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Law’s Authorizations and Rule-of-Law Ideals: Lessons from Russia

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Law’s Authorizations and Rule-of-Law Ideals: Lessons from Russia

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Abstract

It is widely accepted that core rule of law ideals require that the legal consequences of various acts be predictable both in terms of statutes and their administration, and that these consequences pertain to agents of the state no less than other actors. Debates over the rule of law and development have generated little clarity over how to pursue these ideals, however. This article argues that it is crucial to recognize that the laws that govern a capitalist order not only forbid some acts and require others, but also authorize a multitude of individuals and organizations, both inside and outside the state, to create legally significant facts at their own discretion. Creditors, for instance, may accept repayment and cancel the existence of debt; similarly, owners can transfer ownership. The set of legally significant acts created at actors’ discretion, I argue, affects the practicality of rule of law ideals. When the law grants authority to some actors that allows them to affect legal rights of other actors in unpredictable ways, these ideals are not attainable. The common emphasis on institutions that implement and enforce laws obscures this vital role of authorized discretion, and weakens the effectiveness of efforts to promote the rule of law. Empirical cases from contemporary Russia illustrate these theses.
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I. Introduction

Over forty years ago, Lon Fuller cautioned against seeking to build "a utopia of legality in which all rules are perfectly clear, consistent with one another, known to every citizen, and never retroactive. In this utopia the rules remain constant through time, demand only what is possible, and are scrupulously observed by courts, police, and everyone else charged with their administration.” Because these desiderata are often either impractical or mutually contradictory, Fuller argued, such a utopia “is not actually a useful target for guiding the impulse toward legality” (Fuller 1969, 41).

Nonetheless, in recent decades, scholars and practitioners who wish to promote economic development have attached high hopes to these same ambitions, now usually described as “the rule of law.”¹ Backing these hopes are familiar arguments. A state constrained to obey the law is limited in both its ambition and capacity to confiscate the property of private actors. In their dealings with one another, these actors in turn will also benefit from the rule of law, in the form of clear and effectively enforced rules specifying the rights of property owners and the duties of parties to contracts. Clarity in what the law prescribes and reliability in its implementation reduce the uncertainty economic actors face as they seek to calculate the costs and benefits of potential courses of action. Thus secured against the depredations of the state and the malfeasance of counterparties, commerce, production, and investment will flourish.

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¹ For the relationship of Fuller’s ideas to contemporary notions of the rule of law, see Tamanaha 2004.
Such arguments, Fuller’s reasoning implies, rest on a utopian image of the rule of law. They are therefore a poor guide to practical action, as indeed a large critical literature on law and development has argued. The present article concurs, but offers novel reasons for doing so. It argues that to understand the crucial theoretical issues and key practical challenges involved in promoting the rule of law as a route to development, one must investigate what I will term law’s allocation of authority. Law allocates authority when it empowers someone to create legally relevant facts, that is, facts that help determine what specific acts the law will require, forbid, or allow. For instance, actors may be authorized to sign a contract that creates a legally enforceable obligation to fulfill it. Frustrated creditors, under specified circumstances, may be authorized to initiate bankruptcy proceedings against their debtors, which limit debtors’ ability to control their property. More generally, the ordinary, decentralized to-and-fro of a market economy—buying and selling and lending and borrowing, in all their many forms—leaves eddies of legal consequences, changing the facts to which rules established by statute must be applied.

A focus on law’s allocation of authority departs from the perspective on law implicit in most discussions of the rule of law. In this perspective, law’s influence is assumed to result from the behaviors it either prohibits or mandates. Thus, income must not be hidden from the tax authorities. Debts to suppliers must be paid. Sanitation inspectors must not base their conclusions on bribes or their insufficiency. For policy, focusing on law’s prohibitions and mandates leads to a concomitant focus on law

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2 For recent overviews see Ohnesorge 2007 and Chukwumerije 2009; further discussion will be found in the conclusion.
enforcement, broadly understood: the agencies that detect and repair or punish violation of law’s positive and negative injunctions. Such agencies might include courts, bailiffs, procuracies or prosecutors, and the police, among others. A prohibitions-and-mandates view of law also directs attention to the education and organization of the legal profession, which staffs some of these agencies and assists citizens in interactions with them.

The prohibitions-and-mandates perspective on law, and the concomitant focus on law enforcement, obscure a crucial point highlighted by the authorizations perspective:

**What actors do with their lawful discretion has an enormous impact on the practicality of the aims specified under any definition of the rule of law.** This is so because calculable interpretation and reliable implementation of law—at the core of the aspiration to build a rule of law—are not solely a function of legislative precision and bureaucratic rectitude. The feasibility of attaining predictable interpretation and implementation of legal rules depends directly on the facts to which rules are applied, and many of the relevant facts will be the result of lawfully authorized discretion. This brings me to my thesis: a workable, sustainable rule of law can only exist where law does not grant authority to some actors that allows them to affect the legal rights of other actors in unpredictable ways through the creation of legal facts.

Put differently, this article argues that the practicality of the rule of law depends on what I shall term the “calibration” of authorizations, calibration being used here in the
sense of precise adjustment for a particular purpose. In order to protect creditors’ rights, to take an example discussed more extensively below, creditors may be authorized to perform certain acts in the course of a bankruptcy proceeding. If these authorizations are narrow, they may not enable creditors to recover funds from debtors intent on avoiding repayment. On the other hand, if these authorizations are sweeping, creditors will be tempted to connive at launching bankruptcy claims merely in order take advantage of them, and this conniving will necessarily foster the spread of uncertainty. The term calibration captures the intricacy of adjusting authorizations such that they achieve legislators’ purposes without enabling actors to undermine predictability in the interpretation and implementation of law.

The next section of this article briefly relates these claims about law’s authorizations to existing literature, and explains in a more detailed way the radical implications of this view for understanding the challenges in building the rule of law. As an illustration of these implications, the article then turns to the case of post-socialist Russia. The recent and sudden character of Russia’s effort to move to a law-governed capitalist economy offers multiple examples of the link between poorly calibrated authorizations and the reliable operation of the rule of law. Dealing with legal provisions that bear on the security of property rights, I demonstrate the ways in which poorly calibrated authorizations can undermine the predictability of the legal system and the practicality of its effective control over behavior, and the kinds of legal changes needed to redress these

problems. In the concluding section of the essay I turn to broader implications regarding
the character of the rule of law and the project of harnessing it to development.

