Administered Prices and the Concentration of Economic Power

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The celebrated clash between the President of the United States and the steel industry in last year's steel crisis sharply brought to public attention problems of administered prices and the concentration of economic power. In this Article based on the hearings of the Kefauver Subcommittee on Antitrust and Monopoly, Professor Auerbach deals with the economic and noneconomic consequences of economic concentration in answering the question whether we should be concerned about the concentration of economic power. He discusses various solutions, including the breakup of concentrations and their regulation by government. Professor Auerbach concludes that some form of statutory price and wage regulation is needed to attain high employment, steadily increasing output, and stable prices.

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For the past five years, the Antitrust Subcommittee of the Senate Judiciary Committee, under the chairmanship of Senator Estes Kefauver of Tennessee, has been conducting a broad investigation of "administered prices" in American industry. It has studied the steel,1 automobile,2 electrical manufacturing,3 drug,4 asphalt

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3. 1959 Hearings, pt. 13 (dealing generally with identical bidding on sales to the TVA); 1961 Hearings, pts. 27, 28 (dealing with price fixing and bid rigging in the electrical manufacturing industry).

4. 1959 Hearings, pts. 14, 15; 1960 Hearings, pts. 16-26; Antitrust and
roofing, and bread industries. In addition, the Kefauver Subcommittee has sought the views of leading economists and representatives of labor and management on the nature of the problem of "administered prices" and the alternative policies that have been suggested to deal with it. It has also issued two reports on the extent of concentration in American industry, based upon data compiled from the Census of Manufactures for 1954 and 1958 by the Commerce Department's Bureau of the Census. In all, it has published more than 18,000 pages of hearings and reports.

The Kefauver Subcommittee has been entrusted by Congress to make a complete, comprehensive and continuing study and investigation of unlawful restraints and monopolies, and of the antitrust and antimonopoly laws of the United States, their administration, interpretation, operation, enforcement, and effect, and to determine and from time to time redetermine the nature and extent of any legislation which may be necessary or desirable for the attainment of the fundamental objects [of the antitrust laws].

At the outset of the hearings, Senator Kefauver emphasized that his Subcommittee was seeking to determine how the antitrust

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7. 1957 Hearings, pt. 1; 1959 Hearings, pts. 9–11.

Until 1955, the Judiciary Committee entrusted this subject matter to a Subcommittee on Antitrust and Monopoly Legislation. This Subcommittee operated without special funds, which must be provided by special resolution of the Senate. The present Subcommittee was first created in 1955 when special funds for investigation were thus provided. S. Res. 61, 84th Cong., 1st Sess. (1955). The 1962 Senate resolution appropriated $450,000 for the work of the Subcommittee during 1962.
laws could be made to work so as "to guarantee to the American people the benefits of competitive pricing" and termed price regulation "a last resort." Nevertheless, the only piece of pricing legislation seriously considered by the Subcommittee was S. 215—an effort at informal price regulation. No report on S. 215 was rendered by the Subcommittee, and no recommendations have yet been made by it for any change in the antitrust laws.

The accomplishments of the Kefauver Subcommittee cannot be judged solely by the legislation that it has produced. Its work must be judged fruitful if it has brought to public attention important issues of public policy which must still be resolved. Whatever doubt may have existed on this score before the celebrated encounter between the President of the United States and the steel industry in the spring of 1962 must surely have been dispelled by the President's action thwarting the threatened increase in the price of steel. This Article will discuss the issues that concern the Kefauver Subcommittee and the contribution it is making to their resolution.

I. SHOULD WE BE CONCERNED ABOUT THE CONCENTRATION OF ECONOMIC POWER?

A. SOME ESTIMATES OF THE EXTENT OF CONCENTRATION

"The No. 1 weakness of the antitrust laws today," concluded the majority of the Kefauver Subcommittee, "is their inadequacy as a means of coping with . . . the problem of the concentration of economic power." That economic power is concentrated is not subject to dispute. The largest 200 manufacturing companies in 1958 accounted for 38 percent of the total dollar value (141 billion dollars) added by the manufacturing activity of all companies in the United States, compared with 30 percent in 1947. Their share thus increased by almost 27 percent from 1947 to 1958.

12. This paper is one of several prepared by members of a study group that the writer formed, at the request of Mr. W. H. Ferry of the Fund for the Republic's Center for the Study of Democratic Institutions, to evaluate the work of the Kefauver Subcommittee. The only other paper in the series that has been published to date is Stigler, Administered Prices and Oligopolistic Inflation, 35 J. Bus. 1 (1962).
14. REPORT ON CONCENTRATION RATIOS IN MANUFACTURING IN-
On the whole, the companies that were the largest in 1947 remained among the largest in 1958. The companies that were the 100 largest in 1958 accounted for 30 percent of the total dollar value added by manufacture in 1958; these same companies accounted for 22 percent of the value added in 1947. By contrast, the share of the largest 100 companies in 1947 was 23 percent. Of the 50 largest companies in 1947, 34 were still among the 50 largest in 1958. Twelve of the 50 largest in 1947 were among the 100 largest in 1958 and four of the 50 largest in 1947 were among the 200 largest in 1958.

The change in the degree of concentration over the period 1947–58 varied from industry to industry. For example, among those industries in which the total value of shipments exceeded one billion dollars in 1958, the four largest companies in the following industries accounted for a greater percentage of the total dollar value of shipments in 1958 than in 1947—steel (53 percent in 1958 and 50 percent in 1947); automobiles (75 percent and 56 percent respectively); farm machinery, except tractors (38 percent and 36 percent respectively); tractors (69 percent and 67 percent respectively); gray-iron foundries (24 percent and 16 percent respectively); cement (32 percent and 30 percent respectively); radios and related products (27 percent and 26 percent respectively); bread and related products (22 percent and 16 percent respectively); flour and meal (38 percent and 29 percent respectively); soap and glycerine (90 percent and 79 percent respectively); beer and ale (28 percent and 21 percent respectively); canned fruits and vegetables (29 percent and 27 percent respectively); and synthetic broad-woven fibers (34 percent and 31 percent respectively).

In the following industries in which the total value of shipments exceeded one billion dollars in 1958, the largest four companies

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D U S T R Y 8. "Value added by manufacture is derived by subtracting from the value of shipments of any manufacturing plant or establishment the cost of materials, supplies, containers, fuel purchased, electric energy, and contract work." Report on Concentration in American Industry 7. In 1958, the Census Bureau made certain adjustments in the measurement of value added by manufacture that it believed "had little effect on the ranking and relative shares of individual companies or on the aggregate shares of the 50, 100, 150 or 200 largest companies in each year." Report on Concentration Ratios in Manufacturing Industry 7.

15. Id. at 8.
16. Ibid. Similar data for the largest 200 companies in 1958 and 1947, respectively, are not presented.
17. Id. at 9. Similar data for the 200 companies that were the largest in 1947 are not presented.
accounted for a lesser percentage of the total dollar volume of shipments in 1958 than in 1947—meat packing (34 percent in 1958 and 41 percent in 1947); cigarettes (79 percent and 90 percent respectively); petroleum refining (32 percent and 37 percent respectively); tires and inner tubes (74 percent and 77 percent respectively); aluminum rolling and drawing (78 percent and 94 percent respectively); copper rolling and drawing (48 percent and 60 percent respectively); aircraft engines (56 percent and 72 percent respectively); non-rubber footwear (27 percent and 28 percent respectively); pharmaceutical preparations (27 percent and 28 percent respectively); paints and varnishes (25 percent and 27 percent respectively); wire drawing (34 percent and 45 percent respectively); motors and generators (47 percent and 59 percent respectively); and plastics (40 percent and 44 percent respectively).

The largest four companies accounted for the same percentage of the total dollar volume of shipments in 1958 and 1947 in the following industries in which the total value of shipments exceeded one billion dollars in 1958—refrigeration machinery (39 percent) and synthetic fibers (78 percent).

The 1958 share of the largest four companies in the industries listed above varied from 22 percent of the total dollar value of shipments (bread and related products) to 90 percent thereof (soap and glycerine).18

B. THE ECONOMIC CONSEQUENCES OF CONCENTRATION

In essence, it is the thesis of the majority of the Kefauver Subcommittee that the concentration of economic power is the basis of an ancillary power to "administer" prices that can be and has been exercised in ways that produce socially undesirable results.

I. Means' Definition of "Administered" Prices

A good deal of the confusion that the controversy over ad-
An "administered" price, said Means, is "a price set by someone, usually a producer or seller, and kept constant for a period of time and for a series of transactions," as distinguished from a "market" price, which "fluctuates on the basis of supply and demand as these forces are felt in the market." According to these definitions, as Means recognized, "market" prices are to be found only for agricultural commodities and some raw materials; most industrial prices, a large portion of retail prices (including prices in restaurants and barbershops), and most wage rates, are "administered." Thus, in his initial testimony, Means did not identify "administered" prices with those charged in concentrated industries. Nor did he hold "administered" prices responsible for inflation; on the contrary, he recognized that at times they lagged behind "market" prices and served to inhibit inflationary movements. "Administered" prices, Means insisted, are not undesirable per se; they are here to stay and lead to greater efficiency and higher standards of living.

After this exposition, it is difficult to see why "administered" prices should have concerned the Senate Subcommittee on Antitrust and Monopoly. But Means was quick to warn that firms in the "administered" price area had discretion to fix prices at a number of different levels, each of which would yield the same total profits, and that this discretion could be exercised in ways harmful to the public interest. He asked the Subcommittee to undertake an ambitious program of research to ascertain how, in fact, this discretion was used.

In subsequent testimony, however, Means explained that "administered" prices in concentrated industries should be of special concern to the Subcommittee because the greater the concentration, the less the restraint upon pricing discretion imposed by market forces and the greater the possibility of the abuse of discretion. To make his point, Means attributed the price inflation from 1953 to 1958 to increases in "administered" prices in concentrated industries.

19. 1957 Hearings, pt. 1, at 75.
20. Ibid. Even the prices of agricultural commodities are "administered" under the various price support programs.
21. Id. at 93.
22. Id. at 75.
23. Id. at 84, 88.
24. Id. at 88, 98–100.
25. 1959 Hearings, pt. 9, at 4800–01.
2. "Administered" Prices, Price "Rigidity" and the Restriction of Output

(a) Are "Administered" Prices "Rigid" Prices? Are There "Rigid" Prices?

To prove his thesis, Means presented a chart showing the changes, from 1953 to October, 1958, in the wholesale prices of three different groups of commodities which together make up the Wholesale Price Index of the Bureau of Labor Statistics. One group, which Means maintained was "dominated by price administration," consisted of the following classes of products: metal and metal products, machinery and motive products, rubber and rubber products, non-metallic minerals, pulp and paper products, tobacco, and bottled beverages. The second group, which Means maintained was "market dominated," consisted of the following classes of products: farm products, processed foods, textile products and apparel, hides, skin and leather products, and lumber and wood products. The third group, described by Means as "mixed," consisted of the following classes of products: fuel, power and lighting materials, chemicals and allied products, and furniture and other household durables. Means then showed that in 1958 "the administration-dominated groups of prices were well above their 1953 levels while the market-dominated groups were at or below their 1953 levels."

Professor George J. Stigler seeks to refute Means' theory of "administered" prices on the ground that the BLS Wholesale Price Index cannot be relied upon to distinguish between "market" or "flexible" and "administered" or "rigid" prices because (1) the BLS does not report "at all accurately the actual behavior of the prices at which important transactions take place" and (2) well over 500 of the 1900 prices presently in the Index are obtained from reports of one or two sellers, but if the number of price reporters were increased, the frequency of reported price changes would also increase. Professor Stigler concludes that price "rigidity," defined in terms of the frequency of changes in wholesale prices reported by the BLS, is "a gross statistical illusion."

27. Id., pt. 10, at 4899.
28. Id. at 4898, 4909.
29. Stigler, supra note 12, at 5.
Stigler's second point is perplexing. Granted that the frequency of reported price changes increases with the number of price reporters, may we not assume that this will be the case in the "non-administered," as well as in the "administered," price area? If so, may there not still be such a recurring, quantitative difference in the relative frequencies of price changes in the two areas (no matter how large the number of price reporters) as to justify describing the prices in the one as "flexible" and in the other as "rigid"? Stigler's data do not permit us to answer this question. The product groups he uses to make his point (non-food materials, non-food consumer goods, and producer goods) are not the same product groups Means uses as the basis of his definitions. Means' thesis would be disproved if any of the product groups he lists in the "administered" category would have to be moved into the "mixed" or "market-established" category, relative to the product groups now listed by Means in these latter categories, when the number of price reporters is increased for all product groups. (In this connection, too, the relative amplitude, as well as frequency, of price changes would also have to be taken into account.) It is recognized that it may not be practical to increase the number of price reporters for many commodities in Means' "market-established" category because the BLS prices for these commodities are based upon market quotations and not on reports from individual companies. But the very fact that the sources of price information for the "administered" and "non-administered" areas differ in this way tends to support the distinction Means is trying to make.

As to Stigler's first point, it is true that the BLS Wholesale Price Index is based on quoted prices and does not reflect discounts from the published prices that may be granted to consummate particular transactions. In evaluating this point, a distinction must be made between open and hidden discounts. A particular transaction, for example, may involve a quality of steel for which there is no quoted price; the price may have to be determined by deducting from or adding to a quoted base price. But the method of computing the discount or premium for this purpose may be known to all in the trade and may itself be "rigid." The

32. Id. at 4 (Table 1).
33. Stigler does point out that Means "classifies . . . textiles and apparel as market-dominated and rubber products as administered, although both groups had on average nine price changes from December, 1953, to December, 1956." Id. at 3.
34. Stigler maintains that the BLS also greatly underestimates the amplitude of price changes and cites the study by Flueck, supra note 30, to this effect. Id. at 7.
existence of such discounts or premiums would not destroy the usefulness of the Wholesale Price Index in distinguishing between "flexible" and "inflexible" prices. However, the prevalence of secret, unstructured discounts to consummate particular transactions would raise questions about the usefulness of the Index in making the distinction in question.

Dr. John M. Blair, chief economist to the Kefauver Subcommittee, tries to deal with this latter possibility. "For the purpose of analyzing the relationship between concentration and price rigidity," he argues, "the B.L.S. series are invalidated only if it is assumed that during a downswing secret discounts become relatively more important in products of high than in products of low concentration." Relying primarily on a study by Saul Nelson, Blair concludes that this assumption is erroneous.

Offhand, however, it would seem that secret discounts from quoted prices should be more characteristic of industries of high, rather than low, concentration. The very factors that cause the decline of open price competition in oligopolistic industries would lead one to expect more secret price competition—through hidden discounts—in these industries than in industries in which open price competition prevails. Dr. Blair, however, is persuaded that Mr. Nelson's study showed otherwise.

In any case, the question remains whether the concepts of relative price rigidity and relative price flexibility would be destroyed if secret discounts from published prices were taken into consideration.

(b) Do "Administered" Prices Restrict Output?

