

CYCLING TO ECONOMIC FREEDOM?: AN ANALYSIS OF PRIVATIZATION, NATIONALIZATION, AND EXPROPRIATION IN ARGENTINA, MEXICO, AND THE UNITED KINGDOM

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Although privatization has exerted a stronghold over economic policy, several countries have cycled back and forth between privatization and nationalization. In several Latin American countries, governments have conducted a round of privatization followed by expropriation and nationalization. By contrast, in the United Kingdom, privatization-nationalization cycles are less common, and private property rights are more likely to remain entrenched. This Article analyzes privatization and nationalization—and by extension, private property rights—from a comparative constitutional perspective. Through analyzing rounds of privatizations in three countries—Argentina, Mexico, and the U.K.—this Article argues that two constitutional mechanisms impact the privatization-nationalization cycle: executive power and legislative entrenchment. Large grants of executive power and a lack of legislative entrenchment can allow governments to swiftly alter private property rights, shifting economic regimes from privatization to nationalization. Thus, this Article suggests that privatizing nations curb executive power and entrench legislation to advance private property rights. By establishing constitutional safeguards on executive and legislative power, privatizing governments are more likely to promote private property rights, entrench privatization, and foster economic development in their countries.

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INTRODUCTION

Privatization has exerted a stronghold over economic policy, both in developing¹ and developed nations.² Global leaders have hailed privatization as a means for economic development³ and democracy.⁴

1. See, e.g., Edward C. Snyder, *The Menem Revolution in Argentina: Progress Toward a Hemispheric Free Trade Area*, 29 TEX. INT'L L.J. 95, 96 (1994).

2. David Marsh, *Privatization Under Mrs. Thatcher: A Review of the Literature*, 69 PUB. ADMIN. 459, 459 (1991).

3. See, e.g., Carla Davidovich, Note, *The Selling of Argentina: Is the Path to the First World Privatized?*, 28 LAW & POL'Y INT'L BUS. 151, 151 (1996) (describing President Carlos Menem's thoughts on privatization); Alistair Osborne, *Margaret Thatcher: One Policy That Led to More Than 50 Companies Being Sold or Privatized*,

Several countries have also encouraged privatization through constitutionalizing a variety of provisions, including the right to own private property.⁵

Despite such a strong popular and constitutional consensus around privatization, several countries have cycled back and forth between privatization and nationalization.⁶ For example, several Latin American governments have conducted a round of privatization followed by a round of expropriation and renationalization.⁷ By contrast, European governments have privatized state-owned enterprises (“SOEs”) without cycling back toward nationalization.⁸

Scholars have yet to analyze why certain countries fall into a privatization-nationalization cycle, but others do not. Although a few scholars have examined the privatization-nationalization cycle on a more micro-level—for example, Professor Amy Chua focuses her scholarship on the underlying causes of the cycle⁹—scholars have largely failed to identify why the cycle is nonexistent in some countries.

Other scholars have offered different explanations of the cycle. David Bushnell and Neill Macaulay, for instance, hypothesize that countries

TELEGRAPH (Apr. 8, 2013), <http://www.telegraph.co.uk/finance/comment/alistair-osborne/9980292/Margaret-Thatcher-one-policy-that-led-to-more-than-50-companies-being-sold-or-privatised.html> (describing Prime Minister Thatcher’s views on privatization).

4. CHRISTOPHER ADAM ET AL., *ADJUSTING PRIVATIZATION: CASE STUDIES FROM DEVELOPING COUNTRIES* 128-29 (1992).

5. *See, e.g.*, Art. 17, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (safeguarding private property rights in Argentina); *see also* CONST. (1987), art. XIII, sec. 8 (Phil.) (noting that the government will encourage “privatization of public sector enterprises”).

6. *See, e.g.*, Werner Baer & Gabriel Montes-Rojas, *From Privatization to Renationalization: What Went Wrong with Privatizations in Argentina*, 36 OXFORD DEV. STUD. 323, 324 (2008); Degol Hailu et al., *Privatization and Renationalization: What Went Wrong in Bolivia’s Water Sector?*, 40 WORLD DEV. 2564, 2564 (2012).

7. *See supra* note 6 (referring to all sources cited).

8. *See, e.g.*, Marsh, *supra* note 2, at 459; Heather M. Stack, Note, *The “Colonization” of East Germany?: A Comparative Analysis of German Privatization*, 46 DUKE L.J. 1211, 1248 (1997).

9. *See generally* Amy L. Chua, *The Privatization-Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries*, 95 COLUM. L. REV. 223 (1995) (noting that ethnic hatred may influence a country’s decision to renationalize).

privatize or nationalize in response to global geopolitical events, for example the fall of the Soviet Union or the Great Depression.¹⁰ Bushnell and Macaulay's hypothesis, however, does not fully explain certain facets of the privatization-nationalization cycle: the U.K.'s privatization before the fall of the Soviet Union,¹¹ and Argentina's renationalization of some enterprises in 2001.¹²

In sharp contrast to Bushnell and Macaulay's focus on global events, William Glade focuses on internal events and posits that countries privatize in response to economic necessity.¹³ Although Glade's theory may describe some countries' justification for privatizing, Glade's theory does not explain why countries like Argentina renationalize after a round of privatization.¹⁴

Thus, to fill the void in the literature, this Article analyzes why certain countries renationalize and others do not. This Article further provides constitutional and policy prescriptions for controlling the privatization-nationalization cycle and preserving private property rights. To engage in this analysis, this Article compares and contrasts privatizations in three countries: Argentina, Mexico, and the United Kingdom. This Article studies these three countries for two reasons. First, Mexico and the U.K. have not renationalized since privatization in the late 1980s and early 1990s,¹⁵ but Argentina has renationalized since privatization in the 1990s.¹⁶ Second, all three countries are members of the G20,¹⁷

10. DAVID BUSHNELL & NEILL MACAULAY, *THE EMERGENCE OF LATIN AMERICA IN THE NINETEENTH CENTURY* 183, 189 (1988).

11. The U.K.'s privatization plan was set in 1979. See Marsh, *supra* note 2, at 460.

12. Baer & Montes-Rojas, *supra* note 6, at 324.

13. William Glade, *The Contexts of Privatization*, in *PRIVATIZATION OF PUBLIC ENTERPRISES IN LATIN AMERICA* 1, 4, 15 (William Glade ed. 1991).

14. See generally *id.* (discussing the factors that cause countries to privatize but not discussing any factors that may trigger renationalization).

15. See Marsh, *supra* note 2, at 461 (noting the growth of the U.K.'s privatization program); *id.* at 459 (acknowledging that the U.K.'s privatization program is a blueprint for other countries that wish to privatize state-owned enterprises); see also *2013 Investment Climate Statement – Mexico*, U.S. DEP'T OF STATE (Feb. 2013), <http://www.state.gov/e/eb/rls/othr/ics/2013/204693.htm> [hereinafter *Mexico Investment Climate*].

16. Baer & Montes-Rojas, *supra* note 6, at 324.

“economies whose size or strategic importance gives them a particularly crucial role in the global economy.”¹⁸

This Article makes three claims. First, to avoid renationalization, privatizing countries should curb executive power. Executive power need not be severely limited; instead, the limitations should curb the executive’s unilateral ability to modify existing laws and regulations. Limited executive power enshrines permanence and increases ownership and investment.¹⁹ Thus, by reducing executive power, countries are less likely to renationalize. Conversely, countries with increased executive power—in particular, countries that unilaterally allow their presidents to contravene existing legislation—are more likely to sanction swift changes in property rights and longstanding practices.²⁰

In the context of this Article, Argentina renationalized partly because it concentrates considerable executive power in the hands of its executive. Argentine presidents may unilaterally repeal legislation through executive decrees.²¹ Such decrees may enable presidents to renationalize rapidly.²² By contrast, Mexico and the U.K. do not grant their executives the same level of executive power, especially with regard to privatization.²³ Therefore, they are less likely to fall into the privatization-nationalization cycle and are more likely to safeguard private property rights.²⁴

Second, a claim that is plausible but not provable in the context of this Article, is that countries that legislatively entrench and perpetuate private property rights are less likely to renationalize. Legislative entrenchment commits the government to a particular policy preference, in this case

17. *G20 Members*, ORG. ECON. COOPERATION DEV., <http://www.oecd.org/g20/g20-members.htm> (last visited Dec. 31, 2014).