II. Law’s allocation of authority and rule of law ideals

To propose that law allocates authority is hardly novel; legal scholars are well
aware of the point. Hohfeld (1913), for instance, used law’s allocation of authority as
part of his demonstration of the correlative character of legal rights: permitting acts to
one person requires enjoining others from interfering with those acts. John R. Commons
(1957) and Robert Hale (1923) stressed that the bargaining power available to negotiating
parties depends on what the law authorizes them to do if an agreement is not reached. By
demonstrating the omnipresence of law in shaping the basic transactions of capitalism,
the insights of these and other scholars in the related schools of “old” institutional
economics and legal realism added up to a powerful argument against the very coherence
of advocating state non-interference in markets (Fried 1998). More recently, the Critical
Legal Studies movement has drawn on this intellectual legacy to challenge the political
neutralité and syllogistic heft of “efficient” as a standard for crafting the legal
institutions underpinning markets (Kennedy and Michelman 1979; Kennedy 1993).

What scholars do not seem to have done, though, is relate the actual use of legal
authorizations to the prospects for building the rule of law. Yet, on reflection, the
relevance is manifest. To see why this is so, it is sufficient to consider “thin” definitions

4 Compare Fuller: “A familiar distinction between rules of law is that which
distinguishes rules imposing duties from rules conferring legal capacities”(Fuller 1969, 93).
of the rule of law, which try to avoid engaging difficult normative questions about the ultimate purposes of law. (Insofar as normatively richer “thick” definitions of the rule of law supplement thin definitions with additional substantive requirements, the argument advanced here applies to them a fortiori.) Thin definitions ordinarily require, in part, that the laws be clear, consistent, relatively stable, and publicly promulgated (Peerenboom 2004, Tamanaha 2004). Jointly, these requirements should provide a basis for relatively reliable expectations about laws’ implementation. As Hayek famously put it, the rule of law exists when “government in all its actions is bound by rules fixed and announced before-hand — rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge” (1944, 72). At first glance, this would appear to be a set of standards relatively easy to attain, as long as legislators have the will to so. Careful drafting of statutes, reluctance to modify them, and reliable publicity are well within the powers of most legislatures. The practical relevance of this legislative stance may be undermined by spotty or corrupt implementation, but nonetheless it would seem that some core aspects of the rule of law require only political will.

The impression that inspection of statutes would be sufficient to assess these aspects of the rule of law is dispelled once the importance of legally authorized discretion is recognized. There are two reasons for this. First, when it is in their interest to do so, actors can and do use their lawful discretion to orchestrate sets of legal facts that pose “hard cases,” where law is revealed to be unclear or inconsistent (LoPucki and Weyrauch 2000). Inconsistency or opacity in statutes is only potential until someone tries to make use of them in actual practice; legal authorizations offer opportunities to do so. By the
same token, laws that appear consistent and pellucid when drafted may prove to be far less so in application. Second, even when laws are perfectly consistent, unambiguously applicable to cases, and publicly available, which laws are relevant to a particular set of circumstances may be shrouded in mystery for some actors. Insofar as the set of pertinent legal facts arises from the decisions of the multitudinous actors authorized to create these legal facts, divining the applicable rules in a particular instance may be extremely difficult. The stability required under a thin definition of the rule of law, therefore, is not solely a function of how frequently the laws on the books change. The uses made of unchanging rules can change radically with legal innovation. Lawful discretion allows pre-announced rules to be manipulated or applied in unanticipated ways. “Fair certainty,” therefore, is not solely a function of the laws on the books, but also of whether use of these laws follows predictable channels.

Thin definitions of the rule of law generally include not only the above-mentioned preconditions for predictability, but also requirements that statutes are more than wordy irrelevancies to practical life. As Peerenboom puts it, the rule of law requires that “Laws must be enforced – the gap between the law on books and law in practice should be

5 In discussing public promulgation as an aspect of the “inner morality of law,” a notion closely related to the “thin” definition of the rule of law under discussion here, Fuller cautions against imagining that it is possible for everyone to be fully acquainted with the laws that apply to them (Fuller 1969, 49). In his sole mention of legal authorizations (“rules conferring legal capacities”), Fuller notes that the limits of knowledge will particular acute in the case of such rules, since they do not readily correspond to ordinary rules of morality (Fuller 1969, 93).
relatively narrow – and fairly applied.” Since “as a practical matter, relying on compulsory enforcement for every law or most laws is costly and impractical,” a thin rule of law can only exist, Peerenboom suggests, if the laws are broadly acceptable to citizens (2004, 2, 48n3; cf. Fuller 1969, 153). Note that Peerenboom’s unexceptionable discussion here implicitly relies on an image of law as composed not of allocations of authority, but of mandates and prohibitions. This implies a concomitant focus on ‘legality providers’—law enforcement agencies and courts charged with compelling observance of mandates and prohibitions. There is general acceptance of the point that the capacity of legality providers will be degraded if laws are unacceptable: prohibition of alcohol in most countries is likely to prompt not just widespread violation, but also ineffectiveness and corruption in the law enforcement agencies tasked with carrying it out. A law mandating extremely high levels of tax payments is likely to have the same effect.

The extension of the analysis to encompass law’s allocation of authority, which shifts the emphasis from law enforcement to law use, reveals that the same point applies when what is at issue is not the violation of law, but the manipulation of it by those to whom the law allocates authority. Insofar as actors scour law for potential contradictions and loopholes that allow them to use their authorizations to maximum advantage, authorizations poorly calibrated to circumstances can have the same debilitating effects on law providers that widely despised legal prohibitions or mandates do. The practicality of the rule of law depends not only what law requires and forbids, but also the authorizations the law grants. As demonstrated below, laws can, and sometimes do, allocate authority in ways that undermine aspirations of the rule of law.
A further implication of emphasizing law’s allocation of authority is that unchanging rules—as required in Hayek’s definition of the rule of law, and as endorsed by those who see constitutional constraints as the key bulwark of property—may in practice undermine, and not sustain, the predictable exercise of law. When legal innovation turns existing rules to new purposes, destabilizing established patterns of interactions, the result is a destabilizing of expectations. Therefore, the practicability of the rule of law ideal of “fair certainty” depends on mechanisms facilitating change in laws (or their authoritative interpretation) in order to create stable expectations (Stinchcombe 1999, Pistor and Milhaupt 2008). When confronted with legal rules turned to unexpected and troubling uses, people often describe the rules in question as “loopholes.” In these terms, one may say that fair certainty of law depends on loophole closing mechanisms.

