghosts of the Affordable Care Act*, 101 WASH. U. L. REV. (forthcoming 2024) (manuscript at 1) (on file with authors) (arguing that newly enacted social legislation has become more vulnerable due to the rise of "'enactment-entrenchment tradeoffs': the tradeoffs that legislators [are] forced to make between enacting the law and ensuring its durability over time").

218. Congress could temporarily suspend a program as well. In that case, the sunset clause's expiration would mean reverting to the status quo of reviving the prior extant policy.

research. Of course, triggers and indexes may also diminish safety-net programs. A trigger could be designed to revert the program to some status quo condition once the crisis condition has passed. Similarly, indexing could result in benefits increasing as well as decreasing, for instance, if wages or consumer prices decrease. In contrast to sunset clauses and forced funding cuts, however, such contractions would be linked to improved economic conditions, rather than merely occurring after some predetermined time period.

The third category, soft alarms, could be designed to prod Congress to update a program in response to a crisis or policy drift. However, unlike triggers and indexes, soft alarms do not automatically adjust the policy; instead, they work by providing information to Congress. Given legislative inertia and the various roadblocks described above, merely providing information is often insufficient to spur responsive policymaking.

For instance, the Medicare Prescription Drug, Improvement, and Modernization Act of 2003[219] requires that the Medicare trustees monitor what portion of total Medicare outlays are funded by general revenue, rather than other dedicated financing sources.[220] If the former portion exceeds 45% for the current fiscal year or any of the following six fiscal years, for two consecutive years, then a "funding warning" is issued.[221] The funding warning requires that the President propose a legislative solution to Congress.[222] Congress can choose whether to enact the proposed fix.[223] Notably, the Medicare trustees issued the warning each year from 2007 to 2013 and again starting in 2018.[224] But Congress has yet to enact legislation in response to the warnings.[225]

B. EXPANDING THE USE OF TRIGGERS AND INDEXING IN SAFETY-NET PROGRAMS

With this overview of existing automatic fiscal policies, we can consider how to strengthen them throughout the safety net. This Section identifies four ways in which to do so, through making automatic adjustments 1) more consistent across and within federal programs, 2) more attuned to state-specific policy drift, 3) more responsive to noneconomic shocks, and 4) backed up by better data.

1. Making Automatic Adjustments More Consistent

Federal law employs triggers and indexing unevenly across our national tax and transfer programs. Social insurance and disability programs are a good illustration. As we pointed out earlier, Social Security's old-age benefits, disability

219. Pub. L. No. 108-173, 117 Stat. 2066.

220. PATRICIA A. DAVIS, CHRISTOPHER M. DAVIS & TODD GARVEY, CONG. RSCH. SERV., RS22796, MEDICARE TRIGGER 1–2 (2022), https://crsreports.congress.gov/product/pdf/RS/RS22796/30 [https://perma.cc/YXG7-TCDZ]; Kamin, *supra* note 17, at 177.

221. DAVIS ET AL., *supra* note 220, at 2, 5; Kamin, *supra* note 17, at 177.

222. DAVIS ET AL., *supra* note 220, at 5.

223. The proposed legislation would receive "fast track" treatment, curtailing committee consideration and debate. *Id.* at 7.

224. *Id.* at 3.

225. *Id.* at 6.

insurance (SSDI), and SSI are all indexed for inflation.[226] As a result, the roughly sixty-five million Americans receiving old-age or SSDI benefits[227] and the eight million receiving SSI[228] see their benefit levels change to account for economic realities without further action by Congress.

In stark contrast to this regular updating, SSI's asset limit is fixed by statute.[229] Since Congress created SSI in 1972, it has only updated the asset limit once, in 1989.[230] Today, individuals receiving SSI cannot have assets that total more than $2,000—for couples, not more than $3,000.[231] This policy drift makes Americans with a modest bank account ineligible for disability benefits and prevents those currently receiving disability benefits from building up the same.[232] If the 1972 asset limit were indexed to inflation, it would be close to $10,000.[233] A bill recently introduced in Congress would have increased the limit to that amount for individual recipients and updated the asset limit automatically using the Consumer Price Index.[234] Such a reform would have been a step in the right direction.

In addition to disability benefits, federal labor policy is set by unresponsive statutes. Since the federal minimum wage was created in the Fair Labor

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226. *See supra* notes 179–82 and accompanying text. As an alternative to the current method, some have called on the Social Security Administration to consider a special minimum benefit and index it to the average or median wage. *See* Clark Burdick & Lynn Fisher, *Social Security Cost-of-Living Adjustments and the Consumer Price Index*, 67 SOC. SEC. BULL. 73, 74 (2007), https://www.ssa.gov/policy/docs/ssb/v67n3/v67n3p73.html [https://perma.cc/7S29-99L5].

227. OFF. OF RSCH., EVALUATION & STAT., SOC. SEC. ADMIN., NO. 13-11785, FAST FACTS & FIGURES ABOUT SOCIAL SECURITY, 2021, at 15 (2021), https://www.ssa.gov/policy/docs/chartbooks/fast_facts/2021/fast_facts21.pdf [https://perma.cc/G5LK-WN36].

228. *Id.* at 24.

229. 42 U.S.C. § 1382(a)(3) (providing asset limits for SSI eligibility).

230. *Id.* (listing a final date of 1989).

231. *See id.*; *Understanding Supplemental Security Income SSI Resources – 2023 Edition*, SOC. SEC. ADMIN., https://www.ssa.gov/ssi/text-resources-ussi.htm [https://perma.cc/YV93-B4JU] (last visited Oct. 23, 2023).

232. *See* OFF. OF RSCH., EVALUATION & STAT., SOC. SEC. ADMIN., NO. 13-11827, SSI ANNUAL STATISTICAL REPORT, 2020, at 166 tbl.76, 167 tbl.77 (2021), https://www.ssa.gov/policy/docs/statcomps/ssi_asr/2020/ssi_asr20.pdf [https://perma.cc/5XBX-JNDX] (enumerating the number of recipients whose SSI benefits were either suspended or terminated for "excess resources"); *see also* Kathleen Romig, Rebecca Vallas & Jason Fichtner, *Congress Should Give SSI Asset Limits a 21st Century Upgrade*, HILL (June 22, 2022, 3:30 PM), https://thehill.com/opinion/finance/3532554-congress-should-give-ssi-asset-limits-a-21st-century-upgrade/ [https://perma.cc/N4FG-ECZA]; HENRY CHEN & ROBERT I. LERMAN, URB. INST., DO ASSET LIMITS IN SOCIAL PROGRAMS AFFECT THE ACCUMULATION OF WEALTH? 2 (2005), https://www.urban.org/sites/default/files/publication/51686/311223-Do-Asset-Limits-in-Social-Programs-Affect-the-Accumulation-of-Wealth-.PDF [https://perma.cc/UFN2-ADAJ].

233. *See* Andrew Biggs, *Bipartisan Cooperation to Battle Poverty*, FORBES (June 10, 2022, 12:55 PM), https://www.forbes.com/sites/andrewbiggs/2022/06/10/bipartisan-cooperation-to-battle-poverty/?sh=ce10c2f4a4e8; *see also* JPMORGAN CHASE & CO. POLICYCENTER, ENHANCING ECONOMIC OPPORTUNITY AND MOBILITY FOR PEOPLE WITH DISABILITIES THROUGH ASSET AND INCOME LIMIT REFORMS 2, https://www.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/documents/policy-center-asset-limit-issue-brief-ada.pdf [https://perma.cc/VA39-866L] (last visited Oct. 30, 2023).

234. SSI Savings Penalty Elimination Act, S. 4102, 117th Cong. § 2 (2022) (amending the Social Security Act, 42 U.S.C. § 1382(a)(3)); *see also* Biggs, *supra* note 233 (discussing the proposed legislation).

Standards Act in 1938, Congress traditionally raised the wage somewhat regularly, but has not done so in sixteen years.[235] Meanwhile, as of 2022, the federal minimum wage has lost 27.4% of its value and is worth less today than it was sixty years ago.[236] Similarly, the salary thresholds at which employers can classify workers as overtime exempt are not indexed.[237] The result is that even relatively low-wage workers can be classified as a "manager" or "professional," which excludes them from receiving overtime pay if they work more than forty hours per week.[238] In other words, employers can pay certain low-income workers a flat salary regardless of how many hours they work. Indexing the federal minimum wage and overtime-exempt salary thresholds for inflation would help ensure that income-based labor policies provide meaningful protection for lower wage workers.[239]

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235. *See* Fair Minimum Wage Act of 2007, Pub. L. No. 110-28, §§ 8101–8104, 121 Stat. 112, 188–89 (codified at 29 U.S.C. § 206); DAVID H. BRADLEY, CONG. RSCH. SERV., R43089, THE FEDERAL MINIMUM WAGE: IN BRIEF 1 (2021), https://sgp.fas.org/crs/misc/R43089.pdf [https://perma.cc/E8FN-G7AG]; *see also History of Changes to the Minimum Wage Law*, U.S. DEP'T LAB., https://www.dol.gov/agencies/whd/minimum-wage/history [https://perma.cc/99DJ-9GBB] (last visited Oct. 24, 2023).

236. David Cooper, Sebastian Martinez Hickey & Ben Zipperer, *The Value of the Federal Minimum Wage Is at Its Lowest Point in 66 Years*, ECON. POL'Y INST.: WORKING ECON. BLOG (July 14, 2022, 3:39 PM), https://www.epi.org/blog/the-value-of-the-federal-minimum-wage-is-at-its-lowest-point-in-66-years/ [https://perma.cc/7JYV-UZ65]; *see also* Nicolas Vega, *After Inflation, People Making U.S. Minimum Wage Are Earning Less Now than 60 Years Ago*, CNBC (July 20, 2022, 2:33 PM), https://www.cnbc.com/2022/07/20/the-7point25-dollar-federal-minimum-wage-is-worth-less-than-it-was-60-years-ago-.html [https://perma.cc/FG6G-R5GX]; KATHRYN ANNE EDWARDS & GRIFFIN MURPHY, NAT'L ACAD. OF SOC. INS., ECONOMIC SECURITY FOR THE 21ST CENTURY 38 (2022), https://www.nasi.org/research/economic-security/the-four-pillars-of-economic-security/ [https://perma.cc/J5HD-C6BN] (recommending indexing the federal minimum wage).

237. *See* Allen Smith, *DOL Is Reviewing Overtime Rule*, SOC'Y FOR HUM. RES. MGMT. (June 17, 2021), https://www.shrm.org/in/topics-tools/employment-law-compliance/dol-reviewing-overtime-rule [https://perma.cc/CAL2-876S]. The minimum annual salary threshold for overtime-exempt workers has declined in real terms from $62,506 in 1975 to $35,568 in 2023 (expressed in 2020 dollars), even though the amount had been adjusted twice during this period. DAU-SCHMIDT ET AL., *supra* note 156, at 444–45; *Frequently Asked Questions - NPRM: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees*, U.S. DEP'T LAB., https://www.dol.gov/agencies/whd/overtime/rulemaking/faqs [https://perma.cc/V2S8-Q9EV] (last visited Oct. 24, 2023). In September 2023, the Department of Labor published a Notice of Proposed Rulemaking and request for comment that proposed, among other things, to update the salary threshold to $55,068. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 88 Fed. Reg. 62152 (proposed Sept. 8, 2023) (to be codified at 29 C.F.R. 541).

