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The Information Gap in Antitrust Enforcement

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THE INFORMATION GAP IN ANTITRUST ENFORCEMENT

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In a series of cases culminating in the decision of *United States v. Von's Grocery Co.* in May, 1966,[1] the Supreme Court seems to have embraced a more and more rigidly mathematical approach to the enforcement of the Celler-Kefauver Anti-Merger Act of 1950.[2]

In this case no misbehavior on the part of the defendant (or of anyone else) was charged. The attack went, not to conduct, but solely to industry structure. The illegality was found by the court to rest heavily on certain statistical trends which it believed constituted an increase in "economic concentration" in the Los Angeles grocery market.

The Celler-Kefauver Act amended Section seven of the Clayton Act so as to make it read in relevant part as follows:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . of another corporation engaged also in commerce, where for any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[3]

As can be seen, the section deals only with mergers. It does not touch any other aspect of the antitrust laws. However, the enforcement actions being brought against mergers under this section are in fact the cutting edge of current government antitrust policy. The new line of enforcement, with its sharp focus on the purely statistical aspects, makes severe calls on such statistical data and economic expertise as can be brought to bear.

First, a review of the decision. In 1960 Von's Grocery Company, a locally-owned Los Angeles grocery chain, undertook to acquire by merger another local Los Angeles grocery chain, Shopping Bag Food Stores. Both firms were major factors in the retail grocery business in the market comprising Los Angeles and its suburbs. Von's ranked third in sales volume among grocery chains in the area and Shopping Bag sixth, with combined sales aggregating 7.5 percent of the total retail grocery sales of the market.

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1 384 U.S. 270 (1965).

2 Clayton Act § 7, 15 U.S.C. § 18 (1964).

3 *Id.*

Delivering the Court's opinion, Justice Black emphasized heavily the decline which had occurred during recent years in the number of owners operating a single retail grocery store in the Los Angeles market. From 5,365 in 1950, the number of such stores had decreased to 3,818 in 1961 and to 3,590 in 1963.[4] This decline was taken by Justice Black to constitute an increase in economic concentration. In fact, in a footnote to the opinion he created a virtual definition of the concept of rising concentration in just those terms, as "a total decrease in the number of separate competitors . . . ."[5]

Next, Justice Black pointed to the number of recent acquisitions and mergers among other grocery chains in the Los Angeles market, particularly to previous acquisitions by some of the larger firms (although neither Von's nor Shopping Bag had previously merged with any of their competitors). The merger of Von's and Shopping Bag occurred against this background.

These facts were, he said, "alone . . . enough to cause us to conclude that the Von's-Shopping Bag merger did violate [section] 7,"[6] for the basic purpose of the 1950 Act was "to prevent economic concentration in the American economy by keeping a large number of small competitors in business."[7] The economy was believed to be characterized by "a rising tide of economic concentration."[8] Congress intended to preserve competition by arresting this supposed trend toward concentration "in its incipiency."[9] The facts of the *Von's Grocery* case presented "exactly the threatening trend toward concentration which Congress wanted to halt," according to Justice Black.[10]

Some have treated the *Von's Grocery* decision as if it broke radically new ground. Indeed, in his dissent in this case Justice Stewart argued that the majority's opinion was "contrary not only to our previous decisions, but contrary to the language of [section] 7, contrary to the legislative history of the 1950 amendment, and contrary to economic reality."[11] It was, he said scornfully, "a simple exercise in sums," which disregard "the economic concentration of the market, the level of competition in the market, or

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4 United States v. Von's Grocery Co., 384 U.S. 270, 272-73 (1965).

5 *Id.* at 273 n.3.

6 *Id.* at 274.

7 *Id.* at 275.

8 *Id.* at 276.

9 *Id.* at 277.

