

Constitutional Constraints and Property Rights: Lessons from Russia

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Only a ruler in chains can secure property rights. Or so an influential literature in comparative political economy asks us to believe. Following Madisonian reasoning updated in a famous paper by North and Weingast (1989), these scholars emphasize that unconstrained rulers may confiscate property. And not just any constraints will do, for a sovereign whose respectful attitude to private property is manifestly temporary will be unable to stimulate investment. Thus, it is an enduring and credible commitment to secure property that is required. On Madison's argument, democratic constitutions, which create veto points that prohibit unilateral changes in property rules, offer this sort of commitment.

Of course, a ruler too thoroughly chained would lose the capacity not just to seize property, but also to actively defend it. This recognition gives rise to what has been termed the fundamental dilemma of property rights: a state capable of defending property is capable of taking it away. For normative theorists, the classic, Madisonian, answer, is to endow rulers with powers, but constrain discretion in their exercise in a variety of ways. The state's exercise of its positive powers should be predictable, allowing private individuals to build their plans and acquire property on the basis of a reliable understanding of when and how the state will defend property or enforce its confiscation. Hayek, for instance, felt that this could be accomplished if "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 one's individual affairs on the basis of this knowledge"(1944, 72). As Hayek emphasized, this did not mean that the state would not act on behalf of property rights, since in using coercive powers act it very much would--but it would act without discretion. The sovereign power would be chained, but as a

guard dog is: with space enough to carry out its responsibilities but unable to go beyond its prescribed role. To change metaphors: one could resolve the fundamental dilemma by putting the establishment and enforcement of property rights on autopilot, while making it extremely difficult to restore manual control. The position of North and Weingast is very much in this spirit: the problem of credible commitment is to create “rules the sovereign can[not] readily revise,” reducing the probability that “the sovereign will alter property rights for his or her own benefit”(North and Weingast 1989, 803).

Despite its familiarity and broad acceptance, the idea that a credible commitment to implement unchanging rules is a durable formula for secure property rights has a serious, indeed fatal, flaw. Property is valuable to its owners because it is an institution: a set of “shared and generally realized expectations about how people will behave in particular ... circumstances”(Weimer 1997, 2). But if property is to remain an institution in this sense, I will argue, it is regularly the case that the rules regulating it must be changed. The very veto points that hinder legal changes inimical to property rights can also prevent those needed to sustain it. Constitutional constraint can as easily work against the security of property rights as for it.

Discussion of the possibility that “checks and balances” could become a straight-jacket inhibiting positive legal changes is as at least as old as the Federalists’ argument for them. Hamilton took the position that “It may perhaps be said that the power of preventing bad laws includes that of preventing good ones. ... But this objection will have little weight with those who can properly estimate the mischiefs of that inconstancy and mutability in the laws which form the greatest blemish in the character and genius of our governments”(Quoted in Beard, 1961 [1913], Chapter 6). However, this

sanguine attitude toward the effects of legal stasis has not been universally shared. Jacob Hacker (2004) has recently demonstrated that changing circumstances and successful tactical manipulation of the "status quo" have undermined the US welfare state despite formal policy continuity. While 1960's arguments for legally defining welfare benefits as a "new property" may have failed, Hacker's argument nevertheless illustrates the ways that even nominally unchanged rules can stop securing the realization of settled expectations. Raising a similar point in direct response to North and Weingast, David Stasavage (2002) emphasizes that the effect of a veto depends crucially on the character of the status quo (or "reversion point"). In particular, Stasavage notes that constitutional barriers to sovereigns' repudiation of debt repayments do nothing to ensure that sovereigns are able to raise tax rates as needed to meet their obligations. Thus, a concrete political investigation is required to determine whether a particular constitutional arrangement is favorable to creditors.

The present paper builds on these arguments by Hacker and Stasavage by showing how they apply to legally defined property rights. There are two ways that unchanged property-implementing rules may prove unequal to the task of making the rights of ownership reliable. First, and most straightforwardly, changing environmental circumstances can make theft more feasible or attractive, requiring new legal provisions calculated to reduce its feasibility and attractiveness. This mechanism parallels the discussions by Hacker and Stasavage of how external circumstances (whether revenue shortfalls or globalization and deindustrialization) change the effects of unchanged rules. The possible metamorphosis of constitutional constraints into fetters on defending property in these cases stems from exogenous factors.