18. *About*, ORG. ECON. COOPERATION DEV., <http://www.oecd.org/g20/about.htm> (last visited Dec. 31, 2014).

19. Ricardo J. Caballero, *On the Sign of the Investment-Uncertainty Relationship*, 81 AM. ECON. REV. 279, 279 (1991).

20. *See infra* Part II.B.

21. *See* ELANA SHEVER, *RESOURCES FOR REFORM: OIL AND NEOLIBERALISM IN ARGENTINA* 206 n.4 (2012).

22. *See infra* Part V.A.

23. *See id.*

24. *See id.*

privatization, which increases predictability, ownership, and investment.²⁵ In the context of this Article, countries making a legislative commitment to privatization were more likely to have successful privatization programs. For instance, Mexico had trouble attracting ownership and investment in 1989 partly because the Mexican Congress did not codify private property rights in legislation.²⁶ By contrast, the British Parliament compensated for its inherent inability to entrench legislation by making several legislative commitments to privatization.²⁷

While discussing legislative entrenchment, this Article acknowledges that certain regimes are structurally incapable of entrenching laws. For example, the U.K. Parliament cannot bind successive Parliaments.²⁸ Thus, in cases where entrenchment is impossible, this Article recommends a system of tacit entrenchment: by privatizing state-owned enterprises in different legislative terms, a country can reiterate its commitment to private ownership and investment. Tacit entrenchment, therefore, may replicate the benefits of entrenchment in regimes that cannot legislatively entrench various policies.²⁹

25. Legislative entrenchment is particularly important because it “enables a government to make a credible commitment that it will not hold up a person from whom it seeks certain actions.” Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1671 (2002). Entrenchment not only makes repealing legislation difficult, but may also make passing legislation a more deliberative endeavor. By contrast, legislatures lacking legislative entrenchment may be less likely to deliberate extensively. *Id.* at 1693. In the context of privatization, entrenchment “enshrine[s]” certainty in a country’s legal system and helps attract investors. PIERRE GUISLAIN, *THE PRIVATIZATION CHALLENGE: A STRATEGIC, LEGAL, AND INSTITUTIONAL ANALYSIS OF INTERNATIONAL EXPERIENCE* 294 (1997).

26. Michael W. Goldman et al., *An Introduction to Direct Foreign Investment in Mexico*, 5 IND. INT’L COMP. L. REV. 101, 113 (1994).

27. The U.K. Parliament is not bound by its predecessors. MARY COLLINS, *AS LEVEL LAW* 50 (2000). Even though the U.K. is not a paradigmatic example of legislative entrenchment, the U.K. has still managed to perpetuate private property rights. Thus, this Article argues that the U.K. has tacitly entrenched private property rights through privatizing various state-owned companies and conducting privatization during different legislative terms; in doing so, the U.K. has signaled to investors that it favors privatization over expropriation and private ownership over collectivism. *See infra* Part V.B.

28. COLLINS, *supra* note 27, at 50.

29. *See infra* Part V.B.

Third, to curb populist pressure to renationalize, privatizing countries should adopt modernization agreements. Such agreements mandate that privatizers modernize certain services and deliver noticeable benefits to the populace.³⁰ From a distributional perspective, modernization agreements ensure that privatizations confer benefits to all segments of the citizenry, thereby increasing social and consumer welfare.³¹ Privatization's distributional results are paramount because governments often market privatization programs as a means to cure economic ills.³² In law and economics terms, privatization is often marketed as a Pareto improvement, an outcome that makes no one worse off.³³ Yet, several privatizations have led to a maldistribution of resources, making the polity worse off than before.³⁴ Such results, then, serve as a rallying cry for renationalization.³⁵ Curbing populist discontent, therefore, requires that privatization's benefits are spread as widely as possible. A wide disbursement of benefits increases popular support for private property

30. See, e.g., A. Botelho & C. Addis, *Privatization of Telecommunications in Mexico*, in LESSONS FROM PRIVATIZATION: LABOUR ISSUES IN DEVELOPING AND TRANSITIONAL COUNTRIES 71, 83 (Rolph van der Hoeven & György Sziráczki eds., 1997) (providing an example of a concession agreement requiring a privatizer to modernize a country's telephone system); Xun Wu & Nepomuceno A. Malaluan, *A Tale of Two Concessionaires: A Natural Experiment of Water Privatisation in Metro Manila*, 45 URB. STUD. 207, 215, 226 (2008) (providing an example of a concession agreement requiring a privatizer to modernize a city's water system).

31. See CHILE: RECENT POLICY LESSONS AND EMERGING CHALLENGES 322-23 (Guillermo Perry & Danny M. Leipziger, eds. 1999) [hereinafter CHILE] (noting that citizen-centric policies during privatization increase consumer welfare); Raúl González Pietrogiovanna, *The Benefits of Privatization? The Mexican Experience in the Telecommunications Industry* 12 (unpublished manuscript) (available at http://www.lse.ac.uk/europeanInstitute/events/2008-09/Gonzalez_Pietrogiovanna.pdf).

32. See, e.g., Snyder, *supra* note 1, at 96 (noting the Argentine government marketed privatization as means to revitalize Argentina's economy).

33. Robert N. Stavins et al., *Interpreting Sustainability in Economic Terms: Dynamic Efficiency Plus Intergenerational Equity*, 79 ECON. LETTERS 339, 341 (2003).

34. Alberto Chong & Florencio López-de-Silanes, *The Truth About Privatization in Latin America* 19-20 (Inter-Am. Dev. Bank, Working Paper No. R-486, 2003).

35. LUIGI MANZETTI, NEOLIBERALISM, ACCOUNTABILITY, AND REFORM FAILURES IN EMERGING MARKETS 180 (2010).

rights and decreases the likelihood that populist concerns will dismantle protections for private ownership.³⁶

To make these three claims, this Article proceeds in five parts. Part I provides an overview of this Article's methodology, offering definitions for privatization, the privatization-nationalization cycle, and economic liberties. Part I also describes how this Article will study privatizations in each country. Parts II, III, and IV describe privatizations in Argentina, Mexico, and the U.K., respectively. Part V summarizes my findings in Parts II through IV. Additionally, Part V provides constitutional and economic policy prescriptions that can enable privatizing countries to avoid renationalization and preserve private property rights in the long run.

I. METHODOLOGY

A. Key Definitions

In the context of this Article, privatization is defined as the sale of "majority . . . ownership in historically state-owned [enterprises]" ("SOEs").³⁷ Privatization transfers SOEs' ownership from the government to the private sector. Nationalization refers to the transfer of ownership from the private sector to the government.³⁸

This Article defines the privatization-nationalization cycle as having three or more phases: nationalization, privatization, followed by renationalization. Thus, if a country falls into the privatization-nationalization cycle, the country has renationalized previously privatized SOEs. By contrast, a country has avoided the privatization-nationalization cycle if privatized industries remain privatized.

36. See E. Sam Overman, *Privatization in China, Mexico, and Russia: A Comparative Study*, 19 PUB. PRODUCTIVITY & MGMT. REV. 46, 52-53 (1995).

37. Leslie Elliot Armijo, *Menem's Mania?: The Timing of Privatization in Argentina*, 1 SW. J.L. & TRADE AM. 1, 6 (1994).

