

LAW'S AUTHORIZATIONS AND RULE OF LAW IDEALS: LESSONS FROM RUSSIA

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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.”¹ Such utopian visions presume “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.”² 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.”³

Nonetheless, in recent decades, scholars and practitioners wishing to promote economic development have attached high hopes to these same ambitions, now usually described as “the rule of law.”⁴ Backing these hopes is a familiar sequence of arguments. A state constrained to obey the law is limited in its capacity to confiscate the property of private actors.⁵ Private actors, dealing with one another, 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.⁶ 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.⁷ Thus secured against the depredations of the state and the malfeasance of counterparties, commerce, production, and investment will flourish.

The clear, consistent, generally known, and impartially administered law presumed in such arguments recapitulates the unrealistic image of the rule of law Fuller criticized. These arguments are therefore a poor guide to practical action, as indeed a large critical literature on law and development has

¹ LON L. FULLER, *THE MORALITY OF LAW* 41 (rev. ed. 1969).

² *Id.*

³ *Id.*

⁴ See BRIAN Z. TAMANAHA, *ON THE RULE OF LAW* 93–95 (2004), for a discussion of the relationship between Fuller’s ideas and contemporary notions of the rule of law. On the hopes attached to the rule of law and economic development, see generally Okezie Chukwumerije, *Rhetoric Versus Reality: The Link Between the Rule of Law and Economic Development*, 23 *EMORY INT’L L. REV.* 383 (2009); John K.M. Ohnesorge, *The Rule of Law*, 3 *ANN. REV. L. & SOC. SCI.* 99 (2007); MICHAEL J. TREBILCOCK & RONALD J. DANIELS, *RULE OF LAW REFORM AND DEVELOPMENT: CHARTING THE FRAGILE PATH OF PROGRESS* (2008).

⁵ Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 *J. ECON. HIST.* 803, 803–04 (1989).

⁶ Stephan Haggard et al., *The Rule of Law and Economic Development*, 11 *ANN. REV. POL. SCI.* 205, 207–09 (2008).

⁷ Max Weber, *Prefatory Remarks to the Collected Essays in the Sociology of Religion*, in *THE ESSENTIAL WEBER: A READER* 101, 108 (Sam Whimster ed., 2004).

argued.⁸ 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 *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. 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. This implicit perspective assumes that law's influence results 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 the sufficiency *vel non* of bribes. For policy, focusing on law's prohibitions and mandates leads to a concomitant focus on law enforcement (i.e., the agencies that detect and repair or punish violations 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, which lie 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

⁸ Recent overviews of this literature may be found in Ohnesorge, *supra* note 4; Chukwumerije, *supra* note 4. See also THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (David M. Trubek & Alvaro Santos eds., 2006); LAW AND DEVELOPMENT: FACING COMPLEXITY IN THE 21ST CENTURY (John Hatchard & Amanda Perry-Kessaris eds., 2003); Frank Upham, *Mythmaking in the Rule of Law Orthodoxy* (Carnegie Endowment for Int'l Peace, Working Paper No. 30, 2002), available at <http://www.carnegieendowment.org/files/wp30.pdf>.

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. Accordingly, the thesis of this Article is that a workable, sustainable rule of law can only exist where law does not grant authority to some actors that allow 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 the “calibration” of authorizations, i.e., precise adjustment for a particular purpose.⁹ To take an example discussed more extensively below, to protect creditors’ rights, creditors may be authorized to perform certain acts in the course of a bankruptcy proceeding. Narrow authorizations would not permit creditors to recover funds from debtors intent on avoiding repayment. On the other hand, sweeping authorizations can tempt creditors to connive at launching bankruptcy claims merely to exploit these authorizations, 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 Part II 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, Part III 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 direct relationship 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, the Article will 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. Finally, Part IV will discuss 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.¹⁰ Wesley Hohfeld, for instance, used law’s

⁹ Paraphrased from one sense of “to calibrate.” Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/calibrate> (last visited Aug. 15, 2012).

¹⁰ See, e.g., FULLER, *supra* note 1, at 93 (“A familiar distinction between rules of law is that

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.¹¹ John R. Commons and Robert Hale stressed that the bargaining power available to negotiating parties depends on what the law authorizes them to do if an agreement is not reached.¹² 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.¹³ More recently, the Critical Legal Studies movement has drawn on this intellectual legacy to challenge the political neutrality and syllogistic heft of “efficiency” as a standard for crafting the legal institutions underpinning markets.¹⁴

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. Consider “thin” definitions of the rule of law, which try to avoid tackling difficult normative questions about the ultimate purposes of law.¹⁵ (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.¹⁶ Jointly, these requirements should provide a basis for relatively reliable expectations about laws’ implementation. As F.A. Hayek famously put it, the rule of law exists when “government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan

which distinguishes rules imposing duties from rules conferring legal capacities.”)

¹¹ Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 44 (1913).

¹² Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 474 (1923); JOHN R. COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* 54–56 (1924).

¹³ BARBARA FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* *passim* (1998).

¹⁴ Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 *passim* (1980); DUNCAN KENNEDY, *SEXY DRESSING ETC: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY* 83–125 (1993).

¹⁵ For discussions and examples of “thin” and “thick” definitions of the rule of law, see Nicholas Fegen, *Thick or Thin? Defining Rule of Law: Why the “Arab Spring” Calls for a Thin Rule of Law Theory*, 80 UMKC L. REV. 1187, 1197–98 (2012).

