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THE HIDDEN POLITICS OF 'AFFORDABILITY': ADMINISTRATIVE LAW AND THE MAKING OF THE CONSUMER PRICE INDEX

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Perhaps no issue has greater political salience in the United States today than "affordability." Yet the task of constructing official measures of the cost of living is widely understood to be a neutral, technocratic endeavor. The choices involved—which goods to include and how to weight them, how to account for regional variation, which administrative and business data to use—are seen as difficult yet tractable operational questions. For much of the twentieth century, however, cost-of-living measures were the subject of ongoing conflicts between capital and labor and were understood to require contestable normative judgments. By examining the historical development of the most widely used price index, the Consumer Price Index (CPI), we show how this older understanding shifted under the pressure of new kinds of economic expertise as well as changes in administrative law and procedures. Cost-of-living measures were claimed increasingly to be constructed according to neutral or objective standards, with professional economists playing a key role in devising and legitimating them. This new, more sophisticated approach, which was favored by big business, obscured the unavoidably discretionary aspects of price-index construction, and in particular the need for a price index to be underpinned by appropriate normative judgments. As a result, most recent revisions to the CPI have failed to realize its original aim: to capture changes in the requirements for living in "decency and health." Identifying this shift in the construction of price indexes sheds light on several historical and contemporary controversies concerning inflation, wages, and changing living standards, as well as how changes in administrative law and the judicial review of agency decision-making pushed officials toward these more ostensibly

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neutral measures, thus laying the groundwork for this historical transformation in the CPI. This diagnosis thus suggests a better way forward: policy changes to restore a proper normative grounding to the CPI to redress its current limitations in capturing "affordability."

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INTRODUCTION

Not since the 1970s has inflation dominated the news headlines in the United States. But the price increases that began during the COVID-19 pandemic have become a defining political issue. The price of a dozen eggs may have decided the last presidential election. President Donald Trump now faces a continuing problem of "affordability" that may sway the mid-term elections for Congress and thus determine the success of his second term. With so much at stake,

technical economic indicators have become a barometer of political success—and therefore, too, a site of political contestation.

The last several months have been a fraught time for official statistical agencies in the US government. In September 2025, President Trump fired the head of the Bureau of Labor Statistics (BLS), Erika McEntarfer, after the release of a lackluster jobs report, which was seen as reflecting poorly on his administration.[1] At the same time, the White House has launched a wide-ranging attack on constitutional restraints on the President's ability to remove agency officials at will.[2] To replace the fired BLS commissioner, President Trump sought to appoint a former Heritage Foundation economist who, in prior public statements, had cast doubt on the BLS's methods while also suggesting he would devise numbers in deference to the President's preferences.[3] In response, supporters of the BLS have insisted on its independence[4] and its "scientific objectivity."[5]

1. In September 2025, the Department of Labor's Office of Inspector General opened an investigation into how jobs and inflation data is collected by BLS, with the Trump administration alleging that downward job revisions were politically motivated, resulting in the firing of the BLS Commissioner and accusations of "falsified" data. Christopher S. Rugaber, *Trump Fires Bureau of Labor Statistics Commissioner After Dismal Employment Report*, ASSOCIATED PRESS (Aug. 1, 2025, 10:14 AM), https://www.cnbc.com/2025/09/10/trump-bls-jobs-data-labor.html; Rebecca Picciotto, *Trump Slams BLS Jobs Data Revision as 'Weakening' Economy*, CNBC (Sept. 10, 2025), https://www.cnbc.com/2025/09/10/trump-bls-jobs-data-labor.html.

2. *Trump v. Slaughter,* No. 25-332 (U.S. argued Dec. 8, 2025) (discussing whether the President possesses constitutional authority to fire the head of the Federal Trade Commission without cause, potentially overturning *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935)). *See, e.g.*, Lev Menand, Opinion*, Will the Supreme Court Put Real Limits on This President? Start With Lisa Cook.*, N.Y. TIMES (Aug. 27, 2025). *See also* Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 212 (2020) (arguing that a President must have the power to remove executive officers in order to "take care that the laws be faithfully executed").

3. Meredith Lee Hill, Sam Sutton & Lawrence Ukenye, *White House Withdraws E.J. Antoni's Nomination to Lead BLS*, POLITICO (Sept. 30, 2025), https://www.politico.com/news/2025/09/30/white-house-withdraws-ej-antoni-nomination-lead-bls-00589289. Antoni's nomination was soon withdrawn. President Trump nominated Brett Masumoto, a longtime economist at BLS, for the role of commissioner in January 2026. Kyla Guilfoil, *Trump Names Veteran Economist to Lead Bureau of Labor Statistics After Firing Agency's Chief*, NBC NEWS (Jan. 30, 2026), https://www.nbcnews.com/politics/trump-administration/trump-names-brett-matsumoto-bureau-labor-statistics-commissioner-rcna256791.

4. A belief that statistical agencies, despite their political significance, required some insulation has long been common among observers and theorists of the administrative state: "[I]t may be necessary to stand back a little and allow statistical agencies to march according to their own drums." JUDITH ELEANOR INNES, KNOWLEDGE AND PUBLIC POLICY: THE SEARCH FOR MEANINGFUL INDICATORS 283 (2d expanded ed. 1990). *See also* Brian D. Feinstein, *Legitimizing Agencies*, 88 U. CHI. L. REV. 95, 110, 143-44 (2021).

5. Concerns regarding the integrity of federal statistics and agency discretion have characterized much of their history. In a 1973 report concerning statistical integrity, a Joint Subcommittee of the American Statistical Association and Federal Statistics Users Conference (FSUC) "recommended specifically that statistical agency heads should be in the career (not political) service and be statisticians of publically [sic] recognized capability, with publications, professional honors, and previous experience and that they should have direct control over personnel, budgeting priorities, publications and planning programs." JOINT AD HOC

Since January 2025, the Trump administration has thus brought into focus two aspects of modern governance generally out of view of the public: the construction of economic measures and the operation of administrative law. As we show in this Article, the construction of economic measures, including most importantly the Consumer Price Index (CPI), has long been subject to political pressures, at least of a "hidden" kind. Like all economic indexes, the construction of the CPI raises contestable claims because the construction of the index requires normative judgments concerning the selection and weighting of the components. Tracing the CPI's transformation from an overtly normative instrument aimed at capturing the cost of the requirements for "decency and health" of American workers to a putatively neutral and impartial tool for measuring inflation understood as an abstraction, we show how the development of the administrative state and the rise of new economic theories of price and consumption culminated in the "depoliticization" of arguably the most important economic measure compiled for public use by the government.[6]

By "depoliticization" we mean the effort to take a contestable matter of public concern out of general deliberation and contestation—in this case, through the elevation of specialized techniques and procedures that obscure the normative stakes and prerequisites of price index construction. Recognizing the inescapably normative character of this construction does not mean turning over this important task to a particular political official, branch, or party. But it does require recognizing the inescapability of judgment in the construction of price indexes. In particular, it requires doing away with the pretense that new economic techniques mean we no longer need to make contestable judgments. In the Conclusion, we offer some suggestions as to how administrative law might support a more transparent and well-founded approach to price index construction based on democratic consultation.

Over the last hundred years, the construction of the CPI shifted with changes in economic methodology and with the development of the administrative state. In this Article, we emphasize the normative and institutional dimensions of economic measurement, and the elements of political contestation that have often been present behind both. By contrast, conventional histories of the CPI tend to present its development as a triumph of the progressive development of scientific reasoning.[7] According to this conventional account, in the beginning,

COMM. ON GOV'T STATS., REPORT OF THE JOINT AD HOC COMMITTEE ON GOVERNMENT STATISTICS (1973). This recommendation has largely been followed until recently; however, while it means that agency directors and staff are held accountable to disciplinary norms and professional hierarchy, these are not the same as political accountability to the public.

6. For a recent discussion of "depoliticization," see K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 90-91 (2017). For a foundational discussion, see JÜRGEN HABERMAS, LEGITIMATION CRISIS 36-37 (1975).

7. The most influential recent theorist of price indexes has presented such a narrative in a number of writings. *See, e.g.*, W. Erwin Diewert, *Exact and Superlative Index Numbers*, 4 J. ECONOMETRICS 115 (1976); W. ERWIN DIEWERT, AXIOMATIC AND ECONOMIC APPROACHES TO ELEMENTARY PRICE INDEXES (1995); W. Erwin Diewert, *The Consumer Price Index and Index*

statisticians groped in the dark, seeking means of measuring the general "price level" for unspecified purposes. At first, they employed rough and ready measures, which satisfied various axioms or "tests"—the word favored by influential economist Irving Fisher—without any clear basis for choosing one such test over another. But in the middle of the twentieth century, economists devised a utility-based conceptual framework and related technical apparatus that permitted them to derive measures of the real price level with greater objectivity and analytical rigor.

This triumphalist story neglects, however, some of the most basic and unavoidable complexities of measurement and evaluation, as well as the normative and ideological contestation behind price index construction. As we show, the elevation of the now-dominant approach to price index construction over its rivals was not a simple matter of scientific progress, but rather the result of a particular coalescence of institutional and historical factors underpinning the choices that were made by the US Bureau of Labor Statistics (BLS).

Taking the BLS's "cost of living" framework as our chief example, we identify the political, distributional, and legal pressures behind the choices made by official statistical agencies. We also illustrate how the use of formal economic theory in debates over policymaking drew attention away from ongoing normative and distributional contestation, including over the very concepts that the formal theory presupposed. This critical genealogical approach, beyond simply illuminating the roads taken in the past, might also inform contemporary policy debates over affordability and inflation, especially as global price increases since the COVID-19 pandemic have raised the salience of these and related issues.[8]

We also emphasize the connection between these intellectual and ideological shifts in technique and contestation over agency discretion in administrative law. President Richard Nixon's imposition of price and wage controls in 1971 led to litigation by labor unions against the agency managing them, the Cost of Living Council. The resulting decisions altered the background assumptions in administrative law concerning the separation of powers and made the claims to objectivity promised by new economic techniques useful to agencies seeking to justify their discretionary judgments. Specifically, by seeming to check administrative discretion, the new method of price index construction insulated agencies from legal challenges concerning the delegation of legislative power to the executive branch.

Number Purpose, 27 J. ECON. & SOC. MEASUREMENT 167 (2001); W. Erwin Diewert & Alice O. Nakamura, *Index Number Concepts, Measures and Decompositions of Productivity Growth*, 19 J. PRODUCTIVITY ANALYSIS 127 (2003); W. ERWIN DIEWERT, JOHN GREENLEES & CHARLES R. HULTEN, PRICE INDEX CONCEPTS AND MEASUREMENT (2009).

8. As of August 2025, food prices were 45.8% higher than they were in December 2019 across the member countries of the Organization for Economic Co-operation and Development (OECD). *Consumer Prices, OECD—Updated: 6 October 2025*, OECD (Oct. 6, 2025), https://www.oecd.org/en/data/insights/statistical-releases/2025/10/consumer-prices-oecd-updated-6-october-2025.html.

The article proceeds as follows. In the first section, we offer a brief overview of how price indexes are constructed and the present state of debate in economic theory regarding the presuppositions behind them. In the second section, we move to the details of the early development of the Consumer Price Index. We show how shifts in economic theory, as well as distributional and legal conflicts changed the CPI and related measures during the twentieth century, progressively undermining the idea that a consumer price index should capture the cost of attaining a normatively acceptable standard of living for workers and their families. The third section focuses on a key episode in the development of these official measures, Nixon's price and wage freezes, and three key court cases that ensued. The outcome of these cases consolidated the push toward a technical, purportedly neutral approach to price index construction, and was useful to agencies in justifying their decision-making in the face of concern about the separation of powers and the rise of the administrative state. In the fourth section, we examine the consequences of this evolution, focusing in particular on the Boskin Commission Report of 1996, which consolidated an ostensibly neutral theory of price index construction and undermined the original motivation behind the consumer price index: providing an estimate of the cost of keeping working-class families in "decency and health." The article concludes by reflecting on the relationship between administrative law doctrine, economic theory, substantive moral commitments, political contention, and the role of measures in economic policymaking, suggesting ways to make price index construction more susceptible both to ethical assessment and to democratic deliberation.

I. WHAT IS A PRICE INDEX?

To equip the reader with the necessary technical background for the history to come, this section offers a brief introduction to price indexes. A price index is a measure of the change in cost arising from a change in prices. This definition immediately raises a further question: the cost of *what* exactly? This simple question lies at the heart of the normative contention over price-index construction. As some conceptual work on index number construction has underlined, there can be no general answer to this question. Rather, the appropriate answer must depend on the contextually specific purpose of the index: every price index focuses on how price changes affect the cost of something relevant to deliberation or policymaking.[9] For instance, a price index might focus on how price changes affect the cost of achieving a nutritionally adequate diet. To construct an appropriate index, policymakers would need to determine what is required for nutritional adequacy (e.g., the food energy, nutrients, and micronutrients for persons

9. *See, e.g.*, Diewert, *Consumer Price Index*, *supra* note 7; Irving Fisher, *The Best Form of Index Number*, 17 Q. PUB. AM. STATISTICAL ASS'N 533 (1921); Kenneth Rogoff, *The Purchasing Power Parity Puzzle*, 34 J. ECON. LIT. 647 (1996); CHARLES L SCHULTZE & CHRISTOPHER MACKIE, AT WHAT PRICE?: CONCEPTUALIZING AND MEASURING COST-OF-LIVING AND PRICE INDEXES (2002).

of given types under given conditions), what forms of substitution are possible while fulfilling the overall goal, as well as the availability and prices of different foods.

We follow economist and philosopher Amartya Sen in thinking of the answer to the question "*what* exactly?" as the focal "achievement."[10] The achievements to which a price index refers can admit of diverse understandings. In the case of the prior example of a nutritionally adequate diet, such variation in understanding might turn on different views of what deference is due to geographically or culturally specific diets—for example, long-established diets centered on specific staple grains such as rice or wheat. Nevertheless, there are limits to how far such disagreement can extend while maintaining a focus on a specific "achievement." Ultimately, the exercise must be guided by the concern with a focal capability or other achievement, to which specific commodities are instrumental and specific constraints are incidental.[11]

In current mainstream economic analysis, price indexes focus on a level of "utility" as the *what* or the achievement for which a cost estimate is developed. "Utility," in turn, is understood as the satisfaction of "subjective preferences," meaning the satisfaction received from whatever it is that a consumer consumes. A level of utility has been interpreted in terms of ordinally-described subjective preference-satisfaction for a hypothetical agent (specifically, the attainment of a specific level set of utility-equivalent bundles in the space of commodities). This approach to price index construction thus involves examining how a change in price would affect the cost of maintaining such a given level of preference-satisfaction (and determines what cost adjustment would ensure that they remain on the specified level set and therefore are neither better nor worse off than before).

This utility-based conception of achievement can be distinguished from a "commodity bundle"-based interpretation, which focuses instead on the different commodities that an agent can purchase. While more readily comprehensible to lay people, and the original type of price index first constructed, the "commodity bundle" approach has been criticized by mainstream economists as naïve or primitive both because it seems to focus on the "stuff" that someone can buy without taking into account *why* any of that stuff in particular should matter to someone's well-being and because it fails to incorporate the possibilities for substitution that a change in price or the availability of goods may generate. The utility-based approach, by contrast, holds that the "stuff" matters only insofar as it contributes to the satisfaction of an agent's preferences (i.e., "welfare"), whose

10. AMARTYA SEN, COMMODITIES AND CAPABILITIES (1985).

11. See, for example, the responses in Amartya Sen, *The Concept of Development*, *in* HANDBOOK OF DEVELOPMENT ECONOMICS 9 (1988), and S. R. Osmani, *Controversies in Nutrition and Their Implications for the Economics of Food* (World Institute for Dev. Econ. Rsch, Working Paper No. 16, 1987), to the "totally negative" perspectives of T. N. Srinivasan, *Malnutrition: Some Measurement and Policy Issues*, 8 J. DEV. ECON. 3 (1981), and T. N. Srinivasan & Jagdish N. Bhagwati, *On Transfer Paradoxes and Immiserizing Growth*, 15 J. DEV. ECON. 111 (1984).

suitability as a focus has generally been taken to be self-evident.

While the utility-based framework has been extensively technically elaborated, its conceptual foundations remain questionable for many applications.[12] Its plausibility depends on adopting a particular evaluative perspective—namely, a "welfarist" concept of preference-satisfaction—which has been criticized as failing to capture salient dimensions of well-being, not to mention other normative concerns such as freedom.[13]

Other evaluative frameworks, focused on capturing different dimensions of well-being, could be used to specify alternative possibilities for price index construction. Returning to the earlier example, an evaluative focus on nutritional adequacy would, given sufficient information about the requirements of nutrition, enable the identification of the set of commodity bundles that would suffice for attaining it, and moreover the determination of which bundles would do so at least cost, given particular prices. Again, following Sen's conceptualization, an index could specify the cost of a focal achievement such as fulfilling a basic human requirement or attaining an elementary "capability."[14] In a method of this kind, just as with a focus on "utility," the role of commodities is instrumental to the achievement, which is of ultimate evaluative interest, and not treated as an end itself.

One reason that economists have favored the utility-based approach is that this framework foregrounds the possibility of using substitution between different commodities to achieve the same level of overall preference-satisfaction. For instance, even if the price of coffee rises dramatically, *if* one can achieve the same level of preference-satisfaction by purchasing tea (at an unchanged price), then on a utility-based interpretation, the possibility of substitution from coffee to tea might avert an increased cost of living. But this possibility does not mark an inherent difference between the utility-based approach and alternatives which employ *other* focal achievements. Even a non-utilitarian evaluative framework

12. For example, the notion of "exact" price indexes relates to the ability to give a precise or at least approximate utilitarian interpretation to data that can be interpreted as if it was generated by the consumption choices of a representative agent responding in a utility maximizing way to the observed prices and possessing a utility function of an assumed family. The related idea of a "superlative" price index accommodates approximate interpretations along similar lines.