10 *Id.*

11 *Id.* at 283 (Stewart, J., dissenting).

the potential adverse effects of the merger on that competition."[12]

True, in its heavy reliance on the simple datum of a decline in the number of grocery firms, *Von's Grocery* went considerably beyond any previous holding by the high Court. Yet much of this approach was foreshadowed as long ago as 1962, in Chief Justice Warren's opinion in *Brown Shoe Co. v. United States*,[13] which forbade the merger of Brown Shoe Company, a manufacturer with some retail outlets, and G. R. Kinney, primarily a retail shoe chain. In that opinion the Chief Justice, not once but twice, referred to the "rising tide of concentration" that he thought was occurring throughout the economy. The opinion also referred to the decline which had occurred in the number of shoe manufacturing companies, although the decision was not made to rest specifically on that fact. However, the opinion did object directly to the fact that in some individual towns and cities, Brown, by adding the Kinney retail outlets to its own, would come into control of what the court considered too great a share of the retail market in those various towns and cities. "If a merger achieving 5% control (of the retail sales in a city) were now approved, we might be required to approve future merger efforts by Brown's competitors seeking similar market shares,"[14] the Court said.

The significance of the *Von's Grocery* decision is pointed up by the fact that the Federal Trade Commission has moved to implement it by announcing broad guidelines as to what scale of mergers in the food distribution industry are permissible in the Commission's eyes.[15] Mergers by grocery chains involving annual sales of over 500 million dollars "raise sufficient questions regarding their legal status to warrant attention and consideration by the Commission . . . ." and likewise for voluntary and cooperative groups doing a comparable volume of business in the food field.[16] Those with annual sales of between 100 and 500 million dollars raise less question unless they involve competitive overlap in particular local markets, but even so they will be subject to semi-automatic commission investigation.

In an unprecedented move the commission also imposed a requirement for a pre-merger notification to itself by any company

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12 *Id.* at 282-83 (Stewart, J., dissenting).

13 370 U.S. 294 (1961).

14 *Id.* at 343-44.

15 "Enforcement Policy with respect to Mergers in the Food Distribution Industries," announcement by the Federal Trade Commission, 1 TRADE REG. REP. ¶ 4520 (1967).

16 *Id.*

fitting any of the above specifications, such notification to be given sixty days prior to the consummation of a projected merger acquisition.[17]

This writer is an economist, not a lawyer. In these and other decisions it is apparent that the Court has been operating on the basis of certain premises regarding trends and developments believed to characterize the nation's economic structure. Evidently the Court's decisions have been powerfully shaped by these premises.

Some of these premises appear to be the following:

1. The American competitive system ought to be, so far as possible, comprised of numerous, principally small producers in each industry or line of commerce.
2. During the present period the economy is characterized by a "rising tide of economic concentration."
3. In this context, the definition of increased economic concentration is simply a decline in the number of firms.
4. This assumed trend toward concentration has been caused at least partly by the large number of mergers among corporations; although the court has nowhere said so, presumably it must be bebelieved that blocking the mergers will check the trend toward concentration, if such a trend exists.

To what degree do these premises accurately reflect the factual situation? Clearly some of them are value judgments, not susceptible to proof or testing. For the most part, however, they are based on statistical data or economic reasoning. A true judgment, based on facts rather than emotion or prior ideological leanings, should be possible in some cases.

During the past three years the Antitrust and Monopoly Subcommittee of the Senate Judiciary Committee has engaged in a rather extensive study of the general topic of economic concentration in several of its aspects. Five substantial volumes of hearings have been compiled.[18] In addition, there have been made available voluminous statistical tabulations prepared by the United States Census Bureau, which have attempted to define the extent

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[17] *Id.*

[18] At this writing four of the volumes have been published as *Hearings on Economic Concentration Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess., and 89th Cong., 1st Sess., Pts. 1-4 (1964 & 1965). The fifth volume will appear shortly. See also REPORT OF THE BUREAU OF THE CENSUS PREPARED FOR THE SUBCOMM. ON ANTITRUST AND MONOPOLY OF THE SENATE COMM. ON THE JUDICIARY, 89th Cong., 2d Sess., CONCENTRATION RATIOS IN MANUFACTURING INDUSTRY, 1963, Pt. 1 (Comm. Print 1966). [Hereinafter cited as REPORT OF THE CENSUS BUREAU].

of concentration found to exist in the various manufacturing industries. Despite such laborious delving, most of the questions relating to this topic remain unanswered, understandably so. Yet the facts permit categorical conclusions on some points.

