

LAMENT FOR CEMENT: BEING AN ANSWER  
TO A REPLY  
EARL LATHAM†

IN order to understand the central matters of dispute raised by the authors of the *Reply* it is first necessary to strip it of its innuendoes,<sup>1</sup> its personal misrepresentation,<sup>2</sup> its dolorous recall of the past,<sup>3</sup> its insinuations against the integrity of the findings of the Federal Trade Commission,<sup>4</sup> its bathos,<sup>5</sup> and its citations of inferior authority.<sup>6</sup> When this is done, it appears that the principal matters of dispute are first, whether the findings of the Federal Trade Commission are a reliable source of factual information for an understanding of the activities and practises of the Cement Institute and the major part of the cement industry in regulating and controlling competition; and second, the accuracy of specific statements made about these activities and practises. In their peroration, the authors of the *Reply* also make some mention of academic freedom. I shall conclude this *Answer* with some observations about academic freedom, for which certain members of the Cement Institute showed a cynical lack of respect.

Before proceeding to the two principal issues, perhaps a word or two will not be amiss about the authors' statement that the article on *Giantism* "dis-

---

† Joseph B. Eastman Professor of Political Science; Chairman, Department of Political Science, Amherst College.

1. "The presumption of respect for truth and nothing but the truth, supported by care to ascertain it and intellectual integrity in dealing with all the facts, attaches to the publications of those who have the honor of membership upon the faculty of an old and respected institution of higher learning. But Dr. Latham has his own thesis. . . ." *Reply*, p. 1068 *supra*.

2. "It is idle to pursue further Dr. Latham's rugged fancy as applied to a nationwide industry operating amid a state of facts of which he has taken no pains to inform himself." *Reply*, p. 1077 *supra*.

3. "Dr. Latham would have found interesting materials had he studied the forces let loose in the days of the N.R.A. and W.P.A. The Government itself was there not only with the Blue Eagle but with the biggest peacetime spending program ever undertaken by the Government up to that time." *Reply* p. 1074 *supra*. The inference I draw from this is that learned counsel didn't like the N.R.A. and the W.P.A. It is hard to be sure about this inference since the only evidence adduced to identify the "forces let loose" was the revival of trade associations, including the Cement Institute. The authors surely did not mean that the Cement Institute was one of the horrors of the New Deal.

4. "But when the accuser also presides at the trial and drafts the findings and the verdict, the odds against the whole truth and nothing but the truth by this compounding of antithetic functions are truly heavy." *Reply*, p. 1069 *supra*.

5. See the phrase which the authors regarded so well that they used it twice in referring to cement corporations—"the men who labor to make and sell cement," *Reply*, pp. 1068, 1078 *supra*.

6. The authors of the *Reply* cite the losing brief for statements of fact while the Supreme Court of the United States cites the Federal Trade Commission for its statements of fact. As in *Giantism and Basing Points*, I shall herein follow the example of the Supreme Court and cite the findings of the FTC directly.

closes no evidence suggesting that he looked into the record, examined the digest of the evidence, or even read the 36 page opinion of the Court of Appeals for the Seventh Circuit, setting aside the order of the Commission."<sup>7</sup> I will go even further and say that the article discloses no evidence that I have read *Little Women*. In informing myself about the cement industry and its practises, I not only "looked into the record," "examined the digest of evidence," but "even read the 36 page opinion." In fact the court of appeals opinion was cited and discussed in the article as it was originally submitted to the editors of the YALE LAW JOURNAL. Because the same issue of the JOURNAL contained a fuller discussion of the cases, the editors proposed and I consented to delete the overlapping discussion. There was also a vast quantity of other materials searched in the preparation of the article,<sup>8</sup> for the manuscript that was originally submitted to the JOURNAL (although longer than the printed text) was itself a shortened statement of a full and comprehensive treatment and presentation of the subject at the Chicago meeting of the American Political Science Association in December, 1948. The remarkable suggestion of the authors that what they don't see can't exist, might be applied to their *Reply*. Their article discloses no evidence that they have read the opinion of the Supreme Court in the second *Cement* case. There, Mr. Justice Black says some things about the function of the Federal Trade Com-

---

7. *Reply*, p. 1068 *supra*. With their commendable distaste for half-truths, the authors will want it to be understood that the court of appeals opinion, which they cite frequently, was decided by one vote (2-1) and that it was reversed and remanded by the Supreme Court.

