

11-19-2018

## Understanding Institutions: A Multi-Dimensional Approach

Raymond H. Brescia

Follow this and additional works at: [https://scholars.unh.edu/unh\\_lr](https://scholars.unh.edu/unh_lr)

 Part of the [Law Commons](#)

---

### Repository Citation

Raymond H. Brescia, *Understanding Institutions: A Multi-Dimensional Approach*, 17 U.N.H. L. Rev. 1 (2018).

This Article is brought to you for free and open access by the University of New Hampshire – School of Law at University of New Hampshire Scholars' Repository. It has been accepted for inclusion in The University of New Hampshire Law Review by an authorized editor of University of New Hampshire Scholars' Repository. For more information, please contact [ellen.phillips@law.unh.edu](mailto:ellen.phillips@law.unh.edu).



Raymond H. Brescia

# Understanding Institutions: A Multi-Dimensional Approach

17 U.N.H. L. REV. 1 (2018)

**ABSTRACT.** With the rise of nativist policies throughout the world, the growing dangers posed by climate change and rising income inequality, and ever-increasing threats to the rule of law, many turn to the institutions of democracy to achieve desired policy goals. Indeed, if one seeks to address climate change, preserve the rule of law, or reduce income inequality, functioning institutions are needed to further such objectives. But the ability to leverage institutions to achieve legal and policy goals presupposes a common understanding of institutions as well as an appreciation for the ways in which they can and may function. Traditional comparative institutional analysis uses this functional understanding to identify which institutional setting—typically the political process, the markets, or the courts—is the preferred means of achieving one’s chosen legal or policy goals.

This Article argues that merely differentiating between these institutional settings is insufficient to conduct a meaningful comparative analysis. Such a narrow view of institutional settings, what I will call institutional systems and the institutions they contain, leaves much to be desired, particularly as the scale and complexity of both problems and proposed solutions continue to grow. Indeed, this monolithic, one-dimensional view of institutions is ill-equipped to address the scale and scope of contemporary, collective-action problems. This Article develops an approach to comparative institutional analysis that recognizes the rich, multi-dimensional aspects of not only the characteristics of institutions but also the problems institutions are asked to solve. By embracing a robust and comprehensive view of institutions, this new approach to comparative institutional analysis offers a more meaningful and informative foundation upon which to pursue solutions to the complex societal problems of today and those that will emerge in the future.

**AUTHOR.** Hon. Harold R. Tyler Chair in Law and Technology and Professor of Law, Albany Law School. JD, Yale Law School; BA, Fordham University. Formerly the Associate Director of the Urban Justice Center; a Skadden Fellow with the Legal Aid Society of New York; and law clerk to the Hon. Constance Baker Motley, Senior United States District Court Judge, Southern District of New York. I would like to thank the participants in the State and Local Government Works-in-Progress Conference for their thoughtful comments on prior versions of this piece, especially Nestor Davidson and Kathleen Morris. Both Daniel H. Cole and Gregory Shaffer also offered helpful feedback on prior drafts. Similarly, faculty at the University of New Hampshire School of

Law also provided valuable feedback on an earlier draft, especially Roger Allan Ford, John Greabe, Lucy Hodder, Stanley Kowalski, Leah Plunkett, Alexandra Roberts, Danette Wineberg, and Susan Drisko Zago. I am also grateful to my faculty colleagues who gave me helpful feedback on prior drafts, including Andrew Ayers, Ted DeBarbieri, Joseph Buffington, Stephen Gottlieb, Mary Lynch, Nancy Maurer, David Pratt, Patricia Reyhan, Sarah Hill Rogerson, Christian Sundquist, and Evelyn Tenenbaum. Special thanks to Sherri Meyer and Cassandra Sweetser for their assistance with this project, and for the helpful research assistance of Mary Ann Krisa. Most of all, I am indebted to Neil Komesar and his life’s work, for making the ideas contained here even possible. All errors and omissions are, of course, solely mine.

INTRODUCTION..... 3

I. INSTITUTIONS IN THEORY ..... 7

II. INSTITUTIONS AT WORK: MASSACHUSETTS V. EPA AS A LENS  
THROUGH WHICH TO EXPLORE THE DIMENSIONS OF  
INSTITUTIONS ..... 19

    A. *Background and the Court’s Holding* .....19

    B. *Massachusetts v. EPA and Institutions with Multiple Dimensions* ..... 23

III. UNDERSTANDING THE MULTIPLE DIMENSIONS OF  
INSTITUTIONS AND THEIR IMPLICATIONS.....39

    A. *Vertical Heterogeneity* ..... 39

    B. *Horizontal Heterogeneity* .....41

    C. *Role Heterogeneity*..... 42

    D. *Interest Heterogeneity* ..... 45

    E. *Institutional Interdependence*..... 48

    F. *Blurring of Institutional Lines*.....51

    G. *Temporal Heterogeneity*..... 52

IV. IMPLICATIONS OF INSTITUTIONS WITH MULTIPLE DIMENSIONS ..56

CONCLUSION .....65

## INTRODUCTION

*[W]e are just temporary occupants of this office. That makes us guardians of those democratic institutions and traditions -- like rule of law, separation of powers, equal protection and civil liberties -- that our forebears fought and bled for. Regardless of the push and pull of daily politics, it's up to us to leave those instruments of our democracy at least as strong as we found them.*<sup>1</sup>

Institutions are all around us. And the institutions of the political and legal order are under threat. Depending on one's political perspective, the election of Donald J. Trump to the United States presidency, the "Brexit" vote, and the rise of a conservative populism indicate that institutions are evolving in some way, for better or worse. Extant institutions are no longer viable bulwarks against an apparent erosion of rights and weakening of the power of certain elites.<sup>2</sup> Yet the very survival of societies depends on the functioning of their institutions to protect civil and political rights and to preserve the rule of law.<sup>3</sup> As Daron Acemoglu and James A. Robinson show, the strength of a nation's institutions helps determine its lasting power over time.<sup>4</sup> Many commentators from across the political spectrum also put their faith in the role that institutions will play in ensuring the rule of law, the survival of democracy as a political system, and the future of the planet.<sup>5</sup> The

---

<sup>1</sup> Letter from President Barack Obama to Donald Trump, *quoted in* Kevin Liptak, *Exclusive: Read the Inauguration Day Letter Obama Left for Trump*, CNN (Sept. 5, 2017, 2:25 PM), <http://www.cnn.com/2017/09/03/politics/obama-trump-letter-inauguration-day/index.html> [<https://perma.cc/Z8QV-YWQN>]. See also Senator Jeff Flake's (R-AZ) statement upon announcing he is not seeking re-election in 2018:

We must never regard as normal the regular and casual undermining of our democratic norms and ideals. We must never meekly accept the daily sundering of our country. The personal attacks, the threats against principles, freedoms and institution, the flagrant disregard for truth and decency.

*Full Transcript: Jeff Flake's Speech on the Senate Floor*, N.Y. TIMES (Oct. 24, 2017), <https://www.nytimes.com/2017/10/24/us/politics/jeff-flake-transcript-senate-speech.html> [<https://perma.cc/2HV6-65ZB>].

<sup>2</sup> See Eric A. Posner, *Liberal Internationalism and the Populist Backlash*, 49 ARIZ. ST. L.J. 795, 812–13 (2016) (describing the populist backlash to the international legal order); Uri Friedman, *Trust in Government Is Collapsing Around the World: The Trend Helps Explain Trump and Brexit. What's Next?*, ATLANTIC MONTHLY (July 1, 2016) (describing the decline in trust in government generally).

<sup>3</sup> For a discussion of the interplay between rule of law, legitimacy, rights, and institutions, see generally Samuel J. M. Donnelly, *Reflecting on the Rule of Law: Its Reciprocal Relation with Rights, Legitimacy, and Other Concepts and Institutions*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 37 (2006).

<sup>4</sup> DARON ACEMOGLU & JAMES A. ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY* 428–37 (2012).

<sup>5</sup> A range of commentators from across the political spectrum have expressed their belief in the durability of institutions to preserve democracy, while others have argued otherwise. For a sample of these perspectives, see Adam Liptak, *Donald Trump Could Threaten U.S. Rule of Law*,

presence and robustness of such institutions are also critical features in ensuring economic growth; indeed, it is the absence of durable and responsive institutions that may be driving, at least in part, the populist backlash to the very policies that might support such growth.<sup>6</sup>

Furthermore, as the incidence and complexity of broad-scale societal and planetary threats increase, so does the importance of robust and effective institutions. Threats such as climate change, globalization, new technologies, and rising economic inequality require coordinated institutional actions capable of benefitting society and protecting its interests as times change.<sup>7</sup> The need for institutional evolution is even more demanding and acute given the accelerating pace of change itself, testing the limits of existing institutions.<sup>8</sup> Regardless of one's political affinity or policy preferences, developing an understanding of what institutions are and how they function is critical to the pursuit of such preferences, whatever they might be.<sup>9</sup>

Historically, the discipline of comparative institutional analysis, most closely associated with Neil Komesar, has attempted to address the question of how to

---

*Scholars Say*, N.Y. TIMES (June 3, 2016). For a pessimistic view on American institutions in this moment, see George Packer, *Will Our Democratic Institutions Contain Trump? All the Pieces Are in Place for the Abuse of Power, and It Could Happen Quickly*, THE NEW YORKER (Nov. 21, 2016) (“The democratic institutions that held Nixon to account have lost their strength since the nineteen-seventies—eroded from within by poor leaders and loss of nerve, undermined from without by popular distrust.”).

<sup>6</sup> Daron Acemoglu & Simon Johnson, *Unbundling Institutions*, 113 J. POL. ECON. 949, 988 (2005) (showing property rights institutions “have a major influence on long-run economic growth”); Frank B. Cross, *Law and Trust*, 93 GEO. L.J. 1457, 1525–27 (2005) (finding strong correlation between the rule of law and economic growth); Martin Leschke, *Constitutional Choice and Prosperity: A Factor Analysis*, 11 CONST. POL. ECON. 265 (2000) (analyzing cross-country data and showing rule of law promoted economic growth).

<sup>7</sup> See, e.g., Craig Anthony Arnold, *Fourth-Generation Environmental Law: Integrationist and Multimodal*, 35 WM. & MARY ENVTL. L. & POL'Y REV. 771, 792 (2011) (describing the field of environmental law “as a complex and adaptive institutional system within the larger law-and-society system” that “continues to evolve, not settling on some optimal equilibrium, but instead adapting to the many forces and conditions that shape it”).

<sup>8</sup> See, e.g., THOMAS L. FRIEDMAN, THANK YOU FOR BEING LATE: AN OPTIMIST'S GUIDE TO THRIVING IN THE AGE OF ACCELERATIONS 3–4 (2016) (describing the pace of change in contemporary America and dubbing this period the “Age of Accelerations”).

<sup>9</sup> See generally Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1 (2013) (emphasizing the importance of institutional analysis and arguing for a balance between institutional realism and institutional formalism in public law adjudication to achieve appropriate outcomes).

choose between institutions when seeking to pursue policy goals.<sup>10</sup> Despite its longstanding use, I argue that Komesar’s approach is narrow and limited. Notably, it only identifies a small category of institutions—the public sector, the private sector, and the courts—from which to choose and fails to conduct a more nuanced analysis of available institutions.<sup>11</sup> The need to dig deeper is not unique to an analysis of institutions. For example, there is a growing body of scholarship recognizing the need to adapt our views of federalism towards a more nuanced understanding of the interactions between different levels of government,<sup>12</sup> what Dean Heather Gerken calls “federalism all the way down.”<sup>13</sup> The time is right to adopt a similar view of institutions: an institutional analysis all the way down.

Indeed, a monolithic, or one-dimensional, view of institutions would seem inadequate for confronting the task of addressing the large, complex problems of our time. A simple view of institutions and institutional processes leaves much to be desired in terms of addressing these problems, as they arise in different contexts and at different times. For example, comparative institutional analysis has been used to argue that a private property regime is best suited to achieve the goals of ensuring proper stewardship of property and resource allocation efficiency.<sup>14</sup> Yet

---

<sup>10</sup> Evidence of Komesar’s prominence in and importance to the discipline of comparative institutional analysis is all around, perhaps seen best in the dedication of a symposium and issue of the *Wisconsin Law Review* that enlisted contributions from diverse subfields such as statutory interpretation, cybersecurity, and administrative law, among others, to address the lasting impact of Komesar’s work. See Symposium Issue—Thirty Years of Comparative Institutional Analysis: A Celebration of Neil Komesar, 2013 WIS. L. REV. 2 (2013), <http://wisconsinlawreview.org/volume-2013-no-2/>.

<sup>11</sup> NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 4–9 (1994) [hereinafter KOMESAR, *IMPERFECT ALTERNATIVES*].

<sup>12</sup> See, e.g., David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 491 (1999) (arguing local governments are often in a better position than state or federal governments for resolving critical disputes over the “most contentious of public questions”); Richard Briffault, “What About the ‘Ism’?” *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1335–49 (1994) (arguing for a formal role for states in the federal system); Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 63 VA. L. REV. 959, 1010–11 (2007) (arguing that the “normative case for devolutionary federalism leads to a defense of federal authority to empower local governments”). On the effects of a decentralized federalism on local power, see RICHARD SCHRAGGER, *CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE* 78–102 (2016).