A final, broadly accepted attribute of the rule of law is “meaningful restraints on the state,” (Peerenboom 2004, 3). An authorizations view of law sheds new light on this issue as well. The problem of calibrating authorizations applies not only to economic actors, however, but also to those directly employed by the state: judges, prosecutors, police officers, bailiffs, sanitation inspectors, tax collectors, etc. These too are authorized under law to create new legal facts (a court decision, an investigation, an arrest, a confiscation, an inspection, etc.) with a degree of discretion. These too may use these authorizations in unanticipated ways that undermine the stability of expectations. In practice, meaningful restraints depend not just on what the state is forbidden to do, but even more directly on what the state’s agents are authorized to do.
To review: the arguments in this section concerned the implications for the rule of law that derive from how law authorizes agents to create legally significant facts. Common aspects of the definition of the rule of law, designed to ensure that law’s application will be predictable for those subject to it and practical for the institutions charged with carrying it out, appear in a different light when the discussion of authorizations is incorporated. What actors do with the authorizations law provides them affects the capacity of both statutes and institutions to secure the aims of the rule of law. In particular, reliable predictions of the effect of law may be possible only if laws are changed. Practical challenges for the rule of law arise not only from the need to enforce law’s mandates and prohibitions but from the need to react to a multitude of pertinent facts lawfully established by those authorized to do so. Table 1 summarizes these points.

Table 1: Prerequisites of the rule of law

<table>
<thead>
<tr>
<th>Feature of rule of law:</th>
<th>Prerequisites where law specifies:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Predictability</td>
<td>Mandates and prohibitions</td>
</tr>
<tr>
<td></td>
<td>• Clarity, consistency, and publicity of statutes</td>
</tr>
<tr>
<td></td>
<td>• Legal stasis</td>
</tr>
<tr>
<td>Practicability</td>
<td>Authorizations</td>
</tr>
<tr>
<td></td>
<td>• Clarity, consistency, and publicity of legally relevant circumstances</td>
</tr>
<tr>
<td></td>
<td>• Adaptive legal change</td>
</tr>
<tr>
<td></td>
<td>• Absence of contextually corrosive authorized discretion</td>
</tr>
<tr>
<td></td>
<td>• Broad acceptance</td>
</tr>
<tr>
<td></td>
<td>• Adequately staffed, funded, or trained organizations</td>
</tr>
</tbody>
</table>
III. Evolution of authorizations in Russia

The foregoing arguments offer a new perspective on how to understand the process of establishing the rule of law in countries seeking to develop on its basis. On the whole, as discussed further in the conclusion, the law-and-development movement has focused attention on the left-hand column of Table 1, pushing for adoption of “best practice” legislation that will not need further change, and funding the organizations intended to enforce laws’ mandates and prohibitions. Yet for rule-of-law ends to be attained, attention to the right-hand column is also required.

In this section of the article I seek to establish the plausibility of this claim. In ordinary assessments of the rule of law, snapshots of the legal system at a moment in time tend to be the proper form of methodology. Progress or regress over time is measured as the difference between one snapshot and the next. However, the pathways towards achievement of rule-of-law ends associated with the authorizing vision of law imply a different methodology, involving describing emergent patterns in the use of authorizations, and narrating processes of successful or forestalled legal evolution over time, and seeking causal mechanisms that play a repetitive role.

This section of the paper applies such a methodology to some legal developments in post-Soviet Russia. It bears emphasis at the outset that what follows does not pretend to the status of a full-fledged, up-to-the minute survey of Russian legality: I have chosen examples from Russia’s post-Soviet history that demonstrate the practical significance of allocations of authority for efforts to establish the rule of law. Russia is a useful case for such an illustrative purpose, for although the problem of calibrating authorizations is
entirely generic to legal systems, Russia’s particular circumstances have rendered this problem especially vivid. Like the other post-socialist states, Russia faced the task of drafting much key market-enabling legislation at a moment when markets were at best nascent, if not embryonic. As a result, even with the best will in the world, legislators faced great difficulties in predicting what sort of legal collisions might arise. Foreign models, whether sought out by domestic actors or encouraged by the international community, served to bridge the gap between the murky post-communist present and the capitalist future, but these unsurprisingly often proved inappropriate for local circumstances (Hendley 1997). Second, as a commodity-exporting state, Russia has been subject to staggeringly large swings in relative prices as the value of hydrocarbons and metals have changed on the world market. Radical price shifts change the incentives that actors bring to their dealings with the legal system, potential creating new challenges to the predictability and practicability of the rule of law.

Two examples of the way poorly calibrated authorizations undermine rule of law ambitions will be discussed. The first is the evolution of struggles over corporate property from Russian privatization until the 2000s. The form of privatization, as discussed below, touched off long-running battles over ownership of industrial assets created in the Soviet era. Contenders in these battles used both mundane authorizations, such as the right to buy and sell shares, and more recondite ones in an effort to create a pattern of stock ownership that would allow for stable governance of the corporations descended from socialist enterprises. Efforts to close the loopholes uncovered in this process—in other words, to recalibrate authorizations—are also described in this section.
Because the authorizations approach recognizes that private property and contract in effect deputies non-state actors to carry out legally significant actions, and recognizes that such deputations can have a disruptive and not only stabilizing effect on legal certainty, it does not make a sharp distinction between the problem of ‘binding the state’ and ‘binding private actors’. Both must be constrained to act in within limits consistent with predictability. The second topic of this section illustrates this point by charting areas where an excess of discretion by state agents proved disruptive to predictability, demonstrating how political contention over how to restore certainty revolved around issues clearly recognizable as calibration of authorizations.
Battles over corporate ownership

Russian privatization involved wholesale creation of new legal facts. What had been socialist ‘enterprises’ under unitary state ownership became corporations and issued shares of stock. These shares of stock then passed to the public via a variety of mechanisms. While the details need not detain us, what these mechanisms had in common is that they tended to create distributions of corporate shareholding that practically guaranteed conflict (Woodruff 2004). With some overgeneralization, it can be said that in the standard post-privatization situation, enterprise “insiders” in management accumulated majority shareholdings, joining de jure to de facto control, while outsiders held a minority stake. Laws and presidential orders required that minority shareholders be given a reasonable opportunity to participate in corporate governance, but these rules were quite universally ignored in practice: insiders ran firms in their own interests, and ignored outsiders. While both statutory and organizational resources for securing minority shareholder rights were weak (Pistor 1997), neither of these circumstances explains why flouting of the rules was so widespread. Simply put, majority insider owners had no incentives to share profit and governance with minority shareholders. These shareholders had not, in fact, contributed to the firm’s capital: most often they acquired shares at “voucher auctions” where the currency of purchase was privatization certificates that had been freely distributed to the public. Moreover, the new shareholders generally had no business relations with the corporation in question other than that of ownership. In short, nothing other than the legal requirements—and in particular, neither capital needs nor business ties—encouraged majority shareholders to accept the rights of
minority shareholders—and they did not (Black et al. 2000, Woodruff 2004). With share ownership of so little practical worth without de facto control, market stock valuations remained exceedingly low, so simply selling was an unattractive option. If outsider shareholders wanted to make something of their nominal ownership rights, they would have to fight for them. The same was true even in the relatively small number of cases when money was paid for shares in privatization—as in the notorious loans-for-shares deals of the mid-1990s that gave outsiders controlling stakes in some of the country’s most attractive raw materials enterprises for (very small) payments. The funds involved went to government, the share purchasers were generally not partners of insider management, and turning formal ownership into de facto control required ferocious legal battles (Barnes 2006).

