

Comparative Institutional Analysis and a New Legal Realism

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(for University of Wisconsin Law Review Symposium)

If there are hedgehogs and foxes in scholarship, as Isaiah Berlin opined,² then Neil Komesar is surely a hedgehog. He has developed a powerful analytic framework called comparative institutional analysis that has been of immense value to many foxes. Komesar's work has had a huge impact across subject areas, as reflected in this conference, from torts to property, from environmental to constitutional law, from regional governance in the European Union (EU) to global trade governance in the World Trade Organization (WTO).

The comparative institutional analytic framework advanced by Komesar makes a simple claim. It contends that the pursuit of any substantive goal is necessarily mediated through different institutional processes that will affect outcomes, so that institutional analysis is required and such analysis must be comparative.³ All institutional processes reflect biases in participation, whether the imperfections are in the market, the political process, the courts, or otherwise. Thus, those who critique and wish to correct for imperfections in the market through political intervention must assess, in parallel, imperfections in the political process. Those who critique problems in the political process and wish to leave decision making to the market must assess, in parallel, imperfections in the market. And those who call for greater or lesser involvement of courts or greater or lesser

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² Berlin distinguished those people (foxes) drawn to an infinite variety of questions and phenomena and those (hedgehogs) who view everything in terms of an all-encompassing system. See Isaiah Berlin, *The hedgehog and the fox; and essay on Tolstoy's view of history* (1953) (building from a quote from the 7th-century Greek poet Archilocus — "the fox knows many things, but the hedgehog knows one big thing").

³ NEIL KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY* (1995); NEIL KOMESAR, *LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2002).

judicial deference toward administrative agencies must assess the relative defects of the judicial process in relation to those of other institutions.

Komesar's analytic framework necessarily calls for close empirical understanding and micro-analysis of institutional processes in particular contexts. It is such empirical study that is advocated by another tradition at the University of Wisconsin Law School, law and society scholarship reflected in a call for a new legal realism.⁴ New legal realists tend to be foxes. They aim to assess how law operates in the world, deploying qualitative and quantitative empirical methods. They assess, in particular, the interaction of formal law and law's normativity with other factors in particular contexts, including the role of power and inequality in law's formation and application. For a new legal realist, Victoria Nourse and I have contended, law cannot be reduced to power or social forces (a skeptical view sometimes associated with the old legal realism), but neither can its operation be meaningfully assessed in isolation from them.⁵

My core claim in this article is that comparative institutional analysis is empty without a new legal realist assessment of how real-life institutions operate in particular contexts, and that new legal realism is of no practical use without an analytic framework in which to translate and organize its findings for purposes of real-life decision making. Komesar's participation-centered comparative institutional analytic framework, I contend, is critical for a new legal realist scholarly agenda that aims to inform institutional choices. Comparative institutional analysis and new legal realism are complementary components of any policy-relevant analysis of law.

Part I of this article briefly presents Komesar's comparative institutional analytic framework. Part II compares it with other forms of comparative institutional analysis used in the social sciences in light of the questions being asked, and Komesar's more open-ended understanding of law and institutions. Part III

⁴ See e.g. Howard Erlanger et al., Foreword: Is It Time for a New Legal Realism?, 2005 WIS. L. REV. 335, 345–56; Stewart Macaulay, The New Versus the Old Legal Realism: “Things Ain’t What They Used to Be”, 2005 WIS. L. REV. 365; Victoria Nourse and Gregory Shaffer, Varieties of New Legal Realism, Cornell law review (2009).

⁵ Id; and Victoria Nourse and Gregory Shaffer, What’s Law Got to Do with It: Vices and Virtues of New Legal Realist Theory and Practice (draft on file).

examines the challenge of applying comparative institutional analysis, which can be critiqued (by some) for being too narrow in its neoclassical law-and-economics focus on incentives, and (by others) for being too unwieldy on account of the variables at play. Part IV discusses why a new legal realism grounded in both empirics and a subtle understanding of law needs to complement comparative institutional analysis. Part V presents a brief example of the application of new legal realist empirics and comparative institutional analysis in light of the challenges of global governance.

I. Komesar's Comparative Institutional Analytic Framework

Komesar provides a conceptual framework for assessing the pursuit of social goals through alternative social decision making processes that inevitably skew decision making in different ways. Goal choice thus implicates institutional choice. Komesar's work focuses, in particular, on the dynamics of participation, direct and indirect, of parties in alternative institutional settings, whether the market, legislatures, administrative bodies or courts, that ultimately shape outcomes.

Since all institutions are imperfect because they reflect biases in participation, their relative tradeoffs in different contexts must be compared. Markets reflect informational and other asymmetries, which provide advantages to certain interests over others. Political processes reflect the influence of organized groups, and the self-interest of representatives. Participation in judicial processes is costly and time-consuming, often advantaging the haves over the have nots,⁶ and, in any case, courts have limited resources to hear all relevant claims in increasingly complex and rapidly changing societies.⁷

Biases, moreover, can take different forms, reflecting (in ideal type terms) what Komesar calls minoritarian and majoritarian biases. Public choice and interest group theories of politics reflect concerns over minoritarian biases in politics —

⁶ Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95 (1974).

⁷ KOMESAR, *LAW'S LIMITS*, *supra.*

think of discrete interest groups drafting statutes that legislators sponsor. Theories of asymmetric information reflect concerns over minoritarian biases in markets. Yet, as Komesar notes, we also need to be concerned about majoritarian biases in which majorities fail to take account of the adverse impacts of policy choices on discrete minorities. Majorities in the United States, for example, had justifiable concerns about enhancing their security after 9/11, but minorities experienced the policies' impacts most severely. Majority decision making in the market may also have asymmetric adverse consequences on minorities, such as for people of color seeking housing, or for particular localities subject to environmental hazards where goods are produced for the market.

