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Privatization in Britain - The Institutional and Constitutional Issues

Cento G. Veljanovski

PRIVATIZATION IN BRITAIN — THE INSTITUTIONAL CONSTITUTIONAL ISSUES

CENTO VELJANOVSKI*

I. INTRODUCTION

Privatization is the transfer of activities and production from the public sector to the private sector. It is a policy which has gained momentum in the last decade.[1] Great Britain, where the direct involvement of the state in production and in the provision of goods and services is much greater than that of the United States, is at the forefront of this movement; followed at the obligatory Gallic distance is France and more recently Japan. In each of these countries the reasons for and the nature of privatization differs substantially. The terms of the debate over privatization appear different from that in the United States because the privatizing countries start from a position where public ownership is more significant and has been the usual technique of intervention, particularly for the utility industries.

France's privatization program pulls back from privatizing the utilities whereas Britain and Japan have extended privatization to this heartland of state control, arguing in Britain's case that private but regulated monopoly is more efficient than public monopoly. In an important sense Britain is moving rapidly towards the United States regulated industry model where utility industries are regulated by independent utility commissions and subject to rate setting and quality of service obligations.

There is a tendency to view privatization as a simple transfer of ownership. However, this is not the case, particularly for the utility industries. Privatization in practice involves a complex and simultaneous change in the ownership (itself a multi-faceted concept) and in the regulatory structure. In many cases it also involves the liberalization of markets; that is, the removal of legal barriers to entry and competition. In Britain, privatization has been accompanied by a radical and major institutional change in British public administration. With privatization has come explicit economic regulation and the rise of the regulatory agency. These institutional innovations have created a wide range of constitutional, legal and economic issues which have not been seriously addressed. Many of the matters discussed in

* Research and Editorial Director, Institute of Economic Affairs, London.

1. For a detailed discussion of Britain's privatization program see C. VELJANOVSKI, SELLING THE STATE: PRIVATISATION IN BRITAIN (1987).

Professor Cass' paper[2] parallels those relevant to the present phase of Britain's privatization.

British legal scholars and lawyers are only dimly aware of these developments.[3] Moreover, the conceptual apparatus used by English public lawyers is wholly inadequate to deal with the issues that are central to privatization. There is no law-and-economics tradition in this area of scholarship, even though the area is one which lends itself most naturally to economic applications. The remarkable thing is that in a period of transition and great policy development the whole area of institutional design has been ignored by lawyers and economists. British lawyers, for the most part, seem satisfied to follow developments and to engage in rather sterile discussions about judicial review, legitimacy and accountability without the benefit of a well developed framework of analysis.

This commentary will relate Professor Cass' observations to what has occurred in Britain in the last seven years, where the privatization program of the Thatcher administration has gained momentum and changed the national consensus about the role of the state in the economy. This paper will not be a direct commentary on the principal paper because I am not sufficiently familiar with the American approach to make any informed comments. Rather, in the spirit of Adam Smith, this essay will employ the principles of comparative advantage and division of labour by discussing what the author knows, while hopefully covering the same topics as Professor Cass. The paper has two principal functions. The first is to provide the background to Britain's privatization program and the progress which has been made so far. The second will be to consider the issues surrounding one aspect of the regulatory structure which has grown to control the utility industries. To date the Thatcher government has partially privatized two utilities, namely British Telecom and British Gas, and the government is committed to selling all the state-owned enterprises. This has led to the growth of explicit and often novel economic regulation administered by new regulatory organizations. The nature of this regulation has been discussed elsewhere.[4] The major area of concern is whether, in the design of these regulatory organizations, sufficient thought has been given to some of the

2. R. CASS, PRIVATIZATION: FORMS, LIMITS, AND RELATION TO A POSITIVE THEORY OF GOVERNMENT (1987).

3. T. PROSSER, NATIONALISED INDUSTRIES AND PUBLIC CONTROL-LEGAL, CONSTITUTIONAL AND POLITICAL ISSUES (1986); Graham & Prosser, *Privatising Nationalised Industries: Constitutional Issues and New Legal Techniques*, 50 MOD. L. REV. 16 (1987). *See also* Lewis & Harden, *Privatisation, De-Regulation and Constitutionality: Some Anglo-American Comparisons*, 34 N. IRELAND LEGAL Q. 207 (1983).

4. C. VELJANOVSKI, *supra* note 1, at 140-64.

problems. The concerns which one finds rehearsed in the United States over accountability, capture and performance criteria have only received muted discussion in Britain. As one noted authority has commented: "when designing and setting up regulatory agencies, the British way has been to muddle through . . . ."[5] The latter part of this paper examines a central issue raised by the proliferation of regulatory agencies within the British system of government and administrative law. Specifically, the issue of how the regulators will be controlled will be discussed.

II. BACKGROUND

A. Nationalization 1947-1980

In Britain a significant proportion of the major industries were owned by the state prior to 1980. Most of these industries were taken into public ownership under the postwar labour government of Clement Attlee.[6] The principal reason for this, apart from an ideological commitment to the common ownership of the means of production, was to use state control of these industries as a means for national economic planning and postwar reconstruction. British industry urgently needed rationalization and modernization to recover from the devastation of the war, and it was a belief widely held at the time that recovery was most effectively achieved by nationalization.

It has to be appreciated that the early British approach to nationalization was intensely pragmatic. The Attlee program of nationalization proceeded on a case-by-case basis. The industries which were nationalized were once referred to as the "commanding heights" — the utilities, energy, and defense related industries — while during the period the transport industry moved in and out of the public sector. At a later date ailing and nearly insolvent industries such as Rolls Royce and British Leyland were taken into the public sector as part of a rescue operation. But the nature of these nationalizations were radically different from those of the Attlee government. Nationalization created large enterprises which, for the most part, adopted a goal of universal service and as a result became dominated by engineers rather than businessmen. It involved the creation of large monolithic organizations often nationalizing and reorganizing ones which had already been owned by municipalities. Others were run as government

5. R. BALDWIN, REGULATING THE AIRLINES: ADMINISTRATIVE JUSTICE AND AGENCY DISCRETION 263 (1985).

6. *See* Sir Norman Chester's authoritative and official history of nationalization. N. CHESTER, THE NATIONALISATION OF BRITISH HISTORY 1945-51 (1975). *See also* A. CARCINCROSS, YEARS OF RECOVERY: BRITISH ECONOMIC POLICY 1945-51 (1985).

departments. The post office, which was in the state sector before Attlee's government, was run as a government department until the British Telecommunications Act of 1981.