In these battles, the opportunities offered by the various authorizations incident on share ownership and other legally formulated relationships were absolutely crucial. Both insiders and outsiders struggled to use their own authorizations to render those of their opponents useless. The high stakes involved meant large resources were devoted to legal inventiveness, and many facially reasonable statutes were found to create mechanisms for the forced transfer of shares. Two examples now follow.

**Share consolidations**

In December of 1995, Russia passed a law on corporations (Federal'nyi zakon ot 26 dekabria 1995). The carefully drafted legislation was intended to redress common grievances by strengthening the ability of minority shareholders to constrain company management, in particular by granting them voice in or vetoes over decisions that might harm minority shareholder interests (Black and Kraakman 1996). These procedural
safeguards were designed to be “self-enforcing,” in the sense that minority shareholders would be given the opportunity to defend their own rights, rather than relying primarily on an outside agency. The rights granted to minority shareholders were sufficiently strong that some would later decry them as enabling greenmail and corporate raiding by holders of small blocks of shares that had made little investment in a company (Glushetskii 2004).

Nevertheless, in at least one respect the law created a new vulnerability for minority shareholders. Among its provisions was one authorizing shareholders’ meetings to initiate share consolidations, also known as “reverse stock splits,” in which outstanding shares would be consolidated into a smaller number, distributed proportionally to existing holdings. For instance, a consolidation might reduce the number of shares from 100,000 to 10,000, with shareholders receiving 10 new shares for each old share. Some shareholders, of course, could be left with fractional shares. Under the law, such shareholders would be compensated for their fractional shares at “market value,” with market value to be determined by the corporation’s board of directors in light of some general guidelines (Federal'nyi zakon ot 26 dekabria 1995).

Shareholders locked in sharp contention over corporate control soon discovered that the law’s authorization of share consolidation could be a powerful weapon. With a sufficiently large reduction in the number of outstanding shares in a corporation, majority shareholders could convert minority shareholders’ stakes to fractional shares, subject to mandatory sale back to the corporation at a price fixed by the corporate board of directors. In a widely publicized conflict in 2001, for example, the Volgogradskii Zavod Burovoi Tekhniki (VZBT) converted its 178,635 shares into 4 shares, forcing minority
shareholders to sell their stakes at a board-determined “market price” (Privalov 2001). In the absence of public trading for the shares, the law left the board wide discretion. The price they chose was not an attractive one, valuing the company at only 2.2 million dollars. In January, minority shareholders had publicly said they were ready to pay 7 million dollars for just a quarter of the shares (Anonymous 2001).

While perhaps the loudest such conflict over share consolidation—the minority shareholders were closely linked to a major business publication, and relied heavily on the media to make their case—the VZBT consolidation was far from an anomaly. The first detectable use of the corporate law in this way occurred in late 1996, when the Akron corporation, a fertilizer manufacturer based in Novgorod, consolidated 29,000 outstanding shares into a single share (Anonymous 1996, Teider 1997). This meant all shareholders had to accept compensation, and put control of the corporation in the hands of existing management, which later issued new shares. Widespread efforts to exploit the loophole seem to have begun late in 2000. A representative of the Federal Securities Commission (FSC) reported in November that it was rejecting many applications for share consolidations that would hurt minority shareholders (Kozlov 2000). However, because consolidation was provided for under the law, the FSC could itself only seek technical grounds for rejecting applications. In February 2001, the FSC approved an application by the Sibneft oil firm, which wanted to carry out share consolidations at several partially owned subsidiaries. (For instance, at Noiabrskneftegaz, the ratio of old to new shares was 1,376,783 to 1, leaving only 100 shares.) An FSC deputy chair claimed to have used every technical possibility to delay approval of the transaction,
complained that legislation had forced the commission’s hand, and noted the FSC was calling for legislative changes to ban the practice (Rushailo and Sapozhnikov 2001).  

In sum, Russian corporate law’s authorization of share consolidations created circumstances that undermined both the predictability of shareholder rights and the practicality of reliable implementation. Indeed, the FSC found itself trading these two desiderata of the rule of law against one another: they could protect minority shareholder’s expectations only by themselves looking for adventitious, unrelated reasons for rejecting consolidation petitions (Rushailo and Sapozhnikov 2001; Author’s interview with FSC consultant, July 2003). Where traditional views of the rule of law emphasize the importance of keeping laws stable, it was only an adaptive legal change that eventually eliminated the use of share consolidations as a tool to dispossess minority shareholders. The relevant provisions—which authorized shareholders to retain and vote fractional shares if they wished to—were adopted by the Russian parliament in the summer of 2001, and came into force in the beginning of 2002 (Kats 2001).

