COMPARATIVE INSTITUTIONAL ANALYSIS AND A NEW LEGAL REALISM

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INTRODUCTION

If there are hedgehogs and foxes in scholarship, as Isaiah Berlin opined,[1] 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 Symposium, 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

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1. Berlin distinguished those people (foxes) drawn to an infinite variety of questions and phenomena, and those people (hedgehogs) who view everything in terms of an all-encompassing system. ISAIAH BERLIN, THE HEDGEHOG AND THE FOX: AN ESSAY ON TOLSTOY'S VIEW OF HISTORY 1–2 (1953) (building from a quote from the seventh-century Greek poet Archilochus—"The fox knows many things, but the hedgehog knows one big thing").

required and such analysis must be comparative.[2] All institutional processes reflect biases in participation, whether the imperfections are in the market, the political process, the courts, or otherwise.[3] 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.[4] 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.[5] And those who call for greater or lesser involvement of courts or greater or lesser judicial deference toward administrative agencies must assess the relative defects of the judicial process in relation to those of other institutions.[6]

Komesar's analytic framework necessarily calls for close empirical understanding and microanalysis 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.[7] 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 that 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.[8]

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

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2. *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 3–6 (1994) [hereinafter KOMESAR, IMPERFECT ALTERNATIVES]; NEIL K. KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS 174–77 (2001) [hereinafter KOMESAR, LAW'S LIMITS].

3. *See* KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 2, at 5–7.

4. *See id.* at 22, 112–15.

5. *See id.* at 22, 26–27.

6. *See id.* at 21–23, 26–27.

7. *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, 385, 388–92; Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 136–37 (2009).

8. Nourse & Shaffer, *supra* note 7, at 129, 132; Victoria Nourse & Gregory Shaffer, What's Law Got to Do With It?: Vices and Virtues of New Legal Realist Theory and Practice 6–7, 15–16 (Sept. 16, 2012) (unpublished manuscript) (on file with author).

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 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 less reductive understanding of law and institutions. Part III 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.[9]

All institutions are imperfect because they reflect biases in participation; therefore, their relative tradeoffs in different contexts must be compared. Markets reflect informational and other asymmetries, which provide advantages to certain interests over others.[10] Political processes reflect the influence of organized groups and the self-interest of representatives.[11] Participation in judicial processes is costly and

9. *E.g.*, KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 2, at 11 (noting that Komesar's approach to comparative institutional analysis is participation-centered); KOMESAR, LAW'S LIMITS, *supra* note 2, at 189 (emphasizing the importance of the dynamics of participation to comparative institutional analysis).

10. *See* KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 2, at 100–05.

11. *See id.* at 54–55, 58–64.

time-consuming, often advantaging the haves over the have nots,[12] and, in any case, courts have limited resources to hear all relevant claims in increasingly complex and rapidly changing societies.[13]

Biases, moreover, can take different forms, reflecting (in ideal-type terms) what Komesar calls minoritarian and majoritarian biases.[14] Public choice and interest group theories of politics reflect concerns over minoritarian biases in politics—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.[15] 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 framework 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

12. Marc Galanter, *Why the "Haves" Come out ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 124–25 (1974).

13. KOMESAR, LAW'S LIMITS, *supra* note 2, at 35, 37–38.

14. For definitions of minoritarian versus majoritarian bias, see KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 2, at 56–57.

15. *Id.* at 81.

asymmetries—without reference to other institutions that may well be subject to similar (but not identical) dynamics.[16] 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.[17] Neither the market nor the political process, neither administrative bodies nor the courts, offer a simple solution. 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 his or her framework comparative institutional analysis. Do a search of the term and you will find completely different literatures grounded in institutional economics,[18] comparative politics,[19] and economic sociology.[20] 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),[21] while others call for a contextualized, empirically grounded approach (such as Victoria Nourse and Gregory Shaffer).[22] Some focus on efficiency as the

16. *Id.* at 5–6.

17. *See* CHARLES DICKENS, BLEAK HOUSE 14–15 (Stephen Gill ed., Oxford Univ. Press 1996) (1853).

