

Michigan Law Review

Volume 93 | Issue 6

1995

Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy

David A. Luigs
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Rule of Law Commons](#)

Recommended Citation

David A. Luigs, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy*, 93 MICH. L. REV. 1559 (1995).

Available at: <https://repository.law.umich.edu/mlr/vol93/iss6/20>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY. By Neal K. Komisar. Chicago: The University of Chicago Press. 1994. Pp. xi, 287. \$ 34.95.

According to a standard history of American legal thought, in the 1930s and 40s a generation of thinkers broke down the reigning analytical structure of the law — legal formalism — that conceived of law as a science that decided cases by deducing conclusions from authoritative premises.¹ The legal process school emerged as formalism's chief contender and soon took its place as the dominant school of legal thought. The advocates of this new thinking rallied around a few central ideas, including law as social policy, and the importance of institutional competence. As two commentators recently noted,² the school produced legal classics, such as Hart and Wechsler's *The Federal Courts and the Federal System*,³ Lon Fuller's "Forms and Limits of Adjudication,"⁴ and, most importantly, Hart and Sacks's unfinished and long-unpublished teaching materials entitled *The Legal Process: Basic Problems in the Making and Application of Law*.⁵ In the 1960s and 70s, however, social divisions such as the civil rights and women's movements and sudden economic insecurity undermined this legal consensus, and "the socio-political conditions for the legal process synthesis ended."⁶

1. See MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960*, at 109-212 (1992); G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION 154-77* (1988). Professor Arthur A. Leff has provided an "intellectual parod[y]" of this history:

Once upon a time there was Formalism. The law itself was a deductive system, with unquestionable premises leading to ineluctable conclusions The job of legal commentators . . . was to find the consistent thread in the inconsistent statements of others and pull it all together along the seam of what was implicit in "the logic of the system."

Arthur A. Leff, *Economic Analysis of Law: Some Realism about Nominalism*, 60 VA. L. REV. 451, 453 (1974). Joseph Beale summed up the formalist approach in stating that "law . . . is not a mere collection of arbitrary rules, but a body of scientific principles [that] in great part . . . consists in a homogeneous, scientific and all-embracing body of principle." JOSEPH BEALE, *TREATISE ON THE CONFLICT OF LAWS 24-25* (1935), quoted in Leff, *supra*, at 459.

2. William Eskridge & Philip Frickey, *The Making of The Legal Process*, 107 HARV. L. REV. 2031, 2048-49 (1994).

3. HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953).

4. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (revision of the draft originally prepared in 1956-57).

5. HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994) (tent. ed. 1958). The legal process school takes its name from Hart and Sacks's work.

6. Eskridge & Frickey, *supra* note 2, at 2051 ("In the . . . 1970s, the halls of Harvard Law School during Sacks's tenure as dean echoed with faculty announcements that 'legal process is dead.'").

Legal process is back. Last year, in "one of the most unusual decisions in the history of legal publishing,"⁷ Foundation Press published the 1958 "tentative edition" of Hart and Sacks's canonical work.⁸ In an article discussing its publication after a thirty-five year delay, the new editors of *The Legal Process*, Professors William Eskridge and Philip Frickey, argue that "the legal process philosophy is, in some respects, even more productive today than it was in the 1950s. . . . [N]ew positive theories of political institutions . . . suggest more sophisticated ways of thinking about the different competencies of institutions and about the dynamics of their relationships — in other words, a more sophisticated Hart-and-Sacks analysis . . ."⁹ The editors observe that former students of the legal process school, such as Justice Stephen Breyer and Judge Richard Posner, have applied their learning to new legal issues in administrative law, constitutional law, and statutory interpretation.¹⁰ Moreover, a new generation of legal-process theorists — including Judge Guido Calabresi, and Eskridge and Frickey themselves — have been inspired to revive the study of statutory interpretation.¹¹ Eskridge and Frickey end their article with a challenge:

If institutions are central to law's unfolding, is it not our responsibility to develop theories of comparative institutional legitimacy and efficacy? Hart and Sacks posed good questions. Their would-be heirs in the 1990s face the challenge of answering *those* questions as well as the *new* ones posed by the critics of the legal process.¹²

Professor Neal K. Komisar¹³ has taken up the challenge. His book, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy*, offers an elegant and encyclopedic argument for the necessity of comparing institutions when making law and public policy.¹⁴ He drills home his message with messianic zeal: any decision about law or public policy depends not only on a set of values or goals that we want to achieve, but also on an evaluation as

7. *Id.* at 2031.