¹⁶ Randall Peerenboom, *Varieties of Rule of Law: An Introduction and Provisional Conclusion*, in *ASIAN DISCOURSES OF RULE OF LAW* (Randall Peerenboom ed., 2004); TAMANAHA, *supra* note 4.

one's individual affairs on the basis of this knowledge.”¹⁷ At first glance, this would appear to be a set of standards relatively easy to attain, as long as legislators have the will to do so, since careful drafting of statutes, reluctance to modify them, and reliable publicity should be 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 appears 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 interests 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.¹⁸ Inconsistency or opacity in statutes is only latent until someone tries to make use of them in actual practice as permitted by legal authorizations. 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 consistent, unambiguously applicable to cases, and publicly available, which laws are *relevant* to a particular set of circumstances may be unknown to some actors.¹⁹ 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 the notion that statutes should be more than wordy irrelevancies to practical life. As Peerenboom puts it, “[l]aws must be enforced—the gap between the law on books and law

¹⁷ FRIEDRICH A. VON HAYEK, *THE ROAD TO SERFDOM: WITH THE INTELLECTUALS AND SOCIALISM* 72 (1944).

¹⁸ Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 *DUKE L.J.* 1405, 1454–55 (2000).

¹⁹ 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, *supra* note 1, at 49. In his sole mention of legal authorizations (“rules conferring legal capacities”), Fuller notes that the limits of knowledge will be particularly acute in the case of such rules, since they do not readily correspond to ordinary rules of morality. *Id.* at 93.

in practice should be relatively narrow—and fairly applied.”²⁰ 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.²¹ Note that Peerenboom’s 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, e.g., 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.²² A law mandating extremely high levels of tax payments is likely to have the same effect.

Extending the above 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 their maximum advantage, authorizations poorly calibrated to circumstances can have the same debilitating effects on law providers as widely despised legal prohibitions or mandates have. The practicality of the rule of law depends not only on 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,²³ 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 gives existing rules new purposes and destabilizes established patterns of interactions, the result is a disruption of predictability.²⁴ Therefore, the practicability of the rule of law ideal of

²⁰ Peerenboom, *supra* note 16, at 2.

²¹ *Id.* at 48 n.3; cf. FULLER, *supra* note 1, at 153.

²² See, e.g., John T. Schuler & Arthur McBride, *Notes from the Front: A Dissident Law-Enforcement Perspective on Drug Prohibition*, 18 HOFSTRA L. REV. 893 (1989).

²³ VON HAYEK, *supra* note 17, at 72.

²⁴ For example, consider Llewellyn’s discussion of the tactical use of tender rules as a pretense to refuse acceptance of a shipment contracted at a price subsequently regarded by the purchaser as unfavorable. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 122–23 (1960). Even if such rules were in force and well known before a contract

“fair certainty” depends on mechanisms facilitating change in laws (or their authoritative interpretation) in order to create stable expectations.²⁵ 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 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.”²⁶ An authorizations view of law sheds new light on this issue as well. The problem of calibrating authorizations applies not only to economic actors, but also to those directly employed by the state: judges, prosecutors, police officers, bailiffs, sanitation inspectors, tax collectors, etc. These individuals too are authorized under law to create new legal facts with a degree of discretion, via a court decision, an investigation, an arrest, a confiscation, an inspection, etc. And they 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 from doing, but even more directly on what the state’s agents are authorized to do.

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 their authorizations 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 also from the need to react to a multitude of pertinent facts lawfully established by those authorized to do so. TABLE 1 summarizes these points.

was concluded, prior practice would not necessarily have led sellers to expect those rules to be exploited to take advantage of changing market conditions.

²⁵ Arthur L. Stinchcombe, *Certainty of the Law: Reasons, Situation-Types, Analogy, and Equilibrium*, 7 J. POL. PHIL. 209, 224 (1999); CURTIS J. MILHAUPT & KATHARINA PISTOR, LAW AND CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD 219–24 (2008).

²⁶ Peerenboom, *supra* note 16, at 2.

TABLE 1: PREREQUISITES OF THE RULE OF LAW

FEATURE OF RULE OF LAW:	PREREQUISITES WHERE LAW SPECIFIES:	
	MANDATES AND PROHIBITIONS	AUTHORIZATIONS
PREDICTABILITY	<ul style="list-style-type: none"> • Clarity, consistency, and publicity of statutes • Legal stasis 	<ul style="list-style-type: none"> • Clarity, consistency, and publicity of legally relevant circumstances • Adaptive legal change
PRACTICABILITY	<ul style="list-style-type: none"> • Broad acceptance • Adequately staffed, funded, or trained organizations 	<ul style="list-style-type: none"> • Absence of contextually corrosive authorized discretion

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 development on that basis. As discussed more extensively in the conclusion, the law-and-development movement has focused its attention on the left-hand column of Table 1, pushing for the adoption of “best practice” legislation that will not require further change, and funding the organizations intended to enforce law’s mandates and prohibitions.²⁷ Yet for rule-of-law ends to be attained, attention to the right-hand column is also required.

This Part of the Article examines 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. This methodology involves describing emergent patterns in the use of authorizations, narrating processes of successful or forestalled legal evolution over time, and seeking causal mechanisms that play a repetitive role.

Such a methodology will now be applied to some legal developments in post-Soviet Russia. It bears emphasis that what follows does not pretend to the status of a full-fledged, up-to-the-minute survey of Russian legality: examples from Russia’s post-Soviet history were chosen to 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

²⁷ Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 AM. J. COMP. L. 97, 98 (2002); Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 31, 61–65 (Thomas Carothers ed., 2006).

although the problem of calibrating authorizations is entirely generic to legal systems, Russia's particular circumstances have rendered this problem especially vivid. Like other post-socialist states, Russia faced the task of drafting key market-enabling legislation when markets were at best nascent, if not embryonic. As a result, even with the best intentions 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.²⁸ Also, 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 in the world market.²⁹ Radical price shifts change the incentives that actors bring to their dealings with the legal system, potentially creating new challenges to the predictability and practicability of the rule of law.

