

# LAW AND CONTEMPORARY PROBLEMS

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Volume 63

Autumn 2000

Number 4

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## FOREWORD

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Like many other parts of the world during the past two decades, my own country of Canada has seen governments at all levels—federal, provincial, and municipal—undertake programs to privatize key enterprises, agencies, and functions.<sup>1</sup> After World War II, Canada's public policymakers committed the country to Keynesian economic planning, one feature of which was a dynamic public sector designed to stimulate aggregate demand and to promote high rates of employment and social and economic stability.<sup>2</sup> The shift to privatization reflects an international trend that, even if it falls short of a late twentieth-century

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Earlier versions of the papers published here were presented at a conference held in Geneva, Switzerland, July 16–18, 1999, in conjunction with the annual Duke-Geneva Institute in Transnational Law. For their cooperation and invaluable assistance in organizing both the academic and logistical aspects of the conference, I am grateful to Professor Bénédict Foëx of the University of Geneva and Professor Madeline Morris of Duke University.

1. For a historical background on the positive role of the state in Canada's economic development, see JEANNE KIRK LAUX & MAUREEN APPEL MOLOT, *STATE CAPITALISM: PUBLIC ENTERPRISE IN CANADA* 37–60 (1988). For a thoughtful collection of diverse opinions about the prospects for public ownership and regulation in Canada when the pressure to privatize has intensified, see *PUBLIC ENTERPRISE IN AN ERA OF CHANGE* (John R. Allan ed., 1998) [hereinafter *ERA OF CHANGE*]. The situation in the United States differs because there has never been a comparable concentration of ownership in the public sector, and deregulation has been a more common strategy than asset sales. See Dennis E. Logue, *The Strategy for Privatization in the United States*, in *DEREGULATION AND PRIVATIZATION IN THE UNITED STATES* 88, 94–99 (Paul W. McAvoy ed., 1995) [hereinafter *PRIVATIZATION IN THE UNITED STATES*].

2. See ROBERT MALCOLM CAMPBELL, *GRAND ILLUSIONS: THE POLITICS OF THE KEYNESIAN EXPERIENCE IN CANADA, 1945–1975*, at 4–5 (1987). Not everyone is persuaded that Keynesian theory has become irrelevant for Canadians. See, e.g., Harold Chorney, *The Future of Crown Corporations: Government Ownership, Regulation or Market Control: A Keynesian Approach*, in *ERA OF CHANGE*, *supra* note 1, at 103.

revolution<sup>3</sup> or the fulfillment of a timeless economic imperative,<sup>4</sup> amounts at least to a contemporary transformation.<sup>5</sup> Some writers treat privatization as an integral part of a larger, sweeping, and perhaps irresistible process<sup>6</sup>—that of economic globalization—that involves the creation of worldwide markets and complex networks of finance, information, production, distribution, and service.<sup>7</sup> According to this view, the pursuit of a global economic order requires mobility of capital, goods, services, and labor; deregulation; and the push for privatization schemes, particularly in developing countries.<sup>8</sup>

Privatization is a protean concept. It can take various forms, including (1) the complete or partial sell-off (through asset or share sales) of major public enterprises; (2) the deregulation of a particular industry; (3) the commercialization of a government department; (4) the removal of subsidies to producers; and (5) the assumption by private operators of what were formerly exclusively public services, through, for example, contracting out.<sup>9</sup> Another form of privatization, the distribution of vouchers to citizens (who do not pay for their stake when they use the vouchers to obtain shares in a formerly state-owned enter-

3. For a claim that the privatization movement itself constitutes a “revolution,” see HARVEY FEIGENBAUM ET AL., *SHRINKING THE STATE: THE POLITICAL UNDERPINNINGS OF PRIVATIZATION* 1 (1999).

4. For the perception that privatization constitutes a “revealed truth” about the ultimate value of free markets and the demonstrated dysfunctionality of the welfare state, see *id.* at 147.

5. The retreat of governments from economic control and public responsibilities—not only in the West, but also in Latin America, Asia, and Central and Eastern Europe—has been analyzed and lauded in DANIEL YERGIN & JOSEPH STANISLAW, *THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND THE MARKETPLACE THAT IS REMAKING THE MODERN WORLD* (1998). Yergin and Stanislaw describe the process as a “vast drama” that, according to their chronology, has antecedents in 1776 with the start of the American Revolution and the publication of Adam Smith’s *Wealth of Nations*. *Id.* at 390, 393.

