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# Extraterritorial Antitrust: The Sherman Act and U.S. Business Aboard by James Townsend

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## BOOK REVIEW

Extraterritorial Antitrust: The Sherman Act and U.S. Business Abroad. By James B. Townsend. Boulder: Westview Press, 1980. Pp. 308, \$27.50.

*Reviewed by Paul H. Brietzke\**

Owing to recent changes in the political climate of antitrust, Professor Townsend's book has a timeliness that might not have been apparent when it went to press. Citing antitrust bills authored by Senators Hart and Bayh, he warns that a "rising populism since 1976 would tend to argue for continuing caution"<sup>1</sup> among businessmen who expect favorable changes in the law. "Populism" may still be rising, but antitrust "hawks" have no part in it: Hart is dead and Bayh defeated, key Congressional committee chairs and bureaucratic posts have seemingly gone to antitrust "doves," and Townsend's arguments can thus be expected to find a much more receptive audience. Many in Washington and elsewhere are deeply concerned about the marked and relatively recent deterioration in the economic performance of American companies overseas.<sup>2</sup>

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1. J. Townsend, *Extraterritorial Antitrust: The Sherman Antitrust Act and U.S. Business Abroad* 225 (1980) [hereinafter cited as J. Townsend]. "Populism" is a term much misused in antitrust analyses, as a mildly derogatory label for those who favor an aggressive enforcement policy. This seems to be the sense in which Townsend uses it, but the reader cannot be certain.

2. Over the last decade, America's share of world trade declined 23%, resulting in the loss of two million domestic jobs. Address by Robert Reich, *AALS Antitrust Section* (San Antonio, Jan. 5, 1981) [hereinafter cited as Reich]. The better view is that the loss of jobs through competition from

Supply-side economists,<sup>3</sup> who apparently have the ear of the Reagan Administration, attribute this failing to, among other things, an overzealous, extraterritorial application of United States antitrust laws.<sup>4</sup> This position fits nicely with Townsend's and with those taken by the Chicago School of antitrust (protrust?). To simplify, but not by much, the Chicago School favors an extensive relaxation of antitrust enforcement in most areas.<sup>5</sup> Their arguments are clinched in the area of foreign trade by linking them to national security issues. Companies in technologically-advanced industries (microchips, aircraft, etc.), they say, must be strengthened for defense purposes by giving them a free hand to augment their export potential:<sup>6</sup> future American missiles cannot be safely guided by Japanese microcomputers. The logic of, and empirical support for these arguments are far from impeccable, but the same can be said of the justifications for any other antitrust policy. Townsend's book provides some of the grist needed by the antitrust policy mill, which is starting up once again.

Until very recently,<sup>7</sup> the judicial battle lines over extraterritorial antitrust were drawn fairly clearly. The dominant view—few victories are ever permanent in antitrust—is perhaps best represented by Judge Rifkind:

The major premise of the Sherman Act is that

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imports is small compared to losses through technological change. Belassa, *The 'New Protectionism' and the International Economy*, 12 J. World Tr. L. 409, 427 (1978); Friedman, *Do Imports Cost Jobs?*, Newsweek, Feb. 9, 1981, at 77.

3. While this generic label encompasses some diversity of opinion, it serves to describe those economists who see increased levels of savings and investment (inevitably at the expense of consumption) and radical reductions in the governmental regulation of business as the keys to increased productivity. The growing dominance of these economists reflects a radically rightward shift in economists' thinking over the last decade, a dissolution of the Keynesian consensus. Dean, *The Dissolution of the Keynesian Consensus*, Pub. Interest, (Special Issue), 1980, 19, at 29-30 *passim*. See Galbraith, *The Conservative Onslaught*, New York Rev. of Books, Jan. 22, 1981, at 30.

4. Address by Ira Millstein, *AALS Antitrust Section* (San Antonio, Jan. 5, 1981) [hereinafter cited as Millstein]; see also Reich, *supra* note 2.

5. See, e.g., R. Bork, *The Antitrust Paradox* 405-07 *passim* (1978) [hereinafter cited as Bork]. See also Brietzke, *Book Review*, 13 Val. U.L. Rev. 403 (1979).

6. Reich, *supra* note 2.

7. See notes 63-68 and accompanying text *infra*.

the suppression of competition in international trade is in and of itself a public injury; or at any rate, that such a suppression is a greater price than we want to pay for the benefits it sometimes secures.<sup>8</sup>

....

The courts do not . . . readily permit a frustration of valid national policy.<sup>9</sup>

The more flexible approach reflected in Justice Frankfurter's *Timken* dissent<sup>10</sup> made little headway:

Of course, it is not for this Court to formulate economic policy as to foreign commerce. But the conditions controlling foreign commerce may be relevant here. When as a matter of cold fact the legal, financial and governmental policies deny opportunities for exportation . . . and importation . . ., arrangements that afford such opportunities to American enterprise may not fall under the ban of a fair construction of the Sherman Law because comparable arrangements regarding domestic commerce came within its condemnation.<sup>11</sup>

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8. *United States v. Nat'l Lead Co.*, 63 F. Supp. 513, 525 (S.D.N.Y. 1945), *aff'd* 332 U.S. 319 (1947) (quoted by J. Townsend at 67).

9. *Id.* at 525 n.8 (quoted by J. Townsend at 65).

10. *United States v. Timken Roller Bearing Co.*, 341 U.S. 593, 605-06 (1951) (Frankfurter, J., dissenting) (quoted by J. Townsend at 74). *See* text accompanying notes 61, 64 & 65 *infra*. *Cf.* 341 U.S. at 607-08 (Jackson, J., dissenting). Like many another of Justice Frankfurter's "of course" statements about judicial self-restraint, this one finds little support in the case law. The Court will inevitably "formulate economic policy" because this is the role assigned to it by the broad and vague Sherman Act. *See Standard Oil of California v. United States*, 337 U.S. 293 (1949):

I regard it as unfortunate that the Clayton Act [and, presumably, the Sherman Act] submits such economic issues to judicial determination. It not only leaves the law vague as a warning or guide, and determined only after the event, but the judicial process is not well adapted to exploration of such industry-wide, and even nation-wide, questions.

*Id.* at 322 (Jackson, J. dissenting).

11. 341 U.S. at 605-06 (Frankfurter, J., dissenting).

We can assume that this degree of play in the antitrust joints would be a congenial state of affairs for the Reagan Administration. It certainly finds eager support in Townsend's book, which treats five related topics: the historical development of key concepts in the Sherman Act, its extraterritorial application traced through the cases, advice to managers of United States multinational corporations (MNCs) about the practical impact of these cases, an opinion survey of managers of large MNCs which assesses the impact of extraterritorial antitrust on business decisions, and an estimate of the extent to which extraterritorial antitrust coincides with the interests of the American public.

Townsend's historical perspective on the Sherman Act is very well done within the brief compass chosen.<sup>12</sup> Brevity was a logical choice, since the history is tangential to his main topics. He avoids the trap, into which others have fallen,<sup>13</sup> of ascribing a single, one-dimensional intention to Congress in 1890: "Sometimes fools rush in where angels fear to tread, but history is often made in just that way. More likely, the framers of the [Sherman] Act saw the Gordian knot of conflicting interests as incapable of precise solution."<sup>14</sup> Townsend's discussion of the *per se* rule<sup>15</sup> is particularly good. Overall, he finds antitrust decisions "nebulous" and "as frustrating as they are puzzling."<sup>16</sup> This must seem a truism to all but a few of the antitrust *cognoscenti*, but some of the evidence on which he bases this conclusion is shaky. His history chapter takes its prolegomenon from Justice Holmes's first antitrust dissent, which begins with: "Great cases like hard cases make bad law."<sup>17</sup> This passage has, of course, stimulated much discussion,

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12. See J. Townsend, *supra* note 1, at 25-40. The survey does, however, omit the 1920s, when the Court developed the basic antitrust rules applicable to trade associations and systematically gutted the Federal Trade Commission—a treatment from which that agency has never fully recovered.

13. See, e.g., Baxter, *Placing the Burger Court in Historical Perspective*, 47 Antitrust L.J. 803, 803 (1979); R. Bork, *supra* note 5, at 61.