Nationalization, despite its outward appearance, is not synonymous with state-ownership in the sense that these enterprises were run directly by the government of the day. This is one point where I must differ with Professor Cass. His discussion equates public ownership with state-run enterprises in which the government has a direct hand. But the nationalized industries can take on a whole variety of forms, and certainly in Britain the idea behind nationalization was that these firms should be distanced from the government and not run by public officials. The model of nationalization adopted in Britain is largely due to the thinking of Herbert Morrison, the Deputy Leader of Labour in the Attlee government. Nationalized industries were to operate at arm's length from the government and were to be run by a class of professional managers. Workers had no direct say in the conduct of these enterprises. Moreover, where relevant, the workers' principal objective was the pursuit of the public interest. They were, to use the words of the period, to act as high custodians of the public interest. Although the profit motive was replaced by a higher calling in these businesses, the firms were nonetheless required to be run along commercial lines and break even, taking one year with another. How this was to be achieved was not clearly stated and what framework of controls and objectives were to be used was left to be developed.

The nationalized industries soon posed a problem for successive governments. These governments became increasingly concerned about the efficiency and accountability of such industries, and this was mirrored by the management of nationalized industries' hostility to what they saw as unnecessary ministerial interference. The publication of the 1961 White Paper,[7] an official statement of government policy on the nationalized industries marked the beginning of a trend that was to continue for the next two decades weakening the first principle of Morrison's concept: that the nationalized industries should operate at arm's-length from the government. Concerned with the massive amount of resource controlled by the public corporations, the White Paper put forward a framework for greater economic controls over the operation of these industries. Financial targets were to be set and the pricing policy of each corporation was to be designed to meet these targets. Any departures from these targets required written permission of the relevant minister.

7. FINANCIAL AND ECONOMIC OBLIGATIONS OF THE NATIONALIZED INDUSTRIES, CMD 1337 (1961).

The second White Paper,[8] published in 1967, tightened these controls by setting out detailed pricing and investment policies. Prices were to be set, while longrun marginal costs and investment policies were to be evaluated in terms of net present values. Moreover, the corporations' noncommercial objectives were to be clearly stated and supported in terms of social cost-benefit assessments. The government was also to be consulted about price changes and any major price increase would be investigated by the Prices and Income Board.

The 1978 White Paper,[9] which still governs the conduct of the nationalized industries, completed the shift in policy. The financial target became the primary instrument of control.[10] Each corporation was required to set prices at a level meeting the financial target, and earn a rate of return earned on capital equivalent to that which could be earned in the private sector. How the actual financial target was determined remained obscure. The corporations were to cover total costs, however, the government could also determine each industry's policy target in the light of general policy objectives, including considerations of social, sectoral and counter-inflation policy.

Each White Paper and its suggested reforms read as restatements of the same problems: the need for financial controls and economically rational investment and pricing policies. The study by the National Economic Development Office[11] (NEDO) of the regulatory framework that had developed to control the nationalized industry concluded that the control mechanism had failed. The study painted a picture of ad hocery, confusion and blatant political manipulation of the nationalized industries. It began by noting the central role that the nationalized industries played in the British economy — accounting together for one-tenth of national product and nearly one-fifth of total fixed investment, and occupying a dominant position in the energy, communications, steel and transport sectors. The regulatory framework was considered unsatisfactory and in need of radical change.

Among the catalogue of deficiencies were the lack of trust and mutual understanding between government and management, confusion about roles and the absence of an effective system of measuring performance and

8. NATIONALISED INDUSTRIES: A REVIEW OF ECONOMIC AND FINANCIAL OBJECTIVES, CMD 3437 (1967).

9. THE NATIONALISED INDUSTRIES, CMD 7131 (1978).

10. Heald, *The Economic and Financial Control of UK Nationalised Industries*, 90 ECON. J. 243 (1980).

11. NATIONAL DEVELOPMENT OFFICE, A STUDY OF UK NATIONALISED INDUSTRIES — THEIR ROLE IN THE ECONOMY AND CONTROL IN THE FUTURE (1976).

managerial competence. The nationalized industries were clearly being used to promote the government's macroeconomic policy. In the early 1970's the industries were told to keep prices down as part of the government's anti-inflation strategy. In the implementation of the privatization program, the capacity for government to interfere in the pricing policies of the nationalized sector, particularly British Gas and Thames Water, was amply demonstrated.

NEDO recommended a number of reforms which were never adopted by the government. To remedy the unsatisfactory relationship between the management of the nationalized industries and the government, the NEDO report recommended that a policy council be established for each nationalized industry.

By the end of the 1970's the principle that the nationalized industries should operate independently of the government had been replaced with one premised on comprehensive, detailed and direct regulation of their activities. The notable thing about the White Papers and the debates and analysis surrounding them was the idea that ownership by the state was irrelevant to the industry performance. Moreover, the basic premise that these industries should be state-owned was never challenged. The issue was seen as one of monitoring performance and activities and developing the appropriate system of objectives and controls for the nationalized industries.

Despite these reforms, dissatisfaction with the performance of the nationalized industries grew. Pryke, in his book *Public Enterprise in Practice*,[12] delivered a favorable verdict on the performance of the nationalized industries at the end of the sixties. However, he was forced a decade later to conclude that "[i]n general the nationalized industries' performance has been third rate."[13]

It is also possible with the benefit of hindsight to see why the Morrisonian ideal of arm's-length public corporations managed independently was unworkable and would be quickly compromised. First, despite their formal independence the nationalized industries quickly became synonymous with the government itself. Ministers increasingly found themselves tangled in the minutiae of the day-to-day running of these industries. Secondly, the industries quickly became political footballs — instruments of

12. R. PRYKE, PUBLIC ENTERPRISE IN PRACTICE (1971).

13. R. PRYKE, THE NATIONALISED INDUSTRIES: POLICIES AND PERFORMANCE SINCE 1968, at 257 (1981). The only recent overview of the performance and efficiency of the remaining nationalized industries is R. MOLYNEUX & D. THOMPSON, THE EFFICIENCY OF THE NATIONALISED INDUSTRIES SINCE 1978 (Institute of Fiscal Studies Working Paper No. 100, 1986); Molyneux & Thompson, *Nationalised Industry Performance*, 8 FISCAL STUD. 48 (1987).

general economic and industrial policies. An increasing degree of direct Ministerial interference occurred in their pricing, investment, employment and wage policies. This undermined not only the role of management under the vague cloak of the "public interest," but also the long run commercial success which was subordinated to broader short-term political and macroeconomic objectives.

B. Privatization under Thatcher

The British privatization program which has gained momentum since 1980 provides a real life example of a major shift in the property rights structure of an industrial economy.[14] Not only have major state-owned industries been sold to the private sector but a very large number of council houses have been sold to their tenants. Moreover, the privatization program has been tied to the goal of creating a nation of shareholders and has had the effect of increasing threefold the number of noninstitutional shareholders.

Although the British Conservative Party has always evinced a distaste for state ownership, it was not very committed to the protection of private property. The party accepted what in Britain is called consensus politics — a general acceptance of the "mixed economy" which involved substantial involvement of the state. Although the details of why the Conservative Party more readily accepts the political theory of the New Right need not detain a reader here, it is important to note that the party's acceptance of a political philosophy is a major departure for the party. Conservatism eschews any dogmatic adherence to a political philosophy and is essentially a pragmatic opportunist approach.