<sup>13</sup> Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 9–10 (2010).

<sup>14</sup> Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967) (arguing transaction costs associated with managing communal property require private property regime).

as the work of Elinor Ostrom shows, there are times when non-market arrangements, particularly at the local level, are in a better position to regulate common-pool resources in certain circumstances.<sup>15</sup> Similarly, as the American public and its founders discovered, the weak institutional arrangements preferred under the Articles of Confederation were ill-equipped to provide for the common defense of the new nation.<sup>16</sup> The Hoover Administration struggled to address the economic crisis of the Great Depression using the pre-1929 institutional preferences of strong state and local governments, a comparatively weak federal government, and a large private sector.<sup>17</sup> In both examples, the institutions of our federal government evolved in response to a crisis.<sup>18</sup> The historical, one-dimensional approach to comparative institutional analysis overlooks the temporal and contextual effects on an institution's ability to facilitate collective-action objectives. As broad-scale problems and our understanding of institutions evolve, a one-dimensional view of institutions must evolve as well.

This Article introduces what I call a “multi-dimensional” approach to comparing institutions, one that, I argue, offers a richer understanding of the different facets of institutions: how they operate in relation to each other, how they operate in opposition to each other, and how they operate over time. By developing a better and more nuanced understanding of how institutions function, we can ensure that the proper institution is deployed in its proper context and at the proper time to achieve desired policy goals. In this way, my multi-dimensional approach to comparative institutional analysis flows from a “New Legal Realist” view of institutions that engages with how institutions function in the real world in light of the new legal empiricism.<sup>19</sup>

---

<sup>15</sup> ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 89–102 (James E. Alt & Douglass C. North eds., reprinted 2002) (1990) (describing the types of institutional features of common-pool resource arrangements that can lead to successful outcomes in terms of community resource management).

<sup>16</sup> Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 117 (2010) (describing efforts to create a Constitution as a means of addressing collective action problems the Articles of Confederation could not solve).

<sup>17</sup> See DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945 50–60 (1999).

<sup>18</sup> See Cooter & Siegel, *supra* note 16 (describing the emergence of the federalist constitution); KENNEDY, *supra* note 17 (describing the expansion of the federal government in response to the Great Depression).

<sup>19</sup> As Gregory Shaffer argues: “Komesar’s framework needs to be complemented by an empirically grounded, new legal realist approach regarding how law is translated in different institutional contexts. In this way, new analytics can emerge that will update and inform

To pursue these ends, this Article proceeds as follows. Part I offers a common vocabulary for discussing institutions and introduces the discipline of comparative institutional analysis. Part II offers a case study of the United States Supreme Court’s decision in *Massachusetts v. EPA*<sup>20</sup> as a lens through which to view comparative institutional analysis in a new, multi-dimensional light. The case serves as an instructive example of a multi-dimensional approach, clearly framing the issues as institutional inquiries. Part III identifies and explains the seven different dimensions of institutions this review of *Massachusetts v. EPA* surfaces. Lastly, Part IV explores the implications a multi-dimensional approach has on our understanding of institutions and comparative institutional analysis itself.

But before I embark on this endeavor, let me clarify what this Article does *not* attempt to do. This Article embraces the complexity of how institutions and institutional systems function, but it does not use comparative institutional analysis to advance social change of a particular political bent or promote a specific policy goal. I will leave that to future work if this approach proves useful and illuminative.

## I. INSTITUTIONS IN THEORY

So what does one mean when one talks about the importance of institutions? Indeed, what are institutions and how do they function? How do they sustain a society, provide norms for behavior, and offer a legal structure to the order of human affairs? How do they arise, operate, and evolve over time? How do they relate to each other and to public policies and societal goals? Are certain institutions in a better position to achieve such goals as preserving the rule of law, protecting civil and political rights, or developing resiliency in the face of climate change? This intersection between policy preferences and institutions is central to the discipline known as comparative institutional analysis, which this Article proudly and humbly embraces as its foundation.<sup>21</sup> However, I will show that as the scale and complexity

---

comparative institutional analysis in a dynamically changing world.” Gregory Shaffer, *Comparative Institutional Analysis and a New Legal Realism*, 2013 WIS. L. REV. 607, 628 (2013). For a discussion of the similarities and differences between the “New Legal Realism” and comparative institutional analysis, see Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 85–88 (2009). On the trend toward empiricism in law, see Mark C. Suchman & Elizabeth Mertz, *Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism*, 6 ANN. REV. L. & SOC. SCI. 555, 557–59 (2010).

<sup>20</sup> 549 U.S. 497 (2007).

<sup>21</sup> KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 11, at 4–5.



of problems inevitably evolve, historical comparative institutional analysis can also evolve as the lens for assessing the proper role of institutions in achieving policy goals. Traditionally, the main focus of that assessment is captured in the decisions over who decides a particular policy question and who decides who decides.<sup>22</sup> I argue that such a limited focus must evolve and expand to consider a variety of institutional dimensions in order to render the analysis sufficiently actionable.

But first, I will develop a definitional baseline to set the stage for the discussions that follow. In one common usage of the term “institution,” an institution is an organization or a class of organizations.<sup>23</sup> I can refer to the law school at which I teach as an institution. One might also speak of law schools in general as institutions (plural) or as a single institution, e.g., “law schools, as an institution, must instill their students with appropriate professional values to confront a complex world.” Other uses of the term institution abound,<sup>24</sup> the detailed exploration of which is beyond the scope of this Article and could take at least a full article to address.<sup>25</sup>

There are at least three common uses of the term institution in the context of conducting comparative institutional analysis. First, and for our purposes, an institution can be used to describe stand-alone organizations or a particular entity

---

<sup>22</sup> *Id.* at 3.

<sup>23</sup> For example, one such definition, from Webster’s Dictionary, describes an institution as “an established organization or corporation (such as a bank or university) especially of a public character.” *Institution*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/institution> [<https://perma.cc/CM8D-8G9G>] (last visited Oct. 5, 2018).

<sup>24</sup> When it comes to the functioning of the national government in the United States, one could easily concoct the following sentence and have the term institution mean something very different each time the term finds its way into the statement: “The Senate as an institution that protects the institution of collegiality among members will only be preserved if the institution of the filibuster is honored.” Here we see three somewhat distinct notions and usages of the term. First, the idea that the “Senate is an institution” reflects the concept that it is a body or organization that has a role to play in our constitutional structure (dare I say an “institutional role” to even further complicate things?). Collegiality is an informal behavioral norm that encourages certain types of conduct (again, using the adjectival form, it is an “institutional norm”—a norm that is found among actors within the institution). Finally, some might see an institution as a formal rule or law that governs behavior, as in the case of the filibuster in different contexts, when it was embodied in the rules that govern Senate practices. Thus, in this simple example, we see that the term institution can be used in many different ways, to mean different things, in different contexts.

<sup>25</sup> Indeed, one such very effective article-length attempt has been made to do just that: see generally Daniel H. Cole, *The Varieties of Comparative Institutional Analysis*, 2013 WIS. L. REV. 383 (2013).

like the U.S. Senate, a law school, a nonprofit organization, or a business.<sup>26</sup> Second, as used by Professor Komesar,<sup>27</sup> institutions may refer to what I call institutional systems. These are the government, the market, and the courts, rather than a particular governmental body, business, or court. Institutional systems, like solar systems, are settings in which smaller institutions—discrete organizations per the first definition—operate. Third, while Douglass North describes institutions as “the rules of the game,”<sup>28</sup> I reject this use as simply too far removed from the nuanced, multi-dimensional analysis that is required.

For the purposes of this Article, I will use the term “norm” when I mean an informal rule or pattern of behavior,<sup>29</sup> “law” when I mean a prescription formally passed by a legislative body,<sup>30</sup> and “regulation” when such a prescription is adopted by a regulatory body.<sup>31</sup> Finally, when I use phrases like “the Senate as an institution,” I am referring to the institution’s “institutional role”—the relative place it inhabits and the functions it fulfills within an institutional system.<sup>32</sup>

With our definitional baseline established, we now turn to the discipline of comparative institutional analysis itself. In the late 1980s and early 1990s, in the face

---

<sup>26</sup> See MERRIAM-WEBSTER, *supra* note 23.

<sup>27</sup> See KOMESAR, *IMPERFECT ALTERNATIVES*, *supra* note 11, at 4–5.

<sup>28</sup> DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* 3 (James Alt & Douglass North eds., 27th prt. 2009) (1990); see also Oliver E. Williamson, *Why Law, Economics, and Organization?*, 1 ANN. REV. L. & SOC. SCI. 369, 385 (2005) (distinguishing between the “institutional environment” which are the “rules of the game” and the “institutions of governance” which are referred to as the “play of the game”).

<sup>29</sup> See, e.g., Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 914 (1996) (defining norms as “social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done”).

<sup>30</sup> See, e.g., RONALD DWORKIN, *LAW’S EMPIRE* 31–33 (1986) (discussing different views of the term “law”).

<sup>31</sup> Even these descriptions can sometimes become blurry in their interchangeable use in scholarship. KOMESAR, *IMPERFECT ALTERNATIVES*, *supra* note 11, at 31 (discussing the role of “regulations and rights” in the interplay between institutions).

<sup>32</sup> For any institution, understanding that institution’s institutional role requires one to take into account the norms, laws, and regulations that may encumber or shape the functions of that institution within the institutional system or systems within which it operates as well as its relationship to other institutions with which it comes into contact. My own taxonomy of institutions might be somewhat different than the ways in which theorists from the New Institutional Economics (NIE) school might use the term and certainly different from the somewhat idiosyncratic view of Komesar. I hope this approach is more workable and helps to offer a clearer way in which to view institutions. For a somewhat different take on institutional definitions in comparative institutional analysis, see generally Cole, *supra* note 25.

of emerging fields of study such as law and economics<sup>33</sup> and critical legal studies,<sup>34</sup> comparative institutional analysis arose as not only a critique of these other approaches to law, but also as a way to think about the pursuit of policy goals, i.e., as a process embedded within an institutional framework.<sup>35</sup> When using this discipline, in order to make decisions about how best to achieve select policy goals, one had to compare various institutions to determine the proper institution for achieving those goals.<sup>36</sup> While the intellectual forefather of this approach to institutional choice in the pursuit of policy goals is Ronald Coase, it is primarily through the work of Neil Komesar and his work's progeny that the discipline of comparative institutional analysis emerged.<sup>37</sup> Komesar urged a generation of scholars to think critically and seriously about the proper role of institutions in achieving policy goals, and his work has encouraged the comparative analysis of institutions and their role in managing property law regimes,<sup>38</sup> pursuing environmental protection,<sup>39</sup> promoting firearm regulation through the tort

---

<sup>33</sup> For an introduction to the law and economics approach, see generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (9th ed. 2014).

<sup>34</sup> For an overview of critical legal studies scholarship, see generally MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987).

<sup>35</sup> KOMESAR, *IMPERFECT ALTERNATIVES*, *supra* note 11, at 4–5. For an intellectual history of the emergence of comparative institutional analysis alongside these other schools of thought, see generally Edward L. Rubin, *Institutional Analysis and the New Legal Process*, 1995 WIS. L. REV. 463 (1995) (book review).

<sup>36</sup> KOMESAR, *IMPERFECT ALTERNATIVES*, *supra* note 11, at 5–8.

<sup>37</sup> On the emergence of comparative institutional analysis from the work of Coase, see Joel P. Trachtman, *The Theory of the Firm and the Theory of International Economic Organization: Toward Comparative Institutional Analysis*, 17 NW. J. INT'L L. & BUS. 470, 501–04 (1997).

<sup>38</sup> See, e.g., William W. Buzbee, *Sprawl's Dynamics: A Comparative Institutional Analysis Critique*, 35 WAKE FOREST L. REV. 509 (2000) (using comparative institutional analysis to discuss policies related to housing sprawl); Daniel H. Cole, *Political Institutions, Judicial Review, and Private Property: A Comparative Institutional Analysis*, 15 SUP. CT. ECON. REV. 141 (2007) (applying comparative institutional analysis to property law).

<sup>39</sup> See, e.g., Jennifer M. Egan & Joshua M. Duke, *Water Quality Conflict Resolution and Agricultural Discharges: Lessons from Waterkeeper v. Hudson*, 39 WM. & MARY ENVTL. L. & POL'Y REV. 533 (2015) (using comparative institutional analysis to assess best approaches to environmental policies in certain settings).

system,<sup>40</sup> interacting with social movement theory,<sup>41</sup> and ensuring the proper functioning of the courts.<sup>42</sup>

The primary insight of Komesar's theories is that when seeking policy goals, the appropriate method of analysis is not simply to identify a single institution that might carry out a policy in a given context, assess whether that particular institution, standing alone, is effective at achieving that goal, and accept or reject that institution based on that assessment. Rather, for Komesar, the better approach is to determine which institution among a set of institutions is better equipped to deliver on that chosen policy outcome.<sup>43</sup> For Komesar, an "institution" for comparative institutional purposes is either one of three options: the public sector (the government), the courts (the judiciary), or the private sector (the market).<sup>44</sup> The pursuit of policy goals, and the choice of the institutions best suited to achieve those goals, then, comes down to a choice between these institutional processes and institutional systems, as I have called them.<sup>45</sup> Komesar is critical of those who engage in what he refers to as "single institutional analysis," which arises when one looks only at the value of one institution to achieve a given policy goal.<sup>46</sup> Such an approach, he argues, fails to appreciate the value of comparing the functioning of multiple institutions in particular contexts to determine the institution best suited to meet the intended goals.<sup>47</sup>

For example, Komesar asserts that courts and the adjudicative process have

---

<sup>40</sup> Timothy D. Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 CONN. L. REV. 1247, 1248 (2000) (using comparative institutional analysis to argue that the tort system is an effective forum for the regulation of gun violence).