There are also, however, processes endogenous to systems of property-defining legal rules that regularly transform these rules' effects. It is these more interesting and complex processes that will be the focus of the present paper. These endogenous processes stem from the fact that property laws authorize actions as well as forbid them. Those invested with such authority--occupants of such legally defined roles as owner, or shareholder, or creditor--can and often do try to make use of it not just to defend their own property, but to frustrate others' expectations of property security. Such efforts can make even rules designed to secure property rights into sources of unpredictability that destabilize settled expectations, destroying the institutional character of some property rights. "Reinstitutionalizing" these rights then requires legal changes. Whether these changes are forthcoming depends not just on constitutional arrangements, but the character of the political forces that interact under these arrangements.

Thus, the first thesis of this paper is that constitutions that create a credible commitment to legal stasis do not thereby impart a stable institutional character to property rights. In substantiation of this thesis I offer a causal mechanism whereby property secured by formally unchanged rules can be deinstitutionalized, as rules come to generate unexpected effects via the efforts of self-interested actors who explore and exploit the authority granted to them under law.

The argument, therefore, crucially relies on a particular vision of the kinds of agency enabled by legally enacted property rights. In the usual formulations of the "fundamental dilemma," property is implicitly seen as having a concrete, thing-like character. Rulers seize property or do not, defend it or do not. They either deploy a "grabbing hand" or they guard the fences behind which owners quietly enjoy their

property. However, as any number of scholars have emphasized, legally instituted property is not usefully thought of as a thing. It is, instead, a “bundle of rights.”

These rights include the authority to choose whether or not to perform acts with legal significance. Law forbids, for instance, entering a privately owned home without permission. But it authorizes the owner to issue such permission. Law forbids stealing another’s property, but authorizes property owners to sell that property. **The configuration of property rights that the state is legally obliged to defend is thus a function not only of legislation, but also of decentralized decisions by private actors authorized by law to make these decisions. In this sense, property owners and their counterparties in all sorts of transactions administer the property rights system together with the state** (Commons 1957, 83ff.). In the words of Joseph Singer (1988, 650), “Property and contract rights are powers delegated by the state; they assign decision-making power.”

Conceiving property rights as rooted in law that authorizes as well as enjoins acts has enormous consequences for the whole problematic posed by the credible commitment literature. Instead of deriving from properly circumscribed authority for a sovereign acting from a single center, stable property rights result from the mutual adjustment of the legal authorizations granted to millions of individuals and legal entities, acting on a welter of motivations and shifting situationally determined incentives. It bears emphasis that these motivations may prompt efforts to undermine rather than stabilize existing property rights. To the extent that it is possible deliberately to orchestrate stability in this complex and dynamic ecosystem, not a guard dog but something like a gardener, patient and adaptable, is required. When the decentralized exercise of legal authority has deinstitutionalized property rights, their reinstitutionaliza-

tion requires a recalibration of the authorizations in question. This claim is the second thesis of the paper.

Thus, I propose the existence and operation of a causal mechanism in two stages: an existing set of rules relevant to property authorize actions that have unexpected results (deinstitutionalization) and the rules are recrafted in a way that allows more accurate expectations of their effects (reinstitutionalization). To demonstrate that this mechanism can and does operate in the real world, I provide below a small number of examples, drawn mostly from the experience of Russia. Even a single example would be enough to demonstrate that a strong version of the claim 'limited government = unalterable rules = stable property rights' is inaccurate. Defenders of the claim might argue, though, that these examples are atypical. However, I contend in the concluding section that a range of considerations suggest that the burden of proof very much rests with those who prove the link between limited government and property rights, and draw some implications for further study.

Examples

I. Workers' expectations of continued employment

My first example concerns the wave of downsizing that began in U.S. industry in the 1980's, especially in the aftermath of hostile takeovers. Downsizing involved the elimination of established, but not legally enacted, "property rights." One analysis along these lines comes from Shleifer and Summers (1987). Noting the sharp rise in stockmarket valuations of corporations after their hostile takeover, Shleifer and Summers refute the idea that it arises from expectations of improved performance. Instead, they argue, hostile takeovers facilitate an abrogation of "implicit contracts" with company employees, reducing the corporation's liabilities. They give the example of traveling salespeople who may accept poor conditions in return for an implicit or explicit promise of a higher-paid and easier office job in the future. A corporation that does not have to make good on such promises can return more value to shareholders. A parallel example that resonates with the concerns of scholars in the "varieties of capitalism" school would involve workers who had made incompletely compensated investments in firm-specific human capital in expectation of a long-term return from employment in the same firm. Downsizing such employees amounts to a confiscation of the implicit "property" their human capital represents (Iversen and Soskice 2001; Commons 1957, 368).

