

Legislating a More Responsive Safety Net

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I INTRODUCTION

The COVID-19 pandemic underscored glaring weaknesses in the ability of American safety net programs to adequately respond to a national crisis. The pandemic and ensuing economic recession left millions of Americans struggling with joblessness, hunger, unstable housing, and insufficient access to health care. Government action was often either short-lived or long-delayed. Policymakers can learn from these mistakes. They must reform safety net policies to ensure that American families can survive future crises. This chapter charts a path for how they can do so.

First, we start by summarizing how Congress and federal agencies responded to the COVID-19 pandemic through various changes to safety net programs.¹ Second, we explore how existing safety net programs proved inadequate in the face of such a catastrophic and sustained crisis, and how Congress can remedy the systemic flaws underlying this inadequate response. We argue that Congress should enact mechanisms – often called “automatic stabilizers” – to ensure that safety net programs respond more immediately and effectively to future emergencies. Third, we defend strengthening automatic stabilizers on democratic grounds, arguing that doing so would increase transparency, limit delegation, and heighten responsiveness.

II PANDEMIC-RELATED CHANGES TO SAFETY NET PROGRAMS

The COVID-19 pandemic was both epidemiological and economic in nature. It resulted in a breathtaking loss of life, leaving over a million Americans dead and many others suffering from debilitating and perplexing long-term symptoms. Meanwhile, the pandemic’s economic effects shattered many Americans’ financial security. Yet although the pandemic was initially hailed by some as “the great

¹ This part of the discussion draws from our previously published essay. 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 (2020).

equalizer,” it was anything but. The pandemic both reflected and augmented preexisting social inequalities. Low-income people and people of color in particular were disproportionately harmed by its economic and health impacts.

To address these twin crises, the federal government enacted six major pieces of legislation between March 2020 and March 2021.² The most prominent and largest of these were the Families First Coronavirus Response (Families First) Act, the Coronavirus Aid, Relief, and Economic Security (CARES) Act, the Consolidated Appropriations Act, 2021, and the American Rescue Plan Act (ARPA). These laws altered the US safety net in various ways, including through bolstering cash transfers, food support, medical assistance, and job-related support.

This part briefly describes some of the most important changes, though our discussion is necessarily incomplete, given its brevity. We focus in particular on the federal response, due to the federal government’s important role in funding these programs and setting their requirements. However, state and local governments likewise play key roles in funding and administering safety net programs, and we highlight these roles as appropriate.³

A *The Tax System*

The CARES Act directed the Internal Revenue Service to send “recovery rebate” checks of \$1,200 per adult, and \$500 per child, to millions of American households.⁴ The Consolidated Appropriations Act and ARPA authorized additional payments of \$600 and \$1,400, respectively, to all adults and children.⁵ All payments phased out for incomes above \$75,000 (\$150,000 for married couples). The Consolidated Appropriations Act also temporarily modified the Earned Income Tax Credit (EITC) and Child Tax Credit to ensure that taxpayers would not be penalized for losing their jobs during the pandemic. The provision allowed taxpayers to use either 2019 or 2020 income to calculate the credit amount for 2020.⁶ This change ensured that taxpayers did not receive a smaller credit if they lost work due to the pandemic, since both tax credits phased in at low income levels in tax year 2020.

² Coronavirus Preparedness and Response Supplemental Appropriations Act, Pub. L. No. 116-123, 134 Stat. 146 (2020); Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020); Coronavirus Aid, Relief, and Economic Security 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; American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4.

³ See, generally, Andrew Hammond, *Welfare and Federalism’s Peril*, 92 *Wash. L. Rev.* 1721 (2017) (critiquing the devolution of control over safety net programs to the states).

⁴ IRC § 6428 (West 2020).

⁵ Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. N, § 203, 134 Stat. 1182, 1953; American Rescue Plan Act § 9601.

⁶ Consolidated Appropriations Act, § 211.

With ARPA, Congress temporarily expanded the Child Tax Credit by making it available to all families, regardless of employment status, and by increasing the credit amount from \$2,000 to \$3,000 per child (or \$3,600 for children under six).⁷ Congress also temporarily increased the maximum EITC for childless workers, from about \$540 to just over \$1,500.⁸ These expansions expired at the start of 2022.

