A Few Thoughts on the Use of the Consumers Price Index to Adjust Constitutional Salary Limits

Dick Roberts
Special Comment

By Dick Roberts*

A FEW THOUGHTS ON THE USE OF THE CONSUMERS PRICE INDEX TO ADJUST CONSTITUTIONAL SALARY LIMITS.

The last temptation is the greatest treason: To do the right deed for the wrong reason.

T. S. Eliot, Murder in the Cathedral

On June 22, 1962, the Kentucky Court of Appeals in Matthews v. Allen1 relaxed the constitutional limits on the salaries of public officials. The controversy centers around the use of the Consumers Price Index2 to adjust the dollar figures in section 2463 of the Kentucky Constitution prescribing limits on salaries of of public officials. Attorney General Breckenridge agreed that the specific holding of Allen should be sustained on narrow grounds, but denied that the Consumers Price Index should be used to adjust the figures in section 246.4 The Court of Appeals observed that the Consumers Price Index at the time of the decision was 1.289 times its 1949 level. Therefore, it takes a dollar bill, a quarter and four pennies to buy in 1962 what a dollar bill alone would have bought in 1949. Because the present form of section 246 became effective in 1949, the court adjusted the salary limit applicable to circuit judges to $10,827.60,5 i.e., $8,400 x 1.289.

This holding invites comment in four areas: first, the court's reasoning; second, the political and economic history of section 246 and possible motives for the Allen decision; third, the validity and prac-

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1 The opinion was originally released, though not for publication, on June 22, 1962. A petition for rehearing by Attorney General John Breckenridge, on grounds that the opinion went too far and took up matters not in issue, was denied and the final opinion, as modified, released on October 5, 1962. 360 S.W.2d 135 (1962). For the newspaper account of the Attorney General's petition, see Louisville Courier Journal, July 26, 1962, p. 1, col. 1.

2 Note 34 infra.

3 No public officer shall receive as compensation per annum for official services any amount in excess of the following sums: officers whose jurisdiction or duties are coextensive with the Commonwealth and judges and commissioners of the Court of Appeals, Twelve Thousand Dollars ($12,000); Circuit Judges, Eight Thousand Four Hundred Dollars ($8,400); and all other public officers, Seven Thousand Two Hundred Dollars ($7,200). Ky. Const., §246 (1949).

4 Note 1, supra.

ticability of employing the Consumers Price Index, and fourth, the significance and applicability of the *Allen* decision to all salary limitations and to other areas of public concern.

*Matthews v. Allen* tests the constitutionality of House Bill 65. House Bill 65 gives circuit judges new duties “coextensive with the Commonwealth,” and provides additional compensation which raises their salaries above the $8,400 dollar limit of section 246. Authority supports the decision of the Franklin Circuit Court and of the Court of Appeals that the salary increase is constitutional. The new statewide duties of circuit judges makes inapplicable section 235, which prohibits a salary increase during a term of office. The new duties also make applicable the $12,000 dollar limit of section 246 rather than the $8,400 dollar limit because the duties “are coextensive with the Commonwealth.” Judge Bird wrote a concurring opinion that upholds the constitutionality of House Bill 65 on the narrow ground that “each regular circuit judge is to hold two separate and distinct offices.” This reasoning is substantially similar as that used by Judge Prewitt in the Franklin Circuit Court and that sought by Attorney General Breckenridge.

Discarding these grounds, Judge Milliken’s opinion states:

> Candor compels the questions: Is this sort of approach necessary in order to afford circuit judges an adequate salary under the Constitution? Is the salary limitation provision (of Section 246) of our State Constitution a mere lifeless mathematical formula? At this point in his decision, Judge Milliken abandoned discussion of the new, statewide duties of circuit judges, a point that would have disposed of the case. He turned his attention to section 133 of the Kentucky Constitution, which authorizes the General Assembly to pay circuit judges an “adequate salary.” Judge Milliken reasons that the authorization of “adequate compensation,” found in section 133, conflicts with the $8,400 dollar limit on the salary of circuit judges found in section 246 (that $8,400 dollars per year is not adequate...