The fact of the matter is that the majority of the Kefauver Subcommittee is not concerned about the frequency of price changes but about "the responsiveness of a price to changes in the market." It defines price rigidity and price flexibility in terms of this responsiveness. Its Steel Industry Report states: "It is possible for a price, though changing infrequently, to be responsive to changes in the market and thus approximate the classical market behavior. The critical question is whether, when demand falls off price is maintained through a decrease in production." Thus, only those prices are "administered" that are maintained or even

38. Ibid.
increased in the face of declining demand and excess productive capacity. These prices are of concern to the Subcommittee because they are thought to result in the further under-utilization of the commodities thus priced and to inhibit the optimum use of resources.\textsuperscript{39}

Means himself made this point in his original paper on "administered" prices in 1935 when he distinguished between markets in which "economic adjustments are brought about primarily by fluctuations in price" and those in which "economic adjustments are brought about primarily by changes in volume of production.\textsuperscript{40}" Dr. Edwin G. Nourse agrees that the danger of "administered" prices inheres in the fact that management can fix them so as to yield predetermined levels of profit by allowing "volume of operations to bear the brunt of adjustment to whatever consumer demand exists at that price level.\textsuperscript{41}" This possibility, according to Dr. Nourse, exists only when prices "are formulated in executive offices as matters of operating policy or economic planning by officials of corporations or unions who, through their control over blocks of capital resources or labor resources, have considerable power to implement the price schedules they adopt.\textsuperscript{42}" Nourse thus states the theory of administered prices and wages in a way that ties it to the concentration of economic power because in an industry in which "there are a very large number of units," the "attempt to implement a price by control of supply would not be effective.\textsuperscript{43}

Stigler admits that if the facts support this theory of administered prices, then it is "of the highest importance.\textsuperscript{44}" But, resting principally upon TNEC Monograph No. 27,\textsuperscript{45} he states flatly that Means' "suggestion" that "rigid prices led to large decreases in output and employment, whereas industries with flexible prices underwent small (if any) reductions in output" is not supported by the facts.\textsuperscript{46} Yet Blair, in a recent paper not yet published, states with equal certainty: "In all of the controversy which has

\textsuperscript{39} See the statements of Senator Kefauver, in 1957 Hearings, pt. 1, at 1, pt. 2, at 197.
\textsuperscript{40} Means, \textit{Industrial Prices and Their Relative Inflexibility}, S. Doc. No. 13, 74th Cong., 1st Sess. 1 (1935).
\textsuperscript{41} 1957 Hearings, pt. 1, at 10-11.
\textsuperscript{42} Id. at 9.
\textsuperscript{43} Id. at 21.
\textsuperscript{44} Stigler, \textit{supra} note 12, at 1.
\textsuperscript{45} THORP, CROWDER & ASSOCIATES, TEMPORARY NATIONAL ECON. COMM. 76TH CONG., 3D SESS., THE STRUCTURE OF INDUSTRY, MONOGRAPH No. 27 (Sen. Comm. Print 1941) (hereinafter cited as TNEC MONOGRAPH No. 27).
\textsuperscript{46} Stigler, \textit{supra} note 12, at 1.
revolved around the price rigidity issue, there is one point on which the findings of the various disputants are in agreement. This is the finding of an inverse relationship between price and production declines during the 1929–1933 downswing. In support, Blair cites both Means and his opponents—Thorp and Crowder and Neal. Blair regards Professor Jules Backman as the sole dissenter from the view that an inverse relationship characterizes the movements of price and output. And even Backman concluded that "within very broad limits there is evident some tendency for inflexibly-priced products to be accompanied by greater decreases in production than those which were more responsive to the impact of outside forces."

Like Nourse, Blair links price rigidity and the restriction of output with concentration in industry. Blair maintains that "the adjustment to a decline in demand" in oligopolistic industries "usually takes the form of a decrease in production rather than in price." This view is contrary to the conclusion of Thorp and Crowder that:

Concentration in the control of production of the products does not appear to be associated with any particular and unique price or quantity behavior in either the cyclical downswing from 1929 to 1933 or in the upswing from 1933 to 1937. Products with high concentration ratios and products with low concentration ratios experienced strikingly similar changes in price and quantity.

To test the Thorp-Crowder thesis, Blair compared the price behavior of the same products during the 1890–1897 and 1929–1933
depressions. He found that the prices of farm products, foods, textiles, and lumber (which Blair describes as "atomistic," and Means would say were "market-established," during both depressions) were flexible during both these periods. However, price rigidity manifested itself in the later depression, relative to the earlier one, "following the concentration of the industry, in such diverse fields as iron and steel, salmon, salt, biscuits and crackers, molasses, matches, plate glass, window glass, and anthracite . . . ." Blair attacks the Thorp-Crowder explanation of price rigidity in terms of the characteristics of the product and the Neal explanation in terms of changes in direct costs.

(c) The Findings of the Kefauver Subcommittee

(1) The Steel Industry

The Subcommittee's general conclusions about administered prices were based primarily upon its study of the steel and automobile industries. The Subcommittee found that in the post-World War II period, the steel industry either maintained or raised its prices while the demand for its products was declining and its capacity was grossly under-utilized.

Stigler doubts how "real this phenomenon is" because "there are no adequate transaction prices on steel products." But there is no good reason to expect that an industry will raise its quoted prices in the face of declining demand and below-capacity operations, only thereafter secretly to undercut the new prices. And, even if it did so, is it not likely that the transaction prices will be higher after the quoted prices were increased than before? Why else were the quoted prices raised?

In any case, Stigler asserts that "no light was shed" by the Subcommittee on why the steel industry "raised prices while operating at relatively low outputs" and offers an explanation of his own. "The presence of congressional investigations such as this is a very strong reason for the steel industry to raise quoted prices whenever a suitable occasion (cost increase) occurs: if it reduced quoted prices in depression, it would have the usual congressional...

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56. Blair, supra note 35, at 431–35. For a criticism of this paper, see Backman, Economic Concentration and Price Inflexibility, 40 REV. ECON. STAT. 399 (1958). See also Blair, Rejoinder, 40 REV. ECON. STAT. 405 (1958).


58. Stigler, supra note 12, at 11.
hearings when they were restored in prosperity." This explanation is not very persuasive. The immediate question is not why the industry failed to reduce its prices "in depression," but why it increased them at such a time. Furthermore, the fact that the Kefauver Subcommittee sat did not deter the industry from increasing its prices in 1957 and 1958. Most significant, however, is the fact that the steel industry has the power to increase its prices "whenever a suitable occasion . . . occurs," even "in depression."

In his recent book, Means adds that the demand for steel dropped to such an extent during the first half of 1960 that operations had to be curtailed from approximately 95 percent to 50 percent of engineering capacity. Yet only a very mild softening of the mill prices for steel accompanied this drastic decline in output.

The Subcommittee made strong efforts to shed light on this industry behavior. Acting on Means' suggestion, it questioned corporate executives about the price-making process in their companies in order to ascertain "what members of their organization are involved in the decision, what information the decision makers have before them . . . and what factors they take into account in making a decision." While the inquiry along these lines was not penetrating, it was sufficient to confirm Nourse's view that steel and automobile prices "are formulated in executive offices as matters of operating policy or economic planning."

Mr. Roger M. Blough, then president of the United States Steel Corporation, explained that the top managers of his company decided upon the six dollar per ton increase on July 1, 1957, after lengthy consideration of many factors, including (1) overall cost trends in the company; (2) the long-run competitive situation; (3) the future demand for steel and its bearing on capacity requirements; (4) "depreciation deficits" and (5) President Eisenhower's call for price restraint. While Mr. Blough thought that an increase of nine or ten dollars per ton would have been justified,

59. Id. at 11-12.
60. It is possible, of course, that the price increases would have been even greater if no congressional committee were there to call the industry to account. It is difficult to know how to weigh the impact of congressional investigations upon the price decisions of industry.
62. 1957 Hearings, pt. 1, at 100.
63. Id. at 9.
64. 1957 Hearings, pt. 2, at 296-98. By a "depreciation deficit," Mr. Blough means the amount by which the original cost of a machine, recovered by depreciation charges, falls short of its replacement cost. Id. at 298.
the management collectively agreed to propose a six dollar increase to the board of directors, which discussed and approved the recommendation. 65 No record of intra-company discussions about prices is kept. "We talk things out until we agree," said Mr. Blough. 66

Mr. George M. Humphrey, chairman of the board of the National Steel Corporation, contended that an increase in the price of steel would be justified because of "declining earnings" due to a low operating rate. 67 Mr. A. B. Homer, president of the Bethlehem Steel Corporation, stated that it is the policy of his company to keep the price of steel stable over considerable periods of time. 68 Dissenting from the Subcommittee's majority report on the steel industry, Senator Everett Dirksen of Illinois similarly emphasized the planning function of steel pricing. He wrote:

The record of these hearings contains many references to the fact that planning the steel facilities needed to support the future growth of our economy must be done 5, 10 or 15 years ahead. If the industry is correct in seeing a long-term upward trend in steel demand, it must make long-range plans on this basis. It cannot be diverted from its long-term purpose by the normal fluctuations of the short-term market. It must keep its customers throughout the business cycle and it must continuously strive to expand the future demand for steel. 69

So, Senator Dirksen concluded, the industry cannot charge "what-the-traffic-will-bear" when the short-run demand presses on capacity, nor can it reduce prices simply because short-run demand falls off. 70

However meritorious these contentions may be, they hardly disprove the thesis that steel prices are "administered" in the sense that the limits fixed by the market do not deprive the executives of the steel companies of wide discretion to determine the level of steel prices, and that they sometimes exercise this discretion so as to maintain or even increase steel prices "in depression." The Subcommittee also concluded that price increases could not be effected in the face of declining demand and under-utilization of capacity without the suppression of price competition by means of the institution of price leadership. Dr. Blair has suggested that industry-wide wage negotiations in oligopolistic industries facilitate price leadership by giving each oligopolist

65. Id. at 304–05.
66. Id. at 305.
67. 1957 Hearings, pt. 3, at 822–23. See charts introduced by Blair to show that as the production of various steel products declined from 1947–1957, their prices increased. Id. at 884–90.
68. 1957 Hearings, pt. 2, at 666.
70. Ibid.
"knowledge of his rivals' probable reaction to a given wage increase," thus enabling the price leader to set "a price high enough to meet general approval from the other producers but not so high as to needlessly invite undercutting." The power to administer prices thus belongs to the price leader.

The clash between the President and the steel industry in the spring of 1962 dramatically confirmed these findings of the Kefauver Subcommittee. On March 31, 1962, President Kennedy publicly congratulated the steel industry and the steelworkers' union for negotiating a two-year agreement, effective the following July 1, 1962, which was to be "obviously noninflationary and should provide a solid base for continued price stability." On April 10, Mr. Leslie B. Worthington, president of the United States Steel Corporation, announced that the corporation (which was then operating at approximately two-thirds of estimated 1961 capacity) would increase its prices by six dollars a ton on the average, effective that midnight. The following day, Bethlehem Steel Corporation, Republic Steel Corporation, Jones and Laughlin Steel Corporation, Youngstown Sheet and Tube Company, and Wheeling Steel Corporation, (which, with United States Steel, account for almost 60 percent of the steel industry's output) stated that they would follow suit.

That same day, April 11, President Kennedy denounced these "simultaneous and identical actions of United States Steel and other leading steel corporations" as "a wholly unjustifiable and irresponsible defiance of the public interest" on the part of "a tiny handful of steel executives whose pursuit of private power and profit exceeds their sense of public responsibility." The President made it known that the Department of Justice and the Federal Trade Commission would examine "the significance of this action in a free competitive economy"; the Department of Defense and other agencies would review "its impact on their policies of procurement"; and Congress would inquire "what legislative safeguards may be needed to protect the public interest."

71. Blair, supra note 53, at 439.
72. N. Y. Times, April 1, 1962, § 1, p. 1, col. 1. The settlement in question called for no increases in the hourly wage, but provided improvements in fringe benefits amounting to about ten cents an hour for the first year. Wages for the second year were left open to future negotiation, Id., April 15, 1962, § 4, p. 1, cols. 1, 3. See id., April 1, 1962, § 1, p. 1, col. 1; p. 55, col. 1.
73. Id., April 11, 1962, p. 28; Id., April 15, 1962, p. 28, col. 2.
76. Ibid.
Mr. Blough, now chairman of the board of United States Steel, indicated that the corporation would remain firm in the face of this presidential attack. The Justice Department instituted a grand jury investigation of the steel price increases to determine whether the Sherman Act had been violated, and FBI agents began to search for evidence. The Federal Trade Commission, the Kefauver Subcommittee, and the Antitrust Subcommittee of the House Judiciary Committee, opened immediate investigations. The Secretary of Defense declared that he had directed "that where possible procurement of steel for defense production will be shifted to those companies which have not increased prices." The Defense Department announced that it had bypassed the United States Steel Corporation and ordered 11,000 tons (five to six million dollars' worth) of high-grade steel from the Lukens Steel Corporation, which had not raised its prices. The President and his advisers sought, privately, to persuade the other steel companies not to raise their prices.

On April 13, Mr. Joseph L. Block, chairman of the board of Inland Steel Corporation, the eighth largest steel producer in the United States, stated that his company would not follow the lead of United States Steel. "We do not feel," he said, "that an advance in steel prices at this time would be in the national interest." Kaiser Steel Corporation aligned itself with Inland Steel, and the price leader lost its followers. Bethlehem Steel was the first of the five companies that followed the leadership of United States Steel to rescind its increase. Finally, Mr. Worthington announced that United States Steel was rescinding its price increase "in the light of the competitive developments today, and all other current circumstances, including the removal of a serious obstacle to proper relations between Government and business."

That the market did not determine the price of steel in the spring of 1962 is hardly open to doubt. Mr. Blough would have fixed it, but for the intervention of the President, who—with the help of Inland Steel—thwarted the price leadership of United States Steel. Even though the price of steel was not increased, the

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77. See id., April 13, 1962, p. 18 (transcript of news conference held on April 12, 1962, by Mr. Roger M. Blough).
79. Id., April 12, 1962, p. 1, col. 2; p. 21, col. 8.
81. Id., col. 3.
82. Id., col. 1.
83. Id., at 1, col. 8: p. 10, col. 1.
84. Id., at 10, col. 2.
85. Ibid.
86. Id., col. 6.
steel operating rate since April of 1962 has fallen to less than 60 percent of estimated capacity.\textsuperscript{87}

(2) The Automobile Industry

The Kefauver Subcommittee highlighted the practice of “target-return” pricing in the automobile industry. Prices of the products of the General Motors Corporation, for example, are established, Mr. Harlow Curtice [then GM president] explained, by a price policy committee composed of himself, Mr. Frederic G. Donner, executive vice president and chairman of the financial policy committee, Mr. L. C. Goad, executive vice president in charge of the automotive and parts divisions, and Mr. George Russell, vice president in charge of the financial staff.\textsuperscript{88} The Subcommittee found that in setting its prices, General Motors seeks to attain a target goal of 20 percent rate of return on net worth after taxes at a predetermined level of production or standard volume. The amount of profit per car needed to yield the desired rate of return at the standard volume is incorporated as a cost in arriving at the price level. When actual production exceeds standard volume, as has been true during most of the postwar period, the actual rate of return exceeds the target—General Motors' actual rate of return after taxes on net worth during the period 1948–1957 averaged 25 percent.\textsuperscript{89} Mr. Curtice defined “standard volume” as “the estimated rate of operations which represents the normal or average and annual utilization of a capacity that must be large enough to meet the cyclical and seasonal peaks which are characteristic of the automobile industry.”\textsuperscript{90} This “standard volume” is currently estimated as the number of cars GM has the capacity to produce in 180 (16 hour or two shift) working days of the year.\textsuperscript{91}

Other studies confirm the conclusions of the Kefauver Sub-

\textsuperscript{87} Id., Oct. 14, 1962, § 3, p. 13, cols. 4–5.
\textsuperscript{88} The steel operating rate was 58.5 percent for the week ended October 13, 1962, compared with 71.9 percent for the same week in 1961. Id., Oct. 14, 1962, § 3, p. 13, cols. 4–5.
\textsuperscript{89} The events of April, 1962, seem to have disproved Professor M. A. Adelman's prediction in 1960 that “steel prices have ceased to be independent of the general price level.” Adelman, Steel, Administered Prices and Inflation, 75 Q.J. Econ. 34, 40 (1961). Had the President not acted, steel prices generally would have moved upward in rather independent fashion.
\textsuperscript{90} 1958 Hearings, pt. 6, at 2515–16.
\textsuperscript{91} Id. at 2515–16.
committee with regard to target-pricing in the auto industry and find this practice prevalent in other oligopolistic industries.\textsuperscript{92} On the basis of the data in the hearings on the automobile industry, Blair attributes to target-pricing the fact that "between 1955 and 1956, total new car registrations fell 17 percent while price, depending on the index used, rose 4–5 percent; similarly between 1957 and 1958 new car registrations fell by more than 20 percent while price again rose about 4 percent."\textsuperscript{93} To show that this phenomenon is general in oligopolistic industries, Blair also introduced into the record of the hearings a study, based on a BLS report, showing that during the recessions of 1948–1949 and 1953–1954, in each of which the Federal Reserve Board index of industrial production dropped by about seven percent, the prices of products classified as "flexible" declined while the prices of products classified as "rigid" remained virtually unchanged in the earlier, and actually rose in the later, recession.\textsuperscript{94}

(d) Evaluation of the Findings

The majority of the Kefauver Subcommittee concluded that price administration presents the dual danger that

\begin{quote}
[If] the price maker . . . establishes his price at too low a level, he fails to maximize his profitmaking possibilities, which in turn may impede the flow of needed resources into the industry . . . [but if] he establishes his price at too high a level, the fall in demand might reduce his operations below the level of maximum profitability, and in the process bring about a curtailment of output, reduction of employment and loss of purchasing power.\textsuperscript{95}
\end{quote}

Yet the facts found by the Subcommittee indicate that price administrators in oligopolistic industries fix their prices at "too low" levels precisely when demand exerts inflationary pressures and at "too high" levels when demand is insufficient for full-capacity operation. As Senator Dirksen explained, the executives in administered-price industries seek a longer-run price stability that will be immune from "the normal fluctuations of the short-term market."\textsuperscript{96}

\textsuperscript{92} See \textsc{Kaplan, Dirlam \& Lanzillotti, Pricing in Big Business} (1958); Lanzillotti, \textit{Pricing Objectives in Large Companies}, \textit{48 Am. Econ. Rev.} 921 (1958). For a summary of the target returns of ten large industrial corporations, see Blair, \textit{supra} note 53, at 440.

