Journal of Law and Policy

Volume 24 | Issue 2 Article 1

2016

Constitutions as Counter-Curses: Revenue Allocation and the Resource Curse

Tom Brower

CONSTITUTIONS AS COUNTER-CURSES: REVENUE ALLOCATION AND THE RESOURCE CURSE

Tom Brower[*]

The resource curse—the paradoxical relationship between natural resource abundances and poorer economic growth, weaker political institutions, and higher levels of conflict—remains one of the most confounding issues in international development. Although the literature has proffered a plethora of institutional solutions to the resource curse, they have been vexed by a common theme: their unsuccessful implementation in developing countries without the proper institutional foundations that act as a bulwark against policy reversal and the perpetuation of rent-seeking behavior. This Article introduces constitutionally protected natural resource revenue allocation institutions as a superior mechanism for a state to allocate rents from natural resources. Constitutions act as credible commitments both by formally entrenching rules and institutions against legal change as well as by serving as coordination mechanisms that significantly deter policy reversal due to the significant costs associated with ignoring or undermining constitutional provisions. As a result, constitutional revenue allocations can help counter the resource curse because they are more likely to endure and they can assist in managing and distributing natural resource revenue in an efficient and equitable

---

[*] Vinson & Elkins LLP; J.D. 2015, University of Virginia School of Law; M.A. 2012, Indiana University; B.A. 2008, Washington and Lee University. This Article was the recipient of the 2015 Phanor J. Eder J.D. Prize in Comparative Law from the American Society of Comparative Law and was presented at the Fourth Annual Conference of the Younger Comparativists Committee of the American Society of Comparative Law on April 17, 2015. Additionally, it was selected as part of the Lloyd N. Cutler Fellows in International Law Program and was presented at the 2015 Salzburg Global Seminar on February 20, 2015. I am very grateful to Mila Versteeg for her guidance, as well as Daniel Abebe, Rachel Brewster, and Dylan Lino for constructive comments and suggestions.

fashion. Ultimately, this Article makes significant conceptual and theoretical contributions to one of the most pressing issues facing international development.

"It is the devil's excrement. We are drowning in the devil's excrement."[1]

INTRODUCTION

Over the past half-century, scholars have devoted considerable attention and energy to the resource curse—the paradoxical relationship between natural resource abundances and poor rates of economic growth, weaker and less democratic formal political institutions, and higher levels of intra- and inter-state conflict.[2] Although a number of policy and institutional solutions have been proffered,[3] their utility and applicability to poorly institutionalized countries is limited by the problem of identifying a mechanism for rent-seeking[4] states to credibly commit to managing and utilizing natural resource wealth in a restrained, welfare-enhancing, and non-particularistic manner. Recognizing the limitations of the existing literature, this Article draws on principles of comparative constitutional and institutional design to suggest a new mechanism for addressing the resource curse by providing constitutional protections for natural resource revenue allocation institutions.

This Article contends that constitutions are useful in mitigating the resource curse, particularly in poorly institutionalized countries, through two mechanisms. First, constitutions serve as precommitment mechanisms that bind future generations of citizens to predetermined institutional forms through which politics is practiced.[5] By limiting the actions available to future state elites,

---

[1] *See* TERRY LYNN KARL, THE PARADOX OF PLENTY: OIL BOOMS AND PETRO-STATES 4 (1997) (quoting Juan Pablo Pérez Alfonso, Founder of OPEC).

[2] *See infra* notes 11–17 and accompanying text.

[3] *See infra* Sections I.B, I.C.

[4] In this Article, rent-seeking refers to government restrictions upon the social or political environments in which economic activity occurs in order to capture existing wealth. *See* Anne O. Kreuger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291, 291 (1974).

[5] *See infra* Section II.A.

constitutions increase the likelihood that natural resource revenue allocation institutions remain implemented and substantively unchanged. Second, constitutions operate as coordination mechanisms. Operating as a "focal equilibrium," constitutions provide a set of functional governance structures to which all groups will acquiesce. In doing so, constitutions impose high costs on actors that seek to alter the existing equilibrium, entrenching the existing institutional arrangement.[6] This Article makes a noticeable conceptual and theoretical contribution by integrating comparative constitutionalism principles into the resource curse literature.

This Article proceeds as follows. Part I introduces the concept of the resource curse, reviews the literature on its causal mechanisms, discusses institutional and policy responses to mitigate the resource curse, and assesses the limitations of these responses. With these limitations in mind, Part II provides a theoretical framework that draws upon the constitutional design literature to identify how constitutional protection for natural resource revenue allocation institutions provides a superior mechanism for states to credibly commit to efficiently allocate rents from natural resources. Part III empirically analyzes two case studies, Alaska and Nigeria, and their constitutionally protected mechanisms that allocate revenue from natural resource rents. This Part largely focuses on Nigeria, looking prospectively to assess steps Nigeria could take in its constitution to improve its natural resource revenue allocation and what lessons can be learned from the Alaskan constitution's natural resource fund and direct cash transfer system. The adoption of a constitutionally protected natural resource fund that distributes hydrocarbon revenue to the public in the form of dividends provides the benefits of revenue distribution arrangements[7] by minimizing rent-seeking and creating the proper incentives for governance without the considerable administrative and economic costs of institutional reform. Part IV concludes and offers policy implications.

---

6 *See* John M. Carey, *Parchment, Equilibria, and Institutions*, 33 COMP. POL. STUD. 735, 754 (2000).

7 *See infra* Section I.C.1.

I. EXISTING INSTITUTIONAL SOLUTIONS TO THE RESOURCE CURSE

A. Introducing the "Paradox of Plenty"

A "recurring motif of economic history," the resource curse describes the paradoxical phenomenon that natural resource abundances are associated with poorer development outcomes.[8] This "paradox of plenty" confounds on two fronts. First, it is counterintuitive insofar as history has taught us that natural resources have been a *sine qua non* for the development of national manufacturing and materials industries.[9] Second, countries that have little or nothing in common ethnically, geographically, culturally, or politically still seem to face the same predicament.[10] Natural resource endowments are often associated with poorer development outcomes through economic, political, and social lenses. Studies have shown that countries with natural resource endowments have lower levels of economic growth compared to their resource-poor counterparts.[11] On the political front, "resource dependent economies and resource booms seem to lead to highly dysfunctional state behavior, particularly large public sectors and unsustainable budgetary policies."[12] Natural resource endowments have also been linked to weaker and less democratic formal political institutions,[13]

---

8 *See* Jeffrey D. Sachs & Andrew M. Warner, *Natural Resource Abundance and Economic Growth* 2 (Harvard Univ. Ctr. for Int'l Dev., Discussion Paper No. 517a, 1995).

9 *See, e.g.*, *id.* at 3.

10 *See* KARL, *supra* note 1, at xv–xvi.

11 *See generally* RICHARD M. AUTY, SUSTAINING DEVELOPMENT IN MINERAL ECONOMIES: THE RESOURCE CURSE THESIS (1993); ALAN GELB ET AL., OIL WINDFALLS: BLESSING OR CURSE? (1988); Gobind Nankani, *Development Problems of Mineral Exporting Countries* (World Bank, Working Paper No. 354, 1979); Paul Collier & Benedikt Goderis, *Prospects for Commodity Exporters: Hunky Dory or Humpty Dumpty?*, 8 WORLD ECON. 1 (2007); Sachs & Warner, *supra* note 8. For case studies, see generally KARL, *supra* note 1; MICHAEL ROSS, TIMBER BOOMS AND INSTITUTIONAL BREAKDOWN IN SOUTHEAST ASIA (2001) [hereinafter ROSS, TIMBER BOOMS AND INSTITUTIONAL BREAKDOWN].

12 James A. Robinson et al., *Political Foundations of the Resource Curse*, 79 J. DEV. ECON. 447, 448 (2006).

13 *See, e.g.*, Nancy Birdsall & Arvind Subramanian, *Saving Iraq from Its Oil*, 83 FOREIGN AFF. 77, 81 (2004); Michael L. Ross, *Does Oil Hinder Democracy?*,

higher incidences of corruption,[14] and greater misallocations of public resources.[15] Lastly, natural resource-dependent countries are more prone to conflict[16] and human rights abuses.[17]

In the 1950s, structuralist economists raised three main objections to development strategies based on primary commodities. First, primary commodity exporters would suffer from a decline in the terms of trade, which would widen the gap between the rich industrialized states and the poor resource-exporting states.[18] Second, "international commodities markets

---

53 WORLD POL. 325, 356–57 (2001) [hereinafter Ross, *Does Oil Hinder Democracy?*]; Benjamin Smith, *Oil Wealth and Regime Survival in the Developing World, 1960-1999*, 48 AM. J. POL. SCI. 232, 238 (2004); Jay Ulfelder, *Natural Resource Wealth and the Survival of Autocracy*, 40 COMP. POL. STUD. 995, 996 (2007); Xavier Sala-i-Martin & Arvind Subramanian, *Addressing the Natural Resource Curse: An Illustration from Nigeria* 5 (Nat'l Bureau of Econ. Research, Working Paper No. 9804, 2003); Nicholas Shaxson, *Oil, Corruption and the Resource Curse*, 83 INT'L AFF. 1123, 1124 (2007).

[14] *See* Macartan Humphreys et al., *Introduction: What is the Problem with Natural Resource Wealth?*, *in* ESCAPING THE RESOURCE CURSE 1, 11 (Macartan Humphreys et al. eds., 2007); Aaron Tornell & Phillip R. Lane, *The Voracity Effect*, 89 AM. ECON. REV. 22, 23 (1999).

[15] *See* THAD DUNNING, CRUDE DEMOCRACY: NATURAL RESOURCE WEALTH AND POLITICAL REGIMES 5–22 (2008) (arguing that when elites gain their status from the private sector, resource rents will reduce elite opposition to democracy by decreasing popular demand for redistribution); Paul Collier & Anke Hoeffler, *Testing the Neocon Agenda: Democracy in Resource-Rich Societies*, 53 EURO. ECON. REV. 293, 303–05 (2009) (finding that resource wealth has tended to reduce economic growth in both autocracies and fledgling democracies but that strong, functional checks and balances offset this effect).

[16] *See* PAUL COLLIER, ECONOMIC CAUSES OF CIVIL CONFLICT AND THEIR IMPLICATIONS FOR POLICY 6 (2000); Paul Collier & Anke Hoeffler, *Greed and Grievance in Civil Wars*, 56 OXFORD ECON. PAPERS 563, 588 (2004); Paul Collier et al., *On the Duration of Civil War*, 41 J. PEACE RES. 253, 265 (2004); Macartan Humphreys, *Natural Resources, Conflict, and Conflict Resolution: Uncovering the Mechanisms*, 49 CONFLICT RESOL. 508, 511–13 (2005); Ross, *Does Oil Hinder Democracy?*, *supra* note 13, at 328.

[17] *See* Ross, *Does Oil Hinder Democracy?*, *supra* note 13, at 335–36.

[18] *See, e.g.*, Raul Prebisch, U.N. DEP'T OF ECON. AFFAIRS, ECONOMIC COMMISSION FOR LATIN AMERICA, THE ECONOMIC DEVELOPMENT OF LATIN AMERICA, U.N. Sales No. 50.II.G.2 (1950); H. W. Singer, *The Distribution of Gains Between Investing and Borrowing Countries*, 40 AM. ECON. ASS'N 473 (1950). Terms of trade have been shown to be robust determinants of economic growth. *See, e.g.*, William Easterly et al., *Good Policy or Good Luck? Country*

were subject to unusually sharp price fluctuations."[19] Accordingly, states reliant on these volatile international markets would find these fluctuations transferred to their domestic economies, making government revenues and foreign exchange unreliable and private investment prohibitively risky.[20] Third, natural resource industries were unlikely to stimulate broader economic growth because these "enclave" sectors would be insufficiently linked to other sectors of the national economy.[21]

A fourth, and the most well-known, theory of the resource curse is the "Dutch disease," so-named in light of the deterioration of the Netherlands' manufacturing sector following the discovery of oil in the North Sea in the 1970s.[22] The Dutch disease is characterized by two main mechanisms: the "spending effect" and the "resource pull effect."[23] First, a rise in the value of natural resource exports leads to real exchange rate appreciation.[24] As a result, non-natural resource commodities are relatively more expensive, making them both more difficult to export and less competitive against imports.[25] Natural resource commodities generate foreign exchange that facilitates the purchase of internationally traded goods instead of

---

Growth Performances and Temporary Shocks, 32 J. MONETARY ECON. 459 (1993); Enrique G. Mendoza, *Terms-of-Trade Uncertainty and Economic Growth*, 54 J. DEV. ECON. 323 (1996).

[19] Michael L. Ross, *The Political Economy of the Resource Curse*, 51 WORLD POL. 297, 301 (1999) [hereinafter Ross, *The Political Economy of the Resource Curse*].

[20] *See generally* JONATHAN V. LEVIN, THE EXPORT ECONOMIES: THEIR PATTERN OF DEVELOPMENT IN HISTORICAL PERSPECTIVE (1960); Ragnar Nurkse, *Trade Fluctuations and Buffer Policies of Low-Income Countries*, 11 KYKLOS 141 (1958).

[21] Humphreys et al., *supra* note 14, at 4, 18 n.1.

[22] *Id.* at 5. The moniker "Dutch disease" appears to have appeared for the first time in the Economist magazine in 1977, in an article that sought to explain the contrast between the "external health and internal ailments" of Holland's economy. *The Dutch Disease*, ECONOMIST, Nov. 26, 1977, at 82.

[23] Humphreys et al., *supra* note 14, at 5.

[24] *Id.* at 5; Ross, *The Political Economy of the Resource Curse*, *supra* note 19, at 306.

