Disaster! Tax Legislation in Crises

Stephanie Hoffer[*]

Congress cuts and pastes in times of crisis. This Article, a study of tax legislation passed in response to natural disasters and national crises during the years 2000–2020, documents and examines Congress's use of recurring provisions from one disaster relief bill to the next. Of 272 individual statutes included in the study, Congress drew 200 from prior legislation. Far from being cabined, as they appeared when passed, these recurring tax relief statutes affected taxpayers over a broad geography throughout the entire twenty-year study period. Data also shows that recurring provisions tended to expand in scope over time. Many required taxpayers who claimed them either to hold assets or to expend resources in socially favored ways, affording relief to those who already had means. In addition, recurring tax provisions often designated a federal declaration of disaster as their on-switch, leaving taxpayers who suffered equivalent economic harm outside of disaster areas without relief despite being similarly situated for tax purposes. With these and other findings, the study documents the likelihood that recurring crisis-motivated tax relief

 Lawrence A. Jegen III Chair in Tax Law, Indiana University Robert H. McKinney School of Law. Thank you to Lee Little, Richard Kaplan, Kenworthey Bilz, and the participants of the University of Illinois College of Law Faculty Workshop, Benjamin Alarie and participants in the James Hausman Tax Law and Policy Workshop, Brian Galle and participants in the Georgetown Law Center tax policy colloquium, Leandra Lederman and participants in the Indiana University tax policy colloquium, Blaine Seto, Philip Hackney and participants of the AMT Summer 2021 series, participants of the Ohio State Business Journal Symposium for comments on my work, and participants in the Indiana University McKinney School of Law's faculty colloquium, with a special thanks to the incomparable George Wright and Florence Roisman for their care and insightful comments. I owe a debt of gratitude to the late Professor Jegen who remains a legend in our halls, to the Jegen family for securing his legacy, and to the many alumni who genuinely loved their tax professor and whose donations support my work. All errors (and surely there are at least a couple) are my own.

provisions are potential contributors to both the racial wealth gap and the overall wealth gap and that they also may work against the interests of newly established or very small businesses.

Recurrence in the crisis-motivated tax context is of genuine immediate concern. The study shows that recurring provisions tended to ossify over time, with Congress permanently codifying some and repeatedly incorporating others into recurring tax disaster relief packages. At the same time, destabilization of environmental and geopolitical conditions may necessitate Congress's more frequent use of cut-and-paste. Recurrence does not have to be a bad guy, though. With its tendency to extend and broaden relief measures over time and place, recurrence done without politicization and with proper advance consideration of its likely long-term distributional effects could be a constructive means of balancing interests of timeliness, efficiency, and the equitable distribution of resources.

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INTRODUCTION

These are the results of a comprehensive study of twenty years of United States tax legislation passed in response to national crises, and they reveal a distinct pattern. Much of congressional tax relief in crises in the past twenty years has been (re)created through cut-and-paste. The study period, from 2000 through 2020, includes but is not limited to the COVID pandemic, the terrorist attacks of 9/11, the Great Recession, the housing market collapse, and many natural disasters.[1] During that time, Congress repeated many forms of statutory tax relief, sometimes verbatim, from one crisis to the next. The study examines which kinds of statutory relief provisions recur in crisis-motivated tax

[1] *See* Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (codified in scattered sections of 26 U.S.C.); Coronavirus Aid, Relief, and Economic Security ("CARES") Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) (codified in scattered sections of 26 U.S.C.) [hereinafter CARES Act]; Taxpayer Certainty and Disaster Tax Relief Act of 2019, Pub. L. No. 116-94, Div. Q, 133 Stat. 3226 (part of the Further Consolidated Appropriations Act, 2020 and codified in scattered sections of 26 U.S.C.); Taxpayer Certainty and Disaster Tax Relief Act of 2020, Pub. L. No. 116-260, Div. EE, 134 Stat. 3038 (part of the Consolidated Appropriations Act, 2021 and codified in scattered sections of 26 U.S.C.); Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 64 (codified in scattered sections of 26 U.S.C.) (addressing California wildfires and tax relief for Hurricanes Harvey, Irma, and Maria); American Recovery and Reinvestment Act of 2009 ("ARRA"), Pub. L. No. 111-5, 123 Stat. 115 (codified in scattered sections of 26 U.S.C.); Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (codified in scattered sections of 26 U.S.C.); Economic Stimulus Act of 2008, Pub. L. No. 110-185, 122 Stat. 613 (codified in scattered sections of 26 U.S.C.); Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (codified in scattered sections of 26 U.S.C.); Mortgage Forgiveness Debt Relief Act of 2007, Pub. L. No. 110-142, 121 Stat. 1803 (codified in scattered sections of 26 U.S.C.); Hokie Spirit Memorial Fund, Pub. L. No. 110-141, 121 Stat. 1802 (2007) (codified in scattered sections of 26 U.S.C.); U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Pub. L. No. 110-28, 121 Stat.112 (codified in scattered sections of 26 U.S.C.); Gulf Opportunity Zone Act of 2005 ("GOZA"), Pub. L. No. 109-135, 119 Stat. 2577 (codified in scattered sections of 26 U.S.C.); Katrina Emergency Tax Relief Act of 2005, Pub. L. No. 109-73, 119 Stat. 2016 (codified in scattered sections of 26 U.S.C.); Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, 117 Stat. 752 (codified in scattered sections of 26 U.S.C.); Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, 116 Stat. 21 (codified in scattered sections of 26 U.S.C.); Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, 115 Stat. 2427 (codified in scattered sections of 26 U.S.C.).

legislation, under which circumstances, for whose benefit, and at what cost.

The study began with three hypotheses. First, crisis tax legislation has formulaic components, generally including provisions drawn from prior tax crisis bills. Second, subsequent crisis tax legislation tends to expand the scope of provisions repeated from earlier crisis tax legislation. Third, among recurring provisions, privately directed outlays via tax expenditure will outweigh Congressionally directed outlays.

Data support the study's first two hypotheses but not its third. Of the study's 272 individual provisions, Congress drew 200 from prior legislation. Over time, a number of provisions, like bonus depreciation for business expenses, employment-focused credits, and net operating loss deductions broadened in scope. And finally, while estimated spending through direct outlay was greater than through tax expenditure, the number of tax expenditure provisions (those that provide a tax break to taxpayers who engaged in specified behavior or who have specified characteristics) greatly outstripped the number of direct spending provisions, showing tax expenditure to be Congress's favored mode of tax recurrence in crises.

The normative concern undergirding the study's hypotheses is that the hurry-up nature of crisis-motivated tax legislation leaves little or no time for consideration of the legislation's long-term distributive effects or for how those effects might cumulate through cut-and-paste repetition. Legislation today incorporates ideas and language from two decades ago or longer without re-examining its effects in light of twenty years of progress in economics, political, behavioral, and social sciences, or legal theory. A better understanding of recurring crisis-motivated tax provisions is necessary in light of racial and other historical inequities, the expanding wealth gap, and new understandings of the broader effect of tax law in society, or for the simple but important reason that Congress should pass laws that work.

Prior writing on tax legislation in crises has examined temporary provisions of the Code through the lens of particular events or from various normative perspectives. This Article adds a comprehensive longitudinal analysis that brings to the fore the repetitive nature of tax relief legislation. It gives a positive account of the phenomenon of recurring provisions in crisis tax legislation and considers their possible distributional effects, not in isolation, but over time. It posits that Congress should engage in a re-examination of crisis-motivated tax legislation during a non-crisis period, taking recurrence into account with an understanding that repeated use of provisions likely alters their distributive outcome through cumulative effect, and it recommends designing reform of crisis-motivated tax legislation in a way that fits, rather than fights, Congress's existing legislative pattern.

Part I of the Article provides a literature review. Scholars in the area have described many of the disaster-related provisions of the Internal Revenue Code, and some have considered their distributional consequences in relation to particular events.[2] Many have

[2] *See, e.g.*, Michelle D. Layser, Edward W. De Barbieri, Andrew J. Greenlee, Tracy A. Kaye & Blaine G. Saito, *Mitigating Housing Instability During a Pandemic*, 99 OR. L. REV. 445, 457-66 (2021) (extrapolating from interventions enacted during prior crises, including the low-income housing tax credit, to recommend interventions in support of housing security during the COVID-19 pandemic); Christine Manolakas, *The Tax Law and Policy of Natural Disasters*, 71 BAYLOR L. REV. 1, 27-37 (2019) (comparing action taken by Congress and the Treasury Department in particular disasters); Danshera Cords, *Charity Begins at Home? An Exploration of the Systemic Distortions Resulting from Post-Disaster Giving Incentives*, 44 RUTGERS L.J. 213, 215 (2014) (discussing charitable giving incentives in the context of various disasters); Danshera Cords, *Charitable Contributions for Disaster Relief: Rationalizing Tax Consequences and Victim Benefits*, 57 CATH. U. L. REV. 427, 431-33 (2008) [hereinafter *Charitable Contributions for Disaster Relief*] (comparing incentives for giving in 9/11, the Indian Ocean tsunami, and various hurricanes); Christine L. Agnew, *Come Hell and High Water: Can the Tax Code Solve the Post-Katrina Insurance Crisis?*, 11 LEWIS & CLARK L. REV. 701, 706-07, 750-52 (2007) (discussing disaster relief and concluding that tax legislative proposal for catastrophe savings accounts is not advisable because it would create a windfall for insurers while both encouraging people to move into disaster-prone areas while discouraging reinsurance); Patrick E. Tolan, Jr., *The Flurry of Tax Law Changes Following the 2005 Hurricanes: A Strategy for More Predictable and Equitable Tax Treatment of Victims*, 72 BROOK. L. REV. 799, 836 (2007) [hereinafter *Flurry of Tax Law Changes*] (arguing that disaster relief provisions provided in Hurricanes Katrina, Rita, and Wilma should be extended to every disaster); Ellen P. Aprill & Richard Schmalbeck, *Post-Disaster Tax Legislation: A Series of Unfortunate Events*, 56 DUKE L.J. 51, 55-56 (2006) (providing a comprehensive analysis of disaster relief provisions enacted for 9/11 and various hurricanes, noting distributional and other concerns); Meredith M. Stead, Note, *Implementing Disaster Relief Through Tax Expenditures: An Assessment of the Katrina Emergency Tax Relief Measures*, 81 N.Y.U. L. REV. 2158, 2162-63 (2006) (observing increased use of tax expenditure provisions in Hurricane Katrina tax relief and noting potential adverse distributional consequences for taxpayers with low income and low asset holding); Francine J. Lipman, *Anatomy of a Disaster Under the Internal Revenue Code*, 6 FLA. TAX REV. 953, 959-60 (2005) (using case

recommended changes to Congress's legislative approach.[3] This essay builds on prior work by employing a comprehensive longitudinal approach to account for recurrence of the provisions described in earlier work. Part II describes the study and its limitations. Part III provides the study's quantitative results, demonstrating a legislative pattern of recurrence and expansion of many relief provisions. Part IV provides qualitative observations about patterns in crisis-motivated legislation in the study, including differences between legislation addressing localized crises and legislation addressing crises that are national in scope, as well as provisions that Congress enacts to address individual financial shock in contrast to those it enacts to intervene in systemic economic shock. Part V analyzes Congress's use of employment-related credits in response to both local and national crises and highlights the evolution of Congress's legislative approach to their distributional impact. Part VI describes means by which crisis-motivated tax provisions ossify, and it raises distributional concerns in conjunction with ossification. Part VII presents a brief case study of the employee retention credit to demonstrate potential benefits of recurrence as a tool for reform. Part VIII builds upon and refines the recommendations of prior scholarship, considering this study's results, to suggest process-oriented reforms that would harness recurrence as a useful legislative tool.

Tax scholars can provide real value by deepening policy makers' understanding of tax legislation in times of crisis through the careful study of past enactments, providing them with data, tools, and insights to improve the tax legislative process.[4] This Article is a step in that direction.

study method to discuss tax and other general disaster relief provisions); Robert A. Katz, *A Pig in a Python: How the Charitable Response to September 11 Overwhelmed the Law of Disaster Relief*, 36 IND. L. REV. 251, 255 (2003) (reviewing charitable giving incentives applicable to 9/11 and noting distortion and inefficiency as a result of economic bunching and other problems).

[3] *See supra* note 2 and accompanying text.

[4] For example, see Albert H. Choi, Quinn Curtis & Andrew T. Hayashi, *Crisis-Driven Tax Law: The Case of Section 382*, 23 FLA. TAX. REV. 1, 5-7 (2019) (using the IRS's administration of I.R.C. § 382 as a case study to illuminate lawmakers' decisions about whether and how to make law during a crisis).

I. LITERATURE REVIEW

Over the past decade, scholars have examined various tax statutes passed in response to crises, documented possible concerns with them, and recommended substantive reforms from a normative perspective.[5] This study joins a push to shift focus to the legislative process by comprehensively and systematically analyzing *all* crisis-motivated tax legislation over a twenty-year study period. The results support some of the reforms proposed in prior scholarship and cast doubt on others. The following paragraphs describe the tax literature with which this study is in conversation.

Much of the existing work on crisis-motivated tax legislation has centered on the relative lack of permanent crisis relief in the Internal Revenue Code.[6] Some scholars have argued that tax relief provisions should be made permanent.[7] They note that because relief bills can be delayed or politicized, disaster area designations can create disparate treatment of similarly situated taxpayers across boundaries.[8] Congress

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[5] *See, e.g.*, Aprill & Schmalbeck, *supra* note 2, at 55-56 (comparing tax legislative responses to the terrorist attacks on 9/11 and the 2005 hurricanes, noting that relief is often directed to high-income taxpayers, and suggesting amendments to address equity concerns); Lipman, *supra* note 2, at 959-60 (surveying disaster relief provisions in tax law, noting their complexity and opacity, and suggesting changes to promote administrability and equity); Manolakas, *supra* note 2, at 5-6 (surveying permanent tax relief provisions applicable to victims of natural disasters and arguing that making some of those provisions dependent on a federal disaster declaration violates well-accepted concepts of equity); Stead, *supra* note 2, at 2162-63 (using a tax expenditure model to provide crisis relief disadvantages low-income taxpayers).

[6] *See, e.g.*, Aprill & Schmalbeck, *supra* note 2, at 100 (recommending permanency for certain packages of provisions and creation of expert panel to draft legislative guidelines for Congress to use as needed); Cords, *Charitable Contributions for Disaster Relief*, *supra* note 2, at 464 (same for particular kinds of disasters); Manolakas, *supra* note 2, at 62 (recommending enactment of permanent relief); Patrick E. Tolan, Jr., *After the Disaster: Lessons Learned About Tax Relief from Hurricanes Katrina and Sandy*, 85 MISS. L.J. 553, 593 (2016) [hereinafter *Lessons Learned*] ("It is unsound for Congress to react on an ad hoc basis to the tragedy of the day, because it results in disparate treatment of casualty victims.").

[7] *See supra* note 6 and accompanying text.

[8] *See* Andrew L. Lawson & William E. Foster, *Presidential Tax Discretion*, 73 ALA. L. REV. 291, 294 (2021) ("Congress's well-intended desire to facilitate rapid, uniform, and predictable relief in various sympathetic circumstances should not undermine the deliberative safeguards of the legislative process . . . ."); Aprill & Schmalbeck, *supra* note

also may be more likely to address disasters that receive high-profile media coverage at the expense of less-publicized events.[9] Some on-the-fly disaster relief packages disproportionately benefit people with relatively higher income and wealth, since people with fewer means owe little or no federal income tax to begin with.[10] Because of the problems inherent in past tax relief legislation, some authors have recommended an enactment of a permanent relief package.[11]

The results of this study do not support wholesale permanent adoption of the existing crisis relief tax landscape. Recurring provisions in the data are obvious candidates for codification if and when Congress moves toward permanent codification of disaster relief. But there is a distinct lack of data on their effectiveness or their long-term distributional consequences. In short, they appear to be re-enacted in a rote manner, and there simply is not enough information at present to recommend permanency for many of the most frequently recurring measures.

In their article, *Post-Disaster Tax Legislation: A Series of Unfortunate Events*, Professors Ellen Aprill and Richard Schmalbeck take a different approach.[12] They compare legislation passed in response to the terrorist attacks of 9/11 and the 2005 hurricanes.[13] Noting with considerable nuance many contours of the problems with crisis-motivated tax legislation, they posit that members of Congress are nonetheless

2, at 59 (discussing horizontal equity); Stead, *supra* note 2, at 2189 (stating that providing relief based on geographic designations can be simultaneously over-inclusive and under-inclusive).

[9] *See* Manolakas, *supra* note 2, at 61-62. As Ellen Aprill and Richard Schmalbeck have noted, "Smaller-scale disasters, it would appear, call for dramatic legislative responses only if they occur within some temporal proximity to bigger ones, and involve losses that are similar in type, if not in magnitude. Disasters, however, fall along a continuum of severity, and the individual victims of smaller disasters, while less numerous, may be just as deserving (or undeserving) of any special tax relief as victims of the disasters whose magnitude moves Congress into action." Aprill & Schmalbeck, *supra* note 2, at 69.

[10] *See* Stead, *supra* note 2, at 2183 ("The very poor do not benefit from tax expenditures in general, and the effects of a disaster make the very poor even less likely to benefit. The most obvious example is families with no income, or income so low that they do not owe taxes.").

[11] *See supra* note 6 and accompanying text.

[12] Aprill & Schmalbeck, *supra* note 2.

[13] *Id.* at 55-56.

compelled to legislate in response to disasters due to time constraints and a desire to cultivate a positive image among constituents.[14] Congress's legislative response "is encouraged by the fact that the IRS, at least in its own view, lacks statutory authority to provide certain types of relief, no matter how much such relief seems merited by the circumstances."[15] The result, given time constraints on the process, is "disappointing, and largely inconsistent with sound tax policy."[16] They do not favor unexamined adoption of existing crisis-motivated tax provisions.

Aprill and Schmalbeck argue that a better approach can be institutionalized in part through reform of the legislative process — a position that this study supports.[17] They make a number of process-oriented proposals for reform.[18] They recommend that Congress identify relief provisions that satisfy certain policy and efficacy concerns[19] and that it grant the Treasury broader authority to decide when at least some of those provisions will be available.[20] Recognizing the congressional imperative for constituent signaling, though, they also recommend that Congress retain the function of declaring disasters, for the purpose of triggering tax relief provisions, through passage of a joint resolution.[21] Finally, acknowledging that implementation of their recommendations is unlikely, they also suggest that Congress convene an expert panel to identify provisions that should be available on an

[14] *See id.* at 53 ("[Congress] tends to overreact. There appears to be a legislative imperative, a felt need to be seen by constituents as engaged actively in providing whatever relief or succor within the imagination of Congress . . . .").

[15] *Id.*

[16] *Id.* at 54.

[17] *See id.* at 90.

[18] *See id.* Part IV.

[19] *See id.* at 90 (clarifying that some relief provisions are sound enough for Congress to "generalize to a broader range of victims").

[20] *See id.* at 94 (allowing administrative invocation of relief provisions may shorten response time and allow Treasury to create rules and standards that will better tailor the provision of relief); *id.* at 97 (noting that Congress should grant the Commissioner of the IRS power to "toll the running of limitations on reinvestment of insurance proceeds in similar property, excuse the imposition of penalty taxes on withdrawals from retirement accounts, and so on").