6 Legal challenges to consolidation transactions after the fact were generally no more successful. While lower court judges sometimes ruled in favor of minority shareholders, arguing that the “repurchase” [vykup] mandated under the law should be considered a voluntary transaction to which the minority shareholders would agree, higher courts concluded that payment and acceptance of compensation at market value for fractional shares was in fact mandatory for both parties (Butrin and Mokrousova 2004, “Po delu…” 2004). This was probably the interpretation that would have been embraced by the law’s authors (cf. Black and Kraakman 1996, 52n120).
Corporate bankruptcy

Another example of the way law-granted authorizations became entangled in conflicts over corporate control concerns debt enforcement. The authority to invoke state aid in enforcing debts is the authority to take debtors’ property against their will (Kennedy and Michelman 1979-1980, 741). If debt enforcement is to serve the predictability and security of property rights, the conditions under which this authority is invoked must be clear. However, to the extent that creditors actively seek to gain the most from the authority the law grants to them, there is every possibility that debt enforcement rules will come to undermine debtors’ expectations about property rights. In 1997, Russia passed a law on bankruptcy designed to improve creditors’ rights. The law set a relatively low threshold for the amount of unpaid debt a creditor needed to initiate bankruptcy proceedings, and for the amount of time it needed to be outstanding. Russia’s arbitrazh or commercial courts had jurisdiction over the proceedings.\(^7\) They were charged to apply a standard of a failure to pay obligations, rather than assessments of general solvency, as the criterion of whether bankruptcy should be initiated. Once bankruptcy was initiated, shareholders immediately lost all control over the corporation’s

\(^7\) These are sometimes referred to as the “arbitration courts” in English translation, but as Katherine Hendley (2006) points out this is confusing because “arbitration” is not their function. Since some civil matters are also heard in the separate “courts of general jurisdiction,” referred to in the text as the general court system, conflicts around jurisdiction have been frequent. See Firestone 2008, 1219.
assets and transactions.\(^8\) Control passed first to an interim manager, and then quickly to a creditors’ meeting, in which creditors held voting rights (on most questions) that were proportional to the value of the debt owed to them (Kratzke 2000).

It soon developed that these sweeping authorizations granted to creditors meant that bankruptcy law could be turned to purposes other than recovery of unpaid loans (Mogiliansky, Sonin, and Zhuravskaya 2000, Volkov and Privalov 2001, Volkov 2004, Woodruff 2004, Firestone 2008, 1210-1211). Often creditors would try to avoid accepting repayment of debts, preferring the opportunities participation in the creditors’ council offered.\(^9\) Creditors’ councils were sometimes able to confiscate firm stock against their debts, or to arrange auctions of corporate shares in ways that ensured favored purchasers received an inside track. What were in effect hostile takeovers via bankruptcy, with expropriation of equity owners, went forward on a massive scale.

As in the case of share consolidations, this miscalibration of authorizations had the effect of undermining the rule of law. Reliable implementation was threatened as procedural decisions in bankruptcy cases came to have significance in the hundreds of

\(^8\) This is quite different from the U.S. debtor-in-control system, and more like the German pro-creditor policy. For comparative bankruptcy law see Hoshi 1998 and Skeel 1998.

\(^9\) For instance, in the prominent struggle over the Siberian oil firm Chernogorneft’, its parent company, Sidanco, repeatedly offered to repay all of Chernogorneft’s outstanding debts to extricate the firm from bankruptcy proceedings, but was unable to force creditors to accept payment. See Goldman 2003, 137-139.
millions of dollars, rendering widespread suspicion of the suborning or illegitimate partiality of judges quite plausible (Goldman 2003, 137-139; Firestone 2008, 1210). Knowledge of legally relevant facts became elusive as entrepreneurial lawyers, responding to similar incentives, sought far and wide for legal circumstances that might enable them to block or facilitate bankruptcy procedures, for instance via judges’ injunctions, of which more below. In one major bankruptcy conflict it was reported that there were efforts to serve as many ten injunctions from different jurisdictions in order to block an auction of firm shares against debts (Chernitskii 1999).

Hostile takeovers via bankruptcy continued until a law designed to remove bankruptcy law as a weapon against owners passed in fall 2002 (Medvedeva, Timofeev, and Iukhnin 2003; Woodruff 2004). The law focused on recalibration of authorizations, for instance making it much harder for creditors to refuse to accept payments of debt in order to take advantage of bankruptcy proceedings, and giving equity owners increased participation. Bankruptcy-based takeovers quickly faded.

Public-private manipulation of authorizations: “raiding”

The authorizations so far described have been those of owners and creditors. But the legally allowed discretion of the representatives of the state also came to play an important role in the Russia’s battles over corporate control. Post-Soviet laws gave Russian judges powers to impose “provisional remedies” (obespechitel’nye mery, which can also be translated as “interim remedies” [Nekrasova 2008]) forbidding or mandating certain acts at the request of plaintiffs. The purpose of these powers, analogues of which exist in many legal systems, is to enable judges to ensure that a plaintiff won’t find a legal victory hollow due to irreversible actions by the defendant before the case
concludes. For instance, a defendant might be enjoined from destroying a building claimed by a creditor as collateral against an unpaid loan. Without such provisional remedies, legal defense of property rights would often amount to securing an enclosure from which cows have already departed. To encompass the manifold potential scenarios in which plaintiffs’ interests might be at risk, interim measure powers need to be broad and flexible. However, in Russia these features also made provisional remedies a useful tool for hampering the exercise of legal authority of all sorts. For instance, in one prominent Russian bankruptcy case, allies of equity owners wished to prevent the creditors’ council from finalizing its plans to sell the corporation at auction. To do so, they arranged a suit contesting ownership over a tiny fraction of the company’s outstanding debt, and successfully asked a judge to enjoin actions by the creditors’ council until the dispute was resolved (Author’s interview, 2003). The distance between the ostensible and actual purposes of the suit in question was vast: rather than bearing on the interests of the parties on the courtroom, it was in fact a move in a conflict between entirely different parties. For this same reason, tactical use of provisional remedies meant sharp uncertainty for owners: they need not be parties to suits that affected them profoundly, and therefore learned about the injunctions only when they are served.

Use of precisely crafted provisional remedies became a common phenomenon in the Russian legal system. They undermined the security of property rights by striking at the reliable exercise of the legal authority property grants owners. Particularly prevalent were efforts to win injunctions prohibiting the conducting of shareholder meetings. In 2003, Russia’s highest commercial court (the Supreme Arbitration Court) issued a guidance to commercial judges intended to sharply curtail injunctions of this sort,
suggesting they “contradict the intent of provisional remedies, which have as their goal the defense of interests of the plaintiff, and not denying another entity the opportunity and right to carry out its own legal activity” (“O praktike…” 2003). Nevertheless, participants in battles over corporate control continued to convince (or suborn, see below) judges to invoke provisional remedies. In 2006, the Supreme Arbitration Court revisited the matter with a second resolution, this one providing judges with lists of reasons to reject applications for provisional remedies (“O primenenii…” 2006).