238. *See* Smith, *supra* note 237; *Overtime Pay*, U.S. DEP'T LAB., https://www.dol.gov/agencies/whd/overtime [https://perma.cc/5R6M-U76C] (last visited Oct. 24, 2023). Overtime pay is 1.5 times a worker's hourly wage. *Id.*

239. A number of states and the District of Columbia have indexed their minimum wages for inflation. Dave Kamper & Sebastian Martinez Hickey, *Tying Minimum-Wage Increases to Inflation, as 13 States Do, Will Lift Up Low-Wage Workers and Their Families Across the Country*, ECON. POL'Y INST.: WORKING ECON. BLOG (Sept. 6, 2022, 9:10 AM), https://www.epi.org/blog/tying-minimum-wage-increases-to-inflation-as-12-states-do-will-lift-up-low-wage-workers-and-their-families-across-the-country/ [https://perma.cc/7VXU-3D3F]. These states span the political spectrum and include Alaska, Arizona, Colorado, Maine, Montana, Ohio, and South Dakota. *Id.*

The federal tax code has dynamic provisions, many of which benefit wealthy taxpayers, as well as static ones, some of which affect poor Americans. Tax brackets, including those for capital gains, are indexed.[240] Other features of the tax code that benefit wealthier Americans like the annual exclusion for gifts received and limits on the 20% pass-through business income deduction are also indexed.[241] Among tax credits designed to provide economic security for families with children, some have dynamic features and others do not. For instance, the EITC's maximum earned income and phaseouts have been indexed to inflation since 1986.[242] The refundable portion of the Child Tax Credit is currently indexed to inflation, but the statute includes a sunset clause that ends indexing in 2026.[243] Meanwhile, the Child and Dependent Care Tax Credit amount and phaseout as well as the Child Tax Credit's maximum credit per child and phaseouts are not adjusted for inflation.[244] As a result, the Child Tax Credit lost 25% of its value from 2003 to 2017.[245]

Congress's recent proposal to permanently expand the Child Tax Credit in the Build Back Better Act would not have indexed the credit for inflation,[246] signaling that such a reform is not a legislative priority. Given the fact that the nonrefundable version of the credit is intended to benefit middle-income and upper-middle-income families,[247] perhaps this inaction makes the benefit more targeted. Even so, policymakers could consider building a trigger into the credit to cushion families' budgets during difficult times. For instance, in the event of a recession

240. Stephen J. Entin, *Getting "Real" by Indexing Capital Gains for Inflation*, TAX FOUND. (Mar. 6, 2018), https://taxfoundation.org/research/all/federal/inflation-adjusting-capital-gains/ [https://perma.cc/2Q88-3BDZ]. The Trump Administration floated the possibility of indexing capital gains. For an extended criticism of this proposal, see Leonard E. Burman, *Should Treasury Index Capital Gains?*, TAX POL'Y CTR.: TAXVOX BLOG (May 10, 2018), https://www.taxpolicycenter.org/taxvox/should-treasury-index-capital-gains [https://perma.cc/AYM9-2U4M].

241. I.R.C. § 2503(b)(2) (providing for inflation adjustment for taxable gifts); § 199A(e)(2) (providing for inflation adjustment for the income threshold at which limitations begin to apply to the qualified business income deduction for pass-through businesses).

242. *Id.* at § 32(j); *see* Tax Reform Act of 1986, Pub. L. No. 99-514, § 111(c), 100 Stat. 2085, 2107 (amending I.R.C. § 32 to include inflation adjustments).

243. I.R.C. § 24(h)(5)(B).

244. *Id.* at § 21 (providing credit amounts as well as an income phaseout of $15,000, neither of which are adjusted for inflation); § 24 (authorizing the Child Tax Credit without mention of inflation adjustments for the credit amount or phaseout thresholds).

245. Joshua McCabe, *Indexing the Child Tax Credit Is Long Overdue*, NISKANEN CTR. (July 25, 2022), https://www.niskanencenter.org/indexing-the-child-tax-credit-is-long-overdue/ [https://perma.cc/6SX4-LW29].

246. *See* MARGOT L. CRANDALL-HOLLICK, CONG. RSCH. SERV., IN11786, THE CHILD TAX CREDIT IN THE HOUSE-PASSED BUILD BACK BETTER ACT: SUMMARY TABLE 2 tbl.1 (2021), https://crsreports.congress.gov/product/pdf/IN/IN11786 [https://perma.cc/VQF8-UQRB] (detailing the absence of inflation adjustments in the Build Back Better Act Child Tax Credit provisions).

247. *See* David Wessel, *What Is the Child Tax Credit? And How Much of It Is Refundable?*, BROOKINGS (Jan. 22, 2021), https://www.brookings.edu/articles/what-is-the-child-tax-credit-and-how-much-of-it-is-refundable/ [https://perma.cc/F59P-3737].

lasting longer than six months, the credit amount could increase, say, to $3,000 per child—as it did in 2021.[248] Or the earnings threshold could drop to $0, allowing nonworking families to obtain support. In this way, Congress could ensure that during times of crisis, extra cash support goes to the families that need it most.

The point of this brief survey is not to conclude that tax and transfer programs are more likely to automatically adjust to benefit wealthy households rather than poor households. There are many programs, benefiting both wealthy and poor households, that fail to adequately adjust for changing economic conditions. Rather, the point of this discussion is to show that many programs that seek to support low-income Americans approach policy drift in a somewhat random and unprincipled way. Certain inputs are indexed while others are not. Making automatic-adjustment provisions more consistent among and within safety-net programs would help to protect low-income Americans from losing vital support during difficult times.

2. Responding to State-Specific Policy Drift

As described above, devolution of safety-net policies to states often results in state governments failing to meet the needs of vulnerable populations, in part for budgetary reasons and in part for political reasons. Federal safety-net programs should be able to address state-specific shocks and economic downturns. Given the interconnectedness of states' economies and the importance of the safety net to shoring up the national economy, the entire country has an interest in ensuring that safety-net programs adequately protect vulnerable families from regional downturns.

When federal law allows for state-specific tailoring, the legal mechanism is usually through waivers. Typically, state governments will request that the relevant federal agency waive certain legal requirements, which allows states to implement the program differently from the federal default scheme.[249] Those waivers can involve reporting requirements, social experiments, and fiscal flexibility. For instance, as of August 2023, the Centers for Medicare and Medicaid Services (CMS) has approved sixty-eight Section 1115 Medicaid waivers across forty-eight states.[250] These waivers allow states to pursue experimental or pilot projects that promote the objectives of Medicaid.[251] Quite recently, the Biden

248. American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9611, 135 Stat. 4, 144–45 (codified at I.R.C. § 24).

249. *See, e.g.*, David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 279–81 (2013).

250. *Medicaid Waiver Tracker: Approved and Pending Section 1115 Waivers by State*, KFF (Oct. 26, 2023), https://www.kff.org/medicaid/issue-brief/medicaid-waiver-tracker-approved-and-pending-section-1115-waivers-by-state/ [https://perma.cc/YRF2-D2Y2].

251. *Section 1115 Demonstrations*, MEDICAID.GOV, https://www.medicaid.gov/medicaid/section-1115-demonstrations/index.html [https://perma.cc/6MJB-7BN6] (last visited Oct. 24, 2023).

Administration approved Medicaid waivers that allowed Oregon to experiment with continuous enrollment and permitted Arkansas, Arizona, Massachusetts, and Oregon to pilot services aimed at health-related social needs.[252]

Some waivers already rely on triggers. Take SNAP's time limit for adults without disabilities or dependents—we refer to them as "childless adults" for simplicity, although they often care for children at least part of the time. Federal law bars unemployed childless adults under fifty[253] who do not have a disability from receiving SNAP for more than three months in any three-year period.[254] However, the statute recognizes that during periods of high unemployment, such a time limit may be particularly punitive and, therefore, permits state and regional waivers.[255] In the wake of the 2008 financial crisis and the deepening recession, Congress suspended this time limit nationwide.[256] Many states continued to have high unemployment rates and thus qualified for waivers beyond the nationwide suspension period. However, as the labor market tightened, some states no longer qualified for the waivers, while others chose to reinstate the time limit despite persistently high unemployment.[257]

As SNAP's time limit illustrates, relying on state policymakers to expand federal programs in hard times simply swaps legislators in D.C. for those in state capitals. The well-documented confusion in various states around reintroducing the time limit suggests that state bureaucracies may not be well-equipped to

252. Mindy Lipson & Cindy Mann, *CMS Approves Groundbreaking Section 1115 Demonstrations*, COMMONWEALTH FUND (Dec. 7, 2022), https://www.commonwealthfund.org/blog/2022/cms-approves-groundbreaking-section-1115-demonstrations [https://perma.cc/45UG-CZY9]; *see also* Madeline Guth & Elizabeth Hinton, *Recent Developments and Key Issues to Watch with Medicaid Section 1115 Waivers*, KFF (Sept. 28, 2022), https://www.kff.org/policy-watch/recent-developments-key-issues-medicaid-section-1115-waivers/ [https://perma.cc/33MG-V848]; Nicole Huberfeld, *Medicaid Waivers, Administrative Authority, and the Shadow of Malingering*, 49 J.L., MED. & ETHICS 394, 394 (2021).

253. This age threshold will increase to fifty-five by 2025. *See* Tami Luhby, *Here's Who Would Have to Work for Government Benefits – and Who Wouldn't – Under the Debt Ceiling Package*, CNN POL. (June 2, 2023, 11:04 AM), https://www.cnn.com/2023/06/02/politics/food-stamps-debt-ceiling-work-requirements/index.html [https://perma.cc/G5QN-JL4H].

254. 7 U.S.C. § 2015(o); *see also* 7 C.F.R. § 273.24(b). Federal regulations and guidance refer to this group as Able-Bodied Adults Without Dependents (ABAWDs). *See* Andrew Hammond & MacKenzie Speer, *SNAP's Time Limit: Emerging Issues in Litigation and Implementation*, CLEARINGHOUSE REV., Apr. 2017, at 2, 2.

255. 7 U.S.C. § 2015(o)(4); *see also* 7 C.F.R. § 273.24(f).

256. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 101(e), 123 Stat. 115, 121.

257. *See* ED BOLEN & STACY DEAN, CTR. ON BUDGET & POL'Y PRIORITIES, WAIVERS ADD KEY STATE FLEXIBILITY TO SNAP'S THREE-MONTH TIME LIMIT 3–6 (2018), https://www.cbpp.org/sites/default/files/atoms/files/3-24-17fa.pdf [https://perma.cc/3CTM-JMH3]. As with other safety-net programs, the COVID-19 pandemic blunted some state variation in SNAP. At the start of the pandemic, Congress once again suspended the SNAP time limit nationwide. Families First Coronavirus Response Act, Pub. L. No. 116-127, § 2301(a), 134 Stat. 178, 187–88 (2020); *see also* Memorandum from Jessica Shahin, Assoc. Dir., Supplemental Nutrition Assistance Program, to All State Agency Dirs., Supplemental Nutrition Assistance Program (Mar. 20, 2020), https://fns-prod.azureedge.us/sites/default/files/resource-files/FFCRA-Impact-on-ABAWD-TimeLimit.pdf [https://perma.cc/CVS2-XRWZ].

implement these dynamic provisions.[258] Waivers also present opportunities for abuse, as both federal agencies and state lawmakers can utilize waivers to change programs in ways that conflict with the goals of their governing statutes, although such policies are often subject to litigation.[259]

There are better ways to use triggers to geographically target poverty programs. Consider Medicaid. Apart from K–12 education, states spend more of their own revenue on Medicaid than any other budget item.[260] However, the federal government also contributes at least half, and sometimes significantly more, to finance each state's Medicaid program.[261] For instance, the federal government pays for nearly 80% of Mississippi's Medicaid program.[262] As a result, federal Medicaid spending is the largest source of federal contributions to state budgets. This federal–state financing of Medicaid therefore offers a mechanism through which the federal government can better help states weather deteriorating economic conditions.

