NEW MONEY, OLD STATUTES: INFLATION AND STATUTORY DRIFT

Patrick Sullivan[1]

"The value of money may not only alter but the State of Society may alter. In this event the same quantity of [goods], the same value would not be the same compensation . . . [Amounts] must always be regulated by the manners & the style of living in a Country"

– Governour Morris to the Constitutional Convention[2]

I. INTRODUCTION

The United States Code contains uncounted monetary values, from the penalties that give the law its force to the thresholds that define its very limits. When stated nominally these provisions erode as the value of money changes. As they erode their impacts drift away from what legislators and citizens expect, sometimes in serious ways such as adding years to criminal sentences or shifting tax burdens.

This inflationary drift[3] presents a separation of powers quandary. Most scholars agree that only Congress can update such unambiguous statutory provisions.[4] But Congress has often failed to address even large inflationary drifts. The amount in controversy floor for diversity jurisdiction was last set

---

[1] J.D., Harvard Law School. An earlier version of this article won Harvard Law School's Irving Oberman Memorial Prize. I appreciate the prize fund's assistance with publication costs. Many thanks to Jacob Gersen, Rosa Vargas, and Amanda Madigan for their invaluable insights and support during the writing process.

[2] The Records of the Federal Convention of 1787, at 45 (Max Farrand ed., 1911) (opposing indexation of judicial salaries to the price of grain).

[3] Inflationary drift is used throughout as shorthand for shifts in expected impacts of statutes driven by the changing value of money, both in inflationary and deflationary directions.

[4] *See* Jim Chen, *The Price of Macroeconomic Imprecision*, 54 HASTINGS L.J. 1375, 1378 (2003) ("Whatever power courts may have in other settings to forestall statutory obsolescence through dynamic interpretation, judges are mostly impotent to adjust numbers or quantitative formulas engraved directly into a statute") (citations omitted); Note, *Desuetude*, 119 HARV. L. REV. 2209, 2220 (2006) (identifying longstanding and broad consensus that legislative monopoly on lawmaking prevents other entities from revising obsolete statutes); *see also* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION & REGULATION 79 (2017) (describing widespread acceptance of the primacy of clear text); *cf.* William Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 UNIV. PA. L. REV. 1479, 1494–95 (1987) (arguing against "conventional" view that clear text forecloses room for an interpretation more consistent with current context).

at $75,000 in 1996.[5] It has declined 40% in real terms since.[6] From 1864 until 1988 the fee payable to an attorney in a veteran's benefits dispute was capped at $10,[7] by the time it was finally changed that cap was 13% of its original value.[8] The threshold for construction contracts covered by the Davis Bacon Act's wage regulations was set at $2,000 in 1931 and as of 2022 had yet to be updated.[9] The same threshold would be $38,000 today.[10] Legislative failure coupled with administrative and judicial impotence has led to many such cases of statutory disrepair.

The problem of obsolete statutory text has inspired several eminent critiques of strictly separated lawmaking powers.[11] Inflationary drift is a less-discussed subcategory of that problem. Further exploration is warranted because of its novel aspects. First, inflationary drift lacks the interpretive safety valve of other forms of obsolescence. Money values are too clear and often too central to be reinterpreted by courts and agencies.[12] Second, the effects of statutory aging are measurable—via long-spanning price indices—to a degree unheard of with other forms of obsolescence.[13] Third, the pace of obsolescence has shifted over time. The 19th century saw short term inflation and

---

5 28 U.S.C. § 1332(a), *last amended by* Federal Courts Improvements Act of 1996, Pub. L. 104-317 § 204, 110 Stat. 3847, 3850 (1996).

6 Steven Gensler & Roger Michalski, *The Million Dollar Diversity Docket*, 47 BYU L. REV. 1653, 1714 (2022).

7 Charles L. Craigin, *The Impact of Judicial Review on the Department of Veterans Affairs' Claims Adjudication Process: The Changing Role of the Board of Veterans' Appeals*, 46 MAINE L. REV. 23, 26 (1994).

8 Calculation based on FED. RES. BANK OF MINN., *Consumer Price Index 1800-* [hereinafter *Historical CPI-U data*].

9 Notice of Proposed Rulemaking: Updating the Davis-Bacon and Related Acts Regulations, 87 FED. REG. 15698, 15700 (proposed Mar. 18, 2022).

10 Calculation based on *Historical CPI-U data*, *supra* note 8.

11 *See, e.g.*, Henry J. Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787, 797 (1963) (discussing as an example the obsolescence problems created by nationwide circulation of media for defamation suits); GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES *passim* (1982).

12 Compare Richard A. Merrill, *FDA's Implementation of the Delaney Clause: Repudiation of Congressional Choice or Reasoned Adaptation to Scientific Progress?*, 5 YALE J. REG. 1, 21–41 (1988) (describing FDA's interpretive "escape" from strict text of non-monetary Delaney Clause), *and* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 493–96 (1989) (describing common interpretive responses to obsolete non-monetary text), *with* Randall v. Sorrell, 548 U.S. 230, 262 (2006) (finding judicial adjustment of political donation limits to account for inflation outside of the judiciary's interpretive authority).

13 *Cf.* PATRICK HANKS, LEXICAL ANALYSIS: NORMS AND EXPLOITATIONS 145 (2013) (describing difficulties in measuring shifts in linguistic meaning). Even our most eloquent jurists have struggled to precisely express the magnitude of the drift of statutes, often resorting to intuition and example. *See, e.g.*, Benjamin Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 117 (1921) ("I have spoken in generalities, but instances will leap to view. There are fields, known to us all, where the workers in the law are hampered by rules that are outworn and unjust.").

deflation but relative stability in the long-term value of the dollar.[14] Since roughly 1930 long-run inflation has been the norm, with decade-over-decade increases in the value of money.[15]

These characteristics provide a valuable historical experiment. The clarity of money values controls for the confounding potential of updating disguised as statutory interpretation—this allows for observation of how a strictly formal separation of powers approach functions in practice. Price indices help measure the magnitude of obsolescence. And the change from a long-term stable to long-term dynamic monetary environment presents an exogenous shock to the legal process. Collectively, they provide insight into how well the original conception of separation of powers has adapted to a more dynamic context. They help answer the pressing question: can just one helmsman keep the ship of state from drifting amidst increasingly strong socioeconomic tides?

This article evaluates the results of that historical experiment. It argues that traditionally strict separation of powers has not adapted well to the changing monetary environment. It does so by describing the evolution of the monetary context from 1789 to today and evaluating five efforts by Congress and its agents to address the statutory drift caused by that shift. It demonstrates that a highly formalist approach has proved ill-suited to the mix of technical and normative updating problems inflationary drift presents.

The article proceeds in three parts. Part II describes the problem of inflationary drift and why separation of powers doctrine hinders efforts to address it. It supplements and synthesizes the work of prior scholars who described particular aspects of the problem but did not address the broad and evolving scope of this statutory pathology.[16] Part III interprets the results of the historical experiment created by the changed monetary context. It describes the major shift from long run price stability to long run inflation that occurred beginning in the 1930s and then analyzes five efforts to address the consequences of that shift for nominally worded statutes. These efforts began in the 1970s as the reality of the new monetary environment sank in and continue into the current decade. Part IV concludes by arguing that a strict separation of powers approach is outdated and ill-suited to a society of rapid and lasting change. A more collaborative approach to lawmaking is needed.

---

14 Section III, *infra*.

15 *Id.*

16 *See, e.g.*, KEITH S. ROSENN, LAW AND INFLATION (1982) (discussing inflationary erosion across private law issues); Chen, *supra* note 4, at 1384–1402 (reviewing several areas where inflation impacts public law as prelude to discussing tradeoffs in inflation indexes); KENT R. WEAVER, AUTOMATIC GOVERNMENT: THE POLITICS OF INDEXATION (2010) (analyzing indexation of mostly entitlement programs from a political science perspective).

II. INFLATIONARY DRIFT CAUSES WIDESPREAD HARMFUL EFFECTS WHICH HYPER FORMAL SEPARATION OF POWERS STRUGGLES TO ADDRESS

Congress enacts three types of monetary values—penalties, payouts, and thresholds. Penalties include criminal fines and civil penalties. Payouts are the amounts received under various welfare or stimulus programs such as Social Security or corporate tax credits.[17] They also include statutorily-defined transaction values such as public employee salaries and caps on federal contracts. Thresholds include provisions that define the boundaries of the law like the amount in controversy precondition for diversity jurisdiction. They also include provisions which trigger different treatment like income tax brackets. Unlike penalties and payouts, thresholds do not always have direct fiscal impacts.

When stated nominally all these are affected by monetary fluctuations. The quality of the change depends on the structure of the provision and interests of the affected parties. For example, an increase in nominal wages driven by broad-based inflation can move a taxpayer into a higher tax bracket even though their real wealth has not changed.[18] At the same time it makes the nominal penalty for a willful failure to pay tax, set at $10,000,[19] less burdensome. Deflation would work in opposite directions. Impacts also depend on the duration of the inflation. Sustained year over year price shifts lead to the most dramatic shifts as the gap between the nominal amount in the statute and real values is compounded.[20] Short run fluctuations can also change how the law is experienced but in a less universal way. A civil penalty assessed during a six-month period of deflation will feel more burdensome than one assessed when the value of a dollar is worth less, but only citizens who pay during the deflationary period will experience this deviation. Long running appreciation in the value of the dollar would subject more people to the more punitive experience.

The consequences of these drifts profoundly affect legal outcomes. Prior to income tax bracket indexation, Milton Friedman estimated that every 10% increase in prices led to a 15% increase in personal tax rates as inflation moved taxpayers into higher brackets.[21] According to one analysis the failure to index the current child tax credit to inflation will leave roughly 10% more

---

[17] Some payouts are not stated as an explicit dollar value but are based on a percentage of historical income. These also drift because the base is nominally stated.

[18] Reed Shuldiner, *Indexing the Tax Code*, 48 TAX L. REV. 537, 541–42 (1993).

[19] 26 U.S.C. § 7202.

[20] *See* Alan Reynolds, *The Mystifying Arithmetic of Year-to-Year Inflation Estimates*, CATO AT LIBERTY (July 29, 2021).

[21] Milton Friedman, *Inflation, Taxation, Indexation*, *in* INFLATION: CAUSES, CONSEQUENCES, CURES 14 IEA READINGS 71 (1974).

children in poverty in 2032.[22] The inflation-driven depreciation of offense severity thresholds in federal sentencing guidelines contributed to thousands of years of additional prison time.[23] The income threshold to be considered an accredited investor has not been updated since 1982, bringing millions more households into less regulated private securities markets.[24]

This Part argues that these shifts are harmful because they frustrate citizen expectations and legislative plans. It also describes how separation of powers formalism limits efforts to address these harms.

A. *Drift causes laws to deviate from citizens' and lawmakers' expectations*

Inflationary drift is primarily a problem of divergence from expectations. Economic theory suggests that the bulk of inflation's welfare costs arise when citizens and policymakers cannot plan for changing prices.[25] In the legal context, two types of analogous planning errors arise. One can misestimate the rate of inflation. One can also mistime the occurrence and duration of inflation. Both are harmful. A citizen whose nominal income grew faster than expected might find herself unprepared for her higher tax bracket. A legislator proposing an unindexed tax credit to save money will see her expectations frustrated if a deflationary period arrives earlier than expected. Because inflation is difficult to predict (in rate and duration) both errors are probably common.[26]

In fact, instances of drift regularly cause expectation mismatches. Citizens are often surprised and burdened by shifts in the real values of their obligations to and payouts from the government.[27] Public officials regularly

22 Sophie Collyer, Christopher Wimer & David Harris, *Keeping Up with Inflation: How Policy Indexation Can Enhance Poverty Reduction*, THE CENTURY FOUND. (Aug. 25, 2022), https://tcf.org/content/report/keeping-up-with-inflation-how-policy-indexation-can-enhance-poverty-reduction/.

23 *See* Sentencing Guidelines for United States Courts, 80 Fed. Reg. 25782-01, 25789–90 (May 5, 2015) (discussing how updating thresholds for inflation would free up 956 prison beds per year by the fifth year of implementation).

24 *See* Michael L. Monson, *The Evolution and Future of the Accredited Investor Standard for Individuals*, 23-Dec UTAH B.J. 36, 37 (2010).

25 *See* N. GREGORY MANKIW, MACROECONOMICS 119 (8th ed. 2006).

26 *See* Tim Sablik, *Forecasting Inflation: For policymakers and market participants inflation can be challenging to predict*, FED. RES. BANK OF RICHMOND ECON FOCUS (2021); Jeanna Simalek, *Inflation Forecasts Were Wrong Last Year. Should We Believe Them Now?*, N.Y. TIMES (Dec. 12, 2022).

27 *See, e.g.*, Kate Dore, *How soaring inflation may deliver a higher tax bill — especially for retirees, homeowners and high earners*, CNBC (July 18, 2022) (discussing "surprise" tax burdens), https://www.cnbc.com/2022/07/18/how-soaring-inflation-may-deliver-a-higher-tax-bill-for-retirees.html; Martha C. White, *Higher food costs make the math even harder for Americans on food stamps*, NBC NEWS (Nov. 23, 2021), https://www.nbcnews.com/business/consumer/higher-food-costs-make-math-even-harder-americans-food-stamps-rcna6446; Gabriella Cruz-Martinez, *Child Tax Credit: Parents miss the money for their children as inflation rises*, YAHOO MONEY (July 5, 2022); Jason Delisle, *What*

grapple with unforeseen impacts on their programs. Recent inflation has upended many established federal contracts.[28] The SEC has acknowledged that the inflation-driven expansion of the definition of accredited investor was an unanticipated departure from the limited scope expected in 1982.[29] Members of the U.S. Sentencing Commission acknowledged in 2015 that the drift of offense severity thresholds was unplanned.[30] Congress can also be caught off guard. Efforts to update inflation-eroded provisions have been justified as correcting unpredicted deviations from the plan of the enacting congress.[31]

Even predictable drift may have subtle costs. Affected parties will incur mental costs from regularly recalculating the real values of legal thresholds.[32] To the extent the effects of drift are unevenly distributed they may result in social division.[33] And the need to regularly update laws can undermine public confidence and increase opportunities for pork legislation.[34]

These costs add up. Some instances of drift have grave individual consequences, such as longer sentences.[35] And instances that seem merely inconvenient individually can have concerning aggregate effects. While empirical evidence is scarce in the legal context, economic work indirectly illuminates the seriousness of the problem. Economic models predict that rapid unexpected price movements, such as the fluctuations experienced during the Great Depression and post WWII, can cause nontrivial drops in GDP.[36] And even more predictable price movements can harm those who have not fully planned for them.[37] Menu costs—the costs to firms of changing posted

---

Better Data Reveal about Pell Grants and College Prices, URBAN INST. (Aug. 18, 2021) (describing how Pell grants have imperfectly kept pace with inflation of education costs).

28 *See, e.g.*, DEPT. OF DEFENSE, Memorandum on Managing the Effects of Inflation with Existing Contracts (Sept. 9, 2022) (describing impacts on fixed-price contracts), https://www.acq.osd.mil/dpap/policy/policyvault/USA001773-22-DPC.pdf; NAID, Can an institution apply an inflation rate to its budget on competing grant applications?, NAID FUNDING NEWS (Jun. 16, 2021) (describing prohibition on automatic inflation adjustments in NAID grants).

29 *See* SEC. & EXCH. COMM'N, Revisions of Ltd. Offering Exemptions in Regul. D, 72 Fed. Reg. 45117 n.53, 45119 (Aug. 3, 2007) (to be codified at 7 C.F.R. pts. 200, 230, 239).

30 Section 0, *infra.*

31 *See, e.g.*, 136 CONG REC. 1493–95 (daily ed. Feb. 12, 1990). (remarks of Sen. Lautenberg on OSHA penalties) ("If it were presented for a vote, would the Senate approve a two-thirds cut in OSHA penalties, when workplace hazards persist? . . . The answer, I think, is no. Yet inaction gives us the same result.").

32 Ruchir Agarwal & Miles Kimball, *How Costly is Inflation?*, INT'L MONETARY FUND: FINANCE & DEVELOPMENT (Apr. 7, 2022), https://www.imf.org/en/Publications/fandd/issues/2022/03/Future-of-inflation-partII-Agarwal-kimball.

33 *Cf.* Mankiw, *supra* note 25, at 119.

34 *See* Section III.C.1, *infra*.

35 *See* Section 0, *infra*.

36 Miquel Faig & Zhe Li, *The Welfare Costs of Unexpected Inflation*, 56 J. MONETARY ECON. 1004, 1012 (2009). The authors also find that more stable monetary cycles have smaller welfare effects, but that even these periods can erode cash balances in a significantly harmful way. *Id.*

37 *Id.* (discussing costs of even regular inflation to individuals who, perhaps irrationally, hold significant cash balances).

prices—are a useful private sector analog to drift. The available data shows that firms expend significant resources to avoid incurring these costs.[38]

The history of political reactions to erosive inflation also hints at the scale of the problem. Populist unrest in the 1880s and 1890s was largely driven by the uneven impacts of deflation on the agricultural class's debts and taxes.[39] Major inflationary and deflationary periods in Chile, Russia, and Germany famously toppled governments and have been sources of instability elsewhere.[40]

Of course, some instances of inflationary drift are intentional. Forgoing tax credit indexation is often a strategy to reduce a bill's fiscal footprint.[41] And Judge Calabresi has posited that a failure to index could represent an indirect effort at sunset legislation or transition smoothing.[42] He also suggests the lack of indexation could reflect some sort of compromise-enhancing ambiguity, though he acknowledges the difficulty in identifying confirmed examples of this behavior.[43]

But these theories of drift by design are either implausible or only explain a limited subset of the instances of inflationary drift. The transition smoothing theory is implausible because of the difficulty in forecasting the direction and magnitude of price changes. Suppose Congress wanted more individuals to be defined as accredited investors over time and thus have access to private securities offerings, but it wanted the adjustment to occur gradually to allow the SEC time to implement necessary safeguards. It could accomplish this by allowing the threshold income qualifications to be nominally stated or it could spell out a schedule of gradual real decreases. The costs of either drafting method are similar, but their likely effectiveness diverges dramatically. Using drift by design assumes nominal incomes will rise predictably. That is an extremely risky bet on the quality of inflation

---

38 Daniel Levy et al., *The Magnitude of Menu Costs: Direct Evidence from Large U. S. Supermarket Chains*, 112 Q. J. ECON. 791, 815–18 (1997).

