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Privatization–The Road To Democracy?

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## PRIVATIZATION—THE ROAD TO DEMOCRACY?

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### I. INTRODUCTION

Since the fall of the Soviet Union, many governments around the world have adopted measures that are often described as “privatization.” That label generally refers to governmentally-sponsored efforts to move assets and economic decisionmaking away from the political arena and into the hands of individuals or private corporations. Some of these efforts have been part of the package of economic principles –the so-called “Washington Consensus” - urged by the International Monetary Fund and the World Bank since the early 1990s, and as such they have drawn criticism on a number of grounds.<sup>1</sup> Influential proponents continue to advance privatization schemes over a great range of subjects, both at home and abroad.<sup>2</sup>

Why have they done so? The primary reasons are economic. The old Soviet Union and its satellites dramatically illustrated the manner in which dirigiste, state-centered economies can lapse into wasteful decrepitude. Drawing a lesson from those bad examples, privatizers have

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<sup>1</sup>See, e.g., Jedediah Purdy, *A World of Passions: How to Think About Globalization Now*, 11 *Ind. J. Global Legal Stud.* 1, 4 (2004) (describing the so-called “Washington Consensus,” including deregulation and privatization of government-owned enterprises along with trade liberalization). The origin of the name “Washington Consensus” is John Williamson, *What Washington Means By Policy Reform*, in *Latin American Adjustment: How Much Has Happened?* 5 (1990).

<sup>2</sup> Eric Sylvers, *Strong Demand as Italy Sells Utility Sales*, *NY Times* Oct. 26, 2004, at W1, col. 1 (describing privatization of Italian state energy utility, plans for privatization of state telecommunications entity and postal service); cf. Ryan Tyz, *Energy Maquiladoras: Integrating the Energy Markets of the United States and Mexico*, 6 *Or. Rev. Int’l L.* 63, 64-65 (2004) (arguing that energy production has been slower to privatize, though the process is beginning).

hoped to infuse their respective economic spheres with the efficiency, energy and innovation that are thought to accompany decentralized individual initiatives. Nevertheless, over the last decade, critics have beaten the drums ever more loudly about the failings and lapses of privatization policies, particularly as represented by the Washington Consensus on international investment, and they have thus lent some intellectual support to the leaders of popular backlash, as well as to the political figures who wish to stage some kind of retreat.<sup>3</sup> Many of these critiques point to the political costs of privatizations – their adverse impact on local sovereignty,<sup>4</sup> their short-changing of less-well-off citizens,<sup>5</sup> their stirring of intergroup domestic strife.<sup>6</sup>

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<sup>3</sup> See, e.g. Juan Forero, *Latin America Fails To Deliver on Basic Needs*, N.Y. Times, Feb. 22, 2005, at A1, col. 3 (describing popular resistance to privatizations); Larry Rohter, *With New Chief, Uruguay Veers Left, in a Latin Pattern*, N.Y. Times, Mar. 1, 2005, at A3, col. 1 (describing newly-elected president's promise to rein in privatization). A leading critic has been Joseph Stiglitz, *Globalization and its Discontents* 18, 57-58, 73-74, 247-48 (2002) (criticizing pace, insensitivity of Washington Consensus principles to specific needs, especially for poverty reduction). Criticism also appears with respect to certain economic sectors; see, e.g., Maude Barlow and Tony Clarke, *Blue Gold: The Fight to Stop the Corporate Theft of the World's Water* xii, 161 (2002) (criticizing Washington Consensus and international financial institutions' pressure to privatize water systems). Even American President George W. Bush, a great proponent of private ownership of previously governmentally-operated systems as retirement benefits, seems to notice the unpopularity of privatization; see Robin Toner, *It's "Private" vs. "Personal" in Debate Over Bush Plan*, NY Times, Mar. 22, 2005, at A1 (describing plan to privatize social security, though calling accounts "personal" instead of "private").

<sup>4</sup>Catherine H. Lee, *To Thine Own Self Be True: IMF Conditionality and the Erosion of Economic Sovereignty in the Asian Financial Crisis*, 24 U. Pa. Int'l Econ. L. 875, 903-904 (2003) (arguing that world financial organizations' imposition of Washington Consensus infringes on national sovereignty); William Finnegan, *The Economics of Empire: Notes on the Washington Consensus*, Harper's Magazine, May 2004, at 50 (same); Stiglitz, *supra* note —, at 247 (same).

<sup>5</sup>See, e.g. Alhaji B. M. Marong, *From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development*, 16 Geo. Int'l Envtl. L. Rev. 21, 33-34 (2003) (arguing that neoliberal Washington Consensus standards ignore distributional and environmental welfare criteria).

<sup>6</sup>Amy Chua, *World on Fire: How Exporting Free Market Democracy Breeds Ethnic*

Privatization's critics have encountered critics of their own,<sup>7</sup> but they have managed to shift some attention away from the economic foundations of privatization, re-directing attention to the political aspects of privatization. Following that lead, this Article will focus primarily on the political intellectual rationales for privatization. Indeed, the arguments for privatization have continually sounded a political note, though it may played on a second or third fiddle in the Washington Consensus:<sup>8</sup> somewhere behind the economic case for privatization is the companion idea that privatization promotes democracy.

Recent privatization efforts, taken together with increasing political resistance to privatization, offer an opportunity to reassess this idea in the light of recent experience. The Article will begin by setting out a fairly simplified classification of some different types of measures that are commonly considered "privatization." Following that, the Article will delve into several controversies surrounding such measures, and into the basic economic arguments that are supposed to support privatization even in the face of controversy. It will then shift the focus to the political rationales for privatization.

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Hatred and Global Instability 6-7 (2003) (arguing that privatization policies ignore potential backlash against market-dominant minorities); see also Purdy, *supra* note — (arguing that Washington Consensus ignores emotional issues).

<sup>7</sup>See, e.g. Kevin C. Kennedy, A Review of Globalization and Its Discontents, 35 *Geo. Wash. Int'l L. Rev.* 251, 254-56 (2003) (criticizing author Joseph Stiglitz for inconsistencies in critique of international lending policies); Tom Ginsburg, Democracy, Markets and Doomsaying: Is Ethnic Conflict Inevitable? 22 *Berkeley J. Int'l Law* 310, 312 (2004) (reviewing Amy Chua's *World On Fire*, arguing that evidence does not support its thesis of link between privatization and ethnic conflict).

<sup>8</sup>See Williamson, *supra* note —, at 8 (describing "promotion of democracy and human rights" as a concern, but one far behind economic motivations in Washington consensus).

Of particular interest is the light that modern privatization efforts cast on the central political claim for privatization. That claim is that private property and contract (as opposed to centrally-organized economic direction) fundamentally advance the growth of democratic institutions. A variety of arguments purport to support this central claim--arguments that long predate modern privatization efforts and that have been remarkably persistent over time. At least some aspects of modern privatization do indeed add to their weight. Nevertheless, there are also weighty exceptions, suggesting that privatization alone cannot do all the work of democratization. While in some respects, modern privatization initiatives indicate that individual economic rights --together with the larger economies that grow out of them-- sometimes do help to foster accountable institutions, in other respects it is clear that these initiatives toward private ownership depend on a pre-existing accountable institutional infrastructure. The basic argument of this Article is thus that privatization and democratic governance cannot be seen simply as ancestor-to-successor, where the one (privatization) precedes the other (democratization). At most (to continue the family analogy) privatization and democratization are siblings, co-existing in a mixed environment of mutual support, dependence, and occasional rivalry.

## II. A TYPOLOGY OF PRIVATIZATIONS.

Very roughly, one can classify the last two decades' privatization initiatives into four types of state-sponsored measures with respect to property, which I will call "recognition," "deregulation," "divestment," and "enablement."

First, recognition measures are those that provide the administrative means to regularize private property ownership, particularly by formalizing ownership rights in persons who

previously enjoyed only informal claims. This is a fairly low-key form of privatization, though it too can be controversial. One major type of recognition measure is the reform of titling procedures. This reform seems quite pedestrian at first glance, but it can have large implications for security of title, and security of title in turn can have large implications for the lives of property owners.<sup>9</sup> The Peruvian economist Hernando de Soto in particular has brought these titling reform measures into the public eye, arguing that developing countries can very much enhance their wealth by converting informal land titles – claims held in squatter communities in particular -- into formal ones.<sup>10</sup> De Soto stresses that with formal title to their property, newly-secured owners can use their property as collateral to borrow money and finance small businesses.<sup>11</sup> Other scholars point out that with formal title, an owner can enforce her claims through the police, the courts, and other governmental institutions, and as a consequence she need not spend so much effort on guarding her property in person, nor need she rely so heavily on neighborhood bosses to enforce her claims. Once freed from those obligations, she might be able to take a job at some distance from her home, knowing that her property is safe from a forceful takeover by others.<sup>12</sup> Finally, clearer titles simply loosen up the market for property, allowing resources to flow into the hands of those who are willing to pay most for them. For these reasons

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<sup>9</sup>See Edgardo Mosqueira, *Políticas y Estrategias para la Creacion de Sistemas de Informacion Sobre la Propiedad* (FEMICA paper, 2002)

<sup>10</sup>Hernando DeSoto, *Mystery of Capital* (2000).

