

## LEGISLATING FOR GOOD TIMES AND BAD

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*Congress tends to move in fits and starts. Major policy changes are often followed by periods of legislative stasis. This means that, even as circumstances change and policies may no longer be appropriate in the new conditions, Congress may not respond. This is the problem of “policy drift.”*

*The academic literature has recognized this challenge and largely focused on one particular type of solution employed by Congress: empowerment of other institutions, in particular administrative agencies or the courts to more quickly adapt policy. However, this view is far too limited. Congress can keep such authority in its hands and still address policy drift, sometimes even more effectively.*

*This article is the first to comprehensively consider the tools available to Congress. It particularly focuses on “automatic-adjustment mechanisms”—mechanisms that are pre-set by Congress and automatically adapt policy to new circumstances. Such mechanisms are among the most promising ways for addressing policy drift—since they respond quickly and predictably. For instance, such mechanisms could automatically diversify risk across generations in Social Security; cut unemployment in a recession; and reduce the danger that a carbon tax or cap-and-trade system would result in carbon prices that are either too high or too low.*

*Still, automatic-adjustment mechanisms have their limits, since they come with little room for discretion, and so there are roles for other tools as well—such as alarm-bells for Congress, fast-track rules for congressional consideration, and the traditional tools of empowering agencies or courts. In combination, these tools—and perhaps especially automatic-adjustment mechanisms—can help Congress legislate for good times and bad.*

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## INTRODUCTION

In 1983, Social Security faced a financing crisis,<sup>1</sup> and policymakers responded with a deal meant to keep Social Security solvent for at least seventy-five years.<sup>2</sup> Or, that was the idea. Today, the picture has changed. A combination of factors has meant that the original projections done at the time of the deal have proven too optimistic. If the original projections had held, the system should be solvent for at least another forty years given the reforms that were enacted several decades ago. Instead, Social Security is now expected to be solvent for less than twenty more years.<sup>3</sup> And Congress has not acted in response.<sup>4</sup>

Today, the United States and the world face another crisis—that of climate change.<sup>5</sup> One of the primary tools to address that crisis is to put a price on the carbon emissions that are contributing to global warming.<sup>6</sup> However, if

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1 See BOARD OF TRUSTEES OF THE FEDERAL OLD AGE AND SURVIVORS INSURANCE AND FEDERAL DISABILITY INSURANCE TRUST FUNDS, 1982 ANNUAL REPORT 3 (1982) (describing how the OASI trust fund, the trust fund financing Social Security retirement benefits, was projected to become insolvent by July 1983).

2 For an overview of the 1983 Social Security deal, see generally John A. Svahn & Mary Ross, *The Social Security Amendments of 1983: Legislative History and Summary of Provisions*, SOC. SECURITY BULL., July 1983, at 3. After the deal, the 1983 Social Security Trustees Report projected that the Social Security Trust Funds would remain solvent for at least 75 years under three of the four scenarios given. In the most pessimistic scenario, the Trust Funds were projected to become insolvent in the 2010s. See BOARD OF TRUSTEES OF THE FEDERAL OLD AGE AND SURVIVORS INSURANCE AND FEDERAL DISABILITY INSURANCE TRUST FUNDS, 1983 ANNUAL REPORT 2 (1983). In disaggregating the changes in its projections since 1983, the Social Security Administration finds that roughly all of the deterioration for the same projection period used as of 1983 comes from economic assumptions and disability rates. See JASON SCHULTZ & SEUNG H. AN, SOCIAL SECURITY ADMINISTRATION, DISAGGREGATION OF THE LONG-RANGE ACTUARIAL BALANCE FOR THE OLD AGE, SURVIVORS, AND DISABILITY INSURANCE PROGRAM SINCE 1983, 3 tbl.1 (2015).

3 The Social Security Trustees now project that the Trust Fund will become insolvent as of 2034, BOARD OF TRUSTEES OF THE FEDERAL OLD AGE AND SURVIVORS INSURANCE AND FEDERAL DISABILITY INSURANCE TRUST FUNDS, 2015 ANNUAL REPORT 3-4 (2015) [hereinafter 2015 SOCIAL SECURITY TRUSTEES REPORT], and the Congressional Budget Office (CBO) projects that insolvency will occur in 2029, CONG. BUDGET OFFICE [CBO], CBO'S 2015 LONG-TERM PROJECTIONS FOR SOCIAL SECURITY: ADDITIONAL INFORMATION 2 (2015).

4 See Schultz & An, *supra* note 2, at 3 (showing that legislative and regulatory measures taken since 1983 have had very little effect on the long-term Social Security balance).

5 There is of course an extensive literature on the causes and effects of climate change. For a report representing the consensus assessment of scientists around the world and describing the considerable risks associated with climate change, see generally INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: SYNTHESIS REPORT (2014).

6 As with reports on climate change, there is no shortage of reports and groups advocating putting a price on carbon. To quote the statement of a coalition of numerous countries and major businesses: "Pricing carbon is inevitable if we are to produce a package of effective and cost-efficient policies to support scaled up mitigation." *Statement of the Carbon Pricing Leadership Coalition* (June 13, 2014), <http://www.worldbank.org/en/programs/pricing-carbon#3>.

Congress does eventually do this, it will act in the face of considerable uncertainty, much like Congress did when it closed the Social Security shortfall some three decades ago.<sup>7</sup> And, there is a real danger that, if later adjustments to a carbon pricing system were left entirely to Congress under normal legislative rules, Congress would fail to act as new information is received. That could lead to significant costs as the price of carbon could be either too high or too low based on the latest information.<sup>8</sup>

The experience in Social Security and the prospect of a similar problem in a carbon pricing system are representative of a broader challenge—the challenge of legislating in the face of uncertainty. This might not be such a problem if Congress could respond adroitly to unexpected, if still probable, circumstances with new legislation. However, considerable experience suggests that this is not the case in many circumstances. Congress tends to move in fits and starts.<sup>9</sup> Major policy changes are often followed by periods of legislative stasis. This means that, even as conditions change that justify updating and fine-tuning policies, Congress may not respond via new legislation.

The problem can be called one of “policy drift.” Specifically, policy drift is 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.<sup>10</sup>

<sup>7</sup> There is both uncertainty as to the social cost of carbon—the cost that the use of carbon imposes on the society—and the cost to society of abating carbon emissions. Both of these uncertain costs are relevant in deciding how much to adjust the price of carbon. On the uncertainty of the social cost of carbon, see generally David Anthoff & Richard S. J. Toll, *The Uncertainty About the Social Cost of Carbon: A Decomposition Analysis Using Fund*, 117 CLIMATIC CHANGE 515 (2013). On the uncertainty of the cost of abating carbon emissions, see generally CAROLYN FISCHER & RICHARD D. MORGENSTERN, RESOURCES FOR THE FUTURE, CARBON ABATEMENT COSTS: WHY THE WIDE RANGE OF ESTIMATES? (2005).

<sup>8</sup> For a discussion of the challenge of uncertainty in setting the price of carbon as well as other environmental policies, see generally Robert S. Pindyck, *Uncertainty in Environmental Economics*, 1 REV. OF ENVTL. ECON. AND POL’Y 45 (2007).

<sup>9</sup> For a discussion of the evidence that Congress moves in fits and starts and does not respond proportionately to new information, see *infra* notes 26-35 and accompanying text.

<sup>10</sup> This is very similar to the concept of policy drift described by the political scientists Jacob Hacker and Paul Pierson. They define drift as:

[t]he politically driven failure of public policies to adapt to the shifting realities of a dynamic economy and society. Drift is not the same as simple inaction. Rather, it occurs when the effects of public policies change substantially due to shifts in the surrounding economic or social context and then, *despite the recognition of alternatives*, policy makers fail to update policies *due to pressure from intense minority interests or political actors exploiting veto points in the political process*. Jacob S. Hacker and Paul Pierson, *Winner-Take-All-Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States*, 38 POL. & SOC. 152, 170 (2010).

Notably—and like here—Hacker and Pierson explicitly describe this drift as

This article describes various forces that can contribute to policy drift. This includes Congress's limited agenda-space and problems reaching negotiated agreements in a system with multiple veto gates and increasingly polarized parties.<sup>11</sup>

The academic literature has recognized this problem and largely focused on one particular type of solution employed by Congress: empowerment of other institutions, especially administrative agencies<sup>12</sup> and, sometimes, the courts.<sup>13</sup> By empowering them, Congress can take policy decisions out of its hands and use the potentially greater responsiveness of agencies and courts to adapt policy to new circumstances. To agencies, Congress can formally delegate legislative authority; to courts, Congress can leave ambiguity in the statutes it writes, allowing the courts to adapt their interpretation to new information (using an interpretive style that is often called "dynamic statutory

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"nonmajoritarian." However, in terms of the sources of drift, they focus on drift caused by intense minority interests and, especially, the best off in the country wanting it that way. This article recognizes those sources of drift but also defines drift as encompassing those situations where policy does not get updated simply because it does not make it onto a crowded agenda.

This concept of policy drift can be contrasted with at least two other ways that policy can essentially drift. The political science literature has also described a process of "bureaucratic drift" and "legislative drift." These concepts are fundamentally concerned with the ability of agencies to drift away from the policies that the enacting Congress may have actually wanted them to pursue (bureaucratic drift) and how even a check by later Congresses may not maintain the original political deal due to changes in that body (legislative drift). The fundamental concerns here are ones of democratic accountability and sustaining the deals made by an enacting legislature. See, e.g., Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 GEORGETOWN L.J. 671, 671-73 (1991) (defining these terms). By contrast, this article is primarily concerned with the effect of evolving information and how Congress and other bodies may not appropriately adapt policy to such information.

11 See *infra* notes 37-46 and accompanying text.

12 For examples of the legal and political science literature describing how the flexibility of agencies to adapt to changing circumstances is a key justification for delegation to them, see Steven Callander & Keith Krehbiel, *Gridlock and Delegation in a Changing World*, 58 AM. J. POL. SCI. 819 (2014) (detailing how delegation can be used to overcome the problems associated with legislative gridlock); David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 954 (1999) (describing how "one of the primary reasons for delegating" is "the ability of agencies to respond flexibly to changed conditions"); Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 2 (2014) (describing how agencies adapt policy in areas of particular congressional dysfunction and where Congress fails to adapt the old statutory schemes itself); Jeffrey Shuren, *The Modern Regulatory Administrative State: A Response to Changing Circumstances*, 38 HARV. J. ON LEGIS. 291 (2001) (emphasizing that one of the main purposes of the administrative state is to respond flexibly to changed conditions).

13 The idea of courts acting to update statutory schemes to new information in ways that Congress cannot is at the core of an entire school of statutory interpretation. This is what William Eskridge has termed "dynamic statutory interpretation." See generally WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994).

interpretation”<sup>14</sup>). To be clear, this is certainly not the only reason for Congress to empower these institutions. Agencies, for instance, offer expertise—another classic reason for Congress to delegate authority. But, rapidity of response is a frequently cited reason.<sup>15</sup>

However, much of the literature’s view is far too limited. Congress has tools at its disposal other than empowerment of agencies or courts for addressing the problem of policy drift. In particular, these additional tools fall into three categories: (1) Automatic adjustments written into the legislation itself that adapts policy to new circumstances (“automatic-adjustment mechanisms”), with indexing being an important variety of this; (2) Alarms written into legislation meant to prompt action by Congress (“alarm-bell mechanisms”), with expiration of the legislation being a prominent example; (3) Changes in congressional rules to make legislation easier to pass. In each of these three categories, Congress remains the central player, even as Congress addresses the problem of policy drift.

Some of these other tools have received some attention of their own in the literature, especially expiration of legislation.<sup>16</sup> But, these tools have not been comprehensively described and evaluated as a way for Congress to address policy drift. This is the first article to do so and to emphasize the importance of these alternatives to empowering either administrative agencies or courts. This is not to say that empowering agencies or the courts are necessarily poor approaches for addressing policy drift, but it is to say that there are important—and, in some cases, superior—alternatives to address the problem.

This article focuses on what I call “automatic-adjustment mechanisms.” Such mechanisms—pre-designed by Congress when legislation is first enacted—are particularly effective ways of addressing drift. That is because the mechanisms can respond quickly and predictably to new information—often, more quickly and more predictably than relying on the later discretion of some combination of Congress, agencies, or courts.

To take the examples of Social Security and carbon pricing again: This article recommends a mechanism that would automatically adjust Social Security parameters—both on the benefit side and on the revenue side—for changes in Social Security’s projected balance. The result would be to better

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14 *Id.*

15 *See supra* note 12.

16 *See, e.g.*, Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 249 (2007) (“[W]ithin certain well-specified policy domains, temporary legislation should be embraced as the rule rather than eschewed even as an exception.”); Rebecca Kysar, *Lasting Legislation*, 159 U. Pa. L. Rev. 1007 (2011) (arguing against the use of temporary legislation especially in the context of tax legislation); George K. Yin, *Temporary Effect Legislation, Political Accountability, and Fiscal Restraint*, 84 N.Y.U. L. REV. 174, 187-94 (2009) (arguing for temporary legislation as a way of promoting political accountability and fiscal restraint).

spread risks of unexpected shocks to the Social Security system across generations, so that the risk to any given generation of changes in factors like productivity or longevity would be minimized.<sup>17</sup> In the context of carbon pricing, the article discusses mechanisms that would, for instance, lead to automatic issuance of additional carbon permits in a cap-and-trade system if prices turn out to be higher than expected or the opposite if prices are lower, or automatic adjustment of the rate of a carbon tax depending on the amount of carbon consumption.<sup>18</sup>

The article also explores the limits of such automatic-adjustment mechanisms. The lack of discretion—which allows for quick and predictable adjustments—is a double-edged sword. And, there are areas where discretion is needed. For instance, in the context of carbon pricing, there are types of information that simply cannot be processed automatically—like new research on the sensitivity of global temperatures to carbon emissions. This type of information cannot be readily incorporated into an automatic-adjustment, and so reducing policy drift requires another one of the tools, whether that be an alarm for Congress, fast-track rules to facilitate legislative updates, or the classic delegation of authority to an agency.

This article's contribution is meant to be both descriptive and normative. It is descriptive as it sets out categories of tools above and beyond empowering administrative agencies or courts for addressing the problem of policy drift. This is a significant step forward in understanding the family of tools that Congress has at its disposal. It is normative in that it considers the trade-offs among these tools and recommends that these tools and especially automatic-adjustment mechanisms be deployed more often than they are now.

Part I begins by defining the problem of policy drift and considers how the legal literature has focused on empowering administrative agencies and courts as a response. Part II sets out alternative tools—that keep authority in the hands of Congress—for addressing policy drift, compares them with each other, and suggests how they could be better employed in policymaking. Part III illustrates more concretely how automatic-adjustment mechanisms in particular can be employed as well as the limits of such mechanisms by focusing on examples in three policy areas, two of which have already been mentioned: Social Security, countercyclical policy, and carbon pricing. Finally, Part IV concludes by considering the prospects for better addressing policy drift than we do now and lays out questions for further research.

## I. POLICY DRIFT, AGENCIES, AND COURTS

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<sup>17</sup> See *infra* Part III.A.

<sup>18</sup> See *infra* Part III.C.

The problem of policy drift—that of policies remaining in place even as evolving conditions justify updating and fine-tuning those policies—arises because of a combination of at least two factors.<sup>19</sup> One factor is uncertainty in policymaking. A second factor is an inability of lawmakers to respond quickly to new information. This problem has been recognized by Congress itself and the legal literature, and that legal literature has largely focused on one way by which Congress can respond—namely, empowering other institutions, especially agencies and, sometimes, courts.<sup>20</sup>

### A. Uncertainty

At the time many policies are being crafted, there is often uncertainty as to the any number of relevant factors—factors that affect the appropriate policy to adopt.

For instance, and focusing on the three specific policy areas to which this article returns in Part III: Congress continues to face considerable uncertainty in legislating fixes for Social Security. While the Social Security Trustees project that the system will be insolvent in 2034, they also offer alternative scenarios in which the system becomes insolvent as soon as 2028 and another scenario where it does not become insolvent at all.<sup>21</sup> In the context of countercyclical policy, Congress must set tax and spending levels for a given point in time often well before it knows where the country will be in its economic cycle.<sup>22</sup> And, when it comes to carbon pricing, there is uncertainty both as to the cost of reducing carbon pollution and the cost to society of that pollution.<sup>23</sup> Thus, whether in Social Security, countercyclical policy, carbon pricing, or many other areas, there is vast uncertainty as to what the future holds, even as policy must be developed that may last into the uncertain future.

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<sup>19</sup> See *supra* note 10 and accompanying text for further discussion of the definition of policy drift.

<sup>20</sup> See *infra* Part I.C.

<sup>21</sup> These insolvency dates assume that the Old Age and Survivors Insurance Trust Fund and the Disability Insurance Trust Fund are eventually combined. 2015 SOCIAL SECURITY TRUSTEES REPORT, *supra* note 3, at 64-65. Or, to put this in terms of the tax increase or benefit cut needed to maintain solvency over the next 75-years, the Trustees offer scenarios that range from no adjustment being needed, to an intermediate scenario with an adjustment needed of 2.7 percent of taxable payroll, to a high-cost scenario with an adjustment needed of 6.3 percent of taxable payroll. *Id.* at 71 tbl.IV.B5.