To begin with, among experts and students in this field there is now substantial agreement on exactly what is meant by the term "economic concentration." It relates to the situation in which a large share of an industry (or of a market for a product or group of products) is controlled by a limited number of firms. Let us pick an example at random. According to the Census Bureau, of the total value of shipments in 1963 by the industry designated "organic fibers, noncellulosic" (SIC 2824), ninety-four percent was shipped by the four largest companies in the industry. If the calculation is extended to include the eight largest companies these eight accounted for ninety-nine percent; the twenty largest companies accounted for 100 percent of the total. These percentage figures are referred to as the four-firm, eight-firm, or twenty-firm "concentration ratios" respectively for the industry.[19]

From such a high figure of concentration, four-firm concentration ratios range all the way down to such levels as thirty-one percent for meat slaughtering plants (SIC 2011),[20] eleven percent for logging camps and contractors (SIC 2411),[21] and five percent for fur goods (SIC 2371).[22]

It is unfortunate that in his decision in *Von's Grocery*, Justice Black chose to focus his argument on the mere *number* of grocery firms. In so doing he revealed his own economic predilections rather than any useful analysis of the realities of economic competition. If several thousand small food stores are replaced by several hundred grocery supermarkets in Los Angeles or anywhere else, it does not indicate any lessening of competition, which may become more vigorous than ever. As well might it be argued that farming is becoming a concentrated industry on the ground that the number of farms in the United States has declined from 7,000,000 in 1935 to 3,300,000 today.

A larger business unit in both food retailing and farming has come to predominate because of the movement of vast economic

19 Under some circumstances the measurement may be made, not in terms of value of shipments, but in terms of the percentage of "value added by manufacture," or of employment, total assets, or some other measure of size. REPORT OF THE CENSUS BUREAU, *supra* note 18, at 81.

20 *Id.* at 42.

21 *Id.* at 66.

22 *Id.* at 63.

forces, but that does not mean that competition has become any less vigorous. Justice Black seeks to halt the supermarket revolution by judicial fiat, but as a matter of fact it was not the chains which accomplished the displacement of the Mom and Pop corner groceries. It was the independent grocers who led the way in establishing supermarkets and thereby displaced their fellow independents who operated smaller stores. If the Justice could block all the mergers, and dissolve all the chains, even by that means he could not resurrect the multitude of tiny stores that have passed away.

The definition of concentration, then, is not based on mere number of firms. As noted above, for the specialists in this field the term relates to *percentage share controlled by a few firms*, in other words, to a concentration ratio. The overwhelming preponderance of this view is reflected in the pages of the hearings held by the Antitrust and Monopoly Subcommittee. Numerous witnesses, lawyers, and other experts as well as economists, testified on economic concentration, its causes and results, its significance, the discernible trends. They represented the entire spectrum of political, economic, and legal views on this topic. Not one stressed the decline in mere numbers of firms as a measure of concentration; in fact, so far as I can recall, none even mentioned it at all.

The difference in concept is crucial. A reduction in the number of firms has no relationship to the question of concentration, unless so few are left that the market comes under some form of control. If the market for any product falls under the domination of a limited number of firms, the danger is that they may consciously or unconsciously fall into practices inconsistent with free competition. Even absent any conspiracy to restrain trade by fixing prices or the like, there may still be at least a possibility that the few powerful firms will refrain from energetic competitive tactics to avoid inviting retaliation or otherwise "spoiling the market." But clearly this danger will not arise merely because of a decline in numbers of competitors, provided only that a sufficient number remain.