39 Katherine Unterman, *1896: A Populist Insurgency in America's First Gilded Age*, 34 S. CENT. REV. 26, 27 (2017).

40 *See* Dave Blanchard & Kenny Malone, *When Bricks Were Rubles*, NPR: PLANET MONEY (Apr. 1, 2022), https://www.npr.org/2022/04/01/1090312774/when-bricks-were-rubles; c*f.* Harvey D. Palmer & Guy D. Whitten, *The Electoral Impact of Unexpected Inflation and Economic Growth*, 29 BRITISH J. POL. SCI. 623, 631–36 (1999) (describing significant connection between failure to keep inflation within expectations and decline in incumbent votes across elections in over 100 countries); Lewis E. Hill et al, *Inflation and the Destruction of Democracy: The Case of the Weimar Republic*, 11 J. ECON. ISSUES 299 (1977); Israel Shenker, *Power Eluded Allende, Then Slipped From His Grasp,* N.Y. TIMES, Sept. 12, 1973, at 16.

41 Alexis Leondis, *Why Are Only Some Tax Breaks Adjusted for Inflation?*, WASH. POST (Aug. 16, 2022); MARGOT L. CRANDALL-HOLLICK, CONG. RSCH. SERV., R45124, THE CHILD TAX CREDIT: LEGISLATIVE HISTORY (2021).

42 CALABRESI, *supra* note 11, at 66.

43 *Id.* at 67 n.25.

forecasting, which suffers from a number of well-known limitations.[44] If inflation moves unexpectedly quickly the SEC might have too little time implement safeguards. If deflation occurs the exact opposite effect than intended—fewer people accessing private markets—will occur. Given the salience of inflation as a political issue, lawmakers are surely aware of these prediction difficulties.[45] And legislators do not appear to have a meaningful advantage in forecasting economic trends.[46] It seems far easier for Congress to simply spell out the path it wishes the threshold to take, avoiding the possibility that prices could move faster or in the opposite direction than anticipated. Why rely on such a risky drafting strategy when a low-cost alternative is available?

The theory that the ambiguity of nominally drafted statutes is somehow compromise-enhancing has not been empirically confirmed. Moreover, the same forecasting uncertainty that undermines the transition smoothing theory makes compromise hard to explain. Perhaps lawmakers could have divergent expectations for inflation and thus drafting with nominal values would allow for votes consistent with both sets of expectations. For example, a nominally drafted threshold for accredited investors would attract the votes of representatives who wanted the standard to relax over time and expected inflation and votes from those who wanted the standard to be more stringent and expected deflation. But the idea that a bill's drafter would know these expectations and respond to them tactically seems farfetched. It also seems unlikely that lawmakers possess sufficient confidence in their own predictions of inflation to make them decisive factors in voting decisions over more traditional drivers like currying favor with key constituents.

A more plausible motivation for nominal drafting is securing fiscal savings. Many payouts have been restated in nominal terms to reduce their fiscal footprint.[47] In these cases CBO scoring rules may artificially reduce the forecasting problems described above. CBO reports provide point estimates of the revenue and expenditure effects of a bill.[48] These estimates incorporate

44 *See* Julie Bennett & Michael T. Owyang, *On the Relative Performance of Inflation Forecasts*, 104 FED. RES. BANK ST. LOUIS REV. 131, 132 (2022) (finding a tendency to overestimate inflation).

45 *Cf., e.g.*, Victoria Guida & Kate Davidson*, 'Deeply troubled': Lawmakers Challenge Fed's Inflation War*, POLITICO (Nov. 7, 2022) (describing examples of political rhetoric around inflation); REPUBLICAN POLICY COMM., *Rising Prices Hit American Families* (July 13, 2021).

46 *See* William Belmont et. al., *Do senators and house members beat the stock market? Evidence from the STOCK Act*, 207 J. PUB. ECON. 104602, 104607 (2022) (finding public equities held by members of Congress do not outperform the market).

47 *See* Leondis, *supra* note 41.

48 CONG. BUDGET OFF., HOW CBO PREPARES COST ESTIMATES, at *8 (2018).

specified inflation forecasts,[49] which appear to be relied on by legislators.[50] Within this artificial information environment, non-indexation becomes a less risky drafting strategy.

However, that artificial certainty is only available when drift is used as a tool to secure fiscal impacts. The CBO does not publish regular estimates of how nominally stated thresholds might shift with inflation.[51] For provisions where inflationary drift would have non-fiscal impacts no additional certainty is created. Moreover, fiscally-motivated use of nominal values only explains legislative intent. To the extent that the relied-on prediction of inflation turns out to be incorrect, the provision will still create expectation mismatches. Thus legislators still must contend with the risk that the actual impact of the nominally drafted bill will diverge from expectations.

In sum, inflationary drift of statutes causes all sorts of laws to diverge harmfully from expectations. And even predictable drifts create meaningful costs, such as undermining confidence in government's effectiveness. These deviations seem unintentional in the majority of cases.

B. *Drift is under-addressed due to separation of powers formalism*

Inflationary drift is significantly under-addressed. Despite some recent efforts, many instances of historical drift have yet to be corrected and important statutory provisions remain vulnerable to erosion.[52]

Most striking is the lack of coherence as to which provisions are resiliently drafted and which remain subject to drift. Difficult to explain variations exist in many policy areas. The definition of accredited investor under the Securities Exchange Act is not indexed, instead updates are left to the

---

49 Nathaniel Frentz et. al., *A Simplified Model of How Macroeconomic Changes Affect the Federal Budget*, CBO Working Paper 2020-01 at *32 (2020) (describing statutorily required inflation measure for discretionary spending); *id.* at *10 (describing role of CBO price forecast in estimating tax credit impacts); *id.* at *24 (explaining reliance on CPI-W in scoring benefit programs).

50 *See, e.g.*, Philip Rocco, *Congress is waiting on the CBO for its Build Back Better report – but how did fiscal scorekeepers come to be so powerful in politics?*, THE CONVERSATION (Nov. 16, 2021), https://theconversation.com/congress-is-waiting-on-the-cbo-for-its-build-back-better-report-but-how-did-fiscal-scorekeepers-come-to-be-so-powerful-in-politics-171642; Jason Dick, *CBO Score Will Ring in Another Round of House Fight*, ROLL CALL (Mar. 13, 2017), https://rollcall.com/2017/03/13/cbo-score-will-ring-in-another-round-of-house-fight/.

51 *See* CONG. BUDGET OFF., HOW CBO PREPARES COST ESTIMATES, at *8 (2018); CONG. BUDGET OFF., ESTIMATING THE COST OF ONE-SIDED BETS: HOW CBO ANALYZES THE EFFECTS OF SPENDING TRIGGERS, at *3 (2020) (explaining that for fiscal estimates contingent on certain one-sided thresholds, such as a nominal price, being passed the CBO publishes averages of fiscal impacts based on probability distributions of the relevant threshold but does not regularly publish point estimates of that threshold).

52 *See* KENT R. WEAVER, AUTOMATIC GOVERNMENT: THE POLITICS OF INDEXATION 240–41 (2010); *cf.* Suzanne Mettler, *The Policyscape and the Challenges of Contemporary Politics to Policy Maintenance*, 14 PERSP. ON POL. 369, 379–82 (2016) (describing lower frequency of efforts to revisit old statutes).

discretion of the SEC.[53] But the SEC is required to update the threshold for Emerging Growth Companies every five years pursuant to an explicit indexing procedure in the Securities Act.[54] The limits on campaign contributions to Congressional candidates have been indexed for inflation since the 1970s, but the levels of improper contributions that trigger criminal penalties are nominally stated.[55] Thresholds for certain federal procurement supervision policies must be updated using the urban CPI every five years.[56] But many of the appropriations funding those contracts remain vulnerable to inflation.[57]

The tax code is especially messy. The base income above which social security benefits are taxable has not been adjusted since the provision was introduced in 1983.[58] But the contribution limits for tax-deferred retirement plans are required to be updated annually by a set cost of living adjustment.[59] The Child Tax Credit and the income thresholds at which it phases out have oscillated between indexation and being allowed to drift since being introduced in 1997.[60] The sustainable fuel credits contained in the recent Inflation Reduction Act are, perhaps optimistically, not indexed.[61]

Most of the aforementioned statutes are of relatively recent vintage. Nevertheless, significant erosion can occur over just a few decades. The $25,000 nominal income threshold that triggers taxation of social security benefits would need to double to keep pace with inflation that has occurred since it was enacted in 1993.[62] Older statutes have eroded still further.

To be sure, Congress has made some efforts to clean up statutes that have significantly drifted. In Dodd-Frank, for example, Congress finally indexed the upper bound for consumer leases to be exempt from requirements of the Truth in Lending Act after letting it drift from 1968 to 2011.[63] And Part III.C outlines steps it has taken to make certain provisions more resilient. But as a general matter, the law remains a crazy quilt of nominally stated and inflation-resilient provisions. And cleanup efforts have yet to reach many

---

53 Monson, *supra* note 24, at 38.

54 15 U.S.C. § 77(b).

55 *Compare* 52 U.S.C. § 30116(c) (contribution limits indexed annually), *with* 52 U.S.C. § 415(d) (not indexing penalty threshold).

56 41 U.S.C. § 1908. *See also* 75 FED. REG. 53129 (2010) (NASA updates); 85 FED. REG. 62485 (2020) (Dept. of Labor updates).

57 *See, e.g.*, Andrew Duehren, *Inflation threatens to erode impact of 1 trillion infrastructure law*, WALL ST. J. (Feb. 24, 2022), https://www.wsj.com/articles/inflation-threatens-to-erode-impact-of-1-trillion-infrastructure-law-11645698601.

58 26 U.S.C § 86; PL 98–21, April 20, 1983, 97 Stat 65 at § 121 (showing original text).

59 26 U.S.C. § 415(d). *See also* Kelly Tyko, *IRS increases 401(k), IRA contribution limits for inflation*, AXIOS (Oct. 21, 2022), https://www.axios.com/2022/10/21/401k-contribution-irs-limits-retirement-tax-benefit.

60 MARGOT L. CRANDALL-HOLLICK, CONG. RSCH. SERV., R45124, THE CHILD TAX CREDIT: LEGISLATIVE HISTORY 2-3 (2021).

61 *See* Inflation Reduction Act § 40B, Pub. L. No. 117-169 (Aug. 16, 2022).

62 Calculation based on *Historical CPI-U data*, *supra* note 8.

63 15 U.S.C. § 1603 (enacted 2011) (updating to $50,000 and indexing); *see also* Pub.L. 90-321, Title I, § 104 (1968) (showing original threshold of $25,000).

adrift provisions. Given current legislative productivity,[64] a fully resilient code seems far away indeed.

Many factors contribute to this status quo, but the inability of judicial and administrative actors to respond is critical. Their impotence arises from two limits rooted in separation of powers—interpretive methodology and constraints on delegation. The following subsections analyze these limits. The analysis is organized by the type of limit, rather than actor (courts versus agencies) or problem (designing resilient new laws versus correcting old ones), because the limitations apply across actors and across problems, albeit with different force.

1. Limits imposed by interpretive methodology: nominalism & plain meaning

One strategy for keeping law current is to rely on courts and agencies to interpret enacted money values in real terms. Under this approach a value of $100 enacted in 1980 would simply be read at its current value. This would be analogous to the common law's reliance on judicial reinterpretation of precedents to fit new contexts.[65] Leaving aside the administrative challenges, two interrelated legal barriers foreclose this strategy: nominalism and the plain meaning rule.

a. The role of nominalism

Nominalism refers to the tendency to treat all dollars as having the same value regardless of purchasing power. Dollars today are equivalent to dollars tomorrow and paper dollars are equivalent to coined dollars. To the extent nominalism is incorporated into a legal system it constrains judges and officials by limiting a money value to a single meaning: they must read $100 to mean $100 in current money. This is not the inevitable approach. At various times and places a purchasing-power definition has been employed.[66] But nominalism defined money at common law in the 17th and 18th centuries and is a core assumption of the legal systems of most economically important nations today.[67]

In the United States the nominalist approach prevails, though its source is not entirely clear. One possible source is § 20 of the Coinage Act of 1792 which states "the money of account of the United States shall be expressed in dollars or units, dimes or tenths . . . and that all accounts in the public

---

64 *Cf.* GOVTRACK, Statistics and Historical Comparison: Bills by Final Status (Apr. 5, 2023, 5:44 PM), https://www.govtrack.us/congress/bills/statistics.

65 *See* CALABRESI, *supra* note 11, at 4.

66 Rosenn, *supra* note 16, at 38.

67 *Id.*

offices, and all proceedings in the courts of the United States, shall be kept and had in conformity to these regulations."[68] While the requirement of nominalism is not explicit in the text, the Supreme Court clarified its meaning in 1868 in *Bronson v. Rodes*. In Bronson, the Court was asked to decide whether Civil War-era paper money could satisfy obligations under preexisting contracts. It held that the general wording of § 20 required all lawful money to use the same units.[69] Thus, by virtue of their shared units, paper dollars and gold dollars had the same legal value despite their different purchasing powers.[70] However, because *Bronson* involved a contract which specified payment in gold it did not provide the Court with an opportunity to squarely hold that all dollars were equivalent. That came two years later in *Knox v. Lee*, one of the *Legal Tender Cases*.[71] The *Knox* court held that Congress' declaration of the paper greenback as lawful money made a greenback dollar equivalent to a gold dollar.[72] Thus forcing individuals to accept paper money with less purchasing power than gold-backed money did not violate the Contracts Clause.[73] The *Knox* majority did not explicitly discuss the 1792 Act but its reasoning is quite similar to that in *Bronson*, arguing that nominal equivalence existed even prior to the advent of paper money.[74] This was so "not because of the intrinsic value of the coin, but because of its legal value."[75]

The *Bronson* and *Knox* decisions were immediately controversial. Justice Clifford authored a fifty three page dissent in *Knox* arguing in part that § 20 of the 1792 Coinage Act should be read exactly opposite to the majority's dicta in *Bronson.*[76] He thought that other provisions of the act assigning weights to silver and gold coins treated "unit", "dollar", and "coined dollar" as synonyms.[77] Thus, in his view, the dollar was defined according to a certain real value in gold.[78] Other commentators advanced similar arguments.[79]

Despite this controversy, nominal equivalence was never seriously challenged after *Knox.* By the next century it had transcended its origins as a debatable construction and was considered a canonical legal rule. The most cited articulation comes from Justice Holmes in 1926 in *Die Deutsch Bank*

---

68 1 Stat. 246, § 20 (1792).
69 Bronson v. Rodes, 74 U.S. 229, 254 (1868).
70 *See id.*
71 Knox v. Lee, 79 U.S. 457 (1870).
72 *Id.*
73 *Id.* at 550–51.
74 *Id.* at 548–49.
75 *Id.* at 549.
76 *Knox*, 79 U.S. at 593–94.
77 *Id.* at 594.
78 *Id.*
79 *See* Kenneth W. Dam, *The Legal Tender Cases*, 1981 SUP. CT. REV. 367, 382 (1981) (describing reaction).

Filiale Nurnberg v. Humphrey.[80] The case involved the calculation of damages from a breach of a contract by Deutsche Bank.[81] The contract was denominated in German Marks, and the liability was incurred in 1915 but the suit to collect was not brought until 1921.[82] During the intervening years the Mark depreciated, thus Humphrey, the injured party, wanted damages based on an earlier value of the mark while Deutsche Bank preferred a more recent valuation. Justice Holmes, writing for the majority, rejected Humphrey's argument that damages should be valued in real terms and held that "an obligation in terms of the currency of a country takes the risk of currency fluctuations . . . [o]bviously in fact a dollar or a mark may have different values at different times but to the law that establishes it[,] it is always the same."[83] The four dissenters agreed on this point.[84] Notably, neither the majority nor dissent referenced the 1792 Act or *Bronson* for this proposition. Instead they portrayed nominal equivalence as a settled principle shared across legal systems.[85] Indeed, Justice Holmes considered this approach so uncontroversial that he "refrain[ed] from citing the many cases that have touched upon it and content[ed himself] with stating . . . the proper rule."[86]

Since then courts have consistently interpreted money values in contracts with a nominal approach.[87] However, they have provided little guidance on how the doctrine extends to statutory interpretation and questions remain as to the source and strength of nominalism. When confronted with issues of nominalism in statutory interpretation the Supreme Court has generally ignored the issue or adopted the principle without explanation. In 1985 in *Walters v. National Ass'n of Radiation Survivors* the Court confronted a Due Process challenge to the cap on attorney's fees related to veteran's benefit disputes, which was set at $10 in 1862.[88] The majority opinion found the cap justified by the enacting legislature's interest in making dispute proceedings non-adversarial,[89] but it *made no mention* of the fact that in 1862 the $10 cap was equivalent to $580 in 1985 dollars.[90] As the dissent pointed out, this threshold would have enabled limited rather than zero legal assistance in the

---

80 272 U.S. 517 (1926); *see also* Shaw, Sahill, Albion & Co. v. The Fredericksburg, 189 F.2d 952, 955 (2d Cir. 1951) (citing *Humphrey*).

81 272 U.S. at 518.

82 *Id.*

83 *Id.* a 519.

84 *Id.* at 522.

85 *Id.* at 519 (Homes, J.) ("We may assume . . . [the] liability . . . by the German law . . . was fixed in [M]arks only, not at the extrinsic value those marks then had."); *id.* at 521 (Sutherland, J., dissenting) ("[That the] liability was fixed by German law at a certain number of German marks . . . and was open to satisfaction in that number of marks . . . however much the mark might have fallen in value . . . of course is true if the payment be made in Germany, where marks remain legal tender at all times.").