<sup>41</sup> Nancy J. Knauer, *The Recognition of Same-Sex Relationships: Comparative Institutional Analysis, Contested Social Goals, and Strategic Institutional Choice*, 28 U. HAW. L. REV. 23 (2005) (assessing the value of comparative institutional analysis in relation to social movement theory in the context of the campaign for marriage equality).

<sup>42</sup> See, e.g., William N. Eskridge, Jr., *Expanding Chevron's Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411 (2013) (applying comparative institutional analysis to administrative law and statutory interpretation).

<sup>43</sup> KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 11, at 4–5.

<sup>44</sup> *Id.* at 9.

<sup>45</sup> *Id.* at 4–9. The use of the term institution in this setting in this way may be unique to Komesar's approach and those who follow Komesar in conducting traditional comparative institutional analysis. It is by no means consistent with common usage to limit the term institution to refer simply to the political processes, the courts, or the market.

<sup>46</sup> *Id.* at 6.

<sup>47</sup> *Id.* at 4–7.

three distinct characteristics when compared to the institutions of the market and the political process: “higher threshold access costs, limited scale, and judicial independence.”<sup>48</sup> On the first characteristic, these access costs are a function of a blend of norms and formal rules about who can come to court to resolve a dispute and when they can do so.<sup>49</sup> As Komesar explains, “[s]tanding determines who can bring action based on a given wrong. Choice of law determines which state’s law will be employed. Justiciability and ripeness determine when wrongdoing can come to the courts. The difficulty of understanding and meeting these requirements raises the cost of litigation.”<sup>50</sup>

For Komesar, it is not enough to understand that these threshold barriers exist; rather, it is also necessary to understand that the courts’ threshold access costs are comparatively higher than those of the political process or the market.<sup>51</sup> Furthermore, he argues that the components of the judiciary’s limited access are a product of blended concerns about preserving the proper role of the courts based on our collective understanding of what that institutional role should be in the distinctively American system.<sup>52</sup> In this system, courts are not supposed to be “super-legislatures.”<sup>53</sup> Rather, as John Hart Ely describes, their role is to ensure that other branches of government are following the law and that private litigants have a forum in which to resolve their disputes peaceably.<sup>54</sup> Interestingly, the judiciary is often criticized if it is perceived as lowering its comparatively high threshold access costs. Failure to honor the norms and rules defining the types of disputes it should try to resolve, when it should try to resolve them, and the parties that can come before it to resolve them can threaten the courts’ legitimacy as an institution because of its particular institutional role.<sup>55</sup>

The second and third characteristics identified by Komesar—limited scale and

---

<sup>48</sup> *Id.* at 123.

<sup>49</sup> *Id.* at 124–25.

<sup>50</sup> *Id.* at 126 (footnote omitted).

<sup>51</sup> *Id.* at 123.

<sup>52</sup> *Id.* at 123–54.

<sup>53</sup> James Michael Scheppele, *Are We Turning Judges into Politicians*, 38 *LOY. L.A. L. REV.* 1517, 1518 (2005) (noting risks of turning courts into unaccountable “super legislatures,” displacing the proper role of the electorate and other branches of government).

<sup>54</sup> For criticism of judges that promote their own values over more carefully circumscribed principles, see JOHN HART ELY, *DEMOCRACY AND DISTRUST* 43–71 (1980).

<sup>55</sup> See, e.g., Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 *HARV. L. REV.* 40, 51–71 (1961) (discussing different mechanisms by which courts maintain their legitimacy by only resolving disputes perceived as properly within their institutional power to resolve).

judicial independence—operate in a similar manner to the first. The scope of judicial inquiry and the relief courts can offer litigants reflect our sense of the proper role of the judiciary in resolving disputes, the types of disputes it can resolve, and its ability to hold government and private actors accountable where appropriate.<sup>56</sup> Likewise, judicial independence is an institutional *norm*—what we expect of individual judges in their conduct—and reflects an institutional *imperative* or *role*—what we expect of courts as institutions.<sup>57</sup>

Komesar uses the New York Court of Appeals' decision in *Boomer v. Atlantic Cement Co.*<sup>58</sup> to frame a discussion of goal-setting and comparative institutional analysis.<sup>59</sup> In that case, residents of upstate New York sued a local cement plant that was emitting noxious fumes and sought an injunction to stop the plant's emissions.<sup>60</sup> The case, for Komesar, helps to illuminate the ability of one institution to achieve a policy goal where others are less equipped to do so.<sup>61</sup> In *Boomer*, the key policy goal at issue was resource allocation efficiency.<sup>62</sup> The court concluded that the economic value generated by the cement plant's normal activities outweighed the loss of value to the small number of residents who initiated the action.<sup>63</sup> Consequently, instead of halting the operations of the plant, the court simply ordered the defendant to compensate the plaintiffs for the harms they were suffering as a result of the plant's emissions.<sup>64</sup>

According to Komesar, this outcome shows that the judiciary was in a better position relative to the other institutional processes available to resolve the question of how to accomplish the goal of resource allocation efficiency effectively.<sup>65</sup> Use of the market would have required protracted negotiations, compromising the speed and efficiency of the resolution.<sup>66</sup> Similarly, the partiality of the political process could have hindered the fairness of the resolution and the efficiency of the resource

---

<sup>56</sup> NEIL K. KOMESAR, *LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY OF DEMAND AND RIGHTS* 159–60 (2001) [hereinafter KOMESAR, *LAW'S LIMITS*].

<sup>57</sup> KOMESAR, *IMPERFECT ALTERNATIVES*, *supra* note 11, at 127–28.

<sup>58</sup> 26 N.Y.2d 219 (1970).

<sup>59</sup> KOMESAR, *IMPERFECT ALTERNATIVES*, *supra* note 11, at 14–28.

<sup>60</sup> 26 N.Y.2d at 222.

<sup>61</sup> KOMESAR, *IMPERFECT ALTERNATIVES*, *supra* note 11, at 15–16.

<sup>62</sup> *Id.* at 14–17.

<sup>63</sup> 26 N.Y.2d at 223, 227–28.

<sup>64</sup> KOMESAR, *IMPERFECT ALTERNATIVES*, *supra* note 11, at 15–16.

<sup>65</sup> *See id.*

<sup>66</sup> *Id.* at 21.

allocation if one party was able to exert political influence to capture a favorable outcome.<sup>67</sup> Komesar thus concludes that neither alternative institutional process could have resolved the *Boomer* dispute in a manner that accomplished the goal of resource allocation efficiency as fittingly as the judiciary.<sup>68</sup>

Of course, resource allocation efficiency is not the only possible goal that could have been at issue in *Boomer*. One might have wanted to ensure some degree of air quality or that businesses should not be permitted to engage in their activities in an unfettered fashion. However, *Boomer* was decided at a time—1970—when the nation’s awareness of the risks to the environment from unconstrained business practices was just emerging and federal intervention to curb environmental abuses was just beginning.<sup>69</sup> Since then, our understanding of environmental and climate science has evolved considerably and our appreciation for the costs and benefits associated with environmental degradation has become more sophisticated.<sup>70</sup> Correspondingly, the role of political processes in resolving environmental dilemmas has grown.<sup>71</sup> Given the growth in the scale and complexity of environmental problems facing the world, one must ask whether extant institutions have the capacity to address these problems today.

Significantly, the capacity of Komesar’s institutions to function deteriorates as problems become larger and more complicated. He argues that as numbers—the number of individuals involved in, associated with, or affected by a problem or situation—and complexity increase, the institutions asked to address that problem struggle to operate effectively.<sup>72</sup> This does not negate the need to choose between the institutions Komesar has identified in making decisions regarding their effectiveness in a particular setting. But one is likely to find that the institutional

---

<sup>67</sup> *Id.* at 26–27. This tension also exposes what Komesar calls the potential majoritarian and minority biases present, at times, in different institutional systems. *Id.* at 56–81.

<sup>68</sup> *Id.* at 21, 26–27.

<sup>69</sup> See Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545, 566–77 (2007) (describing the relationship between the decision in *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219 (1970), and the emergence of federal statutory and regulatory intervention in the environmental field).

<sup>70</sup> Over ten years ago, an editorial in the journal *Science* praised the emergence of a sophisticated understanding of climate science but lamented a failure on the part of the scientific community to communicate that information effectively to the broader populace. See Donald Kennedy, Editorial, *Climate Change and Climate Science*, 304 SCIENCE 1565 (2004).

<sup>71</sup> See Paul S. Weiland, *Unfunded Environmental Mandates: Causes, Burdens, and Benefits*, 22 HARV. ENVTL. L. REV. 283, 286–96 (1998) (describing the growth of federal oversight over the environment).

<sup>72</sup> KOMESAR, *LAW’S LIMITS*, *supra* note 56, at 159–60.

systems of the market, the courts, and the political processes are each in a weaker position to achieve contemporary policy objectives that involve a greater number of affected individuals and/or added complexity.<sup>73</sup> As more individuals become involved in market transactions, transaction costs associated with obtaining information about all of them, reaching negotiated agreements between them, and monitoring compliance of those participants also increase.<sup>74</sup> Lawsuits involving more parties and a wider range of issues become more complicated and costly to resolve.<sup>75</sup> Political processes can become paralyzed when they attempt to meet the conflicting needs of a diverse electorate, which can lead to their capture by a powerful elite.<sup>76</sup> Thus, the effectiveness of the Komesarian institutions at the heart of traditional comparative institutional analysis weakens when the number of individuals involved in a particular setting increases and the complexity of their problems grow.<sup>77</sup>

This phenomenon—that institutional effectiveness deteriorates in the face of increasing numbers and complexity—does not, neither Komesar nor I argue, mean that we should abandon comparative institutional analysis.<sup>78</sup> Rather, it means that such analysis just gets more difficult.<sup>79</sup> Contemporary problems facing the world on a global scale, such as climate change, economic inequality, threats to the rule of law, and rapid technological change, are massive in terms of both the numbers of individuals they affect as well as their complexity.<sup>80</sup> These problems are exactly the types of issues that make any form of comparative institutional analysis challenging. Indeed, the world has changed dramatically since Coase identified the

---

<sup>73</sup> *Id.*

<sup>74</sup> Neil Komesar, *The Logic of the Law and the Essence of Economics: Reflections on Forty Years in the Wilderness*, 2013 WIS. L. REV. 265, 299–301 (2013) [hereinafter Komesar, *The Logic of the Law*].

<sup>75</sup> See generally KOMESAR, *IMPERFECT ALTERNATIVES*, *supra* note 11, at 177–95.

<sup>76</sup> KOMESAR, *LAW'S LIMITS*, *supra* note 56, at 116–22.

<sup>77</sup> Komesar, *The Logic of the Law*, *supra* note 74, at 300.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> See Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1159–72 (2009) (describing the scope, scale, and risks associated with climate change). See generally ACEMOGLU & ROBINSON, *supra* note 4 (describing the consequences of abandonment of the rule of law for institutional stability and economic health); JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE* (2012) (describing the global scope, scale, and impact of economic inequality).



role transaction costs play in decision-making<sup>81</sup> and Komesar argued for a comparative approach to institutions.<sup>82</sup> Globalization, political strife, nationalism, nativism, the financial crisis of 2008, economic inequality, and technological change have threatened the stability of the world order as it has existed since the fall of the Berlin Wall and the collapse of the Soviet Union.<sup>83</sup> The Internet and mobile technologies have brought the world closer together in many respects,<sup>84</sup> and yet a neo-nativism movement that resists globalization is threatening to create higher barriers to the flow of ideas and people.<sup>85</sup> Global climate change is having significant impacts on the world and is one of the greatest threats to global stability and our collective ability to sustain a rapidly growing population base.<sup>86</sup> The sharing economy has brought new modes of interacting to established and emerging economies alike, creating economic opportunity for millions and fostering a new relationship between producer and consumer, but also providing few worker protections to such producers.<sup>87</sup> These phenomena demonstrate that

---

<sup>81</sup> R. H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 390–92 (1937).

<sup>82</sup> KOMESAR, *IMPERFECT ALTERNATIVES*, *supra* note 11, at 7–9.