8. Among the materials searched were the following (an incomplete list): KEIM, GEOGRAPHICAL DIFFERENTIALS IN PRICES OF BUILDING MATERIALS (TNEC Monograph 33, 1940); HANDLER, A STUDY OF THE CONSTRUCTION AND ENFORCEMENT OF THE ANTI-TRUST LAWS (TNEC Monograph 38, 1941); FTC, THE BASING POINT PROBLEM (TNEC Monograph 42, 1941); SELECT COMMITTEE ON SMALL BUSINESS OF HOUSE OF REPRESENTATIVES, UNITED STATES VERSUS ECONOMIC CONCENTRATION AND MONOPOLY (STAFF REPORT TO MONOPOLY SUBCOMMITTEE) (1946); "The Basing Point Decisions and the New England Economy," New England News Letter (Oct. Supp. 1948); Address of Commissioner Lowell B. Mason before the Twentieth Boston Conference on Distribution, Oct. 26, 1948, Boston Herald, Oct. 27, 1948, p. 8, col. 3; Statement of Corwin D. Edwards on "Basing Point Systems," delivered at a Technical Seminar Sponsored by Dept. of Commerce for State Planning and Developing Agencies, Washington, D.C., Aug. 4, 1948; Statement of Corwin D. Edwards on "How Business is Affected by the Recent Basing Point Decisions," delivered at a meeting of Chicago Ass'n of Commerce and Industry, Oct. 6, 1948; FTC, Notice to the Staff, Commission Policy Towards Geographic Pricing Practises (Oct. 12 and 21, 1948); Federal Reserve Bank of Philadelphia, F.O.B., THE BUSINESS REVIEW 101 (Sept. 1948); *Proceedings of the Annual Convention of the American Economic Association, December, 1947*, 38 AM. ECON. REV. (Supp. 1948) (papers on and discussions of monopoly, basing points, and anti-trust regulation); *Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce on S. Res. 241*, 80th Cong., 2d Sess. (1948), held by Senator Capehart, and reported in the New York Times. A new work, not published at the time of the article on *Giantism*, is MACHLUP, THE BASING POINT SYSTEM (1949), my review of which will appear in an early issue of the AMERICAN POLITICAL SCIENCE REVIEW.

mission which bear upon the first of the two principal matters of dispute raised by the *Reply* of the attorneys for the Cement Institute.

Justice Black said there was a special reason "why courts should not lightly modify the Commission's orders made in efforts to safeguard a competitive economy."<sup>9</sup> The Commission is a body of "men trained to combat monopolistic practises." "In the present proceeding," he said, "the Commission has exhibited the familiarity with the competitive problems before it which Congress originally anticipated the Commission would achieve from its experience."<sup>10</sup> Justice Black also cited the statement of the Senate Committee on Interstate Commerce which (in discussing the Commission's power to aid courts in drafting anti-trust decrees) attributed to the Commission "special expert experience and training in matters regarding which neither the Department of Justice nor the courts can be expected to be proficient."<sup>11</sup> It may be concluded on the highest authority, therefore, that the Commission was intended to be, and is, an expert body, established, trained, and trusted to investigate and find the facts.

The authors of the *Reply* say that the Commission "set out to make good its charge of a combination among cement manufacturers."<sup>12</sup> "Naturally," they conclude, "the findings do not reflect any aspect of the truth inconsistent with the purpose of the Commission."<sup>13</sup> What the authors evidently mean is that the Commission managed to find a combination among cement manufacturers merely because there was one. The Commission wasn't alone in this view. Its facts were accepted, adopted, and approved by one judge below and by the Supreme Court with only Justice Burton dissenting. The authors of the *Reply* dwell upon what the Commission did, as though it found its facts in a closet with the door locked. But the findings were not made in an *ex parte* proceeding. As the Supreme Court said, ". . . members of the cement industry were legally authorized participants. They produced evidence—volumes of it. They were free to point out to the Commission by testimony, by cross examination of witnesses, and by arguments, conditions of the trade practises under attack which they thought kept these practises within the range of legally permissible business activities."<sup>14</sup>

The respondents got a fair hearing. The Federal Trade Commission found the facts after the now proverbial three years of hearings, 49,000 pages of oral testimony, and 50,000 pages of exhibits. The complaint, findings and conclusions were distilled into 176 pages. These findings and conclusions bore up very well in the Seventh Circuit,<sup>15</sup> and of course in the Supreme

---

9. *FTC v. Cement Institute*, 333 U.S. 683, 726 (1948).