86 *Id.* at 520.

87 *See* Rosenn, *supra* note 16, at 59.

88 473 U.S. 305, 307–08 (1985)

89 *Id.* at 333.

90 *Id.* at 361 (Stevens, J., dissenting).

1860s.[91] In *Schweiker v. Gray Panthers* the Court rejected a challenge to Medicaid regulations that required a certain amount of spousal income above a threshold to be considered available to support the other spouse when calculating Medicaid benefits.[92] The plaintiffs argued those thresholds were too low to assure spouses had adequate funds to live on and thus were outside the agency's authority which only allowed it to include "available" spousal funds.[93] The Court explicitly denied the relevance of inflation, stating that even though inflationary erosion was the real cause of the hardships experienced by the challengers—because states had failed to update the nominally-stated exclusions for spousal income—such considerations were not relevant to interpreting whether the regulation was valid.[94] It did not explain why dollar values had to be interpreted this way. These cases make it clear that nominalism also prevails in statutory interpretation, but they say little about the basis for the rule. One could take their complete lack of discussion of the 1792 Coinage Act or the contract precedents as indicating that nominalism is a background principle of interpretation rather than the product of legislative guidance. But the Court has not explicitly adopted this view.

Recent cases involving contract construction point towards a statutory source. These cases deal with the aftermath of the sole amendment to section 20 of the 1792 Act. In 1982, Congress engaged in a project to recodify Chapter 31 of the US Code.[95] During the recodification, certain supposedly non-substantive changes were made, including to section 20 (previously codified in 31 U.S.C. § 371, now recodified in 31 U.S.C. § 5101).[96] First, the phrase "money of account" in the original was adjusted to "money."[97] According to a House of Representatives report, this was done to eliminate unnecessary words.[98] The second change removed the "or units" language next to "dollar" as redundant, though the "or tenths" and "or hundredths" next to dimes and cents were kept. [99] The third change removed the final clause requiring that "all accounts in the public offices and all proceedings in the courts shall be kept and had in conformity to this regulation" as surplus.[100]

Several courts and authorities have found the repeal of the final clause of § 20 consequential. In *Competex, S.A. v. Labow*, the Second Circuit

---

91 *Id.*

92 Schweiker v. Gray Panthers, 453 U.S. 34, 38–42 (1981).

93 *Id.*

94 *Id.* at 49 n.19.

95 Act of Sep. 13, 1982, Pub. L. No. 97-258 (to revise, codify, and enact without substantive change certain general and permanent laws, related to money and finance, as title 31, United States Code, "Money and Finance").

96 H. REP. NO. 97-251, at 146–47 (1982).

97 *Id.*

98 *Id.* at 146.

99 H. REP. NO. 97-251, at 147 (1982).

100 *Id.*

considered whether a judgment by a United States court had to be in dollars or could be issued in foreign currency unaffected by exchange rate fluctuations.[101] This involved the same fundamental question of whether § 20 prohibited a court from considering real changes in the dollar's value, only in this case the variance was cross-jurisdiction as well as over time. The court observed that the assumption "that American judgments must be entered in dollars . . . probably deserves reexamination in light of the repeal of [the last clause of] section 20."[102] It also discussed the unsettled foundation of the doctrine, having been derived alternatively from common law notions of sovereignty and from the 1792 Act.[103] Subsequent opinions and authorities have also found the repeal consequential.[104]

This winding history of nominalism has several implications for the inflationary drift problem. Regardless of its source, nominalism is clearly the law of the land in contractual and statutory interpretation. Dollar amounts cannot be read in real terms. However, the unsettled source of the doctrine raises questions about the options available for addressing inflationary drift. A statutory source for nominalism provides room only for Congress to institute alternate assumptions.

b. The Plain Meaning Rule

Nominalism integrates with the second limit on interpretive solutions to drift, the plain meaning rule. This rule requires courts and agencies to always "give effect to the unambiguously expressed intent of Congress."[105] If "dollar" clearly means current dollars because of nominalism then courts and agencies are not permitted to override that meaning. This faithfulness to written law has been acknowledged since the beginning of the republic.[106] Today it is nothing short of canonical, a cornerstone of separation of powers.[107]

---

101 Competex, S.A. v. Labow, 783 F.2d 333, 337 (2d Cir. 1986).

102 *Id.* at 337.

103 *Id.*

104 *See* Leidos, Inc. v. Hellenic Republic, 881 F.3d 213, 218 n.5 (D.C. Cir. 2018); In re Oil Spill by Amoco Cadiz, 954 F.2d 1279, 1328 (7th Cir. 1992); Mitsui & Co. v. Oceantrawl Corp., 906 F. Supp. 202, 203 (S.D.N.Y. 1995). *See also* RESTATEMENT (THIRD) FOREIGN REL.'S LAW U.S. § 823 cmt. a (Am. L. Inst. 1987) (finding dollar judgment requirement abrogated by repeal of § 20).

105 Chevron U.S.A. v. Natural Resources Defense Council, 46 U.S. 837, 843 (1984).

106 Marbury v. Madison, 5 U.S. 137, 176 (1803) ("To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained?").

107 *See* Cass R. Sunstein, *Nondelegation Canons*, 67 UNIV. CHI. L. REV. 315, 329 (2000) ("When Congress has spoken clearly, everyone agrees that agencies are bound by what Congress has said."); John F. Manning, *What Divides Textualists and Purposivists*, 106 COLUM. L. REV. 70, 87 (2006); Justice Elena Kagan, The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes, at 8:28 (Nov. 17, 2015) ("I think we're all textualists now . . . ").

Perhaps because the principle is so widely accepted, courts have had little chance to confront the issue of inflationary drift. But the cases that do address the issue make clear that non-legislative actors cannot disregard clearly enacted monetary values, no matter how much they have been or might be eroded. The most revealing strand concerns challenges to campaign contribution limits because they have found drift to be a cause of statutory invalidity and still refused to revise the plain text. In 2006 in *Randall v. Sorrell,* the Supreme Court considered a First Amendment challenge to a Vermont election law which capped individual contributions at a nominal $200 for a state representative as of 1997.[108] This was the lowest contribution limit in the country and well below the lowest limit the Court had previously upheld ($1,275) which was, as the court stressed, indexed for inflation.[109] A splintered court ultimately struck down the contribution limit as "too restrictive" and thus overly limiting of the ability to conduct an effective campaign, especially by challengers.[110] The failure to index for inflation was one of the factors which Justice Breyer's plurality opinion found, taken together, made the limit unconstitutional.[111] In particular, the plurality was concerned that the legislature might not "diligently police" the erosion of levels in the future.[112]

Despite misgivings about the legislature's ability to cope with inflationary erosion, the Court was unequivocal in rejecting any invitation to make its own indexing amendment, characterizing such a move as "writing words into the statute" in a manner clearly beyond its authority.[113] In just three sentences Justice Breyer's opinion resolved that the proper remedy was to completely invalidate the contribution limits and leave the legislature "free to rewrite those provisions."[114] Justice Alito and the Chief Justice joined this portion of Justice Breyer's opinion and none of the concurring or dissenting opinions expressed disagreement with the remedy.

In 2019, the Supreme Court confronted a similar challenge to Alaska's unindexed contribution limit, set at $500 twenty-three years prior.[115] In a per curiam opinion, the Court again found the provision's lack of indexation was one of several "danger signs" that might require special justification.[116] On remand, the Ninth Circuit held that, in part because of the lack of indexation,

---

108 Randall v. Sorrell, 548 U.S. 230, 253 (2006).

109 *Id.* at 251.

110 *Id.* at 253–54.

111 *Id.* at 261.

112 *Id.* Importantly, the Court only found the statute invalid due to the combination of factors; failure to index was not individually sufficient to create a constitutional violation. Since *Randall*, lower courts have not regarded failure to index as an independent ground for invalidation. *See* Anh Cao v. Federal Election Comm'n, 688 F. Supp. 2d 498, 548 (E.D. La. 2010).

113 *Id.* at 262.

114 *Id.* at 262.

115 Thompson v. Hebdon, 140 S. Ct. 348, 350–52 (2019).

116 *Id.* at 352.

the low contribution limit was not justified.[117] But, consistent with *Randall,* both the Court and the Ninth Circuit declined to remedy the infirmity by writing indexation into the law.[118]

Even when provisions do not contain explicit money values—thus arguably opening space for finding ambiguity—courts and agencies have been reluctant to read such statutes in real terms. The most notable instance involves the calculation of capital gains, discussed in more detail in Part 0. The appreciation (gain) on capital assets is taxed preferentially to other income and is calculated as the price upon a realization event (typically a sale) minus the basis (defined in statute as the "cost of such property").[119] Inflationary drift enters the equation through the basis because cost is measured nominally. Arguably this consequence could be avoided by defining "cost" in the definition of basis in real terms, but such arguments have been rejected since they were first raised.[120] It is conceivable that a similar non-numeric provision relying on more ambiguous terminology could be unilaterally indexed, but such provisions are far from the norm.[121]

Outside the monetary context, courts have been even clearer in their disapproval of judicial remedies to existing obsolescence. For example, the doctrine of desuetude—the abrogation of outdated and unenforced criminal statutes by courts—has been repeatedly and near-unanimously rejected.[122] The principal reason given is that such statutory revision of the plain words of a statute is clearly antithetical to the fundamental precepts of separation of powers.[123] And administrative efforts to update outdated statutes via interpretation, while occasionally successful, have been rare.[124]

2. Delegation Barriers

The second non-legislative strategy for addressing drift would be to delegate the task of updating monetary values to administrative or judicial

---

117 Thompson v. Hebdon, 7 F.4th 811, 821–22, 827 (9th Cir. 2021).

118 *See id.* at 827; Thomas R. Lucas, Alaska Public Offices Comm., AO 21-09-CD, Contribution limits in light of Ninth Circuit Court of Appeals ruling, at *2 (Nov. 3, 2021).

119 I.R.C. §§ 1001(a), 1011(a), 1012(a).

120 *See* Jeff Strnad, *Deflation and the Income Tax*, 59 TAX L. REV. 243, 244 (2006); Bruce Bartlett, *Indexing Capital Gains by Fiat*, 135 TAX NOTES 883, 884 (2012). *See also* Bates v. United States, 108 F.2d 407, 408 (1939), *cert. denied*, 309 U.S. 666 (1940) (rejecting real interpretation of cost); Legal Authority of the Department of the Treasury to Issue Regulations Indexing Capital Gains for Inflation, 16 Op. O.L.C. 136, 146–51 (1992) (same).

121 *Cf.* Verizon Communications, Inc. v. F.C.C., 535 U.S. 467, 500 (2002) (finding the use of "cost" in statutory guidance on rate setting ambiguous enough to encompass real or historical cost).

122 Note, Desuetude, 119 HARV. L. REV. 2209, 2209 (2006).

123 *Id.* at 2213.

124 *Cf.* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 UNIV. PENN. L. REV. 1, 19 (2014) (describing two unusual efforts in the environmental and energy contexts).

actors. To a limited extent, this already occurs. Over forty agencies update civil penalties annually based on a prescribed formula.[125] The U.S. Sentencing Commission can suggest inflation adjustments subject to congressional override.[126] And certain provisions of the tax code receive specified yearly cost of living adjustments.[127] These delegations mostly involve applying a pre-determined index formula or are subject to Congressional veto, but a few more discretionary delegations exist. The SEC, for example, is actually required to review the accredited investor definition at least every four years and may modify it as needed based on, among other things, the "state of the economy."[128]

Any viable delegation solution will need to extend well beyond the scope of these existing delegations. Mechanical and veto procedures have serious practical shortcomings, discussed in Part 0 below. The SEC model is closer to the flexibility a delegation approach would need to achieve, but it is already an outlier. The SEC has enjoyed greater administrative discretion than many agencies for historical reasons,[129] but that latitude is increasingly in question.[130] Extending a similar approach to other areas would be a significant departure from tradition. Moreover, none of the existing modes address how delegates can update statutes for which no adjustment instructions are likely to be provided.

The main constraint facing such a solution will be the nondelegation doctrine. The doctrine is important but murky because of the tension between its strong theoretical formalism and the weakness with which it has been customarily applied. The basic theory of nondelegation is that agencies may not engage in lawmaking that usurps the legislative power granted to Congress.[131] There are good reasons for this. Certain decisions may be so important they

---

125 *See* Section 4. Civil Penalties round two: flexible formulas but oversight challenges 0, *infra*.

126 *See* Section 0, *infra*.

127 *See* Section 0, *infra*.

128 Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 413, 124 Stat. 1376 (2010).

129 *Cf.* Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk and the Choice Between Agencies and* Courts, 119 HARV. L. REV. 1035, 1040 n.12 (2006) (describing unusually large grant of discretion to SEC in 1934 as reflecting Congressional desire to enable regulator-driven development of detailed scheme).

130 *Cf.* Jarkesy v. Sec. & Exch. Comm'n, 34 F.4th 446, 461 (5th Cir. 2022) (narrowing traditional enforcement power); Lucia v. Sec. & Exch. Comm'n, 138 S. Ct. 2044, 2051 (2018) (invalidating traditional ALJ appointment procedure).

131 *See* Martin H. Redish., *Pragmatic Formalism, Separation of Powers, and the Need to Revisit the Nondelegation Doctrine*, 51 LOY. UNIV. CHI. L. J. 363, 383 (2019). Nondelegation is sometimes framed as focusing on what Congress cannot grant and other times on what agencies cannot do. *Compare* Gundy v. United States, 139 S. Ct. 2116, 2121 (2019) (Kagan, J.) ("The nondelegation doctrine bars Congress from transferring its power."), *with* Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181, 1186–89 (2018) ("[The doctrine] does not forbid Congress from doing anything at all. Instead it forbids agencies from acting in particular ways."). There are important differences between these approaches, but they agree that agencies and Congress have some nonoverlapping roles.

should only be made by a highly democratically responsive legislature.[132] The framers' carefully calibrated system of ambition checking ambition may fall apart if the proper roles of the branches are not respected.[133] And, to the extent the Constitutional text prescribes limits on non-legislative lawmaking, those limits should be respected.[134] While nondelegation is traditionally thought of as a limit on administrative activity, most of its concerns are just as applicable to judicial updating of statutes.[135]

The nondelegation doctrine has been administered by requiring Congress to provide an intelligible principle to guide agency action, the idea being that such guidance confines an agency merely to implementing Congress' intent rather than making its own judgments into law.[136] This has been described as a sliding scale.[137] The more important the area of discretion the more guidance Congress must provide.[138] Alternate methods of distinguishing between those activities reserved to Congress and those permitted to other branches—such as asking whether agencies are merely filling up the details of a statutory scheme, or whether such a delegation accords with historically accepted practices—have also gained traction among some jurists.[139] But the underlying objective of all approaches is the same: to keep the most sensitive and open-ended judgments within the legislature while allowing enough agency discretion for government to function.

In practice, nondelegation is honored in the breach. Congress instructs other branches to make all sorts of decisions that implicate similar policy choices to those associated with lawmaking.[140] Because of the ubiquity and necessity of those delegations, courts virtually never reject such schemes outright.[141] Consequently, some commentators have declared nondelegation dead.[142] Some historians argue it was never really alive to begin with—just a Frankenstein doctrine trotted out as a rear guard action against political and

---

132 Redish, *supra* note 131, at 384.

133 *Id.* at 384–85.

134 *Id.*

135 *See* Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CALIF. L. REV. 405, 428 (2008).

136 *Id.* at 416–18.

137 *See* Sean P. Sullivan, *Powers, But How Much Power? Game Theory and the Nondelegation Principle*, 104 VA. L. REV. 1229, 1234 (2018).

138 *Id.*

139 *See* Gundy v. United States, 139 S. Ct 2116, 2136 (2019) (Gorsuch, J., dissenting) (fill up details approach); *id.* at 2129–30 (Kagan, J.) (looking to prior grants of discretion).

140 *See* David Schoenbrod, Power Without Responsibility: How Congress Abuses the People Through Delegation, 58 (1993).

141 Redish, *supra* note 131, at 378.

142 *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002).

governmental change.[143] This may be true in certain areas, such as antitrust, where doctrinal evolution has long been entrusted to administrative and judicial actors.[144] But the doctrine retains significant rhetorical and legal force. It is frequently cited and several members of the Supreme Court have expressed a desire for more rigorous policing of administrative delegations.[145] Moreover, formalist separation of powers concerns that motivate the doctrine clearly still have teeth, especially in the presence of unambiguous statutes.[146] Courts regularly implement related tools such as the Major Questions doctrine and interpretive canons to blunt the most extreme uses of delegated authority.[147] It would be foolish to think a meaningful expansion of non-congressional inflation updating would escape nondelegation scrutiny.

The question then is what that scrutiny will look like for different updating approaches. The most extreme option would be to update statutes without any instructions from Congress. This scenario is plausible because updating instructions require legislation. Congress lacks the time to do this for the multitude of vulnerable provisions and may be disinclined to invite the political battles that arise when well-established laws are revisited. Unfortunately, completely uninstructed updating is not viable. The one thing nearly everyone agrees on with regard to nondelegation is that Congress, not agencies or courts, must construct the principle that guides non-legislative discretion.[148] In fact, such unilateral updating does not appear to have ever been attempted. The one case in which the possibility was significantly debated involved the aforementioned effort to modify the capital gains formula to account for inflation.[149] The White House, Treasury, and Justice Department all resoundingly rejected this proposal.[150] Their main objection was that the proposal skipped over *Chevron*'s first step.[151] When Congress "writes legislation in specific terms . . . [that do] not leave policy choices to be resolved by an administrative agency, then Congress's decision binds both the executive branch and the judiciary."[152] This finding was reaffirmed by academic

---

143 *See* Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 UNIV. PENN. L. REV. 379, 380 (2017); *cf.* Nikolas Bowie & Daphna Renan, *The Separation of Powers Counterrevolution*, 131 YALE L. J. 2020, 2024 (2022).

144 *Cf.* Lemos, *supra* note 135, at 461 (describing incompatibility of large-scale delegation in antirust with nondelegation).