\textsuperscript{93} Blair, \textit{supra} note 53.


\textsuperscript{95} \textit{Steel Industry Report} 53.

\textsuperscript{96} See notes 69 \& 70 \textit{supra} and accompanying text.
ADMINISTERED PRICES

Should the criterion of the public interest be whether oligopolistic industries maximize their profits? If so, may we not rely upon the managers of these industries to know best what policies will maximize their profits in the long run? In addition, may not the failure of these industries to maximize their profits at every opportunity be in the public interest? Means, for example, regards the tendency of administered prices to lag behind market prices during periods of excessive demand as a beneficial anti-inflationary factor. And Professor Alvin H. Hansen thinks that, at least at the beginning of a depression, price rigidity is probably a positive good because price reductions would "accelerate the decline in the national income and thus intensify the downward movement in business activity" and confirm "the already unfavorable business expectations engendered by the decline in investment" that precipitated the downward movement. (Hansen assumes that such price reductions would be accompanied by reductions in money wages.) Professor Sumner H. Slichter has also contended that increasing money wages ("administered" wages) in the 1958 recession had a favorable effect on employment and output by producing rising expenditures and incomes.

The Hansen-Slichter views seem to conflict with Blair's position that an inverse relationship exists between prices and output. In evaluating the conflict, it should be noted that Blair's underlying assumption that demand is generally more elastic than businessmen think was not supported by the findings of the Kefauver Subcommittee. So far as steel is concerned, the majority of the Subcommittee concluded that "a body of knowledge of reasonable currency does not exist" upon which any reliable conclusions can be based concerning the elasticity of the demand for steel. It suggested that "the steel industry could make a contribution to knowledge on this subject . . . by making a few price reductions."

In spite of its assumption that the elasticity of consumer demand

97. 1957 Hearings, pt. 1, at 93.
99. Id. at 321, n.7.
102. Steel Industry Report 64. The Subcommittee's majority criticized the elaborate study prepared by Dr. Theodore Yntema for the United States Steel Corporation and submitted to the TNEC, which concluded that "the demand for steel is very inelastic." Hearings Before the Temporary National Economic Committee, 76th Cong., 3d Sess., pt. 26, at 13914 (1940).
103. Steel Industry Report 64.
for automobiles is higher than some experts maintain, the Subcommittee concluded that "elasticity . . . admittedly is not high enough to preserve the present level of profits in the face of price cuts, given the current level of costs in the industry."104 But the Subcommittee thought that substantial cuts in the prices of cars could be made and existing profit levels maintained if "annual expenditures for styling, advertising and tooling associated with increasingly frequent model changes . . . were compressed to their pre-1955 levels."105

While it may be that these costs of non-price competition in the automobile industry are wasteful, the Subcommittee did not make an impressive showing that the maintenance, and even increase, of prices in the face of declining demand in the automobile and steel industries caused reductions in output in these industries which would not otherwise have occurred. In his recent book, Means abandons the problem of elaborating the criteria by which we should determine what degree of flexibility in industrial prices will serve the public interest. Instead, he emphasizes that it is the level of prices arrived at by the private administration of price, not the inflexibility or the insensitivity to changes in supply and demand, which is at issue.106

3. Administered Prices and Inflation

(a) Do Administered Prices Cause "Administered Inflation"?

Both Means and Nourse fear that the power of oligopolistic industries to administer prices may be exercised in a manner that will feed the inflationary process. Because they earn profits in excess of those needed to attract capital, the administered-price industries, it is argued, provoke demands for wage increases. The managers of these industries are willing to accede to these demands because they know they have the power to pass on the increases through higher prices and even to use the occasion to widen profit margins.107 In his recent book, Means adds that the pricing power possessed by these managers may also be employed to in-

105. *Ibid.* The majority of the Subcommittee estimated that the Big Three in the automobile industry spend 1.2-1.3 billion dollars a year "to promote fictitious style obsolescence." *Id.* at 147. In Senator Dirksen's opinion, it was "unwarranted effrontery for any Senate Committee to undertake to advise the automobile industry how to design its cars, how to secure public appeal for its products, and how best to conduct its business." *Id.* at 213.
106. MEANS, *op. cit. supra* note 61, at 159–60.
107. 1957 *Hearings*, pt. 1, at 84 (Means); *id.* at 10–11 (Nourse); 1959 *Hearings*, pt. 9, at 4703 (Nourse).
crease prices even when there is no change in costs or demand. Means describes the resulting inflation as an "administrative inflation," but rejects the implication that "any individual or small group intentionally creates the inflation." To Means, the movement of prices since 1953 demonstrates the existence of an "administrative inflation." He attributes the bulk of the price increases before 1953 to the pressure of excess demand associated with the monetary inflation of World War II and the Korean War. By 1953, he contends, administered prices, and particularly steel prices, had fully adjusted to the two war inflations. Yet during the period after 1953, when there was no general excess of demand but rather a deficiency in demand and excess capacity, almost all the price increases, according to Means, occurred in the administered-price industries, while every price decrease took place in the non-administered price area. For example, in the period from 1953 until the middle of 1959, when the long steel strike began, Means points out that the index of finished steel prices rose to a level 36 percent above that of 1953. In the same period, the wholesale price index rose only eight percent, and if the prices of steel and other metal manufactures are excluded, it rose hardly at all. Stigler, however, insists that the "attribution of inflation to monopoly power of enterprises is . . . lacking both a theoretical rationale and an empirical basis."

The hearings of the Kefauver Subcommittee dealing with the relationship between administered prices and inflation were devoted, in large part, to an examination of management's charge that rising wage costs sparked the post-World War II inflations and labor's countercharge that unduly high profits were responsible. The Subcommittee also raised the question whether the power to administer prices was not also an inflationary factor to the extent that it was used for the purpose of internal financing.

(b) The Findings of the Kefauver Subcommittee

(1) On the Wage-Profit Issue

The Subcommittee concentrated its investigation of this issue on the steel and automobile industries. No company in either

109. Ibid.
110. Id. at 113. Means merely elaborates on the testimony he gave before the Kefauver Subcommittee. 1959 Hearings, pt. 10, at 4897-923.
111. Means, op. cit. supra note 61, at 65-111.
112. Id. at 113-14.
industry, however, furnished the Subcommittee with the unit cost data necessary to resolve the issue. And the Subcommittee, until recently, was not prepared to use its subpoena power to compel the production of the data. The lack of firsthand unit cost data, however, did not inhibit the expression of Subcommittee opinion. A majority of the Subcommittee rejected the argument that the price increases made by the steel and automobile industries in the face of declining demand were necessitated by rising labor costs. Furthermore, it concluded that the price increases effected by the steel industry after the wage increases in July of 1957 widened the industry's profit margin and increased its rate of return. Similar conclusions were reached with respect to the wage-price movements in the automobile industry.

The wage-profit issue resounded in the April, 1962, controversy involving the steel industry. The president of United States Steel sought to justify the announced six dollars per ton increase on the ground of the "steadily mounting production costs which have included four increases [amounting to 40 cents an hour] in steelworker wages and benefits" between the summer of 1958 (the time of the last overall price increase) and the end of 1960. The wage increases mentioned did not include the new fringe benefits negotiated just prior to the announced price rise. Adding the post-1958 increases in employment costs for employees other than the steelworkers, in the cost of products and services purchased by United States Steel, in state and local taxes, in interest on money the corporation borrows, and in other expenses, Mr. Worthington maintained that United States Steel experienced a net increase of about six percent in its total costs during the period from 1958 to 1961. The announced increase, consequently, was only a "partial catch up, . . . considerably short of the amount needed to restore even the cost-price relationship in the low production year of 1958." A larger increase was not possible because of "competitive pressures from domestic producers and from imports of foreign-made steel as well as from other materials which are used as substitutes for steel."

President Kennedy, however, stated that he was informed by the BLS that employment costs per unit of steel output in 1961 were essentially the same as in 1958 and that the cost of steel scrap and coal—the industry's principal raw materials—had de-

117. Id., cols. 2-4.
118. Ibid.
119. Id., col. 2.
clined since 1958. While Mr. Worthington claimed that the steel corporation's profits during 1958–1961 had dropped to the lowest levels since 1952, President Kennedy stated that its earnings during the first quarter of 1962 were among the highest in its history.

This time the Kefauver Subcommittee sought to ascertain the facts by using its subpoena power to compel the steel corporations to submit their unit cost data. United States Steel and eight other steel companies agreed to furnish the data. But Bethlehem, Republic, National, and Armco refused to obey the subpoenas, arguing that disclosure of the cost data would injure their competitive positions vis-a-vis other steel producers and producers of substitute products at home and abroad. The recalcitrant companies did not think that the secrecy of their data would be protected by the Subcommittee's proposal to have them submit the data to the General Accounting Office, which would then furnish the Subcommittee with combined figures for three or more producers. The Subcommittee recommended to the full Senate Judiciary Committee that the four recalcitrant companies and nine of their officers should be cited for contempt of Congress, but the full Committee refused to do so. Apparently, as Senator John Carroll of Colorado explained, the stock market decline and the lagging economic recovery that followed the President's intervention in April of 1962 (whether propter hoc or merely post hoc is difficult to say) led many Committee members to think that the pressing of contempt charges was "not timely."

Though lacking adequate data—which apparently will not be forthcoming soon—Means has attempted to estimate the changes in the relationship between costs, prices, and profits, in the steel industry since 1953. He concludes that there is evidence to show that the target return of United States Steel "prior to recent years" was eight percent of its invested capital, after taxes, when operating at 83 percent of capacity. To enable the industry to hit this target in 1959, Means estimates, the margin over operating costs would have had to be 20 percent higher than in 1953. In fact, Means contends, the margin nearly doubled over this period.

120. Id., April 12, 1962, p. 20, col. 1.
121. Id., April 11, 1962, p. 28, col. 3. From Mr. Blough's subsequent statement, it is apparent that Mr. Worthington was referring to profit as a percentage on sales. Id., April 13, 1962, p. 18, col. 2.
123. The above account is based upon the report of Kenneth S. Smith, appearing in N.Y. Times, Sept. 9, 1962, § 3, p. 1, col. 4.
125. Ibid.
126. MEANS, op. cit. supra note 61, at 112–50.
and United States Steel's rate of return on invested capital, after taxes, almost doubled too. Means insists, therefore, that its price policy in 1959 "was based on a target rate of return of closer to 16 percent." In other words, while an eight percent rate of return on capital, after taxes, in 1959 could have been earned with steel prices only 15 percent higher than in 1953, in fact prices in 1959 were 36 percent higher than in 1953.

Means' essential finding that the increases in costs per unit of steel output since 1953 did not compel the price increases that have occurred is supported by other studies. Eckstein and Fromm find that wages in the steel industry rose substantially more than wages in other industries during the period from 1947 to 1957, in spite of the fact that the rise in output per man-hour was slightly less in steel than in manufacturing as a whole. Nevertheless, possession of market power enabled the industry "to maintain and perhaps increase profit margins" and obtain from profits the funds to replace existing facilities and expand capacity. Conrad, too, agrees that

the decline in the share of employee's compensation in durable goods production [in the period 1947-1956] is not the combined result of unusual productivity gains, which would have held down unit labor costs, but of increases in profit rates in steel and automobiles that were out of line with those generally reported in the rest of the group. The greater than average wage gains in these industries were not made at the expense of profits, but were accompanied by increases in the profit margins.

Eckstein and Fromm conclude that "the rise in steel prices is a critical part of the inflation in industrial goods prices" during the postwar period, 1947 to 1958.

If steel prices had behaved like other industrial prices, the total wholesale price index would have risen by 40 percent less over the last decade and less by 52 percent since 1953. Finished-goods prices would have risen less by 23 and 38 percent, respectively. . . . The wage and price behavior of the steel industry represents an important instance

127. Id. at 147.
129. Id. at 34. The authors conclude that "there is some evidence that profit margins have been somewhat higher for given rates of utilization [during the post-war period] than was true earlier." Id. at 25. "Other industries, whose demand experience was at least equally favorable, did not succeed in maintaining constant margins" over total cost. Id. at 25-26.
131. ECKSTEIN & FROMM, op. cit. supra note 128, at 34.
of inflation caused to a substantial degree by the exercise of market power.\textsuperscript{132}

Demand for steel, while not strong enough to account for these increases, "nevertheless was strong and inelastic enough to permit these increases to occur without immediate and telling decline in the demand for steel."\textsuperscript{133}

Looking at the period from 1955 to 1958, the Council of Economic Advisers concluded that there was no general excess of demand to account for the eight percent rise in consumer prices and nine percent rise in wholesale prices during this period. The Council attributed this inflation to the following factors:

\begin{itemize}
\item the existence of relatively high demand, principally in one sector of the economy [metals and metal products and machinery and motive products]; the use of market power by management to maintain profit margins despite rising costs; the exercise of market power by labor unions in an effort to capture a substantial share of rising profits for their membership; and the transmission of these developments to other sectors of the economy.\textsuperscript{134}
\end{itemize}

(2) On the Issue of Internal Financing

The president of the United States Steel Corporation did not rely solely upon increases in costs to justify the April, 1962, price hike. Mr. Worthington maintained that the price increases were also necessary to generate the funds with which to finance the plant modernization that would enable United States Steel to compete successfully with lower-cost mills abroad.\textsuperscript{135} He pointed out that in the three years since the end of 1958, United States Steel spent $1.185 billion dollars for the replacement and modernization of its facilities and for the development of new sources of raw materials. Depreciation reserves accounted for 610 million dollars of this total and reinvested earnings for 187 million. The remaining 388 million were borrowed. (In fact, he stated that United States Steel borrowed a total of 800 million dollars during this period.) Mr. Worthington also claimed that United States Steel had not increased its dividend rate in more than five years, but President Kennedy pointed to the fact that the cash dividends paid out by

\begin{itemize}
\item 132. Ibid. The authors recognize that the rise in steel prices "is not more than a part of the story of inflation in this period, other important elements being the runup in machinery prices, the rise of construction costs, the increase in service prices, and, perhaps equally important, the failure of prices in other fields to fall." \textit{Ibid}.
\item 133. Ibid.
\item 134. \textsc{Council of Economic Advisers Ann. Rep.} 171 (1962).
\item 135. \textit{N.Y. Times}, April 11, 1962, p. 28, col. 2.
\end{itemize}
United States Steel exceeded 600 million dollars in each of the preceding five years.136

During the period from 1946 to 1956, the Kefauver Subcommittee found, United States Steel invested 3.766 billion dollars in new facilities, of which 1.408 billion came from reinvested earnings.137 Thus, the proportion of new capital derived from reinvested earnings during the period from 1958 to 1961 (approximately 16 percent) was considerably less than the proportion derived from this source during the period from 1946 to 1956 (approximately 37 percent). Nevertheless, Mr. Worthington reinforced a basic thesis of the Kefauver Subcommittee—that the power to administer prices is exercised so as to produce profits sufficient not only to pay reasonable dividends to the stockholders, but also to pay for the current cost of replacing existing capacity and for a significant portion of the cost of expanding capacity.