Recognizing that fiscal reality, economists Matthew Fiedler, Jason Furman, and Wilson Powell III have proposed automatically increasing the share of Medicaid expenditures borne by the federal government in order to buttress state budgets.[263] Under their proposal, the federal share of Medicaid expenditures would automatically rise together with the unemployment rate, after the latter

258. *See* Memorandum from Lizbeth Silbermann, Dir., Food & Nutrition Serv., to Reg'l Dirs., Supplemental Nutrition Assistance Program (Nov. 19, 2015), https://fns-prod.azureedge.us/sites/default/files/snap/ABAWD-Time-Limit-Policy-and-Program-Access-Memo-Nov2015.pdf [https://perma.cc/NB8V-L9M8] (warning state agencies that "[t]o comply with Federal law, States must do more than track ABAWDs"); *see also* Memorandum from Lizbeth Silbermann, Dir., Food & Nutrition Serv., to Reg'l Dirs., Supplemental Nutrition Assistance Program (May 20, 2016), https://fns-prod.azureedge.us/sites/default/files/snap/ABAWD-Time-Limit-Exemption-for-Veterans-Disability-Benefit.pdf [https://perma.cc/BJ29-8VX4] ("It has come to the Food and Nutrition Service's (FNS) attention that certain State agencies are not accepting receipt of VA disability compensation as verification of an individual's exemption from the ABAWD time limit.").

259. *Compare* Anthony Albanese, *The Past, Present, and Future of Section 1115: Learning from History to Improve the Medicaid-Waiver Regime Today*, 128 YALE L.J.F. 827, 846 (2019) (discussing how "waivers have been repeatedly used as a guise for cuts in benefits and reductions in coverage"), *and* Gabriel Scheffler, *Waiving Away Medicaid*, REGUL. REV. (May 8, 2019), https://www.theregreview.org/2019/05/08/scheffler-waiving-away-medicaid/ [https://perma.cc/E4Y2-5QAE] (discussing the Trump Administration's changes to Section 1115 waivers in comparison to previous administrations), *with* Hammond, *supra* note 100, at 408–18 (discussing Medicaid waiver litigation).

260. *See Medicaid's Share of State Budgets*, MACPAC, https://www.macpac.gov/subtopic/medicaids-share-of-state-budgets/ [https://perma.cc/6Q97-SUKC] (last visited Oct. 25, 2023).

261. *See* 42 U.S.C. § 1396d(b); *see also* Federal Financial Participation in State Assistance Expenditures, 85 Fed. Reg. 76,586, 76,588 tbl.1 (Nov. 30, 2020) (listing Federal Medical Assistance Percentages (FMAP) for each state during fiscal year 2022).

262. *See* Federal Financial Participation in State Assistance Expenditures, 85 Fed. Reg. at 76588 tbl.1.

263. Matthew Fiedler, Jason Furman & Wilson Powell III, *Increasing Federal Support for State Medicaid and CHIP Programs in Response to Economic Downturns*, *in* RECESSION READY: FISCAL POLICIES TO STABILIZE THE AMERICAN ECONOMY, *supra* note 31, at 93, 94. For a similar proposal from the Government Accountability Office, see generally U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-38, MEDICAID: PROTOTYPE FORMULA WOULD PROVIDE AUTOMATIC, TARGETED ASSISTANCE TO STATES DURING ECONOMIC DOWNTURNS (2011), https://www.gao.gov/assets/gao-12-38.pdf [https://perma.cc/Y6YJ-6VYF].

exceeds a predetermined threshold.[264] When the state's economy improves, the federal share would automatically decrease, eventually back to its normal level. Fiedler, Furman, and Powell calibrate their proposal so that it would be designed to offset roughly two-thirds of states' budget shortfalls during economic downturns.[265]

What is particularly useful about this proposal for our purposes is that it would be tailored to specific states' economic conditions as opposed to a nationwide, uniform approach. Interestingly, this proposal would rely on both a trigger—increasing the federal share of Medicaid and Children's Health Insurance Program (CHIP) expenditures once the unemployment rate reaches a certain level—as well as an index—linking the federal share to the level of unemployment above the predetermined threshold. One could imagine similar trigger or indexing mechanisms built into other jointly funded federal–state safety-net programs, including TANF, SNAP, and UI.[266]

3. Making the Safety Net More Responsive to "Noneconomic" Disasters

As our discussion of the COVID-19 pandemic makes clear, there are ways to legislate that would make American social policy more responsive not only to economic shocks, but also to crises that have significant noneconomic dimensions.[267] Two obvious categories include natural disasters, which have and will continue to become more frequent and more destructive due to climate change, and Public Health Emergencies (PHE), such as the COVID-19 pandemic.[268] For both of these categories, triggers might be particularly useful.

Federal disaster responses have few, if any, automatic triggers. Rather, the statutory scheme relies on a presidential declaration and state requests for assistance.[269] Once those conditions have been met, federal law creates flexibility for federal and state agencies to administer emergency assistance.[270] This patchwork

264. Fiedler et al., *supra* note 263, at 94.

265. *Id.*

266. *See What Are the Major Federal Safety Net Programs in the U.S.?*, U.C. DAVIS CTR. FOR POVERTY & INEQUAL. RSCH. (Mar. 15, 2018), https://poverty.ucdavis.edu/article/war-poverty-and-todays-safety-net-0 [https://perma.cc/M6BL-UKZA] (listing joint federal–state safety-net programs and providing information on federal funding of each program).

267. That is not to say, of course, that these disasters do not also have important economic effects. *See, e.g.*, Hammond et al., *supra* note 4, at 155–63 (describing the COVID-19 pandemic's health and economic impacts). But because these disasters also have significant noneconomic effects, and because these effects pose particular challenges for automatic fiscal policies, it is worth considering them separately.

268. *See* Avantika Gori, Ning Lin, Dazhi Xi & Kerry Emanuel, *Tropical Cyclone Climatology Change Greatly Exacerbates US Extreme Rainfall–Surge Hazard*, 12 NATURE CLIMATE CHANGE 171, 171 (2022) (estimating between a 30–195-fold increase in hurricanes that bring both heavy rain and extremely high tides by 2100 in the Northeast); Yuanyu Xie, Meiyun Lin, Bertrand Decharme, Christine Delire, Larry W. Horowitz, David M. Lawrence, Fang Li & Roland Séférian, *Tripling of Western US Particulate Pollution from Wildfires in a Warming Climate*, PNAS, no. 14, Apr. 5, 2022, at 1, 9.

269. Disaster Relief and Emergency Assistance Act, Pub. L. No. 100-707, §§ 401, 408, 102 Stat. 4689, 4696, 4702 (1988) (codified as amended at 42 U.S.C. §§ 5170a, 5174(f)); *see also* Hammond, *supra* note 19, at 1085–86.

270. *See* Hammond, *supra* note 19, at 1086–99 (enumerating disaster welfare programs).

creates all kinds of implementation challenges. It also risks excluding the people who are most vulnerable during a disaster recovery, such as children, senior citizens, and people with disabilities.[271] For instance, because federal law requires in-person applications for emergency food assistance, if local agencies fail to provide sufficient application sites, people must stand in line for hours to receive aid.[272] The elderly, people with health conditions, and people with disabilities often cannot stand in line for hours, and thus regularly miss out on emergency food assistance.[273] Furthermore, disaster and emergency declarations create a kind of all-or-nothing approach that causes significant uncertainty for agencies.[274]

As a start, crafting effective triggers based on economic indicators can improve responses to noneconomic crises as well. For instance, as described above, Congress did not increase SNAP benefits for all beneficiaries until ten months into the COVID-19 crisis.[275] For future pandemics or other crises, Congress could add triggers to the Food and Nutrition Act so that SNAP benefits increase automatically when certain economic data, such as the Sahm recession indicator, highlight a surge in need.[276] And while Congress initially expanded UI benefits, that expansion ended on July 31, 2020.[277] Congress did not renew the expansion until December 2020[278] (and then again in March 2021[279]). Admittedly, no one in Congress—or anyone else for that matter—knew how long the pandemic would last. But incorporating triggers or indexing would have adjusted programs as needed. Doing so would have prevented some of the most egregious legislative delays and would have continued the expanded support until the crisis was truly over.

Another potential way to make the safety net more responsive to noneconomic disasters would be to rely on noneconomic triggers. Throughout this Article, we have favored triggers based on data that are not as easily subject to political manipulation. Disaster declarations and PHE declarations rely on human action,

271. *See id.* at 1105–09 (identifying delays and disparities in distributing relief).

272. *Id.* at 1105–06.

273. *Id.*

274. *See* Megan Messerly, *Next Big Health Crisis: 15M People Could Lose Medicaid When Pandemic Ends*, POLITICO (Feb. 2, 2022, 4:30 AM), https://www.politico.com/news/2022/02/02/medicaid-states-pandemic-loss-00004153 [https://perma.cc/6QQZ-FNAM]; *see also* Nicole Huberfeld & Sidney Watson, *Lessons Learned: Strengthening Medicaid to Address Health and Economic Emergencies*, *in* COVID-19 POLICY PLAYBOOK: LEGAL RECOMMENDATIONS FOR A SAFER, MORE EQUITABLE FUTURE 96, 101–02 (2021), https://www.networkforphl.org/wp-content/uploads/2021/05/COVIDPolicyPlaybook-v2_May2021.pdf [https://perma.cc/E5M3-T5D3].

275. *See supra* notes 109–12 and accompanying text.

276. *See* Hilary Hoynes & Diane Whitmore Schanzenbach, *Strengthening SNAP as an Automatic Stabilizer*, *in* RECESSION READY: FISCAL POLICIES TO STABILIZE THE AMERICAN ECONOMY, *supra* note 31, at 217, 235 n.5.

277. Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 2104(e), 134 Stat. 281, 319 (2020) (codified as amended at 15 U.S.C. § 9023(e)).

278. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 203, 134 Stat. 1182, 1953 (2020) (amending the CARES Act, 15 U.S.C. § 9023(e)).

279. American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9022, 134 Stat. 4, 120 (codified at I.R.C. § 3304).

making them vulnerable to politicization, as well as the other problems identified above. However, it is challenging to identify noneconomic triggers that do not rely on human decisions. Climate disasters and pandemics involve many moving pieces, and no one data point can definitively indicate a pandemic or climate disaster in all cases.[280]

Extended school closures offer one possible noneconomic trigger. Schools sometimes close temporarily or switch to virtual education during major emergencies such as pandemics and climate disasters. School closures or moving instruction online might therefore serve as a proxy for such disasters. There are at least two reasons why such a trigger might be a good idea. First, schools themselves provide basic services to families; when they close, other programs must expand to fill the gap. The experience of Pandemic EBT during the COVID-19 pandemic is illustrative here. Some thirty million children rely on schools to provide lunch each day.[281] When schools closed or moved online during the pandemic, many families struggled to provide their children with adequate nutrition.[282] Congress created Pandemic EBT to deliver food assistance to these families.[283] Even better, if lawmakers wanted to compensate for the drop in food assistance when schools are closed, they could legislate an automatic increase in SNAP benefits any time schools are closed for more than a few days.