<sup>22</sup> As Larry Summers has noted, “no postwar recession has been predicted a year in advance by the Fed, the White House or the consensus forecast [of private sector economists].” Lawrence Summers, *Preparing for the Next Recession*, WASH. POST (Dec. 6, 2015), [https://www.washingtonpost.com/opinions/preparing-for-the-next-recession/2015/12/06/7c787184-9c23-11e5-a3c5-c77f2cc5a43c\\_story.html](https://www.washingtonpost.com/opinions/preparing-for-the-next-recession/2015/12/06/7c787184-9c23-11e5-a3c5-c77f2cc5a43c_story.html).

<sup>23</sup> See *supra* notes 7-8.



Some would differentiate among the types of uncertainty in policymaking. For instance, there is often a distinction drawn between “risk” and “uncertainty,” based on the work of Frank Knight.<sup>24</sup> According to this view, risk involves a range of possible outcomes where the probabilities of the possible outcomes are known. By contrast, uncertainty involves a range of possible outcomes where the probabilities of those outcomes are unknown or the possible outcomes are themselves unknown.<sup>25</sup> This article will refer to both categories as “uncertainty” since they raise the same key challenge for policymaking—namely, the possibility that policies enacted now will be operating in ways that are unexpected.

### **B. Lack of Legislative Response to New Information**

Congress tends to move in fits and starts. Congress will change policy significantly and follow that moment of major policy change with a period of legislative stasis during which it is relatively insensitive to new information. The pattern of legislative action followed by stasis has been chronicled by a number of political scientists, perhaps most prominently in the recent literature by Frank Baumgartner and Bryan Jones.<sup>26</sup> They describe a phenomenon of “punctuated equilibrium” in which there is “a pattern of extreme stability and occasional punctuations, rather than either smooth adjustment processes or gridlock forever.”<sup>27</sup>

As evidence of this pattern, Baumgartner and Jones focus on changes in the federal budget. They describe how “[i]ncrementalism and dramatic budget change coexist.”<sup>28</sup> Much budgetary change is small from year to year, but “a sizable number of changes are abrupt and distinctly non-incremental.”<sup>29</sup> Figure 1 helps to illustrate the phenomenon, showing the distribution of real annual percent change in budget authority by subfunction of the budget.<sup>30</sup>

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24 See FRANK H. KNIGHT, RISK, UNCERTAINTY, AND PROFIT 19-20 (1921) (differentiating risk and uncertainty).

25 *Id.*

26 See generally FRANK BAUMGARTNER AND BRYAN JONES, THE POLITICS OF ATTENTION: HOW GOVERNMENT PRIORITIZES PROBLEMS (2005).

27 *Id.* at 5.

28 *Id.* at 112.

29 *Id.*

30 Following the methodology employed by Baumgartner and Jones, this figure excludes certain subfunctions where changes in funding levels are unlikely to reflect programmatic change. In particular, it excludes change in net interest. It also excludes changes in subfunctions where there are large amounts of offsets to spending that create an erratic record but probably do not reflect programmatic change like subfunctions for undistributed offsetting receipts, deposit insurance, and mortgage credit.

While much of the change is incremental—with the annual change in funding tending to be slightly positive and small (the distribution is bunched there)—there are also a substantial number of changes that are large, or non-incremental.<sup>31</sup> In fact, some 40 percent of the real annual percent changes in subfunctions were (positive or negative) changes of over 10 percent in the years from 1947-2013.<sup>32</sup> Importantly, Baumgartner and Jones note that this is not simply a function of the initiation of new programs. As they explain, significant change in budget programs “appear[s] to be a constant part of the process; there is always the chance that a given area of policy will become the object of renewed attention and fundamental re-thinking.”<sup>33</sup>

Thus, as an empirical matter, there is substantial evidence of periods of stability combined with moments of major policy movement.<sup>34</sup> What causes this pattern is less clear. As one scholar observes, “[t]here is probably no single explanation of the discontinuous fashion in which major policy change often occurs.”<sup>35</sup>

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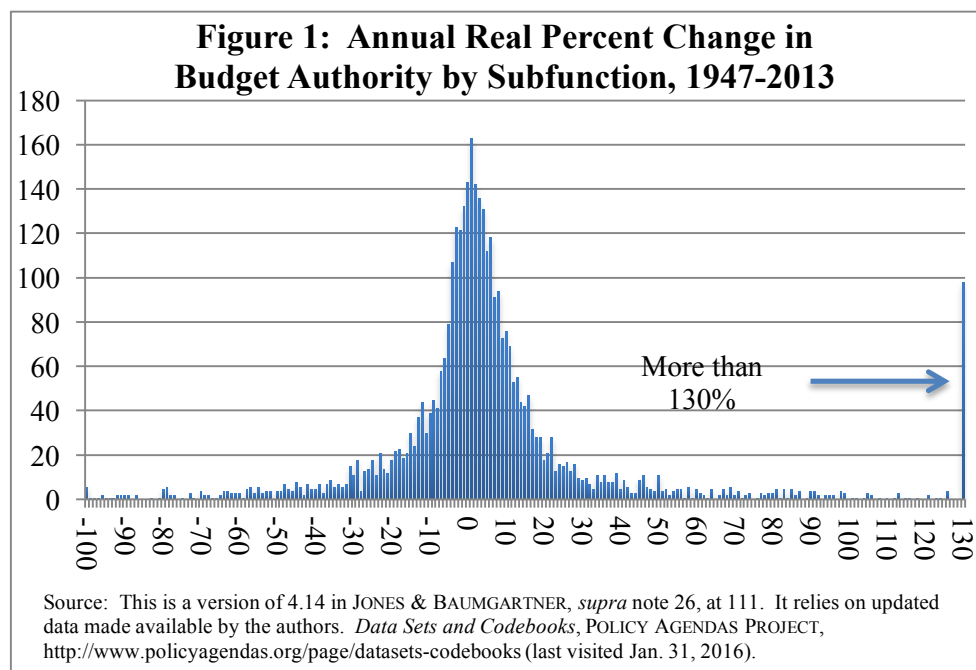
31 In technical parlance, the distribution is “leptokurtic”—with a concentration of policy changes in the “incremental” range—and then a small but significant number falling outside of that. This is as compared to a “normal” distribution.

32 Notably, this same pattern—of mostly incremental changes with a small but significant number of larger ones—remains even if the changes are weighted by the size of the budget subfunction. In that case, about one-quarter of annual budgetary change in the subfunctions exceeds 10 percent (either positive or negative). Author’s calculations based on updated data made available online by Baumgartner and Jones. *Data Sets and Codebooks*, POLICY AGENDAS PROJECT, <http://www.policyagendas.org/page/datasets-codebooks> (last visited Jan. 31, 2016).

33 *Id.* at 112.

34 There is also evidence of policy change being punctuated outside the United States. For instance, Peter John and Shaun Bevan chronicle this pattern of policy punctuation in the United Kingdom and describe the types of forces that led to these punctuations. See generally Peter John & Shaun Bevan, *What Are Policy Punctuations? Large Changes in the Legislative Agenda of the UK Government, 1911-2008*, 40 POL’Y STUD. J. 89 (2012). However, the claim that policy change occurs in this way has not gone unchallenged. For instance, Michael Givel describes a few different areas of policy where there are no apparent punctuations. See generally Michael Givel, *The Evolution of the Theoretical Foundations of Punctuated Equilibrium Theory in Public Policy*, 27 Rev. Pol’y Res. 187 (2010).

35 Robert H. Nelson, *Review of: Punctuated Equilibrium and the Dynamics of U.S. Environmental Policy*, Edited by Robert Repetto, THE INDEP. REV. (2008) (reviewing PUNCTUATED EQUILIBRIUM AND THE DYNAMICS OF U.S. ENVIRONMENTAL POLICY, (Robert Repetto, ed., 2006), available at <http://www.independent.org/publications/tir/article.asp?a=683>). See also William A. Brock, *Tipping Points, Abrupt Opinion Changes, and Punctuated Policy Change*, in PUNCTUATED EQUILIBRIUM AND THE DYNAMICS OF U.S. ENVIRONMENTAL POLICY 47, 49 (Robert Repetto ed., 2006) (“Natural and social scientists have worked hard to understand dynamic processes that produce punctuated equilibrium behavior. There are many kinds of models that do so....”).



One possibility could be that the new information available to policymakers is shaped like the distribution of budgetary changes. In that case, the budgetary pattern shown in Figure 1 would not be evidence of Congress failing to react proportionately to new information but rather that the distribution of new information is shaped in the same way. The problem with this explanation is that, so long as errors in previous information are random, the distribution of that information should be more evenly distributed than the budgetary changes shown in Figure 1.<sup>36</sup>

But, why would Congress not react proportionately to new information?

One theory focuses on Congress's limited agenda.<sup>37</sup> According to this theory, policymakers have limited capacity as individuals and Congress has

<sup>36</sup> In technical parlance, the distribution of new information should be normal, rather than leptokurtic. See Baumgartner and Jones, *supra* note 26, at 156-62. It is quite likely that the errors of *particular* indicators relevant for budget decision-making, such as information on the need for military action or on a natural disaster, would not be normal. These will be characterized by significant punctuations, such as national security emergencies or particular disasters. However, so long as these indicators are not correlated with one another and there are a sufficient number of them, the errors in information relevant to the budget would, on the whole, still be approximately normally distributed. Baumgartner and Jones, in fact, show this to be the case, even with as few as five non-correlated informational indices, each of which has errors that are not normally distributed—and then simulating the distribution of errors taking a random draw from each index 10,000 times. *Id.* at 132-135.

<sup>37</sup> In their work, Baumgartner and Jones largely focus on Congress's limited agenda-space to explain the pattern of punctuated equilibrium. For instance, they say:

Decision makers, like all people, often ignore important changes until they become

limited capacity as an institution to process information and then translate this into policy adjustments. The result is that new information is not processed all at once and in proportion to the content of that information. Instead, the information only receives attention in the legislative process—and sometimes is given disproportionate weight—if the issue actually gets on the congressional agenda. There may be a threshold below which informational signals may not break through. But, there may also be factors beyond just a pure threshold effect in terms of what gets on the agenda, including the extent of interest group mobilization and who happens to hold political power at a given point in time.<sup>38</sup>

Other models focus more on the multiple veto gates in U.S. lawmaking and the super-majority rules in the Senate. In combination, these tend to preference the law on the books—and produce discontinuous policy change.<sup>39</sup> The system’s multiple veto gates—in each of the two houses plus at the executive level—along with the super-majority voting rules in the Senate produce a legislative process that is less sensitive to new information than would be the case with fewer veto gates and less restrictive voting rules. This is because, if any of the players with veto power prefer the law on the books to alternatives to which the other relevant parties would agree, the existing law will be maintained. In that case, policy is in what political scientists often term to be the “gridlock zone” or “gridlock interval”—where, based on underlying preferences, there are no alternatives to which all of the policymakers controlling the veto gates can agree.<sup>40</sup> Notably, this means that even majority coalitions frequently fail to enact legislative changes.<sup>41</sup>

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severe or until policy entrepreneurs with an interest in the matter highlight such changes. The fact that decision makers filter signals through their attentiveness, assimilate information in a biased manner, and generally act as bounded rationalists, means that they cannot be expected to respond proportionately to the strengths of incoming informational signals. *Id.* at 7-8.

38 *Id.*

39 *See, e.g.,* KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING 47 (1998) (describing a theory of how legislative policy gets set given the multiple veto gates in the federal government and concluding that his theory explains “why gridlock is common but not constant...[and], when gridlock is broken, it is broken by large, bipartisan coalitions.”). Baumgartner and Jones also note the importance of the institutional set up in the United States in generating a pattern of punctuated equilibrium, though they emphasize the interaction between this institutional set up and the naturally limited agenda of any policymaking structure. *See* Baumgartner & Jones, *supra* note 26, at 172-174 (“Considerable friction would exist even if institutions of government were informationally efficient, because American political institutions are not designed to be fully responsive. Supermajorities in Congress, Presidential vetoes, separation of powers, and federalism all combine to produce a purposeful status-quo bias in our institutions.”)

40 KREHBIEL, *supra* note 39, at 38.

41 *See id.* (describing how “within the gridlock interval *losing* coalitions are typically *larger* than bare-majority sized,” meaning that majoritarian coalitions often fail to successfully legislate given the system’s multiple veto gates).

Other theories focus on how strategic positioning can lead to failures in negotiation—where, based on underlying preferences, legislators might actually prefer alternative policies but do not get them enacted.<sup>42</sup> There is an interaction between this and the multiple veto gates, since coordinating negotiation becomes more challenging with more players involved. Failures in negotiation can happen as the different sides take aggressive negotiating postures and, in the hopes of reaching a deal more to their liking, end up failing to reach any deal at all.<sup>43</sup>

Further, others have described how increased polarization in the American political system can make negotiations even more challenging and decrease the chances of compromise deals to update policy—again, giving preference to the laws already on the books.<sup>44</sup> The polarization can increase the size of the gridlock zones, especially if there is divided government.<sup>45</sup> Further, it can worsen the kinds strategic positioning that lead to negotiating failure. For instance, political scientists have described how political leaders have incentives to engage in “strategic disagreement”—where disagreement is driven not just by differences in policy preferences but also a desire to simply differentiate from the other party.<sup>46</sup> In such an environment, policymakers may only take legislative action when the costs of the existing laws differing from their underlying preferences outweigh the political gain from simply appearing to disagree with one another.

What is key here—irrespective of the exact theory—is that policy can drift as the world turns out to be different than at the time of legislation, and there is not a proportional response from Congress to new information.

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42 See, e.g., Cathie Jo Martin, *Negotiating Political Agreements*, in *NEGOTIATING AGREEMENT IN POLITICS* 1, 3 (Jane Mansbridge & Cathie Jo Martin eds., 2013) (“Individuals often fail to agree to resolutions that would leave everyone better off in part because the human brain falls prey to negotiation myopia, a constellation of cognitive, emotional, and strategic mistakes that stand in the way of achieving agreement and mutual gains.”)

43 *Id.*

44 See, e.g., Michael Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in *NEGOTIATING AGREEMENT IN POLITICS* 19, 41 (Cathie Jo Martin and Jane Mansbridge eds., 2013) (“The most direct effect of polarization induced gridlock is that public policy does not adjust to changing economic and demographic.”).

45 *Id.* at 37 (“The predicted consequences of polarization in this environment [of divided government] are not benign. Increased policy differences shrink the set of compromises that both parties are willing to entertain.”)

46 See JOHN GILMOUR, *STRATEGIC DISAGREEMENT: STALEMATE IN AMERICAN POLITICS* 25 (1995) (“Politicians routinely exhibit behavior that in normal bargaining situations would be bizarre.... The explanation for apparently perverse bargaining is that politicians often prefer disagreement to agreement, believing that the compromises necessary to reach an agreement may be more politically damaging than no agreement at all.”) See also Barber & Nolan McCarty, *supra* note 44, at 35 (“Such behavior often results in the appearance of a level of polarization that exceeds the actual policy differences between the parties.”).

### C. If Congress Can't Do It, Agencies and Courts (Sometimes) Can

The problem of policy drift is recognized in the legal literature, even if it generally has not gone by that particular moniker. That literature has largely focused on one type of response for Congress: empowering other institutions as a way to make policy more adaptive. Specifically, the literature describes how agencies can potentially adapt policy in ways that Congress could not, and, to a lesser degree, how courts could do the same. Thus, it is a literature very much focused on how Congress can shift authority from itself (or other institutions could take authority for themselves) as a way to address policy drift.

#### 1. Delegation to Agencies

Delegation of legislative authority from Congress to agencies is “a now-foundational governmental practice.”<sup>47</sup> In many areas of policy, Congress has delegated substantial legislative powers to administrative agencies. And, while a range of justifications have been offered for delegation, a key one is that agencies may be better able to respond to new information than can Congress. As Jeffrey Shuren, a top official at the Food and Drug Administration once described, “agencies are the governmental entities best equipped to respond to changing circumstances. Indeed, the modern basis for regulatory administrative agencies is to provide a more effective mechanism for the federal government to respond to changing conditions.”<sup>48</sup> To put this differently, agencies may be able to adjust policies more in response to the receipt of new information than Congress can, and agencies can as a result stand as a bulwark against policy drift. To be clear, this vision does not always work out in practice. Frequently, Congress will match its grant of authority to agencies with various checks on those agencies—checks that can sometimes slow the agency policymaking process to a crawl.<sup>49</sup>

Still, the potential of agency delegation to reduce drift has led to calls for broad delegation where Congress has yet to do so. For instance, as compared to other areas of policy, there has been relatively limited delegation of the

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47 David J. Barron and Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 266 (2013).

