

KOMESAR’S RAZOR: COMPARATIVE INSTITUTIONAL ANALYSIS IN A WORLD OF NETWORKS

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This contribution to the Symposium in honor of Professor Neil Komesar’s pathbreaking work on comparative institutional analysis addresses one question: what is the relevance of comparative institutional analysis to a world based on networks of individuals often operating across institutions or working to create new institutions? After a review of the context for Komesar’s work and an appreciation of “Komesar’s Razor,” the author addresses this key question in the context of three contemporary debates: international intellectual property reform, same-sex marriage, and reform of health care delivery and finance in the United States. The main conclusion is that Komesar’s work provides an important starting point for addressing institutions in a world of networks.

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INTRODUCTION

Although associated with economics, Ockham’s Razor is a principle of explanation that is robust across many disciplines from sociology to physics.¹ Parsimoniously stated, Ockham’s Razor is the proposition that simple explanations are more desirable than complicated ones.² Whether applied to explanations for the interactions of individuals or of planets, the principle provides intellectual guidance and comfort.

Professor Neil Komesar’s work demonstrates the appeal of Ockham’s Razor. Applicable across the range of human activities and failures that the discipline of law seeks to address, Komesar’s

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1. *William of Ockham*, STANFORD ENCYCLOPEDIA PHIL. (Jul. 2, 2011), <http://plato.stanford.edu/entries/ockham/#4.1>; see also, e.g., MARK BLAUG, THE METHODOLOGY OF ECONOMICS, OR HOW ECONOMISTS EXPLAIN 20–21 (1980). For a discussion on the issue of parsimony in economic methodology, see MILTON FRIEDMAN, *The Methodology of Positive Economics*, in ESSAYS IN POSITIVE ECONOMICS 3, 4 (1966).

2. *William of Ockham*, *supra* note 1.

comparative institutional analysis cuts through the morass of details to a core question: who should decide? The options for the identity of the decider are reduced to three: the legislators as conscious deliberators, market actors as transactional actors, or the judiciary as reviewers of facts and appliers of law.³ For Komesar, normative questions are largely unimportant.⁴ Explanations in the discipline of law entail the designation of actors situated within a specific decision-making infrastructure.

Komesar's Razor is appealing. Like its close cousin, law and economics, comparative institutional analysis has affinities to the legal process school, a dominant mode of legal training for most legal scholars of Komesar's generation. The appeal is that difficult substantive questions do not need to be answered. Instead, the discipline of law engages in its forte, the identification and construction of processes for deriving an answer. Agreements to disagree are entered into on the promise that one's wins will be balanced against losses through some institutional accounting over time. As we are often reminded in life, the thrill is not in the victory, but in the play.

My aim is to reveal the problems with Komesar's Razor, to reveal how it aids in ducking issues while at the same time bringing institutions back into the center of legal policy making. Normative questions are not as deftly avoidable as Komesar suggests. At the same time, comparative institutional analysis aids in moving beyond the dominant concern with behavior in shaping policy. Whether framed in terms of the rational actor or his debilitated cousins, the boundedly rational or the emotionally sensitive, legal analysis focuses on behavior, whether that of the decision makers or those regulated by the law. In part, this focus on behavior follows from a naïve consequentialism. Law's dictates act like prices that dissuade certain acts and encourage others. Human behavior is the medium through which law moves to reach the desirable results. Komesar's Razor takes us beyond this mechanistic view of law and focuses our attentions on the contexts within which behavior occurs.⁵

3. NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 9–10 (1994) [hereinafter KOMESAR, *IMPERFECT ALTERNATIVES*]; NEIL K. KOMESAR, *LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* 11 (2001) [hereinafter KOMESAR, *LAW'S LIMITS*].

4. See KOMESAR, *IMPERFECT ALTERNATIVES*, *supra* note 3, at 4–5.

5. Right around the time of the publication of *Imperfect Alternatives*, the field of behavioral law and economics took off. For a survey, see Christine Jolls, *Behavioral Law and Economics*, in *BEHAVIORAL ECONOMICS AND ITS APPLICATIONS* 115 (Peter Diamond & Hannu Vartiainen eds., 2007). The comparison of behavioral and institutional economics is a topic worthy of a symposium. Professors Richard Cyert and James Marsh laid the foundation in industrial organization and organization theory for analyzing behavior within institutions. See RICHARD M. CYERT & JAMES G. MARCH, *A BEHAVIORAL THEORY OF THE FIRM* 1–3 (1963). For an application of behavioral economics to the problem of institutional design, see, for example, RICHARD H. THALER

By shifting scholarly and policy attention from behavior to institutional design, Komesar enriches economic analyses of law and opens up policy tools beyond manipulation of variables such as prices and incomes, the standard and often overused focus of microeconomic analysis. His central insight is that policy should not be based on a focus on single institutions, such as the market or the state, but on the choice among imperfect institutional alternatives.⁶ Neither the market nor the state is perfect, and policy choices often entail determining whether the market or the state is more appropriate in formulating policy. While microeconomic analysis as applied to law in the form of law and economics focuses on tradeoffs that individuals face in their behavior between alternative types of transactions, Komesar asks about the tradeoffs among institutions. His question is at a deeper level, asking us to think about the construction of markets and of the state, as opposed to taking them as immutable and fixed structures.

What complicates Komesar's elegant account of comparative institutional analysis is what could be described as the irrelevance of institutions. Individuals act and live within institutions, but much human interaction, made possible by technological developments that lower the cost of movement of information and people, occurs through networks. The networked world entailing communication technologies, human migration, and global markets is postinstitutional. A scholar in a United States university may be part of a network of researchers across many universities globally. Collaborations occur across profit and nonprofit entities, across nation-states, across class and ethnic boundaries. Institutions, conventionally defined, can be constraining, while networks are liberating. Within comparative institutional analysis, networks may be inchoate institutions, much like contractual interactions cohere into business organizations. Alternatively, what I call networks are just new institutions which can be brought within the terms of comparative institutional analysis. The primary motivating question for this Article is whether networks pose a challenge for comparative institutional analysis. I address this question partially by examining the notion of institution within Komesar's framework. To put it starkly, the question is whether Komesar's Razor excludes historical and social developments that may make the notion of institution irrelevant.