[25] Humphreys et al., *supra* note 14, at 5.

those that are domestically manufactured.[26] Second, because of different rates of return between sectors, factors of production are shifted away from the non-tradables sector to the natural resource sector; this raises the prices of such resources in the domestic market, which, in turn, increases costs to domestic producers.[27]

The principal limiting factor of these macroeconomic explanations, however, was the empirical variation in economic performance among countries endowed with natural resources.[28] While nations such as Nigeria and Venezuela epitomize the resource curse,[29] natural resource endowments were a blessing for nations like Botswana and Norway.[30] Political economists began explaining "[t]he 'resource curse' [as a] primarily . . . political [rather than] economic phenomenon."[31] They identified policy failures as a critical intervening variable and focused on analyzing how states utilized and allocated the revenues associated with natural resource endowments.[32] Political economists proffered three main theories. First, cognitive approaches suggested that resource wealth causes a type of myopia among state actors.[33] Upon receiving large windfalls, governments grow irrationally optimistic about future

---

[26] *Id.*; *see also* W. Max Corden & J. Peter Neary, *Booming Sector and De-Industrialization in a Small Open Economy*, 92 ECON. J. 825, 827 (1982).

[27] *See* Humphreys et al., *supra* note 14, at 5; Ross, *The Political Economy of the Resource Curse*, *supra* note 19, at 306.

[28] *See, e.g.*, Ross, *The Political Economy of the Resource Curse*, *supra* note 19, at 308.

[29] *See, e.g.*, KARL, *supra* note 1, at 4.

[30] *See, e.g.*, Humphreys et al., *supra* note 14, at 2.

[31] *See* Terry Lynn Karl, *Ensuring Fairness: The Case for a Transparent Fiscal Social Contract*, *in* ESCAPING THE RESOURCE CURSE, *supra* note 14, at 276, 276 [hereinafter Karl, *Ensuring Fairness*].

[32] *See* Ross, *The Political Economy of the Resource Curse*, *supra* note 19, at 307; Jeffrey D. Sachs, *How to Handle the Macroeconomics of Oil Wealth*, *in* ESCAPING THE RESOURCE CURSE, *supra* note 14, at 173, 184–85.

[33] *See generally* Hussein Mahdavy, *The Patterns and Problems of Economic Development in Rentier States: The Case of Iran*, *in* STUDIES IN ECONOMIC HISTORY OF THE MIDDLE EAST 443 (M.A. Cook ed., 1970); Dani Rodrik, *Understanding Economic Policy Reform*, 34 J. ECON. LITERATURE 9 (Mar. 1996) (discussing cognitive approaches top policy failure). *But see* Ross, *The Political Economy of the Resource Curse*, *supra* note 19, at 310 (noting studies that describe "state actors who are well-informed about the perils of resource booms but whose behavior is highly constrained by political pressures and institutions").

revenues and "devote the greater part of their resources to jealously guarding the status quo" instead of promoting development.[34] As a result, "politicians tend to over-extract natural resources relative to the socially efficient extraction path because they only care about the future stock of resources if they are in power."[35] Societal theories suggested that windfalls from natural resource booms enhance the political leverage of non-state actors who favor growth-impeding policies.[36] If non-state actors associated with the natural resource sector are able to collectively organize, their capacity to pressure the government to adopt particular sector-friendly policies is considerably improved.[37] Many natural resource sectors are capital intensive and have economies of scale, and therefore have an industrial structure that facilitates relatively easy collective action.[38]

Lastly, rentier state theories contended that when governments gain most of their revenues from external sources, such as resource rents or foreign assistance, they are freed from the need to levy domestic taxes and become less accountable to the societies they govern.[39] Countries dependent on the same export or activity are likely to be characterized by a particular type of institutional

---

[34] Mahdavy, *supra* note 33, at 443.

[35] Robinson et al., *supra* note 12, at 450.

[36] *See* ROBERT BATES, TOWARDS A POLITICAL ECONOMY OF DEVELOPMENT: A RATIONAL CHOICE PERSPECTIVE (1988); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION AND THE THEORY OF GROUPS (1965).

[37] The paradigmatic example is the resource-poor East Asian nations moving away from import-substitution industrialization, while the resource-rich Latin American nations failed to change their industrial policy. *See* Ross, *The Political Economy of the Resource Curse*, *supra* note 19, at 311.

[38] *See* D. MICHAEL SHAFER, WINNERS AND LOSERS: HOW SECTORS SHAPE THE DEVELOPMENT PROSPECTS OF STATES 2–3, 10, 25 (1994).

[39] KARL, *supra* note 1, at 16; Ross, *The Political Economy of the Resource*, *supra* note 19, at 312. *But see* John Waterbury, *Democracy Without Democrats? The Potential for Political Liberalization in the Middle East*, *in* DEMOCRACY WITHOUT DEMOCRATS? THE RENEWAL OF POLITICS IN THE MUSLIM WORLD 29 (Ghassan Salamé ed., 1994) ("[N]either historically nor in the twentieth century is there much evidence [in the Middle East] that taxation has evoked demands that governments account for their use of tax monies. Predatory taxation has produced revolts, especially in the countryside, but there has been no translation of tax burden into pressures for democratization.").

isomorphism[40] focusing on the organization of the state apparatus.[41] As a result, "the origins of a state's revenues reveal the links among modes of economic development, the transformation of political institutions, the shaping of preferences, and, ultimately, the capacity of states to design or alter their development trajectories."[42]

A variety of rentier state theories emphasize different causal mechanisms linking resource rents and poor economic governance. Hussein Mahdavy, who first advanced the rentier state concept, argues that resource rents make state officials both myopic and risk-averse.[43] Hootan Shambayati suggests that rentier states face little social pressure to improve their economic policies because their low taxes and generous welfare programs discourage opposition groups from mobilizing around economic issues.[44] Kiren Aziz Chaudhry suggests that rentier states develop poor extractive institutions and therefore lack the information they need to formulate sound development strategies.[45] Lisa Anderson argues that rentier states adopt exceptionally risk-averse policies, favoring egalitarian current consumption over development policies that, while furthering social and economic transformation, risk provoking social conflict.[46]

Despite their nuances, these theories share two fundamental claims: first, that states are revenue satisficers rather than revenue maximizers; and second, a state's demand for revenues is positively

---

[40] *See* Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 147 (1983) (describing institutional isomorphism as a phenomenon in which institutional and organizational fields become homogenous to one another with respect to structure, culture, and output as a result of individual efforts to deal rationally with uncertainty and constraint).

[41] KARL, *supra* note 1, at 13.

[42] *Id.* at 222.

[43] Mahdavy, *supra* note 33, at 443.

[44] *See generally* Hootan Shambayati, *The Rentier State, Interest Groups, and the Paradox of Autonomy: State and Business in Turkey and Iran*, 26 COMP. POL. 307 (1994).

[45] *See generally* Kiren Aziz Chaudhry, *The Price of Wealth: Business and State in Labor Remittance and Oil Economies*, 40 INT'L ORG. 101 (1989).

[46] *See generally* Lisa Anderson, *The State in the Middle East and North Africa*, 20 COMP. POL. 1 (1987).

correlated with the soundness of its economic policies.[47] The state's rent-seeking behavior dominates both the political and economic logics of the state.[48] As a result, the state's jurisdiction is expanded while its authority is weakened by increasing the opportunities for both public and private actors to engage in rent-seeking.[49] The institutionalization of rent-seeking, coupled with a lack of political accountability and weak alternative sources of authority, produces a set of state interests that are set on protecting the state's revenue base and advancing policies focused on interests that will perpetuate the status quo.[50] Thus, rentier states have been characterized by significant misallocations of state resources, unsustainable budgets, bloated public sectors, and other forms of patronage and clientelism that are utilized as means of regime survival.[51]

As a result, the literature has overwhelmingly emphasized the primacies of strong institutions and good governance as bulwarks against the resource curse.[52] In fact, Terry Lynn Karl notes that the institutional characteristics of the rentier state are essentially inevitable unless significant state building has occurred prior to the introduction of the export activity.[53] However, the mantra of "institutions matter"[54] is unsatisfying on several fronts. Institutions and governance are conceptually unwieldy and can be operationalized in multitudinous ways.[55] Second, highly abstract

---

[47] Ross, *The Political Economy of the Resource Curse*, *supra* note 19, at 313–14.

[48] KARL, *supra* note 1, at 15.

[49] *Id.*

[50] *See id.* at 16, 227.

[51] Robinson et al., *supra* note 12, at 448–50, 466; KARL, *supra* note 1, at 268–69.

[52] *See* Robinson et al., *supra* note 12 at 447; ROSS, TIMBER BOOMS AND INSTITUTIONAL BREAKDOWN, *supra* note 11, at 298; Sachs, *supra* note 32, at 190–91; Jeffrey A. Frankel, *The Natural Resource Curse: A Survey* (Nat'l Bureau of Econ. Research, Working Paper No. 15836, 2010).

[53] KARL, *supra* note 1, at 13.

[54] *See, e.g.*, DOUGLASS C. NORTH, STRUCTURE AND CHANGE IN ECONOMIC HISTORY (1980); DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990) [hereinafter NORTH, INSTITUTIONAL CHANGE].

[55] "Most of the work on governance appears satisfied with a description or provision of a shopping list of ingredients for good governance . . . . [s]uch

analysis neglects specific features of institutional design necessary to mitigate the resource curse, both in terms of the origin of the institution and its implementation in particular resource-rich nations. Noting these limitations, the literature has approached the question of institutional solutions to the resource curse on both international and domestic fronts.

B. International Institutions: Transparency Through Corporate Social Responsibility

Grounded in the human rights literature, scholars contend that international institutions that regulate access to information pertaining to natural resources serve to mitigate the resource curse, particularly the sociopolitical conflicts and human rights violations associated with resource-rich states.[56] A number of conflicts are funded by revenues from natural resources—so-called conflict minerals.[57] Accordingly, simply limiting the access to disputed resources can decrease the motivation and funding for such conflicts.[58] The lion's share of international institutions that have focused on extractive industries have done so through corporate social responsibility frameworks focused on increased information

---

[as] . . . accountability, transparency, anti-corruption, rule of law, advancement for women, democracy, and decentralization." Francis N. Botchway, *Good Governance: The Old, the New, the Principle, and the Elements*, 13 FLA. J. INT'L L. 159, 161 (2001).

[56] *See, e.g.*, Matthew Genasci & Sarah Pray, *Extracting Accountability: The Implications of the Resource Curse for CSR Theory and Practice*, 11 YALE HUM. RTS. & DEV. L. J. 37 (2008); Patrick J. Keenan, *International Institutions and the Resource Curse*, 3 PA. ST. J. L. & INT'L AFF. 216 (2014); Lesley Wexler, *Regulating Resource Curses: Institutional Design and Evolution of the Blood Diamond Regime*, 31 CARDOZO L. REV. 1717 (2010); Annie Wallis, *Data Mining: Lessons from the Kimberley Process for the United Nations' Development of Human Rights Norms for Transnational Corporations*, 4 NW. U. J. INT'L HUM. RTS. 388 (2005).

[57] *See* Ian Bannon & Paul Collier, *Natural Resources and Conflict: What We Can Do*, *in* NATURAL RESOURCES AND VIOLENT CONFLICT: OPTIONS AND ACTIONS 1, 4–7 (Ian Bannon & Paul Collier eds., 2003); Wexler, *supra* note 56, at 1724–26.

[58] Wexler, *supra* note 56, at 1728.

and transparency in transactions involving natural resources.[59] The underlying logic of such policies is that, with greater exposure of the financial relationships between states and extractive industries, citizens gain access to information that enables them to exert pressure on their governments to allocate more resources toward more socially ameliorative policies such as poverty alleviation.[60] Additionally, consumers of these resources may elect to not purchase from firms operating in countries with a history of human rights violations; accordingly, in order to sustain their business, these firms may also pressure governments.[61]

To this end, a number of international regulatory regimes and institutions have been created. The Kimberley Process,[62] a global certification scheme designed to drive blood diamonds off the legal market, has been described as a "model for the governance of other commodities for which there is significant inadvertent funding of conflict"[63] and as an exemplar for international action on humanitarian and security problems.[64] Sections 1502 and 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act have recently blurred the lines between securities regulations and human rights law.[65] Section 1502 imposes a new reporting requirement on publicly traded companies that manufacture products using certain conflict minerals.[66] Companies must identify

---

[59] *See id.* at 1740–41.

[60] *See, e.g.*, HALINA WARD, CORP. SOC. RESPONSIBILITY PRACTICE OF THE WORLD BANK GRP., PUBLIC SECTOR ROLES IN STRENGTHENING CORPORATE SOCIAL RESPONSIBILITY: TAKING STOCK 8 (Jan. 2004), http://documents.worldbank.org/curated/en/548301468313740636/pdf/346560CSR1Taking1Stock.pdf.

[61] The most well known case pertains to "blood diamonds" or "conflict diamonds." *See, e.g.*, Wexler, *supra* note 56.

[62] *See id.*

[63] *Id.* at 1720; *see also* Bannon & Collier, *supra* note 57, at 1, 13.

[64] Andrew Bone, *Conflict Diamonds: The De Beers Group and the Kimberley Process*, *in* BUSINESS AND SECURITY: PUBLIC-PRIVATE SECTOR RELATIONSHIPS IN A NEW SECURITY ENVIRONMENT 129 (Alyson J. K. Bailes & Isabel Frommelt eds., 2004); Wallis, *supra* note 56, at 388.

[65] *See generally* Galit A. Sarfaty, *Human Rights Meets Securities Regulation*, 54 VA. J. INT'L L. 97 (2013).