13. See Amartya Sen, *Personal Utilities and Public Judgements: Or What's Wrong with Welfare Economics*, 89 ECON. J. 537, 537-539 (1979).

14. *See, e.g.*, Sanjay G. Reddy, *Counting the Poor: The Truth about World Poverty Statistics*, 42 SOCIALIST REG. (2006); Sanjay G. Reddy & Thomas Pogge, *How Not to Count the Poor* (2009); Sanjay Reddy & Rahul Lahoti, *$1.90 a Day: What Does It Say? The New International Poverty Line*, 97 NEW LEFT REV. 106 (2016); Sanjay G. Reddy, *Beyond Property or beyond Piketty?*, 72 THE BRIT. J. SOCIO. 8 (2021). On the perspective of capabilities as pertinent to this exercise, *see, e.g.*, Amartya Sen, *Poor, Relatively Speaking*, 35 OXFORD ECON. PAPERS 153 (1983); AMARTYA SEN, COMMODITIES AND CAPABILITIES (1985). Thomas Stapleford also suggests adopting a capabilities approach to measure the cost-of-living. *See* THOMAS A. STAPLEFORD, THE COST OF LIVING IN AMERICA: A POLITICAL HISTORY OF ECONOMIC STATISTICS, 1880-2000, 388 (2009).

can and generally would also allow for relevant substitutions.[15] For instance, when the prices of different kinds of foods change, the cost-minimizing way of achieving nutritional adequacy will generally change too, even while meeting taste, convention, or other requirements. To be sure, a simple price index that is defined strictly by the cost of a specific commodity bundle requires a rationale that justifies *why* that bundle has been chosen. Once such a rationale is identified, a specific commodity bundle may prove only one possible solution to a more general problem of cost-minimization that provides for substitution possibilities in furthering the focal achievement.

For the purposes of price index construction, one significant drawback of the utilitarian conception of the focal achievement is that it makes no attempt to link different levels of utility to normative criteria such as the capabilities of human beings (or, if one prefers, human requirements, needs, or even wants, including higher-order desires). These considerations have often been central to the motivation of price indexes, and such criteria have understandably underpinned other conceptions of the focal achievement because of their moral plausibility and social force. While different bundles of commodities may be interpreted as generating different levels of utility, utility is here understood merely as subjective preference-satisfaction, a purely ordinal ranking of preferences. Adopting this approach, there is no way to translate the increasing satisfaction of a hypothetical consumer's preferences into greater abilities to achieve appropriately valued ends. Crucially, the framework is *not intended* to do so: historically, this normative standard was advanced to avoid the need to make such assessments altogether.[16]

This failure to relate a price index to persuasive underlying normative criteria is replete with consequences. For instance, a price index that is not aimed squarely at capturing a normatively relevant achievement cannot capture how the cost of attaining it changes over time.[17] This evasion of normative evaluation need not be the intention of foregrounding a utility-based approach to the price level. But it may nevertheless lead to a convenient fog of confusion—and even be exploited strategically—as we illustrate across the rest of the paper through our discussion of the history of the development of price indexes in the United States.

II. THE DEVELOPMENT OF THE CONSUMER PRICE INDEX

When and why did US government authorities begin constructing price indexes—and how have the methods and rationales for them changed? In this Part,

15. One way to see this is that the conceptual framework of the Konüs index (see discussion *infra* Part II.B) can be generalized as an achievement-based index with the achievement interpretable as a level of utility corresponding to a level-set in the commodity space.

16. Indeed, the evasion of such normative debates is central to the supposed non-arbitrariness of the welfarist evaluative framework. *See generally* Sen *supra* note 13.

17. *See* Reddy & Lahoti, *supra* note 14.

we analyze the origins and development of the Consumer Price Index from the Arbitration Act of 1888 to the Economic Stabilization Act of 1970. We show that the CPI figured in ongoing political and distributive contests across the twentieth century. Its original purpose was to estimate the cost of securing working-class families in what was called "decency and health." But with a shift in economic theory and technique—and against the backdrop of fights between organized labor and big business—it developed into an increasingly abstract standard focused on consumer preference-satisfaction.

A. Origins: The Arbitration Act of 1888 and Tariffs

The history of price index construction begins in the late nineteenth century with the President and Congress seeking to manage domestic labor disputes and provide domestic industrial protection against foreign trade. The development of official consumer price indexes came with the passage of the Arbitration Act of 1888.[18] The Act moved the Bureau of Labor Statistics (BLS) from the Department of the Interior into a newly created Department of Labor and launched the creation of price measures by calling for "studies of the domestic and foreign costs of producing goods."[19] Early work on the collection of prices under this mandate accelerated with the passage of the McKinley Tariff Act of 1890, which raised the average duty on imports to nearly 50%, leading the Senate Finance Committee to call on the BLS to collect data on "prices, wages, and hours of work" as a means of gauging the tariff's effects.[20]

As BLS statisticians Joseph Goldberg and William Moye explained in their centennial history of the BLS, the Committee specified that it wished to evaluate the impact of the tariff on the "cost of living" for a "family" consisting of "a husband and wife, up to five children under the age of 15, and without other dependents or boarders," and which ought to "reflect the standard of living supported by the actual levels of family income."[21] With the assistance of Roland Falkner, a statistician at the University of Pennsylvania, the BLS set to work developing indexing techniques to elaborate assessment measures for tracking

18. Arbitration Act of 1888, ch. 389, 25 STAT. 183 (1888). Price index construction was undertaken by both non-governmental entities and by other governments during this time, including an important British government commission, the Royal Commission on the Depression of Trade and Industry (1885-1886), often referred to as the Iddesleigh Commission, to study price measures at this time. *See generally* NEIL TONGE & MICHAEL QUINCEY, *Depression and Decline? The British Economy 1870-1900*, *in* BRITISH SOCIAL AND ECONOMIC HISTORY 1800-1900, at 97 (1980).

19. JOSEPH P. GOLDBERG & WILLIAM T. MOYE, THE FIRST HUNDRED YEARS OF THE BUREAU OF LABOR STATISTICS 15 (1985).

20. The committee report on the necessity of statistics on prices and wage states that, "Without them it has been impossible to judge even with approximate accuracy of the progress of the people of the country and the changes which have taken place from time to time in their condition." *Id.* at 35 (quoting S. REP. NO. 52-1394 (1893)).

21. *Id.* at 34.

prices, using family expenditure patterns compiled by the BLS in cost-of-production studies to weight both wholesale and retail prices in respective indexes.[22] An early twentieth-century economist, Wesley Mitchell, criticized the use of family-expenditure survey data to weight the wholesale price index, since families do not make wholesale purchases.[23] In response to this criticism, in 1902 the BLS changed the weights for the wholesale price index from those of the family expenditure survey to "a large number of representative staple articles," chosen at the Bureau's discretion.[24] The Bureau's discretion in choosing which staple articles were or were not to be representative marked the Bureau's ongoing approach to constructing baskets of goods selected and weighted for the aims of the price indexes constructed.

From the mid-1890s to the 1910s, these price indexes were used by the Cleveland and Roosevelt administrations to mediate labor disputes and avert strikes.[25] In constructing them, the Bureau's practitioners accepted the necessity of making discretionary choices concerning which consumption items should be included, and for whom, in order to ensure that the index served the intended purpose of measuring the cost of living for a representative family. To this end, from 1901 to 1903, the BLS conducted a nationwide survey of family expenditures, which aimed to be "representative of the conditions of workers in the whole country."[26] This unprecedented survey covered families in the principal industrial centers in 33 states and included both native and foreign-born families, including African-American survey respondents who had previously been

22. In producing studies of the cost of production of iron and steel, coal, textile, and glass, the Bureau would also collect data on wages of workers and their budgets. Data on cost of living was produced through surveying family expenditures. From these surveys of family expenditure patterns, precursors to the Consumer Expenditure Survey, weights were assigned to goods composing the wholesale and retail price indexes. *See id.* at 34-35.

23. The critique levied by Wesley Mitchell, amongst others, was that family expenditure patterns fail to capture the consumption of wholesale goods, which are often sold to retailers, manufacturers, and other businesses rather than directly to families. *See* W.C. Mitchell, *Methods of Presenting Statistics of Wages*, 9 PUB. AM. STAT. ASS'N 325, 328-30 (1905); Wesley C. Mitchell, *The Trustworthiness of the Bureau of Labor's Index Number of Wages*, 25 Q.J. ECON 613 (1911).

24. GOLDBERG & MOYE, *supra* note 20, at 36.

25. For instance, in 1886, the Knights of Labor called on President Cleveland to expand the powers of the Bureau and for Commissioner Wright of the Bureau to take a more engaged role in averting railroad strikes in the Southwest, with Wright calling for further compilation of price data in his to-be-established role in the new Department of Labor. *Id.* at 14-15. In 1903, President Roosevelt called on Commissioner Wright of the Bureau to produce a measure of the change in food prices as part of an *ad hoc* Anthracite Coal Strike Commission, which was then used to resolve the level of wage increases awarded to striking United Mine Workers miners. *Id.* at 46. *See also* Darren Rippy, *The First Hundred Years of the Consumer Price Index: A Methodological and Political History*, MONTHLY LAB. REV. (Apr. 2014), https://www.bls.gov/opub/mlr/2014/article/the-first-hundred-years-of-the-consumer-price-index.htm.

26. *See* GOLDBERG & MOYE, *supra* note 20, at 36.

excluded.[27] Bureau agents were tasked with collecting expenditure data on one year's worth of "food, rent, principal and interest on homes, fuel, lighting, clothing, furniture, insurance, taxes, books, and newspapers, and other personal expenditures."[28] Apart from food, for which weights were "determined for principal articles of food consumed," the results of the survey provided an informational basis for the relative weights that the Bureau adopted in determining the cost of living.[29]

The construction of this index thus reflected significant discretion over weights, guided by policy purpose. The resulting index concluded that the purchasing power of workers in 1903 marked a 5.4% increase over the average purchasing power of workers in the period 1890-99.[30] This claim was hotly contested by politicians, academics, and labor unions, including the Amalgamated Meat Cutters and Butcher Workmen and the International Association of Machinists, as overstating the increase in purchasing power and as reflecting partisan motives.[31] The BLS was unmoved by these criticisms, choosing neither to recalibrate the basket weights on the index nor recollect any prices.

The next round of retail price collection (halted in 1908 but resumed in 1911) saw the BLS operating in 39 cities in 32 states, and expanded the range of retail dealers surveyed. In a further instance of the Bureau's normative discretion in index construction, neighborhood stores were favored over downtown ones, chain stores were included only when they were "so numerous as to be an important factor in the city's trade," and dealers were selected only when selling mainly to families of American, English, Irish, German, or Scandinavian descent (i.e., the highest paid portion of the racially segregated working class).[32] In a new set of indexes on the "Relative Retail Prices of Food," the Bureau collected prices for 15 leading food items, "representing approximately two-thirds of the expenditure for food by the average workingman's family."[33] These prices were

27. *Id.*

28. *Id.*

29. The resulting weighted index provided "monthly quotations of 30 principal items of food and summarized them in terms of 'average price of the article' and 'relative price,' presenting these as averages and as weighted by consumption." The BLS maintained this index until 1907. *Id.*

30. The wage and retail price survey results were placed in juxtaposition in an article in the Bureau's Bulletin in July 1904, with the observation that, "taking 1903, it is seen that hourly wages were 16.3 percent above the average of 1890-1899, while retail prices of food were 10.3; making the increase in purchasing power of the hourly wage, 5.4 percent." BUREAU OF LAB., DEP'T OF COMMERCE AND LABOR, BULL. NO. 53, WAGES AND COST OF LIVING (1904). *See also* GOLDBERG & MOYE, *supra* note 20, at 38.

31. *See* Ernest Howard, *Inflation and Prices*, 22 POL. SCI. Q. 81 (1907). GOLDBERG & MOYE, *supra* note 20, at 38.

32. GOLDBERG & MOYE, *supra* note 20, at 38. *See also* BUREAU OF LAB., DEP'T OF COMMERCE AND LABOR, BULL. NO. 105, RETAIL PRICES, 1890 TO JUNE 1911, 4-6 (1911); BUREAU OF LAB., DEP'T OF COMMERCE AND LABOR, BULL. NO. 106, RETAIL PRICES, 1890 TO JUNE 1912, 5-6 (1911); GOLDBERG & MOYE, *supra* note 20, at 70.

33. *Id.* at 71.

presented as a simple average over the selected 15 items, with indexes weighted according to the expenditure survey of 1901.[34] These tables showing the relative prices of food were also controversial, with a well-known activist writing to the Secretary of Labor that they were "inadequate as a basis for percentages representing the general cost of living."[35]

The Bureau's initial forays into price indexes were thus largely *ad hoc*, and taken at a time of rising labor unrest and distributive contestation. In the two decades from the Arbitration Act of 1888 to the start of World War I, the Bureau made initial, yet sporadic efforts to index prices so as to gauge the "condition" of workers and their "cost of living."[36] Notably, over this same period, a related development was occurring: the emergence of economics as an academic discipline and profession. A rationalized administrative state growing rapidly in size encouraged the development of economic theories and a professional corps to apply those theories to problems of contemporary administration.[37] However, even as the BLS sought to refine and institutionalize the construction of price indexes, it had little direct contact with the budding economics profession. That would change in the following decade: the onset of World War I would raise the profile of price index construction, as inflation measures became central to debates over war-time wages.

B. World War I, Bombshells, and the Shipbuilding Labor Adjustment Board

In the lead-up to the US entry into the World War I, the BLS made several substantive changes to the construction of its retail price index. In 1914, it increased the number of food items priced, added additional textile and clothing items, included fuels such as anthracite and bituminous coal and gas for domestic use, and expanded the number of cities in which prices were collected from 39 to 46, with the Bureau continuing to exercise normative discretion over which items and cities were "representative" for the purpose of this index.[38] The base

34. *Id. See also* BUREAU OF LAB., DEP'T OF COMMERCE AND LABOR, BULL. NO. 136, RETAIL PRICES, 1890 TO AUGUST 1913, 10-15 (1913).

35. Business leaders also rejected the tables, claiming the data was misleading on the cost of living. *See Wilson's Figures Wrong, He's Told*, N.Y. TIMES (Mar. 2, 1914); Stephen Reed, *One Hundred Years of Price Change: The Consumer Price Index and the American Inflation Experience*, MONTHLY LAB. REV. (2014), https://www.bls.gov/opub/mlr/2014/article/one-hundred-years-of-price-change-the-consumer-price-index-and-the-american-inflation-experience.htm.

36. In the BLS's early days, funding was often scarce for surveys and price collection, with the Bureau often dependent on one-off allocations from either the President or from Congress. See discussion and Table 2 in GOLDBERG & MOYE, *supra* note 20, at 73-74.

37. *See* Michael A. Bernstein, *Economic Knowledge, Professional Authority, and the State*, *in* WHAT DO ECONOMISTS KNOW? NEW ECONOMICS OF KNOWLEDGE 103 (Robert F. Garnett, Jr. ed., 1999); Marion Fourcade, *The United States: An Economist's Economy, in* ECONOMISTS IN THE AMERICAS 157 (Veronica Montecinos & John Markoff eds., 2009).

38. GOLDBERG & MOYE, *supra* note 20, at 92; BUREAU OF LAB., DEP'T OF COMMERCE AND LABOR, BULL. NO. 156, RETAIL PRICES, 1907 TO DECEMBER 1914, 357, 364 (1915).

year for computing the index was also shifted to that of a "chain index"—that is, an index using the most recent year as the base. This change drew on the work of economist Irving Fisher and others who favored chain indexes for ease of comparability, lack of dependence on an arbitrary base year, and other technical reasons.[39] Wesley Mitchell agreed with Fisher on the use of chain indexes, but differed in arguing for the adoption of a much larger survey field: "The more commodities that can be included in such an index number the better, provided that the system of weighting is sound."[40]

Instead of viewing price indexes as instruments developed for a specific normative objective, both Fisher and Mitchell understood prices in naturalistic terms and accordingly viewed a price index as a sort of yardstick. While later economic theorists would view prices as providing constraints and opportunities to satisfy preferences, Fisher and Mitchell viewed the problem of price index construction "in relatively physical terms, making explicit analogies to height, weight, and motion."[41] Indeed, in discussing the construction of an index, both used the analogy of "measuring the trajectory of a bursting bombshell."[42] Fisher, in particular, employed the bombshell analogy throughout his 1922 article on price indexes, adopting artillery imagery that would have been familiar from the recently concluded Great War:

> If we look at prices as starting at any time from the same point, they seem to scatter or disperse like the fragments of a bursting shell. But, just as there is a definite center of gravity of the shell fragments, as they move, so is there a definite average movement of the scattering prices. This average is the 'index number.' Moreover, just as the center of gravity is often convenient to use in physics instead of a list of the individual shell fragments, so the average of the price movements, called their index number, is often convenient to use in economics.[43]

The use of such naturalistic metaphors both reflected and reinforced a "depoliticized" approach to the construction of price indexes. Rather than

39. On ease of comparability, see Irving Fisher, *The Best Form of Index Number*, 17 Q. PUB. AM. STAT. ASS'N 533 (1921); Warren M. Persons, *Fisher's Formula for Index Numbers*, 3 REV. ECON. & STAT. 103 (1921). Other reasons noted by Fisher include reducing the impact of initial or final year choice for determining the weights of an index applied over multiple years.

40. GOLDBERG & MOYE, *supra* note 20, at 93; Wesley C. Mitchell, *The Making and Using of Index Numbers*, BULL. BUREAU LAB. 173, at 112-13 (1915).

41. H. Spencer Banzhaf, *Quantifying the Qualitative: Quality-Adjusted Price Indexes in the United States, 1915-61*, 33 HIST. POL. ECON. 345 (2001).

42. *Id*. An earlier work by Fisher, *The Equation of Exchange, 1896—1910*, 1 AM. ECON. REV. 296 (1911), also analogizes the construction of a price index to a mechanical balance "in which items of different weight (prices) are placed at different distances from the fulcrum (quantity weights), and whose average weight (price) can be assessed by balancing the same items at one point." Mitchell, on the other hand, preferred a barometric analogy for the measurement of prices, and also compared prices to the velocity of sound. *See* Mitchell, *supra* note 24.