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280. Germany offers two interesting examples of noneconomic triggers outside of a safety-net context. The first relates to the COVID-19 pandemic. In April 2021, the German government introduced a federal "emergency brake" to ensure uniform pandemic restrictions across all German states. Jenny Gesley, *Germany: Uniform Federal COVID-19 "Emergency Brake" Introduced*, LIBR. CONG. (Apr. 27, 2021), https://www.loc.gov/item/global-legal-monitor/2021-04-27/germany-uniform-federal-covid-19-emergency-brake-introduced/ [https://perma.cc/BUC9-X3EK]. When the local seven-day average of COVID-19 cases exceeded 100 for three consecutive days, certain measures would automatically kick in, including curfews, mandatory business closures, limitations on gatherings, and other lockdown restrictions. *Id.*

The second example of a noneconomic legislative trigger is climate-related. In order to meet the European Union's nitrogen dioxide (NO2) limits, in 2022 the City of Munich enacted a series of progressively stricter diesel car bans that would be triggered by atmospheric levels of NO2. Denis Balgaranov, *Munich's New Polluting Car Ban Runs Like Clockwork*, THEMAYOR.EU (Jan. 24, 2023, 5:29 PM), https://www.themayor.eu/en/a/view/munich-s-new-polluting-car-ban-runs-like-clockwork-11450 [https://perma.cc/89X2-FQES]. If NO2 levels exceed predetermined levels on specific dates between February 2023 and April 2024, certain diesel cars will be automatically banned from the city's low-emission zone. *Id.*; *see also Munich: New Diesel Driving Bans from 2023*, GREEN-ZONES.EU (Oct. 7, 2022), https://www.green-zones.eu/en/blog-news/munich-new-diesel-driving-bans-from-2023 [https://perma.cc/TQ7E-FYCV].

281. *See School Meal Statistics*, SCH. NUTRITION ASS'N, https://schoolnutrition.org/about-school-meals/school-meal-statistics/#participation [https://perma.cc/T4GH-GB4A] (last visited Oct. 25, 2023); Jennifer Gaddis, *Why Are You Still Packing Lunch for Your Kids?*, N.Y. TIMES (Feb. 10, 2020), https://www.nytimes.com/2020/02/10/opinion/universal-free-school-lunch.html.

282. *See* Eliza W. Kinsey, Amelie A. Hecht, Caroline Glagola Dunn, Ronli Levi, Margaret A. Read, Courtney Smith, Pamela Niesen, Hilary K. Seligman & Erin R. Hager, *School Closures During COVID-19: Opportunities for Innovation in Meal Service*, 110 AM. J. PUB. HEALTH 1635, 1636 (2020) (estimating the number of school meals missed during the COVID-19 pandemic).

283. Families First Coronavirus Response Act, Pub. L. No. 116-127, § 1101, 134 Stat. 178, 179–80 (2020); *see supra* notes 64–65 and accompanying text.

Second, unexpected extended school closures—more than, say, a week—typically only occur during major disruptions. School officials work hard to keep schools open until no longer feasible. Extended school closures could therefore serve as a kind of broader trigger to expand safety-net programs beyond school lunches. For instance, a statute could provide that if public schools are closed for more than one week due to a climate event or health event, an expanded package of crisis safety-net benefits is released. Although school closures rely on human decisionmakers, and thus are vulnerable to some of the same concerns discussed above regarding politicization, our hope is that closing schools or moving instruction online is such a significant disruption that school officials would only do so when truly necessary. Also, the sheer number of school districts may offer a way in which school closures can be a useful metric even if they do not all act in concert.

Another example from the pandemic of a trigger event would be some kind of government-imposed lockdown. A curfew or lockdown would correlate with a period during which many people would be unable to work. As with the school example, where instruction for some children moved online, lockdowns may just force some adults to work from home. However, the service sector, which employs millions of low-income Americans, does not lend itself to remote work.[284] Thus, expanded unemployment assistance could be triggered by a lockdown, especially for those in jobs that cannot be done remotely.

For climate crises specifically, atmospheric and environmental data could trigger targeted subsidies for affected groups. For instance, if water contamination levels exceed a certain level, it could trigger expanded SNAP benefits to enable low-income households to purchase bottled water.[285] To respond to wildfires and other air pollution events,[286] air quality metrics could trigger expanded benefits to assist with temporary relocation or help people purchase air purifiers. To protect farmworkers from heat exposure during heatwaves, high temperatures could

284. *Compare* Riccardo Crescenzi, Mara Giua & Davide Rigo, *How Many Jobs Can Be Done at Home? Not as Many as You Think!* 10 (London Sch. Econ., Geography & Env't Discussion Paper Series, Paper No. 37, 2022), http://eprints.lse.ac.uk/117523/1/How_many_jobs_can_be_done_at_home.pdf [https://perma.cc/5JLJ-GAZN] (noting that other researchers "significantly overestimat[ed] the share of jobs that could be done from home in key industries during the crisis, such as wholesale & retail and accommodation & food service activities"), *with* JONATHAN I. DINGEL & BRENT NEIMAN, UNIV. CHI. BECKER FRIEDMAN INST. FOR ECON., HOW MANY JOBS CAN BE DONE AT HOME? 1, 5 (2020), https://bfi.uchicago.edu/wp-content/uploads/BFI_White-Paper_Dingel_Neiman_3.2020.pdf [https://perma.cc/HV63-BJL9] (finding that jobs that can be done remotely "typically pay more than jobs that cannot be done at home").

285. *See* Emmanuel Felton, *Living in a City with No Water: 'This Is Unbearable*,*'* WASH. POST. (Sept. 3, 2022, 9:11 AM), https://www.washingtonpost.com/nation/2022/09/03/jackson-mississippi-water-crisis/.

286. *See, e.g.*, Bridger Beal-Cvetko, *Utah's Poor Air Quality Shortens Life Expectancy by Two Years. A New Bill Could Help Understand the True Cost*, DESERET NEWS (Jan. 12, 2022, 11:56 PM), https://www.deseret.com/utah/2022/1/12/22878857/utah-poor-air-quality-deaths-shortens-life-expectancy-asthma-diabetes-covid-19-environmental-justice [https://perma.cc/4DLN-NDGU].

trigger subsidies to agricultural employers to enable them to provide safer working conditions for workers—or even keep them home if necessary.[287]

We are lawyers, not scientists; many of these design questions are beyond our expertise. The main point of this discussion is to raise the question of how such triggers should be designed. Policymakers should call on experts to inform the design of automatic fiscal policies for noneconomic disasters. In some cases, an official declaration may continue to be the best option.

4. Improving the Quality of Underlying Data and Metrics

Any agenda to make social legislation more responsive to major social and economic forces should include measures to make the relevant data more accurate, more transparent, and more secure. For instance, the aforementioned bill that would index the SSI asset limit would rely on the Consumer Price Index published by the U.S. Department of Labor's Bureau of Labor Statistics.[288] Or drawing on another earlier example, legislators could index the federal minimum wage using the Consumer Price Index, median weekly earnings, or average hourly earnings.[289] There's also been much debate about tying Social Security's old-age benefits to other price indexes.[290] Reasonable minds will differ as to the strengths and weaknesses of certain indexing methods.[291]

Reasonable disagreements aside, some of the key metrics upon which federal law relies have well-known flaws. Unlike the rest of the Organisation for Economic Co-operation and Development (OECD),[292] the official federal poverty threshold in the United States is not measured relative to median wages, but

287. *See* Letter from Alex Padilla, U.S. Sen., Sherrod Brown, U.S. Sen., Elizabeth Warren, U.S. Sen., Ron Wyden, U.S. Sen., Bernard Sanders, U.S. Sen., Catherine Cortez Masto, U.S. Sen., Kirsten Gillibrand, U.S. Sen., Dianne Feinstein, U.S. Sen., Richard Blumenthal, U.S. Sen., Tammy Baldwin, U.S. Sen., Tina Smith, U.S. Sen., Edward J. Markey, U.S. Sen. & Cory Booker, U.S. Sen., to Martin Walsh, Sec'y, U.S. Dep't of Lab. (Aug. 3, 2021), https://www.padilla.senate.gov/wp-content/uploads/FINAL-Letter-to-DOL-re-Heat-Standard.pdf [https://perma.cc/Z5NT-YNL7] (urging the Occupational Safety and Health Administration (OSHA) to adopt a federal heat standard); *see also* Cresencio Rodriguez-Delgado & Chloe Jones, *Farmworkers Are Dying in Extreme Heat. Few Standards Exist to Protect Them*, PBS NEWSHOUR (Aug. 6, 2021, 5:57 PM), https://www.pbs.org/newshour/health/farmworkers-are-dying-in-extreme-heat-few-standards-exist-to-protect-them [https://perma.cc/CB77-AURZ].

288. SSI Savings Penalty Elimination Act, S. 4102, 117th Cong. §2(b) (2022).

289. EDWARDS & MURPHY, *supra* note 236, at 39 n.117 (calculating the difference in minimum wage growth depending on those three indexes). A number of states and D.C. already do this. *See supra* note 239.

290. *See* Alexander Strand & Kalman Rupp, *Disabled Workers and the Indexing of Social Security Benefits*, 67 SOC. SEC. BULL. 21, 23–24 (2007) (discussing different price indexes and their implications for Old-Age, Survivors, and Disability Insurance (OASDI)). *See generally* Matthew Weinzierl, *Seesaws and Social Security Benefits Indexing* (Harv. Bus. Sch., Working Paper No. 15-039, 2014), https://www.hbs.edu/ris/Publication%20Files/15-039_dfd54d67-dd2f-4884-98d1-bf8b58742c9e.pdf [https://perma.cc/7L8L-EJZ9] (discussing proposed models of Social Security indexing).

291. *See* Strand & Rupp, *supra* note 290, at 23–24 (discussing different methods); Reed Shuldiner, *Indexing the Tax Code*, 48 TAX L. REV. 537, 547 (1993) (discussing tradeoffs with Consumer Price Index).

292. *See Poverty Rate*, OECD DATA, https://data.oecd.org/inequality/poverty-rate.htm [https://perma.cc/8N3N-6GMZ] (last visited Oct. 25, 2023).

instead by using a multiple of a minimum food budget.[293] Such a formula may have made sense sixty years ago when food made up a larger share of poor families' spending, but now it looks out of date.[294]

Poverty experts have excoriated the inaccuracy and arbitrariness of the method underlying the official U.S. poverty threshold.[295] The measurement does not take into account shifts in household expenses, the increasing cost of housing, changes in the standard of living, nontraditional households, or geographic variation.[296] Similarly, the unemployment rate has been criticized for understating the number of people no longer in the labor force.[297] Of course, there is a benefit to using the same metric over time. Swapping out one measurement for another or constantly tweaking the same one will make it harder to understand longitudinal changes in our society and economy. But that difficulty is far from insurmountable. For instance, researchers have been able to extend the Supplemental Poverty Measure (SPM) back decades[298] even though the U.S. Census Bureau only

293. *See* Gordon M. Fisher, *The Development and History of the Poverty Thresholds*, 55 SOC. SEC. BULL. 3, 3–6, 4 n.15 (1992); *The History of the Official Poverty Measure*, U.S. CENSUS BUREAU (May 24, 2022), https://www.census.gov/topics/income-poverty/poverty/about/history-of-the-poverty-measure.html [https://perma.cc/P3BX-SFMF].