[21] *See id.* at 95 (arguing that a joint resolution requirement preserves a role for Congress, which "will likely always feel that it needs to act when disaster strikes").

equitable basis in all disasters, provisions that should be available only in the presence of an extraordinary policy justification, and guidelines that should apply to provisions that Congress customizes for particular disasters,[22] since "they can be reasonably evaluated only outside the context of any particular disaster."[23]

The data in this study support the assertion of Aprill, Schmalbeck, and others, that systemic reform to Congress's crisis-driven tax legislation is needed. This study also supports the position, taken by Aprill and Schmalbeck, that Congress should, in some cases, remove itself from the determination of whether relief is available. It strengthens the position of various scholars that further work is needed to identify provisions that should be made permanent features of the Internal Revenue Code and that Congress must work outside of times of crisis, and in coordination with outside parties, to identify best practices for crisis-motivated tax legislation.[24] This study adds to the existing literature by providing documented evidence of legislative pattern and practice in the crisis tax context, by focusing systematically and comprehensively on the highly repetitive nature of the tax legislative process in crises, by comprehensively documenting patterns in the legislation that amount to de facto permanence, by expressing concern over the long-term distributional effect of this de facto permanence, and, perhaps most

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[22] *See id.* at 97-98.

[23] *Id.* at 100.

[24] *See id.* (recommending adoption of some generally applicable provisions for all disasters and creation of a panel of tax experts to create packages of tax relief for different disasters that are ready for use by Congress when needed); Christine E. Cerniglia, *Systemic Injustice: The Need for Disaster and Pandemic Preparedness Legislation*, 99 U. DET. MERCY L. REV. 53, 88-90 (2021) (calling for advance research about stakeholder vulnerability and inclusion of stakeholders in disaster preparedness policymaking); Cords, *Charitable Contributions for Disaster Relief*, *supra* note 2, at 468 ("[B]efore the occurrence of the next mega-disaster, it would be advisable to consider the results of recent mega-disasters, as well as both current charitable giving laws and the temporary measures that followed these and other mega-disasters. After such study, legislation could be designed that would address equity concerns and optimize contributions to disaster relief."); Manolakas, *supra* note 2, at 62 (calling for equity in relief provided to all affected taxpayers through enactment of permanent relief provisions in the Internal Revenue Code); Tolan, *Flurry of Tax Law Changes*, *supra* note 2, Part V (providing specific proposals for enactment of broadly applicable legislation prior to disasters).

importantly, by demonstrating with actual evidence that reforms targeting increased equity will come more easily if they conform to, rather than fight, existing legislative patterns.

II. The Study

To test its hypotheses, the study reviews tax legislation passed in response to crises occurring during the years 2000–2020. Included bills responded to the 9/11 terrorist attacks, numerous hurricanes, the Virginia Tech shooting, the 2008 housing market collapse, the Great Recession, and the COVID pandemic, among other things.[25] For each bill, the study quantifies how many provisions were directed toward individuals in their private capacity; how many were directed toward businesses; how many were directed toward public finance; whether Congress provided the tax benefit through direct spending or through a tax expenditure (requiring the intended beneficiary to spend money or hold/sell particular assets), as well as whether the benefit was related specifically to debt, loss, employee hiring or retention, exemption, rate reduction, or refund.

The study is meant to be an initial exploration of the subject and is not meant to be a quantitative empirical work. It is a qualitative analysis informed by math. It has the following limitations. First, it does not include re-enactment of expiring provisions, referred to as extenders, which are ambiguous in terms of whether they are responding to a crisis or to expiration or to both. Second, the study categorizes provisions using the bare language of legislation without considering the empirical question of its downstream effects. For example, a business owner who withdraws penalty-free funds from a retirement account during a crisis may use those funds to retain an employee through temporary business closure, but neither the business use of the funds nor the crisis-driven outlay to the employee would be visible in the study's data.[26] Rather, a provision permitting the early withdrawal would be coded as a tax expenditure benefitting taxpayers in their individual capacity, creating an opacity problem for which the Internal Revenue Service's statistical function provides no solution. Third, for quantitative purposes, the

[25] See *supra* note 1 for a list of included legislation.

[26] To the best of this author's knowledge, the data does not exist.

study currently treats provisions related to public finance and low-income housing as a single category, essentially carving them out for later consideration. These provisions contain complexity related to business versus private use, capitalization versus expensing, employment, and other categories considered by the study, but, again, Internal Revenue Service data are unable to provide a full picture of which resources went where.[27] Fourth, the study currently is a single-source study. It relies on the Joint Committee on Taxation's General Explanations to identify and understand legislation enacted during the study window and on the revenue estimates provided by them.[28] Revenue estimates used by the Joint Committee are not data on actual spending; rather, they are data on what Congress thought it would be spending when it enacted the relevant legislation. Finally, the study is not meant to address *why* there are recurring provisions in crisis-motivated tax legislation. Rather, it documents the fact of, and frequency of, recurring provisions and considers their possible distributional effects.

III. Summary Statistics

The study scored a total of 272 individual crisis tax relief provisions across twenty pieces of legislation.[29] Total anticipated spending from these 272 provisions was slightly more than $1.7 trillion over the twenty-year study period, with mean spending per bill of slightly more than $6 billion and median spending per bill of $158 million (a differential driven by the presence of stimulus checks in the study period).[30]

27 I hope to consider this area more fully in future work.

28 The General Explanations for each Congress are known as the Bluebooks. *Publications*, The Joint Comm. on Tax'n, Cong. of the U.S., https://www.jct.gov/publications/?it=content&category_name=Bluebooks (last visited Sept. 22, 2023) [https://perma.cc/GT7U-V5CK].

29 Extenders were excluded from the study and would have increased this number noticeably.

30 Data on file with the author. The difference between the mean and median numbers is driven by bills containing direct stimulus spending.

A. Crisis-Motivated Tax Legislation Is Formulaic

Data supported the study's first hypothesis, that crisis-motivated tax legislation is formulaic, with subsequent bills incorporating the provisions of prior bills.[31] There were approximately 200 repeated provisions during the study period (a figure which would be significantly higher if the public financing and extender provisions were included in the count). All but three enactments of crisis-motivated tax legislation in the study contained recurring provisions. Two of those three were the first two bills in the study, which had no recurring provisions simply because they were the first bills in the period and addressed separate aspects of the 9/11 attacks.[32] The third provided a payroll credit to employers affected by Congress's required sick leave mandate during the COVID pandemic.[33] The Act of which the payroll credit was a part was not a tax act, so arguably the cut-and-paste mechanism that produced recurrence in the other crisis-motivated tax bills was not at work.[34]

The average number of provisions in the legislation that were recurring provisions was forty-three percent, and the median was thirty-five percent. In thirty-five percent of the legislation, fifty percent or more of the bill's provisions were recurring, and in twenty percent of the legislation, 100% of the provisions were recurring.

It is clear from the data that Congress's reliance on recurring provisions is both significant and regular, and that conceptualizing such provisions as confined to a particular crisis would be missing an important opportunity to consider the cumulative effect of recurrence.

[31] Data on file with the author.

[32] *See* Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, 115 Stat. 2427 (codified in scattered sections of 26 U.S.C.) (approved on January 23, 2002 and amending the Internal Revenue Code to provide tax relief for victims of the 9/11 terrorist attacks); Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, 116 Stat. 21 (codified in scattered sections of 26 U.S.C.) (approved on March 9, 2002 and providing tax incentives for economic recovery following the terrorist attacks of 9/11).

[33] Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020) (codified in scattered sections of 26 U.S.C.).

[34] *See id.*

B. The Scope of Recurring Provisions Holds Steady or Expands over Time

Once recurring, a provision rarely retracts in scope. This portion of the study examined all provisions that appeared five or more times during the study period, accounting for almost a third of all included provisions.[35] Of them, sixty-two percent became broader over time;[36] thirty-eight percent remained the same,[37] and none contracted in scope. Though not direct evidence, the stickiness of more frequently recurring provisions suggests that Congress is not regularly revisiting their effectiveness in terms of delivering relief or their long-term distributional consequences. If anything, the data suggest (though again, do not provide direct evidence) that Congress broadens recurring provisions in response to the perceived broader magnitude of crises, rather than in response to either the provisions' performance in the past or the possible severity of the crisis for individual claimants.

C. Direct Spending and Spending on Individuals Were Proportionately Larger than Business Relief and Privately Directed Tax Expenditures

1. Relief to Individuals Outweighed Relief to Businesses

Stated as projected expenditures in 2020 dollars,[38] spending on taxpayers in their individual capacities outweighed business-related

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[35] They were the employee retention credit, use of the prior year's income to calculate the earned income and child tax credits, loosened restrictions on the deduction of casualty losses, loosened restrictions on the deduction of charitable contributions, penalty-free early withdrawal from retirement savings accounts, increased expensing under section 179, expanded availability of the net operating loss deduction, and required extension of filing and other deadlines.

[36] They were the employee retention credit, net operating loss, charitable contributions, retirement withdrawals, and section 179 expensing.

[37] They were the earned income and child tax credit lookbacks, requirements that the Treasury extend deadlines, and expanded availability of casualty losses.

[38] To compute the amounts in this section, I used the nominal dollar expenditure estimates provided by the Joint Committee on Taxation in its biannual Bluebooks, adjusted for inflation using the CPI Inflation Calculator provided by the U.S. Bureau of Labor Statistics. *CPI Inflation Calculator*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/data/inflation_calculator.htm (last visited Nov. 22, 2023) [https://perma.cc/TWD6-VYVG]. For purposes of computation, I stated all amounts in 2020 dollars.

spending, with roughly $1.4 trillion projected to go to the former and about $471 billion to the latter.[39] Public finance provisions, many largely business-related, accounted for another $56 billion. The balance between individually oriented provisions and business or public finance provisions was driven in large part by stimulus checks, with projected direct spending on individuals making up slightly more than $680 billion of the just over $777 billion projected direct spending amount. Most bills did not feature stimulus check-type spending, with just nineteen direct spending provisions out of 272 total coded provisions during the entire period, and those nineteen included multiple small-scale adjustments to the child and earned income tax credits. The median projected amount of direct spending per bill in the study, even when the stimulus was included, was $268 million, or just over one hundredth of a percentage point of the total spending.

2. The Third Hypothesis Failed Due to Magnitude of Stimulus Checks (but Survived in Spirit . . .)

The study's third hypothesis, that among recurring provisions, privately directed outlays via tax expenditure would outweigh congressionally directed ones, was not supported by the data. Direct spending comprised thirty-nine percent of total projected spending, while privately directed tax expenditures accounted for only twenty-seven percent. Once again, though, the ratio of the former to the latter is driven largely by stimulus checks, the projected cost of which, when adjusted for inflation, totaled almost $600 billion over the study period.[40] If stimulus check provisions are omitted from the calculation,

[39] Though, as explained earlier in the paper, it is not always possible to draw a clean line between these two categories.

[40] The government has estimated that actual spending was much higher. Over 476 million payments went to taxpayers during the three rounds of COVID stimulus, for a total of more than $814 billion according to the Internal Revenue Service. *See Update: Three Rounds of Stimulus Checks. See How Many Went Out and For How Much*, PANDEMIC OVERSIGHT (Feb. 17, 2023), https://www.pandemicoversight.gov/data-interactive-tools/data-stories/update-three-rounds-stimulus-checks-see-how-many-went-out-and [https://perma.cc/WUF6-QGTS]; *see also SOI Tax Stats — Coronavirus Aid, Relief, and Economic Security Act* (*CARES Act*) *Statistics*, IRS, https://www.irs.gov/statistics/soi-tax-stats-coronavirus-aid-relief-and-economic-security-act-cares-act-statistics (last updated Apr. 4, 2023) [https://perma.cc/EU6M-HURC].

privately directed tax expenditures remain twenty-six percent of total projected spending, but direct expenditures drop to 8.9%, just a little over one third of the amount of privately directed tax expenditures. Even with stimulus provisions included, the number of privately directed tax expenditure provisions outstrips the number of direct spending provisions by almost seven to one.

Though the data don't satisfy the study's third hypothesis, which focused narrowly on total spending, the much higher frequency of privately directed tax expenditures demonstrates that, as a legislative mechanism, Congress prefers them to the enactment of direct spending in tax relief bills. Furthermore, the inversion of the spending ratio in the absence of stimulus check-type provisions demonstrates that outside of a large-scale economic crisis, privately directed tax expenditure provisions are a significant mechanism for the delivery of relief, particularly to businesses. Finally, the frequency with which such provisions recur in subsequent crisis-motivated legislation suggests that the form enjoys bipartisan consensus and plays an important role in the crafting of such legislation.

IV. Qualitative Analysis

Beyond the summary statistics, patterns emerged from the study. The following sections describe those patterns and suggest inferences that may be drawn from them.

A. Two Kinds of Crisis Tax Legislation

During the study period, crisis-motivated tax legislation varied in its content depending on whether the crisis at hand was localized or national in scope. Although the two types of bills share occasional overlap, localized crises gave rise to legislation focused more heavily on relief for individuals provided through income tax benefits affecting inclusion and rate, as well as special preferences for public financing. Crises that were national in scope resulted in legislation meant to support the economy overall, with some individual relief included. In other words, Congress tended to appropriately tether the scope of its crisis-motivated tax legislation to the geographical reach of the crisis.

Tax legislation addressing localized crises during the study period generally addressed events that captured national media attention. During the years 2000–2020, examples of such legislation included the Victims of Terrorism Tax Relief Act ("VTTRA"),[41] which applied to people directly affected by the 9/11 terrorist attacks, Title II of the Job Creation and Worker Assistance Act of 2002 ("JCWA"),[42] which benefited the area of New York damaged by the terrorist attacks, the Katrina Emergency Tax Relief Act of 2005 ("KETRA")[43] and the Gulf Opportunity Zone Act of 2005 ("GOZA"),[44] which addressed hurricanes Katrina, Rita and Wilma, the Hokie Spirit Memorial Fund[45] for victims of a mass shooting at Virginia Tech, Subtitle A of Title VI of the Emergency Economic Stabilization Act of 2008 ("EESA"),[46] which addressed Hurricane Ike and flooding in the Midwest, the Bipartisan Budget Act of 2018 and the Disaster Tax Relief and Airport and Airway Extension Act of 2017,[47] which addressed Hurricanes Harvey, Irma, and Maria, the Disaster Tax Relief and Airport and Airway Extension Act of 2017, and the Taxpayer Certainty and Disaster Relief Acts of 2019[48] and

[41] Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, 115 Stat. 2427 (codified in scattered sections of 26 U.S.C.).

[42] Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, §§ 201-09, 116 Stat. 21, 26-33 (codified in scattered sections of 26 U.S.C.).

[43] Katrina Emergency Tax Relief Act of 2005, Pub. L. No. 109-73, 119 Stat. 2016 (codified in scattered sections of 26 U.S.C.).

[44] Gulf Opportunity Zone Act of 2005 ("GOZA"), Pub. L. No. 109-135, 119 Stat. 2577 (codified in scattered sections of 26 U.S.C.).

[45] Hokie Spirit Memorial Fund, Pub. L. No. 110-141, 121 Stat. 1802 (2007) (codified in scattered sections of 26 U.S.C.).

[46] Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 601, 122 Stat. 3765, 3893-94 (codified in scattered sections of 26 U.S.C.).

[47] *See* Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 64 (codified in scattered sections of 26 U.S.C.) (addressing California wildfires and tax relief for Hurricanes Harvey, Irma, and Maria); Disaster Tax Relief and Airport and Airway Extension Act of 2017, Pub. L. No. 115-63, 131 Stat. 1168 (codified in scattered sections of 26 U.S.C.) (providing for tax relief for Hurricanes Harvey, Irma, and Maria).

[48] Taxpayer Certainty and Disaster Tax Relief Act of 2019, Pub. L. No. 116-94, Div. Q, §§ 201-08, 133 Stat. 3226, 3236-47 (part of the Further Consolidated Appropriations Act, 2020 and codified in scattered sections of 26 U.S.C.).

2020,[49] which applied to all federally declared disasters during statutorily designated periods of time.

Tax legislation addressing crises of national scope tended to be broader and to contain provisions seemingly intended to support the overall economy. In part, this is because the crises themselves, with the exception of the COVID-19 pandemic, were primarily economic rather than humanitarian crises. During the study period, these included the post-9/11 recession beginning in 2001, the Great Recession and housing market collapse beginning in 2007, and the COVID-19 pandemic beginning in 2020. Legislation addressing these events included the Job Creation and Worker Assistance Act of 2002,[50] the Jobs and Growth Tax Relief Reconciliation Act of 2003 ("JGTRRA"),[51] the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act of 2007,[52] the Mortgage Forgiveness Debt Relief Act of 2007,[53] the Emergency Economic Stabilization Act of 2008,[54] the Housing and Economic Recovery Act of 2008,[55] the Economic Stimulus Act of 2008 ("ESA"),[56] the American Recovery and Reinvestment Act of 2009 ("ARRA"),[57] the Coronavirus Aid, Relief, and Economic Security

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49 Taxpayer Certainty and Disaster Tax Relief Act of 2020, Pub. L. No. 116-260, Div. EE, §§ 301-06, 134 Stat. 3038, 3070-82 (part of the Consolidated Appropriations Act, 2021 and codified in scattered sections of 26 U.S.C).

50 Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, 116 Stat. 21 (codified in scattered sections of 26 U.S.C.).

51 Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, 117 Stat. 752 (codified in scattered sections of 26 U.S.C.).

52 U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Pub. L. No. 110-28, 121 Stat. 112 (codified in scattered sections of 26 U.S.C.).

53 Mortgage Forgiveness Debt Relief Act of 2007, Pub. L. No. 110-142, 121 Stat. 1803 (codified in scattered sections of 26 U.S.C.).

54 Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (codified in scattered sections of 26 U.S.C.).

55 Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (codified in scattered sections of 26 U.S.C.).

56 Economic Stimulus Act of 2008, Pub. L. No. 110-185, 122 Stat. 613 (codified in scattered sections of 26 U.S.C.).

57 American Recovery and Reinvestment Act of 2009 ("ARRA"), Pub. L. No. 111-5, 123 Stat. 115 (codified in scattered sections of 26 U.S.C.).

and the Taxpayer Certainty ("CARES") Act of 2020,[58] and the Consolidated Appropriations Act of 2021 (which, despite its name, was passed at the end of 2020).[59]

B. Repeat Players in Localized Crises

Tax legislation addressing localized crises during the study period typically provided financial relief through exemptions and preferences for individuals in the affected region, as well as tax exempt bond funding for redevelopment. The following paragraphs describe some of the locally focused repeat players and consider their potential distributional effects.

1. Exemptions from Income

Exemptions for individual income were common in tax legislation addressing localized crises during the study period. For example, legislation addressing the 9/11 terrorist attacks provided an exemption for the income of individuals killed in the attacks,[60] individual exclusion of death benefits,[61] payments to victims and their families from charitable organizations,[62] and certain cancellations of indebtedness.[63] The cancellation of indebtedness exemption appeared again in bills related to Hurricane Katrina[64] and the June 2008 Midwest flooding.[65] The Katrina bill increased the personal exemption for taxpayers who

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58 CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) (codified in scattered sections of 26 U.S.C.).

59 Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (codified in scattered sections of 26 U.S.C.).

60 Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, § 101, 115 Stat. 2427, 2428 (codified at 26 U.S.C. § 692). In addition, decedents whose tax bills would not have reached $10,000 were treated as having paid in $10,000, entitling their estates to refunds. *Id.*

61 *Id.* § 102 (codified at 26 U.S.C. § 101).

62 *Id.* § 104 (codified at 26 U.S.C. §§ 501, 4941).

63 *Id.* § 105 (codified at 26 U.S.C. § 108).

64 *See* Katrina Emergency Tax Relief Act of 2005 ("KETRA"), Pub. L. No. 109-73, § 401, 119 Stat. 2016, 2026-27 (codified in scattered sections of 26 U.S.C.).