Two examples of poorly calibrated authorizations that undermine the rule of law will be discussed here. The first is the evolution of struggles over corporate property from the beginning of Russian privatization until the 2000s. The form of privatization, as discussed below, touched off long-running battles over ownership of the 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 Part.

Because the authorizations approach recognizes that private property and contract in effect deputize non-state actors to carry out legally significant actions, and that such deputations can have a potentially disruptive 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 within limits that are consistent with predictability. The second portion of this Part illustrates this point by charting areas where an excess of discretion by state agents proved disruptive to predictability, demonstrating

²⁸ Kathryn Hendley, *Legal Development in Post-Soviet Russia*, 13 POST-SOVIET AFF. 228, 229–30 (1997).

²⁹ Nikola Spatafora & Irina Tytell, *Commodity Terms of Trade: The History of Boom and Busts* 3–7, 31 (Int'l Monetary Fund, Working Paper No. 09/205, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1486523.

how political contention over how to restore certainty revolved around issues clearly recognizable as calibration of authorizations.

A. *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.³⁰ These shares of stock then passed to the public via a variety of mechanisms.³¹ While the details need not be examined, what these mechanisms had in common was their tendency to create distributions of corporate shareholding that practically guaranteed conflict.³² In the standard post-privatization situation, with some overgeneralization, enterprise “insiders” in management accumulated majority shareholdings, joining de jure to de facto control, while outsiders held a minority stake.³³ 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.³⁴ While both statutory and organizational resources for securing minority shareholder rights were weak,³⁵ 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. Minority shareholders had not 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.³⁶ Moreover, the new shareholders generally had no business relations with the corporation in question other than that of ownership.³⁷ In short, nothing other than the legal requirements—neither capital needs nor business ties—

³⁰ See, e.g., Bernard Black et al., *Russian Privatization and Corporate Governance: What Went Wrong?*, 52 STAN. L. REV. 1731, 1739–42 (2000); ANDREW BARNES, *OWNING RUSSIA* 75 (2006); JOSEPH R. BLASI ET AL., *KREMLIN CAPITALISM: THE PRIVATIZATION OF THE RUSSIAN ECONOMY* (1997).

³¹ Black et al., *supra* note 30, at 1741; BARNES, *supra* note 30, at 75.

³² See generally David M. Woodruff, *Property Rights in Context: Privatization’s Legacy for Corporate Legality in Poland and Russia*, 38 STUD. COMP. INT’L DEV. 82 (2004) (discussing the relationship between Russian privatization and conflicts around corporate property).

³³ *Id.* at 96.

³⁴ Black et al., *supra* note 30, at 1941; Katharina Pistor, *Company Law and Corporate Governance in Russia*, in *THE RULE OF LAW AND ECONOMIC REFORM IN RUSSIA* 165, 170–75 (Jeffrey D. Sachs & Katharina Pistor eds., 1997).

³⁵ Pistor, *supra* note 34, at 170–75.

³⁶ MAXIM BOYCKO ET AL., *PRIVATIZING RUSSIA* 81–85 (1995).

³⁷ Woodruff, *supra* note 32, at 95.

encouraged majority shareholders to accept the rights of minority shareholders, and they did not.³⁸ With share ownership of so little practical worth without de facto control, market stock valuations remained exceedingly low, in turn made selling an unattractive option.³⁹ 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.⁴⁰

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.

1. Share Consolidations

In December of 1995, Russia passed a law on corporations.⁴¹ 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.⁴² 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.⁴³ The rights granted to minority shareholders were sufficiently strong that some would later decry

³⁸ *Id.*; Black et al., *supra* note 30, at 1771–72.

³⁹ Woodruff, *supra* note 32, at 95.

⁴⁰ BARNES, *supra* note 30, at 82.

⁴¹ Federal'nyi zakon ot 26 dekabria 1995 g. ob aktsionermykh obshchestvakh [Federal Law of 26 December 1995 # 208-FZ on Stock Companies], ROS. GAZ., Dec. 29, 1995, available at <http://www.rg.ru/1995/12/29/ao-dok.html>.

⁴² Bernard Black & Reiner Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911, 1932–33 (1992).

⁴³ *Id.*

them as enabling greenmail and corporate raiding by holders of small blocks of shares that had made little investment in a company.⁴⁴

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 and distributed proportionally to existing holdings.⁴⁵ For example, a consolidation might reduce the number of shares from 100,000 to 10,000, with shareholders receiving ten 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" determined by the corporation's board of directors in light of some general guidelines.⁴⁶

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 (the Volgograd Drilling Equipment Factory, VZBT) converted its 178,635 shares into four shares, forcing minority shareholders to sell their stakes at a board-determined "market price."⁴⁷ In the absence of public trading of the shares, the law left the board wide discretion.⁴⁸ The price they chose was not an attractive one, valuing the company at only \$2.2 million.⁴⁹ In January, minority shareholders had publicly said they were ready to pay seven million dollars for just a quarter of the shares.⁵⁰

⁴⁴ A. Glushetskii, *Kto zashchitit ot minoritariia, ili bogatye tozhe plachut* [Who Will Protect Us from the Minority Shareholders, or the Rich Also Weep], *EKON. I ZH.* Mar. 20, 2004, available at <http://ebiblioteka.ru/sources/article.jsp?id=6138726>.

⁴⁵ Federal'nyi zakon ot 26 dekabria 1995 goda # 208-FZ ob aktsionernykh obshchestvakh, *supra* note 41.

⁴⁶ *Id.*

⁴⁷ Aleksandr Privalov, *Konsultant uzhe v gorode* [The Consultant is Already in Town], *EKSPERT*, Apr. 9, 2001, available at <http://ebiblioteka.ru/searchresults/article.jsp?art=15&id=2795671>.