43. IRVING FISHER, THE MAKING OF INDEX NUMBERS: A STUDY OF THEIR VARIETIES, TESTS, AND RELIABILITY (1922).

foregrounding the normative choices that go into the construction of any price index—prominently, which prices to include and how to weight them, and the related question of who is making them and for which purposes—a naturalized view of the price level imagines economic statistics as achieving a neutral or objective measurement, like tracking the fragments from an explosion. Accordingly, no evaluative framework would seem to be needed to guide the construction of a summary indicator of prices, only an adequate technique for tracking the fragments.[44]

The accumulation of price data useful to that end had been well underway by the time of Fisher's article, and would expand considerably due to the war effort. Immediately prior to World War I, the Bureau sought to collect updated expenditure data so as to better set wage rates for government employees, such as those working in the Government Printing Office and the Washington Navy Yard.[45] The Bureau's new head, Royal Meeker, pushed for accurate price information: "[i]n order to settle upon what is a fair and reasonable wage, it is necessary to know what a dollar will buy and this is the most accurate information available to both trades-union men and to employer."[46] After struggling to find funding to develop this "accurate price information," Meeker's efforts were finally rewarded by Congressional appropriations when the Senate Committee on Education and Labor requested a new survey to investigate the cost of living in Washington, DC.[47] During its first phase in 1917, surveyors collected data on the budgets of 2,110 families in Washington, DC and during its second, on the income and expenditures of 600 white women earning wages of under $1,100 a year. Finally, during its third phase, the BLS, in cooperation with the Office of Home Economics of the Department of Agriculture, conducted a dietary study of 31 families.[48] The results were grim, with the BLS's *Monthly Labor Review* concluding that "a very considerable proportion of the low-income families of Washington do not buy enough food to maintain the family members in health and strength."[49] With these data in hand, William F. Ogburn, a Columbia sociologist and statistician, determined that "an average family of man, wife, and three children under the age of 10 needed an income of at least $1,155 to s[t]ay [sic]

44. See the discussion in Marshall Reinsdorf & Jack E Triplett, *A Review of Reviews: Ninety Years of Professional Thinking About the Consumer Price Index*, *in* PRICE INDEX CONCEPTS AND MEASUREMENT 68 n. 71 (W. Erwin Diewert, John Greenlees, & Charles R. Hulten eds., 2009).

45. GOLDBERG & MOYE, *supra* note 20, at 94.

46. *Id*. at 95; *Legislative, Executive, and Judicial Appropriation Bill for 1915: Hearings Before the H. Comm. on Appropriations*, 63d Cong. 741, 743 (1914).

47. GOLDBERG & MOYE, *supra* note 20, at 95; S. REP. NO. 63-377, at 1-2 (1914).

48. GOLDBERG & MOYE, *supra* note 20, at 95; *Minimum Wage for Women and Children: Hearings on H.R. 10367 Before the Subcomm. of the H. Comm. on the District of Columbia*, 65th Cong. 14 (1918).

49. GOLDBERG & MOYE, *supra* note 20, at 95; *Cost of Living in the District of Columbia, Second Article: Summary of Family Expenditures*, 5 MONTHLY LAB. REV. 839 (1917).

out of debt."[50]

This preliminary survey was conducted none too soon. With the entry of the US into the First World War in 1917, the BLS received funding to conduct a nationwide comprehensive consumer expenditure survey. This survey played a crucial role in the US war effort, as the Bureau's price indexes were integrated into discretionary wage escalations coordinated by the Shipbuilding Labor Adjustment Board.[51] The Board's role was to mediate wage disputes between shipbuilding laborers and their employers. Thus, it became necessary for the BLS to assess the rise in living costs for shipbuilders in major shipbuilding cities.[52] In doing so, the BLS faced a series of crucial choices about how to deal with rapidly changing prices. For instance, when faced with rapidly rising food prices that the BLS thought would "distort" the index, Fisher suggested wage adjustments should be set at half the rise in the Bureau's retail food price index number, given that, as Fisher claimed, general prices rose at half the rate of that of food.[53] Meeker rejected Fisher's proposal, preferring that the change in the retail food price index be used in full to adjust wages, without the inclusion of non-food commodities, pending further investigation into retail price changes in the latter.[54] This choice by Meeker would of course benefit workers subject to wage raises and better meet the mandate of the index regarding workers' welfare, though Fisher and others at the BLS thought this approach distortionary and subjected Meeker to public criticism. In 1918, the Shipbuilding Labor Adjustment Board asked the Bureau to establish an index for the "cost of living" to be used in future wage adjustments.[55] The National War Labor Board would soon follow suit, calling for nationwide data on the cost of living beyond just shipbuilding cities.[56]

In response, a national study was conducted in 1918-19, covering 92 cities in 42 states and including quantities purchased as well as costs (unlike the 1901 expenditure study, which only collected data on costs).[57] Average yearly

50. GOLDBERG & MOYE, *supra* note 20, at 95; William F. Ogburn, *Analysis of the Standard of Living in the District of Columbia in 1916*, 16 Q. PUB. AM. STAT. ASS'N 374, 389 (1919).

51. GOLDBERG & MOYE, *supra* note 20, at 102. *See also* Willard E. Hotchkiss & Henry R. Seagar, *History of the Shipbuilding Labor Adjustment Board, 1917 to 1919*, BULL. BUREAU LAB. 283, 10 (1921).

52. In this regard, the BLS took a page from Great Britain, which had earlier set out to revise its cost-of-living measurements during wartime. Wage adjustments were at first "based on the retail prices of food, but these were found unsuitable in a time of rapidly changing prices, even with more frequent publication." As such, the British Board of Trade produced "a new index number covering all groups of expenditures and representing the 'average cost of living of the working classes." GOLDBERG & MOYE, *supra* note 20, at 102. George E. Barnett, *Index Numbers of the Total Cost of Living*, 35 Q.J. ECON. 240 (1921).

53. GOLDBERG & MOYE, *supra* note 20, at 102-03.

54. *Id.* at 103.

55. *Id*.

56. *Id*.; *National War Labor Board: History of its Formation and Activities*, BULL. BUREAU LAB. 287, 31-33 (1921).

57. GOLDBERG & MOYE, *supra* note 20, at 104.

expenses per family for food, clothing, rent, fuel and light, furniture, and miscellaneous expenses were published in the *Monthly Labor Review* of May 1919.[58] Meeker concluded from the data that "there was no American standard of living that provided 'all the necessaries, many of the comforts, and a goodly supply of the luxuries of life.' Instead, there were many different standards depending on the income and size of families."[59] In particular, Meeker highlighted the plight of lower-income families, whom he argued needed higher wages and cheaper food, clothing, houses, medical treatment, and insurance. "[T]he minimum living standard in America," he concluded, should be "one that will support life in decency and health."[60] As he explained, the market basket used to construct cost-of-living indexes must be one "which will allow a sufficiency of all necessary commodities and services, food, clothing, housing, fuel, furniture, house furnishings, and miscellaneous to enable the standard family to live healthfully and decently."[61]

This "decency and health" standard was criticized by the *New York Times* editorial board, which accused the BLS of advocating "an ideal standard, a standard incapable of being realized in any nation, and especially in the present acute industrial crisis."[62] Nevertheless, the "decency and health" standard would come to be established in the Bureau for decades following, forcing recognition of the normative dimension of price index construction and permitting ample room for contestation over whether the Bureau had gotten it right. What is "decency"? What is "health"? These questions necessarily invite further discussion about what constitutes a good life, the consumption profile required to support it, and how that consumption can be measured. As a result—and in light of ongoing distributional conflict in the twentieth century—the "decency and health" standard has elicited continuing controversy.

At the time that the "decency and health" standard was being debated, an alternative approach to price index construction was developing, which would have the effect of precluding normative debate altogether. This approach would eschew contestable concepts like "decency and health" in selecting the goods that comprised the price index, and instead, focus on how price changes impacted an individual's level of "utility," defined as preference-satisfaction, with no evaluation of which goods were preferred. Developing this approach, however,

58. *Id.*; 8 MONTHLY LAB. REV. 5, 123-141 (1919).

59. GOLDBERG & MOYE, *supra* note 20, at 105. In his address before the forty-sixth Annual National Conference of Social Work, Meeker acknowledged the heterogeneity of the American public and the lack of a representative agent. Royal Meeker, *What Is the American Standard of Living?*, 9 MONTHLY LAB. REV. 1 (1919).

60. GOLDBERG & MOYE, *supra* note 20, at 105; Meeker, *American Standard*, *supra* at 10.

61. GOLDBERG & MOYE, *supra* note 20, at 106. *See generally* Royal Meeker, *Need for and Uses of a Standard Minimum Quantity Budget*, *in* PROCEEDINGS OF THE NATIONAL CONFERENCE OF SOCIAL WORK 82, 83 (1920).

62. GOLDBERG & MOYE, *supra* note 20, at 105. Royal Meeker, *The American Standard*, N.Y. TIMES, Oct. 29, 1919, at 12.

required overcoming a significant theoretical and technical challenge: the problem of determining "what change in expenditure must follow a given change in the price situation in order to leave an individual as 'well off' as before," as the English economist and statistician R.G.D. Allen put it in 1933.[63] By 1939, a solution to this problem pioneered by the Russian economist Alexander Konüs was available in translation for the English-speaking world: a framework for relating consumer expenditure patterns to a constant level of preference-satisfaction in the commodity set available to consumers, allowing for substitution among bundles.

Unlike the naturalist approach adopted by Fisher and Mitchell, the Konüs approach did not assume that a price index was "some physical or metaphysical entity that is 'out there,' waiting to be captured by an appropriate measuring rod," as Marshall Reinsdorf and Jack Triplett have put it.[64] Instead, it was understood to be an invention, created for the purposes of economic analysis. Nevertheless, these early efforts to propound a utility-based alternative to the "decency and health" standard found little immediate traction owing to a lack of available data on expenditure and consumption, the unresolved technical challenge of how to relate expenditure patterns to constant utility, and strong leadership at the BLS that sought to maintain its discretion in deciding what consumption pattern would maintain the "decency and health" of the American working-class family. Decades later, however, proponents of a "constant utility" or "real price" approach would find a more favorable political landscape, partly created by a new jurisprudence of administrative law seeking to insulate agency discretion from political conflict, and shaped by powerful interests which favored a more abstract and arguably obscurantist approach unanchored in the specific needs of working-class families.

C. The Interwar Period: The Bureau of Labor Statistics Muddles Along

In the meantime, the BLS sought to expand its operational scope in the wake of the First World War, with its price indexes gaining more widespread use due to the upheavals of the Great Depression and the programmatic changes of the New Deal. From 1919, the BLS began publishing semiannual cost-of-living indexes for the whole nation and for major industrial and shipbuilding centers.[65] An article in the agency's December 1919 issue of the *Monthly Labor Review* estimated a total budget necessary to sustain "a level of health and decency for a government employee in Washington, D.C., with a family of five."[66] This budget

63. This problem is called "compensating variation" in the economics literature. *See* R.G.D. Allen, *On the Marginal Utility of Money and Its Application*, ECONOMICA 186 (1933).

64. Reinsdorf & Triplett, *supra* note 44, at 69.

65. GOLDBERG & MOYE, *supra* note 20, at 103-05.

66. *Id.* at 106; *Tentative Quantity-Cost Budget Necessary to Maintain Family of Five in Washington, D.C.*, 9 MONTHLY LAB. REV. 6, 22-25. (1919); *Quantity-Cost Budget Necessary to Maintain Single Man or Woman in Washington, D.C.*, 10 MONTHLY LAB. REV. 1, 35 (1920);

specifically represented "a sufficiency of food, respectable clothing, sanitary housing, and a minimum of essential 'sundries'," but did not include "many comforts which should be included in a proper American standard of living.''[67] This meant no savings (other than insurance), vacations, books or (private) education. To address these and related issues, in 1927, the new head of the BLS, Ethelbert Stewart, proposed a new family budget study aiming "to cover a better variety of industrial centers, a larger number of smaller cities, a larger number of families, and families with a higher income level."[68] Here and elsewhere a tension (and perhaps a confusion) arose between the idea of developing a normative standard based on an appropriate pattern of life and one based on what workers actually did consume.

The challenges of the Great Depression and the policy response to it brought price indexes into a more contentious political light. The New Deal administration of President Franklin D. Roosevelt and the appointment of Frances Perkins as Secretary of Labor raised the profile of the price indexes produced by the BLS. The Economy Act of 1933 instituted a 15% reduction in federal salaries on the basis that the BLS cost-of-living index had dropped by more than 20%.[69] Federal employee unions and the preceding commissioner of the Bureau were quick to point out that the basket of goods on which the cost-of-living index was based was outdated—a complaint to which President Roosevelt was sympathetic. In response to the political outcry, the Advisory Committee to the Secretary of Labor (ACSL) was given an increased role in a "modernization" of the BLS's methodology for its cost-of-living indexes.[70] These changes were, however, only a stopgap until a new survey could be undertaken.

This new survey, conducted between 1934 and 1936, expanded the number of cities covered, and was restricted to families making over $500 a year (with one earner making at least $300 a year), and excluded clerical workers making more than $200 a month or $2,000 a year. Also excluded from the survey were families that received financial assistance from either private or government relief programs, workers on commission, the self-employed, and those who primarily received in-kind benefits for their work, such as some categories of domestic workers.[71] These restrictions reflected what Darren Rippy, a BLS economist, has called "the established beliefs about what constituted a working-class family at the time."[72] The exclusion of specific kinds of families from the

Minimum Quantity Budget Necessary to Maintain a Worker's Family of Five in Health and Decency, 10 MONTHLY LAB. REV. 6, 1-18 (1920).

67. GOLDBERG & MOYE, *supra* note 20, at 106.

68. *Id.* at 122; FIFTEENTH ANNUAL REPORT OF THE SECRETARY OF LABOR 59-61 (1927).

69. Rippy, *supra* note 25.

70. For example, several scope and technical changes were undertaken for existing survey data from 1917 to 1919 to more accurately reflect changes in the price index up to 1935. *Id*.

71. *Id.*

72. *Id.*

survey was an implicit indication of the normative character of the exercise. The results of this expenditure survey were then incorporated into a new index in 1940, the "Cost of Living of Wage Earners and Lower-Salaried Workers in Large Cities Index." In it, the Bureau sought to reflect changes to American consumption habits, with less weight given to food and clothing and greater weight to fuel and electricity. Such changes to consumption habits would soon become an even greater source of political dispute during World War II, as conceptions of what constituted a suitable standard for the well-being of workers experienced significant wartime changes.

D. World War II and the Meany-Thomas Report

Labor unions in the 1930s and into the 1940s had been well integrated into the BLS construction of price indexes. From the New Deal period to American entry into the Second World War, the public management of labor relations depended on updated information from the BLS and other government agencies about prices and wages. Under Commissioner Isador Lubin, the BLS made continual discretionary decisions about the composition of the basket of goods, the weighting of the component items, and the frequency of price measurements in an effort to respond to both the demands of labor and business, as well as to the exigencies of military mobilization.[73]

In 1940, the Bureau began holding annual conferences of research directors of labor unions to review the cost-of-living index. These were, in the beginning, mostly technical reviews of the index "in view of changes in the availability and quality of commodities, additional expenditures by workers required to shift work locations, and rising prices in booming localities."[74] These union research directors further suggested the BLS publish a pamphlet clarifying what the index showed—and what it could not show.[75] Once the war effort was underway, the research director of the International Ladies' Garment Workers' Union even suggested the BLS point out explicitly that its indexes understate price rises due to quality deterioration and other wartime conditions.[76] Given the importance of smooth negotiations between unions and employers in key wartime industries, the BLS complied with this request. The resulting pamphlet emphasized that "a cost of living index can only measure the general change in the particular city of the goods and services customarily purchased by workers. It obviously cannot

73. For example, the BLS, in updates to its market baskets in 1934-36 and 1939, added automobiles, light bulbs, radios, vacuum cleaners, refrigerators, and more fresh foods. Later, in 1942, with World War II well underway, the diversion of goods toward the war effort entailed dropping the following items only added two years previously: automobiles, gas stoves, radios, refrigerators, sewing machines, washing machines, vacuum cleaners, studio couches, bedsprings, and silk goods. *See* Banzhaf, *supra* note 41.

74. GOLDBERG & MOYE, *supra* note 20, at 152.

75. *Id*.

76. *Stabilization: Hearings on H.R. 7895 Before the H. Comm. on Banking and Currency*, 69th Cong. 605, 615, 619-21 (1926).

cover every conceivable increased cost which individual families experience."[77]

As the prospect of wage controls loomed, union research directors went so far as to ask the BLS to replace the cost-of-living index, or at least supplement it, "by developing budgets for maintaining a working-class family in 'health and decency.'"[78] After the actual imposition of both price controls and wage controls in 1942,[79] the political importance of the cost-of-living index exploded. To keep the unions and the general public informed on the uses and limitations of the index, the BLS decided to retain two union research directors to facilitate lines of communication. But by 1943, the relationship between unions and the BLS had substantially deteriorated, with the unions contending that "what was needed were studies of workers' expenditures and a determination of the cost of an adequate standard of living."[80]

Sensing unrest, the BLS acted quickly to assuage its union partners. At the request of acting commissioner A. Ford Hinrichs, Secretary of Labor Francis Perkins asked the American Statistical Association (ASA) "to review and appraise the cost-of-living index with reference both to its construction and its uses."[81] Under the leadership of Frederick C. Mills, an economist from Columbia University and the National Bureau of Economic Research, a committee of the ASA ("the Mills Committee") produced an assessment of the BLS's cost-of-living index. The Mills Committee largely reaffirmed the BLS approach, finding that its index was a "trustworthy measure of changes in the prices paid by consumers for goods and services," and claiming that any difficulties and doubts on the part of critics arise from "attempts to use [the index] uncritically for purposes for which it is not adapted."[82]

Labor unions rejected outright the findings of the Mills Committee. In response, President Franklin Roosevelt established a new President's Committee on the Cost of Living, a tripartite committee consisting of labor, management, and the government, which was chaired by William H. Davis of the National War Labor Board.[83] At the Davis Committee's very first meeting, George Meany, a representative from the American Federation of Labor (AFL), immediately moved to investigate "the cost of living in October 1943 compared with January

77. GOLDBERG & MOYE, *supra* note 20, at 152. The pamphlet in this passage demonstrates the Bureau's awareness of both the first-stage problem of the nonexistence of a representative agent at the individual level and the second-stage problem of aggregation that has troubled the existence of the Bureau's price indexes from the very beginning to today.