This thesis is also buttressed by the Subcommittee's findings with respect to the automobile industry and by other studies. From 1947 to 1956, General Motors' net worth increased from 1.570 billion dollars to 4.581 billion. Eighty-seven percent of this three billion dollar increase came from retained profits; only 390 million dollars (13 percent) did not.138 As of December 31, 1957, GM's capital totalled 4.905 billion dollars, of which 3.701 billion represented profits retained for use in the business.139

The Survey of Current Business reports that of the 289.7 billion dollars in capital funds used by corporate business (other than banks and insurance companies) in the postwar decade, 1947–1956, 60 percent came from retained profits and depreciation allowances; 20 percent was borrowed, chiefly from banks; and 20 percent came from the capital markets.140 Professor A. A. Berle, Jr., estimates that the bulk of the 20 percent raised in the capital markets was invested by insurance companies, mutual funds, and pension trusts; perhaps five percent of this 20 percent was invested by individuals.141

137. 1957 Hearings, pt. 2, at 398, 403.
139. Id., pt. 7, at 3864.
141. BERLE, op. cit. supra note 140, at 43–45. For the period 1947–1958, Houthakker reports that corporations other than banks and insurance companies invested a total of $412 billion; of this amount, $255 billion, or 62 percent, came from retained profits; $61 billion from bank loans; $52 billion from the sale of bonds; $29 billion, or seven percent, from the sale of common and preferred stocks; and $15 billion from other external long-term sources. HOUTHAKKER, JOINT ECONOMIC COMM., 86TH CONG., 1ST SESS., PROTECTION AGAINST INFLATION 121 (Jt. Comm. Print 1959).
Of the 173.3 billion dollars of capital used by the manufacturing and mining industries during this decade, about 33 percent came from retained profits and 30 percent from depreciation reserves. The railroad industry used 11.7 billion dollars, of which 37 percent came from retained profits and 43 percent from depreciation reserves. Other forms of transportation used 12.5 billion dollars, of which 11 percent came from retained profits and 50 percent from depreciation reserves. The public utility and communication industries used 55.9 billion dollars, but because their rates are regulated, only three percent came from retained profits and 26 percent from depreciation reserves. 142

The profits thus earned for the purpose of reinvestment gave labor a plausible basis for pressing its demands for higher wages, and thereby intensified the inflationary process. 143

(c) Evaluation of the Findings

(1) Concentration and Economic Growth

Essentially, then, the Kefauver Subcommittee is concerned that profits are too high in the industries in which the managers exercise a wide discretion to determine prices. While it is true that oligopoly prices normally yield a higher margin over costs than competitive prices, the Kefauver Subcommittee concluded that in the postwar years oligopolistic industries tended to increase their relative profit margins and thereby set off an "administrative inflation." The Council of Economic Advisers has elaborated this concept of "administrative inflation" as follows:

Upward pressure on prices may originate in those sectors of the economy where competitive forces are weak and large corporations and unions have a considerable degree of discretion in setting prices and wages. . . . There are two ways in which wage and price decisions in these sectors may put upward pressure on the general price level. First, prices may be increased when demand is not strong in the aggregate or even in the specific industries involved. Because the prices of these industries affect costs elsewhere, increases in their prices tend to spread throughout the economy. Second, prices in these sectors may remain constant in the face of declining demand, although they rise

142. BERLE, op. cit. supra note 140, at 39–42. It may be pointed out, incidentally, that the respective percentages for the regulated industries may constitute a fairly reliable index of the effectiveness of rate regulation.

Internal financing may be even more significant for the larger corporations. The financial data compiled by the Board of Governors of the Federal Reserve System show that in the period 1950–1956, 200 large manufacturing companies added $19 billion to their net capital; $17 billion represented retained profits, and $2 billion (less than seven percent) was accounted for by the sale of stocks. MEANS, op. cit. supra note 61, at 270. 143. See id. at 159–60.
in times of increasing demand. The result in the long run is an upward drift in prices in these industries which again tends to be transmitted to the whole economy.  

Oligopolistic pricing, therefore, is presumed to be contrary to the public interest because its total effect is to impede the possibility of sustaining full employment and a satisfactory rate of economic growth. It is true that our economy has not been performing satisfactorily in these important respects. While the Council of Economic Advisers suggests a maximum unemployment rate of four percent of the civilian labor force as "a reasonable and prudent full employment target for stabilization policy," the unemployment rate has exceeded four percent in every year since 1954, reaching a peak of 6.9 percent during 1961. In September, 1962, 5.8 percent of the civilian labor force remained unemployed. Although the Council suggests 4.5 percent as the target annual rate of growth of output for the 1960's, in fact the gross national product (in 1961 prices) grew at an average annual rate of only 3.5 percent during the period from 1947 to 1960 (3.8 percent on the average from 1947 to 1954 and 3.2 percent on the average from 1954 to 1960). Since the end of World War II, we have experienced four recessions—in 1948–1949, 1953–1954, 1957–1958, and 1960–1961. Recovery seems to be progressively more difficult to achieve after each recession, measured by the percentage of the labor force remaining unemployed at the peak of recovery. As a result, underutilization of our plant and equipment capacity is becoming chronic. The Council of Economic Advisers estimates that full utilization of our existing capacity would mean full employment, that is, no more than four percent of our labor force would be unemployed.

However, whether the poor performance of our economy is due to the concentration of economic power and whether its performance would be improved if our economy became more competitive are questions to which answers are by no means certain. The
Kefauver Subcommittee, for example, attempted to link oligopoly in the steel industry with technological backwardness. Eckstein and Fromm also report that according "to a study conducted by the Bureau of Labor Statistics and the Census Bureau for the National Science Foundation, the primary metal industries were among the lowest in the percentage of their sales dollar spent on research and development in the last decade." Means explains that the reason for this is that the high, noncompetitive, target rate of return at which the steel industry aims slows investment in new technology.

Recently, too, the Kefauver Subcommittee has announced that it will investigate the charge that the pricing policies of concentrated industries may be responsible for the decline in real exports of these industries which has affected their total output. The New York Times reports that the steel production of the United States in 1960 was only ten percent higher than in 1954, while in the same period the six nations of the European Common Market increased their steel production by 66 percent. In ten years, the United States' share of the world steel trade dropped from 17 percent to about seven percent, and American imports of steel have risen to a point where they exceed exports in some months.

The particular case against the steel industry is persuasive. Yet there is a considerable and respected body of opinion to the effect that oligopolistic industries generally intensify the pace of technological advance. There are other obstacles in the way of assuming that a more competitive economy would so allocate resources as to produce a larger volume of goods and services. How shall we compare the efficiency of a hypothetical economic order that is more competitive in the classical sense with an existing, functioning economic order characterized by large-scale enterprise and oligopolistic competition? There is no body of data correlating degrees of competition with degrees of efficiency, and Professor Edward S. Mason acknowledges that "there is an element of faith in the proposition that maintaining competition substantially improves the efficiency of resource use." Means, on the contrary, warns that if existing oligopolies are broken up into a larger num-

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154. ECKSTEIN & FROMM, op. cit. supra note 128, at 22 n.26. For United States Steel's reply to these charges, see 1957 Hearings, pt. 3, at 1057–60.
155. MEANS, op. cit. supra note 61, at 273–74.
ber of business entities, oligopoly profits may be eliminated, but only by wastefully increasing costs and not by lowering prices to the consumer.\textsuperscript{160}

The experience of other countries, furthermore, makes it difficult to share Professor Mason's faith. It is commonly accepted that the Soviet Union has increased its industrial production at a more rapid rate than the United States, and, needless to say, the Soviet economy is not competitive in the sense in which we use that term. We may argue that this comparison is unfair; that no economy "can guarantee as high a rate of capital formation as a dictatorial economy that is prepared to squeeze forced savings out of the consumer."\textsuperscript{161} But then, during the period from 1950 to 1959, when the average annual rate of growth of the gross national product, per man-year, was 2.2 percent in the United States, it was 2.8 percent in Sweden, 3.1 percent in Norway, 3.4 percent in the Netherlands, 3.6 percent in France, 4.5 percent in Germany, 4.7 percent in Italy, and 6.1 percent in Japan.\textsuperscript{162} In 1960, too, the unemployment rate in the United States was considerably higher than the rate in these countries.\textsuperscript{163} Yet it cannot be said that the non-dictatorial economies of these countries are more competitive than the economy of the United States.

Nevertheless, we need not be too defensive about these comparisons. The existing structure and organization of our economy have not been obstacles to the production of a flood of goods and services of constantly better quality at prices that have permitted the real standard of living of our people to improve steadily. Since 1939, for example, \textit{real} average weekly earnings in manufacturing industries increased almost 90 percent.\textsuperscript{164} We are concerned about the current performance of the economy because it is not fulfilling its potential and realizing, at a fast enough rate, its promise of eliminating economic scarcity.

(2) Concentration and the Distribution of Income and Wealth

Professor J. K. Galbraith is persuaded that "few things are

\textsuperscript{160}. \textit{Means}, \textit{op. cit. supra} note 61, at 213-31.
\textsuperscript{161}. \textit{Wallich}, \textit{The Cost of Freedom} 63 (1960).
\textsuperscript{163}. Using comparable standards, a presidential committee studying statistics on employment and unemployment concluded that the unemployment rate in the United States was 5.6 percent, while it was 1.9 percent in France, 1 percent in Germany, 2.4 percent in Great Britain, 4.3 percent in Italy, 1.1 percent in Japan, and 1.5 percent in Sweden. Of the countries studied, only Canada had a higher unemployment rate (seven percent) than the United States. \textit{N.Y. Times}, Sept. 30, 1962, § 1, p. 43, cols. 1, 2.
more evident in modern social history than the decline of interest in equality as an economic issue" and that this "has been particularly true in the United States."165 Whether interest in this issue should be reawakened, however, may depend upon the extent to which our economy has succeeded in eliminating sharp inequalities. It is pertinent, therefore, to inquire whether the concentration of economic power exacerbates inequalities in the distribution of income and wealth. Apart from the ethical problems of inequality, the maldistribution of income and wealth may be a contributing cause of the deficiency in demand that afflicts our economy with idle capacity and inhibits our economic growth.

The Kefauver Subcommittee has not concerned itself with the question of the distribution of income and wealth in the United States. It sought to publicize the huge salaries and opportunities for profit through stock options that corporation executives in oligopolistic industries have procured for themselves.166 But it wished thereby to demonstrate the self-interest that these men have in higher prices and higher profits and not the unequal distribution of income.

Poverty in the United States. Our "affluent" society has not succeeded in abolishing poverty. Professor Robert J. Lampman estimates that there were 32.2 million Americans (or 19 percent of the population) in a "low-income status" in 1957—a status barely above that required for subsistence.167 The Council of Economic Advisers reports in 1962 that "about 30 percent of all families and unrelated persons have less than $1,000 of money income per person, and are now below the level that the average American achieved a quarter-century ago."168

167. LAMPMAN, JOINT ECONOMIC COMM., 86TH CONG., 1ST SESS., THE LOW INCOME POPULATION AND ECONOMIC GROWTH 4–5 (Comm. Print 1959). Professor Lampman defines a "low-income person" as "one with an income equivalent to that of a member of a four-person family with total money income of not more than $2,500 in 1957 dollars." On this basis, a single individual is classified as a low-income person if he had income in 1957 under $1,157; a two-person family is so classified if it had income under $1,638; a three-person family, if it had income under $2,016; a four-person family, if it had income under $2,516; a five-person family, if it had income under $2,888; a six-person family, if it had income under $3,236; and a family of seven or more, if it had income under $3,750. Professor Lampman's standard contrasts with the $4,000 per year that the BLS estimated was necessary in 1957 for an urban family of four to maintain an "adequate standard of living." His standard, however, is well above the budget levels used in determining need for public assistance in most states. Ibid.
Yet the reasons why these people suffer poverty have little to do with the structure and organization of the industrial order. Professor Lampman finds that in 1957 about 22.5 million low-income persons (70 percent of the total) had one or more of these handicapping characteristics—65 years of age or older (eight million or 25 percent of the total); nonwhite (6.4 million or 20 percent of the total); in consumer units headed by women (eight million or 25 percent of the total); and in consumer units headed by a person with eight grades or less of schooling (21 million or 65 percent of the total). About 25 percent of all low-income persons (eight million) were in rural farm residence, and 40 percent (12.9 million) lived in the South. At least 34 percent of the low-income persons (11 million) were children under 18; this meant that 20 percent of all children under 18 were low-income persons.

“One of the most remarkable characteristics of the low-income family heads,” Lampman finds, “is the low degree of participation in employment.” One-third of all low-income persons were in consumer units headed by a person in nonemployed status; the heads of 4.2 of the 8.7 million families with incomes under 2,500 dollars were in the Armed Forces or not employed; one-third of low-income family heads were retired.

Of the employed families with less than 2,500 dollars of income, one-third were in agriculture, forestry, and fishing and one-half were farmers or unskilled workers.

Professor Galbraith has argued that the poverty remaining in the United States “is not efficiently remedied by a general and tolerably well-distributed advance in income,” because it is the result primarily of some handicapping characteristic of the poverty-stricken individuals or of the unwillingness or inability of these individuals to leave the geographical “island of poverty in which they were born.” However, Lampman shows that over the period from 1947 to 1957, the proportion of the population in low-income status declined from 26 percent to 19 percent (more than one-fourth of the way toward zero), despite the increase in

169. Lampman, op. cit. supra note 167, at 4. “If the 32.2 million under discussion had the same characteristics as the general population only 2.9 percent would be aged, 3.2 would be nonwhite, 3.2 would be in units headed by a female and 15 would be headed by a person with educational attainment of no more than 8 grades.” Id. at 12.
170. Id. at 7, 8.
171. Id. at 7.
172. Id. at 10.
173. Ibid.
174. Ibid.
175. Galbraith, op. cit. supra note 165, at 327.
average family size, the aging of the adult population, and a large shift out of employment. 176 He attributes this reduction in poverty in significant measure to the movement of persons from low-income areas, particularly from the farm. 177 Nevertheless, Lampman recognizes the "limited validity of Galbraith's thesis insofar as it is not likely that economic growth alone will alleviate the poverty of those individuals possessing the handicapping characteristics of old-age, or female sex, or physical, mental or emotional difficulties." 178 But he thinks that economic growth in the future will help nonwhite persons to rise out of poverty, as it will require and make possible increased educational opportunities for those now deprived of these opportunities. 179

The Extent of Inequality. Gabriel Kolko contends that a "radically unequal distribution of income has been characteristic of the American social structure since at least 1910" and presents data showing that "throughout the 1950's, the income of the top tenth [of income recipients] was larger than the total for the bottom five income-tenths—about the same relationship as existed in 1910 and 1918." 180 Lampman tends to corroborate these data; he points out that the lowest two-tenths of all income recipients received about five percent of the total income in the 1930's, in 1947, and in 1957. 181 These lowest two-tenths constitute the groups in low-income status, as defined by Lampman. The composition of the low-income group and the validity, if only limited, of Galbraith's thesis, goes far to explain why this group's share of the total income has not increased over time. It would not be reasonable to conclude that the concentration of economic power was responsible for this fact.