14. J. Townsend, *supra* note 1, at 30.

15. See *id.* at 38-40. The *per se* rule may be defined as follows: "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal [*per se*], without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *United States v. N. Pac. Ry.*, 356 U.S. 1, 5 (1958) (per Black, J.).

16. J. Townsend, *supra* note 1, at 1.

17. *Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1904)

but not among contemporary antitrust lawyers. Until the Burger Court, virtually all antitrust cases reaching the Court were arguably "great." Can we deduce from Holmes's aphorism that they were also all "bad"? This is the tack Townsend would have us take,<sup>18</sup> but Holmes is arguably an unreliable witness against antitrust. He wrote no significant antitrust opinion for a majority of the Court (apart from the questionable *Window Glass*<sup>19</sup> and the superseded *American Banana*<sup>20</sup>), and the "nature of his contribution

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(Holmes, J., dissenting) (quoted by J. Townsend at 25). Holmes argued that when a holding company is created from the Northern Pacific and Great Northern railroads, evoking high political passion and economic resentment, the Sherman Act is to be read "as if the question were whether two small exporting grocers shall go to jail." 193 U.S. at 402 (Holmes, J. dissenting).

18. "[P]erhaps, as Justice Holmes may have summarized his dissent . . ., one might more charitably observe that bad cases often make bad law." J. Townsend, *supra* note 1, at 88. If that is what Holmes meant, he would certainly have said so: "Like our own Austin, . . . Holmes was sometimes clearly wrong; but again like Austin, when this was so he was always wrong clearly." Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 593 (1958).

19. *Nat'l Ass'n of Window Glass Mfr's v. United States*, 263 U.S. 403 (1923). Justice Holmes, for the Court, found that the agreement in issue did not concern sales or distribution, and thus its legality must depend on the facts. The relevant facts were that the growing economic efficiency of machinery used in the production of glass, coupled with the decrease in available manpower, were posing a serious threat to manufacturers of hand-blown glass. As a result, an agreement was entered into between such manufacturers and the union representative of the labor force whereby half the factories would run exclusively for half the season, and the remaining factories would run during the other half. This would secure employment for all of the labor force for the whole of the season, while saving manufacturers unnecessary expenses from operating undermanned. In view of this, the agreement was seen not to be an unreasonable restraint of trade.

20. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). In July, 1904, the government of Costa Rica, by virtue of its sovereign power, seized plaintiff's banana plantation lying within its jurisdiction. Plaintiff alleged that this action was instigated by the defendant in order to further its monopolistic control over the market and thereby violated United States law. The Court, however, took the view that since the acts took place outside the United States, they were not governed by any acts of Congress. "A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by local law." *Id.* at 359.

For a full discussion of the line of cases superseding *American Banana*, see J. Townsend at 42-88.

[to antitrust] . . . dims the lustre of his otherwise incomparable renown."<sup>21</sup>

Another Justice, Tom Clark, is prominently quoted by Townsend to the effect that businessmen "naturally detest" the "vagueness and uncertainty" of antitrust laws.<sup>22</sup> This is obviously true, but it is only part of the story: businessmen "detest" the certainty of antitrust liability under rigid per se rules even more; the certainty they would much prefer is the certainty of non-liability, and "vagueness and uncertainty" comes in second-best. Further, Clark felt able to offer a very different characterization of the antitrust laws in a different context,<sup>23</sup> thereby illustrating the chameleonic nature of judicial attitudes toward antitrust. As Townsend briefly notes, Europeans who contemplate doing business in the United States find these judicial attitudes "excessively legalistic and not sufficiently pragmatic."<sup>24</sup> As this is a criticism commonly made of European legal systems by those familiar with the common law,

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21. M. Handler, *Antitrust in Perspective* 13 (1957). Welcoming economic concentration, Holmes clashed fiercely on economic issues with his constitutional comrade-in-arms, Brandeis. *Id.* Another famous Holmes aphorism seems broadly representative of the attitudes of the Justices and the "intellectual maquis" (e.g., Herbert Croly, Thorsten Veblen and Charles Beard) of the twenties: "I don't disguise my belief that the Sherman Act is a humbug based on economic ignorance and incompetence." Letter from Oliver Wendell Holmes to Sir Frederick Pollack (April 23, 1910) reprinted in 1 *Holmes-Pollack Letters* 163 (M. Howe ed. 1941). See G. Lodge, *The New American Ideology* 154 (1978). This line of thought was, however, cut off by the Depression and the bureaucratic revival of antitrust late in the New Deal. It is conceivable but fairly unlikely that it will be revived in the future.

22. Clark, *Foreword* to E. Kinter, *Antitrust Primer* at ix (2d ed. 1973) (quoted by J. Townsend at 16). See also *Standard Oil of California v. United States*, 337 U.S. 293, 322 (1949) (Jackson, J. dissenting).

23. Clark stated that, for the Court, antitrust is not  
a riddle in which the participants try to guess the answer  
syllable by syllable. We at least know what the problem  
is and its consequence. The problem is simple. Are  
the parties keeping within the law? The evidence is  
no guesswork either. Perhaps the economists try to re-  
duce it to an enigma, but the Court is able to see  
through their gyrations and come out about right.

Clark, *A Judicial View*, in *Antitrust and the Judicial Process* 17, 18 (1968) (Conference Board, 7th Conf. on Antitrust Issues). Clark was Head of the Antitrust Division and Attorney-General prior to his elevation to the Bench.

24. J. Townsend, *supra* note 1, at 126.

antitrust must be a strange bird to prompt Europeans to return the compliment. This is indeed the case; antitrust is *ius sui generis* from the civil law perspective, combining as it does elements of national and international private, administrative and criminal laws with unique historical and philosophical adjuncts.<sup>25</sup>

The historical, philosophical and domestic elements of antitrust are dealt with adroitly by Townsend, who makes only the briefest of mentions of antitrust problems arising under international law. These fall outside his chosen frame of reference, which is the real and perceived effects of the Sherman Act on United States MNCs. While this truncation of the subject is unobjectionable at one level—a topic must be delimited somehow to remain manageable, and other works<sup>26</sup> deal fairly effectively with the problems that non-Americans face under the United States antitrust laws—it makes the interests of United States MNCs appear more congruent with the public interest than they really are, as I shall argue below.

In 1955, it seemed “clear” that the Sherman Act applied “to acts abroad, performed by an American firm acting alone or in concert with foreign firms with such substantial effect upon American foreign commerce as to amount to unreasonable restraints, attempts to monopolize, or monopolization.”<sup>27</sup> The same is only a little less clear today despite, as Townsend notes, the cases being few and “relatively obscure.”<sup>28</sup> Most of the relevant cases are also studied with regard to their implications for domestic antitrust, and lawyers familiar with the cases will find many old friends appearing in new and interesting configurations in Townsend’s book. He ascribes the earlier, strictly territorial jurisdiction in antitrust to “legal isolationism” and the later and broader “protective principle” to the Court’s “insularity.”<sup>29</sup> This sounds like

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25. See H. Zwarensteijn, *Some Aspects of the Extraterritorial Reach of the American Antitrust Laws* 68, 76-77 (1970) [hereinafter cited as H. Zwarensteijn].

26. See, e.g., H. Zwarensteijn, note 25 *supra*, for a full discussion of this topic.

27. See Report of the Attorney General’s Committee to Study the Antitrust Laws 70 (1955).

28. A. Simons, *The Sherman Antitrust Act and Foreign Trade* 5 (1962) (quoted by J. Townsend at 1). But see notes 63-68 and accompanying text *infra*. Little attention is paid to extraterritoriality in general works on antitrust: for example, a standard 900-page text devotes only three pages to it. L. Sullivan, *Antitrust* § 234, 714-17 (1977).

29. J. Townsend, *supra* note 1, at 41, 47, 75.



a paradox, yet, as with some paradoxes, it is probably true in the sense that both jurisdictional rules reflect a preoccupation with effects on *American* competition to the virtual exclusion of all other considerations. For Townsend, the extraterritoriality of the antitrust laws was expanded in response to the "emergence of the United States as a world power in 1945": America "stood above all others in power and wealth. What it could do, and would do without challenge, might surpass even the forbidden dreams of others."<sup>30</sup> Extraterritorial jurisdiction connotes power, the power to render binding decisions, and America's antitrust rules seem out of step with changes in her relative wealth and status. Townsend does not pursue this line of thought,<sup>31</sup> however, confining himself to the inconveniences experienced by United States MNCs.

