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ARTICLES

PRIVATIZATION — THE UNITED KINGDOM EXPERIENCE

*Cosmo Graham**

The business of government is not the government of business.

- Nigel Lawson

I have been asked to try and explain why the privatization program in Britain took the shape that it did. In order to do this, I need to spend some time explaining the legal and political context within which privatization in Britain was undertaken. In so doing, we will see that there are certain factors, unique to Britain, which are not replicable in other countries. This raises the question of what lessons can be learned from the British experience.

I. THE LEGAL CONTEXT

Britain may well be unique in having an unwritten constitution. This does not mean that there is no constitution. It simply means that there is no one constitutional document, and that our constitution is a mixture of legislation, case law, conventions and informal practices. The foundation stone of this structure is the principle of Parliamentary sovereignty, famously enunciated by Professor Dicey:

The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to

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override or set aside the legislation of Parliament.¹

Following from this principle, the orthodox position is that the courts are not permitted to review the legality of primary legislation. Parliament may make any law on any subject. This lack of an ability to review legislation on constitutional grounds is not unique to Britain, the position is the same in France² and the Netherlands.³ However, such an absence is more problematic in the context of the British Parliamentary system.

When Albert Dicey refers to Parliament, he means the House of Commons, House of Lords and the Sovereign. When he first wrote the words in 1885, the House of Lords could still block proposed legislation and the Royal Assent was perhaps not entirely a formality. Although the party system in the House of Commons was beginning to take its modern form, it was still possible to see Members of Parliament as independently minded. It has been one hundred or so years since the Parliament Acts of 1911 and 1949 were passed, which have reduced the House of Lords' power to that of delay only, and the assent of the sovereign has become a formality. The House of Commons has become dominated by the modern party system whereby Members of Parliament are expected to support the party line without exception. The result is that the House of Commons is commanded by the majority party, which forms the government. With a majority, the government is able to pass whatever legislation it wishes so the legislature becomes, in effect, the tool of the executive. The only time that there is a problem is when the proposed legislation divides the governing party, as was the case recently over the ratification of the Maastricht Treaty.⁴ There are limited opportunities for the

1. ALBERT V. DICEY, *THE LAW OF THE CONSTITUTION* 39-40 (10th ed. 1959).

2. See JOHN BELL, *FRENCH CONSTITUTIONAL LAW* 1 (1992). However, Bell notes that while France has always been a fervent believer in parliamentary supremacy, this supremacy has come to be understood in a new way with limited powers of constitutional review being placed in the *Conseil Constitutionnel*. *Id.* As Bell explains, "[t]he new boundaries of Parliament's powers are policed by the *Conseil constitutionnel*, a body that is best seen as a form of constitutional court." *Id.*

3. See GRONDWET [Constitution] art. 120 (Netherlands).

4. See generally Richard Rawlings, *Legal Politics: The United Kingdom and Ratification of the Treaty on European Union (Part One)*, 1994 PUB. L. 254; Richard Rawlings, *Legal Politics: The United Kingdom and Ratification of the Treaty*

use of procedural tactics to delay or halt legislation. Filibustering is impossible because the government can introduce a guillotine, as it did with the bill introduced to privatize British Telecom (BT), and the government always has a majority on the relevant committees.

The result of this system is that legal constraints on the government's privatization program have been minimal. The courts have only been involved at the fringes of the program, on largely technical issues.⁵ Other ex post facto scrutiny has been limited to committees of the House of Commons, of which the most important has been the Public Accounts Committee. This Committee only has been concerned with the question of whether the government received a fair price for the assets sold; it has not sought, or been entitled to, question the wider policy aspects of the program.⁶ Major criticism from within the Parliamentary system has also come from the Select Committee on Energy of the House of Commons which issued a variety of highly critical reports on the arrangements for privatization, at both pre and post-legislative stages, without questioning the basic principle of privatization.⁷ There was, and still is, no equivalent Select Committee for telecommunications and water and so there has been little sustained Parliamentary scrutiny of these areas. In any event, with the abolition of the Department of Energy after the 1992 general election, the Energy Select Committee was wound up and its functions were transferred to the Select Committee on Trade and Industry, which is currently spending substantial time on utilities matters.

on *European Union (Part Two)*, 1994 PUB. L. 367.

5. See, e.g., *Ross v. Lord Advocate*, [1986] 3 All E.R. 79 (whether the assets of the Trustee Savings Bank were owned by the state); *Institution of Professional Civil Servants v. Secretary of State for Defence*, [1987] 3 C.M.L.R. 35 (consultation with the workforce on the Transfer of the Undertakings Regulations); *Sheffield City Council v. Yorkshire Water Services Ltd.*, [1991] 2 All E.R. 280 (transfer of assets of old water authorities).

6. On the work of the Public Accounts Committee, see COSMO GRAHAM & TONY PROSSER, *PRIVATIZING PUBLIC ENTERPRISES* 60-61, 93-95 (1991); J.F. McEldowney, *The National Audit Office and Privatisation*, 54 MOD. L. REV. 933 (1991).

7. See, e.g., HOUSE OF COMMONS, *FIRST REPORT FROM THE ENERGY COMM., REGULATION OF THE GAS INDUSTRY*, H.C. DOC. NO. 15, 1985-1986 SESS. (1986); HOUSE OF COMMONS, *THIRD REPORT FROM THE ENERGY COMM., THE STRUCTURE, REGULATION AND ECONOMIC CONSEQUENCES OF THE ELECTRICITY SUPPLY IN THE PRIVATE SECTOR*, H.C. DOC. NO. 307-i, 1987-1988 SESS. (1988).

The one area where important legal restraints do exist is in the area of European Union law. In this area, if there is a clash of law between Union and domestic law, it is firmly established, at least in the mind of the European Court of Justice, that Union law will prevail over domestic law.⁸ For all practical purposes so far, British judges have accepted that this is also the position in English law.⁹ The Treaty of Rome is neutral regarding property ownership, whether property is to be publicly or privately owned is a matter for the member state.¹⁰ The Treaty does, however, contain rules that have affected the British privatization program. Article 92 contains a general prohibition of state aids to industry, with a limited range of exceptions which have to be approved by the Commission of the European Community. Articles 85 and 86 contain rules about agreements, cartels and abuse of dominant positions which are relevant to monopoly enterprises whether public or private. In addition, there are various rules contained in Union "secondary" legislation which have the potential to affect the privatization process. Of these provisions, it has been Article 92 which has had the most highly publicized effects on the privatization process. The general consequence has been, not to halt the privatization process or change the structure of privatization, but to limit the government's discretion to offer incentives to prospective buyers of privatized companies. Thus, for example, after the sale of the Rover Group to British Aerospace the Commission demanded a £331 million cut of the cash injection into Rover and, after a second investigation, demanded that British Aerospace repay some £44.4 million of the purchase price.¹¹

To summarize this section, there have been few legal constraints placed on the British government's privatization program. To explain the shape that the program took, we must

8. Case 6/64, *Costa v ENEL*, 1964 E.C.R. 585, [1964] 3 C.M.L.R. 1.

9. *Regina v. Secretary of State for Transport (No. 2)*, 1 App. Cas. 603 (H.L. 1991).