⁴⁸ Federal'nyi zakon ot 26 dekabria 1995 goda # 208-FZ ob aktsionernykh obshchestvakh, *supra* note 41.

⁴⁹ Calculated from figures given in Svetlana Novolodskaia, *Konsolidatsiia burovoi tekhniki* [The Consolidation of Drilling Equipment], *VEDOMOSTI*, Apr. 4, 2001, available at <http://www.ebiblioteka.ru/sources/article.jsp?id=8930483>.

⁵⁰ *Na zavode burovoi tekhniki smenilas' vlast'* [The Regime at the Drilling Equipment Factory has Changed], *DELOVOE POVOLZH'IE*, Jan. 24, 2001, available at <http://www.ebibliot>

While perhaps the loudest such conflict over share consolidation 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.⁵¹ This meant all shareholders had to accept compensation and put control of the corporation into 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.⁵² However, because consolidation was provided for under the law, the FSC could itself only seek technical grounds for rejecting applications.⁵³ 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.⁵⁴ 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.

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

eka.ru/sources/printarticle.jsp?id=2719130.

⁵¹ *Region, OKTIABRSKAIA MAGISTRAL' (SAINT PETERSBURG)* (Dec. 17, 1996), available at <http://www.integrumworld.com>; Anatolii Teider, *Konsolidiruietes' otsiudova!*, EKSPERT, May 19, 1997, available at <http://aafnet.integrum.ru/artefact3/ia/ia5.aspx?lv=8&si=QJDXxY2R&qu=221&bi=565&nd=2&srt=0&tnd=0&f=0&st=0>.

⁵² Ivan Kozlov, *FKTsB protiv konsolidatsii aktsii* [The FSC Opposes Share Consolidation], VEDOMOSTI, Nov. 30, 2000, available at <http://ebiblioteka.ru/sources/article.jsp?id=3710966>.

⁵³ *Cf. id.* (noting that lack of normative limits on the share conversion coefficient).

⁵⁴ Petr Rushailo & Petr Sapozhnikov, *Sibneft' prosochilas' skvoz' FKTsB* [Sibneft' has Seeped Through the FSC], KOMMERS., Mar. 13, 2001, available at <http://ebiblioteka.ru/source/s/article.jsp?id=3717601>. 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" 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. Dmitrii Butrin & Irina Mokrousova, *Pravoprimenenie. Drobnye aktsii ne priznali imushchestvom* [Jurisprudence. Fractional Shares Not Recognized as Property], KOMMERS., Feb. 25, 2004, available at <http://ebiblioteka.ru/searchresults/article.jsp?art=17&id=5937472> (last visited Apr. 10, 2008); Postanovlenie konstitutsionnogo suda RF ot 24 fevralia 2004 g. abz. 4 p. 5.1 [paragraph 4 section 5.1 of the Ruling of the Russian Federation Constitutional Court of Feb. 24, 2004], ROS. GAZ., Mar. 2, 2004, available at <http://www.rg.ru/2004/03/02/ks-dok.html>. This was probably the interpretation that would have been embraced by the law's authors. Black & Kraakman, *supra* note 42, at 1967 n.120.

could protect minority shareholder's expectations only by themselves looking for adventitious, unrelated reasons for rejecting consolidation petitions.⁵⁵ 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 2002.⁵⁶

2. *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.⁵⁷ If debt enforcement is to create 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, debt enforcement rules may well come to undermine debtors' expectations about property rights. In 1998, Russia passed a law on bankruptcy designed to improve creditors' rights.⁵⁸ 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.⁵⁹ They were charged to apply a standard of a failure to pay obligations, rather than an assessment of general solvency, as the criterion of whether bankruptcy should be initiated.⁶⁰ Once bankruptcy was initiated, shareholders

⁵⁵ Rushailo & Sapozhinikov, *supra* note 54.

⁵⁶ Ekaterina Kats, *Dolgiĭ put' k poriadku* [The Long Road to Order], VREMIA NOVOSTEI, June 29, 2001, available at <http://ebiblioteka.ru/sources/article.jsp?id=2457240>.

⁵⁷ Kennedy & Michelman, *supra* note 14, at 741.

⁵⁸ Description of the law in the rest of the paragraph follows William P. Kratzke, *Russia's Intractable Economic Problems and the Next Steps in Legal Reform: Bankruptcy and the Depoliticization of Business*, 21 NW. J. INT'L L. & BUS. 1 (2000).

⁵⁹ These are sometimes referred to as the "arbitration courts" in English translations, but, as Katherine Hendley points out, this is confusing because "arbitration" is not their function. Kathryn Hendley, *Assessing the Rule of Law in Russia*, 14 CARDOZO J. INT'L & COMP. L. 347, 365 (2006). 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 Thomas Firestone, *Criminal Corporate Raiding in Russia*, 42 INT'L LAW. 1207, 1219 (2008).

⁶⁰ Kratzke, *supra* note 58, at 34.

immediately lost all control over the corporation's assets and transactions.⁶¹ 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.⁶²

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.⁶³ Often creditors would try to avoid accepting repayment of debts, preferring the opportunities participation in the creditors' council offered.⁶⁴ 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.⁶⁵ What were in effect hostile takeovers via bankruptcy, with expropriation of equity owners, went forward on a massive scale.⁶⁶

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

⁶¹ 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 Iraj Hoshi, *Bankruptcy, Reorganization, and Liquidation in Mature Market Economies: Lessons for Economies in Transition*, in ENTERPRISE EXIT PROCESSES IN TRANSITION ECONOMIES: DOWNSIZING, WORKOUTS, AND LIQUIDATION 19 (Leszek Balcerowicz et al. eds. 1998); David A. Skeel, *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, 51 VAND. L. REV. 1325 (1998).