6. For an academic version of this claim, see Proshanta K. Nandi & Shahid M. Shahidullah, *Introduction: Globalization and Development: The Emerging Dynamics and Dilemmas*, in *GLOBALIZATION AND THE EVOLVING WORLD SOCIETY* 7 (Proshanta K. Nandi & Shahid M. Shahidullah eds., 1998) (“Today, globalization is an evolutionary necessity, and it is an open and deliberate process of individual and collective choice for progress and development.”). For a more popularized version, expressed in concrete terms, see THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* xvii (1999):

I feel about globalization a lot like I feel about the dawn. Generally speaking, I think it’s a good thing that the sun comes up every morning. It does more good than harm. But even if I didn’t care much for the dawn there isn’t much I could do about it.

7. See SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* 12-13 (1996)

8. See *id.* at 59.

There is a growing consensus in the community of states to lift border controls for the flow of capital, information, and services and, more broadly, to further globalization. But when it comes to immigrants and refugees, whether in North America, Western Europe, or Japan, the national state claims all its old splendor in asserting its sovereign right to control its borders.

*Id.*

9. For a discussion of each of these different methods, with particular reference to the United Kingdom, see various chapters in *PRIVATISATION AND REGULATION: A REVIEW OF THE ISSUES* (Peter M. Jackson & Catherine M. Price eds., 1994). For a comprehensive list of “privatization activities,” see GRAEME A. HODGE, *PRIVATIZATION: AN INTERNATIONAL REVIEW OF PERFORMANCE* 15 (2000).

prise), originated in Canada and has since been widely used in the process of “mass privatization” in Russia.<sup>10</sup>

What have been the dominant reasons supporting a government’s decision to privatize one of its branches? To what extent is this motivated by anti-bureaucratic ideology or simple distrust of government,<sup>11</sup> in addition to considerations of economic efficiency?<sup>12</sup> Privatization proposals often appeal to a classical liberal view that economic decisionmaking is best left to private ordering or the exercise of individual preferences through the mechanisms of private property and freedom of contract.<sup>13</sup> The provenance of this tradition can be traced back to the publication in the seventeenth century of John Locke’s *Two Treatises of Government*, which described the permissible limits of government action in terms of preserving the individual property-owner’s security and liberty.<sup>14</sup> Individual citizens—who are frequently re-cast in the role of “consumers” of goods and services in the rhetoric of privatization debates—should be free to make decisions and arrange their priorities without submitting to command institutions or government paternalism.<sup>15</sup> In the words of a contemporary

10. For a discussion of universal distribution via vouchers in the British Columbia Resources Investment Corporation, see Robert W. Poole, Jr., *Privatization for Economic Development*, in THE PRIVATIZATION PROCESS: A WORLDWIDE PERSPECTIVE 10-11 (Terry L. Anderson & Peter J. Hill eds., 1996). The program to transform Russia’s economy and the mechanics of mass privatization are described and assessed in Edgar L. Feige, *The Transition to a Market Economy in Russia: Property Rights, Mass Privatization and Stabilization*, in A FOURTH WAY? PRIVATIZATION, PROPERTY, AND THE EMERGENCE OF NEW MARKET ECONOMICS 57 (Gregory S. Alexander & Grazyna Skapska eds., 1994). Another perspective on the so-called “shock therapy” approach used in Russia—involving rapid price liberalization, stabilization, and privatization—has been offered by Andrei Shleifer. See ANDREI SHLEIFER & ROBERT W. VUISHNY, THE GRABBING HAND: GOVERNMENT PATHOLOGIES AND THEIR CURES 227-53 (1998). Blame for the problems associated with Russian privatization has been attributed to a “market fundamentalist bias,” as well as cronyism and corruption. See George Soros, “Who Lost Russia?,” N.Y. REV., Apr. 2000, at 10. For a discussion of the latter point, particularly with respect for the loans-for-shares programs (and scandals) that succeeded mass privatization, see CHRYSTIA FREELAND, SALE OF THE CENTURY: RUSSIA’S WILD RIDE FROM COMMUNISM TO CAPITALISM 161-81 (2000).

11. For samples of polling data on the extent to which U.S. citizens exhibit decreasing levels of trust in their governments, see Joseph S. Nye, Jr., *Introduction: The Decline of Confidence in Government*, in WHY PEOPLE DON’T TRUST GOVERNMENT 1 (Joseph S. Nye, Jr. et al. eds., 1997).

12. For a discussion of the ideological background to privatization movements in the past two decades in the United Kingdom (during the Thatcher era) and the United States (during the Reagan years), see JOEL F. HANDLER, DOWN FROM BUREAUCRACY: THE AMBIGUITY OF PRIVATIZATION AND EMPOWERMENT 8-9 (1996).