48 Shuren, *supra* note 12, at 292. For additional examples in the literature of scholars justifying delegation based on the ability of agencies to respond to changed conditions, see *supra* note 12.

49 For more on this, see *infra* notes 115-117 and accompanying text.

taxing power to an administrative agency.<sup>50</sup> The Treasury does have considerable authority when it comes to implementing particular parts of the code, especially when it comes to further defining what should be in the tax base, but decisions about tax rates and the amount of tax credits, for instance, remain wholly in the hands of Congress.<sup>51</sup> The legal scholars James Hines and Kyle Logue have called for greater delegation of tax as a result. They give a variety of justifications, but chief among them is faster response to changes in economic conditions. In calling for authority over tax rates to be delegated to the Federal Reserve or a similar body, Hines and Logue explain that “an agency that concentrates on economic policy is better positioned than Congress to react quickly and adroitly to economic developments.”<sup>52</sup>

At one point, Hines and Logue briefly recognize that there may be alternatives to delegation to an administrative agency—like setting up automatic triggers that would adjust tax rates depending on the economic circumstances—but that gets largely dismissed as insufficiently flexible relative to the discretion of an agency,<sup>53</sup> and, in line with much of the legal literature, delegation is seen as the leading way for addressing the problem of policy drift. However, as this article later explains, automatic-adjustments like these actually offer considerable benefits generally<sup>54</sup> and in the countercyclical context specifically<sup>55</sup>—benefits that the literature too often ignores.

## 2. *Judicial Interpretation*

While delegation to administrative agencies is more widely accepted as a solution to policy drift, many legal scholars have also looked to the interpretive power of courts as another way approach to reducing policy drift.

This basic idea motivates an important school of statutory interpretation. William Eskridge terms this “dynamic statutory interpretation.”<sup>56</sup> This is a process by which judicial interpretation of statutes is informed by changing circumstances. As Eskridge puts it, “[d]ynamic statutory interpretation is inevitable because of the structure of policy-making in the United States. Because it is hard to enact statutes, the ones that are enacted have to last a long

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50 See James R. Hines, Jr. & Kyle D. Logue, *Delegating Tax*, 114 MICH. L. REV. 235, 237 (2015) (“Congress rarely enacts tax statutes that set out broad tax policy principles and authorize the Treasury Department or some other regulatory agency to fill in the details.”)

51 *Id.* at 253.

52 *Id.* at 261.

53 *Id.* at 263-264.

54 See *infra* notes II.B.2.

55 See *infra* Part III.B.

56 See generally ESKRIDGE, *supra* note 13.

time. As they encounter unanticipated circumstances, the statutes are bound to change.”<sup>57</sup> Eskridge further explains that “the legislature will often speak on a specific question just once, leaving it to the judge (agent) to fill in the details and implement the statute in unforeseen situations over a long period of time.”<sup>58</sup> Or, in other words, the principal (here, Congress) is limited in its capacity to adapt directives to new circumstances and so the agent (here, the court) is charged with doing so.

Dynamic statutory interpretation has engendered its share of controversy, with some asking whether adapting policy to new circumstances is an appropriate role for courts.<sup>59</sup> Still, it is widely thought to actually capture the behavior of courts in a number of important policy areas.<sup>60</sup>

And, in an important sense, the legal literature here is in the same vein as that with regard to delegation. Specifically, the problem of policy drift is addressed by empowering institutions other than Congress. Congress cannot do enough to adapt policy to new circumstances, and so administrative agencies and the courts are seen as riding to the rescue.

#### **D. Is Policy Drift *Really* a Problem?**

This article is motivated by the idea that policy drift is a real problem in our legislative process, and it is certainly not alone in that contention. Others have argued this as well, often in motivating delegation to legislative agencies<sup>61</sup> but also more broadly.<sup>62</sup>

<sup>57</sup> *Id.* at 10.

<sup>58</sup> *Id.* at 125.

<sup>59</sup> See, e.g., Anthony D’Amato, *The Injustice of Dynamic Statutory Interpretation*, 64 U. OF CIN. L. REV. 911, 934 (1996) (“But most policies are good; after all, they’re our policies and we live in a democracy. So, I’ll rephrase the question: what’s wrong with deciding cases according to today’s perfectly good policies?”)

<sup>60</sup> Eskridge chronicles how this theory is reflected in the actual behavior of courts. ESKRIDGE, *supra* note 13, at 73-74, 82-105. Others have detailed how courts doing this in particular policy areas. For example, the judiciary has played a central role in the development of the country’s bankruptcy policy, updating that policy via their interpretation of the underlying statute for broad changes in the economy. See, e.g., Douglas G. Smith, *The Role of the Courts in Shaping American Bankruptcy Law: Review of Debt’s Dominion — A History of Bankruptcy Law in America*, 33 SETON HALL L. REV. 109, 110-111 (2003) (reviewing DAVID SKEEL, *DEBT’S DOMINION — A HISTORY OF BANKRUPTCY LAW IN AMERICA* (2001)(describing the central role of courts in the development of bankruptcy policy). In another example of this, Nancy Staudt has chronicled how courts adjust their conclusions in tax controversies depending on what the judiciary perceives to be the fiscal needs of the country in times of foreign policy crisis. See generally NANCY STAUDT, *THE JUDICIAL POWER OF THE PURSE: HOW COURTS FUND NATIONAL DEFENSE IN TIMES OF CRISIS* (2011).

<sup>61</sup> For numerous examples, see *supra* note 12.

<sup>62</sup> For example, the political scientists Jacob Hacker and Paul Pierson also define policy



Still, some might question the degree to which policy drift is a legislative failing. I have defined policy drift as when “policies remain 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.”<sup>63</sup> But, perhaps evolving conditions might not in fact justify updating and fine-tuning policies. This could be for at least three reasons: First, the lack of response to new information by Congress could reflect the actual preferences of not just a party controlling one veto gate but the majority of policymakers. Second, changing the law might involve fixed social costs—such as costs to those who had relied on the previous legal framework—that could outweigh the benefits of incorporating new information.<sup>64</sup> Finally, some might say that a traditional “conservative” approach would be to limit change and give priority to the status quo since that is what we know best.<sup>65</sup> So, based on this, there is a reasonable model to explain why people may prefer having policy move in “fits and starts” rather than in proportion to new information. In that case, policy may not be adrift in any way that is harmful; it may in fact reflect the considered preferences of people and their representatives.

First, it is important to dispose of this last objection—that allowing drift aligns with conservative values. This misunderstands the very nature of the policy drift that is the concern of this article. Drift *is* change. It reflects policy changing from what would otherwise be expected because of changes in conditions or new information. Sticking with static law on the books is not in any meaningful sense “conservative;” that would be a new and different policy. In fact, the adjustments often are intended to hold policy closer to what was expected when legislation was designed.

Second, there are a number of reasons to think that congressional inaction in the face of new, relevant information will *often*—though certainly not always—be undesirable. This is if that is judged in terms of the interests of most in the country.

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drift as a problem plaguing the legislative process though they focus on the context in which drift results from lobbying by intense minority interests and especially those at the top of the income spectrum. See Hacker & Pierson, *supra* note 10, at 170-71.

63 See *supra* note 10 and accompanying text.

64 See Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 793 (2002) (“Whatever one’s normative perspective, a legal system will incur costs simply in adjusting to the existence of a new legal norm.... Indeed, transition costs reflect a systemic phenomenon. Although in differing degrees, they will arise from legal change in all fields....”)

65 As Edmund Burke wrote: “All we can do, and that human wisdom can do, is to provide that the change shall proceed by insensible degrees.” 4 EDMUND BURKE, *Letter to Sir Hercules Langrishe, on the Subject of the Roman Catholics of Ireland*, in THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 241, 301 (1866).

As discussed, some of this inaction likely derives from natural limits on what can fit on to Congress's agenda at any given time.<sup>66</sup> And, to the extent the problem of a limited agenda-space can be overcome, it should be from a majoritarian perspective (so that policy can be affected in the interests of most in the country), and policymakers would probably be interested in doing so.

Some of the inaction likely also comes from failures in negotiation.<sup>67</sup> In that case, there is bargaining space available for a deal to be reached based on the underlying policy preferences of policymakers controlling the veto gates, but they still fail to arrive at a deal. That could be because each side takes aggressive negotiating positions or because policymakers controlling at least one veto gate thought it would rally their constituents to disagree simply to differentiate from the other side (rather than because of the underlying policy), which, as noted, is a strategy associated with greater polarization.<sup>68</sup> Again, to the extent tools can be used to overcome these negotiating failures, they should be. It would sometimes be in the collective interest of policymakers and, more often, their constituents to deploy such tools on a prospective basis, knowing that negotiations could fail to reach agreements in their mutual self-interest.

The above are all situations where policy drifts away from the underlying preferences of current policymakers and especially their constituents, which is relatively easy to define as undesirable. But, drift may be harmful even where this is not the case—even where the preference of policymakers controlling at least one veto gate is to stick with current law relative to other alternatives that could be achieved through negotiation. This can still be counter-majoritarian and in harmful ways. In this case, policy is in the “gridlock zone” as defined by the underlying preferences of policymakers.<sup>69</sup>

Even if policy is “drifting” in the gridlock zone as new information is received, it is possible that, on the whole, it would be better if policy could continue to update in that zone—if a party controlling one veto gate cannot stop policy from updating entirely. The updates could not shift policy outside the gridlock zone—at least such shifts would not be stable, since a coalition could be built to undo the adjustment. But, updates could shift policy as compared to where it would otherwise be *within* the gridlock zone. This article will show how automatic adjustments, for instance, can be added in Social Security solvency, countercyclical policy, or carbon pricing—and the point is that these adjustments could update the policy (say, the number of carbon permits available in the country) *within* the gridlock zone and in a way that Congress could not. And, especially as gridlock zones are widening due to

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66 See *supra* notes 37-38 and accompanying text.

67 See *supra* notes 42-46 and accompanying text.

68 *Id.*

69 See *supra* notes 39-41 and accompanying text.

party polarization and as it becomes harder to pass affirmative new policy,<sup>70</sup> it may be especially important to enact laws that can be so updated *within* the gridlock zone and *without* action by Congress. Further, enacting coalitions may see it in their interest to write laws that adjust in this way, knowing that future Congresses may be gridlocked in responding to new information. There is similar logic echoed in many of the arguments for delegation to administrative agencies.<sup>71</sup>

This is not to argue that policy should always adjust when new information is received. There is especially something to the idea that there could be fixed costs involved with such adjustments that should be weighed against the benefits to be derived. The point is that there is very good reason to think that the legislative system faces considerable challenges in making as many adjustments as is optimal in the face of new information.

## II. ADDRESSING POLICY DRIFT: ALTERNATIVES TO AGENCIES AND COURTS

The academic literature has a long-standing and largely limited focus on agencies and courts as the leading solutions to the problem of policy drift. To be clear, they are certainly useful tools in this regard. But, they are part of a family of tools that can be used in this fashion. And, importantly, the other tools do not involve Congress empowering other institutions. In many circumstances, Congress can keep the reigns in its hands, but still address the problem of policy drift effectively—and, in many cases, more effectively than through empowering agencies or courts.

As discussed above, these additional tools fall into three distinct categories: (1) Automatic-adjustment mechanisms; (2) Alarm-bell mechanisms; and (3) Changes in congressional rules to make legislation easier to pass.

These represent important alternatives to empowering agencies and courts. First, these tools and especially automatic-adjustment mechanisms may—in many circumstances—be more effective than agencies and courts at reducing policy drift. Second, they differ in other important ways from

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<sup>70</sup> See Barber & Nolan McCarty, *supra* note 44, at 38-39 (summarizing research suggesting that gridlock zones are widening due to increasing polarization and that legislative productivity is falling as a result).

<sup>71</sup> See, e.g., Barron & Rackoff, *supra* note 47, at 271 (describing how delegating to administrative agencies the power to “waive” statutory requirements “brings the advantages of administration to bear on those existing federal statutory schemes that are themselves in need of revision but that, due to legislative gridlock and the difficulties of contemporary policymaking, cannot easily be revised through the legislative process alone.”); Callander & Krehbiel, *supra* note 48, at 831 (“Delegation to a moderate agency does not preclude all statutory gridlock, but it ameliorates its pernicious consequences by breaking both policy and outcome gridlock should statutes prove to be unchangeable.”).

employing agencies and courts. For instance, the automatic-adjustment mechanisms come with greater certainty as to how they will respond to changed circumstances. And, perhaps most obviously, each of these alternative tools does not involve shifting authority over to other institutions, which for these reasons and others, Congress may not wish to do.

This part begins by laying out criteria for normatively evaluating the efficacy of each of these tools and then analyzes them in turn. The analysis concludes that automatic-adjustment mechanisms are, in many circumstances, the most attractive of the tools and, in fact, probably better than empowering agencies or courts—where new information is discrete and appropriate responses to that information can be pre-wired into the legislation. However, where that is not true and where discretion is important at the time the new information is received, then other tools are needed.

### **A. Criteria for Evaluation**

The main criterion employed here for evaluating these tools is the degree to which each would reduce policy drift. Or, to use a few more words, I judge the degree to which the tool would facilitate policy updates to appropriately reflect new information. This goes to the core of the problem this article has described.

This is a judgment in probabilities. In some circumstances, none of these mechanisms would change policy outcomes. There are times at which policymakers will act in light of new information and the default policy will not matter. In such situations, policy drift would not be a significant problem to begin with. Further, the relative effectiveness of these mechanisms will depend on the kind of new information received. For instance, automatic-adjustment mechanisms work best where the new information is discrete, and appropriate responses can easily be incorporated into a policy formula. So, these tools are evaluated in terms of likely outcomes—asking which of them (and in what circumstances) they will most effectively address policy drift.

This paper also considers a few other criteria for evaluating these tools:

The first criterion is how easy it is for Congress to initiate. This focuses especially on the amount of information needed and decision costs involved in establishing and using the particular legislative tool.<sup>72</sup> Information is limited and sometimes costly to attain. Deals require effort to negotiate, and Congress as an institution has a limited capacity to focus on policy and make decisions. Thus, the more decisions that must be made in one particular policy space, such as the decisions needed to set an automatic-adjustment mechanism, the

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<sup>72</sup> See BAUMGARTNER & JONES, *supra* note 26, at 151 (describing the costs involved in Congress arriving at a policy decision).

smaller the capacity to focus on other issues and the more difficult it is to resolve any given policy problem.

The second criterion is predictability. Many private actors plan based in part on government policies, whether businesses planning for investment or individuals planning for how much to save. A lack of predictability can impose costs on planners and also more often lead private actors to take positions that are less optimal than alternatives given the government policies that end up being pursued. Being able to predict with greater confidence how policy would develop under different circumstances is therefore of value to private actors whose decisions depend on government policy.<sup>73</sup>

Finally, and perhaps most obviously, these alternative tools naturally involve more direct control by elected representatives in Congress than empowering administrative agencies or courts. This matters, if for no other reason, because Congress may want to retain more direct control in certain policy areas than in others, as for instance, it has traditionally done so when it comes to tax rates.<sup>74</sup> In other words, given Congress's desire to directly retain control in certain areas, empowering agencies or courts may simply not be available as an option. But, it will also matter for other reasons, including the degree to which there is democratic accountability for policy decisions and concentration of power in the executive.<sup>75</sup> Note that, unlike with the other criteria, it is not clear that more is always better with regard to direct responsiveness to the immediate preferences of the electorate and their representatives. Important institutions—such as the Federal Reserve—are meant to be shielded from democratic preferences in the short term, and this has been justified as allowing such institutions to better optimize policy over

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<sup>73</sup> See, e.g., Scott R. Baker et al., *Measuring Economic Policy Uncertainty* 24 (Nat'l Bureau of Econ. Research, Working Paper No. 21633, 2015) (“Our findings are broadly consistent with theories that highlight negative economic effects of uncertainty shocks. The magnitudes of our estimated effects suggest that elevated policy uncertainty in the United States and Europe in recent years had material harmful effects on macroeconomic performance.”)

<sup>74</sup> See *supra* notes 50-51 and accompanying text.

<sup>75</sup> There is of course an extensive literature on the relative merits and demerits of delegation of legislative authority to administrative agencies and how it affects democratic accountability and presidential power. For instance, Theodore Lowi famously argued that the expansive administrative state was fundamentally undermining democratic accountability in detrimental ways. See, e.g., Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism, and Administrative Power*, 36 AM. U. L. REV. 295, 297 (1986) (“[E]very delegation of discretion away from electorally responsible levels of government to professional career administrative agencies is a calculated risk because politics will always flow to the point of discretion.”). There have been many responses to these types of concerns, including a literature describing the ways that Congress checks the administrative agencies. See, generally, e.g., Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. OF POL. SCI. 165 (1984). However, the concern remains relevant; as Lowi argues, it seems natural that decisions delegated to administrative agencies will be less democratically accountable.

time in the interests of the country as a whole.<sup>76</sup> However, there are also advantages to a policy being responsive to those preferences, especially where there is no evidence that those preferences will be self-defeating (unlike with monetary policy).