78. GOLDBERG & MOYE, *supra* note 20, at 152; *A Constructive Program for Price Statistics*, 27 J. AM. STAT. ASS'N 74, 78 (1932); *Establishment of National Economic Council: Hearings on S. 6215 Before the S. Comm. on Manufactures*, 72d Cong. 583 (1931).

79. *See, e.g.,* the directives and opinions of the National War Labor Board in the "Little Steel" Case. NAT'L WAR LAB. BD., DIRECTIVE ORDERS AND OPINIONS OF THE NATIONAL WAR LABOR BOARD IN THE "LITTLE STEEL" CASE (1942).

80. GOLDBERG & MOYE, *supra* note 20, at 154.

81. *Id*.

82. *Id*.

83. *Id.* at 152.

1, 1941, May 15, 1942, and September 15, 1942; how the index figure was arrived at; whether there were any changes in the methods of securing or computing the figures; and concrete suggestions for improving the securing of figures."[84] Dissatisfied with the response from the BLS, Meany, along with R. J. Thomas of the Congress of Industrial Organizations (CIO), set out to author a minority report.[85] The following year, Meany broadened the scope of criticisms, claiming that the AFL had "never agreed to the principle of basing wages on cost of living or on price inflation."[86] Meany further argued that:

> [T]he established wage policy of this country has always been based on raising wages as increases in productivity made this possible. This is the only possible basis for an expanding economy with rising living standards. In wartime, however, we have been willing to meet the emergency with emergency measures. At every stage of wartime policymaking the American Federation of Labor has supported inflation control and has loyally supported the war administration even though our living standards have not been maintained and we have been denied fair compensation for work done.[87]

Meany, Thomas, and other labor leaders were specifically concerned with deteriorations in quality, increasing substitution due to wartime shortages, rising shelter costs due to housing shortages, and changes in the requirements of living due to the war (such as more restaurant visits by workers who would not otherwise have the rations for making comparable meals at home).[88] The Meany-Thomas minority report, issued by the National Industrial Conference Board, argued that the price rises computed by the BLS were not high enough, and countered the BLS figures with the unions' own surveys and computations of consumer price inflation.[89]

Taken aback by the report, the Davis Committee asked Wesley Mitchell to prepare a response in 1944. Notably, the Mitchell Report first publicly mooted the idea that a price index may seek to keep consumers at a "constant utility."[90] Nevertheless, it saw no way to make this aim operational and so refrained from endorsing it. Instead, while providing an extensive exploration of the technical issues regarding the cost-of-living index, the Mitchell Report suggested only one

84. *Id*. at 155; OFF. OF ECON. STABILIZATION, REPORT OF THE PRESIDENT'S COMMITTEE ON THE COST OF LIVING 2 (1945).

85. Reinsdorf & Triplett, *supra* note 44, at 22.

86. OFF. OF ECON. STABILIZATION, *supra* note 84, at 35.

87. *Id*. Note that Meany somewhat misleadingly contrasts the "cost of living" based approach to one that sees workers' claims in terms of their contribution to productivity. Whether workers would stand to benefit from one approach or the other would depend on recent trends. This example does illustrate that critics of the cost-of-living approach did not come only from the 'right.'

88. *Id*.

89. *Id*.

90. While the idea had been considered by academic economists prior, notably by Konüs in 1924, the invocation of constant utility in the Mitchell Report marked the first time a major government commission outlined this approach, though crucially refusing to endorse it. *See* Banzhaf, *supra* note 41, at 351, 355.

substantive change, which concerned how the price index should address changes in quality, and made only one explicit recommendation, that the name of the index be changed and the term "cost of living" abandoned entirely.[91] Thomas strongly endorsed this recommendation, while Meany continued to reject the idea that wage increases should be based on the cost of living at all. Following the Mitchell Report, each month's BLS price index contained the disclaimer "the index does not show the full wartime effect on the cost of living of such factors as lowered quality, disappearance of low-priced goods, and forced changes in housing and eating away from home."[92] In a significant step toward a utilitarian approach to price index construction, the BLS also dropped the terminology of "cost of living" and adopted a new name for the index: the "Consumers' Price Index for Moderate Income Families in Large Cities."[93]

As Meany, Thomas, and other labor leaders were busy contesting the construction of a cost-of-living index, Congress passed two important pieces of legislation presaging future conflicts over the delegation of authority and standards-setting on the part of economic policymakers in the executive branch: the Emergency Price Control Act of 1942 and the Administrative Procedures Act of 1946. In 1944, two years after the Price Control Act, and in response to a challenge from defendants convicted for selling wholesale cuts of beef above the set maximum price, the Supreme Court held that the Act was indeed a constitutionally valid delegation of authority from Congress to the executive branch. It further held that Congress had furnished sufficiently specific regulations and standards to allow the agency to meet Congressional intent and had provided means of redress to vindicate the right to due process. While administrative law theory and doctrine was still in its infancy, these early guidelines regarding standards and due process, as well as the example of wartime price controls, would soon inform the future development of price indexes and related economic measures. A new

91. GOLDBERG & MOYE, *supra* note 20, at 157. These substantive recommendations suggested sampling a greater number of small cities and a wider range of qualities for some items, and to be more attentive to the impact of markdowns and discounts on price. *See* OFF. OF ECON. STABILIZATION, REPORT OF THE TECHNICAL COMMITTEE APPOINTED BY THE CHAIRMAN OF THE PRESIDENT'S COMMITTEE ON THE COST OF LIVING, at 294-95 (1944). While the chairman's report recommended changing the name—a move endorsed by R.J. Thomas and other members of the President's Cost-of-Living Committee—it did not recommend an alternative. *Id.* at 25-26. In its search for a new name, the leaders of the BLS even went so far as to offer a prize to members of its staff, with the promise that upon determining the best new name it would be immediately adopted. *Id.* at 30.

92. GOLDBERG & MOYE, *supra* note 20, at 156; Reinsdorf & Triplett, *supra* note 44, at 22-25.

93. GOLDBERG & MOYE, *supra* note 20, at 158. The title was agreed to by union research directors at a conference in January 1945 but was rejected by Secretary Perkins because the "Cost of Living" title was "widely used in other countries and was well understood." *Id.* The title was formally changed in July 1945 by Perkins' successor. In a note of optimism, the press release forecasted that this change "should end the confusion and controversy caused by the misunderstanding of what the index is designed to measure and by the use of the index for purposes for which it is not adapted." Reinsdorf & Triplett, *supra* note 44, at 25.

framework of administrative law would come to displace the discretionary space within which labor and business had fought over the construction of official economic measures.

As we have seen, prior to this shift, labor, business, and government pursued different interests and values through rival interpretations of the "cost of living." As economist H. Spencer Banzhaf has explained, three different conceptualizations of the "cost of living" were then in play. First, a cost-of-living index endorsing the "real price," as the Mitchell report mooted but did not endorse; second, a cost-of-living index based on a fixed basket of goods and meant to reflect a representative family budget, as promoted by the BLS for several decades; and finally, a cost-of-living index deemed appropriate by a more demanding normative standard, and capable of reflecting rising expectations of the standard of living, as advocated by labor unions and advanced by Thomas and Meany.[94]

As noted above, the new name for the BLS price index—now called a *Consumers'* price index rather than a "cost of living" index—foreshadowed methodological developments to come. Despite being suggested and endorsed by union leaders,[95] who wanted to reject the contention that what the BLS had been measuring with its fixed basket approach really was the appropriate "cost of living" for workers, the name change elevated the "consumer" as the perceived subject of the price index. Earlier "cost-of-living" studies had instead taken the working-class family and its reproduction requirements as the unit of focus. While the language of "cost of living" would later return to discussions of price indexes, it would then be only a term of art used to describe a utilitarian notion of consumer welfare without reference to the specific cost of maintaining a family in "decency and health."

Under this new dispensation, consumer expenditure surveys took on a new salience. They were no longer useful merely for price information that could be used to select the (discretionary) contents and weights of a fixed basket of goods from which the index was to be computed but were instead viewed as indicative of the purchasing behavior of a hypothetical universal consumer, now recast as a "representative agent." It is worth observing that there was no actual consumer for whom such a hypothetical basket—constructed of weights from a survey extended to many different families across many different cities—was in fact "representative." Instead, a strictly abstract notion of a worker-consumer as the subject of price indexes would soon serve to help the BLS navigate conflict between business, labor, and government in the establishment of a stable post-war social compact.

E. Postwar: The Treaty of Detroit and the Korean War

In the immediate postwar years, the BLS price index program proceeded

94. *See* Banzhaf, *supra* note 41, at 353.

95. *See supra* note 92.

much as before: short on both funding and programmatic direction. However, as the "cost of living" came to be identified less with a particular set of norms for "healthy" or "decent" family life, and instead with the maintenance of a constant level of preference-satisfaction, the "constant utility" formulation came to offer a way of muting political conflict over the price index.

A turning point came with the outbreak of the Korean War in October 1950. Seeking to avoid the union backlash it had faced during World War II, the BLS immediately sought a revision of the CPI using expenditure surveys from 1947-49 and a survey of new rental units.[96] Upon consulting the labor and business advisory committees of the BLS, as well as the technical advisory committee of the American Statistical Association (ASA), the BLS was met with two conflicting recommendations. The ASA and business advisory committee suggested the interim revised index be linked to the existing series as of January 1950, while the labor advisors preferred the more recent date of June 1950 (and thus a more comprehensive overall revision).[97]

The BLS chose to satisfy the ASA and business community, opting for the existing, older series. A few months later, in April 1951, the United Electrical, Radio, and Machine Workers (UE) issued their own cost-of-living index, attacking the "fundamental pro-employer, anti-labor character of the BLS index."[98] The UE charged the BLS index with the same shortcomings alleged by unions during World War II: that the index failed to account for deterioration in the quality of goods and the shifting nature of what the unions considered suitable consumption patterns for working families. The BLS index therefore substantially understated the higher cost, as calculated by the union.[99]

After this criticism, and in the context of rising labor unrest, the House Committee on Education and Labor established a special subcommittee to study the CPI.[100] While rejecting the UE's criticism, the Congressional committee "noted several technical problems and made a number of suggestions, including the development of estimates of place-to-place differences, annual sample surveys of family expenditures, and direct measures of homeowner costs."[101] In response, the BLS introduced a revised CPI in 1953, covering a more modernized market basket with more items, smaller urban locales (including towns with as few as 2,500 people), and the cost of acquiring and operating a home—the latter change

96. GOLDBERG & MOYE, *supra* note 20, at 193.

97. *Id*.

98. *UE Calls U.S. Price Index 'Fraud'; Asks Senate Probe*, UE NEWS, Apr. 30, 1951; HARVEY A. LEVENSTEIN, COMMUNISM, ANTICOMMUNISM, AND THE CIO 299-301 (1985); GOLDBERG & MOYE, *supra* note 20, at 194.

99. *UE Calls U.S. Price Index 'Fraud'; Asks Senate Probe*, *supra* note 98.

100. *Id*.

101. GOLDBERG & MOYE, *supra* note 20, at 194; *Consumers' Price Index: Hearings Before a Subcomm. of the H. Comm. on Educ. and Lab.*, 82nd Cong. 202, 207-08, 275, 278, 280-82, 358 (1951).

reflecting the shift from renting to homeowning in postwar America.[102]

Continuing labor unrest, rising prices, the recession of 1957-58, and attacks on administered prices brought increased public scrutiny to the CPI in the later 1950s.[103] Business economists accused the CPI of including too many luxury items, characterizing the index as representing "what the average urban family spends to live, not what it actually costs to supply its reasonable needs."[104] With a substantial portion of the nation's workforce employed in industries governed by contracts with wage escalation tied to price indexes, business interests had a significant stake in pressuring the BLS to adopt a CPI that reflected a cheaper basket of items.

In the final years of the decade, slowing growth and rising inflation suggested a need for yet another reevaluation of the CPI. But a new criticism surfaced at this moment. At a hearing of the Joint Economic Committee of Congress, economists Richard Ruggles of Yale University and Albert Rees of the University of Chicago argued that "the disparity between slowing aggregate growth and rising inflation was illusionary because the CPI was overstating true inflation."[105] Rather than underestimating the true cost of living—a perennial critique of the Bureau's measure to date—these economists argued that the CPI was instead *overstating* the true cost of living because it inadequately reflected retail innovation, quality improvements, and new goods. Importantly, the focus of this criticism was not the failure to capture a substantive conception of what working families needed to live in "decency and health" but a more abstract notion of consumer utility and its measurement, untethered to the specific costs of any particular commodities. The stage was thus set for a dramatic shift in the underlying approach to the construction of the Bureau's main price index through a new blue-ribbon commission of economists and the seeming return of an old concept in new, substantially different garb: "cost of living." The appropriation of this old term and its application in a new and unrecognizable form is one of the confusing twists in this history.

F. The Stigler Commission and the "Cost of Living" Concept

This tumult of the late 1950s led the Office of Statistical Standards of the Bureau of the Budget to call on the National Bureau of Economic Research (NBER) to convene a commission to reevaluate the CPI. Economist George Stigler chaired the Price Statistics Review Committee, convened by NBER in

102. GOLDBERG & MOYE, *supra* note 20, at 197.

103. *Id.* at 188-89.

104. *Id.* at 196. *See also The Cost of Living: The Index Is Misleading & Incomplete*, TIME, Nov. 11, 1957, https://time.com/archive/6805578/the-cost-of-living-the-index-is-misleading-incomplete/. These attacks by business demonstrate that it was not just labor who may have reason to criticize a basket tied too firmly to a theory of consumption rather than a standard of living.

105. Rippy, *supra* note 25.

1959, which issued its report in 1961. Two background developments seemed to play a significant role in guiding the Committee's recommendations: first, the contentious and bruising wage escalation disputes of the wartime and postwar years, and second, recent technical innovations, such as the development of hedonic measures.[106]

The technical innovations enabled a major shift in how prices indexes were constructed, which had the effect of limiting agency discretion. Previously, the BLS had selected the component items and corresponding weights for a fixed basket with every revision, using the results of consumer expenditure surveys and other surveys as a guide. The Stigler Commission now suggested that the BLS base the contents and weights of the basket on the results of the expenditure surveys themselves. But doing so required a revised conceptual framework to explain what the index would represent and how it would accommodate substitution among goods, changes in their quality, and the introduction of new goods. This conceptual revision entailed both a commitment to neutrality as to what people purchased—that is, deference as to the population's aggregate empirical consumption patterns—and to abstraction, reinterpreting the level of "living" in terms of an abstract concept of consumer preference-satisfaction for a hypothetical representative agent (not the actual consumption needs of a worker or a family).

The result was a concept of "cost of living" detached from customary reference points, such as the income required to maintain a working-class family in "decency and health," and which was unintelligible in ordinary language. It was no longer clear how exactly the "cost" was to be measured for any particular standard of "living," nor how this standard of living was determined in the first place. In other words, while the index would continue to be framed as concerned with the "cost of living," there was no real person or family to whom these costs and this standard of living applied. Instead, the Stigler Commission adopted the "constant utility" and "real prices" concepts of the Mitchell Report but redubbed them as the "Cost of Living Index" or COLI approach, despite the conceptual distance from what had previously been considered the cost of living. The conception of "living" at the heart of this new concept of the "cost of living" was defined purely in terms of a level of utility-maintenance, rather than a thicker normative standard that could directly guide the choice of goods and their weights.

Technically, the Stigler Commission devised an index to capture changes in consumer behavior in response to changes in quality, prices, and available goods,

106. Hedonic measures typically refer to measures for the adjustment of prices given innovations or introduction of completely new products and are derived from statistical regression analysis on the particular characteristics of objects to determine the utility derived from these characteristics. For further discussion of how the Bureau of Labor Statistics computes and employs hedonic measures, see *Frequently Asked Questions about Hedonic Quality Adjustment in the CPI*, BUREAU OF LAB. STAT. (Sept. 30, 2020), https://www.bls.gov/cpi/quality-adjustment/questions-and-answers.htm.

with the aim of inferring the cost of maintaining a given level of consumer preference-satisfaction. Observed purchasing decisions—called "revealed preferences"—related to the introduction of new consumer items, improvements in quality, or changes in relative prices could be used to calculate the "cost of living" required to maintain a hypothetical level of constant consumer utility.[107] Practically, this meant constructing a comprehensive basket using probability sampling to select outlets and product varieties for the basic component indexes, and then aggregating them using the consumer expenditure survey—a two-step process still used in constructing the CPI today.[108] Thus, whereas the BLS had previously interpreted the cost-of-living index as a fixed basket index for a family budget, which reflected a set of normative premises as to what should be valued, the COLI approach interpreted the cost-of-living index as holding constant a "standard of living" based on the level of utility presumed to be derived from the basket chosen by a hypothetical ("representative") consumer.[109]

The Stigler Commission's COLI approach was immediately met with strong resistance by Commissioner Clague and the staff of the BLS. The Bureau saw a consumer welfare index, of the kind the Stigler Commission suggested, as at most a useful complement to the fixed-basket CPI. It stressed the "many purposes" that the traditional price index served and questioned the move toward a "welfare concept."[110] Because it foregrounded substitution and quality changes, a "welfare concept" (like the COLI) would be much less transparent than the fixed-basket CPI, requiring users to adapt to a much less intuitive framework of

107. It is worth noting at length how the Stigler Commission describes their motivation in the introduction to their report, reflecting the earlier arguments made by Ruggles and Rees, while conflating the concept of "a constant level of utility" and a "fixed standard of living":

> It is often stated that the Consumer Price Index measures the price changes of a fixed standard of living based on a fixed market basket of goods and services. In a society where there are no new products, no changes in the quality of existing products, no changes in consumer tastes, and no changes in relative prices of goods and services, it is indeed true that the price of a fixed market basket of goods and services will reflect the cost of maintaining (for an individual household or an average family) a constant level of utility. But in the presence of the introduction of new products, and changes in product quality, consumer tastes, and relative prices, it is no longer true that the rigidly fixed market basket approach yields a realistic measure of how consumers are affected by prices. If consumers rearrange their budgets to avoid the purchase of those products whose prices have risen and simultaneously obtain access to equally desirable new, low-priced products, it is quite possible that the cost of maintaining a fixed standard of living has fallen despite the fact that the price of a fixed market basket has risen.