Dealing with the example of steel plant closings in Youngstown, Ohio, Singer (1988) makes a more lawyerly argument that in effect tries to find within the common law a plausible defense for vulnerable parties to implicit contracts. Singer notes that U.S. law many cases protects a "reliance interest" in ongoing relationships: when one party to an ongoing relationship has "legitimately relied" on its continuance, the law

may offer protection against the other severing the relationship (Singer 1988, 664). He argues that given the way the steel plant employees and their communities had relied on the long-term presence of U.S. Steel, and that U.S. Steel had been happy for them to do so, judges ought to both recognize and defend a reliance interest. However, Singer (1988, 621) concedes that this would have required a degree of judicial innovation amounting to a "substantial change in the law." And he also canvasses possible legislative solutions that would have recognized the reliance interest, for instance by requiring more notice to employees and encouraging alternatives to plant shutdown.

The explicit legal authority of corporate owners to dismiss employees or liquidate a firm does not necessarily discourage employees from making uncompensated investments in human capital, as long as they expect that owners will not have an incentive to make use of this authority. Changes in market conditions such as those that provoked the downsizing wave, however, can alter owners' incentives. Legally uncodified employee "rights" to a stake in ongoing concern proved vulnerable to changing circumstances. Recreating a set of stable expectations required legal changes--though in the event, only limited legislative measures were passed, 14 years after the first efforts to do so (Addison and Blackburn 1994).

II. Reverse stock splits (share consolidations) in Russia

In November of 1995, Russia passed a law on corporations. By this time, three years after the collapse of the Soviet Union, the country had carried out a great deal of privatization, and created a large number of shareholders. However, in most cases corporations were controlled by those who had run them in their Soviet-era incarnations, who generally sought to acquire as much outstanding stock as possible. Share-

holders not among this group of de facto owners had little chance of making their de jure property rights stick. Regulations governing relations between shareholders and corporations were limited, and a Presidential order aimed at sharing up shareholder rights did more to emphasize how regularly those rights were violated than to strengthen them.

The carefully drafted 1995 corporate law was intended to remedy this situation by strengthening the ability of minority shareholders to constrain company management, in particular by granting them voice in or 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.

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." 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, Privalov 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).

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 [citations pending]. In this author's opinion, the latter argument was more convincing (cf. Black and Kraakman 1996, 52n120). In any event, it was a sufficiently plausible reading to defy any effort to rescue the case that constitutional restrictions on rule changes defend property rights by claiming that the rule passed by the legislature had been willfully changed by judicial action.

Thus, in direct contrast to the argument that an unalterable set of rules will enable secure property rights, adherence to the provisions of the 1995 corporate law frustrated minority shareholders' expectations about their opportunities to participate in corporate governance and defend the value of their shares. Indeed, "veto points" manifestly delayed amendment of the law to defend minority shareholders better. Pro-

visions banning disadvantaging minority shareholders through consolidations were included in a revised bill passed by the lower house of Russia's parliament, the Duma, in the summer of 2000 (Anonymous 2000, Kholodkova 2001). However, the bill was rejected twice by the upper chamber of parliament, the Federation Council, for reasons apparently unlinked to the share consolidation issue (Kholodkova 2001, Sagdiev 2000). When the amended bill finally passed, in the summer of 2001, it specified that it would not come into force into the beginning of 2002. According to one press report, this delay was the result of last-minute lobbying by big business representatives (Kats 2001). Whether or not big business had arranged the delay, majority shareholders at a number of large corporations certainly took advantage of it. Oil companies were particularly active; share consolidations took place in either the parent or subsidiary companies at Yukos, Sibneft, TNK, and Tatneft [citations pending] before the end of the year.

III. Bankruptcy as hostile takeover in Russia

The cases of employees' expectations about their future careers at particular workplaces and Russian share consolidations both illustrate the following point: it cannot be assumed that rules which are unaltered are, by that very token, favorable to secure expectations about property rights. As Stasavage argued, as soon as positive action rather than passivity is required to defend property rights, veto points can render prospects of better property rights defense less credible rather than more so. In both cases, legislation to establish a new basis for secure expectations was not immediately forthcoming. Some readers may feel, though, that these are marginal instances. After all, employees' rights were not explicitly defended in statute, and reverse share splits are usually not central to corporate governance. The next two examples, by contrast,

involve authorizations that are manifestly at the core of any legal system intended to stabilize expectations about property.