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6 H.B. 65, Ky. 1962.
7 The salaries of public officers shall not be changed during the terms for which they were elected; but it shall be the duty of the General Assembly to regulate, by a general law, in what cases and what deductions shall be made for neglect of official duties. Ky Const., §235.
8 Barker v. Barnes, 246 S.W.2d 901 (Ky. 1952); Coleman v. Hurst, 226 Ky. 501, 118 S.W.2d 133 (1928); James v. Cammack, 139 Ky. 233, 129 S.W. 582 (1910). These cases are cited in Matthews v. Allen, 360 S.W.2d at 136.
9 Ibid.
10 Matthews v. Allen, 360 S.W.2d at 137.
11 The judges of the Circuit Court shall, at stated times, receive for their services an adequate compensation to be fixed by law, which shall be equal and uniform throughout the State. Ky. Const., §133.
12 Ky. Const., §246.
The opinion constituted that it would be better to attempt to harmonize the two sections than to hold that one overruled the other, and stated that "the sections can be truthfully harmonized only through equating dollars with what they will do in the market place." By failing to hold constitutional House Bill 65 on the grounds of the judges new duties, the decision in Allen violates the long accepted principle that a court will not unnecessarily decide a constitutional issue.

The first fallacy in Judge Milliken's reasoning is that the court cites no proof of the inadequacy of present salaries. Prices have risen, but the court showed that no fewer candidates seek judgeships. No proof was offered to demonstrate that qualifications of those who do run for judge are lower than they should be. As Judge Milliken commented, salaries of public officials have never been based on quantum meruit. Pursuit of wealth alone does not motivate public service. Prestige, power and rectitude are also important values, and it might be argued that a multi-value motivation provides better judges than pursuit of wealth alone. The court's further observation that taxes today take a large bite out of judges salaries ignores the fact that these taxes apply to everyone.

Even if sections 133 and 246 conflict, by accepted principles of constitutional interpretation the specific dollar amounts of section 246 should control the general language of section 183. However,

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13 The famous dictum of Mr. Justice Holmes in Lochner v. New York, 198 U.S. 45 (1905), is appropriately recalled: General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise.


14 Matthews v. Allen, 360 S.W.2d at 137.


16 Empirical determination of whether current salary limits affect the quality of the judiciary is feasible. How many candidates choose to run for the office of county circuit or Court of Appeals judge can be counted. Educational and legal experience of candidates can be ascertained. These records can be compared with records of previous years, and with similar data from other states. The task is not Herculean. The court may expect aid from the advocates, its clerks, and perhaps could suggest that the Legislative Research Commission study the problem.

17 Matthews v. Allen, 360 S.W.2d at 137.

18 Whittenberg v. Louisville, 238 Ky. 117, 36 S.W.2d 853 (1931); Bittizer & Wiley v. State Highway Commr., 203 Ky. 15, 261 S.W. 855 (1924); Cnck v. Rush, 190 Ky. 820, 229 S.W. 63 (1921).
stare decisis provides no more than broad propositions in a case as unique as Allen. Recitation of the facts in cases enunciating the rule that specific provisions control general provisions is less helpful than an understanding of that rule. The rule rests on the idea that nothing demonstrates the meaning of a general principle so well as a specific application. Section 246 exemplifies the range of salaries that section 133 contemplates to be adequate. Cases in which general provisions prevail over specific provisions involve facts in which application of a specific provision would defeat a well-established general principle. In these cases, there is usually a high degree of agreement that those responsible for the conflicting propositions intended for the general proposition to prevail.

History of section 246 does not support the proposition that it was intended to be subordinated to section 133. Those who voted for section 246 were fully exposed to the effects of price level changes. When the Constitutional Convention of 1891 met, the struggle between “hard money” and “soft money” forces was the nation’s biggest political question. The Bland-Allison Act, passed in 1878, was repealed in 1890, and in 1896, William Jennings Bryan tiraded that labor was being crucified on a “cross of gold.” After every major war, the United States has experienced inflation. By 1949, when the voters of Kentucky amended section 246, the Consumers Price Index had risen seventy-six per cent from its September 1939 level. Moreover, techniques of tying prices and wages to price level indexes had been developed by industry and labor, and were available to the draftsmen of the 1949 amendment.