Price Stats. Rev. Comm., *The Consumer Price Index*, *in 73* THE PRICE STATISTICS OF THE FEDERAL GOVERNMENT 51 (1961).

108. The Fisher geometric mean based 'ideal index'—which the Commission believed served as a reasonable near-term approximation of changes in the cost-of-living and Konüs Cost-of-Living Index (i.e., constant utility)—would serve as the overall measurement concept guiding the exercise.

109. Rippy, *supra* note 25. The Stigler Commission also recommended several additional technical changes to the way that the BLS constructed price indexes, mostly concerned with accounting for new products, quality changes, and complex purchases (such as insurance premiums). *Id. See also* PRICE STATISTICS *supra* note 107.

110. GOLDBERG & MOYE, *supra* note 20, at 197. *See* BUREAU OF LAB. STATS., DEP'T OF LABOR, BULL. NO. 1517*,* THE CONSUMER PRICE INDEX: HISTORY AND TECHNIQUES (1966).

a shifting basket and weights. Nevertheless, despite this initial opposition, the BLS began implementing some recommendations from the Stigler Commission, including "a more unified and comprehensive consumer price index program," by "first, including single-person households in the current index and, second, expanding the index to cover the entire population, including the 'rural nonfarm and farm areas'."[111] The Bureau also took up the task of "determining the feasibility and cost of the collection of price statistics representative of the entire Nation."[112] Starting with the 1964 CPI, the BLS began including single-person households, eliminated income restrictions, and expanded to smaller urban areas and suburbs in their revision. These changes were part of a larger postwar movement, advanced by liberals and conservatives alike, toward the integration of "scientific" methods such as cost-benefit analysis into regulatory processes.[113]

Over the years to come, the Bureau would slowly move toward adopting the COLI approach. As other scholars have shown, part of the reason for this change was a generational shift within the Bureau staff from the "old hands" of the New Deal to younger economists trained in the new welfare economics.[114] But, as we show in the next section, there was also a broader external shift that influenced the move toward seemingly technically grounded, utilitarian welfare measures: a new concern with agency discretion in administrative law and a resulting push to employ economic expertise as a means to depoliticize the construction of the CPI.

III. THE ECONOMIC STABILIZATION ACT OF 1970 AND THE COST OF LIVING COUNCIL

In the United States, the last great crisis of what is today called "affordability" came with the inflation of the late 1960s and early 1970s, which set the backdrop for a shift in administrative law. While experts continue to debate its precipitating causes, the basic trend is clear: the annual rate of inflation accelerated from a range of 1-2% per year in the beginning part of the 1960s, to 2.9% in 1966 and 5.7% in 1970.[115] In response, Congress delegated authority to the President to "tame inflation" through price and wage freezes and controls. Challenges to this delegation of authority then helped push the Bureau toward the COLI approach and away from its traditional "health and decency" standard.

The Economic Stabilization Act of 1970 brought what were arguably the first peacetime wage and price controls in American history (though American

111. Rippy, *supra* note 25.

112. *Id.*

113. For discussion of these changes, see generally ELIZABETH POPP BERMAN, THINKING LIKE AN ECONOMIST: HOW EFFICIENCY REPLACED EQUALITY IN U.S. PUBLIC POLICY (2022).

114. *See* STAPLEFORD, *supra* note 14, at 347.

115. These measures of inflation are computed using the CPI-U (*see infra* Section IV.B) for the years 1960 to 1970. *See Databases, Tables & Calculators by Subject: Prices*, BUREAU OF LAB. STATS., https://www.bls.gov/data/#prices (last visited Feb 3, 2026).

involvement in Vietnam of course played a major factor).[116] With this distinction came heightened political and legal stakes for the government.[117] Immediate political pushback led Congress to amend the Act, carving out exemptions from wage freezes for the lowest rung of American workers.[118] In so doing, Congress utilized the BLS's "lower-level budget," while also creating a new Cost of Living Council with the discretion to determine whose wages would be exempt.[119]

The BLS lower-level budget was one of three standard budgets that the agency was charged with producing, corresponding to three classes of families: a below moderate-income family, a moderate-income family, and an above moderate-income family. From 1967-68, these budgets were integrated into federal and state legislation regarding "social security, unemployment insurance, public welfare, and employment and training programs."[120] The lower-standard budget in particular owed its roots to the "City Worker's Family Budget," a profile produced by BLS representing a "minimum of adequacy" which was still significantly above the official poverty line, and perhaps a relic of the earlier BLS "health and decency" standard for the cost of living.[121]

The gradual adoption of BLS price indexes into government programs raised the political stakes of index construction. The Economy Act of 1933 permitted the use of price indexes for computing reductions in federal salaries while accounting for cost-of-living changes. From that time, price indexes were used by government agencies to make "fair and timely" adjustments in various wage and benefit schemes.[122] These adjustments became especially important in the late 1960s and 1970s, when the CPI was used to adjust federal pensions, income tax brackets, veterans' pensions, and more, all against a background of rising inflation.[123]

The BLS had never been under such pressure to supply new data, and the normative assumptions built into the CPI and its budget lines elicited controversy.[124] In particular, uneasiness with the construction of its lower-standard budget would grow once Nixon proposed to replace cash benefits to poor Americans with a negative income tax. Advocates for the poor and for minority groups held that the BLS's lower-standard budget was too low even while business groups complained that it was above the federal poverty line.[125] As the following

116. Economic Stabilization Act of 1970, Pub. L. No. 91-379, tit. II, 84 STAT. 796, 799.

117. INNES, *supra* note 4, at 151.

118. *Id.*; Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85 STAT. 743.

119. INNES, *supra* note 4, at 150.

120. GOLDBERG & MOYE, *supra* note 20, at 233.

121. STAPLEFORD, *supra* note 14, at 364.

122. *Id*.

123. *Id.* at 294.

124. *See, e.g.,* GOLDBERG & MOYE, *supra* note 20, at 226.

125. STAPLEFORD, *supra* note 14, at 364-65. For a discussion of the debate between the use of the poverty threshold developed by Mollie Orshansky, favored by business and the Nixon administration, and the BLS lower-standard budget, favored by the unions and

sections show, these budgets became a key flashpoint in litigation about the Cost of Living Council.

A. Challenges to the Cost of Living Council

In the early 1970s, labor unions repeatedly challenged the decisions of the Cost of Living Council regarding exemptions to freezes and controls under the Economic Stabilization Act. By examining three cases of this kind from the District Court of the District of Columbia (the court of original jurisdiction), we can better understand several emerging features of administrative law that influenced the construction of price indexes: an application of fairness and equitability, self-limiting to prevent executive aggrandizement, a standard of reasonable economic consistency, and an increased burden on the government to defend its actions as not irrational. For administrators seeking to survive judicial review of agency decisions, the COLI approach favored by a new generation of economists seemed to limit agency discretion and thus advance a defensible—because "non-arbitrary"—method of decision-making.[126]

1. Amalgamated Meat Cutters v. Connally

In 1971, the Amalgamated Meat Cutters union challenged the constitutionality of the Economic Stabilization Act of 1970.[127] The union contended that employers could not appeal to a recent executive order establishing a 90-day price-wage freeze as a defense for refusing to raise wages as required by a 1970 collective bargaining agreement. It charged both that the Economic Stabilization Act was unconstitutional and that the executive order was invalid.[128] In claiming that the Act constituted an unconstitutional delegation of legislative authority to the President, the union plaintiff cited the Court's holdings in *A. L. A. Schechter Poultry Corp. v. United States*,[129] and *Panama Refining Co. v. Ryan*,[130] which found invalid provisions of the National Industrial Recovery Act.[131] In its defense, the government noted earlier, similar grants of authority, notably in *Yakus v. United States*,[132] where the Court upheld the grant of price-fixing authority to the President by the Emergency Price Control Act of 1942.[133] The DC district court ultimately held that the Economic Stabilization Act was indeed

Congress, see DANIEL P. MOYNIHAN, THE POLITICS OF A GUARANTEED INCOME: THE NIXON ADMINISTRATION AND THE FAMILY ASSISTANCE PLAN 246-47 (1973).

126. All three cases were unchallenged at the appellate level.

127. Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 743 (D.D.C. 1971).

128. *Id.*; Exec. Order No. 11, 615, 3 C.F.R. 602 (1971-1975).

129. 295 U.S. 495 (1935).

130. 293 U.S. 388 (1935).

131. *Amalgamated*, 337 F. Supp. at 745 (D.D.C. 1971).

132. 321 U.S. 414 (1944).

133. *Amalgamated*, 337 F. Supp. at 745 (D.D.C. 1971).

constitutional and the executive order valid, declaring that the Act gave the President broad authority "to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages and salaries."[134] However, in reaching this judgment, the Court imposed constraints on the delegation of authority, suggesting that policymakers and agency officials should prefer seemingly objective, non-discretionary economic measures.

Siding with the government, the court held that *Yakus* fit more closely the facts of this case, since *Yakus* also concerned a grant of Congressional authority to the executive to impose price controls. The court insisted that whether Congress could grant such legislative power to the executive turned largely on the question of limits.[135] Citing *Yakus*, the Court held that: "Congress is free to delegate legislative authority provided it has exercised 'the essentials of the legislative function' in determining the basic policy," requiring that "'the rule, with penal sanctions, that prices shall not be greater than those fixed by maximum price regulations which conform to standards and will tend to further the policy which Congress has established.'"[136] In other words, the relevant standard required that Congress "'sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.'"[137]

That standard was understood by the *Amalgamated* court as one of intelligibility, as per Chief Justice Taft in *Hampton*,[138] and in this particular case concerning price controls, that maximum prices be "generally fair and equitable," as per the Court's holding in *Yakus*.[139] Reading into the context, function, and legislative history of the Act, the court found ample evidence that such a standard had been met.[140] The plaintiff argued that the "fair and equitable" standard could not be met, as there was no "system for testing [the President's orders], administratively and by judicial review, as in the earlier legislation."[141] The court disagreed, finding that the legislation, in charging the President with attending to the removal of "gross inequities," provided ample ground for judicial challenges to the discretion delegated to the President.[142] Finally, the court also held that the

134. *Id.* It is worth noting, per Robert Kagan, that the opinion was written by Judge Harold Leventhal, head of the price control agency during the Korean War. *See* ROBERT A KAGAN, REGULATORY JUSTICE: IMPLEMENTING A WAGE-PRICE FREEZE 54, n. 26 (1978).

135. *Amalgamated*, 337 F. Supp. at 745 (D.D.C. 1971).

136. *Id.* at 745-46, citing *Yakus*.

137. *Id*. at 746, citing *Yakus* ("The issue is whether the legislative description of the task assigned 'sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.'").

138. *Id*. citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

139. *Id.* at 747.

140. *Id.* at 748.

141. *Id.* at 755.

142. *Id.* at 757. *See also id.* at 760 (affirming that the government's determinations are subject to judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 and holding there is no requirement of notice and comment if it is impracticable, citing 5 U.S.C. §

Executive must "self-limit," according to standards it has set itself, so as to avoid "undue breadth of executive authority."[143]

Thus, while the *Amalgamated* court ultimately held in favor of Congress's delegation to the executive branch, its articulation of the bounds within which constitutional delegation should proceed required that Congress clearly limit the field of executive authority. This limitation would come to play an important role in the development and application of economic measures by administrative agencies. Given the historical record of "fairness and equity" in prior price and wage controls, along with the self-limiting standard-setting of the Administrative Procedure Act and the Economic Stabilization Act, policymakers and agency officials would proceed on the assumption that the use of economic measures must conduce to both consistency and fairness to survive judicial review. This constraint would, we argue, put pressure on policymakers and agency officials to adopt standards that seem objective and non-discretionary, such as the new utility-based "cost of living" approach to price index construction.

2. Jennings v. Connally (1972)

The following year saw another challenge to the Economic Stabilization Act, brought by Paul Jennings of the International Union of Electrical, Radio and Machine Workers, George Meany of the AFL-CIO, and other unions, including the Amalgamated Meat Cutters Union once again. In *Jennings v. Connally*, plaintiff unions claimed that the Cost of Living Council had overstepped its authority in declaring wages under $1.90 per hour exempt from control of the Economic Stabilization Act.[144] They sought a determination as to whether Section 203(d) of the Act required the President and the Cost of Living Council to exempt from wage controls "all persons whose earnings are at or below levels established by the Bureau of Labor Statistics in determining an income necessary to afford adequate food, clothing and shelter and similar necessities," and whether that discretion had been exceeded in the administration's exemption of workers making $1.90 per hour.[145]

On the first issue, the court ruled in favor of the government. As both plaintiff and court agreed, Congress wished to exempt the poorest American workers from the wage freeze. While the Act did not explicitly designate who should determine whose wages are exempt as "substandard," the court found with reference to the relevant legislative history that Congress intended the President to

553 and *Yakus* as precedent for not applying this section of the APA to a maximum price law).

143. *Amalgamated*, 337 F. Supp. at 758 (D.D.C. 1971).

144. 347 F. Supp. 409, 411 (D.D.C. 1972). Setting the exemption level at $1.90 posed significant consequences for the 50% of workers who would be eligible for pay increases, with the higher $3.35 level jeopardizing the success of the wage control program in taming inflation in the eyes of some policymakers. KAGAN, *supra* note 131, at 79.

145. *Connally*, 347 F. Supp. at 411 (D.D.C. 1972).

have broad authority to make this determination.[146] The court also found that Congress had rejected the use of poverty levels estimated by the Office of Management and Budget (OMB), suggesting that whatever standard was prescribed by Section 203(d) of the Act, it was to be different from mere poverty (as determined by OMB or other agencies).[147]

On the second question—whether the President had exceeded his discretion in setting the level at $1.90 per hour—the court noted that the Cost of Living Council faced an accounting challenge in meeting Congress's definition of "substandard." In the absence of more specific data, the Council had been forced to rely on BLS data not intended to achieve the aims of Section 203(d). The competing calculations in play suggest not only the technical difficulty of making such an estimate, but the inescapably normative dimension of deciding what wage level was "substandard."

The Council began with the BLS's lower-budget figure, computed in the Spring of 1970 at $6,960. Using additional BLS data, the Council estimated an increase due to a rise in the "cost-of-living" to be $372, to which it added an average increase in Social Security taxes of $26, yielding a new lower-budget figure of $7,358. Finally, this figure was revised downward by several adjustments determined at the discretion of Council staff. These revisions became the central subject of the dispute.[148]

Plaintiffs noted that the Council began its calculation with the initial BLS lower-budget figure of $6,960, which applied only to families of four with only a single wage earner between the ages of 35 and 54. Combining this figure with corresponding BLS budget figures for wage earners under the age of 35 and from 55 to 64 (and weighting them according to the distribution of family heads across these three buckets), the Council lowered the budget level to an average of $6,651.[149] But, as plaintiffs objected, these other age bracket budgets were not similarly adjusted for cost-of-living increases from 1970 to 1971.[150] A second set of reductions to the budget figure—made to account for a reduction in taxes for families of four whose income was below $7,000 at the beginning of that year, 1972—was also argued to be inappropriate, as the Council had not similarly accounted for increases in the cost-of-living for that year.[151]

Two further reductions were made based on new assumptions about family size. First, the Cost of Living Council computed average family size as 3.6 (rather than 4), with plaintiffs observing that these reductions relied on data that included older heads of family who were over 65 and thus likely to have fewer dependents. Second, the Council assumed not 1 but 1.7 wage earners per family

146. *Id.* at 412.
147. *Id.* at 413.
148. *Id.* at 415.
149. *Id*.
150. *Connally*, 347 F. Supp. at 415 (D.D.C. 1972).
151. *Id*.

and revised its budget figures upward to account for the increased income of the additional 0.7 wage earner, while revising the lower budget figure downward by a factor of 1.7. The Council thus arrived at its final budget figure of $3,962 per year—far lower than the original BLS figure of $6,960 per year—which was then divided by an assumed 2,080 working hours per year to arrive at the $1.90 per hour level for "substandard" wages.[152]

While the court acknowledged the administrative challenge facing the Cost of Living Council from the use of data not specifically devised to achieve the aims of Section 203(d), it found the Council had nevertheless failed to realize the intent of Congress.[153] The Council had exceeded its discretionary authority in setting the $1.90 wage level. In reaching this decision, rather than deferring to the judgment of the executive branch agency, the court concluded that it was the judiciary's own role, as designated to it by the Act and the APA, to undertake a careful quantitative assessment of whether the Cost of Living Council had met the standard set by Congress. In the wake of this decision, it will have become clear to the Cost of Living Council, the BLS, the OMB, and Congress that the formulas used to construct and apply economic measures need to withstand judicial review, not only based on standards of intelligibility, fairness, and equitability, but also of reasonable economic consistency.[154]

3. Jennings v. Schultz (1973)

A further case involving the same plaintiffs and defendants confirmed the importance of achieving such regulatory consistency.[155] In *Jennings v. Shultz*, plaintiffs challenged the setting of an exemption level ($2.75) claiming that the Council did not possess the authority to deviate from the BLS lower budget figure as adjusted for cost-of-living increases. In response, the Council claimed discretionary authority to consider all income and other measures in its determination.[156] The DC district court, again holding in favor of the defendants, found that the Cost of Living Council did indeed possess the discretionary authority to compute a substandard wage level and was not limited to adopting BLS measures. Nevertheless, the burden of proving that the government's actions

152. *Id*. at 416-17.