13. For a sketch of the inter-relationship between private property and political liberty, see JOHN GRAY, LIBERALISM 61-67 (rev. ed. 1995). Gray makes the controversial claim that the former is a “condition and a component” of the latter. *Id.* at 61. The conceptual connection identified by Gray does not by itself justify a wholly laissez-faire approach to government policy, for many writers sympathetic to classical liberalism concede some grounds for legitimate government intervention. See, e.g., FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 230-31 (1960); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 42 (1990).

14. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT §§ 123-31 (Peter Laslett ed., Cambridge Univ. Press 1988); Richard Ashcraft, *Lockean Ideas, Poverty, and the Development of Liberal Political Theory*, in EARLY MODERN CONCEPTIONS OF PROPERTY 43 (John Brewer & Susan Staves eds., 1995).

15. The transformation from citizenship to consumerism is described in BENJAMIN R. BARBER, JIHAD VS. MCWORLD 8 (1996). According to Sassen—who runs the risk of anthropomorphism—the true economic citizens under conditions of globalization are “firms and markets, particularly the global financial markets.” SASSEN, *supra* note 7, at 38.

historian of the concept of private ownership, “[p]roperty is an indispensable ingredient of both prosperity and freedom.”<sup>16</sup> Autonomous, private action promises greater rewards than acts of participation in public life.<sup>17</sup> Free, competitive markets, predicated on natural human desires for acquisition and exchange, would make those rewards achievable.<sup>18</sup> Public ownership of a particular firm or nationalization of an industry becomes the exceptional situation that calls for special justification. Absent compelling reasons for administering goods through a public agency, the processes of production and distribution should be left to market forces.<sup>19</sup> Governments should be scaled back and become less *dirigiste*. Under this theory, market discipline is preferable to the use of administrative directions, public ownership, controls, plans, or regulations.<sup>20</sup>

Legislators supporting privatization initiatives are less likely to cite Locke, however, than to invoke the virtues of efficiency, competition (both domestic and international), debt reduction, the stimulation of trade, and higher rates of share ownership among citizens.<sup>21</sup> From the perspective of agency theory, which takes into account the costs associated with incentives and monitoring, private ownership of an enterprise should provide superior efficiency.<sup>22</sup> Agency theorists conceive of an organization as a series of contracts.<sup>23</sup> This nexus-of-contracts analysis, while not uncontroversial, usefully illuminates the policy aspects at stake in the debate over private versus public enterprise.<sup>24</sup> When setting up a private firm, owners of the enterprise contract with managers to pro-

16. RICHARD PIPES, *PROPERTY AND FREEDOM* 286 (1999).

17. For a description of the frustrations associated with participation in public life, see ALBERT O. HIRSCHMAN, *SHIFTING INVOLVEMENTS: PRIVATE INTEREST AND PUBLIC ACTION* 92-120 (1982).

18. Free markets, individual preferences, and the profit motive are arguably no more natural than any other socially constructed matrix of interaction and personal formation. See, e.g., SUNSTEIN, *supra* note 13, at 41 (“Private preferences are partly a product of available opportunities, which are a function of legal rules.”). For three rival conceptions of the market, each with a claim to historical validity, see Thomas L. Haskell & Richard F. Teichgraber III, *Introduction: The Culture of the Market*, in *THE CULTURE OF THE MARKET: HISTORICAL ESSAYS* 3-17 (Thomas L. Haskell & Richard F. Teichgraber, III eds., 1993). For anthropological interpretations of the market as a “cultural entity,” see generally the readings in *MEANINGS OF THE MARKET: THE FREE MARKET IN WESTERN CULTURE* (James G. Carrier ed., 1997).

19. See Ronald A. Cass, *Privatization: Politics, Law, and Theory*, 71 *MARQ. L. REV.* 449, 463 (1988).

20. Hayek argues that, on his conception, *dirigisme* violates the rule of law, not because it requires following a redistributive plan, but because it connotes specific government action aimed at favouring the material condition of a particular beneficiary. See HAYEK, *supra* note 13, at 231-32.

21. See JOHN D. DONAHUE, *THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS* 57 (1989) (“Except for a handful of ideologues, few people would be very interested in privatization unless private suppliers promised superior efficiency.”).

22. For a germinal source for this perspective, see Michael A. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 *J. FIN. ECON.* 305 (1976).