Also in 2006, the Russian Ministry of Economic Development and Trade (MERT) proposed legislation meant to block abuse of provisional remedies (“MERT predstavliaet…” 2006). The measure was part of a broader set of proposed legal changes that became known as the “anti-raider package.” While the term ‘raider’ (reider, as in ‘corporate raider’) had earlier been applied in the context of battles over industrial giants, by the middle of the 2000s the problem had become one largely of smaller businesses, often those whose premises were tempting targets in a booming real-estate market. ‘Raider’ (reider) acquired the meaning of an individual or a group that makes use of trickery and fraud to acquire legal ownership of a business. Estimates of the number of such ‘raids’ on the property rights of small businesses varied widely, but that there were

10 The Supreme Arbitration Court is constitutionally authorized to issue “clarifications on questions of judicial practice” as guidance to judges in the application of law (Konstitutsiia Rossiiskoi Federatsii, Chapter 7, Article 127). These justifications play a role roughly analogous to that of precedent in common-law systems. For some examples of their role, see Petrova and Bulychev 2008.
certainly hundreds, and quite possibly thousands, of such incidents each year from the middle of the decade (Privalov and Volkov 2007).

‘Raids’ involve painstaking legal maneuvers (Firestone 2008, 2010). Ideally (from the raiders’ point of view), ownership is acquired without the original owners becoming aware of their dispossession. Then the raiders, often backed by armed men, confront the original owners with evidence of the new set of legal circumstances and evict them from their premises (Tsentr politicheskikh tekhnologii 2008). The most effective raider takeovers involve initiating multiple chains of legal events that are difficult to reverse (Firestone 2010, 563-567). For instance, a firm’s might discover that raiders had: (1) using forged documents, registered a new general director at the state’s Unified Registry of Legal Entities; (2) sold the firm, on the new general director’s authority, to a shell company [a]; (3) resold the firm to another shell company [b]; (4) officially liquidated shell company [a]; (5) resold the firm to another shell company [c], etc. By mixing fraud (exploiting the authorizations of the Unified Registry), with the entirely legitimate authority of an owner, raiders in this way created ‘good faith purchasers’ whose acquisitions were legally difficult to challenge (especially without being able to bring suit against the now liquidated intermediaries).

Although the details of individual ‘raid’ schemes can vary, the general tactic is to use legal authorizations to multiply and obscure chains of legal events that can create significant barriers to restitution. A MERT consultant only somewhat hyperbolically summarized the situation as follows:
…if someone took your business, in order to regain it you’ll need to file 150 suits in 35 courts against various elements of the takeover, contesting a stock issue in one court, a decision to issue bonds in another, then a decision of the board of directors, and 25 stock sale transactions (‘Utonchennyi zakхват’ 2007).

What is taken in a ‘raid’, then, is not physical assets, but the authorizations accompanying ownership of assets. When these are deployed with the aim of creating irreversible consequences, the resulting legal tangle can rapidly achieve Gordian complexity.

The MERT “anti-raider” proposals offer an excellent illustration of the ways in which recognition of law’s authorizing functions illuminates the practical challenges of building the rule of law (‘MERT predstavliat…” 2006). While MERT did call for specific criminal sanctions against ‘raiderism’ (reiderstvo), the core of their proposal lay in recalibrating or eliminating authorizations that raiders regularly exploited. In addition to calling for a ban on any interim remedies that would force a business to cease operations, MERT suggested that multiple lawsuits launched as part of a conflict over control of a firm ought to be unified into a single case, to be heard in a commercial (arbitrazh) court located in the jurisdiction of the firm’s registration. This would involve switching the jurisdiction of lawsuits by individuals against corporations from the general court system to the commercial court system, when such lawsuits were in fact ‘masked’ maneuvers in a control conflict. Note that this suggestion involves solely shifting authorizations: restricting in certain circumstances the right of individuals to sue company’s in the general court system, and restricting the general court system’s ability
to claim jurisdiction over such cases. The proposal also involved expanded authorizations, by legalizing class action suits.

With respect to state agencies, MERT sought to ensure that they would hinder raider schemes without at the same time acquiring new authorizations that might provoke corruption. Thus, the Ministry proposed requiring the Unified Registry to check vigorously the authenticity documents presented to it—although this should be done according to tight deadlines to avoid leaving the Unified Registry with too great a discretion. In a similar vein, it suggested that investigators criminal charges in cases of raiderism should be prevented from holding company securities as evidence, which could interfere with their sale.

It was only in late 2009, nearly three years after MERT’s initial proposals, that the bulk of them found their way into what became known as the “anti-raider law” (Ostapets 2009). The history of the anti-raider law illustrates several of the distinctive challenges for building the rule of law that attention to authorizations reveals. First, rather than legal stasis, it was adaptive legal change that was required to restore the calculability and reliable implementation of law. Despite high profile denunciations of raiderism from both Prime Minister Putin and President Minister Medvedev, and the continued efforts of MERT representatives to articulate their case, the legislative progress of the proposals was extremely slow (Zykov 2008, Mel’nikova 2009). Jurisdictional rivalries between different arms of the state may be part of the reason. Legal advisers to the relevant Duma committee, along with the Constitutional Court, objected to the shifting of some lawsuits out of the general court system into the commercial courts (Butrin and Granik 2007). The long stalemate highlights the importance of loophole closing mechanisms.
Second, an addition to the MERT proposals that appeared in the final law was a requirement that commercial courts adjudicating corporate conflicts publish details of significant processual events on their official websites (Federal’nyi zakon ot 19 iiulia 2009, article 225-4). This provision is especially striking in the context of the argument advanced earlier on how ignorance of pertinent legal circumstances, rather than laws, can be a key source of uncertainty.

Finally, calibration of authorizations—regulating judges’ use of interim measures, specifying jurisdictions and rights to bring suit—were central to political discussion on raiderism and the eventual legislative outcome.\footnote{Firestone (2008), who gives an excellent empirical overview of reiderstvo, also supplies an opportunity to demonstrate the increased analytical precision a focus on law’s authorizations enables. Firestone throughout emphasizes the criminal character of raiding, and his policy proposals focus largely (though not exclusively) on changes to criminal law (1228). Yet, earlier in the article he noted the effectiveness of changes to bankruptcy legislation (}{\footnote{Firestone (2008), who gives an excellent empirical overview of reiderstvo, also supplies an opportunity to demonstrate the increased analytical precision a focus on law’s authorizations enables. Firestone throughout emphasizes the criminal character of raiding, and his policy proposals focus largely (though not exclusively) on changes to criminal law (1228). Yet, earlier in the article he noted the effectiveness of changes to bankruptcy legislation (}}
Binding the state and limiting corruption

On definitions either thin or thick, the rule of law demands the state’s consistent observance of the rules it has proclaimed. How and when it is that the leadership of a state comes to accept this principle is a matter of much discussion and little clarity in the scholarly literature (Maravall and Przeworski 2003). While the focus on the authorizing functions of law presented here cannot resolve this controversy, it can offer new insights regarding some aspects of the discussion.