153. *Id*. at 417.

154. *See* INNES, *supra* note 4, at 151 ("Eventually, a Federal judge ruled that the Council had acted against the intent of Congress in setting the $1.90 figure. It then revised its substandard definition upward to $2.75. The result was a compromise, accounting for the view that a family was likely to have more than one breadwinner. The problem reflected the fundamental conceptual difficulty that continually gave trouble—that although the budget purported to measure needs according to some standard, it was for a particular family type and to compare it with any wage proposal would produce an ambiguous result, as the wages would go to people in many different circumstances.").

155. John Connally was replaced by George Schultz as head of the Cost of Living Council in the interim. *See* Jennings v. Shultz, 355 F. Supp. 1103, 1200 n.1 (D.D.C. 1973).

156. *Id.* at 1204.

"cannot be considered irrational" was up to the government to defend, and not a rebuttable presumption for the plaintiffs to overcome.[157] The expectation for the government to meet this higher burden of proof likely weighed on subsequent administrators in their work constructing price indexes.

B. Fallout from legal challenges and further factors

As the challenges posed by plaintiffs in *Amalgamated Meat Cutters v. Connally*, *Jennings v. Connally*, and *Jennings v. Schultz* made clear, the BLS found itself in a precarious position by the early 1970s. On the one hand, it needed to collect data and produce economic measures that could be used for a variety of novel purposes, many of which would advantage or disadvantage specific parties. In doing so, however, it also needed to be seen as avoiding arbitrary discretion. The threat of nondelegation and external standards imposed by the judiciary hung over the OMB, the Cost of Living Council, and the BLS during this time, especially prior to *Chevron*. As this new litigation demonstrated to agency officials, discretionary determinations by executive branch officials, including the assessments of the BLS, would be subject to revision by courts if not adequately defended.

In response, the BLS sought to become more "scientific" in its measurement construction. Public law scholar Robert Kagan, who served in the Nixon administration during the price control episode, has observed that there was a great deal of uncertainty among BLS and other officials regarding how to balance price stability against other values. In this context, strict abidance by a legal mandate seemed an appropriate response.[158] Rather than understanding themselves as economic planners, these officials saw their work as implementing pre-determined policy, albeit with a set of facts yet to be discovered and in a constantly shifting economic landscape.[159] They sought what Kagan calls a "deductive" approach—that is, working outward from Congressional intent—rather than an "inductive" approach that assessed the full scope of the public interest and applied the tools delegated to address them. More generally, he writes, price control officials sought to "avoid responsibility for the effort of balancing conflicting values, gathering data, and formulating principles of justifiable accommodation," claiming that they did not possess "legal authority to control economic activities after November 13, 1971" when the freeze ended or to condition policymaking thereafter.[160] Price control officials preferred the intellectual burden of planning to be shifted to other agencies.[161] Nevertheless, these agencies inevitably ran into contestation regarding their discretionary authority in decision-making, as in the

157. *Id*. at 1205.
158. KAGAN, *supra* note 131, at 72.
159. *Id*. at 72-73.
160. *Id*. at 73.
161. *Id*. at 74.

court cases discussed above.

Kagan also notes the distinctive role played by price indexes during the price control episode. The BLS's price indexes were utilized widely across government: the CPI and the Wholesale Price Index were seen as "external and objective measures of [their] agency's success or failure."[162] For many administrators, including Kagan, the aim of these price indexes was to achieve the narrow aim of stopping inflation. These indexes thus came to seem almost self-legitimating as objective or neutral measures. Nevertheless, decisions regarding how to construct and deploy them involved inescapably contentious questions about redistribution—for example, who would receive the benefits of government intervention (e.g., permitted to "catch up" in wages while others faced wage freezes). Rather than acknowledging this dimension of their work, many administrators doubled down on the search for neutral, impartial, or objective measures.

No one reflected this ambition better than the incoming head of the BLS, Julius Shiskin. Shiskin was a macroeconomist who had previously served as head of the Office of Statistical Policy at OMB, where he had focused on producing objective economic measures.[163] Taking over from Nixon's appointee, Geoffrey Moore, at a moment of mounting political tension, he would seek to replicate this approach at the BLS.[164] Shiskin was not the first BLS commissioner with this aim. Moore, too, had sought to divest the agency of the responsibility for producing budgets and to avoid any political controversy.[165] Moore expressed serious doubts as to whether the BLS should have the authority to determine "what is adequate or inadequate, what is a luxury and what is not, etc., no matter how reasonable the position may seem to us."[166]

Complicating their efforts was the fact that both Congress and the business community found the BLS budgets useful.[167] Shiskin argued in response that an

162. *Id*. at 78. The adoption of the CPI as a measure of overall policy success in taming inflation also placed significant pressure from the Price Commission on the BLS to identify specific prices driving up the index. INNES, *supra* note 4, at 281.

163. *Id*. at 152.

164. GOLDBERG & MOYE, *supra* note 20, at 230.

165. STAPLEFORD, *supra* note 14, at 365.

166. *Id*. *See also* Memorandum from Geoffrey H. Moore, Comm'r, Bureau of Lab. Stats., to Users of BLS Budgets and Interarea Living Cost Indexes, Improved Program for the BLS Family Budget Estimates and Interarea Indexes of Living Costs (Dec. 15, 1971); GOLDBERG & MOYE, *supra* note 20, at 233.

167. *See* Memorandum from Geoffrey H. Moore, Comm'r, Bureau of Lab. Stats., to Users of BLS Budgets and Interarea Living Cost Indexes, Improved Program for the BLS Family Budget Estimates and Interarea Indexes of Living Costs (Dec. 15, 1971) (on file with the U.S. Department of Labor) ("In any case, Administration determination to abolish the budgets became stronger by 1972. . .A new BLS director was appointed, a macroeconomist with little interest in the microperspective of the budget, and, in 1972, the principal spokesman for budgets inside the BLS retired. However, new support for the indicator emerged from many sources. Congress had found it useful and was not prepared to abolish it. Business liked the interarea cost index function, which for technical reasons a price index could not fulfill. Social analysts and economists acknowledged the limitations and arbitrariness of the budget's design,

operating agency would be better suited to making political determinations, at one point even suggesting that the Department of Health, Education, and Welfare take on the responsibility of setting of these budgets.[168] The Department refused, despite a concurrent recommendation from OMB.[169] As historian Thomas Stapleford notes, BLS's struggle to rid itself of the task of producing budgets—and thereby pass on associated political liability to another agency—was long and difficult, and only succeeded in the end because of Congressional funding cuts.[170] For Shiskin and others at the BLS, the experience of being in a price controls regime provided further proof that a scientific approach was necessary to shield statisticians and economists from the politics of picking winners and losers. "Policy," Shiskin remarked, upon taking over the agency, "is not a role for professional statisticians," emphasizing the importance of "traditional BLS neutrality."[171] He was committed, according to Goldberg and Moye's account of his tenure, to "improving the basic data and expanding the analytical work of the Bureau while maintaining the highest professional standards."[172]

To this end, Shiskin tasked the BLS in 1974 with revising its most important set of measures: the CPI and other price indexes. Shiskin sought to expand the coverage of the CPI to all urban workers, beyond its longstanding coverage of only urban wage earners and salaried workers—a move that would better align the index with its status as a "broad economic indicator."[173] Economic theory also supported this expansion: if there were a real price level to be measured, then the accuracy of the price index required collecting as much data as possible from the total population. It also helped that such an expansion would provide greater cover for accusations that the BLS exercised selective, political discretion over whose costs were measured.

Shiskin saw the consumer price index as serving two major functions: as "a yardstick for revising wages, salaries, and other income payments to keep in step with rising prices," and as "an indicator of the rate of inflation in the American economy."[174] Shiskin was also well aware of the tension between these two uses,

but as of this writing it continues to be repriced and published annually by a reluctant BLS.").

168. GOLDBERG & MOYE, *supra* note 20, at 234.

169. *Id*.

170. *See* STAPLEFORD, *supra* note 14, at 365 ("[BLS] tried handing responsibility for the budgets to other federal agencies, but no one would take it. It tried suspending publication pending further research and new expenditure data, but administrators in state and private social service agencies (along with congressional supporters) forced the program to continue. Finally, it succeeded in gathering official sanction (in the form of an external review committee) to transform the project, which would now publish average expenditures for families at different income levels rather than estimating adequate standards. And then, perhaps a bright spot amidst an otherwise distressing situation, congressional funding cuts in 1981 allowed the bureau to scuttle the entire program.").

171. GOLDBERG & MOYE, *supra* note 20, at 219; *Nomination: Hearing Before the S. Comm. on Labor and Public Welfare*, 93d Cong. 13 (1973).

172. *Id.*

173. *Id*. at 227.

174. Julius Shiskin, *Updating the Consumer Price Index*, 97 MONTHLY LAB. REV. 3, 3

acknowledging that the general public still conflated them.[175] When it came to the introduction of new retail products and substitution among them, Shiskin was aware of the gap in what the index purports to measure, and was insistent in addressing it.[176]

The problem comes because the measurement of inflation concerns a macroeconomic phenomenon with complex relationships to other observed phenomena, such as unemployment, the money supply, and economic growth. To construct an instrument for price escalation is to evaluate that instrument against specific normative objectives, such as maintaining the standard of living of workers while prices rise or to redistribute productivity gains. The macroeconomic phenomenon of inflation need not overlap with the choice of escalator, even if, in principle, the measures for both involve some conception of rising prices. Wages may be escalated well beyond any specific measure of inflation as a policy objective while a measure of prices intended to maintain workers' standard of living need not be viewed as inflationary. To attempt to satisfy these two objectives with one index confounded Shiskin and the BLS, and motivated the search for some objective reality behind both which the Bureau could measure.

Here, an expanded Consumer Expenditure Survey served a crucial role, with greater scope and more sampling of products. Shiskin saw these changes as providing "a sounder basis for the selection and weighting of items in the market basket."[177] On this view, the wider the population surveyed, the closer the index would come to a notional representative agent embodying urban consumers (if not wage earners).[178] Shiskin also wished to "modernize" the conceptual framework underlying the indexes, making them more suitable to "current and prospective economic conditions."[179] He sought to make the CPI more accurate by improving stratification, lowering nonresponse rates, reducing the length of recall periods, and improving estimation procedures.

The question of who should constitute the index population, however, remained a problem that could not be answered simply by collecting more data. Shiskin acknowledged that while the index had historically been geared toward urban workers, the "characteristics of the urban wage earner family have changed over the years," necessitating changes to the index.[180] In describing prospective

(1974). Shiskin sought to devise an index that served both these purposes—measuring inflation and escalating wages—by publishing simultaneously two different CPIs. These functions ultimately corresponded to the CPI-W for escalation and the CPI-U for inflation. *See id.* ("Starting in April 1977, BLS will publish two Consumer Price Indexes: an improved index for urban wage earners and clerical workers to meet the requirements of collective bargaining, and an index for all urban households, which will provide a new comprehensive measure of price change for the economy.").

175. *Id.* at 4.

176. *Id*. at 5.

177. *Id*. at 10.

178. *Id*. at 5.

179. Shiskin, *supra* note 171, at 9.

180. *Id*. at 11.

changes, Shiskin referred back to the Stigler Commission's recommendation that the index should broaden its coverage such that it is "appropriate to the measurement of the changes in welfare of the Nation and to the measurement of inflation (and hence the guidance of monetary and fiscal policy)."[181] Beginning in April 1977, the new index would thus include all urban households, not just urban wage earners and clerical workers. Shiskin justified this expansion by pointing to earlier decisions by former Commissioner Clague to cover single families and all non-farm families, and by Commissioner Ross to cover all consumers and all retail sales.[182]

The move toward broadening coverage was, according to Shiskin, made with the support of both the business and labor research advisory councils to the BLS.[183] Despite this, the announcement of such an expansion was met with skepticism from some labor leaders. Leonard Woodcock, President of the United Auto Workers, feared the discontinuation of the CPI measure used historically in collective bargaining, noting that the existing index reflected "changes in the cost of living actually experienced by working people."[184] Woodcock insisted on the utility of this index to union economists, who were already familiar with its strengths and weaknesses.[185] Woodcock also identified a key issue: the CPI would no longer be a measure primarily for workers. He proclaimed that "[i]n principle we are totally opposed to the abolition of a CPI geared to workers in favor of one geared to nobody."[186] Woodcock's suspicion was that this new index would reflect fewer cost-of-living increases than the previous measure, weakening labor's case for wage increases in collective bargaining negotiations.[187] Notably, Lazare Teper, Director of Research for the International Ladies' Garment Workers' Union, warned that this new index would include in its construction of a representative agent consumers who were not workers but rather people "whose marketplace experience is different from that of wage and salaried workers," and would thus be unacceptable to both workers and management as a common measure for negotiation.[188] George Meany of the AFL-CIO strongly urged the BLS to focus its limited resources on producing indexes of use to American workers, while Woodcock launched a more procedural attack on the BLS for excluding labor from the deliberations that led to the revision.[189]

181. *Id*. at 12.
182. *Id*.
183. *Id*.
184. Shiskin, *supra* note 171, at 12.
185. *Id*.
186. *Id*. at 13.
187. *Id*.
188. *Id*.
189. GOLDBERG & MOYE, *supra* note 20, at 240. Meany's reappearance in this narrative one final time signifies—as it often has in other stories about the US labor movement—organized labor's last stand on behalf of the once-dominant notion that the interests of workers ought to take priority in the regulation of the economy. On labor's earlier role, see SAM PIZZIGATI, THE RICH DON'T ALWAYS WIN: THE FORGOTTEN TRIUMPH OVER PLUTOCRACY THAT

While organized labor protested these changes, agencies across the government expressed their support through the Interagency Subcommittee on Economic Statistics organized by the Council on Economic Policy.[190] Shiskin, meanwhile, considered pushing even further by adopting a possibility raised by economist Milton Friedman: indexing the entire US economy to the CPI.[191] In discussing this scenario, Shiskin emphasized the possibility that the income of certain groups would be escalated by the CPI while others would not.[192] The "unescalated" groups would be at a handicap, which would create persistent inequality and unfairness over time.[193] Shiskin also entertained the possibility of developing indexes for each subgroup of the population, but rejected this approach as it "would create uncertainties in the minds of many groups regarding the particular index to which it would be most appropriate to tie their own income payments."[194]

Ultimately, in 1976, the BLS would attempt to appease all parties by continuing to produce its previous index (now renamed and known as the CPI-W), aimed at urban workers, while also creating a new index, CPI-U, covering 80% of the civilian non-institutional population, including "the self-employed; professional, managerial, and technical workers; short-term and part-time workers; and the unemployed, retirees, and others not in the labor force."[195] OMB and GAO strongly recommended the adoption of the new CPI-U to index government programs, including notably tax brackets in 1985, citing the CPI-U as "the best measure that we now have in the country in a technical sense."[196] Nevertheless, despite this recommendation, the traditional CPI-W continued to be used by most federal programs and collective bargaining agreements.[197]

CREATED THE AMERICAN MIDDLE CLASS, 1900-1970 (2012); WILLIAM J. NOVAK, NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE (2022).

190. Shiskin, *supra* note 171, at 12.

191. *Id.* at 16.

192. *Id.*

193. *Id.*

194. *Id.*

195. GOLDBERG & MOYE, *supra* note 20, at 240.

196. *Id.* at 241.

197. Commissioner Shiskin, in arguing for why the CPI-U would not be any more unrepresentative than the existing CPI-W index, remained careful to acknowledge the limitations of price indexes in general in tracking the rise in prices for any given individual:

> Even the urban wage-earner and clerical-worker segment of the population is not a completely homogenous group; it is made up of many individuals, each with an individual way of life. If a price index were calculated for each of the individuals in this group, some of these indexes would rise more rapidly than others. So even under the current wage-earner and clerical-worker index, there are some covered individuals who gain when wages are escalated by the [CPI] and some who lose in relation to their actual expenditures.

Shiskin, *supra* note 171, at 12.

C. "Superlative" Indexes, the Decline of Labor, and Inflation

While the BLS had rejected COLI in 1961 on grounds of theoretical and technical feasibility, it became the guiding conceptual framework for the agency in the 1970s. This shift was aided in the latter phase by the development of "superlative" indexes by W. Erwin Diewert, who extended the earlier work of Konüs and Fisher. Diewert argued in 1976 that "a class of indexes could be constructed using only information on actual quantities and prices in the two periods that would closely approximate a Konus [sic] cost-of-living index for some standard of living intermediate between those in the base and comparison periods and would do so for any pattern of (stable) consumer tastes."[198] In short, this class of indexes permits an approximation of Konüs' original formulation of the cost of living with the survey data and prices at hand, given strong empirical assumptions—in particular, that the observed data corresponded to the maximizing choices of a hypothetical representative agent, whose utility is held constant in the index. This agent was also assumed to have "homothetic" preferences which (against all the empirical evidence) rules out a changing pattern of consumption with higher income. (This latter assumption was required to keep the consumer at the same level of utility without specifying what that level of utility was.) In general, the assumptions required for constructing this type of index were far stronger than widely appreciated.

The adoption of this approach by the Bureau and leading price index theorists was thus by no means a foregone conclusion. Wesley Mitchell, for example, had been critical of the Fisher approach that formed one of the inspirations of the theory of superlative indexes, stating that "the CPI should be a measure of price change only and that, by including both changing prices and changing quantities, the Fisher Ideal index muddled any interpretation of changes in the index."[199] Meeker agreed, objecting to the work of Fisher in the *Quarterly Proceedings of the American Statistical Association* in 1921:

> We have here an inextricable mixture of changes in prices and changes in quantities of goods. What does this "ideal index" which has been achieved by so much mathematical labor, represent? Is it an index of price changes? Or is it an index of quantity changes? The answer seems clear that it is both and neither….The all-important fact is that this index does not mean anything that can be clearly grasped.[200]

The resuscitation of Fisher's work in new and different form in the 1970s would have come as a surprise to these previous architects of the BLS's price indexes.