<sup>83</sup> For a discussion of some of these forces shaping the contemporary age, see, for example, KEVIN KELLY, *THE INEVITABLE: UNDERSTANDING THE 12 TECHNOLOGICAL FORCES THAT WILL SHAPE OUR FUTURE* 29–60 (2016) (describing machine learning and artificial intelligence); ALEC ROSS, *THE INDUSTRIES OF THE FUTURE* 35–42 (2016) (discussing the impact of technology on employment prospects of various industries); RICHARD SUSSKIND & DANIEL SUSSKIND, *THE FUTURE OF THE PROFESSIONS: HOW TECHNOLOGY WILL TRANSFORM THE WORK OF HUMAN EXPERTS* 45–99 (2015) (discussing the role of technology on various professions, including the legal profession). For a discussion of economic inequality as a force in politics and economics, see, for example, THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 305–06 (Arthur Goldhammer trans., 2014) (discussing the interplay of technology, education, and inequality); DOUGLAS RUSHKOFF, *THROWING ROCKS AT THE GOOGLE BUS: HOW GROWTH BECAME THE ENEMY OF PROSPERITY* 222–39 (2016) (describing ways technology can help combat economic inequality and foster sustainable prosperity).

<sup>84</sup> Thomas Friedman famously declared, “The World is Flat,” in light of globalization generally and the advent of the internet, but this was before mobile technologies advanced this phenomenon. See THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 9–11 (2005) (describing forces creating a “flat” world).

<sup>85</sup> For a discussion of the impact of the “Brexit” vote in Great Britain on immigration and commerce, see Charles Ries, *Theresa May Invokes Article 50: On with the Smoke and Mirrors*, *NEWSWEEK* (Mar. 29, 2017, 9:00 AM), <http://www.newsweek.com/theresa-may-invokes-article-50-smoke-and-mirrors-574048> [archival unavailable].

<sup>86</sup> See ELIZABETH KOLBERT, *THE SIXTH EXTINCTION: AN UNNATURAL HISTORY* 92–110 (2014) (describing the impact of climate change on the environment and human activity).

<sup>87</sup> For a discussion of the role of law in regulating the sharing economy, see Orly Lobel, *The Law*

the scale and complexity of the problems the world faces have only grown, in some cases exponentially.<sup>88</sup> As Komesar’s work posits, our institutions (and institutional settings) tend to buckle as a result.<sup>89</sup>

To avoid this buckling, I hope to show that we can try to deepen and evolve our understanding of institutions. Komesar’s traditional approach to comparative institutional analysis applied in a contemporary setting has, to date, exhibited a similar shortcoming to those engaging in single institutional analysis: it has viewed institutions as “one-dimensional.” To understand the ways in which institutions function, and to achieve desired policy goals and outcomes through such institutions, one must take, instead, a multi-dimensional approach to institutions, recognizing how they differ, are interdependent, evolve, and interact.<sup>90</sup> To be fair to Komesar, at times he makes reference to a complex view of institutions. For example, he discusses the role different levels of government might play in addressing a particular issue.<sup>91</sup> He also acknowledges that his theory of comparative institutional analysis was intended to be “as simple, accessible, and intuitively sensible as possible”<sup>92</sup> and not to “present[] the last word on the topic.”<sup>93</sup> As a result, much of his work is devoted to conducting comparative institutional analysis through an assessment of the particular types of institutional process—the markets, political processes, and the courts—and their relative ability to address particular social policy goals.<sup>94</sup> This approach leaves much work to do for those who would study institutions and their nuances, the ways in which they interact and collaborate and the ways in which they evolve over time. And many have taken on

---

*of the Platform*, 101 MINN. L. REV. 87, 142–61 (2016).

<sup>88</sup> See generally ERIK BRYNJOLFSSON & ANDREW MCAFEE, *THE SECOND MACHINE AGE: WORK, PROGRESS, AND PROSPERITY IN A TIME OF BRILLIANT TECHNOLOGIES* (2014) (describing the impact of exponential and combinatorial computing power on life, work, and prosperity). As Geoffrey West explains: “It is in the very nature of exponential expansion that the immediate future comes upon us increasingly more rapidly, potentially presenting us with unforeseen challenges whose threat we recognize only after it’s too late.” GEOFFREY WEST, *SCALE: THE UNIVERSAL LAWS OF GROWTH, INNOVATION, SUSTAINABILITY, AND THE PACE OF LIFE IN ORGANISMS, CITIES, ECONOMIES, AND COMPANIES* 9 (2017).

<sup>89</sup> KOMESAR, *LAW’S LIMITS*, *supra* note 56, at 159–60 (discussing the impact of scale and complexity on institutions and comparative institutional analysis).

<sup>90</sup> This multi-dimensional approach is described *infra* Part III.

<sup>91</sup> Neil K. Komesar, *The Perils of Pandora: Further Reflections on Institutional Choice*, 22 L. & SOC. INQUIRY 999, 1003 (1997) [hereinafter Komesar, *Perils of Pandora*] (citations omitted).

<sup>92</sup> KOMESAR, *IMPERFECT ALTERNATIVES*, *supra* note 11, at 8.

<sup>93</sup> Komesar, *Perils of Pandora*, *supra* note 91, at 1008.

<sup>94</sup> KOMESAR, *IMPERFECT ALTERNATIVES*, *supra* note 11, at 9–10.

the task of using comparative institutional analysis to study the best way to address particular policy goals in different settings.<sup>95</sup> My purpose here is not to criticize this earlier, path-breaking work but to learn from it, build on it, and help it evolve to address the emerging challenges of the contemporary age.

Indeed, as Komesar himself recognizes, as problems change and grow in size and complexity, it is difficult for institutions to respond to such changes effectively.<sup>96</sup> Moreover, if one acknowledges that comparative institutional analysis is an effective tool for addressing social problems and pursuing policy goals, the shifting nature of problems—think of the growing threat to the planet posed by climate change—means not only that institutions themselves must change over time, but that our understanding of such institutions must also change. Different markets, different political processes, and different courts might be better suited to further a particular policy goal and might be in a better position to do so at one point in time over another. Moreover, as the scale and complexity of problems grow, so must policy responses to such problems evolve. Thus, our understanding of institutions, in a more complex world with more complex problems and more complex solutions, should also grow and evolve.

To further explore the multi-dimensional aspects of institutions, Part II examines the U.S. Supreme Court's decision in *Massachusetts v. EPA*,<sup>97</sup> which arose out of emerging changes in the environment, evolution in the legal responses to such change, and the public and private reactions to both.<sup>98</sup> There, several institutional actors brought a lawsuit against the federal government for its failure to regulate greenhouse gas emissions.<sup>99</sup> This discussion of the Court's opinion helps to illuminate the multi-dimensional aspects of institutions. In subsequent parts, I will first identify these different dimensions of contemporary institutions and then explore the critical implications of such a view of institutions in terms of their

---

<sup>95</sup> Comparative institutional analysis has been utilized in many contexts. See, e.g., Larry I. Palmer, *Patient Safety, Risk Reduction, and the Law*, 36 HOUS. L. REV. 1609 (1999) (assessing the best liability rules in the provision of medical services to lower patient risk); Gregory Shaffer & Joel Trachtman, *Interpretation and Institutional Choice at the WTO*, 52 VA. J. INT'L L. 103 (2011) (analyzing international treaty interpretation and commercial dispute resolution at the level of international trade). For my own effort to engage in comparative institutional analysis in an exploration of legal responses to the economic fallout from the financial crisis of 2008, see Raymond H. Brescia & Nicholas Martin, *The Price of Crisis: Eminent Domain, Local Governments, and the Value of Underwater Mortgages*, 24 TEMP. POL. & CIV. RTS. L. REV. 1, 7–23 (2014).

<sup>96</sup> KOMESAR, *LAW'S LIMITS*, *supra* note 56, at 159–60.

<sup>97</sup> 549 U.S. 497 (2007).

<sup>98</sup> See *id.*

<sup>99</sup> *Id.* at 505.

problem-solving capacities in both law and policy.

## II. INSTITUTIONS AT WORK: MASSACHUSETTS V. EPA AS A LENS THROUGH WHICH TO EXPLORE THE DIMENSIONS OF INSTITUTIONS

The Supreme Court’s landmark decision in *Massachusetts v. EPA* reflects the comparative institutional approach, which, at a minimum, asks and attempts to answer the question: *who decides who decides*. But the Court goes beyond this simple question, as my multi-dimensional approach advocates. The complexity of the problem, the heterogeneity of the institutions and the institutional processes involved, and the dimension of time that the Court considered all point to and highlight the multi-dimensional aspect of institutions and comparative institutional analysis. In this Part, I will first provide an overview of the Court’s majority opinion (with some references to the dissenting opinions at relevant points), and then discuss the opinions’ implications for comparative, multi-dimensional institutional analysis.

### A. Background and the Court’s Holding

In *Massachusetts v. EPA*, the Commonwealth of Massachusetts, the City of New York, and several nonprofit plaintiffs sought judicial intervention to compel the U.S. Environmental Protection Agency (EPA) to assess whether it should issue regulations of greenhouse gas emissions under the Clean Air Act (CAA) relating to emissions from new motor vehicles.<sup>100</sup> Under the CAA, the EPA can issue regulations concerning control of “air pollutants.”<sup>101</sup> Because the EPA had decided not to make a determination as to whether greenhouse gases were air pollutants, which the plaintiffs challenged, the EPA, in turn, would not issue rules regulating such gases emitted by new motor vehicles.<sup>102</sup> The plaintiffs argued that the statute required the EPA to determine that greenhouse gases were air pollutants and subject to EPA oversight.<sup>103</sup> Once it made that determination, the plaintiffs argued, the EPA was also required to issue regulations that would cover these pollutants emanating from new motor vehicles.<sup>104</sup> The plaintiffs alleged that the EPA’s failure

---

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 528 (citing 42 U.S.C. § 7521(a)(1) (2006)).

<sup>102</sup> *Id.* at 513–14 (citing Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,930–33 (Sept. 8, 2003)).

<sup>103</sup> *Id.* at 510.

<sup>104</sup> *Id.* at 505 (arguing that the EPA “abdicated its responsibility under the Clean Air Act to regulate the emissions of four greenhouse gases, including carbon dioxide”).

to take these steps contributed to global warming and caused significant harm to the plaintiffs by endangering the Massachusetts coastline, among other stated injuries.<sup>105</sup>

One of the most important aspects of the ruling, which has implications for comparative institutional analysis and which I will discuss shortly, was the Court's conclusion that Massachusetts had standing to challenge the EPA's failure to address greenhouse gas emissions from new motor vehicles.<sup>106</sup> Justice Stevens's majority opinion pointed out that Congress had explicitly authorized suits by litigants challenging the EPA's failure to issue regulations under the CAA with respect to a particular pollutant.<sup>107</sup> Quoting Justice Kennedy's concurring opinion from *Lujan v. Defenders of Wildlife*,<sup>108</sup> the majority opinion held as follows:

Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before. In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit. We will not, therefore, entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws.<sup>109</sup>

The majority recited the traditional elements of standing as articulated by the Court in *Lujan* as an actual or imminent injury, traceable to the defendant, and redressable by a court.<sup>110</sup> But the *Massachusetts v. EPA* opinion also stressed the authority of Congress to, in essence, create standing for the violation of a procedural harm:

[A] litigant to whom Congress has "accorded a procedural right to protect his concrete interests"—here, the right to challenge agency action unlawfully withheld—"can assert that right without meeting all the normal standards for redressability and immediacy." When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.<sup>111</sup>

In assessing Massachusetts's standing, in addition to reviewing the procedural harm suffered by the denial of a procedural right (review of greenhouse gas

---

<sup>105</sup> *Id.* at 510, 515.

<sup>106</sup> *Id.* at 516.

<sup>107</sup> *Id.*

<sup>108</sup> *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 579 (1992) (Kennedy, J., concurring in part and concurring in the judgment).

<sup>109</sup> *Massachusetts v. EPA*, 549 U.S. at 516–17 (citations and internal quotation marks omitted) (quoting *Lujan*, 504 U.S. at 580–81 (Kennedy, J., concurring in part and concurring in the judgment)).

<sup>110</sup> *Id.* at 517 (citing *Lujan*, 504 U.S. at 560–61).

<sup>111</sup> *Id.* at 517–18 (quoting *Lujan*, 504 U.S. at 572 n.7) (citing 42 U.S.C. § 7607(b)(1) (2006)).

emissions by the EPA), the majority found that the Commonwealth met the injury-in-fact element in part because it owned “a substantial portion of the state’s coastal property.”<sup>112</sup> As a result, it had “alleged a particularized injury in its capacity as a landowner.”<sup>113</sup>

With respect to the causation element of the standing inquiry, the Court noted that the EPA did not contest Massachusetts’s position that there is a causal connection between greenhouse gas emissions and global warming.<sup>114</sup> Instead, the EPA argued that the relief the Commonwealth (and other plaintiffs) sought—requiring the EPA to review such gases as pollutants and issue regulations as they relate to new vehicles’ emission of the gases—would only contribute “insignificantly” to the harms plaintiffs alleged.<sup>115</sup> The Court disagreed with the EPA, concluding that a judicial remedy that might induce even “a small incremental step” towards mitigating a plaintiff’s injury satisfies the causation element of the standing inquiry.<sup>116</sup>

Finally, in terms of satisfying the redressability prong of standing, the Court noted that even though other nations might increase their output of greenhouse gases, a “reduction in domestic emissions” of such gases “would slow the pace of global emissions increases, no matter what happens elsewhere.”<sup>117</sup>

Once it decided that at least one plaintiff had standing, the majority addressed the merits of the collective plaintiffs’ contentions.<sup>118</sup> The Court admitted that its scope of review in this setting was narrow<sup>119</sup> and that “an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities.”<sup>120</sup> The majority nevertheless determined that it could, according to the Clean Air Act, reverse a decision of the Administrator of the EPA to refuse to engage in rulemaking if such action was “arbitrary,

---

<sup>112</sup> *Id.* at 522.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 523.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 524–25.