294. *How the Census Bureau Measures Poverty*, U.S. CENSUS BUREAU (June 15, 2023), https://www.census.gov/topics/income-poverty/poverty/guidance/poverty-measures.html [https://perma.cc/H529-DS66]. *See generally* ICELAND, *supra* note 20, at 22–38 (discussing absolute, relative, and quasi-relative poverty measures and their limitations). Recognizing the weaknesses in the Official Poverty Measure (OPM), the federal government introduced a Supplemental Poverty Measure (SPM). *See* LIANA FOX, U.S. CENSUS BUREAU, P60-265, THE SUPPLEMENTAL POVERTY MEASURE: 2017, at 14–15 (2018), https://www.census.gov/content/dam/Census/library/publications/2018/demo/p60-265.pdf [https://perma.cc/CZQ4-W43W]. However, that new data currently does not dictate program levels. *See id.* at 3; *see also* Ariel Jurow Kleiman, *Impoverishment by Taxation*, 170 U. PA. L. REV. 1451, 1466 n.65 (2022) (discussing SPM).

295. *See, e.g.*, CONG. RSCH. SERV., R41187, POVERTY MEASUREMENT IN THE UNITED STATES: HISTORY, CURRENT PRACTICE, AND PROPOSED CHANGES 1 (2010), https://www.everycrsreport.com/files/20100412_R41187_abcd0b92f0d81427d5787812b3c450146a6d744d.pdf [https://perma.cc/KZS9-35MK]; *see also* Bruce D. Meyer & James X. Sullivan, *Identifying the Disadvantaged: Official Poverty, Consumption Poverty, and the New Supplemental Poverty Measure*, J. ECON. PERSPS., Summer 2012, at 111, 133 (critiquing the official poverty measure as well as the U.S. Census Bureau's Supplemental Poverty Measure, and concluding that a "well-constructed consumption-based poverty measure would be preferable to [such] income-based measures of poverty").

296. *How Is Poverty Measured?*, INST. FOR RSCH. ON POVERTY, https://www.irp.wisc.edu/resources/how-is-poverty-measured/ [https://perma.cc/7EWM-F62C] (last visited Oct. 25, 2023) (itemizing the ways in which experts think "the OPM falls short").

297. *See* B. Ravikumar & Lin Shao, *Accounting for Discouraged Workers in the Unemployment Rate*, 2014 FED. RSRV. BANK ST. LOUIS: ECON. SYNOPSES, no. 9, at 1, 1; Troy Davig & José Mustre-del-Río, *The Shadow Labor Supply and Its Implications for the Unemployment Rate*, 2013 FED. RSRV. BANK KAN. CITY ECON. REV. 5, 7–8; *see also* Elise Gould, *The Unemployment Rate Is Not the Right Measure to Make Economic Policy Decisions Around the Coronavirus-Driven Recession*, ECON. POL'Y INST.: WORKING ECON. BLOG (Mar. 20, 2020, 4:01 PM), https://www.epi.org/blog/the-unemployment-rate-is-not-the-right-measure-to-make-economic-policy-decisions-around-the-coronavirus-driven-recession/ [https://perma.cc/XAY2-ZMEX] (criticizing unemployment rate as "a bad choice for a policy trigger" during the pandemic).

298. *See Historical Supplemental Poverty Measure Data*, CTR. ON POVERTY & SOC. POL'Y COLUM. U., https://www.povertycenter.columbia.edu/historical-spm-data [https://perma.cc/3H9P-GPA3] (last visited Oct. 25, 2023).

developed it in 2009.[299] Nonetheless, we are not blind to the reality that some of the same forces that lead to unequal legislative drift also create a kind of data drift.

In addition to concerns about data drift, there has been concern about politicization of government data. The most prominent example is the controversy over the Trump Administration's efforts to add a citizenship question to the 2020 census.[300] Eventually winding its way to the Supreme Court, this controversy raised concerns about the extent to which the President and other political figures can interfere with the constitutionally mandated decennial counting of the country.[301] The decennial census has widespread ramifications for political representation in Congress and state legislatures, not to mention $1.5 trillion in government funding in a given year.[302] Beyond that example, a White House task force on scientific integrity recently released a report identifying threats to government data.[303] Elected officials will always fear political fallout when data make those in power look bad.

But there is also encouraging evidence that members of Congress can come together to improve administrative data. In the last Farm Bill, Congress tasked the U.S. Department of Agriculture with updating the Thrifty Food Plan (TFP) in 2022 and every five years thereafter.[304] The TFP, the underlying formula for SNAP benefit levels, had not been updated since 2006 and was based on decades-old data that reflected out-of-date information about food preparation and

299. *Supplemental Poverty Measure*, U.S. CENSUS BUREAU, https://www.census.gov/topics/income-poverty/supplemental-poverty-measure.html [https://perma.cc/9SP6-AG6R] (last visited Oct. 25, 2023).

300. *See* Aaron Blake, *The Audacious Timeline of Trump's Failed Plot on the Census and Citizenship*, WASH. POST (Jan. 18, 2022, 4:53 PM), https://www.washingtonpost.com/politics/2022/01/18/audacious-timeline-trumps-failed-plot-census-citizenship/.

301. *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2561 (2019); *see also* OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF COM., OIG-20-050-M, THE ACCELERATION OF THE CENSUS SCHEDULE INCREASES THE RISKS TO A COMPLETE AND ACCURATE 2020 CENSUS 2–3 (2020), https://www.oig.doc.gov/OIGPublications/OIG-20-050-M.pdf [https://perma.cc/JP9K-T5AN] (describing the census). Since the Supreme Court's decision, more information has come to light suggesting the White House's interference was more significant than the litigation initially suggested. *See* All Things Considered, *Documents Detail the Secret Strategy Behind Trump's Census Citizenship Question Push*, NPR (July 20, 2022, 3:44 PM), https://www.npr.org/2022/07/20/1044944618/census-citizenship-question-history-oversight-committee [https://perma.cc/MV39-Q8R9].

302. *See* Andrew Chatzky & Amelia Cheatham, *Why Does the Census Matter?*, COUNCIL ON FOREIGN RELS. (May 11, 2021, 5:06 PM), https://www.cfr.org/backgrounder/why-does-census-matter [https://perma.cc/646J-HQPW].

303. SCI. INTEGRITY FAST-TRACK ACTION COMM., EXEC. OFF. OF THE PRESIDENT, PROTECTING THE INTEGRITY OF GOVERNMENT SCIENCE 8 (2022), https://www.whitehouse.gov/wp-content/uploads/2022/01/01-22-Protecting_the_Integrity_of_Government_Science.pdf [https://perma.cc/8WV4-2B2L] (warning that "[f]ederal statistical agencies, such as the Census Bureau, must protect against interference in their efforts to create and release data that provide a set of common facts to inform policymakers, researchers, and the public").

304. Agricultural Improvement Act of 2018, Pub. L. No. 115-334, § 4002, 132 Stat. 4490, 4624 (codified at 7 U.S.C. § 2012(u)) ("By 2022 and at 5-year intervals thereafter, the Secretary shall re-evaluate and publish the market baskets of the thrifty food plan based on current food prices, food composition data, consumption patterns, and dietary guidance.").

nutrition science.[305] The federal agency responded with data-driven revisions that more accurately reflect nutrition science and restored the purchasing power of SNAP for millions of Americans.[306] And thanks to the 2018 Farm Bill, the Department of Agriculture will have to revise the TFP regularly going forward. Similarly, the aforementioned SPM, prompted by the Office of Management and Budget (OMB) and designed by an interagency working group, offers a promisingly more accurate and sophisticated way to measure poverty in the United States.[307]

Legislative triggers and indexes are only as responsive as the metrics that drive them. Congress should mandate that agencies engage officials and institutions inside and outside government to constantly review and improve the underlying data, they should legislate protective measures to ward off political interference, and they should mandate a schedule of periodic agency review.

III. OBJECTIONS AND RESPONSES

In this final Part, we consider objections to our proposal that federal lawmakers rely increasingly on triggers and indexing to strengthen anti-poverty programs. We identify five strands of criticism of our argument: objections sounding in accountability, entrenchment, epistemic limitations, politics, and budgeting. We attempt to give each a fair hearing and respond to each in turn.

A. ACCOUNTABILITY

One potential concern with relying on automatic fiscal policy is that doing so would undermine democratic accountability. This concern echoes the longstanding critique of Congress's practice of delegating wide-ranging authority to administrative agencies: that such delegations enable members of Congress to avoid taking public positions on consequential matters of public policy and

305. *See* Lauren Bauer, *A Healthy Reform to the Supplemental Nutrition Assistance Program: Updating the Thrifty Food Plan*, HAMILTON PROJECT (Aug. 19, 2021), https://www.hamiltonproject.org/publication/post/a-healthy-reform-to-the-supplemental-nutrition-assistance-program-updating-the-thrifty-food-plan/ [https://perma.cc/NF8V-4Z38]; JAMES P. ZILIAK, THE HAMILTON PROJECT, BROOKINGS, MODERNIZING SNAP BENEFITS 7 (2016), https://www.hamiltonproject.org/assets/files/ziliak_modernizing_snap_benefits.pdf [https://perma.cc/4UAC-9AFT] (explaining how "[t]oday the ways that we prepare food and the types of foods we eat have changed dramatically since SNAP was introduced in the 1960s").

306. FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., FNS-916, THRIFTY FOOD PLAN, 2021 viii (2021), https://fns-prod.azureedge.us/sites/default/files/resource-files/TFP2021.pdf [https://perma.cc/XHQ9-MYWK]; *see also* Kristin F. Butcher, *The New Thrifty Food Plan Re-Evaluates a 50-Plus-Year-Old Design and Low-Income Kids Will Benefit*, BROOKINGS (Sept. 1, 2021), https://www.brookings.edu/articles/the-new-thrifty-food-plan-re-evaluates-a-50-plus-year-old-design-and-low-income-kids-will-benefit/ [https://perma.cc/VJ96-VHXB] (explaining that before the change "the purchasing power of SNAP benefits, pinned to this decades-old level, [was] starkly lower than when the original Thrifty was designed"); JOSEPH LLOBRERA, MATT SAENZ & LAUREN HALL, USDA ANNOUNCES IMPORTANT SNAP BENEFIT MODERNIZATION, CTR. ON BUDGET & POL'Y PRIORITIES 1 (2021), https://www.cbpp.org/sites/default/files/8-26-21fa.pdf [https://perma.cc/C26A-9SWC].