23. See FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 14-15 (1991).

24. For suggestions of some limitations of agency theory, see Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 *COLUM. L. REV.* 1403 (1985). For more skeptical views, see generally William W. Bratton, Jr., *The “Nexus of Contracts” Corporation: A Critical Appraisal*, 74 *CORNELL L. REV.* 407 (1989); Lawrence E. Mitchell, *The Cult of Efficiency*, 71 *TEX. L. REV.* 217 (1992).

vide executive services. Because the private firm measures success in terms of profit, managerial contracts typically include incentives that reflect the level of the firm's performance.<sup>25</sup> Executive compensation can be paid not only in salary and performance bonuses, but also in the form of equity, such as shares or share options. In a public enterprise, the latter, alternative types of reward are unavailable to civil servants.<sup>26</sup> Thus, public enterprises lack the full range of incentives necessary in contemporary business administration to make managers accountable for economic performance.<sup>27</sup>

Agency theory also addresses the costs of monitoring. This, too, is arguably more effective when the enterprise is privately operated. The owners and managers are assumed to have interests and objectives that often diverge.<sup>28</sup> In a private firm, the board of directors is supposed to supervise the firm's management to ensure that officers and employees do not shirk their duties or engage in disloyal conduct.<sup>29</sup> Directors are compensated for performing this supervisory task, and, again, the amount of the directors' fees can be geared to the firm's overall profitability. The market for executive talent will also prompt managers to act in a way that makes them desirable to other firms. By contrast, government officials do not enjoy the same market for talent. In addition, monitoring their activities through democratic governmental processes is sporadic and difficult. Unlike a private firm, whose single goal is to make profits, the aims of a public enterprise are often vaguely expressed and distinctive to that particular agency; different public enterprises might have different goals in terms of balancing their political mandate against profit maximization.<sup>30</sup> When the agency's mission is so confused, ascertaining what is in the "public interest" or "common good" is no easy task.

The public monitors themselves—elected representatives—are prone to follow their own political aims. Public choice theory, developed by economists to account for political action, attributes to politicians and bureaucrats alike relatively meretricious motives. That is, in performing their duties, public offi-

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25. On the strict contractual view, a firm does not have to be devoted to maximizing short-term profits; its aims could be negotiated at the time the corporation is formed. Different rights to dividends, fixed payouts, or residual value could be negotiated among different classes of investors. See EASTERBROOK & FISCHER, *supra* note 23, at 36-37.

26. The obverse of this argument, of course, is that the use of stock options for executive compensation can lead corporate managers to pay undue attention to the firm's short-term performance, at the expense not only of the long-term fortunes of the corporation, but also the "nation's long-run economic interests." See DEREK BOK, *THE COST OF TALENT: HOW EXECUTIVES AND PROFESSIONALS ARE PAID AND HOW IT AFFECTS AMERICA* 116 (1993).

27. See Robert Howse, *Accountability in Public and Private Enterprise: The Uneasy Case for Privatization*, in *ERA OF CHANGE*, *supra* note 1, at 129 (questioning whether civil servant management incentives might be adopted to increase accountability, so that "public-sector restructuring" rather than privatization would be a better choice of policy instrument).

28. See EASTERBROOK & FISCHER, *supra* note 23, at 91-92.

29. At least this is so in theory. For questions about whether directors are in practice sufficiently attentive, see generally JAY W. LORSCH & ELIZABETH MACIVER, *PAWNS OR POTENTATES: THE REALITY OF AMERICA'S CORPORATE BOARDS* (1989).

30. See William T. Stanbury, *Control and Accountability: Government Ownership, Economic Regulation and Competitive Market Forces*, in *ERA OF CHANGE*, *supra* note 1, at 90.

cials are inclined to engage in self-interested or “rent-seeking” behavior. They use the system to appropriate benefits for themselves at public expense.<sup>31</sup> This might take the form of bureaucrats enlarging the size of their own staff or their influence, instead of striving to serve clients or citizens most efficiently.<sup>32</sup> Politicians, who suffer from the same rational propensity to act selfishly as other people, are therefore ill-suited to the role of conscientious watchdogs.

A third ground on which privatization has been justified is the recognition that in certain sectors, governments no longer need to protect monopolies. Conventionally, it was thought that certain infrastructural sectors, such as energy or telecommunications, because of scale economies, could provide services to the public more efficiently through a single, coordinated operator, controlled by a government accountable to electors, rather than through several private operators.<sup>33</sup> The provision of such goods or services as electricity, heating fuel, water, postal services, or a telephone system were treated as giving rise to a natural monopoly. Advances in technology, the ability to raise vast sums of capital to cover sunk costs, and the arrival of multi-national firms, have created new opportunities for competitive entry.<sup>34</sup> For example, Canada’s national postal service (re-invented as Canada Post) is now just one among a host of carriers and couriers.<sup>35</sup> The “exclusive privilege” of transmitting and delivering letters, advertising, and packages has been attenuated.<sup>36</sup> New telecommunication technologies, including telephone, telefax, and the Internet, provide alternative means for linking citizens in a universal system. When a public enterprise retains a monopoly, there are no incentives to be “businesslike” comparable to those motivating private firms to adopt efficient strategies.<sup>37</sup> This consideration does not always point toward selling off the public enterprise as the only effec-

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31. “Rent-seeking” has been defined as “the attempt to obtain economic rents (*i.e.*, rates of return on the use of an economic asset in excess of the market rate) through governmental intervention in the market. An example of rent-seeking is a firm’s attempt to secure government-granted monopolies.” Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 472 n.4 (1988). For an examination of the deployment of public choice models to justify privatization schemes, see Michael D. Wright, *A Critique of the Public Choice Theory Case for Privatization: Rhetoric and Reality*, 25 OTTAWA L. REV. 1 (1993).