65 *See* Emergency Economic Stabilization Act of 2008 ("EESA"), Pub. L. No. 110-343, § 702, 122 Stat. 3765, 3912 (codified in scattered sections of 26 U.S.C.).

housed people displaced by the disaster, as did the legislation for the Midwest flooding.[66] Both laws provided the host an additional $500 per displaced guest, for an additional amount of up to $2,000.[67] Likewise, legislation related to the Virginia Tech shooting exempted payments from the Hokie Spirit Memorial Fund.[68]

Section 139 of the Code, passed in response to the 9/11 terrorist attacks, has a similar effect. It makes permanent an exemption for "disaster relief payments."[69] It covers payments for personal, family, or funeral expenses resulting from a disaster, disaster-related payments for repair or rehabilitation of a residence, including replacement of its contents, payments for death or physical injury from a common carrier, and general welfare payments from a government or government instrumentality in light of a disaster.[70] For this purpose, "qualified disaster" is defined broadly to include not only federally declared disasters, but also those resulting from military or terrorist action, those resulting from accidents involving common carriers, or "from any other event, which is determined by the Secretary to be of a catastrophic nature."[71]

One-time exemptions in response to specified localized crises during the study period raise few distributional concerns. Few of them are novel; the crisis-related exemptions from income tax mirror existing Code provisions, apply one time only, and are available to only a narrow

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[66] KETRA § 302; EESA § 702. As noted in the Bluebook language describing the Heartland Disaster provisions of the EESA, "The Act provides relief for the Midwestern disaster area identical to the relief for the Gulf Opportunity Zone for 2008 and 2009 (except that this relief relates to the Midwestern disaster rather than Hurricane Katrina)." STAFF OF J. COMM. ON TAX'N, 110TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 110TH CONGRESS 495 (Comm. Print 2009) [hereinafter EXPLANATION OF 110TH CONGRESS TAX].

[67] KETRA § 302; EESA § 702.

[68] Hokie Spirit Memorial Fund, Pub. L. No. 110-141, § 1, 121 Stat. 1802, 1802 (2007).

[69] 26 U.S.C. § 139. The permanent codification of section 139 followed a common law exclusion of these payments from income that was periodically legislated in disasters that preceded the opening of my study period. In this regard, it is an example of a recurring provision ossifying. For an in-depth analysis of this section and its common law predecessor, see Charlotte Crane, *Government Transfer Payments and Assistance: A Challenge for the Design of Broad-Based Taxes*, 59 SMU L. REV. 589, 607 (2006).

[70] 26 U.S.C. § 139(b).

[71] 26 U.S.C. § 139(c).

class of beneficiaries. Exclusions of death benefits and payments from charities have long-standing corollaries in sections 101[72] and 102[73] of the Code, which exclude certain payments from life insurance, as well as gifts.[74] While scholars have raised concerns with these provisions along equitable, critical, and other lines of inquiry, the use of exemptions in crisis tax legislation during the study period was narrowly tailored to payments from organizations to individuals and provided a one-time benefit.[75] In contrast, the recurring availability of the section 102 gift exemption, for instance, permits repeated intergenerational transfers of wealth.[76] As a consequence, discussions of distributional concerns raised by sections 101 and 102 of the Code apply, but perhaps with less force, to section 139 and the other crisis-driven exclusions described here.

a. Early Withdrawals from Tax-Preferred Retirement Accounts

Multiple bills allowed people in crisis-affected areas to make tax-favored withdrawals from retirement accounts or borrow money from qualified plans on a tax-preferred basis.[77] Once introduced, the

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[72] 26 U.S.C. § 101.

[73] 26 U.S.C. § 102.

[74] *See* 26 U.S.C. § 101(a) ("[G]ross income does not include amounts received (whether in a single sum or otherwise) under a life insurance contract, if such amounts are paid by reason of the death of the insured."); *id.* § 102(a) ("Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.").

[75] *See, e.g.*, Ilan Benshalom, *The Dual Subsidy Theory of Charitable Deductions*, 84 IND. L.J. 1047 (2009) (arguing that tax subsidization of charitable organizations is undemocratic because it allows taxpayers with more giving power to direct the disposition of government resources); Miranda Perry Fleischer, *Charitable Giving and Utilitarianism: Problems and Priorities*, 89 IND. L.J. 1485 (2014) (stating that utilitarianism supports reform to prioritize charitable organizations that aid the poor); Brian Galle, *The Role of Charity in a Federal System*, 53 WM. & MARY L. REV. 777 (2012) (critiquing commonly accepted justifications for government subsidization of nonprofits and arguing that the charitable sector is necessary when competition in a federalist system produces poor governmental outcomes).

[76] *See* 26 U.S.C. §102(a) ("Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.").

[77] These provisions appeared in legislation related to Hurricanes Katrina, Rita, Wilma, the Heartland Flood, other disasters. *See, e.g.*, Gulf Opportunity Zone Act of 2005 ("GOZA"), Pub. L. No. 109-135, § 201, 119 Stat. 2577, 2596 (codified in scattered sections

provision quickly became a recurring feature of crisis legislation, despite very little evidence of its efficacy or consideration of its long-term consequences. Unlike the exemptions described above, which may aid those who previously had no asset holdings, the rules described here are valuable only to beneficiaries who have some level of wealth or disposable income. Typically, non-qualified withdrawals of funds from tax-preferred retirement accounts, including qualified employer plans and IRAs, are subject to a ten percent tax penalty upon withdrawal.[78] Most bills during the study period relaxed this ten percent penalty for qualified withdrawals of up to $100,000 made in response to natural disasters.[79] Typically, withdrawals were spared the penalty if they were made by an account beneficiary who lived in the geographical region of the disaster and who suffered economic harm as a result of it.[80]

The retirement savings withdrawal provision is particularly troublesome because it depletes the very asset to which relief is tethered, and some people simply have no tax-preferred retirement savings. Two problems result. First, encouraging withdrawal from tax-preferred retirement accounts leaves beneficiaries at the low end of asset holding more vulnerable to financial shock in retirement, a time when there is no impetus for the government to provide direct

of 26 U.S.C.) (addressing hurricanes Katrina, Rita and Wilma, and the Hokie Spirit Memorial Fund). It is worth noting that these provisions are also prevalent in responses to federal-level crises.

78 *See* 26 U.S.C. § 72(t) ("If any taxpayer receives any amount from a qualified retirement plan . . . the taxpayer's tax . . . shall be increased by an amount equal to 10 percent of the portion of such amount which is includible in gross income.").

79 *See* Taxpayer Certainty and Disaster Tax Relief Act of 2020, Pub. L. No. 116-260, Div. EE, § 302, 134 Stat. 3038, 3070-75 (part of Consolidated Appropriations Act, 2021 and codified in scattered sections of 26 U.S.C.); CARES Act, Pub. L. No. 116-136, § 2202, 134 Stat. 281, 340 (2020) (codified in scattered sections of 26 U.S.C.); Taxpayer Certainty and Disaster Tax Relief Act of 2019, Pub. L. No. 116-94, Div. Q, § 202, 133 Stat. 3226, 3237 (part of Further Consolidated Appropriations Act, 2020 and codified in scattered sections of 26 U.S.C.); Disaster Tax Relief and Airport and Airway Extension Act of 2017, Pub. L. No. 115-63, § 502, 131 Stat. 1168, 1173 (codified in scattered sections of 26 U.S.C.); Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 20102, 132 Stat. 64, 110 (codified in scattered sections of 26 U.S.C.); Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 702, 122 Stat. 3765, 3912 (codified in scattered sections of 26 U.S.C.); GOZA § 201; Katrina Emergency Tax Relief Act of 2005 ("KETRA"), Pub. L. No. 109-73, § 101, 119 Stat. 2016, 2017 (codified in scattered sections of 26 U.S.C.).

80 *See supra* note 79 and accompanying text.

assistance. It also deprives those individuals of the return on their investment over time, increasing the wealth gap between those who must use their retirement savings to weather a crisis (no pun intended) and those who cover crisis-related expenses from other sources.[81] A second distributional problem is that tax-favored withdrawals leave beneficiaries more vulnerable to the next financial or humanitarian crisis by depleting the taxpayer's capital, reducing future investment earnings, hobbling the very asset on which aid relies (assuming on the basis of its past recurrence that the provision will be repeated in future crises).

Another pressing problem is that the use of retirement funds for crisis relief is neither race nor class neutral. As Professor Dorothy Brown has noted, tax-preferred retirement accounts are more prevalent among white taxpayers than they are among black taxpayers.[82] Among taxpayers who have access to tax-preferred retirement savings accounts, black taxpayers are more likely to use their earnings to support extended family.[83] They are also five times more likely than white taxpayers to make hardship withdrawals outside of the context of national crises.[84] And they are disproportionately among the populations affected by natural disasters.[85] If the government relies on taxpayers' own retirement savings to provide relief and liquidity in a crisis, it misses an important part of the population. By extension from Brown's work, black taxpayers may be less likely to have retirement funds to draw on in a crisis, and those who do have such funds may have less savings to draw upon. The tax advantage that they derive from tax-

[81] It is likely, then, that only those taxpayers who have no other assets to draw on will take advantage of the tax-preferred withdrawal provisions.

[82] DOROTHY A. BROWN, THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS — AND HOW WE CAN FIX IT 148-49 (2021).

[83] *Id.* at 152.

[84] *Id.* at 154.

[85] *See, e.g.*, Laura A. Bakkensen & Lala Ma, *Sorting over Flood Risk and Implications for Policy Reform*, 104 J. ENV'T ECON. & MGMT., Aug. 15, 2020, at 1, 21 (finding empirical evidence that "low income and minority residents are more likely to sort into high flood risk areas"); John R. Logan, Sukriti Issar & Zengwang Xu, *Trapped in Place? Segmented Resilience to Hurricanes in the Gulf Coast, 1970–2005*, 53 DEMOGRAPHY 1511, 1530-31 (2016) (studying population mobility in response to hurricanes and finding that "the less advantaged (older, black, poor) moved increasingly into harm's way").

preferred retirement savings, then, such as tax-free growth of investments over time, may be disproportionately diminished by their use of retirement funds in a crisis, and they may be disproportionately found among those who are left in a more vulnerable position if the government repeats the provision in a subsequent disaster. Finally, use of these funds during a crisis also will affect the intergenerational transfer of wealth, one of the primary drivers of the racial wealth gap.[86]

In summary, the government's reliance on taxpayers' own retirement savings to provide crisis relief provides no assistance to taxpayers who have no savings; it leaves lower-savings taxpayers more vulnerable to future crises; and the burden placed on both of these groups is likely to fall disproportionately on black and other marginalized taxpayers. Congress's repeated reliance on tax-preferred withdrawals from retirement accounts in crises likely contributes in some way to a widening wealth gap not only between rich and poor but also among races, and repeated passage of this recurring provision in crisis-motivated tax legislation further entrenches the problem.[87]

b. Loosened Rules for Charitable Contributions

Legislative responses to localized crises during the study period also typically suspended the limitations on deductions of certain charitable contributions.[88] Charitable organizations often are on the front lines of

[86] *See generally* Laurence J. Kotlikoff & Lawrence H. Summers, The Role of Intergenerational Transfers in Aggregate Capital Accumulation, 89 J. POL. ECON. 706, 730 (1981) (arguing that wealth inequality in the United States would decline significantly without intergenerational transfers); Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453, 502-03 (2010) (surveying studies on intergenerational wealth transfer and recommending changes to succession laws).

[87] *Cf.* BROWN, *supra* note 82, at 158 (calling for the removal of all penalties for early withdrawal from retirement savings on the basis that black taxpayers are forced to make hardship withdrawals more frequently than white taxpayers due to financial disparities resulting from historic and present discrimination).

[88] *See* Taxpayer Certainty and Disaster Tax Relief Act of 2020, Pub. L. No. 116-260, Div. EE, § 211, 134 Stat. 3038, 3066-67 (part of the Consolidated Appropriations Act, 2021 and codified in scattered sections of 26 U.S.C.) (relaxing limitations of the charitable deduction for aid in federally declared disasters occurring during specified time period); Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 20104, 132 Stat. 64, 115-18 (codified in scattered sections of 26 U.S.C.) (relaxing limitations of the charitable deduction for

disaster relief, and aid provided from charitable organizations to disaster victims may be excluded from gross income as a gift under section 102.[89] Congress's repeated use of incentives to charitable giving is unsurprising in this regard, but it also may be unsound as a distributional matter in cases where it is not adequately bounded.

KETRA provides a robust example of the use of incentives to charitable giving which have recurred in many subsequent crisis tax bills.[90] KETRA's star provision in this regard was a temporary suspension of limitations on the section 170 deduction of charitable contributions.[91] The usual limitation on deductions did not apply to contributions of money made to a charitable organization between August 28, 2005 and December 31, 2005.[92] A requirement that the donation be made to support hurricane relief efforts applied only to corporations.[93] KETRA also increased the standard mileage rate for deductions permitted to taxpayers who donated services to charities for hurricane relief, and it included special provisions addressing the

aid in the California wildfires); Disaster Tax Relief and Airport and Airway Extension Act of 2017, Pub. L. No. 115-63, § 504(a), 131 Stat. 1168, 1181 (codified in scattered sections of 26 U.S.C.) (relaxing limitations of the charitable deduction for aid in Hurricanes Harvey, Irma, and Maria); Emergency Economic Stabilization Act of 2008 ("EESA"), Pub. L. No. 110-343, § 702, 122 Stat. 3765, 3912 (codified in scattered sections of 26 U.S.C.) (relaxing limitations of the charitable deduction for aid in the Midwest flooding and Hurricane Ike); Gulf Opportunity Zone Act of 2005 ("GOZA"), Pub. L. No. 109-135, § 201, 119 Stat. 2577, 2596 (codified in scattered sections of 26 U.S.C.) (relaxing limitations of the charitable deduction for aid in Hurricanes Katrina, Rita, and Wilma); Katrina Emergency Tax Relief Act of 2005 ("KETRA"), Pub. L. No. 109-73, § 301, 119 Stat. 2016, 2022 (codified in scattered sections of 26 U.S.C.) (relaxing limitations of the charitable deduction for aid in Hurricane Katrina). Congress also passed laws to accelerate availability of the charitable deduction for contributions made to aid foreign disasters. *See* Haiti Assistance Income Tax Incentive Act, Pub. L. No. 111-126, § 1, 124 Stat. 3, 3 (2010); Indian Ocean Tsunami Relief Act, Pub. L. No. 109-1, § 1, 119 Stat. 3, 3 (2005).

89 *See* Lipman, *supra* note 2, at 973-74, 978-79 (describing the role of charities in crises and the tax treatment of relief provided by them).

90 *See* KETRA, tit. III (prescribing charitable giving incentives).

91 *See* STAFF OF J. COMM. ON TAX'N, 109TH CONG., JCX-64-05R, TECHNICAL EXPLANATION OF H.R. 3768, THE "KATRINA EMERGENCY TAX RELIEF ACT OF 2005," at 3 (2005) (describing rationale for expanding availability of the deduction).

92 *See* KETRA § 301 (relaxing percentage of income limitations of the charitable deduction for aid in Hurricane Katrina).

93 *Id.*

donation of food and books to the relief effort.[94] Not only have multiple crisis-driven tax bills borrowed KETRA's broadened charitable deduction since its passage in 2005, but its special provisions for donation of food and books were incorporated into the EESA in 2008 as part of a suite of relief copied from Katrina and pasted directly into the context of other hurricanes.[95]

A narrower expansion of the charitable deduction was later adopted to address Hurricanes Harvey, Irma, and Maria.[96] Deductions in excess of the usual limitation were still permitted but were limited to contributions aiding the hurricane relief effort.[97] Congress adopted an identical provision in legislation addressing the California wildfires, among others,[98] and it appears again, applicable to any federal disaster occurring in the year 2020, in the Taxpayer Certainty and Disaster Relief Act.[99]

While it is easy to understand Congress's impulse to spur charitable giving during crises, and while the provisions are (for the most part) tailored to donations made toward crisis relief efforts, a quick consideration of the potential distributional effects of broadening the charitable contribution deduction suggests that the provision might unduly benefit the wealthiest taxpayers. For the most part, the usual critique of the charitable deduction — that it can function as an upside-down subsidy of the interests of the rich — is applicable in the crisis

94 *See id.* § 303 (increasing the standard mileage rate); *id.* § 305 (allowing deduction for charitable contribution of food inventory); *id.* § 306 (allowing deduction for contributions of book inventory to public schools).

95 *See* Emergency Economic Stabilization Act of 2008 ("EESA"), Pub. L. No. 110-343, § 702.

96 *See* Disaster Tax Relief and Airport and Airway Extension Act of 2017, Pub. L. No. 115-63, § 504(a), 131 Stat. 1168, 1181 (codified in scattered sections of 26 U.S.C.) (relaxing limitations of the charitable deduction for aid in Hurricanes Harvey, Irma, and Maria).

97 *Id.*

98 *See* Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 20104, 132 Stat. 64, 115 (codified in scattered sections of 26 U.S.C.) (relaxing limitations of the charitable deduction for aid in the California wildfires).

99 *See* Taxpayer Certainty and Disaster Tax Relief Act of 2020, Pub. L. No. 116-260, Div. EE, § 212, 134 Stat. 3038, 3067-68 (part of the Consolidated Appropriations Act, 2021 and codified in scattered sections of 26 U.S.C.) (relaxing limitations of the charitable deduction for aid in federally declared disasters occurring during specified time period).

legislation context as well.[100] Because the broadened deduction matters only after a taxpayer has exhausted the normal deduction limit, the provision will apply only to taxpayers who can donate outsized proportions of their income while still covering their other expenses. Second, although the scope of the broadened deduction is narrower than the general one in that it applies only to donations to a disaster relief effort, the disaster relief categorization still allows sufficient breadth for taxpayers to sub optimally direct a government subsidy to non-critical causes. For example, if starting from a blank slate, the government might choose to give cash relief directly to displaced families rather than indirectly (via looser limits on section 170) to the refurbishment of a historic building damaged by flooding. In addition, in some cases, an enhanced incentive for charitable giving might cause overallocation of giving to crisis-related spending at the expense of other worthy causes.[101] In the end, in order to make sense of this provision from a distributional standpoint, one must find evidence that the objects of disaster relief chosen by wealthy donors align with actual need, or perhaps that the benefits of social solidarity or misaligned giving, to the extent they are created by such a provision, outweigh the detriments caused by misallocation of resources meant for disaster remediation.

Finally, there is no evidence that Congress has considered the downstream distributive consequences of its recurring expansion of the charitable deduction in disaster relief legislation. Expanding the deduction for charitable contributions for disaster relief gives donors and, ultimately, not-for-profit organizations, the power to allocate a public subsidy. Congress itself does not separately track the subsidy. There are no built-in data collection measures to tell us where the money goes and what downstream distributional effects of it are. There is no information to aid Congress in determining whether repeated use of the measure creates a compounding effect in areas where declarations of disaster are more frequent, such as California or the hurricane-affected coastal areas. Congress's recurring use of the provision, then, is one of trust despite the absence of data.

100 *See supra* note 75 and accompanying text.