The phrase "imperfect alternatives," the title of Komesar's first book, has an important pedigree that places comparative institutional analysis in a broader frame. In 1949, Arthur Schlesinger penned the

& CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

6. KOMESAR, *IMPERFECT ALTERNATIVES*, *supra* note 3, at 5–6.

following statement, described as a manifesto for “liberal Cold Warriors”⁷:

We can act, in consequence, only in terms of imperfect alternatives. But, though the choice the alternatives present may be imperfect, it is nonetheless a real choice. Even if capitalism and Communism are both the children of the Industrial Revolution, there remain crucial differences between the USA and the USSR. These can be defined as basically the differences between free society and totalitarianism. This is a choice we cannot escape.⁸

Komesar’s *Imperfect Alternatives* was published in 1994, after the Cold War.⁹ Presumably, much of the thought occurred during the tail end of the war, as stone and barbed wire walls and iron curtains fell. As a matter of authorial intent, the end of the Cold War perhaps did not directly inform Komesar’s writing. But the context of Communism’s demise and the question of what capitalism will look like certainly provide the correct frame through which to understand Komesar’s comparative institutional analysis. By posing the analysis as a choice between an imperfect state and an imperfect market, *Imperfect Alternatives* and its progeny reveal the inadequacies of both state control and laissez-faire.

What makes the notion of imperfect alternatives far from satisfying is the limited options Komesar provides for us. He gives policy makers choices among three institutional processes and avoids the details of how institutions are to be constructed. Both the Communist and capitalist projects began with the goal of creating new institutions. One failed, and the other continues on its quest. Komesar takes institutions as a given, rather than as a matter of construction. It is the latter, as I will show, which matters for many critical areas of the law.

Figure 1 provides what I hope is a vivid picture of my ideas in this paper. I took this photograph in August 2011 in the port town of Katakolon in Greece, described as the gateway to the original Olympic village.¹⁰ Much can be said about the picture. I want to focus on the three options the sign represents. Komesar presents the top and the bottom: the police, as metonym for the state, and the market. Whether the market is

7. ARTHUR REDDING, *TURNCOATS, TRAITORS, AND FELLOW TRAVELERS: CULTURE AND POLITICS OF THE EARLY COLD WAR* 80 (2008).

8. ARTHUR M. SCHLESINGER, JR., *THE VITAL CENTER: THE POLITICS OF FREEDOM* 7–8 (1949).

9. See KOMESAR, *IMPERFECT ALTERNATIVES*, *supra* note 3.

10. See, e.g., *TTT Traveler’s Port Reviews of Bari, Katakolon, Izmir, Istanbul, Dubrovnik, Venice*, CRUISE CRITIC, <http://www.cruisecritic.com/memberreviews/portreviews.cfm?EntryID=109843#124> (last visited Jan. 23, 2013).

really to the right and the police somewhere up and in the sky (as the sign suggests) can be the subject of debate. But the sign also shows us another option: the beach. I do not wish to make light of comparative institutional analysis, but the beach is an often overlooked alternative. By the beach, I do not mean frivolity. I mean the free play of human activity, the source of creativity and invention. The beach represents the networked world of human connections that exists outside existing institutions. I use the term free play here in contrast with free market, which has its own private constraints of income, price, status, and private exclusion. At the same time, the beach is a place where institutions are made from the full range of human cognitive and emotional capacities. My point is that there are options other than those considered by Komesar, and those options do not come in constraining packages. One may be tempted to proclaim: “*sous les institutions, la plage!*”¹¹ Such enthusiasm is fine as long as one recognizes that the beach too is an institution.

FIGURE 1
THE STATE, THE MARKET, AND THE BEACH



11. Translated, “Beneath the institutions, the beach!” The reference is to the anonymous graffiti from the 1968 student rebellion in Paris: “*Sous les pavés, la plage,*” translated, “Under the cobblestones, the beach!” As one commentator explains:

The anonymous graffiti from Paris 1968 conjures up any number of images—a subaltern vitality, the control of something unruly, the dominance of nature, and a possible return of the repressed. The expression also speaks to a new kind of social imagination, a right to view the city as a space for democratic possibilities, a social geography of freedom.

BENJAMIN SHEPARD & GREG SMITHSIMON, *THE BEACH BENEATH THE STREETS: CONTESTING NEW YORK CITY'S PUBLIC SPACES* 3 (2011). The point is that too rigid an understanding of institutions may lead to ignoring the range of human activity that institutions are supposed to serve.

Such is my understanding and appreciation of Komesar's work at the broadest level. The rest of this paper presents the details. Part I presents, as the title states, the razor's edge. I relate comparative institutional analysis to Ronald Coase's critique of marginalism in economics and his focus on the transaction. I argue that Komesar provides the details for the institutional context in which transactions occur, but in a constraining way. In Part II, I look to three contemporary examples as illustrations of comparative institutional analysis and the limits of Komesar's Razor. The examples are (1) international intellectual property institutions, (2) same-sex marriage and the 2011 decision from the Ninth Circuit, and (3) the 2012 United States Supreme Court review of the Affordable Health Care Act. These three examples illustrate how institutions are more rich and complex than Komesar's version of comparative institutional analysis lets on. My goal is to restore what has been stripped off by Komesar's Razor.

I. THE RAZOR'S EDGE

Ronald Coase is often reduced to several glib mantras about the use of economic thinking in law.¹² A gross mischaracterization is the statement that law is irrelevant to the efficient allocation of resources since affected parties can always negotiate around any rule towards the wealth-maximizing result. A related mischaracterization is that transaction cost minimization should guide the allocation of legal rights. There is, of course, a kernel of truth to each of these statements, but to conclude that they succinctly summarize Coase's major essays is to reduce ideas into black letter legal rules.

The importance of Coase's ideas comes across in the last few sentences of his article *The Problem of Social Cost*. Although this is, at last count, one of the most cited articles in legal scholarship, this last paragraph seems to not have garnered many citations. He writes:

[I]n choosing among social arrangements within the context of which individual decisions are made, we have to bear in mind that a change in the existing system which will lead to an improvement in some decisions may well lead to a worsening

12. For an overview of understandings and misunderstandings, see Stewart Schwab, *Coase Defends Coase: Why Lawyers Listen and Economists Do Not*, 87 MICH. L. REV. 1171, 1189 (1989). For a discussion of the misunderstood notion of transaction costs among Coaseans, see Lee Anne Fennell, *Resource Access Costs*, 126 HARV. L. REV. (forthcoming 2013) (proposing the concept of resource access costs, or the costs of gaining access to a valuable resource, as an alternative to transaction costs).

in others In devising and choosing among social arrangements, we should have regard for the total effect. This, above all, is the change in approach which I am advocating.¹³

The first sentence of this excerpt reveals the underlying utilitarianism in Coase's thinking. Institution design and change entails both benefits and costs. But it would be wrong to reduce this point to one of bureaucratic benefit-cost analysis. Instead, the point is a pragmatic one. Institutional design will affect individuals in different ways, with some desiring the change and others opposing it. In the second sentence, Coase reveals what is the more counterintuitive point: assessing institutional change requires looking at total effects. In one short sentence, Coase takes aim at marginalism, the dominant form of economic thinking when he wrote these words in 1960.