145 *See, e.g.*, Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) (describing *Chevron* as an "abdication of judicial duty"); Gundy v. United States, 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring in judgment); Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1 (2019) (describing incremental narrowing of administrative latitude).

146 Sunstein, *supra* note 131, *passim*.

147 *Id.*

148 *See* Redish, *supra* note 131, at 375.

149 *See* Section 0, *infra*.

150 *See* Section 0, *infra*.

151 *See* Legal Authority of the Department of the Treasury to Issue Regulations Indexing Capital Gains for Inflation, 16 Op. O.L.C. 136, 146–51 (1992).

152 *Id.* at 139.

commentators when the same proposal was revived during the Trump Administration.[153]

A more limited form of unilateral updating might be accomplished via re-interpretation of an agency's existing grants of discretion. The viability of this approach will largely turn on the nature of the discretion-granting provision and the regulatory context. Some cases will fit well with the task of updating statutory text for inflation. The SEC is permitted under § 413 of the Dodd-Frank Act to modify the threshold for the accredited investor definition "for the protection of investors, in the public interest, and in light of the economy."[154] This authority is easily broad enough to permit inflation updates.[155] On the other hand, the Department of Labor might be more hamstrung in overriding the $2,000 value threshold for federal contracts to be subject to the Davis Bacon Act's minimum wage requirements. The Department has been given authority to administer the act in certain ways, such as setting minimum wages at levels "the Secretary of Labor determines to be prevailing."[156] But only the most strained reading could extend that authority to modifying the coverage threshold. From the outset then, one can see this approach may only be selectively applicable.

Attempts to stretch existing authority also suffer from a number of practical limitations. It may be difficult to sustain this approach year over year thus some of the expectation-mismatch problems of drift may persist. The SEC's authority only allows it to "review" the threshold periodically not necessarily to prescribe a predictable adjustment procedure for the medium and long term.[157] Any rule adjusting a monetary threshold, penalty, or payout will also likely have to go through notice and comment,[158] possibly delaying updates and making them less predictable. And such updating will introduce inconsistency within regulatory schemes where regulatory discretion only extends to certain provisions.

---

153 *See* Daniel Hemel & David Kamin, *The False Promise of Presidential Indexation*, 36 YALE J. ON REG. 693, 706–15 (2019).

154 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 413, 124 Stat. 1376 (2016).

155 *Cf.* Revisions of Ltd. Offering Exemptions in Regul. D, Release No. 8828, 72 FED. REG. 45115, 45126 (Aug. 10, 2007) (implying existence of pre Dodd-Frank authority to make one-off inflation adjustment but declining to use).

156 40 U.S.C. § 3142(b). *See also* 87 FED. REG. 15698, 15702 (Mar. 18, 2022).

157 *Cf. id.* ("not less frequently than once every four years . . . the Commission shall undertake a review . . . to determine whether such requirements should be adjusted").

158 *See* Community Nutrition Inst. v. Young, 818 F.2d 943, 945–48 (D.C. Cir. 1987) (holding that FDA rule setting quantitative limits for certain food contaminants was a binding legislative rule and thus required to go through notice and comment). *Cf.* Michael A. Rosenhouse, Annotation, *Construction and Application of Good Cause Exception to Notice and Comment Rulemaking*, 26 A.L.R. Fed. 2d 97, at § 2 (2008) (summarizing cases on applicability of § 553 good cause exception to price setting regulations and finding exception only found applicable when "dislocations likely to be caused by advanced notice . . . but not otherwise.").

Agencies with less clear modification authority than the SEC might also run afoul of the Major Questions doctrine—a special application of the non-delegation approach.[159] The doctrine comes into play when an agency interprets its power to promulgate regulations in an extremely broad or novel way.[160] If it is not clear that Congress intended the agency to have such rule-making authority the Court will reject the interpretation.[161] The Court has typically found regulations involving issues of great economic or political significance, such as public health or the environment, to be beyond agency authority absent a very clear commitment of regulatory power in the relevant area.[162] But the doctrine potentially encompasses far more than just attempts to address front-page problems. More specialized assertions of authority can also be struck down for being too broad. *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, while not explicitly an invocation of the doctrine, is closely on point.[163] In *MCI* the FCC attempted to interpret its statutory authority to "for good cause, modify any requirement" of the rate filing provisions of the Communications Act of 1934 as allowing it to make the filing requirement optional for long-distance carriers.[164] The Court rejected this construction, finding it "highly unlikely" that Congress would assign the determination of whether an entire industry or part of an industry, will be rate regulated to an agency in such a subtle way.[165] Recent Supreme Court opinions, such as *West Virginia v. EPA*, have also found departures from settled understandings of authority relevant to the major questions analysis.[166]

These recent decisions indicate that merely demonstrating a delegation of regulatory discretion may not be enough for a novel regulatory move to survive major questions review. Agencies attempting to update inflation-eroded provisions may have to prove that the issue at hand is minor across several dimensions and that their interpretation is consistent with prior ones.

---

[159] *See* Gundy v. United States, 139 S. Ct 2116, 2142 (2019) (Gorsuch, J., dissenting) ("Although it is nominally a canon of statutory construction, we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency.").

[160] *See* Nat'l Fed'n of Indep. Bus. v. Dep't. of Labor, 142 S. Ct. 661, 663 (2022) (rejecting OSHA attempt to interpret to promulgate standards "reasonably necessary . . . to provide safe or healthful employment" as authorizing *nationwide* vaccine mandate); West Virginia v. Env't Prot. Agency, 142 S. Ct 2587, 2601, (2022) (rejecting attempt to interpret § 111 of Clean Air Act—permitting agency to promulgate "federal standards of performance" reflecting the "best system of emission reduction" for certain pollution sources—to allow issuance of standards incentivizing shifts to cleaner fuels *in contravention of historical practice*).

[161] West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2607–08 (2022).

[162] CONG. RSCH. SERV., IFI2077, THE MAJOR QUESTIONS DOCTRINE 1 (2022).

[163] 512 U.S. 218 (1994)

[164] *Id.* at 225.

[165] *Id.* at 231.

[166] *See West Virginia*, *supra* note 161, at 2595; Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 154–55 (2000).

This would be quite difficult. There are strong arguments, especially when one considers the nominalism precedents discussed above, that Congress has kept the discretion to adapt the law to macroeconomic shocks to itself. Indeed, one is hard-pressed to think of an issue of more far-reaching economic and political significance than inflation. And consistency with prior interpretations would be nearly impossible to show. No agency has attempted to exercise such authority previously.

The final option is the promulgation of a clear updating directive from Congress. This presents a number of practical challenges which are discussed at length in Part 0, the most important being the vast number of provisions needing attention. This strategy is also not immune to delegation challenges. The difficulty lies in balancing flexibility with constraint in the instructions. Congress could provide an updating procedure with zero room for deviation. This is essentially what it has done with tax bracket indexation: the IRS is required to update income tax brackets each year by a completely predetermined formula based on the CPI-U.[167] Such an approach would present no delegation issues. However, the provisions vulnerable to inflationary drift are diverse, complex, and touch on many sensitive policy areas. This raises the question of how much flexibility Congress can provide before the agency begins to legislate thresholds, penalties, or payouts. The law is unsettled on this. Existing updating delegations indicate Congress likely has room to maneuver so long as the general package adds up to a certain level of restraint. The Sentencing Commission is utterly free to choose when and by what procedure it updates its guidelines, but Congress has a direct veto over these.[168] Meanwhile, agencies can make civil penalty updates without the need for explicit approval from Congress, but only according to a prescribed formula and with a narrow economic harm exception for initial adjustments that must be approved by the OMB.[169] To be sure, the propriety of these updating mechanisms has not been litigated and not all possible delegation packages would be allowed. Congress could probably not permit an agency to unilaterally decide when and if an inflation adjustment could be applied.[170] It may also be unable to give an agency discretion to design an updating process that is triggered by especially open-ended judgments such as a finding of economic hardship, though this may be more permissible in conjunction with a prescribed methodology.[171] What is clear is that any approach beyond a preset

---

[167] 26 U.S.C. § 1(f).

[168] Section 0, *infra.*

[169] Section 0, *infra*.

[170] *See* Gundy v. United States, 139 S. Ct 2116, 2123 (2019) (A provision allowing executive officer to "change her policy for any reason and at any time . . . would face a nondelegation question.").

[171] *Compare* A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 552–553 (1935) (Cardozo, J., concurring) (criticizing a hypothetical delegation that would allow president to mandate competitive practices thought "desirable"), *with* Yakus v. United States, 321 U.S. 414, 424–27 (1944) (finding power to set maximum prices contingent on administrator's factual determination was permissible delegation because, unlike the delegation in *Schechter*, the action was constrained by instructions that administrator consider specified factors, including historically prevailing prices, in setting price).

formula or a direct approval mechanism goes beyond traditional delegations. More flexible delegations may be permissible but only up to an as-yet indeterminate point.

* * * *

As the forgoing discussion demonstrates, the inflationary drift problem is serious and widespread. Addressing it is made harder by doctrinal obstacles that require most solutions to run through Congress. The first Congress imported nominalism into the law, foreclosing findings of ambiguity with respect to monetary values. Legislation is arguably required to adjust that assumption. Only Congress can revise unambiguous statutory text. And delegated updating requires, at minimum, legislative development of updating procedures for hundreds of provisions, procedures which will have to be somewhat inflexible to satisfy intelligible principle requirements.

These limits can be traced to a key source: an understanding of separation of powers that requires careful segregation of the power to create and revise clearly written laws. That highly formal understanding is not universally applied, but it is far from a dead letter, especially when it comes to revision of unambiguous, specific statutory provisions. There may be good reasons to construe separation of powers so strictly. But the approach is risky. It depends on a single actor to avoid the expectation mismatch challenges of inflationary drift. The next section evaluates whether Congress has been successful in that effort.

III. THE CONSTITUTIONAL ALLOCATION OF LAWMAKING POWER HAS NOT KEPT PACE WITH MONETARY CHANGE

Inflationary drift is not new. The issue was discussed at the Constitutional Convention with respect to judicial salaries. The framers escaped the problem by leaving the task of periodically setting judges' compensation to Congress. That approach—relying on legislators to regularly update money values in statutes—would predominate for the next century.[172] It appears to have worked reasonably well. The limited monetary values enshrined in statutory law, such as tariffs, were often revisited and the economic dynamics were such that drifts were somewhat self-correcting.

This is no longer true. In the first part of the 20th century two shifts began to place significant strain on the traditional approach. The volume of statutory law exploded with the birth of the administrative state and, roughly contemporaneously, the country experienced a macroeconomic revolution as it began the bumpy transition from a specie-backed currency to a floating one, overseen by a central bank. This transition reduced the dramatic short-term

---

[172] *Cf.* COMMITTEE ON GOVERNMENT OPERATIONS, STUDY ON FEDERAL REGULATION 1 (Feb. 1977) ("For close to 100 years Congress chose to exercise the commerce power directly.").

monetary corrections the country had experienced in the 19th century but introduced a trend of long-term inflation that made legislative action the only way to avoid statutory erosion.

The arrival of the new monetary environment was partly obscured by the Depression and war-related price shocks. But eventually, through the painful process of attempting to keep welfare benefits current through ad hoc legislation, Congress realized laws would need to accommodate this new environment. By the 1970s and early 1980s Congress began to act, starting with indexing some of the most obviously vulnerable benefits and tax provisions. The next few sections explore that response. Fifty years later it is apparent that Congress has come up short. The full legislative calendar and special interests have kept it from revisiting key provisions and led to inconsistent treatment within the same statutory schemes. It has made staggeringly counterproductive errors in drafting indexation formulas and generally failed to adapt its broad-brush formulas to the complexity of the U.S. Code. Most critically, it has been unable to strike the right balance between administrative flexibility and Congressional oversight of key policy decisions.

A. *The traditional approach to drift emerged during a period of long-run price stability and greater legislative agility*

Monetary fluctuation has been a fact of life since before the founding of the United States.[173] The motivation for the Constitution was in large part driven by the unstable monetary environment in the United States in the 1780s.[174] And in almost every decade since the country experienced some sort of monetary price shock.[175] The impact of these price shifts was never lost on Congress. Some of the most heated political battles of the 19th century—the debate over the Second Bank of the United States, the financing of the Civil War, and the battles over free silver—were about the money supply.[176]

---

173 *See, e.g.*, *Letters of Delegates to Congress: Volume 7 May 1, 1777 - September 18, 1777, Henry Marchant to Nicholas Cooke* (Aug. 18, 1777) (discussing impact of inflation on efforts to pay for revolution); Charles W. Calomiris, *Institutional Failure, Monetary Scarcity, and the Depreciation of the Continental*, 48 J. ECON. HIST. 47, 54–60 (1988).

174 Farley Grubb, *The US Constitution and monetary powers: an analysis of the 1787 constitutional convention and the constitutional transformation of the US monetary system*, 13 FIN. HIST. REV. 43, 50 (2006).

175 *See* Michael D. Bordo, *The Classical Gold Standard: Some Lessons for Today*, FED. RES. BANK OF ST. LOUIS REV. 11–13 (1981).

176 *See* RICHARD BENSEL, THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION: 1877-1900 394 (1949) (discussing free silver debates); Leon M. Schur, *The Second Bank of the United States and the Inflation after the War of 1812*, 68 J. POL. ECON. 118, 119 (1960); Julliard v. Greenman, 110 U.S. 421, 422–24 (1884) (involving controversy around monetary impacts of greenbacks, the primary method of Civil War finance).

However, the historical experience of price shocks was different from our modern experience in a crucial way: until the 1930s price shocks were largely short term dynamics.[177] Sharp deflationary and inflationary periods accompanied wars and panics, but these did not dramatically move long term prices.[178] According to the best historical data, $100 in 1840 would still be worth roughly $97 in 1880.[179] The average annual rate of change during that period was roughly 0.15%.[180] Comparatively, $100 dollars in 1940 would be worth $588 by 1980, an annual rate of change of roughly 15%.[181] Figure 1, from an analysis by Carmen Reinhart and Kenneth Rogoff, demonstrates the remarkably different character of changes in the price level after 1930.

177 Stephen B. Reed, *One hundred years of price change: the Consumer Price Index and the American inflation experience*, BUREAU LAB. STAT.: MONTHLY LABOR REV. (2014) ("Most living Americans have essentially known nothing but inflation. . . . However, before World War II the experience of price change was very different. Prices zigged and zagged rather than following a consistent upward course."). *See also* Williams v. United States, 122 S. Ct. 1221, 1227 (2002) (mem.) (Breyer, J., dissenting from denial of certiorari) (describing the inflationary erosion of judicial salaries as "a phenomenon familiar to the Nation's founders, but absent during much of the 19th century").

178 Allan H. Meltzer & Saranna Robinson, *Stability Under the Gold Standard in Practice*, *in.* MONEY, HISTORY, AND INTERNATIONAL FINANCE: ESSAYS IN HONOR OF ANNA J. SCHWARTZ 163, 164 (Michael D. Bordo ed., 1987).

179 *Historical CPI-U Data*, *supra* note 8.

180 Michael D. Bordo, *The Classical Gold Standard: Some Lessons for Today*, FED. RES. BANK OF ST. LOUIS REV., 8–10 (1981) (finding prices declining on average only 0.14% annually between 1834 and 1913).

181 *Historical CPI-U Data*, *supra* note 8.

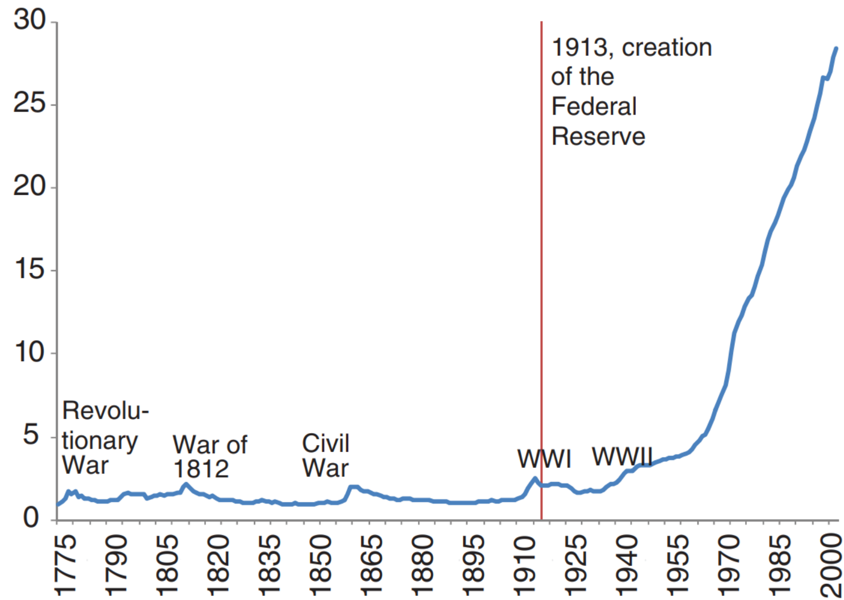

Figure 1: Consumer Price Index 1775-2012[182]

This period of stability was largely due to the makeup of the money supply. Prior to 1933 the United States mostly used specie-backed money, except for brief hiatuses in wartime.[183] This kept prices stable in the long run, with intermittent periods of rapid inflation associated with war or the suspension of convertibility of paper money into coin followed by deflation as ordinary life resumed.[184] Because prices during this period tended to revert to the mean, inflationary drift was somewhat self-correcting.[185]

To be sure, short-term fluctuations in the monetary and economic environment still created mismatches between expected and actual impacts of nominally drafted statutes. Given the limited nature of statutory law during this period, the effect is mostly observable through taxes. The excise tax

[182] Carmen M. Reinhart & Kenneth S. Rogoff, *Shifting Mandates: The Federal Reserve's First Centennial*, 103 AM. ECON. REV. 48, 48 (2013).