On coming to office in 1979, the government did not immediately embark on an ambitious program to return more industrial activity to the private sector. The party feared that privatization would be electorally unpopular and that it was not the easiest way to decrease the role of the state. In the conservatives' first term in office, 1979-1983, it either privatized or took steps to privatize twenty-five public enterprises.[15] In that four-year period it raised millions of pounds through the sale of public assets, converted four major state-owned undertakings into companies with just under fifty percent private shareholding and began the process of liber-

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14. C. VELJANOVSKI, *supra* note 1; PRIVATISATION AND REGULATION: THE UK EXPERIENCE (J. Kay, C. Mayer & D. Thompson ed. 1986); J. VICKERS & G. YARROW, PRIVATIZATION AND THE NATURAL MONOPOLIES (1985). *See also* PRIVATISATION AND THE WELFARE STATE (J. LeGrand & R. Robinson ed. 1984)

15. Steel & Heald, *The Privatization of Public Enterprises 1979-83*, in P. JACKSON, IMPLEMENTING GOVERNMENT POLICY INITIATIVES (1984).

alization in the transport and telecommunication sectors of the economy. Most of these sales involved only the partial transfer of ownership. However, Amersham International, most of British Rail Hotels and some of the subsidiaries of National Enterprise Board, Ferranti, International Computers Limited and Fairey Holdings were outright sales of all the equity. The usual approach was a partial sale of assets with the government retaining ownership of just less than fifty percent.

The government's second term in office saw the privatization program accelerating and entering a new phase, culminating so far in the sale of British Telecom and British Gas. The British Telecom sale, which yielded nearly four billion pounds for the government, was the biggest equity issue in the financial history of the world. The British Gas sale proved greater with gross receipts of over five billion pounds only overshadowed by the sale in 1986 of Nippon Telephone and Telegraph (NTT) by the Japanese government. By the beginning of 1987, twelve major companies and a larger number of smaller ones had been privatized. This has transferred twenty percent of the state sector and over 400,000 jobs to the private sector, doubled the number of shareholders in the United Kingdom and raised over twelve billion pounds. In addition, over 750,000 council houses have been sold raising eight billion pounds for the government.

The pace of the program has also accelerated in recent years. The government has committed itself to the sale of nearly all the nationalized industries. Official estimates place the value of scheduled and future privatizations at around twenty-six billion pounds. When these sales have been completed the proportion of Gross Domestic Product (GDP) in the government's hands will have decreased from ten and one-half percent to six and one-half percent since 1979 — a reduction of nearly one-half in the government's involvement in economic production.

Britain's privatization policies can be divided into two distinct phases. The first phase, 1979-1983, involved the sale of firms without any special characteristics that would justify their retention in the public sector. The first, Amersham International, was a producer of medical radioisotopes. The others, operating in the oil (BP, Britoil), hotels (British Rail Hotels), computers, electronics, telecommunications (ICL, Ferranti, Cable and Wireless, British Aerospace) and transport (British Freight, British Ports) sectors, all carried out activities which were carried out in the private sector and which faced active domestic or international competition.

The second phase began with the sale of British Telecom. These are the so called public utility industries, such as telephone, gas, water, and electricity, where total output is produced by one organization because it involves a network and therefore competition in the provision of the service is

not practical. Privatization of these industries means that a public monopoly is converted into a private one which must be regulated in order to curb its power to exploit consumers. It is the government's plan to privatize all the natural monopolies based on the belief that regulated private ownership of natural monopolies is preferable to nationalization. Two have so far been privatized — British Telecom and British Gas — and plans are being publicly drawn up for the privatization of the water authorities and electricity.[16]

C. *Objectives of Privatization*

It is a mistake to regard the Thatcher program of privatization as a well-thought and coherent program with a single or fully consistent set of objectives.[17] It was not until 1983 that the then Financial Secretary to the Treasury first stated what the objectives of the privatization program were.[18] Among the prominent ones which can be identified are: (1) reduce government involvement in the decisionmaking of industry; (2) permit industry to raise funds from the capital market on commercial terms and without government guarantee; (3) raise revenue and reduce the public sector borrowing requirement (the PSBR); (4) permit wide share ownership; (5) create an enterprise culture; (6) encourage worker share-ownership in their companies; (7) increase competition and efficiency; and (8) replace ownership and financial controls with a more effective system of economic regulation designed to ensure that benefits of greater efficiency are passed onto consumers.

Some have argued that the government's program, rather than having a complex rationale has none, and that the multiplicity of objectives is a smoke screen for a general incoherence of the policy.[19] Its real objective, it is argued, is to finance government expenditures through the sale of state assets. It is true that once the decision to privatize had been made the short-term objective which has tended to dominate the actual process of transfer was the firms' rapid and successful sale to the private sector. As part of this desire to quickly transfer the assets to the private sector, cou-

16. S. LITTLECHILD, ECONOMIC REGULATION OF PRIVATISED WATER AUTHORITIES (1986); PRIVATISATION OF THE WATER AUTHORITIES IN ENGLAND AND WALES, CMD 9734 (1986).

17. For an attempt to develop a theory of privatization see Dunleavy, *Explaining the Privatisation Boom: Public Choice Versus Radical Approaches*, 64 PUB. ADMIN. 13 (1986).

18. Moore, *Why Privatise, reprinted in* PRIVATISATION AND REGULATION: THE UK EXPERIENCE (J. Kay, C. Mayer & D. Thompson ed. 1986).

19. Kay & Thompson, *Privatisation: A Policy in Search of a Rationale*, 96 ECON. J. 19 (1986). *Cf.* Brittan, *Privatisation — A Comment: An Examination the Government Did not Sit*, 96 ECON. J. 33 (1986).

pled with the goal of giving preference to the small first-time shareholder, there has been a tendency to under-price shares.

The debate over British privatization has not been carried on in terms of a sophisticated analysis of its underlying premises or in terms of the assertion that private enterprise is more efficient than public enterprise. In many areas the issue has simply not arisen because of a feeling that there is no legitimate reason the industry should be in the public sector, and hence has given rise to little comment other than the price that should be set for the shares. There is a widespread feeling that many enterprises were sold too cheaply.[20] The subsequent performance of shares in privatized firms gives a certain credence to this allegation.

For other industries, particularly the utility industry, the discussion has centered on the regulatory scheme, pricing of assets and a shared view that not enough has been done to encourage greater competition with the new private monopolies. This has sometimes been expressed in the view that deregulation, or as it is called in Britain "the liberalization of industries," is a more potent force for efficiency and good performance.[21] Privatization has been seen as the enemy of competition because the government has been encouraged to keep the utilities intact to maximize the revenue that a sale of the assets will yield. The focus of the debate has been largely on general principles and the methods and pricing of a state asset.