The first of these is 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. And if the "constitutions as credible commitment" argument is to hold, such clarity ought to be obtainable through embracing unalterable rules. However, given 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. Russia again provides an example. In 1998, Russia passed a law on bankruptcy designed to improve creditors' rights. But it soon developed that the bankruptcy law authorized creditor actions that could be turned to purposes other than recovery of unpaid loans (Mogiliansky, Sonin, and Zhuravskaya 2000, Volkov and Privalov 2001, Volkov 2004, Woodruff 2004). 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. Once a firm was placed in bankruptcy administration, a council of creditors, with votes proportional to outstanding debt, gained extensive powers and the ability to marginalize equity owners. Creditors' councils were sometimes able to confiscate firm stock against their debts, or to arrange auctions of corporate shares in ways that favored purchasers received an inside track. Often creditors would try to avoid accepting repayment of debts, preferring the opportunities participation in the creditors' council offered. Hostile takeovers via bankruptcy, with effective expropriation of equity owners, went for-

ward on a massive scale until a law designed to remove bankruptcy law as a weapon against owners passed in fall 2002. The law reined in creditors' authorizations, and made it much harder for creditors to refuse to accept payments of debt in order to take advantage of bankruptcy proceedings. The political force behind the law came from big business leaders who were eager to stabilize their ownership rights by reining in creditors' legal authorizations (Medvedeva, Timofeev, and Iukhnin 2003; Woodruff 2004)

IV. Provisional remedies in Russia

Russia's battles over corporate control provide an additional example of the way authorizations crucial to defense of property rights can also be turned against them. Post-Soviet legal codes gave Russian judges powers to impose "provisional remedies" (obespechitel'nye mery, which can also be translated as "interim measures") forbidding or mandating certain acts at the request of plaintiffs. The purpose of these powers, analogs 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 auc-

tion. 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 [citation pending]. 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 creates sharp uncertainty for owners: they need not be parties to suits that affect them profoundly, and therefore learn 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 resolution intended to sharply 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." (Postanovlenie 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. And a law under consideration (as of August 2008) would improve notification procedures so that injunctions would be less likely to arrive as a bolt from the blue.

Conclusion

At the core of the “credible commitment” literature following on North and Weingast (1989) is the idea that property rights can be secured by binding the state to enforce an unalterable set of property-regulating rules. I have sought to demonstrate that sustaining property rights’ institutional character can and often does require changes in the rules that regulate them. This is so in part because the legally enacted property rights allocate authorizations to invoke the power of the state, and advantage-seeking agents may turn these authorizations to the purpose of undermining, rather than upholding, others’ property-related expectations. Restoring a situation in which expectations are reliably realized requires a recalibration of authorizations via changes in rules. Thus, the need for rule changes can arise out of the core institutions enabling the defense of property rights. A constitutional structure that inhibits such changes can have a destabilizing rather than stabilizing effect on expectations

At this point let me respond to some objections that may have occurred to readers. The first is that I have ascribed to North and Weingast an absurd position that they did not intend to embrace. Their case that the state must commit to “unalterable rules” was surely not intended to imply that any rules whatever would do. When they note the destruction, as early as 1641, of “the centralized administrative apparatus which enforced royal attempts to alter rights and property,” they presume the existence of some alternative apparatus which sustained rights and property in their unchanged state. This apparatus (it seems) was the common law courts, and they stress how the institutions emerging from the Glorious Revolution insured the independence of such courts (North and Weingast 1989, 818-819). Similarly, when Hamilton rated the danger of legal change above that of legal stasis, he also did so on the background

of a system of common law courts for business regulation and a situation in which “the field of private property [was] already extended to cover practically every form of tangible and intangible wealth” (Beard 1961 [1913], chapter 6). Implicitly, then, arguments suggesting that a credible commitment to legal stasis defends property rights involve an assertion that the initial legal framework (or “reversion point” after a veto) is an appropriate one, and link this appropriateness to the activity of common law courts. The Russian examples above then, would offer no ammunition against the credible commitment argument, either because Russia operates with a system of civil rather than common law or because the laws on bankruptcy, provisional remedies, and share consolidation were of poor quality, unlike the tried-and-true common law traditions of 18th century Britain and the U.S.