Excluding the lowest one-fifth of all income receivers, there has been some trend toward a less unequal distribution of income. Even the data adduced by Kolko show that the percentage of national personal income, before taxes, received by the highest income-tenth of recipients fell from 39 percent in 1929 to 28.9 percent in 1959; the second, third, fourth, fifth, sixth, and seventh income-tenths each increased its share; the share of the eighth income-tenth remained the same; and the shares of the lowest ninth and tenth income-tenths fell. 182 Lampman agrees that the

177. Id. at 25.
178. Id. at 26–28.
179. Ibid.
181. LAMPMAN, op. cit. supra note 167, at 24, 29.
182. KOLKO, op. cit. supra note 180. Kolko's data on the lowest two-tenths of income recipients are not in line with Lampman's finding that
"top [income] group's share has been lowered at the expense of a gain in share by the upper middle group."183 The best estimates of income distribution after taxes do not change the picture materially.184

However, Kolko finds, as did Lampman, that most of the lowest fourth-tenths of income recipients consist of service workers, unskilled laborers, and farm operators, while most skilled workers are in the fourth and fifth highest income-tenths, and most semi-skilled workers are in the fifth and sixth income-tenths.185 Thus, there is little basis for concluding that the concentration of American industry is responsible for the fact that the share of income received by the lowest 30 percent of income recipients has remained virtually the same since 1929. The people in this lowest group are not generally employed by the concentrated industries. On the whole, the workers and white-collar employees in the concentrated industries have not only increased their real incomes, but also their shares of total income at the expense of the highest income-receivers. Concentration may inhibit the trend toward less inequality insofar as it may be said to inhibit economic growth, but it cannot be assumed that the fostering of greater competition will be more likely to induce economic growth and narrow inequality. Professor Berle reminds us that experience refutes such an assumption when he writes: "Highly competitive industries carried on by a multiplicity of small-scale producers frequently exhibited wide fluctuations in production and price and unbearable conditions of employment, while freedom to enter or leave the industry often meant little more than an annual grist of bankruptcies."186

To stimulate economic growth and narrow inequalities in the distribution of income and wealth, greater reliance will have to be placed upon Government tax and spending policies than upon policies to promote competition. Whether the groups that will not

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183. LAMPMAN, op. cit. supra note 167, at 29.
184. KOLKO, op. cit. supra note 180, at 30–45. Miller estimates that in recent years "the wealthiest 5 per cent [of families] received 20 per cent of the income before taxes and about 18 per cent of the income after Federal individual income tax payments were deducted." Miller, supra note 182.
185. KOLKO, op. cit. supra note 180, at 83.
186. BERLE, op. cit. supra note 140, at 89.
benefit from the process of economic growth will be lifted out of poverty will depend upon whether our programs of education, vocational guidance and rehabilitation, social insurance and public assistance, are expanded; low-income farmers are encouraged to move into other occupations; depressed agricultural communities and other distressed areas are developed; and racial discrimination is eliminated.187

Administered Prices and Wages and Inequalities in the Distribution of Wage Income. Professor Daniel Bell has charged that the power to administer prices and wages has exacerbated inequalities in the distribution of income because it has been used to benefit the members of strong unions bargaining with corporations possessing market power and the stockholders and executives of these corporations, but only at the expense of "unorganized workers (e.g., textile workers) in marginal industries, rentiers, pensioners, and the like"—the groups that always suffer from inflation.188 Basic to Professor Bell's argument is his assumption that unions affect only the structure of wages (the relationship between the wages of the organized workers relative to the wages of the unorganized) and not the level of wages ("the total wage bill in relation to other economic factors").189 In answer to Professor Bell, Arthur J. Goldberg maintained that "collective bargaining has had, and certainly can have, an effect in increasing labor's share of the total product, both directly and by inducing increases in productivity"; he expressed the "firm view" that "the pressure of the rise of wages in steel and auto has helped to raise the wages of lower-paid groups."190

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189. Id. at 189.

190. Goldberg, Collective Bargaining, Goals and Achievements, 30 COMMENTARY 60, 63 (1960). See Bell's reply, id. at 64.
Though the issue debated by Professor Bell and Mr. Justice Goldberg is crucial, it is difficult to resolve because of the problem of estimating what the situation would be if there were no unions with the power to administer wages and no corporations with the power to administer prices. It has been argued that "there are no significant differentials between the rates of workers in union and nonunion plants." If this is so, two conflicting conclusions follow—that even strong unions cannot affect the wage rates paid their members or that increases in union rates help to bring up nonunion rates. In the former case, the assumptions of both Professor Bell and Mr. Justice Goldberg are unwarranted; in the latter, Mr. Justice Goldberg's firm view is supported. In either case, the position that strong unions benefit their members at the expense of unorganized workers is refuted.

Professor Robert Ozanne has sought to test the alternatives by measuring the impact of unions on the level of wages and the distribution of income through a comparison of wage gains in manufacturing during a nonunion period, 1923–1929, with wage gains during a union period, 1947–1955. On the basis of these limited data, Ozanne concluded that (1) unionization creates the power to administer wages; (2) it is probable "that gains which went to union workers were not made at the expense of nonunion employees"; and (3) the gains made by all employees during the union period were made at the expense of profits in the sense that the distributive share of profits before taxes would have been greater in the absence of unionization. The "actual losers" during the union period were the recipients of rental and unincorporated income. Ozanne's conclusions thus support Mr. Justice Goldberg's view.

193. Id. at 188.
194. Id. at 193. Ozanne found that:
   (1) Real average hourly earnings of production workers in manufacturing in the union period rose over twice as rapidly as in the nonunion period . . . although increase in productivity in manufacturing as measured by change in physical output per man hour was greater in the nonunion period . . . .
   (2) Average annual compensation per full-time employee (all industries) rose less than per capita personal income in the nonunion period but exceeded gains in per capita personal income in the union period . . . .
   (3) The rate of increase in average annual incomes of white collar workers in manufacturing far outdistanced that of production workers in the same industries in the nonunion period. In the union period the
The Council of Economic Advisers has commented on the effect of unionization in the post-World War II years, reflected in the contrast between the earnings and employment of salaried and production workers in manufacturing, as follows:

Although aggregate salaries in manufacturing have risen twice as rapidly as aggregate wages, annual disbursements per worker for salaried workers increased at an average rate of only 3.8 percent a year during the period 1947–61, while disbursements per production worker increased at a rate of 4.9 percent. At the same time, the number of salaried workers was increasing at a rate of 3.7 percent a year, and the number of production workers declining at a rate of 0.5 percent.\footnote{195}

In the absence of accepted standards of equity, it is as difficult to say whether these are "just" consequences of unionism as it is to say whether a target rate of return of 16 percent, rather than eight percent, is "just" for the steel industry. Nor is much gained by blaming unions, as Bell does, for the "subversion" of the collective bargaining process;\footnote{196} or blaming industry, as Mr. Justice Goldberg does, for its "exorbitant pricing policies."\footnote{197} Both labor and management are acting in accordance with the impersonal logic of the situation that gives them the power that accompanies control of large blocks of human and material resources. Nevertheless, it remains a fact that the process of contention between strongly organized groups in our society (even if no one of them is strong enough to overpower the others) will not necessarily produce desirable results for the society as a whole. A twentieth-

\begin{enumerate}
\item[(4)] In the nonunion period the rate of increase in average annual incomes of production workers lagged well behind the rate of increase in per capita personal income. In the union period the situation was reversed.\ldots Average hourly earnings of production workers in manufacturing showed the same trends.\ldots
\item[(5)] Three out of four groups which were partially organized in the twenties showed greater relative gain in the 1947–55 period as their degree of unionization rose to nearly 100 per cent. (Bituminous coal, Class I railroads, and printing\ldots).
\item[(6)] Wage movements in the union period show surprising independence of market demand for labor.\ldots
\item[(7)] The distributive share of employees remained constant in the nonunion period. It rose in the union period.\ldots
\item[(8)] The distributive share of profits before taxes (adjusted for inventory changes) rose in the nonunion period and remained relatively stable in the union period.\ldots
\end{enumerate}

\footnotetext{195}{Id. at 195.}
\footnotetext{197}{Bell, supra note 188, at 195.}
century policy of "laissez-faire the group" is as inadequate as was the nineteenth-century policy of "laissez-faire the individual." But the problem of defining and enforcing what is desirable for the society as a whole is still unresolved.

**Internal Financing and the Distribution of Wealth.** Reinvested profits have operated as a factor increasing the concentration of wealth since 1949. Professor Lampman reports that the share of wealth held by the top two percent of families fell from 33 percent in 1922 to 29 percent in 1953 and that the share held by the top one percent of adults fell from 32 percent to 25 percent over this period. However, Lampman also finds that the concentration of wealth has been increasing since 1949 and attributes this trend to the fact that corporate saving has enabled the top wealth-holders to offset their losses on income account by gaining on capital account.  

Professor Bell argues that internal financing is a "hidden tax mechanism" by which "a corporation can, through a protected price policy, 'tax' consumers for its own purposes and do whatever it wishes with the money." If we accept the premises of existing law, Bell's characterization of internal financing is not apt. Under existing law, all profits earned by a corporation—whether distributed as dividends or retained for investment in the business—belong to the stockholders. Retained profits increase the stockholders' "equity"—the value of their ownership rights—in the corporation, just as if all the profits had been distributed to them as dividends and they had purchased additional stock in the corporation in the amount of the retained profits. No particular portion of the total profits can be singled out for description as the fruit of a "tax." But there is a sense in which Bell's description may be valuable. Internal financing operates as a "hidden tax mechanism"  

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198. Lampman, The Share of Top Wealth-Holders in National Wealth, 1922-1956 (1962). The share of wealth held by the top one percent of adults rose to 38 percent in 1929, fell to 22 percent in 1949 and rose to 25 percent in 1953. Id. at 244.

The point Lampman makes can best be appreciated by pondering over some comparisons suggested by Mr. Walter Reuther, president of the United Automobile Workers, to the Kefauver Subcommittee. Mr. Reuther pointed out that in 1947 an investment of $52,000 in 1,003 shares of GM stock would have earned $3,009 in dividends for that year. This $3,009 is what the average GM worker would have earned in 1947 if he worked the full year. If the worker continued to work a full year each of the next 10 years, he would have earned a total of $46,000. But if the stockholder sold his 1,003 shares of stock in September, 1957, he would have received $284,000 for his original investment, including dividends over the years and capital gains. A $9,000 investment in GM stock in 1947 would have yielded the investor the same amount in 1957 that the average GM worker earned during the whole period. 1958 Hearings, pt. 6, at 2260.

199. Bell, supra note 188, at 186.
that does not benefit the "taxpayer" (consumer) if it results in higher prices and profits than would prevail if the nonregulated, oligopolistic industries relied upon the capital markets for capital to finance the expansion of their productive facilities to the same extent as do the regulated industries.

Judging by the explanation that the steel and automobile executives gave to the Kefauver Subcommittee of the factors that influence their pricing decisions, we must conclude that the policy of internal financing does result in such higher prices and profits. This explanation was reiterated when both Mr. Worthington and Mr. Blough sought to use the policy of internal financing to justify the price increase announced by United States Steel in April of 1962. Mr. Blough thus stated the principle that guided his decision: "The profits which any company has left over after paying its employees, its other expenses, the tax collector and its stockholders for the use of their resources, are the main source of the plants and equipment that provide the work that thousands of workers have now." In response to a reporter's question, Blough indicated that United States Steel would take into consideration in pricing steel any "changes in the tax laws that are beneficial from the standpoint of depreciation" and that would, thereby, diminish the need for price increases to raise the capital funds for the modernization and expansion of productive facilities.200

The merits of internal financing have been hotly debated.201 To require industry to pay out to its stockholders substantially all its profits would curb the power of management by compelling it periodically to run the gauntlet of approval in the markets for capital. On the other hand, internal financing performs the function of a compulsory savings arrangement, administered by corporate enterprise, which a consumption-oriented society may need badly. Internal financing may also be a more economical way of raising capital because it saves the approximately two dollars and sixty cents per 100 dollars that it costs to raise capital by the sale of stocks.202

If internal financing accords with the public interest, then the current corporate income tax laws need to be re-evaluated. Since 52 percent of all corporate income is paid out in taxes, prices must be high enough to yield more than two dollars of retained profits for every one dollar the corporation plans to keep for investment

201. See Brewster, The Corporation and Economic Federalism, in The Corporation in Modern Society 72, 81–84 (Mason ed. 1959); Lintner, The Financing of Corporations, id. at 166.
in new plant and equipment. The tax system thus doubles the inflationary impact of internal financing. No industry representative appearing before the Kefauver Subcommittee suggested that reinvested profits be exempt from tax, in whole or in part. Such a suggestion was made by Mr. Frederick R. Kappel, President of the American Telephone and Telegraph Company, in his capacity as a member of the Research and Policy Committee of the Committee for Economic Development.\textsuperscript{203} The C.E.D. itself merely proposed that taxpayers be permitted to write-off the cost of investment at a faster rate than the tax laws then provided.\textsuperscript{204}

Elements of both these suggestions have been adopted recently. The Treasury Department has promulgated new rules permitting a shortening of the depreciable lives of plant and equipment and the Revenue Act of 1962 allows a credit against any income tax due of an amount not exceeding seven percent of the cost of investment in machinery and equipment on or after January 1, 1962.\textsuperscript{205} It is estimated that these two measures will mean a tax saving of approximately 2.5 billion dollars a year to American industry.\textsuperscript{206} Whether they will stimulate new investment and reduce the pressure, \textit{pro tanto}, to secure the investment funds out of prices remains to be seen.

In any case, to whom, in equity, should the "compulsory savings" exacted by a policy of internal financing (or tax subsidy) belong? Retained profits (in excess of the amount necessary to yield "reasonable" dividends) would represent savings to the consumer if management established prices so as not to yield any return on the cost of facilities purchased with such profits. But it is clear that no such policy could be enforced without governmental price control. If, however, internal financing is of concern primarily because of its effect upon the distribution of wealth, and not because of its inflationary impact, other alternatives may

\textsuperscript{203} COMMITTEE FOR ECONOMIC DEVELOPMENT, \textit{GROWTH AND TAXES} 19 (1961). To stimulate expenditures for new plant and equipment, Mr. Kappel proposed "a lower tax rate on a part of income proportionate to the increase in investment." For example, "if a taxpayer's investment in plant and equipment increased by 5 percent in a given taxable year, then 5 percent of his taxable income for that year would be exempted from surtax or from a stated number of percentage points of tax." \textit{Ibid.}

\textsuperscript{204} \textit{Ibid.}

\textsuperscript{205} See New Depreciation Guidelines and Rules, Rev. Proc. 62–21, 1962 \textit{INT. REV. BULL.} No. 30, at 6; Revenue Act of 1962, § 2, 76 Stat. 960. The tax credit may not exceed an amount equal to the first $25,000 of the taxpayer's tax liability plus 25 percent of its liability in excess of $25,000. The taxpayer is required to reduce its base for the depreciation of property by the amount of the credit it takes.

be available. Means remarked during the course of the hearings of the Kefauver Subcommittee that "if the corporation would issue a piece of a share of stock to each purchaser of steel in proportion to the contribution that purchaser is making to capital, then justice would be done." To measure this contribution, however, would require governmental determination of "reasonable" dividends—and possibly even limitation of dividends. Such government intervention, however, would not limit managerial discretion as much as price control. To put it mildly, however, effectuation of Means' objective would present perplexing problems of administration—how, for example, would we identify the buyers who paid the prices that produced the retained profits?

One way to assure more widespread ownership of the facilities purchased with retained profits—in the interest of a more equitable distribution of income and wealth—is to encourage corporations to adopt profit-sharing plans under which stock representing the cost of these facilities would be distributed to their employees. This suggestion is in part embodied in the first profit-sharing plan in the automobile industry negotiated by American Motors Corporation and the United Automobile Workers. Under this plan, 15 percent of the corporation's profits before taxes on products manufactured in the United States, after an amount equal to ten percent of its adjusted net worth is deducted from these profits, will be distributed among the corporation's workers. Ten percent will be distributed in the form of fringe benefits such as pensions and health insurance and five percent in the form of stock. As stockholders, the employees will benefit from the increases in the stockholders' equity produced by retained profits.

Obviously, however, it is difficult to justify a policy under which the facilities internally financed would belong, entirely, to the employees of the corporation rather than to the consumers who paid for them. It may be that the only practical way of benefiting these consumers is to make the Government of the United

207. 1959 Hearings, pt. 9, at 4776. Means destroys the point he is making by stating that the price of steel would not be lower if internal financing were not relied upon by the companies and all earnings were distributed to the stockholders. Id. at 4777.