Komesar's comparative institutional analysis provides a frame that is useful for both positive and normative analysis. From a positive perspective, it focuses attention on how decision making occurs in different institutional contexts as a function of the dynamics of participation within them, which helps us to predict likely biases in outcomes from those processes. Normatively, it helps us evaluate choices over the allocation of decision making to markets, courts, and political and administrative bodies, whatever the goal may be, including that of inclusiveness in determining goal choice. There may be parallels in the pathologies of decision making in different institutions, but these parallels are never identical. Thus the pursuit of any goal must involve not only institutional analysis regarding the defects of any particular institution, but also comparative analysis of the relative deficiencies of one institutional process compared with other real life institutional alternatives.

Most pointedly, Komesar insists that from a policy perspective, we cannot meaningfully assess the attributes and deficiencies of one institutional process — beset by resource, informational and other asymmetries — without reference to other institutions that may well be subject to similar (but not identical) dynamics. He thus most vehemently critiques single institutional analysis, whether of the normative autism of markets stipulated in neoclassical economics, the “sausage-making” of self-interested legislators, or the *Jarndyce v Jarndyce* endless delays and obfuscation of lawyer-driven judicial review. Neither the market nor the political

process, neither administrative bodies nor the courts, offers a simple solution, and thus single institutional critiques of any one of them, calling for allocation of decision making to another, is both deficient and misleading. Any meaningful analysis for public policy purposes must address institutional processes comparatively.

II. Varieties of Comparative Institutional Analysis

Komesar is not the only one to call their framework comparative institutional analysis. Do a search of the term and you will find completely different literatures grounded in institutional economics,⁸ comparative politics,⁹ and economic sociology.¹⁰ Those within the legal academy who use or reference Komesar's framework, moreover, also differ in important ways. Some turn to a deductive approach based on game theory (such as Adrian Vermeule) while others call for a contextualized, empirically grounded approach (such as Victoria Nourse and Shaffer). Some focus on efficiency as the underlying comparative measure (such as Dan Cole and Joel Trachman), while others focus on the dynamics of participation (such as Miguel Maduro, this author, and Komesar himself). In my view, Komesar's participation-based, factually-contextualized approach is the better way to proceed for both positive and normative analysis.

When social scientists hear of comparative institutional analysis they tend to think of new institutional economics as reflected in the work of Oliver Williamson or Douglass North. For North, institutions represent the "rules of the game" under which economic activity occurs within a given society.¹¹ Similarly, for political scientists and sociologists, such as Kathleen Thelen and John Campbell, the term comparative institutional analysis is used to compare institutions in terms of the

⁸ See e.g., DOUGLAS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990); DOUGLASS NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE 5 (2005); MASAHIKO AOKI, TOWARD A COMPARATIVE INSTITUTIONAL ANALYSIS (2001); also AVNER GREIF, INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY: LESSONS FROM MEDIEVAL TRADE 308 (2006).

⁹ See e.g. Morgan et al, The Oxford handbook of Comparative Institutional Analysis (2010); Thelen 1999, Mahoney & Thelen 2009 (for a historical institutionalist perspective)

¹⁰ See e.g. John Campbell (2004) (in instl sociology)

¹¹ Douglas North defines institution in a top-down way in terms of "any form of constraint that human beings devise to shape human interaction." North, Institutions, *supra* note..

rules of the game across societies.¹² Komesar, in contrast, views institutions in terms of different social decision-making processes, such as legislatures, courts and markets.

These definitional starting points are useful for different questions. The conception of institutions of North is useful for addressing macro questions such as why certain societies have experienced greater economic growth than others. The key questions become how do particular rules of the game emerge and change, and what are their implications for economic activity since these rules of the game facilitate and constrain economic activity. Similarly, comparative political scientists and institutional sociologists address macro-level questions such as why some countries have adopted particular policies regarding relations between capital and labor compared to others. Like Komesar, these latter scholars are interested in legislatures, courts and markets, but they assess them in terms of the overall rules of the game of a society, such as those that distinguish corporatist, consociational democracies, and neoliberal governance systems.

Komesar's starting point, in contrast, is more useful for micro-analysis of decision making in particular case-specific, factual contexts. He applies his framework to such questions as institutional alternatives for addressing the tensions between economic activity and environmental pollution reflected in the famous *Boomer* case,¹³ and between community development, racial diversity, access to housing, and associational decision making reflected in the New Jersey Supreme Court decision in the *Mount Laurel Township* case regarding zoning.¹⁴ His approach is particularly useful for lawyers and legal academics assessing the institutional implications of judicial interpretive choices in discrete cases and in judicial doctrine that have broader social repercussions. It is likewise useful for assessing alternative design of primary and secondary legal rules in light of their implications for subsequent social decision making.

¹² See Thelen, *supra* note...; Campbell, *supra* note...

¹³ See Komesar, *Imperfect Alternatives*, *supra* note... (chapter 2).

¹⁴ See Komesar, *Law's Limits*, *supra* note... (chapter 4).

Komesar's comparative institutional analysis places law and law's contingencies front and center, and differs in this way from the generalized treatment of law in much of the social sciences. In terms of debates within the legal academy, he addresses law not from a formal perspective, but from that of the law-in-action, and in particular the way in which social decision-making processes shape law's meaning and effects. In sum, his approach does not reduce law — whether in terms of legal formalism or of the “rules of the game” — but openly acknowledges the contingencies of law and legal interpretation that need to be pragmatically assessed by anyone interested in law's effects in particular contexts.