From this perspective Townsend's discussion is, with a couple of slips,<sup>32</sup> excellent, although a few cases perhaps deserve more prominence than they receive<sup>33</sup> and a few important cases are

30. *Id.* at 47.

31. Townsend merely states parenthetically that "(The United States assuredly would not allow others to legislate the quantity of *its* exports and imports)." J. Townsend, *supra* note 1, at 85. This is not as obvious as the parentheses suggest: What the United States will "allow" has or may become increasingly irrelevant, and some would argue that Japan is already legislating a high volume of imports for the United States. *See* note 32 *infra*.

32. *See* J. Townsend, *supra* note 1, at 248. Townsend further states that:

[P]ermissible joint arrangements [under the Defense Production Act, § 708 and the Sherman Act] were too limited to enable the [United States oil] companies to counter effectively Libya's nationalization tactics in 1969 and the demands of . . . OPEC . . . the following year. . . . The desire to protect consumer choice rather than business opportunity had set in motion a cascading chain of events that occurred in time to cause a massive transfer of the world's wealth to the OPEC nations.

*Id.* at 137.

With respect, the "chain" of causation was much more complex than this: Gaddafi's actions and the growing dependence of the West on oil imports could hardly have been countered by any conceivable antitrust policy. The footnote to this passage cites Senate subcommittee hearings but states that: "The conclusion is the author's, not the subcommittee's." *Id.* at 202 n. 108.

33. *E.g.*, *Continental T.V., Inc. v. GTE Sylvania*, 443 U.S. 36 (1977); *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964); *Continental*

excluded,<sup>34</sup> presumably because they fall outside his frame of reference. An author is entitled to choose which cases to analyze and how, but Townsend's omission of the most sweeping of jurisdictional statements under the Sherman Act, from *Pacific Seafarers*,<sup>35</sup> is puzzling:

If, as the defendants contend, that policy  
[“limiting the accumulation and exercise of  
dominant economic power”] cannot extend  
to the full sweep of American foreign commerce

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*Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) (conspiracy to monopolize or restrain United States domestic or foreign trade confers jurisdiction even though conduct occurred overseas). *Penn-Olin* is the leading case on joint ventures, devices much in vogue among MNCs, yet it receives only a brief mention: see J. Townsend, *supra* note 1, at 154.

34. *E.g.*, *Branch v. FTC*, 141 F.2d 31 (7th Cir. 1944); *United States v. Joseph Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Cal.), *aff'd per curiam* 385 U.S. 37 (1966). In *Branch* it was held that the FTC has jurisdiction over the false and deceptive advertising of correspondence courses in Latin America by United States companies: much of the objectionable activity occurred in the United States and American competitors have the right to be protected from “defilement.” This is not an antitrust case, but it is commonly cited as an example of the applicable standard of antitrust extraterritoriality: see, *e.g.*, H. Zwarensteyn, *supra* note 25, at 139-40. *Branch* became more important when the FTC's antitrust jurisdiction was expanded from “in commerce” to “in or affecting commerce.” Federal Trade Commission Act of 1914, § 5, 15 U.S.C. § 45(a)(1) (1976). This amendment enables the FTC to take a greater interest in extraterritorial antitrust in the future. This is not mentioned by Townsend, presumably because he restricts his analyses to Sherman Act cases. The FTC does, however, deal with many matters closely analogous to Sherman Act violations. In *Schlitz*, the acquisition of a large Canadian brewery was enjoined despite persuasive arguments that the sole reason for the acquisition was participation in the Canadian market. Like *Penn-Olin*, *supra* note 33, *Schlitz* arises under § 7 of the Clayton Act, which is outside the author's frame of reference: see J. Townsend, *supra* note 1, at 145. At this point, his delimitation of the topic becomes too arbitrary; mergers cannot be sensibly analyzed as Sherman Act violations with only the briefest mentions of the Clayton Act. *Id.* at 145-50.

35. *Pacific Seafarers, Inc. v. Pac. Far East Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968), *cert. denied* 393 U.S. 1093 (1969) (Sherman Act applies to conspiracy legal under *lex situs* and not involving American imports or exports, where one American flag shipper forces another, the plaintiff, out of carriage of goods between Asian ports). The decision can be given a slightly narrower reading, see 404 F.2d at 816, 819, but most commentators apply it broadly: see, *e.g.*, H. Zwarensteyn, *supra* note 25, at 80, 126.

because of the international complications involved, then surely the test which determines whether United States law is applicable must focus on the nexus between the parties and their practices and the United States, not on the mechanical circumstances of effect on commodity exports and imports.<sup>36</sup>

This is the kind of thinking Townsend seeks to rebut throughout the book, although he takes pains to advise the managers of United States MNCs of its effects on their operations.<sup>37</sup> This is undoubtedly the most useful aspect of the book, a "what you can and can't do under the Sherman Act" with the "can'ts" far outnumbering the "cans." The picture Townsend paints for MNC managers is too bleak,<sup>38</sup> but perhaps not by much. He finds that

36. 404 F.2d at 818.

37. See J. Townsend, *supra* note 1, at 123-219.

38. Townsend is arguably too brief and too negative concerning anti-trust exemptions under the Defense Production Act of 1950, § 708, ch. 932, 64 Stat. 798 (1950) (current version at 50 U.S.C. § 2158 (1976)), and the Webb-Pomerene Act, 15 U.S.C. § 62 (1976). See J. Townsend, *supra* note 1, at 135-37. These statutes do, of course, fall outside his frame of reference. He may also take too dim a view of antitrust exemptions arising from actions by a foreign sovereign: see J. Townsend, *supra* note 1, at 82-83, 142-43. It is quite likely that the immunity of foreign sovereigns will be expanded on the basis of a comity and judicial self-restraint akin to the Burger Court's "new federalism" in *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978); *Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978). Insufficiently stressed is the MNC's ability to protect itself against imports from its subsidiaries, licensees or competitors under the Sherman Act, the Robinson-Patman Act, § 2(a), 15 U.S.C. § 13 (1976) (price discrimination), the Anti-Dumping Act, 19 U.S.C. §§ 160-171 (1976) (selling in the United States at lower than home prices or goods' reasonable value), The Tariff Act of 1930, § 337, 19 U.S.C. § 1337 (1976) (as amended) (unfair competition). See, e.g., J. Townsend, *supra* note 1, 159-61, 179-82. Worries that a foreign subsidiary, a device popular with United States business and broadly lawful under anti-trust laws, will be decreed unlawful because the overseas market is too small to support more than one company—J. Townsend, *supra*, note 1, at 142-43—are all but groundless: this has long been recognized as an antitrust defense. *Union Leader Corp. v. Newspapers of New England, Inc.*, 284 F.2d 582 (1st Cir. 1960); *United States v. Aluminum Co. of America*, 148 F.2d 416, 429-30 (2d Cir. 1945). Townsend fails to advise MNC managers of the incredible proof problems involved in bringing an antitrust case with international dimensions. See, e.g., *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F.

"widely disparate" national regimes of antitrust send international "competitors into different races with different rules" and starting points, to the disadvantage of United States MNCs.<sup>39</sup> Whether and to what extent this is in fact true has long been the subject of intense debate, much of which is given its fair say in Townsend's book. What he neglects to mention is that (to extend his metaphor) the notion of different races, rules and starting points can become an all-to-convenient excuse for the losing American runner who stumbles or lacks the stamina to compete for reasons unrelated to antitrust.