307. JOSEPH DALAKER, CONG. RSCH. SERV., R45031, THE SUPPLEMENTAL POVERTY MEASURE: ITS CORE CONCEPTS, DEVELOPMENT, AND USE 6–7 (2022), https://crsreports.congress.gov/product/pdf/R/R45031 [https://perma.cc/YWC3-MCUX] (detailing the development of the SPM).

thereby render it more difficult for voters to hold them accountable.[308] Indeed, some proponents of trigger mechanisms have accepted that such features would weaken accountability. In one especially prominent instance, Peter Orszag (the former Director of both the OMB and the Congressional Budget Office[309]) has framed this accountability gap as the necessary cost of easing congressional gridlock:

> To solve the serious problems facing our country, we need to minimize the harm from legislative inertia by relying more on automatic policies and depoliticized commissions for certain policy decisions. In other words, radical as it sounds, we need to counter the gridlock of our political institutions by making them a bit less democratic.[310]

Orszag is not alone in these views. Although only a handful of legal scholars have focused on the democratic implications of automatic fiscal policies, some have, like Orszag, concluded that they would undermine accountability.[311]

Two aspects of Orszag's argument are worth underscoring: First, Orszag portrays these policies as technocratic devices that "reduce the power of elected officials and therefore make our government somewhat less accountable to voters."[312] Second, he suggests that automatic fiscal devices are in fact comparable to "depoliticized commissions" such as the Federal Reserve.[313] In doing so, Orszag has (perhaps unwittingly) tapped into a potentially potent line of attack against automatic fiscal policies, which has already been wielded with great success against administrative agencies.[314]

We believe that Orszag is mistaken in both respects. Perhaps counterintuitively, enacting automatic fiscal policies would in fact make Congress not less accountable, but more. Moreover, automatic fiscal policies differ in key respects from delegations to administrative agencies. Indeed, we think critics of broad delegations to administrative agencies have reason to support a greater role for automatic fiscal policies in the safety net.

Before making this argument, however, it is necessary to provide some background. The portrayal of administrative agencies as "unaccountable" is one of the

308. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 131–34 (1980); *see also* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 99–100 (1993).

309. *See Peter Orszag*, LAZARD, https://www.lazard.com/our-people/peter-r-orszag/ [https://perma.cc/L7ZH-Q9AP] (last visited Oct. 26, 2023).

310. Peter Orszag, *Too Much of a Good Thing*, NEW REPUBLIC (Sept. 14, 2011), https://newrepublic.com/article/94940/peter-orszag-democracy [https://perma.cc/CP5N-FHA3].

311. *See, e.g.*, Michael J. Teter, *Congressional Gridlock's Threat to Separation of Powers*, 2013 WIS. L. REV. 1097, 1143; David Kamin, *In Good Times and Bad: Designing Legislation That Responds to Fiscal Uncertainty* 22 (Brookings Inst., Hutchins Ctr. on Fiscal & Monetary Pol'y, Working Paper No. 7, 2014), https://www.brookings.edu/wp-content/uploads/2016/06/15_legislation_responds_fiscal_uncertainty_kamin.pdf [https://perma.cc/G2YC-546C].

312. Orszag, *supra* note 310.

313. *Id.*

314. *See id.*

most commonly invoked critiques of the administrative state.[315] Although the concept of accountability is complex,[316] the basic critique of agencies is straightforward. The charge is that agencies, unlike members of Congress or the President, are less accountable to the American people because they are not elected.[317] Setting aside whether this critique is valid (and defenders of delegation have offered various rebuttals),[318] there is no doubt that it has been influential. The Supreme Court has, for instance, invoked this critique in recent years to justify its decisions to hold unconstitutional the Public Company Accounting Oversight Board's dual layers of "for-cause" removal protections,[319] as well as the Consumer Financial Protection Bureau and the Federal Housing Finance Agency's for-cause removal protections for their single directors.[320] Likewise, legal scholars have relied on this portrayal of agencies in advocating for doctrinal and legislative reforms which—if adopted—would curb delegations even further.[321]

Orszag's account suggests that the accountability critique of administrative agencies is also applicable to automatic fiscal policies, in that both mechanisms similarly undermine accountability by reducing the power of elected officials. Although he does not specify exactly why he believes that such policies reduce the power of elected officials, presumably the idea is that automatic-adjustment mechanisms (such as delegation to administrative agencies) enable public policy to change without Congress having to enact new legislation. For this reason, some legal scholars have suggested that enacting automatic fiscal policies would undermine accountability by permitting the current Congress to effectively hide behind legislation passed by a previous Congress.[322]

We believe this view is wrong. To the contrary, triggers and indexing should appeal to those who are concerned about delegations to administrative

315. *See* Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1600, 1603 (2023).

316. *See* Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, *in* PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 115, 115–16 (Michael W. Dowdle ed., 2006) (describing accountability as "protean," and describing six different features of accountability).

317. *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2131, 2134–35 (2019) (Gorsuch, J., dissenting). *But see generally* Joshua Ulan Galperin, *The Life of Administrative Democracy*, 108 GEO. L.J. 1213 (2020) (exploring the United States Department of Agriculture's elected farmer committee system).

318. *See, e.g.*, Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2075, 2119 (2005) (critiquing the notion of accountability and arguing that it is "intrinsically bureaucratic or administrative in character"); Mashaw, *supra* note 125, at 95.

319. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 496–98 (2010).

320. Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2192, 2204 (2020) (quoting *Free Enter. Fund*, 561 U.S. at 499); Collins v. Yellen, 141 S. Ct. 1761, 1783–84 (2021).

321. *See, e.g.*, Adler & Walker, *supra* note 100, at 1977 (arguing that Congress should sunset delegations to agencies); David Schoenbrod, *How Reins Would Improve Environmental Protection*, 21 DUKE ENV'T L. & POL'Y F. 347, 347, 359 (2011) (advocating for enacting the Regulations from the Executive in Need of Scrutiny (REINS) Act, which would require Congress to approve all major agency rules).

322. *See* Kamin, *supra* note 311, at 22.

agencies.[323] Consider the most obvious difference between automatic-adjustment mechanisms and administrative agencies: when Congress delegates to administrative agencies, it often affords them broad discretion regarding how to implement or interpret legislation.[324] It is this broad discretion that the Court and some scholars have deemed problematic from the perspective of democratic accountability.[325] Such discretion enables agency officials to shape and even make law without the threat of voter rebuke.

By contrast, when Congress enacts automatic fiscal policies, far from "pass[ing] the buck to the agencies with vaguely worded statutes,"[326] Congress itself decides ahead of time how government programs must respond to future crises. In fact, to the extent that agencies administer safety-net programs, automatic-adjustment mechanisms may actually serve to constrain the scope of their authority by dictating ahead of time exactly how they must respond to changing circumstances. Likewise, it seems plausible that bolstering automatic-adjustment mechanisms will make Congress less reliant on delegations to agencies, since doing so provides Congress with an alternative means of addressing policy drift.

Additionally, automatic-adjustment mechanisms heighten transparency, which Justice (then-Professor) Elena Kagan has described as "a fundamental precondition of accountability."[327] In order for Congress to be held accountable, its actions must be visible and comprehensible. Yet the status quo approach of legislating one-off emergency packages that temporarily bolster safety-net programs raises concerns about transparency. Because Congress is under intense time pressure to pass such packages, it tends to do so in ways that bypass traditional procedures—such as committee deliberation and report writing[328]—that promote these values. The speed, lack of transparency, and complexity associated with such emergency legislation serve in turn to advantage well-resourced business interests, while making it more difficult for public interest groups and individual members of the public to participate in the legislative process.[329] By contrast, if Congress were to enact, in a nonemergency context, a set of prospective rules governing how safety-net programs would automatically adjust during future economic downturns, there would be ample time to follow the standard legislative procedures that enhance transparency and accountability. Public interest groups and

323. This Section reprises and elaborates on some of the arguments that we make in Hammond et al., *supra* note 37.

324. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 372 (1989) ("[I]n our increasingly complex society . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives."); Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 7 (2017) ("[B]road delegations of authority to the executive branch . . . represent the central reality of contemporary national government.").

325. *See, e.g.*, SCHOENBROD, *supra* note 308, at 109–11; Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1465 (2015).

326. *See* ELY, *supra* note 308, at 132 (quoting Congressman Elliott H. Levitas).

327. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2332 (2001).

328. Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1808 (2015).

329. *See supra* Part I.

members of the public would therefore be better able to understand and participate in the legislative process, and to hold members of Congress accountable for their decisions.

What about the objection that automatic policies will undermine accountability by enabling the current Congress to hide behind past Congresses? As Rebecca Kysar points out, there is also an attendant risk that "the *failure* to automatically adjust policy may allow lawmakers to skirt public judgment for the consequences of that failure."[330] Indeed, Kysar suggests that the accountability-undermining effects of the latter are more deleterious than the former.[331] Thus, even if one accepts the accountability critique of automatic fiscal policies at face value, one could plausibly argue that *any* legislation that survives beyond its enacting Congress's term will make successive Congresses less accountable by allowing representatives to pin mistakes on their predecessors. Unless we are willing to have all legislation sunset at the end of each congressional term, then this seems like an inevitable and unavoidable risk. In any case, once one takes into account the accountability-enhancing effects described above, it seems that on balance, automatic-adjustment mechanisms are more likely to promote accountability than undermine it.

B. ENTRENCHMENT

A second concern has to do with "entrenchment." Entrenchment is a slippery concept.[332] Paul Starr defines it in capacious terms, as "any process whereby an institution, a technology, a group, or a cultural form—any kind of social formation—becomes resistant to pressures for change."[333] Daryl Levinson and Benjamin Sachs helpfully distinguish between what they refer to as "formal" and "functional" entrenchment.[334] Both formal and functional entrenchment serve to insulate incumbent politicians and their preferred policies from democratic change, but the former operates by changing the "formal legal rules governing processes of political change," whereas the latter depends on political (rather than legal) mechanisms.[335]

Entrenchment has a bad reputation in public law circles.[336] To some extent, this is due to public law scholars' focus on the dangers (or potential dangers) of formal entrenchment in two especially fraught contexts: the practice of incumbent politicians' attempting to rig election laws to preserve their political power

330. *See* Kysar, *supra* note 30, at 851.

331. *Id.*

332. *See, e.g.*, *id.* at 835 ("Frustratingly, . . . the parameters of entrenchment are ill-defined."); Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1666 (2002) ("'Entrenchment' is a promiscuous word in the academic literature.").

333. PAUL STARR, ENTRENCHMENT: WEALTH, POWER, AND THE CONSTITUTION OF DEMOCRATIC SOCIETIES 1–2 (2019).

334. Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 403, 405–07 (2015).

335. *Id.* at 407.

336. *Id.* at 402 ("As far as public law is concerned . . . efforts at political 'entrenchment' are viewed as dubious at best.").

and stay in office, and the prospect of Congress attempting to prohibit a future Congress from repealing a statute (or adopting elevated procedural requirements to make repeal more difficult).[337] Both of these forms of formal entrenchment are widely viewed as at odds with democratic accountability, since they both "substitute the 'dead hand' control of the past for present majority will"[338] and make it more difficult for voters to "effect change by electing new officials."[339] Critics of formal entrenchment worry in particular about policy drift. That is, entrenchment would prevent policymakers from adapting legislation in response to changing circumstances, new information, or changes in the electorate's preferences or values.[340]

Triggers and indexing mechanisms are not, however, formally entrenched. There are no special legal protections that make it more difficult for Congress to repeal or alter them.[341] None of the lawmaking mechanisms we recommend are harder to amend or repeal than typical legislation.