In his opinion in *Brown Shoe*, Chief Justice Warren made particular reference to a "rising tide of economic concentration" which he considered to be under way at this time. This phrase in the Warren opinion was quoted with approval by Justice Black in *Von's Grocery*.[23] It is apparent that this idea—that American

[23] United States v. Von's Grocery Co., 384 U.S. 270, 276 (1965), citing Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1961).

markets and industries are falling more and more under concentrated control, which must be checked somehow—has underlaid the Court's philosophy in recent years, and explains much about some of its decisions.

Now, the interesting fact is that the data completely fails to support this belief. In fact, the statistics strongly indicate that there has been no trend whatever, either upward or downward, in industry concentration generally.[24] This statement is based on analysis of data prepared for the Antitrust and Monopoly Subcommittee by the Census Bureau, consisting of concentration ratios for the various manufacturing industries according to the Standard Industrial Classification for each of the years 1947, 1954, 1958, and 1963. The calculations for 1963 have been available only since last fall (1966).

It must be explained that for many industries no comparison is possible between two different years, because of a change in the definition of the industry between the two dates. Of the 416 manufacturing industries identified in 1963, a comparison could be made with 1947 (in a few cases, only with 1954) in somewhat over half the industries.

The data can be analyzed in various ways. One method is shown in Table I. Table I presents a simple tabulation showing the number of industries of which the four-firm concentration ratio (that is, the share of total shipments of the industry accounted for by the four largest companies) fell within the percentage brackets shown in the table. For example, the table shows that for 1947 there were twenty of the 219 industries in which the four largest firms accounted for eighty percent or more of total shipments, while for 1963 this was the case for only seventeen of the same industries.

[24] In this portion of the discussion attention is focused on "industry concentration," that is, the degree of concentration in the various industries, each taken separately. It is this concept which has to do with the possible danger of controlled markets and monopolization. A somewhat unrelated concept sometimes termed "overall concentration," having to do with the percentage share in the total national economy occupied by the 50, 100, 200, etc. largest corporations, is dealt with in passing at the conclusion of this paper.

Table I.[25]

Number of Industries having Four-firm Concentration Ratios within Specified Percentage Brackets, 1963 compared with 1947

Percentage of Concentration	Number of Industries		Number of Industries Cumulative	
	1947	1963	1947	1963
80-100	20	17	20	17
70-79	13	13	33	30
60-69	14	18	47	48
50-59	28	28	75	76
40-49	26	19	101	95
30-39	31	44	132	139
20-29	42	37	174	176
10-19	31	34	205	210
0-9	14	9	219	219

It should be noted that the same industries are included in both years; all industries for which a comparison between 1947 and 1963 is shown in the source were included in the tabulation. If for a particular industry the concentration ratio for 1947 was lacking but the ratio for 1954 was available, the latter was used instead. For a number of the industries value added by manufacture was used rather than value of shipments because the latter contained a substantial and unmeasurable amount of duplication. For a few industries value of production was used rather than value of shipments. In any case, the source was followed each time.

For a few industries the concentration ratio had been withheld by the Census Bureau to avoid disclosing figures for individual companies. Since practically all of such industries were in the higher concentration ranges, their omission might have seriously misrepresented the profile by understating the number of industries in such higher ranges. For that reason estimates based on information believed to be reliable were made of concentration ratios as follows:

2814 Cyclic (coaltar) crudes, 1963—80-100 percent[26]
2822 Synthetic rubber, 1947—80-100 percent[27]
3334 Primary aluminum, 1963—80-100 percent[28]
3492 Safes and vaults, 1963—80-100 percent[29]
3636 Sewing machines, 1963—80-100 percent[30]
3723 Aircraft propellers and parts, 1963—80-100 percent[31]

For two industries, primary lead and dolls, on which the Census Bureau withheld the figures because of the disclosure rule, no

25 REPORT OF THE CENSUS BUREAU, *supra* note 18, at 6-41.

26 *Id.* at 79.

27 *Id.* at 81.

28 *Id.* at 98.

29 *Id.* at 105.

30 *Id.* at 118.