B *Unemployment Insurance*

Unemployment insurance (UI) is a joint federal–state program that states administer pursuant to federal guidelines. The CARES Act, Consolidated Appropriations Act, and ARPA temporarily expanded the amount, duration, and scope of UI benefits for those who lost work during the COVID-19 pandemic. With the CARES Act, Congress provided a \$600 per week supplement to be paid on top of state UI benefits through July 31, 2020. It also extended the duration of benefits by funding additional weeks of support for workers who had exhausted all state benefits.⁹ The CARES Act also expanded UI eligibility by providing federal funding for states to pay benefits to workers who lost hours (even if they retained their jobs), as well as to “gig workers” and other non-employee workers who would otherwise be excluded from UI programs.¹⁰ Congress extended these various provisions with the Consolidated Appropriations Act and then ARPA, and further authorized a \$300 weekly UI supplement through September 6, 2021.¹¹

C *Food Assistance*

In the Families First Act, Congress authorized the Department of Agriculture to allow states to create “Pandemic E B T [Electronic Benefit Transfer]” programs.¹² Pandemic EBT was created for families with children who were missing out on free or reduced-price meals as a result of school closures.¹³ Congress also allowed states to make “emergency allotments” for households receiving Supplemental Nutrition Assistance Program (SNAP) benefits; however, this provision excluded the poorest Americans, who were already receiving maximum benefits. In the Families First Act, Congress also made emergency appropriations to the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), the

⁷ American Rescue Plan Act § 9611.

⁸ *Id.* § 9621.

⁹ Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116–136, § 2104, 134 Stat. 281, 318–21 (2020).

¹⁰ *Id.* §§ 2102, 2108–09.

¹¹ American Rescue Plan Act §§ 9011–18, 9021–22.

¹² Families First Coronavirus Response Act, Pub. L. No. 116–127, § 1101(b)-(i), 134 Stat. 178, 179–80 (2020).

¹³ Food & Nutrition Serv., US Dep’t Agric., State Plan for Pandemic EBT (P-EBT) (June 2, 2020), www.fns.usda.gov/snap/state-guidance-coronavirus-pandemic-ebt-pebt.

Emergency Food Assistance Program (one of the commodity food programs), and the nutrition assistance block grants for the three territories (Commonwealth of the Northern Mariana Islands, American Samoa, and Puerto Rico) that federal law excludes from SNAP.¹⁴ Finally, Congress addressed ongoing efforts by the Trump Administration to restrict access to food assistance for roughly 750,000 SNAP recipients.¹⁵ Even though a federal court had enjoined the Trump Administration's regulation before it could go into effect, Congress suspended all SNAP work requirements until a month after the end of the COVID-19 emergency declaration.¹⁶

Subsequent COVID-19-related legislation made additional appropriations and built on the Families First Act's food assistance provisions. In the CARES Act, Congress increased federal funding of SNAP assistance by over \$16 billion.¹⁷ In the Consolidated Appropriations Act, the stimulus passed at the very end of the Trump Administration, Congress strengthened food assistance in the same manner that it did at the start of the Great Recession. It increased SNAP for all food stamp beneficiaries by 15 percentage points.¹⁸ Through ARPA, Congress extended that increase through September 2021.¹⁹ In passing ARPA, Congress also made additional appropriations for SNAP, WIC, and the nutrition block grants to the three territories.²⁰ ARPA contained provisions strengthening Pandemic EBT as well. Congress removed date limits to the program, explicitly allowed its operation in summer months, and expanded the program to cover children in schools with reduced hours, as well as children in SNAP households who were enrolled in child care facilities affected by pandemic closures and reduced hours.²¹

D Medical Assistance

The federal government took an array of legislative and administrative actions to address the cost of COVID-19-related medical care for patients, health care providers, and states. For instance, through the Families First Act and the CARES Act, Congress generally required most private health plans, Medicare, and Medicaid to cover testing for COVID-19 during the public health emergency.²²

¹⁴ Families First Coronavirus Response Act, Title I (authorizing \$500 million for WIC and \$400 million for Emergency Food Assistance Program through September 30, 2021); *id.* §§ 1102,

¹⁵ *Id.* § 2301(a).

¹⁶ *District of Columbia v. US Dep't of Agric.*, 20-cv-119 (D.D.C. May 12, 2020). See also Families First Coronavirus Response Act § 2301(a).