The real impact of privatization has been not to withdraw the state from economic activity, but to change its role from a producer to "the protective state." It is based on the principle that it is not the legitimate function of the state to be involved in economic production. This point is missed by many commentators of the British experience who evaluate privatization in instrumental terms; privatization's only justification is that it promotes greater efficiency and therefore the boundary between private and public production is to be determined by the relative effectiveness of each in achieving greater efficiency. British economists have been notorious in promoting this view of privatization, arguing often that reform of the financial and economic controls in the nationalized industries, particularly the utilities, would have been superior in many cases. The evidence for or against this proposition or the claim that private monopolies perform better than state monopolies is equivocal.[22] The empirical evidence seems to generate

20. C. VELJANOVSKI, *supra* note 1, at 93-114; Mayer & Meadowcroft, *Selling Public Assets: Techniques and Financial Implications*, 6 FISCAL STUD. 42 (1985).

21. *See generally supra* note 14; Bailey, *Price and Productivity Change Following Deregulation: The US Experience*, 96 ECON. J. 1 (1986).

22. Boyd, *The Comparative Efficiency of State-Owned Enterprises*, in A.R. NEGANDHI, MULTINATIONAL ENTERPRISES AND STATE-OWNED ENTERPRISES A CHALLENGE TO INTERNA-

only two firm generalizations. The first is that competition improves efficiency and the second is that the contracting out of services to the private sector decreases the costs of provision without significant deterioration in the quality of the services supplied.[23]

The point missed by the efficiency analysis is the difficulty of orchestrating a major institutional shift in the relationship between government and the private sector. Most critics seem to view politics as detrimental to rational policy. This may be so as an abstract proposition, but it does not address the central issue of how to bring about radical institutional change in a political context. Privatization is first and foremost a political phenomenon and needs to be addressed explicitly in these terms.

The major constitutional issue raised by the Thatcher government's privatization program is the way it has redefined the role of the state without real political debate. The privatization program evolved and was never put to the electorate as a coherent policy. Since Britain lacks a written constitution and since Parliament is sovereign, there are few checks on its government pursuing policies which mark major changes in the function and scope of its authority.[24] The political system of Britain is very different from that of the United States where less power is reposed in the Prime Minister than the President and where party politics is much stronger than in the American system.

Nonetheless, the conservative government has achieved a new political consensus that nationalization along the Morrisonian blueprint has failed and is in urgent need of reform. Thus, while the political basis for the privatization program seems to have been lacking in the sense of the policy being formally put to the electorate, there is nonetheless widespread support for the policy. The clearest indication of this is the acceptance that nationalization has failed. Labour's leadership has moved to a position where the wholesale renationalization of the enterprises so far sold is not on the agenda, except in the case of the utilities, and there is a greater acceptance of their part that market forces can play in the economy. British so-

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TIONAL BUSINESS (1980); G.K. YARROW, PRIVATIZATION IN THEORY AND PRACTICE, ECONOMIC POLICY 324 (1986); Domberger & Piggott, *Privatization Policies and Public Enterprise: A Survey*, 62 ECON. REC. 145 (1986); Millward, *The Comparative Performance of Public and Private Ownership*, in THE MIXED ECONOMY (L. Roll ed. 1982); Millward & Parker, *Public and Private Enterprise: Comparative Behaviour and Relative Efficiency, reprinted in* PUBLIC SECTOR ECONOMICS (Millward ed. 1983); Pryke, *The Comparative Performance of Public and Private Enterprises*, 3 FISCAL STUD. 2 (1983).

23. Domberger, Meadowcroft & Thompson, *Competitive Tendering: The Case of Refuse Collection*, 7 FISCAL STUD. 69 (1987). *See also* Cubbin, *Competitive Tendering and Refuse Collection: Identifying the Sources of Efficiency Gains*, 8 FISCAL STUD. 49 (1987).

24. Baldwin & Veljanovski, *Regulation by Cost-Benefit Analysis*, 62 PUB. ADMIN. 51 (1984).

cialism is being recast into a form of libertarianism by the leadership of the Labour Party.[25] What is not accepted by the present Labour leadership is that the utilities and other essential industries should be in private ownership. The reasons for this are again instrumental: public ownership is a better form of control; industry requires active state backing if it is to compete successfully especially in internationally competitive markets; and it is necessary to ensure the goal of universal service.

III. INSTITUTIONAL ISSUES

A. Nature of Privatization

The debate over privatization is usually cast in terms of a contrast between state ownership and private enterprise. The latter is said to be more efficient in the variety of senses that the word is used. But as Professor Cass points out, this dichotomy is in a sense meaningless. The modern economic property rights theory emphasizes that what is of issue is not a unitary concept of property but the bundle of property rights. Nationalization or state ownership is an infinitely varying concept because the property rights structure of these industries, and privatized industires as well, can take many different forms. There can be inefficient private property just as there can be inefficiently organized public production.

The *bundle* of property rights governing the use of assets and resources is at the heart of any analysis of privatization. It is this bundle which governs the economic value of resources; ultimately what constitutes the bundle of enforceable legal rights to resources is a legal decision. It must also be recognized that there is a rich variety of different property rights bundles that can be considered private. If this is accepted then it is easy to see that broad debates over private and public property are misleading and to some extent meaningless. The point is ably captured by Tawney:

> It is idle . . . to present a case for or against private property without specifying the particular forms of property to which reference is made, and the journalist who says that "private property is the foundation of civilization" agrees with Proudhon, who said it was theft, in this respect at least that, without further definition, the words of both are meaningless.[26]

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25. R. HATTERSLEY, CHOOSE FREEDOM — THE FUTURE FOR DEMOCRATIC SOCIALISM (1987). "Socialism exists to provide — for the largest possible number of people — the ability to exercise effective liberty." *Id.* at xvi. Or as Herbert Morrison, Labour's Deputy Leader for over twenty years, once said: "Socialism . . . is what the Labour Party happens to be doing at any one time." *Id.* at 3.

26. R. TAWNEY, THE SICKNESS OF AN ACQUISITIVE SOCIETY ch. 5 (1920), *reprinted in* PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 136 (C. Macpherson ed. 1978).

When one moves away from these sweeping statements to a more careful consideration of the issues, the case for private property as a unitary notion underlying liberal political theory becomes more problematic. Property is not an abstract proposition and *the key issue in the privatization debate is whether private property as it exists in practice is more efficient than public ownership of the means of production.* In the White Papers on the nationalized industries and in the views of some economists, a firm is of secondary importance. This is not, however, the same as saying that privatization will have very little affect on the firm's behavior. Privatization involves much more than the simple transfer of ownership. It involves the transfer and redefinition of a complex bundle of property rights which creates a whole new penalty/reward system which alters the firm's incentives as well as its performance.