⁶² Kratzke, *supra* note 58, at 39–40.

⁶³ Ariane Lambert-Mogiliansky et al., *Capture of Bankruptcy: Theory and Russian Evidence 6* (Ctr. Econ. & Fin. Res., Working Paper No. 3, 2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=253334; Aleksandr Volkov & Aleksandr Privalov, *Khudshii zakon Rossii* [The Worst Law in Russia], EKSPERT, Oct. 22, 2001; Vadim Volkov, *The Selective Use of State Capacity in Russia's Economy: Property Disputes and Enterprise Takeovers, 1998–2002*, in CREATING SOCIAL TRUST IN POST-SOCIALIST TRANSITION (János Kornai et al. eds., 2004); Woodruff, *supra* note 32, at 98; Firestone, *supra* note 59, at 1210–11.

⁶⁴ 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. MARSHALL I. GOLDMAN, *THE PIRATIZATION OF RUSSIA: RUSSIAN REFORM GOES AWRY* 144–46 (2003).

⁶⁵ *Kriminal'nye bankrotstva ruzhat ekonomiku. V Rossii aktivno razvivaetsia praktika zakhvata krupnykh prepriatii za schet fiktivnykh bankrotstv* [Criminal Bankruptcies are Ruining the Economy. The Practice of Corporate Takeovers Using Fictional Bankruptcies is Rapidly Expanding in Russia], NEZAVISIMAIA GAZ., Apr. 26, 2002, available at <http://dlib.eastview.com/browse/doc/3802121>.

⁶⁶ *Peredel v zakone* [Redivision via Law], NEZAVISIMAIA GAZ., Sept. 28, 2001, available at <http://dlib.eastview.com/browse/doc/284772>. In this interview, Tatiana Trefilova, director of the Federal Service for Financial Restoration, said that around 12,000 bankruptcy cases had been initiated that year, with nearly 30,000 active overall, and stated that "approximately a third of creditors [who initiated bankruptcy] were interested not in receiving money, but in changing the owners." *Id.*

came to have significance in the hundreds of millions of dollars, rendering widespread suspicion of the suborning or illegitimate partiality of judges quite plausible.⁶⁷ 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 as discussed 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.⁶⁸

Hostile takeovers via bankruptcy continued until a law designed to remove bankruptcy law as a weapon against owners passed in Fall 2002.⁶⁹ 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.⁷⁰

B. 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 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")⁷¹ forbidding or mandating certain acts at the request of plaintiffs.⁷² The purpose of these powers, analogues of which exist in

⁶⁷ GOLDMAN, *supra* note 64, at 144–46; Firestone, *supra* note 59, at 1210; Volkov & Privalov, *supra* note 63.

⁶⁸ Oleg Chernitskii, 'Sidanko' zanialas' pereosmysleniem [Sidanko Has Started Rethinking its Strategy], VEDOMOSTI, Nov. 30, 1999, available at <http://dlib.eastview.com/browse/doc/9638754> (last visited June 20, 2011).

⁶⁹ Tat'iana Mikhailovna Medvedeva, Aleksei Viktorovich Timofeev & Aleksei Vladimirovich Iukhnin, *Spros na instituty, vliiaushchie na korporativnoe upravlenie, na primere instituta bankrotstva (vzgliad iurista)* [Demand for Institutions Affecting Corporate Governance, Based on the Example of the Institution of Bankruptcy (A Lawyer's Perspective)], in RAZVITIE SPROSA NA PRAVOVOE REGULIROVANIE KORPORATIVNOGO UPRAVLENIIA V CHASTNOM SEKTORE [The Development of Demand for Legal Regulation of Corporate Governance in the Private Sector] 159–85 (Andrei Aleksandrovich Iakovlev ed., 2003); Woodruff, *supra* note 32, at 101.

⁷⁰ Firestone, *supra* note 59, at 1211.

⁷¹ Tamara P. Nekrasova, *Ne gundi i ne perech', a podi i obespech'!* [Don't Whine and Complain; Go Get Some Guarantees!], DUMAT' VSLUKH: MATERIALY O PEREVODE [THINKING OUT LOUD: MATERIALS ON TRANSLATION] (2008), <http://www.thinkaloud.ru/feature/nek-prov-is.pdf>.

⁷² ARBITRAZHNO-PROTSESSUALNYI KODEKS ROSSIISKOI FEDERATSII [APK RF] (Code of Arbitration Procedure) art. 90 (Russ.).

many legal systems, is to enable judges to ensure that a plaintiff would not find a legal victory hollow due to irreversible actions by the defendant before the case concludes.⁷³ 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, powers for interim measures 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.⁷⁴ 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.⁷⁵ 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. 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 might not be parties to suits that affected them profoundly, and therefore learned about the injunctions only when they were served.⁷⁶

Use of precisely crafted provisional remedies became a common phenomenon in the Russian legal system.⁷⁷ 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

⁷³ See, e.g., H.-U. Freimuller, *Attachments and Other Interim Remedies in Support of Arbitration: Switzerland*, 12 INT'L BUS. L. 119 (1984); Maître Jacques Buhart, *Attachments and Other Interim Remedies in Support of Arbitration: France*, 12 INT'L BUS. L. 107 (1984); D.W. Shenton, *Attachments and Other Interim Remedies in Support of Arbitration: The English Courts*, 12 INT'L BUS. L. 101 (1984); Giovanni M. Ughi, *Attachments and Other Interim Remedies in Support of Arbitration: Italy*, 12 INT'L BUS. L. 115 (1984).