¹⁷ H.R. Rep. No. 116-146, at 73 (2020).

¹⁸ Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. A, Title IV, 134 Stat. 1182, 1209-10.

¹⁹ American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 1101(a), 135 Stat. 4, 115.

²⁰ *Id.* §§ 1101, 1103, 1105-06.

²¹ *Id.* § 1108.

²² Families First Coronavirus Response Act, Pub. L. No. 116-127, §§ 6001-04, 134 Stat. 178, 201-07 (2020); Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, §§ 3201-02, 134 Stat. 281, 366-67 (2020).

The CARES Act – together with the Paycheck Protection Program and Health Care Enhancement Act and the Consolidated Appropriations Act – provided \$178 billion in funding for hospitals and other health care entities struggling with the cost of COVID-19-related care and the cancellation of elective procedures.²³ In addition, to help defray the costs of rising Medicaid enrollment and prevent states from cutting benefits (the Medicaid program is jointly funded by the federal government and the states), the Families First Act temporarily increased the Federal Medical Assistance Percentage (FMAP) for state and territorial Medicaid programs by 6.2 percentage points until the end of the public health emergency.²⁴ States were required to meet various conditions to be eligible for the increased matching funds, including not imposing more restrictive Medicaid eligibility standards or procedures, increasing premiums, and terminating beneficiaries from the program involuntarily.²⁵ ARPA also provided additional funding for COVID-19 public health activities, including vaccine distribution, contact tracing, and supporting the public health workforce.²⁶

ARPA included several reforms that built on the coverage expansions of the Affordable Care Act (ACA), and went beyond paying specifically for COVID-19-related medical care. For instance, ARPA provided that states that newly adopted the ACA's Medicaid expansion for low-income adults would receive a 5 percentage point increase in their FMAP rate for two years, giving the holdout states that had not yet adopted the Medicaid expansion additional incentives to do so.²⁷ The law also temporarily created an option for states to extend postpartum coverage in Medicaid and the Children's Health Insurance Program (CHIP) for twelve months.²⁸ In addition, ARPA temporarily offered enhanced premium tax credits for individuals who enrolled in private health insurance coverage through the ACA's health insurance marketplaces, for the plan years 2021 and 2022. Previously, the tax credits had been generally available only for people with a modified adjusted gross income between 100 percent and 400 percent of the federal poverty level (FPL), and even people at the poverty level had to make some premium payments. ARPA both offered increased subsidies for individuals making between 100 percent and 400 percent of the FPL (who were already eligible for subsidized coverage) and expanded the subsidies so that people with incomes above 400 percent of the FPL were newly

²³ CARES Act Provider Relief Fund, US Dep't of Health and Hum. Servs., www.hhs.gov/coronavirus/cares-act-provider-relief-fund/index.html; Karyn Schwartz & Tricia Neuman, Funding for Health Care Providers During the Pandemic: An Update, Kaiser Fam. Found. (Feb. 11, 2021), www.kff.org/policy-watch/funding-for-health-care-providers-during-the-pandemic-an-update/.

²⁴ Families First Coronavirus Response Act § 6008.

²⁵ *Id.*

²⁶ Jennifer Kates, What's in the American Rescue Plan for COVID-19 Vaccine and Other Public Health Efforts?, Kaiser Fam. Found. (Mar. 16, 2021), www.kff.org/policy-watch/whats-in-the-american-rescue-plan-for-covid-19-vaccine-and-other-public-health-efforts/.

²⁷ American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9814, 135 Stat. 4, 215.

²⁸ *Id.* § 9812.

eligible for assistance.²⁹ In addition, ARPA included temporary subsidies to defray the cost of Consolidated Omnibus Budget Reconciliation Act premiums for people who had lost employer-sponsored insurance.³⁰

III MAKING THE SAFETY NET MORE RESPONSIVE

A *The Pandemic Revealed Structural Flaws in the Safety Net*

Although it provided essential support, the federal government's response to the COVID-19 pandemic was inadequate in numerous ways. For one, because Congress chose to provide benefits through existing safety net programs, the response excluded the same people these programs have excluded from the beginning. These include childless adults, immigrant families, and those with unstable ties to the labor market. Meanwhile, other stimulus bill provisions – and the ways that agencies implemented those provisions – directed huge sums of money to wealthy individuals and hospitals, and large businesses.³¹ In addition, the Families First Act's FMAP increase provided less Medicaid funding than states needed and did not apply to enrollees covered through the ACA's Medicaid expansion.³² The COVID-19-testing coverage provisions in the Families First Act and CARES Act also had loopholes which caused some Americans to remain on the hook for testing-related out-of-pocket costs.³³