38. Chua, *supra* note 9, at 226-27.

Lastly, in the context of this Article, economic liberties are defined as “the right to acquire, use, and possess private property and the right to enter into private contracts of one’s choosing.”³⁹

B. Privatization Studies

Scholars have studied privatization in various ways.⁴⁰ Because this Article engages in a comparative study of privatization, this Article employs the methodology used in Heather Stack’s comparative note on German privatization.⁴¹ In her note, Stack engages in a three-part analysis: first, she describes the political and economic factors leading to privatization; second, she discusses the privatization’s legal framework; third, she analyzes the results of privatization.⁴² This Article employs Stack’s methodology because Stack’s note, like this Article, critiques existing privatization policies and focuses on the history and legal structure of various privatizations.⁴³ Thus, Stack’s methodology seems particularly fitting for this Article’s substantive focus and comparative approach.

39. Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 HARV. J.L. & PUB. POL’Y 5, 5 (2012).

40. Chua, *supra* note 9, at 227-238 (engaging in a historical analysis that focuses on the role of foreigners in privatization); Wu & Malaluan, *supra* note 30, at 214-19 (engaging in an analysis that focuses on the privatizer’s corporate governance and financial stability).

41. Stack, *supra* note 8, at 1214.

42. This Article follows the methodology employed in Parts I and II of Stack’s note. *See id.*

43. *Id.* Stack’s critique, however, does not focus on constitutional and political issues. *See id.*

II. PRIVATIZATION IN ARGENTINA

A. Political and Economic Factors

At the beginning of the Twentieth Century, Argentina's economy boomed.⁴⁴ With annual growth rates above five percent, Argentina's "standard of living was equal to [that of] the United States."⁴⁵ After World War II, however, Argentina changed course.⁴⁶ With the election of Juan Domingo Perón, who espoused populist policies, the country nationalized several industries.⁴⁷ As a result, Argentina's economy stagnated: annual growth rates ranged between 0.9% and 3.2% from the 1950s to the late 1960s, and inflation skyrocketed from 19.6% to 38.1% from the 1960s to the 1970s.⁴⁸ In 1980, "the public sector accounted for [twenty seven percent] of Argentina's GDP."⁴⁹

Despite Argentina's dismal economy, two regimes in 1980—a military regime and Raul Alfonsín's administration—did not privatize many Argentinean SOEs.⁵⁰ As the Argentinean economy continued to deteriorate, voters rejected Alfonsín's policies and elected Carlos Menem, a Perónist, to the presidency.⁵¹ Menem, who belonged to a party of statist and nationalists, reversed his party's election platform and championed economic liberalization upon taking office.⁵²

44. Snyder, *supra* note 1, at 101; see also Alexander J. Loftus & David A. McDonald, *Of Liquid Dreams: A Political Ecology of Water Privatization in Buenos Aires*, 13 ENV'T & URBANIZATION 179, 179 (2001).

45. Snyder, *supra* note 1, at 101; see also Loftus & McDonald, *supra* note 44, at 179. ("[E]conomists confidently predicted that Argentina would soon be second only to the US in its economic strength and stature.").

46. See Armijo, *supra* note 37, at 4; Davidovich, *supra* note 3, at 153.

47. Davidovich, *supra* note 3, at 153.

48. Armijo, *supra* note 37, at 4.

49. Snyder, *supra* note 1, at 102.

50. The military junta refused to privatize any SOEs. *Id.* Alfonsín, who inherited an economy plagued by "triple digit inflation and negative growth," privatized only four SOEs. Armijo, *supra* note 37, at 8.

51. Snyder, *supra* note 1, at 103.

52. Julio C. Cueto-Rúa, *Privatization in Argentina*, 1 SW. J.L. & TRADE AM. 63, 69-71 (1994); Loftus & McDonald, *supra* note 44, at 179.

B. Privatization's Legal Framework

“Argentina is ready to triumph . . . and leave this true hell called the Third World.”

-President Carlos Menem⁵³

Less than two months after Menem became president, the Argentine Congress passed Law 23.696, the Administrative Emergency and Reorganization of the State Law (“the State Reform Law”).⁵⁴ The law authorized Menem—or the executive generally—“to replace all directors or administrators” of SOEs.⁵⁵ As a result, Menem had the sole authority to privatize; if privatization was impossible, then the executive could “liquidate [SOEs] entirely.”⁵⁶ The State Reform Law targeted the following SOEs for privatization: airlines, infrastructure, shipping, coal mines, oil companies, consulting firms, the postal service, telecommunications, utility companies, printing companies, and chemical companies.⁵⁷ With the backing of the State Reform Law, Menem sold fifty-one SOEs.⁵⁸

In addition to the State Reform Law, the Argentine Congress passed Law 23.697, “the Economic Emergency Law.”⁵⁹ Under the law, the executive had the authority to remove SOEs’ existing management and install a handpicked “intervenor,” who was accountable only to the executive, not the legislature.⁶⁰

Scholars agree that both pieces of legislation were procedurally “rushed.”⁶¹ Although Congress deliberated on other privatization

53. Davidovich, *supra* note 3, at 151.

54. Law No. 23.696, Aug. 23, 1989, A.D.L.A. (Arg.); Davidovich, *supra* note 3, at 158-59.

55. Snyder, *supra* note 1, at 103.

56. *Id.*; see also Law No. 23.696, *supra* note 54, at art. XI (Arg.) (codifying the liquidation provision).

57. Cueto-Rua, *supra* note 52, at 69.

58. Snyder, *supra* note 1, at 104.

59. Law No. 23.697, Sept. 15, 1989, A.D.L.A. (Arg.).

60. Cueto-Rua, *supra* note 52, at 70.

61. Cueto-Rua, *supra* note 52, at 69; Loftus & McDonald, *supra* note 44, at 182.

provisions for ten months, the State Reform Law passed in one month.⁶² A month after Congress enacted the State Reform Law, Congress passed the Economic Emergency Law.⁶³ Substantively, both laws represented special, not popular, interests: Menem's handpicked economic experts, not elected officials, authored both laws.⁶⁴

Moreover, scholars—even those who present enthusiastic accounts of Menemismo policies⁶⁵—admit that both laws enabled Menem to undermine the Argentine Congress and unilaterally determine the scope of various economic liberties.⁶⁶ Such executive power, however, is not completely unusual in context: strong presidential authority is a hallmark of several Latin American countries. For example, Argentina grants the president the authority “to initiate legislation and make decrees without the consent of Congress.”⁶⁷ Using their broad executive powers, Argentine presidents have both created new laws and repealed old ones. Menem's actions, however, increased Argentine executive power in an unprecedented manner.⁶⁸ During his presidency, Menem issued 336 executive decrees.⁶⁹ By contrast, previous presidents had issued a total of only thirty-five decrees since the 1853 signing of the Argentine Constitution.⁷⁰

Menem's executive decrees—often used to further privatization programs—subverted congressional power.⁷¹ Menem issued decrees to sidestep congressional authority, and his decrees substantively affected policy areas that were previously under the purview of Congress.⁷²

62. Daniel Treisman, *Cardoso, Menem, and Machiavelli: Political Tactics and Privatization in Latin America*, 38 *STUD. COMP. INT'L DEV.* 93, 99 (2003).

63. Snyder, *supra* note 1, at 105.

64. SHEVER, *supra* note 21, at 89.

65. Loftus & McDonald, *supra* note 44, at 179 (using the phrase “Menemismo economics”).

66. Snyder, *supra* note 1, at 105.

67. SHEVER, *supra* note 21, at 206 n.4.

68. *See id.* (comparing the number of executive decrees Menem issued vis-à-vis the executive decrees issued by previous Argentine presidents).

69. *Id.*

70. *Id.*

71. Roberto Pablo Saba & Luigi Manzetti, *Privatization in Argentina: The Implications for Corruption*, *CRIME L. & SOC. CHANGE* 353, 361-62 (1997).