Marginalism can be traced back to the economist Alfred Marshall, whose nineteenth century *Principles of Economics* became the model for how economics is taught even up to today.¹⁴ The idea behind marginalism is that incremental changes are what is relevant for decision making. Choices between A and B can be reduced to making small changes in A and in B and determining whether these small changes result in incremental net benefits. Institutions such as markets can be assessed by measuring these small changes and gauging whether incremental improvements can occur. Modern day benefit-cost analysis is the technical and bureaucratic manifestation of this way of thinking.

Coase's charge against marginalism specifically derives from his criticism of Arthur Pigou, an important welfare theorist and policy-minded economist.¹⁵ Pigou used marginalism to structure policy. Many institutions were less than wealth maximizing, one measure of efficiency, because marginal costs and marginal benefits were not aligned. For example, education resulted in benefits to society that extended beyond the individual receiving schooling. Consequently, the marginal social benefit from educating one more person exceeded the marginal private benefit and the marginal social cost. In order to cure this situation, education should be subsidized so that the marginal private

13. R.H. COASE, *The Problem of Social Cost*, in *THE FIRM THE MARKET AND THE LAW* 95, 155–56 (1988).

14. See ALFRED MARSHALL, *PRINCIPLES OF ECONOMICS* (C.W. Guillebaud ed., 9th variorum ed. 1961). For Coase's views on Marshall, see R.H. COASE, *Marshall on Method*, in *ESSAYS ON ECONOMICS AND ECONOMISTS* 167 (1994). For historical background on economic analysis of law, see HEATH PEARSON, *ORIGINS OF LAW AND ECONOMICS: THE ECONOMISTS' NEW SCIENCE OF LAW, 1830–1930*, at 78–79 (1997) (marginalism as basis for policy analysis).

15. See generally A.C. PIGOU, *WEALTH AND WELFARE* (1912). For Coase's views on Pigou and his relationship to Marshall, see COASE, *supra* note 14, at 151–66.

benefit and marginal social benefit were equalized. Analogously, industrial activity can result in environmental harms that make the marginal social cost greater than the marginal private cost and the marginal social benefit. Therefore, through an application of marginalism, Pigou would recommend a tax so that the marginal private cost and marginal social cost would be equalized.

Marginalism, of course, is not wrongheaded. Contemporary discussions of education loan subsidies and pollution taxes reflect this style of thinking. Coase's important contribution is that marginalism is limiting. It reduces policy making to a question of identifying the correct set of prices, in the form of taxes or subsidies, in order to address social ills. Although he does not make this point, marginalism is consistent with a very particular view of law associated with John Austin, that law is a command that can regulate behavior through sanctions or rewards.¹⁶ As Coase points out, many social ills do get resolved through negotiation as opposed to command and sanctions. In *The Problem of Social Cost*, he looks at examples of what economists would call negative externalities, or what lawyers would call nuisances, to show how the disputes are resolved through negotiation as opposed to manipulation of marginal benefits and costs by the regulator.¹⁷ When Coase refers to "total effects," he is criticizing marginal thinking, but also extolling understanding economics (and social science) in broader terms than the language of incremental changes. The latter is not completely unhelpful, but a strict practitioner would miss many dimensions of institutional design.

While Coase is often criticized as reducing law to a matter of transacting, a reduction that ignores questions of fundamental rights, human dignity, and due process, his approach is liberating for the practice of social science, specifically economics. By looking beyond margins, Coase helps us to see that more than simple rational, self-interested calculation matters. History, politics, social relationships—all enter the picture in utilitarian policy making. The debate is not whether these contexts are relevant, but how. We take this point for granted now, I think, but it was a profound move back in the late 1940s when technical thinking was dominant.¹⁸

Connected to the point about Ockham's Razor and the explanation that begins this Article, Coase was challenging the simplifying implications of marginalism. The appeal of marginalism was its elegance

16. See, e.g., Bruce D. Fisher, *The Ethical Consumer: A Rejecter of Positive Law Arbitrage*, 25 SETON HALL L. REV. 230, 235 (1994).

17. See COASE, *supra* note 13.

18. See generally SYLVIA NASAR, GRAND PURSUIT: THE STORY OF ECONOMIC GENIUS 402–08 (2011).

and grace in identifying what is essential to utilitarian decision making. By shifting the focus from the incremental to the total, Coase was pointing out that the elegance of marginalism was too simplistic. His examples from nuisance law showed how judges actually handled disputes not by setting prices at the margin, but by devising rights that individuals could then take as a baseline for social interactions.¹⁹ The point was not to add complications. The point was not to advocate simple rules for a complex world. Instead, the target was a way of thinking that oversimplified and ignored critical aspects of reality.

Now enters Komesar's work. As stated in the introduction, Komesar's *Imperfect Alternatives* was published in the wake of the Cold War's end. Whether out of authorial intent or not, the book's title highlights the imperfection of institutions, particularly that of markets. In part, given the publication date of 1994, the book was a response to simplistic domestic thinking about markets and regulation that dominated the 1980s and beyond. Just as Coase's famed article was a response to the simplification of marginalism as applied to policy, so Komesar's first book was a riposte to those who would reduce legal policy to a dichotomy between liberty and government, or property and regulation. Interestingly enough, Komesar's recognition of the imperfection of institutions, particularly the market, is a response to a simplistic understanding of Coase. In combatting government regulation, advocates sometimes appealed to Coase for the proposition that social disputes can be resolved through private bargaining without need for governmental regulation. Again, the mistake behind this argument is to not look at the total context within which liberty and property arise and are possible.