10. *Id.* at 727.

11. *Id.* at 726 n. 20.

12. *Reply*, p. 1069 *supra*.

13. *Ibid.*

14. 333 U.S. 683, 701 (1948).

15. For a similar appraisal of the circuit court's action on the Commission's findings, see Zlinkoff & Barnard, *Basing Points and Quantity Discounts: The Supreme Court and a Competitive Economy, 1947 Term*, 48 *COL. L. REV.* 985, 999 n.55 (1948).

Court. One may properly conclude therefore that the factual basis of the Commission's order was as solid as a rock.

The chief respect in which the question of a fair hearing was raised in the Supreme Court was the argument made by one of the respondents that the Commission was "prejudiced and biased against the Portland cement industry generally" and that it had pre-judged the issues. This accusation was rejected by the Supreme Court. It was also rejected by the Seventh Circuit Court of Appeals, although the authors did not choose to refer to this rejection in the *Reply*.

The position of the authors of the *Reply* on the matter of the reliability of the Commission's findings as a foundation of fact for an inquiring student of government goes beyond the assertion that the Commission was wrong in the cement industry proceedings. It seems to suggest that adversary proceedings are bad instrumentalities for establishing facts. "Every trial is, after all, a contest in which all the evidence adduced by the accuser is aimed to prove the essential fact to which the alleged guilt attaches."<sup>16</sup> If the Commission's findings are unreliable for this reason, think how unreliable all of the citations from the respondent's brief must be—for the same reason. For all of the evidence adduced by the accused must be aimed to contradict the essential fact to which the alleged guilt attaches, not to establish the objective facts. The authors' citations from their brief can do no more than to challenge the allegations which contradict them. But the courts proceed upon a different assumption from that of the authors of the *Reply*. Adversary proceedings are regarded as one of the better ways of establishing the facts. The merits of the opposing positions taken by the lawyers for the cement industry and the lawyers for the Government were passed upon by the judges. They accepted the Commission's facts with remarkable unanimity. Something more than citations from the respondent's brief will be needed to prove they were wrong.

We come then to the specific statements which bother the authors of the *Reply*, following the same sequence in which both the original article and the *Reply* proceed.

*The Cement Confederation.* The striking point about the Institute is that it was organized for the *government* of the cement industry, as the articles of association declare, and for the maintenance of the multiple basing-point delivered price system, which was the chief instrument of control of competition.<sup>17</sup> The authors of the *Reply* make an imaginative effort to make it appear as though the Institute was a creature of the Government, which gave it its first impulse, revived it when it languished, and solidified it when the Federal Trade Commission started its proceedings. This suggests a degree of docility towards public authority that must be startling to the Federal Trade Commission. The suggestion that only the Government propped up the Institute overlooks the previous history of the cement industry. As the Federal

---

16. *Reply*, p. 1069 *supra*.

17. In the Matter of The Cement Institute, 37 F.T.C. 87, 157 (1943).

Trade Commission found, "[t]here have been numerous trade organizations and associations in the cement industry over a long period of years."<sup>18</sup> The Cement Institute came into being only after inferior forms of association had been tried and found wanting. The search for forms of control long antedated 1929. Whether the Institute held any meetings or not in the twenty-two months after July, 1930 is unimportant in the light of the evidence that it continued to exist and that its bureaucracy represented the Institute in negotiations with railroad companies and the National Builders Supply Association.<sup>19</sup> It is therefore a misstatement that the only activity was the publication of freight rate books and the collection of money to pay for them. Even if this were the case however, the authors of the *Reply* have made an unhappy admission since the maintenance of the freight rate books was the key to the maintenance of the price control system that the Supreme Court declared was unlawful.<sup>20</sup>