In the book, managers of MNCs get to talk back to the antitrust laws. It is always helpful to know what businessmen think about law, and Townsend undoubtedly did the best he could under the circumstances to elicit opinions. There are, however, serious methodological faults to be found with Townsend's opinion survey, some of which he acknowledges,<sup>40</sup> which render problematic any policy conclusions he or we would wish to draw. For example, all of Townsend's interviewees came from seventeen "*Fortune* 500" MNCs each of which had more than \$1 billion in sales in 1974. Not surprisingly, they take a view of their business prospects under an extraterritorial regime of antitrust which is reminiscent of Mathew Arnold's view from Dover Beach.<sup>41</sup> The largest of

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Supp. 889 (E.D. Pa. 1979). These, combined with the paucity of Antitrust Division enforcement resources (mentioned briefly—J. Townsend, *supra* note 1, at 224) and government's relative lack of interest in extraterritorial antitrust enforcement mean that a United States MNC would have to be exceedingly unlucky to be sued by the government. On the other hand, Townsend does not sufficiently stress a significant and growing threat faced by United States MNCs: treble damage suits, trade wars by other means, brought by foreign and American competitors. See Millstein, *supra* note 4.

39. J. Townsend, *supra* note 1, at 127, 124-30.

40. Statistical measures of reliability are impossible because obtaining answers to "a question general in aspect and broad in possibility" necessitates "a descriptive survey," "a nonquantitative pilot study." J. Townsend, *supra* note 1 at 5-7. Verbal data arguably introduces two levels of imprecision—speaking and interpreting—and includes the risk of "leading" questions. Further, bias is possible in so small a sample as 17 MNCs. *Id.* at 5. Townsend nevertheless concludes that: "The effect of the law on the MNC was ascertained by interview." *Id.* at 123.

41. . . . for the world which seems  
To lie before us like a land of dreams;  
So various, so beautiful, so new,  
Hath really neither joy, nor love, nor light,

American companies find they have nothing to gain and everything to lose when (as Harold Fleming puts it) "tropismatically suspicious" government lawyers apply their "doctrine of original sin": "Build a better mousetrap, sell enough of them, and [the] Justice Department . . . will beat a path to your door."<sup>42</sup> Going beyond Townsend's frame of reference, a better "balance" of business opinion would have included the views of smaller exporters, importers and MNCs, which are particularly important in technologically-advanced industries. These firms obtain a limited protection, only some of which is anticompetitive, from American *and* foreign rivals under the antitrust laws. Further, even large MNCs are discovering the balance-sheet magic of a treble damage antitrust suit (which is often the most profitable investment conceivable). No mention is made of this by Townsend or his interviewees.

Managers of seventeen MNCs were questioned about five types of business strategies: export, joint venture, licensing (largely of technology), merger, and forming a subsidiary. Eight MNCs reported that the antitrust laws had no effect on their business decisions, while the other nine reported a total of sixteen effects (plus three "indirect" effects).<sup>43</sup> Townsend finds in this a serious condemnation of antitrust, but it can also be regarded as sixteen out of eight-five (seventeen MNCs multiplied by five types of strategy) or a fairly low average of interference from antitrust. More to the point, Townsend reports that in only three instances was a decision not to enter an overseas market squarely based on antitrust considerations.<sup>44</sup> Two of these instances were reported by

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Nor certitude, nor peace, nor help for pain;  
And we are here as on a darkling plain  
Swept with confused alarms of struggle and flight,  
Where ignorant armies clash by night.

Arnold, *Dover Beach*, Penguin Book of English Verse 344, 345 (J. Haywood, ed. 1956).

42. H. Fleming, *Ten Thousand Commandments* 10, 13, 56 (1951) (anthology of *Christian Science Monitor* articles about antitrust intended "not for lawyers but for people," *id.* at vii). Cf. L. Mason, *The Language of Dissent* 116 (1959) (competition "is something most businessmen like to see in every other business but their own"); G. Steiner, *Business and Society* 414 (1971) (businessmen "think of competition in terms of what their competitors are doing to take business away from them and what they must do to keep and increase their business").

43. J. Townsend, *supra* note 1, at 187 (Table 4.4).

44. *Id.* Townsend concludes that:

"Company 1" (anonymity was respected), about which we learn much in the course of the book. For example:

Company 1 has no aversion to licensing either patents or know-how, but it has great reservations about its inability to protect itself by contract against the reappearance of its own technology in imported form. It complains bitterly, pointing out that such protection is accepted practice overseas.

....

Company 13 has no qualms about licensing. . . . It is not concerned with protecting its domestic markets, because the progress of its technology is so rapid that any licensee would be hard put to invade the U.S. . . .<sup>45</sup>

Some lawyers would conclude that antitrust and patent laws are working as they should here, rewarding innovation but not by so much as to encourage complacency. (In any event, there are good reasons why know-how receives no legal protection, in the absence of a business tort.)<sup>46</sup> The daring Company 13 is also compared with Company 11:

Company 11 . . . will not enter any market where prices are fixed. If already in a market, it will leave when it is undersold. While there has been no effect [from antitrust laws] on

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Extraterritorial application of the Sherman Act generally nullified the market-entry strategy of USMNCs engaged in manufacturing. The interaction of market and antitrust either afforded no chance for an alternative strategy of market entry or made it clear that a change in strategy would bring the same results. In a very few instances a company was able to achieve market entry by changing to a market strategy less advantageous to the company. The matter of market entry was made more painful by the fact that markets lost by U.S. firms could be gained by foreign competitors not subject to corresponding antitrust restrictions.

J. Townsend, *supra* note 1, at 251.

45. *Id.* at 181.

46. See, e.g., *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974); *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969); *Universal Oil Products Co. v. Globe Oil and Refining Co.*, 322 U.S. 471 (1944).

its overall market entry strategy, it could be reasoned that its strategy has been negated.

Company 13 . . . will not participate in any price-fixing scheme as a condition of market entry. Unlike Company 11, if it is already established in a market it will make every effort to stay . . . by shaving profit margins, explaining, "We sharpen up our pencils and find a different way. . . ." Its entry strategy has not been changed, but it, too, could be considered to have been negated.<sup>47</sup>

Arguably, Townsend's conclusions here are both *non sequiturs*. Company 13's strategy seems to be to compete regardless of the peccadillos by others that it would obviously prefer to do without. The Sherman Act does not frustrate this strategy and would even further it, given the right jurisdictional circumstances. The strategy of Company 11 seems to be to prefer the "quiet life" to competition, a strategy the Act abhors. It does not follow that, but for the extraterritorial application of the Sherman Act, this excessively timid behavior would change, however.

Townsend's survey makes no attempt to evaluate the *intensity* of the Sherman Act's effect on business decisions. It seems plausible that an aggressive competitor will pursue very profitable opportunities abroad, letting the antitrust laws go hang and rationalizing the very few resulting lawsuits to the board of directors as an inevitable consequence of the law's "vagueness and uncertainty." (Businessmen would, of course, be exceedingly reluctant to volunteer this kind of opinion.) For such a competitor, only decisions involving business opportunities of marginal profitability will truly be affected by the antitrust laws (discounted by the probability of getting caught). This does not mean that the antitrust laws cannot also serve as a rationalization of managerial timidity to a board of directors or to a diligent researcher such as Professor Townsend. Private practitioners of antitrust, professional naysayers, foster this strategy by and large,<sup>48</sup> stand behind a company when it "com-

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47. J. Townsend, *supra* note 1, at 161.

48. At a conference on March 9, 1977, Douglas E. Rosenthal, the Assistant Chief of the Justice Department's Foreign Commerce Section, Anti-trust Division, stated:

One of my biggest surprises since joining the government three years ago has been the number of

plains bitterly" to all who will listen, and even serve as scapegoats on occasion.

To be fair to Professor Townsend, much of the discussion of his opinion survey is careful and useful. It is insufficient to support his central policy conclusion, however: the Sherman Act has "brought us more than our rightful share of international economic disadvantage."<sup>49</sup> This *may* be true if "us" means very large United States MNCs, but what if the American public is included in "us," as citizens and as consumers of imports and domestically-produced goods? While properly warning us of "the Justice Department's implicit attitude that it alone is capable of determining the public interest,"<sup>50</sup> Townsend goes too far in the opposite direction toward

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times businessmen have told me that their antitrust lawyers advised them they could not enter potentially profitable and non-collusive ventures because of potential antitrust liability. Frequently they are told by their lawyers that it is not even worthwhile looking at the facts of a particular proposed venture. If that is the counsel some businessmen are receiving, it is little wonder that they view us as an impediment to business growth.

Department of Justice Guide for International Operations, [1977] 5 Trade Reg. Rep. (CCH) ¶ 50, 309, at 55, 654 [hereinafter cited as Rosenthal].