One criterion that this article specifically rejects as irrelevant to this analysis is “entrenchment.” Some might argue that, as a matter of democratic values, past policymakers should not entrench their positions and, thus, make them hard for current policymakers to change—preferencing the majoritarian preferences of the past rather than the present.<sup>77</sup> However, this article rejects the idea that some of these mechanisms—and specifically automatic-adjustment mechanisms—entrench policy in some ways that are specially detrimental to democracy or majoritarianism. Of course, automatic-adjustment mechanisms have effects going forward, but so do most of these tools including, for instance, expirations (since future policymakers and their constituents must then deal with the expiring policies).<sup>78</sup> In that sense, all of these tools involve entrenchment of one sort or another. It is a question of what is better to entrench.

These criteria are not comprehensive. There are other important factors for judging legislative tools, such as how they might affect the power of different interest groups or the expertise of Congress relative to agencies. And in any particular policy arena, there are likely to be idiosyncratic factors. Nonetheless, the analysis here should be suggestive of the broad advantages and disadvantages of each of these mechanisms and where they may be most appropriately deployed.

<sup>76</sup> See, e.g., Christopher Crowe and Ellen E. Meade, *The Evolution of Central Bank Governance Around the World*, 21 J. Econ. Persp. 69, 70 (2007) (“[G]reater independence for the central bank could help to provide the policies necessary to achieve lower inflation.”)

<sup>77</sup> This could be considered a form of what Daryl Levinson and Benjamin Sachs term to be “functional entrenchment.” This is entrenchment not accomplished through formal changing of voting rules but, instead, by the very way in which the legislation functions, such as the mobilization of interest groups. See Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 426-430 (2015) (defining functional entrenchment). In the case of automatic-adjustment mechanisms, some might see the automatic adjustments as decreasing the chances of the policy being revisited by current policymakers and, thus, serving as a functional form of entrenchment. This is akin to the criticism Howell Jackson makes of permanent (automatically-adjusting) entitlement programs and in contrast to programs subject to annual appropriation. See Howell E. Jackson, *Counting the Ways: The Structure of Federal Spending*, in FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY 196 n.17 (Elizabeth Garrett et al. eds., 2008).

<sup>78</sup> This is similar to a point made by George Yin in rejecting the notion that temporary legislation improves the ability of each generation to decide its own policies. As he notes, that would massively crowd the agenda of each legislature needing to renew past laws and potentially hamper the ability of each generation to decide its own policies. See Yin, *supra* note 16, at 248-52.

## B. Automatic-Adjustment Mechanisms

An automatic-adjustment mechanism adjusts the legal framework to establish policy that is more appropriate for a new set of conditions. This requires Congress to decide, at the time of legislation, how policy should adapt. Thus, the mechanism presets policy adjustments for different conditions—and without requiring any further action by Congress or by agencies and courts (other than technical implementation).

These mechanisms can be set up as a trigger that significantly adjusts the legal framework—in a discontinuous way—under certain conditions. That is, once certain conditions are met (“trigger conditions”), the trigger goes off and implements a set of changes to the legal regime that are appropriate to those changed conditions (“trigger consequences”).

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. Often, a numerical parameter in a policy is adjusted up or down and by the same percent as a measured index (an inflation index, or wage index for instance). The policy is then considered to be “indexed” to that information.

### *1. Examples of Automatic-Adjustment Mechanisms*

There are numerous examples of such automatic-adjustment mechanisms in existing legislation. For instance:

The federal unemployment insurance system has an automatic-adjustment trigger built into it. The Extended Benefits program—established in 1970—works on a state-by-state basis and triggers on when the unemployment rate increases and exceeds certain thresholds in a given state.<sup>79</sup> This program was in fact added in 1970 as a way to replace the ad hoc temporary programs Congress had been enacting during recessions—and to do so without the “delays” and “disputes” that occurred during ad hoc enactment.<sup>80</sup> This is an automatic-adjustment trigger since it is designed to adjust the unemployment insurance program to the new environment, rather than simply broadcast a warning. As described in Part III.B., such automatic triggers have the potential to be used much more broadly in fiscal policy (and more effectively in UI

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<sup>79</sup> For a description of the EB program and exactly how it works, see JULIE M. WHITTACKER AND KATELIN P. ISAACS, CONG. RESEARCH SERV., UNEMPLOYMENT INSURANCE: PROGRAMS AND BENEFITS 18-21 (2014).

<sup>80</sup> See NAT’L EMP. L. PROJECT, BACKGROUND PAPER ON EXTENDED BENEFITS: RESTORING OUR UNEMPLOYMENT INSURANCE SAFETY NET FOR WORKERS AND COMMUNITIES IMPACTED BY LONG TERM UNEMPLOYMENT 1 (2001) (“The intent of EB was to establish a permanent UI program to provide UI extensions automatically during recessions without the delays and disputes that had accompanied ad hoc UI benefit extensions under temporary programs.”)

specifically) as a way to counteract the problem of policy drift as the economy moves through the business cycle.

Most prominent examples of indexing involve adjusting policy parameters for either changes in prices or wages. This includes price indexing for most tax parameters,<sup>81</sup> for Social Security benefits after retirement, for civil service retirement benefits, and for a range of other programs.<sup>82</sup> Social Security also includes wage indexing as part of its initial benefit calculation formula, increasing benefits to reflect the rise in average wages over time,<sup>83</sup> and there is also wage indexing for the cap above which Social Security taxes do not apply.<sup>84</sup>

This article elevates these mechanisms, by both emphasizing their importance and describing ways that they can be deployed more broadly and effectively.

## *2. Evaluating Automatic-Adjustment Mechanisms*

In many circumstances, automatic-adjustment mechanisms are the best tool available for addressing policy drift. They allow for minimal time lag between a change in circumstances and an appropriate change in policy. There is no need to wait for policy decisions, whether in Congress or at agencies. There is little chance the adjustments will be held up in long-lasting litigation, as can be the case with the decisions of administrative agencies. In sum, automatic-adjustment mechanisms can produce quick responses and with agencies playing a ministerial (if still important) role in simply implementing the adjustments.

The key trade-off here is a lack of discretion, at least as compared to facilitating decision-making by Congress or empowering agencies or courts. By its very nature, the automatic-adjustment mechanism is pre-designed, and, while it is meant to adjustment for *some* new information, it will not be able to adjust for all new information. That is the blessing of an automatic-adjustment mechanism, and its curse. As a result, the pre-designated adjustment may not turn out to be fully optimal in actuality. Given their discretion, Congress,

81 See MARC LABONTE, CONG. RESEARCH SERV., INFLATION: CAUSES, COSTS, AND CURRENT STATUS 6 (2011) (“During the 1980s, the U.S. tax code was rewritten to adjust the tax brackets for inflation.”)

82 See DAN NUSCHLER, CONG. RESEARCH SERV., INFLATION-INDEXING ELEMENTS IN FEDERAL ENTITLEMENT PROGRAMS 6-18 tbl.1 (2013) (listing entitlement programs and describing whether or not indexed to inflation).

83 See NOAH P. MEYERSON, CONG. RESEARCH SERV., HOW SOCIAL SECURITY BENEFITS ARE COMPUTED: IN BRIEF 2 (2015) (describing wage indexing).

84 See KEVIN WHITTMAN AND DAVE SHOFFNER, SOCIAL SECURITY ADMINISTRATION, THE EVOLUTION OF SOCIAL SECURITY’S TAXABLE MAXIMUM 1 (2011) (“This taxable maximum (or ‘tax max’) increases annually, according to growth in the national average wage index.”)



agencies, or courts would have greater flexibility to take all relevant information into account. Notably, however, when Congress hands discretion to agencies especially, it also often matches that with various checks that can slow agency decision-making considerably.<sup>85</sup>

Given this lack of discretion, some types of adjustments can more effectively be done by formula than others. The utility of automatic adjustments depends in part on whether there are relevant metrics to measure change; it also depends on whether there is a set of appropriate policy changes that can be automatically adopted in response. In many policy areas, this is the case. As described in Part III, there can be extensive and effective use of automatic-adjustment mechanisms in Social Security, countercyclical policy, and carbon pricing—and these automatic mechanisms may in fact be superior to any of the other tools to address policy drift. But, in highlighting these areas, Part III also illustrates the limitations of these mechanisms by exploring the kinds of information that cannot easily be translated automatically into policy adjustments.

Another shortcoming of these automatic-adjustment mechanisms is how challenging they can be for Congress to initiate. They 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 came with relatively high informational and decision costs at the time of legislation—even if it later speeds adjustment and reduces decision costs.

On the other hand, when it comes to certainty, the automatic-adjustment mechanisms do better than any of the other mechanisms for reducing policy drift; this is the natural result of them involving less discretion. They give the public greater confidence in projecting future government policy under circumstances where the adjustment occurs. Compare that to the uncertainty of any of the other tools discussed in this article—all of which involve discretionary decisions by some combination of Congress, agencies, or courts. Such discretionary decisions naturally will tend to be more difficult to predict than the effects of the automatic adjustments.

Finally, some might argue that these tools come with the detriment of “entrenching” policy decisions of past policymakers—since the automatic adjustments make it less likely that current policymakers will act to adjust policy. But, as noted above, this criticism lacks any real weight in that, whatever past policymakers decide, there will be effects on future policymakers and their constituents. If none of these tools are used, then policy drift is entrenched. If agencies or courts are employed instead of

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<sup>85</sup> For more discussion of the checks on agency decision-making, see *infra* notes 115-117 and accompanying text.

automatic adjustments, then that structural decision is entrenched. It is not clear why any of these alternative forms of entrenchment are any worse or better.<sup>86</sup>

### 3. *Automatic-Adjustment Mechanisms as Weak Devices of Constraint*

Automatic-adjustment mechanisms (and sometimes alarm-bell mechanisms) have also been offered as ways of addressing a problem that must distinguished from that of policy drift. They have been advocated as ways of constraining policymakers. The adjustments—often offered in the context of debt, deficit, or spending targets that are enforced with automatic spending cuts or tax increases—are meant to overcome or change the preferences of most policymakers.<sup>87</sup> In this sense, they are described as counter-majoritarian—countering the later preferences of the majority—but in a way that saves the majority from themselves.

The comparison is sometimes made to Ulysses lashing himself to the mast, knowing that he will—in the future—desire something that is bad.<sup>88</sup> Automatic adjustments may represent a form of pre-commitment to a certain set of policies and may be intended as a way to force those policies on policymakers' future selves.

However, the well-identified problem with such constraints is that—so long as the mechanisms are not given special procedural protections—they can be turned off via the very same process by which they were enacted.<sup>89</sup> To be sure, the mechanism might still matter, to some degree. Given the multiple veto gates and the need for coordination, passing legislation is more difficult than not—and so setting the default one way versus another can matter, as this article has emphasized. But, they matter largely *within* a later gridlock zone—that is, these mechanisms can shift policy within the zone but not outside the zone, at least in any stable fashion. In the United States, the override of a

<sup>86</sup> See *supra* notes 77-78 and accompanying text.

<sup>87</sup> See, e.g., THE PEW-PETERSON COMMISSION ON BUDGET REFORM, TIED TO THE MAST: FISCAL RULES AND THEIR USES 6 (2011) (“If policymakers think that an electoral sanction may not be sufficient to sustain the rule, they may want to reinforce it further by enacting more direct legal penalties, perhaps a statutory budget trigger that imposes automatic budget adjustments as soon as the rule is violated.”).

<sup>88</sup> *Id.* at 5 and n.5 (describing how, in the context of fiscal rules, leaders may choose to “tie themselves to the mast” and comparing to Ulysses).

<sup>89</sup> See Alan J. Auerbach, *US Experience with Federal Budget Rules*, 7 CESIFO DICE REPORT 41, 43-44 (2009) (“It is not surprising that the [fiscal] rules failed, given that they could be repealed by majority vote. The question is whether they had any significant impact at all.”).

number of past budget control mechanisms illustrates the issue, as the mechanisms lost their effectiveness once a coalition formed to override them.<sup>90</sup>

To be clear, automatic adjustments *can* make a difference in the outcome of legislation. But they are most effective as ways to overcome problems in information-processing, legislative coordination, and later hold up by policymakers controlling a veto gate (as opposed to policymakers controlling all of them). Thus, these restrictions essentially coordinate the various actors in their desire to reach a desired policy outcome.

In sum, these adjustments cannot be seen as strong bonds that can save all policymakers from a siren song, but they can still address the very real problem of policy drift.

### C. Alarm-Bell Mechanisms

Alarm-bell mechanisms are another alternative to courts and agencies as a way to address policy drift. An alarm-bell mechanism is designed to get Congress to act when it might not otherwise.<sup>91</sup> So, again, the reins remain in Congress's hands, but, this time, the tool is not self-adjusting law, as is the case for automatic-adjustment mechanisms. Rather, it is a prod of Congress itself—designed by Congress. However, as this section explains, an alarm come with important downside, namely Congress may fail to turn the alarm off.

The alarm bell can be attached to a trigger. Just like with an automatic-adjustment trigger, there are then specific conditions under which the trigger would go off. The trigger implements certain consequences that change the legal regime in some way, but, unlike the automatic-adjustment trigger, these consequences are not meant to automatically adapt the legal regime for new

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<sup>90</sup> See, e.g., ALLEN SCHICK, *FEDERAL BUDGET: POLITICS, POLICY, PROCESS* 74-82 (3rd ed. 2007) (describing the effects of discretionary caps on annual appropriations and the pay-as-you-go rules on mandatory spending and taxes in the 1990s).

<sup>91</sup> This “alarm bell” is similar in terminology to the “fire alarm” concept that Mathew McCubbins and Thomas Schwartz used to describe a process by which Congress can check federal agencies. See generally Mathew D. McCubbins & Thomas Schwartz, *supra* note 75. However, they are not the same idea. In particular, McCubbins and Schwartz describe how Congress—rather than directly engaging in oversight of agencies—can rely on interest groups to sound the “fire alarm” if an agency is acting in a way that Congress did not intend, with the interest group seeking remedy in the agency itself, courts, or Congress. See *id.* at 166 (“...Congress establishes system of rules, procedures, and informal practices that enable individual citizens and organized to examine administrative decisions...and to seek remedies...”). By contrast, the alarm-bell trigger I discuss here does not rely on interest groups to set off an alarm but, instead, on some automatic procedure in the law that is meant to attract Congress’s attention in the event some specified circumstances come to pass.

circumstances. Rather, the consequences are meant to encourage Congress itself to do the updating, and to alert it to do so (the alarm).

Such alarms come in two broad forms—“soft alarms” and “loud alarms.” The soft alarm is largely informational. For instance, the alarm might require an agency to report to Congress on the changed conditions, or require the President to propose some solution to those conditions for Congress to consider. An alternative is a “loud alarm.” A loud alarm changes the legal framework to one that is explicitly designed to be undesirable. This is meant to serve as impetus for revisiting the policy to both turn off the alarm and correct the underlying drift. (Some might call this a “shot-in-the-foot” mechanism—the point being that the alarm is meant to get attention and a response by imposing an undesirable condition.<sup>92</sup>)

Expiration of legislation often functions as one version of a loud alarm. Expirations have a long and storied history going back to the founding of the country.<sup>93</sup> Expirations tend to prompt legislative review and further action to renew the expiring authority. Of course, there are some cases where the expiration is intended to stick and does. In that case, the expiration is not an alarm but, instead, an automatic adjustment to the legal framework that simply occurs after passage of a certain amount of time. In many cases, however, Congress renews the authority. As Jacob Gersen writes in describing one of the key benefits of expirations, “because staged decision procedures facilitate the integration of new information into the policy process, they generally increase the probability that an optimal public policy will be selected by legislators.”<sup>94</sup> Or, in other words, expirations in legislation have the potential to reduce policy drift by encouraging Congress to update policies at a pre-determined point.

### *1. Examples of Alarm-Bell Mechanisms*

There are numerous examples of such alarms written into legislation, both soft and loud. For instance, as part of the 2003 legislation establishing a prescription drug benefit, Congress set up a soft alarm. Specifically, the

<sup>92</sup> Thanks to Richard Kogan for offering the “shot-in-the-foot” analogy.