Second, administrative complexity and technological problems common to safety net programs hampered the speed and efficiency of the pandemic response. As one example, many states' UI systems simply were not equipped to handle a large influx of claims. Claimants faced network crashes and confusing messaging; many failed to access benefits as a result.³⁴ As another example, six months after the passage of the CARES Act, approximately nine million people still had not received their rebate checks because the Internal Revenue Service lacked their

²⁹ Id. §§ 9661–63.

³⁰ Id. § 9501.

³¹ Example, Clint Wallace, *The Troubling Case of the Unlimited Pass-Through Deduction: Section 2304 of the CARES Act*, *U. Chi. L. Rev.* Online (2020), <https://lawreviewblog.uchicago.edu/2020/06/29/cares-2304-wallace/> [<https://perma.cc/Y78T-KSL3>]; Jesse Drucker, Jessica Silver-Greenberg & Sarah Kliff, *Wealthiest Hospitals Got Billions in Bailout for Struggling Health Providers*, *NY Times* (May 25, 2020), www.nytimes.com/2020/05/25/business/coronavirus-hospitals-bailout.html.

³² See Aviva Aron-Dine et al., *Larger, Longer-Lasting Increases in Federal Medicaid Funding Needed to Protect Coverage*, *Ctr. on Budget & Pol'y Priorities* (May 5, 2020), www.cbpp.org/sites/default/files/atoms/files/5-5-20health.pdf.

³³ See Karyn Schwartz et al., *Gaps in Cost Sharing Protections for COVID-19 Testing and Treatment Could Spark Public Concerns About COVID-19 Vaccine Costs*, *Kaiser Fam. Found.* (Dec. 18, 2020), www.kff.org/health-costs/issue-brief/gaps-in-cost-sharing-protections-for-covid-19-testing-and-treatment-could-spark-public-concerns-about-covid-19-vaccine-costs/.

³⁴ 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.* (Apr. 28, 2020), 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/89HW-zFG3>].

contact information.³⁵ Many of these overlooked individuals had incomes below the tax-filing threshold and thus were particularly vulnerable.

Third, while Congress acted quickly to pass the first round of stimulus relief, some relief came too late, while other relief ended too early. For instance, Congress did not increase SNAP benefits for all beneficiaries until ten months into the crisis.³⁶ The delay left millions of families in need. Meanwhile, although Congress initially expanded UI benefits, the expansion ended on July 31, 2020, just as the virus began surging around the country. Congress did not renew the expansion until December 2020 (and then again in March 2021). The legislative process throughout was rushed and chaotic, then partisan and unproductive. Both modes left little room for community participation, but plenty of room for well-heeled lobbyists. Congress ultimately delayed far too long to provide additional support after the first round of relief bills, each side blaming the impasse on the recalcitrance of the other. Meanwhile, poverty, hunger, and despair deepened.

The COVID-19 pandemic was unexpected and, in some ways, unprecedented. Although the federal government's response was essential, it was also flawed. We can learn from this experience to improve crisis lawmaking in the future. The next section describes how.

B Principles to Improve Future Crisis Response

The flawed response of Congress to the pandemic points to several key principles that should inform how policymakers react to future crises. These principles apply to safety net reforms that seek to address not only national emergencies, but state and local emergencies as well.

When future crises occur, safety net program expansions and emergency responses should be:

Immediate. Crises deepen as government delays. While Congress can act quickly, it may not always do so. And, as the COVID-19 response shows, it may not do so comprehensively. Linking temporary program expansions to economic indices or other automatic triggers is one possible way to ensure an immediate response.

Inclusive. The US social safety net has long been and remains exclusionary, especially for Black Americans, immigrants and their families, Indigenous Americans, and Americans living in the territories. During normal times, political pressure and concern over scarce resources may overshadow calls for inclusivity. Yet improving the inclusivity of safety net programs during normal times will ensure that federal programs can reach everyone during hard times.