⁷⁴ Liza Golikova, *Oruzhie v zakone* [Legal Weaponry], KOMMERS., Dec. 12, 2011, available at <http://dlib.eastview.com/browse/doc/6677143>.

⁷⁵ This information is from a written deposition by a Russian lawyer, whose employer represented an interested party, prepared as part of a dispute over payment for the employer's services in a foreign court. The author was allowed to examine the written testimony and take notes.

⁷⁶ Aleksandr Privalov, *O vydavlivanii reidera po kaple* [On Squeezing Out the Raider Drop by Drop], EKSPERT, Apr. 9, 2007, available at <http://www.ebiblioteka.ru/sources/article.jsp?id=11824867>.

⁷⁷ Golikova, *supra* note 74.

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.”⁷⁸ Nevertheless, participants in battles over corporate control continued to convince, or suborn, judges to invoke provisional remedies.⁷⁹ 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.⁸⁰

Also in 2006, the Russian Ministry of Economic Development and Trade (MERT) proposed legislation meant to block abuse of provisional remedies.⁸¹ The measure was part of a broader set of proposed legal changes that became known as the “anti-raider package.”⁸² 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 was generally with smaller businesses, whose premises were often tempting targets in a booming real estate market.⁸³ Raider acquired the meaning of an

⁷⁸ *O praktike rassmotreniia arbitrazhnymi sudami zaiavlenii o priniatii obespechitel'nykh mer, sviazannykh s zapretom provodit' obshchie sobraniia aktsionerov* [On the Procedure for Consideration by Arbitration Courts of Requests for Remedial Measures Prohibiting the Holding of General Shareholder Meetings] (Jan. 31, 2004), <http://ebiblioteka.ru/sources/article.jsp?id=5961241>. 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 [KONST. RF] [CONSTITUTION] art. 127 (Russ.). These clarifications play a role roughly analogous to that of precedent in common-law systems. For some examples of their role, see Viktoriia Vladimirovna Petrova & Viktor Viktorovich Bulychev, *Poriadok i mekhanizm zaschity prav litsa, osnovannye na raz'iasnenii sudebnoi praktiki* [The Process and Mechanism for Protecting Civil Rights Based on Clarifications of Judicial Practice], ZAKON, Mar. 2008, at 193–98.

⁷⁹ Filipp Sterkin, *Bez obespecheniia* [Without Remedy], VEDOMOSTI, Sept. 27, 2006, available at <http://ebiblioteka.ru/sources/article.jsp?id=10097411>.

⁸⁰ *Postanovlenie Plenuma Vysshego Arbitrazhnogo Suda RF “O Primenenii Arbitrazhnymi Sudami Obspechitel'nykh Mer” ot 12 oktiabria 2006 g.*, No. 55 [Russian Highest Arbitration Court Plenary Ruling on the Application of Provisional Remedies by Arbitration Courts] (Oct. 12, 2006).

⁸¹ MERT predstavliaet na zasedanii pravitel'stva RF v chetverg proekt konceptsii razvitiia korporativnogo zakonodatel'stva na period do 2008 g [MERT is Presenting at Thursday's Meeting of the Russian Government a Draft Concept for the Development of Corporate Legislation for the Period until 2008], PRAIM-TASS: AGENTSTVO EKONOMICHSKOI INFORMATSII (May 17, 2006), <http://www.prime-tass.ru/news/show.asp?id=592983&ct=news> [hereinafter MERT Presents Draft Legislation].

⁸² Dmitrii Butrin & Irina Granik, *Gosduma odobrila antireiderskii paket* [The Gosduma [Russia's Federal Legislature] Has Approved the Anti-Raider Package], KOMMERSANT-DAILY (Apr. 9, 2007), available at <http://www.ebiblioteka.ru/sources/article.jsp?id=11809959>.

⁸³ Stanislav Ukhov, *Iurii' Borisov: “Rei'derstvo – eto kupit' na grosh piatakov,”* IZVESTIIA (July 21, 2006), available at <http://ebiblioteka.ru/sources/article.jsp?id=9803198>; Rinat Sagdiev, *Reidery poshli po magazinam* [The Raiders have Gone Shopping], VEDOMOSTI (July

individual or a group that makes use of “fraud, blackmail, obstruction of justice, and actual and threatened physical violence” to acquire legal ownership of a business.⁸⁴ Estimates of the number of such ‘raids’ on the property rights of small businesses varied widely, but that there were certainly hundreds, and quite possibly thousands, of such incidents each year from the middle of the decade.⁸⁵

Raids involve painstaking legal maneuvers.⁸⁶ Ideally, from the raiders’ point of view, ownership is acquired without the original owners becoming aware of their dispossession.⁸⁷ 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.⁸⁸ The most effective raider takeovers involve initiating multiple chains of legal events that are difficult to reverse.⁸⁹ For instance, a firm might discover that raiders had (1) used forged documents to register a new general director at the state’s Unified Registry of Legal Entities; (2) sold the firm to a shell company on the new general director’s authority; (3) resold the firm to another shell company; (4) officially liquidated the first shell company; (5) resold the firm to yet another shell company; etc.⁹⁰ By mixing fraud (committed through exploiting the authorizations of the Unified Registry) with the entirely legitimate authority of an owner, raiders created good faith purchasers, whose acquisitions were legally difficult to challenge (especially without being able to bring suit against the now liquidated intermediaries).⁹¹

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:

12, 2007), available at <http://ebiblioteka.ru/sources/article.jsp?id=12279917>.

⁸⁴ Firestone, *supra* note 59, at 1207.

⁸⁵ Aleksandr Privalov & Aleksandr Volkov, *Rassuzhdenie o rei'derstve po metode barona Kiuw'e [Considerations on Raiderism Using the Method of Baron Cuvier]* 54–60, EKSPERT, May 14, 2007, available at <http://expert.ru/expert/2007/18/sobstvennost/>.