31 *Id.* at 124.

estimate was possible and they have been omitted from the above tabulation.[32]

Evidently the changes which have occurred in the profile as a whole over the entire sixteen-year period have not been great. The overall picture is one of relative stability, with any increases having apparently been offset by an equal or greater number of decreases. There has been some decline in the number of highly-concentrated industries (eighty to one hundred percent), but also a decrease in the number of less-concentrated ones (under twenty percent), with a resulting slight "bunching" in the middle brackets. However, on the whole the changes have not been great or particularly significant.

Table II presents a tabulation of the changes, industry by industry, over the 16-year period. Again it can be seen that there has been no marked trend, either upward or downward. Of the 215 industries for which comparison can be made, an increase in the four-firm concentration ratio occurred in 103 industries, a decrease in exactly 100 industries. It is practically a tie ball game. Similarly, when the minor changes (less than five percentage points) are excluded, there still remain practically equal numbers of increases and decreases, sixty-eight and sixty-four.

TABLE II.[33]

Number of industries having increases and decreases in four-firm concentration ratio based on value of shipments, 1947-63, by industry grouping

Industry grouping	Total Number of Industries	Change in concentration ratio, 1947-63				
		Number with increases			Number with decreases	
		5 percent or more	Less than 5 percent	No change	Less than 5 percent	5 percent or more
Total	215	68	35	12	36	64
Food and kindred products	26	12	4	—	4	6
Tobacco manufactures	4	1	—	—	1	2
Textile mill products	14	5	5	1	1	2
Apparel and related products	21	6	7	2	3	3
Lumber and wood products	5	2	2	—	1	—
Furniture and fixtures	6	1	1	—	—	4
Paper and allied products	3	—	1	—	—	2
Printing and publishing	10	3	1	1	2	3
Chemicals and allied products	15	1	2	—	5	7
Petroleum and coal products	5	1	—	1	2	1
Rubber and plastic products, n.e.c.	2	1	—	—	—	1
Leather and leather products	6	1	2	—	1	2

[32] *Id.* at 97, 130.

[33] *Id.* at 6-41.

Stone, clay and glass products	16	6	3	1	4	2
Primary metal industries	8	3	1	2	—	2
Fabricated metal products	12	2	—	—	2	8
Machinery	13	3	1	1	5	3
Electrical machinery	13	3	2	1	3	4
Transportation equipment	9	4	1	1	1	2
Instruments and related products	5	2	1	—	1	1
Miscellaneous manufacturing	22	11	1	1	—	9

All industries were included for which a comparison was possible between 1947 and 1963 or lacking that, between 1954 and 1963. Industries included are the same as those for Table I, except in four cases where the lack of data because of the disclosure rule prevented a comparison.

For the information of the reader the breakdown is presented by major industry groups. It is interesting to note, for example, that in the chemical and allied products group, decreases in the four-firm concentration ratio occurred in twelve industries, in seven of them by five percentage points or more, as compared with only three increases in this group. By contrast, among the apparel and related products industries there were increases in thirteen industries and decreases in only six.

Evidently this table likewise demonstrates the absence of any strongly marked trend, either upward or downward. What is also interesting to note is the considerable number of substantial changes, both upward and downward, in individual industries. For almost two-thirds of the industries there have been changes of five percentage points or more, either upward or downward. Although the profile as a whole has maintained approximately the same height, the peaks and valleys within that general profile have moved substantially in some cases. Evidently the picture is one of considerable diversity and flexibility within the economic system, showing that the various industries have great capacity for adjustment to changing conditions.

Since principal interest is sometimes focused on the more concentrated industries, Table III presents a listing of all those showing a four-firm concentration ratio of seventy-five percent or more in any one of the four years for which data are available. Of the twenty-nine industries included in the list, eighteen showed a smaller concentration ratio in 1963, while only ten showed an increase. Furthermore, by 1963 only seventeen or eighteen had concentration ratios of seventy-five or more, whereas in 1947 at least twenty-one (and probably more) had fallen in that bracket.