<sup>117</sup> *Id.* at 525–26.

<sup>118</sup> The Court assessed the standing of Massachusetts after finding that “[o]nly one of the petitioners needs to have standing to permit us to consider the petition for review.” *Id.* at 518 (citation omitted).

<sup>119</sup> *Id.* at 527.

<sup>120</sup> *Id.*

capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>121</sup>

The statutory scheme at issue is complex, but, in the end, the inquiry can be synthesized into several critical components. Initially, the Court had to decide if the statute required the Administrator to make a so-called “finding of endangerment” to identify whether an air pollutant—greenhouse gas emissions—endangers public health or welfare.<sup>122</sup> If it did, and if the EPA found that greenhouse gas emissions endanger public health or welfare, the Court then had to decide whether the Administrator was required to promulgate regulations regarding such emissions from new motor vehicles.<sup>123</sup> In addition to these questions, a third would ultimately arise: if the EPA decided not to take action with respect to greenhouse gas emissions, would it need to articulate reasons, as provided for in the statutory scheme, to justify its decision not to do so.<sup>124</sup>

The EPA argued that “Congress did not intend [the agency] to regulate substances that contribute to climate change” and thus carbon dioxide is not an air pollutant for the purposes of the statute rendering a “finding of endangerment” irrelevant.<sup>125</sup> The majority rejected this view, holding that the statute was “unambiguous” in requiring the EPA to at least determine the potential harm to the environment from carbon dioxide and other greenhouse gas emissions.<sup>126</sup>

In addition to its arguments on statutory interpretation, the EPA also made several policy arguments as to why it would be unwise to require it to assess the potential impacts of greenhouse gas emissions, including the assertion that to do so would infringe upon foreign policy judgments that are the clear province of the executive branch.<sup>127</sup> The majority indicated that it had “neither the expertise nor the authority to evaluate these policy judgments,” but added that foreign policy judgments “have nothing to do with whether greenhouse gas emissions contribute to climate change.”<sup>128</sup> Furthermore, the Court determined that such foreign policy implications did not “amount to a reasoned justification for declining to form a scientific judgment.”<sup>129</sup>

---

<sup>121</sup> *Id.* at 528 (citing Clean Air Act § 7607(d)(9)).

<sup>122</sup> *Id.* at 528, 533.

<sup>123</sup> *Id.* at 533.

<sup>124</sup> *Id.* at 533–35.

<sup>125</sup> *Id.* at 528.

<sup>126</sup> *Id.* at 529.

<sup>127</sup> *Id.* at 533.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 533–34.

The Court ultimately concluded as follows:

[The] EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore “arbitrary, capricious, . . . or otherwise not in accordance with law.” We need not and do not reach the question whether on remand [the] EPA must make an endangerment finding, or whether policy concerns can inform [the] EPA’s actions in the event that it makes such a finding. We hold only that [the] EPA must ground its reasons for action or inaction in the statute.<sup>130</sup>

Thus, the Court ruled for the plaintiffs by holding that the EPA was required to either assess the likely environmental impacts of greenhouse gas emissions from new motor vehicles as required by Congress or articulate a basis, firmly grounded in the statute, for refusing to do so.<sup>131</sup> The majority opinion, as well as the dissents issued in response, help illuminate the institutional aspects of the decision.

### **B. Massachusetts v. EPA and Institutions with Multiple Dimensions**

The decision in *Massachusetts v. EPA* has profound implications for our understanding of institutions and their multi-dimensional aspects. The decision is certainly one that is, at its core, a conflict over *who decides who decides*. By pursuing legal action and prosecuting the case through the lower courts, and, ultimately, the United States Supreme Court, the plaintiffs first chose from among the markets, political processes, and the courts to further their goals. The plaintiffs, who themselves were a collection of diverse institutions, asked the Court to resolve a question of institutional decision-making. The Supreme Court confirmed its decisional authority and concluded that an agency of the executive branch was obligated to make a decision regarding greenhouse gas emissions.<sup>132</sup> But this question of *who decides who decides* was and is not so simple to answer. There are many layers to the inquiry, just as there are many more layers and facets to the institutions and the institutional issues at play in *Massachusetts v. EPA*, which I will explore further in this Part.

#### 1. The Legal Issues

Fundamentally, *Massachusetts v. EPA* is about when and under what circumstances a federal executive agency must make a decision. But it also serves as a prime example of how to analyze the institutions that form the chain of *who decides who decides*. Institutional concerns over the proper role of the courts in

---

<sup>130</sup> *Id.* at 534–35 (citations omitted).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 535.



reviewing agency decisions have led to the so-called *Chevron* doctrine, through which agencies are generally afforded a degree of discretion in carrying out their functions.<sup>133</sup> But the courts also have another role to play in reviewing agency action: they must, in the words of Chief Justice Marshall, “say what the law is.”<sup>134</sup> This emphatic prescription also empowered the Court to review and interpret the enactments of another institutional player—Congress—which had made an assessment of the proper role and function of the executive agency.<sup>135</sup>

Congress’s enactment of the Clean Air Act created the obligation at issue in *Massachusetts v. EPA*, which the courts have recognized as a lawful exercise of Congressional power.<sup>136</sup> That power granted the EPA the authority to make a decision, but the EPA’s decision, though insulated to a degree by *Chevron* deference, was not beyond judicial review.<sup>137</sup> The majority concluded that Congress itself preserved the Court’s power for judicial review by providing that agency action under the Clean Air Act could not be arbitrary, capricious, or contrary to law.<sup>138</sup>

In summary, the EPA had the authority to make a decision, which reflects that question so common to comparative institutional analysis: *who decides*. In allocating that decisional authority upon the EPA, Congress was the institution who decides who decides. The plaintiffs’ choice to leverage the judiciary took the chain one step further, essentially asking the Court to be the institution who decides who decides who decides. In other words, the Court, acknowledging its deferential responsibility to the agency, stepped in to play the role of referee, ensuring that the EPA was acting in accordance with the authority that Congress had conferred on it.<sup>139</sup> But between whom was this dispute, and why did the court have this role to play? These questions lead to the next area of institutional analysis within the *Massachusetts v. EPA* decision.

---

<sup>133</sup> See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984) (describing the deference owed to administrative agencies by the courts).

<sup>134</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

<sup>135</sup> *Id.* at 138; *Massachusetts v. EPA*, 549 U.S. at 528–32.

<sup>136</sup> For a discussion of the history and cases interpreting the Clean Air Act, see Jonathan Martel et al., *Clean Air Regulation*, in *GLOBAL CLIMATE CHANGE AND U.S. LAW* 134–52 (Michael B. Gerrard & Jody Freeman eds., 2d ed. 2014).

<sup>137</sup> 549 U.S. at 527–28.

<sup>138</sup> Clean Air Act § 7607(d)(9); 549 U.S. at 528, 534.

<sup>139</sup> 549 U.S. at 533–55. This point is made quite succinctly in one of the closing lines of the majority opinion: “We hold only that [the] EPA must ground its reasons for action or inaction in the statute.” *Id.* at 535.

## 2. The Parties

*Massachusetts v. EPA* involved a number of different institutional actors, which complicates our understanding of institutional processes and institutional roles when conducting comparative institutional analysis if one assumes the limited view of institutions common in such analysis. There were several different actors engaged on both sides of the dispute—most notably the EPA and the states that filed suit—residing within the Komesarian realm of the political process.<sup>140</sup> In addition, several states intervened in the action in support of the EPA,<sup>141</sup> and these political-process entities were joined by several industry trade groups from the private sector.<sup>142</sup> Several local governments and a host of nonprofit organizations also joined the litigation, teaming up with Massachusetts and other states to challenge the EPA.<sup>143</sup> As a part of civil society, we may consider the nonprofits' part of the

---

<sup>140</sup> *Id.* at 505.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*; see also Final Brief for the Petitioners in Consolidated Cases at 5–10, *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005) (Nos. 03-1361) (describing the organizational status of petitioners as follows: Sierra Club as a nonprofit corporation with more than 700,000 members nationwide organized under California law; Bluewater Network as a nonprofit corporation with no parent corporation; Center for Biological Diversity as a nonprofit corporation with no parent corporation; International Center for Technology Assessment (ICTA) as a nonprofit corporation; Center for Food Safety (CFS) as a national nonprofit membership organization that seeks to address the impacts of current industrial farming and food production systems on human health; Environmental Advocates of New York (EANY) as nonprofit membership organization that is the voice of New York State's environmental community and devoted to the protection of New York's wildlife, land, and people; Greenpeace as a nonprofit, nonviolent environmental membership organization whose mission is to raise public awareness of environmental problems and promote changes that are essential to a green and peaceful future; Conservation Law Foundation as a Massachusetts not-for-profit 501(c)(3) corporation that works to solve the environmental problems that threaten the people, natural resources, and communities of New England; Environmental Defense as a nonprofit corporation with no parent corporation and no publicly held company has a 10% or greater ownership interest in Environmental Defense; Friends of the Earth as a nonprofit corporation with no parent corporation and no publicly held company has a 10% or greater ownership interest in Friends of the Earth; National Environmental Trust (NET) as a nonprofit corporation with no parent corporation and no publicly held company has a 10% or greater ownership interest in NET; Natural Resources Defense Council (NRDC) as a national nonprofit corporation with no parent corporation and no publicly held company has a 10% or greater ownership interest in NRDC; Union of Concerned Scientists as a nonprofit corporation with no parent corporation and no publicly held company has a 10% or greater ownership interest in Union of Concerned Scientists; United States Public Interest Research Group (US PIRG) as a nonprofit corporation with no parent corporation and no publicly held

market process, Komesar's second institutional system.<sup>144</sup>

Stepping back, this case involved a group of states, local governments, and civil society organizations—political actors—joining together to challenge the actions of a federal agency—another political entity—which in turn had representatives of both the public and private sectors aligned with it. This was not simply a challenge between institutional sectors, as Komesar's one-dimensional comparative institutional analysis contemplates. Rather, the alignment of various institutional parties on both sides of the dispute cuts across institutional systems with the parties then seeking the help of the third institutional sector—the courts—to resolve their dispute. Furthermore, what was at stake was the Court's interpretation of the intent of Congress in passing the Clean Air Act, which brings in another institutional actor from within the political process—the federal legislative branch.

This institutional alignment has ramifications for traditional comparative institutional analysis. First, the interests of actors within an institutional process do not always align, and those actors can find themselves on different sides of a dispute. A one-dimensional analysis of the institutional process wholly ignores these heterogeneous interests. Within the political process alone, we see a federal executive agency, the legislative branch, and state and local governments each attempting to influence the institutional setting and achieve their goals through the resolution of the dispute.

Second, not only are there different institutional interests within a particular institutional process, it also includes different types of actors. Returning to the political process, *Massachusetts v. EPA* involved federal, state, and local actors, each occupying their own place in our system of federalism and attempting to optimize their institutional roles.<sup>145</sup> Similarly, the market is not really one, monolithic institution either, as private sector trade associations and nonprofit organizations found themselves on either side of the dispute.<sup>146</sup>

The blurring of the lines between institutional systems reveals the multi-dimensional character of these institutions in the circumstances surrounding the

---

company has a 10% or greater ownership interest in US PIRG, and is dedicated to delivering persistent, result-oriented public interest activism that protects our environment, encourages a fair, sustainable economy, and fosters responsive, democratic government).

<sup>144</sup> For a discussion of the traditional comparative institutional view of the market and civil society, see Rubin, *supra* note 35, at 475–77. For a discussion of the debate over the scope of civil society, see Laura Pedraza-Fariña, *Conceptions of Civil Society in International Lawmaking and Implementation: A Theoretical Framework*, 34 MICH. J. INT'L L. 605, 607–08 (2013) (citations omitted).

<sup>145</sup> See 549 U.S. at 505.

<sup>146</sup> See sources cited *supra* note 143.

*Massachusetts v. EPA* case, making traditional comparative institutional analysis challenging. It is not enough to say that a single institutional system is best suited to resolve the dispute when there are different actors with different powers, roles, and interests emerging from within that system. Actors from within different institutional systems all have a role to play—litigators, referees, national regulators, protectors of state interests, lawmakers, environmental advocates, etc.—in the resolution of the dispute, each trying to attain its own particular policy goals. It is not simply a question of asking which institutional system is the one to decide, given the specific context, and which institutional actor within that system makes that decision. There is no meaningful single answer when actors within each institutional system vary, have different interests, and are not limited to working collaboratively or in an adversarial fashion. Instead, a realistic understanding of the richness of the institutions within and across different institutional systems reveals a spectrum of institutional dimensions and the need to consider them when conducting comparative institutional analysis.