<sup>11</sup> DeSoto, at — GET PAGE

<sup>12</sup> See, e.g. Erica Field: *Entitled to Work: Urban Property Rights and Labor Supply in Peru 35-36* (2002) (manuscript; available on Soc. Sci. Research Network site).

and others, Peru, India and Thailand, among a number of other countries, are currently making major efforts to simplify the registration of land titles.<sup>13</sup>

2) Second is deregulation, that is, relaxing governmental control over entrepreneurial activities. India, again, is considering abandoning its elaborate constraints on the size of individual landholdings;<sup>14</sup> meanwhile Germany debates the welter of labor regulations that may protect currently-employed workers but that may also impede businesses' ability to create new jobs.<sup>15</sup> The general idea of deregulation is to shed governmental intrusions that simply protect certain groups at the expense of others, or that pursue ideological goals that no longer seem useful. On those grounds, many countries carry regulations that would seem to be candidates. Just to take the example of size limits on landholding: India is by no means alone in these regulations. In order to protect small farmers, the United States until recently imposed sharp restrictions on the size of farms that received irrigation water from federally-financed dams, but large-scale agricultural interests evaded these limits by entering into complicated leasing arrangements.<sup>16</sup> In the end, the constraints seemed to do no one any good because they were so widely evaded, and

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<sup>13</sup>Joanna Slater, Murky Records, Litigation, Entangle Real Estate Deals, But Change Comes Slowly, Wall St. J., May 15, 2002, at B7 C (concerning land registration reforms in India, other Asian countries). GET PAGE

<sup>14</sup>Slater, supra note —.

<sup>15</sup>Carter Dougherty, Jobless Germans Face a New Round of Benefit Cuts, N.Y. Times, Dec. 30, 2004, at W1, col. 3 (describing cuts in formerly ample benefits).

<sup>16</sup>See Hamilton Candee, The Broken Promise of Reclamation Reform, 40 Hastings L. J. 657, 660-63 (1989) (describing 1902 legislation restricting reclamation water delivery to 160-acre farms, widespread evasion through leasing). The Reclamation Reform Act of 1989 expanded the size limit for subsidized water to 960 acres, with owners being required to pay "full price" for larger acreage. Id, at 664-65.

because they complicated market transactions for no good reason. A different kind of protectionist regulation is residential rent control, which can keep current tenants' rents low, but which may make it difficult for outsiders to find a place to rent, since owners may balk at opening up more property at fixed rents.<sup>17</sup>

Favoritism and inefficiency are nothing new in regulatory regimes, of course; Adam Smith complained about these issues over two hundred years ago.<sup>18</sup> Nevertheless, most commentators acknowledge that certain types of regulatory controls may be necessary to safeguard public health and safety, along with the environment, matters that are often underprotected by the market transactions of private owners.<sup>19</sup> The trick, of course, is to figure out which regulations are genuinely socially advantageous to overcome market failures, and which are merely protectionist or ideological. For example, a few years ago the United States banned tunafish imports when the fish had been caught without excluding dolphins from the nets. The United States claimed that this was an environmental protection. But Mexico brought a complaint under international trade agreements, claiming that these purported dolphin protections were merely protectionist measures

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<sup>17</sup> See, e.g. Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 *Brook. L. Rev.* 741, 762-63, 767 (1988); cf. Peter D. Salins, *Reflections on Rent Control and the Theory of Efficient Regulation*, 54 *Brook. L. Rev.* 775, 776, 779-80 (1988) (noting that Epstein's arguments to date have been impossible to test).

<sup>18</sup> Emma Rothchild, *Economic Sentiments: Adam Smith, Condorcet, and the Enlightenment*, 127-28 (2001) (describing Smith's low opinion of merchants' propensity to seek and get political favors).

<sup>19</sup> See, e.g. Steven P. Croley, *Theories of Regulation: Incorporating the Regulatory Process*, 98 *Colum. L. Rev.* 1, 12-13 (1998) (noting that theories of regulation derive from market failure). Croley however faults the major theories of regulation for failing to account for the actual regulatory process; *id.*, at 3-6.

to shield US fishermen from Mexican competition.<sup>20</sup> Mexico success in this claim did not close the issue, however, since many still believe that the tuna regulation was an important environmental measure, and not merely an example of protectionism.<sup>21</sup>

3) A third privatization initiative I will call divestiture, i.e., removing whole enterprises from governmental administration, placing them instead in the hands of private entrepreneurs. These are probably the best-known kinds of “privatization” measures, and they can be very controversial. Margaret Thatcher’s government in England led the way in the 1980’s, denationalizing all kinds of industries that had been brought into public ownership over the course of the twentieth century, particularly under Labour governments after the Second World War.<sup>22</sup> A decade later, with the collapse of the Soviet Union in 1989, Russia and Eastern Europe say whole arrays of enterprises moving into private hands.<sup>23</sup> Beginning at about the same time, at

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<sup>20</sup> For a brief account, see Richard Skeen, *Will the WTO Turn Green? The Implications of Injecting Environmental Issues Into the Multinational Trading System*, 17 *Geo. Int’l Envtl. L. Rev. L.* 161, 185-87 (2004) (describing case, its outcome, and followup case involving Netherlands).

<sup>21</sup> See Belina Anderson, *Unilateral Trade Measures and Environmental Protection Policy*, 66 *Temp. L. Rev.* 751 (1993) (noting that some environmentalist groups were sufficiently alarmed to ask for reconsideration of trade agreements; Mexico and U.S. defused political heat by subsequent agreement for dolphin protections).

<sup>22</sup> For an extensive study of the theory and practice of the Thatcher era deregulations, see John Vickers & George Yarrow, *Privatization: An Economic Analysis* (1988); *id.* at 139-40, 160-69 (for postwar era of nationalization, radical shift to privatization after 1979). See also Roger Barrett James, *Information— The Key to Fair Privatization: British Successes and Russian Pitfalls*, 20 *Loy. L.A. Int’l & Comp. L. J.* 837, 842-48 (1998) (narrating short history of British privatization).

<sup>23</sup> See, e.g. James, *supra* note --- at 858-64 (describing massive Russian privatizations in early 1990s); White, *Privatization in Eastern and Central Europe*, 13 *SPG Int’l L. Practicum* 19, 22-25 (2000) (giving survey of privatizations in Poland, Czech Republic, Hungary); Terry Cox & Bob Mason, *Social and Economic Transformation in East Central Europe: Institutions, Property*

the urging of international financial institutions, a number of Latin American countries experimented with the privatization of several different industries, for example telecommunications systems and municipal waterworks.<sup>24</sup> Even China now has been quietly pondering measures that move agriculture at least partly out of state or commune control and into the hands of peasants.<sup>25</sup>

4. Enablement refers to the governmental establishment and protection of property rights in resources that would otherwise not easily be turned into property at all. Intellectual property rights—trademark, copyright, and patent—are a well-established example of governmentally-enabled property rights. These property rights owe their existence very largely to statutory law. They effectively privatize the uses of inventions and expressions that would otherwise be open to copying by the general public. Intellectual property (IP) is not new; the protection of copyright in the English speaking world is commonly dated back to the Statute of Anne in 1710, and patent rights for inventors followed over the next century.<sup>26</sup> In recent decades, however, IP has become

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Relations and Social Interests 101-104 (1999) (summarizing post-Soviet era economic restructuring in the Czech Republic, Hungary and Poland).

<sup>24</sup>Andrea L. Johnson, Preserving Privatization of Telecommunications in Five Emerging Markets: Germany, Egypt, South Korea, Argentina and Mexico, 12 Alb. L. J. Sci & Tech 311 (2002) (concerning telecommunications in Latin American countries, among others); Maria McFarland Sanchez-Moreno and Tracy Higgins, No Recourse: Transnational Corporations and the Protection of Economic, Social and Cultural Rights in Bolivia, 27 Fordham Int'l L. J. 1663, 1747-1774 (2004) (describing “water wars” in Bolivia following privatization of water system in Cochabamba); Eric J. Woodhouse, The “Guerra del Agua” and the Cochabamba Concession: Social Risk and Foreign Direct Investment in Public Infrastructure, 39 Stan. J. Int'l L. 295 (2003) (same)

<sup>25</sup> Joseph Kahn, China Pledges to Lift Wealth of Its Peasants, Int'l Herald Trib. Feb. 3, 2005, at News3 (describing debates over possibility of peasant land rights).

<sup>26</sup> For the Statute of Anne, see Paul Goldstein, Copyright's Highway: From Gutenberg to

particularly important, as global trade has whetted interest in the import and export of expressive materials and technology all over the world, and as new technologies have made it so much easier to copy the ideas of others. Indeed, IP in a sense signals how closely privatization is linked to globalization. Questions about IP have become a major focus in debates over world trade, with more developed countries usually pressing for greater IP protection while less developed countries hold out for more relaxed rules.<sup>27</sup>

Although this Article will focus on IP as the primary example of privatization through governmental enablement, there are also other property rights that have also depended almost wholly on governmental action. Tradeable environmental allowances (TEAs) are another example. Although TEAs are newer, less well-developed and more experimental than IP rights, they are certainly much-discussed as a means to control pollution and resource depletion.<sup>28</sup> Among the better-known TEA regimes are the United States' program for tradeable emission rights in the gases that form acid rain, and in the European Union's more recent proposals to use

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the Celestial Jukebox, 34-40 (1994); for patent see Adam Mossoff, Rethinking the Development of Patents: An Intellectual History 1550-1800, 52 *Hastings L. J.* 1255 (2001) (tracing history of British "patent" from royal grant or monopoly to protection for inventors).