Nevertheless, these new superlative indexes, supported by new econometric techniques, made questions of substitution, quality change, and the introduction

198. SCHULTZE & MACKIE, *supra* note 9, at 23.

199. Rippy, *supra* note 25, at 26.

200. Royal Meeker, *On the Best Form of Index Number*, 17 Q. PUB. AM. STAT. ASS'N 909, 912 (1921), *quoted in* STAPLEFORD, *supra* note 14, at 113.

of new goods seem far more tractable than ever before, while the fact that they were based on strong assumptions went largely unnoticed. Notably, even when these sophisticated techniques were adopted, much discretion was still left to individual data collectors and agents of the BLS, who were required to make judgments about the composition and relative weights of items in the basket of goods. Rather than eliminate seemingly "arbitrary" decision-making, these techniques hid it from view.[201]

The establishment of a Division of Price and Index Number Research within the Bureau in 1964 had hastened this conceptual shift toward the COLI. The welfare programs of the Great Society as well as the regulatory needs of an expanding administrative state required "objective," non-partisan means of escalating government expenditures; in this context, the BLS paid greater attention to what were called "comprehensive" methods developed by academic economists. The CPI-W had proved useful in labor-employer bargaining, but such Fordist arrangements were already on the decline by the 1970s. The worker-focused index came to be perceived as inadequate for other tasks, such as indexing government expenditure programs, which had many more and diverse beneficiaries.[202]

The conceptual development of the CPI during these years would also be influenced by Shiskin's awareness that it would be used as a general measure of inflation, in addition to being used as wage mediator and an escalator for government expenditures. These concerns motivated the adoption of what is called a "plutocratic" aggregation approach over a "democratic" one[203] for the CPI, since that approach would "be best for 'deflating GNP and component income distribution' for the national accounts."[204] Specifically, as the measurement of inflation for macroeconomic policy became increasingly important in the following decade, some economists argued that the COLI approach represented the best available option. Triplett explains:

> The COL index is a welfare-oriented measure, it is the price index that holds constant the standard of living between two periods. If the 'not COL' index deviates from the COL index, it must not hold the standard of living constant,

201. Organized labor may have had special reason to object to the adoption of these techniques. A Laspeyres index, such as that used by the BLS, will, by definition, overstate rises in price indexes, so any "superlative" adjustment would reduce the escalation factor labor used to argue for wage increases.

202. See Rippy, *supra* note 25. Despite the perception that the CPI-W would be seen as inadequate for government expenditure programs, it was eventually used, and still used today, for indexing cost-of-living adjustments to social security payments. Even with the now more "comprehensive" methods applied to the construction of the CPI-W, it has remained a target of criticism and political contestation. *See* discussion *infra* Section IV.B.

203. A "plutocratic" index refers to an index that uses the aggregate expenditure of the entire population on specific items in determining index weights. Unlike a "democratic" index, a plutocratic index is biased toward the consumption patterns of the wealthy as it does not treat individuals' consumption patterns as being of equal importance. Angus Deaton, *Getting Prices Right: What Should Be Done?*, 12 J. ECON. PERSPS. 37, 42-43 (1998).

204. Rippy, *supra* note 25, at 28.

> so the not COL index must change when some component of the standard of living changes. Why monetary authorities should want to stabilise an inflation measure that incorporates increases or decreases in the standard of living (as does the 'not COL' index) is not clear. Stabilising such an inflation measure might imply a falling standard of living, which would correspond to no central banker's objective.[205]

Organized labor continued to criticize methods of CPI construction that went beyond the composition and weighting of the fixed basket. In 1978, upon the suggestion that the BLS would revise the CPI market basket more frequently using a continuing consumer expenditure survey, the BLS's labor advisors argued that "out of economic necessity in periods of rapid inflation, workers would substitute products—'trade down'—and, therefore, frequent revision would 'understate price increases."[206]

Nevertheless, the 1978 revision to the CPI was, broadly, another watershed in the declining focus on substantive achievements in constructing the Bureau's price indexes and another step toward the use of consumer expenditure surveys as the non-discretionary basis for the composition and weights of the CPI's basket. Rather than use 400 specific items for the basket, the BLS instead created 250 general item categories, into which a much larger variety of goods could be sorted. The expenditure item share of each item within its respective category would be reflected in the degree to which that item was represented in the total market basket.[207] Pricing agents now had the discretion to determine how that category was represented at a particular outlet. In an example furnished by the Bureau, the category of "Whole fresh milk" would be identified by agents at a specific outlet assigning weights based on the quantity sold by that outlet:[208]

> If Vitamin D, Homogenized milk in half-gallon containers makes up 70 percent of the sales of fresh whole milk, and the same milk in quart containers accounts for 10 percent of all whole milk sales, then the half-gallon container will have a 7 times greater chance of being chosen than the quart container.[209]

This approach to pricing items dramatically expanded the number of items that could be integrated into the Bureau's fixed basket and, along with the expanded range to additional urban areas, permitted many CPI users to interpret it as a comprehensive, nationwide index. Yet, while claiming to make the CPI more comprehensive, and therefore more "objective," the Bureau had in fact shifted decisions about how the ultimate basket of goods was composed and weighted from staff economists and policymakers to its local agents, whose discretion was required when assigning available items at any particular outlet to one of these general item categories. Finally, the Stigler Commission's recommendation to

205. Jack E. Triplett, *Should the Cost-of-Living Index Provide the Conceptual Framework for a Consumer Price Index?*, 111 ECON. J. 311, 324 (2001).

206. GOLDBERG & MOYE, *supra* note 20, at 230.

207. Rippy, *supra* note 25.

208. BUREAU OF LAB. STATS., DEP'T OF LABOR, REP. NO. 517, THE CONSUMER PRICE INDEX: CONCEPTS AND CONTENTS OVER THE YEARS (1977).

209. *Id.*

use hedonic regression[210] as a means of treating changes in quality and in the composition of available goods "more scientifically" hung over the 1978 CPI revisions.[211] The Bureau chose not to implement hedonic regression in 1978, thus leaving unresolved how quality changes ought to be handled within the "constant utility" framework.[212] This was, however, a fairly minor dispute given that the more fundamental question—namely, whether the constant utility framework itself should be embraced—had long since been settled.

IV. THE CONSUMER PRICE INDEX TODAY

A. Consumption Theory Triumphant?

1. The Boskin Commission

Throughout the 1980s and 1990s, government expenditure levels became a matter increasing political concern, with annual payment raises in Social Security constituting a large non-discretionary part of the federal budget.[213] As these increases were tied to changes in the CPI, many critics of growing government spending accused the BLS of overestimating increases in the CPI, thereby creating larger budget expenditures than necessary to keep up with the "cost of living." As Federal Reserve Chair Alan Greenspan claimed in testimony before the House and Senate Budget Committees, the "CPI exaggerated annual inflation by 0.5 percentage point to 1.5 percentage points and that, by changing the way the CPI was calculated, Congress could save the federal government $150 billion over 5 years."[214]

In response, the United States Senate appointed a committee in 1995 to study the possibility of bias in the computation of CPI. Called the "Advisory Commission to Study the Consumer Price Index," the committee was chaired by Michael Boskin of Stanford University and issued its report, "Toward A More Accurate Measure Of The Cost Of Living," in 1996.[215] The Boskin Commission made one

210. *See* GOLDBERG & MOYE, *supra* note 104 (regarding the definition of hedonic measures and the use of regression methods for adjustment of prices).

211. Rippy, *supra* note 25, at 30. In particular, the use of hedonic regressions is elaborated in a staff paper included with the main Stigler Commission report. *See* PRICE STATISTICS, *supra* note 107. The primary aim was to take account of improvements in quality and changes in available goods.

212. Rippy, supra note 25, at 25.

213. As explained: "almost a third of federal expenditure [was] directly linked to the CPI or related price measures, and over half of the federal budget [was] affected if indirectly indexed expenditures [were] added." CONG. BUDGET OFF., INDEXING WITH THE CONSUMER PRICE INDEX: PROBLEMS AND ALTERNATIVES xiii (1981). Small movements in the CPI could dramatically affect government outlays; for example, a 1% increase would "automatically trigger nearly $2 billion of additional federal expenditures, at 1981 program levels." *Id*.

214. Rippy, *supra* note 25, at 35.

215. ADVISORY COMM'N TO STUDY THE CONSUMER PRICE INDEX, 104th Cong., TOWARD

major conceptual recommendation: that the BLS should adopt wholly the COLI approach, such that its formulas and measurement techniques were based on COLI as closely as possible. In particular, the Boskin Commission recommended the BLS publish only two indexes: a monthly CPI constructed using a superlative index and an annual CPI similarly using a superlative index formula and a re-weighted basket designed to incorporate the introduction of new goods.[216]

As with earlier proposals of this kind, the Boskin Commission report was controversial. While the BLS responded largely favorably to its recommendations—a first for the Bureau[217]—many others did not.[218] The Commission was accused of providing cover to a government intent on reducing government expenditure payments tied to the CPI. As a result of these controversies, Congress commissioned an additional report from the operational arm of the National Academies, the National Research Council (NRC), which convened a Panel on Conceptual, Measurement, and Other Statistical Issues in Developing Cost-of-Living Indexes. This committee, also known as the Committee on National Statistics of the National Academy of Sciences (CNSTAT), was composed of economists, including some who were not specialists in price index construction, along with representatives of other disciplines, including statistics, psychology, and marketing. The diversity of disciplinary viewpoints was itself a response to the charge that Congress had stacked the Boskin Commission with economists favorable to cutting budget expenditures and committed to the COLI methodology.

2. The CNSTAT response to the Boskin Commission

Put simply, the CNSTAT report makes many of the criticisms offered in this article while hesitating to embrace the necessary conclusions that would follow.[219] While the report articulates clearly and comprehensively many of the problems with COLI as a conceptual approach to the construction of price indexes, the panelists disagreed over whether to endorse it or to instead re-affirm the fixed-baskets approach to index construction (what the report termed a Cost-of-Goods Index, or COGI, approach).

The skepticism about COLI stemmed from a few different lines of criticism. Some committee members doubted any statistical agency's ability to define "a constant standard of living in an economy in which the nature of goods and

A MORE ACCURATE MEASURE OF THE COST OF LIVING (Comm. Print 1996).

216. *Id*. *See also* Rippy, *supra* note 25.

217. The BLS responded to Congress regarding the Commission's recommendations in 1997, claiming that it had been "using the cost-of-living concept for many years as a framework for making decisions about the CPI and that it accepts the COLI as the measurement objective for the index." SCHULTZE & MACKIE, *supra* note 9, at 2.

218. *See* Reinsdorf & Triplett, *supra* note 44, at 38, 40-41 (enumerating critiques of the Commission's recommendations).

219. *See* SCHULTZE & MACKIE, *supra* note 9.

services is constantly changing."[220] As the report notes, COLI did not necessarily prescribe a definitive means of handling changes in quality, and COLI differed from the approach adopted by many statistical offices outside the United States.[221]

The COLI and COGI approaches considered in the report cannot be directly compared, as they operate on the basis of differing fundamental assumptions. The COLI approach, at its core, is built on the economic theory of consumption, which assumes that "households act rationally to achieve the highest possible standard of living given their income and the prices they face."[222] At the margin, households therefore allocate their incomes so that "goods for which they pay more make a larger contribution to their standard of living."[223] As such, one can infer "the relative values to consumers of different goods" from their relative prices. The COGI approach, on the other hand, merely refers to the use of a fixed basket to construct an index—no more, no less. A normative account is still required to assign the weights that the component items should have in the price index.[224] Furthermore, adopting COGI still leaves unanswered "the questions of which people, when did they buy them, and what varieties of goods."[225]

The CNSTAT committee argued that the answers to these questions depended on the underlying purpose of the index, including for whom it was designed, whether it ought to be democratic or plutocratic in its aggregation, and how to measure and interpret changes in product quality. Because these questions necessarily come *before* an index can be constructed technically, any price index reflects one possible settlement of such questions; the mere progress of economic technique, therefore, cannot replace normative evaluation (and, institutionally, agency discretion). As the CNSTAT committee acknowledged, "current BLS practice, within a broad COGI framework, requires continuous judgments, many of which are based on theories of how consumers behave and of the relationship between quality and price."[226]

220. *Id*. at 3.

221. *Id*.

222. *Id*. at 19.

223. *Id*.

224. Schultze and Mackie quickly fill in the "theory" with an idea of consumers, noting that "it takes very little theoretical background to explain to an intelligent but untrained bystander that a consumer price index ought to price the things that consumers buy." SCHULTZE & MACKIE, *supra* note 9, at 57. Despite astutely pointing out the role of theory in price index construction, Schultze and Mackie fail to consider that even the notion of a *consumer* price index is itself a constraining choice. Much like the renaming of the BLS's price indexes as consumer price indexes in the immediate postwar era, the assumption of a consumer-oriented price index perpetuates the conceptual restraint through which only theories of the consumer may enter. *See also* Luke Herrine, *What Is Consumer Protection For?*, 34 LOY. CONSUMER L. REV. 1 (2022) (discussing the rise of consumer sovereignty and an argument for replacing it with a moral economy framework).

225. SCHULTZE & MACKIE, *supra* note 9, at 57.

226. On this last question of quality, one can ask what varieties of goods accord with the informative purpose for which the index is constructed, and if that is to be "decency and

In principle, the advantage of COLI over COGI in the eyes of the committee was that it provided a conceptual framework for the problem of substitution between goods in maintaining a level of overall consumption. But as the committee also acknowledged, under a fixed basket COGI approach, the choice of basket itself may permit the resulting index to be interpreted as tracking the cost-of-living:

> Indexes derived from the cost-of-living approach allow for the fact that, when relative prices change, consumers tend to substitute toward the relatively cheaper items. Basket price indexes simply measure the cost of a fixed bundle of goods and are not designed with substitution in mind, *notwithstanding the fact that a suitable choice of basket sometimes allows them to be interpreted as cost-of-living index numbers*.[227]

The main advantage of the COGI approach, on the committee's view, was the relative simplicity of its construction and interpretation, and thus the way that a fixed basket approach highlights rather than obscures the discretionary choices in price index construction.

The CNSTAT report came in for immediate criticism from many academic economists, which may have influenced the way that the report was subsequently viewed by the BLS. As former BLS researchers, Marshall Reinsdorf and Jack Triplett reacted to the CNSTAT report:

> A fixed basket index as the objective leaves the question of the underlying conceptual motivation largely inchoate. The motivations offered for the COGI—to track 'the prices of the things that people buy' or 'the price level'—provide little analytic insight into questions such as what items belong in the basket, what price concept to use in cases where the definition of the price is ambiguous, what to do about quality change, how to treat voluntary or involuntary substitution, how to treat product introductions and disappearances, and so forth.[228]

Reinsdorf and Triplett proceeded to characterize the objectives of COGI proponents (at least as characterized by the CNSTAT report), as believing that "the CPI should measure the 'price level' rather than the level of compensation needed to hold welfare constant."[229] But this characterization may attribute much stronger views to the report than its authors actually proposed. Rather than claiming that the CPI should measure the price level, CNSTAT proponents of COGI merely advocated for disaggregating the bundle of questions constituting each stage of the construction of a price index. On the COGI approach, the price index could measure the price level of any particular class or basket of goods, depending on the purpose of the price index. It could even coincide with COLI's

health" (as the BLS in interwar period so desired), or even "standard of living," one must supply a conceptual (and thereby normative) framework.

227. SCHULTZE & MACKIE, *supra* note 9, at 39 (emphasis added).

228. Reinsdorf & Triplett, *supra* note 44, at 46.

229. Reinsdorf and Triplett compare the view of COGI proponents with that of Fisher, thereby giving a misleading impression of their motivations: "the COGI advocates apparently viewed the price index in a way that coincides with the views of Fisher—some price level exists, like the level of water in a lake, and the index is a device to find it." *Id*. at 42.

representative agent if desired. In other words, the COGI offers a flexible approach which makes clear the points of entry for normative evaluations in a way the COLI approach does not.[230]

In spite of these theoretical criticisms, the Bureau continued its effort to integrate COLI into its indexes. Even as it did so, the BLS showed some awareness of the challenges involved in constructing a single cost-of-living index that satisfied the needs of many diverse uses and users. Commissioner Abraham herself noted these concerns in an article in the *Monthly Labor Review* in 1998:

> The BLS is intensely aware of the sensitive nature of the data it produces, and of the critical need for these data to be as accurate as possible. Although we believe that we can make important improvements in the CPI, we do not believe it to be possible to produce a perfect cost-of-living measure. It is, in fact, commonplace to observe that there is no single best measure of inflation. It is evident that the expanding number of users of the CPI have objectives and priorities that sometimes can come into conflict. The BLS response to this situation has been to develop a "family of indexes" approach, including experimental measures designed to provide information that furthers assessment of CPI measurement problems, or to focus on certain population subgroups, or to answer different questions from those answered by the CPI. All of these measures are carefully developed but have their own limitations. Those who use the data we produce should recognize these limitations and exercise judgment accordingly concerning whether and how the data ought to be used.[231]

Despite these misgivings, the Bureau moved forward in adopting the Boskin Commission's most substantive recommendations, which took the CPI in the direction of further abstraction and unmooring from specific material reference points and normative concerns.

B. The CPI today

By 2002, the Bureau had completed its work transforming the CPI-U into a notional cost-of-living index using the COLI approach.[232] The result—the "Chained Consumer Price Index for All Urban Consumers (C-CPI-U)—has

230. This approach is especially apparent in the issue of medical pricing. For Reinsdorf and Triplett, what treatments are included in the CPI is an "arbitrary judgment":

> This appears to be an arbitrary judgment about what medical conditions are appropriately included in the treatments priced for the CPI. This kind of arbitrariness could be considered a powerful argument against the COGI approach, because it lacks any theoretical framework for determining what goods are to be included and how they are to be measured.