101 *See* Katz, *supra* note 2, at 272 (explaining that in high profile disasters, relief organizations may receive more donations than are required to address basic needs).

c. Public Finance Provisions

Another legislative response common to localized crises during the study period was tax-advantaged public financing. For example, the Job Creation and Worker Assistance Act of 2002 included provisions for the issuance of bonds to rebuild the New York City disaster area, which it dubbed the New York Liberty Zone.[102] The bill also provided bond refunding preferences for the zone, along with increased expensing and special depreciation. Similar provisions applied to the Gulf Opportunity Zone (the "GO Zone").[103] Mortgage revenue bonds made repeated appearances as well, appearing in legislation addressing Hurricanes Katrina, Rita, Wilma, and Ike, and the Midwest flooding.[104]

Distributional concerns presented by public finance in other contexts remain present and may be magnified by the legislation included in this study. Public finance is complex, and the distributional effects of tax-exempt bond funding are murky.[105] Little, if any, legal scholarship has focused on the end disposition of tax-exempt bond proceeds authorized by crisis-motivated tax legislation. Presumably, concerns raised generally by the current system of public finance are also present in this study and may be elevated in some cases by looser restrictions on the private use of funds in crises. For example, mortgage revenue bonds typically require a certain percentage of the eventual homebuyers to

[102] *See* Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, § 301, 116 Stat. 21, 33 (codified at 26 U.S.C. § 1400L(d)) (authorizing issuance of tax-exempt private activity bonds for use in rebuilding New York disaster area).

[103] *See* Gulf Opportunity Zone Act of 2005 ("GOZA"), Pub. L. No. 109-135, § 101, 119 Stat. 2577, 2578 (codified at 26 U.S.C. § 1400N(l)) (authorizing issuance of tax credit bonds for use in the GO Zone, advance refunding of certain tax-exempt bonds, additional first-year depreciation, and increased expensing for GO Zone property, demolition and cleanup expenses, and environmental remediation costs).

[104] *See* Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 702, 122 Stat. 3765, 3912 (codified in scattered sections of 26 U.S.C.) (providing mortgage revenue bonds for Midwest flooding and Hurricane Ike); GOZA § 104 (providing mortgage revenue bonds for Hurricane Katrina); GOZA § 201 (providing mortgage revenue bonds of the GO Zone); Katrina Emergency Tax Relief Act of 2005, Pub. L. No. 109-73, § 404, 119 Stat. 2016, 2022 (codified in scattered sections of 26 U.S.C.) (prescribing special rules for mortgage revenue bonds).

[105] The common use of shell corporations as borrowers makes Form 8038 information compiled by the IRS statistics function less useful for analysis.

have income of ≤ 115% of median income for the area in which the home is located.[106] During the study period, the usual statutory income requirement was relaxed multiple times to include borrowers with up to 160% of the area median income.[107]

Mortgage revenue bonds, which are meant to provide liquidity in the aftermath of a natural disaster, may be particularly problematic from a distributional standpoint. Tax subsidization of home ownership is the primary driver of the racial wealth gap.[108] Repeat funding of mortgage interest bonds in response to localized crises may exacerbate the problem, particularly in cases where income restrictions on the resulting mortgages are liberalized. For example, black families are more likely to get subprime mortgages than their white counterparts of equal income.[109] In addition, capital appreciation of homes accrues more quickly and reliably in majority white neighborhoods than in comparable neighborhoods with a significant black presence, and the increase in value, though disproportionate along racial lines, usually is not taxed when the homeowner sells.[110] Given these priors, Congressional provision of mortgage interest bonds may subsidize a racially biased market and may exacerbate existing racial inequity, a consideration that Congress could account for when determining how best to allocate resources in a crisis.

In summary, consideration of the distributive effects of recurring relief provisions in response to localized crises during the study period suggests that some are helpful, while others reach only beneficiaries who already have resources at their disposal. Provisions in this latter category may tend to exacerbate inequality in the distribution of resources through the tax system. The tendency of recurring provisions

[106] *See* 26 U.S.C. § 143(f).

[107] *See* GOZA §§ 104, 201 (providing citations for legislative provisions on mortgage revenue bonds in localized crises).

[108] *See* BROWN, *supra* note 82, at 85 (citing longitudinal research by the Institute on Assets and Social Policy at the Heller School for Social Policy and Management at Brandeis University).

[109] *See id.* at 86 ("White Americans are far less likely (26 percent) than black (53 percent) and Latinx (47 percent) Americans to have subprime mortgages.").

[110] *See id.* at 81 (describing research showing that due to white buyers' preference for majority-white neighborhoods, "property values start falling when black presence in a neighborhood exceeds 10 percent" and "fall even further as black presence increases").

to widen the wealth gap is particularly problematic since during the study period Congress regularly used prior crisis tax legislation as a resource when crafting new crisis tax legislation. The subject would benefit from further study, particularly a data-driven examination of the distributional effects of recurrence.

C. Repeat Players in Nationwide Crises

Nationwide crises were also fertile ground for recurring tax legislation during the study period. These crisis bills, which addressed two recessions, the 2008 housing crisis, and the COVID-19 pandemic, featured many of the individual income tax and public finance provisions described above. They also contained an additional group of repeat players: increased expensing, enhanced depreciation, and the expanded deduction of net operating losses. The following paragraphs focus on these latter provisions.

1. Expensing

Expensing is another provision that frequently recurs in crisis-motivated tax legislation. Currently codified in section 179, the provision allows taxpayers to claim an immediate deduction for the cost of tangible or real property used in a trade or business rather than deducting the expense over several years through depreciation.[111] As an early committee report notes, the provision was enacted to give businesses a boost because "it lowers the cost of capital" and "eliminates depreciation recordkeeping requirements with respect to expensed property."[112] Congress has employed it regularly in response to crises.

Expensing allowances under Section 179 expanded exponentially during the study period. In 2003, Congress increased the maximum

[111] *See* 26 U.S.C. § 179.

[112] STAFF OF J. COMM. ON TAX'N, 108TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 108TH CONGRESS 19 (2005) [hereinafter EXPLANATION OF 108TH CONGRESS TAX].

deductible amount from $25,000 to $100,000.[113] The phase-out amount for property placed in service rose from $200,000 to $400,000.[114] Congress revisited these amounts again in response to Hurricane Katrina and the 2008 housing crisis, raising the maximum deductible amount to $250,000 and the phase-out to $800,000.[115] Finally, while it was not crisis-driven and therefore was not included in the study, the Tax Cuts and Jobs Act (publicized by the President at the time as though it were crisis-driven) raised the maximum deductible amount to $1 million and set the phase-out for property placed in service at $2.5 million.[116]

Like other provisions, section 179, which allows taxpayers to immediately deduct capital expenditures that otherwise would have to be accounted for piecemeal, over time, is a tax expenditure.[117] Congress requires taxpayers to purchase assets in order to receive its benefit. By definition, then, when used as a relief provision, it excludes businesses that are illiquid.

[113] *See* Jobs and Growth Tax Relief Reconciliation Act of 2003 ("JGTRRA"), Pub. L. No. 108-27, § 202, 117 Stat. 752, 757 (codified in scattered sections of 26 U.S.C.). $25,000 in 2003 is roughly equivalent to $41,163 in 2023. *CPI Inflation Calculator*, *supra* note 38.

[114] *See* JGTRRA § 202.

[115] *See* Emergency Economic Stabilization Act of 2008 ("EESA"), Pub. L. No. 110-343, § 707, 122 Stat. 3765, 3923 (creating 26 U.S.C. § 198A, which provided expensing of qualified disaster expenses); Economic Stimulus Act of 2008, Pub. L. No. 110-185, § 102, 122 Stat. 613, 618 (codified in scattered sections of 26 U.S.C.) (raising the maximum deductible amount to $250,000 and increasing the phase-out amount to $800,000); Gulf Opportunity Zone Act of 2005 ("GOZA"), Pub. L. No. 109-135, § 101, 119 Stat. 2577, 2583 (codified at 26 U.S.C. § 1400N(e)) (permitting additional expensing of up to $100,000 of disaster-related expenses, with a reduction for qualifying expenses in excess of $600,000). Additionally, the Small Business Jobs Act, though not passed in response to an emergent event, continued the trend of expanded expensing in 2010 with the goal of increasing investment at the end of the financial downturn. *See* Small Business Jobs Act of 2010, Pub. L. No. 111-240, § 2021, 124 Stat. 2504, 2556 (codified in scattered sections of 26 U.S.C.) (expanding expensing provisions to allow for a deduction of up to $250,000 for years 2007–2009 and up to $500,000 for years 2010–2011 and raising the phase-out amount to $800,000 for years 2007–2009 and $2 million for years 2010–2011).

[116] Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 13101, 131 Stat. 2054, 2101 (modifying § 179 rules on expensing).

[117] *See* 26 U.S.C. § 179.

2. Depreciation

Depreciation followed a similar pattern. Congress expanded depreciation multiple times in response to crises during the study period.[118] The most dramatic change was the introduction and exponential expansion of bonus depreciation, but adjustments to the recovery period of assets were frequent too.[119]

The growth of bonus depreciation in response to crises is striking. In 2002, JCWA created a first-year bonus depreciation deduction under section 168 equal to thirty percent of the adjusted basis of property

[118] *See* Taxpayer Certainty and Disaster Tax Relief Act of 2020, Pub. L. No. 116-260, Div. EE, § 115(a), 134 Stat. 3038, 3050 (part of Consolidated Appropriations Act, 2021 and codified in scattered sections of 26 U.S.C.) (creating seven-year recovery period for motorsports entertainment complexes); *id.* § 137(a) (creating three-year property classification for certain racehorses); *id.* § 138(a) (allowing accelerated depreciation for business property on Indian reservations); 134 Stat. at 3050-54 (amendments to 26 U.S.C. § 168 on depreciation made in response to crises during the study period); CARES Act, Pub. L. No. 116-136, § 2307(a), 134 Stat. 281, 359 (2020) codified in scattered sections of 26 U.S.C.) (making qualified improvement property eligible for bonus depreciation); Taxpayer Certainty and Disaster Tax Relief Act of 2019, Pub. L. No. 116-94, Div. Q, §§ 114, 115, 116, 130, 113 Stat. 3226, 3229, 3232 (part of the Further Consolidated Appropriations Act, 2020 and codified in scattered sections of 26 U.S.C.) (extending temporary depreciation relief provisions); Bipartisan Budget Act of 2018, Pub. L. No. 115-123, §§ 40304(a), 40305(a), 40306(a), 40412(a), 132 Stat. 64, 146, 151 (codified in scattered sections of 26 U.S.C.) (extending temporary depreciation relief provisions); American Recovery and Reinvestment Act of 2009 ("ARRA"), Pub. L. No. 111-5, Div. B, § 1201(a)(1), (2)(A)- (D), (3)(A), (b)(1), 123 Stat. 115, 333-34 (codified in scattered sections of 26 U.S.C.) (lengthening eligibility period for bonus depreciation); EESA, Div. B, § 201(a), (b) (including of cellulosic biofuel in bonus depreciation); *id.* Div. C, § 305(a), (b)(1), (c) (extending 15-year recovery period for certain real estate costs); *id.* § 306(a)-(c) (creating accelerated recovery period for smart meters and smart grid systems); *id.* § 308(a) (creating special depreciation allowance for certain reuse and recycling property); *id.* § 315(a) (re-enacting accelerated depreciation for business property on Indian reservations); *id.* § 317(a) (re-enacting seven-year period for motorsports facilities); *id.* § 505(a), (b) (designating classification of certain farm equipment as five-year property); *id.* § 710(a) (enacting special depreciation for qualified disaster property); GOZA § 101(d)(1) (creating additional depreciation allowance for qualified Gulf Opportunity Zone property); JGTRRA § 201(a)- (c)(1) (increase and extension of bonus depreciation); Job Creation and Worker Assistance Act of 2002 ("JCWA"), Pub. L. No. 107-147, § 101, 116 Stat. 21, 22-25 (codified at 26 U.S.C. § 1400L(d)) (additional depreciation allowance for qualified property).

[119] *See supra* note 118 and accompanying text.

acquired between September 10, 2001 and September 11, 2004.[120] Congress tied its new deduction directly to the 2001 terrorist attacks through its choice of dates.[121] With the economy still flagging in the following year, Congress again amended section 168 to increase bonus depreciation to fifty percent, this time for property acquired between May 5, 2003 and January 6, 2006.[122] The relevant committee report cited the committee's belief that the twenty percent increase in bonus depreciation would "accelerate purchases of equipment, promote capital investment, modernization, and growth, and would help to spur an economic recovery."[123] A related report added that "[a]s businesses accelerate their purchases of equipment current employment will increase to produce that equipment."[124] Taking its cue from these earlier crisis bills, the GO Zone legislation again allowed a fifty percent bonus depreciation for property placed in service during 2008 for twenty-year Modified Accelerated Cost Recovery System ("MACRS") and certain other real property used substantially in the zone.[125] Likewise, the ARRA granted a fifty percent bonus depreciation for property placed in service in 2009.[126] These uses of bonus depreciation during crises set the stage for its drastic expansion in the TCJA (which, again, is not formally a part of the study) of bonus depreciation to 100% until 2023.[127]

Repeated liberalization of the expensing and depreciation provisions in response to crises, coupled with expansion of net operating loss deductions, raises distributional concerns. First, like most tax expenditures, expensing and depreciation apply only to those

[120] JCWA § 101 (providing the special depreciation allowance).

[121] *See id.*

[122] *See* JGTRRA § 201 (providing the increase in bonus depreciation).

[123] STAFF OF J. COMM. ON TAX'N, EXPLANATION OF 108TH CONGRESS TAX, *supra* note 112, at 17.

[124] WILLIAM M. THOMAS, CHAIRMAN, COMM. ON WAYS & MEANS, REP. 108-94, REPORT ON THE JOBS AND GROWTH RECONCILIATION TAX ACT OF 2003, at 23 (2003).

[125] Gulf Opportunity Zone Act of 2005 ("GOZA"), Pub. L. No. 109-135, § 101 (codified in 26 U.S.C. § 1400N(d)) (providing for additional first-year depreciation for GOZA property).

[126] *See* American Recovery and Reinvestment Act of 2009 ("ARRA"), Pub. L. No. 111-5, Div. B, § 1201.

[127] *See* Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 13201, 131 Stat. 2054, 2105 (codified in scattered sections of 26 U.S.C.).

businesses that have both sufficient liquidity and a reason to purchase depreciable property during a crisis. These are likely to be only a subset of businesses that would benefit from aid in a crisis. Businesses that struggle with liquidity, or those that are service oriented rather than property or physical plant dependent, are helped little by depreciation and expensing. In short, relying on these provisions to deliver aid in a crisis has a Darwinian tinge. Businesses that were struggling prior to the crisis are put at a competitive disadvantage during the crisis when competitors with greater liquidity are rewarded for spending. Distributionally speaking, that disadvantage is more likely to affect small businesses and start-ups, especially those that are service-oriented, which are perhaps the very businesses most likely to need help to weather a disaster.

3. Net Operating Loss

Congress also amended the net operating loss provisions in response to each national crisis during the study period.[128] Changes to net operating loss were more cabined than changes to expensing and depreciation, but they followed the same pattern of escalation. Each amendment extended (at least temporarily) the carry-back period for losses or removed limitations on the deduction of them.[129] Over time, the breadth of the provision has expanded significantly, spurred almost exclusively by Congress's responses to crises.

Net operating losses are of interest to Congress during crises for many reasons. First, a business the revenue of which is adversely affected by a disaster may not have sufficient profits to offset losses. Consequently, the net operating loss deduction provides a natural narrow tailoring mechanism for crisis relief provided through the tax code. Other factors are significant as well. First, personal casualty losses, which currently are deductible in excess of casualty gains only if

[128] *See* CARES Act, Pub. L. No. 116-136, § 2303, 134 Stat. 281, 352-56 (2020) (codified in scattered sections of 26 U.S.C.); ARRA § 1211; Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 702, 122 Stat. 3765, 3912 (codified in scattered sections of 26 U.S.C.); GOZA § 101 (creating 26 U.S.C. § 1400N(i)(2)); Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, § 102, 116 Stat. 21, 25-26 (codified in scattered sections of 26 U.S.C.).

[129] *See supra* note 128 and accompanying text.

they arise from a federally declared disaster, are treated as losses from a trade or business for purposes of computing net operating loss.[130] The trade or business categorization is important, since it is a definitional requirement of net operating loss.[131] Second, net operating losses can generate liquidity with relative speed because they can be carried back to a prior year to generate a refund.[132] Significantly, refunds resulting from net operating loss are eligible for a special "quick refund" procedure.[133] Put simply, net operating loss amendments can put cash in taxpayers' pockets more quickly than other tax expenditure provisions.

At the beginning of the study period, typical net operating losses could be carried back for a period of two years.[134] The JCWA temporarily increased the carry-back period for net operating losses from two years to five years for tax years ending in 2001 or 2002.[135] The GOZA did the same for losses of businesses located in the affected areas.[136]

Building on its frequent use of loss carrybacks to deliver financial aid, Congress included the five-year carryback extension in a suite of automatically recurring provisions in the Emergency Economic Stabilization Act of 2008.[137] The statute provided an automatic carryback extension for "qualified disaster losses," which were section 165 casualty losses attributable to federally declared disasters occurring in the years 2008 through 2011.[138] This provision cemented the net

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[130] *See* 26 U.S.C. § 165(h)(5) (limitation on deduction of personal casualty losses); *id.* § 172(d)(4) (personal casualty losses treated as trade or business losses for purposes of calculating net operating loss).

[131] *See id.* § 172(d)(4) (non-business deductions includible in the loss computation only to the extent of non-business income).

[132] *See id.* § 172(b) (net operating losses may be carried back to a prior year).

[133] *See* I.R.S. Pub. 536 (Dec. 29, 2022) (describing the quick refund procedure).

[134] *See* STAFF OF J. COMM. ON TAX'N, 107TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 107TH CONGRESS 221 (2003) (describing a net operating loss ("NOL") two-year carryback in effect prior to the passage of JCWA).

[135] *See* Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, § 102, 116 Stat. 21, 25 (amending 26 U.S.C. § 172 to create a five-year NOL carryback).

[136] *See* Gulf Opportunity Zone Act of 2005 ("GOZA"), Pub. L. No. 109-135, § 101, 119 Stat. 2577, 2587 (enacting a five-year NOL carryback applicable to certain losses).

[137] *See* Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 708, 122 Stat. 3765, 3924 (enacting NOL rules for Midwestern disaster and Hurricane Ike).

[138] *See* STAFF OF J. COMM. ON TAX'N, EXPLANATION OF 110TH CONGRESS TAX, *supra* note 66, at 466.

operating loss in Congress's disaster-mitigation toolkit, and so uncontroversial had it become that Congress delegated responsibility for its application to the Executive Branch's declaration of disaster.[139]

The next year, in response to a national financial crisis (rather than the localized disasters addressed by the EESA), the ARRA increased the net operating loss carryback for "small" businesses with annual gross receipts of fewer than $15 million.[140] For any tax year either beginning or ending in 2008, a qualifying business could extend the carryback for that year's net operating losses for three to five years, with no requirement that the loss be tied to a federally declared disaster.[141] Shortly afterward, and again in response to the Great Recession, Congress extended this provision to include all businesses with net operating losses in any taxable year beginning or ending in 2008 or 2009.[142] The carryback was, however, limited to fifty percent of the taxpayer's taxable income for the year to which it was carried, an idea that would recur almost a decade later.[143]

The net operating loss was next expanded by the Tax Cuts and Jobs Act, which was passed during a period of relative stability that was billed by the administration at the time as a pending economic crisis.[144] The provision, which was not formally a part of this study, was a significant change, eliminating net operating loss carrybacks and creating an unlimited carryforward period.[145] Picking up on an idea from its 2009 amendment, Congress limited the carryforward deduction to eighty percent of taxable income for the year in which it is was claimed.[146] The provision applied to losses arising in the years 2018 through 2020.[147]

139 *See id.*

140 *See* American Recovery and Reinvestment Act of 2009 ("ARRA"), Pub. L. No. 111-5, § 1211, 123 Stat. 115, 335-36 (codified in scattered sections of 26 U.S.C.).