[183] Michael D. Bordo et al., *Aggregate Price Shocks and Financial Instability: An Historical Analysis* 8 (Nat'l Bureau of Econ. Rsch., Working Paper No. 7652, 2000); Fernando M. Martin, *A Short History of Prices, Inflation since the Founding of the U.S.*, FED. RES. BANK ST. LOUIS (July 25, 2017), https://www.stlouisfed.org/publications/regional-economist/second-quarter-2017/a-short-history-of-prices-inflation-since-founding-of-us.

[184] Fernando M. Martin, A Short History of Prices, Inflation since the Founding of the U.S., FED. RES. BANK ST. LOUIS (July 25, 2017), https://www.stlouisfed.org/publications/regional-economist/second-quarter-2017/a-short-history-of-prices-inflation-since-founding-of-us; *see also* Michael D. Bordo, *The Classical Gold Standard: Some Lessons for Today*, FED. RES. BANK OF ST. LOUIS REV. 2, 8–10 (1981).

[185] *See* Meltzer & Robinson, *supra* note 178, at 164–67.

giving rise to the Whiskey Rebellion was stated nominally.[186] Thus its already unpopular burden was worsened by the scarcity-driven deflation concurrent with its enactment.[187] Import duties were stated in both nominal and percentage terms under various tariff acts throughout the period.[188] To the extent commodity prices fluctuated during the time duties were nominally stated, their real impact also shifted.[189] The nominally-fixed taxes of farmers generated enormous hardship during the deflation of the 1890s.[190]

These shifts, however, would not have induced lasting expectation mismatches, nor do they seem to have evinced much concern among legislators for more resilient drafting mechanisms. The political discussion of inflation and deflation, while frequent,[191] was focused on fiscal and monetary policies to combat the effects of short-run volatility.[192] Discussion of long-term price movements, to the extent it shows up at all in economic reform debates, is mostly centered on the hypothesized effects on trade and financial competitiveness.[193] The lack of concern with long-term drift of statutes shows up most starkly when one considers how Congress dealt with member salaries. There were no adjustments made to member compensation between 1818 and 1856.[194] Salaries were raised after the Civil War to $7,500 in 1871, reduced to $5,000 annually in 1874, and then left alone until they returned to $7,500 in 1907.[195] In comparison, Congress passed compensation bills multiple times

---

[186] Act of March 3, 1791, 1 STAT. 199 at § 1 (1791) (setting duties at nominal amounts between 20 and 40 cents).

[187] *See* Jeffrey J. Crow, *The Whiskey Rebellion in North Carolina*, 66 N.C. HIST REV. 1, 13–16 (1989) (describing pre-enactment concerns about the exacerbating effect of money scarcity).

[188] *See* F.W. Taussig, *The Tariff, 1830-60*, 2 Q. J. ECON. 314, 324–25 (1888) (describing duties on iron).

[189] *Cf. id.* (describing occurrence of converse case of shifts in nominal values of the tariff when percentage rates were applied to changing prices).

[190] Rory Kreitner, Money in the 1890s: The Circulation of Politics, Economics, and Law, 1 UC IRVINE L. REV. 975, 978, 986 (2011).

[191] *See* RICHARD BENSEL, THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION: 1877-1900, 355 (1949).

[192] *See, e.g.*, James Madison, "Vices of the Political System of the United States" (April 1787) *in* 9 *The Papers of James Madison*, William T. Hutchinson et. al., eds. 349–50 (1975) (discussing uniform federal money system as response to economic crisis of 1780s); Andrew Jackson, Eighth Annual Message to Congress (Dec. 5, 1836) (describing specie circular as solution to excessive issues of state banks); Nicolas Barreyre, *The Politics of Economic Crises: The Panic of 1873, the End of Reconstruction, and the Realignment of America*, 10 J. GILDED AGE & PROGRESSIVE ERA 403, 409–16 (2011) (discussing congressional proposals to combat the effects of the Panic of 1873 with inflationary fiscal tools).

[193] *Cf.* Jeffrey A. Frieden, *Monetary Populism in Nineteenth Century America: An Open Economy Interpretation*, 57 J. ECON. HIST. 367, 388 (1997) (characterizing "principal" arguments on both sides of free silver debates as centered on trade).

[194] IDA A. BRUDNICK, CONG. RSCH. SERV., RL97-1011, CONGRESSIONAL SALARIES AND ALLOWANCES: IN BRIEF 18 (Dec. 14, 2023).

[195] *Id.*

per decade from the 1930s to 1980s, even when such raises might have been unpopular (such as the three raises made between 1933 and 1935).[196]

The agility with which 19th century legislatures enacted and revisited major statutes likely also made resilience measures an afterthought. While there was little need to respond to long-term monetary shifts, Congress regularly passed legislation to adapt to other economic changes. New tariff legislation adjusted import duties in response to shifts in trade conditions at an average pace of once every seven years until the Civil War (in 1789, 1816, 1818, 1820, 1824, 1828, 1832, 1833, and 1846).[197] Congress also possessed a robust capacity for dealing with exigent circumstances through what has come to be known as "disaster legislation."[198] From 1800 to 1900 Congress passed at least forty bills providing funding for victims of unexpected disaster.[199] While it largely declined to use this capacity in response to economic calamities for ideological reasons, the frequency of the practice demonstrates a nimble legislature.[200] The massive petition system, which produced hundreds of private bills annually throughout the 19th century, also reveals a Congress ready to address problems of fit between the law and individual experience.[201]

B. *The 20th century produced long-run inflation that exacerbated statutory erosion*

The last nine decades have been different. The demise of long-run price stability and the explosion of federal statutory law during the 20th century transformed inflationary drift from a short-term issue into a long-term challenge. The first major shift concerned the structure of government. The Progressive and New Deal eras produced a massive increase in regulations and the birth of a number of new complex statutory schemes creating the agencies and codes needed for the modern state.[202] The additional statutes created more

---

196 *Id.*

197 *See* Summary of the History of the United States Tariff Legislation and Trade Agreements Procedure Before the S. Comm. on Finance, 80th Cong. 1–5 (1947) (statement of Oscar B. Ryder, Chairman United States Tariff Commission).

198 *See generally* MICHELLE LANDIS DAUBER, THE SYMPATHETIC STATE: DISASTER RELIEF AND THE ORIGINS OF THE AMERICAN WELFARE STATE (2013).

199 *Id.* at 46.

200 *Cf. id.* at 48–51 (describing shift towards inclination to use relief powers for economic crises beginning with the panic of 1893).

201 *See* Maggie L. McKinley (now Blackhawk), *Petitioning and the Making of the Administrative State*, 127 YALE L. J. 1538, 1573 (2008); Naomi R. Lamoreaux & John Joseph Wallis, *Economic Crisis, General Laws, and the Mid-nineteenth Century Transformation of American Political Economy* 5–6 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27400, 2020).

202 *See* Susan E. Dudley, *Milestones in the Evolution of the Administrative State*, 150 DAEDALUS 33, 34 (2021); *see, e.g.,* Interstate Commerce Act, 24 Stat. 379 (Feb. 4, 1887), Federal Trade Commission Act, 38 Stat. 717 (Sep. 26, 1914), Securities Act of 1933, 48 Stat. 74 (May 27, 1933), Securities Exchange Act of 1934, 48 Stat. 74 (Jun. 6, 1934).

points of drift-vulnerability because their largely economic focus included numerous money values.

The second shift was economic. When the United States partially suspended the gold standard during World War I, it began a process that would jettison the anchor that made inflationary drift self-correcting.[203] The standard was fully suspended by 1933, and the country never truly returned to it.[204] As a result, the CPI increased 2,978% from 1913 to 2022.[205] This sustained and enormous increase created the potential for unprecedented erosion of dollar amounts in statutes.

The full ramifications of these developments were not immediately apparent.[206] There was some legislative discussion of adapting laws for price fluctuations during the 1930s, but it was ad hoc and focused on dealing with past price changes. The first law to use a cost of living indexing procedure of which the author is aware is the Economy Act of 1933, which instructed the President to reduce the compensation of federal employees based on decreases in the cost of living from 1928 to 1932.[207] The law included a mechanism for future updates but only if the cost of living continued to fall, indicating it was focused on ensuring public employees did not benefit from the Depression and not on accommodating future trends.[208] And even Social Security, one of the most important new programs of the period and which was intended to be long-lasting, was drafted in nominal terms.[209]

It was not until after World War II that the reality of secular price increases began to cement itself in the minds of policymakers.[210] Congressional debates reflect this dawning realization. In the 1950s it began to make regular ad hoc updates to benefit programs to deal with real declines in benefit

203 *See* Leland Crabbe, *The International Gold Standard and U.S. Monetary Policy from World War I to the New Deal*, 75 FED. RES. BULLETIN 423, 426 (1989).

204 Kenneth W. Dam, *From the Gold Clause Cases to the Gold Commission: A Half Century of American Monetary Law*, 50 U. CHI. L. REV. 504, 504-505 (1983); *see also* Richard N. Cooper et al., *The Gold Standard: Historical Facts and Future Prospects*, 1982 BROOKINGS PAPERS ECON. ACTIVITY 1, 3-4 (1982). The United States would return to a modified version from 1946 through 1979 but with nothing like the stability of the historical policy. *Id.* at 7. Milton Friedman described this as a pseudo-gold standard. *See* Dam at 526 (1983).

205 *Historical CPI-U Data*, *supra* note 8.

206 *See* Missouri ex rel. Sw. Bell Tel. Co. v. Pub. Serv. Comm'n, 262 U.S. 276, 303 n.16 (1923) (Brandeis, J., concurring) (expecting, mistakenly, that prices following WWI would revert to historical patterns: "peak price levels were practically the same during the War of 1812, the Civil War, and the World War, and it shows that practically continuous declines, for about 30 years, followed the first two wars. The experience after the third may be similar.").

207 Pub. L. 73-2 II. §§ 2–3 (1933).

208 *See id.* at § 3(b).

209 *See infra* Section 0.

210 *See* Weaver, *supra* note 52, at 55 (describing 1949 as the beginning of the first wave of commodity indexation efforts).

values.[211] And by 1958 it started to include future resiliency measures, adding the first automatic cost of living adjustment to veterans' retirement benefits.[212] In 1962 it authorized indexing of civil service retirement benefits as well.[213] The inflationary crises of the 1970s only heightened awareness of the negative consequences of price shifts.[214] At that time Congress began to focus on updating penalties as well as benefit programs.[215] Since the mid-1980s, legislative enactments have seen increasing use of indexation provisions and authorization of agencies to update for inflation.[216]

Two reasons likely explain the three decades between the shift to a floating currency and the beginnings of Congressional efforts to address the statutory effects. First, the economic confusion accompanying two world wars and the Great Depression during the first portion of this new inflationary period obscured the underlying economic trends that made indexation necessary. To observers in the first half of the 20th century, the combination of major inflationary and deflationary periods would have been difficult to distinguish from prior short-run price fluctuations during economic crises and wartime.[217] Surely no one thought the price conditions surrounding the Great Depression and both world wars were business as usual. It was only after a decade or so of regular peacetime inflation that the new reality would have been apparent. A second reason is the recent vintage of reliable price indicators. The Bureau of Labor Statistics was created in 1884, but it did not begin publishing a rudimentary cost of living index until 1905.[218] The original Consumer Price Index was launched in 1913, and time series data were not published until 1921.[219] Thus, legislators likely lacked familiarity with the tools needed to contextualize and address drift until mid-century.[220]

Nevertheless, as price increases began to span decades rather than years, it became clear that something had to be done. The next subsection explores efforts to develop a workable response.

---

211 *See* Section 0 (discussing Social Security).

212 *See* STAFF DATA WITH RESPECT TO H.R. 17550, *infra* note 232, at 14.

213 *Id.*; *see also* CONG. RSCH. SERV., INDEXATION OF FEDERAL PROGRAMS 7 (1981).

214 *See* Adam Clymer, *40% in Survey Say Inflation is Major Issue for 1980 Race*, N.Y. TIMES (Oct. 19, 1979).

215 *See infra* Section 0.

216 *Id.*

217 *See* Stephen B. Reed, *One hundred years of price change: the Consumer Price Index and the American inflation experience*, 137 MONTHLY LAB. REV., 1, 16 (2014) (describing 1950s as "turning point" in American inflation experience); Reinhart & Rogoff, *supra* note 182, at 48 ("It is probable that in 1913, while financial panics were not uncommon, high inflation was still largely seen by the founders of the Fed as a relatively rare phenomenon associated with wars and their aftermath.").

218 Darren Rippy, *The first hundred years of the Consumer Price Index: a methodological and political* history, 137 MONTHLY LAB. REV., 1, 1-2 (2014).

219 *Id.*

220 *See* Hugh Rockoff, *On the Controversies Behind the Federal Origins of Economic Statistics*, 33 J. ECON. PERSPECTIVES 147, 152 (2019).

C. *Congress began to address increasing drift in the 1970s but with only limited success*

1. Social security: ad hoc updating proves unworkable

The first major effort to address the inflationary erosion of a statutory scheme involved Social Security.[221] Old age benefits were described in essentially nominal terms in the Social Security Act of 1935. Benefits were set at certain percentages of eligible wages earned after 1936 and capped at $85 a month;[222] thus as prices rose during and following World War II, the real value of the historical wages from which benefits were calculated fell. The real value of the cap also declined. In 1950 Congress acknowledged that benefit levels had become inadequate due to rising prices, and it enacted old age benefit increases ranging from 40-50%.[223] Of course this one-off adjustment was soon eroded, and Congress had to make another increase in 1952.[224] That increase also quickly proved insufficient, and further adjustments were need in 1954, 1959, 1965, 1968, 1970, and 1971.[225] Each ad hoc adjustment was a major political battle where a seemingly technical correction became a vehicle for battles over the underlying program. Fiscal hawks attempted to ensure the updates lagged inflation or resisted them entirely. [226] While advocates of broader social support attempted to increase real benefits under the guise of updating for inflation. [227]

Starting in the late 1960s both political parties began to grow weary of this political combat masquerading as updating.[228] Substantively, both sides recognized the process had veered uncomfortably far from its stated purpose, with increases well in excess of changes in cost of living occurring in

---

221 There were earlier efforts to adjust federal wages for past price changes. *See supra* note 207 and accompanying text. And Congress had instituted efforts to keep certain agricultural commodity prices at real parity in the 1930s. Chen, *supra* note 4, at 1399–41. But these earlier efforts were attempts to address contract terms or past erosion.

222 Social Security Act of 1935 § 202(a)-(b).

223 S. Rep. No. 1669, at 20 (1950) ("There are compelling social and economic reasons for liberalizing benefits . . . [beneficiaries] need benefits which are revised to take into account that the 1939 benefit formula proved to be inadequate soon after its enactment and that prices have risen since then.").

224 Wilbur J. Cohen, *Social Security Act Amendments of 1952*, SOC. SEC. BULLETIN 3 (1952) ("The rapid rise in wages and prices during the last few years makes immediate benefit adjustments imperative.").

225 PAUL S. DAVIES & TAMAR B. BRESLAUER, CONG. RSCH. SERV., R94803, SOCIAL SECURITY: COST-OF-LIVING ADJUSTMENTS 9 (2023).

226 Nancy Altman & Ted Marmor, *Social Security from the Great Society to 1980: Further Expansion and Rekindled Controversy*, *in* CONSERVATISM AND AMERICAN POLITICAL DEVELOPMENT 162 (Brian J. Glenn et al. eds., 2011).

227 *Id.* at 163; *see also* Interview with Robert Ball, former Commissioner of Social Security (May 1, 2001) https://www.ssa.gov/history/orals/ball4.html.

228 Altman & Marmor, *supra* note 226, at 162.

democratic and republican administrations.[229] And procedurally the updates were deeply flawed. There was growing concern that updates inevitably became "Christmas tree bills", with gifts to special interests riding alongside substantive provisions.[230] Even when cost of living updates were passed individually without pork, they were generally attached to veto-proof tax and debt bills, providing little in the way of democratic approval.[231]

Several proposals were made to institute an automatic update to keep pace with inflation and take politics out of updating.[232] Finally, in 1972 Senator Frank Church introduced a rider to a debt extension bill that created the modern CPI-based cost of living adjustment mechanism for old age benefits.[233] According to Senator Church, the intent of this provision was to ensure benefits kept pace with inflation without the accompanying political battles.[234] President Nixon agreed on the purpose in his remarks upon signing the bill.[235] The procedure adopted was simple and inflexible. The annual update is calculated mechanically based on the CPI-U (or, in special circumstances an alternate but no less mechanically calculated wage index).[236] The only exceptions for when an update will not be made are if a legislative increase was made the prior year or the update would decrease benefit values.[237] The administrator has no discretion to avoid an update and there is no special legislative override other than new legislation.

This shift from ad hoc to automatic adjustments implies a growing belief in Congress that long-run inflation was a reality it needed to face. It also demonstrates the practical difficulties of ad hoc updating. The need to pass a cost of living update every few years taxed even the series of congresses in the 1950s and 60s known for passing complex social legislation. Most importantly, it illustrates the susceptibility of ad hoc updating to political capture. Opening up any provision of a statute to amendment, even a technical one, invites more controversial changes. And the tactics needed to avoid

---

229 MARTHA DERTHICK, POLICYMAKING FOR SOCIAL SECURITY 280, 343–46 (1979).

230 *Id.* at 41–42.

231 *Id.* at 346.

232 *See, e.g.*, Staff of S. Comm. on Finance, 91st Cong., Rep. on Data with Respect to H.R. 17550 Social Security Amendments of 1970 2 (1970) (discussing these motivations for a 1970 bill).

233 SOC. SEC. ADMIN., *1972 Cola Adjustments*, https://www.ssa.gov/history/tally1972b.html.

234 Frank Church, Letter to the Editor, N.Y. TIMES (Aug. 17, 1972) ("My proposal would . . . authorize cost-of-living adjustments to protect low-income older Americans from the cruel effects of inflation.").

235 Richard M. Nixon, Statement on Signing a Bill Extending Temporary Ceiling on National Debt and Increasing Social Security Benefits (July 1, 1972) ("This action constitutes a major break-through for older Americans, for it says at last that inflation-proof social security benefits are theirs as a matter of right, and not as something which must be temporarily won over and over again from each succeeding Congress.").