8. HART & ALBERT, *supra* note 5.

9. Eskridge & Frickey, *supra* note 2, at 2053.

10. *Id.* at 2052 (citing, among others, STEPHEN BREYER, REGULATION AND ITS REFORM 346-68 (1982); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 286-93 (1985)).

11. *Id.* (citing, among others, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 87-90 (1982); Daniel B. Rodriguez, *The Substance of the New Legal Process*, 77 CAL. L. REV. 919, 919-20 (1989) (reviewing WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION (1988))).

12. Eskridge & Frickey, *supra* note 2, at 2055.

13. James E. and Ruth B. Doyle-Bascom Professor of Law, University of Wisconsin.

14. Komisar briefly discusses *The Legal Process* as one of "three major works on institutional choice . . . requir[ing] comparison to my approach." P. 11. He distinguishes Hart and Sacks's work as "significantly different from mine. [They] presented a largely idealized image of institutions. . . . [T]heir conception of institutional behavior assumes away most of the difficulty and richness of institutional choice." P. 12.

to which institution — the market, the courts, or the political system — can best achieve such values or goals. To this end, Komesar's book presents and applies a theory of how to compare institutions.

The breadth of Komesar's project is striking. In making his argument and presenting his theory, he reprimands countless prominent legal thinkers for their failure to compare institutions. The list of Komesar's targets reads like a "Who's Who" of constitutional and law and economics scholarship. His book finds failures of institutional analysis in John Rawls's *Theory of Justice*,¹⁵ Richard Posner's *Economic Analysis of Law*,¹⁶ John Hart Ely's *Democracy and Distrust*,¹⁷ Richard Epstein's *Takings*,¹⁸ Cass Sunstein's analysis of constitutional protection against rent seeking,¹⁹ and Bruce Ackerman's criticism²⁰ of the famous *Carolene Products* footnote four.²¹ He also takes minor jabs at Guido Calabresi and Douglas Melamed's analysis of the choice between property and liability rules,²² Calabresi's *A Common Law for the Age of Statutes*,²³ and Laurence Tribe's antiprocess view of constitutional law.²⁴ On the law and economics front, Komesar criticizes Patricia Danzon's proposed schedule of pain-and-suffering damages in tort,²⁵ Alan Schwartz's recommendation for administrative fines in place of reduced damages to obtain accident deterrence,²⁶ and W. Kip Viscusi's preference for administrative over tort regulation of product design defects.²⁷ Moreover, Komesar indicts whole schools of thought — originalist (pp. 262-65) and fundamental-rights approaches (pp.

15. Pp. 34-44 (discussing JOHN RAWLS, *A THEORY OF JUSTICE* (1971)).

16. Pp. 17-22, 157-61 (discussing RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed. 1992)).

17. Pp. 198-215 (discussing JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980)).

18. Pp. 235-44 (discussing RICHARD EPSTEIN, *TAKINGS* (1985)).

19. Pp. 217-21 (discussing Cass Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29 (1985)).

20. Pp. 221-30 (discussing Bruce Ackerman, *Beyond Carolene Products*, 989 *HARV. L. REV.* 713 (1985)).

21. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

22. P. 22 n.17 (discussing Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1098 (1972)).

23. P. 137 n.13 (discussing GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982)).

24. P. 215 & n.37 (discussing Laurence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *YALE L.J.* 1063 (1980)).

25. Pp. 179-80 (discussing Patricia Danzon, *Tort Reform and the Role of Government in Private Markets*, 13 *J. LEGAL STUD.* 517 (1984)).

26. Pp. 180-81 (discussing Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 *YALE L.J.* 353, 371-84 (1988)).

27. P. 180 n.49 (discussing W. KIP VISCUSI, *REFORMING PRODUCTS LIABILITY* 128 (1991)).

256-61) to constitutional judicial review and interest-group political theory (pp. 216-21) — as wrongheaded or incomplete.