<sup>27</sup>See, e.g. F.M. Scherer, *The Pharmaceutical Industry and World Intellectual Property Standards*, 53 *Vand. L. Rev.* 2245, 2248-50 (2001) (describing campaign by drug companies to get stronger international IP protections for variety of western products, resistance by less-developed countries).

<sup>28</sup>See, e.g. Thomas Merrill, *Explaining Market Mechanisms*, 2000 *U. Ill. L. Rev.* 275, 276 (describing literature on market and trade-based environmental programs); Carol M. Rose, *Expanding the Choices for the Global Commons: Comparing Newfangled Tradable Allowance Schemes to Old-Fashioned Common Property Regimes*, 10 *Duke Envtl. L. & Pol'y F.* 45, 51 (1999) (same).

tradeable rights to control carbon dioxide emissions.<sup>29</sup> These too are property rights that owe their existence to enabling governmental legislation, generally passed quite overtly to promote ends that would otherwise be served by more direct command regulation.

### III. CONTROVERSY, ECONOMY, POLITICS

All of the above types of privatization have proved to be controversial and disruptive in some locations and circumstances. Converting informal titles to formal ones, for example, can encourage squatters to try to displace existing private owners, leading to the kinds of conflicts that sometimes break out in rural Brazil.<sup>30</sup> In the more common case, where squatters settle on public lands rather than private ones, the relevant public spaces may be environmentally sensitive or dangerous to the squatters themselves, for example areas subject to flooding or mudslides.<sup>31</sup> Deregulation of the workplace can disrupt existing labor relations, just as housing deregulation can upend landlord-tenant relations; meanwhile, the loosening of environmental regulations can leave the air, water, and flora and fauna unprotected and vulnerable to degradation. Divestiture of formerly state-run enterprises threatens the jobs of employees in formerly governmentally-operated enterprises, and alarms consumers about the private takeover of what seem to be

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<sup>29</sup>Rose, *supra* n. — [duke envtl .. forum] [same page]

<sup>30</sup>See Kristen Mitchell, *Market-Assisted Land Reform in Brazil*, 22 N.Y.L. Sch. J. Int'l & Comp. L. 557, 570-72 (2003) (describing legitimization of squatting, later increase in squatting and violence).

<sup>31</sup>Winter King, *Illegal Settlements and the Impact of Titling Programs*, 44 Harv. Int'l L. J.433, 441 (2003).

governmental functions.<sup>32</sup> Enablement laws, through which governments create property rights in otherwise unowned resources, raise moral issues about the extent to which private individuals should be able to own nature or ideas and profit from them – particularly when, as in the case of pharmaceutical products, the protection of “enabled” property rights seems to come at the cost of sick persons’ health.<sup>33</sup>

Given the controversial nature of these various forms of privatization, it is important to ask about their purposes. What are governments attempting to accomplish through privatization? Why is private decisionmaking, made by property owners, thought to be preferable to governmental management, where decisions are made by public servants?

The chief answer to these questions, of course, is an economic one. During the Cold War, many thought that central planning would prove to be economically superior to private property and free contract—that is to say, capitalism. “We will bury you,” Nikita Khrushchev notoriously warned the West.<sup>34</sup> But in the end, it was central planning that was buried, unable to compete with the variety, innovation, and nimbleness of market forces.

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<sup>32</sup> See, e.g. Floyd Norris, Two Companies Hope Going Public Will Solve Their Problems, NY Times, Dec. 21, 2004, at C9, col. 5 (describing union resistance to privatization of state-owned French electric service).

<sup>33</sup> See, e.g. Nicholas D. Kristof, Death by Dividend, N.Y. Times, Nov. 22, 2003, at A15, col. 1 (attributing AIDS deaths to American insistence on patent protection).

<sup>34</sup> In an interesting later development, Khrushchev’s Sergei son took American citizenship and used the occasion to explain that his father only meant the famous phrase in an economic sense. Francis X. Clines, A Khrushchev Is Pledging New Allegiance, N.Y. Times, July 11, 1999, at A1, col 4.

Economic thinkers have long had an explanation: private property creates the right incentives for creating value.<sup>35</sup> The owner gets the rewards if she plans carefully, works hard, and pays attention to useful innovation; and she takes the punishment if things do not work well because of her carelessness and laziness. Those rewards and punishments are powerful motivations to industry, initiative, and attentive planning. Moreover, property rights identify who has what, and thus they encourage people to negotiate trades instead of wasting time on quarrelling and jockeying for position. In turn, the ability to buy and sell greatly enhances the value of everyone's property. Free alienability means that an individual owner can specialize in, say, shoemaking, since she can buy her foodstuffs from others who are specializing in raising food. Since the shoemaker can now sell her shoes to a whole array of people who want them, her shoemaking talent and tools become all the more valuable. The same can be said of the farmer who can specialize in raising particular crops.

These crude examples carry through to the enormously sophisticated creations of a modern economy. Take for example intellectual property, a highly complex form of property: although some commentators disagree, one major theory of intellectual property is squarely based on the same kind of rationale: that is, when we allocate property rights to the person who creates expressions or inventions, he or she is encouraged to produce all the more expressive works and inventiveness.<sup>36</sup> Conversely, on this theory, treating inventions and expressions as free for the taking would much diminish the artist's or inventors's willingness to put time and thought into

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<sup>35</sup> The classic statement is Jeremy Bentham, *The Theory of Legislation* 109-22 (C.K. Ogden ed., 1931)

<sup>36</sup> See, e.g., *Mazer v. Stein*, 347 U.S.201, 219 (1954) (describing theory of patents and copyrights as the encouragement of individual inventiveness).

these products; if for some reason they did create anyway, they would hoard their secrets rather than disseminating them through trade. Thus whether the issue is building a fence around the family farm or going through the steps to get a biotech patent, property rights taken together with freedom of contract—the basic building blocks of free enterprise—are thought to make everyone better off, because they encourage labor and innovation, permit specialization, and encourage the free movement of goods and services to those persons who most value them.

These are old arguments, going back to the eighteenth century and before.<sup>37</sup> It is of course also widely known that capitalism is subject to what are called “market failures,” where property and contract require some constraints. But even given that caveat, the basic lesson of these arguments has much influenced today’s thinking about economic development, including the push for privatization made by international trade and finance institutions.<sup>38</sup>

But those are not the only arguments for privatization. Quite aside from these well-known economic arguments, there are additional political arguments for private property—arguments that are also long-standing, and that were developed more or less contemporaneously with the classical Enlightenment case for private property as an economic matter. Putting it succinctly, the classical political brief for property stated that private property supports democracy and liberty. As one eighteenth century American Revolutionary leader put it, “property is the

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<sup>37</sup>See, e.g. Carol M. Rose, *Enough and as Good of What?* 81 Nw. U. L. Rev. 417, 419, 428-30 and authorities cited therein (1987) (describing views of John Locke, Jeremy Bentham and Adam Smith on the social utility of property and trade).

<sup>38</sup>See, e.g., W. Graeme Donovan, *Investing in Rural Development*, in *Agricultural Intensification in Sub-Saharan Africa*, Steven A. Berth, ed. (1998)

guardian of every other right.”<sup>39</sup> That is to say, not only is property ownership an important political right, but it is the most important of all.

This assertion may seem strange in a modern context, where so many people would be likely to select free speech as the critical political right, the one right that guards all others. But one listens more closely, one hears many echoes of this thought about property even now, at the beginning of the twenty-first century, and indeed those echoes may be getting louder. This is a subject on which I have written in the past,<sup>40</sup> but the modern controversies over privatization present an opportunity to revisit some of the classic political arguments that property (along with contract) are the central rights, the critical core, of what we would broadly see as democratic liberty, such that the establishment of property and trade form the ground floor for the development and flourishing of democratic institutions. How do these classic arguments map onto the modern contours of privatization?

#### IV. PRIVATIZATION AND THE CASE FOR PROPERTY’S POLITICAL CENTRALITY

The privatization efforts of the past decades certainly seem to focus on converting public management to private property. How do these efforts reflect on the array of political arguments about property’s centrality to liberty and democracy? In the pages that follow, I will go through

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<sup>39</sup>Arthur Lee, *An Appeal to the Justice and Interests of the People of Great Britain, in the Present Dispute with America* 14 (New York, Rivington, 4th ed. 1775), quoted in James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 26 (1992).

<sup>40</sup>Property as the Keystone Right? 71 *Notre Dame L. Rev.* 329 (1996) [hereinafter *Keystone Right*]

some of the arguments for property's centrality, to look for the light that the new privatization casts on these arguments.

1. The Priority Argument: Property is the central right because property alone predates, and justifies, government.

Here the classic treatment is John Locke's, who famously argued that individuals acquired property before governments were formed, and that when they eventually formed governments, they did so in order to secure their property.<sup>41</sup> Governmental intrusions on property, in this view, undermine the very purposes for which government is formed. Thus human property-formation not only predates government, but it gives people the normative leverage to critique government: government is only legitimate if it protects people's property.