236 *See* 42 U.S.C. § 415(i).

237 *Id.*

opening this can of worms, such as attaching updates to unrelated omnibus bills, are undemocratic.

Congress absorbed many of these lessons and shifted to an automatic indexing strategy for many benefit programs in the 1970s.[238] The results have been imperfect. On the one hand, indexation may have been the only way for benefit programs to survive. The repeated ad hoc updating of the 1950s and 1960s was already breaking down in 1972, even before the great inflation at the end of the decade. On the other hand, the formulaic approach has drawbacks. Most obviously, it has locked in an escalating fiscal impact.[239] Costs have ballooned in a way that may not be consistent with democratic preferences, but indexing is an update first and ask hard policy questions later procedure.[240] Only Congress can apply the brakes. Another drawback is that the CPI-U—which was chosen with limited reflection in 1972—may be introducing error into the updates.[241] Congress has acknowledged that the relatively narrow basket of goods used to construct the CPI-U may not reflect the basket of goods that seniors who receive old age benefits typically buy.[242] But given the rigid adjustment procedure, no remedial action can be taken without legislation.

2. Taxes: tradeoffs between legislative control and coherence in updating complex schemes

The next major battle over updating involved the tax code. As with social security, Congress would attempt an indexing strategy, but factors not present in the benefit context complicated matters. The tax code was older than social welfare legislation and more complex. It relied on a mess of interconnected provisions, with many different nominal thresholds, to calculate a single person's tax liability. Welfare benefits generally operate more independently from each other. The politics were also different. Welfare indexation had a large and vocal base of supporters whose crucial benefits were universally threatened by inflation. This allowed for more sustained action even in the face of political opposition. Conversely, public opinion split on tax indexation as taxpayers staying within a bracket saw their taxes become less burdensome under inflation. Consequently, the indexation of taxes was piecemeal and never fully achieved. In one sense this incompleteness is

---

238 *See* DAWN NUSCHLER, CONG. RSCH. SERV., R42000, INFLATION-INDEXING ELEMENTS IN FEDERAL ENTITLEMENT PROGRAMS 6 (2013).

239 *Id.* at *1.

240 *See* B. Guy Peters & Donald J. Savoie, *Managing Incoherence: the Coordination and Empowerment Conundrum*, 56 PUB. ADMIN. REV. 281, 286 (1996) (Rigid social security indexation formulas "provide simple solutions for complex problems, and substitute algorithms for thought."); Daniel Hemel, *Indexing, Unchained*, 83 L. & CONTEMP. PROBLEMS 83, 85 (2020) ("How Social Security benefits ought to change year to year . . . are not questions of measurement. They are, instead, value judgments.").

241 Jim Chen, *The Price of Macroeconomic Imprecision*, *supra* note 4, at 1405.

242 *Id.* at 1406.

desirable. It represents the political process controlling indexation, avoiding the lock-in problem encountered in social security updating. But it also introduced an incoherently divergent approach to income in the tax system that creates distortions no reasonable drafter would have wanted.

When the modern federal income tax was introduced in 1913, items were dealt with in nominal terms.[243] While tax rates were described as percentages the thresholds which divided the various income brackets were set nominally.[244] This caused bracket creep, a process whereby taxpayers near the top of tax brackets were forced to pay higher rates during periods of inflation as they hurdled bracket thresholds despite no change in real incomes.[245] When the standard deduction was introduced it was similarly stated in nominal terms.[246] The alternative minimum tax was also nominally stated at inception.[247] Over time, tax brackets (1981), the personal exemption (1981), the standard deduction (1986), and the alternative minimum tax (2013) have been indexed to inflation.[248] However, important portions of the code remain susceptible, such as the basis for capital gains and the interest deduction.[249]

Lawmakers first began to consider doing something about the drifting tax code during the inflation of the late 1970s.[250] Increasing nominal incomes meant some families were pushed into higher brackets without any uptick in real income.[251] The last half of the decade saw repeated failures to index

---

243 *See* Strnad, *supra* note 120, at 245 ("Since its inception, U.S. tax law has measured "taxable income" and other tax accounting quantities on a nominal basis"). It is worth noting that the concept of income itself was not defined as nominal or real from the inception of the tax code. Charlotte Crane, *The Income Tax and the Burden of Perfection*, 100 NW. L. REV. 171, 179–82 (2006). Thus a nominally-based tax was not inevitable given the text of the statute.

244 Tracey M. Roberts, *Brackets: A Historical Perspective*, 108 NW. U. L. REV. 925, 929 (2014).

245 *See* Burkhard Heer and Bernd Süssmuth, *Tax Bracket Creep and its Effects on Income Distribution*, 38 J. MACROECONOMICS 393, 393 (2013) (defining the phenomenon).

246 Strnad, *supra* note 120, at 240–42.

247 *See* Richard Sousa, *Bracket Creep*, HOOVER DIGEST (Oct. 19, 2007) (criticizing nominal AMT).

248 *See* Reed Shuldiner, *Indexing the Tax Code*, 48 TAX L. REV. 537, 548–50 (1993); American Taxpayer Relief Act of 2012, § 104, Pub. L. 112-240, 126 Stat. 2313 (2012) (amending AMT to include inflation adjustment); TAX POLICY CENTER, *What is the AMT?*, https://www.taxpolicycenter.org/briefing-book/what-amt.

249 *See* Daniel Hemel & David Kamin, *The False Promise of Presidential Indexation*, 36 YALE J. ON REG. 693, 694 (2019).

250 *See* Weaver, *supra* note 52, at 195–96. The earliest indexed provisions were the limits on qualified retirement plans enacted in 1974. Richard J. Kovach, *Technical and Policy Standards for Inflation Adjustments Under the Internal Revenue Code*, 33 OKLA. CITY U. L. REV. 603, 605–06 (2008). However, these were enacted under ERISA, not specific tax legislation. *Id.* Thus the income bracket indexation is the first example of tax-focused indexation.

251 *See* S. Rep. 97-144, at 11–12 (1981); Karen W. Arenson, *Tax Rate Cuts vs. Inflation*, N.Y. TIMES (Sept. 16, 1981); Emmanuel Saez, *The effect of marginal tax rates on income: A panel study of 'bracket creep'*, 3 n. 1 (Nat'l Bureau of Econ. Rsch., Working Paper No.7367, 1999) (describing "substantial" 1979-81 increase as leading to tax revolt). The effect was not universal. For those families that stayed within the same bracket their real tax incidence would have decreased. *Id.* at 1.

brackets in 1975, 1976, 1977, 1978, and 1979.[252] Finally, Republicans mustered a majority in 1981 to enact the Economic Recovery Tax Act (ERTA), which added an indexing provision to annually update income tax bracket thresholds for increases in the CPI-U over the preceding year.[253] It also included a measure to index the personal exemption deduction.[254] According to the Senate committee report, the use of indexing was motivated by the hardships imposed by bracket creep and recognition that ad hoc adjustments had failed to keep pace with inflation.[255]

ERTA passed both the House and Senate by healthy margins,[256] but it was not without controversy. While many supporters saw the measure as one of simple fairness and technocratic governance, others saw profound policy choices at stake.[257] A key criticism concerned interactions with recent and proposed tax cuts also designed to account for inflation.[258] Opponents were concerned that overlapping tax breaks and indexing would lead to repeated overcompensation for inflation, especially in periods of stress where Congress might feel pressure to show action even when automatic adjustments were already working in the background.[259] Critics also worried that revenue losses from indexation might limit other tax credits and programs, though some conservative supporters saw the same revenue declines as means to engender fiscal discipline.[260] This expected disciplining effect probably clinched the vote in the Senate.[261] Despite several subsequent attempts to repeal indexing as a means of closing the budget deficit, the provision stuck,[262] likely because it came to be viewed, despite its fiscal impacts and the political motivations behind its passage, as a fairness-driven effort to protect taxpayers against unexpected increases in their liability.[263]

This splintered debate reveals the importance of reliance interests in indexing old laws. Failing to index means regulated persons, in this case taxpayers, will be at the mercy of variable laws. On the other hand, indexing

---

[252] Weaver, *supra* note 52, at 195–96.

[253] Weaver, *supra* note 52, at 201–03; Roberts, *supra* note 244, at 937; Economic Recovery Tax Act of 1981 (ERTA), § 104, Pub. L. No. 97-34, § 101, 95 Stat. 172, 179 (1981) (adding subsection (f) to 26 U.S.C. § 1).

[254] Economic Recovery Tax Act of 1981, § 104(c).

[255] S. Rep. 97-144, 118-19 (1981).

[256] *See* 97 CONG. REC. 19329, 19538 (1981).

[257] Weaver, *supra* note 52, at 200–01.

[258] *Id.*

[259] *See id.* at 200.

[260] *Id.* at 201; MONICA PRASAD, STARVING THE BEAST: RONALD REAGAN AND THE TAX CUT REVOLUTION 114 (2018) (explaining Republican theories that indexing would force Congress to take responsibility for otherwise hidden tax increases caused by inflation).

[261] Weaver, *supra* note 52, at 201–03.

[262] Weaver, *supra* note 52, at 205–07; Prasad, *supra* note 260, at 122.

[263] *See* Ronald Reagan, Remarks on Tax Reform to Concerned Citizens (May 29, 1985) ("By . . . indexing [credits] for inflation . . . we can make sure that the working families do not suffer under the burden of Federal taxation."). *Cf.* Shuldiner, *supra* note 18, at 547 n. 37 (describing the view that indexation protects vulnerable taxpayers).

harms those benefiting from the status quo. In the income tax case that was the public purse, which gained revenue from bracket creep. Moreover, indexing has important interaction effects. It can frustrate the desired function of related enactments, such as tax cuts that presume a certain amount of inflationary erosion.

The regular battles between these competing interests seem mostly to be decided by inertia. The multiple failed attempts to pass indexing show the difficulty of changing course, finally succeeding only after inflation hit record highs. The resiliency of indexing in the face of several repeal attempts further demonstrates the point. Important fiscal concerns were not enough to remove what had grown to be considered a mechanism of good governance.[264]

The momentum surrounding indexation continued into the next round of tax reform in 1986.[265] In the following years numerous other provisions were indexed, such as caps on contributions to Roth IRAs, certain deductions, and a variety of tax credits.[266] But this effort was incomplete. Despite pressure for further indexing, Congress failed to index a variety of other provisions, including the interest deduction and the basis for capital gains.[267]

Things stalled in the early 1990s with the failure to index the basis used in calculating capital gains for inflation. As previously explained, the appreciation (gain) on capital assets is calculated as the price upon a realization event (typically a sale) minus the basis (defined in statute as the "cost of such property").[268] Inflationary drift enters the equation through the basis because the cost at time of purchase is stated nominally, as is the price upon realization. Thus, the total gain can include increases that are due merely to changes in the value of the dollar rather than real appreciation of the asset. Put simply, the basis drifts with inflation, introducing error into the measurement of real income from the sale of the asset.

Supporters of indexation argue that it is unfair to tax these inflation-driven gains because it could impose tax even when the taxpayer suffers a real loss.[269] They also point out that the lack of indexation distorts the decision to save or consume because it untethers tax liability from real investment income.[270] Opponents point out that the preferential tax rates and delayed

---

264 *Cf.* Louis Kaplow, *Regional Cost-of-Living Adjustments in Tax-Transfer Schemes*, 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 5008, 1995) (providing view of prominent scholar in the field a decade later that "it is generally accepted that changes in the cost of living should be reflected in the tax system").

265 *See* Tax Reform Act of 1986, § 104, Pub. L. 99-514, 100 Stat. 2085 (Oct. 22, 1986). *See also* Jared Walczak, *Inflation Adjusting State Tax Codes: A Primer*, TAX FOUND. (Oct. 29, 2019) (describing momentum around state adoption of indexation during same period), https://taxfoundation.org/inflation-adjusting-state-tax-codes/.

266 *See* Kovach, *supra* note 250, at 606–07.

267 *See* Kovach, *supra* note 250, at 604 (collecting the numerous inconsistencies).

268 I.R.C. §§ 1001(a), 1011(a), 1012(a).

269 *See* Shuldiner, *supra* note 18, at 549 (neutrally describing this impact).

270 Hemel & Kamin, *supra* note 249, at 705.

realization applied to capital gain income more than account for the impact of inflation.[271]

Despite strong lobbying by indexation supporters, indexation had not been included in earlier reform bills. ERTA had not indexed capital gains in 1981 because of double counting concerns: it already dropped the top tax rate on capital gains by 20 percentage points, and at the time 60% of such gains could be excluded from income.[272] Then in 1986 Congress temporarily reversed course and removed the preferential treatment for capital income entirely out of a concern that it unfairly advantaged wealthy taxpayers.[273] Preferential treatment was soon reinstated in 1990,[274] but it proved politically impossible for the Bush administration to push through indexation in addition to the reinstatement.[275] This stall was the result of shifting political winds. Memories of the high inflation of the 1970s and 1980s were fading, and fiscal concerns had risen in importance among Republicans.[276] Many representatives, especially Democrats, were also concerned about being seen as giving rich taxpayers a windfall.[277]

Consequently, supporters of indexation looked to an unprecedented strategy—executive indexing. If the definition of cost was deemed ambiguous it could be interpreted by the Treasury to mean cost in real dollars (i.e. current dollars at the time of sale).[278] This argument was textually plausible but otherwise a long shot. In 1939, the Seventh Circuit, relying largely on nominalist principles and the 1792 Coinage Act, rejected a similar argument in *Bates v. United States*.[279] A taxpayer claimed that "cost" meant the amount he paid for securities based on the 1931 dollar, which was worth more than the dollar in 1934 because of FDR's gold redemption suspension.[280] The Seventh Circuit disagreed, holding that the gold value of the dollar was irrelevant because courts and statutes only dealt in units of "lawful money" which had been the same standard (the dollar) throughout the period in question.[281] In 1976 the Tax Court rejected a similar claim—that inflation should be deductible from nominal income—holding "our tax structure is not set up to take

---

271 *See id.* at 706; Bruce Bartlett, *Indexing Capital Gains by Fiat*, 135 TAX NOTES 883, 883 (2012).

272 Joint Economic Comm., The Economic Effects of Capital Gains Taxation 1 (1997).

273 Suyoung Moon, *Revisiting the 100-Year-Old Debate on the Preferential Treatment of Capital Gains*, 41 ABA TAX TIMES (2021).

274 *Id.*

275 Nathaniel C. Nash, *Here's a Twist: Gains Tax is Rising*, N.Y. TIMES (OCT. 31, 1990) (describing fiscally-driven "compromise" that frustrated presidential agenda for further revision of capital gains).

276 *Cf.* Justin Fox, *The Mostly Forgotten Tax Increases of 1982-1993*, BLOOMBERG (Dec. 15, 2017) (documenting fiscally-motivated correction to the tax cuts of the 1980s that first included indexation).

277 *See* David E. Rosenbaum, *Bush Drops Fight for Lower Tax on Capital Gains*, N.Y. TIMES (Sep. 30, 1990).

278 Hemel & Kamin, *supra* note 249, at 706–09.

279 Bates v. U.S., 108 F.2d 407, 408 (7th Cir. 1939).

280 *Id.*

281 *Id.*

into account the effects of inflation."[282] Nevertheless, proponents believed the recent development of *Chevron* deference would safeguard the interpretation from judicial reversal.[283]

This was the first time an argument for administrative indexing without congressional approval gained traction in the news cycle.[284] The momentum was such that President George H.W. Bush asked Attorney General William Barr to review the legality of the proposal.[285] After consideration, both the DOJ and the Treasury would independently determine unilateral indexation exceeded the Executive's lawful authority.[286] The main reason: the meaning of cost clearly meant the price paid at time of purchase, and thus *Chevron* was inapplicable.[287] Unless Congress had explicitly delegated authority to override the plain meaning of cost, the revisionist cost argument was inconsistent with separation of powers.[288] The DOJ's thorough opinion carried the day and efforts to renew similar arguments failed.[289]

Capital gains indexation was essentially dead in the water from that point on. Two repeated objections to subsequent efforts are worth mentioning. First, some commentators have observed that the rise of the major questions doctrine has made a strained interpretation of cost even less plausible.[290] Second, many observers oppose indexing capital gains in isolation because it might lead to tax arbitrage if other nominal provisions are not indexed simultaneously. A much discussed opportunity involves the business interest deduction, which allows for borrowers to deduct interest payments for non-personal loans.[291] These deductions are calculated, like capital gains, in nominal terms.[292] Interest has an inflationary component (lenders require compensation for the inflation-driven erosion in the value of their principal), so when one deducts interest payments the deduction is slightly larger than the real economic transfer because it accounts for both the true interest expense and an inflation-offset payment.[293] Under the current system taking out a loan to

---

282 Crossland v. Commissioner, 35 T.C.M. (CCH) 262, *3–*5 (1976).

283 *See* Memorandum from Charles J. Cooper, Michael A. Carvin & Vincent J. Colatriano to Dr. Lawrence A. Hunter, Exec. Vice Pres., Nat'l Chamber Found. 11–12 (Aug. 17, 1992), https://www.atr.org/sites/default/files/assets/shaw%20pittman%20potts.pdf.

284 Other administrative efforts by the U.S.S.C and the Civil Penalties Adjustment Act were explicitly authorized by Congress.

285 *See* Bruce Bartlett, *Indexing Capital Gains by Fiat*, 135 TAX NOTES 883, 884 (2012).

286 *Id.*

287 *See* Legal Authority of the Department of the Treasury to Issue Regulations Indexing Capital Gains for Inflation, 16 Op. O.L.C. 136, 146–51 (1992).

288 *See id.* at 138, 151–52.

289 See Hemel & Kamin, *supra* note 249, at 707–09.

290 *Id.* at 716–18; *but see* Charles J. Cooper & Vincent Colatriano, Law in an Age of Austerity: The Regulatory Authority of the Treasury Department to Index Capital Gains for Inflation: A Sequel, 35 HARV. J. L. PUB. POL. 487, 504–13 (2012) (arguing the argument is still viable).