49. J. Townsend, *supra* note 1, at xi.

50. *Id.* at 228. A subtle but nevertheless telling example of this "implicit attitude" is offered by a former Assistant Attorney-General:

A company has a perfect right to refuse to give any information. . . . However, it should be kept in mind that except by inquiry and investigation law enforcement officials have no means of distinguishing between those who are complying with the law and those who are violating it. One who refuses to disclose any information to the Government cannot reasonably complain at being forced to engage in litigation although he may be innocent or have a defense. . . . Since the antitrust laws are basically for the protection of business and the public, the course of reasonable cooperation with a Government investigation would seem to be proper and wise in most situations.

Loevinger, *The Department of Justice and the Antitrust Laws*, in J. Von Cise, *Understanding the Antitrust Laws* 235, 247 (rev. ed. 1966). Here, the Antitrust Division is portrayed as the altruistic guardian of both business and the public. It is therefore impossible to conceive of bureaucratic "fishing expeditions" which the businessmen's "perfect right" is designed to frustrate.



making antitrust policy the hostage of "Fortune 500." The Anti-trust Division and MNCs both exercise a power which floats free of its social base, subject to few of the cross-cutting influences brought to bear on, for example, Congress, the President and many foreign governments. The Division and MNCs alike propose policies and the Supreme Court, likewise immune to most forms of outside pressure, disposes of these recondite matters about which the American public has few if any opinions. This *ménage à trois* is inherently unstable, incapable of producing a coherent and consistent flow of antitrust policy, but this does not justify the giving over of policymaking to big business.<sup>51</sup>

Even if, as seems likely, Congress now gives MNCs a more sympathetic hearing, Townsend argues persuasively that businessmen at present lack the evidence needed to justify plausibly the elimination or radical pruning of extraterritorial antitrust.<sup>52</sup> Con-

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51. See Musgrave, *The Public Interest*, in *Nomis V: The Public Interest* 107, 108 (C. Friedrich ed. 1962): "The standard of public interest is provided by the results which would be obtained under perfect competition. Policy measures to come closer to these results, therefore, are in the public interest." This is an economist's careful attempt at a general definition, permeated with American ideals of liberalism and capitalism, which also characterizes the goal of antitrust policy most frequently mentioned by the Court. To circumvent this goal, special interests must justify themselves on the basis of superior performance in the public interest. See Cohn, *The Public Interest*, in *Nomis V: The Public Interest* 115, 119, 121, 124 (C. Friedrich ed. 1962); J. Townsend, *supra* note 1, at 227. Arguably, the recent economic performance of United States MNCs has been far from superior; on occasion, their political performance has been appalling. MNCs thus face a heavy burden of demonstration that relaxing the enforcement of extraterritorial antitrust will lead to a future superiority. But see *id.* at 235: "The public interest has been neither well enough nor forcefully enough defined to bring about repeal, amendment or disuse of the Sherman Act and its extraterritorial precedents." Could this be because the Sherman Act is the public interest, at least in the view of Congress from 1890 to the present—with due allowance made for legislative inertia and temporary policy changes during World Wars I and II and the early New Deal?

52. J. Townsend, *supra* note 1, at 227-28, 232-35. "Whatever the pressures or policies of local governments, foreign investment has been supremely attractive to U.S. business." *Id.* at 141. Supremely attractive, I would add, despite "the pressures or policies" of American antitrust. Townsend cites Jean-Jacques Servan-Schreiber's *American Challenge* (1979), *id.* at 131, without pointing out that he voices the fears of influential segments of European business and political opinion that American business was outstripping the Europeans in their own economic and political markets. This argu-

gress might abolish the extraterritorial application of the Sherman Act anyway, in reaction to the "new protectionism" spreading through world trade since the oil crisis and worldwide recession began in 1974-75. Countries are placing primary reliance not on protective tariffs or quotas but on "rationalization": direct subsidies, preferential tax and credit treatment (e.g., of Chrysler in the United States), employment schemes which strengthen ailing industries, and the fostering of international cartels in, for example, steel and shipbuilding.<sup>53</sup> A clever American foreign policy initiative might be used: although the abolition or truncation of extraterritorial antitrust would be a basically mercantilist step, in comparison to the United States policies that now obtain, it could be "sold" to foreign governments as demonstrating respect for their sovereignty.

Would such a policy be in the interest of the American public and/or the world community? A wide variety of new international cartels could be formed: the cartelization of many industries is impractical if United States MNCs do not join, but most of these would participate gleefully if it were lawful to do so. We could quickly find ourselves back in a 1930s-style international economy, as production declines worldwide (rationalized in terms of, for example, eliminating "excess capacity") and protectionist policies by one government provoke retaliatory measures by others in a desperate scramble for dwindling markets. Expectations of retaliation would reduce private investment in international activities, and the resulting decrease in economic growth and increase in unemployment would fuel domestic demands for additional protectionist measures.<sup>54</sup> The extraterritorial application of American antitrust is one of the few means available to forestall this eventu-

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ment would be far less plausible today, but not because of an extraterritorial antitrust which has remained more or less unchanged over the relevant time period.

53. See Belassa, *The 'New Protectionism' and the International Economy*, 12 J. World Trade L. 409, 413-22 (1978).

54. *Id.* at 421, 428-31. See Adams, *The Case for a Comprehensive and Vigorous Antitrust Policy*, in *Antitrust Policy and Economic Welfare* 1, 13 (W. Sichel ed. 1970); Rosenthal, *An Overview of the Guide and its Objectives*, in *Perspectives on the Extraterritorial Application of United States Antitrust and Other Laws* 82 (J. Griffin ed. 1979), wherein the author states: "it is difficult to be self-righteous about . . . export cartels . . . while being indignant about OPEC. . . . 'Beggars my neighbor' always has its limits." *Id.* at 86.

ality,<sup>55</sup> this may be one of the reasons why some foreign governments are so strongly opposed to United States antitrust policies. For example, the United Kingdom, staunchly protectionist even under the Tories, has promulgated a sweeping statute<sup>56</sup> designed to nullify within its borders the application of American antitrust. To be sure, the attitudes reflected in this kind of legislation are justified by assertions that extraterritorial antitrust creates friction in international relations by offending the dignity of sovereign states and that it is otherwise contrary to international law. These issues are mentioned by Townsend, but only in passing.<sup>57</sup> Allegations of international law violations are implausible so long as rules concerning a state's legislative capacity in the area of industrial organization remain hopelessly vague and incomplete. For the foreseeable future, each country will continue to act in accordance with its own public policy (*ordre public*).<sup>58</sup> Disputes concerning industrial organization policies are, however, real and grow-

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55. The United States was established as a "free trade zone" in 1789, and the Sherman Act was passed when it became too painfully evident that cartels and combines were able to restrain trade. Davidow, *U.S. Antitrust, Free Trade, and Nonmarket Economies*, 12 J. World Trade L. 473 (1978). It is not ethnocentric to contend that twentieth century trade in the West has reflected the same kinds of problems faced by American states in 1890: perhaps there are no antitrust "flags of convenience" corresponding to the incorporation laws of New Jersey and Delaware, but cartels and MNCs have proved all but immune to the laws of particular countries and international rules have been few and tolerant of trade restraints. American rules have exerted a measure of control, without necessarily embodying the policies that are best for the international community. See text accompanying note 26 *supra*. Historical, cultural and political differences among nations are particularly pronounced with regard to the extraterritorial application of national laws. See H. Zwarensteijn, *supra* note 25, at 85.

56. The Protection of Trading Interests Act, 1980, c. 11 (Halsbury's Current Statute Service 305 (Issue No. 77)). See also Mannick, *Antitrust*, 21 Harv. Int'l L.J. 727 (1980).

57. See J. Townsend, *supra* note 1, at 128-30.

58. See Shenefield, *The Perspective of the U.S. Department of Justice*, in Perspectives on the Extraterritorial Application of United States Antitrust and Other Laws 12, 13-21 (J. Griffin, ed. 1979); see also Grendell, *The Antitrust Legislation of the United States, the European Economic Community, Germany and Japan*, 29 Int'l & Comp. L.Q. 64, 65-66 (1980); H. Zwarensteijn, *supra* note 25, at 100, 159. The matter is currently under consideration by UNCTAD: see Report of the Third Ad Hoc Group of Experts on Restrictive Business Practices on its Fourth Session, TD/B/C.2/AD.6/13.

ing in the realm of international relations. An OECD-sponsored Consultation and Conciliation Procedure<sup>59</sup> has registered limited successes, but many problems remain. Is it in the interests of the American public to antagonize foreigners by implementing anti-trust policies?