Komesar's approach also differs from new institutional economics in terms of his focus on the dynamics of participation within institutions that affect the pursuit of any social goal, as opposed to a focus on resource allocation efficiency (RAE). Williamson and his followers propose that individuals, firms, and states select institutional devices in order to maximize welfare benefits, net of transaction costs and strategic costs.¹⁵ A number of legal scholars use Komesar's version of comparative institutional analysis within an RAE law-and-economics framework. Dan Cole, for example, insists on the need for welfare-based measurements in his presentation of comparative institutional analysis, with a particular focus on property law.¹⁶ Joel Trachtman similarly takes such an approach to assess institutional tradeoffs in global and WTO governance from a constitutional economics perspective.¹⁷ In contrast, Komesar's approach focuses on the dynamics of participation, and, while taking efficiency concerns seriously, remains agnostic about the particular substantive goal pursued. In light of the wide diversity of priorities, perspectives and goals at stake regarding most governance matters, and

¹⁵ Oliver E. Williamson, *The Mechanisms of Governance* (1996). See also the earlier work of Ronald Coase, including Ernest W. Williams, Jr. and Ronald H. Coase, Discussion, 54 *Am. Econ. Rev.* 192 (1964).

¹⁶ Daniel H. Cole and Peter Z. Grossman, *Principles of Law & Economics* (2d ed Kluwer/Aspen 2011), pp. 28-29; and Dan Cole, "Political Institutions, Judicial Review, and Private Property: A Comparative Institutional Analysis, 15 *Sup. Ct. Econ. Rev.* 141 (2007).

¹⁷ See, e.g., Joel Trachtman, *The Theory of the Firm and the Theory of the International Economic Organization: Toward Comparative Institutional Analysis*, 17 *NW. J. INT'L L. & BUS.* 470, 555 (1997) (identifying efficiency in meeting state preferences as a metric for comparison).

the bounded character of rationality,¹⁸ it seems presumptuous to prescribe a single goal for the evaluation of all policy contexts. In this sense, Komesar's approach can be viewed as incorporating a form of value pluralism, to refer once more to the work of Isaiah Berlin.¹⁹

Nonetheless, as Komesar has argued, and I have applied elsewhere with Trachtman, these two approaches (welfare-based and participatory-based) are related, and not necessarily opposed.²⁰ Participation lies at the center of neoclassical economists' concern with resource allocation efficiency, whether in terms of supply and demand curves, market distortions through monopolistic and oligopolistic behavior, information asymmetries and information manipulations, and "public choice" effects on government decision-making. The different dynamics of participation characterizing different institutional fora will determine the pursuit of a particular social goal, including that of resource allocation efficiency, or whatever bundle of goals might be promoted.

Finally, there is a key difference between Komesar's application of his framework that calls for analysis of particular contexts and those who apply it in a deductive way resulting in single, cross-cutting recommendations regarding legal interpretation. Adrian Vermeule notably acknowledges the importance of comparative institutional analysis given the different "capacities of interpreters and

¹⁸ See e.g., Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 *AM. ECON. REV.* 1449 (2003) (studying "the psychology of intuitive beliefs and choices and examin[ing] their bounded rationality"); Herbert Simon, "Bounded Rationality and Organizational Learning," *Organization Science* 2 (1): 125 (1991).

¹⁹ As Berlin writes, "Pluralism, with the measure of 'negative' liberty that it entails, seems to me a truer and more humane ideal It is truer, because it does, at least, recognise the fact that human goals are many, not all of them commensurable, and in perpetual rivalry with one another." *ISAIAH BERLIN, LIBERTY* 216 (Henry Hardy ed., 2002).

²⁰ For further explication, see Neil Komesar, *The Essence of Economics: Law, Participation and Institutional Choice (Two Ways)*, in *ALTERNATIVE INSTITUTIONAL STRUCTURES: EVOLUTION AND IMPACT* 165, 170 (Sandra Batie & Nicholas Mercurio eds., 2008) ("participation lies at the heart of key economics concepts such as transaction costs, externalities and resource allocation efficiency. Transaction costs are the costs of market participation. Externalities are failures of market participation where missing transactions give rise to allocative decisions that do not reflect all costs and benefits. Resource allocation efficiency is defined by transaction costs and violated by externalities and is, therefore, a participation-based notion"); and Gregory Shaffer and Joel Trachtman, *Interpretation and Institutional Choice at the WTO*, *Va. J Int'l L.* 52:1 (2011).

... the systemic effects of interpretive approaches.”²¹ Yet Vermeule ultimately calls for a “no frills” textualism in judicial interpretation based on rational choice decision theory.²² He concedes that comparative institutional analysis depends on empirics, but maintains that empirical work cannot help courts because of the problem of “trans-science” (the limits of social science) so that although the resolution of interpretive debates is “empirical in principle,” it is “intractable in practice.”²³ He turns to decision theory to maintain that judges should limit themselves to textualist reasoning and generally defer to other branches of government. He thus makes a single institutional choice for all cases, regardless of context, maintaining “[w]here texts are intrinsically ambiguous, the legal system does best if judges assign the authority to interpret those texts to other institutions . . . [such as] administrative agencies . . . [or] legislatures.”²⁴ Komesar, in contrast, although he is quite skeptical of courts as panaceas and thus implicitly critiques much liberal legal scholarship,²⁵ recognizes the parallel defects in legislative and administrative processes so that any meaningful analysis must be comparative in a more contextualized manner.

III. The Challenges of Applying Comparative Institutional Analysis

Although I am a great advocate of Komesar’s approach, it raises significant challenges for those wishing to apply it. On the one hand, it can be critiqued for being too narrow in its predominant focus on incentives and thus fails to capture that institutions are independent actors with their path dependencies and taken-for-granted ways. On the other hand, it can be critiqued for being too open-ended

²¹ ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 2 (2006).