³⁵ Michelle Singletary, *IRS Is Trying to Reach 9 Million People Who Haven't Collected Their Stimulus Payments*, Wash. Post (Sept. 11, 2020), [washingtonpost.com/business/2020/09/11/irs-stimulus-check-letter/](https://www.washingtonpost.com/business/2020/09/11/irs-stimulus-check-letter/) [https://perma.cc/D7SJ-H8KS].

³⁶ Consolidated Appropriations Act, 2021, Pub. L. No. 116–260, div. A, Title IV, 134 Stat. 1182, 1209–10.

Targeted. Programs must deliver support to the places and people that need it most. In the context of extreme weather events, for instance, federal programs must deliver support to a specific region only. State and local indices should therefore drive automatic responses.

Sustained. Program changes triggered during a crisis must continue until the crisis is truly over. In some places, the economic fallout of a crisis might last several years, as was true after the Great Recession. Once again, automated, quantitative indices will provide a more accurate measure of continued need than a politicized decision-making process.

C Strengthening Program Responsiveness

Experts have advocated improved crisis lawmaking for some time. Many such proposals focus on automatic stabilizers – governmental mechanisms that do not require legislative approval and that increase spending or decrease taxes when the economy slows.³⁷ In other words, they automatically inject money into the economy during contractions. Of course, some safety net programs already *are* automatic stabilizers; for instance, SNAP, UI claims, and Medicaid enrollment tend to increase during recessions. In doing so, they help to protect individuals and families from the worst financial and health effects of economic downturns, as well as to mitigate the downturns themselves through stimulating aggregate economic demand.³⁸ Yet policymakers can improve these stabilizing effects. This section surveys various proposed reforms that aim to improve how well safety net programs respond to crises, focusing on automatic responses that obviate the need for approval from Congress.

1 Tax Credits

The EITC provides cash transfers to low-income families and childless workers, targeting households living near and just above the poverty line. It therefore operates as an automatic stabilizer by providing cash support to households when incomes drop. However, the work-incentive structure of the EITC mitigates this automatic stabilizer effect. Specifically, the program excludes non-working individuals; further, below a certain income level, benefits decrease as income decreases. This design feature means that a recession can cause many people to lose their benefits or receive a smaller benefit amount if they lose work entirely or lose enough hours to place them in the phase-in range. Imagine a server who works fewer hours when a recession causes her restaurant to cut shifts. This worker could face the double harm

³⁷ Vivien Lee & Louise Scheiner, What Are Automatic Stabilizers?, Brookings Inst. (2019), www.brookings.edu/blog/up-front/2019/07/02/what-are-automatic-stabilizers/.

³⁸ Id.

of reduced wages as well as a smaller EITC. To prevent this procyclical effect, tax policy experts have urged Congress to accelerate how quickly the benefit phases in at low income levels or to eliminate the phase-in entirely.³⁹

Outside of ARPA's temporary tax credit expansions, childless workers receive only a small EITC compared to families with children. ARPA's expansion expired after one year. Tax experts and policymakers have routinely called for permanently increasing the benefit provided to childless workers, or to *all* workers, which would strengthen the program's ability to shore up the economy during recessions.⁴⁰

2 Unemployment Insurance

UI is already a vital automatic stabilizer. Even so, Congress and state policymakers can improve the programs' ability to support struggling workers during economic downturns. To start, UI systems have historically excluded certain "nontraditional" workers from coverage – including part-time, temporary, and non-employee workers – leaving them without protection and undermining the systems' ability to act as a safety net during recessions. This exclusion is becoming increasingly untenable considering that such jobs have dominated job-growth figures over the past decade.⁴¹ Since the Great Recession, experts have called on Congress and state legislators to expand UI coverage for self-employed workers and workers who lose hours while retaining their jobs.⁴² Although Congress did so in response to the pandemic, the changes were only temporary.

Additionally, states' budgets are often overburdened during economic downturns, since demand for public assistance tends to increase just as tax revenue decreases.⁴³ Instead of relying on Congress to expand UI funding during each economic downturn, experts have urged Congress to legislate automatic increases.⁴⁴ For instance, federal UI funding could increase automatically when a state's unemployment rate increases rapidly or exceeds a threshold level.⁴⁵

³⁹ See Elaine Maag & Donald Marron, Design Changes Can Strengthen the EITC During Recessions, *Urban- Brookings Tax Pol'y Ctr.* 9 (2020), www.taxpolicycenter.org/publications/design-changes-can-strengthen-eitc-during-recessions/full.