I would argue that there is no simple and clear-cut answer to this question: balances must be struck separately for each aspect of antitrust policy, between the net domestic benefits of antitrust enforcement and the extent to which foreigners are antagonized. Courts have been striking these kinds of balances, under a "rule of reason" analysis,<sup>60</sup> in certain areas of domestic antitrust for years, although *Timken*<sup>61</sup> flatly rejected its application in extra-territorial antitrust cases where the per se rule would apply to the equivalent domestic violations. While Townsend would apparently prefer to abolish extraterritorial antitrust jurisdiction altogether, he seems to regard the rule of reason approach as a more easily attainable second-best.<sup>62</sup> Starting from different per-

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59. See Recommendation of the Council (OECD) Concerning a Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade (1973), 19 Antitrust Bull. 283 (1974).

60. See, e.g., Justice Brandeis' formulation in *Bd. of Trade of the City of Chicago v. United States*, 246 U.S. 231 (1918), where he stated:

Every agreement concerning trade . . . restrains. . . . The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business . . . ; the nature of the restraint and its effect, actual and probable. [K]nowledge of intent may help the court to interpret facts and to predict consequences.

*Id.* at 238. Cf. the "per se" rule, discussed at note 15 and accompanying text *supra*.

61. *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); see text accompanying note 10 *supra*.

62. See J. Townsend, *supra* note 1, at 226-27, 235-36 (citing Kingman Brewster, Jr.). This is also a dominant thread in businessmen's thinking: "Basically they [antitrust laws] are good statutes, and they have served a good purpose except where they have been construed in doctrinaire ways by government and the courts. . . . The need is for greater flexibility, more responsiveness to dynamic economic changes, more adjustment to the realities of business operation today." H. Brayman, *Corporate Management in a World of*

spectives and considering different policy issues, Townsend and your reviewer arrive at one conclusion together: the desirability of an extraterritorial rule of reason. If Townsend is serious about advocating rule of reason analyses, he should have dealt in detail with significant new cases indicating that the Burger Court favors this approach.<sup>63</sup> Perhaps two of these cases, decided in 1978 and 1979, came too late for inclusion in a book published in July, 1980.

This does not, however, explain Townsend's omission of a "jurisdictional" rule of reason directly on point, framed by Judge Choy in *Timberlane Lumber*:<sup>64</sup> "[I]t is evident that at some point

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Politics 216 (1967).

63. See, e.g., *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1 (1979); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). Only *GTE* receives (brief) mention, and in a footnote at that. J. Townsend, *supra* note 1, at 198 n.74. Townsend prefers to discuss *United States v. Arnold, Schwinn & Co.*, 338 U.S. 365 (1967) in the text, J. Townsend, *supra* note 1, at 132, relegating to a footnote the fact that *GTE* "overruled *Schwinn* in part." J. Townsend, *supra* note 1, at 198 n.74. Unfortunately, the part of *Schwinn* that was overruled is the part relied upon in the text.

64. *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 609 (9th Cir. 1976). This is consistent with the position adopted by the Restatement (Second) of the Foreign Relations Law of the United States (1965), §§ 18, 40. See Shenfield, *The Perspective of the United States Department of Justice*, in *Perspectives on the Extraterritorial Application of United States Antitrust and Other Laws* 12, 22-24 (J. Griffin ed. 1979). Even in *Pac. Seafarers, Inc. v. Pac. Far East Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968), *cert. denied* 393 U.S. 1093 (1969), which adopts a sweeping standard of extraterritorial jurisdiction, the court admits that: "[I]t may be fairly inferred, in the absence of a clear showing to the contrary, that Congress did not intend an application [of the Sherman Act] that would violate principles of international law." 404 F.2d at 814. See text accompanying note 34 *supra*. There are dangers associated with giving courts too free a rein in defining and balancing domestic and foreign interests under a rule of reason: see, e.g., *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] A.C. 535. A business and patents were purchased on the basis that the seller would not compete with the new company anywhere in the world for 25 years. An English court upheld the restraint, despite its being clearly unlawful under *Mitchell v. Reynolds*, 24 Eng. Rep. 347 (1711). The presumed basis of the decision was a reluctance to increase competition in arms sales to tribes who might later make war against the Crown. L. Schwartz, *The Enterprise and Economic Organization* 36 (3d ed. 1966). Similarly, United States courts could become involved, for good or for ill, for example, in defense policy, which can hardly

the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction." Choy would balance United States and foreign interests by examining the effects of the restraint, actual or intended, and by requiring "a *greater* showing of burden or restraint" where foreign interests are involved.<sup>65</sup> Significantly, the Justice Department indicated in 1977 that it would follow an almost identical approach.<sup>66</sup> If it were also adopted by the Supreme Court, there would be no conceivable need for Congressional action - unless Congress wishes to bolster the new protectionism. Recent cases suggest that the Burger Court would be sympathetic to a jurisdictional rule of reason,<sup>67</sup> but its exercise of self-restraint, and its unwillingness to review the "big" cases in antitrust<sup>68</sup> suggest that a clarification will not be forthcoming soon.

In sum, my criticisms of Townsend's book suggest that he

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be deemed an appropriate sphere of influence for the judiciary.

65. 549 F.2d at 613. *See also* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1291-93, 1297-98 (3d. Cir. 1979) (United States courts must balance antitrust enforcement against international comity when deciding whether to exercise extraterritorial jurisdiction). *See also* Norton, *Extraterritorial Jurisdiction of United States Antitrust and Security Laws*, 28 Int'l & Comp. L.Q. 575-97 (1979).

66. *See* Rosenthal, *supra* note 48:

[I]t may be appropriate for United States courts to refrain from asserting [antitrust] jurisdiction . . . where (1) the effect of the conduct in the United States is not substantial, (2) the United States public interest in having its law enforced is not substantial, (3) the United States court is not capable of achieving compliance with United States law, and (4) most of the institutions and conduct in question are located or take place in the foreign jurisdiction. When all these factors are present, or one or more of them predominate, imposing United States jurisdiction is inappropriate and would not only improperly interfere with foreign sovereignty but could unduly burden United States businessmen in competition with some foreign firms.

*Id.* at 55, 655 (footnote omitted).

67. *See* New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96 (1978); Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978); and cases cited note 63 *supra*.

68. *See* Posner, *The Antitrust Decisions of the Burger Court*, 47 Antitrust L.J. 819, 821, 824, 826 (1979).

would have had to analyze extraterritoriality from additional perspectives in a much longer book, in order to justify his policy conclusions adequately. The book he *did* choose to write is an excellent one, nonetheless. It is, perhaps, a little out of date, but much less so than the standard works on the subject.<sup>69</sup> He gives us an extensive bibliography and more exhaustive footnoting than the economics of publishing might lead us to expect today. Townsend's prose is clear, marred only by the occasional mixed metaphor or malapropism,<sup>70</sup> and his chosen combination of legal analysis, advice to businessmen, and surveys of business opinion make for an interesting read.

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69. See, e.g., K. Brewster, Jr., *Antitrust and American Business Abroad* (1958); W. Fugate, *Foreign Commerce and Antitrust* (2d ed. 1973).

70. One example of such a slip is the following passage:

In early 1978 the Carter Administration put together a task force. . . . I was heartened to read that my iceberg was going to be brought out of the closet. . . . At the same time new laws had broadened the overseas reach of the Justice Department and put new fire in the eyes of its precedent makers. The antipodes were unmistakably upon us and they forecast more evil than good. [T]he mountain gave forth the proverbial mouse and my iceberg resumed its original position.

J. Townsend, *supra* note 1, at xii. Like most of us, Professor Townsend needs an editor—or a geologist in this instance. The gloomy forebodings I had when reading this paragraph in the "Preface" were quickly dispelled by the text itself. The iceberg, the mountain and the mouse do, however, reappear at intervals, joined by a glacier. The book was printed from a photo-reduced typescript and, although the book presumably costs less as a result, this production process seemed to obviate the few editorial touches that were necessary here.