10. THE TREATY OF ROME CONSOLIDATED AND THE TREATY OF MAASTRICHT 711 (Neville M. Hunnings & Joe M. Hill eds., 1992) (Article 222).

11. For details of this and other interventions of the Commission, see GRAHAM & PROSSER, *supra* note 6, at 126-29. The second decision of the European Commission was subsequently annulled by the European Court of Justice on procedural grounds. See Case C-292/90, *British Aerospace plc v. Commission*, 1992 E.C.R. 493, [1992] 1 C.M.L.R. 853.

look to the political and pragmatic constraints faced by the government.

II. THE POLITICAL CONTEXT

The Conservative government which took office in 1979 was, at least ostensibly, committed to radically different policies from that of the Labour government. There is fierce debate in the political science literature over the extent to which "Thatcherism" (to use what became a convenient shorthand for the policies of the Conservative government) had a coherent program and the extent to which its policies were developed pragmatically, in an incremental and opportunistic fashion.¹² The privatization policy is a very good example of this ambiguity. The Ridley report that was leaked before the election contained a program for dealing with the unions but had only a small place for privatization.¹³ The 1978 manifesto referred only to the sale of shares in the National Freight Corporation, sale of the recently nationalized aerospace and shipbuilding industries and of the National Enterprise Board's holdings, a "complete review" of the British National Oil Corporation's activities and relaxation of bus licensing. The early privatizations were modest, concentrating on companies in competitive sectors. Yet from these modest beginnings the program has grown to encompass the major public utilities of telecommunications, gas, electricity and water as well as the railways and the "ultimate privatization," that of the coal industry. How then did the program gain momentum, to the point of becoming one of the centerpieces of the Conservative party's strategy?

Feigenbaum and Henig have produced a useful typology of the political motivations underlying privatization initiatives.¹⁴ They distinguish between pragmatic, tactical, and systemic privatization strategies. Pragmatic privatization strategies

12. See, e.g. ANDREW GAMBLE, *THE FREE ECONOMY AND THE STRONG STATE: THE POLITICS OF THATCHERISM* (1988); DENNIS KAVANAGH, *THATCHERISM AND BRITISH POLITICS: THE END OF CONSENSUS?* (1987); PETER RIDDELL, *THE THATCHER GOVERNMENT* (1985); *THATCHERISM* (Robert Skidelsky ed., 1988).

13. See Mariusz M. Dobek, *Privatization as a Political Priority: The British Experience*, 41 *POL. STUD.* 24, 36-37 (1993).

14. Harvey B. Feigenbaum & Jeffrey R. Henig, *The Political Underpinnings of Privatization*, 46 *WORLD POL.* 185 (1994).

take place where the key actors view privatization as one among several alternative "tools" for solving societal problems.¹⁵ "Tactical privatizations . . . are advocated to achieve the short term political goals of particular parties, politicians, or interest groups."¹⁶ "Systemic privatization strategies . . . are intended to reshape the entire society by fundamentally altering economic and political institutions and transforming economic and political interests."¹⁷ My contention in this paper is that, from the point of view of the Conservative party, privatization has been in practice, largely a tactical matter. At the same time, however, it offered a pragmatic solution to the seemingly insoluble problems presented by public enterprises which made it attractive to the civil servants involved. The resulting scale of the program, combined with other changes brought about by Conservative governments, have, in the end, brought about important systemic changes.

There are two important background factors to bear in mind when assessing the development of the privatization program. First, an important faction of the Conservative party, including then-Prime Minister Margaret Thatcher, converted to neoliberal ideas. Without going into any great detail on the content of neoliberal beliefs, the important point is that important sections of the Conservative party believed in market mechanisms rather than state centered allocative mechanisms. Thus, this wing of the party saw privatization as a natural policy.¹⁸ The second factor was the overall economic context and, in particular, the strategies adopted by the Conservatives for dealing with the economy. In the late 1970s and early 1980s, Britain was in a severe economic crisis. The favored solution was to cut back on public expenditure which formed the centerpiece of the Conservative government's policies. The major measure of public expenditure was the Public Sector Borrowing Requirement (PSBR). Borrowing by nationalized industries was part of this measure, but due to Treasury accounting rules, the sale of nationalized industries helped to

15. *Id.* at 191-92.

16. *Id.* at 192.

17. *Id.*

18. See NIGEL LAWSON, THE VIEW FROM NO. 11: BRITAIN'S LONGEST-SERVING CABINET MEMBER RECALLS THE TRIUMPHS AND DISAPPOINTMENTS OF THE THATCHER ERA 199 (1992).

reduce the PSBR.

We must also remember that the nationalized industries were, in themselves, an important policy problem. The structure created for their operation had brought about neither clear commitment to social goals nor great economic efficiency. They were bedevilled by short term political interventions which hit, in particular, their capital expenditure.¹⁹ Consequently, by the 1980s, a number of the industries, notably telecommunications and water, were in need of substantial capital injections, which would not be forthcoming from the public sector. There were attempts within government to produce reforms of nationalized industries but, for one reason or another, they were all dismissed as unworkable.²⁰

How does this account, which emphasizes the key role of economic problems, square with the publicly admitted objectives of the policy? The problem is nicely put by Abromeit:

[The system of aims] was not formulated at the beginning of the policy of privatization: we search in vain for official government pronouncements-e.g. a White Paper-from the early years which comprehensively present and adequately clarify the aims and scope of the proposed measures. Only in recent times, after this policy has steadily expanded by a sort of dynamic of its own, have government members, in particular John Moore, made it their business in various speeches to equip the de facto policy, after the event, with a more or less consistent philosophy.²¹

Most of the commentators agree and they produce fairly similar lists of objectives of which Vickers and Yarrow's is a fair example. They list seven aims: reducing government involvement in industry, improving efficiency in the privatized industries, reducing the PSBR, easing problems in public sector pay determination, widening share ownership, encouraging employee share ownership and gaining political advantage.²² These

19. See generally TONY PROSSER, NATIONALISED INDUSTRIES AND PUBLIC CONTROL: LEGAL, CONSTITUTIONAL AND POLITICAL ISSUES (1986).

20. For details of these ideas, which were never made publically available, see LAWSON, *supra* note 18, at 204-05. See also DENNIS SWANN, THE RETREAT OF THE STATE 236-37 (1988).

21. Heidrun Abromeit, *British Privatization Policy*, 41 PARLIAMENTARY AFF. 68, 72 (1988).

22. JOHN VICKERS & GEORGE YARROW, PRIVATISATION: AN ECONOMIC ANALYSIS

are not all compatible. For example, improving efficiency suggests increasing competition while reducing the PSBR means maximizing the sale price of an industry. If competition in the industry is increased, then the sale price is likely to be reduced.