72. *Id.*

Although Congress adopted a commission to oversee Menem's economic policies, the commission lacked any veto powers.⁷³

Moreover, the Argentine Supreme Court did not invalidate Menem's economic policies. To ensure that the Supreme Court would validate his actions, Menem increased the number of justices on the Court shortly after his election.⁷⁴ Unsurprisingly, the post-election Court affirmed all of Menem's executive decrees, even though several of them were patently unconstitutional.⁷⁵

C. Privatization's Results

From 1990 to 1993, privatization raised \$18.8 billion for the Argentine government.⁷⁶ In total, the government privatized approximately 90% of SOEs by 1994.⁷⁷ Although privatization raised billions of dollars for the Argentine government, not all privatizations were successful. For example, after privatization, Aerolíneas Argentinas was partially renationalized because the airline increased its prices and decreased its level of service.⁷⁸

Menem's privatization process was also plagued by corruption and inefficiency. For example, Menem "bought out" *capitanes de la industria*—an organized group of public contractors who initially opposed privatization⁷⁹—by selling them SOEs at below market value prices.⁸⁰ Following privatization, unemployment increased to thirteen percent in 1995 and fifteen percent in the late 1990s.⁸¹ Several privatized firms increased prices even though Argentina's economy stagnated during the late 1990s.⁸²

73. *Id.* at 362.

74. *Id.*

75. *Id.*

76. Armijo, *supra* note 37, at 17.

77. Treisman, *supra* note 62, at 94.

78. Saba & Manzetti, *supra* note 71, at 364.

79. Treisman, *supra* note 62, at 95.

80. *Id.* at 100.

81. Loftus & McDonald, *supra* note 44, at 182.

82. *Id.*

Despite such results, some commentators lauded Argentina's privatization. For example, Edward Snyder noted that Argentina's privatizations were "highly unlikely . . . [to] be reversed."⁸³ Snyder further predicted, "Menem's economic reforms will continue even if he must step down in 1995. All of the political parties support the economic program, including the opposition Radical Civic Union Party."⁸⁴

Despite Snyder's predictions, President Néstor Kirchner—a Peronist—renationalized several industries in the early 2000s: Argentina's postal service, Argentina's largest utility company, and Aerolíneas Argentinas.⁸⁵ Kirchner detested foreign investors' monopolistic practices, which presumably increased post-privatization inefficiencies.⁸⁶ Moreover, Kirchner noted that privatization enabled investors to profit at the expense of poor Argentine consumers.⁸⁷

President Cristina Kirchner, Néstor Kirchner's wife and successor, continued her husband's renationalization policies.⁸⁸ Although Menem's pro-privatization policies allowed Argentina to "relinquish[] control of the oil and gas industry,"⁸⁹ Cristina Kirchner succumbed to populist and protectionist sentiment and renationalized Argentina's "biggest oil company, YPF."⁹⁰

83. Snyder, *supra* note 1, at 119.

84. *Id.* at 120.

85. PERIDE K. BLIND, *DEMOCRATIC INSTITUTIONS OF UNDEMOCRATIC INDIVIDUALS* 136 (2008); Bill Faries, *Argentina's Congress Approves Airline Nationalization*, BLOOMBERG (Dec. 17, 2008), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a6MQqRJojsk>.

86. MANZETTI, *supra* note 35, at 180.

87. *Id.* The poor and labor unions "applauded" Kirchner's renationalization program. Alexei Barrionuevo, *Former President Makes a Comeback in Argentina*, N.Y. TIMES (Dec. 3, 2009), <http://www.nytimes.com/2009/12/04/world/americas/04argentina.html>; Faries, *supra* note 85.

88. Jonathan Gilbert, *Argentina's Renationalization of YPF: A Push to Manage Oil on Its Own Terms*, CHRISTIAN SCI. MONITOR (May 12, 2012), <http://www.csmonitor.com/World/Americas/2012/0512/Argentina-s-renationalization-of-YPF-A-push-to-manage-oil-on-its-own-terms> (noting that President Cristina Kirchner renationalized energy and oil companies in Argentina).

89. Snyder, *supra* note 1, at 108.

90. Gilbert, *supra* note 88.

The government's expropriation of YPF chilled Argentina's investment climate: in 2013, the U.S. Department of State cautioned investors from increasing their ownership in "Argentine-based assets."⁹¹ Although the Argentine Constitution requires the government to compensate investors prior to expropriation,⁹² the Kirchner Administration did not compensate Repsol, a Spanish company that was previously YPF's majority shareholder, until two years after expropriation.⁹³

III. PRIVATIZATION IN MEXICO

In contrast to Argentina, Mexico has not renationalized since privatization in the late 1980s and early 1990s.⁹⁴ Prior to the late 1980s, however, Mexico cycled between privatization and nationalization.⁹⁵ This Part discusses the recent round of Mexican privatizations and their results.

A. Political and Economic Factors

Before the 1980s, Mexico had cycled between privatization and nationalization.⁹⁶ Mexico nationalized "hundreds" of businesses under President Lázaro Cárdenas's administration during the Great Depression.⁹⁷ After Cárdenas left office in 1940, Mexico privatized its previously nationalized industries.⁹⁸ Privatization, however, did not last

91. See Bureau of Econ. & Bus. Affairs, *2013 Investment Climate Statement – Argentina*, U.S. DEP'T STATE (Feb. 2013), <http://www.state.gov/e/eb/rls/othr/ics/2013/204592.htm> [hereinafter *Argentina Investment Climate*].

92. Art. 17, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

93. See *Argentina's Congress Approves \$5bn Repsol Compensation*, BBC (Apr. 24, 2014), <http://www.bbc.com/news/world-latin-america-27141955>.

94. See *Mexico Investment Climate*, *supra* note 15.

95. See Chua, *supra* note 9, at 234-38.

96. MEXICO AND THE UNITED STATES 571 (Lee Stacy ed., 2002) [hereinafter MEXICO]; Chua, *supra* note 9, at 232-34.

97. MEXICO, *supra* note 96.

98. Chua, *supra* note 9, at 232-34.

long. In 1958, Mexico renationalized several companies, including Telmex—the national telephone company—and foreign-owned power companies.⁹⁹ Mexico’s pro-nationalization policies continued in the 1970s under Luis Echeverría’s presidency. Echeverría believed that the state’s increased economic intervention “would help develop Mexico.”¹⁰⁰

The next decade would prove Echeverría wrong. In 1982, Mexico experienced perhaps the worst debt crisis in its history.¹⁰¹ Inflation almost reached triple digits,¹⁰² and “the budget deficit was [twelve percent] of [Mexico’s] GNP.”¹⁰³ Mexico, therefore, turned to privatization. President Miguel de la Madrid “privatized or closed down” approximately 750 SOEs.¹⁰⁴ President Carlos Salinas de Gortari, de la Madrid’s successor, continued to privatize several industries, including the state owned telephone, banking, steel, mining, and airline companies.¹⁰⁵

B. Privatization’s Legal Framework

Although several foreign governments and Mexico’s business elite pressured the Mexican government to privatize,¹⁰⁶ the government’s powers were severely restricted by isolationist, statist policies of the past. Since independence, Mexico had cultivated a culture of self-sufficiency, obstructing foreign investment and promoting nationalization in the process.¹⁰⁷ For example, in 1917, Mexico adopted a new constitution that restricted foreign investment and nationalized Mexico’s land, water, and mineral resources.¹⁰⁸ In 1973, when Echeverría championed

99. *Id.* at 234-35.