A more modern development of this line of argument comes from a very interesting school of political scientists who have specialized in the study of small-scale common property regimes. A leader in this group is Professor Elinor Ostrom of the University of Indiana, who has described and analyzed communities all over the world, communities in which local people have created institutions for managing irrigation system, fisheries, grazing fields, and other activities undertaken in common.<sup>42</sup> Ostrom and her colleagues argue that many of these self-created common property regimes have sprung up and lasted for long periods of time—some for centuries on end—without governmental support. Indeed, she argues that all too often, governments unjustly and unwisely disrupt these community institutions, as, for example, when corrupt or thoughtless

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<sup>41</sup>Locke, *Two Treatises of Government*, The Second Treatise (ed. Peter Laslett, 2d ed. 1967).

<sup>42</sup>Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (1990).

bureaucrats in a central government allow their friends to invade a community's distribution of fishing rights among the local residents.<sup>43</sup> The lesson from Locke to Ostrom seems to be that people can form property regimes without government; that government's role, if any, is to assist in property formation; and that overly intrusive governments effectively undermine the natural and sustainable economic activity of human beings. Following Ostrom, what some scholars would like to see would be governmental protection of the fishery—or the grazing area or irrigation system—as a common property resource for the relevant community; privatization in that sense would be entirely appropriate.<sup>44</sup>

At least one of the new privatization categories, however, casts a somewhat different light on this set of arguments about the relationship of property to government. That is the “recognition” category, notably the efforts to clarify, simplify and formalize previously informal or unclear titles. Formal title is not important in the genre of older communities that Ostrom and her colleagues have generally studied, because everyone in the community understands the informal distribution of entitlements. For example, in one Swiss village, the most important property right consists of access to the meadows where a resident can graze his livestock. But such grazing access rights belong only to village citizens, and only members of very longstanding

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<sup>43</sup>See, e.g., Ostrom, *supra* note ---, at 154-57 (explaining how central governmental intrusion into fishery weakens local self-management of fishery); Evelyn Pinkerton, *Intercepting the State: Dramatic Processes in the Assertion of Local Comanagement Rights*, in *The Question of the Commons*, *supra* note 27, at 344, 359-63 (citing examples of central governmental policies that encouraged local overfishing).

<sup>44</sup>See, e.g., Alison Rieser, *Prescriptions for the Commons: Environmental Scholarship and the Fishing Quota Debate*, 23 *Harv. Env'tl. L. Rev.* 393, 405-406 (1999)

resident families can be citizens.<sup>45</sup> These are communities that my colleague Robert Ellickson describes as “close-knit”:<sup>46</sup> the residents all know one another, and they are intimately aware of who has what property claims. If there are transfers of property, everyone knows about that too. These transfers can be made without written documents and formal recording, and the gestures of transfer may be witnessed and understood only by local people—the handshake, the transfer of a clod of dirt or a set of keys.<sup>47</sup> More modern squatter communities too depend on enforcement of their informal claims through barrio insiders, e.g. the community “bosses” in Equador who accept payment for protecting residents’ informal claims.<sup>48</sup>

By contrast, the clarification of formal title is useful precisely because it makes the status of property knowable to outsiders, that is, to strangers to the community. Formal title, managed through central record offices, makes it possible for the owner to borrow from a bank on the security of the property. A lending bank also formally records its own secured interest, and this means that if the borrower fails to repay, the lending bank—perhaps in some distant city—may become the title owner of the property. Indeed, formal title gives assurances to any stranger at all who may want to purchase the property. Thus formal title potentially introduces strangers into

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<sup>45</sup>R. M. Netting, *Balancing on an Alp: Ecological Change and Continuity in a Swiss Mountain Village* 78 (1981).

<sup>46</sup>Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (1992).

<sup>47</sup>See Bernard J. Hibbitts, “Comiing to Our Senses”: Communication and Legal Expression in Performance Cultures, 41 *Emory L. J.* 873, 911-19(1992) (describing variety of gestures in different cultures signifying contractual obligation, including land transfer).

<sup>48</sup>J. O. Lanjouw & Phillip Levy, *Untitled: A Study of Formal and Informal Property Rights in Urban Equador*, 112 *Economic J.* 986, 992-93 (2002) (describing neighborhood bosses).

the community, through a form of property assurance that is not at all “natural” to a close-knit community.

Formal title, in short, is an assurance of property that does not predate the state. Formal title is a creature of the state, and if anything it tends to dissolve the small-scale communities, in which property can be created by “nature.” As an economic matter, formal property rights are effectively available to a global economy, not simply to a local one; thus formal title opens up these small communities to a whole world of potential buyers. This opening-up process may or may not happen, and local residents may or may not see it as a good thing. But as a political matter, this particular “recognizing” mode of privatization can scarcely be justified on the classic ground that it simply reinforces a form of pre-existing property that is somehow natural to humans.

Formal title, and the economic benefits it brings, introduce property rights that potentially engage much wider populations than any that exist in a Lockean (or Ostromian) state of nature. Property rights of this sort, rights that hold between strangers, cannot easily exist without the political organization of state agencies. Thus “privatization” of this sort assumes the active participation of government. That fact alone sharply detracts from the easy assumption that privatization supports democratic government because privatization protect “natural” pre-existing property rights. This is not the case. Formal title, like IP rights, gives rise to a form of property that would not exist at all without governments. Whatever relationship this kind of privatization may have to democratic governance—and it could be a strong one--it is distinctly not about governmental recognition of some kind of natural property right. Quite the contrary, the property

protected by formal title tends to erode the kinds of “natural,” community-based property rights that can predate government.

Parenthetically, recognition programs are among the most attractive forms of privatization; formal titling concentrates on furthering the economic advancement of people who otherwise have very limited prospects. But because formal titling programs potentially open a community to strangers, they give a frisson of the kinds of larger-scale problems generally associated with the term “anti-globalization.” When outsiders can freely enter a local economy, they may bring needed capital, but only at a cost: the loss of a sense of local or national control. This is of course one of the reasons why globalization can be so very disturbing to some local populations. Just as formal title puts a barrio house into play in an economy that is much larger than the local community, so do other forms of privatization put a country’s natural resources or banks or telecommunications systems at play in an even larger international economy. At times, this is can be a deeply unpopular feature of privatization, and even a ground for civic unrest that shakes democratic institutions.<sup>49</sup>

2. The Power-Spreading Argument: Property is a central right because it diffuses political power.

Perhaps the best-known proponent of this view is Milton Friedman, a libertarian economist who began to espouse his views in the 1950s and 1960s. Friedman very much opposed

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<sup>49</sup> See, e.g. Terry Cox & Bob Mason, *Social and Economic Transformation in East Central Europe* 79 (1999) (describing popular objection to loss of control from privatization and foreign investment in early post-Communist East Europe); Juan Forero, *Free Trade Proposal Splits Bolivian City*, N.Y. Times, Mar. 9, 2005, at C1, col. 2 (describing protests, violence and instability over planned trading agreement with U.S. to export much Bolivian natural gas).

socialism on political grounds as well as economic ones, arguing that socialist states had only a single source of power. Because the socialist state could control jobs, education, and indeed advancement on any front, Friedman argued, the socialist state could repress dissent easily. Capitalism and private property, on the other hand, offer multiple sources of power, taking the forms of income, prestige, and assets. Thus on Friedman's argument, states that permit private property and free enterprise also foster the proliferation of multiple power sources and, ultimately, diverse political views and movements.<sup>50</sup>

Interestingly enough, there is an older version of this argument that appeared during the eighteenth century Enlightenment, when the political figures most interested in "privatization" were actually the so-called "enlightened despots," figures like Frederick II of Prussia, Catherine the Great of Russia, and Joseph II of Austria. These monarchs hoped to foster commerce for both economic and political reasons: economic, in that they hoped that commerce would bring more wealth and thus tax revenue to their treasuries; political, in that they hoped that the "deregulation" of aristocratic and guild monopoly privileges would undermine some of their most entrenched opponents.<sup>51</sup> Then as now, deregulation caused anxiety and fierce opposition among the holders of the numerous exclusive privileges. Town guilds in Germany, for example, very much opposed royal charters for manufacturers to open factories in the countryside outside the guilds' legal control.<sup>52</sup> But James Steuart, a writer associated with the Scottish Enlightenment, asserted that

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<sup>50</sup>Milton Friedman, *Capitalism and Freedom* (1962).

<sup>51</sup>For the enlightened monarchs and their economic policies, see John G. Gagliardo, *Enlightend Despotism* 28-36 (1967).

<sup>52</sup>See Mack Walker, *German Home Towns: Community, State, and General Estate 1648-1871*, at 120-22, 125-26 (1971) (describing guild conflicts with non-guild large merchants,

even though monarchs were chiefly concerned to enlarge their tax revenues when they undermined the older privileged classes and fostered free commerce, in taking such measures they would engender a new class of wealthy entrepreneurs, and these newcomers would demand greater liberty and limitations on arbitrary rule.<sup>53</sup> Hence economic liberalization would bring about political reform, whether monarchs liked it or not.

How does the power-spreading argument map onto modern privatization measures? Clearly this argument does have some resonance, particularly with respect to the divestiture of state enterprises in favor of private control. Consider China: as China increasingly shifts formerly state-run operations to private enterprise, western democracies continue to echo the hope that Stuart expressed over two hundred years ago: that freer markets make citizens more rights-conscious and ultimately force rulers to open up more breathing room to democratic processes.<sup>54</sup>

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arguing that royal officials favored latter).