What is all the fuss about? According to Komesar, these thinkers have fundamentally missed the boat by failing to analyze the *institutions* that make and apply law.²⁸ First, the worst sinners simply ignore the all-important question of "Who Decides?" The big target in this group is Rawls. According to Komesar, Rawls's *Theory of Justice*²⁹ merely articulates and ranks principles of liberty and equality, and "focuses virtually no attention on real world institutions and institutional choice" (p. 37). Komesar argues that such an "etherial and arid" worldview (p. 39) proves useless for lawmaking because justice requires not only the ordering of values, but also "the presence of institutions capable of translating high-sounding principles into substance" (p. 41). When a theory like Rawls's contains "such loosely defined elements and complicated standards . . . the character of the institutions that will define and apply these goals becomes an essential — perhaps *the* essential — component in the realization of the just society."³⁰

Second, Komesar assails well-known legal scholars as suffering from the defect he calls "single institutionalism" (p. 6). According to Komesar, these scholars rightly evaluate the competence of a particular institution like the market, the courts, or the political system, but they myopically ignore the alternatives. For example, Komesar argues that Richard Posner's analysis of the common law, with its exclusive focus on how well markets work, is "single institutional" rather than "comparative institutional" (p. 20). He points out that Posner's choice between markets, via a property rule, and courts, via a liability rule, as the institution that can most efficiently resolve the problem of local pollution turns solely on the *market's* varying ability to accommodate transactions (pp. 20-22). For Pos-

28. Regarding constitutional judicial review, Komesar goes so far as to say that "scholars and judges must accept the difficult task of institutional choice Any analysis that does not centrally focus on this task is largely useless." P. 270.

29. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

30. P. 42. Komesar writes further that "[j]ust societies are based not on the announcement of broad principles but on the design of real world institutional decision-making processes and the designation of which process will decide which issues." Pp. 48-49. To illustrate this flaw in Rawls's theory, Komesar attempts to apply Rawls's principle of ordered liberty to the real-world dilemma presented by the *Pentagon Papers* case. Pp. 42-49 (discussing *New York Times Co. v. United States*, 403 U.S. 713 (1971)). In this case, the federal government brought an action to enjoin the *New York Times* and the *Washington Post* from publishing a top-secret Defense Department study of the Vietnam War, claiming that such publication would endanger national security. By a vote of 6-3, the Supreme Court refused the injunction. Komesar claims that the nine Justices' radically different opinions all share Rawls's goal of "the most extensive total system of equal basic liberties compatible with a similar system of liberty for all." P. 43. They differ, however, in their assumptions about which institution best achieves this balance of liberties — some preferring an absolutist unregulated marketplace of ideas, others trusting either the courts or the political process to best determine the balance of liberty and order. Pp. 45-49.

ner, "where the market works, the courts allocate the . . . balancing of costs and benefits[] to the market; where the market does not work, the courts make the efficiency determination themselves" (p. 19). To Komesar, such analysis is incomplete:

If the issue involves two institutions — the market and the courts — then why does Posner only ask about variations in the ability of the market? . . .

. . . .

. . . [O]ur question is not whether market performance improves or deteriorates with larger numbers of parties, but rather whether the market works better or worse than the courts.³¹

Komesar observes that the same factors that cause market performance to deteriorate may also impede the functioning of courts, making our choice between the two institutions much more difficult than Posner recognizes (pp. 21-28).

Komesar criticizes John Hart Ely's *Democracy and Distrust*³² as suffering from a comparable tunnel vision: "Like Posner's analysis of the common law, Ely's analysis of constitutional law is single institutional, relying largely on variation in *political* malfunction" rather than comparing the varying abilities of the political and judicial processes (p. 199; emphasis added).

Although Komesar's exhaustive critique of such single-institutional and noninstitutional analyses occupies a large part of his book, he also offers and applies his own affirmative theory of how to compare institutions. Komesar presents this argument in six parts. First, he analyzes the three institutions at issue: the political process, the market, and the courts. He then applies this understanding of institutions to three legal issues: tort reform, constitution making, and constitutional judicial review.

31. Pp. 20-21. Similarly, Posner's analysis of which institution should establish the efficient standard of care in negligence law solely focuses on the varying ability of the market. Posner argues that the market, which establishes its standard through custom, rather than the judicial process, should set the standard of care where plaintiffs and defendants can allocate the costs of accidents between themselves through market interactions. From his vantage point, Posner finds himself at a loss to explain the holding in a well-known custom case, *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932), in which Judge Learned Hand affirmed a negligence decision for a plaintiff even though the defendant and plaintiff were in a market relationship and the defendant's standard of care complied with custom. P. 159. Komesar explains Judge Hand's holding in *T.J. Hooper* as not just an evaluation of the *market's* varying ability to set the standard of care but also as a comparison with the alternative: *judges and juries'* varying competence to set care standards. Pp. 159-60. Unlike medical malpractice cases, which often present a jury with complex technical questions beyond its competence, *T.J. Hooper* involved the relatively simple question of whether a tug-owner was negligent in failing to have a radio on board to warn against an impending storm. Pp. 160-61. Thus Komesar notes that the difference between Judges Posner and Hand "may stem from their implicit institutional presumptions or default positions. To Posner, if the market works relatively well, the market gets the job. To Hand, if the courts work relatively well, the courts get the job (or, more accurately, retain the job)." P. 161 n.16.

32. JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

According to Komesar's theory of comparative institutional analysis, which he terms the "participation-centered approach," an institution's competence depends on the participation of the institutional actors within it (p. 7). Komesar claims that "the actions of the mass of participants . . . best accounts for the variation in how institutions function. In this sense, the adjudicative and political processes are like the market, with its myriad of buyers and sellers" (p. 7). Drawing upon his law and economics background, Komesar's participation-centered theory examines the costs and benefits to individuals of participating in each institution.

Komesar relies upon the celebrated insights of two scholars, Mancur Olson and Ronald Coase, to elaborate upon these costs and benefits.³³ Regarding benefits, Komesar takes from Olson's work on collective action³⁴ the importance of "the distribution of stakes" — the average per capita benefit derived from institutional participation and the variance of this benefit across the population of beneficiaries. Following Coase,³⁵ Komesar portrays the costs of institutional participation — including transaction costs, litigation costs, and political participation costs — as the costs of information and organization. Chapters Three, Four, and Five apply this cost-benefit framework to describe the workings of three institutions: the political process, the market, and the courts.

Komesar's discussion of the political process synthesizes the insights of previous scholars to introduce a new way of thinking about the functioning of legislatures that he calls the "two-force model" (p. 53). Komesar begins by introducing the prominent position in current legal scholarship of the "interest group theory of politics" (p. 53). Derived from the Nobel-prize-winning work of economists George Stigler and James Buchanan,³⁶ this theory asserts that small, concentrated interest groups are often able to exert a disproportionate influence over the political process — obtaining legislation or regulation even though the gains to the interest group are less than the losses imposed on the dispersed majority. A classic

33. Komesar candidly acknowledges his intellectual debt to Olson and Coase. He writes: Nothing is new or startling about the participation-centered approach. Ronald Coase's transaction cost approach . . . emphasized the cost of information in understanding institutional activity . . . The emphasis on the distribution of stakes can be traced to Mancur Olson's work on collective action. That this analysis is simple and its components well known are major advantages . . . for my purposes. An analytical framework meant to serve so vast a range of possible investigations . . . must be as simple, accessible, and intuitively sensible as possible.

P. 8; citations omitted.

34. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965), cited at p. 8 n.3.

35. Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937), cited at p. 8 n.2; Ronald H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1 (1960), cited at p. 8 n.2.

36. See pp. 53-58 (discussing TOWARD A THEORY OF THE RENT-SEEKING SOCIETY (James Buchanan et al. eds., 1980); George J. Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 3 (1971)).

example is the imposition of a protective tariff that benefits a small cadre of producers to the detriment of a larger group of consumers. Komesar refers to this phenomenon, variously known as capture theory, special interest theory, or interest group theory, as “minoritarian bias” (p. 56).

Komesar argues that current scholars’ preoccupation with such *minoritarian bias*³⁷ obscures an arguably more severe malfunction in the political process — *majoritarian bias* (p. 67). Such “tyranny of the majority” is the countervailing force whereby a larger group imposes disproportionately high costs on a smaller group. In addition to the obvious historical examples involving mistreatment of racial minorities — slavery, Jim Crow laws, and the internment of Japanese Americans during World War II — Komesar cites local zoning ordinances as frequent examples of majoritarian bias (p. 81).

The existence of both forms of bias makes it very difficult to predict which type of political malfunction will occur — more so than the theorists who concentrate solely on one form of bias may think. Komesar’s theory, like most current scholarship, predicts that minoritarian bias will prove the more frequent problem, because small, concentrated interest groups often can gain great benefits at reduced costs of information-gathering and organization. But Komesar also enumerates the factors that make majoritarian bias more probable: increases in “the absolute per capita stakes of the majority, the non-uniformity of distribution (which affects the possibility of entrepreneurship), [and] the size of the majority[;]” as well as reductions in “the complexity of the issue, and the cost of information” (p. 88). Komesar concludes that although it is likely that minoritarian bias is a more common problem, “the severity of majoritarian bias — its total impact on society — may rival that of minoritarian bias” (p. 81).