[66] Dodd-Frank Wall Street Reform and Consumer Protection Act § 1502, 15 U.S.C. § 78m(p) (2016).

whether the sourcing of the minerals originated in the Democratic Republic of Congo and bordering countries.[67] If so, they must submit an independent private sector audit report on due diligence measures taken to determine whether those conflict minerals directly or indirectly financed or benefited armed groups in the covered countries.[68] Section 1504 requires natural resources companies to disclose certain payments made to governments for the commercial development of oil, natural gas, or minerals.[69] Although the United States District Court for the District of Columbia vacated Section 1504 in 2013,[70] the provision reinforced the global standard outlined by the Extractive Industries Transparency Initiative ("EITI"), a multi-stakeholder coalition that promotes revenue transparency through government legislation.[71] Countries that commit to implementing EITI require all extractive companies operating within that country to report their oil, gas, and mining payments, which are then compared against reported receipts from the government and made public.[72]

These international institutional solutions to the resource curse are limited on several fronts. Many present problems with respect to enforcement, particularly due to their voluntary nature.[73] Given that rentier states adopt a policy framework that seeks to preserve the status quo and perpetuate rent-seeking, it is inherently counterintuitive for them to self-select into a set of rules that seeks

---

67 *Id.*

68 *Id.*

69 *Id.* § 1504; 15 U.S.C. § 78m(q).

70 Am. Petroleum Inst. v. Sec. and Exch. Comm'n, 953 F. Supp. 2d 5 (D.D.C. 2013).

71 EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, http://eiti.org/ (last visited June 7, 2016); *see* Peter Eigen, *Fighting Corruption in a Global Economy: Transparency Initiatives in the Oil and Gas Industry*, 29 HOUS. J. INT'L L. 327 (2007); Genasci & Pray, *supra* note 56; Virginia Haufler, *Disclosure as Governance: The Extractive Industries Transparency Initiative and Resource Management in the Developing World*, 10 GLOBAL ENVTL. POL. 53 (2010).

72 Genasci & Pray, *supra* note 56, at 51.

73 *See, e.g.*, Eli G. Burton, *Reverse the Curse: Creating a Framework to Mitigate the Resource Curse and Promote Human Rights in Mineral Extraction Industries in Africa*, 28 EMORY INT'L L. REV 425, 434 (2014) (identifying enforcement issues with the Kimberley Process).

to affect change in natural resource-rich states.[74] However, even in instances where rentier states voluntarily adopt these institutions, there may be a fundamental disjunction between being party to such agreements and institutions, on one hand, and the extent of actual commitment, on the other hand. States often adopt a "politics of the mirror" where aid partners and international actors are placated by state elites who give the impression of reform but instead devote financial resources to private accumulation and violent preservation of power.[75]

Critics of international institutions also point to an improper focus of these regimes that ultimately limits the likelihood of institutional change in resource-rich countries. Corporate social responsibility agendas reflect the agendas of stakeholders in high-income countries, particularly the legal and reputational risks of Western corporations; accordingly, these institutions simply do not address the most salient of problems in resource-rich countries.[76] Some critics have also argued that such institutions erode the very concept of sovereignty, and are nothing more than neo-colonialism under another name, as these institutions advocate foreign intrusion into what should be purely domestic concerns.[77] Although this is generally used as a normative critique, it is also problematic on a positive front, as these frameworks are unlikely to be tailored to the specific national contexts of each country, and thus may struggle in being successfully implemented.[78] Given these issues with international institutional approaches to the resource curse, scholars have also suggested domestic institutional reforms in the form of

---

[74] *See supra* note 50 and accompanying text.

[75] PATRICK CHABAL & JEAN-PASCAL DALOZ, AFRICA WORKS: DISORDER AS POLITICAL INSTRUMENT 117 (1999).

[76] *See* Genasci & Pray, *supra* note 56, at 41; Lisa J. Laplante & Suzanne A. Spears, *Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. L.J. 69, 82–84 (2008).

[77] *See* Keenan, *supra* note 56, at 255.

[78] *Id.* at 255–56 (noting that "countries expect to have unchallenged authority over their domestic affairs, including the use of natural resources found in their territory"). *But see* W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866 (1990) (arguing that the advent of universal human rights norms has modified traditional conceptions of sovereignty).

natural resource funds ("NRFs"), revenue distribution arrangements ("RDAs"), and intergovernmental fiscal relations ("IGFR").

C. *An Alphabet Soup of Domestic Institutions: NRFs, RDAs, and IGFR*

1. Natural Resource Funds (NRFs)

NRFs have emerged as pragmatic, domestic institutional tools that can help mitigate, avoid, or reverse the resource curse.[79] NRFs can take a variety of forms, ranging from independent institutions characterized by a high degree of discretion and autonomy to funds that exist as government accounts.[80] NRFs aim to create a trust or trust-like institution that collects a share of government revenue from the exploitation of natural resources that can be used to fund public outlays in the indefinite future.[81] Generally, NRFs are controlled and managed as *stabilization funds* that aim to smooth expenditures and mitigate the effects of revenue volatility associated with natural resources or *savings funds* that create intergenerational stores of wealth.[82]

Theoretically, NRFs commit states to adopting more sound fiscal policies and reduce corruption by placing limitations on the natural resource revenue directed to the fund or placing them out of reach entirely.[83] The NRF acts as a surrogate for a rentier state's

---

[79] *See, e.g.*, Emeka Duruigbo, *Managing Oil Revenues for Socio-Economic Development in Nigeria: The Case for Community-Based Trust Funds*, 30 N.C. J. INT'L L. & COM. REG. 121, 169–70 (2004) [hereinafter Duruigbo, *Managing Oil Revenues*] ("Lately, trust funds have been attracting attention in academic and policy circles as pragmatic tools for addressing the unfortunate predicament generally manifesting in entities blessed with natural resources, especially oil.").

[80] Jeffrey Davis et al., *Stabilization and Savings Funds for Nonrenewable Resources: Experience and Fiscal Policy Implications*, *in* FISCAL POLICY FORMULATION AND IMPLEMENTATION IN OIL-PRODUCING COUNTRIES 273 (J.M. Davis et al. eds., 2003) [hereinafter Davis et al., *Stabilization and Savings Funds for Nonrenewable Resources*].

[81] Sachs, *supra* note 32, at 189; *see also* Davis et al., *Stabilization and Savings Funds of Nonrenewable Resources*, *supra* note 80, at 273–74.

[82] Davis et al., *Stabilization and Savings Funds of Nonrenewable Resources*, *supra* note 80, at 274.

[83] Karl, *Ensuring Fairness*, *supra* note 31, at 293–94.

weak formal institutions, is managed by multiple apolitical stakeholders,[84] and is designed as an independent and transparent institution[85] that is tailored to local context.[86] Despite popular belief in their utility, however, scholarship on NRFs does not find evidence that funds lead to better management of natural resources.[87] This poor empirical relationship can be explained by omitted variable bias[88]—namely, that the economic logic used to justify the use of NRFs is insufficient to show the necessity of the funds.[89]

Instead, the potential value of NRFs is institutional. NRFs affect the political incentives facing policymakers and constrain behavior otherwise focused on myopia.[90] Policymakers have strong political incentives to follow suboptimal economic policies because the competition for power among different groups can create perverse incentives to overspend in the short-run, even if there is a more stable time path for spending that all groups would prefer.[91] NRFs address the political incentive problem in three ways. First, NRFs can be set up with rules that govern the magnitude and composition of spending from the fund to improve the regularity and consistency

---

[84] Stephen D. Krasner, Troubled Societies, Outlaw States, and Gradations of Sovereignty 41 (July 20, 2002) (unpublished manuscript) (on file with author); *cf.* Macartan Humphreys & Martin E. Sandbu, *The Political Economy of Natural Resource Funds*, *in* ESCAPING THE RESOURCE CURSE, *supra* note 14, at 194, 219.

[85] Joseph C. Bell & Teresa Maurea Faria, *Critical Issues for a Revenue Management Law*, *in* ESCAPING THE RESOURCE CURSE, *supra* note 14, at 286, 287–88; Humphreys & Sandbu, *supra* note 84, at 220–21.

[86] Humphreys & Sandbu, *supra* note 84, at 214.

[87] *Id.* at 195.

[88] In econometrics, omitted variable bias occurs when the omission of a variable from a regression that affects the dependent variable becomes part of the error term and, as a result, there is a potential violation of the assumption for the minimum sum of squared errors criterion to be unbiased. *See* Alan O. Sykes, *An Introduction to Regression Analysis* 25 (Coase-Sandor Inst. for L. & Econ., Working Paper No. 20, 1993). Additionally, if the omitted variable is correlated with included variables, the coefficients of included variables will also be biased. *See* ERIC A. HANUSHEK & JOHN E. JACKSON, STATISTICAL METHODS FOR SOCIAL SCIENTISTS 81–82 (1977); J. JOHNSTON, ECONOMETRIC METHODS 168–69 (2d ed. 1972).

[89] Humphreys & Sandbu, *supra* note 84, at 195.

[90] *Id.*

[91] *Id.* at 200.

of policy.[92] Second, NRFs impose a separation, or sharing, of decision-making authority.[93] Lastly, NRFs provide information to citizens and, as a result, encourage greater governmental accountability and more efficient policy outcomes.[94]

The paragon of NRFs is undoubtedly the Government Pension Fund of Norway ("GPF").[95] The GPF was established in 1990 as the Petroleum Fund of Norway and renamed in 2006.[96] It was established as a fiscal policy tool to support long-term management of petroleum revenues and transparency in their subsequent use.[97] The GPF operates both as a stabilization and as a savings fund, the latter particularly focused on helping the Norwegian government cope with the costs associated with an aging population and rising pension costs.[98] Rather than having a separate legal persona, the GPF is part of the Norwegian state apparatus and managed by Norges Bank, the Norwegian Central Bank, and the Norwegian Ministry of Finance.[99] Operationally, the GPF receives all net oil revenues and "finances the budget's non-oil deficit through a reverse transfer."[100] One of the most lauded characteristics of the GPF is its transparency:

---

[92] *Id.* at 214.

[93] *Id.*

[94] *Id.*

[95] *See* Larry Catá Backer, *Sovereign Wealth Funds As Regulatory Chameleons: The Norwegian Sovereign Wealth Funds and Public Global Governance Through Private Global Investment*, 41 GEO. J. INT'L L. 425, 452 (2010).

[96] *The Fund*, NORGES BANK INVESTMENT MANAGEMENT (Mar. 14, 2016), http://www.nbim.no/en/the-fund/about-the-fund/. The fund was not activated until 1995, when an overall budget surplus was reached. *See* Davis et al., *Stabilization and Savings Funds for Nonrenewable Resources*, *supra* note 80, at 303.

[97] Backer, *supra* note 95, at 450–51; Martin Skancke, *Fiscal Policy and Petroleum Fund Management in Norway*, *in* FISCAL POLICY FORMULATION AND IMPLEMENTATION IN OIL-PRODUCING COUNTRIES, *supra* note 80, at 316, 320.

[98] Davis et al., *Stabilization and Savings Funds for Nonrenewable Resources*, *supra* note 80, at 283; Skancke, *supra* note 97, at 316–17.

[99] Backer, *supra* note 95, at 451–52.

[100] Davis et al., *Stabilization and Savings Funds for Nonrenewable Resources*, *supra* note 80, at 286.

> [t]he International Monetary Fund indicates that [Norway's] Ministry of Finance . . . reports regularly on the governance framework, the fund's goals, investment strategy and results, and ethical guidelines. The Central Bank—the fund's operational manager—publishes quarterly and annual reports on the management of the fund, including its performance and an annual listing of all investments. Detailed information on the fund's voting in shareholders' meetings is also published.[101]

Thus, the institutional design of the GPF counterbalances the incentive structures built into rentier states by encouraging government accountability and efficient use of natural resource revenues.

The utility of NRFs has, however, been criticized with respect to their viability in developing countries with weaker institutions.[102] NRFs only work if they are managed in ways that are wholly uncharacteristic of rentier states: strict adherence to the rule of law, intertemporal stability, an emphasis on intergenerational wealth, a low discount rate in respect to the future, immunity from political and rent-seeking pressures, and political will.[103] Accordingly, the institutional design of NRFs represents their core limitation in the developing world. In countries with weak institutions, funds that have been modeled after Norway's GPF have been characterized by highly malleable fund rules, a dearth of accountability mechanisms, and high incidences of policy reversal.[104] Accordingly:

> [t]he central lesson that Norway's experience provides other oil exporters and natural resource-

---

[101] Delia Velculescu, *IMF Survey: Norway's Oil Fund Shows the Way for Wealth Funds*, IMF SURV. MAG. (July 9, 2008), http://www.imf.org/external/pubs/ft/survey/so/2008/POL070908A.htm.

[102] Michael L. Ross, *How Mineral-Rich States Can Reduce Inequality*, *in* ESCAPING THE RESOURCE CURSE, *supra* note 14, at 237, 243–44 [hereinafter Ross, *How Mineral-Rich States Can Reduce Inequality*].

[103] *Id.*

[104] *See, e.g.*, Humphreys & Sandbu, *supra* note 84, at 243; Jeffrey Davis et al., *Oil Funds: Problems Posing as Solutions*, FIN. & DEV., Dec. 2001, http://www.imf.org/external/pubs/ft/fandd/2001/12/davis.htm; Ross, *How Mineral-Rich States Can Reduce Inequality*, *supra* note 102, at 243.

> dependent countries is that structure matters . . . . Where appropriate institutions are in place, a state has considerably good prospects of managing the commencement of oil development and greater capacity to handle booms that occur thereafter.[105]

Ultimately, the specific institutional design features are the critical causal variables in explaining the success or failure of natural resource revenue allocation mechanisms.

Chad's NRF experience as part of the Chad-Cameroon Oil Pipeline project is illustrative of the extant critiques of domestic institutional solutions to the resource curse. In 1988, the Chadian government had entered into a concession agreement with a consortium of oil companies "to develop . . . oil fields and extract crude oil."[106] Due to its landlocked character, Chad entered into a bilateral agreement with Cameroon in 1996 to construct and operate a 1,070-kilometer pipeline in order to export the oil to international markets.[107] The pipeline was the largest private sector investment project ever constructed in sub-Saharan Africa.[108] However, because of the high risk associated with such a major project in a poorly institutionalized state, one member of the consortium, ExxonMobil, refused to participate without the support of the World Bank.[109]

The World Bank conditioned the loan agreement on Chad's approval of a Revenue Management Law ("RML"), designed to prevent Chadian government officials from misallocating oil

---

105 Emeka Duruigbo, *Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law*, 38 GEO. WASH. INT'L L. REV. 33, 86 (2006) [hereinafter Duruigbo, *Permanent Sovereignty*].