²² *Id.* at 80–81 (discussing second-best accounts of interpretation); see *id.* at 171 (discussing decision theory under uncertainty). Vermeule also discusses and applies cost-benefit analysis, the “principle of insufficient reason,” the “maximin criterion,” the importance of “picking” a clear rule, and the desirability of “fast and frugal heuristics.” *Id.* at 171–81. See generally DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 46 (1994) (“[G]ame theory shares its basic premises with classical economics.”).

²³ *Id.* at 162. For example, he cites the empirical work of William Eskridge as the “best available,” but then rejects it because of the limits of empirical studies. *Id.* at 159–61 (citing William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331 (1991)). For Vermeule, such empirical work suffers from a “fallacy of composition: the assumption that a feature true of a subset of cases will hold true when generalized to all cases.” *Id.* at 161.

²⁴ *Id.* at 4.

²⁵ See *Law’s Limits*, *supra* note...

for meaningful analysis because it includes too many variables, some of which are endogenous to each other.

First, Komesar's framework can be viewed as relatively narrow, coming from a University of Chicago neoclassical law-and-economics perspective that focuses on law as a price and participation in cost-benefit terms, which together affect outcomes.²⁶ Within his framework, he addresses rational-choice factors affecting participation such as per capita stakes in outcomes, transaction costs, and collective action challenges. Surely these factors are critical, and I highlight them in my work. Yet the framework can be critiqued because it does not take account of institutions as independent actors that "think" in particular ways, to take from the cultural anthropologist Mary Douglas.²⁷ Institutional epistemologies and path dependencies can be viewed through a participation lens as products of the costs and benefits of participation, but such epistemologies and path dependencies can be powerful and difficult to change when they become entrenched. From this perspective, institutions reflect repeated patterns that inform their behavior, which is notably the case with the institutions that administer and implement law. As Elizabeth Mertz writes, "[l]egal institutions speak to other institutions using law's fundamental 'grammar,' and those who must interpret the resulting legal directives receive these messages through the filter of their own institutions' priorities and discourses."²⁸ Similarly, in matters of global governance, constructivist international relations theorists Michael Barnett and Martha Finnemore show how institutions create patterns of perceiving matters and acting upon them that independently affect outcomes.²⁹ In this sense, allocating issues to different institutions will give rise to outcomes that do not simply reflect dynamics of participation within an

²⁶ See Komesar, *Essence*, supra note... ("I remain a neoclassical economist in the sense that I have a strong instinct to see all social phenomena in terms of a small set of determinants. In my case, these are the determinants of institutional participation. I suspect that the "paths" of path dependence are variations in the costs and benefits of participation").

²⁷ See MARY DOUGLAS, *HOW INSTITUTIONS THINK* (1987); see also ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY* (1984).

²⁸ Elizabeth Mertz, *Language Structure and Law School Reform* (LSA Berlin presentation). Here, actors within such different institutions work within different cognitive and discursive frames that require some forms of translation for other institutional contexts.

²⁹ Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (2005).

institution, but also embedded institutional cultures — the way the institution itself thinks.

Comparative institutional analysis can nonetheless be applied to take account of institutional norms, building from a micro-analysis of institutions. In this vein, Ed Rubin has argued that we need a complementary “phenomenology of institutional thought” to understand “how individual human beings, on the basis of their own thoughts and actions, are shaped by their institutional context, and how, in turn, they shape that context in response to changing circumstances or conceptualizations.”³⁰ In an important article engaging with Komesar’s framework, he calls for a synthesis of law and economics and social theory that will give rise to “a new, unified methodology for legal scholarship based on the analysis of institutions.”³¹ In doing so, he stresses that “[t]he one element of legal process theory that was not explicitly attacked by law and economics or critical legal studies was the call for comparative institutional analysis.”³²

In addition, Komesar works with institutions in ideal-type terms — assessing the political process, the market process, and the judicial process as institutional alternatives. He thus does not explicitly address the central role of administrative agencies in contemporary governance,³³ nor variation in private forms of governance. He also does not address the critical issue of variation in institutional

³⁰ Edward Rubin & Malcolm Feeley, *Creating Legal Doctrine*, 69 S. CAL. L. REV. 1989, 1994 (1996). This microanalysis of institutions should also address private organizations as well, building on neoinstitutional insights from sociology as applied to law. Sociological neoinstitutionalism assesses how institutions work and have social effects. See, e.g., JAMES G. MARCH & JOHAN P. OLSEN, *REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS* 1–19 (1989); Paul J. DiMaggio & Walter W. Powell, *Introduction to THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* 1, 1–38 (Walter W. Powell & Paul J. DiMaggio eds., 1991); Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147 (1983) (studying the causes of bureaucratization and organizational change); John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340 (1977) (studying the formal structures of organizations in postindustrial society); and Lauren B. Edelman, Steven E. Abraham & Howard S. Erlanger, *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC’Y REV. 47, 75 (1992). See also Arthur Denzau & Douglass North, *Shared Mental Models: Ideologies and Institutions* 47 *Kyklos* 3 (1993) (integrating analysis of shared mental models and ideologies of actors).

³¹ See Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1424 (1996).

³² *Id.* at 1403.