<sup>53</sup>1 James Stuart, *An Inquiry into the Principles of Political Economy* 248 (1767).

<sup>54</sup>See, e.g. President Nominates Bob Portman as United States Trade Representative, White House Press Release Mar. 17, 2005, available on Westlaw as 3/17/05 WHPRESSREL (describing Portman as negotiator of free trade agreement with China, Portman's belief that "through trade, the roots of democracy and freedom are deepened"). For a more systematic presentation, see Erich Weede, *The Diffusion of Prosperity and Peace by Globalization*, 9 *Independent Review* 165 (Sept. 24, 2004) (developing theme that prosperity precedes democracy, and both lead to peace; using China as example of country where greater prosperity brings about more attention to rights and ultimately less bellicosity); Pitman B. Potter, *Legal Reform in China: Institutions, Culture and Selective Adaptation*, 29 *Law & Soc. Inquiry* 465, 467-68 (2004) (describing view of author Randall P. Perenboom that Chinese economic development makes citizens demand more rights), *id.* at 480-81 (supporting same view, describing economic development as generating alternative power sources); Anthony Kuhn, *China's Newly Rich are Getting Political*, *Wall St. J.*, Aug. 17, 2004, at A14, col. 3 (describing increasing political activity of new Chinese entrepreneurs); cf. Ellen Bork, *Asian Blues: Why the Problem of China Will Not Go Away*, *Weekly Standard*, July 19, 2004 at 34 (criticizing what author describes as decades-long "driving idea" that democracy in China will follow from economic engagement). See also Stiglitz, *supra* note —, at 163-64 (attributing to Andrei Schleifer, and sharply criticizing, the view

Indeed, in some measure this has happened. The Chinese press is not bold by western standards, but it is still bolder than it was a few years ago, and as property has spread among the citizens, small-scale grassroots protests have emerged in a way unthinkable only a decade ago.<sup>55</sup> As yet, of course, this is a transformation still in the making, and China is certainly not yet a case study for the diffusion of political power in the wake of marketization.

In addition, other modern “divestitures” give some reason for caution. The experience of the former Soviet Union suggests that the divestiture of former state-run enterprises may diffuse power, but that this diffusion might not spread very far. Major economic sectors like energy and banking soon became concentrated into the hands of a favored few.<sup>56</sup> Indeed, the popular backlash against the Yeltsin-era “oligarchs” appears to have strengthened the hands of President Putin in re-centralizing governmental control over the press and the electoral machinery.<sup>57</sup>

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that privatization would lead to demand for political institutions to reform economy).

<sup>55</sup>See Bruce Gilley, *China’s Democratic Future* 72-74 (2002) (press’s greater boldness); Jonathan Kaufman, *New Crop of Protesters in Tiananmen Square: Restive Homeowners*, *Wall St. J.*, June 9, 2004, at A1 (new homeowners’ organization, protests).

<sup>56</sup>See, e.g., Bernard S. Black & Anna Tarassova, *Institutional Reform in Transition*, 10 *Sup. Ct. Econ. Rev.*, 211, 218-220 (2003) (describing “oligarchs” acquisition of major economic sectors, including natural resources, resulting in undermining support for democratic and economic reforms); see generally David Hoffman, *The Oligarchs: Wealth and Power in the New Russia* (2002) (biographical information, description of rise of “oligarchs”). Interestingly enough, the divestitures of British nationalized enterprises in the 1980s showed some of the same “giveaway” characteristics. See Vickers & Yarrow, *supra* note –, at 180-81, 183-85 (describing sharply uneven payoffs from sale of enterprises); see also Cox & Mason, *supra* note —, at 131-33, 201 (describing greater gap between rich and poor in poverty in post-Soviet era Eastern Europe, along with potential for social unrest).

<sup>57</sup>Book Notes, 40 *Stan. J. Int’l L.* 179, 188 (2004) (describing Putin’s suppression of the “oligarchs”); Arkady Ostrovsky and Stefan Wagstyl, *Comment and Analysis*, *Fin. Times (UK)*, Dec. 17, 2004, at 17 (describing Russian populace as “revel[ing]” in Putin’s prosecution of oligarchs).

One type of privatization-by-divestiture may present particular problems as a route to the diffusion of political power. That is the divestiture and transfer of some former public utilities—enterprises that have been called “natural monopolies.”<sup>58</sup> These types of enterprises generally have infrastructure or other startup costs that are so high that there is effectively only room for one participant. For example, once the electric lines are up, there may not be enough demand for electricity to support a second set of lines. This gives the first mover a great advantage. If threatened with competition, the first mover can lower rates to marginal cost until the rival is driven out of business. These “natural monopolies” typically exist in power delivery, transportation facilities, water and sewer lines, and to some (now diminishing) degree telecommunications.<sup>59</sup> Nineteenth century economic theory treated it as a matter of indifference whether such “natural monopolies” were state-run (as with the German railroads), or privately-run (as with the U.S. railroads), so long as the latter operated under state regulatory supervision to avoid monopolistic prices and practices.<sup>60</sup> In an interesting example, over a period of well over a century, New York City shifted its water supply system back and forth between private and public

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<sup>58</sup> See Henry Carter Adams, *Relation of the State to Industrial Action*, 1 *Publications of the Amer. Econ. Assn.* 55 (1884), reprinted in *Two Essays by Henry Carter Adams* (J. Dorfman, ed., 1969) (explaining theory of “natural monopoly”); see also William W. Sharkey, *The Theory of Natural Monopoly* 12-20 (1982) (describing history of economic thinking about natural monopoly).

<sup>59</sup> See, e.g., Herbert Hovenkamp, *Technology, Politics, and Regulated Monopoly: An American Historical Perspective*, 62 *Tex. L. Rev.* 1263, 1273-75 (1984) (describing characteristics and various types of natural monopoly); cf. Wei Li & Lixin Colin Xu, *The Impact of Privatization and Competition in the Telecommunications Sector Around the World*, 47 *J. Law & Econ.* 395,400 (2004) (arguing that technological advances have reduced natural monopoly characteristics of telecommunications).

<sup>60</sup> Adams, *supra* note —.

ownership, beginning with a private company in the late 1700s, then shifting to public control in the 1830s, then trying a private firm again in the early 20<sup>th</sup> century, before putting the system firmly in the City's hands thereafter.<sup>61</sup>

In emergent economies, both private and public management often have difficulty raising the capital needed for major improvements in these major public works. Thus, as was the case with New York City's water supply, public officials may transfer control to private management in the hope that a private enterprise can raise more initial capital; they may hope as well that private management will be more efficient and innovative than bureaucracy, and that private managers can more easily charge consumers to cover the costs of modernizing infrastructure. In some cases, some or all of these hopes for improvement can be realized, particularly since public management of utilities can grow slack -- bureaucratized, rudderless, ridden with political meddling, and generally underperforming.<sup>62</sup> CITE SCHLEIFER ARTS TOO?

But private management has problems too, notably that a "natural monopoly" in private hands, unless adequately monitored and regulated, is in principle constrained neither by political accountability nor by economic competition.<sup>63</sup> It is this apparent gap in control that sometimes makes public utilities problematic as candidates for divestiture, not only because of economic

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<sup>61</sup>Gerard T. Koepfel, *Water for Gotham: A History* 68, 140-41, 165, 289 (2000)

<sup>62</sup>See, e.g. Vickers & Yarrow, *supra* note —, at 130-34, 143-50 (describing weaknesses of British nationalized enterprises).

<sup>63</sup>See Li & Xu, *supra* note —, at 400 (noting importance of competition in successful privatization); Stiglitz, *supra* note —, at 56 (criticizing privatization of utilities prior to development of effective regulatory structures); Vickers & Yarrow, *supra* note —, at 428-29 (concluding that British divestiture was short-sighted in case of some aspects of utilities, other enterprises with natural monopoly characteristics).

effects of privatization, but also because of the political consequences. In particular, the privatization of public utilities in some instances defies the political argument that private control diffuses power. Instead of spreading power outward, these privatizations of “natural monopolies” would appear to place great power in private hands (and indeed sometimes foreign hands), unconstrained either by private competition or by public oversight. Citizen outrage at this kind of apparent aggrandizement can be tremendously disruptive politically, as in the electricity crisis in California a few years ago,<sup>64</sup> or in the water supply crisis in Cochabamba, Bolivia in 1999-2000.<sup>65</sup>

In fact, however, all of these privatizations of “natural monopolies” have involved very complex relationships between government and private entities.<sup>66</sup> While private suppliers have sometimes seemed to grasp too much, it also seems clear that they themselves have sometimes been saddled with unrealistic burdens and expectations, and that they sometimes have to operate in climate of crosscutting political motivations. In Cochabamba, for example, there were apparently many flaws and mistakes created by the newly-created foreign-dominated private water supply consortium, but it was local politicians who insisted that the project cover an expensive new dam. In part to cover this expense, the consortium had to raise consumers’ water

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<sup>64</sup>See, e.g. Michael Hiltzig, *Golden State: Davis Recall Effort a Case of Casting Stones*, L.A. Times, Aug. 7, 2003, pt. 3, col. 1 (listing energy crisis first among reasons, though unjustified, for the recall campaign against then-Governor Grey Davis)

<sup>65</sup> Note, Eric J. Woodhouse, *The “Guerra del Agua” and the Cochabamba Concession: Social Risk and Foreign Direct Investment in Public Infrastructure*, 39 *Stanford J. Int’l Law* 295 (2003); William Finnegan, *Leasing the Rain*, *New Yorker*, Apr. 8, 2002.