In many cases these declines in concentration were substantial. The share of the largest four cigarette producers fell from ninety to eighty percent. For the distilled liquor industry, the percentage share declined from seventy-five to fifty-eight. For tobacco stemming and redrying, the ratio declined from eighty-eight to seventy; for pressed and molded pulp goods, from eighty-six to seventy-two; for industrial gases, from eighty-three to seventy-two; for rubber footwear, from eighty-one to sixty-two; for phonograph records, from seventy-nine to sixty-nine. Of the industries showing increased concentration ratios, in only four cases did the increase amount to ten percentage points or more: chewing gum, household laundry equipment, primary batteries, and motor vehicles.

These declines in concentration in a majority of the highly concentrated industries doubtless will come as a surprise to some. Equally noteworthy is the fact that in no case were these declines caused by governmental action of an antitrust nature. They must have occurred as a natural result of the competitive forces in the free market. There is no other explanation.

Table III.[34]

Percent of value of shipments accounted for by the four largest companies in each manufacturing industry: 1963 compared with 1947, 1954, and 1958: All industries having concentration ratios of 75 percent or more in any one of the four years.

SIC number	Industry	Concentration Ratio 1947	1954	1958	1963
2043	Cereal preparations	79	88	83	86
2046	Wet corn milling	77	75	73	71
2072	Chocolate and Cocoa products	68	70	71	75
2073	Chewing gum	70	86	89	90
2085	Distilled liquor, except brandy	75	64	60	58
2111	Cigarettes (1)	90	82	79	80
2141	Tobacco stemming and redrying (1)	88	79	73	70
2646	Pressed and molded pulp goods	86	72	69	72
2813	Industrial gases	83	84	79	72
2822	Synthetic rubber	(D)(2)	53	60	57
2892	Explosives	80	79	77	72
3021	Rubber footwear	81	72	65	62
3031	Reclaimed rubber	84	73	87	93
3211	Flat glass	(3)	90	92	94
3275	Gypsum products	85	90	88	84
3313	Electrometallurgical products	88	77	73	79
3331	Primary copper (4)	(3)	(3)	87	78
3334	Primary aluminum	100	100	(D)	(D)
3411	Metal cans	78	80	80	74
3572	Typewriters	79	83	79	76
3612	Transformers	73	78	71	68
3624	Carbon and graphite products	87	86	87	83
3633	Household laundry equipment	40	68	71	78
3641	Electric lamps	92	93	92	92
3652	Phonograph records	79	70	76	69

[34] *Id.*

3661	Telephone; telegraph apparatus (4)	(3)	90	92	92
3692	Primary batteries, dry and wet	76	78	84	89
3717	Motor vehicles and parts (4)	56	75	75	79
3741	Locomotives and parts	91	91	95	97

(D) Withheld to avoid disclosing figures for individual companies.

(1) Value of production shown for this industry rather than value of shipments.

(2) At least 80 percent, since there were only five companies in this industry in 1947.

(3) Comparable data are not available because of significant changes in the plants or products in this industry.

(4) Value added by manufacture is shown for this industry rather than value of shipments because the latter contains a substantial and unmeasurable amount of duplication.

Apparently it has been widely believed that when an industry becomes concentrated, the large firms in that industry have power commensurate with their size, and can thereby dominate price and production policies in the market for that line of products. By this line of reasoning surely it would be supposed that the large firms would use such market power to increase their respective shares of the market.

Evidently our data indicate pretty clearly that any such theory is fallacious. The dominant firms in the concentrated industries have been unable to increase their dominance in most cases. The level of concentration has not changed greatly in most cases; but to the extent that it has, concentration ratios have gone down instead of up. More often than not the smaller firms have gained at the expense of the larger ones, to at least a limited degree. Evidently there are competitive forces of great strength in our markets, sufficient in many cases to wear away the leading positions of the industrial giants.