141 *See id.*

142 Worker, Homeownership, and Business Assistance Act of 2009, Pub. L. No. 111-92, § 13, 123 Stat. 2984, 2993 (codified in scattered sections of 26 U.S.C.).

143 *Id.*

144 *See* Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 13302, 131 Stat. 2054, 2121 (codified in scattered sections of 26 U.S.C.).

145 *Id.* at 2122.

146 *Id.* at 2121.

147 *Id.* at 2123.

Finally, the CARES Act again reached for the net operating loss as a crisis mitigation tool.[148] The Act simultaneously suspended the eighty percent limitation for net operating losses claimed during the 2018 through 2020 tax years and reintroduced the five-year carryback.[149] The deduction of net operating losses reached its broadest point yet.

Like other crisis-motivated recurring tax provisions targeting businesses, the history of the net operating loss provision has been one of expansion and recurrence. From one perspective, Congress's frequent use of net operating loss is a useful means of providing relatively quick access to needed liquidity. From another perspective, though, the provision is distributionally lopsided, like the expansion of depreciation and expensing. The net operating loss deduction provides quick liquidity only for those taxpayers who reported income in prior years. For others, like start-ups, or those that were already struggling when the crisis arose, expansion of the net operating loss deduction is not useful and in fact may widen the gap between competitors. It is worth keeping in mind that the liquidity provided to taxpayers through the quick refund process, while described by the Code as a return of the taxpayer's own profits, is actually a new disbursement of cash from the government, the recipients of which are chosen on the basis of their prior fiscal health. Like expensing and bonus depreciation, the expansion of net operating losses in a crisis operates on a "to those who have, more shall be given" basis, which can result in unanticipated distributional results.[150] Unless counterbalanced by other provisions in a particular relief bill, the long-term consequence of repeating these provisions over time may be to widen the wealth gap.

[148] *See* CARES Act, Pub. L. No. 116-136, § 2303, 134 Stat. 281, 352-56 (2020) (codified at 26 U.S.C. § 172(b)(1)(D)).

[149] *Id.* at 353.

[150] Former President Trump, for example, used a net operating loss of more than $105 million to offset income. *See* Asha Glover, *Parts of Trump's Returns Warranted Exam by IRS, JCT Finds*, LAW360: TAX AUTH. (Dec. 21, 2022, 6:52 PM EST), https://www.law360.com/tax-authority/articles/1560498/parts-of-trump-s-returns-warranted-exam-by-irs-jct-finds [https://perma.cc/3TJ8-C4ZV] (noting how the IRS, when conducting a mandatory audit, did not confirm that the large NOL was proper).

V. JOBS, JOBS, JOBS

Congress's concern with the labor market cut across both localized and national disasters during the study period. In particular, two credits made multiple appearances as crisis-motivated recurring provisions: the work opportunity credit and the employee retention credit. While the first has remained relatively static, the second demonstrates that Congress's legislative pattern of recurrence is not incompatible with reform.

A. Work Opportunity Credit

The work opportunity credit, which benefits employers, is a repeat player in crisis-motivated tax legislation. The provision provides a non-refundable credit against federal income tax liability to businesses that hire people belonging to statutorily specified groups, such as veterans, recipients of public assistance, or ex-felons.[151] Originally passed during 1977 in the wake of stagflation and calculated as a percentage of wages, the provision was available for any new hire.[152] Within a year, Congress narrowed its application, allowing the credit only for wages paid to employees hired from specific categories.[153]

The modularity and the narrow scope of the work opportunity credit's statutory categories have worked to Congress's advantage in crisis-motivated tax legislation. Congress used the work opportunity credit as a relief provision following the terrorist attacks on 9/11.[154] The JCWA extended the credit to include employees in the New York Liberty Zone.[155] It was limited to businesses with an average of 200 employees or fewer, and it applied only to businesses in the disaster area or those

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[151] *See* 26 U.S.C. § 38 (permitting taxpayers to claim that amount as part of the general business credit); *id.* § 51(a), (d) (specifying the amount of the work opportunity credit and listing targeted groups).

[152] *See* Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, § 202, 91 Stat. 126, 141 (amended by Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763).

[153] Revenue Act of 1978, Pub. L. No. 95-600, § 321, 92 Stat. 2763, 2830 (codified in scattered sections of 26 U.S.C.).

[154] Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, § 301, 116 Stat. 21, 33 (creating new 1400L(a) of Code and codifying the work opportunity credit for the Liberty Zone).

[155] *Id.*

that had been displaced to other parts of the city by physical damage to the place of business.[156] Congress made a similar move in response to Hurricane Katrina, allowing employers to claim the credit for employing people who either lived in the disaster area or who had been displaced from it.[157] Congress also expanded the Work Opportunity Credit in response to the Great Recession: the ARRA added two new categories of employees for which employers could receive the benefit during 2009 and 2010: unemployed veterans and "disconnected youth."[158] Finally, the Taxpayer Certainty & Disaster Tax Relief Act of 2020, in a package of measures addressing the COVID-19 pandemic, extended the credit through 2025.[159]

Because the amount of the credit is limited and its duration short, it only aids businesses that have sufficient liquidity to hire a new employee during a crisis. It provides a competitive advantage to businesses that already are at a competitive advantage coming into the crisis. The short duration of the credit may cause employer-driven attrition as well, possibly leading to non-optimal bunching of new employee hires and dismissals.

B. Employee Retention Credit

Like the work opportunity credit, the employee retention credit has recurred multiple times in crisis-motivated tax legislation. Originally codified in section 1400R of the Internal Revenue Code, it provided a credit equal in amount to the work opportunity credit — a maximum of $2,400 — and it was available to any employer that retained its employees when the business was inoperable at its original location due

[156] 26 U.S.C. § 1400L(a)(1)(C)(ii) (repealed by Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, Div. U, § 401(d)(6)(A), 132 Stat. 348, 1211).

[157] *See* Katrina Emergency Tax Relief Act of 2005 ("KETRA"), Pub. L. No. 109-73, § 201, 119 Stat. 2016, 2020 (codified in scattered sections of 26 U.S.C.).

[158] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1221, 123 Stat. 115, 337 (not renewed by Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296).

[159] Taxpayer Certainty and Disaster Tax Relief Act of 2020, Pub. L. No. 116-260, Div. EE, § 113, 134 Stat. 3038, 3050 (part of the Consolidated Appropriations Act, 2021 and codified in scattered sections of 26 U.S.C.).

to damage from Hurricane Katrina.[160] Congress later expanded its coverage to Hurricanes Rita, Wilma, and Harvey, extreme weather in Kansas and the Midwest during 2007–2008, and the California wildfires in 2018.[161]

Also like the work opportunity credit, the employee retention credit is potentially troubling from a distributional standpoint. The credit was not tailored to financial need; it was available to any business that became inoperable because of the applicable disaster, with no limitations based on income or assets of the claimant. Claimants also were not required to show lost income because of the business stoppage. In addition, there are no relevant data to show whether affected employers would have retained their employees absent the credit. At best, one can speculate that, on the margin, the credit resulted in continued employment for some individuals who otherwise would have been dismissed, with no indication that benefitted employers or employees were appropriate targets for redistribution. Finally, an employer could claim the credit only if it had sufficient liquidity to pay wages or salary to employees far in excess of the available credit, which means that the credit was limited to businesses with at least some measure of financial health. Giving businesses with sufficient liquidity an advantage over liquidity-constrained competitors in a crisis runs counter to the probable intent of the statute — to keep affected businesses afloat.[162]

[160] 26 U.S.C. § 1400R(a), which was repealed by Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, Div. U, § 401(d)(6)(A), 132 Stat. 348, 1211, which was enacted by KETRA § 202.

[161] Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 20103, 132 Stat. 64, 114 (providing the ERC for California wildfires); Disaster Tax Relief and Airport and Airway Extension Act of 2017, Pub. L. No 115-63, § 503, 131 Stat. 1168, 1179 (providing the ERC for Hurricane Harvey); Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 15345(a)(8), 122 Stat. 1651, 2282 (providing the ERC for Kansas hurricane disaster area); Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 702, 122 Stat. 3765, 3912 (codified as amended at 12 U.S.C. §§ 5201-53) (providing the Employee Retention Credit ("ERC") for Heartland and Hurricane Ike disasters); Gulf Opportunity Zone Act of 2005 ("GOZA"), Pub. L. No. 109-135, § 201, 119 Stat. 2577, 2601 (creating new 1400R of Code).

[162] No pun intended.

Though section 1400R was repealed in 2018,[163] several members of Congress urged its readoption in 2020 in response to business closings resulting from the COVID-19 pandemic.[164] A letter from the members specifically invoked the credit's prior use in crisis-motivated tax legislation, urging, "this credit, which has been implemented in previous disasters, would provide a temporary retention credit for businesses affected by coronavirus that continue to pay wages to their employees despite their businesses being shuttered."[165]

Indeed, Congress included a version of the employee retention credit in the CARES Act.[166] The legislation did not simply re-enact section 1400R, though. While still functioning as an incentive for employee retention, CARES added new section 3134, which took an innovative approach to the existing idea. Unlike section 1400R, which was a credit against income tax liability, section 3134 was a credit against payroll tax liability.[167] In addition, Congress made the new credit refundable.[168] Because income tax is reported at the end of the year, but payroll tax is reported quarterly, updating the tax base from income to payroll allowed employers to benefit from the refundable credit immediately. The amount of the credit is larger as well — up to $5,000 per employee.[169]

Section 3134 also changed the Code's approach to employer eligibility. While the employee retention credit remained available to employers of

[163] *See* Consolidated Appropriations Act of 2018 § 401(d)(6)(A) (repealing the employee retention credit).

[164] Letter from Chris Pappas & Jim Hagedorn, Members of Congress, U.S. House of Representatives, to Nancy Pelosi, Speaker, U.S. House of Representatives, & Kevin McCarthy, Minority Leader, U.S. House of Representatives (Mar. 24, 2020), https://pappas.house.gov/sites/evo-subsites/pappas-evo.house.gov/files/Employee%20Retention%20Tax%20Credit%20Letter_v2.pdf [https://perma.cc/97XK-KAZ8].

[165] *Id.*

[166] CARES Act, Pub. L. No. 116-136, § 2301, 134 Stat. 281, 347 (2020) (codified in scattered sections of 26 U.S.C.).

[167] *Compare* 26 U.S.C. § 1400R (employee retention credit claimed as a general business credit against income tax under section 38), *with* 26 U.S.C. § 3134(a) (the amount "shall be allowed as a credit against applicable employment taxes . . .").

[168] CARES Act § 2301.

[169] *See id.* § 2301(a). The credit was calculated as 50% of up to $10,000 of statutorily qualified wages. *See id.* The applicable percentage was later increased to 70%. *See* 26 U.S.C. § 3134(a).

any size, the definition of wages eligible for the credit's computation was narrower for large employers than for smaller ones.[170] An employer with more than 100 employees that was not severely financially distressed could claim the credit only for wages paid to employees who had work stoppages as a result of the pandemic.[171] An employer with less than 100 employees, or an employer that was severely financially distressed as a result of the pandemic could claim the credit for any employee regardless of whether the employee provided services or experienced a work stoppage.[172] In all cases, in order to claim the credit, the employer must have suspended its operations as the result of a COVID-19-related shut-down order or seen its gross receipts decline by more than fifty percent in comparison to the same quarter of the prior year.[173]

If, as a normative matter, recurring provisions should be facile in response to distributional concerns, the switch to section 3134 has succeeded where repeated enactments of section 1400R did not. Though the credit still is useful only to those businesses with sufficient liquidity to retain their employees, section 3134 is not insensitive to the financial condition or size of the employer receiving the credit, and in that sense, it provides less of an unfair advantage to already-healthy businesses. Amendments to the amount of the credit, its refundability, and quarterly delivery indicate the legislature's active consideration of how to make the credit more immediately available in a financial crisis.

The section 3134 employee retention credit has itself become a recurring provision, having been both extended and amended by two subsequent COVID-19 relief measures.[174] The American Rescue Plan Act increased the credit from fifty percent to seventy percent of eligible wages and loosened the qualified wages limitation from $10,000 yearly

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[170] CARES Act § 2301(c) (defining "qualified wages").

[171] *Id.*

[172] *Id.* Under current 26 U.S.C. § 3134(c)(3)(C), a "severely financially distressed" employer is one who had gross receipts in the relevant quarter that were less than 10% of the gross receipts for that quarter in the prior year.

[173] CARES Act § 2301(c)(2) (defining "eligible employer").

[174] *See* American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9651, 135 Stat. 4, 176-77 (expanding the employee retention credit against payroll taxes); Taxpayer Certainty and Disaster Tax Relief Act of 2019, Pub. L. No. 116-94, Div. Q, §§ 206, 207, 133 Stat. 3226, 3246 (part of the Further Consolidated Appropriations Act, 2020 and codified in scattered sections in 26 U.S.C.) (amending CARES Act § 2301).

to $10,000 quarterly per employee.[175] The Act also liberalized the restriction on large employers from businesses with 100 employees to those with 500 employees.[176] Finally, the American Rescue Plan Act broadened the scope of wages to which the credit could apply by including employer contributions to health insurance.[177]

Once introduced, the reform followed the typical pattern of recurrence and expansion, having been continued in two subsequent COVID relief measures, broadening with each. It demonstrates that recurrence is not necessarily inconsistent with reform. With section 3134, Congress tied into the consensus that recurrence had built up for an employee retention credit; however, the provision itself is much different and more progressive than its predecessor (which remained in effect for federally declared disasters).[178] In addition, Congress's use of a new Code section may allow it to more easily collect data about taxpayers' uptake of the provision (though this will depend on how the IRS chooses to format the relevant reporting form). More information would allow for better tailoring of the potentially recurring provision in future crises.

In this sense, further research into the legislative process behind the employee retention credit may prove to be a fruitful case study for evolution of a recurring crisis-driven provision.

VI. Distributional Concerns and Ossification

The distributional effects of recurring provisions in crisis tax legislation merit closer consideration. During the study period, the cost of recurring provisions related to business was estimated to be over $80 billion for national-level crises alone.[179] This figure, compiled from JCT

[175] *See* American Rescue Plan Act § 9651 (enacting amended 26 U.S.C. § 3134(b)(1)(B)).

[176] *Id.* (enacting amended § 3134(c)(3)(C)).

[177] *Id.* (enacting amended § 3134(c)(4)(B)(1)).

[178] *See* Taxpayer Certainty and Disaster Tax Relief Act of 2023 § 203 (providing employee retention credit against income tax for disasters declared during the relevant statutory period).

[179] Calculation is based on revenue estimates contained in the Joint Committee on Taxation's Blue Books for the legislation in question. All dollar amounts were converted

reports of estimated budget effects, does not account for possible contraction of the economy caused by overbreadth and underbreadth of the provisions in comparison to actual need. It does not reflect harms associated with the widening of the wealth gap overall or the racial wealth gap in particular. It does not consider the disparity in treatment between service-based businesses and those that rely on returns to property. It does not account for the potential bunching of expenditures that accelerated depreciation might encourage. In short, recurring crisis-motivated tax provisions are very costly, and both data on their effectiveness and evidence of their distributional soundness is scarce, regardless of one's preferred normative framework.

The need for political expediency in crises would seem to work against thoughtful consideration of recurring provisions in crisis-motivated tax legislation *at the time of the crisis*. Absent a different approach to tax stimulus and stabilization, though, Congress's preference for borrowing language and ideas from past bills may entrench or exacerbate existing inequities created by the recurring provisions. To the extent that tax expenditures are driven by individual and business spending and asset holding, Congress delegates its decision-making authority over the direction of crisis funding to taxpayers who are already positioned well enough to spend and hold assets. Normative justifications for this allocation of power or distribution of assets during a crisis are not non-existent, but neither are they compelling or abundant. While in some bills, private direction of tax expenditures is counter-weighted by direct spending through stimulus checks and refundable credits, such is not always the case, and stimulus checks (which are also recurring provisions) come with their own set of distributional concerns.[180]

Two examples highlight how recurrence can compound the distributional failure of prior crisis-motivated provisions. Consider again Congress's reliance on retirement savings accounts as a means of

into 2020 dollars using the Bureau of Labor Statistics CPI Inflation Calculator. *CPI Inflation Calculator*, *supra* note 38.

[180] *See, e.g.*, Paul Kiel, Jesse Eisinger & Jeff Ernsthausen, *These Billionaires Received Taxpayer-Funded Stimulus Checks During the Pandemic*, PROPUBLICA (Nov. 3, 2021, 11:42 AM EDT), https://www.propublica.org/article/these-billionaires-received-taxpayer-funded-stimulus-checks-during-the-pandemic [https://perma.cc/SZD6-EEL4] (observing that stimulus checks were distributed to very wealthy taxpayers in some instances because availability of funds was determined on the basis of income rather than wealth).

providing cash relief to individuals affected by natural disasters. A taxpayer who relies on this provision loses the account's tax deferral benefits, in contrast to a taxpayer who can simply cover disaster-related costs out of pocket. In addition, the taxpayer who relies on the account depletes the very asset on which Congress relies for relief. And worse, the taxpayer to whom Congress intended to provide relief is compromised in retirement. Repeated over time among vulnerable populations in disaster-prone geographies, the provision's recurrence may have unintended distributional effects along geographic and demographic lines.

A second example highlights how recurrence can have the unintended consequence of entrenching the advantage of established businesses at the expense of new entrants. Consider again the expansion of bonus depreciation in response to crises. A taxpayer can take advantage of the provision only if it has sufficient liquidity or leverage to purchase depreciable property. The provision, then, may drive a wedge in normal market competition in two ways. First, it magnifies the advantage of the more well-resourced taxpayer. Second, it prefers equipment-heavy businesses over service-based businesses. If the provision recurs frequently across multiple areas of declared disaster, it may have the effect of eliminating young enterprises at the margins to the benefit not only of established businesses in areas of declared disaster but also to the benefit of potential competitors in other geographic areas as well. And both distinctions — resource rich versus resource thin, and equipment based versus service based — may correlate with the distribution of wealth and opportunity.

To the extent that the distributional effects of recurring crisis-motivated tax provisions are non-normative (again, under whatever normative framework one chooses), and to the extent that those effects are compounded through future recurrence — ossification of those provisions through reuse or semi-permanent/permanent codification is cause for concern. Furthermore, even if such provisions are accomplishing whatever normative goals one chooses today, their repeated use and expansion in the face of changing social and business conditions might make them normatively unsuitable for repeated future use.

The following paragraphs describe ways in which ossification of recurring crisis-motivated legislation occurred during the study period, with an eye toward recommending ways in which Congress could harness the benefits of recurrence while avoiding problems that may be associated with ossification.

A. What Is "Ossification?"

Ossification, which I will define here as a statute's shift toward universal availability in crises, happened in four distinct ways during the study period. The first and most common was through repeated cut-and-paste use of provisions from prior crisis-motivated tax legislation. The second was through the creation of zone-based packages of legislation using a public finance model for rehabilitation of affected geographical areas. A third and much less frequent example of ossification was the passage of a group of measures meant to apply prospectively to all future disasters declared during a statutorily designated period of time. Finally, some provisions were made permanent after a period of recurrence.

Each of these forms of ossification is discussed below. Each has its own political economy and public choice story, and each can teach us something about how Congress could use recurrence more deliberately and constructively.