<sup>66</sup>For the range of issues in such enterprises, see 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).

rates dramatically. In turn, the rate hikes led to an outburst of popular opposition and violence that ultimately defeated the entire project and indeed threatened Bolivian political stability.<sup>67</sup>

However the blame is allocated in that case, popular fears are very real that privatization of these enterprises can lead not to the diffusion of power, but rather to the aggrandizement of monopoly power in private hands, and to the victimization of ordinary people. This is not to say that all such charges are true. A 2003 empirical study of privatization in Latin America found that in fact, privatized firms are generally more efficient than their state-managed predecessors, and that they generally offer better services to all social levels.<sup>68</sup> This study also found that the failed privatizations are most often attributable to political interference, to corruption and lack of transparency, and in the case of “natural monopolies,” to weak governmental capacity to provide the necessary post-privatization regulatory structure.

But there is an important political lesson to be learned from these failures. They show that the full weight of political reform cannot be borne by privatization alone, contrary to the suggestion of such Enlightenment thinkers as Steuart. Instead, success or failure, both economic and political, may depend on the underlying condition of political institutions. Undoubtedly privatization can often help to reform politics insofar as newly-minted private sources of income make people less frightened of government, and insofar as people engaged in trade and commerce are likely to demand access to information, along with some say in predictably-enforced laws.

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<sup>67</sup>Woodhouse, *supra* note —, at 305-306, 313, 327-28; Finnegan, *supra* note —.

<sup>68</sup>Florencio Lopez de Silanes and Alberto Chong, *The Truth About Privatization in Latin America* (2003) (available at <http://ssrn.com/abstract=464460>); cf Li & Xu, *supra* note —, at 426-27 (concluding a study of telecommunications privatization that privatization generally enhanced performance and competition, but that certain groups – e.g. previously subsidized pensioners and laid-off employees – may not have shared in gains).

But privatization itself often depends to a greater or lesser degree on existing political institutions, and insofar as this is true, politicians may still treat newly-privatized enterprises as a splendid new cash cow. In turn, the “cow” may face opprobrium for its association with politicians’ pet projects, undermining confidence in privatization itself. All this suggests that political reform needs to be approached on broader fronts and in a more direct manner, particularly by attending to such matters as competent courts and regulatory institutions, honest elections, and a free press.

3. The Distraction argument: Private property and commerce can make politics seem dull and boring.

This is a conception that may have influenced some of the United States’ founders, particularly given their consciousness of the religious wars that had racked Europe in the previous centuries. The idea behind the Distraction argument is that if property can be made secure and trade made easy, citizens are likely to become more interested in making money, and correspondingly less interested in killing one another for religious or clan-related or nationalistic reasons. For these reasons, private property and active commerce should make politics as a whole less heated and less deadly.<sup>69</sup> Boring politics are better than overheated and over-exciting politics on this view, and the encouragement of commerce is one way to make politics boring. Thus low voter turnout may not be taken as a problem, but rather as a sign that people have better things to do with their time, namely, get rich.<sup>70</sup> If they can busy themselves getting rich, they will

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<sup>69</sup>Martin Diamond, *The Federalist*, in *History of Political Philosophy* 631. 648-49 (Leo Strauss & Joseph Cropsey, eds, 2d ed. 1972).

<sup>70</sup> See, e.g. Judge Posner’s acid comments on Bruce Ackerman’s and James Fishkin’s idea to have a “deliberation day” to discuss issues at stake in elections: Richard A. Posner,

stop shooting at one other. The same idea seems to have animated some members of George W. Bush's administration in their hopes for a new Iraq, though the violence in that country to date has sharply undercut the possibilities for commerce.<sup>71</sup> WALL ST J – PAKISTAN TOO

How do modern ideas about privatization reflect on this political hope for private property and commerce? The pattern seems to be somewhat mixed. At least in some of the divestiture cases mentioned above, the privatization of major utilities has not at all de-fused politics, but rather inflamed them, as in Bolivia, where the attempted privatization of Cochabamba's water supply set off a train of events that united very disparate groups of citizens in violent opposition to the new supply contract.<sup>72</sup> More generally, Amy Chua argues that globalization, which often overlaps with privatization, can set off ethnic violence aimed particularly at market-dominant minority groups such as the Chinese in Indonesia.<sup>73</sup> Somewhat less violently, political fights over the deregulation of rent control periodically turn up the heat in New York politics.<sup>74</sup>

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Smooth Sailing: Democracy Doesn't Need Deliberation Day, *Legal Aff.*, Feb. 2004, at 41-42, (arguing that competition informs voters about candidates, just as it does about toaster; that voter apathy can express rational preference; and that an additional "deliberation day" would take time that citizens would rather spend on other matters such as family or business).

<sup>71</sup>Jay Sol et al, *Positive Trend: As Growth Returns to Pakistan, Hopes Rise on Terror Front*, *Wall St. J.* Nov. 9, 2004, at A1, col. 1 (describing hope that economic improvement would overcome terrorism).

<sup>72</sup>Woodhouse, *supra*; Andrew Nickson & Claudia Vargas, *The Limits of Water Regulation: The Failure of the Cochabamba Concession in Bolivia*, 21 *Bulletin of Latin American Research* 99 (2002)

<sup>73</sup>Amy Chua, *World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability* (2003)

<sup>74</sup>See Guy McPherson, *Note: It's the End of the World As We Know It (and I Feel Fine): Rent Regulation in New York City and the Unanswered Questions of Market and Society*, 72 *Fordham L. Rev.* 1125-26 (2004) (describing political turmoil about New York's rent

On the other hand, not all deregulations and divestitures have had this disruptive effect. The privatization of the water systems in some cities in Chile appears to have worked well without political backlash, perhaps in part because the Chileans created a system for subsidizing poor families' water bills through the social security system.<sup>75</sup> This may not accord with the best understanding of prices and economic incentives, but it undoubtedly relieved public opposition. It is not a complete answer for every situation, though, because the Cochabamba project aroused fierce opposition even though it too contemplated somewhat lower rates for lower income households.<sup>76</sup> India, which has deregulated many aspects of its economy in the last few years and has enjoyed a striking economic boom, may be a test case for the theory that commerce can take the heat out of politics. Interestingly enough, the strident and confrontational Hindu nationalist party, the Bharatiya Janata Party (BJP), was the chief sponsor of India's deregulation, and presumably it was destined to become the chief political beneficiary of economic good fortune. Instead, it was the more inclusive Congress Party and its allies that raised issues about privatization, and that surprisingly defeated the BJP at the polls in 2004, in large part due to the dissatisfaction of rural citizens who thought that they were left out of the good times.<sup>77</sup> All the

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regulation).

<sup>75</sup>World Water Council, World Panel on Financing Water Infrastructure (Michael Camdessus, Chair), Report: Financing Water For All 19 (2003); Barlow & Clarke, supra note —, at 217.

<sup>76</sup>Note, Guerra del Agua, supra note ----, at 318-19; Vargas & Nickson, supra note —, at 111.

<sup>77</sup>Amy Waldman, Premier of India is Forced to Quit After Vote Upset, N.Y. Times, May 14, 2004, at A1, col. 1 (describing Hindu nationalist party rule's privatization policies and economic success, rural backlash in election).

same, the Congress Party also seems unlikely to take a major turn away from its predecessor's privatization efforts, recognizing their importance for employment and economic prosperity, so in a sense the book is still out on whether commerce in India can soften political divisions.<sup>78</sup>

Modern privatization measures suggest that a key factor for the Distraction Argument concerns what we might call “baselines”: if a substantial number of people have a stake in current governmental regulation or management, and if they think that privatization causes them to suffer a substantial drop in the current baseline of their well-being (as in the case of tenants who face rent deregulation), then privatization will heat up politics rather than calm politics down, at least over a short run. Issues of relative wellbeing may matter too. In the 2004 elections, India's rural poor reacted angrily at seeing themselves bypassed by the newly wealthy urban sectors, but at least they took out their resentments in elections. Amy Chua recounts much more disastrous responses to unevenly distributed gains from privatization, particularly when angry majority populations have ousted and devastated the “market dominant minorities” who had gained the most from free market policies.<sup>79</sup> More broadly, the issues of baseline and relative status also suggests that distributional issues may have a very pronounced effect on the possibilities for privatization.<sup>80</sup>

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<sup>78</sup>See Amy Waldman, *In India, Economic Growth and Democracy Do Mix*, N.Y. Times, May 23, 2004, sec. 4, at 3 (describing continuing central commitment to free market reforms, including in agriculture, in spite of populist election rhetoric and rural discontent).

<sup>79</sup>Chua, *supra* note —, at 163-75.

<sup>80</sup>Mark J. Roe, *Backlash*, 98 Colum. L. Rev. 217 (1998) (describing potential political backlash from policies that increase total wealth but also increase distributional gap); Richard H. McAdams, *Relative Preferences*, 102 Yale L. J. 1 (1992) (arguing that behavior can be motivated strongly by desire for relative status); Robert Frank, *Choosing the Right Pond: Human Behavior and the Quest for Status* (1985) (same).