100. MEXICO, *supra* note 96.

101. Overman, *supra* note 36, at 51.

102. Chua, *supra* note 9, at 236.

103. Overman, *supra* note 36, at 51.

104. MEXICO, *supra* note 96, at 573.

105. *Id.*

106. *Id.*

107. Goldman et al., *supra* note 26, at 101.

108. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, art. 28, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.) [hereinafter Mexican Constitution].

nationalization, the Mexican Congress passed the Law to Promote Mexican Investment and to Regulate Foreign Investment, commonly known as the 1973 Foreign Investment Law.¹⁰⁹ The law had three main provisions: first, certain industries were “reserved” for the Mexican government;¹¹⁰ second, another tranche of industries was “reserved” for Mexican nationals or Mexican companies;¹¹¹ third, any remaining industries not covered by the previous two provisions had a cap of forty-nine percent foreign ownership.¹¹² Thus, to privatize, Salinas used his executive power to issue the 1989 Foreign Investment Regulations (“the Regulations”).¹¹³

Salinas’s executive powers, however, were limited. Article 89(1) of the Mexican Constitution limited the scope of presidential rule-making, only permitting those regulations that “explain[ed] and suppl[ied] detailed rules for the application of specific laws.”¹¹⁴ Moreover, the Mexican Supreme Court had previously proscribed regulations that “contravene[d]” existing law.¹¹⁵ Thus, even though Latin American executives traditionally enjoyed broad executive powers,¹¹⁶ the Mexican Constitution prevented Salinas from using his rule-making power to repeal the 1973 Foreign Investment Law.

The 1989 Foreign Investment Regulations, therefore, were limited in scope. Through the Regulations, Salinas curtailed the authority of the administrative agency that enforced the 1973 Foreign Investment Law.¹¹⁷

109. Ley para Promover la Inversión Mexicana y Regular Inversión Extranjera [Law to Promote Mexican Investment and Regulate Foreign Investment], *Diario Oficial de la Federación* [DO], 9 de Marzo de 1973 (Mex.).

110. *Id.* art. 4; Goldman et al., *supra* note 26, at 107.

111. Law to Promote Mexican Investment and Regulate Foreign Investment, *supra* note 109, art. 4; Goldman et al., *supra* note 26, at 107.

112. Law to Promote Mexican Investment and Regulate Foreign Investment, *supra* note 109, art. 5; Goldman et al., *supra* note 26, at 107-08.

113. Reglamento de la Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera [Regulation of the Law to Promote Mexican Investment and Regulate Foreign Investment], *Diario Oficial de la Federación* [DO], 16 de Mayo de 1989 (Mex.).

114. HARRY WRIGHT, *FOREIGN ENTERPRISE IN MEXICO* 16 (1971).

115. Goldman et al., *supra* note 26, at 103.

116. SHEVER, *supra* note 21, at 206 n.4.

117. Goldman et al., *supra* note 26, at 111.

Salinas also authorized Series N shares, a class of stock that had no voting rights but allowed foreign investors to share in capital gains and dividends in privatized SOEs.¹¹⁸ Ultimately, the Regulations were Salinas's attempt to promote private property rights and enhance competition throughout Mexico.¹¹⁹

The Regulations, however, were initially ineffectual. Perhaps because of Salinas's limited constitutional authority or Mexico's history of renationalization, there was no mad rush to purchase shares in Mexican SOEs. In 1990, the year after the Regulations were promulgated, direct foreign investment decreased.¹²⁰

From a legal perspective, however, the Regulations may have empowered the Mexican Congress to codify Salinas's economic reforms.¹²¹ After two years of deliberation, the Mexican Congress enacted the 1993 Foreign Investment Law.¹²² The Law repealed the 1973 Foreign Investment Law, but did not overturn restrictions on foreign investment in the oil, banking, and television industries; these industries continued to remain under the purview of either state or "private monopolies."¹²³ The 1993 Foreign Investment Law also codified Salinas's 1989 Foreign Investment Regulations, thereby increasing certainty and predictability.¹²⁴

In 1994, with the ratification of the North America Free Trade Agreement ("NAFTA"), Mexico further strengthened its protection of private property rights.¹²⁵ NAFTA's investment provisions attempt to "create a secure investment climate through the promulgation of clear

118. Regulation of the Law to Promote Mexican Investment and Regulate Foreign Investment, *supra* note 113, arts. 13-15.

119. Goldman et al., *supra* note 26, at 110.

120. *Id.* at 114.

121. *Id.* at 115.

122. Ley de Inversión Extranjera [LIEEX] [Foreign Investment Law], Diario Oficial de la Federación [DO], 27 de Diciembre de 1993 (Mex.); Tim Golden, *Mexico Planning to Loosen Foreign Investment Rules*, N.Y. TIMES (Nov. 26, 1993), <http://www.nytimes.com/1993/11/26/business/mexico-planning-to-loosen-foreign-investment-rules.html>.

123. Foreign Investment Law, *supra* note 122, arts. 5, 6; Golden, *supra* note 122.

124. Goldman et al., *supra* note 26, at 119-21.

125. *See id.* at 121.

rules for the fair treatment of foreign investors.¹²⁶ Moreover, Chapter 11 of NAFTA proscribes expropriation unless four conditions are met: the country (1) has a public purpose for expropriation; (2) expropriates on a nondiscriminatory basis, (3) in accordance with the due process of law; and (4) offers fair market value compensation for the expropriated entity.¹²⁷

C. Privatization's Results

From 1989 to 1992, privatization generated revenues that were equivalent to 6.3% of Mexican GDP.¹²⁸ From December 1990 to June 1993, privatization generated \$18.1 billion for the Mexican government.¹²⁹ In total, by 1994, Mexico reduced its SOEs from 1,100 to 200; most of the 200 SOEs were in sectors that could not be privatized.¹³⁰

In key privatizations, the Mexican government and privatizers limited inefficiencies by protecting certain constituencies.¹³¹ For example, after the privatization of Telmex—the state owned telephone company—the privatizers agreed to maintain pre-privatization employment, thereby curbing populist discontent.¹³² Moreover, as part of the concession for Telmex's sale, the privatizers promised the government that Telmex would modernize its services.¹³³ Thus, the privatized company completed

126. *Id.* at 121.

127. North American Free Trade Agreement art. 1110, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

128. Botelho & Addis, *supra* note 30, at 72.

129. Taeko Hoshino, *Privatization of Mexico's Public Enterprises and the Restructuring of the Private Sector*, 34 THE DEVELOPING ECONOMIES 34, 37 (1996).

130. Pietrogiovanna, *supra* note 31, at 6; *see also supra* Part III.B (listing industries that could not be privatized even after Congress passed the 1993 Foreign Investment Law). Immediately after privatization, Mexico suffered a financial crisis. Although the financial crisis erased any gains from privatization, no industries were renationalized. Pietrogiovanna, *supra* note 31, at 8 n.4.

131. *See* Botelho & Addis, *supra* note 30, at 88; Eric P. Perramond, *The Rise, Fall, and Reconfiguration of the Mexican "Ejido,"* 98 GEOGRAPHICAL REV. 356, 356-57 (2008).

132. Botelho & Addis, *supra* note 30, at 88.

133. *Id.* at 81-82.

an \$8 billion modernization program, transitioning from analog lines to digital lines and advancing social welfare in the process.¹³⁴

Additionally, the Mexican government avoided bitter populist clashes by refusing to privatize certain SOEs, including rural land.¹³⁵ In Mexico and Latin America, rural land has signified the gap between the “haves” and “have-nots,” and governments have implemented various land redistribution schemes to reduce inequity.¹³⁶ Although the Mexican government granted itself the constitutional authority to privatize communal land, called *ejidos*, “the vast majority” of Mexican *ejidos* have remained unprivatized.¹³⁷ Such actions may have curbed populist resistance to privatization efforts, restraining populist uprisings against pro-privatization administrations.¹³⁸

Despite the Mexican government’s efforts to increase post-privatization efficiencies, some commentators have criticized Mexico’s privatizations. In particular, Sam Overman notes that Mexico’s reliance on foreign investment has “recolonized” the Mexican economy.¹³⁹ Moreover, Overman argues that privatization has not democratized ownership in the Mexican economy: “wealthy . . . Mexican investors” and foreign investors own most privatized assets.¹⁴⁰ Lastly, according to Overman, even successful privatizations—for example the privatization of Telmex¹⁴¹—“[c]reat[ed] new [privately owned] monopolies” and have failed to foster competition.¹⁴²

Despite such inefficiencies, the Mexican government has continued to champion privatization and has protected private property rights for

134. *Id.* at 88; Pietrogiovanna, *supra* note 31, at 12.