What I shall do in the remainder of this paper is to take certain of these claims and see whether or not the resulting arrangements meet these objectives. I am going to look at three: increasing share ownership, improving efficiency through increasing competition and improving efficiency and accountability through better arrangements for regulation.

III. INCREASING SHARE OWNERSHIP

The claim here is that increasing share ownership would produce a new means of accountability for the industries. John Moore put the arguments nicely:

[T]he extraordinary success that privatization now has in creating a wide distribution of shares produces shareholder pressures quite unlike those faced by nationalized industries or conventional companies. The existence of large numbers of shareholders who have both paid for their shares expecting a reasonable return and are customers interested in good service at a fair price is an irresistible combination and a powerful lobby in favor of both efficiency and price restraint.²³

What he seems to have in mind is accountability to the shareholders through company law techniques, e.g., the general meeting. Additionally, the market for corporate control should not be ignored, even though this is not a politically attractive point.

IV. ACCOUNTABILITY IN THE GENERAL MEETING

The first point to notice is that the number of shareholders in the privatized industries has dropped dramatically and rapidly after flotation. Even in BT, the number of small share-

157 (1988). See also SWANN, *supra* note 20, at 228-38; CENTO VELJANOVSKI, *SELLING THE STATE* 7-10 (1987).

23. John Moore, *The Success of Privatisation*, in *PRIVATISATION AND REGULATION* 94, 95 (John Kay et al. eds., 1986).

holders dropped from 2.1 million on flotation to 1.4 million,²⁴ only 24% of shares not held by government or employees were clearly in the hands of individual shareholders. British Airways lost over 750,000 shareholders in the seven months after flotation.²⁵ In British Airports Authority (BAA), the number of shareholders dropped from 2.2 million to under 1.3 million in three months.²⁶ Since 1979, despite the privatization program, the dominance of institutional over personal investors on the UK Stock Exchange has increased. However, after a decade of privatization, the number of shareholders in the population has almost tripled and there is evidence that shareholders are more likely to vote for the Conservative, rather than the Labour Party.²⁷ That the Conservatives were aware of this is perhaps illustrated by the fact that before the 1987 general election, the Party Chairman wrote to shareholders in BT who lived in constituencies with a Labour Member of Parliament warning them of the effect of the latter's policies on nationalization.

The second point is that the information flow to shareholders is deficient. For example, it has been claimed that British Gas' Annual Report actually contains less commercial information than it did when it was a nationalized industry.²⁸ This situation has deteriorated because the Companies Act of 1989 introduced new rules which allow listed public companies to provide shareholders with an abbreviated version of their reports and accounts,²⁹ an option which has been taken up by some of the privatized companies, such as BT. This followed, according to reports, an argument by the Trustee Savings Bank ("TSB"), backed up by other privatized companies, that sending the full report was wasteful, as it just ended up in the bin.³⁰ It should be added that problems about annual reports is not something peculiar to privatized companies. The Scottish

24. *Big Fish Grab Sell Off Shares*, LAB. RES., Sept. 1987, at 7, 8.

25. *Id.* at 7.

26. Lynton Mclain, *Traffic Rise Helps BAA to £136m*, FIN. TIMES, Nov. 25, 1987, at 24.

27. For the figures and survey evidence, see Dobek, *supra* note 13, at 23-24.

28. Nick Bunker, *TSB Shareholders' Fury Falls to Stop Bid for Bank*, FIN. TIMES, Nov. 3, 1987, at 1.

29. Companies Act, 1985, ch. 6, § 251 (Eng.).

30. Richard Waters, *Fears of What Lurks Below the Bottom Line*, FIN. TIMES, April 7, 1988, at 7.

Chartered Accountants published a report criticizing the type of information supplied in company annual reports and making suggestions to improve the situation.³¹

Finally, reports of the annual general meetings (AGMs) of privatized industries indicate that, with the possible exception of the first BT AGM, proper scrutiny of directorial performance is non-existent. The general attitude of the privatized companies appears to be that ascribed by The Economist to BT: "BT's attitude, sadly, is that it has a statutory obligation to hold an AGM and that the shareholders are there under sufferance."³² Whenever shareholders have attempted to raise controversial issues, they have easily been out-manuevered. For example, at one AGM of the TSB there was violent opposition to the proposed take-over of the merchant bank Hill Samuel from the small shareholders. Their challenge was unsuccessful, in part because the motion of no confidence was reported to be contrary to the articles of association. The episode illustrates that when it comes to controlling meetings, the incumbent management holds all the cards. The shareholders did not give up, and a committee of some 20 private shareholders was formed to coordinate criticism of the TSB's acquisition policy.³³ Another good example was BREL, where the campaign to save 1,200 jobs by cancelling a four million pound shareholders dividend and investing the money in the company failed at the AGM when the Chairman revealed that he held 85% of the votes in proxy form.³⁴

Equally instructive has been the response of the British Gas board to challenges to retiring directors. At the first AGM after privatization, the industrial consumers (whose complaints about British Gas's pricing policy have led to a Monopolies and Mergers Commission (MMC) probe and consequent policy changes) attempted to have Ian Macgregor appointed to the board as a representative of their interests. This was easily

31. MAKING CORPORATE REPORTS VALUABLE: A DISCUSSION DOCUMENT BY THE RESEARCH COMMITTEE OF THE INSTITUTE OF CHARTERED ACCOUNTANTS OF SCOTLAND (Peter N. McMonnies ed., 1988). See also TERRY SMITH, ACCOUNTING FOR GROWTH: STRIPPING THE CAMOUFLAGE FROM COMPANY ACCOUNTS (1992).

32. *British Telecom Has a Thing or Two to Learn From Ma Bell*, ECONOMIST, Sept. 7, 1985, at 91.

33. Bunker, *supra* note 28, at 1; *TSB Board Faces Stormy AGM*, OBSERVER, Jan. 31, 1988, at 6.

34. RAIL, April 3-16, 1991, at 20.

defeated in, as one commentator put it, "a near-unanimous card vote reminiscent of the back parking lot at Cowley." In 1988, Noel Falconer put himself forward as a representative of the small shareholders. This was also unsuccessful and the board of British Gas have now made it more difficult to challenge incumbent directors by putting forward a resolution which deleted Article 92(3) of the articles of association, which obliged British Gas to end shareholders advance notice of any challenge to incumbent directors.³⁵

There are, however, recent signs that perhaps the regional companies are becoming more responsive to shareholder pressure. As part of a broader campaign against certain policies of Yorkshire Water, a consumer group bought shares in the company and nominated Diana Scott, who had been the Chair of the Customer Services Committee, for the board of directors. This nomination was opposed by the board and at an acrimonious general meeting, she was defeated on a poll vote having obtained the support of some of the local authority pension funds.³⁶ Subsequently, it seems that the company has changed its position, conceding the need for a broader spread of non-executive directors and making concessions on certain issues of concern to consumers, notably water metering.