32. See HODGE, *supra* note 9, at 36–37.

33. See SANFORD V. BERG & JOHN TSCHIRHART, *NATURAL MONOPOLY REGULATION: PRINCIPLES AND PRACTICE* 2-3 (1988) (enumerating what are arguably the essential characteristics of a natural monopoly).

34. For a discussion of detailed reasons and processes for “denaturalizing” infrastructural monopolies, see PIERRE GUISLAIN, *THE PRIVATIZATION CHALLENGE: A STRATEGIC, LEGAL, AND INSTITUTIONAL ANALYSIS OF INTERNATIONAL EXPERIENCE* 203-86 (1997); ALAN SHIPMAN, *THE MARKET REVOLUTION AND ITS LIMITS: A PRICE FOR EVERYTHING* 79-82 (1999).

35. See ROBERT M. CAMPBELL, *THE POLITICS OF THE POST: CANADA’S POSTAL SYSTEM FROM PUBLIC SERVICE TO PRIVATIZATION* (1994). For comparative perspectives on changes to national postal systems in North America, Europe, and Australia, see generally *MANAGING CHANGE IN THE POSTAL AND DELIVERY INDUSTRIES* (Michael A. Crew & Paul R. Kleindorfer eds., 1997).

36. CAMPBELL, *supra* note 35, at 187–95.

37. As the example of Canada Post shows, in the mid-1980s, when the federal government was considering ways to reform the post office, the politicians found it useful to commission a “private-sector review” panel, whose mandate was to study the postal corporation’s productivity and woeful financial record. The focus was on the public corporation’s “corporate rationale,” rather than its public service functions or constraints. See *id.* at 239–46.

tive form of privatization. In the case of Canada Post, the strategy instead has been to introduce an element of competition and to encourage the public firm to operate more efficiently as a quasi-private enterprise.<sup>38</sup>

To what degree does the rationale for privatization rest (at least in part) on emulating the policies enacted in other countries? Has membership in international organizations such as the International Monetary Fund (“IMF”), the Organization for Economic Cooperation and Development (“OECD”), the World Bank, or the World Trade Organization (“WTO”), as well as the last decade’s phenomenal growth in trade liberalization—Canada’s and Mexico’s entry, for instance, into the North American Free Trade Agreement—fostered the creation of a new “culture” of privatization and marketization? The IMF and the World Bank have been vocal supporters of privatization schemes among the least-developed countries receiving financial support from those organizations.<sup>39</sup> There is a sharp difference of opinion as to whether those organizations operate merely by recommending privatization as a matter of policy advice or technical expertise, or by actually tying financial assistance to a promise to privatize.<sup>40</sup> Some writers claim that these international lenders typically lay down the conditions regarding structural or sectoral adjustments that must be satisfied by the debtor country,<sup>41</sup> conditions that encourage high levels of foreign investment. This image differs from the view that IMF or World Bank officials take of themselves. They have characterized their methods as engaging in “policy dialogue”<sup>42</sup> and working closely together with the country—through the provision of “technical assistance”—to help resolve balance of payments problems and public debt reduction.<sup>43</sup> Privatization is simply presented as one option among many. Countries are not coerced into privatizing their national enterprises;

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38. Since the adoption in 1986 of major reforms affecting Canada Post, the corporation’s goals have been to raise its revenues, cut its costs (especially its labor costs), increase its productivity, and overall to make a profit each year. For this transition in Canada Post’s mandate, see *id.* at 291–95. For a critical assessment of similar attempts with respect to the U.S. postal service, see Sharon M. Oster, *The Failure of Postal Reform*, in PRIVATIZATION IN THE UNITED STATES, *supra* note 1, at 109.

39. These lending organizations are naturally concerned about possible future defaults by countries that receive IMF or World Bank loans; to that extent, they have an interest in promoting sound economic policies. See generally Kim Reisman, *The World Bank and the IMF: At the Forefront of World Transformation*, 60 FORDHAM L. REV. 349 (1992).