Most of those who went to the polls on November 8, 1949, prob-

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19 Jefferson County v. Jefferson County Fiscal Court, 117 S.W.2d 918, 920 (Ky. 1938).

20 Runyon v. Smith, 308 Ky. 73, 212 S.W.2d 521 (1945); City of Lexington v. Thompson, 250 Ky. 96, 61 S.W.2d 1092 (1934).

21 Between 1878 and 1890, when the law was repealed, the treasury purchased $308 million of silver against which it created $378 million of currency, netting about $70 million seignorage on its operation. Klise, Money and Banking 76 (1955).


23 Ibid.

24 Cost of living data was used by the U. S. Anthracite Coal Strike Commission as early as 1902. By the 1940’s, unions requested clauses in collective bargaining agreements that determined wages by referring to the Consumers Price Index. Wilson, Collective Bargaining Principles and Practices (1952). See generally id. 262-71.
ably had no *intent* one way or the other on the purchasing power. The 1949 amendment to section 246 cannot be interpreted as a price level adjustment of the 1891 limitation of 5,000 dollars. Purchasing power of 5,000 1891 dollars is approximately that of 19,950 1949 dollars. In other words, if the knowledge of price level adjustment can be imputed to the 1949 voters, they actually *reduced* the salary limitations! \(^{24b}\) Short of better proof that the voters “intended” for salaries to be adjusted by the use of price levels, the Court of Appeals should not subordinate the plain meaning of the word “dollars” in section 246 to the fancied intent of voters who were never asked. The only authority cited by the court to support its invocation of price level indexes is *J. C. Penny Co. v. Livingston* \(^{25}\) and the *Gold Clause* cases. \(^{26}\) The *Penny* case refused to set aside a jury verdict as excessive, and stands for nothing more than judicial recognition that prices change. The *Gold Clause* cases enunciate a principle of learning to live with price level changes, and are further evidence that those who passed the 1949 amendment did not naively assume that prices remain constant.

Reluctance of Kentucky voters to raise salary limits might account for the *Allen* decision. Four times prior to 1949, attempts to amend the 1891 limit of 5,000 dollars failed emphatically \(^{27}\) Not until Friday after the Tuesday election could it be ascertained that the 1949 amendment to section 246 carried. It passed by only 6,569 votes, and it failed by 25,366 votes to carry the First, Second, Fourth and Fifth Districts. \(^{28}\) Extra light might be cast on the *Allen* decision by considering that the court abandoned the reasoning that the circuit judges new duties are “coextensive with the Commonwealth.” \(^{29}\) This narrow reasoning could not effect the 12,000 dollar limit of the salaries of the judges of the Court of Appeals and other officials with state-

\(^{24a}\) Although the Bureau of Labor Statistics Consumers Price Index is not available for the full period of 1891-1949, a good approximation of price level changes during these years can be made. Fisher & Cohrszen, Stable Money 5 (1944); see Chandler, *op. cit.* supra note 22.

\(^{24b}\) Appellee’s brief quotes Mr. Pettit as stating to the 1891 Constitutional Convention:

> [Kentucky] is not niggardly, not penurious, nor will she ever be. Her laborers are “worthy of their hire,” and she always rewards them.

Considering that a 5,000 dollar salary limit in 1891 is equivalent to about 25,700 dollars in 1961, and about 15,950 dollars in 1949, Mr. Pettit’s statement proves only that sometime between 1891 and 1949 Kentucky’s willingness to pay large salaries to her public officials decreased; or, more likely, that it was easier to slip something through in a package deal like the 1891 Constitution than to have the voters focus on it as they did the 1949 amendment.

\(^{25}\) 271 S.W.2d 106 (Ky. 1954).

\(^{26}\) 324 U.S. 240 (1935).

\(^{27}\) Louisville Courier Journal, Nov. 9, 1949, p. 1, col. 6.


\(^{29}\) Cases cited note 8 *supra* and accompanying text.
wide jobs, whereas the Allen opinion raises these limits to $15,468.00, i.e., $12,000 x 1.289.