106 S.A. BRONKHORST, LIABILITY FOR ENVIRONMENTAL DAMAGE AND THE WORLD BANK'S CHAD-CAMEROON OIL AND PIPELINE PROJECT 8 (S.A. Bronkhorst ed., 2000).

107 Emeka Duruigbo, *The World Bank, Multinational Oil Corporations, and the Resource Curse in Africa*, 26 U. PA. J. INT'L ECON. L. 1, 38–39 (2005) [hereinafter Duruigbo, *The World Bank*].

108 CLAUDIA FRANK & LENA GUESNET, "WE WERE PROMISED DEVELOPMENT AND ALL WE GOT WAS MISERY"—THE INFLUENCE OF PETROLEUM ON CONFLICT DYNAMICS IN CHAD 25 (2010).

109 *See* Genoveva Hernández Uriz, *The Application of World Bank Standards to the Oil Industry: Can the World Bank Group Promote Corporate Responsibility*, 28 BROOK. J. INT'L L. 77, 93 (2002).

revenue.[110] The RML was codified in Chadian Law 001.[111] The RML specified that oil royalties were to be deposited into an offshore escrow account that saved 10 percent for future generations.[112] Of the balance of royalty revenue, 80 percent was earmarked for priority sectors—public health, social affairs, education, rural development, infrastructure, the environment, and water resources.[113] "[F]ifteen percent [of the balance] was set aside for the state's recurring . . . cost, and the remaining five percent was to be spent on development in the oil-producing Doba region."[114] In order to monitor the allocation of monies and fund spending, "the RML also established the Petroleum Revenue Oversight and Control Committee" ("the Collège"), comprised "of representatives from the judiciary, government, and civil society."[115] The project became the "most significant, and most closely watched, experiment designed to change the pattern of the 'oil curse' and promote poverty reduction through targeted use of oil revenues."[116]

From its inception, the design of the RML has been highly criticized, and these flaws were ultimately exploited to undermine the project's success.[117] Approximately less than half of Chadian oil revenue was not covered by the allocation and oversight

---

[110] Loan Agreement (Petroleum Pipeline Development Project) Between Republic of Chad and International Bank for Reconstruction and Development sched. 5, Chad–Int'l Bank Reconstr. & Dev., Mar. 19, 2001, http://web.worldbank.org/archive/website01210/WEB/IMAGES/TD_LA_EN.PDF.

[111] NAT'L ASSEMBLY Law No. 001/PR/99 of January 11, 1999 on the Petroleum Revenue Management (Chad) [hereinafter RML]; *see also* Dustin N. Sharp, *Requiem for a Pipedream: Oil, the World Bank, and the Need for Human Rights Assessments*, 25 EMORY INT'L L. REV. 379, 390 (2011).

[112] RML, *supra* note 111, § 2, art. 9; Sharp, *supra* note 111, at 390.

[113] RML, *supra* note 111, § 2, art. 8(c).

[114] Annalisa M. Leibold, *Aligning Incentives for Development: The World Bank and the Chad-Cameroon Oil Pipeline*, 36 YALE J. INT'L L. 167, 175 (2011).

[115] *Id.*; *see* RML, *supra* note 111, § 1, arts. 15, 18.

[116] IAN GARY & TERRY LYNN KARL, BOTTOM OF THE BARREL: AFRICA'S OIL BOOM AND THE POOR 60 (2003).

[117] *See id.* at 68; Duruigbo, *The World Bank*, *supra* note 107, at 43–46; Sharp, *supra* note 111, at 391; Genoveva Hernández Uriz, *To Lend or Not to Lend: Oil, Human Rights, and the World Bank's Internal Contradictions*, 14 HARV. HUM. RTS. J. 197, 223 (2001).

mechanisms of the RML based on the statutory language.[118] For instance, "the spending [restrictions] covered only direct profits . . . [defined as] the government's share of the dividends and royalties, excluding taxes, customs, and other duties."[119] Tax revenue and signing bonuses were exempt from the RML.[120] The RML could also be changed by presidential decree.[121] This became problematic in 2006 when President Idris Déby signed a law that included national security as a priority sector under RML in order to increase military spending in the eastern provinces bordering the Darfur region of Sudan.[122] The government also abolished the part of the fund devoted to saving for future generations, effectively completing the policy reversal.[123]

In addition to the weaknesses of the enacting statute, the Collège was designed to be weak and woefully inadequate at undertaking its monitoring support. The Collège suffered from limitations on its enforcement powers,[124] inadequate resources,[125] and an unclear mandate.[126] Importantly, the procedure for removing members of the Collège was easy, which "made it particularly susceptible to political manipulation."[127] The Chadian state was able to retain

---

[118] Sharp, *supra* note 111, at 391.

[119] Leibold, *supra* note 114, at 75; *see* RML, *supra* note 111, § 1, arts. 3–4.

[120] RML*, supra* note 111, § 1, arts. 2–4.

[121] *Id.* § 2, art. 8; Uriz, *supra* note 117, at 223.

[122] Han van Dijk, *Political Deadlock in Chad*, 106 AFR. AFF. 697, 697–99 (2007). The Chadian government also spent part of its signing bonus on arms purchases. *See* GARY & KARL, *supra* note 116, at 70.

[123] van Dijk, *supra* note 122, at 698–99; Paul Blustein, *Chad Pipeline Project Steeped in Controversy: World Bank Reconsiders Role as Nation looks at Altering Terms*, HOUS. CHRON. (Dec. 28, 2005), http://www.chron.com/business/energy/article/Chad-pipeline-project-steeped-in-controversy-1569643.php.

[124] KORRINA HORTA ET AL., THE CHAD-CAMEROON OIL & PIPELINE PROJECT: A PROJECT NON-COMPLETION REPORT 12 (2007).

[125] LISA MARGONELLI, OIL ON THE BRAIN: PETROLEUM'S LONG, STRANGE TRIP TO YOUR TANK 181 (2007).

[126] GARY & KARL, *supra* note 116, at 70–72.

[127] *Id.* at 72 (discussing Chad's removal of Amine Ben Bark from from his position as president of the Revenue Oversight Committee); Alexandros Zervos, *Linking Natural Resource Exploitation and Primary Health Care in Developing Countries*, 11 UCLA J. INT'L L. & FOREIGN AFF. 227, 253 (2006).

considerable control over its natural resource revenues and perpetuate rent-seeking behavior due to the poor institutional design of the RML and the capacity for policy reversal.

2. Revenue Distribution Arrangements (RDAs)

By comparison, RDAs directly transfer revenue from the sale of natural resources to the citizens of that country.[128] The underlying logic of RDAs is based on normative claims focusing on the recognition that nationals of a country are the "true and legitimate owners" of natural resources contained in their country.[129] Supporters also turn to political economic arguments that direct transfers to citizens will deprive governments of the opportunity to misallocate resources and thus reduce rent-seeking and corruption.[130] Positive economic arguments hold that direct transfers develop credit markets and foster entrepreneurship and economic growth.[131] Additionally, RDAs can potentially make the government dependent on taxes rather than resource rents, the underlying causal mechanism of rentier state theory.[132] Michael L. Ross points out some of the benefits of cash transfers: they provide for more equitable rent distribution; allow individuals, who are in a better position than governments, to decide the optimal way to spend the rents and make spending choices; prevent corruption and rent-seeking because rents are spared from politicians' control; and can be tied to complementary social goals, such as child immunization or increasing primary and secondary school enrollment.[133] There are only a few RDAs currently implemented. Both Alaska and Alberta utilize direct distribution agreements to much success, and recent

---

[128] Sala-i-Martin & Subramanian, *supra* note 13, at 17, 19.

[129] *Id.* at 17.

[130] *Id.*; Sachs, *supra* note 32, at 188. A similar argument is proffered in support of foreign aid targeted at the grassroots level. *See generally* WILLIAM EASTERLY, THE WHITE MAN'S BURDEN (2006); WHAT WORKS IN DEVELOPMENT? THINKING BIG AND THINKING SMALL (Jessica Cohen & William Easterly eds., 2009).

[131] *See* Duruigbo, *Permanent Sovereignty*, *supra* note 105, at 80.

[132] *Id.*; *see also supra* notes 39–42 and accompanying text.

[133] Ross, *How Mineral-Rich States Can Reduce Inequality*, *supra* note 102, at 243.

scholarship has argued that other countries—most notably Iraq—should adopt direct distribution plans.[134]

RDAs have been criticized on three grounds. First, direct cash transfers to citizens reduce the amount of funds available for the provision of public goods, particularly infrastructure and social service delivery.[135] This is particularly problematic in poor countries, where public investment rather than private consumption spending is typically needed to foment economic development and growth and, consequently, break the country out of a poverty trap.[136] Second, like NRFs, RDAs depend on proper institutional management and design, which is generally in tension with rentier states.[137] Generally, other forms of specialized commodity funds established in developing countries have failed to function well.[138] Lastly, there is the possibility of generating a "rentier mentality," which "predisposes citizens to an indolent attitude of waiting for checks from the government as a substitute for productive economic activity."[139]

3. Intergovernmental Fiscal Relations (IGFR)

A third institutional solution for managing natural resource revenues is to divide revenues between national and subnational governments through fiscal federalism mechanisms.[140] Outside of

---

[134] *See id.*

[135] Duruigbo, *Permanent Sovereignty*, *supra* note 105, at 81.

[136] *See* Sachs, *supra* note 32, at 177, 188–89.

[137] *See* Ross, *How Mineral-Rich States Can Reduce Inequality*, *supra* note 102, at 243–44.

[138] *See* Davis et al., *Stabilization and Savings Funds of Nonrenewable Resources*, *supra* note 80; Humphreys & Sandbu, *supra* note 84; Ross, *How Mineral-Rich States Can Reduce Inequality*, *supra* note 102.

[139] Duruigbo, *Permanent Sovereignty*, *supra* note 105, at 81 (contending that the magnitude of the distribution may not be large enough to foment such behavior); *see also* DOUGLAS A. YATES, THE RENTIER STATE IN AFRICA: OIL RENT DEPENDENCY AND NEOCOLONIALISM IN THE REPUBLIC OF GABON 21–22 (1996).

[140] Such mechanisms can be operationalized through the concept of subnational fiscal autonomy, or the "set of fiscal relationships between the autonomous levels of government in a single country," and can be broadly characterized by how independent subnational governments are from national

the Middle East, there is a global trend of decentralizing revenues, regardless of whether the state is unitary or federal.[141] The main arguments in favor of these mechanisms focus on providing for ownership of natural resources at the subnational level and compensation for the social, environmental, and infrastructural cost of natural resource extraction.[142] Revenue sharing has also been used as a political tool to appease secessionist tensions in resource-producing areas.[143]

In contrast, critics of fiscal decentralization of natural resource revenue point to the relative higher capacity of central governments. Central governments are more insulated from revenue volatility, absorb new investments from windfall spending, and better implement countercyclical fiscal policies.[144] Central governments can contribute to horizontal equity between subnational units by redistributing natural resource revenue between resource-rich and resource-poor units.[145] Furthermore, and perhaps most important in the context of this Article, fiscal discipline is often worse at the subnational level than the central level.[146] Decentralizing revenues does not imply a circumvention of the rent-seeking state apparatus

---

governments over their revenues, their spending, and their capacity to enter into contracts. J. TYLER DICKOVICK, DECENTRALIZATION AND RECENTRALIZATION IN THE DEVELOPING WORLD: COMPARATIVE STUDIES FROM AFRICA AND LATIN AMERICA AND AFRICA 3–5 (2011).

[141] *See* Ehtisham Ahmad & Eric Mottu, *Oil Revenue Assignments: Country Experiences and Issues*, *in* FISCAL POLICY FORMULATION AND IMPLEMENTATION IN OIL-PRODUCING COUNTRIES, *supra* note 80, at 216, 216–17; Giorgio Brosio, *Oil Revenue and Fiscal Federalism*, *in* FISCAL POLICY FORMULATION AND IMPLEMENTATION IN OIL-PRODUCING COUNTRIES, *supra* note 80, at 243, 243.

[142] Ahmad & Mottu, *supra* note 141, at 217; Ross, *How Mineral-Rich States Can Reduce Inequality*, *supra* note 102, at 249.

[143] Ahmad & Mottu, *supra* note 141, at 217.

[144] Ross, *How Mineral-Rich States Can Reduce Inequality*, *supra* note 102, at 248–49. Countercyclical fiscal policies are those policies relating to government spending and taxation that work against the current state of the economy (i.e., a reduction of spending and increase in taxation during a boom period and an increase in spending and cutting of taxes during a recession). *Id.* at 249.

[145] Ahmad & Mottu, *supra* note 141, at 217.

[146] Ross, *How Mineral-Rich States Can Reduce Inequality*, *supra* note 102, at 266.

or the trickling down of revenue to the household level.[147] Natural resource revenue may remain in the hands of corrupt, rent-seeking actors—simply at another level of government. In these instances, the same kind of institutional concerns expressed with respect to NRFs and RDAs exist in fiscal federalism arrangements.

Given the poor institutionalization of rentier states, the critical question becomes whether successful revenue allocation institutions, such as those in Norway and Alaska, can be used to realign incentives in a way to make them self-enforcing.[148] Identifying a mechanism for a state to constrain its present behavior and make a credible commitment to future action is integral to answering this question in the affirmative. The following Part introduces principles from comparative constitutional design to identify how such a credible commitment can be made to create self-enforcing natural resource revenue allocation institutions to assist in mitigating the resource curse.