The government's case, for example, is based on a model of the firm as an owner-managed entity. The reality of the businesses that have been privatized is that they are organizations in which, in a substantial sense, the firm remains collectively owned (by shareholders) and run by management and workers and still subject to external government regulation albeit in a substantially different way. The issue is whether this organization is more effective than a publicly owned firm which in crude terms shares many of the same organizational features: widespread ownership; divorce of ownership from management; monopolistic, divisional and hierarchical structure; and large and diffused operations.[27]

The crisis in the nationalized industries can be seen as one of designing adequate controls and incentives to promote efficiency and good performance. Privatization alone does not remove these incentive problems. The issue of control and the separation of management from the ownership of the firm still plagues both private and public firms and has been a source of concern since Adam Smith's comment that the joint stock company would be the source of "negligence and profusion" and the more contemporary analysis of Berle & Means.[28] In both forms of enterprises there still exists what economists now call a "principal-agent problem"[29] — that the agent (management) does not act in the best interests of the principal (shareholders). That is precisely the same problem that existed in the nationalized

27. M. RICKETTS, THE ECONOMICS OF BUSINESS ENTERPRISE — NEW APPROACHES TO THE FIRM (1987).

28. A. BERLE & G. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932). *See also* the evaluation of their basic argument in *Corporations and Private Property*, 26 J. LAW & ECON. 3 (T. Moore ed. 1983).

29. *See* J. PRATT & R. ZECKHAUSER, PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS (1984).

industries — that of monitoring performance and controlling management.[30] Which is to say that the forces that work against efficiency are an inherent feature of both private public corporations and the nationalized industries, because in both cases there is widely diffused ownership and control by a separate management.[31]

But I think it goes too far to argue that the private/public distinction is without value. One only has to be clear as to what institutional changes have been brought about by privatization. The constitutional issues raised by this are many, but principally center around how the assets are to be transferred to the private sector and what limitations and conditions are to be imposed on the new enterprises. For example, the single differentiating characteristic of a private firm is the ability to trade and transfer ownership rights through shares. The "market for corporate control"[32] that this ability facilitates acts as a necessary set of checks and balances on management. It also results in statements that private monopoly is more cost efficient than a state-run monopoly because of the ability of management to be displaced by a hostile takeover bid. However, the reality of privatization is that through a number of ownership controls including maximium shareholding in any "person" limited to fifteen percent and the retention by the government of a Golden Share (effectively the right to veto changes in ownership), hostile takeovers are impossible. Thus, while privatization in the sense of an actual change in the bundle of property rights which has occurred will lead to behavioral changes in the firm,[33] these changes need not induce the level of cost efficiency that are often asserted to arise from private enterprise.

The other point missed in discussions of privatization is that it is usually accompanied by another state phenomenon: regulation. The efficiency analysis provides no a priori basis for asserting that regulated private property will produce goods and services more cheaply. Regulated private property can be inefficient, as the so-called Averch-Johnson analysis shows. Therefore, it is quite possible to move from state ownership to regulated private ownership without any significant efficiency gains, not because pri-

30. J. REDWOOD & J. HATCH, CONTROLLING PUBLIC INDUSTRIES (1982).

31. Heald, *Will Privatisation of Public Enterprises Solve the Problem of Control?*, 63 PUB. ADMIN. 7 (1985).

32. For an anthology containing some of the more important articles on this subject see R. POSNER & K. SCOTT, ECONOMICS OF CORPORATION LAW AND SECURITIES REGULATION (1980).

33. Boardman, Freedman & Eckel, *The Price of Government Ownership: A Study of the Domtar Takeover*, 31 J. PUB. ECON. 261 (1986); Eckel & Vermaelen, *Internal Regulation: The Effects of Government Ownership on the Value of the Firm*, 29 J. LAW & ECON. 381 (1986).

vate property is inefficient but because the regulatory system which has been imposed on the industry is inadequate.

B. Regulation

The extent of institutional change brought about by the Thatcher government extends far beyond the enactment of a few statutes and the formation of a number of new regulatory agencies. Policy in this area has led to a shift in the territory occupied by the government and, paradoxically, to a more legalistic relationship between the state and the private sector. Related to privatization is a complete overhaul of the system of financial regulation which has a crucial bearing on the privatization program itself.

Explicit economic regulation administered by a new breed of regulatory authority replaces ownership, direct controls from government departments, and internal regulation by the utility.[34] New regulatory authorities have so far been set up, including the Office of Telecommunications (OFTEL), the Cable Authority and the Office of Gas Supply (OFGAS). Several others, most notably the Office of Fair Trading (OFT) and the Monopolies and Mergers Commission (MMC), have had their powers extended. As a result, we are witnessing the rise of the regulatory agency as a potent force in British public administration. These agencies have been given the power to monitor performance, prices and quality of the services provided by the utility industries and to ensure that the consumers are afforded some protection. They combine a number of functions: they administer economic regulations under the RPI-X price rule where relevant;[35] ensure that the privatized (or liberalized) firms comply with the terms of their licenses; have a statutory duty to promote competition in the industry and to detect anti-competitive practices; act as a conduit for consumer complaints and in some cases, most notably the Cable Authority, are responsible for licensing new utilities. Other regulatory agencies have had the scope of their jurisdictions and their powers extended by privatization and liberal-

34. Professor Stephen Littlechild, an economist at the University of Brimingham and member of the British Monopolies and Mergers Commission, has been particularly important in devising the form of profit control which has been applied to British Telecom and British Gas. His reports to the government are worth reading. *See* S. LITTLECHILD, ECONOMIC REGULATION OF PRIVATISED WATER AUTHORITIES (1986); S. LITTLECHILD, REGULATION OF BRITISH TELECOMMUNICATIONS' PROFITABILITY (1983).

35. Instead of controlling British Telecom's profits by a rate of return regulation, a price control has been devised known as "RPI minus X." This price control sets a ceiling on the average price rise permitted for a clearly defined bundle of service to no more than the retail price index (RPI) minus an arbitrary percentage designed, in BT's case, to reflect the cost reducing pressures of technological advance. The formula was first proposed in S. LITTLECHILD, REGULATION OF BRITISH TELECOMMUNICATIONS' PROFITABILITY (1983).

ization. In particular, the Civil Aviation Authority, which will administer the regulations governing the privatized airports and the Independent Broadcasting Authority (IBA), has been given power to franchise and control satellite television.

These regulatory authorities do not have the power to enforce general competition law which is relevant to the industries they regulate. They merely monitor the privatized firms and refer detected instances of monopoly abuse to the Office of Fair Trading which, in turn, has the power to refer the utility to the Monopolies and Mergers Commission (MMC). The result is that privatization has led to the creation of a new subordinate layer of administration to complement the work of the competition agencies. This has also led to a considerable widening of the scope of these agencies. Prior to privatization the MMC was not given an opportunity to examine the potentially anti-competitive practices of the nationalized industries as nearly all the references related to efficiency and costs. However, the MMC now has a direct role in the regulation of the utilities. If OFTEL wants to modify the terms of the BT license it may refer this to the MMC. Also at the expiration of the current license in 1989, it will be the MMC which reviews the BT license terms and makes recommendations which could have an important bearing on the regulations affecting BT.