18. *See, e.g.*, MASAHIKO AOKI, TOWARD A COMPARATIVE INSTITUTIONAL ANALYSIS 2–3, 377 (2001); AVNER GREIF, INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY: LESSONS FROM MEDIEVAL TRADE 4–5 (2006); DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3 (1990) [hereinafter NORTH, INSTITUTIONS]; DOUGLASS C. NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE 1, 5 (2005).

19. *See, e.g.*, James Mahoney & Kathleen Thelen, *Preface* to EXPLAINING INSTITUTIONAL CHANGE: AMBIGUITY, AGENCY, AND POWER xi, xii (James Mahoney & Kathleen Thelen eds., 2010) (providing a historical institutionalist perspective); Glenn Morgan et al., *Introduction* to THE OXFORD HANDBOOK OF COMPARATIVE INSTITUTIONAL ANALYSIS 1, 2–3 (Glenn Morgan et al. eds., 2010); Kathleen Thelen, *Historical Institutionalism in Comparative Politics*, 2 ANN. REV. POL. SCI. 369, 369–71 (1999).

20. *See, e.g.*, JOHN L. CAMPBELL, INSTITUTIONAL CHANGE AND GLOBALIZATION 2–3 (2004) (providing an institutional sociology perspective).

21. *See, e.g.*, ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 145 (2006).

22. *E.g.*, Nourse & Shaffer, *supra* note 7, at 129–32.

underlying comparative measure (such as Daniel Cole[23] and Joel Trachtman[24]), while others focus on the dynamics of participation (such as Miguel Maduro,[25] Gregory Shaffer,[26] and Komesar himself[27]). 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.[28] 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 rules of the game across societies.[29] 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. North's conception of institutions 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

23. *See, e.g.*, Daniel H. Cole & Peter Z. Grossman, *When Is Command-and-Control Efficient? Institutions, Technology, and the Comparative Efficiency of Alternative Regulatory Regimes for Environmental Protection*, 1999 WIS. L. REV. 887, 888.

24. *E.g.*, Joel P. 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, 518–19 (1997).

25. *E.g.*, MIGUEL POIARES MADURO, WE THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION (1998); Miguel Poiares Maduro, *From Constitutions to Constitutionalism: A Constitutional Approach for Global Governance*, *in* 1 GLOBAL GOVERNANCE AND THE QUEST FOR JUSTICE 227, 227 (Douglas Lewis ed., 2006).

26. *E.g.*, Gregory Shaffer, *A Structural Theory of WTO Dispute Settlement: Why Institutional Choice Lies at the Center of the GMO Case*, 41 N.Y.U. J. INT'L L. & POL. 1, 4 (2008).

27. *E.g.*, KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 2, at 11 (noting that Komesar's approach to comparative institutional analysis is participation-centered); KOMESAR, LAW'S LIMITS, *supra* note 2, at 189 (emphasizing the importance of the dynamics of participation to comparative institutional analysis).

28. NORTH, INSTITUTIONS, *supra* note 18, at 3. Douglass North defines "institution" in a top-down way in terms of "any form of constraint that human beings devise to shape human interaction." *Id.* at 4.

29. *See* CAMPBELL, *supra* note 20, at 6–7; Thelen, *supra* note 19, at 389, 398.

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 microanalysis 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 v. Atlantic Cement Co.*[30] case,[31] and between community development, racial diversity, access to housing, and associational decision making reflected in the New Jersey Supreme Court decision in the *Southern Burlington County NAACP v. Township of Mount Laurel* [32] case regarding zoning.[33] 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 has 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.

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 the 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

30. 309 N.Y.S.2d 312 (1970).

31. *See* KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 2, at 14–27.

32. 336 A.2d 713 (N.J. 1975).