208. N.Y. Times, Nov. 11, 1962, § 1, p. 142 (report of Damon Stetson). In the first year of the plan's operation, the 27,000 factory workers covered by the agreement were allotted $9,766,907, of which $6,511,271 went for fringe benefits and $3,255,636 for the purchase of 197,311 shares of stock or 7.3 shares per worker. The American Motors Corporation inaugurated a similar plan for its 5,200 salaried employees. These employees were allotted $2,604,277 under the plan, of which $1,736,185 went to finance fringe benefits and $868,092 for the purchase of 52,611 shares of stock. Minneapolis Morning Tribune, Nov. 16, 1962, p. 9.
States the owner of new stock representing the amount of profits in excess of that which would have been earned if prices had been fixed to return the competitive cost of capital. Some procedure similar to that now used for the renegotiation of Government contracts could be employed to determine the amount of these excess profits. Furthermore, the tax on such excess profits could then be eliminated. To assure that the Government would never be in a position to gain control of the enterprise, the stock issued to it could be nonvoting.

C. THE NON-ECONOMIC CONSEQUENCES OF CONCENTRATION

The proponents of a more competitive economic order oppose the concentration of economic power on political and social, as well as economic, grounds. They argue, essentially, that concentration jeopardizes political liberty and individualism. Professor Louis B. Schwartz puts this case most eloquently:

The centers of great wealth will own and influence newspapers, magazines and broadcasters, direct the development of universities, retain the ablest lawyers, economists and public relations specialists, finance political parties, infiltrate or wear down the executive agencies by which they are supposed to be regulated, and operate powerful lobbies so that the popular will itself is shaped to their needs. In addition, individual dignity and responsibility are magnified in a free economy. Success will not depend solely on the favor of superiors in a great pyramid of power, but may be achieved also by striking out on one's own, winning fortune from the patronage of fellowmen. Freedom on the economic frontier is today's only substitute for the open Western lands which in other generations nourished American individualism.209

Both of Professor Schwartz's arguments seem to rest on dubious premises. It is doubtful that "striking out on one's own" today offers greater scope for the development of individuality than executive responsibility in a large-scale corporation. Too much of the writing on the modern corporation misses the excitement and the drama always present in the administration of any large organization, whether private or public. Nor is it clear that the decline of American individualism—if, in truth, there has been any—is a consequence of the disappearance of the small entrepreneur. The life of the typical small businessman is not particularly conducive to the development of the individual personality.

Schwartz's fear that the "popular will" may be "shaped" to the "needs" of the "centers of great wealth" must be taken more seriously. Concentrated power is always a danger, but the institutions of democracy function to hold it in check. The relationship created is always one of tension, but on the whole it has been tolerable. This is not to say that economic power may not, on occasion, be wielded for political purposes. Some reporters, for example, voiced the suspicion that the United States Steel Corporation was politically motivated when it held the steel price line for two years under a Republican Administration, only to increase prices, in April of 1962, under a Democratic Administration. Mr. Blough, however, denied that there was any basis for this suspicion. Ascertainment of the truth in this matter may be left to the historians. Looking ahead, however, it is interesting to note that Berle sees economic power "gradually but steadily being aggregated under the American system in nonpolitical but equally impersonal fiduciary institutions," run by "non-Statist civil servants."

It is erroneous to discern too necessary a relationship between the economic order and the political order. To maintain that a competitive order, as Professor Schwartz defines it, is necessary for the preservation of political liberty is to accept the Marxist conception that the economic structure of a society determines its political "superstructure." But this conception has been refuted by experience.

The economy of the Third Reich was more like ours than like the Soviet economy, yet the political totalitarianisms of the Nazis and Communists more closely resembled each other than either resembled our political democracy. The history of the Soviet Union itself refutes the view that the political order is merely a function of the economic order. Indeed, the Bolsheviks created their economic order to serve their political objectives. Now the Russian Communists openly acknowledge that there are many "roads to socialism" and that different economic systems—ranging from Tito's "market" socialism to Mao's communes—are consistent with one-party (Communist Party) rule.

Democracies have also coexisted with a variety of economic systems. Both the British and American democracies antedated and survived the Industrial Revolution. And while the "mixed econo-

210. N.Y. Times, April 13, 1962, p. 18, col. 6 (transcript of news conference held by Roger M. Blough on April 12, 1962).
211. BERLE, op. cit. supra note 140, at 51, 76.
my" (not the economy of classical competition) is characteristic of Western democracies today, the ingredients of the mixture differ considerably from country to country. In few other democracies is competition as important an ingredient as in ours. What basis, then, is there for insisting that it is only the competitive features of our economic order that keep political liberty alive?

Our own history demonstrates that the growth of large-scale economic organizations has not been accompanied by a decline in the vitality of our democracy. Quite the contrary. During the period of this growth, the industrial worker has been admitted to full-fledged membership in our political community, and racial and religious minorities have been able to struggle, with increasing success, for equal rights and opportunities.

There is little evidence that the "centers of great wealth" dominate the political process itself. Indeed, special efforts seem to be necessary to stimulate the interest of corporate executives in political affairs. A recent study points out that the "businessmen in politics" movement did not begin in earnest until after the "humiliating rout" of the Republican Party in the congressional elections of 1958, which is attributed, in significant measure, to the work of the AFL-CIO's Committee on Political Education.214 And all seem to agree that this movement never took hold; in the course of the 1962 election campaign, ex-President Eisenhower felt impelled once again to exhort businessmen to get into politics. On the other hand, a trade unionist may conclude, with reason, that the "American labor movement has changed the face of American politics."215

Available evidence, too, does not nourish the fear that democracy is threatened by the power of money that the executives of large-scale corporations put at the disposal of the party of their choice. Dean Heard concludes:

Despite a general financial inferiority, it cannot be argued convincingly that the Democratic party has lost a single presidential election in the twentieth century for want of funds. If the facts could be known, the number of candidates at lower political levels whose defeat could be ascribed simply to a shortage of funds would probably be comparatively few.216

216. Heard, The Costs of Democracy 34–35 (1960). Dean Heard points out that money is more influential in deciding "who will be a candidate for a party's nomination and who will not." Id. at 35.
The increasing cost of financing electoral campaigns, particularly primaries, warrants public attention and concern, but this problem is not a by-product of the concentration of economic power nor will measures aimed at concentration solve it.

Do the holders of concentrated economic power threaten our democracy because they control the mass media of information either directly or by their advertising expenditures? Do they exercise this control to impose their values upon the people and thereby set definite limits upon the scope of action of the elected representatives of the people? There is danger here. Public relations campaigns, for example, are conducted by segments of the business community to disparage public spending for the satisfaction of communal needs, while extolling private spending to satisfy not-so-urgent private wants. But it is doubtful that a change in our hierarchy of values is dependent upon the restoration of a more competitive economic order or that a more competitive society will produce less acquisitive individuals.

We may agree, however, that the dispersal of economic power helps to curb the abuse of power and to diffuse energy into the economic decision-making process as a whole. The creation of a more competitive order, however, is neither the only nor the best way to disperse economic power. We have succeeded in enlarging the number of effective participants in the process of making economic decisions by creating centers of countervailing private and public power.\textsuperscript{217}

\section{II. WHAT SHOULD WE DO ABOUT THE CONCENTRATION OF ECONOMIC POWER?}

\subsection{A. The Alternatives}

So long as the managers of large-scale corporations in oligopolistic industries possess the power to make price decisions, the public will have reason to inquire about the policies these decisions are designed to implement. Berle is optimistic that the acceptability of these policies to society will, in time, become the principal criterion by which the decisions of the managers will themselves be guided. Corporate managers, he writes, are developing an appreciation of the "public consensus"—the "set of ideas, widely held by the community . . . that certain uses of power are 'wrong,' that is, contrary to the established interest

\textsuperscript{217} See generally \textsc{Galbraith}, \textit{American Capitalism: The Concept of Countervailing Power} (rev. ed. 1956); \textsc{Auerbach}, \textit{Law and Social Change in the United States}, 6 U.C.L.A.L. Rev. 516 (1959).
and value system of the community." This development is encouraging. But it is also apparent that neither "the public consensus" nor the "corporate conscience" is sufficiently developed as yet to prevent the kind of clash that occurred between the United States Steel Corporation and the President of the United States in April of 1962. How can the development of both the public consensus and the corporate conscience be facilitated?

Those who, like Professor Schwartz, are dissatisfied with posing the question in this fashion seek to destroy the managerial power of decision by advocating the breakup of industrial concentrations. Others seek ways of defining, if not imposing, objectives of public policy for the private power-holders to attain. The difficulty to date seems to be that those who are dissatisfied with the status quo regard these alternatives as mutually exclusive, choose one, and attack the other; an effective job of mutual demolition is usually accomplished, while the status quo remains.

B. ANTITRUST POLICY

1. The Need for Additional Inquiry

Few of the witnesses who appeared before the Kefauver Subcommittee were sanguine about the possibility of enacting an adequate body of law, which the Subcommittee concluded does not exist, to eliminate "control of the market by a few large enterprises which may behave in such a manner as to yield exactly the same result as would be produced by a complete one-company monopoly or by outright conspiracy." Furthermore, it is discouraging to read a work by a close and discerning student of our antitrust policy that concludes that a factual and analytic basis does not yet exist upon which to decide the economic issues raised by this policy. There are, as noted above, sharp differences in the views of competent men even when they look at the same data. Unfortunately, the Kefauver Subcommittee did not try to bring before it the men who differed on these economic issues and to challenge them either to demolish the positions they opposed or else reach agreement with their opponents, at least on the lines fresh inquiry should take to resolve differences. To the extent that the legislative investigating process was depended upon to develop a consensus on which legislative and administrative decisions can be based, it failed in this case.

218. BERLE, op. cit. supra note 140, at 90-91.
It may be that the necessary fact-finding and analysis can best be undertaken or sponsored by the antitrust agencies. The Department of Justice and the Federal Trade Commission will also be able to use these studies in planning their enforcement activities. These agencies should examine the structure and market practices of each of our industries and undertake to say whether the objectives of the antitrust laws are being attained in each industry. If they are not being attained in a particular industry, the study should indicate how that industry's structure and market behavior can be made to conform with antitrust goals. If the agencies conclude that existing law makes it impossible to do so in the case of particular industries, they should propose the necessary additional legislation.

2. Proposals to Break Up Existing Concentrations

Professor Schwartz has suggested that a new agency be established with powers similar to those held by the Securities and Exchange Commission under the Public Utility Holding Company Act in order "to compel the reorganization of excessively large enterprises into units" no larger than may be "justified by production or distribution economies." Professors Kaysen and Turner have similarly proposed the creation of an Industrial Reorganization Commission to bring suits before an Economic Court to compel the structural reorganization of firms possessing market power, and the creation of new independent companies.

Immediately after the threatened steel price increase was withdrawn in the spring of 1962, Senator Albert Gore of Tennessee introduced a bill to amend section 2 of the Sherman Act in order to give the courts "the same yardstick to apply to break up existing large concentrations, that they can already apply to prevent proposed mergers and acquisitions." The bill would have made it illegal for any corporation with assets in excess of 100 million dollars to engage in interstate or foreign commerce if the "effect of its business activities may be substantially to lessen competition, or to tend to create a monopoly, in any line of commerce" in any

221. Schwartz, supra note 209, at 69-70.
222. KAYSEN & TURNER, ANTITRUST POLICY 266-72 (1959). The authors conclusively presume the existence of "market power" if "for five years or more, one company has accounted for 50 percent or more of annual sales in the market, or four or fewer companies have accounted for 80 percent of sales." Id. at 267. They would, however, permit such firms to defend suits to compel their structural reorganization on stated grounds that justify the existence of market power. Id. at 268.
section of the United States. In any suit brought under the act to enforce this new prohibition:

[Proof that such corporation during any of the preceding five years has conducted its affairs in such a way as to indicate a substantial lack of competition or any lessening of competition in the production and marketing of commodities of any class produced within the United States shall constitute prima facie proof that the effect of the business activities of that corporation with respect to articles or commodities of that class may be substantially to lessen competition, or to tend to create a monopoly, in commerce in articles or commodities of that class within the United States.

Finally, the bill would have required a court that found that a corporation had violated the proposed prohibition to "enter its order requiring the dissolution of such corporation and the re-arrangement of its assets, liabilities, and share capital in such manner as may be required to establish two or more unrelated enterprises the business activities of which will not substantially lessen competition, or tend to create a monopoly, in commerce in such class of articles or commodities" in any section of the United States.

The Gore bill bears the marks of hasty drafting, and it has been ignored. If the breakup of firms possessing market power is the objective, the carefully thought out proposal of Professors Kaysen and Turner is much to be preferred. The Kefauver Subcommittee would perform a public service if it made a serious effort to enact such a proposal. Even if the attempt should fail, the current myth about how our economy functions might be exploded and the status quo accepted without the guilt feelings, shared by businessmen and intellectuals, that are provoked by the discrepancies between the myth and reality. Or serious public attention might be forced upon possible alternatives to our antitrust policy.

C. POLICIES OF GOVERNMENT REGULATION

1. The Need for Regulation

The term "regulation" in this context will be used to include reference to policies of guidance that fall short of direction by government.

The clash between the President and the steel industry in April, 1962, made it clear that corporate managers will no longer be permitted to act as the principal arbiters of the conflicting claims of their stockholders, employees, suppliers, dealers, and customers and of living and future generations. While this clash disclosed
the need for regulation, it raised perplexing questions about the institutional form regulation should take.

The controversies engendered during the course of the hearings of the Kefauver Subcommittee revealed the lack of agreement on issues that would have to be resolved if policies of regulation were to be adopted. There seems to be agreement on the desirability of attaining full employment, a satisfactory rate of economic growth, and reasonable price stability, but not on whether these objectives are consistent with each other nor on what wage and price policies will best effectuate them. Furthermore, there does not seem to be any "public consensus" on the standards of justice or equality that should govern the distribution of the national income. What is a "fair" wage? Or a "fair" profit?

2. Should the Courts Perform Additional Regulatory Functions?

It has been proposed that we should make additional use of the courts to control the exercise of concentrated economic power. Professor Corwin Edwards, for example, recently reported: "I . . . saw a suggestion, by a person who has substantial influence on public policy, to the effect that large companies should be given public utility status. This would mean, of course, that they would be required to sell to all comers at reasonable prices." The courts would be relied upon to enforce this dual obligation. It has also been urged, quite frequently of late, that the modern corporation, as well as the trade union and any other private association wielding power, should be regarded as "private governments" and subjected to the constitutional restraints now imposed upon the federal and state governments. If the Supreme Court of the United States accepted this view, it would assume the ultimate responsibility to review the exercise of corporate power.

This is not the place to explain the legal doctrines under which it is thought that private power-wielding associations can be "constitutionalized" or to predict whether the Supreme Court will once again effect a constitutional revolution by adopting any one of them. There is always the possibility of constitutional amendment


if the objective is vital enough. But what would be accomplished by such constitutional interpretation or amendment?

Though one of the first to advance the proposal, Pekelis warned that "constitutional control of de facto governments of churches or unions, fraternities or monopolies, trade associations or universities, is big not only with hopes but with dangers as well—the danger of a monistic, centralized, coalescent leviathan state." Whether or not the fusion of economic and political power must lead, inevitably, to the extinction of individual freedoms, Western democratic societies have seen sufficient danger in the combination to oppose it. To hold that the corporation and the trade union should be regarded as private governments is to equate economic power in our society with political power. While it would still be possible to justify the relative independence of the "economic" order as a means of decentralizing the "political" order, it would be difficult for public government to deny its responsibility for whatever it permitted private government to do. The assumption of such responsibility would encourage intervention to discharge it, and the grounds for Pekelis' fears are laid bare.