If the shareholders generally are ineffective, what about the institutional investors? Reliable empirical evidence is very sparse but it seems to indicate that institutions rarely intervene in management matters, and that they will not do so in the public forum of the AGM. This is not the sort of shareholder accountability the government would wish to be seen promoting. None of this is particularly surprising nor peculiar to the privatized industries.³⁷ As one commentator put it, "[a] system designed in the 19th century when the whole quoted company mechanism was developed cannot cope with mass capitalism."³⁸ All of which goes to show that perhaps we ought to look for the real restraints in the market for corporate

35. Simon Rose, *British Gas Faces Another Small Shareholder Bid*, INDEPENDENT, July 1, 1990, (Business), at 17.

36. For details of the defeat, see Simon Davies, *Watchdog Fails to Join Yorkshire Water Board*, FIN. TIMES, Sept. 30, 1994, at 22.

37. See, e.g., *Burton's Problems Are Not, On Present Evidence, Really Tailor-Made to the Guinness Pattern*, GUARDIAN, Jan. 13, 1988, at 30.

38. Hamish McRae, *Annual Meetings Do Not Work — We Need Another Way*, GUARDIAN, Aug. 17, 1988., at 7.

control.

V. GOLDEN SHARES

The market for corporate control in Great Britain is not, by any means, the classic free market. In reality it is a highly politicized, discretionary market where takeover bids are overseen by a complicated network of regulatory institutions.³⁹ With privatized industries there is an additional complication - the existence of "golden shares". A colleague and I have dealt with the legal provisions in detail elsewhere⁴⁰ and so the discussion here will be somewhat schematic.

The basis, in general, for a golden share scheme is that the share capital of the company will contain one special rights redeemable preference share of £1 held by the government or their nominee. Certain matters are then specified as being deemed to be a variation of the rights of the Special Share and can, therefore, only be effective with the consent in writing of the Special Shareholder. The most common of these matters are: any amendments to the article relating to the Special Share, the article defining the restrictions on shareholding and the definitions of various terms. A prohibition on a voluntary winding-up and on the creation of new shares, other than ordinary equity shares, is usually included.⁴¹ One provision worth mentioning in greater detail is that in four cases (Amersham International, Cable and Wireless, Jaguar and Rolls-Royce) the disposal of a material part of the assets of the company, defined as 25%, is deemed to be a variation of the rights of the Special Shareholder.⁴² In these cases, even a substantial re-

39. See generally Paul Craig, *The Monopolies and Mergers Commission: Competition and Administrative Rationality*, in REGULATION AND PUBLIC LAW 201 (Robert Baldwin & Christopher McCrudden eds., 1987); Maurice Wright, *City Rules O.K.? Policy Community, Policy Networks and Takeover Bids*, 66 PUB. ADMIN. 389 (1988).

40. Cosmo Graham & Tony Prosser, *Golden Shares: Industrial Policy by Stealth?*, 1988 PUB. L. 413.

41. Sometimes, the creation of non-equity shares is allowed which, when aggregated with all other such shares, carry the right to cast less than 15% of the votes capable of being cast on a poll at any general meeting.

42. The Articles of British Airports Authority make the disposal of airports a variation of class rights and thus subject to the consent of the special shareholder. The Articles of Rolls-Royce also make specific provision for the protection of its nuclear business, i.e., the development, manufacture and sale of nuclear propulsion units and nuclear cores for submarines.

structuring of the company will depend on negotiations between it and the government, rather than the free play of market forces.

On these foundations, two different types of schemes are identifiable. The first was peculiar to Britoil and Enterprise Oil. The basic idea was that if any person controls, or makes an offer for, more than 50% of the voting rights, then the special shareholder will have one more vote at a general meeting than all the other shareholders. The second scheme has been used in the other privatizations and the usual reference to 'golden' shares is rather misleading. The only function of the special share is to entrench certain provisions about the limitations on shareholding which are then operated by the directors. It is quite possible to have such limitations without a special preference share, as is the case for British Airways and the TSB. The essence of this scheme is that if a person owns over 15% of the shares, then he/she is compulsorily divested of them, the shares are sold to other parties and the persons so divested receive the proceeds. While the procedure is being carried out, the person's voting rights are removed.

These are draconian and wide-ranging powers without parallel in conventional company law. The previous cases on the alteration of articles have all dealt with attempts to alter the articles in order to deprive a particular person of their shares. No matter what one's interpretation of this line of cases, it cannot be stretched to encompass a general ban included in the original articles. Nor can it be interpreted to challenge the directors. Their decisions are carefully insulated from challenge, and they are mandatory. The possibility of challenging the valuation is also highly unlikely.⁴³

There has been little public discussion by the government of the rationale, in general, for golden share schemes, just occasional justifications for specific schemes. Nigel Lawson has claimed parentage and that their object was to prevent companies falling into foreign hands, although this could not be stat-

43. For a discussion of this line of cases, see F. G. Rixon, *Competing Interests and Conflicting Principles: An Examination of the Power of Alteration of Articles of Association*, 49 MOD. L. REV. 446 (1986). Given that the privatized companies are all listed on the Stock Exchange, the problems that arise in valuing shares in private companies do not exist here.

ed explicitly because of European Union law.⁴⁴ There appears to be some uncertainty about when they are appropriate and how long they should last. It is difficult, for example, to think of convincing reasons why BT should have a golden share but not British Petroleum. Equally, it is not clear why the proposed golden shares for the English water authorities should be given a five year time limit whereas the golden share proposed for Welsh Water will be permanent, unless 75% of the shareholders agree otherwise.⁴⁵

This apparent confusion would be less important if golden shares were only a presentational device, which were unlikely to be utilized. Experience, however, has shown otherwise. The most highly publicized example has been the takeover of Britoil by British Petroleum.⁴⁶ The salient point here is that the government, after much hesitation and confusion, used the golden share to negotiate with British Petroleum and extract certain concessions from it about the takeover.⁴⁷ These included, *inter alia*, undertakings that employee numbers in Aberdeen and Glasgow, taking British Petroleum and Britoil together, would not fall as a result of the acquisition and that British Petroleum would ensure that Britoil would not, except in the ordinary course of trading, dispose of the whole or a substantial part of its assets. In return for the undertakings, the golden share would not be exercised and, after a period of time, its redemption would be considered. Meanwhile, the golden share would be the sanction behind the monitoring of the undertakings, and would be transferred from the Treasury to the Department of Energy. Just over 18 months later, after a global review of its strategy, British Petroleum announced plans to cut 970 jobs in Scotland and to sell £843 million of assets to Oryx Energy, a United States oil company, as part of a corporate reorganization.