135. *See* Perramond, *supra* note 131, at 356-57.

136. James V. Kohl, *Peasant and Revolution in Bolivia*, 58 *HISP. AM. HIST. REV.* 238, 242 (1978); Perramond, *supra* note 131, at 356-57.

137. Perramond, *supra* note 131, at 356-57.

138. I make these arguments because previously, in Latin America, privatizing rural land and water has led to populist uprisings. *See* Timothy O’Neill, Note, *Water and Freedom: The Privatization of Water and Its Implications for Democracy and Human Rights in the Developing World*, 17 *COLO. J. INT’L ENVTL. L. & POL’Y* 357, 368 (2005).

139. Overman, *supra* note 36, at 52.

140. *Id.*

141. Botelho & Addis, *supra* note 30, at 88.

142. Overman, *supra* note 36, at 53.

foreign and domestic investors alike.¹⁴³ In 2012, the government eased restrictions on SOEs that were previously “reserved” for the state.¹⁴⁴ For example, the Mexican government enacted regulations that made Pemex—Mexico’s state-owned oil company—“more enticing to foreign participation.”¹⁴⁵ While “talk of ‘privatizing’ Pemex” may have been “political suicide” two years ago,¹⁴⁶ President Enrique Peña Nieto recently signed legislation that “open[s] . . . [Pemex] to private investment.”¹⁴⁷

IV. PRIVATIZATION IN THE UNITED KINGDOM

Scholars universally agree that the U.K.’s privatization in the 1980s was successful;¹⁴⁸ after completion, several of the U.K. privatizations served as a “blueprint” for other countries.¹⁴⁹ This Part discusses the U.K.’s privatizations under the leadership of Prime Minister Margaret Thatcher.

A. Political and Economic Factors

The U.K. conducted a round of nationalization in the 1940s, under Clement Attlee’s labour government.¹⁵⁰ Attlee nationalized to rebuild Great Britain’s postwar economy; at the time, government officials

143. See *Mexico Investment Climate*, *supra* note 15.

144. Goldman et al., *supra* note 26, at 117 (noting the provisions of the 1993 law that were “in accord with the 1973 law”).

145. Sara Miller Llana & Whitney Eulich, *Brazil, Venezuela, and Mexico: Three Ways to Nationalize Oil*, CHRISTIAN SCI. MONITOR (May 12, 2012), <http://www.csmonitor.com/World/Americas/2012/0512/Brazil-Venezuela-and-Mexico-three-ways-to-nationalize-oil>.

146. *Id.*

147. Anthony Harrup, *Mexico to Decide on Details of Oil Sector Privatization*, WALL ST. J. (Aug. 11, 2014), <http://www.wsj.com/articles/mexico-to-decide-on-oil-sector-privatization-pemex-projects-1407780656>.

148. See, e.g., Andrew Gamble, *Privatization, Thatcherism, and the British State*, 16 J.L. SOC’Y 1, 18 (1988); Marsh, *supra* note 2, at 459 (1991).

149. Marsh, *supra* note 2, at 459.

150. Cento Veljanovski, *Privatization in Britain—The Institutional Constitutional Issues*, 71 MARQ. L. REV. 558, 560 (1987).

wrongly believed that nationalization would spur modernization.¹⁵¹ Unlike the mass nationalizations in Latin America,¹⁵² British nationalization was conducted on a case-by-case basis.¹⁵³ The government nationalized industries such as defense, energy, and utilities, but the government's nationalization program also encompassed companies that were insolvent at the time.¹⁵⁴

By the late 1970s, Great Britain's nationalized industries were woefully inefficient and unproductive. "Massive portions" of the populace were "dependent on the state for their housing, education, and livelihoods."¹⁵⁵ By 1979, 29.3% of the labor force was employed by the government or by nationalized industries.¹⁵⁶ Nationalized industries, in turn, received 4.6 billion GBP in government subsidies.¹⁵⁷

Additionally, in 1979, the British economy stagnated. Inflation reached eighteen percent, and "[t]he British pound sank to one-twentieth [of] the purchasing power it had forty years earlier."¹⁵⁸ Despite high inflation and low purchasing power, tax rates remained extraordinarily high: the highest tax bracket was eighty-three percent.¹⁵⁹

Amidst the economic turmoil, Margaret Thatcher, then the Conservative Opposition Leader, moved for a no-confidence vote against Labour Prime Minister James Callaghan.¹⁶⁰ The House of Commons granted Thatcher's motion by one vote, compelling Callaghan to call an

151. *Id.* I use the word "wrongly" because of the events that unfolded in the 1970s. *See infra* Part IV.A.

152. *See supra* Parts II.A, III.A.

153. Veljanovski, *supra* note 150, at 560.

154. *Id.*

155. Clint Bolick, *Thatcher's Revolution: Deregulation and Political Transformation*, 12 YALE J. ON REG. 527, 529 (1995).

156. *Id.* at 529-30.

157. *Id.* at 530.

158. *Id.*

159. *Id.*

160. 1979: *Early Election as Callaghan Defeated*, BBC, http://news.bbc.co.uk/onthisday/hi/dates/stories/march/28/newsid_2531000/2531007.stm (last visited Jan. 8, 2015).

early election.¹⁶¹ On May 4, 1979, the Conservative Party won the general election, and Thatcher became the U.K.'s prime minister.¹⁶²

During the 1979 election, the Conservative Party had no plans to conduct a wide scale privatization program.¹⁶³ Upon assuming office, Thatcher did not conduct any major privatizations during her first term.¹⁶⁴ Nevertheless, as the economy continued to decline, Thatcher championed privatization during her second and third terms.¹⁶⁵

B. Privatization's Legal Framework

Unlike the privatizations in Mexico and Argentina, privatization in the U.K. was a much more gradual process. Each individual privatization required parliamentary approval through an Act of Parliament.¹⁶⁶ Moreover, unlike Menem,¹⁶⁷ Thatcher did not privatize immediately upon becoming prime minister.¹⁶⁸

British Telecom was the first major company that the Thatcher Administration privatized.¹⁶⁹ In 1982, the government first announced that it planned to sell a majority stake of British Telecom.¹⁷⁰ Two years later, Parliament authorized its sale by passing the Telecommunications Act of 1984 ("the Act").¹⁷¹ In addition to authorizing British Telecom's

161. *Id.*

162. *1979: Election Victory for Margaret Thatcher*, BBC, http://news.bbc.co.uk/onthisday/hi/dates/stories/may/4/newsid_2503000/2503195.stm (last visited Jan. 8, 2015).

163. Marsh, *supra* note 2, at 460.

164. *Id.*

165. *Id.* at 461.

166. William L. Megginson et al., *The Financial and Operating Performance of Newly Privatized Firms: An International Empirical Analysis*, in *THE PRIVATIZATION PROCESS: A WORLDWIDE PERSPECTIVE* 115, 151 (Terry Lee Andersen & Peter Jensen Hill eds., 1996).

167. *See supra* Part II.B.

168. *See supra* Part IV.A.

169. Bolick, *supra* note 155, at 540.

170. Richard Stevens, *The Evolution of Privatisation as an Electoral Policy c. 1970-90*, 18 *CONTEMP. BRIT. HIST.* 47, 61 (2006).