Nevertheless, automatic fiscal policies may well become functionally entrenched in the sense that they may change the political environment in such a way as to make it less likely that Congress will repeal or amend them. The question then is, Setting aside the normative concerns surrounding formal entrenchment, is this form of functional entrenchment problematic?[342] Like other scholars who have examined this question, we believe the answer is clearly not.[343]

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337. *See id.* at 413. Levinson and Sachs term the former "electoral entrenchment" and the latter "legislative entrenchment." *Id.*

338. *Id.* at 467. Levinson and Sachs conclude that these criticisms are applicable to electoral and legislative entrenchment equally. *See id.* at 426 ("[T]he perceived pathologies of entrenchment in both [electoral and legislative entrenchment] are nearly identical.").

339. John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773, 1796 (2003) (arguing that legislative entrenchment undermines accountability); *see also* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 502–09 (1997) (arguing that electoral entrenchment undermines majority rule). *But see* Posner & Vermeule, *supra* note 332, at 1666 (arguing "that entrenchment is both constitutionally permissible and, in appropriate circumstances, normatively attractive").

340. *See* Roberts & Chemerinsky, *supra* note 339, at 1809–13.

341. *See* Kysar, *supra* note 30, at 836.

342. We do not take a position on the normative debate surrounding formal entrenchment or address the question—raised by Levinson and Sachs—of whether formal and functional entrenchment are distinguishable from a normative perspective. *See* Levinson & Sachs, *supra* note 334, at 478 ("Recognizing the continuity of formal and functional entrenchment thus invites the question of why public law identifies and condemns the former while ignoring or pardoning the latter."); *see also* Kysar, *supra* note 30, at 836 ("[I]f we expand the notion of entrenchment to include those acts that are not simply legally binding upon subsequent legislatures, as Posner and Vermuele use the term, but also those acts that functionally bind such legislatures, then entrenchment issues become more concerning.").

343. *See, e.g.*, Kamin, *supra* note 17, at 174 (considering this possibility and concluding that "this criticism lacks any real weight[, because w]hatever past policymakers decide, there will be effects on future policymakers and their constituents"); Kysar, *supra* note 30, at 841 (concluding that "overall dynamic legislation fares well" when it comes to concerns about entrenchment).

Functional entrenchment is simply too broad of a concept to be considered either "good" or "bad."[344] For one thing, although efforts to entrench legislation are "often associated with bad motives," policymakers may also attempt to entrench legislation for reasons that plausibly serve the public interest, such as promoting stability, reducing uncertainty, or protecting important social reforms.[345] In addition, *all* legislation is functionally entrenched, to some extent, simply due to Congress's status quo bias.[346] Even legislative *in*action could be characterized as functionally entrenched, since it will have political ripple effects that will constrain future legislatures' choices.[347] Thus, one cannot reasonably conclude that automatic fiscal policies are undesirable simply on the basis that they may become functionally entrenched.

Moreover, one of the primary concerns about entrenchment is that it exacerbates policy drift. But to the extent that automatic fiscal policies are more likely to become entrenched than other kinds of legislation, it is because they are designed to address precisely this concern.[348] If triggers and indexing work properly and adapt well to changing circumstances, then they are more likely to prove politically popular and Congress is less likely to have reason to repeal or amend them. It is difficult to see how this outcome is problematic. In addition, automatic fiscal policies may actually serve to combat entrenchment by taking some issues off of Congress's busy legislative agenda, freeing policymakers to address policy drift in other areas.[349]

Of course, as we will discuss next, automatic-adjustment mechanisms are not foolproof, and there is a danger that they may themselves succumb to policy drift.[350] However, to the extent that these policies are unsuccessful, there would be less reason to be concerned about entrenchment, since one would expect that in that case there would likely be a greater political impetus to amend or repeal them.[351]

C. EPISTEMIC LIMITATIONS

A third concern about automatic fiscal policies is more practical than the first two: that Congress simply doesn't know enough about the future to competently

344. *See* STARR, *supra* note 333, at xii ("Entrenchment per se is not a bad thing. We could hardly organize our lives, make plans, or have any confidence about the future if not for some more or less fixed aspects of law and society.").

345. Levinson & Sachs, *supra* note 334, at 412; *see also* Posner & Vermeule, *supra* note 332, at 1671–73.

346. *See* Kysar, *supra* note 30, at 836.

347. Levinson & Sachs, *supra* note 334, at 474–75 ("Nearly every political action — as well as every instance of inaction — has some constraining effect on the choices of downstream decision makers.").

348. *See* Kysar, *supra* note 30, at 841.

349. *See id.* at 843.

350. *See infra* Section III.C.

351. Rebecca Kysar demonstrates that, at least theoretically, automatic stabilizers could pose an entrenchment problem if "the automatic mechanism would have to produce a policy outcome that is just inside of the zone of legislative action, on the boundary between action and inaction." Kysar, *supra* note 30, at 843. Yet she concludes that such concerns are applicable "in only a *subset* of . . . already narrow cases." *Id.*

assess future policy problems and prospectively calibrate the appropriate policy response. As Professor David Kamin (himself a proponent of automatic-adjustment mechanisms) has written,

> [Automatic-adjustment mechanisms] require that Congress identify a metric to measure change in the policy environment and then specify an appropriate response to that change that can be written into law. In other words, they come with relatively high informational and decision costs at the time of legislation—even if it later speeds adjustment and reduces decision costs.[352]

This critique certainly has some validity. There will be situations where Congress lacks useful data, and there are areas where existing data are incomplete.[353] As we have discussed, widely relied-on economic indicators such as the Official Poverty Measure,[354] gross domestic product,[355] and the unemployment rate[356] each have shortcomings and may be misleading in some contexts. For this reason, economic policymakers often preach that, when assessing economic conditions, one should not place too much emphasis on any single economic data point.[357] Yet by design, triggers and indexing will only rely on certain indicators that Congress has specified ahead of time and will not incorporate every piece of relevant information that may emerge down the road.[358] To make matters more complicated, the conventional wisdom about economic policy is hardly set in stone. The dominant view of the economic profession has evolved over time, on subjects ranging from antitrust enforcement to the minimum wage to economic inequality.[359] In other words, even though automatic fiscal policies are an important tool to address policy drift, they themselves are susceptible to policy drift—

352. Kamin, *supra* note 17, at 173.

353. *See* Justin R. Pidot, *Governance and Uncertainty*, 37 CARDOZO L. REV. 113, 121–22 (2015).

354. *See, e.g.*, Shawn Fremstad, *The Official U.S. Poverty Rate Is Based on a Hopelessly Out-of-Date Metric*, WASH. POST (Sept. 16, 2019, 1:01 PM), https://www.washingtonpost.com/outlook/2019/09/16/official-us-poverty-rate-is-based-hopelessly-out-of-date-metric/.

355. *See, e.g.*, THOMAS PIKETTY, A BRIEF HISTORY OF EQUALITY 23–24 (Steven Rendall trans., 2022).

356. *See, e.g.*, Jason Furman & Wilson Powell III, *US Unemployment Situation Worsens in November*, PIIE (Dec. 4, 2020, 5:00 AM), https://www.piie.com/blogs/realtime-economic-issues-watch/us-unemployment-situation-worsens-november [https://perma.cc/8S6J-65PV] (explaining why the official unemployment rate "understate[s] the unemployment rate from a historically-comparable perspective").

357. *See, e.g.*, Jason Furman, *Extracting the Signal from the Noise: 7 Tips for Interpreting Macroeconomic Data*, MILKEN INST. REV. (Oct. 19, 2016), https://www.milkenreview.org/articles/extracting-the-signal-from-the-noise-7-tips-for-interpreting-macroeconomic-data [https://perma.cc/RU26-SJ7F].

358. *See id.*

359. *See, e.g.*, Jason Furman, *The Quants in the Room: How Much Power Do Economists Really Have?*, FOREIGN AFFS. (June 21, 2022), https://www.foreignaffairs.com/reviews/review-essay/2022-06-21/quants-in-the-room; *Economics Sometimes Changes Its Mind*, ECONOMIST (Aug. 6, 2020), https://www.economist.com/leaders/2020/08/06/economics-sometimes-changes-its-mind; Mark Thoma, *As the World Changes, So Does Economics*, CBS NEWS (Feb. 5, 2016, 5:30 AM), https://www.cbsnews.com/news/as-the-world-changes-so-does-economics/ [https://perma.cc/5EK4-ZU3U].

if, for example, the data they rely on turn out to be inadequate or if the assumptions on which they are premised turn out to be flawed.

Nevertheless, we believe that automatic fiscal policies are, at least under certain circumstances, the best available means of addressing policy drift, given policymakers' epistemic limitations. The primary alternative to triggers—crisis-based legislating—also involves making predictions about the future based on imperfect information, except those predictions are often based on a single estimate about "what the state of the world will be."[360] Not surprisingly, such predictions frequently turn out to be wrong.[361] Because of Congress's status quo bias, it is often unable to recalibrate the policy response to account for new information in a timely manner. In one well-known example, the American Recovery and Reinvestment Act of 2009,[362] which Congress passed in response to the Great Recession, included insufficient fiscal stimulus, because the Great Recession turned out to be much more severe than forecasters had anticipated at the time.[363] Yet Congress lacked the political will to pass significant additional stimulus, leading to a deeper recession.[364] Triggers and indexing mechanisms, by contrast, are more forgiving than crisis-based legislation, since they can be designed to automatically adjust the policy response if it turns out to be too large or too small. And as for indexing specifically, the alternative is no updating, which exacerbates the problems we have identified far more than inexact updating would.

Still, the epistemic limitations of automatic-adjustment mechanisms are worth taking seriously. One way to address them would be to appoint an independent commission of experts to monitor how a trigger or index fares over time, to issue reports, and to recommend adjustments—along the lines of how the Medicare Payment Advisory Commission (MedPAC) or the Medicaid and CHIP Payment and Access Commission (MACPAC) advise Congress on the Medicare and Medicaid programs, respectively.[365] We concede that this arrangement is far from perfect. Congress could choose to ignore the independent commission's recommendations, as it has sometimes done with MedPAC's and MACPAC's.[366]

360. Kamin, *supra* note 311, at 2.

361. PETER R. ORSZAG, ROBERT E. RUBIN & JOSEPH E. STIGLITZ, PETERSON INST. FOR INT'L ECON., POLICY BRIEF 21-2, FISCAL RESILIENCY IN A DEEPLY UNCERTAIN WORLD: THE ROLE OF SEMIAUTONOMOUS DISCRETION 7 (2021), https://www.piie.com/sites/default/files/documents/pb21-2.pdf [https://perma.cc/V6T6-B8ZG] ("[F]or many of the crucial economic and budget variables, forecast errors have historically been relatively large.").

362. Pub. L. No. 111-5, 123 Stat. 115.

363. Kamin, *supra* note 311, at 9.

364. *Id.* at 9–11. More recently, some leading economists (most notably Larry Summers) have argued that the American Rescue Plan Act of 2021 contained excessive fiscal stimulus, exacerbating inflationary pressures. *See* The Ezra Klein Show, *I Keep Hoping Larry Summers Is Wrong. What If He's Not?*, N.Y. TIMES (Mar. 29, 2022), https://www.nytimes.com/2022/03/29/opinion/ezra-klein-podcast-lawrence-summers.html.

365. *See* Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1597–99, 1597 n.305 (2020).

366. *See supra* notes 219–25 and accompanying text.

Yet at least this way, there will be a watchdog charged with calling Congress's attention to deficiencies and proposing alternatives.