### 3. The Procedural Posture

The procedural posture of *Massachusetts v. EPA* also highlights dimensional insights into the functioning of institutions, reinforcing the need for comparative institutional analysis to evolve beyond its traditional approach. As described above, *Massachusetts v. EPA* is a classic case about who decides who decides. The plaintiffs were not really seeking a court order on the underlying substance of the dispute, i.e., how and in what ways the EPA should regulate greenhouse gas emissions from new motor vehicles manufactured in the U.S. Instead, the plaintiffs sought judicial relief that would direct the EPA to follow Congressional directives to assess such emissions for their impact on the environment.<sup>147</sup> Additionally, the procedural intervention of institutions from both the public and private institutional systems substantially expanded the dimensional web from which the Court was asked to untangle the litigants and the issues. In the end, the Court held that the EPA's decision not to act and its reasons given for not acting were contrary to its statutory obligations under the Clean Air Act.<sup>148</sup> Even after recognizing that the judiciary's institutional role is limited by the concept of general deference to agencies, the Court nonetheless stepped in to serve as an institutional referee over the conflict.<sup>149</sup> As this discussion and those that follow show, not only is *Massachusetts v. EPA* a classic case about who decides who decides, it is a seminal case advocating for a

---

<sup>147</sup> See 549 U.S. at 505.

<sup>148</sup> *Id.* at 534.

<sup>149</sup> *Id.* at 534–35.

multi-dimensional comparative institutional analysis that incorporates a nuanced—and more meaningful—understanding of our institutions.

#### 4. Standing

The majority's noteworthy finding that the Commonwealth of Massachusetts, and the other plaintiffs, had standing to sue goes to the core of the Court's multi-dimensional evaluation of the institutions involved in the case. Instead of answering *who decides who decides*, determinations of standing answer the question of *who gets to call the question*, so to speak. That is, an analysis of standing in the context of institutional plaintiffs evaluates whether a particular institutional actor or group of actors can initiate the adjudicatory dispute resolution process in an effort to achieve their desired goals.<sup>150</sup>

Analyzing whether a plaintiff has standing invites, if not outright requires, a comparative institutional analysis. Standing asks whether a particular actor can invoke the court's jurisdiction based on an understanding of the types of actors who can do so and the types of conflicts the courts are empowered to resolve.<sup>151</sup> When institutional parties seek to invoke the court's jurisdiction, standing requires the court to understand their nature and assess whether they have a sufficient stake in the outcome such that they will pursue their cases with vigor.<sup>152</sup> Just as results from a comparative institutional analysis are goal- or context-dependent, the standing inquiry is claim-specific, evaluating how the nature of the conflict relates to the institutional capacity of the courts.<sup>153</sup>

Moreover, standing—and particularly its redressability element—essentially starts down the path of determining whether the court system is best suited to achieve a plaintiff's goals by asking if and how the court can help resolve the plaintiff's problem. In this way, the doctrine effectively asks whether there is a comparatively better setting for the conflict, not unlike its close cousin, the political

---

<sup>150</sup> For an exploration of some of the institutional aspects of the standing doctrine, see Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894–97 (1983).

<sup>151</sup> For a discussion of standing in the context of enforcing statutory rights and the relationship between the litigant, the harm, and the right allegedly violated, see William A. Fletcher, *The Structure of Standing* 98 YALE L.J. 221, 265–66 (1988).

<sup>152</sup> See, e.g., *Washington Util. and Transp. Comm'n v. FCC*, 513 F.2d 1142, 1149 (9th Cir. 1975) (holding the alleged injury to the plaintiff “gives specificity and concreteness to the controversy and assures its presentation with adversarial vigor”).

<sup>153</sup> Erik R. Zimmerman, *Supplemental Standing for Severability*, 109 NW. U. L. REV. 285, 312–16 (2015) (describing the Supreme Court's recent standing jurisprudence as recognizing a claim-specific approach to the standing inquiry).

question doctrine.<sup>154</sup> The standing analysis often asks whether the parties and the dispute are better left to other institutional settings, like the halls of Congress or the ballot box, to decide.<sup>155</sup> These functions of the standing inquiry demonstrate that it is, in many respects, a doctrine with important institutional aspects. At its core, standing assesses the characteristics of the parties and the dispute to determine whether the courts are the appropriate institutional system in which to resolve that dispute between those parties.

In many ways, the standing analysis itself is like a comparative institutional analysis. It protects the judiciary's institutional role—particularly, though not exclusively, at the federal level—by serving as a means of identifying real “cases and controversies.”<sup>156</sup> The concept of standing reveals many societal norms that shape our views on the role of courts, including the need for those who are harmed to speak up and the desire to avoid court-issued advisory opinions.<sup>157</sup> Case law overwhelmingly supports this notion of the standing doctrine's importance in defining and maintaining the scope of the courts' institutional role and in providing an important check on judicial activism.<sup>158</sup> The dispute at the heart of *Massachusetts v. EPA* provides a prime example of how multi-dimensional institutional characteristics are revealed by and through the standing doctrine.

The standing inquiry in *Massachusetts v. EPA* came down to three critical questions, all of which inform the evolution of comparative institutional analysis. First, can Congress create procedural harms the violation of which create standing?<sup>159</sup> Second, can states bring suit in their *parens patriae* capacity against

---

<sup>154</sup> For a discussion of the role of comparative institutional analysis in determining judicial competency to resolve different disputes, see Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1822–27 (2005).

<sup>155</sup> For the ways in which standing analysis often incorporates comparative institutional concepts, see Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1509–14 (1988).

<sup>156</sup> For the connection between the cases and controversies requirement in Article III of the U.S. Constitution and the standing doctrine, see, for example, *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 151–52 (1970) (citing *Flast v. Cohen*, 392 U.S. 83, 101 (1968)) and Scalia, *supra* note 150, at 882.

<sup>157</sup> *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

<sup>158</sup> See sources cited *supra* note 156 and accompanying text. For a critique of the cases and controversies “approach” to standing, see generally Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169 (2012).

<sup>159</sup> *Massachusetts v. EPA*, 549 U.S. 497, 519–20 (2007).

the federal government?<sup>160</sup> And third, can states claim harm to their proprietary interest as landowners in order to establish standing?<sup>161</sup> I will address each of these questions in turn. I will then discuss Chief Justice Roberts's dissenting opinion on the topic of the Commonwealth's standing, since it speaks directly to some of the critical institutional ramifications of the majority opinion and reveals the tensions within the Court regarding the institutional questions standing disputes often produce.

*Can Congress create procedural harms?* As described above, the majority opinion in *Massachusetts v. EPA* adopted language from Justice Kennedy's concurrence in *Lujan*,<sup>162</sup> in which he articulated the position that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."<sup>163</sup> However, Congress must, in doing so, "identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit."<sup>164</sup> Therefore, the Court decided that Congress can step in and, in a way, create standing where it did not exist before,<sup>165</sup> but only within the bounds of the Constitution's "cases and controversies" requirement, which, many argue, is the original source of the standing doctrine itself.<sup>166</sup> In doing so, the Court recognized that the legislature has an institutional role to play in creating a platform for the courts to resolve particular kinds of disputes. Importantly, however, the Court was cognizant of preserving the societal values that shape its own institutional role by maintaining the requirement that some concrete and cognizable interest be at stake and reiterating that courts still cannot "entertain citizen suits to vindicate the public's non-concrete interest in the proper administration of the laws."<sup>167</sup>

---

<sup>160</sup> *Id.* at 520 n.17.

<sup>161</sup> *Id.* at 520–22.

<sup>162</sup> *Id.* at 517 (citation omitted). The recognition of Congress's power to create procedural harms was not relegated to the Kennedy concurrence in *Lujan*. The majority opinion, penned by Justice Scalia, recognizes such procedural harms when they are coupled with traditional injuries. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992) ("There is this much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.").

<sup>163</sup> *Massachusetts v. EPA*, 549 U.S. at 516 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)).

<sup>164</sup> *Id.* (quoting *Lujan*, 504 U.S. at 580).

<sup>165</sup> *Id.* at 516 (citing *Lujan*, 504 U.S. at 580).

<sup>166</sup> *See Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 151–52 (1970) (citation omitted).

<sup>167</sup> *Massachusetts v. EPA*, 549 U.S. at 516–17 (quoting *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring

*Can states sue the federal government in their parens patriae capacity?* Another institutional question at the heart of the *Massachusetts v. EPA* standing analysis is the issue of whether states, in their parens patriae capacity, have the power to sue the federal government.<sup>168</sup> In 1923, the Supreme Court issued two companion cases, *Commonwealth v. Mellon* and *Frothingham v. Mellon*,<sup>169</sup> in which it rejected actions by the Commonwealth of Massachusetts and one of its residents challenging a federal statutory scheme to promote childhood and maternal health through federal expenditures administered by state actors.<sup>170</sup> The Commonwealth sued the federal government in its parens patriae capacity, alleging the federal government had overstepped its authority and encroached upon the Commonwealth's duty to safeguard the health and wellbeing of its own citizens.<sup>171</sup> The Court held that the Commonwealth could not invoke its parens patriae authority to "institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof."<sup>172</sup> The Court explained that it is the federal government that can vindicate the rights of the citizens to the federal constitutional protections, not the states.<sup>173</sup>

Given this precedent, it seemed unlikely that the state plaintiffs in *Massachusetts v. EPA* could pursue their action in their parens patriae capacity. However, the majority relied on additional precedent, most notably the Court's decision in *Georgia v. Pennsylvania Railroad Co.*,<sup>174</sup> to avoid foreclosing the ability of Massachusetts to have standing in its parens patriae capacity.<sup>175</sup> The Court cited *Georgia v.*

---

in part and concurring in the judgment)). In some ways, these discussions help to identify some of what Komesar calls the high threshold costs of litigation and access to the courts. KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 11, at 123.

<sup>168</sup> According to BLACK'S LAW DICTIONARY, the term "parens patriae" means "parent of the country" (5th ed. 1979) and was first recognized by the Supreme Court as a basis upon which a state could bring suits to protect the rights and interests of its citizens in 1900. See *Louisiana v. Texas*, 176 U.S. 1 (1900).

<sup>169</sup> 262 U.S. 447 (1923) (treating both plaintiffs as bringing the same claim against the Maternity Act and addressing the standing analysis for each of the claims in one opinion).

<sup>170</sup> *Id.* at 478–80.

<sup>171</sup> *Id.*; see also JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 279 (1989) (describing the *Frothingham* case).

<sup>172</sup> *Frothingham v. Mellon*, 262 U.S. at 485.

<sup>173</sup> *Id.* (citation omitted). In some ways, the Court's parsing of the different powers of federal and state governments in terms of parens patriae standing is another example of the vertical heterogeneity present within institutional systems.

<sup>174</sup> 324 U.S. 439, 447 (1945).

<sup>175</sup> *Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007).



*Pennsylvania Railroad Co.* to establish a distinction between attempting to shield a state's citizens from the operation of federal statutes, which is not permitted, and "allowing a State to assert its rights under federal law (which it has standing to do)."<sup>176</sup> Employing this distinction, the Court explained that Massachusetts did not "dispute that the Clean Air Act *applies* to its citizens; it rather [sought] to assert its rights under the Act."<sup>177</sup> And what rights were those? The Court seems to indicate that they are the Commonwealth's interest in protecting its own "earth and air" by referring to its decision in *Nebraska v. Wyoming*,<sup>178</sup> in which it upheld a state's cross-claim against the federal government asserting quasi-sovereign interests in such assets.<sup>179</sup>

This aspect of the opinion is, in many ways, an assessment of the institutional characteristics of state and federal governments and the interactions between them. It clarified that states have institutional interests in vindicating their own rights when threatened by the federal government, even when those rights implicate federal law.<sup>180</sup> While states also have an interest in protecting their citizens, the opinion reaffirmed that they cannot shield their citizens from the operation of federal law or vindicate their citizens' federal rights against the federal government.<sup>181</sup> The discussion of *parens patriae* capacity helps us to understand these political-process institutions at a more nuanced level. The Court's dissection of different the institutional goals of the state government plaintiffs and their relation to the standing inquiry illuminates the drawbacks of one-dimensional comparative institutional analysis.

In answering the final critical question under the standing analysis, the Court's opinion is a little murky in describing the harm at stake and the ability of the Commonwealth of Massachusetts to bring suit to prevent that harm, given its institutional role. Notwithstanding the murkiness, it is apparent that the Commonwealth had standing based on its institutional position as a sovereign landowner and the institutional role it played in vindicating its interests as such, particularly in relation to the federal government.

*Does the Commonwealth's landowner status affect standing?* An essential fact in the determination of whether the Commonwealth of Massachusetts had suffered an injury-in-fact sufficient to give rise to its standing to sue the EPA was its role as a

---

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* (citing *Nebraska v. Wyoming*, 515 U.S. 1 (1995)).

<sup>179</sup> 515 U.S. at 20 (citations omitted).

<sup>180</sup> *Massachusetts v. EPA*, 549 U.S. at 520 n.17 (citations omitted).