<sup>93</sup> As Jacob Gersen chronicles, there was substantial discussion of the utility of expirations in the context of Article I, § 8, clause 12 of the U.S. Constitution. *See* Gersen, *supra* note 16, at 250-51. That provision states that the Army can be funded for no more than two years. Alexander Hamilton advocated for the provision in Federalist 26, saying: “The Legislature of the United States will be obliged, by this provision, once at least in every two years, to deliberate upon the propriety of keeping a military force on foot; to come to a new resolution on the point; and to declare their sense of the matter, by a formal vote in the face of their constituents.” THE FEDERALIST No. 26, at 171-172 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>94</sup> Gersen, *supra* note 16, at 266.

legislation tasked the Medicare Trustees with determining whether general revenue (as opposed to dedicated revenue through the payroll tax and premiums, among other sources) would finance 45 percent or more of the Medicare program in the current year or any of the following six years.<sup>95</sup> If that is determined to be the case in two consecutive annual reports, then the trigger goes off and a Medicare funding warning is issued.<sup>96</sup> Under the law, issuance of the warning requires the President to submit legislation to Congress to address this, and any such proposal is granted certain fast-track protections in Congress.<sup>97</sup> It is noteworthy that this particular trigger has been much maligned in terms of the trigger conditions it sets, with the 45-percent threshold rightly questioned as having little meaning.<sup>98</sup> Further, the trigger has had minimal apparent effect. A Medicare funding warning went off in each year from 2007-2013—without any direct legislative action in response.<sup>99</sup> In fact, President Obama has simply refused to submit legislation arguing, among other things, that the statutory requirement violates the Recommendations Clause of the Constitution—since the alarm required the president not just to inform Congress that a certain condition had come to pass but also submit a legislative recommendation.<sup>100</sup>

And there are also examples of loud alarms. This includes expiration of legislation, such as the annual expiration of appropriations for federal agencies<sup>101</sup> or the expiration of authorizations for a number of major programs like Temporary Assistance for Needy Families<sup>102</sup> or highway programs.<sup>103</sup> This also includes expirations written into the 2001 and 2003 tax cuts, before most of them were finally made permanent—expirations that rightly engendered significant controversy.<sup>104</sup> Finally, the now-infamous “sequester”

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95 PATRICIA A. DAVIS ET AL., CONG. RESEARCH SERV., MEDICARE TRIGGER 2 (2015).

96 *Id.*

97 *Id.* at 4-8.

98 Paul N. Van De Water, *The Misguided Medicare “Trigger,”* CTR. ON BUDGET AND POLICY PRIORITIES: OFF THE CHARTS (Feb. 12, 2013, 1:06 PM), <http://www.cbpp.org/blog/the-misguided-medicare-trigger> (“[T]he standard on which this warning is based is fundamentally misguided.”)

99 DAVIS ET AL., *supra* note 95, at 3-7.

100 *Id.* at 4-6.

101 JESSICA TOLLESTRUP, CONG. RESEARCH SERV., THE CONGRESSIONAL APPROPRIATIONS PROCESS: AN INTRODUCTION 1 (2015).

102 *See* CTR. ON BUDGET AND POL’Y PRIORITIES, POLICY BASICS: AN INTRODUCTION TO TANF 1 (2015) (describing how TANF has been extended on a short-term basis since 2010).

103 *See* ROBERT S. KIRK, CONG. RESEARCH SERV., FEDERAL-AID HIGHWAY PROGRAM (FAHP): IN BRIEF 3 (2016) (noting 2020 expiration for current surface transportation legislation).

104 The expiration in the 2001 and 2003 tax cuts prompted a significant debate about the

is an example that combines aspects of a loud alarm-bell with an automatic-adjustment mechanism. The sequester cuts indiscriminately into both Democratic and Republican priorities, and the result is meant to be undesirable in order to prompt action—a loud alarm.<sup>105</sup> But it also serves as a form of automatic adjustment since it secures savings to hit an agreed upon budget target, even if it does so in an undesirable way. Versions of it were used in triggers in the 1980s to enforce deficit targets; in the 1990s to enforce the legislative pay-as-you-go requirement; and, finally, again in 2011 to be triggered if Congress failed to enact additional deficit reduction—with sequester going off in the most recent incarnation.<sup>106</sup>

## 2. *Evaluating Alarm-Bell Mechanisms*

First, focusing on policy drift. Alarm-bell mechanisms offer the prospect of cutting through both a crowded agenda and, in the case of loud alarms, congressional gridlock to prompt Congress to address drift. Importantly, this allows Congress to adapt policy using its discretion to the new information, and, as described above, some information requires such discretion—formulas do not always suffice. However, the alarm bells come with significant downsides relative to either automatic-adjustment mechanisms or empowering courts and agencies.

In particular, a soft alarm can reduce policy drift, if the drift is the result of there being a crowded and limited agenda. In that case, it is possible that the alarm could flag for policymakers that there is a problem deserving of attention—or, at least, have it be considered for attention. However, such an alarm—being purely informational—cannot easily overcome gridlock resulting from negotiating failure or the preference of policymakers controlling at least one veto gate.

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wisdom of expirations, especially in tax legislation. Much of this debate focused on the degree to which these expirations were or were not used to game fiscal controls, which was important in the context of the tax cuts, but did not fully address some of the broader issues around expirations. *Compare* Rebecca M. Kysar, *supra* note 16, at 1010 (arguing against temporary legislation in light of increasing use to game fiscal controls, including in “some of the largest tax cuts in American history”), *with* George K. Yin, *supra* note 16 (claiming that temporary tax cuts did not undermine fiscal restraint).

<sup>105</sup> See, e.g., Edward Luce, Opinion, *A Taste for Mutually Assured Destruction*, FINANCIAL TIMES (Mar. 3, 2013), <http://www.ft.com/intl/cms/s/0/07184d86-81cf-11e2-b050-00144feabdc0.html#axzz3jxEjeNnP> (“The logic of the sequestration was that Republicans would be hit by blind cuts to the Pentagon budget – something it was thought inconceivable they would tolerate. And Democrats would get yet more reductions in their civilian spending priorities. The point was to ensure it was worse than the alternatives.”)

<sup>106</sup> See KAREN SPAR, CONG. RESEARCH. SERV., BUDGET “SEQUESTRATION” AND SELECTED PROGRAM EXEMPTIONS AND SPECIAL Rules 1 (2013) (briefly describing the history of the sequester).

A loud alarm can serve an informational purpose like a soft alarm, since the tripping of the alarm can still serve as an indicator. But, it also has the potential to overcome gridlock. It can potentially increase the incentive to avoid negotiating failure. Further, it can make the status quo undesirable from the perspective of those controlling all veto gates and, thus, prompt a revisiting of policy that would otherwise be subject to gridlock.

However, and importantly, the alarms do not change the fact that Congress has a crowded and limited agenda-space—meaning the policy drift would likely remain. The fact that an alarm rings does not radically change the number of issues Congress can address. An alarm can help Congress to prioritize that agenda, but even that can be undermined to the degree an alarm applies too broadly. For instance, appropriations for federal agencies expire annually, but that applies to many programs—and, in acting to extend appropriations, Congress faces the same problem of choosing from a very large field on what it should focus.

With a loud alarm, there is also the additional danger of the alarm *worsening* drift. A loud alarm in itself worsens the state of policy as a way to prompt action. However, the alarm might be left to continue to ring, at least for some period of time—because it does not break through to the agenda, because of failures in negotiation, or because those controlling one of the veto gates actually prefer this outcome to the available alternatives (even as others do not).

The dangers of the loud alarm are illustrated by the recent sequester.<sup>107</sup> These automatic spending cuts were set to go off if Congress failed to achieve a certain amount of deficit reduction—and intended to be undesirable to both Republicans and Democrats.<sup>108</sup> However, that alarm came into effect in 2013, and then was largely allowed to keep on ringing for three years—for 2013, 2014, and 2015. Congress adjusted the sequester somewhat in those years, but it was left largely in place as they could not agree how to achieve greater relief.<sup>109</sup> They finally did so for 2016 and 2017, but the prospect remains of the alarm returning in full force in 2018.<sup>110</sup> Here, it is not for a lack of attention but instead, largely, because of apparent failures in negotiation, which

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107 This sequester was not being used so much as a way to address uncertainty as a way to force Congress into taking action. *See supra* Part II.B.3. However, what has transpired remains relevant for this article since alarms like the sequester can also be used to facilitate legislation when unexpected events occur.

108 *See supra* notes 105-106 and accompanying text.

109 DAVID REICH, CTR. ON BUDGET AND POL'Y PRIORITIES, SEQUESTRATION AND ITS IMPACT ON NON-DEFENSE APPROPRIATIONS 3-4 (2015).

110 ROBERT GREENSTEIN, CTR. ON BUDGET AND POL'Y PRIORITIES, BUDGET DEAL, THOUGH IMPERFECT, REPRESENTS SIGNIFICANT ACCOMPLISHMENT AND MERITS SUPPORT (2015).

they finally overcame but only recently. In short, the existing law is sticky, and this loud alarm has stuck the country with an outcome that may have been worse than what would have occurred in its absence and almost certainly would not have been agreed to initially if policymakers had known that it would be implemented.<sup>111</sup>

In terms of the other factors: Alarm-bell mechanisms are relatively easy for Congress to initiate. Setting the alarm still requires it to identify the conditions under which the alarm would go off—something it would not need to do in a simple, broad delegation of authority to an agency or court. However, setting an alarm does not require Congress to evaluate how to appropriately respond to various outcomes, as it must do in establishing an automatic-adjustment mechanism.

Still, in terms of certainty, the alarm-bell mechanism—since it provides discretion to Congress—provides little guidance about what policy might be adopted in a world of changed circumstances; in that way, it is much like empowering agencies or courts—the actual resolution is left open, providing little guidance to planners. In fact, it can generate even greater uncertainty than these other tools, to the extent there is a risk that the alarm itself is left ringing.

There are some who might favor alarm-bell mechanisms to automatic-adjustment mechanisms on the basis of “entrenchment.” The argument would go that the alarm catalyzes *current* policymakers to enact their preferred policy, rather than relying on the policies of the past. But, as prior sections have suggested, this is not a reason to favor alarm bells over automatic-adjustment mechanisms. Alarm bells themselves also represent a form of entrenchment. They force alarms onto future policymakers and can crowd their agenda. Further, to the extent the alarm proves insufficient, they can essentially entrench policy drift—and an undesirable outcome for the future policymakers. The point is that, whatever policies a prior Congress chooses, they will affect future policymakers and their constituents—and the question is what is better to entrench.

#### **D. Changing Congressional Rules**

Policy drift is a function of both uncertainty looking into the future, and Congress’s slow response to new information. So, one way to reduce that drift is to make the legislative process easier and faster, and that can be done by changing the rules by which legislation is enacted. Again, this would allow Congress to exercise its discretion in the face of new information.

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<sup>111</sup> See Leigh Munsil, *Bob Woodward: Obama Mistaken on Sequester*, POLITICO, Oct. 23, 2012 (“No one thought it would happen. The idea was to design something ... that was so onerous that no one would ever let it happen.”) (quoting Bob Woodward).



In some ways, this particular tool is in a different category altogether than the others discussed here. The changes could encompass wholesale revisions to the constitutional system to reduce the number of veto gates or major changes to the system by which representatives are elected (or their districts are drawn) to reduce polarization.<sup>112</sup> Such changes go beyond the bounds of this article, which is focused on discrete tools legislators can deploy in legislation to address policy drift as alternatives to empowering agencies and courts. To be clear, reforms like this might well be worth making if they could ever be achieved, but they are different in kind from the other tools being discussed here as they can involve wholesale revisions to the U.S. political system.

With that said, there are discrete ways in which Congress can—and has—adjusted its rules when it comes to certain types of legislation in order to make it easier to enact. In particular, Congress has provided for “fast track” consideration—including protection from filibuster and certain types of amendments—for legislation. For instance, such protections are given to budget legislation proceeding through the “reconciliation” process<sup>113</sup> and trade legislation when fast-track authority is in place.<sup>114</sup> In this way, it is possible that Congress to establish targeted fast-track rules to deal with issues arising in a particular policy area.

Still, such measures would not entirely address the problem of policy drift, and the other legislative tools discussed here remain relevant. Irrespective of the voting rules, Congress would have a limited agenda, and, even with fast-track rules, negotiation breakdowns and gridlock would remain possible, even if somewhat less probable.

In terms of some of the other metrics, these discrete adjustments to the rules are not difficult for Congress to initiate in the sense that it does not require information about a particular policy area—other than some sense that the area is deserving of different rules than the rest. However, just like all of the tools here other than automatic adjustments, it does little to provide greater certainty in case events turn out to be unexpected.

In short, targeted reforms to the rules of the game may be helpful in areas that are particularly prone to policy drift, and they are an alternative for

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112 For instance, redistricting done by partisan legislators is associated with increased polarization of elected representatives as compared to districts drawn by independent panels. See generally Corbett A. Grainger, *Redistricting and Polarization: Who Draws the Lines in California?*, 53 J.L. ECON. 545 (2010). For more on the association between polarization and gridlock, see *supra* notes 44-46 and accompanying text.

113 DAVE REICH & RICHARD KOGAN, CTR ON BUDGET & POL’Y PRIORITIES, INTRODUCTION TO BUDGET “RECONCILIATION” (2015).

114 IAN F. FERGUSSON, CONG. RESEARCH SERV., TRADE PROMOTION AUTHORITY (TPA) AND THE ROLE OF CONGRESS IN TRADE POLICY (2015).

accomplishing similar ends via agencies or courts. It is not a complete salve; the problem of policy drift could in significant part remain. But, it is a way to reduce it.

### E. Revisiting Agencies and Courts

These tools are all discussed as important alternatives to the ones on which the legal literature has traditionally focused: shifting power to other institutions, especially agencies and, sometimes, courts. In some cases, Congress might deploy these alternatives for exactly that reason—because they do not involve a shift in authority to agencies or courts. But, the other normative criteria invoked here are relevant as well, and, in particular, it is important to note that turning to agencies and courts is not a full-proof way to address policy drift. In fact, doing so has considerable downsides as compared to automatic-adjustment mechanisms where those mechanisms can be effectively deployed.

Importantly, administrative agencies will not always respond quickly to new information. This is especially the case if the administrative process is subject to administrative and judicial checks applied by the President and Congress, as is often true when Congress hands over legislative authority. Congress and the courts often require agencies to jump through a number of hoops to issue a policy, including the publication of draft rules, receipt of comments, incorporation of feedback, review by the White House, and then scrutiny (and possible reversal) by the courts.<sup>115</sup> While there are some very good reasons for such checks,<sup>116</sup> they can slow the regulatory process considerably, sometimes to a crawl. There is now a considerable literature describing substantial delays in the regulatory process that arise in part because of these mechanisms.<sup>117</sup> As a result, agencies—especially if subject to such

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<sup>115</sup> See, e.g., generally JEFFREY W. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING (American Bar Association, 5th ed., 2012) (detailing the rulemaking process including the checks applied by Congress, the executive, and the courts).

<sup>116</sup> See, e.g., generally David S. Rubenstein, *Relative Checks: Toward Optimal Control of Administrative Power*, 51 WM. & MARY L. REV. 2169 (2010) (laying out a theory for determining the optimal degree of checks on an administrative agencies and reviewing the substantial existing literature on the topic).

<sup>117</sup> See, e.g., Sydney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 Admin. L. Rev. 1 (1994) (describing process by which dueling oversight between Congress and executive lead to a dysfunctional regulatory process); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1387-1436 (describing the process leading to ossification). One article has recently disputed the widely held thesis that the regulatory process has ossified, see Jason Webb Yackee and Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 144 (2012), though that has engendered a response that ossification is real at least when it comes to economically

checks—may themselves have trouble adapting policy to new information. Congress may have handed *limited* authority to an agency, but the agency—given the constraints placed on it—may not be much better at addressing drift. And, this can be contrasted with an automatic-adjustment mechanism. Those mechanisms can trigger swiftly and do not require the kinds of checks that can hold up agency decision-making—since Congress is the one fully prescribing the policy.

Courts do not face these same styles of constraints, but the natural ambit of their authority is also more limited in important ways and, as a result, so is their ability to correct drift. Courts generally exercise discretion only where those statutes are actually ambiguous, and there are many areas that do not naturally lend themselves to such ambiguity. As Eskridge says, “[w]hen the statutory text clearly answers the interpretive question...it normally will be the most important consideration.”<sup>118</sup> And, many parameters are naturally specific and not easily adjustable by courts. To take the three policy areas detailed in the next part: when it comes to Social Security, countercyclical policy, or a possible price on carbon, it seems unlikely that courts could have much authority to adjust macro parameters for new information. By contrast, the authority to adjust such parameters can be delegated to administrative agencies so long as Congress gives some direction for how the agency should do so. Further, the judiciary may not be particularly expert at updating particular policy areas, as compared to congressional committees or administrative agencies who may more regularly deal with particular policy problems.<sup>119</sup> Thus, there is some risk that courts make the problem worse than it might otherwise have been in areas where they are not expert in policymaking.

To be clear, there are some key advantages to using agencies and courts, especially relative to automatic-adjustment mechanisms. Specifically, they have discretion. So, their potentially slow or constrained decision-making has to be traded off against the flexibility to actively respond to new conditions taking into account as much information as is available. This is a key trade-off, at least in comparison to automatic-adjustment mechanisms that can respond quickly but based on preset formulas.

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significant regulations, see Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to “Testing the Ossification Thesis,”* 80 GEO. WASH. L. REV. 1493, 1498 (2012) (“Every study of economically significant rulemakings has found strong evidence of ossification—a decisionmaking process that takes many years to complete and that requires an agency to commit a high proportion of its scarce resources to a single task.”).

<sup>118</sup> William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1483 (1987). *supra* note 79, at 34.