If a state (or its leadership) can change the laws at will, the demand that the state itself abide by its rules becomes empty. Thus, a state cannot be meaningfully subject to the rule of law unless changing the law is attended with some difficulty. This implies constitutional procedures for adopting laws, and for changing the constitutional procedures themselves. In discussions of property rights, constitutions are often seen as a solution to the “fundamental dilemma of property rights,” namely, that to have the capacity to defend property rights is to have the capacity to take them away. (Indeed, insofar as creditors are protected by seizing the property of debtors, or property owners by evicting trespassers, the organizational capacities involved in defense and confiscation of property are one and the same.) Constitutional restraint on state action can serve to reassure property owners that the rules securing their ownership will not readily be changed (North and Weingast 1989).

However, the above case studies suggest limits to the argument that constitutional constraints on legal change necessarily promote the rule of law and the security of property. Complicating legal change only serves to constrain the state if the status-quo
rules effectively constrain the state. To the extent that law offers state agents
authorizations (for instance, to grant or decline to grant provisional remedies), rather than
exhaustive scripts for action, the constraining force of abiding by the status-quo rules
cannot be assumed. In a given set of circumstances, legally authorized discretion that
seems facially neutral may create vast scope for arbitrary or corrupt action. In this case,
the “constitutional” problem of binding the state becomes the problem of calibrating the
authorizations of state bureaucrats. Barriers to change of the relevant rules may prove
only to preserve a situation in which state representatives formally abide by the rules, yet
their doing so offers little predictability or security.

Russian businesspeople fearful of arbitrary bureaucratic action regularly call for
legal changes to more precisely specify the scope of bureaucratic authority in particular
circumstances. In discussions over tax reform, for instance, the Russian Union of
Industrialists and Entrepreneurs, the country’s most influential business lobby, argued for
strictly limiting the amount of time tax inspectors were allowed to spend in an on-site
inspection at an enterprise (Shokhin 2006). In a similar vein, businesspeople have
backed proposals to specify the number of times sanitary and fire inspectors are allowed
to visit a particular establishment. Such advocacy of more precisely calibrated
authorizations makes the assumption that constitutional prescriptions alone could enable
a credible commitment to secure property or predictable exercise of law appear highly
implausible. These discussions also illustrate the limitations of a focus on the
prohibitions-and-mandates aspect of law, which implies solving the problem of excess
discretion by better detection and punishment of corruption. The prominence of minutely
detailed discussions of the design bureaucratic discretion in Russian policy debates—
including in the anti-corruption campaign promoted by President Medvedev—suggests that the actors most intimately familiar with abuse of office see recalibration of authorizations as important means of avoiding it.\textsuperscript{12}

\textsuperscript{12} The role of excess discretion is a major theme in the literature on corruption, most famously in Klitgaard (1988). Klitgaard appears to slight a point made in the earlier contribution of Banfield (1975, 590) that narrowing discretion has costs. Here too the metaphor of calibration seems appropriate. For a discussion of corruption in the Russian context, see Ledeneva 2006. For a skeptical view of the anti-corruption campaign, which concentrates largely on the issue of criminal sanctions for corruption, see Burger and Gitau 2010. For a somewhat less skeptical view, see Oxford Analytica 2009.
IV. Conclusion

The core rule of law ideals are clear enough: that the legitimate legal consequences of various acts be predictable, that they correspond to their practical legal consequences, and that these descriptions would apply to agents of the state no less than other actors. What remains far less clear is how to pursue these ideals. I have argued that it is crucial to recognize that the laws that govern a capitalist order not only forbid some acts and require others, but also authorize a multitude of individuals and organizations, both inside and outside the state, to create legally significant facts at their own discretion. The rule of law ideals are attainable only insofar as authorizations are calibrated in ways that prevent their exercise in ways that undermine the calculability and reliable implementation of law.

Fuller argued that the seeking to build the rule of law should not be considered a moral duty, but rather, in light of the practical and intellectual difficulties involved, a moral aspiration (Fuller 1969, 5-8, 41-44). A focus on law’s authorizations suggests that this aspiration needs to be a permanent one. Insofar as the use actors make of their authorizations will change based on changing circumstances and lawyers’ ingenuity, the rule of law becomes a moving target, dependent on the mechanisms that adjust law to practice (Milhaupt and Pistor 2008). Indeed, given the possibility that some sets of authorizations will be stably calibrated while others will not, the attributes of “the rule of law” may be present with respect to one set of rules and empirical situations in a legal situation, even as they are absent elsewhere in the same legal system. Measuring the rule of law on a linear scale, or as a to-do list of moral duties, will obscure this complexity and with it crucial processes of the stabilization of expectations. The rule of law is not a
lamp, burning brightly or dimly, but illuminating all equally. It is, rather, much more like a patchwork quilt, where one may find fraying patches side-by-side with sturdy ones.\textsuperscript{13}

Although the examples provided here are drawn from Russia, nothing about the general argument on how miscalibrated authorizations undermine the rule of law depends on specific features of the Russian legal system. Indeed, the Russian experience sheds some light on a broader impasse in the discussion of whether building the rule of law is an effective route to development. The idea that it might be has received powerful backing, and led to unprecedented levels of international funding for measures intended to support the rule of law. Legal drafting efforts have aimed to create the legislative basis for market economies. Money has also flowed to efforts to strengthen the machinery of justice, improving its human capital through training and its physical capital via investments in infrastructure and computerization. The scale of this aid was such that it has given birth to an entire industry—spanning both academia and a variety of international organizations—that analyses its effectiveness, as well as the character and

\textsuperscript{13} Some observers have question whether changes in black-letter law of the sort emphasized here can readily deal with the frailties of Russia’s rule of law. Firestone, for instance, takes note of the opinion that after the reform of bankruptcy law, “all the raiders who formerly used the law on bankruptcy switched tactics and began to use loopholes in the corporate law” (Firestone, 1211). Yet even if this were so, at most this would indicate that a different section of the patchwork quilt now needed to be repaired. The general impression is that the loopholes in corporate law lent themselves much less easily to the sort of raids characteristic of the 1998-2002; this is one reason the center of gravity has shifted towards raids on smaller firms.
impact of the rule law more generally.\textsuperscript{14} Broadly speaking, studies have tended to support the importance of the rule of law as the route, or at least one route, to economic development. However, whether the measures of rule of law employed in such studies are meaningful is open to serious doubt (Hendley 2006).