<sup>181</sup> *Id.*

landowner.<sup>182</sup> The Court found that the Commonwealth had “alleged a particularized injury in its capacity as a landowner” by arguing that its coastal property was at risk due to climate change.<sup>183</sup> The Court held that Massachusetts’s status as a landowner coupled with its status as a sovereign entity within the nation’s federal system “only reinforce[d] the conclusion that [the State’s] stake in the outcome of this case [was] sufficiently concrete to warrant the exercise of federal judicial power.”<sup>184</sup> By combining Massachusetts’s interests as a landowner and sovereign, the Court also determined that the Commonwealth was entitled to “special solicitude.”<sup>185</sup> As such, it had an “independent interest ‘in all the earth and air within its domain,’”<sup>186</sup> and its desire to preserve its “sovereign territory” would “support[] federal jurisdiction.”<sup>187</sup> While the Court concluded that the Commonwealth of Massachusetts “satisfied the most demanding standards of the adversarial process”<sup>188</sup> even after stating it was entitled to some “special solicitude,”<sup>189</sup> it never explained whether such solicitude—or Massachusetts’s status as a landowner—was determinative in satisfying these high standards.<sup>190</sup> The majority opinion leaves things unclear as to whether it was the finding of “special solicitude,” the Commonwealth’s appearance as a more traditional litigant seeking to vindicate its property interests, or the combination of its landowning and sovereign institutional characteristics that gave rise to the Commonwealth’s standing.<sup>191</sup>

*Chief Justice Robert’s dissent.* Chief Justice Roberts, writing for himself and Justices Scalia, Thomas, and Alito, took issue with the majority’s opinion on standing, utilizing a clear-cut, who-decides-who-decides approach to the analysis. The dissent stated: “This Court’s standing jurisprudence simply recognizes that redress of grievances of the sort at issue here ‘is the function of Congress and the Executive,’ not the federal courts.”<sup>192</sup> Chief Justice Roberts rejected the “special

---

<sup>182</sup> *Id.* at 522.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 519.

<sup>185</sup> *Id.* at 520, 522.

<sup>186</sup> *Id.* at 520 (quoting *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907)).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 521.

<sup>189</sup> *Id.* at 520.

<sup>190</sup> *Id.* at 526.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 535 (Roberts, J., dissenting) (citing *Lujan*, 504 U.S. at 576).

solicitude” approach to state government standing, asserting that it should be harder, not easier, for a state to bring an action against the federal government in its *parens patriae* capacity for the vindication of federal rights.<sup>193</sup>

Though the dissent expressed skepticism of Massachusetts’s claimed injury, it saved its most significant criticisms for the causation and redressability elements of the standing analysis. These criticisms were rooted in the opinion’s focus on the fact that projected greenhouse gas emissions from new vehicles in the U.S. amounted to only a fraction of 4% of the total global greenhouse gas emissions.<sup>194</sup> With respect to causation, the dissent maintained that any loss of Massachusetts’s coastal land could not be traced to the EPA’s inaction in regulating that “fractional amount of global emissions.”<sup>195</sup> The dissent ultimately concluded that the connection between the injury and its cause was “far too speculative.”<sup>196</sup> Chief Justice Roberts found the redressability element to be “even more problematic,”<sup>197</sup> given that most greenhouse gas emissions are emitted from sources throughout the world.<sup>198</sup> He admonished the majority for “never explain[ing] why [any reduction of emissions from new vehicles in the U.S.] makes it *likely* that the injury in fact—the loss of land—will be redressed” through judicial intervention.<sup>199</sup>

The majority opinion and the Chief Justice’s dissent arrive at very different conclusions with regard to the question *who decides who decides*. Such drastic differences in their interpretations of what the federal courts’ institutional role should be in this case exemplifies the value of employing a multi-dimensional approach to comparative institutional analysis.

##### 5. The Merits of *Massachusetts v. EPA*

To flesh out the institutional aspects of the merits of the majority opinion, I turn to the dissenting opinion filed by Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito. This separate dissenting opinion left the criticism of the standing issue to Chief Justice Roberts’s dissent and attacked the merits of the majority opinion, that is, the ruling that the EPA’s decision not to assess greenhouse gas emissions from new motor vehicles was not warranted under the statute.<sup>200</sup>

---

<sup>193</sup> *Id.* at 538–39.

<sup>194</sup> *Id.* at 544.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 544–45.

<sup>197</sup> *Id.* at 545.

<sup>198</sup> *Id.* at 544–45.

<sup>199</sup> *Id.* at 546.

<sup>200</sup> *Id.* at 534–35.

Scalia framed the institutional issues succinctly as follows:

This is a straightforward administrative-law case, in which Congress has passed a malleable statute giving broad discretion, not to us but to an executive agency. No matter how important the underlying policy issues at stake, this Court has no business substituting its own desired outcome for the reasoned judgment of the responsible agency.<sup>201</sup>

In many ways, this passage highlights the cross-cutting institutional issues at the heart of the Court's holding on the merits of the plaintiffs' claims. Again, we see the justices clearly engaging with the question of *who decides who decides*. For these dissenters, Congress had entered into the realm of environmental protection by authorizing an agency of the executive branch to assess, first, whether it needed to regulate in a particular context and, second, whether it was appropriate to issue such regulations.<sup>202</sup>

While it is hard to argue with the dissenters' point that the Clean Air Act provided the EPA with a great deal of decision-making discretion, the statute is not unlimitedly "malleable."<sup>203</sup> Importantly, as the majority opinion discussed, Congress restricted the EPA's discretion by stating that the agency's decisions cannot be arbitrary, capricious, or in violation of the law.<sup>204</sup> Before analyzing the parties' decision to engage the courts, it is worth noting that another institutional actor—Congress—in another institutional system—the political process—could have stepped in to police those boundaries and place restrictions on the EPA's decision-making power. For example, Congress could oversee the EPA's work and tighten restrictions on its discretion by providing the agency with more specific guidance on when it is obligated to contemplate and promulgate regulations. Such actions are consistent with Congress's institutional role as a lawmaker, which at its core involves defining acceptable behavior, even for other branches of government.

Absent additional guidance from Congress on the merits of the EPA's inaction, the courts, when prompted by an appropriate party have an institutional role to play in policing agency misconduct. Both the majority opinion and Justice Scalia's dissent agree that the Court's institutional role is shaped, among other things, by the doctrine of *Chevron* deference.<sup>205</sup> On the merits of the case, the dissent concluded the EPA made a "reasoned judgment," which consequently solidified the

---

<sup>201</sup> *Id.* at 560 (Scalia, J., dissenting).

<sup>202</sup> *Id.* at 557–58.

<sup>203</sup> *Id.* at 560.

<sup>204</sup> *Id.* at 528 (majority opinion).

<sup>205</sup> *Id.* at 557–58 (Scalia, J., dissenting).

Court's role as restricted and restrictive.<sup>206</sup> In emphasizing that the Court should not substitute its judgment for that of the administrative experts, Justice Scalia acknowledged the courts' institutional role as reviewers of agency actions, but prioritized the EPA's institutional role in exercising its specialized decision-making capacity within its institutional expertise.<sup>207</sup> In contrast, the majority concluded that the institutional role of the judiciary was *superior* to that of the agencies in this context, placing more weight on the Court's responsibility to "say what the law is[.]"<sup>208</sup> even in light of the general concept of administrative deference and the EPA's specific expertise.<sup>209</sup>

There is thus not a single, simple institutional response to the policy goal at stake in the context of regulating greenhouse gas emissions from new vehicles. The Court's decision on the merits in *Massachusetts v. EPA*, similar to its holding on standing, helps to further expose the multi-dimensional aspects of institutions and comparative institutional analysis itself. It helps to illuminate the point that different actors within the political processes have institutional roles to play in different contexts and have a say in the institutional rules that must be followed in those contexts. Different parties also have a role in referring not just substantive disputes but also what one might call *border* disputes, i.e., questions about *who decides who decides who decides*.

#### 6. The Dimension of Time in *Massachusetts v. EPA*

As suggested in previous sections, one of the multi-dimensional aspects of institutions is that they change over time. There are several time-oriented features of the Court's decision in *Massachusetts v. EPA* that help to illuminate this concept. At its core, the dimension of time recognizes that the appropriateness or effectiveness of institutional interventions shifts over time as a function of their institutional characteristics, their changing nature, or a combination of both.

Initially, the dimension of time is central to the Court's standing inquiry, particularly the injury and redressability analyses. In articulating its injury-in-fact, Massachusetts alleged that it faced the threat of harm as a result of the EPA's inaction, noting that rising sea levels due to climate change "have already begun to swallow Massachusetts's coastal land . . . ."<sup>210</sup> In evaluating the Commonwealth's

---

<sup>206</sup> *Id.* at 553–54 (Scalia, J., dissenting) (citations omitted).

<sup>207</sup> For a discussion of the comparative institutional aspects of *Chevron* deference, see generally Eskridge, *supra* note 42.

<sup>208</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1802).

<sup>209</sup> *Massachusetts v. EPA*, 549 U.S. at 527–35.

<sup>210</sup> *Id.* at 522.

injury, the majority specifically contemplated the effect of time, recognizing that “[t]he severity of that injury will only increase over the course of the next century.”<sup>211</sup> Beyond analyzing Massachusetts’s alleged present and potentially future harms, the Court also considered temporal implications on its ability to redress these harms through judicial intervention. The majority explained:

While it may be true that regulating motor-vehicle emissions will not by itself reverse global warming, it by no means follows that we lack jurisdiction to decide whether [the] EPA has a duty to take steps to *slow* or *reduce* it. . . . A reduction in domestic emissions would slow the pace of global increases, no matter what happens elsewhere.<sup>212</sup>

The Court’s institutional role to review and redress is thus not limited to short-term, holistic remedial action. Its suitability as the institution that decides who decides reflects its institutional flexibility to offer an effective remedy in light of the impact of the Agency’s inaction over time. The majority concluded that the plaintiffs could seek judicial intervention even if the Court’s means of redress merely required the EPA to consider whether it should take steps that may slow or reduce the harm the plaintiffs will likely suffer in the future.<sup>213</sup>

The aftermath of *Massachusetts v. EPA* also exposes the shifting influence of institutions over time. Indeed, while previous sections discussed the lack of guidance from the public sector before the Court’s decision, after remand, the Obama Administration issued new vehicle emissions standards.<sup>214</sup> It is no accident that such regulations were a product of a new administration, one that had the benefit of the Court’s opinions on the subject and had different views on the public sector’s institutional role in mitigating the potential harm posed by greenhouse gas emissions. Once the Obama Administration issued its finding of endangerment and corresponding regulations—a product of the institutional constraints imposed by Congress as interpreted by the Court<sup>215</sup>—states again chose to leverage the courts’ institutional process.<sup>216</sup> The make-up and political leanings of the

---

<sup>211</sup> *Id.* at 522–23.

<sup>212</sup> *Id.* at 525–26 (bolded emphasis omitted) (footnote omitted) (citation omitted).

<sup>213</sup> *Id.* at 523–27.

<sup>214</sup> See Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (Jan. 14, 2010) (to be codified at 40 C.F.R. ch. 1).

<sup>215</sup> Jonathan H. Adler, *Heat Expands All Things: The Proliferation of Greenhouse Gas Regulation under the Obama Administration*, 34 HARV. J.L. & PUB. POL’Y 421, 428–34 (2011) (describing the Obama Administration’s efforts to regulate greenhouse gas emissions from new vehicles in the wake of *Massachusetts v. EPA*).

<sup>216</sup> *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), *reh’g en banc denied at*

complaining state institutions were notably different this time around.<sup>217</sup> Ultimately, the regulations were upheld as a legitimate exercise of agency authority under the Congressional scheme.<sup>218</sup>

\*\*\*

As the preceding discussion in Part II shows, the Supreme Court's decision in *Massachusetts v. EPA* helps to reveal the multi-dimensional aspects of institutions in complex goal-setting contexts. Institutional systems—the market, the political processes, and the courts—have different institutional components and actors within them, and these in turn have diverse and changing interests and allegiances. The political process can have executive and legislative actors and functions, and those components can be further separated into levels of government: federal, state, and local. The market contains a variety of institutions that help to form civil society, including businesses, trade groups that promote business interests, and nonprofit groups. The judiciary has state and federal components, different levels of courts within those components, and some specialized courts with discrete functions at every level. These institutional systems and their components are also not immune to temporal influences, and characteristics, roles, interests, and allegiances can all shift over time.

The case study of *Massachusetts v. EPA* reveals institutions to be heterogeneous in many ways. Diverse institutional actors engage in goal-setting and policy-making that reflect their perceptions of institutional roles and their interests. Institutions' choices regarding how to align themselves—whether collectively and collaboratively, or in opposition to other institutions—in pursuit of their goals further refracts the dimensional entities. Moreover, institutions and their interests and goals can evolve over time such that a particular institutional system may function well in attaining a policy goal in one instance but may exhibit dysfunction and incapacity in another.

Considering the variety of nuanced factors bearing on the search for the appropriate institution to achieve optimal or desired policy outcomes, it is no surprise that the case study also reveals challenges with attempting to answer the question *who decides who decides* in a straightforward fashion. But does that mean the multi-dimensional nature of institutions is ill-equipped to handle either the

---

2012 WL 6621785 (Dec. 20, 2012), *aff'd in part and rev'd in part on different grounds sub. nom.* Util. Air Regulatory Grp. v. EPA, 573 U.S. 302 (2014).

<sup>217</sup> Officials from states like Texas, Alaska, Virginia, Kansas, and Oklahoma joined the action on behalf of the plaintiffs; officials from states like Massachusetts, Delaware, Rhode Island, and Connecticut joined on behalf of the defendant. *Id.* at 107–09.