⁴⁰ Id.

⁴¹ Jason Furman, Chairman, Council of Econ. Advisers, The Economic Case for Strengthening Unemployment Insurance, Remarks at the Center for American Progress, Washington, DC, at 4 (July 11, 2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160711_furman_uireform_cea.pdf [<https://perma.cc/Z7YK-L3RS>].

⁴² See, for example, id.

⁴³ Matthew Fiedler, Jason Furman & Wilson Powell III, Increasing Federal Support for State Medicaid and CHIP Programs in Response to Economic Downturns, Brookings Inst. (2020), www.brookings.edu/research/increasing-federal-support-for-state-medicaid-and-chip-programs-in-response-to-economic-downturns/ [<https://perma.cc/8ENB-P88W>].

⁴⁴ Example, Furman, *supra* note 41, at 11.

⁴⁵ Id.

3 SNAP

SNAP has a well-earned reputation in Washington, DC for its countercyclical track record. Policymakers know the program can expand quickly during recessions and crises.⁴⁶ That is in part because states contribute to the administrative costs of the program, but the federal government pays 100 percent of the substantive benefits.⁴⁷ But while SNAP excels at enrolling people who are newly eligible because of unemployment, extreme weather events, or pandemics, it could be made stronger for both new and existing recipients in times of acute need.⁴⁸ Experts have called on Congress to amend the Food and Nutrition Act so that SNAP benefits increase automatically when certain economic data suggest a national, regional, state-wide, or even intra-state surge in need.⁴⁹ Such a change would have prevented Congress's nine-month delay in enacting such an increase during the pandemic. In fact, the federal statutes governing SNAP already let economic data drive eligibility for a certain segment of recipients.⁵⁰ The Food & Nutrition Service allows states to waive statutory work requirements for certain childless adults when the Bureau of Labor Statistics reports specified unemployment levels for a state or intra-state region.⁵¹ Congress could simply automate these increases in benefit amounts and expansions in eligibility.

4 Medicaid

Medicaid is another essential automatic stabilizer. Enrollment in Medicaid increased significantly during the COVID-19 pandemic and likely helped to offset the effects of people losing employer-sponsored insurance.⁵²

Yet this stabilizing function should be strengthened. Because states typically must balance their budgets annually, they face significant pressure to cut spending on Medicaid during economic downturns – by making eligibility requirements more

⁴⁶ In the depths of the 2008 financial crisis, White House advisers relied on the macroeconomic multiplier effect of SNAP. See Peter Ganong & Jeffrey B. Liebman, *The Decline, Rebound, and Further Rise in SNAP Enrollment: Disentangling Business Cycle Fluctuations and Policy Changes*, 10 *Am. Econ. J.* 153, 154 (2018).

⁴⁷ See 7 U.S.C. §§ 2013(a), 2019, 2025(a); 7 C.F.R. §§ 277.1(b), 277.4.

⁴⁸ See Ganong & Liebman, *supra* note 46 at 168.

⁴⁹ Hilary Hoynes & Diane Whitmore Schanzenbach, *Strengthening SNAP as an Automatic Stabilizer, in Recession Ready: Fiscal Policies to Stabilize the American Economy 235 n.5* (Heather Boushey, Ryan Nunn & Jay Shambaugh eds., 2019).

⁵⁰ 7 U.S.C. § 2015(o)(4). For Able-Bodied Adults without Dependents, waivers already rely on unemployment data from the Department of Labor.

⁵¹ 7 C.F.R. § 273.24(f)(2). The Trump Administration unsuccessfully tried to make it more difficult for states to obtain these waivers. See Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents, 84 Fed. Reg. 66782, 66802 (Dec. 5, 2019). But see District of Columbia, 20-cv-119 (enjoining the rule).