The Energy Select Committee investigated these events and issued a critical report.⁴⁸ Although the Committee could

44. LAWSON, *supra* note 18, at 219.

45. See Richard Evans, *Confusion in Water Industry*, FIN. TIMES, Jan. 13, 1989, at 6; Paul Nettleton, *Special Share Will Guard Water Groups*, GUARDIAN, Jan. 13, 1989, at 6.

46. Graham & Prosser, *supra* note 40, at 426-30.

47. See LAWSON, *supra* note 18, at 782.

48. HOUSE OF COMMONS, FIRST REPORT FROM THE ENERGY COMM., BP/BRISTOL JOB LOSSES AND ASSET SALES, H.C. DOC NO. 13, 1989-90 SESS. (1989).

identify no clear breach of the letter of assurances (which, it remarked, was hardly surprising given the vagueness of many important parts of them), it observed that British Petroleum's new strategy was causing it to tread close to the bounds of maneuverability which the assurances allowed the company. The Committee criticized the obscurity of the assurances and was particularly dissatisfied with the undefined duration of many of them. As for the Department of Energy's role in monitoring the assurances, the Committee felt that the Department did not place enough emphasis on British Petroleum's duty to abide by them and was concerned by the Department's reliance on information from British Petroleum for its monitoring. The Committee felt that some independent monitoring by the Department was necessary and recommended that the golden share remain in existence for the time being. Despite this recommendation, the government has now abandoned the golden share in Britoil, making the announcement on a Friday in the House of Commons, a day when most Scottish MPs are not in Westminster.

The second type of golden share scheme has also caused problems, although it was successfully used in the case of Rolls-Royce to force the divestment of certain foreign shareholdings. Problems have arisen here because the EC Commission investigated its compatibility with Union law. After protracted negotiations, the Department of Trade and Industry agreed to raise the ceiling for British Aerospace and Rolls-Royce to 29.5%, and the Commission undertook to review this limit before the end of 1992 or sooner if non-UK investors had difficulty in buying Rolls-Royce shares.⁴⁹

Further difficulties have arisen over the government's role in Ford's take-over of Jaguar.⁵⁰ On privatization, Jaguar had been given a golden share, limiting shareholdings to 15%, which was due to expire at the end of 1990. Early in 1989, the company entered into negotiations with General Motors hoping that the American company would take a substantial minority stake in return for investment in Jaguar. By the end of October 1989 the respective Boards had agreed a memorandum of

49. *Brussels Accepts Plan for R-R*, FIN. TIMES, July 20, 1989, at 1, 26.

50. For details of the events, see HOUSE OF COMMONS, DEPARTMENT OF TRADE AND INDUSTRY, SPECIAL SHARES AND THE DTI, H.C. DOC. NO. 90-i, 1989-90 SESS. (1989).

understanding, and the necessary legal documentation to present the deal to the shareholders was being prepared. However, Ford had also been interested in Jaguar since 1988 and had built up a substantial minority stake. Ford then indicated to the United States Securities and Exchange Commission, at the end of October, that it would be prepared to make a full bid for the British company if the restrictions on shareholding were waived.

The day before the General Motors bid was due to be presented, the Secretary of State for Trade and Industry announced that the government would be prepared to waive the 15% restriction on shareholding if 75% percent of the shareholders agreed. This was done without prior consultation of the Jaguar board, which was given less than four hours notice; indeed, it requested him not to make the announcement. No explanation was given of why the Minister did not allow the board to make its own decisions about the future of the company. Although the Secretary of State denied having direct contacts with Ford, it is clear that the Department was aware that Ford was preparing a bid for Jaguar which was due imminently.

As a result of the waiver, Jaguar's share price rose dramatically, General Motors refused to make a full bid, and, after intensive negotiations, the Jaguar board recommended Ford's bid, which was duly accepted by the shareholders, although other parts of the special share remain in place. Unsurprisingly, the bid was not referred to the MMC.

It was the failure to provide British Petroleum with a golden share and the insistence that the sale of the government's remaining shareholding take place, even in the wake of the stock market crash, which provided the Kuwait Investment Office (KIO) with a unique opportunity to purchase a large stake in British Petroleum. In spite of informal attempts to get the KIO to limit its shareholding, it was eventually built up to approximately 21%. The widely dispersed nature of British Petroleum's shareholding (the next largest shareholder only had one-and-an-eighth percent of the shares) raised worries about the level of Kuwait's influence. The government referred the shareholding to the MMC for a quick report. While the MMC was investigating, the Kuwaitis offered to enter into a deed with the United Kingdom Government, giving certain assurances about their shareholding in British

Petroleum. This offer was summarily declined.⁵¹

The MMC came to the conclusion that the shareholding was contrary to the public interest because future conflicts of interest between Kuwait, the United Kingdom, and British Petroleum could be expected to arise. If that happened Kuwait could be expected to use its shareholding to influence British Petroleum's behavior. In particular, it might want to influence British Petroleum's strategies in the product market, exploration policies, future research and development and acquisitions strategy. Difficulties could also arise regarding sensitive commercial and political information if Kuwait could appoint a director. Furthermore, adverse perceptions of British Petroleum could arise in third party countries.⁵²

The MMC recommended that the KIO be required to divest its shareholding in British Petroleum to no more than 9.9% within a period of 12 months. The Kuwaitis were reportedly shocked by this move and, after representations to the government, the period for divestiture was extended to three years. Shortly after this announcement, British Petroleum agreed to buy back 11.7% of the shares for £2.4 billion. A substantial proportion of the price accrued to Kuwait in the form of advance corporation tax, which it was not liable to pay as a sovereign government.

The important point about these three episodes is that golden shares in privatized companies replaced the market for corporate control with government discretion.⁵³ It is tempting to dismiss privatized industries as exceptional, as not like other companies. To do so undermines the rhetoric of the privatization program, but there is a more serious objection. To repeat a point made above, the takeover market is highly politicized. The guidelines for referral and non-referral of bids to the MMC are opaque and it is always possible that non-economic criteria will be invoked. Therefore, to talk, in any simple sense, of a market for corporate control is highly misleading.

51. For the details of the deed, see MONOPOLIES AND MERGERS COMMISSION, THE GOVERNMENT OF KUWAIT AND BRITISH PETROLEUM COMPANY PLC, 1988, CM 477, app. 7.1, at 99.

52. *Id.* ¶¶ 8.68, .73, .81, .90, .94, .98, .101, .118.

53. See STEPHEN C. LITTLECHILD, DEP'T OF ENVIRONMENT, ECONOMIC REGULATION OF PRIVATISED WATER AUTHORITIES: A REPORT SUBMITTED TO THE DEPARTMENT OF THE ENVIRONMENT ¶¶ 5.19-23 (1986).

Thus, if the economic aim was to introduce the privatized industries to new market disciplines and new types of accountability, this part of the policy has had only limited success. What about increasing the competition to which the monopoly utilities are subject?