## BOOK REVIEW

International Liquidity Issues. By Thomas D. Willett. Washington: American Enterprise Institute for Public Policy Research, 1980. Pp. 114. \$5.25

*Reviewed by Raymond J. Waldmann, Esq.\**

Casual browsing through Willett's latest study, *International Liquidity Issues*, is not for the timid.<sup>1</sup> This publication, one of American Enterprise Institute's series of studies in economic policy, reviews recent episodes in the evolution of international finance. Willett's contribution offers first a lucid defense of the managed floating exchange rate system, which has existed since the 1971 Smithsonian agreements, and, second, some suggestions for modest improvements in the existing system and the operation of the International Monetary Fund (IMF).<sup>2</sup> While the audience for these observations may be a small and largely technical one, it is also likely to be an influential one in light of Willett's experience and wide-ranging scholarship in this field.<sup>3</sup>

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1. T. Willett, *International Liquidity Issues* (1980) [hereinafter cited as Willett].

2. The IMF was formed in 1944 at the Bretton Woods Conference. Its principal architects were Lord Keyes of the British Treasury and Dr. Harry White of the United States Treasury. See E. Goldenweiser & A. Bourneuf, *The Bretton Woods Agreements*, Federal Reserve Bulletin, (September, 1944).

3. Thomas D. Willett, an AEI adjunct scholar and Horton Professor of Economics at Claremont Graduate School, has served as Deputy Assistant Secretary of the Treasury for International Research.



The introduction to the study assesses the developments of the early 1970's, which focused worldwide attention on the connection between the expansion of international liquidity, the amount of money in the world economy, and worldwide inflation.<sup>4</sup> Liquidity expanded rapidly at the time of the breakdown of the Bretton Woods fixed exchange rate arrangements.<sup>5</sup> The expansion was compounded with the huge increases in oil prices in 1973 and 1974 and the resulting enormous balance of payments surpluses of the OPEC countries. Willett concludes that these new realities require substantial rethinking of the issues surrounding international liquidity.

The second section of the study analyzes the emergence of current international liquidity concepts.<sup>6</sup> Willett begins by evaluating the degree to which economic concepts rooted in national monetary behavior can be generalized to explain international events. He finds the incentives and constraints operating on governments when controlling domestic monetary supply to be significantly different from those controlling their international monetary behavior, and thus of limited applicability.<sup>7</sup> Instead, one must focus on the unique institutions and incentives of the international system.

The study then describes these unique factors, starting with the liberal gold standard system that functioned during the latter part of the nineteenth century until 1913. Nations were committed to liberal trade policies, fixed exchange rates and the achievement of long-run equilibrium in the balance of payments through automatic adjustments. Countries running surpluses as well as those running deficits would be forced to adjust to restore equilibrium. In practice, of course, the extent, nature and rapidity of adjustment varied from country to country, situation to situation, but the theory was adhered to by all major players in the game.<sup>8</sup>

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4. Willett, *supra* note 1, at 1-5.

5. For a more introductory treatment of this and other international economic problems, see P. Samuelson, *Economics* 645-724 (10th ed. 1976).

6. Willett, *supra* note 1, at 6-75.

7. For contrary views on this conclusion see, e.g., the discussions and references in M. Whitman, *Global Monetarism and the Monetary Approach to the Balance of Payments*, 3 *Brookings Papers on Economic Activity* 491-555 (1975).

8. For a further analysis of the actual operation of the gold standard during the nineteenth and twentieth centuries, see A. Bloomfield, *Monetary Policy Under The International Gold Standard: 1880-1914* (1959).

After the First World War and during the interwar period, domestic macro-economic conditions more heavily influenced government policies, and the international monetary system became less automatic in operation. During the great depression of the 1930's each country tried to stimulate domestic employment through devaluation and protectionist trade policies, regardless of their international impact. As a result, world trade was crippled; and employment was reduced even further.<sup>9</sup>

After World War II, attempts were made to restore the system by institutionalizing the pressures to make exchange rate adjustments through the IMF, to restore respectability to the gold standard, and to prevent destructive trade practices through the General Agreement on Tariffs and Trade.<sup>10</sup> Exchange rates were not adjusted with as much frequency as expected, however. Official prestige became associated with maintaining constant exchange rates, and rigidities prevented the operation of the system as designed.<sup>11</sup> Thus the ground was prepared for the breakdown of the Bretton Woods agreements in the early 1970's.<sup>12</sup>

Willett then analyzes the causes of the liquidity explosion since the 1970's, and its impact on world inflation.<sup>13</sup> Willett argues persuasively that the explosion of officially held monetary reserves altered the perception of monetary authorities, the willingness to adjust, and even ratcheted up the minimum levels of reserves which governments sought to hold.<sup>14</sup> This part of the study, the most technical and arcane for the general reader, deals extensively with an interpretation of events and statistics of that period.

Willett next reviews the liquidity implications of the 1973

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9. Willett, *supra* note 1, at 13.

10. On the establishment of the postwar international monetary system, see T. Willett, *Floating Exchange Rates and International Monetary Reform* (1977) and the references cited therein.

11. See, e.g., J. Murphy, *The International Monetary System* (1979).

12. Willett attributes this breakdown to the inability of the system to adjust to the increase in supply-determined international liquidity caused by the increased size of the United States payments deficit. This was the result of the efforts by the United States to finance the Vietnam War without an increase in taxes thereby overburdening the United States economy. Willett, *supra* note 1, at 28.

13. *Id.* at 29-50.

14. For a further discussion of the policy reactions by the major industrial countries to this monetary expansion see L. Laney & T. Willett, *The International Liquidity Explosion and Worldwide Monetary Expansion: 1970-1972*, Claremont Working Papers (Claremont Graduate School, (1980)).

oil shock and succeeding events through the 1970's.<sup>15</sup> The accumulations of reserves by the oil exporting countries were substantial, but not so large as some of the early forecasts.<sup>16</sup> Nevertheless, he concludes that the ability of the international financial system to accommodate the shock was probably greater under floating rates than it would have been under the Bretton Woods fixed exchange system. Similarly, for many of the same reasons, Willett feels that the large dollar holdings abroad currently should not be viewed in isolation as threats to the soundness of the dollar.

His analysis emphasizes the need to look beyond the behavior of reserve aggregates in order to determine the effects of liquidity expansion. Reserve aggregates held by governments and their rates of growth are not, taken alone, appropriate measures of the effectiveness of the system. Thus the problem of international supervision of the adjustment process must be confronted directly, not just as a reaction to the size of the reserve aggregates.

The third section of the study develops this theme and offers some specific proposals for policy making.<sup>17</sup> Willett argues that various bureaucratic, political and economic incentives make the current international monetary arrangements considerably more stable than many critics have argued. It must be noted in passing that Willett was Deputy Assistant Secretary of the Treasury in the early 1970's and thus is associated with (and perhaps inclined to defend) the changes he describes. He refers to various models for organizing the international monetary system, including the "free for all regime," the automaticity of the gold standard, supranationality with the IMF as a truly international central bank, hegemony with one country (such as the United States) in control, and multilateral negotiation.<sup>18</sup> He suggests that the most practical solution would be a combination of judgmental international guidelines coupled with a great deal of passivity on the part of the United States.<sup>19</sup> This would argue for a large element of "benign neglect"

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15. Willett, *supra* note 1, at 50-76.

16. See T. Willett, *The Oil Transfer Problem and International Economic Stability*, Princeton Essays in International Finance, No. 113 (1975).

17. Willett, *supra* note 1, at 76-101.

18. *Id.* at 81-82. These models are from B. Cohen, *Organizing the World's Money: The Political Economy of International Monetary Relations* (1977).

19. For an elaboration on this solution see T. Willett, *Floating Exchange Rates and International Monetary Reform* (1977).

toward the United States balance of payments, a position held by many associated with the freeing of exchange rates in the 1970's.