The interplay between distributional issues and economic change is a subject that has much engaged the economist Gary Libecap, who has studied a number of proposals to redefine and sharpen property rights. His view, very crudely stated, is that in contemplating reform, people compare their personal pre- and post-reform situations; those who had done well under a pre-existing but inefficient system must often be mollified or paid off, because otherwise they may be able to mount so much opposition to economic reform that the reform will never take place.<sup>81</sup> Libecap is primarily interested in economic reform, but his point is basically a political one: that proposed alterations in a system of entitlements can arouse political disturbances that are so great that they undermine any economic change. The Cochabamba experience is again an example: the pre-existing water delivery arrangements were fragmented and grossly inadequate, but water (when and where it was available) was generally relatively cheap. The newly-privatizing consortium, by contrast, roused suspicion among local people—particularly farmers—that they would lose their existing water sources, however inefficient and ultimately unsustainable those sources were.<sup>82</sup> When the consortium began to raise rates sharply to cover modernization costs and cover investors’ risks, it only confirmed fears of pending loss among already-mistrustful local groups, uniting the rural and urban opposition and eventually leading to the riots that brought down the entire project.<sup>83</sup>

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<sup>81</sup>Libecap, *Contracting for Property Rights* 5 (1989).

<sup>82</sup>Woodhouse, *supra* note —, at 317-321; Nickson & Vargas, *supra* note —, at 112.

<sup>83</sup>Woodhouse, *supra* 328-37; Finnegan, *supra* note —; Willem Assies, *David and Goliath in Cochabamba: Water Rights, Neo-Liberalism, and the Revival of Social Protest in Bolivia*, 30 *Latin Am. Perspectives*, no. 3 (May 2003), at 14, 24-30.

Such failed modern privatization efforts should deliver a warning about the old hope that private property can de-fuse political explosions. The argument has a certain circularity, and it only works if the shift to private property itself is politically acceptable--or can be made acceptable through greater transparency and public discussion, and possibly through distributional concessions to calm potential opposition. Without these essentially political moves, privatization may simply inflame politics all the more.

4. The Symbolic Argument: Property is the central right because it symbolizes all other rights and thus educates all in rights-consciousness.

It is often hard for people to think without real-world examples. Property has a particular concreteness that makes it especially attractive as an example of rights generally. This is true in modern scholarship, where torts and contracts scholars often use examples drawn from property to make their theoretical points.<sup>84</sup> But the use of property examples to illustrate other rights is a pattern that goes much further back as well. James Madison wrote a famous public letter describing a whole litany of his rights as property, saying that he had a “property” in his reputation, his religious views, and in a whole series of other entitlements.<sup>85</sup>

Property thus appears to be more available to the imagination than many other rights, and if this is so, one might think, the protection of property rights is especially important. Having property rights can make the owner think of himself or herself as a rights-holding person more

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<sup>84</sup>Carol M. Rose, *The Shadow of the Cathedral*, 106 *Yale L. J.* 2175 (1997).

<sup>85</sup>Madison, “Property,” *National Gazette*, Mar. 27, 1792, reprinted in 14 *The Papers of James Madison* (1983).

generally; if a person owns a tool or a pig or a house, she gets a sense of what it means to have rights. In that sense, holding property is an education in what it means to be a rights-bearer.

Now, there are those who disagree with this view, such as Jennifer Nedelsky, who thinks that property is a poor symbol for other rights.<sup>86</sup> And of course, it is quite hard to measure whether anyone really generalizes from property ownership to other rights. But there do seem to be some hints that the symbolic argument has some force, Nedelsky to the contrary notwithstanding. Property owners are more likely than tenants to vote and to take part in community affairs, for example. Certainly people with insecure land tenure seem to be anxious to have more firmly fixed property rights, as is the case with farmers in China and squatters in urban areas in many less developed countries.<sup>87</sup> Insofar as property rights give people a sense of security, these rights may act as a kind of emotional platform for greater assertiveness on other fronts.

Some modern privatization measures could add to this assertiveness, particularly the “recognition” privatizations that make land tenure more certain. Privatization in the form of deregulation probably works both for and against the symbolism of secure rights; on the one hand, deregulation could add to owners’ sense of security from governmental intrusion, but on the other, it could diminish the sense of security of, say, tenants who were previously protected by rent control regulations.

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<sup>86</sup> Nedelsky, *Private Property and the Limits of American Constitutionalism* 262-63 (1990).

<sup>87</sup>See, e.g. Craig Smith, *Chinese Farmers Rebel Against Bureaucracy*, *N.Y. Times*, Sept. 17, 2000, at sec. 1, p. 1.

There is one area of modern privatization that seems to cut fairly sharply against the Symbolic argument, however: that is, the “enabling” privatization that protects what are essentially governmentally-created property rights, notably IP. The starting point is that most people are not holders of significant IP rights.<sup>88</sup> Instead, most people perceive themselves as obligated by IP rights, since the rights belong to others. Many IP rights are quite counterintuitive. It is a technical violation of copyright, for example, to sing “Happy Birthday To You” in a bar or restaurant without the copyright holder’s permission.<sup>89</sup> There is even an organization in the United States, ASCAP, that makes a practice of ferreting out such public performances of copyrighted songs and demanding payment—as they did from the Girl Scouts a few year ago, for singing copyrighted songs around the campfire.<sup>90</sup> Most people have no intuition that they are not supposed to perform such copyrighted material, and they resent being told that they are in violation.<sup>91</sup> More seriously, many people feel indignant that because of patent laws, even the

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<sup>88</sup> Or, if they are technically holders of IP rights, they don’t know it. For example, many people are technically owners of copyrights on writings or artwork, since copyright attaches as soon as one “fixes” the writing or work of art, and thus one has a copyright in one’s doodles on a page. But most people are unaware of these rights.

<sup>89</sup> See, e.g., Dan Hunter and F. Gregory Lastowka, *Amateur to Amateur*, 46 *Wm. & Mary L. Rev.* 951, 964 (2004) (describing everyday activities that infringe copyright).

<sup>90</sup> See Ben Depoorter, *The Several Lives of Mickey Mouse: The Expanding Boundaries of Intellectual Property Law*, 9 *Va. J. L. & Tech.* 4 (2004) (describing Girl Scout episode as example of popular backlash when content holders overplay their hand).

<sup>91</sup> *Id.* [Depoorter]; see also Jessica Litman, *Digital Copyright* 29 (2001) (noting counterintuitive character of some copyright rules).

poor have to pay a monopoly price for pharmaceutical drugs, when the drugs themselves can be manufactured so much more cheaply.<sup>92</sup>

This is not to say that there are not good economic reasons for enforcing IP rights, even in the case of pharmaceuticals. There are. Research and development of drugs is expensive, and aside from direct public subsidy, the only significant way to recoup that expense is to charge a price higher than the manufacturing cost for the product itself.<sup>93</sup> Without the certainty of this recompense, much development and improvement of drugs would undoubtedly dry up, and pharmaceutical companies might increasingly turn away from medicine to such politically safer products as cosmetics and cures for sexual dysfunctions.<sup>94</sup> But however compelling those economic arguments may be, as matter of political symbolism, enforcement of IP rights seems not an education in rights-bearing, but rather an education in having to bear the burden of other people's rights. If anything, for most people, the symbolism of IP is disempowering: the symbolism of this form of property is all too often that the powerful have rights, while the rest of us have only obligations. Indeed, this disempowering symbolism maps onto larger global tensions: the nations most insistent on IP enforcement are the IP-exporting developed countries, whereas less-developed countries have tended to resist.

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<sup>92</sup>See M. Gregg Bloche & Elizabeth R. Youngman, Health Policy and the WTO, 31 J. L. Med. & Ethics 529, 535 (2003) (describing criticism of patent law for withholding cheaply manufactured drugs from poor nations and persons).

<sup>93</sup>Note, Theodore C. Bailey, Innovation and Access: The Role of Compulsory Licensing in the Development and Distribution of HIV/AIDS Drugs, 2001 U. Ill. J. L. Tech. & Pol'y 193, 202-204 (describing high risks of drug R&D, need for patent protection for incentive).

<sup>94</sup>See, e.g. [James Surowiecki] No Profit, No Cure, New Yorker Magazine, Nov. 5, 2001, at 46 (suggesting that if patent protection on medicines is weakened, drug companies will divert research efforts to baldness or impotence cures).

The dictatorial edges of IP can be softened. One method is much like the method that Chile used to soften the edges when privatizing some urban water systems—that is, by establishing a subsidy for poor families, which in effect acts like a two-tier pricing system. The controversies over delivering AIDS drugs to less-developed countries have generated a great deal of thinking about tiered systems of payment, and about other ways that IP rights and charges might be modified to accommodate overwhelming need.<sup>95</sup> A second method to soften the edges speaks to a quite different concern, namely to make IP law more attentive to the intellectual creativity of non-western societies. There are many galling stories about western firms that patent minor variations on plants – plants that nonwestern cultivators actually developed over long time periods—and there are other similar stories about western firms that record folktales and then claim copyright, even against the communities from which these tales arose.<sup>96</sup> In more recent negotiations on international IP, less developed countries have been able to get some national protection for local knowledge and cultural productions, for example, for folklore.<sup>97</sup> There are certain difficulties with this solution, however, since in some countries, traditional communities have substantial conflicts with their own national governments, so that local communities may not

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<sup>95</sup> See Jean O. Lanjouw, *Intellectual Property and the Availability of Pharmaceuticals in Poor Countries*, Center for Global Development, Working Paper No. 5 (April 2002) (developing theme of tiered pricing); see also Note, Bailey, *supra* note —, at 217-18 (comparing differential pricing to compulsory licensing).