Even more skepticism attends the effectiveness of assistance meant to promote the rule of law. Dezalay and Garth (1997), for instance, argue that rather than displacing networks of personal influence and arbitrary decision-making with impersonal and impartial rules, the rule-of-law movement has simply elevated the importance of judges and lawyers in those networks. Thomas Carothers (1998), in a highly influential essay, contended that foreign rule-of-law assistance is of little consequence absent rare whole-hearted domestic commitment to building the rule of law. Other critics have convincingly argued that the image of the rule of law embraced by development practitioners bears only a caricatured relationship to actual practices in developed countries, where variations in the character, role, and economic importance of legal systems are rife (Upham 2002, Ohnesorge 2007). Rachel Kleinfeld Belton charges that rule-of-law assistance has become an end in itself, delivering funds to legal system institutions without adequate reflection on the goals they are supposed to attain (Kleinfeld 2006).

Not all scholars agree with this depressing characterization. Trebilcock and Daniels, in a major recent publication (2008), argue that the rule of law should remain at

\textsuperscript{14} For an overview of this industry and an indication of its scale, see World Bank 2005.
the center of efforts to promote development. But their defense of rule-of-law building efforts does not rest so much on refutation of the critics as it does on sidestepping their key arguments. In response to Kleinfeld, they argue (2008, 42) that general discontent with law-administering institutions is a more practical basis for corrective measures than a renewed focus on the overall purposes of the rule of law, which will lead to “largely sterile debates over normative abstractions, detached from their institutional instantiations.” Yet one of the reasons they advocate continued emphasis on the rule of law is its potential role in cementing a political coalition that unites constituencies to whom very different institutions may be important. As they put it:

    to focus most rule of law reform efforts on property rights and contract enforcement … is to engage a very narrow political constituency as proponents of reform and to forego the support of the much larger potential political constituencies to whom formal property rights and formal contract enforcement are of little immediate salience (and in some cases a source of potential antipathy), but to whom protection against abuses of basic civil and political rights is of general concern. In these respects, private and public law should be seen as necessary functional and political complements. (Trebilcock and Daniels 2008, 29).

In other words, it is precisely the rule of law’s status as a “normative abstraction” relevant in diverse institutional realms that makes Trebilcock and Daniels declare it a politically expedient slogan.

    This contradiction illustrates the broader impasse at which the debate over rule of law promotion has arrived. On the one hand, rule of law ideals seem too demanding, abstract, or impractical—here, the critical literature is extremely valuable in pointing out
the ways in which the effects of laws and legal institutions depend on the context in which they operate, and how rare empirical approximations to scholarly ideals of the rule of law are. At the same time, sidelining these ideals in favor a focus on aiding law-providing institutions has given unsatisfactory results. If the gulf between normatively attractive ideals and their “institutional instantiations” is to be bridged, I contend, it will be necessary to analyze directly the practicality of rule of law ideals. Put differently, the question that needs to be addressed is the preconditions for a legal system to play the roles of stabilizing expectations and constraining arbitrary state action celebrated by advocates of the rule of law.

An appreciation of the consequences of legally authorized discretion, this article has sought to demonstrate, has much to offer to an analysis of the practicality of the rule of law ideals. Among the key lessons is that these ideals are not just effects of general procedures, such as public promulgation, as Hayekian and thin views of the rule of law might encourage us to believe. The content of laws matters. As Fuller noted, “a recognition that the internal morality of law may support and give efficacy to a wide variety of substantive aims should not mislead us into believing that any substantive aim may be adopted without compromise of legality” (Fuller 1969, 153). In particular, he suggests, a law that cannot be enforced will necessarily undermine the rule of law. The case of a law allocating authorizations that sow uncertainty is entirely parallel: it is a direct challenge to the calculability and reliable implementation of law.

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15 I thank an anonymous reviewer for this point.
This argument suggests promoting the rule of law in developing and transition states will not be effective insofar as it focuses solely on pushing adoption of ‘best practice’ legislation and aiding the state organizations that enforce and interpret it. It is also important to investigate whether, and how, legislation has corrosive effects on the state’s law providers or on the reliability of legally guaranteed dealings between private parties. Legislation-induced problems, when uncovered, need to be addressed via legal change. And policy must seek to promote such change.

There are at least two important objections to emphasizing mechanisms for legal change that should be addressed. Some might fear that this emphasis would risk such rapid and sweeping changes in law that the ability of actors to rely on it will be impaired. However, this concern is misplaced. One cannot link the reliability of law to static statutes when statutes are not being translated into consistent and coherent practice. If law as written is breeding uncertainty, failing to change it will do nothing to improve the predictability of the legal consequences of various acts.

Even those who accept that legal change will often be required to stabilize expectations might voice a practical concern. The workings of legal evolution—whether via legislation or the court system—are politically sensitive and thoroughly domestic in character. Foreign efforts to promote legal evolution might therefore be taken as meddling with matters that ought to be under sovereign control. Furthermore, the detailed contextual knowledge required to calibrate authorizations is most unlikely to be more accessible to foreign than to domestic experts. In the Russian case, however, the histories related above demonstrate that there are many domestic actors who have pursued legislative or interpretive change. What foreigners can usefully do is to be a
resource in these efforts. For instance, ‘best practice’ laws would be much more helpful if accompanied by their legislative and interpretive histories, so that they may be offered as model of fitting laws to circumstances rather than universal recipes. Accepting that the rule of law is always and everywhere a work in progress might also help to dispel tutelary attitudes and facilitate cooperation.

Attaining rule of law ideals, I have argued, requires changes in particular sets of legal provisions that have proved to foster uncertainty or institutional decay. By the same token, an overall “rule of law” is assembled piecemeal. In this light, Trebilcock and Daniels call to construct a broad political coalition for the rule of law, pursuing both commercial and human-rights aims, is unrealistic. While both sets of aims will require calibration of authorizations, the specific authorizations involved will be very different, and will involve distinct sets of contending interests that may not overlap. Peerenboom has argued that a ‘thin’ conception of the rule of law, by highlighting areas of consensus rather than the more contentious moral aims built into ‘thick’ conceptions, opens the way for more productive cooperation between legal specialists from different systems (Peerenboom 2004, 39-40). The present analysis reinforces this point. If the rule of law ideals are normatively attractive, they ought to remain so even if they only characterize part of a legal system rather than its whole. And there is always the chance that the craftsmanly skills required to achieve predictability and practicability in one sphere of law might in time be extended to others.
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