II. CONSTITUTIONS, COMMITMENT, AND COORDINATION

A. Theory of Constitutional Credible Commitment

Using natural resource revenue allocation institutions created by statute to manage the resource curse in poorly institutionalized, resource-rich countries is problematic due to the absence of mechanisms to deter future policy reversal. This question fits into a larger framework of establishing credible commitments that bind actors across time and enable more complex contracting and transactions to occur.[149] Douglass North and Barry Weingast emphasize that a critical political factor is the degree to which the regime or sovereign is committed or bound to the existing rules:

---

[147] *See generally id.*

[148] Humphreys & Sandbu, *supra* note 84, at 226.

[149] NORTH, INSTITUTIONAL CHANGE, *supra* note 54, at 50–51; Daron Acemoglu et al., *Institutions as a Fundamental Cause of Long-Run Growth*, *in* 1A HANDBOOK ECON. GROWTH 386, 386 (Phillippe Aghion & Steven N. Durlauf eds., 2005); Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutional Governing Public Choice in Seventeenth Century England*, 49 J. ECON. HIST. 803, 808 (1989).

> Rules the sovereign can readily revise differ significantly in their implications for performance from exactly the same rules when not subject to revision. The more likely it is that the sovereign will alter property rights for his or her own benefit, the lower the expected returns from investment and the lower in turn the incentive to invest.[150]

Accordingly, identifying structures that provide mechanisms for credible commitment is imperative for institutional design scholars.

Constitutions, particularly constitutional protection of natural resource revenue allocation institutions, provide such a credible commitment. Such a solution is preferable to international institutions and revenue-based domestic institutions created by statute. Constitutions are useful in mitigating the resource curse, particularly in poorly institutionalized countries, through two mechanisms. First, constitutions serve as precommitment[151] mechanisms that bind future generations of citizens to predetermined institutional forms through which politics is practiced.[152] By limiting the actions available to future state elites, constitutions increase the likelihood that revenue allocation institutions will remain implemented and substantively unchanged.[153] Second, constitutions are coordination mechanisms, operating as a "focal equilibrium," a set of functional governance

---

[150] North & Weingast, *supra* note 149, at 808.

[151] Steven R. Ratner, *Precommitment Theory and International Law: Starting a Conversation*, 81 TEX. L. REV. 2055, 2057 (2003).

[152] ANDRÁS SAJÓ, LIMITING GOVERNMENT: AN INTRODUCTION TO CONSTITUTIONALISM 8 (1999); Tom Ginsburg et al., *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 U. ILL. L. REV. 201, 202 (2008); *see* JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY (1984) [hereinafter ELSTER, ULYSSES AND THE SIRENS]; Jon Elster, *Intemporal Choice and Political Thought*, *in* CHOICE OVER TIME 35, 35 (George Lowenstein & Jon Elster eds., 1992) [hereinafter Elster, *Intemporal Choice and Political Thought*].

[153] *See* Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL STUD. 83, 85–86 (2002); Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 N.Y.U. J. INT'L L. & POL. 707, 710–11 (2006).

structures to which all groups will acquiesce.[154] In doing so, constitutions impose high costs on actors that seek to alter the existing equilibrium, entrenching the existing institutional arrangement.[155] In heterogeneous societies characterized by high degrees of intergroup conflict, higher collective action costs associated with re-coordination are even more pronounced, creating further institutional stability at the constitutionally created equilibrium.[156] Ultimately, constitutionally protected natural resource revenue allocation institutions can endure and succeed because the coordination costs associated with changing the institutions are considerably higher than if they were created by statute.

Precommitment means "becoming committed, bound, or obligated to some course of action or inaction or to some constraint on future action . . .to influence someone else's choices."[157] Precommitment is principally undertaken to restrain oneself from action that one would otherwise do because such restraint represents a welfare improvement.[158] Restraint stems from a concern that one's passions, self-interest, preferences, or method of discounting time will cause one to do something in the future that is deleterious to one's welfare.[159] The political logic of precommitment is the need for a political actor to make a credible promise, both because the citizenry may be reluctant to trust the promise due to changes in circumstances and because the future incentives of the political actor are unknown.[160] To paraphrase Stephen Holmes, people will not

---

[154] Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245, 258 (1997) [hereinafter Weingast, *The Political Foundations of Democracy*].

[155] *See* Carey, *supra* note 6, at 754.

[156] *See* RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY 15–17 (1999).

[157] THOMAS C. SCHELLING, STRATEGIES OF COMMITMENT AND OTHER ESSAYS 1 (2006).

[158] Ratner, *supra* note 151, at 2057.

[159] *See* ELSTER, ULYSSES AND THE SIRENS, *supra* note 152, at 37–47.

[160] *See* Barry R. Weingast, *Constitutions as Governance Structures: The Political Foundations of Secure Markets*, 149 J. INSTITUTIONAL & THEORETICAL ECON. 286, 288 (1993) [hereinafter Weingast, *Constitutions as Governance Structures*]; *see, e.g.*, Weingast, *The Political Foundations of Democracy*, *supra* note 154, at 259 (1997).

believe their leader when sober, knowing that sometimes leaders can become drunk and behave quite differently.[161]

Constitutions have been identified as "precommitment strategies:"

> [b]y enshrining various aspects of procedure or substance in a written document that announces itself as the supreme source of law, and by making that document difficult to change, a people can achieve a future better than any they could otherwise attain . . . .On this view, a constitutionally-bound government acquires capacity it would not otherwise have by effectively restraining itself.[162]

Constitutions, which constrain choices to be made at a later time, help resolve current political problems through facilitating a stable political order in the future and creating durable institutions that are not susceptible to significant change over time.[163] These commitments are made credible by "imposing [political and social] costs on those who violate promises."[164] By binding themselves to the mast, "political actors actually can enhance their own authority."[165] Credible commitments via constitutional provisions confer benefits by both constraining state elites as well as the power of the people.[166] Though seemingly counterintuitive, constraining the democratic process at times is useful for institutional stability as it can insulate institutions against short-run, particularistic interests that may not be in the best interest of the nation.[167]

---

[161] Stephen Holmes, *Precommitment and the Paradox of Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY 195 (Jon Elster & Rune Slagstad eds., 1988); *see also* STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 134–77 (1995).

[162] John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV. 1929, 1929 (2003).

[163] Ginsburg, *supra* note 153, at 710.

[164] *Id.* at 722.

[165] *Id.*

[166] *See* Elster, *Intemporal Choice and Political Thought*, *supra* note 152, at 35, 37.

[167] *See* Guillermo O'Donnell, *Reflections on the Patterns of Change in the Bureaucratic-Authoritarian State*, 13 LATIN AM. RESEARCH REV. 3, 6–8, 27 (1978) (describing the bureaucratic-authoritarian state); *see also* JOSEPH CAMILLERI, STATES, MARKETS AND CIVIL SOCIETY IN ASIA PACIFIC 361 (2000)

Constitutions are an especially strong form of precommitment institutions because of the nature of "rights as trumps."[168] "Because rights operate as trumps over normal government[al] interests, they have an inherent [net social] cost."[169] Constitutionalism communicates that the current regime is "sufficiently aware of the long-run benefits" to bind itself to these future commitments and "give up some of its potential power."[170] This operates as a powerful signaling mechanism.[171] Even without enforcement mechanisms, the political signal sent by ratification may be deemed credible.[172] This immediate sacrifice of short-run social, political, and economic control always helps signal that a host country has a low discount rate, that is, that they place a low value on the present relative to the future. Constitutionalism suggests that a state has a time horizon that is relatively long-run in nature. As Richard McAdams notes, "passing up the short-term gains of opportunism may indicate an ability to hold commitments in the face of changing impulses as much as it indicated a low discount rate."[173]

However, a theoretical emphasis on the importance of constitutions as credible commitments also demands a focus on the

---

(identifying social order and bureaucratic encapsulation as means of insulating the state apparatus from individual interests and pressure groups); ROBERT WADE, GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION 256 (1990) (describing the developmental state as one where "the bureaucracy directing economic development is protected from all the most powerful interest groups so it can set and achieve long-range industrial policies"); David Collier, *Industrial Modernization and Political Change: A Latin American Perspective*, 30 WORLD POL. 593, 597 (1978) (adopting a working definition of O'Donnell's concept of the bureaucratic-authoritarian state). *See generally* GUILLERMO O'DONNELL, MODERNIZATION AND BUREAUCRATIC-AUTHORITARIANISM: STUDIES IN SOUTH AMERICAN POLITICS (1973).

[168] *See generally* Ronald Dworkin, *Rights as Trumps*, *in* THEORIES OF RIGHTS 153 (Jeremy Waldron ed., 1984).

[169] *Id.*; *see also* Farber, *supra* note 153, at 83.

[170] Farber, *supra* note 153, at 85.

[171] *Id.*; *see also* Beth A. Simmons, *Money and the Law: Why Comply with the Public International Law of Money?*, 25 YALE L. J. 323, 324 (2000).

[172] Farber, *supra* note 153, at 86.

[173] *Id.* at 93; *see* Richard H. McAdams, *Signaling Discount Rates: Law, Norms, and Economic Methodology*, 110 YALE L.J. 625, 657–58 (2001).

"positive puzzle of constitutional commitment."[174] If constitutionalism is described as "Ulysses binding himself to the mast in order to resist the fatal call of the Sirens," then popular majorities or other powerful political actors must be able to identify the institutional equivalents of the ropes.[175] The logic of constitutional commitment demands two conditions: (1) incentive compatibility, where political actors are "selectively empowered by constitutionally-specified political decision-making arrangements" that "have interests or incentives that are aligned with constitutional rules or values"; and (2) institutional stability, where the "institutional arrangements that place power in the hands of those decisionmakers" are "relatively stable [and] not subject to revision or subversion by the opponents of" outcomes that come as a result of the constitution.[176] Drawing on these conditions, constitutional commitment can be operationalized through two main mechanisms: formal institutions and coordination.

B. *Operationalizing Constitutional Commitments*

1. Formal Institutions

The standard and intuitive approach to operationalizing constitutional commitment is through stable institutions. Political communities can successfully commit by pointing the incentives of influential constituencies in the right directions or by imposing structural arrangements like federalism, separation of powers, democracy, and delegation.[177] At a formal level, constitutionalizing

---

[174] Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 662 (2011).

[175] *Id.* at 658.

[176] *Id.* at 663.

[177] *See, e.g.*, North & Weingast, *supra* note 149, at 804 (attributing economic growth in early modern England to institutional reforms growing out of the Glorious Revolution, specifically the assertion of parliamentary control over the fiscal powers of the monarch and the establishment of an independent judiciary that led to the protection of property rights); *see also* DARON ACEMOGLU & JAMES A. ROBINSON, ECONOMIC ORIGINS OF DICTATORSHIP AND DEMOCRACY 23–30 (2006) (explaining Britain's nineteenth-century transformation from an elite oligarchy to a broadly enfranchised democracy as a means for elites to credibly

legal rules and institutional arrangements entrenches them against legal change more than other rules because constitutions are more difficult to amend.[178] A considerable amount of attention has been given to the independence of the judiciary and the power of judicial review.[179] Daryl Levinson notes that the institution of judicial review has developed into a relatively stable and important structural commitment device.[180] Additionally, John Ferejohn and Lawrence Sager identify structural constitutional provisions relating to "procedures or mechanisms of governance"—including judicial review—as "external" commitment devices that prevent majorities from reneging on their "internal" commitments to constitutional rights.[181] Politicians can entrench policies by delegating to a politically independent judiciary. For instance, Ran Hirschl explains the recent emergence of constitutional judicial review in a number of countries as a "hegemonic preservation" strategy on the part of threatened elites.[182] In instances where majoritarian democratic movements threaten the survival of an extant regime, elites seek to preserve their policies by entrusting them to a politically independent judiciary that will share and protect their interests.[183] Jack Balkin and Sanford Levinson particularly emphasize "partisan entrenchment," where temporarily dominant political parties lock in their policy gains by appointing ideologically sympathetic judges who continue to further the parties' agendas through constitutional law over the course of the judges' lifetime appointments.[184]

---

commit to redistribute wealth and opportunity in order to stave off social unrest and the threat of revolution).

[178] Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111, 123–26 (1993).

[179] *See* Williams M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & ECON. 875, 892 (1975).

[180] Levinson, *supra* note 174, at 658, 661, 716.

[181] Ferejohn & Sager, *supra* note 162, at 1945–46.

[182] *See* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 50–56 (2007).

[183] *See id.*

[184] Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066–67 (2001); *see also* Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 AM. POL. SCI. REV. 511, 511, 517 (2002)

However, applying a strictly institutionalist approach is unsatisfying on several fronts. First, a strictly institutional focus can result in a lack of conceptual clarity.[185] Second, and more importantly, it still begs the question about how these institutions become impervious to sociopolitical revision or override. This is a particularly important issue in the context of constitutional design in countries with weak or nonexistent institutional foundations, as stable institutions are the ultimate objective. Unfortunately, much of the literature treats stable institutions as objective or exogenous.[186]

2. Constitutions as Coordination

The coordination theory of constitutions contends that, rather than being understood as contracts that imply mutual exchange between parties, constitutions should be conceptualized as bargains among competing groups.[187] Under coordination theory, powerful interest groups compete, compromise, and eventually develop a "focal equilibrium," a set of functional governance structures to which all groups will acquiesce.[188] If the benefits of coordination exceed the costs of constitutional constraints, the competing actors will have an incentive to commit themselves to maintaining the focal point equilibrium.[189] Coordination can also be effective when actors

(explaining the increased power and conservative activism of the U.S. federal courts in the late nineteenth century as a successful effort by the Republican Party to entrench economic policies).

[185] *See supra* note 55 and accompanying text.

[186] *See* Barry R. Weingast, *Political Institutions: Rational Choice Perspectives*, *in* A NEW HANDBOOK OF POLITICAL SCIENCE 167, 175 (Robert E. Goodin & Hans-Dieter Klingemann eds., 1996) [hereinafter Weingast, *Political Institutions*] (noting that "[m]ost studies of institutions ignore" the question of "what makes institutions resistant to change" by "assuming that institutions are fixed and hence cannot be altered by individuals").