33. *See* KOMESAR, LAW'S LIMITS, *supra* note 2, at 79–86.

costs.[34] A number of legal scholars use Komesar's version of comparative institutional analysis within an RAE law-and-economics framework. 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.[35] Trachtman similarly takes such an approach to assess institutional tradeoffs in global and WTO governance from a constitutional economics perspective.[36] 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 the bounded character of rationality,[37] 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.[38]

Nonetheless, as Komesar has argued and as I have applied elsewhere with Trachtman, these two approaches (welfare-based and participatory-based) are related and not necessarily opposed.[39]

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34. OLIVER E. WILLIAMSON, THE MECHANISMS OF GOVERNANCE (1996); *see also* Gregory Shaffer & Joel Trachtman, *Interpretation and Institutional Choice at the WTO*, 52 VA. J INT'L L. 103, 107 (2011).

35. DANIEL H. COLE & PETER Z. GROSSMAN, PRINCIPLES OF LAW & ECONOMICS 28–29 (2d ed. 2011); Daniel H. Cole, *Political Institutions, Judicial Review, and Private Property: A Comparative Institutional Analysis*, 15 SUP. CT. ECON. REV. 141 (2007).

36. *See, e.g.*, Trachtman, *supra* note 24, at 555 (identifying efficiency in meeting state preferences as a metric for comparison).

37. *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 A. Simon, *Bounded Rationality and Organizational Learning*, 2 ORG. SCI. 125, 132–33 (1991).

38. 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).

39. 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 Mercuro eds., 2008) ("[P]articipation is 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,

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, or "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. Vermeule notably acknowledges the importance of comparative institutional analysis given the different "capacities of interpreters and . . . the systemic effects of interpretive approaches."[40] Yet Vermeule ultimately calls for a no frills textualism in judicial interpretation based on rational-choice decision theory.[41] 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."[42] 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."[43]

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therefore, a participation-based notion."); and Shaffer & Trachtman, *supra* note 34, at 108.

40. VERMEULE, *supra* note 21, at 2.

41. *Id.* at 80–81 (discussing second-best accounts of interpretation); *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 171–80; *see also* DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW 46 (1994) ("[G]ame theory shares its basic premises with classical economics.").

42. VERMEULE, *supra* note 21, at 162. For example, Vermeule 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.

43. *Id.* at 4.

Komesar, in contrast, although he is quite skeptical of courts as panaceas and thus implicitly critiques much liberal legal scholarship,[44] 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 openended 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. 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.[45] 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

44. *See* KOMESAR, LAW'S LIMITS, *supra* note 2.

45. *See* MARY DOUGLAS, HOW INSTITUTIONS THINK (1986); ANTHONY GIDDENS, THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION (1984).

through the filter of their own institutions' priorities and discourses."[46] 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.[47] In this sense, allocating issues to different institutions will give rise to outcomes that do not simply reflect dynamics of participation within an 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 microanalysis of institutions. In this vein, Edward Rubin and Malcolm Feeley have 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."[48] In an important article engaging with Komesar's framework, Rubin 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."[49] In doing so, Rubin stresses that "[t]he one element of legal process theory that was not

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46. Elizabeth Mertz, Language Structure and Law School Reform (2007) (unpublished manuscript) (on file with author). Here, actors within such different institutions work within different cognitive and discursive frames that require some forms of translation for other institutional contexts.

47. *See* MICHAEL BARNETT & MARTHA FINNEMORE, RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS (2004).

48. 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 neoinstituionalism 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 (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); Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC'Y REV. 47, 75 (1992); 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); *see also* Arthur T. Denzau & Douglass C. North, *Shared Mental Models: Ideologies and Institutions*, 47 KYKLOS 3 (1993) (integrating analysis of shared mental models and ideologies of actors).

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

explicitly attacked by law and economics or critical legal studies was the call for comparative institutional analysis."[50]

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,[51] nor variation in private forms of governance. He also does not address the critical issue of variation in institutional design and the importance of institutional innovation in a rapidly changing world, although his analytic framework can be used to assess institutional design issues.[52]

Komesar's comparative institutional analysis can also be critiqued for being too static in its analysis, because 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.[53] 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."[54]

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.[55] Halliday focuses on four factors: (1) differences in actors' diagnosis of a "problem" that law is to address, (2) differences in participation of those who devise law and those who implement it, (3) contradictions within the

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50. *Id.* at 1403.