The new system of investor protection is directly relevant to the privatization program for two reasons. First, the efficient operation of the capital market is crucial to the effectiveness of privatization and the RPI-X control as a method of inducing the privatized firms to operate with productive efficiency. Secondly, privatization has been used as a vehicle for widening share ownership. Paralleling this reason are radical changes in London's financial markets. There has been a tremendous degree of change, including heightened competition and an increase in the number of new businesses. As a result the former club atmosphere of the City of London is rapidly disappearing and becoming increasingly unworkable. Clubs can only function on the principle of exclusivity and when this disappears a more formal regulatory system must be put into place. But the need for more investor protection does not necessarily arise because liberalization significantly increases the likelihood of malpractice, but rather because wider share ownership increases the political risks associated with any one financial scandal. Too many scandals and a general feeling that the law is ineffective would not only politically damage the government, but would also undermine the view that liberalization and greater competition have beneficial effects. This is not a cynical view. It is simply a recognition that a few prominent losses and failures will influence policy and attitudes more than will claims that the more competitive system has benefited all if at the

expense of some. Confidence in the share market must be fostered if the government's objective of wider share ownership is to be promoted.

The regulations designed to protect investors have undergone radical change. This process began with a rather innocuous investigation of the Stock Exchange rulebook by the OFT on the grounds that some of its practices, specifically minimum commissions and the separation of jobber and broker functions were anti-competitive.[36] Following an agreement with the then Secretary of State for Trade and Industry, Cecil Parkinson, the Stock Exchange agreed to abolish minimum commissions. This set in motion a series of reforms in the city culminating in the "Big Bang" (essentially the abolition of minimum commissions, the introduction of dual capacity and the move to electronic trading) and the passing of the Financial Services Act of 1986 which resulted from the Gower Committee Report on investor protection.[37] These reforms have altered the regulation of the capital market from the "club" rules and sanctions of the stock exchange and other important institutions to a more formal system of self-regulation administered by the Securities and Exchange Board.[38] The SIB acts as the central agency overseeing a number of self regulatory organizations (SROs) which regulate defined markets. Investment businesses can only carry on business if they are recognized by these SROs. The regulation here is a departure from the orthodox method of regulation. The SIB is a private company, self-financed by the industry and possessing criminal powers. Again the regulatory functions overlap and are fragmented. Several important areas in the financial services industry are not covered by the new regulatory system, including Lloyds of London which controls the insurance market (although Lloyds itself does provide a degree of regulation), and the Takeover Panel which administers the City Takeover Code. The latter is also unusual because it has no legal status and operates on the good will of the City. Recently the Takeover Panel itself became subject to a degree of judicial control.[39] All these developments have led to increased competition in the city and a tighter regime of investor protection.

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36. For an excellent account of the history and nature of new financial regulation see M. CLARKE, REGULATING THE CITY — COMPETITION, SCANDAL AND REFORM (1986).

37. REVIEW OF INVESTOR PROTECTION, CMD 9125 (1984). Most of Gower's recommendations were accepted in THE WHITE PAPER, FINANCIAL SERVICES IN THE UNITED KINGDOM — A NEW FRAMEWORK FOR INVESTOR PROTECTION, CMD 9432 (1985).

38. The new financial regulation covers more than just those operating in the capital market; it includes all "investment businesses" such as insurance brokers, unit trust salesmen, stockbrokers and financial consultants.

39. Note, Regina v. Panel on Takeovers and Mergers, Ex parte Datafin plc (Norton Opax intervening), 1 ALL ENG. L. REP. 564 (1987).

IV. CONSTITUTIONAL ISSUES

A. Institutional Design

The most visible feature of privatization has been the growth of single industry regulatory agencies. The administration of regulation of the utilities has not been extensively debated in the United Kingdom, nor has it been the study of intense academic research.[40] Most of the attention has focused on the legal detail and the general form of the controls that should be imposed on the utilities. Yet the rise of the single industry regulatory agency based on the OFTEL model is emerging as the pattern for each privatization of a utility and raises a number of concerns.

The proliferation of regulatory agencies has, like the privatization program itself, evolved in a piecemeal fashion and has not been governed by a single set of clearly defined objectives. The legal creation of the regulatory organizations has usually been contained in the same act of Parliament as the creation of the saleable corporation and the ministerial powers to sell the assets.

The National Consumer Council (NCC) has argued that the utilities should be regulated by a single public utility commission.[41] Four reasons are given for this view. First, one commission would be better able to carry out cross-comparisons because public utilities have the same features. Second, such a commission would be more cost effective because it would avoid duplication and it would be in a better position to schedule its work program rationally. Third, it would be easier for such a commission to resist capture by a single industry. Finally, this commission would be in a better position to take into account strategic questions. These reasons, argues the NCC, are particularly relevant in the energy field where a single commission would conceivably have control of both the gas and electricity industries.

The problem with the Consumer Council's analysis is that it takes a largely formal and administrative approach to the way regulation should be organized. The approach, that central administration can plan regulation more efficiently than several industry-based ROs, in essence is anti-competitive. However, if competition is strong in the marketplace, such competition will also have beneficial effects in ensuring that the bureaucratic

40. The first extensive study of a regulatory agency (the Civil Aviation Authority) did not appear until the mid 1980's. *See* R. BALDWIN, REGULATION THE AIRLINES — ADMINISTRATIVE JUSTICE AND AGENCY DISCRETION (1985). *See also* REGULATORS AND PUBLIC LAW (R. Baldwin & C. McCruddon ed. 1987).

41. Memorandum submitted by the National Consumer Council in Regulation of the Gas Industry, 15(i) sess., para. 7.3 (1985-86).

machine does not itself get out of hand. And it is not clear that a single and, therefore, more powerful regulatory commission approaches adequately controlling the regulator as opposed to the regulated industry. The view is premised on an assumption that the utilities are in fact very similar and require the same style of regulation. However, electricity is very different from gas and it is not clear what an integrated gas and electricity policy would mean for competition between the two industries for customers.

B. Agency Overlap and Competition

The possibility of overt competition between regulatory agencies for the right to control an industry should be explored more carefully.[42] The NNC's argument that a single utility commission would avoid wasteful duplication ignores the fact that such a commission would be in a monopoly position. There would be no benchmarks to evaluate the agency's performance and a single commission would sacrifice the potential benefits that overt competition would have in fostering better decisions and better regulation. The change in the investor protection laws was in part the result of the increasing competition from foreign financial markets. The ability of national governments to determine their own regulatory structure for satellite communications and broadcasting will be thwarted by the transnational character of satellite communications. The recent decision by the New York Stock Exchange that its members could not trade on the London Exchange in jointly listed securities because the London Exchange had decided to completely abandon trading on the floor is an example of overt competition between two intensely competitive organizations and regulators. It was, of course, an anti-competitive ploy, but not without its humorous side. The President of the NYSE justified his actions by saying: "If the LSE doesn't want to be what a stock exchange looks like, feels like and smells like, that's their business." To which came London's risposte: "[w]ho wants to look like and smell like something Neanderthal."[43]

The prospect of domestic competition between regulatory agencies is not as remote a possibility as it may seem. It is actively present in the self-regulatory framework in Britain's financial markets. SROs can be formed by industry groups to regulate their activities and must impose a minimum set of rules on their members as determined by the SIB rulebook. The SROs which have so far been formed (but yet to be recognized by the SIB), are an essential element in the regulatory system and are actively touting

42. Generally, lawyers and economists view multiple and overlapping regulation less sympathetically as "over regulation."