If North and Weingast meant to suggest that no country without a common law tradition can have secure property rights, which is unlikely, they were taking an extreme and unconvincing position. Even those promoting the idea of superior shareholder property rights protection in common law systems discuss relative superiority and don’t question that larger shareholders have a secure position in civil law systems. If North and Weingast meant to say that the legal framework of capitalism as of the dawn of the 18th century was ideal for guaranteeing secure property they would be ignoring the vast and manifestly crucial legislative changes of the subsequent centuries--including, especially, on formation of limited liability corporations--that sustain modern capitalism. Finally, the case that the Russian laws mentioned above were intrinsically flawed is not compelling. In bankruptcy law, corporate law, and even provisional remedy law, Russia was drawing on foreign analogs that had worked well in other contexts. What made these laws bad was that the authorizations they granted

were destabilizing in the concrete circumstances into which they were inserted. These circumstances were marked by zero-sum battles over corporate property whose structure reflected the form of privatization (Woodruff 2004).

Alternatively, some readers may feel I have caricatured North and Weingast by slighting their interest in whether “the sovereign will alter property rights for his or her own benefit” (North and Weingast 1989, 803, emphasis added). Thus, one could argue that they did not mean to suggest that constitutional structures do or should bar all alterations in property rights, but only those that are “confiscatory”(North and Weingast 1989, 803). In support of this reading of “Constitutions and Commitment” we can consider the following passage:

...by requiring Parliament’s assent to major changes in policies (such as changing the terms of loans or taxes), the representatives of wealth holders could veto such moves unless they were also in their interest. This allowed action in times of crisis, but eliminated the Crown’s unilateral action (817).

However, this mechanism is inadequate to address the sort of causal chain proposed in the present paper. North and Weingast assume that “major changes in policies” can only come via explicit legislative action. Hacker (2004) has already effectively refuted this assumption in another context. And the burden of the examples above was to show how unchanged rules can come to undermine property-related expectations due to shifting use made of these rules by various actors. Property can be deinstitutionalized without legislative intervention, and representation in the legislature gives no veto over this process. Indeed, the exercise of vetoes can block reinstitutionalization, as the examples above demonstrated. North and Weingast’s reliance on a unified interest of “wealth holders” is far too simplistic for the real world situations in which “wealth holders” regularly find themselves in conflict.

Another potential objection is that what I have described is not the operation of a legal system but the operation of a corrupt legal system, at least insofar as the Russian examples go. One Russian lawyer described most provisional remedies rulings as having “‘bribe’ stamped on their foreheads”(Author’s interview, 2003), given their tenuous relationship to the causes of action and manifest calculation to achieve particular effects. Scholars who have discussed the “capture” of bankruptcy (Mogiliansky, Sonin, and Zhuravskaya) posit a corrupt distortion of legal implementation by local authorities. Whatever the truth in such views, it is clear that legislative changes were capable of limiting the opportunities for such corruption. Even if courts were rendering decisions reflecting judges’ cupidity rather than their reason, they were constrained to do so in ways defensible according to existing law. Changing the laws did have the effect of restabilizing property-related expectations. And what I have been trying to demonstrate is that reinstitutionalization of property can require positive legislative action. So for present purposes whether judicial decisions were corrupt is beside the point.

Finally, some readers may find it jarring that I have focused so much on what might be termed “horizontal” struggles over property between non-state actors, whereas the focus of the credible commitment literature would seem to be “vertical” conflicts between a sovereign and property holders. To this two responses may be made. The first concerns the nature of sovereignty under a system of private property. It was a crucial point of the legal realists that private property disperses sovereignty (Cohen 1927; Commons 1957, 318 and passim): it invests all those with legal claims to property with a piece of the sovereign power. Law not only forbids but authorizes--authorizes, among other things, downsizing of workers, consolidation of shares, invoking of bankruptcy, seeking of provisional remedies--and these authorizations, in em-

powering some, may undermine the realization of others' expectations. Thus, the problem of "binding the sovereign" is in part the problem of binding property owners, and the distinction between "vertical" and "horizontal" conflicts is overdrawn.

Second, to the extent it is appropriate to grant a special status to explicit "agents of the state" ranging from tax collectors to fire inspectors, the problem of binding them is far more ramified than simply establishing limited government. These actors too have intricate legally defined authorizations that may require legislative recrafting if they are to be consistent with the stability of expectations. Thus, the distinction between "vertical" and "horizontal" destabilization of property rights may also be overdrawn insofar as the measures required to overcome it may be similar in form.

In conclusion, it is worth mentioning a political implication of the foregoing analysis. The "credible commitment" literature appears to imply that either credible property rights exist for everyone or they do not. But a realistic view of the implementation and exercise of property rights suggests a far more nuanced picture. And this, in turn, opens the door to a broad discussion of distributional issues: about whose property is secure, and in what boundaries, and how and whether property owners are authorized to undermine others' legitimate expectations. This is an important discussion that all-too-common paeans to property's fundamental importance and facile glorification of limited government thoroughly obscure.

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