B. Cut & Paste

During the study period, crisis-motivated tax relief statutes most often ossified because Congress cut and pasted them from one disaster relief bill to the next. Five examples of cut and paste were particularly striking: increased section 179 expensing, favorable look-back rules to determining earned income for purposes of claiming the earned income tax credit and the child tax credit, provisions for penalty-free withdrawals of funds from tax-preferred retirement accounts, loosened restrictions on claiming deductions for charitable contributions, and the employee retention credit.[181] Other examples include the casualty

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[181] Compilation and comparison of the language of each provision is on file with the author.

loss deduction, the extension of filing deadlines, and the low-income housing credit.[182]

The first strong example of Congress's use of cut & paste, expensing under section 179, allows taxpayers to claim an immediate deduction for costs that they otherwise would have had to deduct over a period of years through depreciation.[183] Congress introduced expanded availability of expensing in the Job Creation Worker Assistance Act of 2002.[184] The Gulf Opportunity Zone Act reintroduced the same provision using identical language, but with expanded dollar amounts and references to the new disaster.[185] The Economic Stimulus Act of 2008 piggybacked on this framework (though this time in the permanent codification of expensing in § 179), once again with expanded dollar amounts.[186]

A second example, the earned income tax credit and child tax credit look-back, provides a special rule for determining availability of the credits. In general, the earned income tax credit is available only to

[182] See Taxpayer Certainty and Disaster Tax Relief Act of 2020, Pub. L. No. 116-260, Div. EE, § 304(b), 134 Stat. 3038, 3079 (part of the Consolidated Appropriations Act, 2021 and codified in scattered sections of 26 U.S.C.) (amending I.R.C. § 165 regarding the deduction of casualty loss), Taxpayer Certainty and Disaster Tax Relief Act of 2019, Pub. L. No. 116-94, Div. Q, § 205, 133 Stat. 3226, 3245-46 (part of the Further Consolidated Appropriations Act, 2020 and codified at scattered sections of 26 U.S.C.) (amending I.R.C. § 7805A regarding administrative filing requirements), Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 20104(b), 132 Stat. 64, 116-17 (codified in scattered sections of 26 U.S.C.), Disaster Tax Relief and Airport and Airway Extension Act of 2017, Pub. L. No. 115-63, § 504(b), 131 Stat. 1168, 1182-83 (codified in scattered sections of 26 U.S.C.), Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 702, 122 Stat. 3765, 3912 (codified in scattered sections of 26 U.S.C.), Gulf Opportunity Zone Act of 2005 ("GOZA"), Pub. L. No. 109-135, § 201, 119 Stat. 2577, 2596 (codified at 26 U.S.C. § 1400S(d)), and Katrina Emergency Tax Relief Act of 2005, Pub. L. No. 109-73, §§ 402-03, 119 Stat. 2016, 2027 (codified in scattered sections of 26 U.S.C.), for a sample of cut and paste provisions related to casualty loss and filing.

[183] *See* 26 U.S.C. § 179.

[184] *See* Job Creation Worker Assistance Act of 2002, Pub. L. No. 107-147, § 301, 116 Stat. 21, 33 (creating 26 U.S.C. § 1400L).

[185] *See* GOZA § 101 (codified at 26 U.S.C. § 14I(e)).

[186] *See* Economic Stimulus Act of 2008, Pub. L. No. 110-185, § 102, 122 Stat. 613, 618 (codified at 26 U.S.C. § 179(a)(7)).

taxpayers who reach a certain threshold of income.[187] Likewise, the child tax credit is refundable (meaning the Treasury will write a check to the taxpayer for any amount of the credit that exceeds tax liability) for taxpayers within a certain range of earned income.[188] In KETRA, Congress included a provision permitting taxpayers to include their prior year's income when determining their eligibility for the credits.[189] Congress cut-and-pasted its language verbatim into three subsequent disaster relief provisions covering a multitude of federally declared disasters.[190] In another bill, it incorporated the language verbatim through cross-reference,[191] and in yet another, it used the very same language with some modifications to coordinate with the CARES act during the COVID pandemic.[192]

Penalty-free withdrawals from tax-preferred retirement savings are a third example of obvious cut-and-paste legislation. Introduced in KETRA, these provisions abate a ten percent penalty imposed by section 72 of the Internal Revenue Code on non-qualified withdrawals from IRAs, 401(k)s, and similar accounts.[193] Congress repeated the language from KETRA verbatim or nearly so in six subsequent bills.[194] Congress

[187] *See* 26 U.S.C. § 32(a)(1) ("In the case of an eligible individual, there shall be allowed as a credit against the tax imposed by this subtitle for the taxable year an amount equal to the credit percentage of so much of the taxpayer's earned income for the taxable year as does not exceed the earned income amount.").

[188] *See id.* § 24(d) (calculating refundable portion of child tax credit).

[189] *See* Katrina Emergency Tax Relief Act of 2005 ("KETRA"), Pub. L. No. 109-73, § 406, 119 Stat. 2016, 2028 (codified in scattered sections of 26 U.S.C.).

[190] *See* Taxpayer Certainty and Disaster Tax Relief Act of 2019, Pub. L. No. 116-94, Div. Q, § 204(a), 133 Stat. 3226, 3242 (part of the Further Consolidated Appropriations Act, 2020 and codified in scattered sections of 26 U.S.C.); Disaster Tax Relief and Airport and Airway Extension Act of 2017, Pub. L. No. 115-63, § 504(c), 131 Stat. 1168, 1183; GOZA § 201 (codified at 26 U.S.C. § 1400S(d)).

[191] *See* Emergency Economic Stabilization Act of 2008 ("EESA"), Pub. L. No. 110-343, § 702, 122 Stat. 3765, 3912 (codified in scattered sections of 26 U.S.C.).

[192] *See* Taxpayer Certainty and Disaster Tax Relief Act of 2020, Pub. L. No. 116-260, § 207, 134 Stat. 3038, 3061-62 (part of Consolidated Appropriations Act, 2021 and codified in scattered sections of 26 U.S.C.).

[193] S*ee* 26 U.S.C § 72; KETRA §§ 101-04.

[194] *See* Taxpayer Certainty and Disaster Tax Relief Act of 2020 § 302(a)(1) ("Section 72(t) of the Internal Revenue Code of 1986 shall not apply to any qualified disaster distribution"); CARES Act, Pub. L. No. 116-136, § 2202, 134 Stat. 281, 340 (2020) (codified in scattered sections of 26 U.S.C.); Taxpayer Certainty and Disaster Tax Relief Act of

made meaningful changes in Congress's six repetitions of the language over a sixteen year period only twice: once in its 2019 disaster relief to describe how the provision would apply to a taxpayer affected by more than one qualified disaster (the withdrawal limitations apply separately to each)[195] and again in the CARES Act in 2020, when it introduced a slight expansion of the permissible amount of COVID-related withdrawals.[196] Cutting and pasting again, Congress then repeated the 2019 amendment verbatim in its 2020 disaster relief act.[197]

Two additional examples follow a similar pattern: suspension of the limitations on deducting charitable contributions and the employee retention credit against income tax. Both were introduced in KETRA.[198] Both remain nearly identical until passage of the CARES Act.[199] Both

2019 § 202; Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 20102, 132 Stat. 64, 110 (codified in scattered sections of 26 U.S.C.); Disaster Tax Relief and Airport and Airway Extension Act § 502; EESA § 702 (incorporating identical language from GOZA by cross-reference to 26 U.S.C. § 1400Q); GOZA § 201 (codified at 26 U.S.C. § 1400Q).

[195] Taxpayer Certainty and Disaster Tax Relief Act of 2019 § 202(a)(2)(D) ("The limitation . . . shall be applied separately with respect to distributions made with respect to each qualified disaster.").

[196] *See* CARES Act § 2202(a)(2)(A) (declining to reinstate a requirement of previous provisions that taxpayer subtract prior disaster-related distributions from the $100,000 maximum withdrawal amount).

[197] *See* Taxpayer Certainty and Disaster Tax Relief Act of 2019 § 202(a)(2)(D) ("The limitation . . . shall be applied separately with respect to distributions made with respect to each qualified disaster."); Taxpayer Certainty and Disaster Tax Relief Act of 2020 § 302(a)(1) ("Section 72(t) of the Internal Revenue Code of 1986 shall not apply to any qualified disaster distribution.").

[198] *See* KETRA § 202 (providing employee retention credit); *id.* § 301 (expanding charitable deduction limitations).

[199] *See* Taxpayer Certainty and Disaster Tax Relief Act of 2019 § 204(a) (expanding charitable deduction limitations); Bipartisan Budget Act of 2018 § 20103 (providing employee retention credit); *id.* § 20104 (expanding charitable deduction limitations); Disaster Tax Relief and Airport and Airway Extension Act of 2017 § 503 (providing employee retention credit); EESA § 702(1)(E) (providing employee retention credit by cross-reference to 26 U.S.C. § 1400R(a)); GOZA § 201 (providing employee retention credit (codified at 26 U.S.C. § 1400R) and expanded charitable deduction limitations (codified at § 1400S(a))). The CARES Act both incorporated the cut-and paste language on charitable deductions and created a new one that allowed non-itemizers to deduct up to $300. *See* CARES Act § 2204. In the cut-and-paste portion of the CARES charitable deduction expansion, Congress used its old language nearly verbatim, with a slight

revert almost entirely to their original form in the subsequent 2020 disaster relief act, though Congress expanded the employee retention credit against income tax to make it available to exempt organizations as a credit against payroll taxes instead.[200] This addition left the original language relating to the income tax credit unchanged.[201]

Cut-and-paste is everywhere in Congress's disaster-related tax relief bills. Its prevalence suggests its usefulness. The frequency with which Congress engages in this behavior suggests that it is efficient. It likely saves time in drafting, but also in passage since support for prior identical bills is likely to attach to new similar bills. Cut & paste legislating, though, sacrifices opportunities for innovation and careful policy analysis if it is done without intentional consideration of those opportunities, and very little in the study (which admittedly was confined to the language of the bills) indicates such intentionality.

C. Permanence

The strongest way in which recurring provisions of crisis-motivated recurring tax legislation ossify is through permanence. While many relief provisions sunset or apply only to events occurring in specified tax years, some have been permanently codified. Section 139, which made permanent an exemption for disaster relief payments, is one example of codification of a recurring relief provision in the Code.[202] Others include special provisions for the deduction of personal casualty losses under section 165(h),[203] a special exclusion for insurance proceeds related to personal property and an extended replacement window for destroyed property under section 1033(h),[204] and a grant of authority under section

expansion increasing the limits on contributions of food inventory. *See id.* § 2205(b). CARES also created a new employee retention credit against payroll taxes. *See id.* § 2301.

[200] *See* Taxpayer Certainty and Disaster Tax Relief Act of 2020 § 213 (expanding charitable deduction limitations); *id.* § 303 (providing the employee retention credit).

[201] *See supra* note 200 and accompanying text.

[202] 26 U.S.C. § 139.

[203] *Id.* § 165(h) (making personal casualty loss deduction only available in case of federally declared disaster through 2025).

[204] *Id.* § 1033(h) (creating more lenient rules for the taxation of money received in involuntary conversion of property due to federally declared disaster).

7508A to the Treasury to extend filing deadlines and make other administrative adjustments in cases of disaster.[205]

1. The Stafford Act Problem

Section 139 and many other permanent disaster relief provisions in the Code are tied explicitly to disaster declarations.[206] While perhaps not obviously objectionable from a distributional standpoint, Congress's reliance on the executive's declaration of disaster is a delegation of power from Congress to both the governor of the affected state and to the President. The following paragraphs describe how the federal disaster declaration process can create an arbitrary distribution from the perspectives of vertical and horizontal equity.

The Stafford Act describes the process of federal declaration of disaster and prescribes possible outcomes of such a declaration.[207] The declaration process begins when a state's governor formally requests the declaration.[208] Next, FEMA and local officials work to quantify the effect of the disaster, and the state's governor must determine that the state's resources are insufficient to address it.[209] Finally, the president must approve the governor's request.[210] (Though, presidential discretion means that things might not always occur in the proper order. For example, on March 13, 2020, then-President Trump made a number

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205 *Id.* § 7508A (giving Secretary of Treasury the authority to postpone filing and payment deadlines for various statutory obligations).

206 *See supra* notes 202–205. Permanent provisions linked to disaster declarations include administrative relief under 26 U.S.C. § 7508A, exclusion from gross income of disaster assistance payment and living expense payments, the extended replacement period and gain exclusion for insurance proceeds from an involuntary conversion of taxpayer's principal residence under 26 U.S.C. § 1033, and the deduction for personal casualty losses under 26 U.S.C. § 165. For a summary, see Lawson & Foster, *supra* note 8, at 306.

207 Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 100-707, 102 Stat. 4689 (1988) (codified at 42 U.S.C. § 5121 et seq.); *see* FEMA, OVERVIEW OF STAFFORD ACT SUPPORT TO STATES, https://www.fema.gov/pdf/emergency/nrf/nrf-stafford.pdf [https://perma.cc/C663-CZPT]. Historical context provided by WILLIAM L. PAINTER, CONG. RSCH. SERV., R45484, THE DISASTER RELIEF FUND: OVERVIEW AND ISSUES 8 (2022).

208 *See* FEMA, *supra* note 207.

209 *See id.*

210 *See id.*

of disaster declarations related to COVID-19 that applied to all fifty states, the District of Columbia, territories, and tribes.[211] After announcing the declarations, the president then invited potential recipients to apply for them.)[212]

2. Political Wickets

To the extent that provisions such as section 139 delegate authority to the President or the Secretary of the Treasury to decide which disasters qualify and which do not, they invite politics to enter the decision-making process.[213] Studies have suggested that both the existence of a declaration and the dollar amount of assistance given depend, in some part, on political concerns.[214] An executive that is overly responsive to constituents may see a disaster where others may not or, worse, may drag out the process or deny relief based on the political leanings of the disaster area. For example, in a high-profile incident, President Trump initially refused to issue a declaration of disaster in response to devasting wildfires in California during 2020, and it was widely surmised that his denial was based on Californians' lack of support for his presidential candidacy.[215] Trump relented only when the governor

[211] *See* PAINTER, *supra* note 207, at 15.

[212] *See id.*

[213] *See* Manolakas, *supra* note 2, at 35 ("[E]vidence suggests that States politically important to a President have higher rates of disaster declarations and the mean level of disaster declarations increases in election years as compared to nonelection years." In addition, "once a Federal disaster is declared, researchers have found that the amount of disaster relief per natural event increases with the number of representatives of an affected State on FEMA oversight committees in the House of Representatives.").

[214] *See id;* Lawson & Foster, *supra* note 8, at 321 (summarizing evidence of political influence on disaster declaration process); *cf.* Daniel C. Vock & Jim Malewitz, *Disaster Declaration Denials Exasperate Governors*, STATELINE (Aug. 23, 2013, 12:00 AM), https://stateline.org/2013/08/23/disaster-declaration-denials-exasperate-governors/ [https://perma.cc/7PVM-SR76] (describing how although data show no observable political bias, unclear standards result in decisions that can "seem arbitrary or politically motivated."). It is worth noting that the Stateline study simply counted grants and denials without inquiring into the underlying merits of each state's claim. As such, the study would not have revealed improper grants and denials.

[215] *See* Cameron Peters, *Why Trump Flip-Flopped on California Disaster Relief*, VOX (Oct. 17, 2020, 12:10 PM EDT), https://www.vox.com/2020/10/17/21520570/trump-california-wildfires-disaster-relief [https://perma.cc/QD4D-PR4X] (reporting that in

threatened to appeal a denial of relief.[216] So while sidestepping congressional deliberation over individual disasters has the potential to hasten the relief process, increasing the number of political institutions involved in that decision provides countervailing friction.

And there is another problem with permanence, at least as it is currently iterated. The increasing amount of tax relief tethered to a federal declaration of disaster increases the individual, state, federal, and political stakes at each juncture in the Stafford Act process. The more consequential the presidential declaration of disaster becomes, the more politically salient it will be. Increased salience of the disaster declaration may, in part, become influential in the determination of whether to declare a disaster, since both the governor and the president will be cognizant of constituents' perceptions of them.

3. Horizontal Equity and Market Competition

In addition, if the primary purpose of a given tax provision is to provide relief to individuals (as contrasted with systemic interventions to support infrastructure or the economy) tethering the relief to a federal declaration of disaster creates problems beyond political advantage-seeking. It also throws into question horizontal equity because disaster declarations are a poorly fitted signal of taxpayer need.

To understand this point, consider three taxpayers. Each has a similar house, and each house is affected similarly by flooding. The first taxpayer lives in a rich state with a capital reserve and budget surplus, and the state is affected by widespread flooding. The second taxpayer lives in a poor state with a government deficit, and that state, too, is affected by widespread flooding. The third taxpayer has a burst pipe as

March, "the president told Fox News that Democratic governors seeking federal help 'have to treat us well,'" and that a former administration official had said that "[Trump] told us to stop giving money to people whose houses had burned down from a wildfire because he was so rageful that people in the state of California didn't support him, and that politically it wasn't a base for him."); Scott Wilson & Tim Elfrink, *Trump Administration Rejects, Then Approves, Emergency Aid for California Wildfires, Including Biggest Blaze in State History*, WASH. POST (Oct. 16, 2020, 5:03 PM EDT), https://www.washingtonpost.com/nation/2020/10/16/trump-rejects-california-disaster-wildfires/ [https://perma.cc/PE2L-BQV9] (describing Trump's decision-making timeline and the California governor's plea).

[216] *See* Peters, *supra* note 215.

the result of a power outage caused by a local squirrel. From the perspective of using the tax system to provide individual relief, all three appear to have similar needs. However, their access to such relief will not be similar if it is tethered to a federal declaration of disaster. Because the declaration of disaster hinges on a federal determination of the insufficiency of the affected state's resources, the first taxpayer likely will not be eligible for federal tax relief because the rich state has the means necessary to address the disaster. The second taxpayer likely will receive federal tax relief (assuming that the governor requests it), regardless of the taxpayer's income or wealth. The third taxpayer, however, will not be eligible for any form of relief that requires a federal declaration since an errant home-wrecking squirrel simply isn't Stafford Act material.

The hypothetical outlined in the previous paragraph is born out in real life. Consider, for example, people affected by the California wildfires, for which the Trump administration granted relief, with people affected by wildfires in neighboring Arizona, for which the Obama administration did not grant relief.[217] The disparate federal tax outcomes afforded to these taxpayers is not a function of any of the usual normative considerations named in tax policy literature. Indeed, the determining factors — the fiscal health of the taxpayer's home state and the cause of damage to the taxpayer's property — do not appear to be first-order determinants of the taxpayer's need for relief (though certainly both could produce systemic effects that compound or alleviate need).

The discrepancy among the hypothetical taxpayers becomes even more bizarre if we posit that they are three similarly situated businesses that compete with one another in interstate commerce. Consider, for example, a thriving business in a part of California that is benefitted by a federal declaration of disaster that competes in interstate commerce with a similar business in Arizona. The California business may be able

[217] *See* Vock & Malewitz, *supra* note 214 (quoting a FEMA administrator who wrote to Arizona's governor, "[t]he damage to uninsured private residences from this event was not of such severity and magnitude as to be beyond the capabilities of the state"). Note, though, that nothing in federal law requires the state to provide relief to homeowners, and federal tax benefits accrue in some circumstances even to taxpayers in federally declared disaster areas who do not need assistance.

to take advantage of additional depreciation, employee retention incentives, or special financing provisions, whereas its similarly situated competitor would be unable to access those federal benefits.

In short, tying availability of crisis-driven tax relief to a federal declaration of disaster creates both underbreadth and overbreadth of relief because (a) a disaster may not cause a given taxpayer to experience a financial shock, yet the declaration will make relief available; (b) financial shocks can happen outside of the context of a widespread disaster, yet no relief will be available; and (c) involvement of the state's governor and the requirement of a federal assessment of the state's resources can politically skew the decision to either seek or grant relief.