[187] *See* HARDIN, *supra* note 156, at 12–18, 82–133; Adam Przeworski, *Democracy as a Contingent Outcome of Conflicts*, *in* CONSTITUTIONALISM AND DEMOCRACY, *supra* note 161, at 59, 63–64; Weingast, *Political Institutions*, *supra* note 186, at 257–58, 261.

[188] Weingast, *The Political Foundations of Democracy*, *supra* note 154, at 258; Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209, 240 (2009).

[189] Levinson, *supra* note 174, at 707.

have divergent preferences.[190] While each actor will prefer the arrangement most likely to further its own interests or maximize its individual utility, in many contexts, actors will be willing to sacrifice their first choices of outcomes or institutions in exchange for the benefits of avoiding conflict and agreeing on a common way forward.[191]

Constitutional coordination theory suggests that maintaining coordination around the existing focal point will always be much easier than attempting to re-coordinate around an alternative constitutional regime.[192] This gravitation toward the existing equilibrium is based on the cost-benefit structure built into constitutions. A constitution is a "massive act of coordination that . . . create[s] a convention" whose "maintenance [depends] on . . . self-generating incentives and expectations."[193] Inherent in conventions is "a structure that often exacts costs from anyone who runs against the convention more or less automatically without anyone or any institution having to take action against the rule breaker."[194] Accordingly, the costs of defection from the extant equilibrium—both with respect to defying the convention and the costs of collective action associated with re-coordination—are prohibitively high.[195] Actors have incentives to acquiesce. As a result, "coordination regime[s] tend to become more entrenched over time"[196] because, once the regime is in place, it becomes "extremely difficult to re-coordinate large numbers on doing things some other way."[197] In order to re-coordinate, not only must a large number of citizens and political actors object to the old regime, but

---

190 *See* McAdams, *supra* note 188, at 236–37.

191 *See id.*

192 Levinson, *supra* note 174, at 707–08.

193 Russell Hardin, *Why a Constitution?*, *in* SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 61 (Denis J. Galligan & Mila Versteeg, eds. 2013) [hereinafter Hardin, *Why a Constitution?*]; *see* HARDIN, *supra* note 156, at 111.

194 Hardin, *Why a Constitution?*, *supra* note 193, at 60.

195 *See* HARDIN, *supra* note 156, at 113.

196 Tara Leigh Grove, *The Exceptions Clause As A Structural Safeguard*, 113 COLUM. L. REV. 929, 943 (2013).

197 HARDIN, *supra* note 156, at 15.

a sufficient number must also agree on the same alternative.[198] In heterogeneous societies, where the coordination costs are inherently higher than homogenous societies, re-coordination is an even more daunting and costly task.[199]

The political logic of coordination identifies it as an especially strong mechanism of constitutional commitment because the benefits of coordination and the costs of defecting and re-coordination are the critical consideration.[200] Accordingly, coordination can occur even in the absence of strong institutions. The benefits of constitutional compliance—namely, the creation of a functional government that can make and enforce laws, maintain order, foster economic prosperity, provide public goods, and provide bundles of rights—must be viewed in its entirety as a single unit of analysis. Thus,

> [e]very time the text is ignored or obviously defied, its ability to serve . . . as a focal point[] is weakened . . . . [I]f one person cheats, by failing to follow the text, others are more likely to cheat too, and soon the ability of the text to coordinate behavior will be lost, to everyone's detriment.[201]

Accordingly, if elites ignore specific constitutional provisions that have been determined via coordination, a high cost is incurred because the entire system loses its equilibrium and the basic rules of the political game fall apart. In order to preserve the macroinstitutional stability of the regime, elites will often follow constitutional provisions they oppose because the benefits of coordination outweigh the costs of defection.[202] Everyone needs rules to follow, even dictators and kleptocrats.

Constitutional commitment, applied specifically to institutions managing the resource curse, addresses the underlying issues of statutory natural resource revenue allocation mechanisms by substantially raising the costs of policy reversal. The utility of natural resource revenue allocation regimes in poorly

---

[198] *See* Grove, *supra* note 196, at 943.

[199] *See* HARDIN, *supra* note 156, at 16.

[200] Levinson, *supra* note 174, at 707.

[201] David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L. J. 1717, 1734–35 (2003).

[202] *See* Levinson, *supra* note 174, at 707.

institutionalized countries is conditioned upon the endurance of their design.[203] Once rent-seeking actors begin altering and undermining the initial institutional structure, the institution simply becomes another mechanism for particularistic accumulation and aids in perpetuating and exacerbating the resource curse.[204] Constitutional protection of revenue allocation institutions is a credible commitment mechanism that constrains the future options of political actors and identifies the revenue allocation institution as a focal point equilibrium that operates as a coordinating mechanism for those actors.[205] In doing so, the costs of defecting from this institutional equilibrium by fundamentally altering or completely undermining the institution are significantly higher under a constitutional regime than a statutory regime. Institutional change would have to come through a constitutional amendment, which generally is a more procedurally and politically challenging endeavor.[206] As of result of this higher institutional barrier, constitutional protection of natural resource revenue allocation institutions provides a superior institutional solution to the resource curse than existing proposals in the literature.

The political logic of coordination provides a further bulwark against an extant regime ignoring natural resource revenue allocation institutions within the national constitution. When a revenue allocation statute gets ignored or fundamentally undermined, as was the case in Chad, only that statute is affected and the costs are low relative to the benefits. However, if a similar course of action occurs in a similar institution that is constitutionally protected, the costs are considerably higher because elites cannot ignore or undermine the constitution in a piecemeal fashion. Ignoring or undermining a revenue allocation institution would begin to unravel the fundamental rules of the political game. Accordingly, the costs of deviating from the constitutional equilibrium and focal point would be to undermine the very

---

[203] *See* Humphreys & Sandbu, *supra* note 84, at 209.

[204] *See* Terry Lynn Karl, *How to Maintain State-Society Relations? The Case for a Transparent Fiscal Social Contract*, *in* ESCAPING THE RESOURCE CURSE, *supra* note 14, at 274, 274–75 [hereinafter Karl, *How to Maintain State-Society Relations*].

[205] *See* Levinson, *supra* note 174, at 708.

[206] *See* Humphreys & Sandbu, *supra* note 84.

institutional framework under which the regime operates. Elites will be more likely to abide by constitutional revenue allocation institutions, even if they are not preferential to the extant regime.

This prescription is by no means a panacea. Inherent in many countries with low state capacity and a poor record of governance is the problem that the constitution, despite being the most authoritative legal and political instrument in the land, may not be followed or simply replaced if inconsistent with the objectives of the current regime.[207] In a similar vein, building from the longstanding concern that constitutions may amount to nothing more than "parchment barriers,"[208] David Law and Mila Versteeg identify the disjunction between the state as environed by the *de jure* constitution and the state that actually exists in a *de facto* constitutional sense.[209] The literature has identified an upsetting "relationship between constitutional rights provisions and actual respect for rights."[210] Countries whose constitutions contain a greater number of rights tend also to experience higher levels of political violence and terror, and certain constitutional guarantees correlate with higher levels of severe rights abuse.[211] Empirically documenting the global prevalence and severity of constitutional noncompliance over the last three decades, Law and Versteeg's

---

[207] *See, e.g.*, Duruigbo, *Permanent Sovereignty*, *supra* note 105, at 76 ("Incorporating these ideas into the constitution does not necessarily mean that an unaccountable government will abide by them. Constitutional provisions do not automatically equate with compliance or constitutional governance.").

[208] THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

[209] *See* David S. Law, *Constitutions*, *in* THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 376, 377 (Peter Cane & Herbert M. Kritzer eds., 2010); David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CAL. L. REV. 863, 867–68 (2013) [hereinafter Law & Versteeg, *Sham Constitutions*].

[210] Law & Versteeg, *Sham Constitutions*, *supra* note 209, at 381–83; *see also* ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 53–55 (2009) (providing data showing "the extent to which rights provisions are implemented in practice varies dramatically across countries, with some countries promising more than they deliver and others delivering more than they promise").

[211] *See* Law & Versteeg, *Sham Constitutions*, *supra* note 209, at 382; David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163, 1219–20 (2011) [hereinafter Law & Versteeg, *Evolution and Ideology*].

conceptualizations of "sham constitutions"—those with high *de jure* rights protections and low *de facto* rights protections—and "weak constitutions"—those with low *de jure* and *de facto* rights protections—could both be instances where constitutional protections of natural resource revenue allocation institutions could simply be ignored or changed at will.[212]

Although these theories cut against the argument of this Article, constitutionally protected natural resource revenue allocation institutions still provide a superior domestic institutional solution to the resource curse because the consequences of ignoring the constitution or not enforcing its provisions are still more costly than similar actions under a statutory regime. Although the argument can be proffered that Law and Versteeg focus on rights, which are different from structures insofar as structures are more durable and less sham than rights, nations simply not following their constitutions as a whole is a legitimate concern for the argument of this Article. Law and Versteeg's distinction between "sham constitutions" and "weak constitutions" suggests a possible precondition for the utility of constitutional revenue allocation institutions for natural resources. In sham constitutions, the costs associated with not providing a number of constitutional rights may not be prohibitively high enough for a natural resource revenue allocation institution to exist without being altered or undermined. However, in weak constitutions that both promise and deliver little in terms of rights, the coordination mechanism could have a strong effect on the cost-benefit calculation of elites. By including revenue allocation institutions in their constitutions, these countries could prevent defection by raising its costs, thereby putting the rules of the political game at stake.

The difference between sham and weak constitutions stems from the strength of the signal associated with adding a new constitutional provision relative to the number of existing rights. Ultimately, with respect to countries with sham constitutions, there may be a constellation of cases under which the contention of this Article may be less effective. Further testing would be required to determine the empirical limits of this argument. The next Part of this Article identifies several instances where natural resource revenue

212 Law & Versteeg, *Sham Constitutions*, *supra* note 209, at 882–86.

allocations have been enshrined in constitutions and how constitutional and institutional design principles can be utilized to improve natural resource revenue management in poorly institutionalized nations.

III. THE ODD COUPLE: CONSTITUTIONAL PROTECTIONS OF NATURAL RESOURCE REVENUE IN ALASKA AND NIGERIA

Most allocation mechanisms involving revenues from natural resources are created by statute; however, some of these institutions are enshrined in constitutions.[213] This Article focuses on two constitutionally enshrined natural resource revenue allocation institutions: the Alaska Permanent Fund ("APF"), which is a revenue distribution agreement that utilizes a dividend-style cash transfer, and Nigeria's Federation Account, which employs a revenue decentralization mechanism.[214] While the APF has been widely celebrated as a success,[215] Nigeria has been identified as an epitome of the resource curse and its revenue allocation mechanism has received mixed reviews.[216] This Article suggests that the critiques of the Nigerian allocation system do not stem from its constitutional protections, but rather decentralization principles. Accordingly, constitutional protection is a positive first step. Nigeria should implement a constitutionally protected natural resource fund and revenue distribution agreement similar to the APF in order to improve its management and allocation of hydrocarbon revenues.

A. Alaska: The First Frontier of RDAs

Alaska established the APF in 1976 through a constitutional amendment with a "negative goal"—namely, "to place part of the one-time oil wealth beyond the reach of day-to-day government

---

[213] *See* Bell & Faria, *supra* note 85; Brosio, *supra* note 141, at 244–54.

[214] Although this case selection may not seem immediately intuitive, Versteeg and Zackin have shown that American state constitutions are strikingly similar to world constitutions. *See* Mila Versteeg & Emily Zackin, *American Constitutionalism Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1641 (2014).

[215] *See infra* notes 238–44 and accompanying text.

[216] *See infra* notes 245–52 and accompanying text.

spending."[217] Three purposes underlaid the APF: (1) to provide a mechanism for equitable distribution to the people of Alaska of at least a portion of the state's energy wealth derived from the development and production of the natural resources belonging to them as Alaskans; (2) to encourage persons to maintain their residence in Alaska and to reduce population turnover in the state; and (3) to encourage increased awareness and involvement by the residents of the state in the management and expenditure of the fund.[218] This legislation was amended in 1980 to provide that equal payments be distributed to all eligible residents, including minors, provided they intended to remain permanently in the state.[219] This followed the Supreme Court's ruling in *Zobel v. Williams*,[220] which held that the legislation violated the Fourteenth Amendment.[221] The APF was the first fund to grant recognition to the notion that citizens have full rights to share directly in the revenue accruing from public assets.[222] Article 9, Section 15 of the Alaskan Constitution provides the foundation for the APF:

> [a]t least twenty-five percent of all mineral lease rentals, royalties, royalty sale proceeds, federal mineral revenue sharing payments and bonuses received by the State shall be placed in a permanent fund, the principal of which shall be used only for those income-producing investments specifically designated by law as eligible for permanent fund investments. All income from the permanent fund shall be deposited in the general fund unless otherwise provided by law.[223]

---

[217] Elmer Rasmuson, Address at the 1993 Alaska Permanent Fund Corporation Annual Meeting: A Founder's Reflection on the Early Days of the Alaska Permanent Fund Corporation (Sept. 28, 1993), http://www.apfc.org/_amiReportsArchive/1997_TP5.pdf.

[218] Act of Apr. 16, 1980, ch. 21, § 1(b), 1980 Alaska Sess. Laws 2.

[219] ALASKA STAT. § 43.23.095(8) (Supp. 1992).

[220] *See* Zobel v. Williams, 457 U.S. 55 (1982).

[221] *Id.* at 65.

[222] Vernon L. Smith, *The Iraqi People's Fund*, WALL ST. J., Dec. 22, 2003, at A14.

[223] ALASKA CONST. art. IX, § 15.