This objection to the proposed legal concept of private government may have theoretical significance only. But examination of the uses to which the concept would be put even by Pekelis reveals practical difficulties. Since the constitutional revolution of the 1930's, the Supreme Court has upheld the power of federal and state legislatures to regulate the activities of the corporation and the trade union to promote objectives that the legislatures, with reason, think will promote the public interest. Anything the courts might do under the "constitutionalization" proposal, therefore, the legislatures may do. Furthermore, the legislatures may act in a legal framework that does not make them responsible, even theoretically, for the activities of private associations that they do not choose to control. Those who would give the term "private government" a legal, and not merely metaphorical, sense wish to empower the Supreme Court to review and set aside acts of "private governments" in the face of the legislatures' neutrality toward, or even approval of, these acts. But is the Supreme Court competent to perform this regulatory function, and would its performance be consistent with the proper role of the Court in our democracy?

No general answer can be given to the question of competence;

226. Pekelis, supra note 225, at 126.
227. Even as a metaphor, the term "private government" is misleading if it results in stressing the similarities between public and private governments to the neglect of their differences.
the Court's competence will vary with the particular corporate
decision sought to be subjected to judicial review. Pekelis, for
example, would impose upon private associations a judicially-en-
forceable "duty to act fairly, and with decent respect for the in-
dividual rights of those who, as suppliers, investors, workers, or
buyers, are subject to their powers." Undoubtedly, the courts
are competent to ensure that corporations and trade unions, as
well as governments, follow employment practices that do not
discriminate against individuals on racial or religious grounds.
Yet even in this field we have a sizable body of legislation, often
implemented by administrative agencies, aimed at eradicating dis-
criminatory employment practices. Because many legislatures,
including Congress, have not yet passed such laws, should the
Supreme Court of the United States make itself the supreme fair
employment practices agency in the country? The federal courts—
which must enforce public school desegregation, the voting rights
of the Negro and, now, fair legislative apportionment—bear heavy
responsibilities. By giving them tasks that other branches of govern-
ment should perform, we may jeopardize the functions that only
they can perform. Certainly this risk should be run only to secure
the fundamental rights of the individual. While there may be a
reasonable difference of opinion about what rights are "fundamental,"
the "constitutionalization" of private power-wielding as-
sociations would not permit this distinction.

Yet it would not be wise to ask the Supreme Court to decide,
as a constitutional matter, whether a junior executive of a large
corporation has been deprived of a promotion for some arbitrary
reason other than his race or religion, or to ask the Court to formu-
late the constitutional rights of suppliers, dealers, and customers.
Refusals to deal, for example, now present the courts with dif-
ficult questions, even though the criteria of legality are tied to
the maintenance-of-competition objective of the antitrust laws.
What is "fair dealing" vis-à-vis the supplier, dealer, or buyer,
apart from this objective? Agencies regulating public utilities have
found it difficult to administer legislative prohibitions against dis-
criminatory dealings. How should the courts define discrimination
without any legislative guidance at all?

Furthermore, it would be most unwise to ask the Supreme Court
to determine a "fair" wage and a "fair" price under the guise of
interpreting the Constitution. Should it take a constitutional amend-
ment to alter the judicial pattern of price and wage regulation?
To ask the Court to undertake these regulatory activities, in short,

228. Pekelis, supra note 225, at 118–19.
would not only tax its competence, but would also impair the function of the legislature in our democracy. If regulation is desirable, it should be adopted as public policy by the legislature, which should spell out the regulatory standards with sufficient specificity to disclose the ends of policy.

Finally, implementation of the legislative policy should be entrusted to an administrative agency. It should not be forgotten that the impracticability of public utility regulation under the common law and through the medium of judicial enforcement of regulatory provisions in utility charters led to the creation of administrative agencies to do the job. To return regulation to the courts is not a sensible way to avoid the limitations of the administrative process. It is true that policy-making under the antitrust laws has been delegated, in significant measure, to the courts. But this experiment has hardly proved to be an unqualified success. It is interesting that Professors Schwartz, Kaysen, and Turner agree upon the need to set up a new administrative agency to implement their proposals for change in the antitrust laws.

3. Regulation Under the Employment Act of 1946

By this act, Congress created a means of guiding, but not directing, the exercise of private economic power. The act requires the President in his Economic Report to the Congress (1) to specify the levels of employment, production, and purchasing power, needed to maintain full employment, a satisfactory rate of economic growth, and reasonable price stability; (2) to estimate whether current and foreseeable trends will lead to the effectuation of these goals; and if not (3) to suggest policies that will. The act thus looks to the President (and his Council of Economic Advisers) to make these determinations in a way that can guide private decision-making. Congress retains the ultimate responsibility for carrying out the objectives of the act.

The 1962 Economic Report of the President attempted to discharge the obligation to guide the decisions of corporation and trade union executives to a greater extent than any of the previous reports. In this report, the Council of Economic Advisers first enunciated what Secretary of Defense McNamara came to describe in April of 1962 as "the President's program to maintain price stability based on a national wage policy which limits wage increases to productivity gains." The Council itself, more mod-

230. For suggestions as to how far this guidance function should be carried, see Colim, Economic Stabilization Policy, in Economics and the Policy Maker (1959).
estly, purported to offer "guideposts for noninflationary wage and price behavior" by firms and unions that "exercise considerable discretion over the terms of wage bargains and price decisions." Thus the Council suggested that "the rate of increase in wage rates (including fringe benefits) in each industry be equal to the trend rate of over-all productivity increase"; if a particular industry's rate of productivity increase exceeds the over-all rate, it should reduce its prices; if it lags behind the over-all rate, a price increase is appropriate.233 The Council stressed that it was offering a general guide, not a rule, because it was assuming no change in the relative shares of labor and nonlabor incomes in a particular industry, even though "there is nothing immutable in fact or in justice about the distribution of the total product between labor and nonlabor incomes."234

Exceptions to the "general guide" were also recognized by the Council. Wage increases not warranted by productivity gains were regarded as legitimate if necessary to attract sufficient labor to an industry or to raise "exceptionally low" wages. On the other hand, wage increases might fall short of those warranted by productivity gains if necessary to provide jobs for the entire labor force in a particular industry or if wages were "exceptionally high." Similarly, price movements might not follow the general guide in industries in which (1) profits were either insufficient to attract needed capital or an outflow of capital was desirable; (2) costs other than labor costs have risen or fallen; or (3) "excessive market power has resulted in rates of profit substantially higher than those earned elsewhere on investments of comparable risk."235

The program of the President as described by the Council of Economic Advisers is much more flexible and difficult of application to particular cases than the policy that Secretary McNamara accused United States Steel of attempting to undermine in April, 1962.

4. The President's Advisory Committee on Labor-Management Policy

Early in his Administration, President Kennedy attempted to create an institutional framework within which labor and management could participate in the formulation of wage-price policies to further the public interest. These policies would then be the measure of the public responsibilities that the President was re-

233. Id. at 189.
234. Id. at 185, 189.
235. Id. at 189.
questing corporations and trade unions to discharge. An Advisory Committee on Labor-Management Policy was established, composed of the Secretary of Labor, the Secretary of Commerce, and seven members from labor, seven from management, and five from the public, designated by the President.\textsuperscript{236} The Committee was given the task of studying and recommending to the President "policies that may be followed by labor, management, or the public which will promote free and responsible collective bargaining, industrial peace, sound wage and price policies, higher standards of living, and increased productivity" and "ensure that American products are competitive in world markets."\textsuperscript{237} It was also asked to consider "the benefits and problems created by automation and other technological advances."\textsuperscript{238}

To date, the Committee has issued only two reports—one deals with automation\textsuperscript{239} and the other with collective bargaining.\textsuperscript{240} The problem of "sound wage and price policies" is on its current agenda. The \textit{Report on Collective Bargaining} calls for "preserving the free and voluntary nature of decision-making which collective bargaining represents," but admonishes labor and management that "the privilege they enjoy to agree or disagree on terms and


The labor representatives initially designated were \textit{David Dubinsky}, President, International Ladies' Garment Workers Union; \textit{George M. Harrison}, President, Brotherhood of Railway and Steamship Clerks; \textit{Joseph D. Keenan}, Secretary, International Brotherhood of Electrical Workers; \textit{Thomas Kennedy}, President, United Mine Workers of America; \textit{David J. McDonald}, President, United Steelworkers of America; \textit{George Meany}, President, American Federation of Labor and Congress of Industrial Organizations; and \textit{Walter P. Reuther}, President, United Automobile Workers of America.


The public representatives were \textit{Dr. Arthur F. Burns}, President, National Bureau of Economic Research; \textit{David L. Cole}, attorney and arbitrator; \textit{Dr. Clark Kerr}, President, University of California; \textit{Dr. George W. Taylor}, Professor of Labor Relations, Wharton School of Finance, University of Pennsylvania; and \textit{Ralph E. McGill}, Publisher, The Atlanta Constitution.


\textsuperscript{238} Ibid.

\textsuperscript{239} \textit{PRESIDENT'S ADVISORY COMMITTEE ON LABOR-MANAGEMENT POLICY, REPORT ON THE BENEFITS AND PROBLEMS INCIDENT TO AUTOMATION AND OTHER TECHNOLOGICAL ADVANCES} (1962).

\textsuperscript{240} \textit{PRESIDENT'S ADVISORY COMMITTEE ON LABOR-MANAGEMENT POLICY, REPORT ON FREE AND RESPONSIBLE COLLECTIVE BARGAINING AND INDUSTRIAL PEACE} (1962).
conditions of employment can be preserved only if it is exercised responsibly." To encourage responsibility, the Report states that the Committee proposed, and the President approved, the convening of periodic conferences of labor, management, and public officials under government auspices to "apprise the parties of relevant governmental objectives and policies and also provide an opportunity for industry and labor spokesmen to offer constructive recommendations to the Government." These conferences, the Report emphasized, "will obviously not provide formulas for the disposition of matters at issue between parties engaged in negotiations." Nor, the Report continued, "do we believe that such formulas would be desirable or in the interest of preserving free collective bargaining."

It is difficult to know what to make of this report in the context of the April, 1962, encounter between the President and the steel industry. The Report, which was made public in May of 1962, does not mention this controversy; nor does it mention the formulae for a wage-price policy suggested by the Council of Economic Advisers. However, an addendum to the Report indicates that the Committee plans to study further "the relationship of concentration of labor and management power to the development of national emergency situations."

5. The National Consumer Advisory Council

To give the consumer a voice "on issues of broad economic policy," and "on governmental programs protecting consumer needs," the President, on July 18, 1962, named the 12 members of a national Consumer Advisory Council. The Council is to

241. Id. at 2.
242. Id. at 3. As of this writing, one such conference—the White House Conference on Economic Issues—has been held.
243. Ibid.
244. Id. at 6, 7. The words of Arthur F. Burns are quoted.
245. H.R. Doc. No. 364, 87th Cong., 2d Sess. 3813 (1962) (message of the President to Congress, offering various measures for the protection of consumer interests). The members of the Council are: Helen Canoyer, Dean, Home Economics School, Cornell University (chairman); David Angevine, Information Director, Cooperative League of the U.S.A.; Persia Campbell, Chairman, Economics Department, Queens College; Stephen Dubrul, Partner in Lehman Brothers and a Director of May Department Stores; Mrs. John Lee, past President, League of Women Voters; Edward Lewis, Executive Director, Urban League of Greater New York; Walter Mondale, Attorney General, Minnesota; Richard Morse, Chairman, Family Economics Department, Kansas State University; Helen Nelson, Consumer Counsel, California; Sylvia Porter, newspaper columnist; Caroline Ware, Chairman of President Truman's Consumer Advisory Committee; and Colston Warne, President, Consumers Union.
make recommendations to the Council of Economic Advisers. While it has been meeting bimonthly, the Consumer Council has not yet made public any recommendations or reports.

6. Presidential Intervention

Early in his Administration, President Kennedy indicated his readiness to intervene personally on behalf of wage and price policies that he thought would further the public interest. Under the contracts between the steel industry and the steel workers, a wage increase was scheduled to take effect on October 1, 1961. On September 6, 1961, the President wrote to the heads of the 12 largest steel companies urging them to hold the price line after the wage increases became effective. The President stated:

If the industry were now to forego a price increase, it would enter collective bargaining negotiations next Spring with a record of 3½ years of price stability. . . . It would clearly then be the turn of the labor representatives to limit wage demands to a level consistent with continued price stability. The moral position of the steel industry next Spring—and its claim to the support of public opinion—will be strengthened by the exercise of price restraint now.246

Although Mr. Roger Blough of United States Steel disputed the facts on which the President based his argument that the steel industry could afford to absorb the coming wage increase, the industry exercised the restraint called for by the President. Early in 1962, therefore, the Administration, through Secretary of Labor Goldberg, was instrumental in getting labor and management in the steel industry to negotiate and conclude a new agreement well in advance of the time when the old agreement was to expire.247 Secretary Goldberg also, it was reported, helped to persuade the steelworkers to keep their demands within the expected three percent annual productivity increase. Under this formula, an increase of 12 cents an hour during the first year of the new contract would have been warranted; the increase agreed upon was estimated at ten cents an hour.248 This is why, as noted above, the President hailed the settlement as non-inflationary.

In February of 1962, addressing the Executives' Club in Chi-

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246. The President's letter and the reply of Mr. Roger Blough, Chairman of the Board of United States Steel, have been reprinted in a pamphlet of the Public Relations Department of United States Steel.
chicago, Secretary Goldberg stated flatly that the Administration was prepared, unhesitatingly, to discharge its obligation "to define the national interest and assert it when it reaches important proportions in any area of our economy."\textsuperscript{249} However, the Secretary was not prepared to be specific. "But we are only going to do that [assert and define the national interest]," he stated, "to make sure that the government defines what the government can do, that the government does not do what the government cannot do, and that is enter into the collective bargaining situation as a party who is involved in what the real parties themselves ought to do." The Government, the Secretary reiterated, "ought to act like the government and not replace the parties or their responsibility in collective bargaining."\textsuperscript{250}

In less than two months, the President's public denunciation of United States Steel's abortive price increase made it somewhat clearer how the Administration proposed to discharge its obligation to guard the public interest. But confusion has not been entirely dissipated. The President's action would seem to imply that the theory of intervention expounded by the Secretary of Labor was not going to be heeded in practice. But Solicitor General Archibald Cox, for example, rejects the interpretation that the President intervened to veto the decision of the steel executives. Instead, he views the Presidential intervention as reflecting governmental insistence upon "an opportunity to be heard as spokesman of the wider public interest [which he identifies primarily with the successful meeting of foreign competition and solution of the international balance of payments problem] while the decision is being made."\textsuperscript{251} This is a surprising commentary on a tough and effective exercise of a Presidential veto.\textsuperscript{252}

\textsuperscript{249} Goldberg, \textit{supra} note 247. The Secretary also advocated that the Government should provide the parties with the statistical and economic analyses necessary for intelligent bargaining.

\textsuperscript{250} \textit{Ibid}.


\textsuperscript{252} By contrast, in 1958 Senator Kefauver repeatedly urged President Eisenhower to intervene to prevent the steel price increase that materialized in August of that year. \textit{1958 Hearings}, pt. 8, at 4457–58. President Eisenhower refused. \textit{Id.} at 4460, 4478–79. Secretary of Labor Mitchell explained that this refusal was prompted by "deep respect for our system of free enterprise" and reluctance "to take steps that could amount to intervention in an area of private labor and management responsibilities." \textit{Id.} at 4480. Senator Kefauver urged the President to take the following steps: (1) convene informal conferences between the leaders of the steel industry and government representatives; (2) publicly request the industry to abstain from making the increase; (3) issue suggested price ceilings and ask the industry to adhere to them voluntarily; (4) persuade labor to avoid inflationary
The President's personal intervention to forestall the steel price increase in April of 1962 raises many perplexing questions. The subsidiary effect of this action was to transmute certain "guideposts" for private behavior into a "national wage policy" limiting wage increases to productivity gains. This policy is subject to the serious criticism, which the Council of Economic Advisers advanced, that it assumes the existing distribution of the national income to be equitable. Moreover, it is debatable whether wage increases that result, immediately, in cost increases per unit of output may not perform a socially useful function in spurring technological progress. This spur may be lost if wage increases are always to be bounded by average productivity gains.