<sup>119</sup> See, e.g., Gillian K. Hadfield, *Judicial Competence and the Interpretation of Incomplete Contracts*, 23 J. LEGAL STUD. 159, 162 (1994) (“The reality of generalist courts, however, is that they possess only limited competence in any one area.”).

Relatedly, empowering agencies and courts is relatively easy for Congress to do. It requires relatively little information and decisional effort from Congress at the time of legislation. To be clear, this simply transfers information gathering and decision-making to other institutions. But those institutions may have fewer opportunity costs than Congress in focusing on a particular policy area. Further, the agencies or courts may be able to collect relevant information at a later point in time, when it is easier to attain.

Of course, in terms of certainty, empowering agencies or courts is much like alarm-bell mechanisms or adjusting congressional rules. As compared to automatic-adjustment mechanisms, there is less certainty as to how policy will be adjusted in the new circumstances since there is more discretion involved.

The bottom line is that empowering agencies and courts is—consistent with the legal literature—a key approach for avoiding drift. However, there are alternatives that keep authority in Congress's hands, and, further, may actually be better at reducing drift especially in the circumstances where automatic-adjustment mechanisms can be effectively designed.

### **G. Summing Up**

Figure 2 summarizes the legislative tools discussed here as alternatives to empowering agencies and courts. In broad-strokes, Congress can avoid empowering other institutions and still address policy drift—with automatic-adjustment mechanisms holding particular attraction. These automatic-adjustment mechanisms can react quickly and predictably to changes in the environment. On the downside, these mechanisms sacrifice discretion and require effort by Congress to establish them. But in many important circumstances and especially where there are discrete metrics to measure change and relatively clear responses to those changed circumstances, that sacrifice can be well worth making in exchange for rapidity of adaptation and relative certainty of outcome. The next part delves into how such automatic-adjustment mechanisms could potentially be deployed effectively in three key policy areas, as well as their limitations in each.

**Figure 2**  
**Reducing Policy Drift**  
**Pros and Cons of Each Mechanism**

	Reduces Policy Drift (Two Components)		Is Easy for Congress to Initiate	Increases Certainty	Authority Remains in Congress's Hands	
	Rapidity of Appropriate Adjustment	Discretion				
1. Automatic-Adjustment Mechanisms	●	○	○	●	●	● = yes
2. Alarm-Bell Mechanisms	○	●	●	○	●	○ = no
3. Changing Legislative Rules	◐	●	●	○	●	◐ = mixed
4. Empowering Agencies/Courts	◐	●	●	○	○	

This part has generally treated these mechanisms as if they are clearly distinct from one another. That does not have to be the case. They can also be combined to address policy drift. For instance, one could combine delegation with an automatic adjustment—delegating authority to an administrative agency if certain conditions exist that should prompt action. Or, one could combine a change in the voting rules in Congress with a trigger—so that legislation would get fast track protection if, again, certain conditions exist. In some situations, the combinations of the mechanisms could in fact produce better outcomes than using any one type of mechanism alone.

### III. REDUCING POLICY DRIFT: THREE EXAMPLES

This part applies the lessons of this article to three policy areas. Two are areas with existing policies: Social Security and countercyclical policy. The third, carbon pricing, is an area where Congress has yet to take any significant action. These three are illustrative. They illustrate the concept and dangers of policy drift, how the mechanisms discussed in this article have been deployed, and how they could be either substantially expanded or, in the case of carbon-pricing, introduced in order to improve policy outcomes.

These areas also illustrate the particular potential and limits of automatic-adjustment mechanisms. These are areas where there are relevant metrics and policy responses that can be incorporated into such automatic mechanisms to a much greater degree than now occurs. But, the mechanisms have their limits; there remains an important role for Congress or agencies to further adjust policy in each of these areas—with this complementing the use of automatic-adjustment mechanisms.

## A. Social Security

Congress has not touched Social Security in any significant way for thirty years even as fiscal conditions have changed for the worse.<sup>120</sup> To be sure, a very quick response to new information would not significantly improve outcomes in Social Security. Still, long delay—as we have had—does constrain policy options and changes who bears the burden (or benefit) of uncertain events. The result, relative to more frequent adjustments, is likely to involve more dramatic changes to the program concentrated on fewer generations than would otherwise be the case—a worse outcome than risk diversified (and, hence, reduced) across more generations.<sup>121</sup> Mechanisms to combat policy drift can improve results.

The Social Security system already includes a number of automatic-adjustment mechanisms—such as indexing earnings records to average wage growth.<sup>122</sup> However, despite a long-standing, bipartisan commitment to the Social Security system’s solvency,<sup>123</sup> there are no automatic adjustments in benefits and taxes to maintain that solvency—other than the possibility of a cliff-like cut or delay in benefits if the trust funds run out of sufficient reserves.<sup>124</sup> The latter is probably best characterized as an alarm-bell trigger;

120 See *supra* notes 1-4 and accompanying text.

121 As then-CBO Director Douglas Elmendorf said in testimony before Congress when asked about the cost of waiting to address Social Security, “So the longer one waits to make changes, the larger the changes need to be and the more abruptly they would need to take effect.” *Congressional Budget Office’s Long-Term Budget Outlook, Hearing Before the H. Comm. on the Budget*, 113th Cong. 40 (2013) (statement of Douglas Elmendorf). The effects of waiting can be exaggerated, but they are real and build with time. See DAVID KAMIN & RICHARD KOGAN, CTR. ON BUDGET AND POL’Y PRIORITIES, *THE ADMINISTRATION’S MISLEADING \$600 BILLION ESTIMATE OF WAITING TO ACT ON SOCIAL SECURITY* (2005) (correctly calculating the degree that waiting increases the size of the adjustment needed and finding the effect on an annual basis is small). Importantly, this means effects of uncertain events get concentrated on fewer generations if adjustments do not happen regularly. Because of this, and in the words of Alan Auerbach and Ronald Lee, “[pension] systems with more frequent adjustments that spread risks broadly among generations [are] those most preferred.” See Alan J. Auerbach, and Ronald Lee, *Welfare and Generational Equity in Sustainable Unfunded Pension Systems*, 95 J. PUB. ECON. 16, 16 (2011).

122 See *supra* notes 82-84 and accompanying text.

123 The 1983 deal probably represents the apex of that commitment since it represented not rhetoric but also action. For a history of that deal, see generally Svahn & Ross, *supra* note 2. Since then, leaders on both sides of the aisle have continued to express their commitment to that goal. See, e.g., Office of Mgmt. & Budget, Exec. Office of the President, *Budget of the United States Government, Fiscal Year 2016*, at 42 (2015) (“[T]he Administration is committed to ensuring that the program is solvent and viable for the American people, now and in the future, and the President has laid out key principles to achieve this objective.”); H.R. Rep. No. 114-96, at 78 (2015) (“It is the policy of this concurrent resolution that the President and Congress should work together on a bipartisan basis to preserve Social Security for current and future generations.”)

124 See NOAH P. MYERSON, CONG. RESEARCH SERV., RL33514, *SOCIAL SECURITY: WHAT WOULD HAPPEN IF THE TRUST FUNDS RAN OUT?* 6 (2014) (“The Social Security Act does not

the problem is that the alarm may only attract Congress's attention after years of changed conditions that, optimally, should have resulted in earlier policy shifts.

To be clear, automatic-adjustment mechanisms will not help solve the *current* financing shortfall. That is because a negotiation over an automatic adjustment to restore solvency would, at this point, be the same as a negotiation over how to restore solvency in the absence of the mechanism. Congressional action is needed, and automatic adjustments will not change the set of trade-offs facing Congress. By contrast, once the shortfall is addressed in a compromise deal, automatic-adjustment mechanisms could preserve some of the main parameters of that deal even in the face of new information by continuing to adjust policy even as Congress takes no affirmative action.

Some might question whether Social Security even presents an example of policy drift looking retrospectively. Perhaps long-term solvency was a goal in 1983 but maybe it was not after that from the perspective of most policymakers and their constituents, despite the rhetoric of political leaders.<sup>125</sup> To some degree, this historical question is not as important as it might seem. If it were not an example of policy drift in the past, it could certainly be in the future. However, going to the descriptive question, the idea that preferences with regard to solvency have fundamentally changed seems unlikely. It is notable that Congress has not acted to worsen the Social Security shortfall in this period, as might be expected if their preferences really had shifted away from valuing solvency, and this includes allowing the full retirement age to continue to rise over the decades from 65 to 67 as enacted in the 1983 reform.<sup>126</sup> Still, they have not taken any significant affirmative action to improve solvency. In other words, there appears to be a particular power to the existing law, even as the effects of that law shifted.

### *1. One Model of Automatic Adjustment for Social Security*

To make this more concrete and giving an example of how an automatic-adjustment mechanism could work: The United States could, like some of its international counterparts,<sup>127</sup> add an explicit automatic-adjustment trigger adjusting benefits and taxes in case the Social Security system's solvency

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stipulate what would happen to benefit payments if the trust funds ran out. As a result, either full benefit checks may be paid on a delayed schedule or reduced benefits would be paid on time.")

<sup>125</sup> See *supra* note 123.

<sup>126</sup> For the schedule of increases in the full retirement age, see *Retirement Planner: Full Retirement Age*, SOC. SECURITY ADMIN., <https://www.ssa.gov/planners/retire/retirechart.html> (last visited Feb. 2, 2016).

<sup>127</sup> See *infra* notes 130-132 and accompanying text.

moves away from an agreed-upon target. The adjustment could be done based on the 75-year solvency projections (or using a shorter window if policymakers preferred that) released annually by the Social Security Trustees and calculated by the Social Security Actuary.<sup>128</sup> Based on this, the Social Security Administration would be directed to calculate the minimum savings needed to maintain a specified level of trust fund solvency in all years over the 75-year window.

The necessary savings could be split equally between spending and taxes—or, according to some other ratio. The spending reductions could be automatically done through reductions in the benefit amount—potentially only for new beneficiaries, via any newly calculated primary insurance amount, and perhaps only for those with higher lifetime earnings, as a reflection of their greater ability to absorb risk in these benefits. The tax change would automatically result in increased payroll tax rates. And the mechanism could be symmetrical; in the event of a more favorable projection, taxes could fall and benefits could rise.

The adjustment could be done regularly. That would keep each individual adjustment relatively small and, based on the newest available information, spread the adjustments across generations.

To be clear, this is only one model—though perhaps the most comprehensive in reacting to changes in the solvency projection due to any factors. Other options include indexing benefits or contributions specifically to longevity, or adjusting the parameters based on other relevant factors, like increasing the cap above which Social Security taxes are imposed based on any increase in inequality (which would otherwise erode the payroll tax base). However, these examples show the possible complexity of designing many mechanisms of this kind; a broad rule is easier, if less targeted, in its adjustments.

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128 One danger of a trigger like this is that the projection could be subject to manipulation under political pressure. To guard against this, the Actuary's projection could be better insulated from political influence. This may be desirable as a substantive matter—so that the adjustment tracks what was intended in a deal (rather than the immediate desires of the sitting President)—and it may also be necessary in order for policymakers to agree to such an automatic adjustment. As it is, the Social Security Actuary is already considered both independent and non-partisan, but the underlying economic assumptions in the Social Security Trustees Report are subject to the approval of the Trustees themselves who are political appointees (including the Secretary of the Treasury, Secretary of Labor, and Secretary of Health and Human Services). See ROBERT ROSENBLATT AND LARRY DEWITT, NAT'L ACAD. OF SOC. INS., *THE ROLE OF THE CHIEF ACTUARY OF SOCIAL SECURITY* 4-5 (2004). Potentially, control over the projections could be given entirely to the Actuary to ensure greater independence.



## 2. *Why An Automatic Adjustment*

Automatic-adjustment mechanisms are attractive in Social Security in part because there is information available to build such mechanisms and the set of options is constrained and readily subject to formula-based changes. Changes in relevant conditions—life expectancies, disability rates, birth and immigration rates, or productivity growth—are measurable. Further, the policy options for Congress to consider are limited, or at least more limited than in many other contexts. Benefits can be cut or payroll taxes raised (or the opposite in the case of a surplus)—and both Social Security benefits and payroll taxes can be readily adjusted by formula.

Many public pension systems around the world have automatic-adjustment mechanisms of some kind, including about half of the 34 countries in the Organization for Economic Cooperation and Development (OECD).<sup>129</sup> And a handful of these countries—Canada, Germany, Japan, Portugal and Sweden—have explicit automatic adjustment mechanisms meant to keep their systems solvent.<sup>130</sup>

The Canadian model is probably closest to what is suggested here. In Canada, there is a review every three years of the Canada Pension Plan's 75-year solvency. If the system is found not to be solvent over that period by the system's actuary, this triggers an automatic adjustment—if policymakers cannot otherwise agree on a plan to correct the imbalance. In particular, the contribution rate is increased and cost of living adjustments are suspended until the next triennial review.<sup>131</sup> Notably, Canada's automatic adjustment trigger has yet to actually be tested, though, at one point, this may have been because of political pressure on the actuary—illustrating a pitfall of such mechanisms.<sup>132</sup> A number of publications have detailed the workings of the automatic adjustment mechanisms in these and other countries—some combination of which could provide models for the United States.<sup>133</sup>

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129 ANNA CRISTINA D'ADDIO AND EDWARD WHITEHOUSE, ORG. FOR ECON. COOPERATION & DEV., TOWARDS FINANCIAL SUSTAINABILITY OF PENSION SYSTEMS: THE ROLE OF AUTOMATIC-ADJUSTMENT MECHANISMS IN OECD AND EU COUNTRIES 24 tbl.1 (2012).

130 *Id.* at 35 (“Although, the indexation is a common practice, only in a limited number of OECD countries—Canada, Germany, Japan, Portugal and Sweden—indexation is ‘explicitly’ related to the sustainability of the system.”)

131 For a description of the Canadian automatic adjustment mechanism, see BARRY BOSWORTH AND R. KENT WEAVER, SOCIAL SECURITY ON AUTO-PILOT: INTERNATIONAL EXPERIENCE WITH AUTOMATIC STABILIZER MECHANISMS, CTR. FOR RETIREMENT RES. AT BOSTON COLLEGE 15 (2011).

132 *Id.* at 16.

133 *See, e.g., id.*; JOHN A. TURNER, AM. ASS'N OF RETIRED PERSONS PUB. POL'Y INST., SOCIAL SECURITY FINANCING: AUTOMATIC ADJUSTMENTS TO RESTORE SOLVENCY (2009).

To be clear, the fact that adjustments are automatic does not mean that they are necessarily desirable, and the challenge of constructing optimal adjustments should not be minimized. In the pension context, Alan Auerbach and Ronald Lee have emphasized that an important criterion is how well these mechanisms spread economic risks across generations—allowing generations to insure each other against unexpected shocks.<sup>134</sup> Thus, at least one way to judge the effectiveness of an automatic-adjustment mechanism is the degree to which it distributes the effects of economic shocks across generations, rather than concentrating those risks only on some. In one set of modeling, Auerbach and Lee found that mechanisms in Social Security which used a combination of tax increases and spending reductions to sustain fiscal balance are most effective at such risk spreading—relative to spending- or tax-only instruments—because they better spread the adjustment across generations.<sup>135</sup> This is one reason I propose an automatic mechanism that adjusts both sides of the ledger.

Automatic-adjustment mechanisms also come with other benefits—among them is greater certainty about what the future of the Social Security system would hold in case of various contingencies. On the other hand, such mechanisms—especially if they were more nuanced than the one suggested here—could be challenging to actually institute.

To be clear, any automatic-adjustment mechanism in Social Security would have its limitations. For instance, there are factors unrelated to solvency that should affect Social Security policy. It matters how well the rest of the system to encourage retirement saving is working. If people are saving more, then there is more reason to lower Social Security benefits. If not, the opposite is the case. And, responding to this kind of information requires discretion. Thus, an automatic-adjustment mechanism could not fully supplant Congress in updating Social Security policy and so the risk of policy drift would remain.

However, an automatic-adjustment mechanism would be a significant step forward. It is imaginable that it could be combined with some of the other mechanisms here, perhaps changes in congressional rules or targeted delegation of authority, to further facilitate reforms. But, using these or other mechanisms alone seems unlikely to be as successful as deploying an automatic-adjustment mechanism like on discussed here. If done alone, changing congressional rules or a delegation of authority to an agency could

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134 See generally Alan J. Auerbach, and Ronald Lee, *Welfare and Generational Equity in Sustainable Unfunded Pension Systems*, 95 J. PUB. ECON. 16, 17 (2011) (“Fiscal stability is, of course, a desirable feature, but how the stability is achieved will affect the manner in which the risks associated with shocks are spread among generations.”)

135 See *id.* at 22 (describing how a plan that splits adjustments 50-50 between taxes and benefits performed better than alternatives of either purely benefit or tax adjustments “because it spreads the impact of each adjustment over more generations than either of the other plans.”)

still subject policy changes to significant delay and additional uncertainty, as compared to automatic-adjustment mechanisms. The system already has an alarm-bell in place—namely, projected insolvency—but that has not forced Congress to actually act and the alarm seems likely to keep ringing until the actual date of insolvency draws nearer. The alarm could be made louder or more frequent but that would trade off against greater uncertainty for millions of Americans in or planning for retirement. Finally, courts cannot here ride to the rescue, at least to any significant degree—since the tax and benefit rules are specified in some detail. The bottom line is that automatic-adjustment mechanisms are particularly attractive in Social Security.