43. Dixon, *NYSE Starts Trading in Insults*, Fin. Times, Mar. 1987, at 7.

for members. This is obviously possible in the financial sector where many firms are now merging to become large financial conglomerates and can subject themselves to primary jurisdiction between one of a number of SROs. The same situation may not be present in some of the utility industries because by definition there is no competition and only one firm is to be regulated. However, the possibility does present itself in the telecommunications sector.

At present, in the broadcasting and telecommunications sectors there is a considerable degree of jurisdictional overlap between the relevant regulatory agencies. This is clearly seen in the relationship between the Cable Authority and OFTEL. Cable licensing is a two-tiered system. In addition to a cable operators franchise awarded by the Cable Authority, a public telecommunications operators license is required to build the actual cable system. This is awarded by the Department of Trade and Industry. OFTEL is responsible for monitoring compliance with licenses, ensuring that the construction time-table is adhered to and that all parts of the franchise area are wired and capable of receiving cable. Moreover, OFTEL regulates cable systems over such matters as interconnection, the provision of interactive services and the pricing of these. The Cable Authority only controls the entertainment services provided over cable; OFTEL regulates the telecommunications services. The Cable Authority also has little control over broadcast television retransmitted over cable systems; the IBA controls these. Thus a cable system operator is subject to regulation from the Cable Authority, OFTEL, the DTI and indirectly the IBA and the Home Office, which has ultimate responsibility over broadcasting.

Examples of rivalry between the agencies has already emerged, most notably between the Cable Authority and the IBA over the control of satellite television and local commercial radio. Active competition between agencies would provide valuable information on the deficiencies of each. Moreover, the government's plans to remove commercial radio from the jurisdiction of the IBA and place it in the hands of a new radio minority creates additional competition between regulators.[44]

C. *Going Native*

One area where the debate over regulation has been active is the possibility of agency capture or, as it is referred to in the English Civil Service, "going native." This is the ever-present danger that a regulatory authority will serve the interests of industry rather than the public or consumers at

44. Home Office, Radio: Choices and Opportunities (Cm 92 1987).

large. Part of the regulatory system has been designed with capture explicitly in mind. The RPI-X pricing formula has been chosen by the British government rather than U.S.-style rate-of-return regulation because it is simple to operate and its nondiscretionary nature will limit the possibility of agency capture.

But the issue of agency capture is extremely complex. In the United Kingdom the creation of the dominant private utility and the regulatory agency have occurred at the same time. Indeed the regulated firm has had a large amount to say about the form that the regulation should take and how the firm should be sold. Whereas in the United States, where agencies are subject to the risk (inevitable or otherwise) of capture by the industry they try to regulate, the United Kingdom's experience is that the regulatory system has been devised as part of the privatization process where those to be regulated have been in one sense part of the government machinery. The capture then has taken place one step removed from the operation of the agency. The capture is found in the very formulation of the agencies and the structure of the industry itself, rather than the more traditional form of capture associated with the United States' model. The most visible effect of this form of capture has been the reluctance of the government to break-up British Telecom and British Gas into regional operating companies and, some argue, to foster the maximum degree of competition.

It is also the case that capture may take time to manifest itself. Many regulatory agencies will display a predictable pattern of behavior, a life cycle. The agencies begin as aggressive regulators of the industry but over time become captured by those regulated as they begin to share some of the views of the industry. OFTEL at present has a good track record as aggressively pro-competitive, even though its objectives as stated in the Telecommunications Act of 1984 lists competition as one of several conflicting objectives to be pursued.

The National Consumer Council argues that a single utility commission would be less liable to capture. Yet this idea is not that readily apparent as the risk of capture does not appear to be materially affected by how many industries the agency controls. It is true that one regulator and one firm creates a bilateral situation where a commonality of interests and views may grow over time. But the principal area of capture is not so much the regulator applying the rules in a limited fashion but acting to inhibit new competition. There is no reason to suppose that a multi-industry regulatory agency would be less inhibited in doing this than a single industry agency. The NCC's claim also overlooks the fact that agencies are themselves organizations. The regulation of industries would be divisionalized within the agency, and there is no reason to suppose that a more coherent approach

would be taken to industries as diverse as telecommunications, cable television, water and gas.

The issue of what form the administration of new regulations should take has been extensively discussed in public only once. In the Cable White Paper, the case for a new national cable authority was stated as being "conclusively strong, and widely accepted."[45] The reasons for this were cogently stated. Apart from those relating to the specifics of why the Home Office should not retain control over the industry, the White Paper saw great problems with transferring control to an established regulatory agency such as the Independent Broadcasting Authority. The government's reluctance to transfer responsibility to the IBA was based on a straightforward reason: agency capture. It could be argued that by transforming the IBA into a more broadly-based regulatory agency it would be less liable to capture because of the diversity and conflicting pressures of its client industries. However, this ignores the fact that the older client industry, television operators, would have greater influence in the agency and, therefore, would tend to obtain greater concessions. This fact was stressed in the White Paper, which feared that the IBA "would see cable too narrowly in broadcasting terms" and would favour existing commercial broadcasters to the detriment of cable investors. The IBA would also find it hard to adopt a reactive approach to one part of the television industry and an aggressively pro-active approach to another.

The Cable White Paper's concern was not based on a theoretical possibility, but on the history of the IBA (similar in nature to the Federal Communications Commission but with jurisdiction only over land-based commercial broadcasting, direct broadcast satellite television, and telex and commercial radio). The Pilkington Committee on Broadcasting in 1960 identified the problem when it described the IBA's predecessor (the Independent Television Authority or ITA) as a friend and partner of the independent television program companies.[46] It was to prevent the type of "contractual relationship" which exists between the IBA and the television program companies that the Cable Authority was established.

D. Delegation and Discretion

One of the notable features of the British system of regulation is that it delegates a considerable amount of power to regulatory agencies and then

45. THE WHITE PAPER, THE DEVELOPMENT OF CABLE SYSTEMS AND SERVICES, CMD 8866, at 14 (1983).

46. PILKINGTON REPORT, REPORT OF THE COMMITTEE ON BROADCASTING, CMD 1753, at 168 (1960).

imposes minimal controls over their activities. Moreover, for the most part their activities are hidden from public scrutiny and there is very little formal accountability and review of their decisions. The statutes privatizing nationalized industries are generally very broad, enabling pieces of legislation. In most cases the statutes confer on a new regulatory authority the power to control the private utilities operations and the demarcation of responsibility between the new agency and government departments.