The authors of the *Reply* say<sup>21</sup> that with the National Industrial Recovery Bill, it seemed necessary to the cement industry to have a trade association to function under the Act. (The industry already had one, of course.) It was a "natural thing" to do to "revive" it and employ it. The trustees of the Cement Institute became the Code Authority of the cement industry. As one writer recently has put it, "[t]he Code of Fair Competition now took over where the Code of Ethics had left off, but the enforcement power of the Government was obviously stronger than that of an informal cartel that had to rely on ethics and moral suasion (i.e., intimidation) backed by the financial strength of the leaders."<sup>22</sup> The evidence is that the Institute used the official status with which the Act had endowed it to improve the system of control over the industry.<sup>23</sup> That some members of the industry were reluctant to submit because of the "demands and regulations of the Federal Government" is not remarkable. For working purposes, the Cement Institute *was* the Federal Government in the cement industry.<sup>24</sup>

According to the evidence supplied by the authors themselves, only four companies saw fit to resign from the Institute right after the National Industrial Recovery Act was declared unconstitutional, and a motion to dissolve in May, 1936 was able to muster only 3 votes.<sup>25</sup> Meanwhile, the work of

---

18. *Id.* at 871, 143.

19. See reference to such activity, *id.* at 87, 194, 197.

20. *Id.* at 87, 163.

21. *Reply*, p. 1074 *supra*.

22. MACHLUP, THE BASING POINT SYSTEM 78-9 (1949).

23. See, for example, 37 F.T.C. 87, 168 (1943) (as to land grant rates); *id.* at 197 (as to truckers); *id.* at 219 (as to limitations on increase of productive capacity).

24. This does not mean that it had its way on all things however. For example, the Board of Trustees of the Institute was authorized under the Code to formulate a plan for the sharing of the available business. Although "substantially all members of the industry desired a proration plan," none could be agreed upon, and no plan or method was ever approved by the NRA. 37 F.T.C. 87, 215 (1943).

25. *Reply*, p. 1071 *supra*. It would be interesting to know whether the pecuniary

putting out the freight rate book continued,<sup>26</sup> and this, as the Commission found, was central to the maintenance of the private system of price control.<sup>27</sup> Far from falling apart after the National Industrial Recovery Act was declared invalid, the Institute for seven months after the demise of the NRA attempted to administer some of the provisions of the NRA Code for the Cement Industry through its trade practise committee, composed of the same individuals who had previously constituted the Code Authority.<sup>28</sup> In December, 1935, the Cement Institute issued a "Compendium of Established Terms and Marketing Methods" which codified the established rules and trade practises of the industry. They bore a close resemblance to the rules that had been established under the Code of Ethics and the Code of Fair Competition.<sup>29</sup> The object of the organization was to maintain the multiple basing point system of price making and this system continued in force after the end of the NRA.<sup>30</sup>

*Devices of Control.* Most of the points made by learned counsel under this rubric are quibbles about quiddities.<sup>31</sup>

The statements that there has never been dissemination of cost data in the history of the industry, nor of price data or prices of any sort by any trade association in the history of the industry are contradicted by the *Old Cement Case* and, more recently, by the Federal Trade Commission. In the *Old Cement Case*, the Supreme Court referred to and discussed the reporting service that distributed "information as to production, price of cement sold on specific job contracts and transportation costs. . . ." <sup>32</sup> The dissemination of destination prices among the respondents by the Code Authority could hardly have taken place "under the direction of the President of the United States"

---

penalty for withdrawal (one year's dues) provided by the articles of association was collected from the seceding companies. See 37 F.T.C. 87, 126 (1943).

26. *Reply*, p. 1071 *supra*.

27. See note 20 *supra*.

28. 37 F.T.C. 87, 159 (1943).

29. MACHLUP, *op. cit. supra* note 22, at 79.

30. *Id.* at 79-80. See also the statement of Justice Black sustaining findings "that the Institute was organized to maintain the multiple basing point system as one of the 'customs and usages' of the industry and that it participated in numerous activities intended to eliminate price competition through the collective efforts of the respondents." 333 U.S. 683, 719 (1948).