So while careful crafting of a permanent suite of disaster relief provisions might, in some circumstances, give Congress an opportunity to more carefully consider distributional and other policy concerns raised by its recurring use of crisis-motivated tax provisions, it is important that the "on" switch for those provisions not create independent distributional problems.

D. Prepackaged Relief

A second way in which recurring provisions ossified during the study period came from Congress's use of the Code to create packages of provisions applicable for discrete periods of time or to specified geographical regions. Although originally conceived of as a public finance approach for revival of economically depressed areas, it is a natural fit for localized disasters as well (if one assumes that they require assistance for revival, which is not always the case).[218] The following paragraphs describe Congress's prior forays into this area and assess the benefits and detriments of this approach.

[218] *See, e.g.*, Aprill & Schmalbeck, *supra* note 2, at 74 (finding that individuals entitled to tax relief in 9/11 terrorist attacks "span[ned] the full range of income and wealth possibilities. Indeed, a disproportionate number of them were people of higher income and wealth"); *id.* at 77 ("Our criticism of these provisions is that it would be difficult to find five square miles on earth less in need of enhanced development incentives than the southern tip of Manhattan . . . .").

1. Prepackaged "Zones" as Disaster Responses

One way in which crisis-motivated tax provisions ossified was through Congress's repeated use of geographic "zones" to provide tax benefits to people and businesses in a particular area. The first example of such use during the study period is the New York Liberty Zone, through which Congress provided tax-preferences for bond financing and other tax benefits to the area of New York affected by the 9/11 terrorist attacks.[219]

The zone approach was next adopted to provide relief to areas affected by Hurricanes Katrina, Rita, and Wilma.[220] And those provisions then were adopted wholesale through explicit incorporation into Title VII of the EESA, entitled "Disaster Relief," passed in 2008 to address the Midwest flooding/tornadoes and Hurricane Ike.[221]

EESA's Subtitle A, "Heartland and Hurricane Ike Disaster Relief" opened by incorporating through cross-reference specific benefits provided in the earlier GO Zone and KETRA legislation.[222] It codified the application of twelve pre-existing GO and KETRA provisions covering subjects as diverse as education and mortgage revenue bonds.[223] The referenced GO Zone provisions focused primarily on cash flow and included familiar repeat players like tax-exempt bond financing, increased expensing and broadened depreciation, preferred withdrawals

[219] *See* 26 U.S.C. § 1400L (repealed by Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Div. U, tit. IV, § 401(d)(6)(A), 132 Stat. 348, 1211).

[220] *See* 26 U.S.C. § 1400N(a)(7)(B).

[221] *See* Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 702, 122 Stat. 3765, 3912 (codified in scattered sections of 26 U.S.C.) (allowing benefits described in GO Zone provisions codified in § 1400N (tax benefits), § 1400O (education tax benefits), § 1400P (housing tax benefits), § 1400Q (retirement fund benefits), § 1400R (employee retention credit), § 1400S (other tax relief), and § 1400T (mortgage revenue bonds)); Katrina Emergency Tax Relief Act of 2005 ("KETRA"), Pub. L. No. 109-73, § 302, 119 Stat. 2016, 2023 (codified in scattered sections of 26 U.S.C.) (additional personal exemption amount for taxpayers housing displaced individuals); *id.* § 303 (increased standard mileage rate for charitable use of vehicle); *id.* § 304 (mileage reimbursements for charitable volunteers excluded from gross income); *id.* § 401 (exclusion of cancellation of indebtedness by reason of disaster); *id.* § 405 (extension of replacement period for non-recognition of gain in involuntary conversion due to disaster).

[222] *See* Emergency Economic Stabilization Act of 2008 ("EESA"), Pub. L. No. 110-343, tit. VII, subtit. A; *see supra* note 221 and accompanying text.

[223] *See supra* note 222 and accompanying text.

of cash from retirement funds, and the employee retention credit, among other things.[224] The cross-referenced KETRA provisions focused on charitable giving incentives and the plight of home owners whose homes were damaged or destroyed.[225] All of them recurred in literally the same language as their earlier corollaries.

Congress's reliance on the pre-existing architecture of tax-preferred geographic "zones" allowed it to quickly assemble a relief package. It likely also made the legislation's passage less controversial by creating parity of tax relief among victims of various disasters. Parity may have been particularly important in 2005, given the number of large-scale natural disasters clustered into a single year. The statutory "zone" architecture also allowed Congress to alter the application of pre-existing Internal Revenue Code sections without actually amending the sections themselves, making codification easier and preserving the (relative) simplicity of the underlying Code sections. There is, however, little evidence, as discussed above, that consideration was given to the long-term distributional effects of the crisis-motivated provisions either separately or when they were packaged together. So while the packaging created convenience and likely contributed to political expediency, it further ossified recurring provisions, the aggregate distributional effects of which already were unclear.

2. Prospective Prepackaging with Federal Declaration of Disaster as an "On" Switch

Another way in which Congress has ossified crisis-motivated tax provisions is by enacting them prospectively, with their use limited to future federal declarations of disaster.

EESA's forward-looking Subtitle B, "National Disaster Relief," for example, functioned differently from its zone-oriented sibling in Subtitle A. Instead of creating or relying on the "zone" statutory format, it amended the relevant Internal Revenue Code provisions directly, using a federal declaration of disaster as an on-switch that would bring

224 *See* EESA § 702(a)(1).

225 *See* KETRA §§ 302, 303, 304, 401, 405.

the amendments into effect in the disaster area.[226] Enacted in 2008, its provisions applied to disasters declared before January 1, 2010.[227] The provisions contained in Subtitle B did not overlap with those in Subtitle A. Rather, the two were complimentary, granting to the executive the power to provide all of Subtitle B by declaring a federal disaster and, by inference, giving Congress the option of adding a Subtitle A-type benefits package when warranted, as in the case of the Midwest and Ike disasters (though at the time, Congress allowed only partial overlap of the two subtitles).[228] Like the provisions of Subtitle A, all of those in Subtitle B were recurring provisions from prior disasters.[229] Again like the provisions of Subtitle A, there is no evidence that Congress took into account the aggregate long-term distributional consequences of repeated use of the recurring provisions.

3. Disaster Tax Relief Acts

A third example of prepacked relief, which applied to yet-to-be-declared disasters (as well as many already declared) appears in the Disaster Tax Relief Acts of 2019 and 2020.[230] Characteristic of both Acts,

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[226] *See* EESA § 706(a) (amending 26 U.S.C. § 165 to add waiver of gross income limitation on deduction of personal casualty loss in federally declared disaster); *id.* § 707 (creating new I.R.C. § 198A for expensing of qualified expenses arising from federally declared disaster); *id.* § 708(a) (amending I.R.C. § 172 net operating loss for federally declared disasters); *id.* § 709 (amending § 143 to waive certain mortgage revenue bond requirements in federally declared disasters); *id.* § 710 (amending I.R.C. § 168 for special depreciation allowances in federally declared disasters); *id.* § 711 (amending I.R.C. § 179 to add special rules for expensing qualified disaster assistance property).

[227] *See* EESA § 706(a)(1)(B) (applying to losses incurred before Jan. 1, 2010); *id.* § 707(b)(2)(A) (expanded expensing applies to losses arising from federally declared disaster declared before Jan. 1, 2010); *id.* § 708(b) (applies to NOLs arising from disaster declared before January 1, 2010); *id.* § 709(a) (applying expanded mortgage revenue bond rules to the damage or destruction of residences in a federally declared disaster occurring before January 1, 2010); *id.* § 710(a) (same for depreciation); *id.* § 711(a) (same for expensing).

[228] *See* EESA § 712 (disallowing some provisions of Subtitle B for the Midwestern Disaster Area).

[229] Though this subtitle codified a new code section on expensing, 26 U.S.C § 198(A) (repealed 2014), the move to broader expensing was hardly novel.

[230] Taxpayer Certainty and Disaster Tax Relief Act of 2019, Pub. L. No. 116-94, Div. Q, 133 Stat. 3226 (part of the Further Consolidated Appropriations Act, 2020 and

the relief measures contained in the Disaster Tax Relief Act of 2020 applied to "any qualified disaster area which was determined by the President" any time during the calendar year 2020 and for sixty days following the passage of the Act "to warrant individual or individual and public assistance" under the Stafford Act.[231] (The Act did not apply, though, to areas where the sole reason for a disaster declaration was COVID).[232] Although probably meant to give the embattled President a chance to catch up,[233] the Act created a window during which its provisions were triggered by disasters declared after the passage of the Act. In fact, there were a number of such disasters, including the January 6 insurrection at the Capitol.[234]

The Disaster Tax Relief Acts of 2019 and 2020 contained provisions common to the EESA Disaster Relief Subtitle A, which of course were imported from prior crisis-motivated tax legislation.[235] Among them were tax-preferred withdrawals from retirement funds,[236] the employee retention credit,[237] preferences for charitable contributions,[238] expanded availability of personal casualty losses,[239] and the low-income housing tax credit.[240] In the background, of course, were the expanded expensing and net operating loss provisions left over from prior crisis-motivated legislation. Yet again, there is no indication of Congress giving any

codified in scattered sections of 26 U.S.C.); Taxpayer Certainty and Disaster Tax Relief Act of 2020, Pub. L. No. 116-260, Div. EE, 134 Stat. 3038 (part of the Consolidated Appropriations Act, 2021 and codified in scattered sections of 26 U.S.C.).

[231] Taxpayer Certainty and Disaster Tax Relief Act of 2020 § 301(2)*; see also* Taxpayer Certainty and Disaster Tax Relief Act of 2019 § 201(2).

[232] Taxpayer Certainty and Disaster Tax Relief Act of 2020 § 301(1)(B).

[233] Pun intended.

[234] *See Designated Areas: Disaster 3553*, FEMA, https://www.fema.gov/disaster/3553/designated-areas (last visited Sept. 12, 2023) [https://perma.cc/KG88-K3UN] (declaring the Capitol insurrection a disaster qualifying for individual and public assistance).

[235] Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 702(a), 122 Stat. 3765, 3912 (codified in scattered sections of 26 U.S.C.).

[236] *See* Taxpayer Certainty and Disaster Tax Relief Act of 2020 § 302.

[237] *See id.* § 303.

[238] *See id.* § 304.

[239] *See id.*

[240] *See id.* § 305.

thought to the distributional consequences of repeating these provisions.

Finally, both the EESA and the Disaster Tax Relief Acts of 2019 and 2020 required federal declarations of disaster. For reasons explained earlier, tethering tax relief to such a declaration may not be an optimal way of choosing the taxpayers to whom relief should be provided.

4. Benefits and Detriments of Permanency and Prepacking

Both permanent codification and prepacking of crisis-related provisions can (although may not always) provide expediency, the importance of which can't be discounted at the time of a crisis. Both could provide an opportunity for consideration of the benefits and detriments *outside* of a time of crisis, rather than in the midst of it. Both could provide a period of reflection for policy makers to consider how the provisions work together and what distributional effects they may have. Advance agreement could create distance between congressional wrangling and the provision of relief in a crisis that has been politicized, since presumably political battles could/would/should be fought at the time of drafting rather than at the time of the crisis itself. And, importantly, repeated use of the same provisions across time should allow data collection and assessment of the measures' functionality and distributional effect. The permanently codified or prepackaged measures passed during the study period fell short of these ideals, in no small part because rather than passing well-considered measures on a blank slate during a time of non-crises, Congress tended to merely repeat measures passed during earlier crises. This need not be a fatal flaw of either permanency or prepacking, though. Thoughtful consideration, drafting, and precommitment during a non-crisis period could give rise to the political expediency necessary in a crisis.

During the study period, however, permanent codification and prepackaging exhibited negative characteristics that must be considered before concluding that either are desirable. As noted above, recurring provisions typically broadened over time. Provisions the activation of which were tied to a federal declaration of disaster were susceptible to political capture. In addition, there is little in the legislative record to suggest that Congress revisited the distributional consequences or effectiveness of legislation passed in prior crises before applying them to new ones. And because data collection on the provisions was accidental at best, post-hoc evaluation of them is hobbled. Perhaps most glaringly, the ossification of recurring crisis-motivated provisions leaves little opportunity for the incorporation of new science, new legal thought, or new social or economic conditions or priorities.

The sheer number of recurring crisis-motivated tax provisions during the study period highlights their centrality to Congress's relief efforts, at the very least as a signaling mechanism, but more likely as means of increasing liquidity, delivering aid, and stabilizing the economy. Their ossification through repeated use and through more formal mechanisms is cause for concern to the extent that they are reenacted unexamined. Suggestions for reform of tax law in crises must account for this deficit while preserving the expediency of recurrence, which Congress leaned on heavily during the study period and seems unlikely to abandon.[241]

VII. HOW TO BUILD REFORM

First, a disclaimer. The goal of this project is not to propose substantive reforms. Rather, it is to provide an evidence-based account of patterns of legislation that may create or exacerbate distributional concerns and to suggest how those patterns might be harnessed or changed to address such concerns. To that aim, the paragraphs that follow are procedural rather than substantive recommendations.

A. Harness Recurrence

The patterns emerging from this study — that crisis-motivated provisions are written in the midst of a crisis and are likely to be repeated or broadened in subsequent crises — suggests the political functionality of repetition and ossification to Congress. Proposals for reform should harness rather than fight that functionality. Recurrence allows Congress to act quickly and predictably, and because they have passed a litmus test once before, recurrent provisions may engender less political opposition than innovative ones.

[241] *See* Aprill & Schmalbeck, *supra* note 2, at 53 ("There appears to be a legislative imperative, a felt need to be seen by constituents as engaged actively" in providing disaster relief.).

Recurrence is a legislative tool rather than an evil to be conquered, and as such, it presents opportunities. First, because recurrent provisions are used in individual disasters over a span of years, coupling them with data collection requirements would allow Congress and researchers to study them longitudinally over time and in a variety of contexts. Instead of blindly guessing at their distributional impact, Congress could make informed decisions about whether to continue, discontinue, or amend recurring provisions. Second, because recurring provisions, well . . . recur, targeted interventions to them could permanently change the DNA of Congress's standard crisis response. Research in health law, for instance, suggests that providing deliberative bodies with legislative subsidies such as relevant data or model statutory or regulatory language increases the chances of reform.[242] Having recognized a problem in Congress's current pattern of legislation, scholars and policy makers could aid Congress in identifying and amending recurring language, and such amendments themselves would then recur.

B. Reform Should Begin Outside of the Congressional Response to Any Particular Crisis

Reform, when needed, should be considered in advance of, and not during, crises.[243] The legislative pattern of recurrence suggests that time pressure and careful consideration of detailed tax provisions are at cross-purposes. Because the effectiveness of provisions and the

[242] *See* Taleed El-Sabawi, *What Motivates Legislators to Act: Problem Definition & the Opioid Epidemic, A Case Study*, 15 IND. HEALTH L. REV. 189, 220-21 (2018) (discussing the effect of providing costly information, political intelligence, and legislative labor on legislators' definition of the opioid epidemic as a medical issue).

[243] *See* Aprill & Schmalbeck, *supra* note 2, at 97 (calling for the creation of a panel of tax experts to provide guidelines to apply to tax relief legislation in future disasters). A number of scholars have also called for advance legislation or ossification in the form of permanence, which as noted elsewhere in this Article, in some cases may decrease flexibility and result in disparate treatment of taxpayers inside and outside of declared disaster areas. *See, e.g.*, Manolakas, *supra* note 2, at 61-62 (recommending enactment of permanent relief); Cords, *Charitable Contributions for Disaster Relief*, *supra* note 2, at 464 (same for particular kinds of disasters); Tolan, *Lessons Learned*, *supra* note 6, at 593 ("It is unsound for Congress to react on an ad hoc basis to the tragedy of the day, because it results in disparate treatment of casualty victims.").

consideration of their distributional effects across a variety of normative frameworks is not quick work, it should be done outside of the legislative process of any particular crisis. It should be evidence-based and informed by diverse and multi-disciplinary viewpoints. Such an informed process is not likely to occur in the context of an ongoing crisis itself. Here, again, researchers and policy centers have a role to play in providing legislative subsidies to Congress.

Congress should not approach reform until it either has (or is committed to gathering more) information about its crisis-motivated tax provisions. Currently, Congress has no mechanism in place gauging either the effectiveness or the near or long-term results of many recurring provisions. Many require no separate reporting, but rather, when utilized by a taxpayer, are aggregated with other attributes on the taxpayer's return. For example, accelerated depreciation claimed in response to crisis legislation is indistinguishable from other accelerated depreciation in IRS statistical reports. As a result, there is no accurate measure of how much the provision actually cost the government and no record of which taxpayers claimed it or whether, from a distributional standpoint, they needed it. And without knowing how much money went where, any attempt at quantifying the benefit of a provision in terms of disaster relief is likely to be futile. Yet, without information about whether the provision reached its intended beneficiaries or how it operated in the economy, re-enactment of the same provision in a subsequent crisis is unwarranted.

Congress could remedy its lack of information about the operation of recurring crisis-motivated tax provisions by attaching separate reporting requirements to them. Though administratively frustrating for the IRS, which must issue new forms annually, the problem of form issuance is a secondary matter in comparison to evaluating the effectiveness of hundreds of millions of dollars of annual tax expenditures on crisis relief. And there are simple solutions to the administrative headache, like the insertion of permanent lines that are held open on relevant portions of forms in case of crisis legislation. Or the creation of an entirely separate form — a "Crisis 1040," for example — with an extended filing deadline, which would allow the IRS to timely issue the non-crisis forms for the general population while simultaneously giving taxpayers who experienced a crisis additional time to file.

A second approach would be to gather data outside of the tax filing process. The Treasury could ask a series of questions, like those that follow, and work with the aid of subject area experts to answer them. For example, what are the common elements of crises that necessitate government aid? Second, do these common elements occur only in large-scale events, or do they also apply to taxpayers outside of disaster areas, like the casualty loss provisions? Third, can those elements be addressed effectively through tax measures? Fourth, can these elements be expected to change over time? Fifth, by what criteria should Congress judge the success or failure of relief measures? Sixth, if a particular form of relief successfully reached the majority of eligible claimants, what might the secondary and tertiary effects of that relief be? Seventh, what data are needed to address success, failure, and primary, secondary, and tertiary effects of recurring provisions, and how could they be collected? Eighth, how can recurrence and ossification be made facile enough to account for changes over time and trends revealed by data without sacrificing the functionality of recurrence as a legislative tool? Ninth, how can the process be protected from political capture? Some of the questions above are empirical, some normative. Finding answers to them outside of the crisis legislation process would provide a solid basis for substantive reform, and if coupled with data collection on the reformed provisions, could serve as the foundation to a well-considered, evidence-based approach to using the tax code as one means of providing crisis relief.

C. Identify Commonalities Among Crises and Groups of Affected Taxpayers; Assess the Efficiency and Fit of Recurring Provisions that Address Them

Identifying common problems in crises that may be susceptible to tax relief would allow policy makers to consider some aspects of relief in advance, freeing the legislature to focus on aspects of a particular crisis that are unique.

One way in which law makers might identify common elements among crises would be to work with experts inside of disaster agencies and non-governmental experts working in related areas. A second-best way to approach the question might be to identify commonly addressed concerns in past crisis-motivated tax legislation. Legislation passed during the study period highlights common concerns that are cross-cutting among crises. All bills in the study addressed liquidity, for instance. All bills related to natural disasters addressed the destruction of physical plants. Most addressed temporary business closures. All bills related to financial crises dealt with economic slowdown through incentives for spending.