Komesar elaborates upon Coase's appeal to "total effects." The basic point of *Imperfect Alternatives* is that one cannot analyze the market and the state in isolation from each other.²⁰ Komesar's two-force model, developed in his second book, *Law's Limits*, captures how private bargaining in the marketplace occurs in tandem with bargaining in the legislative arena.²¹ Those who lose in market negotiations can turn to the legislature for redress.²² Market negotiations, in turn, can represent a bargain around legislation.²³ Institutions are designed in coordination not in isolation. Total effects, according to Komesar generally and his two-force model specifically, means looking at a full set of institutions

19. See COASE, *supra* note 13, at 120–24.

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

21. See KOMESAR, *LAW'S LIMITS*, *supra* note 3, at 68.

22. See *id.*

23. See *id.*

and not only the state or the market.²⁴ These ideas are elaborations on what Coase made possible in his 1960 article.

A brief exegesis of Komesar's ideas and his two-force model serves to reveal my main points in the remainder of this Article. Komesar focuses on two institutions: the market and the adjudicative process. By market, he means the domain of private transactions for the satisfaction of mutual self-interest through consent and contract. The adjudicative process is a bit more complex. He means not only the courts, the domain where private parties can negotiate disputes through adversarial processes, but also the legislature, which may set the baselines against which courts operate. These baselines may be statutes and regulations that take away some degree of judicial discretion, or they may entail decisions to defer to courts and allow them to use reason to develop common-law-based rules and standards.

The two-force model states that policy should be set based on which of these two institutions can better, according to some criteria, resolve an issue. Komesar is neutral on how to gauge "better." As he states, normative goals tell us nothing about how to design institutions, and that is his central concern.²⁵ Questions of substance are assessed in broad contours as opposed to specific concerns with the morally correct or just rule. What matters, according to Komesar, is participation, the ability to affect the outcome towards whatever one's particular substantive ends might be.²⁶ As long as participation is allowed and processes exist for voice or exit (to borrow terms from economist Albert Hirschman),²⁷ then we can be comfortable with our design of institutions. The difficult questions are what kind of participation and who will be the ultimate decider of the interaction among the individual participants.

The comparative institutional approach comes in many packages, often depending on the discipline. Political scientists, economists, and organizational theorists all engage in different forms of institutional analysis with a focus on "total effects" in analyzing and promoting public policy. Accompanying the many disciplinary forms in which comparative institution analysis arises is a range of methodological approaches. Game theoretic models, social historical analyses, and modeling of political participation and decision making are all instances of how to pursue the study of "total effects" as a corrective to the marginalist approach, which rests on rational actor models acting autonomously in response to price signals.

24. *Id.* at 19–22.

25. *Id.* at 144–55.

26. *Id.* at 30–32.

27. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 3–5 (1970).

Komesar's two-force model has some mathematical elaboration, but has largely been developed through qualitative analysis. This approach should not be surprising since Komesar is addressing legal scholars and a legal policy audience.²⁸ The debt his idea owes to the legal process school is well recognized even though Komesar criticizes the Hart-Sacks approach²⁹ as relying too much on idealized notions of institutions.³⁰ As he himself acknowledges, the appeal to constitutional scholar John Hart Ely and his work *Democracy and Distrust*³¹ provides the more authentic pedigree for the two-force model.³² Komesar does frame the choice of institutions as a choice of alternative processes, paralleling Hart and Sacks. His focus on the majoritarian bias as a limit on participation within institutions owes a greater debt to the jurisprudence of Equal Protection and the famed footnote four of the *United States v. Carolene Products Co.*³³ decision.³⁴ Komesar blends the concern with majoritarian bias with a recognition of the dangers of minoritarian bias into a Coasean analysis of total effects in institutional design.

To summarize, through his two books, Komesar not only builds on Coase but also parallels Coase's criticism of the simplistic influence of marginalism in economic policy making. Komesar shows how to engage in the study of total effects as opposed to the more simplistic mantra of liberty and property. In turn, Komesar offers an appealing model, satisfying Ockham's Razor, to guide in the making of legal policy.

I raise two points of criticism: (1) institutional poverty and (2) hidden normativity. The two-force model reduces society to two institutions, the market and the state. Needless to say, society consists of many types of institutions, such as the university, the family, political associations, and social clubs. Komesar's analysis is not wedded to any set of institutions³⁵ even though his focus tends to be on legislative, market, and judicial institutions. My criticism is not about the number of institutions, but about the underlying definition of "institution." Komesar equates an institution with process and participation.³⁶ That may be appropriate for the application of his model to traditional legal problems,

28. See KOMESAR, LAW'S LIMITS, *supra* note 3, at 177–80.

29. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1994).

30. KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 3, at 11–12.

31. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

32. See KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 3, at 198–215.

33. 304 U.S. 144 (1938).

34. See *id.* at 152 n.4.

35. KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 3, at 9–10.

36. *Id.* at 27–28 (describing a participation-centered approach to comparative institutional analysis).

such as nuisance or tort law. But if one takes the view that law is about institutional design writ large, institutional poverty suggests that we need a richer recognition of “total effects” in order to engage with a full range of legal policies. The three examples—international intellectual property institutions, same-sex marriage, and health care reform—discussed in Part II illustrate the dilemma of institutional poverty.

Even if any institution could be framed in terms of process and participation, the criticism of hidden normativity would still arise. Komesar reminds us many times that ideology and specific goals tell us nothing about institutional design.³⁷ This declaration implies that justifications of efficiency or wealth maximization tell us nothing about the extent and structure of market regulation. If we recognize that some regulation is necessary, more institutional analysis is needed to understand the details of this recognition. Furthermore, if our goal is one of distributive justice, to say that institutions should be more fair tells us nothing about what more fair institutions should look like. A different type of analysis is needed to explain how to reach normative goals.

Understood that way, Komesar’s point is correct. The problem is that there is a hidden normativity in institutional design. To be more explicit, the design of institutions requires some engagement with normative goals and not the separation of normative arguments and institutional design arguments. A salient example of this point comes from why Komesar thinks participation is so critical to institutional design. Participation may be critical because one cannot rule out certain viewpoints or goals at the outset. Legislation and market transactions both require a large range of inputs, which in turn means that maximal participation is an important end. This argument does not appeal to any sense of justice or fairness, but to a more pragmatic consideration consistent with Komesar’s analytical approach.

The problem is that there are pragmatic instances when participation should be limited. In designing institutions to deal with climate change, for example, it might be pragmatic to exclude views that climate change is a hoax or a conspiracy. In resolving technical questions of management, expertise may be more critical than full civic participation, especially from those who have no technical understanding. My point is that there are pragmatic arguments for why participation should be limited. Komesar’s embrace of participation rests on too great a faith in democracy or a sidestepping of the more challenging question of why participation matters. I would view this criticism as a variation of the problem that arises under the First Amendment. What is a religion for free exercise purposes? What speech counts, and how, for free

37. *Id.* at 4–5.

expression purposes? These are threshold normative questions which cannot be avoided. More to the point, these normative questions should be made explicit in the institutional design question. With this background in hand, I turn now to three specific contemporary examples of institutional design to illustrate my understanding of the merits and problems with Komesar's style of comparative institutional analysis.