Even if the spectre of continued inflation makes the dollar limits of section 246 inimical to section 133, use of the Consumers Price Index for other than evidence of inflation is regrettable. Judge Milliken's opinion abounds with phrases that constitutional provisions are "living and not dead," "concerned with substance and not form," and "more generic and more organic than ordinary law;" but it fails to emphasize that a court's interpretation must be capable of feasible application. The Consumers Price Index changes monthly. It goes down as well as up. Do salary limits change from month to month? Do salary limits decline when the Consumers Price Index declines?

These questions at least invite more litigation. The use of yearly averages would eliminate the objection that monthly changes are too difficult to administer, but the Court of Appeals is in no position to suggest this. Whether monthly, semi-annual, annual or bi-annual adjustments are made is a question of salary policy beyond the Court of Appeal's capacity as a reviewing body. If the price level falls, once the constitutional salary limits are raised, the strong principle that judicial independence requires no salary decreases invites litigation as to whether limits can be lowered with the decline of the Consumers Price Index. The immutability of judges' salaries, more-

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30 It might be noted in passing that Kentucky judges are particularly litigious when their salaries are concerned. Nine and one-half pages are required to list sentence annotations and citations of Kentucky decisions concerning judge's salaries in West's Kentucky Digest, Judges §22 (1962).

The federal judge for the Western District of Kentucky litigated Evans v. Gore, 253 U.S. 245 (1920), which held that the federal income tax did not apply to the salaries of federal judges who took office before passage of the tax law.

31 Observing the behavior of the Consumers Price Index during a recent year illustrates this point.

(1958-59 = 100)

<table>
<thead>
<tr>
<th>Month</th>
<th>Index</th>
</tr>
</thead>
<tbody>
<tr>
<td>April, 1961</td>
<td>103.9</td>
</tr>
<tr>
<td>May</td>
<td>103.9</td>
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<tr>
<td>June</td>
<td>104.0</td>
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<td>July</td>
<td>104.4</td>
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<td>August</td>
<td>104.3</td>
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<td>Sept.</td>
<td>104.6</td>
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<tr>
<td>Oct.</td>
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<tr>
<td>Nov.</td>
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<tr>
<td>Dec.</td>
<td>104.5</td>
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<tr>
<td>Jan., 1962</td>
<td>104.5</td>
</tr>
<tr>
<td>Feb.</td>
<td>104.8</td>
</tr>
<tr>
<td>March</td>
<td>105.0</td>
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In a sense, it is inevitable that the [Supreme] Court, if it be anything, should be a brake on the rest of our machinery of government. By the very nature of the way it works, the Court, for all the power its members hold, is only a negative—never an affirmative force. It cannot create, it cannot initiate, it cannot put into action any governmental policy of any kind; all the justice can do is to say Yes or No to a policy or to a program or a part of a policy or program that has been started by someone else in some other branch of the government.

33 Kentucky courts have often had to interpret various constitutional provi-

(Continued on next page)
over, perhaps motivates lawyers to abandon the uncertainty of private practice to pursue a judgeship; yet it is this very immutability that Allen directly attacks.

The Consumers Price Index cannot accurately measure purchasing power changes. 34 Although one might be surprised at the uniformity with which the prices of different items in different parts of the country move, 35 a general price index measures only average price changes. The index does not reflect changes in the quality of goods. Unless a continuing improvement of living standards is assumed, the concept of purchasing power must refer to consumer utility. The price of a 1949 automobile might be less than that of a 1962 automobile, but the latter is a different car designed to fulfill 1962 desires. 36 Tail-fins,

(Continued on the next page)

(Footnote continued from preceding page)

sions prohibiting a change in the salaries of public officials while in office. One such provision is section 235, note 7 supra. When salaries are increased, the courts have interpreted the provisions liberally. Barrett v. City of Falmouth, 109 Ky. 651, 58 S.W 520 (1900); Stone v. Pryor, 106 Ky. 645, 45 S.W 1053 (1898). When salaries have been decreased, however, the courts construed the provisions stricly. City of Olive Hill v. Crag, 267 Ky. 185 (1928); Adams v. Slavin, 225 Ky. 135, 7 S.W.2d 836 (1928); Grayson County v. Rodgers, 122 S.W 866 (Ky. 1909); Butler County v. James, 116 Ky. 575, 76 S.W 402 (1903); cf. Evans v. Gore, 253 U.S. 245 (1920), discussed in note 30 supra.