From the foregoing it would appear that the courts have been proceeding on the basis of serious misapprehensions as to the nature of the dominant trends in our economy. Both Justice Black and Chief Justice Warren in their opinions have inveighed against a "rising tide" of economic concentration. Evidently they see themselves as obligated to battle against this supposed menace to the free competition in our markets. Probably the same was true of many members of Congress who supported enactment of the Anti-Merger Act in 1950.

Since then, massive tabulations of data by the Census Bureau for three benchmark years—1954, 1958, and 1963—have given us much more exact data on the trends in concentration, industry by industry, than ever before. As shown above, these data have made it clear that no such rising tide exists.

It seems in short that there has been a strange sort of gap between the facts, and the cognition of those facts on the part of the judges and others charged with interpreting and enforcing the law. The facts are there, available to public knowledge. But a majority of the justices have continued to harbor a mental picture of the problem which is inconsistent with those facts.

How has it happened that this faulty picture of a rising tide of concentration has gained such wide currency? Without doubt it is due partly to the erroneous linkage in the public mind of a high volume of mergers with an increase in concentration. It is true that the number of industrial mergers in recent years has been large. The public sees that mergers are common, and perhaps jumps to the conclusion that market control must be passing into fewer and fewer hands. But the consummation of a merger does not automatically mean an increase in concentration.

To understand how this can be, let it be noted that in the oil industry, for example, much of the new discovery of producing structures is accomplished by independents, "wild-catters," which then sell their discoveries to the major companies in many cases. Thus, mergers in this industry are frequent at the producing level, but the independents thereby gain the funds to carry on further exploration activities for new reserves. Competition is maintained and even enhanced by the very ease with which independent exploration companies may sell out their producing properties to the majors.

For another example of increased competition occurring simultaneously with merger activity, look at the transportation industry. The rapid growth of bus lines, trucking services, airlines, and other modes of commercial transportation to say nothing of the use of privately-owned cars has greatly broadened the extent of competition in this field which half a century ago or less was totally dominated by the railroads. This has occurred despite a considerable amount of merger activity within the railroad field, and among other transportation facilities also. Evidently merger activity need not mean a diminution of competition at all if new growth is simultaneously occurring outside the merged facilities.

To return now to the trend of recent court decisions, when judgments are handed down on the basis of faulty premises, the results are unlikely to be salutary. In this matter of enforcing the Anti-Merger Act, the preoccupation of the judiciary with the supposed threat of constantly rising concentration has helped create an attitude of mind unfriendly to almost any merger. Any excuse to say "no" seems good enough. As Justice Stewart said in his dissent to *Von's Grocery*, "the sole consistency that I can find is that in litigation under [section] 7, the Government always wins."[35]

If one starts firmly believing in a premise that the ocean tide is rising, then each incoming wave may seem to lend substance to that belief. Similarly, each individual merger like each wave on the ocean may seem to make up part of a tide of economic concentration presumably rising. But when a little time has passed and it is seen that the level of water is no higher than it was before after all, it becomes clear that the incoming movement of the waves must have been counterbalanced by an unseen flow of the waters outward. Judgment can then replace morbid fears, and the whole movement of events can be viewed in a healthier frame of mind.

Well, it may be asked, even if some harmless mergers are unnecessarily blocked, is any great harm done thereby? Do mergers make any positive contribution to our social well-being anyhow? The answer to both questions is yes. Simply put, the making of mergers is an essential part of the flexibility of our economy. To forbid all mergers hereafter would mean freezing in place the industrial structure of the present moment, that is, the firms that now exist and their present roles in the business flow.

But the economy changes, and business firms must change with it. Suppose a man who has built up a successful business wishes to retire. Or suppose he dies. In many situations the sale of the dominant stock holding in a corporation by its owner to a larger corporation—in other words, a merger—is the normal mode of making an exit from a business. Frequently it is not possible to sell such a stock holding at all, except to a larger corporation. In discussions of this topic, much is commonly made of the importance of "ease of entry" into an industry by outside firms, as a means of preserving competition in that industry. But "ease of exit" would seem to be of equal importance in a case such as this.