31. For example, the authors of the *Reply* prefer to date the "patent control period" from 1907 when the Association of Licensed Cement Manufacturers was formed. An equally good date is November, 1906 when the North American Portland Cement Company was created with an exclusive license to the Hurry and Seaman patent, and authority to sub-license. Just as good is the year 1903 when Atlas Portland Cement Company brought suit for infringement, because this suit led to the settlement which set up the North American Company which led to the Association of Licensed Cement Manufacturers. I prefer to date the "patent control period" from the event that led to all these consecutive developments, namely, 1900, the year that Hurry and Seaman secured the patent.

32. *Cement Manufacturers Protective Association v. United States*, 268 U.S. 588, 602 (1925).

as the authors assert, since the Federal Trade Commission made a finding that the Code did not specifically provide for such dissemination.<sup>33</sup> As the Commission further said, the result of this practise, for which there was no specific warrant in the Code, "was to facilitate greatly the efforts of respondents to make identical bids to the Government."<sup>34</sup> The Commission also found that after the NRA, the trade practise committee of the Cement Institute served as the means for circulating "arbitrary prices" to Institute members. This was a phase of the struggle by the Institute and its members against imported cement.<sup>35</sup>

But in fact, a continuous, overt, and systematic exchange of prices and price data was not necessary to run the private price control system that the Supreme Court found unlawful. Of the formulary price control system, the Commission made the specific finding that the formula, "once put into operation, is self-perpetuating in the sense that renewed understandings or agreements are not needed to maintain identical delivered prices over an indefinite period of time."<sup>36</sup> The Commission found that the formulary price system was the product of a long evolution and that price information necessary for new calculations would circulate habitually through common customers and salesmen in the field.<sup>37</sup>

Although the authors of the *Reply* have me "hurling" myself against the record, the findings, and the courts, I beg to say only that I wouldn't dare, not being of counsel for the defense. Nor did the article on *Giantism* do so. As I said there, "[c]onstituent corporations were semi-autonomous in the management of their respective enterprises."<sup>38</sup> This statement is exactly consistent with the Commission finding that managements could make their mills base mills if they weren't, or nonbase mills if they were. The Commission also found that discipline was imposed to keep this semi-autonomy within limits so that the pricing system could be maintained. In its own words, "[s]uccessful maintenance of the system requires, therefore, that the price leaders, usually the larger chain mills, possess the power to force recalcitrants to adhere to the system and that this power be exercised when necessary."<sup>39</sup> These price leaders, members of the Institute, constituted an inner circle functioning within the formal framework of the Institute. They were so described and discussed in the manuscript on *Giantism* as it was first submitted to the editors of the *YALE LAW JOURNAL*. In the interest of brevity the discussion was deleted. The chastisements involved in the use of punitive bases were in the control of these corporate members of the Institute.<sup>40</sup> The Commission also

---

33. 37 F.T.C. 87, 168 (1943).

34. *Ibid.*

35. *Id.* at 236.

36. *Id.* at 150.

37. *Id.* at 178.

38. 58 *YALE L. J.* 383, 385 (1949).

39. 37 F.T.C. 87, 178-9 (1943).

40. For the findings as to punitive bases, see *id.* at 87, 178 *et seq.*

found that the formal Institute lent its services in matters of discipline to maintain the price control system.<sup>41</sup> The Institute had a great deal more to do with basing points and prices at basing points than Dr. Latham did.

As to freight rate books, the Commission made a finding that "[t]he rate books published by the Institute were intended . . . to provide common freight rate factors for pricing purposes, avoid differences in delivered price quotations resulting from errors in rate calculations or failure to keep abreast of rate changes, and thus enable the corporate respondents to quote identical delivered prices for cement at all destinations; and they were in fact used for that purpose."<sup>42</sup> The freight rate books were part of the mechanism for maintaining the formulary price control system. Members of the Institute used the freight rates in the book in calculating prices, even though these book rates were at variance with official rates, and did not use new official rates until such new rates had been cleared with the Institute Rate Bureau.<sup>43</sup> The freight rate books were regarded by the Federal Trade Commission as lacking information that a *genuine* rate service would be expected to supply. The all-rail freight rates contained in the books were used to calculate delivered prices even though shipment was made by water transportation or by motor truck at rates different from those on which the price was calculated.<sup>44</sup> The allegation was made in the defense in the second *Cement* case, as it is also suggested in the *Reply*, that the books were designed to supply manufacturers with accurate information about freight costs. The authors of the *Reply* add that economy made it desirable for the Institute to prepare one book for many, rather than to have each manufacturer prepare his own. Unfortunately for this view, the Commission found that the rate books contained rates from points where no shipments of cement originated and failed to contain rates from all producing points.<sup>45</sup> The value to the manufacturer in calculating actual freight costs was therefore small. The value to the Institute and its members in maintaining their private price control system was very great.<sup>46</sup>