"Subsequent legislation . . . increased [the applicable percentage] to 50 percent for certain types of oil and gas receipts,"[224] but "the [Alaskan] legislature repealed the change in 2003 and returned to the 25% standard."[225]

As the APF grew, "Alaskans demanded . . . a return of some of the wealth to the citizen[ry] . . . [through] tax repeal and cash distributions."[226] These demands were consistent with Governor Jay Hammond's distribution plan that provided a cash dividend to Alaskan residents based on time of residence within the state.[227] The underlying logic of cash dividends was to create a financial incentive to maintain residence in Alaska.[228] The dividends also provide a check on government spending by giving Alaskan beneficiaries a stake in oil revenue,[229] and the belief that "the money could be used better by individuals than spent on government programs or invested in development projects."[230] In 1980, the legislature responded by annually distributing half of the APF's earnings to state residents in the form of dividend payments.[231]

The Alaska Permanent Fund Corporation ("APFC") manages the APF.[232] The APFC is tasked with "invest[ing] the principal in

---

[224] ALASKA STAT. § 37.13.010(2) (2016); Beattie v. United States, 635 F. Supp. 481, 482 (D. Alaska 1986), *aff'd sub nom.* Greisen v. United States, 831 F.2d 916 (9th Cir. 1987), *cert. denied,* Beattie v. United States, 485 U.S. 1006 (1988).

[225] Deborah Groban Olson, *Fair Exchange: Providing Citizens with Equity Managed by a Community Trust, in Return for Government Subsidies or Tax Breaks to Businesses*, 15 CORNELL J. L. & PUB. POL'Y 231, 292 (2006).

[226] Duruigbo, *Managing Oil Revenues*, *supra* note 79, at 178.

[227] Clifford Groh & Gregg Erickson, *The Permanent Fund Dividend Program: Alaska's "Noble Experiment,"* ALASKA J., Summer 1983, at 141, 141–45.

[228] *Id. at* 29.

[229] *Id.*

[230] Christopher L. Griffin, Jr., *The Alaska Permanent Fund Dividend and Membership in the State's Political Community*, 29 ALASKA L. REV. 79, 82 (2012).

[231] Act of Apr. 16, 1980, ch. 21, § 2, 1980 Alaska Sess. Laws 2. Currently, one-quarter of the APF is distributed via dividend. *See* Olson, *supra* note 225, at 292.

[232] Ross, *How Mineral-Rich States Can Reduce Inequality*, *supra* note 102, at 242.

stocks, bond, and real estate," and its "mandate is to maximize earnings."[233] The APFC was designed to be insulated from day-to-day politics while remaining accountable to Alaskan residents.[234] This balance was struck by having a board composed of independent trustees, a requirement that the APFC report annually to the Legislative Budget and Audit Committee, and a requirement that the APFC's annual budget be approved by the legislature.[235] Importantly, removal of board members is effective only when accompanied by a statement disclosed to the public containing the reasons for removal.[236] Public access to information regarding how much the APF earns and how the revenues are distributed further exemplifies this emphasis on transparency.[237]

The APF has been widely perceived as a success and extolled as "one of the most remarkable social experiments in modern American history."[238] Others have described it as "a result of evolution of thought regarding state ownership of wealth, and how that money should be managed to best benefit all Alaskans, present and future."[239] Much of the APF's success has been attributed "to [the] singleness of financial stewardship,"[240] its emphasis on information disclosure and transparency,[241] and, perhaps most importantly, its institutional endurance due to layers of oversight,[242] political insulation, and constitutional protection. In light of the APF's success, commentators have suggested that similar models be

---

[233] *Id.*

[234] SVETLANA TSALIK, CASPIAN REVENUE WATCH, CASPIAN OIL WINDFALLS: WHO WILL BENEFIT? 22 (Robert Ebel ed., 2003).

[235] *See* ALASKA STAT. § 37.13.050 (2016); ALASKA PERMANENT FUND CORPORATION, AN ALASKAN'S GUIDE TO THE PERMANENT FUND 32 (12th ed. 2009); TSALIK, *supra* note 234.

[236] TSALIK, *supra* note 234.

[237] *See* Duruigbo, *Managing Oil Revenues*, *supra* note 79, at 179.

[238] Groh & Erickson, *supra* note 227.

[239] Joan Kasson, *The Creation of the Alaska Permanent Fund: A Short History*, *in* THE EARLY HISTORY OF THE ALASKA PERMANENT FUND 11, 12 (1997), http://cui-zy.com/Recommended/AlaskaPermanentFund.pdf.

[240] Patrick Wieland, *Going Beyond Panaceas: Escaping Mining Conflicts in Resource-Rich Countries Through Middle-Ground Policies*, 20 N.Y.U. ENVTL. L.J. 199, 272 (2013).

[241] Duruigbo, *Managing Oil Revenues*, *supra* note 79, at 178–79.

[242] TSALIK, *supra* note 234, at 22.

used in other natural resource-rich countries, such as Iraq[243] and Peru.[244]

B. Nigeria: Oil Slays the Giant of Africa

In contrast to Alaska, Nigeria has been a poster child of the resource curse.[245] Nancy Birdsall and Arvind Subramanian conclude that "[n]owhere have all the pathologies associated with oil manifested themselves more clearly than in Nigeria."[246] Nigeria's per capita GDP was $1,113 in 1970 and $1,084 in 2000; between these two dates, the percentage of citizens living on less than $1 per day increased from 36 percent to 69 percent.[247] These pathologies extend into the institutional realm, as Nigeria is one of the best-known instances of a rentier state.[248] In assessing Nigeria's socioeconomic malaise and political predicament despite years of being a major oil exporter, Xavier Sala-i-Martin and Arvind Subramanian explain these problems in terms of "stunted institutional development."[249] They contend that "[w]aste and corruption from oil rather than Dutch Disease has been responsible for [Nigeria's] poor long run economic performance."[250] Rent-seeking practices, kleptocracy, and corruption are evident in virtually every layer of Nigerian politics and society,[251] with

---

[243] *See, e.g.*, Smith, *supra* note 222; Sandra T. Vreedenburgh, *The Saddam Oil Contracts and What Can Be Done*, 2 DEPAUL BUS. & COM. L. J. 559, 584–86 (2004).

[244] *See, e.g.*, Wieland, *supra* note 240, at 271–73.

[245] *See* Jenik Radon, *How to Negotiate an Oil Agreement*, *in* ESCAPING THE RESOURCE CURSE, *supra* note 14, at 89, 94 ("Notwithstanding its considerable oil wealth and its inherited British established institutions and legal system, Nigeria has been bedeviled by the natural resource curse and has witnessed a significant decrease in living standards, unfathomable corruption, and societal strife."); *see also* Shaxson, *supra* note 13, at 1123–24, 1127.

[246] Birdsall & Subramanian, *supra* note 13, at 82.

[247] Sala-i-Martin & Subramanian, *supra* note 13, at 4; Shaxson, *supra* note 13, at 1123–24.

[248] *See* GARY & KARL, *supra* note 116, at 27–28.

[249] Sala-i-Martin & Subramanian, *supra* note 13, at 5.

[250] *Id.* at 3.

[251] *See* Okechukwu Oko, *Subverting the Scourge of Corruption in Nigeria: A Reform Prospectus*, 34 N.Y.U. J. INT'L L. & POL. 397, 397–99 (2002).

estimates that Nigerian politicians may have taken up to $100 billion of national oil revenue for their personal gain between 1970 and 2000.[252]

Nigeria's constitutional history of allocating natural resource revenues began at independence in 1960.[253] Section 140 of the 1963 Constitution made provisions for the sharing of the proceeds of minerals, including mineral oil: "[t]here shall be paid by the federal government to a region, a sum equal to fifty percent of proceeds of any royalty received by the Federation in respect of any minerals extracted in that region and any mining rents derived by the federal government from within any region."[254] Although a *de jure* federal state, a series of decrees beginning in 1969, particularly the Petroleum Act of 1969 and the Land Use Act of 1978, "completely undermined and subverted" Nigeria's federal basis by centralizing fiscal power and creating a *de facto unitary* state with respect to energy policy by providing the federal government exclusive power to legislate on hydrocarbons.[255] This, in turn, led to a "paternalistic form of federalism" that characterizes contemporary Nigeria.[256]

The current incarnation of Nigeria's revenue allocation methods is located in Section 162 of the 1999 Constitution.[257] The Government of Nigeria must "maintain a special account . . . [known as] 'the Federation Account,'" which is funded by all government revenue, less "the proceeds from the personal income tax of the personnel of the armed forces of the Federation, the Nigeria Police Force, the Ministry or department of government charged with responsibility for Foreign Affairs, and the residents of the Federal

---

[252] Birdsall & Subramanian, *supra* note 13, at 82.

[253] Lanre Aladeitan, *Ownership and Control of Oil, Gas, and Mineral Resources in Nigeria: Between Legality and Legitimacy*, 38 T. MARSHALL L. REV. 159, 192 (2013).

[254] CONSTITUTION OF NIGERIA (1963), § 140.

[255] Aladeitan, *supra* note 253 (quoting Innocent A. Ojefia, The Nigerian State and the Niger Delta Question (Sept. 7, 2004) (unpublished manuscript), http://nigeriaworld.com/articles/2004/sep/071.html); *see* DICKOVICK, *supra* note 140 (emphasizing a dynamic view of federalism and the importance of decentralization and recentralization over time).

[256] Aladeitan, *supra* note 253.

[257] CONSTITUTION OF NIGERIA (1999), §§ 162–168.

Capital Territory, Abuja."[258] The allocation of the Federation Account to the states is determined by a formula based on six principles: (1) equality of states; (2) population; (3) derivation; (4) social development factor; (5) landmass and terrain; and (6) internal revenue generation effort.[259]

The *equality of states* principle is based on allocating revenue equally between the states, and is sometimes termed "minimum responsibility of government."[260] This reflects the idea "that each . . . state[] has to sustain a basic minimum set of public functions and institutions [independent] of its size or population."[261] The *population* principle states that revenue should be allocated among states on a per capita basis, justified by the fact that states with higher populations require more revenue to support them.[262] The *social development factor* measures how a state has responded to its population's needs, operationalized through criteria such as the number of hospital beds, primary and secondary school enrollment, and average annual rainfall.[263] The *landmass and terrain* principle indicates that a state has a greater need for revenue allocation because its terrain or landmass acts as a deterrent for the state generating its own revenue.[264] The *internal revenue generation effort* principle operates as an incentive for states to have high

---

[258] *Id.* § 162(1).

[259] *Id.* § 162(2); *see also* ROTIMI T. SUBERU, FEDERALISM AND ETHNIC CONFLICT IN NIGERIA 58, 58–59 (2001).

[260] FEDERAL INLAND REVENUE SERVICE, A COMPREHENSIVE TAX HISTORY OF NIGERIA 7 (2012).

[261] *Id.*

[262] AUGUSTINE IKEIN & COMFORT BRIGGS-ANIGBOH, OIL AND FISCAL FEDERALISM IN NIGERIA: THE POLITICAL ECONOMY OF RESOURCE ALLOCATION IN A DEVELOPING COUNTRY 239 (1998).

[263] FEDERAL INLAND REVENUE SERVICE, *supra* note 260, at 10–11.

[264] SUBERU, *supra* note 259, at 67. *See generally* Ehtisham Ahmad & Raju Singh, *Political Economy of Oil-Revenue Sharing in a Developing Country: Illustrations from Nigeria* 1 (IMF Working Paper, Jan. 2003) (examining the incentives an oil-rich region to share resources within a federation).

extractive capacity[265] by matching internally generated tax revenue with additional federal revenue.[266]

The *derivation* principle states that subnational units should receive revenue from the central government based on the proportion of revenue contributed from the respective sub-national unit.[267] The derivation principle's use, or lack thereof, has been a "political lightning rod,"[268] and has fomented significant debate in the literature. Rotimi Suberu highlights derivation's faults, including its tendency to hinder redistribution and other macroeconomic efforts and to arouse envy and political instability.[269] In contrast, Augustine Ikein and Comfort Briggs-Anigboh note that derivation aims to compensate for what oil-producing areas view as a taking of their property, as the oil is derived from land under their control.[270] They also discuss derivation as a tool to compensate oil-producing areas for the negative externalities they suffer from exploration.[271]

Although the National Assembly is charged with considering these factors and determining their respective weights in the formula, Section 162(2) of the Nigerian Constitution provides an exception that "the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen per cent of the revenue accruing to the Federation Account directly from

---

265 Extractive capacity is "the ability of the state to raise the revenues it needs to pay for the expenses of implementing its policies and goals." Deborah Brautigam, *State Capacity and Effective Governance*, *in* AGENDA FOR AFRICA'S ECONOMIC RENEWAL 83 (Benno Ndulu & Nicolas van de Walle eds., 1996).

266 Ahmad & Singh, *supra* note 264, at 13–14.

267 IKEIN & BRIGGS-ANIGBOH, *supra* note 262, at 228–29.

268 SUBERU, *supra* note 259, at 63–64; Adam B. Felsenthal, *Is Iraq the Next Nigeria?: Revenue Sharing and the Natural Resource Curse*, 27 ARIZ. J. INT'L & COMP. L. 787, 799 (2010); *see* IKEIN & BRIGGS-ANIGBOH, *supra* note 262, at 130–40 (detailing the history of derivation from 1968 to 1977).

269 SUBERU, *supra* note 259, at 63–64; *see also* IKEIN & BRIGGS-ANIGBOH *supra* note 262, at 116 (discussing the argument that the derivation principle promotes instability), 235 (discussing uneven development and an inability to correct the problem due to restricted labor mobility), 305, 311–12 (discussing social development problems, and additional revenues are beyond absorptive capacity of oil producing state).