³³ William Eskridge, this symposium.

design and the importance of institutional innovation in a rapidly changing world, although his analytic framework can be used to assess institutional design issues.³⁴

Komesar's comparative institutional analysis can also be critiqued for being too static in its analysis, since allocations of authority to a particular institution spur reactions by other institutions that give rise to dynamic and recursive institutional interaction over time. William Eskridge has developed a dynamic theory of statutory interpretation based on such institutional interaction.³⁵ Like Vermeule, Eskridge works with game theory, but complements it with empirical work. He presents evidence showing that judicial overrides are more likely to occur if judges adopt formalist "plain meaning" decisions, thus indicating that formalist readings are more likely to contradict congressional purpose and therefore be "countermajoritarian."³⁶

In parallel, Terrence Halliday has developed a theory of the recursivity of law that explicitly addresses different factors that may give rise to recursive interactions between institutions over time.³⁷ Halliday focuses on four factors, (i) differences in actors' diagnosis of a "problem" that law is to address; (ii) differences in participation of those who devise law and those who implement it; (iii) contradictions within the law; and (iv) indeterminacies in the law. All of these factors trigger the dynamic interaction of institutions. Those actors who prevail at the stage of diagnosis in lawmaking may face considerable implementation challenges because other institutions will frame the problem in other ways. The interests of actors that wield power in the implementation of legal norms may not have been represented at the enactment stage, again triggering implementation difficulties that catalyze new cycles of legal normmaking. Contradictions and indeterminacies in the law may reflect differences among actors or unconsidered

³⁴ See e.g. Gregory Shaffer, Parliamentary Oversight of WTO Rule-Making: the Political and Normative Contexts, *Journal of International Economic Law* vol. 7:3, 629-654 (2004).

³⁵ See e.g. WILLIAM ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION* (1994); and WILLIAM ESKRIDGE & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTIONALISM* (2010).

³⁶ *Id.* at 159-61 (citing William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *YALE L.J.* 331 (1991)). See Eskridge's review of Vermeule's book in William N. Eskridge, Jr., *No Frills Textualism*, 119 *HARV. L. REV.* 2041 (2006) (finding Vermeule's book to suffer from "agency nirvana").

³⁷ Terrence C. Halliday & Bruce G. Carruthers, *The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes*, 112 *AM. J. SOC.* 1135 (2007).

issues that will need to be resolved, so that these actors once again spur new cycles of legal normmaking to address ongoing problems.

All of these factors are quite important for understanding how law operates in the world, and they can be incorporated in Komesar's framework. Yet raising them brings to the fore a countervailing concern with the breadth of the framework, leading to challenges in applying it when decision makers must decide in a timely manner. As the legal realist Max Radin wrote: "Judges are people and the economizing of mental effort is a characteristic of people, even if censorious persons call it by a less fine name [A] judge economic of mental effort, may decline to disturb [his initial sense of a case] by searching for new elements which might compel the substitution of a wholly different situation."³⁸

Applying Komesar's framework is beset by challenges in this respect. To start, Komesar's two-force model of politics rightfully raises concerns about the challenges of both majoritarian and minoritarian bias. Sometimes it may be clear which is present. But at other times these concerns may cut in different ways. The analysis may simply reflect the conceptual frame used to assess dynamics of participation. In my area of international trade law, political economists conventionally view protectionism as a reflection of the problem of minoritarian bias. Free trade advocates thus call for international law and institutions to help overcome domestic political malfunctions.³⁹ But liberal trade policy can also have distributive implications that impose severe costs on a few to the benefit of the many, raising the potential challenge of majoritarian bias. One can attempt to devise policies to compensate the losers, but implementing them in practice typically does not occur. Trade law also implicates non-trade values, such as environmental, cultural and developmental concerns that may be quite localized and not taken into account in global decision making.⁴⁰ The resulting incommensurability of values will

³⁸ Max Radin, "The Theory of Judicial Decision: Or How Judges Think." *American Bar Association Journal*, 11(6): 357, 362 (1925).

³⁹ John McGinnis & Mark Movsian, *The World Trade Constitution: Reinforcing Democracy through Trade*, 114 *HARV. L. REV.* 511 (2000).

⁴⁰ In this sense, what constitutes an illegitimate "trade barrier" is a social construction, reflecting different perspectives of different constituencies in different societies in light of their interests and social contexts.

make any normative conclusion difficult to assess, whether in terms of goal choice (such as in welfare analysis) or institutional choice (such as which institution is less biased from the standpoint of participation).

In addition, it is not always clear if the dynamics of participation or institutional choice or institutions should be viewed as the independent, intervening, or dependent variables in Komesar's framework. For example, in applying the framework, is institutional choice the independent variable that determines law, the dependent variable?⁴¹ Or, to the contrary, is the dynamics of participation the independent variable that shapes institutional choice, the dependent variable, in light of strategic behavior?⁴² Or alternatively, is the dynamics of participation the independent variable that determines law as the rules of the game, the dependent variable?⁴³ Each of these possibilities is reflected in different aspects of Komesar's and others' work on comparative institutional analysis because, on the one hand, the operation of institutions depends on the dynamics of participation within them, and, on the other hand, institutions shape and constrain participation. These alternative options nonetheless raise questions regarding the direction of causation being assessed, thus creating the problem of endogeneity for the testing of any model. As a result, Komesar's comparative institutional analysis should be viewed as an analytic framework, and not as a theoretical model.

In distinguishing his approach from that of traditional institutional economists, Komesar has maintained that, from a positive perspective, his interest lies in a bottom-up analysis of how the dynamics of participation in institutions shapes law — the third alternative conception laid out above. As he writes:

⁴¹ Komesar's work advocates the key role of comparative institutional analysis because institutional choice allocates decision making to different institutions (which can be viewed as an intervening variable) characterized by different dynamics of participation that thus affects outcomes.

⁴² Political scientists such as E.E. Schattschneider have assessed how the exercise of institutional power consists of the mobilization of bias. See e.g. E.E. SCHATTSCHNEIDER, *THE SEMI-SOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* (1960). See also Peter Bachrach & Morton Baratz, *Two Faces of Power*, 56:4 *AM. POL. SCI. REV.* 947, 948 (Dec. 1962); and Peter Bachrach & Morton Baratz, *Decisions and Nondecisions: An Analytical Framework*, 57 *AM. POL. SCI. REV.* 641 (1963).

⁴³ Komesar at times has depicted his approach in this vein, as noted below.