*Truckers.* The findings of the Commission completely refute the assertion that the Institute had nothing to do with the successful movement among the cement industry to coerce buyers, freeze out truckers, and incidentally keep transportation business with the railroads. There was a conference of the interested parties in July, 1931, attended by the president of the Cement Institute<sup>47</sup> and one in January, 1932 attended by the president of the Cement Institute<sup>48</sup> at which ways and means of accomplishing these objects were canvassed. As was said in *Giantism*, by 1932 a major part of the cement industry

---

41. See, for example, the part played by the Cement Institute in the use of espionage against and boycott of imported cement. *Id.* at 87, 236.

42. *Id.* at 163.

43. *Id.* at 165.

44. *Id.* at 166-7.

45. *Id.* at 166.

46. For a parallel view, see MACHLUP, *op. cit. supra* note 22, at 78.

47. 37 F.T.C. 87, 194 (1943).

48. *Id.* at 197.

had declined to permit trucking under any circumstances and most of the rest forced buyers to pay penalty prices for delivery by trucks.

*Dealers.* The Commission made a distinction between dealers and other buyers which is very useful because the dealers were a significant element in the private system of price control maintained by the Institute and members of the cement industry.<sup>49</sup> The confused and somewhat irrelevant discursus by the authors of the *Reply* of the dealer policy of the Cement Institute and of the members of the cement industry should be checked against the accurate account in the findings of the Federal Trade Commission.<sup>50</sup> Suffice it to say that the Institute played a not insignificant part in the division of business between the manufacturers and the dealers. The Commission found that the Institute "continued, adapted, and supplemented" previous (i.e., before 1929) actions as changing conditions and circumstances dictated.<sup>51</sup> The Institute proposed a dealer classification to the NRA which was included in the Code for the Cement Industry and then set aside.<sup>52</sup> Representatives of the Institute met with representatives of the dealers in Chicago in 1935 to decide on dealer policies.<sup>53</sup> A district meeting of the Institute attended by the manager of the Institute agreed upon a method of marketing cement substantially identical with the policy worked out in the Chicago meeting.<sup>54</sup> The president of the Institute appointed a committee to maintain contact with Government purchasing agencies and so far as possible further the new dealer policy.<sup>55</sup> Arrangements were also made with the cooperation of the Institute to police the new rule and to report violations of it.<sup>56</sup> The last paragraph of the discussion of "Dealers" by the authors of the *Reply* is, therefore, casuistry.

*Customers.* The authors of the *Reply* say that there were no long term contracts and that there were long term contracts (specific job contracts). Those long term contracts are precisely the ones referred to in the article on *Giantism*. Their purpose as the authors admit was to protect contractors against increases in price decreed by manufacturers. If the purchaser makes the contract with a dealer, the dealer absorbs such price increase as may eventuate, unless he too makes a contract with the manufacturer to protect himself. The danger that these long term contracts presented to the ability of producers to administer the private price control system is refreshingly described by the authors of the *Reply*. The producers combined to stop these practises so that no dealer, to use the phrase of the authors, "would have an opportunity to obtain cement at a lower price than his competitors were currently paying for it."<sup>57</sup>

---

49. *Id.* at 141.

50. *Id.* at 225-34.

51. *Id.* at 225.

52. *Id.* at 227-8.

53. *Id.* at 230.

54. *Id.* at 231.

55. *Id.* at 232.

56. *Id.* at 231.

57. See the findings of the Federal Trade Commission as to specific job contracts, *id.* at 202-6.

As to freight diversion,<sup>58</sup> the evidence is clear that the Institute sought to pin opprobrium on those who practised it by labeling it "unfair,"<sup>59</sup> sought to require payment of the seller's price at the place of final delivery<sup>60</sup> and sought to control the practise through cooperation with the railroads. This is discipline which, as the authors surely realize, does not necessarily mean beating customers with little sticks.