Secondly, the steel industry action was thwarted without giving the industry an opportunity to justify it, even by the guideposts erected by the Council of Economic Advisers. In fact, of course, there were no standards authoritatively laid down by which the steel executives had to be guided. The President acted, apparently, because the steel industry violated what he understood to be an implicit agreement not to raise its prices if a noninflationary wage settlement was obtained.253 But the most important question is raised by the intervention itself and not by the policy for which the President interceded. It is not wise to make the enforcement of any wage-price policy depend upon a test of strength between the President of the United States and the executives of a great industry or a great labor union. If such a test comes, the President must not lose,253a but it is frightening to watch the President muster wage demands; and (5) issue brief summary analyses of the industry's prices, profits and production, indicating generally whether a price increase was required and if so, how much. Id. at 4458.

253. See Cox, supra note 251, at 5. In his year-end discussion with the reporters representing the NBC, CBS and ABC networks, the President, in retrospect, gave the following reason for his intervention:

It seemed to me that the question of good faith was involved and that if . . . after asking the unions to accept the non-inflationary settlement, . . . I had not attempted to use my influence to have the companies hold their prices stable, . . . the union could have rightfully felt that they had been misled. In my opinion, [this] . . . would have made it impossible for us to exert any influence from the public point of view in labor-management disputes which affect the public interest. So I have no regrets. The fact is, we were successful . . .


253a.

Now, supposing we had tried and made a speech about it and then failed. I would have thought that would have been an awful setback to the office of the presidency . . . . There is no sense in raising hell and then not being successful. There is no sense in putting the office of the presidency on the line on an issue and then being defeated.

the immense powers of the federal government against even so formidable an antagonist as United States Steel in order to assure his victory.

Furthermore, it is not desirable that the President should act alone in these matters. The issues, it is respectfully submitted, are not merely "sophisticated and technical," as the President seems to think. Nor will "sophisticated solutions" necessarily promote the public interest when the issue is how the national income should be divided. This question is also political, and the public interest requires that it be solved by a tolerable accommodation of conflicting claims. If, therefore, there is to be governmental intervention in the process of determining wages and prices, it should be sanctioned by the Congress, which is the most suitable instrument of accommodation in our democracy.

This is easier said than done. The knotty problem is the form that legislative intervention should take. It does not help much to be told that there "would seem to be a wide range of possibilities between non-intervention, on the one extreme, and, on the other public regulation through orders backed by force of law." When the range of effective possibilities is canvassed, it must be acknowledged that there is no satisfactory resolution of our problem.

7. Additional Legislative Intervention

(a) S. 215, 86th Congress, 1st Session (1959)

Solicitor General Cox has called for "some new procedural arrangement" to enable the government to define and assert the public interest at a fairly early stage in the process of wage and price decision-making and to "understand and take into account the pressing interests of the parties most immediately affected." These were the objectives of the procedural arrangement proposed by S. 215, which was sponsored by Senator Joseph C. O'Mahoney of Wyoming, then a member of the Kefauver Subcommittee. This

254. President Kennedy's Commencement Address at Yale University, Wall Street Journal, June 12, 1962, p. 20, cols. 1, 3. The President said: The central domestic problems of our own time . . . relate . . . to research . . . for sophisticated solutions to complex and obstinate issues . . .

. . . . What we need is, not more labels and more cliches, but more basic discussion of the sophisticated and technical questions involved in keeping our mighty economic machine moving steadily ahead.

255. Cox, supra note 251, at 6.

256. Ibid.

257. For the text of this bill, see 1959 Hearings, pt. 11, at 5183–85.
bill forbade any large corporation in a concentrated industry from increasing the prices of its products until 30 days after it delivered a notice of the proposed increase to the Federal Trade Commission, the Attorney General, the Speaker of the House of Representatives, and the President of the Senate. Within the 30 day period, the FTC was to call a public hearing, at which, together with the Attorney General, it was to "examine" the corporation "with respect to the reasons for and justifiability of the proposed increase and to take testimony on the impact of such increase upon competition and the economy of the Nation." Their findings, together with any recommendations they chose to make, were to be submitted to the Congress and, of course, made public.

While S. 215 sought to ensure some governmental scrutiny of impending price decisions and would have provided an institutional framework for fact-finding and the application of public pressure, it was deficient in crucial respects. It ignored the problem of wage policy and imposed a measure of price regulation without in any way specifying the principles or standards by which a proposed price increase would be evaluated.

(b) S. 3168 and S. 3169, 87th Congress, 2d Session (1962)

The steel controversy in April of 1962 revived the idea embodied in S. 215. On April 16, 1962, Senator Gore accompanied his bill to break up corporations controlling assets of more than 100 million dollars with two other bills aimed at less drastic, but significant, objectives. S. 3168 proposed to apply the national-emergency-strike-delaying provisions of the Labor Management Relations Act of 1947 to price increases that threaten to "imperil the national health or safety or the economic stability of the Nation." Senator Gore expressed the hope that during the

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258. The bill covered every corporation with a capitalization in excess of $10,000,000 that is engaged in any line of commerce in which eight or less corporations account for 50 percent or more of the total annual sales in that line of commerce in the United States. Compare the Kaysen-Turner definition of the existence of market power, note 222 supra.


260. The bill empowered the President to appoint a board of inquiry to investigate the issues involved in any "threatened or actual increase in the price of any product or service affecting an entire industry or substantial part thereof" that, if permitted to occur or to continue, would, in the President's opinion, "imperil the national health or safety or the economic stability of the Nation." This board would have reported to the President on "the facts with respect to the increase," but would not have made any recommendations. The President could then "direct the Attorney General to petition the district court . . . to enjoin the taking effect or continuation of" the increase. An injunction would issue if the court found that the threatened or actual price increase affected an entire industry or a sub-
80 day period of delay, "the force of public opinion can be brought into play, so as to prevent actions of administered-price industries inimical to the public welfare." This bill would have created an even more cumbersome procedure for fact-finding than S. 215 without remedying the latter's deficiencies. It, too, failed to provide the fact-finding agencies and the public with any principles or standards by which to judge whether particular actions of administered price industries were inimical to the public welfare.

The third bill, S. 3169, proposed to establish a National Consumers Advisory Board, and eight regional boards, to hold hearings, collect information, and publish reports, to provide a sound basis for informed public opinion with respect to general adjustments of prices or wages (or labor disputes involving such adjustments) that occurred or threatened to occur. It should be noted that the newly-created national Consumer Advisory Council has not been given this function. While the bill declares that it is the federal government's policy "to insure that consumers are charged fair and equitable prices for goods and services" and relies upon the proposed consumer boards to mobilize the weight of public opinion "on actions of management and labor which threaten to promote price or wage inequities," it does not define "fair and equitable prices" or "price or wage inequities."

(c) Means' Proposed Economic Performance Act

To his credit, Gardiner Means, in his recent book, has not evaded the problems of defining the standard of a "just" price and enforcing it. Means urges Congress to adopt an Economic Performance Act that would apply to "collective enterprises." A substantial part thereof that, "if permitted to occur or to continue, would imperil the national health or safety, or the economic stability, of the Nation."

The issuance of an injunction would also have required the persons who authorized or proposed the increase to reconsider their decision, in the light of the report of the statutory board of inquiry and of any report or recommendations made by any other Government agency at the request of the President. At the end of a sixty-day period, if the increase had not been rescinded or the proposed increase withdrawn, the statutory board of inquiry would report to the President "the current position of those authorizing or proposing the increase" and the recommendations with respect to the increase made by any Government agency or other interested nongovernmental group. The court injunction would be discharged 20 days after the board of inquiry made this report to the President or as soon as the increase was rescinded or the proposal for an increase withdrawn. After the injunction was withdrawn, the President was to submit a report of the proceedings to Congress, "together with such recommendations as he may see fit to make for consideration and appropriate action."

262. The account that follows is based upon Means, op. cit. supra note 202, at 296–321.
"collective enterprise," to Means, is any corporation possessing unregulated pricing power of sufficient magnitude to affect the corporation with a substantial public interest. He presumes that a corporation that controls assets of 500 million dollars or more is in this category, but not a corporation that controls assets of less than 100 to 200 million dollars. Means concludes that there are about 100 such collective enterprises, that they account for half the manufacturing output of the United States, and that ownership is separated from control of these 100 corporations to a significant degree.

Means argues that a collective enterprise should be run in the interest of the management that controls it, but that steps should be taken to assure that management’s interest coincides with the public interest. He then outlines these steps and, in doing so, indicates why he thinks such a coincidence is possible, even though the interest of the stockholder, in his opinion, cannot be made compatible with the public interest.

As noted above, Means’ basic objection to administered prices is that they yield profits in excess of the competitive cost of capital. Essentially, then, he proposes that the management of a collective enterprise (which, by his definition, possesses the power to administer prices) should be induced, by self-interest, to fix prices that will yield a target rate of return approximating the competitive cost of capital. To this end, Means suggests that bonuses should be paid to management if it fixes prices on this basis and if it also improves the economic performance of the collective enterprise—that is, if it reduces costs, improves technology, expands the enterprise, and so forth. The Economic Performance Act would define the tests of improved economic performance broadly, but the details of the bonus system would be devised by directors who are not also managers and subjected to the approval of the stockholders. The act would then give these management bonuses favorable tax treatment—Means suggests a 25 percent tax rate. The Treasury Department, however, would be empowered to reject as “too high” a collective enterprise’s estimate of the cost of capital that its target rate of return must approximate if the management bonuses are to receive favorable tax treatment. To induce stockholders to accept the proposed bonus system, Means would make it an alternative to (1) the breaking up of the collective enterprise into smaller units; (2) price regulation; or (3) an excess profits tax.

Means’ proposal assumes that the “economic performance” of management can be judged on some basis other than the quantity of profits earned by the enterprise. Thus, he takes his stand with
Professor R. H. Tawney who hoped that the appeal to the professional feeling of the manager of industry would help to abolish what Tawney regarded as the tyranny of functionless property. He wrote:

The difference between industry as it exists today and a profession, is . . . simple and unmistakable. . . . The essence of the former is that its only criterion is the financial return which it offers to its shareholders. The essence of the latter is that, though men enter it for the sake of livelihood, the measure of their success is the service which they perform, not the gains which they amass.\(^{263}\)

Means is not as idealistic as Tawney; he would permit the managers to amass substantial gains for themselves as a reward for serving the public.

On the other hand, Professor Michael Polanyi contends that "economic activities cannot be guided by professional standards because there exists no system of thought from which such standards could be derived in respect to this field"; only profit "must be their guide."\(^{264}\) Means disagrees. He is persuaded that the "working out of measures of specific performance for top management seems well within the economic, accounting, and engineering skills already available,"\(^{265}\) and that his proposal would give management strong incentives to improve these measures.

(d) Lerner's Price Regulation Proposals

Professor A. P. Lerner has suggested a system of price regulation to force administered prices and wages to behave as if they were not administered. Accordingly, he elaborates the following standards for such regulation:

\(1\) administered prices should be permitted to increase only when production and sales are at capacity;

\(2\) administered prices should be forced down when production and sales are significantly below capacity, but not to a level that fails to more than cover current operating costs;

\(3\) administered wages in general should be permitted to increase at a rate equal to the average trend of increase in national productivity;

\(4\) administered wages should be permitted to increase at a greater rate where the labor market is tight; and

\(^{263}\) TAWNEY, THE ACQUISITIVE SOCIETY 94 (1920).


\(^{265}\) MEANS, op. cit. supra note 202, at 291. He points out that such measures have already been worked out for lower-level management.
(5) administered wages should be permitted to increase at a smaller rate where the labor market is slack.  

Lerner's price standards assume that the public will be served if prices in oligopolistic industries are always responsive to short-run changes in demand—an assumption that is rejected by some economists, including Means. Furthermore, his standards would authorize prices to move up when costs moved down and force prices to move down when costs moved up, thereby setting a rather difficult task for the regulatory agency.

CONCLUSION

While the Council of Economic Advisers has been concerned primarily with developing a wage policy that would ensure the stability of the existing level of administered prices, Means' proposal neglects wage policy entirely and concentrates upon developing a profit policy that would bring down the existing level of administered prices. Lerner, however, advocates a wage-price policy that does not seek to control profits or to ensure the stability of the existing level of administered prices. Only the adoption of Means' suggestion to limit profits, however, may make it possible to win labor's acceptance of a policy to limit wage increases to those warranted by average economy-wide gains in productivity.

Each of the possible policy alternatives has serious shortcomings. The Administration might renounce the activist role it has assumed and rely upon its monetary and fiscal powers to overcome the adverse effects of the unregulated, private determination of wages and prices. But this course may make it more difficult for the countervailing monetary and fiscal policies to succeed without jeopardizing other objectives of public policy, such as full employment.

The Administration's present policy of erecting guideposts for voluntary wage and price behavior and using the powers of the Chief Executive to assure that there are no flagrant detours is not a desirable alternative. It creates the danger that the outcome of an ensuing power clash will be arbitrary, and it fails to commit Congress to the policies the President is trying to enforce.

Congress, of course, might participate in the elaboration and effectuation of wage and price policies. But is this a realistic alternative? In a stimulating article, Professor Lindblom points out:

In the United States . . . no part of government attempts a com-

prehensive overview of policy on income distribution. A policy nevertheless evolves, and one responding to a wide variety of interests. A process of mutual adjustment among farm groups, labor unions, municipalities and school boards, tax authorities, and government agencies with responsibilities in the fields of housing, health, highways, national parks, fire, and police accomplishes a distribution of income in which particular income problems neglected at one point in the decision processes become central at another point.\textsuperscript{267}

Is it even desirable, then, to look to Congress for a "comprehensive overview of policy"? Yet the fact remains that only Congress can register the existing consensus on the issues in question. If the "muddling through" process so well described by Professor Lindblom were entirely satisfactory, the April, 1962, events would not have occurred. At the least, Congress must continue to focus public attention and discussion on the policy alternatives. The Kefauver Subcommittee has played a valiant role in discharging this responsibility, but it cannot be said that its work has been near the center of Congress' concern.

Attainment of the objectives articulated by the President at Yale University—"high employment, steady expansion of output, stable prices and a strong dollar"\textsuperscript{268}—will require some form of statutory price and wage regulation in concentrated industries. Only this alternative will lead to the establishment of accepted standards by which to judge wage and price behavior. Statutory regulation need not entirely exclude private participation in the determination of wages and prices. Private interests will, of course, have full opportunity to be heard in the elaboration of the general standards to be enacted into law. Furthermore, provision could be made for the implementation of these statutory standards in each concentrated industry by a tripartite committee representing labor, management, and the public.\textsuperscript{269} But the agency responsible for administering the statute must have the authority to review the implementing agreement reached in each industry or to make the initial decision if agreement is not reached. An important prerogative now possessed by the top private administrators of industrial and labor organizations would thereby be shared with public officials.

\textsuperscript{268} See note 254 supra.
\textsuperscript{269} See \textit{GA.BRAITH}, \textit{THE LIBERAL HOUR} 72–74 (1960). Like the Council of Economic Advisers, Galbraith is primarily concerned with maintaining the stability of the existing level of administered prices.
It is certain that the imposition of price and wage restraints in peacetime will be strongly opposed. The Council of Economic Advisers, for example, rejects this alternative as "unacceptable." One would be foolish to argue that the Council is not accurately reflecting congressional sentiment.

One cannot read the voluminous record of the Kefauver Subcommittee without becoming weary of the same old diagnoses of our ills and the same stale remedies prescribed for their cure. Under these circumstances, one can only hope that, as we "muddle-through," the nature of the problem itself will change to a more manageable form. There is reason to sustain this hope. Concern about the concentration of economic power may mirror past concerns, not future urgencies. Professor Herbert A. Simon, for example, tells us that we will acquire "the technical capacity to automate production as fully as we wish, or as we find economical" and that we will then have "the means to rule out scarcity as mankind's first problem and to attend to other problems that are more serious." Professor Simon envisages that by 1985 work and production will cease to be basic goals of human endeavor. As a consequence, the role of the corporation in our society will no longer be central, and success "in management will carry smaller rewards in prestige and status." Price administration will become the function of the machine.

272. Id. at 54.
273. Id. at 55.