⁵² See Daniel McDemott et al., *How Has the Pandemic Affected Health Coverage in the U.S.?*, Kaiser Fam. Found. (Dec. 9, 2020), www.kff.org/policy-watch/how-has-the-pandemic-affected-health-coverage-in-the-u-s/.

stringent, reducing the scope of covered benefits, or reducing the amount that they pay providers.⁵³ These cuts in turn not only limit health benefits for low-income Americans at a time when they are especially vulnerable, but also have deleterious economic consequences.⁵⁴

During recent economic downturns, including the COVID-19 recession, Congress has legislated one-off temporary increases to the Medicaid matching rates to prevent such negative outcomes.⁵⁵ Yet these increases have sometimes been too small or come too late.⁵⁶ To strengthen Medicaid's role as a stabilizer, economists Matthew Fiedler, Jason Furman, and Wilson Powell III have proposed that Congress automatically increase the federal share of spending for Medicaid and the Children's Health Insurance Program once a state's unemployment rate exceeds a threshold level.⁵⁷ The Government Accountability Office has likewise proposed automatically increasing Medicaid matching rates during national economic downturns.⁵⁸ Either of these approaches would help to mitigate the damaging consequences of future economic downturns, and would help to ensure that the Medicaid program can provide support when Americans need it most.

IV STRENGTHENING DEMOCRATIC NORMS

Until now, most of the arguments in favor of strengthening automatic stabilizers have been made on welfare grounds: that doing so would bolster important protections for vulnerable groups and cushion the impact of economic downturns.⁵⁹ Yet, perhaps counterintuitively, we believe that augmenting automatic stabilizers would also help to strengthen democratic norms. Before the COVID-19 pandemic ravaged the United States, scholars had repeatedly criticized the decreasing capacity and increasing dysfunctionality of Congress.⁶⁰ In particular, researchers identified how Congress's increasing incapacity to legislate raises concerns about its democratic legitimacy. Relatedly, some scholars have critiqued Congress's reliance on infrequent and unorthodox lawmaking as well as its broad delegations to agencies on

⁵³ Fiedler, Furman & Powell, *supra* note 43 at 99–100; Matthew Fiedler, States Are Being Crushed by the Coronavirus. Only This Can Help., NY Times (Apr. 22, 2020), www.nytimes.com/2020/04/22/opinion/coronavirus-states-budgets.html.

⁵⁴ See Gabriel Chodorow-Reich et al., Does State Fiscal Relief During Recessions Increase Employment? Evidence from the American Recovery and Reinvestment Act, 118 *Am. Econ. J. Econ. Pol.* 118, 121 (2012).

⁵⁵ Alison Mitchell, Cong. Res. Serv., Medicaid Recession-Related FMAP Increases (2020).

⁵⁶ See Fiedler, Furman & Powell, *above* note 43, at 99.

⁵⁷ *Id.*

⁵⁸ Gov't Accountability Off., Medicaid: Prototype Formula Would Provide Automatic, Targeted Assistance to States during Economic Downturns (2011).

⁵⁹ See, generally, *Recession Ready: Fiscal Policies to Stabilize the American Economy* (Heather Boushey, Ryan Nunn & Jay Shambaugh eds., 2019).

⁶⁰ See, for example, *Congress Overwhelmed: The Decline in Congressional Capacity and Prospects for Reform* (Timothy M. LaPira, Lee Drutman & Kevin R. Kosar eds., 2020).

the basis that they make the US national legislature less accountable. Here, we offer some preliminary thoughts on the extent to which legislating automatic stabilizers can address the prevailing ills that afflict Congress.

This section tentatively makes a case for automatic stabilizers because of their democracy-protecting potential. In particular, we defend automatic stabilizers on three grounds: transparency, delegation, and responsiveness.⁶¹

A Transparency

The status quo of legislating one-off emergency packages to temporarily bolster safety net programs raises concerns about transparency. Because Congress is under intense time pressure to pass such packages, they tend to do so in ways that bypass traditional procedures – such as committee deliberation and report-writing – that promote transparency.⁶² The speed, opacity, 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.⁶³

By contrast, if Congress were to enact, in a non-emergency 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 members of the public would be better able to understand and participate in the legislative process, and to hold members of Congress accountable for their decisions. It seems plausible, therefore, that enacting automatic stabilizers would actually strengthen – rather than weaken – democratic values.

B Delegation

One concern about strengthening automatic stabilizers is that doing so would weaken the democratic legitimacy of statutes by allowing legislators to escape taking responsibility for decisions about the safety net.⁶⁴ This concern is related to a more general critique that has been levied against broad delegations to administrative agencies: that such delegations enable members of Congress to avoid taking public

⁶¹ We explore some of these issues in greater depth in our forthcoming article, Andrew Hammond, Ariel Jurow Kleiman & Gabriel Scheffler, *The Future of Anti-Poverty Legislation*, 112 *Geo. L. J.* (forthcoming 2023).