Komesar’s discussion of markets in Chapter Four, although interesting in its own right, adds little to the book. After reciting Coase’s renowned insight into the importance of transaction costs, Komesar insists on the parallel significance of transaction *benefits*. Chapter Four further provides a primer on various forms of market failure, explains the necessity of a stable political process to support a well-functioning market, and concludes with a comparison of rent seeking in the market and the political process. Because his voluminous real-world applications make no arguments for or against the market choice, Komesar’s discussion of markets is probably the least interesting part of his book.

37. As examples of legal scholars who have applied interest-group theory to issues in constitutional law and statutory interpretation, Komesar refers to, among others, Erwin Chemerinsky, Richard Epstein, Cass Sunstein, Frank Easterbrook, and Jonathan Macey. See p. 216 n.38.

Chapter Five specifies the unique traits of the judicial process, and thereby sets the stage for the transition to Komesar's most engaging argument. In this chapter, Komesar contends that courts — as compared to the political and market processes — have three distinct structural attributes. First, formal and costly requirements, such as justiciability, jurisdiction, pleading, and discovery procedures, govern participation in the courts, limit the information judges and juries receive, and constrain the judges' ability to initiate decisionmaking. Second, judges and juries are far more independent than their market or political counterparts: judges generally receive autonomy-enhancing employment benefits such as life tenure, while juries are one-shot decisionmakers walled off from outside influence. Finally, compared to markets and political systems, courts have a very limited reach. Komesar concludes that these unique features demand that judges carefully husband the limited resources of adjudication, "by substituting adjudicative decision-making for political decision-making or market decision-making only when the balance of bias, competence, and scale favors that substitution" (p. 150).

Komesar's most comprehensive and intriguing argument follows in Chapter Six: He argues that the characteristics of certain private tort claims do in fact require a substitution of judicial for political decisionmaking. Applying his participation-centered approach to the issue of tort reform, Komesar argues that the distribution of costs and benefits in tort cases involving products and services strongly favors the institution of judicial decisionmaking. Komesar analyzes the distribution of stakes among four groups: actual and potential injurers and actual and potential victims. He argues that because products and services cases involve a fairly small number of "high-stakes" *potential* injurers who will face high-cost lawsuits, as well as a fairly small number of "high-stakes" *actual* victims who will sustain high-cost damages,³⁸ there exists a particularly strong possibility that adjudication of these tort claims can deter accidents. The victims have strong incentives to bring tort suits, and the injurers have strong incentives to learn how to decrease accidents.³⁹

38. The *potential* victims do not have high stakes. Before an accident occurs there exists a large number of potential victims, the vast majority of whom will not suffer an accident. Only after the accident does the *actual* victim sustain the concentrated, high-stakes costs of damages.

39. Komesar compares two other possible distributions, involving "low-stakes" potential injurers and "low-stakes" actual victims. The first group appears in cases in which a much larger number of dispersed potential injurers exists, such as automobile accident cases. The second group appears in cases in which a much larger number of small dispersed injuries occurs, such as minor pollution cases. In cases involving these two groups, the possibility of effective deterrence decreases because the low-stakes potential injurers lack the incentive to incur the costs of learning how to decrease accidents, and the low-stakes actual victims lack the incentive to incur the information-gathering and organization costs required to bring suit

As Komesar points out, this distribution of stakes also makes such cases particularly poor candidates for effective *political* control. Although the actual victims have high stakes, the *potential* victims do not.⁴⁰ Thus, potential victims have little incentive to participate in the political process especially relative to the high-stakes potential injurers. Komesar writes “[t]his overrepresentation has all the elements of minoritarian bias” (p. 192). He concludes: “The tort reform process is biased. Even if some tort reform is necessary, the biased political process . . . is likely to go much farther than it should” (p. 192). These findings lead Komesar to recommend that courts substitute for the political process either by construing reform statutes narrowly or by invalidating them through constitutional review (p. 193). He notes with satisfaction that a great number of courts have already done so (p. 193).