We do not, however, favor more forceful alternatives designed to prompt Congress to revisit and update existing safety-net programs by triggering an undesirable change to the status quo (for instance, by sunsetting programs or funding after a certain period of time). As described above, in our view, such mechanisms have proven ineffective at best, and counterproductive at worst.[367]

It is worth emphasizing that there are many circumstances under which automatic fiscal policies will not be appropriate. For instance, in some contexts, reliable and timely data will be lacking. Moreover, even in those areas where Congress were to employ triggers or indexes, it would need to augment or modify those mechanisms due to the epistemic constraints described above.[368] Thus, automatic fiscal policies represent an important supplement to, rather than a substitute for, the existing means of addressing policy drift. Even if Congress were to embrace a much larger role for automatic fiscal policies in the safety net, the alternative means of addressing policy drift—crisis-based legislating, delegation to administrative agencies, and partnerships with the states—will remain vital.

D. ELECTORAL POLITICS

Another concern about automatic fiscal policies has to do not with their consequences but with whether they are politically realistic. A skeptic of these policies might argue that members of Congress will balk at including dynamic provisions such as triggers and indexing because it is in their interest to pass static legislation. This argument might go as follows: Legislation that updates automatically deprives lawmakers of the lobbying, campaign fundraising, and leverage with fellow members that comes with every committee vote or floor vote. Since members of Congress want to be reelected, they will want more opportunities to have influence and be influenced.[369] If lawmakers incorporate more triggers and indexing mechanisms into anti-poverty legislation, then they will have fewer of those opportunities. Therefore, they will be averse to legislating automatic fiscal policies.

Although this line of argument has some intuitive force, we believe it is somewhat oversold. For one thing, as we explained in Part II, some of the most politically popular transfers, such as Social Security old-age benefits, are already

367. *See supra* Section II.A.3. As we explained earlier, Rebecca Kysar refers to such provisions as "prompting legislation," Kysar, *supra* note 30, at 821–22, whereas David Kamin describes them as "loud alarms," Kamin, *supra* note 17, at 176.

368. *See supra* Section III.C; ORSZAG ET AL., *supra* note 361, at 22.

369. For the classic argument that studies of Congress should theorize members as single-minded reelection seekers, see generally DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974). For a recent account of how members of Congress are driven by reelection concerns, see generally JAKE SHERMAN & ANNA PALMER, THE HILL TO DIE ON: THE BATTLE FOR CONGRESS AND THE FUTURE OF TRUMP'S AMERICA (2020) and Fresh Air, *Reporters Say Members of Congress Are 'Obsessed' with Getting Re-Elected*, NPR (Apr. 9, 2019, 2:26 PM), npr.org/2019/04/09/711379453/reporters-saymembers-of-congress-are-obsessed-with-getting-re-elected [https://perma.cc/3LRB-WV7F].

indexed.[370] So, too, are many provisions of the tax code, including brackets, various tax credits, and the standard deduction.[371] If elected officials prefer not to incorporate triggers and indexing mechanisms in legislation, then why have they done so with programs that generate some of the most intense lobbying? Furthermore, since triggers and indexing mechanisms are not formally entrenched, elected officials could always repeal these mechanisms in order to increase the opportunities for more votes on updating the legislation. In addition, it seems unlikely that many voters are attuned to the policy mechanisms we have discussed. So even if one accepts that politicians are primarily motivated by the desire to seek reelection, they might not view these particular mechanisms as good opportunities to establish highly salient positions or take highly visible votes. Moreover, this argument makes more sense for policies that generate campaign contributions and industry lobbying, which are more likely policies benefiting the wealthy and special interest groups. Anti-poverty policies likely offer policymakers only limited fundraising leverage. Finally, politicians are not always exclusively focused on their own reelection—many of them also have strong ideological commitments, especially when it comes to social welfare legislation. In some cases, they may even prioritize these commitments over their own electoral concerns.[372]

Moreover, automatic fiscal policies have certain political advantages. For one thing, unlike permanent expansions in the safety net, automatic fiscal policies could, at least in principle, appeal to those politicians who generally favor a smaller safety net, but nevertheless believe that it should be responsive to changing circumstances. Congress's history of passing bipartisan relief legislation during major high-salience crises provides some suggestive evidence that there are at least some lawmakers who hold both views.[373] In addition, because automatic fiscal policies can be better targeted than crisis-induced legislation, they may appeal to politicians (and perhaps voters) who favor some form of relief legislation, but worry about excessive stimulus leading to unintended consequences.[374] For instance, rising inflation could be incorporated in advance as one trigger that would help to determine when fiscal stimulus is phased out, ensuring that automatic fiscal policies do not exacerbate inflation.[375]

370. *See supra* notes 179–85 and accompanying text.

371. *See supra* notes 179–85 and accompanying text.

372. *See, e.g.*, *The Politics of Crisis*, MARKETPLACE, https://features.marketplace.org/politicsofcrisis/ [https://perma.cc/VJ8K-NRZZ] (interviewing former Senator Chris Dodd and former Representative Barney Frank on the Dodd-Frank Act in September 2018) (last visited Oct. 27, 2023); Tom Perriello, *I Lost My Election After Voting for Obamacare. Democrats Need to Back Biden's Agenda*, WASH. POST (Sept. 29, 2021, 11:48 AM), https://www.washingtonpost.com/opinions/2021/09/29/tom-perriello-biden-agenda-democrats-aca-vote/.

373. *See supra* Part I.

374. This is reminiscent of scholars' claims that sunset clauses make it easier to enact policy initially. *See supra* notes 192–93 and accompanying text.

375. We thank Cary Coglianese and Ryan Nunn, who independently made variants of this point.

These considerations are not conclusive, and there are other factors that may impede the enactment of automatic fiscal policies in certain cases. Still, the fact that triggers and indexes already exist in several safety-net programs suggests that it's realistic to think that, if policymakers were more focused on their benefits, they might include more automatic policies in safety-net programs.

E. BUDGETING

A final potential criticism of automatic fiscal policies focuses on the federal government's budget process. Recently, public law scholars such as Matthew Lawrence and Gillian Metzger have shed light on the dynamics and disconnects between how Congress legislates and how it appropriates, including how aspects of the appropriations process threaten government's capacity to function.[376] This literature suggests that even if Congress legislates benefit levels to increase or decrease depending on economic indicators, Congress's dysfunctional appropriations process may still undermine anti-poverty programs by failing to approve sufficient funding to honor its legislative commitments.

At one level, this criticism could be leveled against any legislated expenditure, not just expenditures that have triggers or indexing provisions. Simply because Congress creates a transfer program with statutory eligibility provisions does not mean that the future budgetary implications are easily perceived.[377] However, the policies we propose in this Article might present particular challenges because it is harder for Congress to predict future outlays for programs that have these dynamic provisions.[378] And those budgetary implications could become more pronounced the longer the timeframe.[379]

Although these budgetary challenges may make automatic fiscal policies less palatable to some, it is worth remembering that the mechanisms we propose are not one-way ratchets. If economic conditions improve, then automatic fiscal policies may lead to reimposed requirements or even to reductions in benefits. In that

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376. *See generally* Matthew B. Lawrence, *Disappropriation*, 120 COLUM. L. REV. 1 (2020); Metzger, *supra* note 136.

377. *See generally* MARISA CHAPPELL, THE WAR ON WELFARE: FAMILY, POVERTY, AND POLITICS IN MODERN AMERICA (2010) (discussing growth in cash assistance expenditures in the 1970s and 1980s and political backlash).

378. A related concern is that automatic fiscal policies may make budget forecasting more difficult, especially given the necessity of deficit planning under a borrowing cap. While this concern has merit, in most cases automatic fiscal policies should not significantly increase budget unpredictability compared to the status quo. A benefit that is indexed for inflation is certainly harder to forecast than a static benefit, but budget forecasting already accommodates this unpredictability for currently indexed benefits. For triggers that would increase benefit levels during a crisis, the unpredictability arises from the fact that the crisis itself is unplanned. If a safety-net program's claims would have already increased during a recession—as is the case for SNAP and UI—the trigger mechanism should not make forecasting more difficult than it already is; it would merely increase the magnitude of the change. If a trigger mechanism would create new eligibility categories during a crisis, such costs would certainly be difficult to forecast reliably. However, given the current levels of unpredictability in budget forecasting during a crisis, any additional unpredictability from our proposed policy reforms should be marginal.

379. For an early exploration of these challenges, see U.S. GOV'T ACCOUNTABILITY OFF., PAD-79-22, AN ANALYSIS OF THE EFFECTS OF INDEXING FOR INFLATION ON FEDERAL EXPENDITURES 17–18 (1979), https://www.gao.gov/assets/pad-79-22.pdf [https://perma.cc/AH87-GV9P].

way, these policies do not lead to inexorable rises in expenditures, but rather to changes that track evolving economic and social conditions. Moreover, even if Congress *could* effectively undo automatic fiscal policies in the appropriations process, that does not necessarily mean that it *will* do so. As discussed above, Congress does not continuously revisit and update existing policies over time.[380]

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This Part has raised and addressed possible objections to automatic fiscal policies, including arguments based on accountability, entrenchment, epistemic limitations, politics, and budgeting. While any criticisms of automatic fiscal policies should be taken seriously, they must also be weighed against the positives that such policies offer.

Automatic fiscal policies would ensure that safety-net programs respond appropriately and immediately to crises and adapt to gradual social and economic changes. They would also ensure that expanded support continues until a crisis is truly over, rather than petering out as politicians lose interest. Because they are enacted outside of crisis periods, automatic fiscal policies can be designed through a careful, transparent process to ensure that crisis programs are well-targeted. Indexing would protect low-income Americans from losing support due to gradually changing economic conditions. In all, automatic fiscal policies would enable a safety net that is less politicized, more responsive, and more protective of vulnerable Americans.

CONCLUSION

The worst of the COVID-19 pandemic is likely behind us, and yet the predicted overhaul of U.S. safety-net programs never happened. With divided government's return to Washington, the window of opportunity for meaningful reform appears closed. This Article takes stock of the past three years of poverty lawmaking, connecting the failures of crisis legislation with the phenomenon of policy drift. In both contexts, vulnerable American households often get the short end of the stick as support programs lose real value over time and crisis expansions miss the mark.

More than just lamenting recent failures, this Article offers an optimistic message: by enacting and strengthening automatic fiscal policies, U.S. safety-net programs can better protect vulnerable households from crises, volatility, and economic shifts. Automatic mechanisms such as triggers and indexing rely on external data, depoliticizing important decisions and ensuring that people receive help when they need it. As this Article has shown, these automatic mechanisms have already been used in American fiscal and social policy. This Article identifies four ways to build on this foundation and further strengthen automatic fiscal policies: making them more consistent both across and within federal programs; better tailoring them to state-specific shocks and economic downturns; making

380. *See supra* Section I.B.1. We thank Matt Fiedler for making this point.

them more responsive to noneconomic disasters (such as pandemics and climate disasters); and improving the quality and reliability of the data on which they rely. These reforms will not by themselves completely solve the problem of policy drift—there are still important roles to play for crisis-induced legislation, delegations to agencies, and devolution to state and local governments. But together, these reforms will help to make safety-net programs more responsive to changing economic and social circumstances.

The next crisis will come sooner than we think; meanwhile, social and economic change continues apace. Protecting low-income and vulnerable Americans from both should not be an afterthought. Lawmakers cannot futureproof the safety net in the United States, but they can legislate to make the safety net stronger for the future.