⁶² Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking*, *Unorthodox Rulemaking*, 115 *Colum. L. Rev.* 1789, 1808 (2015).

⁶³ See Steven M. Teles, *Kludgeocracy in America*, *Nat. Aff.* 98–103 (Fall 2013); Eric Lipton, *Special Interests Mobilize to Get Piece of Next Virus Relief Package*, *NY Times* (Jul. 19, 2020), www.nytimes.com/2020/07/19/us/politics/coronavirus-relief-lobbyists-special-interests.html.

⁶⁴ See, for example, Michael J. Teter, *Congressional Gridlock's Threat to Separation of Powers*, 2013 *Wis. L. Rev.* 1097, 1143 (2013).

positions on consequential matters of public policy, and thereby render it more difficult for voters to hold them accountable.⁶⁵ Leaving aside the question of whether this more general line of criticism is persuasive, we believe that automatic stabilizers should actually appeal to those who are concerned about excessive delegation.⁶⁶ When Congress enacts automatic stabilizers, it dictates how agencies must act and how programs must respond to future crises. This strict control contrasts with a status quo that, in some cases, gives broad authority to federal agencies to choose the best policy response during a crisis. In short, by choosing an automatic stabilizer, Congress decides ahead of time how safety net programs will respond to the next crisis, and in so doing serves to limit the scope of delegations to agencies.

C Responsiveness

Currently, the American safety net is insufficiently responsive to the needs of the American public. The Electoral College, state representation in the Senate, and gerrymandered districts in the House skew incentives and lead politicians to focus disproportionately on helping certain swing states or vulnerable members, while ignoring others. Politicized assignment to congressional committees, seniority, alliances with formal caucuses and informal voting blocs, and other legislature features confer unequal power on certain states' federal representatives.⁶⁷ Intransigent state policymakers hold up needed assistance or refuse federal support, undermining the federal government's intention to shore up the national economy.⁶⁸ Various features of the legislative process, particularly the filibuster, contribute to legislative gridlock and prevent Congress from addressing major social problems on which there is a broad public consensus.

The poor and middle class have less influence on policy outcomes than the rich.⁶⁹ Strengthening automatic stabilizers would enable a more equitable, less politicized distribution of benefits to the people and places that need it most and make the safety net more responsive to the needs and circumstances of the electorate as a whole.

V CONCLUSION

The COVID-19 pandemic revealed significant weaknesses in the US social safety net. Despite the scale of the federal government's response, Congress failed to

⁶⁵ See, for example, David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (1993).

⁶⁶ For a defense of broad delegations to agencies, see Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 *J. L. Econ. Org.* 81 (1985).

⁶⁷ See Susan Milligan, *Playing Games with a Disaster*, *US News & World Rep.* (Sept. 30, 2016), www.usnews.com/news/articles/2016-09-30/the-partisan-politics-of-disaster-relief.

⁶⁸ See, for example, Grant Schulte, *Ricketts Stands by Decision to Discontinue Emergency SNAP*, *AP* (Sept. 24, 2020), <https://apnews.com/article/virus-outbreak-pete-ricketts-omaha-nebraska-archive-dfb8da0712f6f4cb9307412049ab29a2>.

⁶⁹ See, generally, Martin Gilens, *Affluence and Influence* (2014).

provide adequate assistance to many Americans as it channeled benefits through existing safety net programs. Moreover, although Congress acted relatively quickly by its standards, relief came too late – and ended too early – for many Americans.

This experience underscores the need to legislate a more responsive safety net. During a major crisis, relief should be immediate, inclusive, targeted, and sustained. To achieve these goals, policymakers should strengthen the stabilizing effects of existing safety net programs such as the EITC, UI, SNAP, and Medicaid. Doing so would serve to protect vulnerable populations during economic downturns and to mitigate the downturns themselves. In addition, we defend strengthening automatic stabilizers on democratic grounds, arguing that doing so would increase transparency, limit delegation, and heighten responsiveness.

The COVID-19 pandemic will not be the last major crisis that necessitates temporarily strengthening the safety net. Rather than waiting until the next crisis, Congress should act now to make the safety net more secure and responsive for the future.