VI. INCREASING COMPETITION

In this section, I am concerned mainly with the four major public utilities: electricity, gas, telecommunications and water. As far as electricity and gas were concerned, there were attempts to encourage competition prior to privatization in the Oil and Gas (Enterprise) Act 1982 and the Energy Act 1983, but neither of these measures were successful.⁵⁴ Privatization seemed to offer a perfect opportunity for liberalizing the competitive structure of the industries concerned and there was no shortage of advice on how to do this. In telecommunications, there was liberalization in 1981 and, prior to privatization, the government's economic adviser urged unrestricted resale of voice telephony.⁵⁵ In the gas sector, it was suggested that British Gas be broken up into separate regional companies,⁵⁶ while there were numerous suggestions for making the electricity industry more competitive.⁵⁷

In fact, none of these radical options was adopted and, in general, the government was very cautious in introducing competition. In telecommunications, BT was privatized intact, and initially only one competitor, Mercury Communications, was licensed. Simple resale of telephone services was not allowed. British Gas was a more extreme example. The company

54. See VICKERS & YARROW, *supra* note 22, at 258, 290-94.

55. See MICHAEL E. BEESLEY, DEPT OF INDUSTRY, LIBERALISATION OF THE USE OF BRITISH TELECOMMUNICATIONS NETWORK ¶¶ 78-94 (1981).

56. See E.M. Hammond et al., *British Gas: Options for Privatisation*, 6 FISCAL STUD. 1 (1985); Colin Robinson & Eileen Marshall, *Regulation of the Gas Industry: Memorandum 13* in HOUSE OF COMMONS, MEMORANDA SUBMITTED TO THE ENERGY COMM., REGULATION OF THE GAS INDUSTRY, H.C. DOC. NO. 15-i, 1985-86 SESS. 77 (1986). These options were apparently considered by the government and rejected. See PETER E. WALKER, STAYING POWER 189 (1991).

57. See, e.g., ALEX HENNEY, PRIVATISE POWER: RESTRUCTURING THE ELECTRICITY SUPPLY INDUSTRY (Centre for Policy Studies Policy Study No. 83, 1987); ALLEN SYKES & COLIN ROBINSON, CURRENT CHOICES: GOOD WAYS AND BAD TO PRIVATISE ELECTRICITY (Centre for Policy Studies Policy Study No. 87, 1987) and the list contained in the House of Commons Report 307-i. H.C. DOC. NO. 307-i, *supra* note 7, ¶ 16.

had a monopoly from the landing of gas on the beach to its delivery to the ultimate consumer and it was simply privatized as one entity. The provisions giving the regulator the duty to promote competition in the industrial and commercial market were not part of the original plans and were inserted as the result of an amendment moved by a backbench Tory MP.

Given that blueprints for introducing greater competition existed, and that the government ostensibly saw the introduction of greater competition as one of its economic objectives, why were the industries not restructured? The general answer to this question is a combination of pressures from the management of the companies and the difficulties of a successful flotation. A successful privatization of a major utility in Britain could not be accomplished without the cooperation of the senior management. It is the management who had the information about how the firm operated, not the relevant government department. From the management's point of view, it makes economic sense to retain as much monopoly power as possible.⁵⁸ At the same time delay would not have suited the government's political purposes, in part because it jeopardized the income stream, the initial flotations were quite risky and increasing the amount of competition in the industry could have jeopardized their success.

In the area of competitive privatizations, the best example of these pressures is British Airways. After the decision to privatize was made, the government invited the Civil Aviation Authority to report on the potential consequences for competition policy for the development of the British airline industry.

58. For accounts which stress the influence of management on preventing restructuring, see SWANN, *supra* note 20, at 260; VELJANOVSKI, *supra* note 22, at 118-19; VICKERS & YARROW, *supra* note 22, at 210-11; John A. Kay & David J. Thompson, *Privatisation: A Policy in Search of a Rationale*, 96 *ECON. J.* 18, 29-30 (1986); David Marsh, *Privatization under Mrs. Thatcher: A Review of the Literature*, 69 *PUB. ADMIN.* 459, 467 (1991); Jeremy Moon et al., *The Privatization of British Telecom: A Case Study of the Extended Process of Legislation*, 14 *EUR. J. POL. RES.* 339, 351 (1986); Colin Robinson, *Gas: What To Do After the MMC Verdict*, in *REGULATING UTILITIES: THE WAY FORWARD* 1, 5-6 (Michael E. Beesley ed., 1994). Parkinson makes this point as regards electricity privatization. CECIL PARKINSON, *RIGHT AT THE CENTRE* 257-80 (1992). On the BT privatization, see Douglas Pitt, *An Essentially Contestable Organisation: British Telecom and the Privatisation Debate* in *PRIVATISATION AND DEREGULATION IN CANADA AND BRITAIN* 55 (J.J. Richardson ed., 1990); KARIN NEWMAN, *THE SELLING OF BRITISH TELECOM* 11-13 (1986).

The Authority noted that British Airways would have a formidable advantage over other British airlines when competing with them, and was not optimistic that it could prevent abuse of that power. It recommended a reduction in the relative size of British Airways and the transfer of some routes away from it to other airlines. These recommendations were significantly watered down after powerful lobbying from British Airways. As a result, British Airways absorbed the second largest UK carrier, British Caledonian, shortly after privatization, albeit under conditions imposed as a result of a report by the MMC and the European Commission.⁵⁹

BT is also a good example. The sale of 51% of the shares in November 1984 raised a total of £3.9 billion, six times larger than any previous issue on the UK stock exchange.⁶⁰ Given that it was such a large flotation, that the sell-off was critical to the government's financial needs and political aspirations and that earlier privatizations had mixed results in terms of flotation, it is not surprising that the government adopted a cautious approach.⁶¹ The government had, in any event, gone for a limited measure of competition and, as has been argued, no one had studied the real problems of interconnection that would have followed from a greater degree of break-up and more competition, problems which are proving very difficult to solve at the moment.⁶² In the privatization of British Gas not even these minimal steps have been taken and most commentators have been very critical of the decision to privatize British Gas intact:

The least satisfactory privatization was that of the British Gas Corporation, where there was a Minister, Peter Walker, whose heart was not in the policy, in combination with a strong chairman, Sir Dennis Rooke, whose working-life had

59. See generally Robert Baldwin, *Privatisation and Regulation: The Case of British Airways in PRIVATISATION AND DEREGULATION IN CANADA AND BRITAIN*, *supra* note 58, at 93.