51. William N. Eskridge Jr., *Expanding* Chevron*'s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411.

52. *See, e.g.*, Gregory Shaffer, *Parliamentary Oversight of WTO Rule-Making: The Political, Normative, and Practical Contexts*, 7 J. INT'L ECON. L. 629, 634 (2004); Shaffer & Trachtman, *supra* note 34.

53. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994); WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTIONALISM (2010).

54. ESKRIDGE & FEREJOHN, *supra* note 53, at 159–61 (citing Eskridge, *supra* note 42). See Eskridge's review of Vermeule's book in William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2059 (2006) (reviewing VERMEULE, *supra* note 21) (finding Vermeule's book to suffer from "agency nirvana").

55. *See* 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).

law, and (4) indeterminacies in the law.[56] 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 norm making. Contradictions and indeterminacies in the law may reflect differences among actors or unconsidered issues that will need to be resolved, so that these actors once again spur new cycles of legal norm making 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.[57]

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.[58] 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

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56. *Id.* at 1149–53.

57. Max Radin, *Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. J. 357, 362 (1925).

58. *See* John O. McGinnis & Mark L. Movsesian, Commentary, *The World Trade Constitution*, 114 HARV. L. REV. 511 (2000).

implementing them in practice typically does not occur. Trade law also implicates nontrade values, such as environmental, cultural, and developmental concerns that may be quite localized and not taken into account in global decision making.[59] The resulting incommensurability of values will 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)?[60] Or, to the contrary, is the dynamics of participation the independent variable that shapes institutional choice (the dependent variable) in light of strategic behavior?[61] Or alternatively, is the dynamics of participation the independent variable that determines law as the rules of the game, the (dependent variable)?[62] 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

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59. 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.

60. 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.

61. 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 SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA (2d ed. 1975); *see also* Peter Bachrach & Morton S. Baratz, *Two Faces of Power*, 56 AM. POL. SCI. REV. 947, 952 (1962); Peter Bachrach & Morton S. Baratz, *Decisions and Nondecisions: An Analytical Framework*, 57 AM. POL. SCI. REV. 632, 641 (1963).

62. Komesar at times has depicted his approach in this vein, as noted below. *See infra* note 63 and accompanying text.

participation in institutions shapes law—the third alternative conception laid out above. As he writes:

> 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.[63]

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.[64] 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 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 interest 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.

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63. *See* Komesar, *supra* note 39, at 166–67.

64. 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.

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 Judge Richard Posner himself at the start of the 2008 financial crisis.[65] 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.[66] 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 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.[67]

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65. *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 Richard Posner also noted in a Federalist Society address, "[y]ou can have rationality and you can have competition, and you can still have disasters." Press Release, Columbia Law School, Judge Posner on the Economic Crisis (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.").

66. As Ellickson wrote, "[t]he late Arthur Leff, who read extensively in both, saw law-and-economics as a desert and law-and-society as a swamp." ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 147 (1991). A similar comment could be made in terms of empirical methods.

67. *See* Mathew C. Stephenson, *Legal Realism for Economists*, 23 J. ECON. PERSP. 191, 197–98 (2009).

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.[68] 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.[69] 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, "[t]he 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."[70] Llewellyn called for "[t]he temporary divorce of Is and Ought for purposes of study."[71]

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 accomplished in practicing what they preached.[72] 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

68. Nourse & Shaffer, *supra* note 7, at 127–36.

69. 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, for example, AMERICAN LEGAL REALISM (William W. Fisher et al. eds., 1993) (including classic texts of legal realists and their antecedents); JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995); and Brian Leiter, *American Legal Realism*, *in* THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 50 (Martin P. Golding & William A. Edmundson eds., 2005) (explaining the author's view of legal realism's core claim).

70. *See* Karl N. Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236–37 (1931).

71. *Id.* at 1236.

72. *See, e.g.*, Macaulay, *supra* note 7, at 375 ("The classic realists talked about doing empirical research, but relatively little was accomplished.").

made us more scrutinizing of objective presentations of "law" and "fact."[73]

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 "insist[s] on the need for a scientific study of social problems."[74] 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.