35 If the price levels of the various components of the Consumers Price Index are compared for the period of 1949-1961, it is seen that only the price of medical services rose substantially faster than prices of other components.

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\begin{array}{cccccc}
\text{Year} & \text{All Items} & \text{Food} & \text{Housing} & \text{Apparel} & \text{Transportation} & \text{Medical Care} & \text{Other Services} \\
1949 & 95.5 & 95.9 & 95.0 & 97.1 & 90.6 & 94.9 & 91.1 \\
1955 & 114.5 & 110.9 & 120.0 & 103.7 & 126.4 & 128.0 & 120.2 \\
1961 & 122.4 & 126.4 & 128.0 & 126.7 & 125.9 & 137.1 & 128.9 \\
\end{array}
\]

The Consumers Price Index applied to all items varies little across the country.

(1957-59 = 100) All Items and Food.

City 1960 1961
Atlanta 102.7 103.2
Baltimore 103.4 104.4
Boston 103.6 105.1
Chicag0 103.2 103.6
Cincinnati 102.2 102.6
Detroit 101.3 101.9
New York 103.9 104.8
Philadelphia 103.2 104.4
Pittsburg 104.1 105.1
St. Louis 102.4 103.9
Seattle 103.8 104.9
Washington, D. C. 102.2 103.7

All statistics are found in the January issue of U.S. Bureau of Labor Statistics, Monthly Labor Review, following the year for which statistics are given.

36 The economic universe is not made up of hats, autos and spinach. It is made up of felt hats, straw hats, dress hats, sports hats, blue hats, black hats, aeroplane helmets, nightcaps, and on the edge, triangular scarves; and Plymouths, Fords, Chevrolets, roadsters, coupes, and con-
wrap-around windshields and lengths that create parking problems are perhaps impracticalities that supply the consumers' psychic needs for reasons observed by Thorstein Veblen and Vance Packard. Also, the utility of the 1962 car is influenced, inter alia, by the construction of better roads, and changed prices of gasoline and service in 1962.

To prove the obsolescence of the 1949 amendment, the Consumers Price Index is superb evidence. To fix salary limits by it is objectionable on both theoretical and practical grounds. If the Court of Appeals does discover evidence that judges' salaries are inadequate and therefore that sections 133 and 246 conflict, it would be better to rule that section 246 is inoperative and to instruct the General Assembly to pay what salaries it considers "adequate." Electoral pressures on legislators and potential revival of section 246 should prevent plunder of the Commonwealth's treasury.

Application of the Allen rule, if it prevails, will probably be confined to the salary limits in section 246. Section 112 provides that judges of the Court of Appeals are to receive "adequate compensation," and is therefore completely analogous to section 133. The Allen rule need be extended little for the court to hold that implied in the creation of every office is the power of the General Assembly to pay "adequate compensation." If this inference is made, price level changes can be applied to all salary limitations. However, differences in the nature of the cases will probably prevent application of the Allen rule to dollar amounts such as those that distinguish between grand and petit larceny and that prescribe jurisdictional limits.

More significant than anything the Court of Appeals may do would be the consequences of all governmental decision-makers recogniz-

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(Footnote continued from preceding page)

vertibies; and plain spinach, fancy spinach, spinach in cans, and Birds Eye Frozen Spinach. Norns, The Theory of Consumers Demand 77 (1941).

Those interested in pursuing further the problem of accounting for quality differences in price level indexes may start by reading Hofsten, Price Indexes and Quality Changes (1952). The book also contains a good bibliography.

Section 246, as adopted in 1891, seems to have been directed at the abuses of certain public officials in Louisville. Debates of the Constitutional Convention 4197-98, 4374.

Even then, the problem of the section's rigidity and lack of need for it was debated, although existence of this debate indicates that the provision was recognized as being intended to be as rigid as it sounds.