Id. at 44 n.40. But the CNSTAT report does not indeed say that deciding how to compose the basket of medical treatments ought to be made arbitrarily. Rather, the report argues that answering this question must be motivated by specific questions regarding how the resulting price index will be used, questions that are not clearly or straightforwardly answered by adopting COLI as an underlying conceptual framework. *See* SCHULTZE & MACKIE, *supra* note 9, at 9-10.

231. Katharine G. Abraham et al., *Working to Improve the Consumer Price Index*, 12 J. ECON. PERSPS. 27 (1998).

232. Rippy, *supra* note 25.

become the most widely used measure of price inflation for government purposes, including expenditure adjustments.[233] Despite some deviations from what the Boskin Commission had recommended, the Bureau adopted the most technically significant and consequential recommendation: the use of a superlative index formula in its second-stage, upper-level aggregation.[234] The consequence for workers and most Americans is that the CPI would be consistently revised downward from what it would have been before, leading to lower wage escalations and a lower measure of inflation.[235]

While the C-CPI-U may have marked the final triumph of the original Stigler

233. A chained price index such as the C-CPI-U takes into account consumer substitution using a superlative index formula. *Frequently Asked Questions about the Chained Consumer Price Index for All Urban Consumers (C-CPI-U),* U.S. BUREAU OF LAB. STATS., https://www.bls.gov/cpi/additional-resources/chained-cpi-questions-and-answers.htm (last visited May 8, 2026). There were, however, minor deviations from the ideal approach regarding the publication of the index recommended by the Boskin Commission. Rather than publish the Chained Consumer Price Index as an annual cost-of-living index, the BLS instead published three versions of the Chained CPI: "an initial version contemporaneously with the current-year CPI, a revised interim version the following February, and a final version the second February following publication of the initial index." Rippy, *supra* note 25.

234. The BLS has made a substantive change since the start of the second Trump administration in that it publicly discusses the limitations of the CPI and qualifies its uses. In February 2025, the Bureau, on its FAQ page, posed the question "Where is the C-CPI-U currently being used? Wouldn't the C-CPI-U be a more appropriate index to tie Social Security or other adjustments to?" and responded with the following acknowledgement of the limitation of the use of the Chained CPI-U for accurately gauging the cost of living in practice across a wide spectrum of uses:

> The C-CPI-U, which in final form is said to be a "superlative" index, is designed to be a closer approximation to a cost-of-living index than other CPI measures. That said, BLS publishes thousands of indexes each month; these indexes can vary by which items, geographic areas, and populations are covered. As different users have different needs, BLS cannot say which index is necessarily better than another. As such, BLS takes no position on what the Congress or the Administration should use to make adjustments to Social Security or any other federal program.

Frequently Asked Questions about the Chained Consumer Price Index for All Urban Consumers (C-CPI-U), U.S. BUREAU OF LAB. STATS., https://www.bls.gov/cpi/additional-resources/chained-cpi-questions-and-answers.htm (visited Feb 7, 2025). As of March 2025, a month later, the text of the BLS FAQ page changed the question to "Where is the C-CPI-U currently being used?" and now offers the following response:

> Since 2017, the C-CPI-U has been used to adjust Federal tax brackets for inflation. The Census Current Population Survey Annual Social and Economic Supplement (CPS ASEC) uses the C-CPI-U to adjust historical income estimates for inflation. Additionally, a number of states use the C-CPI-U to adjust tax brackets and budgeting.

Frequently Asked Questions about the Chained Consumer Price Index for All Urban Consumers (C-CPI-U), U.S. BUREAU OF LAB. STATS., https://www.bls.gov/cpi/additional-resources/chained-cpi-questions-and-answers.htm (visited Mar 17, 2025). This question and its response no longer contain language noting the need to match uses and users with specific indexes fit for purpose. The new version also distances the BLS from any normative suggestions as to what Congress should do. The remainder of the March 2025 updated FAQ does not address the appropriate uses of the CPI.

235. *See supra* note 196; Charles Steindel, *Are There Good Alternatives to the CPI?*, 3 FED. RES. BANK N.Y. CURRENT ISSUES IN ECON. & FIN. 6,, Apr. 1997, at 2 (discussing the differences between Laspeyres, Paasche, and Superlative indexes).

Commission approach, it is worth observing that the Bureau does not report the use of the C-CPI-U in any federal legislation as an adjustment mechanism (though it was used to adjust tax brackets for "inflation" in the Tax Cut and Jobs Act of 2017).[236] Indeed, several economists have acknowledged that the adoption of a constant-utility index approach would render these indexes less, not more, usable in their real-world application as tools of escalation. A constant-utility approach based on market data of expenditures and prices cannot account for the utility of unpriced factors, such as pollution, nor the effects of taxes and government services.[237]

Nevertheless, the CPI-U, C-CPI-U, and other indexes produced by the Bureau continue to be used by the President, Congress, and the Federal Reserve to formulate and monitor the effect of monetary policy, to escalate wages in collective bargaining agreements and for pensions, and to adjust other price, income, and sales measures across the public and private sectors. The indexes produced by the BLS also continue to be a source of political contention. President Barack Obama suggested the use of the chained CPI-U in his 2014 budget with the aim of reducing the budget deficit, but this suggestion was rebuffed by Congress in the 2014 budget and dropped entirely from the proposed budget for 2015.[238] In the 2020 presidential contest, candidates including Joe Biden, Bernie Sanders, and Elizabeth Warren campaigned on changing the index to which Social Security Cost of Living Adjustments (COLA) are made, from the CPI-U to the CPI-E, an index that "uses alternate weights for households headed by someone 62 or older."[239] Table 1 provides examples of major US government programs in which the CPI plays a role. While these contemporary political discussions revolve around how these indexes are *used*, a richer, more substantive normative discussion concerning how price indexes ought to be *constructed* has been largely lost. We suggest by way of conclusion how administrative law could be changed to offer greater space for debate over these measures as a necessary part of democratic politics more generally.

236. *See Frequently Asked Questions*, *supra* note 232. *But see* Pub. L. No. 115-97, 131 Stat. 2054 (2017). Social Security COLA remains tied to CPI-W.

237. STAPLEFORD, *supra* note 14, at 319, 334.

238. Congress rejected these proposals. *Obama Dumping Chained CPI, Which Feds, Employee Groups Strongly Opposed*, FED. NEWS NETWORK (Feb. 20, 2014), https://federalnewsnetwork.com/budget/2014/02/obama-dumping-chained-cpi-which-feds-employee-groups-strongly-opposed/; *Obama Drops Chained CPI Proposal, Will Seek New 'Jobs' Plan in 2015 Budget*, BLOOMBERG L.P. (Feb. 20, 2014), https://news.bloomberglaw.com/employee-benefits/obama-drops-chained-cpi-proposal-will-seek-new-jobs-plan-in-2015-budget.

239. Elizabeth Bauer, *Why Does Joe Biden Want To Change The CPI Used By Social Security? An Explainer*, FORBES (June 23, 2020), https://www.forbes.com/sites/ebauer/2020/06/23/why-does-joe-biden-want-to-change-the-cpi-used-by-social-security-an-explainer/.

Table 1

Use of CPI measure	**CPI measure**	**Reference**
Adjustment of the Fed fund rate in response to inflation	CPI-U; Median CPI; 16-percent trimmed mean CPI	Board of Governors of the Federal Reserve System [https://www.federalreserve.gov/faqs/economy_14419.htm]; Cleveland Fed [https://www.clevelandfed.org/indicators-and-data/median-cpi]
Cost of living adjustments (COLA) to Social Security and Supplemental Security Income (SSI)	CPI-W	Social Security Administration [https://www.ssa.gov/cola/]
Deflator for retail sales, wages, GDP, and other economic measures compiled by the Bureau of Economic Analysis	BEA methodologies handbook merely cites CPI	BEA [https://apps.bea.gov/scb/pdf/2008/11%20November/1108_nipa-method.pdf]; BLS [https://www.bls.gov/cpi/questions-and-answers.htm]
Adjust income eligibility level for government assistance (e.g. SNAP)	CPI-U (for SNAP)	CBPP primer on SNAP [https://www.cbpp.org/research/food-assistance/the-supplemental-nutrition-assistance-program-snap]
Adjustments to progressive income tax brackets due to "inflation"	C-CPI-U	Tax Cuts and Jobs Act 2017 [https://www.govinfo.gov/content/pkg/PLAW-115publ97/pdf/PLAW-115publ97.pdf]
Private escalation for wages in a collective bargaining agreement, rental contracts, insurance	CPI-U or CPI-W (as recommended by BLS)	BLS [https://www.bls.gov/cpi/factsheets/escalation.htm]

policies with automatic inflation protection, alimony and child support payments, etc.		

CONCLUSION

As we noted in the Introduction, the last several months have been a fraught time for official statistical agencies in the US government.[240] Through hiring and firing decisions, conspicuous public commentary, and other means, the Trump administration has attempted to influence the construction of economic indicators at the Bureau of Labor Statistics, including job creation numbers and the Consumer Price Index. This pressure reflects a broader effort to dismantle protections for appointed officers to independent agencies in order to further the president's policy agenda.[241]

In response, supporters of the BLS have insisted on its independence and its "scientific objectivity."[242] We agree that the work of statistical agencies such as the BLS should not be dependent on the whim of the White House, especially if the Executive faces few checks from other branches of government. More generally, the administrative state—in addition to being necessary to achieve the objectives of government in a modern society[243]—may also be needed to "constrain executive power and to mitigate the dangers of presidential unilateralism while also enabling effective governance."[244]

At the same time, as we have shown, price indexes, like all economic measures, are inherently normative and therefore invite political and ideological contestation. How is that political and ideological contestation to be managed in a democratic society? And what role is appropriate for administrative discretion and expert policymaking in light of the complexity of price index construction?

In this Article, we have mostly examined and criticized the current strategy for managing this contestation: the effort to construct neutral or objective

240. *See supra* notes 1-5 and accompanying text.

241. *See supra* note 2.

242. *See supra* notes 4-5 and accompanying text.

243. Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 7 (2017) (arguing that "[t]hose delegations are necessary given the economic, social, scientific, and technological realities of our day"). *See generally* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION 285 (2012) (on the administrative state as answer to the question "What structures and processes for administrative action satisfy our demands for effective government and the legitimate exercise of governmental authority?").

244. *See* Metzger, *supra* note 240.

measures that would seem to eliminate it altogether. In the case of perhaps the most important economic measure—the Consumer Price Index—we have shown how this ambition fails to take seriously the inherently normative dimensions of price index construction. The gradual move to the use of seemingly neutral or objective measures (in the COLI approach) means that contentious issues, such as wage freezes and entitlement levels, are now decided through what we call the "hidden politics" of affordability.

But what would it mean to take seriously the inherent normativity of price index construction in a democratic society? As much as statisticians and economists may wish to wash their hands of this problem, so do politicians.[245] Simply producing a wide menu of varied economic measures does not necessarily solve the problem, especially since politicians may simply hand the task of choosing one back to expert statistical agencies.[246]

In an ideal mode of democratic decision-making, a transparent, accountable, and revisable selection among possible measures must be made, tailored to distinct purposes. Doing so might require, however, a reassessment of both administrative law doctrine and the doctrine of the separation of powers. To devise an alternative institutional regime that understands economic statistics as policy instruments reflecting contestable normative evaluations requires reimagining how democratic decision-making can become part of routine governmental administration.[247]

The history of the Consumer Price Index suggests that our current understanding of separation of powers and administrative structure are not fit for this purpose. The delegation of legislative authority can function as a means of disclaiming responsibility for the political consequences of contestable measures. Yet administrative agencies, under the prompt of judicial oversight, also disclaim responsibility by obscuring the normative content of price index construction through the use of seemingly objective economic measures.

A better approach is unlikely to lie in yet more detailed judicial review of economic measures. The dangers of judicial aggrandizement and intervention have become more obvious in the past few years as the Supreme Court has expanded the scope of its "major questions doctrine"[248] and discarded *Chevron* deference to administrative agency decisions.[249] These developments represent a general shift away from a "rational-legal administrative state which has capacity to efficiently, swiftly, and effectively deliver programs and regulate private

245. STAPLEFORD, *supra* note 14, at 378 ("As Senator Alan K. Simpson (R-Wyoming) put it glumly at the end of 1995 hearings on the CPI before the Senate Finance Committee, 'Where we have to go politically, no one wants to go politically.'").

246. STAPLEFORD, *supra* note 14, at 378.

247. *See id*. at 390.

248. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000); West Virginia v. EPA, 597 U.S. 697, 723 (2022).

249. Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

behavior."[250] And if political forces do manage to tie up Congress, the President, or the judiciary, then it falls back once more to depleted, under-resourced administrative agencies to take on the task.[251]

A keen observer of this problem, Thomas Stapleford, has recommended a non-partisan approach to the construction of economic measures.[252] Yet under present conditions of extreme political polarization, a non-partisan approach seems increasingly unviable.[253] Any non-partisan commission or bipartisan composition may be difficult to achieve, as the recent firing of the BLS commissioner suggests.

A better strategy, we suggest, would be to integrate the work of statistical agencies into a set of political institutions with transparency and open debate about the purposes of these measures and their consequences. Recent work on the democratization of the administrative state and administrative law offer some suggestions for possible paths forward.[254] It is worth noting, nevertheless, that increased responsiveness and broader participation in the administrative state[255]

250. Ganesh Sitaraman, *The Secular Decline of the American State*, 100 N.Y.U. L. REV. 2197, 2228-29 (2025).

251. On the ways in which the administrative state swallows the responsibility of governance in the face of government gridlock or lack of willingness elsewhere, see Cynthia Farina & Gillian Metzger, *Introduction: The Place of Agencies in Polarized Government*, 115 COLUM. L. REV. 1683 (2015); Jody Freeman & David Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014); Abbe Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62 (2015); Gillian Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739 (2015); Thomas McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L. J. 1671 (2012).

252. *See* STAPLEFORD, *supra* note 14, at 387.

253. *See, e.g.*, Matt Grossmann & David A. Hopkins, *Ideological Republicans and Group Interest Democrats: The Asymmetry of American Party Politics*, 13 PERSPECT. POLIT. 119 (2015); DANIEL SCHLOZMAN & SAM ROSENFELD, THE HOLLOW PARTIES: THE DISCONNECTION OF AMERICAN REPRESENTATION AND THE PROSPECTS FOR RENEWAL (2024).

254. While prescribing specific procedures for a reformed administrative regime concerning the construction of economic measures such as price indexes is beyond the scope of this article, one may draw on an emerging literature on democratic administrative law as a starting point for institutional redesign. Many of these scholars have argued for democratizing the administrative state by increasing forms of contestation in administrative policymaking and expanding avenues for citizen participation, among other things. *See, e.g.*, Sitaraman, *supra* note 247. *See also* Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L. J. 1 (2022); Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793 (2021); Reeve T. Bull, *Making the Administrative State "Safe for Democracy": A Theoretical and Practical Analysis of Citizen Participation in Agency Decisionmaking*, 65 ADMIN. L. REV. 611 (2013); Joshua D. Blank & Leigh Osofsky, *Democratizing Administrative Law*, 73 DUKE L.J. 1615 (2024); Christopher S. Havasy, *Radical Administrative Law*, 77 VAND. L. REV. 647 (2024); JAMES S. FISHKIN, WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION (2009).

255. Examples of some experiments in democratizing the administrative state include, "experimenting with various kinds of public-listening sessions, citizen panels, and structured polling that operate on the model of courtroom juries." Cary Coglianese & Daniel E. Walters,

is not necessarily a panacea, as greater proceduralism may benefit "well-resourced repeat players" over others.[256] Nevertheless, reforming the administrative state to permit greater public political input might allow for a more grounded discourse around the construction of price indexes. A well-funded BLS could develop several indexes attuned to specific sectoral uses and expenditure programs—as in a "dashboard" approach discussed elsewhere with respect to economic measures—with the normative purpose of each index determined by a political appointee, or a board of political appointees, such as the Federal Reserve. For each index, a council of labor, business, civil society groups, and government officials might offer recommendations and input to statisticians constructing price indexes, making them more susceptible to public understanding and review. Most importantly, as recommended by democratic theorists of administrative law, the BLS could actively seek input from those groups possessing the least resources for expressing how a particular index construction method would impact them. The professional rigor and independence needed by administrative agencies devising these measures need not render either them "depoliticized" in any normatively relevant sense: even while necessarily avoiding partisan affiliation, the production of range of indexes would signal that there is no evading the normative dimension to measurement for economic policymaking.

But what does it mean to be transparent about normative contestation in the construction of administrative expertise more generally—or indeed to understand the administrative state as a "place for politics?"[257] How can expertise be mobilized on behalf of democratic decision-making rather than operating as a substitute for it? At a moment when the White House is openly undermining agency expertise, we can no longer afford a hidden politics of affordability. We need to be up front about the inherently normative—and therefore the inescapably contestable—nature of such measures (and the judgments behind them), lest in ceding their construction to seemingly neutral experts, we invite their ultimate usurpation by nakedly partisan actors. A democratically accountable administration can and must do better.

Whither the Regulatory State?, *in* THE OXFORD HANDBOOK OF THE QUALITY OF GOVERNMENT 367, 376-77 (Andreas Bågenholm et al. eds., 2022). *See also* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR NO. A-4, REGULATORY ANALYSIS (2023).

256. THE AMERICAN POLITICAL ECONOMY: POLITICS, MARKETS, AND POWER 29 (Jacob S. Hacker et al. eds., 1 ed. 2021).

257. Coglianese & Walters, *supra* note 252, at 368 ("Scholars of public administration and administrative law have long advocated a 'place for politics' in regulatory decision-making, recognizing that an unwavering commitment to expert administration runs in tension with principles of democratic, accountable government."). *See also* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L. J. 2 (2009); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985); Walters, *supra* note 251. Blank and Osofsky, *supra* note 251.