II. AT THE BEACH: RETHINKING INSTITUTIONS

Many may characterize my comments about Komesar's comparative institutional analysis as saying that the approach is flawed because there are several problems it cannot address. To make it clear, the lack of universality is not the issue I am raising. Instead, my goal is to offer some important test cases for Komesar's ideas to better refine them and understand the scope and structure of comparative institutional analysis. Although I have not referred back to the concept of network (and its colorful elaboration as the beach) introduced in the Introduction, I illustrate the importance of networks, and the range of human activity captured by that concept, through the following examples.

A. *International Intellectual Property Institutions*

Institutional design is at the heart of international law.³⁸ If the nation-state is a precondition for institutions related to enforcement and implementation of law, then the lack of a supernational state poses a difficulty for international institutions. Do they have legitimacy? What is the process or mechanism for their propagation and sustainability? Comparative institutional analysis provides a method to address these and other questions. To maintain focus and a connection to my specific area of expertise, I will address the question of the design of international intellectual property institutions, such as the World Intellectual Property Organization and the World Trade Organization, which implement treaties, dispute resolution procedures, and other institutions.

Before I proceed to show how, as applied to the design of international intellectual property institutions, the criticisms of institutional poverty and hidden normativity are especially salient, let me begin on a positive note. Komesar begins his *Imperfect Alternatives* with the point that debates over goals tell us little about the detailed questions of how to design institutions.³⁹ I suggested that this point might be an

38. GRAHAM DUTFIELD & UMA SUTHERSANEN, *GLOBAL INTELLECTUAL PROPERTY LAW* 3–4 (2008) (describing the internationalization of intellectual property law).

39. KOMESAR, *IMPERFECT ALTERNATIVES*, *supra* note 3, at 4–5.

overstatement and a failure to disclose implicit normative goals. But in the context of international intellectual property institutions, Komesar is correct.

The critical normative divide, particularly in the debates over intellectual property law in the United States and in Europe, is between Lockean and Hegelian justifications for property rights.⁴⁰ Consistent with Komesar's comments about normativity and institutions, neither Lockean nor Hegelian theories tell us anything about the details of institutional design. While each theory can justify a particular institutional design, they do not answer design questions such as should a court or should an agency determine questions of patentability or copyrightability. They do not aid in understanding the duration of copyright or of patent. Neither theory sheds light on whether there should be fair use in patent law or what the standard for fair use in copyright should be. Of course, no theory can answer all questions. But as I would argue, the theories offer no guidance on the details of institutional design, except as post hoc justification. To this extent, I am in agreement with Komesar's point about normativity and comparative institutional analysis when applied to the place of John Locke and Georg Hegel in the design of international intellectual property institutions.

By contrast, Immanuel Kant's writing on copyright and counterfeiting offers what could be described as a comparative institutional analysis approach. The contemporary understanding overlaps with Kant's thinking.⁴¹ According to Kant, physical ownership of the book is different from the expression.⁴² The expression reflects the personality of the author.⁴³ Therefore, while the owner of the book can sell it, the book owner has no rights in the expression (unless of course they have been transferred). Recognizing the distinction between the physical object and the expression, Kant identified the various stakeholders affected by the corresponding set of rights. Stakeholders include authors, readers, publishers, distributors, and other groups that would have an interest in either the physical book or the expression, or both.⁴⁴ Based on this background, Kant analyzes the rights of the various stakeholders under different forms of copyright law.⁴⁵

I would describe Kant's approach as a form of comparative institutional analysis. His focus is on first identifying the ontological status of the various parts of a work and translating them into the

40. See DUTFIELD & SUTHERSANEN, *supra* note 38, at 53–55, 58–59.

41. See *id.* at 55–58.

42. *Id.* at 56–57.

43. *Id.* at 56.

44. *Id.* at 56–57.

45. *Id.* at 57.

language of interests and rights. This translation serves as a way to design institutions at a fairly high level of detail. More importantly, his approach demonstrates the initial steps of moving from a loose normative understanding of copyright to the more rigorous and difficult questions of legal design and implementation.

Kant's method has parallels to that of Komesar's, which also starts from an identification of interests and moves to the challenge of design. The difference is that Komesar offers more institutional detail than Kant. Specifically, Komesar structures the problem of institutional design as a choice between two types of institutions, the market and the adjudicative processes.⁴⁶ The two-force model sees these two processes as hydraulic forces that would need to be balanced in structuring legal rights and remedies. As applied to intellectual property, the two forces at issue would be innovation driven by (1) market decisions in the production and consumption of new products and services and (2) governance decisions made by a centralized system that promotes innovation either through a set of subsidies or by the calibration of property rights.

To illustrate the application of Komesar's two-force model to intellectual property, consider Justice Stephen Breyer's famous piece on the uneasy case for copyright.⁴⁷ As Breyer points out, copyright law is concerned with unauthorized duplication that provides a source of competition for the creator of a work, such as a book, a piece of music, or a software package.⁴⁸ Competition through unauthorized duplication serves to reduce the price for the work and the economic returns to the original creator.⁴⁹ The depletion of economic returns reduces the incentive to create the work initially.⁵⁰ Copyright as an exclusive right to duplicate restores the incentive.⁵¹ Breyer correctly pointed out that even without copyright, the incentive to create would still exist through a first mover advantage.⁵² By being the first to place a new work on the market, the creator has the advantage of obtaining economic rents before duplication begins.⁵³ The case for copyright rests on the length of the lead time advantage that the creator has. Breyer argued in the 1970s that this lead time could be quite substantial.⁵⁴ Of course, given the

46. KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 3, at 6.

47. Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

48. *Id.* at 293–94.

49. *Id.* at 294.

50. *Id.*

51. *Id.* at 293–94.

52. *Id.* at 299–300.

53. *Id.* at 300.

54. *Id.*

advancement in duplication technologies, this lead time has been reduced quite substantially over the past forty years.