The discretion of these regulatory authorities is controlled in the lightest ways. Discretion has not, however, acquired the opprobrium that it has in the United States. There is in the United Kingdom a general feeling, which Henderson has aptly described as "unreflecting centralism,"[47] that public officials will act in the public interest. The constraints and controls imposed on these agencies are weak and the courts have been reluctant to involve themselves in detailed oversight of these agencies.

The system of control over the agencies themselves tend to be weak. The prospect of judicial review by the courts generally prevents the agency from acting beyond the scope of its powers and breaching natural justice. Although the scope of judicial review has increased in recent years, its impact on the quality decisionmaking by regulatory agencies can be expected to be minimal. This is because the English courts are not prepared to review the basis of a decision or to take an in-depth look at the merits of the applicant's case. Secondly, the remedies available under English administrative law are entirely discretionary and most often do not afford the applicant adequate safeguards. They amount, in rather crude terms, to no more than procedural protection followed by an admonition to the regulatory agency to comply with its own rules or procedures. But if an agency is given discretion, the English courts will generally not interfere on the merits of the decision. In fact our system of English administrative law acts as a positive inducement for regulatory agencies not to state clear criteria or to give reasons for their decisions in order to prevent the courts from reviewing their actions.

This again is not a theoretical possibility, but it is illustrated by the Independent Broadcasting Authority which regulates commercial television and radio. The IBA has been given the power not only to license commercial television and radio stations, but to determine the structure of the industry. It has also framed many of the regulations. The IBA is the closest thing in Britain to a runaway and unaccountable regulatory agency. It arbitrarily awards franchises without stating any criteria or giving reasons why

47. D. HENDERSON, INNOCENCE AND DESIGN — THE INFLUENCE OF ECONOMIC IDEAS ON POLICY 36 (1985).

it has awarded a franchise to one applicant rather than another. A recent study of radio franchising failed to find any objective criteria that could explain the basis on which the IBA awarded franchises.[48] The independent local radio contractors are in a state of near rebellion over the imposts of the IBA which they believe is not aware of the commercial reality of broadcasting and attempting to deliver a gold plated service to a market which simply will not bear it. In 1986, the IBA prevented two takeovers of television stations without either giving the firms concerned a hearing, or giving an explanation for the takeover denials other than in the vaguest terms. Yet few complaints are heard because the regulatees are in the comfortable position of being granted monopolies and the disappointed applicants realize that they have no effective redress through the government or the courts. The cloak of the public interest and the principles of public service broadcasting are used to give the IBA discretion to fashion the British broadcasting system as it likes.

A deeper analysis of the exercise of agency discretion is a complex task. As yet there is no adequate positive theory which would assist one in predicting the forms that the discretion would take under different regulatory settings.[49] There are obviously costs and benefits of permitting these agencies to have such discretion. One of the primary benefits is that they are in a better position to make judgments and that it defeats the purpose of delegation to subject them to judicial or ministerial review which effectively attempts to second guess the rationality and appropriateness of their decisions. Moreover, delegation is used as a legislative device specifically because Parliament and other government bodies do not have the time or the expertise to deal with the issues requiring regulation.[50] A separate body of literature is hostile to delegation and the exercise of discretion, regarding it as leading to unaccountable government, over-regulation and eventual capture. For example, Aronson, Gellhorn and Robinson argue that delegation will lead to welfare reducing regulation and the over-production of rules.[51]

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48. R. BALDWIN, M. CAVE & T. JONES, THE REGULATION OF INDEPENDENT LOCAL RADIO AND ITS REFORM (1986).

49. Paul Fenn and the author of this paper have begun this task by developing a model of enforcement behavior. *See* P. FENN & C. VELJANOVSKI, A POSITIVE ECONOMIC THEORY OF REGULATORY ENFORCEMENT (1987). (forthcoming, ECON. J. (1988)).

50. Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); Forina, *Legislator Uncertainty, Legislative Control, and the Delegation of Legislative Power*, 2 J. LAW, ECON. & ORG. 33 (1986).

51. Aronson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982).

IV. CONCLUDING REMARKS

The institutional and legal issues arising from the Thatcher government's privatization program are considerable. But unlike the United States, the issues have not been at the forefront of either political debate or the academic discussion of regulation. The simple reason for this is that British lawyers as a group have not yet realized the significance of what has happened other than in a purely formal legalistic sense. Furthermore, lawyers are not accustomed to structuring their discussion of the policy issues raised by radical legal reform in the terms that Professor Cass' paper does. The different traditions of legal scholarship combined with the newness of the issues raised by privatization in the British context make it difficult to treat them in the detail required.

CONFERENCE PROCEEDINGS

PREFACE

JEREMY F.G. SHEARMUR*

I would like to thank the Law and Economics Center at George Mason University, and the Liberty Fund, especially Henry Manne and Marc Hoberman for all their assistance and for making possible the conference on which this Symposium was based. I would like to thank my wife, Pamela Shearmur, for her many hours of work with me in the revision of various versions of the proceedings, and also the contributors for their corrections to the edited transcript. I am sorry that it was not possible for the entire corrected transcript to be published. However, I would like to thank Timothy Reardon at *Marquette Law Review* not only for his patience, but also for his helpful suggestions as to how the proceedings might be cut to meet the space constraints of this *Review*.

The participants in the conference, and their institutional affiliations at the time at which the conference took place were:

Professor John Ahrens, Social Philosophy and Policy Center, Bowling Green State University, Bowling Green, Ohio.

Professor Gregory Alexander, The Law School, Cornell University, Ithaca, New York.

John Blundell, Institute for Humane Studies at George Mason University, Fairfax, Virginia.

Dr. Stuart Butler, Domestic Policy Studies, The Heritage Foundation, Washington, D.C.

Professor Ronald Cass, School of Law, Boston University, Boston, Massachusetts.

Professor Robert Ellickson, The Law School, Stanford University, Stanford, California.

Professor Clayton Gillette, School of Law, Boston University, Boston, Massachusetts.

Manuel Klausner, Kindel & Anderson, P.C., Los Angeles, California.

Professor Neil Komesar, The Law School, University of Wisconsin, Madison, Wisconsin.

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* Senior Research Fellow, Institute for Humane Studies at George Mason University.

Professor Henry Manne, School of Law and Law and Economics Center, George Mason University, Arlington, Virginia.

Gale Norton, Solicitor's Department, U.S. Department of the Interior, Washington, D.C.

Professor William Page, School of Law, Mississippi College, Jackson, Mississippi.

Robert Poole, Jr., The Reason Foundation, Santa Monica, California.

Dr. Cento Veljanovski, Faculty of Law, University College, London.

Judge Stephen Williams, U.S. Court of Appeals — D.C. Circuit, Washington, D.C.

Daniel Witt, Citizens for a Sound Economy, Washington, D.C.