The colorable paragraph of the authors of the *Reply* on the Institute's program of security by propaganda<sup>61</sup> can be briefly disposed of. The chairman of the Institute's marketing research committee was of the view that "no sound defense of our methods of selling cement can be made without the admission that some limitation of competition is necessary in such an industry as cement. This is not a subject which can be presented to the public through advertising, or in any way. It is an argument that has to be made and can be made in special places where it may be calculated to do some good."<sup>62</sup> The Institute gave up its advertising program—the essential theme of which had been characterized by the same man as "sheer bunk and hypocrisy"—not because any specific propaganda program was disapproved but because it was thought that the degree of public disfavor was not to be cured by advertising.

I did not raise the issue of profits which the authors of the *Reply* seem to want to discuss. But readers might be interested in the objective conclusion of another observer who uses the same data as the authors. M. A. Adelman says,

"For the ten years 1928-37 inclusive, the average percent of capacity utilized was about 45%. Additional cement could at any time have been produced at half, or less than half, of the current price. . . . Under unrestrained competition, the price would have been driven toward the incremental cost, i.e., below average cost, and the industry as a whole forced to suffer losses until the redundant firms and mills were squeezed out. But in point of fact, the respondents' profits before taxes averaged 3.56 percent of their capital assets. *Something*—whether we call it normal trade practises with Judge Major or combination with Mr. Justice Black—prevented competition from being effective. In no other way could profits have been earned."<sup>63</sup>

*Academic freedom.* The working concept of academic freedom upon which the Institute acted is well illustrated in the findings of the Federal Trade

58. See the findings of the Federal Trade Commission as to diversions of cement in transit, *id.* at 198-202.

59. *Id.* at 199.

60. *Ibid.*

61. The unfamiliarity of the authors with the subject matter of political science which is evident throughout their paper makes it unlikely that they know what the political scientist is "at home with." And I didn't "praise" the plan. I just said it was "noteworthy" and "of interest politically."

62. 37 F.T.C. 87, 248 (1943).

63. Adelman, *Competition and Antitrust Laws*, 61 HARV. L. REV. 1289, 1345-6 (1948).

Commission. The Institute failed to persuade the Commission in 1934 to undertake a study of the basing point system "with the cooperation of the cement industry."<sup>64</sup> So the Institute employed two distinguished Columbia University professors to make a study of the cement industry. In the early stages of the study, the attitude of members of the Institute's marketing research committee is revealed in correspondence which said, in part,

"Altho all of the members of the Committee in the East have had in mind the same objective that you evidently are striving for, namely attempting to mold the professors' minds before any definite conclusions have been reached, it has been our thought that much more could be accomplished by personal contact than through the medium of correspondence."<sup>65</sup>

One wonders if this is the "true appreciation of the functions of scholarship" the eminent authors of the *Reply* had in mind.

The authors of the *Reply* once again have failed to prove that the Federal Trade Commission was wrong in its facts, for although the *Reply* superficially is an attack upon *Giantism*, in reality it is an attack upon the solid basis of fact which the Commission prepared and which my article used. After the authors have chopped logic, ignored pages, and nibbled at words, the fact remains that the Commission in the *Cement* case did describe a structure of private government organized to protect an economic security system against hostile groups on all sides. The Institute was a confederation with executive and legislative powers and the center of a combination that fought off divisionist influences, disciplined and chastised groups that threatened the security system, maintained an information and propaganda service, operated a private price control system, overreached governmental agencies and engaged in cold political calculation. It is of great interest politically because it is an analogue of patterns of behavior to be found in other structures for the organization and administration of power in human relations—for example, in trade unions, farm organizations, military groups, and so on. In fact I have an unpublished manuscript that exhibits the same phenomena in the organization and structure of different types of labor organizations. The indispensable foundation for any such political analysis, however, is a sound basis of certified facts—like the findings of the Federal Trade Commission in the second *Cement* case.

---

64. 37 F.T.C. 87, 248 (1943).

65. *Id.* at 249.