Comparative institutional analysis provides an analytic framework that is consistent with Breyer's criticism of copyright. If lead time advantage exists, the market is the better institution for promoting innovation than a system of rules promoting innovation through the definition of property rights. However, when lead time advantage shrinks, one would expect that the adjudicative and legislative processes would play a larger role in promoting innovation. This prediction is borne out with the development of computing technologies and the Internet that occurred during the 1990s. These technological developments greatly reduced the lead time advantage and there was a corresponding expansion in the range of intellectual property laws from approximately 1995 onward. These expansions included extension of the duration of copyright and of patent, expansion of patentable subject matter to include business method and software patents, and protection for digital works. This shift is consistent with the two-force model. As the market made it more difficult for innovators to survive, they turned to the adjudicative and legislative processes for protection of property rights.

However, this prediction is as far as the two-force model can take us. The twofold problems of institutional poverty and hidden normativity limit the application of the model to intellectual property, particularly its international dimensions. Microinstitutions and intermediaries serve to create new ways to approach the regulation of innovation. For example, licensing intermediaries serve to facilitate transactions between creators and users that allow for compensation of works protectable by intellectual property without the full apparatus of intellectual property law. New forms of licensing, such as open source and Creative Commons, aid in disseminating new works and inventions through innovative forms of contracts. As applied to innovation, the two-force model fails to identify how institutions themselves are created. This tunnel vision also reflects a hidden normativity that elevates market and legal processes over social and cultural ones in shaping innovation.

This criticism is the most salient as applied to international intellectual property. As new technologies for copying spread in communications and in the life sciences globally, intellectual property was no longer a domestic issue. Treaty regimes developed in the nineteenth century allowed nation-states to harmonize their intellectual property laws within a centralized international political system under imperialism.⁵⁵ The regimes reflected interests of European countries. In

55. DUTFIELD & SUTHERSANEN, *supra* note 38, at 23.

the 1990s, these treaty regimes had to accommodate the interests of developing countries and new regional alliances in Asia, Africa, and Latin America.⁵⁶ The World Trade Organization through the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement attempted to align these various interests through integrating intellectual property concerns into a system of managed trade.⁵⁷ From the perspective of the two-force model, these developments were consistent with increased participation. Trade negotiation and treaty implementation are examples of international processes that parallel the market and adjudicative processes that are the centerpiece for the two-force model when applied to domestic institutions. Arguably, international concerns are simply a matter of scale.

Majoritarian and minoritarian biases intermesh in the negotiation of intellectual property rights. Dominant firms benefitted by strong intellectual property rights battle with shifting coalitions of developing countries that attempt to find carveouts for small-scale creators and users. International relations lead to a host of institutions that are outside the market and the institutions of adjudication and legislation. Nongovernmental organizations serve to mediate gaps in the transparency and responsiveness of legislative processes. Market processes, in many developing countries, may often be difficult to disentangle from legislative ones, creating hybrid institutions that mask political influence and corruption. These complexities are not necessarily fatal to the two-force model, but they do require a broader conception of the relevant institutions. What is more often the case is that a vector of forces is at work in the creation of international institutions.

What is more vexing than institutional poverty is the hidden normativity of the two-force model as it is applied to international intellectual property. As described above, the two-force model as applied to intellectual property identifies a tension between competition in the market and lead time. When the latter falls, the adjudicative and legislative process creates exclusive rights that allow innovators to participate in the market without the fear of unauthorized copying. The challenge is to delineate these exclusive rights to allow participation from other innovators in the marketplace. This model rests on two sets of interests: those of innovators and those of imitators.

At the international level, the number of interests proliferates to include questions of access to new technologies by fledgling companies, the rural poor, and the urban semi-elite. But adding to the complexity are the different types of competition at issue. As applied to the domestic

56. *Id.* at 30.

57. *Id.* at 32.

state, the two-force model focuses largely on the marketplace within the borders of the nation-state. In the international sphere, competition exists not only within the nation-states but across the borders of the nation-state. The challenge for comparative institutional analysis is to determine how this trade across borders should be managed. Should it be unregulated? Or should the processes within one state dictate the terms? The standard answer is for the two countries to create a treaty that creates new institutions for the management of the cross-border market. But the hidden normative question is what goals should guide the formulation of the treaty. The issue is not simply who should be the decider, but how should the matter be decided.

The United States Supreme Court illustrates this quandary in a recent case involving the application of the first sale doctrine to international trade. Under the first sale doctrine, which exists across the range of intellectual property laws, the intellectual property owner exhausts the right to distribute the work protected by the intellectual property rights after the first sale is made. The doctrine permits unrestricted resale of the work protected by intellectual property, whether it is a book, an automobile or software, once the first sale is made. In the 2010 *Costco Wholesale Corp. v. Omega, S.A.*⁵⁸ case, the Supreme Court heard arguments on whether the first sale doctrine applied to works made overseas and subsequently imported into the United States.⁵⁹ Omega asserted its copyright in watches sold in Switzerland and argued that the first sale doctrine applied only within the United States.⁶⁰ Costco, which had obtained the watches from an importer who had legally obtained the watches in Switzerland and sold them into the United States, asserted that the first sale doctrine applied globally.⁶¹ The Court split evenly on the case, with Justice Elena Kagan recusing herself.⁶² The split resulted in the Ninth Circuit's decision in favor of Omega.⁶³ The Supreme Court is addressing the same issue this term in *John Wiley & Sons, Inc. v. Kirtsaeng*,⁶⁴ a case concerning imported textbooks.⁶⁵ There are no

58. 131 S. Ct. 565 (2010).

59. *Omega, S.A. v. Costco Wholesale Corp.*, 541 F.3d 982, 983 (9th Cir. 2008), *aff'd by an equally divided court, Costco Wholesale Corp. v. Omega, S.A.*, 131 S. Ct. 565 (2010).

60. *Id.* at 983–85.

61. *Id.* at 984.

62. *Costco Wholesale Corp.*, 131 S. Ct. at 565.

63. *Id.*

64. 654 F.3d 210 (2nd Cir. 2011), *cert. granted*, 132 S. Ct. 1905 (Apr. 16, 2012) (No. 11-697).

65. *Id.* at 212–13. As this Article went to press, the Court decided the case against the copyright owner.

recusals in this case so we can expect an answer, at least based on the available votes.