“The real difference between traditional institutional economic analysis and my version of institutional analysis, however, lies less in definition and more in the direction of causation. For traditional institutional economists like Allan Schmid, laws, rules and customs determine the dynamics of participation, and therefore, the degree of influence and power... For new institutionalists like Douglass North, the role of property rights and the direction of causation is the same (even if the performance measure now emphasizes resource allocation efficiency rather than distribution).... In my approach, law is a function of participation which is in turn a function of the costs and benefits of participation and factors like numbers and complexity. Law is the dependent variable and endogenous to the analysis. That participation is also a function of rules is secondary.”⁴⁴

By taking such a position, Komesar opens up, from a positive perspective, the study of how institutions shape law in different ways.

From a normative perspective, however, Komesar also contends that some institutional choices are better than others because of the dynamics of participation in the institution to which authority is allocated.⁴⁵ This is why he insists that institutional analysis must be comparative. He thus suggests that decision makers, such as judges, can have some autonomy in making institutional choices, and that they should exercise it in a way informed by comparative institutional analysis. These two perspectives — one positive focused on the dynamics of participation, and the other normative focused on an evaluation of decision making — can be reconciled because of their different orientations — descriptive and evaluative. Yet they also illustrate how the dynamics of participation and institutional choices dynamically interact. Although social scientists may find only the positive aspect of Komesar’s work of interest, the work’s normative implications particularly interests

⁴⁴ See Komesar, *Essence*, supra note..., at 166-67.

⁴⁵ As noted earlier, Komesar’s approach remains agnostic regarding substantive normative goals. Its main point is that regardless of one’s normative goal, one needs to address how the goal’s pursuit will be mediated by institutions, affecting outcomes, so that institutional choice is critical.

the legal community. Once again, because of its mix of positive and normative analysis, Komesar's approach should be viewed as an analytic framework, and not a theoretical model.

Komesar's framework should itself be subject to comparative analysis in relation to rival positive and normative frameworks. In my view, Komesar's framework is not easy to apply, but it is superior to simpler frameworks based on gross assumptions that predetermine the analysis — such as the assumptions made in some applications of neoclassical law and economics criticized by Richard Posner himself at the start of the 2008 financial crisis.⁴⁶ It is likewise superior to more complicated approaches that give little analytic leverage in concrete cases — such as the broader skeptical claims regarding law in some of the critical legal studies literature.

Komesar's framework is important because it helps to orient what to look for in understanding, making, and evaluating decisions about law. It provides a middle ground between what Arthur Leff called the desert of law and economics and the swamp of law and society.⁴⁷ From a pragmatist perspective, we need a way to organize an assessment of policy in a world characterized by increasing complexity and volatility, and a growing number of diverse stakeholders affected by policy. One way to do so is to make presumptions and cross-the-board conclusions from simple

⁴⁶ See RICHARD A. POSNER, *A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION* 260 (2009) ("The depression is a failure of capitalism, or more precisely of a certain kind of capitalism ('laissez-faire' in a loose sense, 'American' versus 'European' in a popular sense); id. at 267 ("Many economists have been converted—virtually overnight—from being Milton Friedman monetarists to being J.M. Keynes deficit spenders . . ."). Judge Posner also notrd in a Federalist Society address, "You can have rationality and you can have competition, and you can still have disasters." Press Release, Columbia Law School, Financial Crisis: A Business Failure to a Government Failure: Judge Richard Posner Lectures at Columbia Law School (Nov. 26, 2008), available at http://www.law.columbia.edu/media_inquiries/news_events/2008/november2008/posner. see also GEORGE A. AKERLOF & ROBERT J. SHILLER, *ANIMAL SPIRITS: HOW HUMAN PSYCHOLOGY DRIVES THE ECONOMY, AND WHY IT MATTERS FOR GLOBAL CAPITALISM* 5 (2009) ("This book is derived from a different view of how economics should be described. The economics of the textbooks seeks to minimize as much as possible departures from pure economic motivation and from rationality.").

⁴⁷ As Ellickson wrote, "The late Arthur Leff, who read extensively in both, saw law-and-economics as a desert and law-and-society as a swamp." A similar comment could be made in terms of empirical methods. See Robert Ellickson, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 147 (1991).

models. Another option is to do what the legal realists did which was to create narrower context-specific categories that help to orient legal analysis.⁴⁸

IV. The Contributions of a New Legal Realism

As Victoria Nourse and I have argued elsewhere, applying Komesar's framework should be part of what we call a new legal realist approach.⁴⁹ New legal realism provides a necessary complement that grounds comparative institutional analysis in empirical work. Such empirical work should inform comparative institutional analysis regarding the implications of different institutional choices.

New legal realism grows out of the old legal realist movement that was particularly active in the 1920s and 1930s and that responded to what it viewed as formalist legal scholarship.⁵⁰ Legal realists argued, among other matters, for the need to study the context in which law is made, operates and has effects before making any proposition about what a law means or should do. As Karl Llewellyn maintained, "The argument is simply that no judgment of what Ought to be done in the future with respect to any part of law can be intelligently made without knowing objectively, as far as possible, what that part of law is now doing." Llewellyn called for "the temporary divorce of Is and Ought for purposes of study."⁵¹

What is particularly "new" in new legal realism is first that it engages in empirical work, and second that it engages in critical self-reflection of its empirical endeavors. While the old legal realists called for greater empirical work so that the practice (and thus meaning) of law would be better understood, they were less

⁴⁸ See Mathew Stephenson, *Legal Realism for Economists*, *Journal of Economic Perspectives*, 23:2, 191 (Spring 2009).

⁴⁹ Nourse & Shaffer, *Varieties*, *supra* note...