40. The situation has been summed up in a recent IMF research paper, where the authors observe: “IMF conditionality has reinforced public enterprise reforms, including privatization, planned under the aegis of the World Bank, where these reforms are important to the objectives of the program.” JEFFREY DAVIS ET AL., FISCAL AND MACROECONOMIC IMPACT OF PRIVATIZATION 27 (International Monetary Fund Occasional Paper No. 194, 2000).

41. On the frequent inclusion of references to privatization in both sectoral adjustment loans and structural adjustment loans from the World Bank, see Paul Cook & Colin Kirkpatrick, *Privatisation Policy and Performance*, in PRIVATISATION POLICY AND PERFORMANCE: INTERNATIONAL PERSPECTIVES 15 (Paul Cook & Colin Kirkpatrick eds., 1995).

42. SUNITA KIKERI ET AL., PRIVATIZATION: THE LESSONS OF EXPERIENCE 2 (1992). The World Bank’s role has been described as building “commitment to privatization by dialogue with governments at the policy level.” Wilfried E. Klaffenburger, *Preface* to DAVID DONALDSON & DILEEP M. WAGLE, PRIVATIZATION: PRINCIPLES AND PRACTICE i (1995).

43. See KIKERI ET AL., *supra* note 42, at 34 (defining “technical assistance” to include not only the funding of legal and financial advisors, asset valuers, and industrial consultants, but also helping the recipient country “to build a social safety net”).

they are instead persuaded that privatization is the wise thing to do.<sup>44</sup> To assist countries in precarious economic circumstances to sell nationalized assets, the World Bank even maintains a website that advertises ripe opportunities of which overseas investors—sometimes called global bargain hunters—might take advantage.<sup>45</sup> From the perspective of these organizations, privatization on a grand scale is not a condition for receiving financial assistance. But it is viewed as an important aspect of the overall push to “modernize” and stabilize recipient countries’ economies, to bring them into line with global trends. Much of the literature produced by World Bank or IMF researchers is exhortative. Private sector development is an undoubted success and “any privatization is better than none,” even if certain cases (such as Russia’s program of mass, speedy privatization) have encountered severe problems.<sup>46</sup> The degree to which the least-developed or emerging countries have benefited from the implementation of privatization policies designed to stimulate growth and stability remains a matter of debate. Some critics claim that the lack of competitive markets and of sufficient private investors, coupled with the presence of entrenched oligopolies (which tend to siphon business opportunities to themselves) have undermined privatization programs in many countries.<sup>47</sup> Research compiled for the World Bank itself has recognized that some countries are not ready for a substantial transfer of state-owned enterprises to the private sector, though this observation does little to alleviate the pressure to privatize.<sup>48</sup>

Privatization affects the scope for politics, regulation, and public oversight. To what extent, then, does sustained privatization redefine the state? Moreover, is the process of privatization strategically best executed without widespread political consultation? Should the government absorb the enterprise’s debts in order to attract private owners? Are all public goods best delivered through market systems? Or are there limits to this? Though privatization was in part conceived as an antidote to excessive bureaucratization, can we now detect discontent with overweening corporate power that is insensitive to local conditions? To what extent has the privatization of certain services led to calls for the re-regulation of firms’ behavior in the marketplace?

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44. Even World Bank officials have acknowledged that on occasion, “well-intentioned outsiders, including the World Bank, have sometimes attempted to prod developing countries that are not ready for reform into acting.” WORLD BANK, BUREAUCRATS IN BUSINESS: THE ECONOMICS AND POLITICS OF GOVERNMENT OWNERSHIP 231 (1995).

45. See World Bank’s Privatization Information Service for International Investors (visited Dec. 2, 2000) <<http://privatizationlink.ipanet.net>>. For sources of advice to potential investors about choosing the right target and negotiating a good bargain, see generally ERNST AND YOUNG, PRIVATIZATION: INVESTING IN STATE-OWNED ENTERPRISES AROUND THE WORLD (1994); BURTON MALKIEL & J.P. MEI, GLOBAL BARGAIN HUNTING: THE INVESTOR’S GUIDE TO PROFITS IN EMERGING MARKETS (1998).

46. See OLEH HAVRYLYSHYN & DONAL MCGETTIGAN, PRIVATIZATION IN TRANSITION COUNTRIES: LESSONS OF THE FIRST DECADE 13-14 (1999).

47. See Mark Baker, *Privatization in the Developing World: Panacea for the Economic Ills of the Third World or Prescription Overused?*, 18 N.Y.L. SCH. J. INT’L & COMP. L. 233, 254-57 (1999).