However the issue is decided, it is unlikely, judging from the experience with the *Costco* decision, that the Court will go beyond statutory interpretation to resolve the issue. Policy questions will be sidestepped. But for comparative institutional analysis, the question of global application of the first sale doctrine poses a challenge. Should we defer to the market processes that would allow intellectual property owners to resort to means to attempt to differentiate the global market and thereby prevent reimportation? Or should we defer to legislative processes and let domestic decision makers determine the scope of permissible cross-border trade? The two-force model assumes certain normative preconditions that favor participation and competition. But what if participation is not possible by all interested parties? Domestic legislators will not take into consideration nondomestic interests. What makes this issue particularly vexing is that the TRIPS Agreement leaves open the treatment of this problem known as parallel importation.

When extending Komesar's comparative institutional analysis, and particularly his two-force model, to international intellectual property, we can see that Komesar is correct that focusing on goals will not provide guidance for answering concrete questions. Locke and Hegel provide overarching visions, but little substantive detail. At the same time, the two-force model fails because it ignores several pertinent institutions. Furthermore, the model fails because it ignores the larger normative choices that are made in the design of institutions. Identifying these weaknesses does not lead to trashing the approach, but aids in imagining ways to adapt it to more challenging and difficult circumstances.

B. Same-Sex Marriage

The legal battles over same-sex marriage lead to the theoretical question of what is an institution and how the concept of an institution relates to that of organization. Within the two-force model, whether same-sex marriage should be recognized reduces to a question of participation and process. The problem is that the institution of marriage does not fit neatly within the twin poles of market and adjudicative processes. Ultimately, the two-force model might parallel Professor John Hart Ely's appeal to *Carolene Products*, footnote four.⁶⁶ Homosexuals are a discrete and insular minority, and the nonrecognition of same-sex

66. See *supra* notes 28-34 and accompanying text.

marriages reflects exclusion of minority groups from decision making. Therefore, recognition would provide the corrective.

This reasoning does not sit right. The claim that homosexuals constitute a discrete and insular minority seems a stretch. Many scholars have made the case that homosexuals are diffuse and disparate, forced into an assimilation through covering.⁶⁷ Participation is not the problem. Rather the issue is one of silence. The Ninth Circuit's decision in *Perry v. Brown*⁶⁸ is illustrative. In this case, the court struck down a proposition that overturned a state ordinance redefining marriage to include same-sex couples.⁶⁹ The majority made it clear that the decision was not based on recognizing a right to marry among same-sex couples.⁷⁰ Instead, the court appealed to process grounds.⁷¹ Since the state had already ruled in favor, the reversal through referendum stemmed from irrationality.⁷² Proposition Eight was the product of reaction, not reflection and deliberation.⁷³ Therefore, it was unconstitutional under *Romer v. Evans*.⁷⁴

The *Perry* decision seems consistent with the two-force model. It is a response to the endless cycling that could result from ordinance and referendum. But participation and process seem inadequate in understanding the same-sex marriage issue. What participation and process ignore is the underlying question of what constitutes an institution.

Is, for example, same-sex marriage a new institution? If not, then the exclusion seems to reflect an irrationality in itself. Conservative arguments in favor of same-sex marriage emphasize the stability that the institution of marriage would provide to same-sex couples. On the other hand, resistance to same-sex marriage comes from those who view it as a new institution, inconsistent with the functions of different sex marriage. Comparative institutional analysis and the two-force model are inadequate for this conundrum. The problem is one of institutional poverty.

Economist Elinor Ostrom, who has developed a more sophisticated variation of comparative institutional analysis, defines an institution as

67. See, e.g., Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 728–31 (1985); Elvia Rosales Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 10 WOMEN'S RTS. L. REP. 143, 145, 151–58 (1988); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 836–38 (2002).

68. 671 F.3d 1052 (9th Cir. 2012).

69. *Id.* at 1096.

70. *Id.* at 1082.

71. *Id.*

72. See *id.* at 1093–94.

73. See *id.* at 1089–90.

74. *Id.* at 1093–94 (applying the standard set by *Romer v. Evans*, 517 U.S. 620 (1996)).

“the prescriptions that humans use to organize all forms of repetitive and structured interactions.”⁷⁵ The question is where do these prescriptions originate. The two-force model either takes these prescriptions as given or attributes them to specific choices made about how to determine them. Prescriptions arise, according to this view, from either the market, specifically a market for norms and customs, or from collective decisions, perhaps through the drafting of a foundational document like a constitution or religious scripture. If certain groups are excluded from the decision to make prescriptions, then the groups can be brought into the fold to create more appropriate prescriptions. For the two-force model, the answer always falls back onto participation and process.

Appeals to participation and process, however, do not offer resolution in the *Perry* case. Neither the ordinance permitting same-sex marriage nor the referendum overturning it were enacted by excluding participation.⁷⁶ At stake was not exclusion from process but two conflicting views of the prescriptive norms defining the institution of marriage. Although bigotry and ignorance may have informed some of the votes, there were also rational reasons to define marriage in a particular way. What the court concluded was that Proposition Eight was a response to movements to expand marriage, by excluding some couples from the institution.⁷⁷ That exclusion was the basis for the lack of rational basis to support the referendum. But within a comparative institution analysis, the question is how to determine the correct prescriptions of the institution. Appeals to participation in the process of decision making are not sufficient.

One solution to this quandary is to look deeper into the structure of institutions. Elinor Ostrom uses the term “organization” to refer to the rules of decision making and interaction within institutions.⁷⁸ One can think of organization as the manner in which the prescriptive norms of institutions are implemented. The particular organization the *Perry* case implicates is the organization for legislation. What the majority focuses on is not the organization of the institution of marriage. That issue the

75. ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY 3 (2005).

76. On the referendum issue, it is worth comparing Proposition Eight with Proposition Thirteen, enacted in California in the 1970s in response to a state supreme court ruling upholding school expenditure equalization. By freezing property tax increases, Proposition Thirteen was a popular attempt to limit a state court ruling. In contrast, Proposition Eight appears to be a second bite at the apple by those who lost through one legislative process. For an analysis of referendum politics and judicial decision making, see WILLIAM A. FISCHER, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 3–4 (1995) (discussing *Serrano v. Priest*, 5 Cal. 3d 584 (1971), a California Supreme Court case ordering school expenditure equalization).

77. *Perry*, 671 F.3d at 1090.

78. OSTROM, *supra* note 75, at 57.

court leaves for another time. Instead, the court finds that the referendum process was undoing the results from the legislative process.⁷⁹ Effectively, those opposed to same-sex marriage were getting two votes on the issue. The opinion can be understood as a criticism of the referendum process, one of the more controversial parts of California politics. Voters in favor of Proposition Eight would not accept the result of the ordinances in favor of same-sex marriage. They offered the same arguments that proved unsuccessful. Therefore, the court finds no rational basis for Proposition Eight and undoes the attempt to undo same-sex marriage. Understanding the organization shaping the institution of legislative process helps to clarify the court's analysis.