Many bills contained at least one provision that was uniquely tailored to an eye-catching aspect of the crisis. For example, the Katrina bill contained special provisions encouraging taxpayers to house hurricane victims.[244] During the mortgage-backed securities collapse, Congress introduced a first-time homebuyer credit.[245] At the beginning of the COVID pandemic, Congress enacted a special insurance exception for telehealth services and added certain over-the-counter medications to the category of medical expenses eligible for coverage by flexible spending accounts.[246] However, closer thought about these "unique" provisions reveals that the problems they address are not, in fact, unique, and that they also might be useful in identifying aspects of a crisis for which Congress could plan in advance. For instance, using the Hurricane Katrina provision as a prompt, law makers might ask whether housing is a concern in other crises and whether the incentive provided for housing victims of Katrina was an efficient and safe way of providing aid. Or using CARES as a prompt, Congress might ask whether access to in-person healthcare is a concern in other crises and whether shielding insurance benefits for telehealth was an efficient way of providing aid in prior crises. The answer to both is likely to be that housing insecurity and access to in-person health care are common concerns in the context of natural disasters. If that is the case, then further inquiry into whether

[244] *See* Katrina Emergency Tax Relief Act of 2005, Pub. L. No. 109-73, § 302, 119 Stat. 2016, 2023 (codified in scattered sections of 26 U.S.C.).

[245] *See* Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 3011, 122 Stat. 2654, 2888 (providing a tax credit of up to $7,500).

[246] *See* CARES Act, Pub. L. No. 116-136, § 3701, 134 Stat. 281, 415 (2020) (adding telehealth services to definition of qualified medical expenses for purposes of withdrawals from health savings accounts under 26 U.S.C. § 223); *id.* § 3702 (same for over-the-counter medical products).

these provisions might be effective in future natural disasters is warranted. Here, the Code's naturally occurring pattern — different suites of recurring provisions for humanitarian versus economic crises — might be usefully harnessed to introduce new measures addressing commonalities within each. Or a more granular examination might be useful. Perhaps commonalities exist among all large-scale fires, or all hurricanes, etc.

Identifying commonalities among groups of taxpayers also would be useful in refining Congress's approach to crisis-motivated tax legislation. While making a particular relief provision available to all taxpayers within an affected area is likely to be faster and more easily adopted through bipartisan consensus, as described earlier, the overbreadth of relief provisions within a disaster area, coupled with their unavailability elsewhere, can create problems of equity. Some groups of taxpayers have unique characteristics that would allow Congress to better tailor its delivery of aid. For example, students, renters, small business owners with poor liquidity, gig workers, families caring for small children, individuals with disabilities, rural communities, the urban poor, and people who receive social security are just a few examples of demographics with unique characteristics that Congress could use to more carefully tailor aid. Furthermore, identifying particularly vulnerable groups and building a checkpoint regarding them into the legislative process, or perhaps address their known vulnerabilities through amendments to recurring provisions, should push the distributive effect of recurrence in a more normative direction.

D. Distinguishing Between Aid Provisions for Individual Taxpayers and Systemic Interventions in the Progression of a Crisis

In addition to identifying common elements of crises and common vulnerabilities of groups of taxpayers, Congress should distinguish between recurring provisions that use the presence of a crisis as a proxy for financial shock to individual taxpayers from those that are meant as a systemic intervention against the progression of a crisis.

1. A Federal Declaration of Disaster Is a Poor Proxy for Individual Financial Shock

A federal declaration of disaster is a poor proxy for individual financial shock. As described elsewhere in the paper, there are many causes of financial shock to individuals outside of the federally declared disasters for which Congress enacts relief. A taxpayer whose house is destroyed by a tornado is likely no better off than a taxpayer who lives in a state where residents receive federal tax relief because there are ten such tornados. Or a taxpayer whose house burns down due to an electrical fire probably is not substantially better off than a taxpayer whose house is located at the edge of a forest destroyed by a federally recognized wildfire.

On the other hand, individual taxpayers who sustain financial shock in the context of a federally recognized disaster may find themselves at a disadvantage in recovery because the local economy as a whole is impaired by the disaster. More different still are taxpayers who suffer individual financial shock in the context of a federal-level crisis that impairs the economy as a whole.

Aid provisions meant to address the financial shock of individual taxpayers need not be tied to a federal declaration of disaster. For example, the casualty loss deduction, which softens the financial shock of losing property to an adverse event, is currently tied to a federal declaration of disaster, but it need not be. Similarly, recurring provisions related to the destruction of property or disaster-related health shocks would function more equitably as permanent enactments of the Code, applicable to any person, business, or locality that experiences a qualifying loss. Permanently codifying provisions related to individual financial shock would reduce horizontal equity problems that arise when similarly situated taxpayers are located some inside and some outside of the disaster area. It also would provide a truer reflection of affected taxpayers' accession to wealth (i.e., income) in the year of the adverse event, as well as subsequent years in the event of carried losses. And permanent codification would create an easily administrable opportunity for data collection, allowing Congress to assess the efficiency and equity of its individual relief provisions.

2. Intervention in Systemic Crises

In truly systemic crises, as opposed to local or individual-level crises, specific legislation may be justified. Systemic intervention is a different goal, with different normative underpinnings, than the provision of individual relief. For example, a massive distribution of stimulus during an adverse event at the federal level has as a beneficial ancillary effect individual relief, but it might have as its primary purpose the prevention of economic collapse. In addition, as other scholars have noted, Congress will be compelled to act during large-scale crises, so legislation is likely in that context.[247]

In systemic crises, the functionality of recurrence matters, and targeted, data-driven intervention prior to such crises could alleviate concerns raised by Congress's seemingly unexamined use of recurrence as a legislative pattern during them. For example, it is highly likely that in the next nationwide crisis, Congress will enact a package of tax relief, and that package of tax relief almost certainly will include some form of payroll tax relief for employers or employees. Making this form of relief generally available as a permanent provision, like the casualty loss deduction, would make little sense and would result in erosion of the tax base as well as an inequitable distribution of resources. As part of a suite of crisis-motivated tax provisions, though, payroll tax relief has clear appeal. It supports businesses in a struggling economy and (at least facially) encourages them to retain their employees.

It is for provisions like payroll tax relief that close examination and reform are important. Because Congress will pass tax relief as part of its systemic intervention in large-scale crises, efforts to harness recurrence as a tool for reform could focus most profitably on those measures most likely to occur in systemic relief packages. It is in this context that expediency is seemingly critical, making recurrence likely and careful consideration of distributional consequences unlikely, and it is also in this context that Congress spends the most money on recurring

[247] *See* Aprill & Schmalbeck, *supra* note 2, at 95. Congress, by its nature, has a need for signaling through involvement, and an approach that embraces development of legislation prior to a time of crisis should embody a mechanism to preserve involvement of the current Congress. The authors recommend asking Congress to invoke emergency provisions through a joint resolution which preserves the signaling effect without compromising the process needed to create adequate substance. *Id.*

provisions. Data collection and evidence-driven reform are likely to have their greatest impact in this context as a result.

E. The Employee Retention Credit as Case Study

Congress's reinvention of the employee retention credit presents a natural experiment on the use of recurrence to address distributive justice and efficiency concerns. Originally codified in section 1400R of the Internal Revenue Code, it provided a credit of up to $2,400 to any employer that retained its employees when the business was inoperable at its original location due to damage from Hurricane Katrina.[248] Congress has re-enacted the credit in many subsequent crisis tax relief bills.[249]

As noted earlier, the employee retention credit in its original form is potentially troubling from a distributional standpoint. The credit was available to any business that became inoperable as a result of disaster, with no limitations based on income or assets of the claimant. Congress also did not require credit claimants to show lost income as a result of disruption by the disaster. In addition, an employer must have had sufficient liquidity to pay wages or salary to employees far in excess of the available credit, since the amount of the credit was far lower than the cost of retaining employees. This practical reality limited the credit's scope to businesses with at least some measure of financial health.

After the original employee retention credit was repealed in 2018,[250] several members of Congress urged its readoption in 2020 in response to COVID-19-related closures.[251] A letter from the members specifically

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[248] 26 U.S.C. § 1400R(a).

[249] *See* Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 15345(a)(8), 122 Stat. 1651, 2282 (providing the ERC for Kansas hurricane disaster area); Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 702, 122 Stat. 3765, 3912 (codified as amended at 12 U.S.C. §§ 5201-53) (providing the Employee Retention Credit ("ERC") for Heartland and Hurricane Ike disasters); Disaster Tax Relief and Airport and Airway Extension Act of 2017, Pub. L. No 115-63, § 503, 131 Stat. 1168, 1178 (providing the ERC for Hurricane Harvey); Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 20103, 132 Stat. 64, 114 (providing the ERC for California wildfires).

[250] Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Div. U, § 401(d)(6)(A), 132 Stat. 348, 1211.

[251] *See* Letter from Pappas & Hagedorn, *supra* note 164.

advocated for recurrence of "[t]his credit, which has been implemented in previous disasters . . . ."[252]

Congress included an employee retention credit in the CARES Act and, in doing so, appeared responsive to its members' request.[253] Its new employee retention credit was not related to the old 1400R, though. Though it served a similar purpose — creation of an incentive for employee retention — new section 3134 incorporated new ideas to promote equity and efficiency. It was a refundable credit against payroll tax liability, which allowed employers more immediate access to relief.[254] The credit also was larger than its predecessor: initially it was up to $5,000 per employee per year.[255]

Unlike the old employee retention credit, Section 3134 also placed limits on employer eligibility, curbing the overbreadth of the prior provision. As noted earlier, under the new provision, an employer with more than 100 employees that was not severely financially distressed could claim the credit only for wages paid to employees who had work stoppages as a result of the pandemic.[256] An employer with less than 100 employees, or an employer that was severely financially distressed as a result of the pandemic could claim the credit for any employee regardless of whether the employee provided services or experienced a work stoppage.[257] In all cases, in order to claim the credit, the employer must have suspended its operations as the result of a COVID-19-related shut-down order or seen its gross receipts decline by more than fifty percent in comparison to the same quarter of the prior year.[258] These provisions were designed to direct aid to employers who were most in need of assistance.

[252] *Id.*

[253] *See* CARES Act, Pub. L. No. 116-136, § 2301, 134 Stat. 281, 347 (2020) (codified in scattered sections of 26 U.S.C.).

[254] *See* 26 U.S.C. § 3134(a), (b)(3).

[255] *See id.* § 3134(b)(1)(A) (requiring that the credit be calculated as 50% of up to $10,000 of statutorily qualified wages).

[256] CARES Act § 2301(c) (defining "qualified wages").

[257] *Id.* Under current 26 U.S.C. § 3134(c)(3)(C), a "severely financially distressed" employer is one who had gross receipts in the relevant quarter that were less than 10% of the gross receipts for that quarter in the prior year.

[258] CARES Act § 2301(c)(2) (defining "eligible employer").

The enactment of a new employee retention credit under the name of its expired predecessor raises compelling questions about recurrence. The new credit was enacted with a new tax base to coordinate the need for aid with prompt receipt of it, a measure that should be efficiency-increasing. With a more generous credit limit and means- or needs-based restrictions on claimants, the new credit also is facially more equitable.

Here, I hypothesize, and hope to observe in future work, that section 3134 will both recur and expand in subsequent crisis-motivated tax legislation over the next decade.

In fact, the credit did recur in subsequent COVID relief legislation, and the legislation did expand its scope.[259] The Taxpayer Certainty and Disaster Relief Act of 2020 increased the credit from fifty percent to seventy percent of eligible wages and loosened the qualified wages limitation from $10,000 per year to $10,000 per quarter per employee for the first two quarters of 2021, which increased the maximum credit amount to $14,000.[260] The Act also liberalized the restriction on large employers from businesses with 100 employees to those with 500 employees.[261]

A second COVID-related bill expanded the employee retention credit even further. The Consolidated Appropriations Act of 2021 increased the maximum amount of the credit from $14,000 to $28,000.[262] ARPA, a third bill, also provided a credit of up to $50,000 to "recovery startup businesses," which were defined as businesses established after a certain date, with gross receipts of $1 million or less.[263] Congress lowered the bar on its metric for financial distress.[264] Employers whose gross receipts were less than ten percent of gross receipts for the same quarter

[259] *See* 26 U.S.C. § 3134(b)(1)(A).

[260] *See* Taxpayer Certainty and Disaster Tax Relief Act of 2020, Pub. L. No. 116-260, Div. EE, § 207(a), 134 Stat. 3038, 3062 (part of the Consolidated Appropriations Act, 2021 and codified in scattered sections of 26 U.S.C.) (amending the credit computation by replacing the annual computation with a quarterly one and raising the credit percentage of $10,000 from 50% to 70%).

[261] *See id.*

[262] *See* American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9651, 135 Stat. 4, 176 (codified in scattered sections of 26 U.S.C.).

[263] *See id.* § 9651(b)(1)(B) (enacting amended § 3134(b)(1)(B)).

[264] *See id.* § 9651(c)(3)(C)(ii) (enacting amended § 3134(c)(3)(C)).

of the prior year were permitted to treat all wages (and not just those of employees with work stoppages) as qualifying wages for purposes of the credit.[265] Finally, it expanded the credit by counting employer contributions for health plans as wages even in cases where an employee received no regular pay.[266]

The second and third iterations of the new employee retention credit, then, followed a typical pattern of recurrence and expansion. Subsequent legislation repealed the credit for now, but there have been multiple calls to renew or expand it further.[267] The IRS has collected data

[265] *Id.*

[266] *Id.* § 9651(c)(4)(B)(i) (enacting amended § 3134(c)(4)(B)(1)).

[267] *See e.g.*, Letter from Margaret Wood Hassan et al., U.S. Senators, to Charles E. Schumer, Majority Leader, U.S. Senate, & Mitch McConnell, Minority Leader, U.S. Senate (Feb. 26, 2021), https://www.hassan.senate.gov/imo/media/doc/ERTC_hardest_hit_letter.210225.pdf [https://perma.cc/JJ3P-XYKZ] (letter of several senators in support of expanding the revenue loss restriction on claiming the ERC); *Orlando Mayor Says Restaurants Need Expanded Credits, PPP*, TAX NOTES (Sept. 25, 2020), https://www.taxnotes.com/tax-notes-today-federal/credits/orlando-mayor-says-restaurants-need-expanded-creditsppp/2020/09/28/2d00c?highlight=employee%20retention%20credit%20orlando%20mayor [https://perma.cc/55X5-258U] (publishing letter of Orlando mayor to House Ways and Means Committee requesting ERC expansion); *Organizations Commend ERC Legislation*, TAX NOTES (Feb. 10, 2022), https://www.taxnotes.com/tax-notes-today-federal/credits/organizations-commend-erc-legislation/2022/02/11/7d60h [https://perma.cc/QB68-Y4W9] (letter of trade associations and nonprofit organizations in support of bipartisan legislation to reinstate the ERC); Alexis Gravely, *Replace PPP With Larger Employee Retention Credit, Economist Says*, TAX NOTES (Sept. 21, 2020), https://www.taxnotes.com/tax-notes-today-federal/credits/replace-ppp-larger-employee-retention-credit-economist-says/2020/09/21/2cz87 [https://perma.cc/YMY3-V6AE] (reporting view of economist, Steven Hamilton, that the ERC should be used as a "much longer-term support mechanism"); Fred Stokeld, *Coalition Seeks Revival of Tax Incentives to Help Charities*, TAX NOTES (Aug. 8, 2022), https://www.taxnotes.com/taxpractice/charitable-giving/coalition-seeks-revival-tax-incentives-help-charities/2022/08/08/7dvgk [https://perma.cc/2LVJ-RFDH] (reporting on letter of a coalition of non-profits to the president and congressional leaders urging retroactive reinstatement of credit through 2022); Martin A. Sullivan, *Economic Analysis: Time to Expand the Employee Retention Credit and Retire the PPP*, TAX NOTES (Aug. 3, 2020), https://www.taxnotes.com/featured-analysis/economic-analysis-time-expand-employee-retention-credit-and-retire-ppp/2020/07/31/2cs9y [https://perma.cc/64XS-73XT] (arguing that the ERC is effective and that the PPP loan program should be eliminated for redundancy); Dean Zerbe, *Why Congress Must Revive the Employee Retention Credit*, TAX NOTES (Dec. 6, 2021), https://www.taxnotes.com/tax-notes-today-federal/credits/why-

on the credit that may be used in future congressional amendments,[268] and it would not be unreasonable to expect legislative investment to develop expertise on the credit's uptake and misuse in preparation for potential future use.

The new section 3134 is an example, in real time, of the potential usefulness of recurrence for modifying disaster tax relief to increase equity and efficiency, but it also underscores the tendency of recurring provisions to expand in ways that might be equity-decreasing on their way to ossification. This study begins to consider how to aid policy makers in harnessing the beneficial potential of recurrence to make laws that deliver the right balance of effective, equitable, efficient relief while minimizing overbreadth and unintended adverse distributional consequences through unexamined cut-and-paste legislation.

CONCLUSION

Over the study period, observable trends emerged from Congress's use of tax legislation as a means of providing relief in crises. First, crisis tax legislation is, to a large degree, formulaic. The vast majority in the study repeated provisions found in prior crisis relief bills. Second, subsequent crisis tax legislation tends to expand the scope of provisions repeated from earlier crisis tax legislation, particularly when they are business-related, the crisis is nationwide, and Congress's intervention is a systemic economic intervention. Third, many recurring provisions require, as a prerequisite to relief, that the taxpayer claiming them have a specified asset or a particular level of income or liquidity. Considered in isolation, these provisions raise distributional concerns that may not be rectified by counterbalancing direct expenditures in other parts of

congress-must-revive-employee-retention-credit/2021/12/06/7cn7b [https://perma.cc/NYR5-GJMY] (stating that the benefits of the credit outweigh its costs).

[268] *See* Lauren Loricchio, *Documents Shed Light on IRS Scrutiny of Employee Retention Credit*, TAX NOTES (Dec. 12, 2022), https://www.taxnotes.com/taxpractice/audits/documents-shed-light-irs-scrutiny-employee-retention-credit/2022/12/12/7ffgk [https://perma.cc/SM6X-33QD] (describing IRS training materials for ERC cases); Nathan J. Richman & Lauren Loricchio, *ABA Section of Taxation Meeting: IRS Starts Showing Tax Fraud Fruits of Pandemic Investigations*, TAX NOTES (Feb. 16, 2023), https://www.taxnotes.com/tax-notes-today-federal/credits/aba-section-taxation-meeting-irs-starts-showing-tax-fraud-fruits-pandemic-investigations/2023/02/16/7fyx7 [https://perma.cc/HUC3-WHZ7] (reporting that the IRS is prosecuting multiple ERC fraud cases).

Congress's relief legislation. Finally, recurring provisions tended to ossify over the study period, with Congress permanently codifying some and incorporating others into recurring prepackaged suites of relief, with very little evidence that it considered either their efficacy as relief provisions or their distributional consequences.

The patterns identified by this study can inform future reform proposals that seek to harness the utility of recurrence while guarding against undesirable aspects of unexamined repetitiveness and inflexibility through ossification. Recurrence appears to be a useful tool for Congress in crisis legislation, and future reform projects must account for it as a regular feature of the legislative process. Recurrence is neither good nor evil, but its unexamined use may give rise to unanticipated distributional consequences, including contribution to a widening wealth gap. Future study of empirical questions — even basic ones like how much money Congress gives up through tax expenditures in response to crises and where that money goes — could aid Congress in harnessing recurrence as a fast and effective way of delivering crisis tax relief. Recurrence does not have to be a bad guy. With thoughtful use, it could be a constructive tool for balancing and, over time, rebalancing competing interests of timeliness, efficiency, and the equitable distribution of resources.