60. MATTHEW BISHOP & JOHN KAY, *DOES PRIVATIZATION WORK?* 4 (1988).

61. See Moon et al., *supra* note 58, at 350.

62. See C.D. FOSTER, *PRIVATIZATION, PUBLIC OWNERSHIP AND THE REGULATION OF NATURAL MONOPOLY* 129 (1992). See also LAWSON, *supra* note 18, at 215-16. On interconnection at the moment, see OFFICE OF TELECOMMUNICATIONS, *INTERCONNECTION AND ACCOUNTING SEPARATION: THE NEXT STEPS* (1994); *Mercury Communications Ltd. v. Director General of Telecommunications* (H.L. Feb. 9, 1995) (Eng.).

been spent in the industry and was determined to keep it together.⁶³

These criticisms seem to have had their effect in the next big privatization, that of the electricity industry. Originally, the government planned to break up a vertically integrated industry into three parts: regional distribution companies, a grid company (to be owned by the distribution companies) and two main generating companies. Again the industry and its chairman resisted the break-up, but this time the government imposed the basic scheme. The criticism of the original plan was that the distribution of assets between the two new generating companies was to be on the basis of a 70/30 split. A split of this size was said to be necessary because of the need to retain the nuclear generating capacity in one company. The original proposals were strongly criticized by the Energy Select Committee who thought that "the nuclear pre-occupations of the Government have played a dominant part in its thinking, so much so that the nuclear tail seems to be wagging the ESI [Electricity Supply Industry] dog."⁶⁴ A major problem arose when it became apparent that the private sector would not invest in a company with substantial nuclear capability. As a result, the nuclear power stations had to be withdrawn from the sale and kept in the public sector. The result is that the generating side of electricity is dominated by two firms: National Power and PowerGen. There has been some evidence that they can influence the price of electricity through their own actions. In other words, they have a dominant position in the market for electricity generation.⁶⁵

The instability of these regulatory arrangements can be seen to an extent in gas and telecommunications. In gas, much of the history of the industry since 1986 has been the history

63. FOSTER, *supra* note 62, at 130.

64. H.C. DOC. NO. 307-i, *supra* note 7, ¶ 41. See in particular the evidence of the Secretary of State, Cecil Parkinson in the House of Commons Report 307-vi. HOUSE OF COMMONS, ENERGY COMMITTEE, THE STRUCTURES, REGULATION AND ECONOMIC CONSEQUENCES OF ELECTRICITY SUPPLY IN THE PUBLIC SECTOR, H.C. DOC. NO. 307-vi, 1987-88 SESS. ¶ 376 (1988). For a general discussion, see JANE ROBERTS ET AL., *PRIVATISING ELECTRICITY: THE POLITICS OF POWER* 98-119 (1991).

65. See HOUSE OF COMMONS, ENERGY COMMITTEE, SECOND REPORT, CONSEQUENCE OF ELECTRICITY PRIVATISATION VOL. I, H.C. DOC NO. 113-I, 1991-1992 SESS. ¶¶ 33-76 (1992).

of attempts to introduce more competition into it, starting with the industrial and commercial sector. This led to a MMC reference in 1988, intervention by the Office of Fair Trading and a second MMC reference in 1992. The result has been an agreement for a functional separation of British Gas into trading and distribution arms, plans for greater competition in both domestic and industrial and commercial sectors and greater powers for the regulator.⁶⁶ At the moment, we are waiting for a Gas Bill to be presented to Parliament this session.

VII. REGULATION

The new regulatory bodies that were created on privatization represented a substantial institutional innovation in British terms, as we have had no history of regulatory agencies, unlike the US. Given this, we might have expected to find substantial official discussion of the rationale behind regulation and the merits of different approaches. In fact, there has been remarkably little official discussion of regulation in relation to privatization in Britain. In the case of telecommunications, a brief White Paper emerged, but this simply repeated a ministerial statement about the future of the industry with less than a paragraph on the proposed regulatory arrangements. With regards to gas, no White Paper or considered consultative document was published. The White Paper on electricity privatization dealt with the issue of regulation in five paragraphs. The Energy Select Committee criticized this as a "theoretical statement of intent" and "a misty outline" rather than a fully worked out scheme.⁶⁷ There was slightly more discussion in relation to the regulation of the water industry, but this was largely due to the complexities of dividing economic and quality regulation between two bodies.

The only substantial official discussion that has been published are in Professor Littlechild's reports on the regulation of BT's profitability⁶⁸ and the economic regulation of the water authorities.⁶⁹ These were narrowly focused on the question of

66. For a succinct summary, see Robinson, *supra* note 58, at 1-19.

67. H.C. DOC. NO. 307-i, *supra* note 7, ¶¶ 60, 176.

68. See STEPHEN LITTLECHILD, DEP'T OF INDUSTRY, REGULATION OF BRITISH TELECOMMUNICATIONS' PROFITABILITY (1984).

69. LITTLECHILD, *supra* note 53.

what was the appropriate form of economic regulation. In his discussion, Professor Littlechild was heavily influenced by his perception of the US experience which he saw as having four major defects: it encouraged regulatory capture, competition was reduced due to regulation, there were poor incentives to internal efficiency and the regulatory burden was heavy. The answer was to provide a scheme which placed the minimum of discretion in the hands of the regulator, thus protecting against agency capture, providing a direct incentive for the regulated company to increase its internal efficiency. As a result, he recommended the RPI - X price control scheme. The basic idea underlying this scheme is that a regulated company's prices cannot rise faster than the retail price index minus a certain figure.

These reports do not cover a number of other regulatory issues, such as the regulation of service quality and the institutional arrangements for regulation. If we look at the published accounts of the development of the regulatory structure, there seems to have been a great deal of improvisation involved. This is certainly Foster's view⁷⁰ and his discussion of how regulation was devised for BT is instructive. He says that the idea of a license came from BT's duty to license other users of its system, a duty inherited from the Post Office. It was a small step to conclude that, if it entered the private sector, BT would have to have a license and if BT were to be licensed, it would be inequitable to allow it to license others. It was a political decision that BT should not be regulated by ministers. The job was originally offered to the Director General of Fair Trading, who decided that he had enough to do, so a specialist look-alike was invented, the Director General of Telecommunications. Appeals, in some circumstances, were provided to the MMC and there was an attempt to keep the courts out of regulatory affairs, apparently because of their poor perceived performance in employer/employee relations! This structure then became the general model for subsequent privatizations.

The same sort of improvisation can be seen in accounts of the privatization of water.⁷¹ Here the original plan was to privatize the water industry intact, that is, to allow the water

70. FOSTER, *supra* note 62, at 125.

71. Moon et al., *supra* note 58, at 350-55.

companies to continue with their regulatory functions. This was opposed by numerous bodies outside the industry, including the Confederation of British Industry, and it then became apparent that the water companies would not be recognized as "competent authorities" for the purposes of European Union law. As a result, the government had to change its mind and design a regulatory scheme which was based on separating commercial activities from regulatory ones.