Willett rounds out this section with a reasoned argument that current deviations from a desired economic optimality are not sufficient to trigger major international monetary reform. Instead, he argues persuasively for marginal improvements in the existing system. Such improvements would include allowing the expansion of the special drawing rights (SDR), tying the expansion of SDRs to a greater ability of the IMF to monitor official dealings in exchange and money markets, and allowing for substitution facilities at the IMF so that countries accumulating less desirable currencies may, under certain conditions, exchange them for SDRs or more useful reserve currencies.<sup>20</sup>

In a brief final summary chapter, Willett offers some policy-oriented conclusions.<sup>21</sup> The first three deal with the incentives facing national decision makers, the inadequacy of reserve aggregates as a guide to liquidity policies, and the importance of continuing flexible exchange rates combined with surveillance of official borrowing from private financial markets. Willett's fourth conclusion is that the explosion of liquidity had some effect on worldwide inflation, but much less than that attributed to it.

His last four points focus on the technical functioning of the international monetary system and the IMF, recognizing the fact that countries will not easily sacrifice national sovereignty. Willett argues that the expansion of the Euro-currency markets and official borrowing from private institutions have not caused global inflation or loss of financial discipline. Major international capital flows reflect the fundamental conditions of particular countries, and are thus not in themselves bad; they are only the "bearers of bad tidings." Finally, the IMF needs resources for discretionary lending in cases in which substantial official exchange market intervention is desirable. At bottom, however, stable national economic and financial policies and continued strengthening of the basic fabric of international economic cooperation are more important sources of international monetary stability than

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20. Created by the IMF in 1967, Special Drawing Rights are accounting units, distributed among member-countries of the IMF. They are usable to cover balance-of-payments deficits. D. Snider, *Introduction to International Economics* 369-70 (5th ed. 1971).

21. Willett, *supra* note 1, at 102-03.

the IMF or other institutional adjustment mechanisms.

This study is a tightly reasoned and worthwhile analysis of significant problems not usually addressed in the pages of the business or legal press. It will be instructive for those with the time and inclination to digest it. The questions addressed are primarily economic, not legal ones. For those interested in the evolution of the managed floating rate exchange system and some of the issues now before the international financial community, the book will be of value.

It should be clear from this brief and necessarily superficial review that *International Liquidity Issues* is not a work for everyone. The intended consumers of Willett's study are presumably government policy makers, negotiators and lawyers. Willett's defense of the exchange rate system and his pleas for modest modifications will provide much grist for their mills. A second audience will be found among economists, academicians, and those other writers whose works are so extensively noted in Willett's footnotes and bibliography. For those audiences, the study contains a great deal, and will aid in their search for a more stable international monetary system.

## BOOKS REVIEWED

**Regulating International Business through Codes of Conduct.** By Raymond J. Waldmann. Washington: American Enterprise Institute for Public Policy Research, 1980. Pp. 139.

Recognizing that there is a continuing American interest in the development of effective international regulatory regimes, Mr. Waldmann discusses the creation of Codes of Conduct to regulate multinational enterprises and international business transactions. The book begins with Aldous Huxley's observation that: "Asians and Africans do not forget [imperialists] and are so far from forgiving that, if they can thereby do some harm to the ex-imperialists, they will blithely damage themselves, even commit suicide."

Codes of Conduct, regulating the activities of capital that is primarily from the industrialized nations, have become a focal point in the North-South dialogue. Will the Third World nations blithely damage themselves in the process of creating these new Codes of international regulation? Mr. Waldmann points to the possibility, but not the inevitability, of this result.

Two existing international agreements are examined: the Andean Investment Code and the Organization for Economic Cooperation and Development (OECD) code for multinational enterprises. Of particular importance is the discussion of the impact of the Andean Code and the responses it has elicited from investors and potential investors. While apprehension has been expressed and the fear voiced that future direct investment will be drastically reduced, no major shift in investment behavior has, in fact, occurred.

Mr. Waldmann then examines three new codes: the UNCTAD Code of Conduct for Liner Conferences, adopted in 1974 but not

yet in effect; the UNCTAD Code of Conduct for Transfer of Technology, in the stage of negotiation; and the Code of Conduct for Transnational Corporations, under discussion at the United Nations. These documents propose sweeping changes and are based on principles alien to the legal systems of the industrialized nations.

The outcome is in doubt. In his concluding remarks, the author recognizes the "real possibility . . . that the codes could be discriminatory, nationalistic, and mandatory . . ." leading to increased tension between North and South and a slowing of the growth of the international economy. Mr. Waldmann suggests that the United States must work constructively in the negotiating process to ensure that American interests are accommodated and worldwide growth fostered.

**Transnational Mergers and Acquisitions in the United States.** By Sarkis J. Khoury. Lexington, Mass.: Lexington Books, 1980. Pp. 293.

The author discusses in detail numerous issues relating to the massive inflow of foreign capital and resultant acquisitions of American firms. Approximately one-half of foreign investment ventures are now accomplished by means of acquisition of existing American firms. Although the book is primarily an economic and business analysis there is a well-documented section on the legal issues involved. The subjects treated include: statutory restrictions or prohibitions to foreign ownership in key industries; antitrust policy; disclosure requirements under the Williams Act; state tender offer regulations; and state and federal tax statutes.

**Policy and Politics in Britain: The Limits of Consensus.** By Douglas E. Ashford. Philadelphia: Temple University Press, 1981. Pp. 330.

There is little doubt that the advanced form of the welfare state has greatly changed the relation of politics to policymaking in every society. Britain is by no means alone in finding government and administration severely strained as the scope and complexity of the welfare state increase. In this comprehensive and contextual study, Mr. Ashford examines how particular historical, institutional and political constraints affect British effectiveness in planning and implementing Government programs.

In the British system, parliamentary supremacy rests on the

widely accepted elite consensus that took shape a century or more before the British democracy took over the broad responsibilities associated with the modern welfare state. Modern political parties, mass democracy, even a modern administration were grafted onto a working system but the essential principles of cabinet and ministry responsibilities have survived with relatively little modification. According to Ashford, a scholar in the field of comparative public policy, the result has been a concentration of power at the top, while demands on Government have proliferated.

The analysis offers a strong point of view, unusual in a textbook, that is sure to invite scholarly debate. For example, it argues that although power is quite concentrated in the British system, it is exercised most often in the direction of avoiding decisions. More often than not, the grand adversarial politics played out in Parliament are ineffective in dealing with the complexities of the modern welfare state. In practice, when major changes in policy are at issue, Labor and Conservatives may act less like true antagonists and more like two groups sharing a consensus.

This book is the first in a series that will compare and discuss the governments of the United States, Japan, West Germany, France, and Sweden as well as Britain from a policymaking perspective.

Essential to its comparative approach, the books in the series have selected common policy cases. In turn, each of the policy analyses follows a common format. First the *context* of the problem is discussed: its historical roots, competing perceptions of the problem by major political and social groups, and its interdependence with other problems facing the country. The second section deals with the *agenda* set out for the problem: the pressures generating action and the explicit and implicit motives of important political actors. The third section deals with *process*: the formulation of the issue, its attempted resolution and the instruments involved in policy implementation. The fourth and final section of analysis traces the *consequences* of policy for official objectives, for the power distribution in the issue area, for other policies, and for the country's capacity to make policy choices in the future.

**The Quality of Mercy: Amnesties and Traditional Chinese Justice.** By Brian E. McKnight. Honolulu: University Press of Hawaii, 1981. Pp. 172. (\$15).

This work focuses on a striking aspect of traditional Chinese justice, the "great act of grace," an empirewide amnesty that emp-



tied the prisons and erased the legal record.

While the concept of amnesty is not unknown in other legal systems, the author points out the unique application of it in the Chinese system. In medieval China, every two years on average, the state opened its prison doors, the docket was cleared, the jails were emptied and the open cases were closed.

The reasons why governments in the early empire let their prisoners out and why later governments gradually abandoned this policy are key questions that the author poses in this thorough examination of the amnesty system.

The answers to these questions, McKnight suggests, are to be found in the size and shape of the Chinese bureaucracy and in its efforts to relieve pressures on its criminal justice system.

Although primarily addressed to those interested in the history of China, this well researched and thoughtful study holds much of value for students of legal history. Few works have been written on the role of law in Chinese life. This study makes an important contribution to what will surely be a growing area of research and study.