171. Telecommunications Act, 1984, ch. 12 (Eng.).

sale, the Act created a regulator for the privatized company: the Office of Telecommunications.¹⁷²

The privatization of British Telecom was wildly successful. The sale was the largest IPO in international financial history at the time and generated “almost [four billion GBP]” for the U.K. government.¹⁷³ Following British Telecom’s privatization, the Thatcher Administration privatized other companies, including state-owned gas, electricity, water, steel, and coal companies.¹⁷⁴ Ultimately, the Thatcher Administration, with the authorization of Parliament, privatized more than fifty companies, including modern day brand names such as British Petroleum, Jaguar, British Airways, and Rolls-Royce.¹⁷⁵

C. Privatization’s Results

During the Thatcher Administration, privatization raised approximately fifty-billion pound sterling.¹⁷⁶ Despite such astronomical revenues, Thatcher’s privatization policies still attracted criticism. For example, some accused Thatcher of selling “state jewels at bargain prices.”¹⁷⁷

Privatization experts, however, regard Thatcher’s policies as “by and large successful.”¹⁷⁸ Several privatizing countries viewed the U.K. privatizations as “blueprint[s]” for their own privatization programs.¹⁷⁹ Thatcher’s successor, Prime Minister John Major, continued to privatize

172. Robert F. Durant et.al., *People, Profits and Service Delivery: Lessons from the Privatization of British Telecom*, 42 AM. J. POL. SCI. 117, 124 (1998).

173. Stevens, *supra* note 170, at 61-62.

174. Bolick, *supra* note 155, at 540.

175. Osborne, *supra* note 3.

176. *Id.*

177. Charles Forelle, *Thatcher’s Privatizations Cast a Long Shadow*, WALL ST. J. (Aug. 9, 2013),

<http://www.wsj.com/articles/SB10001424127887323550604578412810723007042>.

178. *Id.*

179. Marsh, *supra* note 2, at 459.

SOEs.¹⁸⁰ More recently, in 2013, the U.K. privatized Royal Mail, the country's postal service.¹⁸¹

Like Menem, who “bought out” privatization's opponents, Thatcher offered employees and customers shares of SOEs at below-market prices.¹⁸² Perhaps to democratize ownership, the government primarily marketed shares to British consumers, not foreigners.¹⁸³ Others, however, dispute Thatcher's motives in selling to employees and domestic investors. For example, one news source states that Thatcher sold shares to employees to dilute unions' opposition to privatization.¹⁸⁴

In addition to promoting private property rights, Thatcher's initiatives unleashed the administrative state. With each privatization, Parliament and the Thatcher Administration created an overseeing administrative agency.¹⁸⁵ Such agencies did not reduce government involvement in the economy, but may have contributed to British privatization's success for two reasons.¹⁸⁶ First, administrative agencies may have enabled markets to function efficiently, thereby increasing privatization's efficacy.¹⁸⁷ Second, by promoting efficient markets, agencies also promoted investor confidence—a crucial facet of any privatization program that democratizes corporate ownership.¹⁸⁸

V. AN OVERVIEW OF PRIVATIZATION

Although the previous Parts discussed the constitutional and legal framework of each privatization, this Part (1) synthesizes constitutional and economic policies associated with each privatization and (2) offers

180. EARL AARON REITAN, *THE THATCHER REVOLUTION* 135 (2003).

181. *Why Is the Royal Mail Being Privatized?*, *ECONOMIST* (Oct. 10, 2013), <http://www.economist.com/blogs/economist-explains/2013/10/economist-explains-9>.

182. Bolick, *supra* note 155, at 540.

183. *Id.* at 541.

184. Forelle, *supra* note 177.

185. For example, the Telecommunications Act of 1984 created the Office of Telecommunications. Veljanovski, *supra* note 150, at 572.

186. *See id.* (noting that the government created a number of agencies to oversee privatized companies).

187. *Id.* at 573.

188. *Id.*

prescriptions for curtailing the privatization-nationalization cycle and preserving economic liberties.

A. Executive Power

Among all three countries, Argentina grants its head of state the most executive power. As described in Part II, Argentine presidents may repeal legislation and issue decrees without Congress's consent.¹⁸⁹ Such broad powers enable Argentine presidents to allocate property rights singlehandedly: for example, Menem unilaterally privatized ninety percent of Argentina's SOEs from 1991 to 1994.¹⁹⁰

By contrast, executive power in Mexico and the U.K. is significantly weaker. Although Latin American presidents enjoy broad executive powers,¹⁹¹ Mexican presidents cannot use their executive power to "contravene" existing law.¹⁹² Similarly, although parliamentary systems do not separate power between the legislature and executive,¹⁹³ the U.K.'s prime ministers cannot unilaterally privatize and nationalize.¹⁹⁴

Such restrictions invariably curb the executive's ability to modify the status quo. For example, Salinas could not autocratically repeal the 1973 Foreign Investment Law.¹⁹⁵ Conversely, Salinas's (hypothetical) antithesis—if ever elected—cannot unilaterally undo legislation passed during Salinas's term in office. In the U.K., Thatcher could not independently privatize SOEs. Moreover, if Thatcher's actions were to generate discontent in the House of Commons, Members of Parliament

189. SHEVER, *supra* note 21, at 206 n.4.

190. Treisman, *supra* note 62, at 94.

191. SHEVER, *supra* note 21, at 206 n.4.

192. Goldman et al., *supra* note 26, at 103.

193. STEVEN CALABRESI ET AL., *COMPARATIVE CONSTITUTIONAL LAW*, ch. 3, at 13 (Jan. 9, 2015) (unpublished manuscript) (on file with author).

194. William L. Megginson et al., *The Financial and Operating Performance of Newly Privatized Firms: An International Empirical Analysis*, 49 J. FINANCE 403, 439 n.32 (1994) (noting that the government created a number of agencies to oversee privatized companies).

195. *See supra* Part III.B.

could make a motion of no confidence, dissolving the government and calling an early election.¹⁹⁶

In the context of privatization, executives with relatively weak executive powers¹⁹⁷ are unlikely to sanction swift changes in private property rights, constitutional provisions, and longstanding practices. Thus, weak executive power may decrease the likelihood that a country cycles between privatization and nationalization. Moreover, if a country has already privatized, weak executive power may also lead to entrenchment. Entrenchment, in turn, promotes economic liberties: if the executive cannot unilaterally modify existing law, then a country is more likely to “enshrine[]” certainty in its legal system, increasing investment and property ownership.¹⁹⁸

Hence, to avoid renationalization, countries adopting privatization policies should simultaneously curb executive power. Restraints on executive power need not be all-encompassing; instead, the restraint should only limit the executive’s unilateral ability to modify preexisting legal and constitutional provisions.¹⁹⁹ Such limitations on executive power are more likely to entrench privatization policies. If privatization becomes more of a permanent fixture—as opposed to a policy to be adopted and discarded at each executive’s discretion—then privatization is more likely to foster certainty, increase investment, and promote economic liberties.²⁰⁰

Despite weak executive power’s benefits, some may argue that strong executive power²⁰¹ frees a country’s ability to privatize rapidly. Menem, for instance, could not have privatized as rapidly as he did if his executive powers were limited. Although weak executive powers lend

196. Parliamentary Elections, HOUSE OF COMMONS INFO. OFF. 3, <http://www.parliament.uk/documents/commons-information-office/m07.pdf> (last updated May 2010).

197. I use the words “weak executive power” to mean power that restricts an executive’s unilateral ability to modify preexisting law.

198. GUISLAIN, *supra* note 25, at 294.

199. *See id.*

200. Ricardo J. Caballero, *On the Sign of the Investment-Uncertainty Relationship*, 81 AM. ECON. REV. 279, 279 (1991).

201. By “strong executive power,” I mean power that enables the executive to modify preexisting laws. *See* Telecommunications Act, *supra* note 171.

more permanence to a set of policy preferences, permanence is desirable in the context of private ownership and economic liberties. Permanence enshrines certainty, thereby increasing investment and property ownership.²⁰² By contrast, impermanence decreases certainty and stifles ownership and investment.²⁰³ Therefore, at least in the long run, weak executive powers—not strong executive powers—are more likely to (1) curb renationalization efforts and (2) promote private investment.

Lastly, Menem's example cannot refute the case for weak executive power. Although Menem used his executive powers to privatize, Menem's hypothetical antithesis would be equally able to use executive powers to renationalize; in fact, because of Argentina's strong executive powers, Menem's hypothetical antithesis may renationalize just as rapidly as Menem privatized. Therefore, strong executive power does not necessarily make privatization a more likely outcome;²⁰⁴ instead, strong executive power increases the likelihood that a country will cycle between privatization and nationalization.