Before going any further, it is worth summarizing the structure of regulation in Britain. The basic structure is similar across all four industries. The utility company is given a license⁷² in the first instance by the Secretary of State. The license contains terms and conditions that the utility is obliged to follow. A regulatory office is also set up, at arms length from the relevant government department, headed by a Director General. The regulator's function is to make sure that the license terms and conditions are followed and that they are appropriate for current conditions. If the regulator wishes to change the license this can be done by agreement or, failing that, the regulator must make a reference to the MMC will decide whether or not the regulator's proposal is in the public interest. The balance of advantage thus lies with the utility. Utilities do not, for example, have to seek prior approval of their tariff structures as in the United States.

This looks to be a simple structure but there are three additional points. First, government has set the initial competitive environment for each industry, not the regulator. The regulators must thus work within that environment. Second, the government retains important reserve powers, such as the power in some cases to approve references to the MMC. Third, the regulators' jurisdiction is divided in important ways. This is most noticeable in the water industry where economic regulation is the responsibility of the Office of Water Services, quality regulation is the responsibility of the National Rivers Authority and Her Majesty's Inspectors of Pollution and quality standards are set by the European Union and implemented by the Secretary of State. The economics of the industry are currently driven by the need to meet the quality standards.

72. The terminology used varies for no apparent reason. "License" is used for electricity and telecommunications; "authorization" for gas; and "appointment" for water. "License" will be used to encompass all these terms.

This is the basic structure. What are the regulators' legal duties? The regulators say that they are there to protect the consumer.⁷³ However, this is an interpretation of their legal duties. Regulators have two primary legal duties. First, to ensure that all reasonable demands for the product are satisfied, or, in the case of water, that water companies carry out their activities "properly". Second, that companies are able to finance the carrying out of their activities. *Subject to* these duties, they have a duty to promote the interests of consumers, as well as having duties to protect the interests of the elderly and disabled.⁷⁴ The position was nicely summarized by David Walker: "The new regulatory offices are not consumer watchdogs or rather, if they are, they are queer canines whose first priority appears to be engaging in deeply meaningful dialogues with the burglar about his financial circumstances."⁷⁵

This structure essentially creates a new separation of powers. Commercial and regulatory activities are clearly separated. Day to day regulatory activities are separated from matters of more general political or strategic importance, although this latter separation is not at all clear, but this is the most favorable interpretation of it. There is no doubt that this has been an improvement over the regulatory structures that existed pre-privatization. The licenses provide a clear statement of the duties and responsibilities of the industries, the regulatory agencies are better equipped to police these licenses than the departments were and more information about the working of the industries reaches the public domain than before.

There has also been a fierce debate about the effectiveness of these regulatory institutions, a debate that shows no signs of disappearing. There seem to be four major criticisms. First, the regulators have too much discretion. Second, the legislation

73. See, e.g., HOUSE OF COMMONS, COMM. OF PUBLIC ACCOUNTS, THE OFFICE OF TELECOMMUNICATIONS: LICENSE COMPLIANCE AND CONSUMER PROTECTION, H.C. DOC. NO. 707-i, 1992-93 SESS. (1993) (Director General of Telecommunications' response to the Public Accounts Committee).

74. See Water Industry Act, 1991, ch. 56, § 2(4) (Eng.); Electricity Act, 1989, ch. 29, §§ 3(4)-(5) (Eng.); Telecommunications Act, 1984, ch. 12 (Eng.); Gas Act, 1965, ch. 36, § 4(3) (Eng.).

75. David Walker, *Enter the Regulators*, 43 PARLIAMENTARY AFF. 149, 156 (1990).

has conflicting objectives and, by formally vesting all the powers in one person, this leads to personalized regulation. Third, there is structural confusion because some industries, such as energy, are divided between two regulators. Fourth, the regulators have changed the rules of the game in a way that was not envisaged at the time of privatization.⁷⁶ I do not have the space to rebut these allegations, but there are substantial defenders of the present system who call for incremental, rather than revolutionary change.⁷⁷

VIII. CONCLUSIONS

What conclusions can be drawn from the British privatization program? First, it represents the failure of legal ordering in Britain as a polity. The major influences have been pragmatic political ones, and there has been little attempt to think about the process in more principled terms. If you want to find a guiding thread to the program, the idea of party political advantage offers as good an explanation as any, as argued by Dobek recently.⁷⁸

There are also a number of more interesting lessons. One is that the process of privatization, with its creation of new institutional structures, alters the policy process in important ways. New groups enter into it, such as the regulators, while other groups are excluded, such as the public sector trade unions. It is impossible to predict what policy changes will emerge from this new arrangement of forces, as matters will develop a momentum of their own. This needs to be seen in the context of the liberalization of markets, which usually accompanies privatization, even if in an attenuated form, and changes brought about by technology, seen most obviously in tele-

76. See generally PETER HAIN, *REGULATING FOR THE COMMON GOOD* (1994); CENTO VELJANOVSKI, *THE FUTURE OF INDUSTRY REGULATION IN THE UK: A REPORT OF AN INDEPENDENT INQUIRY* (1993); Dieter Helm, *Rewrite the Rules for Regulation*, *FIN. TIMES*, April 7, 1993, at 19.

77. See, e.g., FOSTER, *supra* note 62; Sir Bryan Carsberg, *Reflections on the Regulation of Privatised Companies* (unpublished manuscript, on file with the *Brooklyn Journal of International Law*). See also Sir Christopher Foster, *Natural Monopoly Regulation: Is Change Required?* (Sept. 14, 1994) (paper given at the Centre for the Study of Regulated Industries Academic Forum, on file with the author); Sir Christopher Foster, *Who or What Regulates the Regulators?* (Apr. 19, 1994) (paper given at Conference at the University of Hull, on file with the *Brooklyn Journal of International Law*).

78. Dobek, *supra* note 13, at 40.

communications but also relevant in the energy industries. When these factors have been put together in a British context, privatization has developed a momentum of its own, toward greater liberalization and competition. The genie of competition and markets cannot be prevented from escaping and, once it is released, it will not go back in the box. This does not mean that pure market forces reign supreme. The lesson from Britain is that market structures are created by governmental decision and competition is planned, although planning is an inaccurate description of decision making processes in Britain. Nor does the increase in competition mean that regulation will wither away, like the Leninist state. The experience to date suggests that a need for regulation will remain, although the terms and conditions may change. This points to a fundamental truth, that government cannot disengage from strategic markets.⁷⁹ It will always have some responsibility for decisions taken or not taken. One of the things that is important is the institutional structure within which that decision takes place and I think that is one of the major contributions of the British privatization program. Despite its improvised nature, the regulatory structure devised has allowed us to address fundamental questions about the operation of the utilities in Britain. Insofar as a need is seen to reinvent government, then this has been a positive first step.

79. Also drawing the same conclusion is Colin Scott, *Privatization, Control, and Accountability*, in CORPORATE CONTROL AND ACCOUNTABILITY 231 (Joseph McCahery et al. eds., 1993). See also Dieter Helm, *Energy Policy and Market Doctrine*, 64 POL. Q. 410 (1993).