⁸⁶ Firestone, *supra* note 59, at 1207; Thomas Firestone, *Armed Injustice: Abuse of the Law and Complex Crime in Post-Soviet Russia*, 38 DENV. J. INT'L L. & POL'Y 555, 563 (2010).

⁸⁷ Liudmilla Iudina, *Zashchita ot zakhvathikov [Defense Against Invaders]*, TRIBUNA, Dec. 7, 2007, available at <http://ebiblioteka.ru/sources/article.jsp?id=13074938>; Sagdiev, *supra* note 83.

⁸⁸ REIDERSTVO KAK SOTSIAL'NO-EKONOMICHESKII I POLITICHESKII FENOMEN SOVREMENNOI ROSSII [Raiding as Socioeconomic and Political Phenomenon of Modern Russia] 6 (2008), <http://www.politcom.ru/tables/otchet.doc>.

⁸⁹ See Firestone, *supra* note 86, at 563–67.

⁹⁰ See Filipp Sterkin, *Dobrosovestnye reidery [Good Faith Raiders]*, VEDOMOSTI, Apr. 25, 2007, available at <http://dlib.eastview.com/browse/doc/11899054>; Firestone, *supra* note 59, at 1212; Firestone, *supra* note 86, at 563.

⁹¹ Firestone, *supra* note 59, at 1212.

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.⁹²

What is taken in a raid, then, is not physical assets but the authorizations accompanying ownership of assets. When these schemes 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. 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.⁹³ 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 court (*arbitrazh*) located in the jurisdiction of the firm’s registration.⁹⁴ 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.⁹⁵ Note that this suggestion involves solely shifting authorizations: restricting in certain circumstances the right of individuals to sue companies 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.⁹⁶

With respect to state agencies, MERT sought to hinder raider schemes, but to accomplish this without granting state agents new authorizations that might provoke corruption. Thus, the Ministry proposed requiring the Unified Registry to check vigorously the authenticity of documents presented to it—although this should be done according to tight deadlines to avoid leaving the Unified Registry with too great a discretion.⁹⁷ In a similar vein, the ministry also suggested that investigators of criminal charges in cases of

⁹² Utonchennyi zakhvat [Sophisticated Capture], OGONEK, Apr. 16–22, 2007, available at <http://www.ogoniok.com/4992/4/>.

⁹³ MERT Presents Draft Legislation, *supra* note 81.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

raiderism should be prevented from holding company securities as evidence, which could interfere with their sale.⁹⁸

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."⁹⁹ 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.¹⁰⁰ 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.¹⁰¹ 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.¹⁰² 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.¹⁰³

⁹⁸ *Id.*

⁹⁹ Igor Ostapets, *The Russian Federation's Anti-Raiders Law*, PRACTICAL LAW COMPANY (2009), <http://fs.practicallaw.com/2-500-7335>.

¹⁰⁰ See, e.g., Sergei Zykov, "Zakhvat sobstvennosti" *snova perechitaiut* [Property Capture to be Reread], ROS. GAZ., Sept. 25, 2008, available at <http://www.ebiblioteka.ru/sources/article.jsp?id=18949923> (noting that in two years the Duma had only given an anti-raider bill a first reading); Elena Mel'nikova, *Kontseptual'noe opozdanie* [Conceptual Tardiness], GAZ., Feb. 4, 2009, available at <http://www.ebiblioteka.ru/sources/article.jsp?id=19553627> (stating that anti-raider laws proposed in 2008 had still not been adopted).

¹⁰¹ Butrin & Granik, *supra* note 82.

¹⁰² O VNESENII IZMENENII V OTDEL'NYE ZAKONODATEL'NYE AKTY ROSSIISKOI FEDERATSII, art. 225.4 (2009), <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=89577;div=LAW;dst=0;content=091DE3048E8365BCB3B3FE4FA2D0D3A9>.

¹⁰³ It is instructive to compare Firestone, *supra* note 59. Firestone provides an excellent empirical overview of *reiderstvo*, but also an opportunity to demonstrate the increased analytical precision a focus on law's authorizations enables. He throughout emphasizes the criminal character of raiding, and his policy proposals focus largely (though not exclusively) on changes to criminal law. *Id.* at 1228. Yet, earlier in the article, he noted the effectiveness

C. *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 the leadership of a state comes to accept this principle is a matter of much discussion and little clarity in the scholarly literature.¹⁰⁴ 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 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.¹⁰⁵ 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.¹⁰⁶

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 are effective. To the extent that law offers state agents authorizations—for instance, to grant or decline 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

of changes to bankruptcy legislation, *id.* at 1211, which, as argued above, focused especially on authorization issues.

¹⁰⁴ DEMOCRACY AND THE RULE OF LAW *passim* (José Maria Maravall & Adam Przeworski eds., 2003).

¹⁰⁵ See Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1, 1–31 (1995) (discussing the necessity of a limited political foundation that protects private property rights while maintaining the power to accumulate wealth).

¹⁰⁶ North & Weingast, *supra* note 5, at 803–04.

relevant rules may only 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.¹⁰⁷ 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.¹⁰⁸ In a similar vein, businesspeople have backed proposals to specify the amount of time sanitary and fire inspectors are allowed to spend visiting a particular establishment.¹⁰⁹ 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 those in the anti-corruption campaign promoted by former President Medvedev—suggests that the actors most intimately familiar with abuse of office see recalibration of authorizations as an important means of avoiding such abuse.¹¹⁰

¹⁰⁷ See Aleksandr Shokhin, *Interv'iu s Aleksandrom Shokhinym, prezidentom Rossiiskogo soiuza promyshlennikov i predprinimatelei (rabotodatelei) (RSPP)* [Interview with Aleksandr Shokhin, President of the Russian Union of Industrialists and Entrepreneurs (Employers) (RUIE)], GAZETA.RU, July 18, 2006, available at <http://www.gazeta.ru/shohin.shtml>.