MR. WASHINGTON: It occurs to me that the greater light shed on this subject, the more obviously it becomes our duty to say 'hands off.' This is the rankest kind of legislation. It is a matter which should be left entirely to the people of the state. Will wisdom die when this convention adjourns, if it ever does adjourn? Is there no gray matter, no patriotism in Kentucky except what is to be found in this hall? Debates of the Constitutional Convention 4229.

"They [Judges of the Court of Appeals] shall at stated times receive for for their services an adequate compensation to be fixed by law." Ky. Const., §112.
The impact of a changing price level. This comment does not undertake even to list all areas of public interest affected by inflation. A partial list includes income tax laws, rate-fixing by commissioners, accounting practice, labor law, social security payments, and duties of fiduciaries.

Professor Ralph C. Jones of Yale’s Economics Department studied the effects of changing prices on four firms. He concludes that reported income is often less than income adjusted for price level changes. Insufficient depreciation charges creates a major distortion of income reported in historical dollars. For example, assume a firm charges as depreciation 10,000 dollars yearly in hopes of depreciating evenly over ten years the cost of a 100,000 dollar building. If the price level rises, the firm charges too little against current income. If it falls, the firm charges too much.

U S. Steel has experienced difficulty in modernizing its facilities, and contends that current depreciation policies are inadequate. Its recent attempt to raise prices of steel was based on this inability to pay for new facilities. Although rebuking U. S. Steel’s attempt to raise prices, President Kennedy has proposed tax relief via more liberal depreciation policies. Professor Jones observes that changes in utility rates lag behind price level changes. He documented that the New York Telephone Company had to borrow money when the

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39 The American Accounting Association has undertaken a study of this problem and has published several books in a series entitled: Price Level Changes and Financial Statements. Substantial aid for this program was supplied from grants by the Merrill Foundation for the Advancement of Financial Knowledge.


41 Id. at 22, 23, 69, 70, 113, 114, 152.


43 In 1947, U. S. Steel reported depreciation for the previous year on the basis of replacement costs. Their accountants would not certify the financial statements; the Securities and Exchange Commission rejected the statements, and in 1948 U. S. Steel resumed its previous accounting procedure. An interesting account of this dispute with complete documentation is found in Anthony. Manageral Accounting 222-231 (1960).

44 Leslie B. Worthington, President of U S. Steel, made these statements, among others:

In the three years since the end of 1958, United States Steel has spent $1,185,000,000 for modernization and replacement of facilities and for the development of new sources of raw materials. Depreciation in these years amounted to $610,000,000.

Only by generating the funds necessary to keep these facilities fully competitive can our company continue to provide its customers with a dependable source of steel and to provide its employees with dependable jobs. New York Times, April 11, 1962, p.28, cols. 1, 2 & 4.

45 “The President has proposed to Congress a tax incentive for business modernization. It would give a special tax reduction to companies—and stores, and farms, and theaters—that install new equipment and machinery.” New York Times, April 15, 1962, 56, p. E3, col. 8.
price level was high and retire debt when the price level was low.\footnote{Jones, Case Studies of Four companies 38 (1955).}

Unions place cost-of-living clauses in wage contracts, but to date there is no record of a firm's offering financial statements adjusted for price level changes to prove that it could not meet a union's demands.\footnote{An employer, while bargaining collectively with a union, must support by his financial statements the contention that he cannot afford to meet the union's demands for higher wages. N.L.R.B. v. Truitt Mfg. Co., 351 U.S. 149 (1955).}

Portfolios managed by corporate trustees must contain a substantial portion of common stocks if the purchasing power of the corpus is to be preserved during a period of inflation.\footnote{What securities a trustee may purchase with the funds of the trust he holds varies among the states and is sometimes controlled by statute. 54 Am. Jur. Trusts §§380-81 (1945). Rising prices reduce the purchasing power represented by the face amount of a bond, whereas the dollar value of common stocks generally moves with the price level. Jones, Case Studies of Four Companies 39-48 (1955). Therefore, if authoritative decision-makers observe a changing price level, they may be expected to modify portfolio restrictions.}

It is hoped that the proper decision-makers recognize and act effectively in these and other areas of public interest affected by price level changes. If the Allen decision calls attention to the problems created by rising prices, and these problems are effectively met, leadership of the Court of Appeals will be affirmed.
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