48. See KIKERI ET AL., *supra* note 42, at 75; WORLD BANK, *supra* note 44, at 237-41.

The authors contributing to this issue explore many of these questions. The lessons to be derived are valuable, because the process of privatization continues apace. In Canada, for example, two of the most noteworthy divestitures have involved, first, the “people’s airline,” Air Canada, and then the “people’s railway,” Canadian National Railway (“CN”).<sup>49</sup> Both enterprises were originally established to serve the purpose of “nation-building.”<sup>50</sup> Since going private, the firms have faced several challenges, including the spectre of foreign ownership, stiff international competition, and the threat of “re-regulation,” especially on the occasions when it is debatable whether the firm is acting in the public interest.<sup>51</sup> Governments in many countries appear interested in going further than just divesting themselves of inefficient transportation behemoths. Among the sectors often targeted have been public utilities, telecommunications facilities and networks, airports, air traffic control systems, as well as other parts of the public infrastructure, such as highways<sup>52</sup> and registry systems. Will social security schemes and public pension plans be next?<sup>53</sup>

The upshot of denationalization and deregulation is not only that government has shrunk—it has fewer assets and maintains less oversight—but also that the reach of administrative law has been shortened. Once a function has been moved to the private sector, public law remedies for lack of jurisdiction, abuse of administrative discretion, or lack of fair treatment by an overseeing body charged with protecting the public good no longer readily apply.<sup>54</sup> Moreover, putting public assets into private hands reduces the scope for public accountability and transparency. The format of a corporation’s annual general share-

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49. The privatization of CN in 1995, the largest in Canadian history, resulted in proceeds to the federal government of \$2.079 billion, while Air Canada’s initial public offering in 1988 (which involved only 75% of the corporation’s shares) raised \$474 million. See Mylène Levac & Philip Wooldridge, *The Fiscal Impact of Privatization in Canada*, BANK OF CANADA REV., Summer 1997, at 30. By 1999, CN’s market capitalization stood at \$6.427 billion. See NATIONAL POST SPECIAL ISSUE, BUSINESS 500: CANADA’S LARGEST CORPORATIONS 94 (2000).

50. This purpose is relevant also to Canada Post. See *supra* text accompanying notes 35–38. For a description of the post office as a state instrument for national development and cultural identity, see CAMPBELL, *supra* note 35, at 31–32.

51. Such issues have swirled around Air Canada in particular. For a citizen’s lament about the failure of deregulation in the Canadian skies, see WAYNE SKENE, *TURBULENCE: HOW DEREGULATION DESTROYED CANADA’S AIRLINES* (1994).

52. See generally Ronald J. Daniels & Michael J. Trebilcock, *Private Provision of Public Infrastructure: An Organizational Analysis of the Next Privatization Frontier*, 46 U. TORONTO L.J. 375 (1996). For a discussion of the building and operation of highways and bridges in Ontario and Atlantic Canada, see SIDNEY M. LEVY, *BUILD, OPERATE, TRANSFER: PAVING THE WAY FOR TOMORROW’S INFRASTRUCTURE* 178–204 (1996).

53. For an account of the situation in Canada, see generally Evan Atwood & Michael J. Trebilcock, *Public Accountability in an Age of Contracting Out*, 27 CAN. BUS. L.J. 1 (1996). Comparative studies are contained in Symposium *Getting Ready for Individually Managed Pensions: A Global Perspective*, 64 BROOK. L. REV. 739–1121 (1998).

54. For an assessment of how the range of administrative law has been affected by privatization schemes, see Mark Aronson, *A Public Lawyer’s Responses to Privatisation and Outsourcing*, in *THE PROVINCE OF ADMINISTRATIVE LAW* 40 (Michael Taggart ed., 1997). Should public law standards be imposed on private law? For arguments against this as an adequate response to privatization schemes, see Gunther Teubner, *After Privatization? The Many Autonomies of Private Law*, 51 CURRENT LEGAL PROBS. 393 (1998).

holder meeting does not lend itself to any discussion of civic or political values. Indeed, in Canada federal business corporations law expressly restricts the ability of shareholders to raise topics that involve “general economic, political . . . social or similar causes.”<sup>55</sup> As a leading U.S. commentator has noted—after studying several transitional economies in central Europe and the tribulations involved in setting up markets for corporate securities—one of the apparent lessons from newly privatized enterprises is that shareholders there have “shown little interest in monitoring.”<sup>56</sup> Such trends illustrate the need perhaps for re-regulation, in the form of either legislative intervention or enhanced judicial powers, whereby judges faced with securities abuses can enjoy “greater discretion and can fashion novel remedies.”<sup>57</sup> A similar conclusion has been reached in the context of studying the effects of privatization on corporate governance in Australia.<sup>58</sup>