### B. Countercyclical Policy

The problem of policy drift in countercyclical policy is recognized especially among economists, even if it has not been specifically called that.<sup>136</sup> Congress may not react quickly enough to effectively stabilize the macroeconomy through the boom-bust cycle. As such, it presents an “easy case” for deploying some of the tools described here.

The government has two main ways to reduce swings in the economic cycle: fiscal policy (the level of spending and taxes) and monetary policy (which helps to adjust interest rates).<sup>137</sup> Both tools can increase or decrease total demand in the economy and, thus, offset macroeconomic swings. Time is of the essence in doing so; slow response to new information can be costly for the economy in terms of both output and jobs.

Specifically, fiscal policy is a place where more and better automatic adjustments are likely to improve policy outcomes. Further, when it comes to monetary policy, there has been a rich and deep debate about the amount of discretion the Federal Reserve should exercise—a debate that illuminates the limits of automatic-adjustment mechanisms and the benefits of such alternative

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136 See, e.g., J. Bradford DeLong and Laura D. Tyson, *Discretionary Fiscal Policy as a Stabilization Policy Tool: What Do We Think Now That We Did Not Think in 2007?* 2 (April 5, 2013) (unpublished manuscript), <http://www.imf.org/external/np/seminars/eng/2013/fiscal/pdf/tyson.pdf> (“Legislatures are, by design, institutions that find it very difficult to make decisions quickly... Fiscal policies that take effect this year as a result of decisions made by a legislature last year based on information from two or three years ago would seem to guarantee sub-optimal economic outcomes.”)

137 See, e.g., Alan S. Blinder, *Keynsian Economics*, in *THE CONCISE ENCYCLOPEDIA OF ECONOMICS* (David R. Henderson, ed., 2008), <http://www.econlib.org/library/Enc/KeynesianEconomics.html> (“A Keynesian believes that aggregate demand is influenced by a host of economic decisions—both public and private—and sometimes behaves erratically. The public decisions include, most prominently, those on monetary and fiscal (i.e., spending and tax) policies.”)

tools as delegation when the decision-making framework grows too complicated.

Some question whether both fiscal and monetary policy are in fact necessary tools for stabilizing the economy—with the idea being that monetary policy alone may be sufficient. This was the dominant view prior to the Great Recession.<sup>138</sup> In the wake of that dramatic economic downturn in which central banks essentially ran short of ammunition to fight the downturn, the consensus view has changed, recognizing that fiscal policy has an important role to play in tandem with monetary policy.<sup>139</sup> Put simply, monetary policy may not be sufficient, and, therefore, it makes sense for fiscal policy to be at the ready.

### *1. Expanding Automatic-Adjustments in Fiscal Policy*

However, to help stabilize the economy, fiscal policy must be appropriately timed, and that can be a problem to the extent it requires congressional action. The answer to this conundrum may be automatic-adjustment mechanisms. And, importantly, there would be a backstop in the form of continued monetary policy discretion with the Federal Reserve.

So far, there has been relatively little focus on ways to implement such automatic-adjustment mechanisms in fiscal policy—perhaps in part because of the relative lack of attention given to fiscal policy relative to monetary policy in recent decades.<sup>140</sup> Spending programs and the tax system already provide some automatic stabilizing effect (often called the “automatic stabilizers”), but, for the most part, these work without explicit triggers involved. Spending for programs like Supplemental Nutrition Assistance Programs (SNAP) rises as

138 DeLong and Tyson, *supra* note 136, at 1 (“Six years ago, there was near-consensus among economists and policymakers alike ... that aggregate demand management was the near-exclusive province of central banks and monetary policy.”)

139 See, e.g., *id.* at 11 (“In the context of central banks that believe they lack the power and certainly lack the will to use non-standard expansionary monetary policy to rapidly rebalance economies to attain full employment and low inflation, expansionary fiscal policy thus acquires a stabilization policy role.”); THOMAS BAUNSGAARD AND STEVEN A. SYMANSKY, INT’L MONETARY FUND, AUTOMATIC FISCAL STABILIZERS: HOW CAN THEY BE ENHANCED WITHOUT INCREASING THE SIZE OF THE GOVERNMENT? (2009) (“The global economic crisis has shown that during large demand shocks, monetary policy may not provide a sufficient response, particularly, when its transmission mechanism is impeded by the conditions of the financial system.”); Antonio Fatas and Ilian Mihov, *Fiscal Policy as a Stabilization Tool*, 12 B.E. J. MACROECONOMICS 1 (“The 2008–2009 recession has shaken existing prior beliefs and frameworks concerning the role of fiscal policy in advanced economies, bringing this role to the forefront of economic policy discussions.”).

140 See Fatas and Mihov, *supra* note 139, at 1 (“Automatic stabilizers were seen as ‘doing their thing.’ No one questioned their role and there was little discussion as to how these stabilizers could be improved.”)

people's incomes fall; taxes fall for the same reason.<sup>141</sup> As IMF economists wrote in the midst of the Great Recession, expanding the stabilizers further—and without simply increasing the size of the government—could involve building in explicit triggers meant to go off during times of economic weakness.<sup>142</sup>

These triggers, for instance, could be based on the unemployment rate or related measures, which tend to be very good, contemporary indicators of changes in the economic environment. The unemployment rate is reported for a given month only days into the next month—which is much faster than many other broad indicators like GDP growth. While there is statistical volatility in the unemployment rate, large increases are highly indicative of a struggling economy. To take one threshold: an increase in the unemployment rate of at least 0.5 percentage points over a six-month period has accompanied all eleven post-World War II recessions, as designated (well after the fact) by the National Bureau of Economic Research. Moreover, that threshold is crossed on average just 3.5 months after the start of a recession. Finally, outside of recessions or the periods immediately following recessions, such an increase has occurred only twice in the post-World War II period.<sup>143</sup> In sum, significant increases in the unemployment rate strongly indicate the start of a recession and this or related measures could potentially be used as a trigger mechanism for fiscal stimulus, with the size of that stimulus varying by the increase in the unemployment rate.

The Obama Administration in its FY2016 Budget proposed strengthening the one such unemployment-based trigger that now exists. In particular, the unemployment insurance system already uses a state-by-state trigger in the Extended Benefits program to provide unemployment insurance for longer periods in times of weakness.<sup>144</sup> However, the automatic triggers here have

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141 See generally Frank Russek & Kim Kowalewski, *How CBO Estimates Automatic Stabilizers* (CBO, Working Paper No. 2015-07, 2015) (describing the major automatic stabilizers and how CBO estimates their magnitude).

142 See Baunsgaard and Symansky, *supra* note 139, at 15 (“An alternative to enhancing the traditional automatic stabilizers is to have temporary fiscal policy changes triggered by economic developments.”)

143 Author's calculations. Using this threshold as an example was inspired by work done in the Obama Administration on a “debt trigger.” As proposed, the trigger would have required debt to fall as a share of the economy and, if the country failed to achieve that path, automatic spending cuts and tax increases would have gone into place. The debt trigger would have been turned off, however, during periods of economic weakness—and this unemployment rate threshold was proposed. It also proposed to turn the debt trigger back on once the unemployment rate was below 8.5 percent and declining over a six-month period. See THE PRESIDENT'S PLAN FOR ECONOMIC GROWTH AND DEFICIT REDUCTION: LEGISLATIVE TEXT AND ANALYSIS 169 (2011), available at <http://www.cotton.org/issues/2011/upload/11presidentbudgetplan.pdf>.

144 See *supra* notes 79-80 and accompanying text.

proven insufficient, and the administration is proposing to significantly expand the program by changing the triggers and substantially lengthening the number of weeks available.<sup>145</sup>

Such triggers could be used much more broadly than this. On a national level, triggers could, for instance, automatically implement a tax credit that could be immediately reflected in lower tax withholding by businesses from employee checks. They could trigger fiscal relief to the states to allay the economically-harmful cutbacks that tend to come during recessions.<sup>146</sup> They could even trigger increases in investment programs—such as infrastructure—depending on the unemployment rate in a given state, and even the specific unemployment rate in the construction trades.<sup>147</sup>

Importantly, triggers could be included in discrete stimulus legislation. While fully automatic adjustments are preferable, discretionary fiscal stimulus—stimulus enacted by Congress—can itself be made more dynamic by triggering on and off specific provisions in the legislation (providing more or less funding or extending or cutting off tax relief), depending on the economic conditions. For instance, such mechanisms could have significantly improved the performance of the American Recovery and Reinvestment Act (ARRA); that stimulus did turn out to be too small given the size of the Great Recession but that was in part because it was designed before the severity of the recession was fully known. What followed then was policy drift—as the policy was not changed substantially even as new information was received.

The point is that such triggers can be designed in ways to minimize later policy drift and appropriately target periods of economic weakness. In terms of the factors for judging such mechanisms, the information needed to design these mechanisms is relatively readily available to Congress—such as appropriate thresholds at which to trigger countercyclical policies. These measures would reduce uncertainty for many workers, businesses, and the economy broadly.

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145 See EMPLOYMENT AND TRAINING ADMINISTRATION, FY 2016 CONGRESSIONAL BUDGET JUSTIFICATION 17-18 (2015) (describing proposal to reform unemployment insurance system with new triggers).

146 See, e.g., Vic Miller, Geo. U. Health Pol’y Inst., *Stabilizing Medicaid Funding During Economic Downturns* (2007) (proposing ways to automatically adjust Medicaid funding to provide state fiscal relief in recessions).

147 Traditionally, there have been objections to increasing (or decreasing) investments in infrastructure as a way of stabilizing the economy. It is said that infrastructure investments take time implement, even after the funds have been appropriated, and so there is concern about mistiming (essentially, another form of policy drift). This is a real concern; however, the experience in the most recent recession suggests that infrastructure investment can play an important role in countercyclical policy. This was the opinion reached by a recent panel organized by the National Academies. See *generally* NAT’L ACAD., *TRANSPORTATION INVESTMENTS IN RESPONSE TO ECONOMIC DOWNTURNS* (2014).

## 2. Why Delegate Monetary Policy

As noted above, fiscal policy works in combination with monetary policy to help stabilize the economy. Monetary policy has been delegated by Congress to the Federal Reserve,<sup>148</sup> and, while this delegation has been justified for a number of reasons, one of the key ones is essentially preventing policy drift—handing this policy to an entity with the ability to respond to quickly to new information about the economy.<sup>149</sup>

There has been an ongoing debate whether monetary policy could be improved by reducing discretion and, essentially, shifting over to something closer to an automatic-adjustment mechanism.<sup>150</sup> Specifically, economists have debated whether a rule should be adopted (with many advocating the so-called “Taylor rule” after the economist who developed it<sup>151</sup>)—with the most radical proposals being to require the Federal Reserve to adopt a specific formula and justify to Congress any deviations from it.<sup>152</sup>

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148 See generally MARC LABONTE, CONG. RESEARCH SERV., RL30354, MONETARY POLICY AND THE FEDERAL RESERVE: CURRENT POLICY AND ISSUES FOR CONGRESS (2015) (describing the Federal Reserve’s monetary policy authorities).

149 This point is often made in comparing monetary policy to fiscal policy. For instance, John Taylor—in arguing why discretionary fiscal policy should not be used as a stabilization measure, writing in the era before the Great Recession—describes the speed with which monetary policy can be implemented. He writes: “The Fed can and does make adjustments in interest rates relatively quickly—all the Fed Open Market Committee needs to do is have a conference call, vote, and transmit its decision to the New York trading desk where the short-term interest rate is changed.” John B. Taylor, *Reassessing Discretionary Fiscal Policy*, 14 J ECON. PERSP. 21, 27 (2000). Still, Taylor is also of the view that Federal Reserve decision-making should be even more systematized and follow a formula. See *infra* notes 150-153.

150 John Taylor is one of the leading advocates of a more formulaic approach to monetary policy and has proposed a formula to govern this, known as the “Taylor Rule.” See, e.g., John B. Taylor, *Discretion Versus Policy Rules in Practice*, 39 Carnegie-Rochester Series on Pub. Pol. 195, 197 (1993) (“If there is anything about which modern macroeconomics is clear however—and on which there is substantial consensus—it is that policy rules have major advantages over discretion in improving economic performance.”). Taylor has been particularly critical of the recent aggressive monetary policy actions in response to the Great Recession and its aftermath and has called for legislation to try to constrain the Federal Reserve. See generally John B. Taylor, *A Monetary Policy for the Future* 2, Apr. 15, 2015 (unpublished manuscript), [http://web.stanford.edu/~johntayl/2015\\_pdfs/A\\_Monetary\\_Policy\\_For\\_the\\_Future-4-15-15.pdf](http://web.stanford.edu/~johntayl/2015_pdfs/A_Monetary_Policy_For_the_Future-4-15-15.pdf) [hereinafter Taylor, *Monetary Policy for the Future*] (“The implication of this experience is clear: monetary policy should re-normalize in the sense of transitioning to a predictable rule-like strategy for the instruments of policy.”)

151 See *supra* note 150.

152 See Taylor, *Monetary Policy for the Future*, *supra* note 150, at 2 (“These departures suggest that some legislative backing might help. Such legislation could simply require the Fed to describe its strategy or rule for adjusting its policy instruments.”). See also Federal Reserve Accountability and Transparency Act of 2014, H.R. 5018, 113th Cong. (2014) (requiring the Federal Reserve to establish a reference policy rule meeting certain conditions and justify any deviations from it).

This article will not revisit the full breadth of this ongoing debate. But, the takeaway for the purposes of this article is that it illustrates some of the limitations of automatic-adjustment mechanisms in responding to policy drift. It is notable that even the most ardent supporters of more rule-based approaches do not suggest completely eliminating the discretion of the Federal Reserve, just limiting it—since they recognize that the complexity of the economy requires at least some flexibility.<sup>153</sup> And, even that has been subject to considerable pushback. For instance, former Chairman of the Federal Reserve Ben Bernanke writes, in response to the rhetorical question of whether the Federal Reserve’s Open Market Committee (FOMC) should try to follow the Taylor Rule: “No. Monetary policy should be systematic, not automatic. The simplicity of the Taylor rule disguises the complexity of the underlying judgments that FOMC members must continually make if they are to make good policy decisions.”<sup>154</sup> In other words, the decision-making framework is simply too complex for a formula to rule the day.

As discussed above, some have in fact suggested delegating *fiscal* authority to the Federal Reserve, in addition to the current delegation of its monetary powers.<sup>155</sup> That way, the Federal Reserve could bring the same nuance and quick decision-making in that context as well. Here, a key challenge is the normative concerns in delegating such authority: Namely, that core issues of spending and tax distribution potentially should be dealt with directly by elected representatives and not an independent agency. Further, Congress has so far been entirely unwilling to delegate significant authority in this area—hence, the complaint of some academics that they should. And, importantly, there is a viable and in fact highly effective alternative: automatic-adjustment mechanisms in fiscal policy that can serve many of the same function as a delegation and do so very well.

Further, the Federal Reserve can work in concert with robust automatic mechanisms governing fiscal policy to arrive at an optimal response, and, importantly, it is better for these mechanisms to be too large than too little. The Federal Reserve has the ability to offset *too much* fiscal stimulus

153 See Taylor, *Monetary Policy for the Future*, *supra* note 150, at 2 (“Such legislation could simply require the Fed to describe its strategy or rule for adjusting its policy instruments. It would be the Fed’s job to choose the strategy and how to describe it. The Fed could change its strategy or deviate from it if circumstances called for a change, but the Fed would have to explain why.”)

154 Ben S. Bernanke, *The Taylor Rule: A Benchmark for Monetary Policy?*, BROOKINGS: BEN BERNANKE’S BLOG (Apr. 28, 2015, 11:00 AM), <http://www.brookings.edu/blogs/ben-bernanke/posts/2015/04/28-taylor-rule-monetary-policy>.

155 See, e.g., Hines and Logue, *supra* note 50, at 31 (“It would be natural likewise to delegate some countercyclical tax policy tools to the Federal Reserve, permitting it, say, to adjust tax rates within a band (set statutorily by Congress) in response to short- and medium-run economic fluctuations.”)



especially if that stimulus is predictable as it would be with automatic measures. What it does not have the ability to do is offset *too little* stimulus where it has run out of monetary policy ammunition—as was, for instance, the case in recent years in the United States. In short, the automatic rules for fiscal policy can be complementary to the Federal Reserve’s discretion, together producing a much more stable economy than would otherwise exist if only one of these mechanisms were in place.