270 IKEIN & BRIGGS-ANIGBOH, *supra* note 262, at 174–75.

271 *Id.* at 235.

any natural resources."[272] In addition to divisiveness, the major critique associated with derivation is a familiar one.[273] Political leaders of hydrocarbon-producing areas have been cited for rampant corruption and waste of the derivation revenue received.[274] Nancy Birdsall and Arvind Subramanian contend that corrupt oil revenue distribution has significantly increased the economic inequality of Nigeria.[275] In 1970, the top 2 percent of earners earned as much as the bottom 17 percent compared to the bottom 57 percent in 2000.[276] As a result, commentators have called for an overhaul of Nigeria's allocation principles.[277]

C. *"North to the Future:" What Nigeria Can Learn from Alaksa*

The underlying allocation criteria and fiscal federalism mechanics, rather than their constitutional protection, are at the core of Nigeria's resource curse. Indeed, Kenneth Wheare has pessimistically noted "there is and can be no final solution to the allocation of financial resources in a federal system."[278] Ultimately, Nigeria's current allocation system simply shifts revenue from one level of rent-seeking institutions to another without establishing the credible commitments necessary to facilitate optimal utilization of natural resource revenues.[279] Although a different institutional structure of natural resource revenue allocation is needed, creating institutional vehicles for such allocation through constitutions is a promising first step.

---

[272] CONSTITUTION OF NIGERIA (1999), § 162(2).

[273] *See* Birdsall & Subramanian, *supra* note 13, at 81–82. Such divisiveness refers to the regional tension between the envy of non-natural resource-producing states and not properly compensating natural resource-producing states. *See, e.g.*, *id.*

[274] *See* SUBERU, *supra* note 259, at 64–65.

[275] Birdsall & Subramanian, *supra* note 13, at 82.

[276] *Id.*

[277] *See* IKEIN & BRIGGS-ANIGBOH, *supra* note 262, at 280; SUBERU, *supra* note 259, at 76–77, 81–84; Adedotun O. Phillips, *Managing Fiscal Federalism: Revenue Allocation Issues*, 21 PUBLIUS 103, 111 (1991).

[278] KENNETH WHEARE, FEDERAL GOVERNMENT 117 (1963).

[279] *See* Phillips, *supra* note 277, at 104.

Drawing on the success of Alaska, Nigeria should create a constitutionally protected natural resource fund modeled after the APF. Distributing hydrocarbon revenue to the public in the form of dividends provides the benefits of revenue distribution arrangements by minimizing rent-seeking and creating the proper incentives for governance by requiring the government to rely on normal fiscal principles to determine appropriate levels of taxation and expenditure. Furthermore, it avoids many of the issues associated with using natural resource funds without the requisite institutional foundations, namely, the tendency for funds to be undermined through raiding or substantial alteration.[280] Providing constitutional protection for the fund and its particular design features and allocation mechanisms creates additional safeguards against government misuse and establishes the credible commitment mechanism needed to foster institutional endurance.

Four specific design features are particularly salient to this recommendation: (1) the fund creation; (2) the character of the recipient of dividends; (3) the nature of the distributions; and (4) implementation concerns. Creating the fund in the existing Nigeria Sovereign Investment Authority ("NSIA")[281]—created in 2011 to manage three of the country's planned oil sovereign wealth funds—would be an ideal choice for several reasons. The NSIA is independently managed by JPMorgan Chase, which provides the fund a significant level of political insulation with respect to investing the fund's principal.[282] Providing constitutional protection for the NSIA would also respond to the Central Bank of Nigeria's call for constitutional protection of the country's sovereign wealth fund.[283] The acting Governor of the Central Bank, Serah Alade, emphasized how protecting the fund would allow Nigeria to be able

---

[280] *See* Humphreys & Sandbu, *supra* note 84, at 195.

[281] *See* Nigeria Sovereign Investment Authority Act, Federal Republic of Nigeria Official Gazette, June 3, 2011, http://nsia.com.ng/wp-content/uploads/2013/02/NSIA_ACT.pdf.

[282] *See* Ben Agande, *JP Morgan to Manage Sovereign Wealth Funds*, VANGUARD NEWS (Feb. 21, 2013), http://www.vanguardngr.com/2013/02/jp-morgan-to-manage-soverign-wealth-funds/.

[283] *See Nigeria: CBN Calls for Inclusion of Sovereign Wealth Fund in the Constitution*, ALL AFRICA (May 7, 2014), http://allafrica.com/stories/201405071159.html.

to both stabilize against changes in commodity prices and save for future generations.[284] Lastly, constitutional protection of the NSIA would clear up extant legal issues of the constitutionality or mere existence of the NSIA. After one billion U.S. dollars were contributed as seed money to the NSIA, thirty-six state governors filed court submissions to block the sovereign wealth fund's creation because annual payouts would decrease the pool of oil profits distributed to individual states, and because the governors did not trust the leaders in control of the fund.[285] The Nigeria Governors Forum challenged the fund under Sections 80(1)[286] and 162(1) and (3)[287] of the Constitution.[288] Although the Nigerian Supreme Court has not yet deemed this a constitutional issue,[289] providing constitutional protection for the NSIA would cease intergovernmental conflict on this point.

---

[284] *Id.*

[285] Oliver T. Gilbert, *Global Analytical Lessons for Evaluating A Myanmar Sovereign Wealth Fund*, 23 PAC. RIM L. & POL'Y J. 579, 609–10 (2014).

[286]

> All revenues or other moneys raised or received by the Federation (not being revenues or other moneys payable under this Constitution or any Act of the National Assembly into any other public fund of the Federation established for a specific purpose) shall be paid into and form one Consolidated Revenue Fund of the Federation.

CONSTITUTION OF NIGERIA (1999), § 80(1).

[287]

> The Federation shall maintain a special account to be called 'the Federation Account' into which shall be paid all revenues collected by the Government of the Federation . . . [and] (3) Any amount standing to the credit of the Federation Account shall be distributed among the Federal and State Governments and the Local Government Councils in each State.

Id. §§ 162(1), (3).

[288] Omodele Adigun, *Sovereign Wealth Fund: Why Governors are Kicking*, NBF NEWS (Oct. 31, 2011), http://www.nigerianbestforum.com/blog/sovereign-wealth-fund-why-governors-are-kicking/; *see also* Gilbert, *supra* note 285, at 616–17.

[289] *Governors to Seek S/Court's Resolution on Excess Crude Account*, NATION (July 29, 2013), http://thenationonlineng.net/excess-crude-account-governors-to-seek-supreme-courts-resolution/.

Second, although the intuitive answer in respect to who should receive fund dividends would be all Nigerian citizens, this Article contends that only adults should be entitled to dividends. The logic draws from development economics and the inverse relationship between fertility rates and economic development, known as the demographic-economic paradox.[290] If all citizens, including children, are entitled to dividends, fiscal incentives to increase fertility are introduced, which may have deleterious economic and social outcomes for Nigeria. According to Xavier Sala-i-Martin and Arvind Subramanian, if dividends trigger at the age of majority, the incentive to have more children would be lessened since the revenue associated with extra children would be postponed for eighteen years.[291]

A third question is whether all the revenues should be distributed or whether a certain share should be retained to enable the government to provide public goods. One of the main causal mechanisms of the "rentier[ ] [state] is that when governments gain most of their revenues from external sources, such as resource rents or foreign assistance, they are freed from the need to levy domestic taxes and . . . become less accountable to the societies they govern."[292] This is currently the case in Nigeria:

> [c]urrently, oil accounts for a substantial share of total government revenues. As such, the government has little incentive to provide services efficiently because the discipline exerted by the need to tax the public is largely absent: oil revenues are manna from heaven and keep flowing regardless of what the public sector delivers.[293]

---

[290] *See* Quamrul H. Ashraf et al., *The Effect of Fertility Reduction on Economic Growth*, 39 POPULATION & DEV. REV. 97, 97 (2013). *But see* Mikko Myrskylä et al., *Advances in Development Reverse Fertility Rate*, 460 NATURE 741, 741–43 (2009) (concluding that there is a J-shaped relationship between development and fertility).

[291] Sala-i-Martin & Subramaniam, *supra* note 13, at 20.

[292] Elias Chukwuemeka Ngwu & Anthony Chinedu Ugwu, *Rentierism and the Natural Resource Curse: A Contextual Analysis of Nigeria*, 1 J. SOC. SCI. & HUMAN. 422, 423 (2015).

[293] Sala-i-Martin & Subramaniam, *supra* note 13, at 20.

Accordingly, a goal of the fund should be to reduce the government's dependence on natural resource revenue and, instead, create incentives to develop extractive capacity and become dependent on tax revenues to fund public goods. Accordingly, the government should ultimately not retain any share of the revenue; the fund revenue should be either distributed as dividends or invested via the sovereign wealth fund.

Lastly, although there are very real and salient concerns over corruption and fund diversion or leakage in the process of distributing dividends, constitutional protection provides an important countervailing check to those potential abuses. If an eligible citizen does not receive his or her dividend, he or she has a constitutional right to seek relief under the judicial system. Under the existing system, citizens rely on public officials and institutions for receiving the oil money indirectly through public services that may never fully trickle down due to rent-seeking and corruption.[294] Under this Article's recommendation, citizens would have an automatic and justiciable right to receive the proceeds directly.[295]

The economic effects of such a revenue distribution arrangement in Nigeria would be considerable. Xavier Sala-i-Martin and Arvind Subramaniam estimate the magnitude of household payments under two scenarios. Under current and future production levels, each household would receive U.S. $140, or U.S. $425 in per capita terms measured by purchasing power parity ("PPP") (roughly $760 per adult).[296] This figure "represent[s] about 43[%] of current per capita PPP GDP and well above the US $1 per day poverty line."[297] If natural gas revenue is also part of revenue distribution, "these amounts could increase to upwards of U.S. $750 per capita (U.S. $1,330 per adult) in PPP terms."[298] "If debt relief were to result, . . . then the total income to households would [increase] . . . [by] an additional U.S, $100 per capita in PPP

[294] *See* Keenan, *supra* note 56, at 223, 228.

[295] *But see* Law & Versteeg, *Sham Constitutions*, *supra* note 209, at 864 (concluding that "socioeconomic and group rights are somewhat less likely to be upheld" than the other personal integrity rights and civil and political freedoms).

[296] Sala-i-Martin & Subramaniam, *supra* note 13, at 19.

[297] *Id.*

[298] *Id.*

terms."[299] Ultimately, utilizing constitutional design principles to allocate revenue from natural resources provides a promising solution to mitigating and reversing the resource curse.

CONCLUSION

Although the literature has proffered a plethora of institutional solutions to the resource curse, they have been vexed by a common theme: their unsuccessful implementation in developing countries without the proper institutional foundations that act as a bulwark against policy reversal and the perpetuation of rent-seeking behavior. Accordingly, these institutions lack a mechanism for rent-seeking states to credibly commit to managing and utilizing natural resource wealth in a restrained, welfare-enhancing, and non-particularistic manner. This Article has contributed to the existing literature by suggesting constitutional protections of natural resource revenue allocation institutions as a means of credible commitment. The precommitment and coordination functions of constitutions significantly reduce the cost of opportunistic policy reversal and consequently encourage the institutional endurance and entrenchment necessary for natural resource revenues to be properly insulated and effectively managed. Ultimately, constitutions represent a new frontier for both policymakers and scholars to address one of the more persistent and paradoxical problems facing the developing world.

Policymakers in natural resource-rich nations with weak formal institutions should strongly consider creating and further developing revenue management and allocation mechanisms within their constitutional frameworks. However, a fundamental question, particularly in the contexts of rentier states and the entrenchment of rent-seeking practices under the status quo, is why would vested political interests undertake such reforms and, in doing so, undermine the source of their political and economic power? Often, radical policy change is easier to accomplish than incremental change due to the galvanization of public support or the existence of

---

[299] *Id.*

exogenous shocks.[300] Elsewhere, I have argued that the depth of the "socioeconomic trough" has a strong causal effect on nations that undertake radical policy reform.[301] The resource curse and the associated wasteful spending and corruption are arguably the most daunting issues in Nigeria; accordingly, institutional reform in this arena could be a focal point around which Nigerians could coordinate.

In light of the increased difficulty in amending constitutions relative to other laws, drafting the constitutional provisions correctly is of particular importance. It is essential that policymakers in these countries recognize that there is not a "one size fits all" solution to managing natural resource revenue under the constitution. Like any other law, it must be adapted to the needs, institutions, and legal framework of the country. There are a number of institutional design features for policymakers to consider during the drafting process, including the establishment and design of the fund, the entity or institution that will be managing the fund and its portfolios, and what principles and policies will govern the investment of the fund.[302] In light of the design flaws of other funds, such as the Chadian RML, properly defining which cash flows from natural resource rents will constitute the fund is critically important.[303] If an RDA is utilized, defining who receives dividends and how frequently they are distributed are integral to minimizing the administrative costs of such a policy. Lastly, although the Norwegian and Alaskan models cannot likely be imported whole cloth to weaker states, these funds' attentions to oversight and transparency is one feature that should especially be emphasized.

---

[300] *See* DAVID COLLIER & RUTH COLLIER, SHAPING THE POLITICAL ARENA 29 (1991) (describing a critical juncture as "a period of significant change, which typically occurs in distinct ways in different countries (or in other units of analysis) and which is hypothesized to produce distinct legacies").

[301] *See* Tom Brower, Wash. & Lee Univ., Presentation at the Virginia Social Science Association Annual Conference: State Capacity Formation as Functions of Economic Crisis and International Actors: Ghana 1981–1992 (Apr. 5, 2008) (on file with author); *see also* Thomas M. Callaghy, *Lost Between State and Market: The Politics of Economic Adjustment in Ghana, Zambia, and Nigeria*, *in* ECONOMIC CRISIS AND POLICY CHOICE 257, 263 (Joan M. Nelson ed., 1990).

[302] *See supra* Section III.C.

[303] *See* Bell & Faria, *supra* note 85, at 312.

Particularly in weak or low capacity states, avoiding excess complexity and limiting or not permitting discretionary judgment using bright-line rules has been suggested.[304] With proper drafting and design, constitutional revenue allocation institutions can be an effective tool in addressing the resource curse.

---

304 *Id.* at 287.