⁵⁰ Legal realism has many variants and, in large part, can be viewed in terms of a scholarly reaction to classical, formalist legal theory and practice. For different assessments of Legal Realism, see e.g., Leiter, *American Legal Realism*, (re legal realism's core claim); *AMERICAN LEGAL REALISM* (William Fisher, Morton Horwitz & Thomas Reed eds., 1993) (including classic texts of legal realists and their antecedents); JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995).

⁵¹ See Karl Llewellyn, *Some Realism about Realism: Responding to Dean Pound*, 44 *HARV. L. REV.* 1222, 1236-37 (1931).

accomplished in practicing what they preached.⁵² In addition, although the empirical study of law lies at the heart of the new legal realist scholarly commitment, a new legal realism should take into account critical, epistemological challenges to factual and legal constructions. Critical legal theories have made us more scrutinizing of objective presentations of “law” and “fact.”⁵³

New legal realism, nonetheless, is relatively better positioned than formalist and deductive analysis (based on assumptions) to show how presentations of law and fact are not equal. Although a new legal realist approach recognizes that “social science” is never entirely “correct,” it advocates empirical study because it is the best way for us to proceed toward a better understanding of the world in which law operates. This perspective lies at the core of Deweyan pragmatism that rejects “the idea of complete objectivity” but insists “on the need for a scientific study of social problems.”⁵⁴ A new legal realist approach contends that researchers need to be vigilant of biases that reflect their own backgrounds and social contexts. What new legal realism takes from critical perspectives is to engage in more reflexive examination of bias, but in the service of relatively more objective empirical study.

⁵² See, e.g., Stewart Macaulay, *The New Versus the Old Legal Realism: ‘Things Ain’t What They Used to Be’*, 2005 WIS. L. REV. 367, 375 (2005) (“The classic realists talked about doing empirical research, but relatively little was accomplished.”).

⁵³ See, e.g., David Trubek & John Esser, *Critical Empiricism in American Legal Studies: Paradox, Program or Pandora’s Box?*, 14 LAW & SOC. INQUIRY 3 (1989) (rejecting “universal scientism”); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 575 (1984) (going beyond a critique of formalism as legitimization, and critiquing the legal realist’s for their functionalism and the presumption of inevitability and the blindness toward domination that it entails); and Edward Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions* 109 HARV. L. REV. 1393, 1401 (“As Horkheimer and Adorno, the founders of the Frankfurt School, observe, claims of neutrality are designed to mask the exercise of power, to communicate a pseudo-scientific methodology that disables people from perceiving the possibility of rebellion or dissent.” Citing MAX HORKHEIMER & THEODOR ADORNO, *DIALECTIC OF ENLIGHTENMENT* 20-23 (John Cumming trans., 1972)). Among the legal realists, see, e.g., JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 14, 23 (1949) (“Facts are guesses... The trial court’s facts are not ‘data,’ not something that is ‘given’; they are not waiting somewhere, ready made, for the court to discover, to ‘find’”); JEROME FRANK, *LAW AND THE MODERN MIND* 106 (1930) (noting, “Judges, we are advised, are far more likely to differ among themselves on ‘questions of fact’ than on ‘questions of law.’”). For a philosophical investigation of these issues, see JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* (1995).

⁵⁴ See Patricia Ewick, Robert Kagan and Austin Sarat, *Legacies of Legal Realism: Social Science, Social Policy and the Law*, in Ewick, Kagan and Sarat (eds.), *Social Science, Social Policy and the Law* (1999), at 3 (citing JOHN DEWEY, *THE QUEST FOR CERTAINTY* (1960), in rejecting “the idea of complete objectivity” but insisting “on the need for a scientific study of social problems”).

A new legal realism is important for engaging in comparative institutional analysis in two respects. First, it helps us to develop conditional theory regarding the conditions under which law is made and has effects. By conditional theory, I refer to theory built from methodological approaches that seek to understand variation regarding law's development and role in different contexts.⁵⁵ The role of conditional theory is reflected in the legal realists' development of factually-contextualized categories for understanding legal doctrine.⁵⁶ Likewise, empirically-grounded conditional theory is critical for engaging in comparative institutional analysis in a world of high numbers and complexity and limited time for making decisions.

Complementarily, new legal realism is important for developing emergent analytics that upsets prior assumptions and predispositions that turn out to be wrong. By emergent analytics, Nourse and I mean analytics through which researchers can reassess their analytic priors so that new understandings can emerge.⁵⁷ For a new legal realist, methods should not only aim to explain variation, but also must be careful not to simply reconfirm analytic priors. Qualitative methods, such as fieldwork, can be particularly beneficial in this respect. A participation-oriented comparative institutional analysis is linked to the idea of emergent analytics in that it recognizes that the dynamics of participation in different institutional processes give rise to quite different analytics.

V. Applying Comparative Institutional Analysis and New Legal Realism: The Example of Global Governance

The main challenge of comparative institutional analysis lies in applying it. Such comparative institutional analysis will always be imperfect, but we know, at a minimum, that it will be superior to single institutional critiques. It is for us, in different domains, to use it to help orient meaningful analysis that is pragmatically grounded.

⁵⁵ See Gregory Shaffer & Tom Ginsburg, *The Empirical Trend in International Law*, AJIL (2012).

⁵⁶ Stephenson, *supra* note...

⁵⁷ Nourse and Shaffer, *What's Law Got to Do with It*, *supra* note...

Comparative institutional analysis will need to be increasingly used as part of a new legal realism in assessing international and transnational legal ordering. A great deal of my work has applied comparative institutional analysis in assessing decision making in global governance, with special attention on the World Trade Organization in light of the implications of its dispute settlement system.⁵⁸ Comparative institutional analysis is particularly important in the context of global trade governance given that constituencies of different countries at different levels of development have widely varying priorities, perceptions, and abilities to be heard.