291 I.R.C. § 163.

292 Hemel & Kamin, *supra* note 249, at 704.

293 John Bossons, *Indexing for Inflation and the Interest Deduction*, 30 WAYNE L. REV. 945, 954–58 (1984).

finance the purchase of the capital asset would give the borrower access to that bonus inflation-driven deduction but the borrower would also be taxed on inflationary gains at realization. Thus the impact of inflation nets out. But if only capital gains were indexed for inflation a person financing their investment would have an advantage over other purchasers because they would get the inflation-related deduction but not pay tax on inflation-related gains.[294]

The arbitrage critique is forceful but could go even further. It leaves out all the other interactions between capital gains and currently indexed provisions. These already create distortions and arbitrage potential. For example, it is well-documented that the failure to index capital income compared to other forms of income distorts individual savings decisions.[295] One estimate puts the costs of these distortions at roughly 1% of GDP per year.[296]

Stepping back, we can draw several lessons from the tax indexation saga. First, it is difficult to index complex schemes wholesale. It took multiple rounds of legislation to index the tax code even partially. Second, the legislature can be shortsighted and fail to account for the interactions in a statutory scheme. Thus even a politically responsive decision not to index capital gains introduced distortions that the political process never intended to produce. Finally, reliance and inertia matter. Once an indexation procedure is selected it can be difficult to adjust or replace legislatively.

When compared to Social Security, the tax experience suggests a qualification to the emerging thesis about how to respond to inflationary drift. While ad hoc legislative updates certainly cannot keep up with drift, indexation is not a panacea. Indexation may remedy the accuracy problems of ad hoc updating—in that it removes political influence over the adjustment amount—but the decision to index in the first place is still subject to political shortsightedness if the legislature fails to recognize the subtle costs of an incoherent approach to a statutory scheme. Delegation to an agency expert in administering the relevant statutes could help, but the tax experience demonstrates how hard it is to accomplish this under the status quo. Separation of powers bars unilateral agency action and the legislative process does not always delegate updating powers of sufficient scope.

---

294 Hemel & Kamin, *supra* note 249, at 704. Hemel and Kamin provide a helpful example: If real interest rates are zero but inflation is 10% the nominal interest paid on a $100 loan will be $10. If one uses the $100 loan to buy a stock, the value of which would also increase by 10% due to inflation, and sells it with a $10 nominal and $0 real gain. In the current system you could deduct the $10 interest expense but you would pay tax on the $10 nominal gain (at 20%). If only capital gains were indexed you could deduct the full $10 but pay no tax on the gain, making you $2 richer than an investor who did not finance the transaction. *Id.*

295 *See* Martin Feldstein, *Capital Income Taxes and the Benefit of Price Stability* 2 (Nat'l Bureau of Econ. Rsch, Working Paper No. 6200, 1997).

296 *Id.*

3. Civil Penalties round one: information gaps and flawed formulas

Roughly contemporaneously with early tax indexation efforts Congress began to grasp that drift could seriously erode financial sanctions.[297] This led Senator Frank Lautenberg to commence a decades-long effort to index monetary penalties to inflation. Congress approached this effort with more trepidation than its prior attempts and rightly so. Even after a decade of planning, the initial mechanism enacted in 1996 was a catastrophic failure, undermined by errors in the adjustment formula, misconceptions about the complexity of the U.S. code, and an inflexible attitude towards administrative agencies.

a. Early attempts to pass an inflation adjustment act

In 1986, Senator Lautenberg introduced two bills to address the erosion of monetary penalties due to inflation.[298] The Civil Penalties Inflation Adjustment Act would have required agencies to update civil penalties within their authority for changes to the cost of living, as measured by the annualized urban Consumer Price Index (CPI-U), between the year the penalty was last determined and 1986 rounded to the nearest $10.[299] Presumably to avoid unnecessary disruption to very old statutory schemes the first adjustments were capped at 1,000%.[300] Following this initial catch-up adjustment, agencies would be required to update their penalties annually using the same methodology.[301] The bill only contemplated upwards adjustments. Net deflation would not trigger updates.[302] The companion bill, the Federal Criminal Penalties Inflation Adjustment Act, would have required the U.S.S.C. to make similar adjustments of the fines in the federal Sentencing Guidelines but only every four years and rounding to the nearest $100.[303] Because the penalties had been set recently in 1984 there was no cap on the initial adjustment.[304] Both bills required the OMB to track the penalties and report annually on the amounts collected under them and any inflationary adjustments made.[305] Congress failed to act on these bills in 1986 and they were reintroduced with identical language in 1987.[306] They failed to make it out of the Judiciary Committee for uncertain reasons.

---

[297] *See* David A. Lopez, *The Great Inflation: A Historical Overview and Lessons Learned*, PAGE ONE ECONOMICS (Oct. 2012).

[298] S. 2558, 99th Cong. (1986); S. 2559, 99th Cong. (1986).

[299] S. 2559, 99th Cong. § 4–5 (1986).

[300] *Id.*

[301] *Id.* § 4.

[302] *Id.* § 4(c)(1) (Defining the adjustment only as the amount the current CPI "exceeds" the prior year).

[303] S. 2558, 99th Cong. § 4 (1986).

[304] *Cf.* 132 CONG. REC. S7595 (daily ed. June 16, 1986).

[305] S. 2558 § 5; S. 2558 § 7.

[306] 133 CONG. REC. S5172–74 (daily ed. April 10, 1987).

What is clear is that the discussion around these bills showed Congress how little it knew about the scale of the inflationary drift problem. The legislative history reveals basic gaps in knowledge of even the number of fines and penalties.[307] Only as the legislative process developed did the dramatic scale of the issue come into focus, Congress even discovered the rather striking fact that some money penalties had not been updated since 1793.[308]

Sen. Lautenberg appeared to have two considerations in mind in sponsoring the bill—the recent high inflation of the early 1980s and the risk that inflationary erosion would undermine Congress' efforts be tough on crime, including corporate crime.[309] More broadly, he framed the issue to the Senate as a concern about Congressional intent being undermined.[310] He also mentioned revenue gains from increased fines in his floor speeches.[311]

The criminal penalty adjustment bill was never reintroduced, but a watered-down version of the civil penalty bill reemerged in 1989.[312] The bill was amended in response to DOJ criticism that automatic and broad-brush adjustments could lead to unfair impacts.[313] The revised bill merely directed the OMB to calculate what adjustments should be made to all civil money penalties to keep pace with inflation but contemplated individual legislation to actually implement the adjustments.[314] It also inserted a more elaborate six-tiered rounding scheme for the OMB to use in place of the nearest $10 language.[315] The bill was enacted into law on October 5th, 1990.[316]

Congress refrained from direct action until it received more information from the OMB, which reported that there were almost 1,000 unindexed penalties across the U.S. code.[317] Even with this clear evidence of the need for action, Congress still struggled with how to implement the adjustments,

---

307 *See, e.g.*, 136 CONG. REC. S1494 (daily ed. Feb, 22, 1990) (Sen. Lautenberg) ("Unfortunately, the OMB maintains no detailed central account that tracks penalty assessments and collections and matches them with the laws under which they are imposed. There is no accounting of which laws need updating the most. Apparently, hundreds of millions of dollars is seen as small change that is not worth watching more closely.").

308 *Id.* at 1494. *See also* H.R. REP. NO. 101–697, at 2 (1990) ("40 percent of [civil] penalties would need to be increased in amounts greater than $1000 (ranging up to greater than $1 million) in order to account for inflation").

309 *See* 132 CONG. REC. S7594–95 (daily ed. June 16, 1986) ("By its inaction, Congress each year pulls the punch of penalties for a variety of transgressions.").

310 *Id.*

311 *Id.*

312 H.R. REP. NO. 101–697, at 3 (1990).

313 *Id.*

314 136 CONG. REC. 1494 (daily ed. Feb. 12, 1990) (Sen. Lautenberg).

315 Pub. L. No. 101-410, 104 Stat. 890 (Oct. 5, 1990).

316 *Id*.

317 *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-03-409, CIVIL PENALTIES AGENCIES UNABLE TO FULLY ADJUST PENALTIES FOR INFLATION UNDER CURRENT LAW 5 (2003) (describing 1990 report findings).

especially if they should be automatic, and rejected a bill that would implement across-the-board, uncapped automatic adjustments in 1993.[318]

b. Congress gets its math wrong

Finally, in 1996 Congress authorized an actual updating procedure as part of the Omnibus Debt Collection Improvement Act of 1996. It applied to civil penalties across all but four statutes—the Internal Revenue Code, the 1930 Tariff Act, OSHA, and the Social Security Act were exempted.[319] The act resolved the debate over whether Congress should update by individual legislation or delegate to agencies by requiring agency heads to make automatic adjustments for inflation every year as well as a catch-up adjustment in 1997.[320] The same procedures applied to all agencies. Updates were to be based on the annual CPI-U calculations outlined in the 1990 Act with a critical exception: *all initial catch-up adjustments were to be capped at 10%*.[321] The legislative history does not explain why this cap was implemented or why the 1,000% cap initially proposed by Senator Lautenberg was reduced so dramatically. It seems likely that the result was a quickly considered political compromise between those who favored an automatic, agency-administered update system and those who worried about the unfairness of dramatic jumps in penalties.[322] It is also possible that in the chaotic final push of getting such a large omnibus bill passed some regulated entity pushed the change to avoid increasing punishments.

Whatever the reason, the change was massively counterproductive. By capping the initial adjustment at 10% the act ensured that values which had been eroded more than 10% in real terms could never catch up to current prices.[323] The impact was especially dramatic for large corporate fines. In 1996 the NTSB's fine relating to failure to provide crashworthiness information to consumers should have been updated from $800,000 (the initial fine set in the 1960s) to $2.45 million be equivalent in real terms.[324] Instead it was updated to $880,000.[325] A report by the GAO in 2003 found two other counterproductive methodological problems resulting in lower than intended adjustments. First, the act's decision to use the CPI-U for June of the year before the adjustment as the measure of current prices meant adjustments effectively lagged real price increases by one year.[326] And second, the

---

[318] See James Ming Chen, *Inflation-Based Adjustments in Federal Civil Monetary Penalties*, YALE L. & POL. REV. 1, 18 (2016).
[319] GAO-03-409, *supra* note 317, at 33–34.
[320] Pub. L. No. 104-134, § 31001(s).
[321] *Id.* at § 31001(s)(1)(C)(2).
[322] *See* Chen, *supra* note 318, at 19.
[323] *Id.* at 19–22.
[324] Civil Penalties, 64 Fed. Reg. 37876-77 (July 14, 1999).
[325] *Id.*
[326] GAO-03-409, *supra* note 317, at 23.

rounding rules meant some fines at the bottom end of their rounding categories were not updated until massive inflationary drift had occurred.[327] For example, under the rounding rules a fine between $101 and $1,000 (inclusive) should have increases rounded to multiples of $100.[328] This means that a $110 dollar fine would not see any increase until cumulative inflation reached 45% (i.e. when the increase exceeded $50). At typical rates of inflation that would take decades. The GAO sampled six agencies and found that because of this rounding problem 90% of their penalties would not be adjusted for four years and 42% for at least ten years.[329] This was particularly problematic for small dollar value fines that were structured to be multiplied by a very large number of violations. For example, the NHTSA's $5.50 penalty for every 0.1 mpg exceeding CAFE fuel economy standards could not be adjusted for 28 years.[330]

As a result of these errors Congress' 1996 attempt to address impact drift did exactly the opposite of what was intended—locking in rather than resolving inflationary drift in many places. What institutional dynamics led to such a miserable performance? The obvious candidate is the use of the omnibus process to enact such a far-reaching and complex piece of legislation. It seems probable that with more consideration a staffer or lobbyist would have spotted the unintended effects of the 10% cap as well as the lag caused by using CPI data from the prior year. If one believes the 10% cap was not inadvertent but intended to prevent a large increase in the real values of penalties then the Congressional tendency to prioritize political rather than technocratic concerns gains explanatory power.

Besides the rushed passage and possible political compromise, a more fundamental limitation on Congress' ability to deal with inflationary drift is hinted at by the rounding errors. Even after a decade of legislative consideration, Congress simply did not understand how its procedure would impact the full variety of penalties covered. It had to paint with a fairly broad brush and had neither the time, expertise, nor the drafting creativity to accommodate hundreds of distinct penalty structures and amounts. Put plainly, perhaps updating over a thousand distinct provisions across radically different regulatory schemes via a single mandatory procedure was a bad idea from the start. Whatever the cause, the ultimate verdict on the 1996 act came from the agencies charged with implementing it: only 9 of 80 covered agencies implemented on time and six years later 20% had yet to implement at all.[331]

---

327 *Id.* at 26–27.
328 *Id.* at 27.
329 *Id.* at 28.
330 *Id.* at 29.
331 GAO-03-409, *supra* note 319, at 2–3.

4. Civil Penalties round two: flexible formulas but oversight challenges

a. Two decades later Congress corrects the procedure

Despite the major unintended consequences of the 1996 act Congress did not revise its updating structure until 2015, when it passed the Federal Civil Penalties Inflation Adjustment Improvements Act ("Improvements Act") as part of the Bipartisan Budget Act of 2015.[332] This retained the basic structure but attempted to address the inflexibility of the prior act in several ways. First, it required rounding to the nearest $1.00 and changed the CPI used to the October CPI, meaning the adjustment would always be based on CPI data from the same federal fiscal year.[333] Second, to correct for the inadvertent lock-in effect it required a new catch-up adjustment to be implemented by 2016.[334] But, perhaps recognizing the potential for outliers among the many penalties affected, Congress provided an escape hatch to the catch up adjustment. If the agency deemed the catch-up to have a negative economic impact or determined the social costs of updating outweighed the benefits it could implement a lower adjustment if the Director of the OMB concurred.[335] These exemptions do not apply to subsequent updates, though agencies are permitted to forgo a subsequent update if they updated the penalty for other reasons the same year and that increase was larger than the required update. It also capped the catch-up adjustment at 150% rather than 10%.[336] The 2015 improvements also subjected penalties under OSHA and the Social Security Act to inflation updates and required the OMB to provide updating guidance every December and the GAO to report annually on the adjustments made.[337] Finally, the improvements exempted adjustments other than the initial adjustment from § 553 of the APA, alleviating agencies from the burden of going through notice and comment.[338]

Implementation of the new provisions began fairly seamlessly. 46 of 52 agencies subjected to the Act published initial catch-up adjustments.[339]

---

332 Pub L. 114-74 (Nov. 2, 2015).

333 *Id.* at § 701(b)(2). Because the OMB publishes updating guidance in December the October numbers are generally the most recent available.

334 *Id.* at § 701(b)(1)(A).

335 *Id.* at § 701(c).

336 *Id.* at § 701(b)(2)(B).

337 *Id.* at § 701(b)(4).

338 *Id.* at § 701(b)(1).

339 U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-634, CERTAIN FEDERAL AGENCIES NEED TO IMPROVE EFFORTS TO COMPLY WITH INFLATION ADJUSTMENT REQUIREMENTS 6 (2017). Three agencies did not adjust because they believed they were not subject to the act. *Id.*

Nearly universal compliance continued with all but a handful of agencies publishing updates annually through 2020.[340]

b. The Trump Administration attempts to evade the revised procedure

One notable drama marred this otherwise solid record—the NHTSA's delay of its catch-up adjustment to penalties associated with automobile fleet fuel economy standards. Ultimately this controversy would wind up in front of the Second Circuit and raise questions about conflict between the Improvement Act and executive power. In 2016, as with other agencies, the NHTSA published its initial catch-up to the penalty imposed on automakers for failing to comply with fleet fuel economy standards (CAFE standards). The penalty had been set for well over a decade at a $5.50 fee multiplied by the tenths of a mile per gallon an automaker's fleet exceeded a fuel economy target multiplied by the number of cars in the fleet.[341] While rarely imposed, the penalty could reach into the millions for a large manufacturer and is central to robust emissions credit trading.[342] The NHTSA proposed to update the penalty to $14, the maximum allowed under the 150% cap.[343] However, after lobbying by the auto industry, the agency determined that the adjustment should not be applied until 2019 to avoid unfair retroactivity but declined to reduce the adjustment because of economic harm.[344] Then, following the inauguration of President Trump, the agency received a communication from the White House instructing it to delay the final rulemaking.[345] It did so temporarily and then indefinitely suspended the update via final rule.[346] That indefinite suspension was challenged as beyond NHTSA's statutory authority and ultimately vacated by the Second Circuit, which held that the Inflation Adjustment Improvements Act did not grant agencies the discretion to delay adjustments indefinitely.[347]

---

340 U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-567R, CIVIL MONETARY PENALTIES: REVIEW OF FEDERAL AGENCIES' COMPLIANCE WITH THE 2018 ANNUAL INFLATION ADJUSTMENT REQUIREMENTS 3 (2019); U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-488R, CIVIL MONETARY PENALTIES: REVIEW OF FEDERAL AGENCIES' COMPLIANCE WITH THE 2020 ANNUAL INFLATION ADJUSTMENT REQUIREMENTS 3 (2021).

341 NHTSA Final Rule, 81 Fed Reg. 95489, 95489 (Dec. 28, 2016). Prior to the 1996 inflation adjustment the penalty had been set at $5.00 for decades.

342 *Id.*; *see also* ICCT, Briefing: Credit Trading in the US Corporate Average Fuel Economy (CAFE) Standard (2014), https://theicct.org/sites/default/files/publications/ICCTbriefing_CAFE-credits_20140307.pdf.

343 81 Fed. Reg. 95489.

344 *Id.* at 95490.