<sup>96</sup> See, e.g. Thomas Cottier & Marion Pannizon, *Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection*, 7 *J. Int'l Econ. L.* 371, 373-74 (2004) (describing instances of much-resented “biopiracy”); cf. Michael Brown, *Who Owns Native Culture?* 132-34 (2003) (arguing that claims may be ambiguous in connection with technologically advanced uses of native plants).

<sup>97</sup> Cottier & Pannizon, *supra* note —, at 376-81 (describing new international & national legislation to protect traditional knowledge)

be so happy with national IP ownership of local creativity. More broadly, special protections for traditional knowledge subtly undermine the chief theoretical justification for any kind of IP, namely the claim that IP incentivizes intellectual creativity. Traditional knowledge has already been “out there” for some time, and this kind of knowledge would seem to need no further incentive for production.<sup>98</sup> On the other hand, understood as a claim of compensation for contribution, some stretching and bending of standard IP categories could mean that in the future, IP protections will not so lopsidedly symbolize the power of more developed countries against less developed ones.<sup>99</sup>

The debate over traditional knowledge is a kind of marker of IP’s symbolic significance more broadly – one striking instance among many in a larger pattern. However economically useful it may be, IP is a highly specialized kind of property. Precisely because its beneficiaries constitute a relatively narrow set of claimants, IP’s symbolism for most people contradicts the idea that property acts an education in rights-bearing. Instead, for most, IP is simply not personalized or widespread enough to count as a symbol of rights-bearing. Moreover, unlike the

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<sup>98</sup>Shubha Ghosh, *Traditional Knowledge, Patents, and the New Mercantilism (Part I)*, 85 *J. Pat. & Trademark Off. Soc’y* 828, 829-30 (2003). See also Anupam Chander and Madhavi Sunder, *The Romance of the Commons*, 92 *Cal. L. Rev.* 1331, 1354 (2004) (noting awkwardness of traditional knowledge protections in standard IP theory).

<sup>99</sup>Ghosh, *supra* note —, at 832-33 (describing traditional knowledge debates as distributional matter between more developed and less developed nations); Chander & Sunder, *supra* note —, at 1354-57, 1363-69 (same; also relating traditional knowledge debate to treaty-related alteration in the scope of the prior “commons” in intellectual productions); see also Jim Chen, *Biodiversity and Biotechnology: A Misunderstood Relation*, 2005 *Mich. St. L. Rev.* 51, 54, 75-76 (same). However, although sympathetic to compensation claims in other forms, Chen rejects the propertization of traditional knowledge either by traditional communities or first-world developers, because in his view this would diminish the beneficial spread of knowledge. *Id.*, at 78, 83-84.

ownership of consumer goods or even land, it is unlikely that IP ever will be very personalized or widespread, because IP is an unlikely candidate for broad ownership. It is not hard to imagine even very poor people owning some small space, some tools or domestic animals or personal items; but it is hard to imagine those people holding any meaningful rights under IP. All IP will teach such people is that some have rights, while most do not.

With respect to property's symbolic significance, then, modern privatization again presents a mixed picture: some aspects of privatization seem to support property's symbolism of rights, insofar as privatization helps many people to claim ownership. But some other aspects of privatization, notably an expanded IP, serve notice that not all property can function well as a symbol of what it means to bear rights.

5. The Civilizing Argument: Property and commerce are central rights because they educate people in the patterns of give-and-take on which democracy depends.

This “civilizing” argument also goes back to the classical eighteenth-century thinkers on political economy. But it rings rather strangely in modern ears, accustomed as we are to the Marxist description of the ferocity of capitalist exploitation. Earlier thinkers like Montesquieu and Hume, however, compared commercial practice favorably to the even more ferocious practices of aristocratic society, and they argued that commerce “softens” manners.<sup>100</sup> The intuition here is that commercial people cannot afford the pomposity, vainglory and casual violence of aristocrats. Nor, in a more modern setting, can they afford the rudeness that so plagued customer relations in some socialist states. Merchants have to pay attention to the wants

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<sup>100</sup>Albert O. Hirschman, *The Passions and the Interests* 54-62 (1977).

and interests of others, because they have to bargain with others to arrive at a mutually satisfactory conclusion. This is as true of modern commerce as it was in earlier times; like it or not, Disney and MacDonalDs are exquisitely sensitive to the demands of their customers. They have to be, or their customers will go elsewhere.

One sees this pattern of attentiveness quite markedly in some of the privatizing activity of recent years. For example, when MacDonalD's opened its first Moscow restaurant, it had to teach its employees to smile at customers, something that caused astonishment among the customers themselves.<sup>101</sup> Similarly, as China began a few years ago to open up some enterprises to a freer commerce, the government had to give elaborate instructions to store clerks on some things that they should not say to customers, e.g., "Stop shouting. Can't you see I'm eating?"<sup>102</sup>

There is another socializing factor at work in commercial relations as well. Much commerce consists of repeat dealings, so that, in their business affairs, people try to get to know one another and try to earn the trust of others as potential trading partners. Though the matter is controversial, some historians even attribute the rise of philanthropy in the early nineteenth century to the expansion of world trade, as merchants learned about very distant peoples and became interested in their wellbeing.<sup>103</sup> These patterns continue; sometimes commercial

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<sup>101</sup>Adi Ignatius, *Russians Who Wear Jungle Ties or Spit Need Not Apply*, *Wall St. J.*, June 9, 1992, at A1 (describing training in first Moscow McDonalds).

<sup>102</sup>Seth Faison, *Service With Some Bile*, *N. Y. Times*, Oct. 22, 1995, Sec. 4, at 4. Among the other banned remarks of clerks to customers were "Didn't you hear me, what do you have ears for?" and "Why didn't you choose well when you bought it?"

<sup>103</sup>Rose, *Keystone Right?* *supra* note —, at 353-54 and authorities cited therein (describing thesis and controversies about it).

relationships can develop into genuine friendships, friendships that would have been inconceivable except through the gateway of initial commercial contacts.

There are undoubtedly untold instances of rudeness, deceit, and self-dealing in commercial relationships, but we think of these examples over against a backdrop of more typical commercial behavior, which on the whole is reasonably polite and respectful of the rights of others. We tend to forget that this “normal” behavior is part of a culture of commerce, and we think it is simply nature. But it is not. It is learned behavior, and commerce helps to teach it.

At the same time, there are cautionary areas in modern privatization. Once again, the divestiture of public utilities is a particularly problematic area for any “civilizing” character of privatization. It is not that privatized utilities’ staffs are more rude and autocratic than state-run ones; but they may not be a great deal better. This comes from the “natural monopoly” character of utilities, which means that they are relatively undisciplined by competition—the very force that drives commercial people to be attentive to customers. Even in more developed countries, there are many complaints of rudeness and unresponsiveness from the gas company, the electric company, or the local telephone company. They do not have to compete for your business, and as a consequence, they may not pay a great deal of attention to your wishes or complaints.

All this is relative, though, and perhaps even the “natural monopolies”—and even bureaucrats—can learn a modicum of politeness if they are surrounded by other more conventional commercial activities. Democracies require some of the same cultural traits that property and commerce do: respect for the rights of others, an appeal to voluntary agreement rather than force, the channeling of self-interest into cooperation for mutual benefit. Indeed, when we think about it, there are rather few circumstances in which we regularly take into account the needs of others

and try to cooperate with them and to earn their trust. Those that exist are very intense, of course: friendship, family, and love also do this work. But friendship, family and love do not carry us very far from home. Property and trade, on the other hand, can carry us very far indeed, connecting people to others who are strangers to them; consider, for example, the numbers of persons whom you must trust to take a trip in an airplane. And although the appeal to cooperation in commerce has a thin emotional basis – what used to be called “self-interest rightly understood” – commerce still generates institutions in which we learn to engage peacefully with very distant others, and we learn that we can do well for ourselves by respecting rights, avoiding violence, and behaving in trustworthy ways. If there is any really important political capital to be gained for democracies from privatization, surely this culture of commerce must be part of it.

## V. CONCLUSION

In all the examples given above, modern privatization efforts suggest a mixed picture, a certain muting of the political arguments for property and free commerce. It is not that the old arguments are flatly or even mostly wrong, but rather that in some arenas, modern privatization efforts illustrate some weak spots in the older political arguments for property. In fact, many of the modern efforts to privatize are themselves state-led, and it would be surprising indeed if privatization could turn around and singlehandedly reform the political culture of the very states that initiated privatization.

The take-away lesson is that privatization in a modern context is only one of a whole array of political reforms, though it is an important one. Privatization, for example, can help to increase

the demand for governmental accountability and competence, but this is in part because private property depends on accountable and competent government. There is certain circularity here: property requires that a modicum of governmental competence already be in place, before property-owners can increase the demand for more competence. That is why democratic reform needs to engage in efforts on many different fronts, not just the economic one.