B. Legislative Entrenchment

Although the executive may entrench existing law through his or her inaction, the legislature can entrench laws through deliberate action. Legislative entrenchment is defined by Eric Posner and Adrian Vermeule as statutes "that are binding against subsequent legislative action."²⁰⁵ Posner and Vermeule suggest that legislative entrenchment can be accomplished through statutes that require a two-thirds majority to be repealed.²⁰⁶

None of the examples discussed in this Article fit Posner and Vermeule's exact definition of legislative entrenchment. The examples, however, lend plausibility to the argument that countries that perpetuate private property rights through legislation are more likely to have successful privatization programs. For example, in 1989, Mexico had

202. Caballero, *supra* note 200, at 279.

203. *Id.*

204. *See supra* text accompanying note 201.

205. Posner & Vermeule, *supra* note 25, at 1667.

206. *Id.*

trouble attracting capital partly because its foreign investment regulations were not yet enshrined in legislation.²⁰⁷ On the other hand, the U.K. arguably compensated for its inability to entrench legislation—the current Parliament is not bound by acts passed by previous Parliaments²⁰⁸—by passing successive acts of Parliament that privatized several SOEs.²⁰⁹ By continuing to privatize SOEs through several legislative terms, Parliament tacitly entrenched privatization within the U.K. and promoted economic liberties.

Therefore, when privatizing,²¹⁰ the legislature should entrench pro-privatization laws, including laws protecting investment and private property. By perpetuating private property rights, governments decrease the likelihood that a country will renationalize. Moreover, legislative entrenchment “enables a government to make a credible commitment” to a particular policy—in this case, privatization.²¹¹ Such a commitment, in turn, increases predictability and private ownership.²¹²

Aside from Posner and Vermeule, legislative entrenchment receives support from a wide range of authorities. James Madison, for example, noted that “most of the rights of property[] would become absolutely defunct” if the legislature did not entrench “rights depending on positive laws.”²¹³ Furthermore, privatization experts have acknowledged that entrenchment “enshrine[s]” certainty in a country’s legal system, thereby attracting investment.²¹⁴

207. *See supra* Part III.B.

208. COLLINS, *supra* note 27, at 50.

209. *See supra* Parts IV.B & IV.C. The argument that the U.K. tacitly entrenched privatization becomes stronger if one considers the scope of administrative agencies that privatization legislation created. After all, Parliament would not create and finance regulatory agencies if it planned to renationalize. *See supra* Part IV.C.

210. The words “when privatizing” are crucial because this Article’s recommendations are limited to preserving economic liberties; this Article does not recommend that legislatures entrench all laws and all rights.

211. Posner & Vermeule, *supra* note 25, at 1671.

212. *Id.* at 1672.

213. Letter from James Madison to Thomas Jefferson (Feb. 4, 1790), in *THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON* 230, 232 (Marvin Meyers ed., 1973).

214. GUISLAIN, *supra* note 25, at 294.

Despite legislative entrenchment's potential, certain regimes cannot entrench laws as Posner and Vermeule suggest.²¹⁵ Indeed, certain regimes—for example, the U.K.—cannot entrench laws at all.²¹⁶ Therefore, for these countries, a system of tacit entrenchment may be a more viable alternative.²¹⁷ For instance, a country can privatize SOEs in different legislative terms, thus assuring investors that different legislatures are equally committed to preserving private property rights.

C. Distributional Concerns

Distributional inequities may serve as a rallying cry for nationalization. For example, in Argentina, Néstor Kirchner renationalized because privatization enabled foreign investors to profit at the expense of poor Argentines.²¹⁸ Cristina Kirchner likewise renationalized in response to populist concerns.²¹⁹ Moreover, Argentina's poor and labor unions supported both presidents' renationalization efforts.²²⁰

By contrast, Mexico curbed populist sentiment through a number of ex ante measures: while privatizing, the Mexican government negotiated for provisions that would modernize SOEs and maintain pre-privatization employment.²²¹ More importantly, the Mexican government refused to privatize rural land, which symbolically represented bitter clashes between the rich and the poor.²²² Even though Mexico's privatizations "recolonized" the economy and concentrated ownership among foreign and "wealthy individual Mexican investors," Mexico's ex ante measures may have countered anti-privatization sentiment among the poor and

215. See Posner & Vermeule, *supra* note 25, at 1671.

216. COLLINS, *supra* note 27, at 50.

217. *Id.* at 26.

218. MANZETTI, *supra* note 35, at 180.

219. Gilbert, *supra* note 88.

220. Barrionuevo, *supra* note 87.

221. See Botelho & Addis, *supra* note 30, at 72, 88.

222. See *supra* notes 113-15 and accompanying text.

labor unions.²²³ Since privatization in the early 1990s, Mexico has not succumbed to populist pressure and renationalized.²²⁴

Even though distributional inequities stoke populist discontent, it would be a mistake to assume that anti-privatization sentiment lacks another cause: results that lag (often inflated) expectations. Governments often market privatization as an economic panacea, but poorly managed privatizations may leave the polity worse off than before. Menem, for example, remarked that that privatization would bring prosperity and enable Argentina to “leave [the] true hell called the Third World.”²²⁵ Argentina’s privatization, however, did not lift the masses out of poverty; instead, unemployment and prices simultaneously increased, enriching privatized industries over Argentine consumers.²²⁶ In law and economics terms, Menem promised the polity a Pareto improvement, an outcome that leaves no one worse off.²²⁷ The end result, however, was a Pareto efficiency, an outcome in which one party—in this case, the citizenry—was worse off.²²⁸

Therefore, any policy that seeks to curb populist discontent—and by extension, the privatization-nationalization cycle—must also reduce distributional inequities and align results with expectations. Perhaps one policy that can alleviate maldistribution and realign results with expectations is a modernization agreement. Such agreements deliver tangible benefits to the populace, including the poor, thereby reducing distributional concerns. Moreover, modernization agreements—which are governed by contract law—enable the government to align privatization’s results with the citizenry’s expectations.

Mexico has utilized modernization agreements in its privatizations. For example, Telmex—a state-run monopoly plagued by operational inefficiency—was privatized under a modernization agreement.²²⁹ The

223. Overman, *supra* note 36, at 52-53.

224. Harrup, *supra* note 147.

225. Davidovich, *supra* note 3, at 151 (citing Snyder, *supra* note 1, at 96).

226. See Loftus & McDonald, *supra* note 44, at 179, 182.

227. Stavins et al., *supra* note 33, at 341.

228. PAUL SAMUELSON & WILLIAM NORDHAUS, *ECONOMICS: AN INTRODUCTORY ANALYSIS* 966 (13th ed. 1989).

229. Botelho & Addis, *supra* note 30, at 81-82.

government's modernization provisions required Telmex's privatizers to modernize telephone services throughout Mexico.²³⁰ Such provisions increased privatization's benefits and likely increased overall social welfare.²³¹

CONCLUSION

Privatization receives immense constitutional support, but several G20 democracies have cycled back and forth between privatization and nationalization. This Article compares and contrasts privatizations in Argentina, Mexico, and the United Kingdom to identify (1) why certain countries renationalize, and (2) how privatizing regimes can safeguard private property rights. By studying each privatization's constitutional and legal framework, this Article argues that two constitutional factors and one economic factor impact the privatization-nationalization cycle: (1) executive power, (2) legislative entrenchment, and (3) distributional inequities. The first and third factors increase the likelihood that a country will renationalize. The second factor, however, may promote investment and private property rights. Thus, this Article recommends that privatizing nations dilute executive power, increase legislative entrenchment, and reduce distributional inequities. In the past, countries have singularly and tacitly adopted such measures. In the future, however, privatizing countries should concurrently and explicitly adopt all three measures, thereby increasing certainty and promoting economic liberties.

230. *Id.* at 88.

231. Pietrogiovanna, *supra* note 31, at 12.