### C. Putting a Price on Carbon

One of the great challenges in putting a price on carbon is the uncertainty involved in terms of both the cost of carbon to society and the cost of abating carbon.<sup>156</sup> This is no justification for a lack of action.<sup>157</sup> The significant costs associated with global warming caused by carbon emissions—even if uncertain—are reason for government to intervene and put a price on carbon.<sup>158</sup> However, in designing a policy to do so, the uncertainty is still key, since the policy could be subject to drift. In particular, the uncertainty should affect exactly what tools are used to put a price on carbon, and a number of the legislative mechanisms discussed here can and should play important roles. And, delegation to administrative agencies is not the only or even best route forward.

The issues involved in putting a price on carbon, thus, nicely illustrate the slate of legislative tools that can be brought to bear in the face of uncertainty—and do so with a key policy that is likely to continue to be debated and, hopefully, enacted in the years ahead.

Specifically, there are two ways in which policy drift should be addressed in putting a price on carbon: first, there should be automatic-adjustment mechanisms to update the policy especially in the context of a cap-and-trade system; second, there should be mechanisms—some combination of delegation, alarm-bells, or changing congressional rules—to incorporate information that cannot be readily done automatically as time goes on.

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156 See *supra* notes 7-8.

157 See generally Robert S. Pindyck, *Pricing Carbon When We Don’t Know the Right Price: Despite the Unknowns We Should Begin to Tax Carbon*, REGULATION, Summer 2013, at 43 (arguing that, despite the uncertainty surrounding the social cost of carbon, a carbon tax should be implemented immediately and that the tax should then be updated as better information is gathered).

158 *Id.*

### 1. *Automatically Updating Carbon Pricing*

There are two broad approaches for putting a price on carbon: One is the carbon tax. Under this method, the government sets the price of carbon via a tax and then lets the market establish the quantity of carbon emitted given that price. A second is a cap-and-trade system. Under this system, the government sets the total quantity of carbon that can be generated (the cap) and then issues tradable permits up to that cap (the trade).<sup>159</sup>

If policymakers had perfect information as to the market for carbon, the two would be exactly equivalent.<sup>160</sup> A tax could be set to perfectly target a given quantity of carbon emissions and vice versa. However, policymakers do not have perfect information. In fact, the implementation of the policy itself will tend to reveal additional information that policymakers did not have before. For instance, if there were less carbon abatement than expected from a carbon tax, this would suggest that abating carbon is more expensive than expected. Similarly, if the price of a carbon permit turned out to cost more than expected given other economic conditions in a cap-and-trade system, this would also tend to suggest the same thing—that abatement turned out to be more expensive than expected leading to the higher permit prices.

The question is how to effectively incorporate the new information into either the pricing of a carbon tax or the amount of permits issued in a cap-and-trade system. As this article has argued, simply waiting for Congress to do so may produce harmful drift in the period in which no action is taken, and so the degree to which these systems can adapt to the information matters.

The literature on carbon pricing has been focused on the issue of policy drift, although it has not been called that. In particular, one of the principal analytical arguments for using a carbon tax instead of cap-and-trade is that the social cost associated with mispricing the carbon tax because of incorrect information about the cost of abatement is probably significantly less than that of misjudging the quantity of permits to issue for the same reason (though there is some controversy over that conclusion).<sup>161</sup> However, that argument

<sup>159</sup> For a helpful overview of the options for putting a price on carbon and the similarities and differences between a carbon tax and cap-and-trade system, see JONATHAN L. RAMSEUR & LARRY PARKER, CONG. RESEARCH SERV., CARBON TAX AND GREENHOUSE GAS CONTROL: OPTIONS AND CONSIDERATIONS FOR CONGRESS 3-6 (2009) (giving overview of similarities and differences between price and quantity control and describing how, to some degree, there is a continuum between the two options).

<sup>160</sup> *Id.* at 3.

<sup>161</sup> The basic logic for this derives from a foundational paper by Martin Weitzman. See generally Martin L. Weitzman, *Price vs. Quantities*, 41 REV. ECON. STUD. 477 (1974). The paper is about price versus quantity tools broadly, and, in the context of carbon, the lessons from this article suggest that, if there is uncertainty as to the cost of carbon abatement, errors are likely to be more costly in a cap-and-trade system than in a carbon tax system under the following two conditions: (1) the marginal benefit from reducing carbon emissions does not

largely hinges on the idea that policymakers will not quickly act to correct either the tax rate or the number of permits issued once new information becomes available (i.e., information that there is more or less abatement than expected due to a carbon tax, or prices of permits are higher or lower than expected). In other words, it hinges on there being policy drift.

But, policy drift can be addressed in part through automatic-adjustment mechanisms, and such mechanisms are particularly important in cap-and-trade systems since the cost of drift there is likely to be higher.<sup>162</sup> Some have called for price collars—maximum highs and lows—on the price of permits, suggesting that such a system is superior to cap and trade alone.<sup>163</sup> To effectuate that, more permits would automatically be issued if the price of them turns out higher than expected, and fewer would be issued (or the government would reduce total quantity by buying them) if the opposite were the case. Similarly, a tax could potentially be adjusted depending on the quantity of carbon being consumed. While the adjustment is probably less important in this context (since the cost of drift is likely less), the framework could still be improved by some increase in the price of carbon if more carbon were consumed than expected, and reduced somewhat if the opposite were the case.<sup>164</sup>

In this way, automatic-adjustment mechanisms can serve key roles in reducing policy drift in setting the price of carbon and, especially, in cap-and-trade systems. These mechanisms can potentially do so predictably and based on observable prices, quantities, and other data.

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rise steeply with higher carbon consumption (a relatively flat marginal benefit curve); (2) the marginal cost from carbon abatement does rise more steeply as the amount of abatement sought increases (a relatively steep marginal cost curve). *Id.* at 485-86. For further explanation of this, see, e.g., RAMSEUR & PARKER, *supra* note 159, at 7-15. The conclusion of many—although certainly not all—analysts is that the market for carbon is probably consistent with this, with a relatively flat marginal benefit curve and a steeper marginal cost curve, suggesting that errors would be more costly in a pure cap-and-trade system than in a carbon tax system. *Id.* at 10-15.

162 See *supra* note 161.

163 See, e.g., Lawrence H. Goulder & Andrew R. Schein, *Carbon Taxes Versus Cap and Trade: A Critical Review*, 4 CLIMATE CHANGE ECON. 1350010-1, 1350010-2 (“An alternative to both the carbon tax and the pure of cap and trade is a hybrid policy—a cap-and-trade program accompanied by a price floor, price ceiling, or both.... [I]t is easier to make the case for the hybrid than pure cap and trade.”).

164 For one idea of how to make automatic adjustments like this to a carbon tax, see Gilbert E. Metcalf, *Cost Containment in Climate Change Policy: Alternative Approaches to Mitigating Price Volatility*, 29 VA. TAX REV. 381, 391-404 (2009).

## 2. Other Tools for Facilitating Updates

Still, automatic-adjustment mechanisms have their limits. Important information can be automatically incorporated using formulas, especially information on the cost of abatement and that is observable via either the price of carbon permits or the effects of a carbon tax on the quantity of carbon being consumed. However, other information is harder to incorporate via an automatic mechanism. This especially includes information on the social cost of carbon.

The science related to global warming continues to develop, and there is substantial uncertainty with regard to a number of variables that determine the social cost of carbon.<sup>165</sup> Some of this uncertainty may be essentially irresolvable, but some is not, or at least can be reduced with time.<sup>166</sup> For instance, the sensitivity of the climate to release of carbon dioxide and the impacts of climate change on agriculture are among the most important variables for calculating the social cost of carbon, and additional research on these topics seems likely to yield more and better information.<sup>167</sup> But, new research of this kind cannot easily and automatically be translated into adjustments to policy parameters. In short, doing so requires discretion.

That discretion can either be that of Congress or an agency to which Congress has delegated authority. But, importantly—and in keeping with the theme of this article—there are ways for Congress to retain that authority, exercise discretion, and reduce the chance of policy drift. Gilbert Metcalf and David Weisbach recommend a number of the possible ways to do this in exploring how to implement a carbon tax,<sup>168</sup> and their suggestions fit nicely into the categories of this article. As a first best solution, they recommend delegating authority to adjust carbon tax rates to an administrative agency. Second, if Congress were unwilling to do that, they suggest having an administrative agency make recommendations to Congress that would then be given “fast-track protections”—changing the legislative rules to reduce drift. And, finally, as a last resort, they offer either eventual spikes in carbon tax rates or expiration of the carbon tax as a way to force Congress to revisit the

165 See, e.g., Anthoff & Tol, *supra* note 7 (decomposing sources of uncertainty for the social cost of carbon); Pindyck, *supra* note 157, at 43 (describing wide range of estimates of social cost of carbon).

166 Anthoff & Tol, *supra* note 7, at 516 (“[R]esearch could therefore change the uncertainty about the social cost of carbon, although some uncertainties are irreducible.”); Pindyck, *supra* note 157, at 46 (describing how additional research could help inform debates about the social cost of carbon by focusing especially on the potential for catastrophic outcomes).

167 Anthoff & Tol, *supra* note 7, at 526.

168 See Gilbert E. Metcalf & David Weisbach, *The Design of a Carbon Tax*, 33 HARV. ENVTL. L. REV. 499, 519-20 (2009).

tax—forms of alarm-bell mechanisms.<sup>169</sup> Notably, though, they do not fully acknowledge the dangers of such alarm-bell mechanisms, such as the possibility that the alarm does not get turned off quickly and, thus, *worsens* drift.

In this discussion, Metcalf and Weisbach do not focus on automatic-adjustment devices, despite the fact that certain types of new information (ie. carbon consumption) can be processed by formula and without much if any discretion (and despite the fact that Metcalf did offer such an automatic-adjustment system in a separate article<sup>170</sup>). However, their implicit assumption is right that certain important types of information require discretion to process, and such discretion is an important backstop and can be complementary to automatic adjustments.

In short, in designing measures to put a price on carbon, it is important to consider how those policies will be updated going forward as new information is received. The costs associated with policy drift in carbon pricing have the potential to be large, but they could in significant part be addressed through a combination of automatic-adjustment mechanisms and mechanisms to facilitate decision-making that allows for more discretion including traditional delegation but also fast-track rules in Congress to approve changes.

#### IV. THE PROSPECTS FOR ADDRESSING DRIFT

This Article is intended to both describe and evaluate the tools available to legislators to combat policy drift—and especially alternatives to empowering agencies and courts. This section tentatively probes two related questions. The first is whether policymakers can be persuaded to use these tools more effectively to combat policy drift—essentially, whether policymakers will change their ways. The second asks why these tools are sometimes used and other times are not. The thinking here is tentative and meant to prompt additional discussion and research.

##### A. Will Policymakers Change Their Ways?

This article has a normative component to it in addition to the descriptive. Specifically, it recommends that policymakers more often deploy some of the mechanisms discussed here—and especially automatic-adjustment mechanisms. But, in offering a legislative solution to what is fundamentally a political economy problem, there is some question whether policymakers

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169 *Id.*

170 See Metcalf, *supra* note 164.

would ever actually adopt these tools in ways that they have not already. If such solutions were possible, perhaps they would already be done.

There are at least two reasons to be skeptical of such a deterministic perspective:

First, legislative technology, much like technology elsewhere, is subject to innovation, and so better information about that technology seems likely to improve the decision-making of legislators. Take, for instance, the trigger considered here to adjust Social Security for unexpected changes in its solvency. During the last Social Security reform in 1983, such triggers had not yet been adopted anywhere else in the world, and there are now a handful of such examples in advanced countries.<sup>171</sup> The legislative technology is now better developed, and, while this by no means assures adoption, it makes it more likely. Or, to return to the example of carbon pricing, if scholars do not now discuss and model versions of cap-and-trade or carbon tax systems with automatic adjustments, such adjustments are less likely to be adopted at the point of legislation. And, the comprehensive framework laid out here is meant to be a step forward in our understanding of the various technologies to combat policy drift.

Second, a greater focus on the problem of policy drift may mean that policymakers are more attuned to the problem when actually legislating. Even sophisticated policymakers can sometimes misunderstand the degree to which major legislative action can be followed by stasis and produce policy drift. For instance, in the wake of passage of the ARRA to stimulate the economy, various economic advisors to President Obama expressed surprise that Congress did not take further action when the economy turned out to be significantly worse than expected.<sup>172</sup> If policy drift had been taken more

171 ANNA CRISTINA D'ADDIO AND EDWARD WHITEHOUSE, ORG. FOR ECON. COOPERATION AND DEV., TOWARDS FINANCIAL SUSTAINABILITY OF PENSION SYSTEMS: THE ROLE OF AUTOMATIC-ADJUSTMENT MECHANISMS IN OECD AND EU COUNTRIES 24 tbl.1 (2012); BARRY BOSWORTH AND R. KENT WEAVER, SOCIAL SECURITY ON AUTO-PILOT: INTERNATIONAL EXPERIENCE WITH AUTOMATIC STABILIZER MECHANISMS, CTR. FOR RETIREMENT RES. AT BOSTON COLLEGE 15 (2011); JOHN A. TURNER, AM. ASS'N OF RETIRED PERSONS PUB. POL'Y INST., SOCIAL SECURITY FINANCING: AUTOMATIC ADJUSTMENTS TO RESTORE SOLVENCY (2009).

172 As Jared Bernstein, one of the administration's top economic advisers, said in describing the administration's approach to sizing stimulus, "If you're at the barber and they don't cut your hair short enough, you can always ask them to go a little further." Ezra Klein, *Could This Time Have Been Different?*, WASH. POST, Oct. 8, 2011, [http://www.washingtonpost.com/blogs/wonkblog/post/could-this-time-have-been-different/2011/08/25/gIQAiJo0VL\\_blog.html](http://www.washingtonpost.com/blogs/wonkblog/post/could-this-time-have-been-different/2011/08/25/gIQAiJo0VL_blog.html) (quoting Jared Bernstein). Or, as Larry Summers put it more specifically, if somewhat less evocatively, "We believed in the winter of 2009 that if, as seemed likely, more stimulus would ultimately be required, it could be passed through the Congress using the unemployment insurance extension for 2010 as a vehicle. This view proved incorrect." Ezra Klein, *Larry Summers: "I think Keynes mistitled his book"*, WASH. POST, July 26, 2011, [http://www.washingtonpost.com/blogs/wonkblog/post/larry-summers-i-think-keynes-mistitled-%20his-book/2011/07/11/gIQAzZd4aI\\_blog.html](http://www.washingtonpost.com/blogs/wonkblog/post/larry-summers-i-think-keynes-mistitled-%20his-book/2011/07/11/gIQAzZd4aI_blog.html) (quoting Larry Summers).

seriously, the initial policy may very well have differed and included automatic-adjustment mechanisms to increase stimulus if the economy turned out to be worse than expected.

### **B. Why Do Policymakers Sometimes Address Drift—But Sometimes Not?**

The prior section lays out the case for why there is hope for improvement when it comes to policy drift—that political economy forces are not entirely deterministic. With that said, it is notable that the mechanisms described here are sometimes deployed and sometimes not already.

In the two policy areas explored here for which there is already legislation—Social Security and countercyclical policy—a number of the mechanisms described in this article are already in use. Social Security indexes benefits to wage growth and inflation; unemployment insurance has state-by-state triggers that go off if the unemployment rate rises, even if those triggers are limited. And, there are other examples as well.

There is then a descriptive question of when legislators are more likely to use particular mechanisms to combat drift. For instance, it is plausible that automatic-adjustment triggers may be more likely in areas of relatively widespread policy consensus. In that case, negotiating further adjustments to new information may be more easily done. By contrast, if there is relatively little policy consensus, it may be difficult to achieve agreements about how different contingencies would be addressed—and other mechanisms, like, alarm-bell mechanisms or delegation may be more likely. There are also dynamics between Congress and the executive. Clearly, some of these mechanisms like triggers and expirations keep more active decision-making authority in the hands of Congress than delegation does and, depending on the area, this may make use of some of these mechanisms more likely than others.

These are dynamics worthy of further exploration in order to better understand the legislative process. But, the underlying political dynamics do not make this article's normative conclusion superfluous. Whatever the exact forces are, it seems likely that policy drift can be better addressed than it is now and the mechanisms used to address policy drift can certainly be better understood.

### **CONCLUSION**

Congress works in fits and starts. It frustratingly does not and cannot incorporate new information appropriately when that information is received—running contrary to the interests of most Americans. In short, policy drifts.

But, Congress has tools at its disposal to address that drift. And, those tools do not necessarily involve handing authority to other institutions, namely agencies and courts—which is the traditional focus of the academic literature.

Instead, Congress can do so through other mechanisms and especially building automatic adjustments into its legislation.

The costs of policy drift are real. Policy drift means that risk in the Social Security system is concentrated on fewer generations—rather diversified across more. It means deeper recessions. It means a carbon pricing system that could end up with a price that is either too high or too low. These outcomes are not inevitable. Congress has tools at its disposal for addressing drift that go well beyond delegation and courts, and Congress can do so more effectively than it has to date. In short, reducing drift in these areas and others would be counted as a significant accomplishment. It would be a significant accomplishment for Congress to more effectively legislate for both good times and bad.