From a new legal realist perspective, in the international trade law context, academics in the United States are particularly well-placed to participate in international policy framing because they write from the center of global power, not only economically, but also socially and linguistically, including in terms of the relative status of US universities. Their presentations of “law” and “fact” are more likely to reflect their backgrounds and the priorities and perspectives of those with whom they most frequently engage. The very process of engaging in empirical work, especially that which takes us into the field to engage with others with whom we otherwise have no contact, inevitably pushes us beyond our initial assumptions, so that we listen to other voices and perspectives.⁵⁹

Let me give a brief example of how my perspectives on international trade law issues were changed through engaging in fieldwork. As a beginning academic, I obtained a National Science Foundation grant to examine the political economy of trade-environment issues and went to Geneva with a conventional conception (within the US academic context) that the WTO was trade-biased and needed “to balance” competing environmental norms and objectives. I soon learned how much

⁵⁸ See e.g. Shaffer & Trachtman, *supra* note...; Gregory Shaffer, *Global Public Goods in a Legal Pluralist World*, EJIL (2012); Gregory Shaffer, *Power, Governance and the WTO: A Comparative Institutional Approach*, in Barnett and Duvall (eds) *Power in Global Governance* (2005); Gregory Shaffer, *A Structural Theory of WTO Dispute Settlement*, NYU JILP (2008).

⁵⁹ See e.g., Elizabeth Mertz, *Challenging Translations: New Legal Realist Methods*, 2005 WIS. L. REV. 482, 483-84 (2005) (insisting on “the power of social science methodology to push us beyond our personal politics or situations, to enforce a form of humility in which we must listen to voices other than our own”).

more complex the issues were. Interviews turned into lectures from developing country representatives and civil society groups about how my questions reflected a northern frame. I learned about how environmental issues, and thus the trade-environment debate, was constructed (and being constructed) differently by US and European representatives, NGOs and academics than by their developing country counterparts, with the US and Europeans having the advantage of the resources and status that US and European universities bring, and greater access to Western media and learned journals. I learned how the term “environment” has vastly different meanings to stakeholders in developing countries where it is much more difficult to separate the concept from that of “development” because people’s livelihoods are more intimately connected on a day-to-day basis with the environment.⁶⁰ My assumptions and expectations were upset by the experience of weeks of interviewing and discussing the issues with people coming from a much broader range of experience and priorities.

I then reviewed the minutes of WTO trade and environment committee meetings and minutes of meetings that the WTO organized with stakeholders to check what I heard in interviews. I tabulated and assessed who spoke at these meetings on which issues and in which ways to illustrate that one could not simply construct trade and environment issues along a pro-trade/pro-environment, or pro-business/pro-civil society dichotomous frame, as depicted in the US media and much of US scholarly literature. The data showed how government representatives from northern and southern countries distinctly framed trade-environment issues.⁶¹ Civil society advocates from the north and south largely aligned with the frames used by the respective government representatives. In particular, US and EU

⁶⁰ See Gregory Shaffer, *The World Trade Organization under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 *HARV. ENVTL. L. REV.* 1, 61-68 (2001). For an assessment of the different treatment of the environment in the United Kingdom and India, see Graham Chaywan, Keval Kumar, Caroline Fraser & Ivor Gabel, *Environmentalism and the Mass Media: The North-South Divide* (1997) (noting the different perceptions of the word “environment” in Britain and India, and that in India, because many people’s livelihood is directly connected to the environment, “it is difficult to separate it from development”(at xiv)). For an examination of environmentalism from a wide variety of perspectives, see *World Views and Ecology*, Mary Evelyn Taucker & John Grim, eds. 1993.

⁶¹ See Shaffer, *WTO under Challenge*, supra note....

stakeholders and government representatives tended to frame environmental issues in a preservationist manner, while southern stakeholders and government representatives tended to frame them within a developmental lens regarding the intersection of human communities and natural habitats.⁶²

From the perspective of the interpretation of WTO rules in the judicial process, this work made me much more cautious in advocating particular interpretive choices of WTO rules. To give an example, arguably the most famous case in WTO law, known as the US shrimp-turtle case, involved a US ban of imports of shrimp from a number of South and Southeast Asian countries on the grounds that they did not require large shrimp trawlers to use devices that permit endangered sea turtles to escape from nets. To study the background to that case, I obtained funding to travel to Thailand which was the country most affected by the US ban. I interviewed government officials, NGO activists, marine biologists and visited the beaches where sea turtles nested, a port where shrimp trawlers were based, and shrimp farms. I learned of completely different perspectives of the issues where those living by the beaches made less than a dollar a day and had incentives to steal turtle eggs, where luxury hotels visited by Westerners destroyed sea turtle nesting habitat, and where shrimp farmers committed suicide when their investments were wiped out over night by the US ban in which the US provided almost no transition period nor any funding for the increased environmental regulatory demands on which it insisted to protect sea turtles in Asian waters. This empirical work fed into my analysis of the comparative institutional choices available for interpreting WTO law applying in this case, and assessing the choices ultimately made by the WTO Appellate Body.⁶³

VI. Conclusion

Scholars and decision makers need an analytic framework in which to assess the information that empirical study generates. Komesar provides such a framework with his version of comparative institutional analysis. In the case of my

⁶² Id.

⁶³ Shaffer, Power, *supra* note....

work, a comparative institutional analytic framework that is participation-centered helps to situate law and policy conflicts in social and institutional context, recognizing that constituencies of different countries at different levels of development have widely varying priorities, perceptions, and abilities to be heard. Komesar's framework needs to be complemented by an empirically-grounded new legal realist approach regarding how law is translated in different institutional contexts. In this way, new analytics can emerge that will update and inform comparative institutional analysis in a dynamically changing world.