Why should a lawyer be interested in these processes and questions? First, lawyers are inevitably involved in the mechanics of privatization. When a government asset is sold, whether to a single buyer or through a public offering of shares, or when a particular service or duty is “outsourced,” at some stage lawyers bring their skills to bear as tacticians, negotiators, or drafters. Lawyers are among the important technicians working behind the scene. But more than this, lawyers are often the authors of principled arguments over whether the state ought to retreat from doing certain tasks. Because government operates according to various structures—legal and economic, as well as political—decisionmakers turn to legal advisors for opinions on whether a proposed action aligns with the framework of laws, including constitutional and international commitments, that bind the state. Finally, lawyers ought to be interested in the privatization phenomenon because it raises interesting questions about the inevitability of government regulation—if not public ownership—of key engines of public policy.

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The generous support of Canadian National (“CN”) is gratefully acknowledged. But for CN’s sponsorship, the conference on privatization that brought

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55. Canada Business Corporations Act, R.S.C., ch. C-44, § 137(5)(b) (1985) (allowing directors to refuse to include proposals of this type in information circulars distributed in advance of shareholder meetings).

56. John C. Coffee, Jr., *Privatization and Corporate Governance: The Lessons from Securities Market Failure*, 25 J. CORP. L. 1, 26 (1999).

57. *Id.* at 29.

58. See Michael J. Whincop & Stuart Rowland, “*Plus ça change . . .*”: *The Effects of Markets and Corporate Law on the Governance of Privatised Enterprises*, in WHO BENEFITS FROM PRIVATISATION? 58 (Moazzem Hossain & Justin Malbon eds., 1998).

At a positive level, it is possible to detect an increasing infiltration of the leitmotifs of public law into corporate law—an analysis of procedure, the treatment of accountability as an end rather than as a means, the increased use of non-substantive grounds of review, and the liberalisation and expansion of standing rights for shareholders . . . .

*Id.*

together the authors contributing to this volume would not have been possible. In particular, the conference reflected the interest shown by David G.A. McLean, chair of CN's board of directors. After its formation as a Crown corporation during the period from 1917 to 1923, CN played a vital role in populating western Canada, by transporting new immigrants to homesteads on the prairies and by helping them adjust to the climate, the culture, and the business of farming.<sup>59</sup> Canadian National and its privately owned counterpart, Canadian Pacific Railways, also provided the major mode for transporting wheat, cattle, minerals, and forest products to market.<sup>60</sup> Despite its central role in the Canadian economy (at one time it was Canada's largest employer),<sup>61</sup> CN was from its origins overbuilt—it was consolidated out of five separate railway companies—and plagued by financial troubles.<sup>62</sup> After its privatization through an international flotation of its shares in November 1995—the largest initial public offering in Canadian history—CN drastically reduced its debt, transformed itself into a profitable venture, and has emerged as a railway that binds not just Canada east and west, but the continent north and south.<sup>63</sup> Since purchasing Illinois Central in July 1999, CN has re-branded itself as “North America's railroad.”<sup>64</sup>

The conference received additional material support and encouragement from the Duke University School of Law, the Global Capital Markets Center and the Program in Public Law at Duke Law School, Duke's Office of the Vice-President (International Affairs), and the Faculty of Law at the University of Geneva. The views expressed in the articles in this issue remain, of course, those of the authors and not necessarily those of any organization.

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59. See DONALD MACKAY, *THE PEOPLE'S RAILWAY: A HISTORY OF CANADIAN NATIONAL* 63–64 (1992).

60. See *id.* at 149.

61. See HARRY BRUCE, *THE PIG THAT FLEW: THE BATTLE TO PRIVATIZE CANADIAN NATIONAL* 4 (1997); MACKAY, *supra* note 59, at 54 (noting that “counting relatives nearly half a million people, an eighth of the population of Canada, depended on CN pay packets”).

62. It was obvious by the 1930s that the “huge burden of debt of the Canadian National is out of all proportion to the earning power of the property.” LESLIE T. FOURNIER, *RAILWAY NATIONALIZATION IN CANADA: THE PROBLEM OF THE CANADIAN NATIONAL RAILWAYS* 221 (1935). By the early 1990s, 90% of CN's traffic was carried on only 33% of its lines, the rest constituting “costly overhead.” MACKAY, *supra* note 59, at 301.

63. The CN privatization was “remarkable in a number of respects,” including the federal government's complete divestiture (it did not retain a “golden share”), no limit on foreign ownership, and a vast oversubscription for its shares. See D.G. MCFETRIDGE, *THE ECONOMICS OF PRIVATIZATION* 34–36 (1997).

64. This is prominently displayed in the banner at CN's website (visited Dec. 2, 2000) <<http://www.cn.ca>>.