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.[75] The role of

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73. *See, e.g.*, Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984) (going beyond a critique of formalism as legitimization, and critiquing the legal realists for their functionalism and the presumption of inevitability and the blindness toward domination that it entails); Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1401 (1996) ("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 W. ADORNO, DIALECTIC OF ENLIGHTENMENT 20–23 (John Cumming trans., 1972))); David M. Trubek & John Esser, *"Critical Empiricism" in American Legal Studies: Paradox, Program, or Pandora's Box?*, 14 LAW & SOC. INQUIRY 3 (1989) (rejecting "universal scientism"). For the viewpoints of legal realists, see, for example, 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 (2d ed. 1963) ("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).

74. *See* Patricia Ewick et al., *Introduction* to SOCIAL SCIENCE, SOCIAL POLICY, AND THE LAW 1, 3 (Patricia Ewick et al. eds., 1999) (citing JOHN DEWEY, THE QUEST FOR CERTAINTY: A STUDY OF THE RELATION OF KNOWLEDGE AND ACTION 24 (1960)).

75. *See* Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT'L L. 1 (2012).

conditional theory is reflected in the legal realists' development of factually contextualized categories for understanding legal doctrine.[76] 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.[77] 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.

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 WTO in light of the implications of its dispute settlement system.[78] 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.

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76. Stephenson, *supra* note 67, at 197–99.

77. Nourse & Shaffer, *supra* note 8.

78. *See, e.g.*, Gregory Shaffer, *Power, Governance, and the WTO: A Comparative Institutional Approach*, *in* POWER IN GLOBAL GOVERNANCE 130 (Michael Barnett & Raymond Duvall eds., 2005) [hereinafter Shaffer, *Power, Governance, and the WTO*]; Gregory Shaffer, *International Law and Global Public Goods in a Legal Pluralist World*, 23 EUR. J. INT'L L. 669 (2012); Shaffer, *supra* note 26; Shaffer & Trachtman, *supra* note 34.

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 U.S. 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.[79]

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 U.S. academic context) that the WTO was trade-biased and needed to balance competing environmental norms and objectives. I soon learned how much 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 U.S. and European representatives, nongovernmental organizations (NGOs), and academics than by their developing country counterparts, with the United States and Europeans having the advantage of the resources and status that U.S. 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.[80] My assumptions and

79. *See, e.g.*, Joel Handler et al., *A Roundtable on New Legal Realism, Microanalysis of Institutions, and the New Governance: Exploring Convergences and Differences*, 2005 WIS. L. REV. 479, 483–84 (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").

80. *See* Gregory C. 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 CHAPMAN ET AL., ENVIRONMENTALISM AND THE MASS MEDIA: THE NORTH-SOUTH DIVIDE xiv (1997) (noting the different perceptions of the word "environment" in Britain and India, and that

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 U.S. media and much of U.S. scholarly literature. The data showed how government representatives from northern and southern countries distinctly framed trade-environment issues.[81] Civil society advocates from the north and south largely aligned with the frames used by the respective government representatives. In particular, U.S. and European Union (EU) 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.[82]

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 U.S. shrimp-turtle case, involved a U.S. 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.[83] To study the background to that case, I obtained funding to travel to Thailand which was the country most affected by the U.S. ban. I interviewed government officials, NGO activists, and 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

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in India, because many people's livelihood is directly connected to the environment, "it is difficult to separate it from development"). For an examination of environmentalism from a wide variety of perspectives, see BUCKNELL REVIEW, WORLDVIEWS AND ECOLOGY (Mary Evelyn Tucker & John A. Grim eds., 1993).

81. *See* Shaffer, *supra* note 80, at 44–52.

82. *Id.* at 66.

83. Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (May 15, 1998); *see also* Shaffer, *Power, Governance, and the WTO*, *supra* note 78, at 2, 7–8.

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 U.S. ban in which the United States 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.[84] Importantly, the WTO Appellate Body did not simply defer to the U.S. position on environmental protection grounds, but rather interpreted WTO rules in a way to induce the United States to correct biases in the application of its law and procedures that had worked to the detriment of affected foreigners.[85]

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 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.

84. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998); *see also* Shaffer, *Power, Governance, and the WTO*, *supra* note 78, at 8–16.

85. *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, *supra* note 84.