¹⁰⁸ *Id.*

¹⁰⁹ Andrei Dolgikh, *Proverki na porogakh* [Inspections on the Threshold], NOVYE IZVESTIYA, Sept. 17, 2008, available at <http://dlib.eastview.com/browse/doc/18907759>.

¹¹⁰ The role of excess discretion is a major theme in the literature on corruption, most famously in ROBERT E. KLITGAARD, *CONTROLLING CORRUPTION* (1988). Klitgaard seems to slight a point made in the earlier contribution of Banfield that narrowing discretion has costs. *Id.* at 195. Edward C. Banfield, *Corruption as a Feature of Governmental Organization*, 18 J.L. & ECON. 587, 590 (1975). Here too the metaphor of calibration seems appropriate. For a discussion of corruption in the Russian context, see ALENA LEDENEVA, *HOW RUSSIA REALLY WORKS: THE INFORMAL PRACTICES THAT SHAPED POST-SOVIET POLITICS AND BUSINESS* (Bruce Grant & Nancy Ries eds., 2006). For a skeptical view of the anti-corruption campaign, which concentrates largely on the issue of criminal sanctions for corruption, see Ethan S. Burger & Rosalia Gitau, *The Russian Anti-Corruption Campaign: Public Relations, Politics or Substantive Change*, 1 NEW J. EUROPEAN CRIM. L. 218 (2010).

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 should apply to agents of the state no less than other actors. What remains far less clear is how to pursue these ideals. This Article argued that it is crucial to recognize that laws that governing 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 use to undermine the calculability and reliable implementation of law.

Fuller argues that 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.¹¹¹ A focus on law's authorizations suggests that this aspiration needs to be permanent. 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.¹¹² 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 the 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.¹¹³

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.

¹¹¹ FULLER, *supra* note 1, at 5–8, 41–44.

¹¹² MILHAUPT & PISTOR, *supra* note 25, at 6.

¹¹³ Some observers have questioned 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, *supra* note 59, at 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 1998–2002; this is one reason the center of gravity has shifted towards raids on smaller firms.

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. This idea has received powerful backing and led to unprecedented levels of international funding for measures supporting the rule of law.¹¹⁴ Legal drafting efforts have aimed to create a legislative basis for market economies.¹¹⁵ 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.¹¹⁶ 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 analyzes its effectiveness, as well as the character and impact of the rule of law more generally.¹¹⁷ 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 the rule of law employed in such studies are meaningful is open to serious doubt.¹¹⁸

Even more skepticism attends the effectiveness of assistance meant to promote the rule of law. Dezalay and Garth, 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.¹¹⁹ Thomas Carothers, 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.¹²⁰ 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.¹²¹ 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.¹²²

¹¹⁴ Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95–106 (1998).

¹¹⁵ Hendley, *supra* note 28, at 236–39.

¹¹⁶ Kleinfeld, *supra* note 27, at 31–32.

¹¹⁷ For an overview of this industry and an indication of its scale, see Annotated Bibliography: Legal Institutions of the Market Economy, WOLRDBANK.ORG (June 15, 2005), <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/summariesJune2005.pdf>.

¹¹⁸ Hendley, *supra* note 28, at 246.

¹¹⁹ Yves Dezalay & Bryant Garth, *Law, Lawyers and Social Capital: 'Rule of Law' Versus Rational Capitalism*, 6 SOC. & LEGAL STUD. 109, 132–33 (1997).

¹²⁰ Carothers, *supra* note 114, at 96.

¹²¹ *E.g.*, Upham, *supra* note 8; Ohnesorge, *supra* note 4.

¹²² Kleinfeld, *supra* note 27, at 61–65.

Not all scholars agree with this depressing characterization. Trebilcock and Daniels, in a major recent publication, argue that the rule of law should remain at the center of efforts to promote development.¹²³ 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, Trebilcock and Daniels argue 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.”¹²⁴ 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.¹²⁵

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 of a focus on aiding law-providing institutions has given unsatisfactory results. In order to bridge the gulf between normatively attractive ideals and their “institutional instantiations,” it will be necessary to analyze directly the *practicality* of rule of law ideals.

¹²³ See generally TREBILCOCK & DANIELS, *supra* note 4.

¹²⁴ *Id.* at 42.

¹²⁵ *Id.* at 29.

Put differently, the critical issue is identifying the preconditions for a legal system to play the roles of stabilizing expectations and constraining arbitrary state action that are celebrated by advocates of the rule of law.

An appreciation of the consequences of legally authorized discretion 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.¹²⁶ 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.”¹²⁷ In particular, a law that cannot be enforced will necessarily undermine the rule of law.¹²⁸ 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.

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

¹²⁶ Richard H. Fallon, “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 2–3 (1997); FULLER, *supra* note 1, at 42, 44. I thank an anonymous reviewer for emphasizing this point.

¹²⁷ FULLER, *supra* note 1, at 153.

¹²⁸ *See id.* (explaining how contraception bans adversely affect legal morality).

to be under sovereign control. Furthermore, it is most unlikely that the detailed contextual knowledge required to calibrate authorizations is more accessible to foreign experts than to domestic ones. 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 models 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 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,¹²⁹ 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.¹³⁰ 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 the 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.

¹²⁹ TREBILCOCK & DANIELS, *supra* note 4, at 29.

¹³⁰ Peerenboom, *supra* note 16, at 39–40.