What the same-sex marriage controversy illustrates is another dimension of the institutional poverty of comparative institutional analysis. In this case, the poverty is assessing the organization of institutions. But the controversy also demonstrates how background prescriptive norms shape our understanding of institutions. The central question is whether same-sex marriage is a new institution or an old one. That is a normative question that comparative institutional analysis cannot help us understand.

C. Health Care Reform

Komesar's two-force model, as one version of comparative institutional analysis, potentially restricts the universe of institutions to markets, courts, and legislature, or, in process terms, market and adjudicative processes. For a host of problems that invite comparative institutional analysis, this limited set of institutions reveals what I call an institutional poverty. The Supreme Court's decision in *National Federation of Independent Business v. Sebelius*,⁸⁰ which upheld the Affordable Health Care Act (AHCA), provides another example of how process and participation provide a narrow scope for defining institutions.

At the heart of the legal controversy over the AHCA is the power of Congress to enact a mandate under the Commerce Clause.⁸¹ The Court's opinion, authored by Justice John Roberts, supported by the dissents of four justices, held that the Commerce Clause does not permit Congress to mandate the purchase of a product.⁸² Under the Commerce Clause, Congress can limit purchase or production or otherwise regulate existing

79. See *Perry*, 671 F.3d at 1072–73.

80. 132 S. Ct. 2566 (2012).

81. *Id.* at 2608.

82. *Id.* at 2578–79.

commerce, but cannot create commerce through a mandate.⁸³ Within the framework of comparative institutional analysis, this distinction is specious. The question is whether the market can provide a good or service adequately or whether the state should stimulate the market. That is a question of how best to facilitate transactions. The Court recognized the argument of economists that both purchase and nonpurchase affect commerce, and therefore would fall under the Commerce Clause powers.⁸⁴ But it attributed this point to the musings of “metaphysical philosophers,” and not the thoughts of “practical statesmen.”⁸⁵ Practicality, it concludes, mandates an arguably impractical distinction.⁸⁶

Framing the distinction as existing commerce versus created commerce parallels the problem noted in the *Perry* decision. In that context, a critical question is whether same-sex marriage is a new institution or an old one. In the case of health care reform, one could analogously ask whether the insurance market is a new institution or an old one. Proponents of congressional power would point to existing insurance markets. Critics, on the other hand, would characterize the AHCA as creating a new insurance market. This characterization, however, confuses the institution of health insurance markets with its organization. The AHCA alters the set of decisional rules within an existing market and therefore is a change in organization. Contra the Supreme Court, Congress is not creating any new institutions through its mandate.⁸⁷

The Commerce Clause argument as applied to the AHCA is mooted by the majority decision that the health care reform could be justified under the taxing power.⁸⁸ The so-called mandate is not a requirement to purchase but a tax for a nonpurchase. Therefore, the Supreme Court upheld the Act.⁸⁹ From the perspective of comparative institutional analysis, the rationale is a rhetorical justification for the correct result. When the market has failed, the state has responded. The story is a familiar one, made complicated by the concerns of some regarding expansive federal power. But the two-force model would predict that if

83. *Id.* at 2577–78.

84. *Id.* at 2589.

85. *Id.* (quoting *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 673 (1980) (Rehnquist, J., concurring)).

86. *See id.*

87. After this writing, the Supreme Court granted certiorari in both the case involving Proposition 8, *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012), and the case challenging the Defense of Marriage Act, *United States v. Windsor*, 133 S. Ct. 786 (2012). A future paper will develop this discussion of comparative institutional analysis in light of the Court's final decision on the issues raised in those cases.

88. *Sebelius*, 132 S. Ct. at 2600–01.

89. *Id.* at 2608–09.

the state power is too expansive, the market process will respond. From this perspective, the Supreme Court's opinion ultimately comports with the predictions of the two-force model despite the peregrinations.

However, the decision in *Sebelius* is a pyrrhic victory for supporters of health care reform. The Court struck down a provision requiring the state to expand Medicaid coverage,⁹⁰ an important linchpin of broadening insurance coverage. What was surprising is that this part of the opinion had support from the liberal justices on the Court.⁹¹ It is unclear whether this alignment was the result of vote trading or represented some deeper jurisprudential understanding. The bottom line is that the *Sebelius* decision did create new law, but not the one anticipated.

What *Sebelius* means for the two-force model, and comparative institutional analysis more broadly, is that there is need for more sophisticated analysis of process and participation, two workhorse principles that shape Komesar's analysis. Although the two-force model can provide a sophisticated justification for the constitutionality of AHCA, it fails on important details. The internal vote trading will never be fully transparent. A model of Supreme Court decision making will, therefore, always be speculative and incomplete. But the reframing of the mandate as a tax was a critical shift in the Court's analysis. While this shift served to save the Act under the Constitution, it did transform the Act into something that its proponents sought steadfastly to avoid, a new tax. Whether the Court was attempting to wound the Act in the political process, and avoid the politically charged situation of striking down a congressional statute, is perhaps a realistic characterization of the effect of its opinion. But that assessment is speculative. Instead, what the peregrinations of the opinion show is the complexity of process and participation. The two-force model perhaps could be modified to understand the opinion, but that would require a deeper understanding of institutions.

CONCLUSION: TOWARDS A NEW COMPLEXITY AND A SHARPER RAZOR

Understanding comparative institutional analysis is an exercise in navigating the appeal of simplicity and the distractions of complexity. Coase's turn to transactional analysis was a response to the simplicity of marginal analysis, which ignored the "total effects." Works like Komesar's, in turn, proffer a simplifying version of Coase's transactional analysis that provides analytical traction. But when the analytical tools

90. *Id.* at 2608.

91. *See id.* at 2609, 2641–42 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

are brought to bear on critical questions of institutional design, the simplicity may offer little guidance, pointing to some greater degree of complexity. Satisfaction can be found in many directions. Perhaps greater use of game theory, historical analysis, or deeper models of political and judicial processes can provide the cure. The problem is not one of metaphysical philosophizing, but one of developing sharper analytical tools that unpack concepts like process and participation. The contemporary cases discussed in Part II pose the challenge to Komesar's comparative institutional analysis, but perhaps also provide insights into where refinements are needed.