345 Delay of Effective Date of NHTSA Final Rule,82 Fed. Reg. 8694, 8694 (Jan. 30, 2017).

346 Indefinite Delay of NHTSA Final Rule, 82 Fed. Reg. 32139, 32139 (July 12, 2017).

347 NRDC v. NHTSA, 894 F.3d 95, 109 (2d Cir. 2018).

But the NHTSA was not finished. It engaged in a new rulemaking in hope of finding that either the CAFE penalties were not civil money penalties—in contravention of its consistent position since 1996—or that there was a negative economic impact which would justify lowering the catch-up adjustment.[348] It had the support of the OMB in this effort.[349] This was again challenged and the Second Circuit again vacated the NHTSA's rulemaking and ordered the $14 penalty to take effect immediately, holding that the CAFE provision was a civil penalty but not reaching the substance of the negative economic impact question.[350]

c. Lessons from the civil penalties saga

What does this convoluted tale tell us about inflation adjustment? In one sense it is a victory; the clear provisions of the 2015 Improvement Act allowed a court to enforce Congress' vision of economically current fines in the face of what has been described as a special-interest driven attempt to throw a bone to political allies.[351] The heavy fight put up by the auto industry against the increase also perhaps shows the magnitude of the unintended benefit drift had provided.

But the case also points to weaknesses in the current scheme. The Second Circuit's ruling that agencies lacked authority to forestall updates may be concerning if one believes future updates will cause real economic harm, especially in periods of higher inflation. And the interaction between the White House and the NHTSA makes one wonder about the usefulness of the requirement that the OMB concur in the use of a negative economic impact exemption. Did this really provide a check on arbitrary agency action? The concern may be theoretical now that all catch-up adjustments have been made, but it demonstrates the vulnerabilities of a flexible administrative updating system to interest group capture. The energy it took to prevent the political manipulation of the updating procedure was enormous, involving high-powered NGOs, plenty of press, and two appellate panels. And the efforts of the NHTSA to forestall the update were neither subtle nor particularly skillful,[352] but they still resulted in an almost three-year delay. It is easy to imagine a more competent effort utilizing a negative economic impact clause to avoid future updates with little accountability. When one compares the 2015 and 1996 efforts a clear tradeoff in updating emerges: flexibility versus

348 New York v. NHTSA, 974 F.3d 87, 90 (2d Cir. 2020).

349 *Id.*

350 *Id.* at 101.

351 Rebecca Beitsch, *Court for second time strikes down Trump admin rollback of automaker penalties*, THE HILL (Aug. 31, 2022) (quoting the Sierra club "The Trump Administration cannot give away polluting passes to automakers who lag behind on meeting standards required by law").

352 *See* Press Release, California Dep't of Justice, Attorney General Becerra Secures Victory in Lawsuit Challenging Trump Administration Decision to Cut Penalties for Automaker Violations of Fuel Efficiency Standards (Aug. 31, 2020) (characterizing the efforts as "wrong-headed").

accountability. The impact of drift is too variable across even a single type of provision for a standard updating procedure to be applied without some unintended or adverse effects. But more accommodating procedures can be repurposed for political ends.

Finally, the decision to cap the catch-up adjustment well below the actual deterioration, even in the 2015 bill, underscores that updating old, nominally drafted statutes implicates large reliance interests, as the resistance of the auto industry in the NHTSA cases demonstrates.[353] Either reliance concerns or effectuating the original design can be legitimately prioritized, but this choice requires weighing of values not just tweaking formulas. The challenge is when, as they did twice with civil penalty adjustments, legislators try to split the difference. The result is a wholly new law masquerading as technical updating that still diverges from the original legislative scheme but also imposes new costs on regulated entities. Using a broad-based process compounds the issue, making it more difficult to weigh reliance on individual provisions. Even the limited escape valve of negative economic impact in the 2015 law does not fully alleviate this problem because there may be non-economic forms of reliance that the updating procedures prohibit from being weighed.

5. Sentencing Guidelines: a successful administrative-legislative partnership of uncertain durability

The final case study is distinct in that the updating effort was driven by an independent agency. The United States Sentencing Commission is empowered to promulgate amendments to federal sentencing law subject to Congressional veto.[354] This unique structure illustrates the tradeoffs of a flexible, agency-driven updating process.

Congress' refusal to pass a criminal fine indexing bill was not the last word on the subject. In 2015 the Sentencing Commission, inspired by recent Congressional efforts, examined whether it should update the monetary tables in its guidelines.[355] These tables fell into two categories. The first set fine amounts for offenses of a particular level (fine tables). The second determined the offense level of the crime based on the amount of pecuniary loss involved (loss tables). Greater pecuniary loss results in a higher offense level which results in a harsher fine. These values had not been adjusted for

---

[353] Other notable examples of interest groups fighting to maintain inflationary drift include the Angel Capital Association successfully lobbying against updating the revision of the eroded accredited investor standard (Monson, *supra* note 24, at 38) and construction unions fighting for the maintenance of the low Davis Bacon Act contract value threshold (Weaver, *supra* note 52, at 240).

[354] *See* Mistretta v. United States, 488 U.S. 361, 374–77 (1989).

[355] Notice of Proposed Amendments and Request for Public Comment on Sentencing Guidelines, 80 Fed. Reg. 2570 (Jan. 16, 2015).

inflation since the guidelines were first issued in 1987.[356] As a result, crimes resulting in smaller financial harm were triggering greater increases in offense level than before and thus longer sentences.[357] Notably, inflation's impact was not unidirectional. The tables containing fines had also been left alone since 1989.[358] These had become roughly 50% less punitive in real terms.[359]

Ultimately the Commission addressed these dual drifts by making a one time, CPI-based update. Several thorny questions complicated the decision. Foremost was the propriety of updating. The DOJ opposed adjustments out of fear that updating the loss tables for inflation would "lead to an unwarranted reduction in sentences."[360] Why these adjustments to reflect economic reality were unwarranted, the DOJ did not say. Possibly the opposition was another instance of reliance: the DOJ thought more punitive guidelines had become useful. Regardless, the argument failed. At the public hearing on the revisions the DOJ's representative actually retreated from the position.[361] And the Commission dismissed the concern about an unwarranted reduction in sentences, describing it as puzzling.[362] To the Commission, any debate about whether the now higher penalties were beneficial was besides the point: "good governance" required calibrating the penalties to match their effect at enactment.[363]

The DOJ was also concerned about administrative authority. It argued that the death in committee of Senator Lautenberg's bill to adjust criminal penalties indicated Congressional hesitation about indexing fines.[364] The Commission also rejected these concerns. In the final rule, it cited the Improvements Act as implicit evidence of Congressional support for updating.[365] In the public hearing commissioners also speculated that the choice of an agency to set sentencing guidelines implicitly authorized temporal

---

356 80 Fed. Reg. 2570, 2579 ("While some of the monetary values . . . have been revised since they were originally established in 1987 (e.g., the loss table in § 2B1.1 was substantially amended in 2001), they have never been revised specifically to account for inflation. Other monetary values . . . have never been revised.").

357 Notice of Submission to Congress of Sentencing Guidelines, 80 Fed. Reg. 25782, 25789 (May 5, 2015).

358 *Id.* at 25789–90.

359 *See id.*

360 DOJ Comment Letter on Proposed Amendments at 12 (March 9, 2015), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150312/DOJ.pdf.

361 *See* U.S.S.C., Public Hearing on Proposed Amendment to Sentencing Guidelines 139 (March 12, 2015) (response of Mr. Wagner) (responding "I'll do my best" to an invitation to address the inflation adjustments which Wagner had failed to discuss in his prior comments).

362 March 12, 2015, Hearing, *supra* note 360, at 141, 146, 149.

363 March 12, 2015, Hearing, *supra* note 360, at 149.

364 DOJ March 9, 2015, Comment Letter, *supra* note 360, at 12.

365 80 Fed. Reg. 25782, 25789.

updating.[366] One commissioner justified the effort as meeting the commission's obligation to reduce unwarranted disparities.[367] However, in the text of the final rule the Commission only cited its general amendment powers as a source of authority.[368] These powers are more than sufficient to justify the update, but the lack of citation to any explicit guiding factor raises questions about whether the Commission will feel compelled to engage in similar updates in future.

It was also observed that updating automatically and regularly could cause instability and strategic behavior.[369] They worried that trials occurring near an update during an inflationary period would be dragged out by defense attorneys to benefit from upwardly revised loss tables.[370] In response, the Commission ultimately removed language it had been using about considering updates every four years from the final amendment.[371] The Commission has not made another update since 2015.

The Commission also faced tricky technical questions, such as which measure of inflation to use, how to deal with ex post facto concerns, and the baseline year to use in adjustments. The Commission chose to use CPI despite a recommendation to use the GDP Deflator.[372] The reasoning behind this choice is unknown. To ensure the amendments were not unduly retroactive the Commission made a revealing hybrid decision. It applied the old, unadjusted fines to any offenses committed before the effective date of the final rule, but it subjected those old offenses to the newly updated offense level thresholds.[373] In short, it applied the adjustment that benefited defendants retroactively and not the one that increased punishment. One might wonder whether the need to make this choice is consistent with the Commission's perspective that it was engaged in a purely technocratic exercise. Finally, the Commission decided to assume that prior ad hoc adjustments had implicitly

---

366 *See* March 12, 2015, Hearing, *supra* note 361, at 151 ("But it is interesting that the last time [Congress] looked at it was right before the Commission was founded. I mean, you know, they thought about this in 1987 and then, you know, here we are . . . It seems temporally that the thought is there is an agency that can account for it.").

367 *See* March 12, 2015, Hearing, *supra* note 361, at 144. Commissioner Pryor referenced 28 U.S.C. § 3553(a)(6) in support of this claim, but that is guidance on the factors a court should consider in imposing a sentence, not a source of authority for the commission.

368 80 Fed. Reg. 25782, 25782 (citing 28 U.S.C. § 994(a),(o),(p)). One should also note that the position of the U.S.S.C. vis a vis Congress is different from other administrative agencies. Any amendments to the Sentencing Guidelines proposed by the Commission are reviewed and can be changed by Congress. *See* 28 U.S.C. § 994(p). Though in the vast majority of cases Congress makes no changes.

369 March 12, 2015, Hearing, *supra* note 361, at 143.

370 *Id.* ("If I were a defense attorney . . . I would do everything I could to stall my sentencing, until that next [inflation adjustment], to see if my guy was going to get a break.").

371 *Cf. id.* at 143 (discussing the initial proposal).

372 *See* 80 Fed. Reg. 25782, 25789; DOJ March 9, 2015, Comment Letter, *supra* note 360, at 14.

373 80 Fed. Reg. 25782, 25789-90.

accounted for inflation—though they had not done so in any formal way—and thus chose the last update as the year to base its new adjustments on.[374]

Per the unique procedures of the Commission the final guidelines were issued on May 5, 2015, but did not become law until the period for Congressional veto passed on November 5, 2015.[375] The impact was significant, even accounting for the discretionary nature of the Guidelines. The Commission estimated that the changes to loss thresholds would free up almost a thousand prison beds within five years.[376] The increases to the fines table likely resulted in greater revenues and potentially increased deterrence, though data is unavailable.

In retrospect, the updates can be considered a qualified success. They were well-informed, and coherent. Most critically they thoughtfully approached technically complex issues, such as retroactivity and the interaction between loss tables and fines. This nuanced approach demonstrates the potential of delegation.

However, the debates involved in updating the Guidelines reveal several challenges in implementing such a scheme. First, the difference between good governance and policymaking is artificial. The Commission favored the reliance interests of defendants over other stakeholders in rejecting the DOJ's opposition to offense level increases and in the selective retroactive application of the adjustments. Yet the commissioners' repeated insistence that they were merely engaged in good governance makes one wonder if they fully grasped the import of their choices. Any shift from the status quo will require picking winners and losers. Ensuring such decisions are democratically accountable is a key challenge. Second, the technical details of updating are nontrivial. How should one reflect prior updates that may or may not have implicitly accounted for inflation? What adjustment methodology should one use? These questions lack obvious answers and required careful consideration by the Commission. Finally, the lack of a plan for subsequent adjustments demonstrates a drawback in such an agency-driven procedure. The 2015 update was the last explicit inflation adjustment to the Guidelines. Over the intervening years the CPI has risen 25%.[377] A more accountable effort needs an external impetus for future efforts. Absent the inclination of a handful of appointed, busy commissioners fines and thresholds could easily drift in the future.

---

374 *See id.* at 25789-90.

375 *Id.* at 25782.

376 *Id.* at 25790.

377 *Historical CPI-U Data*, *supra* note 8.

IV. CONCLUSION: THE NEED FOR COLLABORATIVE LAWMAKING IN A DYNAMIC SOCIETY

Inflationary drift presents a battle between respect for written law and applying that law justly in new contexts. It is a duel between fighters at full strength. There is no clearer or more precise legal command than the dollar value enshrined in statute. Simultaneously, one is hard pressed to find a more reliable or objective measure of contextual change than the shifting value of money. The clarity of these opposing factors leaves no room to hide from the problem they present: what to do when context changes but the law does not?

The Constitution's authors understood this problem well. As the opening quote from Governour Morris in response to a proposal to index judicial salaries to the price of grain suggests, the framers recognized that social change could undermine written law and that no formula could fully anticipate those changes. Yet they also recognized that a specific value is practically required. Judges don't work for indeterminate pay and the law functions through detail. The framers had a solution: delegate to the legislature. Congress' regular sessions and relatively flexible lawmaking procedure would mitigate the obsolescence challenges of a constitutional provision only changeable by amendment. Meanwhile, the boundaries set out in the compensation clause and the democratic accountability of Congress would prevent overstepping. For a rather long time this sort of delegation worked. While prices were relatively stable and statutory law fairly sparse, Congress was able to keep statutes current.

But the framers did not anticipate one thing—that the value of money would change in faster and prolonged ways. It would have been rather odd if they had thought of this. A crucial goal of their convention was to create monetary stability, and no one designs a government for failure. Nevertheless, this blind spot shaped their choice of delegate. Had they known the future they might have picked a nimbler institution or one less likely to ignore subtle technicalities in favor of political interests. Or they might have given the other branches a more explicit role to play in updating the law. They did not. And over time a series of doctrines developed—nominalism, plain meaning, and nondelegation—that incorporated the blind spots of that original decision by reinforcing strict formal separation of lawmaking power.

Fast forward to today, on the other side of a sweeping upward price curve, and we are left to contend with their limited foresight. What we know is this: The legislative process envisioned by the framers did not keep up with the heightened pace of change. Many statutes drifted in harmful ways. Criminal sentences grew harsher. Government benefits eroded. And macroeconomic volatility was imported into the very boundaries of the law itself, boundaries that defined who could trade in what markets, which employers had to comply with which rules, and even who could get into court.

Doctrines rooted in separation of powers are largely to blame for this state of affairs. Nominalism and the plain meaning rule have hindered

agencies and courts from taking unilateral action. Likewise, nondelegation principles, if not the doctrine itself, have restricted Congressional responses. Congress has generally controlled the updating procedure itself or provided inflexible guidelines to agencies. It has never felt empowered to give executive agencies authority to adjust penalties or payouts without specific instruction or veto. To be sure, exceptions exist, but formal lines retain much force and have clearly chilled more flexible attempts to address inflationary drift.

This article has attempted to illustrate how much the existing system has broken down in the face of unprecedented change. It also aims to point the way to a new approach. One option is to take a page from the framers' book and delegate further. Clearly, ad hoc updating has proven unworkable and, as the taxation and civil penalties cases demonstrate, having Congress develop an indexing procedure for each vulnerable law presents its own problems. Congress lacks the time and expertise for individualized efforts and broad-brush approaches can lead to significant error. Compared to that, having agencies determine when and how to update seems attractive. Indeed, it seems almost unavoidable. But the case studies reviewed above should give one pause before embracing such a wholesale delegation. Determining how to update a monetary value is not pure mathematics. At the very least, updating involves picking winners and losers between those relying on the nominal status quo and those who have been harmed by erosion. How should sentencing indexation be applied retroactively? Which components of income should be indexed? Which price indices best reflect the policy goals of indexed provisions? Any answer to these questions will benefit some constituencies and disadvantage others. And even more fraught judgments occasionally arise. Should the fiscal impact of entitlement programs increase automatically based on criteria set 50 years ago? What size claims should be allowed into federal courts? Surely some of these questions are best suited for a deliberative and democratically responsive body. Moreover, as the White House-led attempt to subvert legislatively mandated CAFE penalty updates shows, even decisions that might seem proper to delegate to agencies present opportunities for corrupt or arbitrary decision making. This discretion can be concerning even when exercised in good faith. Criminal defendants in this country are likely not comforted by the fact that sentencing loss tables will only stay current if the sentencing commissioners decide to include inflation updates on their agenda.

In short, no one branch is capable of resolving inflationary drift of statutes without serious capability or accountability concerns. A collaborative solution is needed. The successes and failures exhibited in the above case studies point towards a more workable sharing of power. Congress, while completely unsuited for determining updating amounts or applying updates each year, is fit to make the macro policy choices about whether updates should be sacrificed to fiscal or other concerns. Agencies, while not well suited and perhaps unable to make decisions on when to update, are the ideal parties to decide how to update. They understand best the interactions within

the statutes they administer and are well-positioned to make the technical but impactful choices in arriving at an updating amount. But there is always the possibility of pretext in agency updating. As the CAFE updating scandal proved, the judiciary is absolutely up to the task of sniffing out when agencies are attempting to evade a Congressionally assigned mandate. Courts can also help police the lines between what levels of decisions are for agencies and which are for Congress.

If this approach sounds familiar that's because it is. A number of scholars and jurists have observed that a similar updating process plays out with non-monetary statutory provisions via interpretation.[378] But this approach is rarely acknowledged for what it is because it contradicts separation of powers formalism. The great value of studying inflationary drift is that it removes this noise. We get to observe the implications of that formalism without the safety valve of interpretation. The results are stark: insisting on such strict separation is totally unworkable in a society of sustained change. Congress alone cannot ensure a body of law that matches citizen expectations. The three branches must integrate their dispersed powers if we are to have law that fits the times we live in. Those who say such an approach is not within the constitutional design should take another look at Figure 1. The Constitution did not design for that sort of sweeping change either.

[378] *See, e.g.*, Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PENN. L. REV. 1, 18–19 (2014); Donald C. Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 MICH. L. REV. 672, 675 (1987); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 493 (1989).