Chapters Seven and Eight explore the institutional implications of constitution making and constitutional judicial review. They criticize, from an institutional perspective, various constitutional law theories, including interest-group political theory, originalist and fundamental-rights approaches to judicial review, and the theories contained in Ely’s *Democracy and Distrust*,⁴¹ and Epstein’s *Takings*.⁴²

Komesar concludes his book by summarizing in rule-like form its three main “Propositions” — that goal or value choice alone is insufficient; that institutional analysis must be comparative; and that it also must be participation-centered.

Given the breadth of Komesar’s analysis, it is important to recognize certain points and distinctions that he does not make. First, Komesar largely ignores the institutional choice between the market and the political process. In so doing, he avoids the interesting debates over the comparative merits of various forms of regulated and unregulated markets. As Komesar admits, his account concentrates on the question of when courts should substitute their judgments for those of the political process (p. 273).

Secondly, unlike Hart and Sacks for example, Komesar never explicitly analyzes the *administrative* process as a distinct institution. Although he does compare administrative agencies to juries (pp. 138-42), he does not treat such agencies as a separate branch worthy of its own participation-centered analysis. Rather he lumps the bureaucracy with the legislature under the rubric of “the political process.” This seems unfortunate, given the likelihood that the

against the injurer. Pp. 161-70. Thus, the distribution of stakes discussed in the text compares favorably with these two.

40. See discussion *supra* note 38.

41. ELY, *supra* note 32.

42. RICHARD EPSTEIN, *TAKINGS* (1985).

manner of participation in these two institutions differs. Such an analysis also ignores the interesting issues surrounding the relationship between courts and agencies that stands at the heart of administrative law.

Thirdly, Komesar essentially ignores the federalist dimension of institutions. Komesar especially slights the institutional distinctions of the state courts. More specifically, his discussion of judicial independence rests on an implicit assumption of Article III safeguards. Also, his discussion of the role of courts focuses on constitutional review and statutory interpretation and fails to elaborate on the institutional dimensions of *common-law* policymaking.⁴³

Ultimately, despite the breadth and sweeping goals of Komesar's project,⁴⁴ his book provides only a preliminary analysis. For example, although he presents detailed criticisms of faulty single-institutional and noninstitutional analyses — namely, Posner's ideas on local pollution and the application of Rawls's theory to the *Pentagon Papers* case — Komesar never concludes which institution should be preferred in either case. His general pattern is to criticize earlier analyses, vehemently advocate for a comparative institutional approach, and demur on the results of this approach.⁴⁵

But even this criticism is not fully justified. Komesar does offer two specific conclusions — he supports the institution of judicial decision in tort reform and he rejects Richard Epstein's expansive version of the Takings Clause. Moreover, he presents his book as a blueprint outlining general principles for future analysts, and he acknowledges that the analysis he describes will prove difficult and will often produce uncertain answers.⁴⁶ In the end, his elegant and accessible book has accomplished a difficult task. It emphasizes the distinction between public values and the institutions we choose to

43. This may simply be an outgrowth of his lack of interest in the institutional choice between markets and regulation, which can be characterized as the choice between common-law property and liability rules. Komesar *does*, however, discuss such issues in his criticism of Judge Posner's analysis of local pollution problems. Pp. 14-28.

44. He begins the book by stating: "My aim in this book is to recast the analysis of law and public policy . . ." P. ix. He closes it by affirming: "My ultimate goal is to aid the reformation of society." P. 274.

45. Moreover, at several points in the book, Komesar explicitly puts off difficult questions of application, noting, for example: "In these examples and others . . . , there are some nascent lessons for constitution making in general. The challenge of developing these lessons will have to await future work." P. 231. "I will leave to another day or, hopefully, another author, the task of thoroughly developing a comparative institutional analysis of statutory interpretation." P. 194 n.77. He even equivocates on the issue of judicial review of tort reform statutes: "[T]he issue of whether and to what extent tort reform decisions should be reviewed by the courts is one I will save for another day. It is too complex and too volatile to be handled as an aside here." P. 195.

46. Komesar concludes by observing that his "participation-centered approach . . . is [no] more than a rope bridge across the chasm of institutional choice. Much more must be done and the work promises to be frustratingly slow and difficult. . . . [But if] I have done my job, [other] analysts will now carry forward the task." Pp. 275-56.

achieve them, and it usefully investigates the ways these different institutions can fail. As his numerous examples illustrate, the task of comparing institutions is all too easy to overlook or perform poorly. This powerful reminder about the importance of comparative institutional competence will only enrich the study of law and public policy.

— *David A. Luigs*