To mention another aspect, the merger process may be the means by which able, agressive executives come into management control of a larger quantum of the nation's industrial assets. If the dynamic quality of our economy is to be preserved, opportunity must be maintained for new men to rise through the ranks into positions of industrial leadership. To block off such men from expanding the corporations they control would be to protect the old established industrial leadership from the challenge of the newcomers.

35 United States v. Von's Grocery Co., 384 U.S. 270, 301 (1965).

In short, the process of merging among businesses needs to be viewed as occupying a necessary place in the flow of economic activity. Certainly it should be subjected to surveillance against abuse, but it should not be treated with automatic hostility and criticism.

Earlier a reference was made to the concept known as "overall concentration," relating to the percentage of the total business of the nation (or perhaps merely the total of all manufacturing) held or controlled by a limited number of large firms—50, 100, or 200. This concept should play no part in antitrust enforcement. In fact, it has no real relevance to the competitive process in a direct sense. Competition has to do with the rivalry in a particular market among a number of buyers or sellers of a particular product or product line, each being intent on gaining for himself a large share of the business. Competition will almost always remain vigorous whenever such a particular market is not dominated by a very few participants.

The concept of overall concentration, however, does not concern itself with particular markets or particular products. Although this concept has not yet been brought into any antitrust enforcement proceeding, it has received a good deal of attention in the literature during the last few years. For that reason a few comments may be of interest.

Data compiled by the Census Bureau and published by the Senate Antitrust and Monopoly Subcommittee[36] show that in 1963, twenty-five percent of the total value added by manufacture of the nation was accounted for by the fifty largest companies, and forty-one percent by the 200 largest. Both figures represented increases from a few years previously. In 1954 the fifty largest had accounted for twenty-three percent, and in 1947, for seventeen percent. However, data was also presented to the subcommittee indicating that the figure for 1947 was abnormally low, and that during the 1930's the percentage share of the fifty largest companies was in about the same range as during the late fifties and early sixties. If this indication is correct, it would mean that there has been very little change in the degree of overall concentration in over thirty years, or at most only a slight increase.

What significance should be attached to these data is hard to say. Some have used the figures as a basis for projecting into the future, and thereby for creating a picture of the horrifying consequences that await us in a few years, if present trends continue.

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[36] REPORT OF THE CENSUS BUREAU, *supra* note 18, at 2, table 1A.

Thus, one witness before the Subcommittee said: "At this rate of increase, by 1975 the 200 largest corporations would control two-thirds of the total assets of American manufacturing corporations."[37] But the passage of time sometimes shows such projections to be ill-founded. Thus, prophets of an earlier generation, in a landmark book published in 1935 had this to say about the shape of the future:

> Just what does this rapid growth of the big companies promise for the future? Let us project the trend of the growth of recent years. If the wealth of the large corporations and that of all corporations should each continue to increase for the next 20 years at its average annual rate for the 20 years from 1909 to 1920, 70 percent of all corporate activity would be carried on by 200 corporations by 1950. If the more rapid rates of growth from 1924 to 1929 were maintained for the next 20 years 85 percent of corporate wealth would be held by 200 huge units.[38]

Needless to say, 1950 came and went without the country having to experience the dire conditions foreseen by these prophets. Instead of increasing, it seems that the share of wealth owned by those 200 largest corporations probably decreased during the period cited in the quotation. So the use of predictions—or even of "projections" surrounded by careful caveats—must be accounted a risky business.

Should government policy be interposed to deal with the question of a supposed increase in overall concentration? Certainly if there has been an increase, it has been at a speed hardly exceeding that of a glacial drift. Nor has there been any showing of the need for such action, or of the kind of action required. As noted above, there is no definable relationship between overall concentration and the problems of competition in the market-place. Doubtless the problem of overall concentration is worthy of further study, but at this time it must be said that the topic does not appear to present the occasion for positive government policy of any sort.

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37 *Hearings on Economic Concentration Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess., pt. 2, at 519.

38 A. BERLE & G. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 40 (1935).