<sup>218</sup> *Id.* at 126–29.

complex problems of today or the desired policy goals in a rapidly changing world? Quite the contrary. In fact, I argue, understanding institutions in their multi-faceted and multi-dimensional glory puts us in a better position to leverage institutions as a means of taking on the world's complex and evolving problems. Acknowledging this opportunity, Part III explores the different dimensions, i.e., characteristics, of institutions that will help inform meaningful comparative institutional analysis in the contemporary age.

### III. UNDERSTANDING THE MULTIPLE DIMENSIONS OF INSTITUTIONS AND THEIR IMPLICATIONS

Neil Komesar's approach to comparative institutional analysis evaluates the choice between three, as I have called them, institutional systems or processes: the political process, the market, and the judiciary. So far in this Article, I have exposed the misconception that institutions are monolithic or one-dimensional. I have argued that, in fact, institutions have many dimensions and are far more complex than the traditional, one-dimensional view of institutions might suggest. Part III endeavors to explain what I identify as at least seven different dimensional qualities of institutions. We previously explored how the United States Supreme Court touched on many of these dimensional elements in *Massachusetts v. EPA*. I will now formalize the dimensions discussed and elaborate on their significance in encouraging a move towards "institutional analysis all the way down." I assert that multi-dimensional institutions exhibit heterogeneity vertically and horizontally, by role and by interest, and over time. Additionally, institutions are influenced by their interdependence and the blurring of institutional lines. I explore each of these dimensions and their implications for comparative institutional analysis, in turn, below.

#### A. Vertical Heterogeneity

The first and perhaps most salient way in which institutions are not monolithic or, as I prefer, one-dimensional, in the policy-making context is that institutional systems can be divided *vertically*, particularly in the United States. The American institutional system of government is divided into, at a minimum, three levels of governing institutions: local, state, and federal. Each level of government has different characteristics, powers, proclivities, and capacities.<sup>219</sup> For example, a local

---

<sup>219</sup> As Merrill argues, "once we introduce the idea of variable jurisdictional scope, it may be possible to identify greater variation between institutions than Komesar typically does." Howard S. Erlanger & Thomas W. Merrill, *Institutional Choice and Political Faith*, 22 L. & SOC. INQUIRY 959, 981 (1997).



or state government is in no position to defend the nation against a foreign invader, even with a “well-organized militia.” Elected officials within local governments are generally more attuned to local needs and, as a result, can often set local land use policy more effectively than their federal or even state counterparts.<sup>220</sup> In contrast, the federal government is typically better equipped to address issues of global climate change or national disasters, given the need for a large and diverse risk pool and an emergency management and response system that is robust in both resources and person-power.<sup>221</sup>

Vertical diversity within institutional systems is also apparent in the market and the judiciary. Markets are commonly differentiated by scale, ranging from global to local. Among other things, the nature of the good or service being offered by institutional market actors such as businesses, trade organizations, and nonprofits directly influences the scale of the institution’s market participation. For example, the contemporary telecommunications market is more efficient at the national and global scale,<sup>222</sup> and the market for logistics is dominated by global institutions.<sup>223</sup> On the other hand, certain markets, for example, those that require local or regional expertise,<sup>224</sup> are inappropriate for a wider stage: one does not see advertisements for whitewater rafting in New York City or duck boat tours in the

---

<sup>220</sup> Ashira Pelman Ostrow, *Process Preemption in Federal Siting Regimes*, 48 HARV. J. ON LEGIS. 289, 294 (2011) (arguing that land use decisions are best made by local government officials because they are more accountable to local communities than officials from other levels of government).

<sup>221</sup> For a discussion of the interaction of federal, state, and local governments in efforts to address collective action problems like the need to adapt to climate change, see Robert L. Glicksman, *Climate Change Adaptation: A Collective Action Perspective on Federalism Considerations*, 40 ENVTL. L. 1159, 1181–88 (2010). For a more traditional comparative institutional analysis that expresses a preference for the executive branch over the courts or Congress in emergency situations, see generally ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007).

<sup>222</sup> For example, in 1996, Congress passed the Telecommunications Act to allow for greater competition in the provision of telecommunications services. Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56 (codified at various sections of 47 U.S.C.). For a description of the purposes of the Act, see Camille Rorer, Note, *Can You See Me Now? The Struggle Between Cellular Towers and Nimby*, 19 J. NAT. RESOURCES & ENVTL. L. 213, 214–15 (2004–2005).

<sup>223</sup> PwC, *Shifting Patterns: The Future of the Logistics Industry* (2016), <https://www.pwc.com/sg/publications/assets/future-of-the-logistics-industry.pdf> [<https://perma.cc/7YBV-DEJE>] (last visited Oct. 5, 2018) (describing the advantages large, global logistics companies have in the logistics market).

<sup>224</sup> For a discussion of the value of local governance over local public goods like streets, parks, and libraries, see Amnon Lehavi, *Property Rights and Local Public Goods: Toward a Better Future for Urban Communities*, 36 URB. LAW. 1, 10–23 (2004).

Iowa plains, for example. Moreover, a particular type of market—for example, the mortgage market<sup>225</sup> or the grocery industry<sup>226</sup>—is not limited to a single scale of operation with different institutional actors serving different customer territories.

Similarly, the American judicial system is not monolithic. At a minimum, it is composed of federal and state jurisdictions and can be further divided into various levels of appellate courts. Each of these institutions serves different functions and has roles to play within the greater system. The complexity of the American judicial system with respect to these differences helps to reveal that it is difficult to categorize the judiciary, writ large, as an institution that might have a role to play in policy-making in different contexts. As the following discussion shows, however, this type of heterogeneity is just one of the multi-dimensional aspects of institutions.

Komesar's institutional systems are not monolithic, and instead have a rich vertical diversity—a dimension of institutional systems that has significant implications for our approach to comparative institutional analysis.<sup>227</sup> The heterogeneity of institutions is not limited simply to their vertical differences, however.

### **B. Horizontal Heterogeneity**

Another dimension impacting comparative institutional analysis is the existence of individual institutional actors within the broader institutional systems, i.e., *horizontal* heterogeneity. In our governmental system, we see legislatures,

---

<sup>225</sup> The residential mortgage market is just one example of a market that exhibits this type of vertical heterogeneity. Traditionally, the health of the mortgage market has been a product of local conditions. Once the U.S. mortgage market was essentially globalized in the mid-2000s, fluctuations in the market affected the nation as a whole, with spillovers throughout the world as foreign sources had invested heavily in U.S. mortgage-backed securities and other investments, leading to adverse global economic contagion. For an overview of the globalization of U.S. financial markets and their impact on the financial crisis of 2008, see Enrique G. Mendoza & Vincenzo Quadrini, *Financial Globalization, Financial Crisis and Contagion* (Nat'l Bur. of Econ. Res. Working Paper 15432, Oct. 2009), <http://www.nber.org/papers/w15432> [<https://perma.cc/QJZ6-GZ3W>].

<sup>226</sup> For a description of the evolution of the U.S. grocery market and its regional variations, see John J. Curtin, Jr. et al., *The EC's Rejection of the Kesko/Tuko Merger: Leading the Way to the Application of a "Gatekeeper" Analysis of Retailer Market Power Under U.S. Antitrust Laws*, 40 B.C. L. REV. 537, 566–69 (1999).

<sup>227</sup> While Komesar does, at times, address different levels of government, the issue of vertical heterogeneity is largely left to the side in his work. See KOMESAR, *IMPERFECT ALTERNATIVES*, *supra* note 11, at 74 (discussing local land use decisions).

executives, administrative agencies, and the like. Similarly, the market is not a single institution. There are businesses large and small, some of which exist on internet and mobile technology platforms and others are more traditional “brick-and-mortar” entities. Some move bytes or finances around, some literally build with bricks. The market also includes trade organizations and nonprofits, which themselves contain actors of diverse shapes, sizes, reach, and focus. Within the structured vertical system of the judiciary briefly described above, there are many different types of courts, varying in focus, expertise, subject matter jurisdiction, and territorial reach.<sup>228</sup> I will discuss, shortly, the ways in which these institutions differ in focus, orientation, and interests. For now, let us recognize that such different actors exist, and thus institutional systems have within them institutions that reflect horizontal heterogeneity.

### C. Role Heterogeneity

Beyond the mere existence of different institutional actors within each institutional system, those actors have diverse institutional roles to play—what I refer to as *role* heterogeneity. This dimension provides strong support for the need to evolve past traditional comparative analysis, because an institution’s role, particularly in its relation to and interaction with other institutions and other institutional systems, is a critical factor in analyzing whether it is best suited to further a specific goal.<sup>229</sup> The separation of powers doctrine provides a simple example of role heterogeneity: the legislature makes the law, the executive enforces the law, and the judiciary interprets the law.<sup>230</sup> As we saw in *Massachusetts v. EPA*,

---

<sup>228</sup> For example, the U.S. district courts of New Hampshire and Connecticut are found within the same “level” of institutional system in terms of vertical heterogeneity, but they are horizontally heterogeneous because they serve as the proper venue for different disputes based on those disputes’ connection to the different geographic jurisdiction of those courts.

<sup>229</sup> This sense of institutional role may be constraining for some, and a desire to shift institutional roles can sometimes lead to social change itself. As Piven and Cloward argue: “[I]nstitutional life depends on conformity with established roles and compliance with established rules. Defiance [of those roles] may thus obstruct the normal operations of institutions. . . . [By ceasing to] conform to accustomed institutional roles; [individuals] withhold their accustomed cooperation, and, by doing so, cause institutional disruptions.” FRANCES FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE’S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* 24 (Vintage Books ed. 1979) (1977).

<sup>230</sup> Of course, even these seemingly clear distinctions can be “phantasms,” as Kurland called them. Philip B. Kurland, *The Rise and Fall of the “Doctrine” of Separation of Powers*, 85 MICH. L. REV. 592, 603 (1986). As he would argue:

[I]t is necessary to government that sometimes the executive and sometimes the judiciary has to create

administrative agencies, typically part of the executive branch, also issue regulations and enforce those regulations.<sup>231</sup> There are countless institutional roles acting in a market economy. Businesses generally generate revenue, deliver goods and services, and provide employment. Trade organizations typically focus on facilitating collaboration between companies in a particular industry. Nonprofits advocate for a shared point of view or social cause. Courts, too, play a range of institutional roles beyond their common function of providing a mechanism for dispute resolution. The nature of the forum offered by a particular judicial institution impacts who may invoke its authority and how effective it can be in attempting to resolve the issues raised. Furthermore, there are many potential institutional roles a particular court could fill, as evidenced in questions regarding whether the court has original or appellate jurisdiction; enjoys either limited or general jurisdiction;<sup>232</sup> specializes in a particular issue, such as mental health or drug courts; or serves a particular community, as does the Red Hook Community Justice Center in Red Hook, Brooklyn.<sup>233</sup>

On the national stage, institutional government actors have taken different stances over the last decade vis-à-vis other members of the political process. Governors and state attorneys general from a variety of states have taken issue with actions of the federal executive branch, and challenged these actions, essentially because they were inconsistent with the perceived institutional role of the executive actor. For example, states have brought lawsuits objecting to the immigration

---

rules, that sometimes the legislature and sometimes the judiciary has to enforce rules, and sometimes the legislature and sometimes the executive has to resolve controversies over the rules. And these variations became more imperative as government became more invasive and complex. Moreover, some parts of government have nothing to do with rules of conduct. There is nothing implicit or self-evident in any of the three labels that permits resort to the generalization about separation as a device, especially for the resolution of hard cases.

*Id.* at 603–04.

<sup>231</sup> On the rise and role of the administrative state in our constitutional system, see Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 530–38 (2015).

<sup>232</sup> For a discussion of the different types of jurisdiction of the federal judicial branch as set forth in Article III of the U.S. Constitution, see generally Anthony J. Bellia, Jr., *The Origins of Article III “Arising Under” Jurisdiction*, 57 DUKE L.J. 263 (2007).

<sup>233</sup> For a description of the Red Hook Community Justice Center, see Victoria Malkin, Commentary, *Community Courts and the Process of Accountability: Consensus and Conflict at the Red Hook Community Justice Center*, 40 AM. CRIM. L. REV. 1573 (2003). For an argument for the value of community-based, problem-solving courts generally, see Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831 (2000); Judith S. Kaye, *Rethinking Traditional Approaches*, 62 ALB. L. REV. 1491 (1999).

policies of both President Obama and President Trump<sup>234</sup> and sued the Environmental Protection Agency for either protecting the environment too aggressively or not aggressively enough.<sup>235</sup> Similarly, Congress attempted to defend the Defense of Marriage Act when the Obama-era Justice Department would not do so.<sup>236</sup> With all this internal conflict over how to define institutional roles, it is clear that the political process as an institutional system is not monolithic.

Interestingly, clear and specifically defined institutional roles will also prevent an institutional system from being monolithic. The presence of different courts with distinct purposes necessarily requires a more discerning analysis for interested parties to reliably identify which court can best address their issues. If the parties can find the correct venue, these specialty courts are designed to resolve a particular type of problem in an effective and efficient way. For example, the Court of International Trade, the Federal Circuit,<sup>237</sup> and a specialty Integrated Domestic Violence Court each have particular jurisdictions, and their judges and court personnel have developed a narrow expertise. Indeed, a particularly successful judicial innovation in recent years has been the growth of so-called “problem-solving courts.”<sup>238</sup> These courts typically specialize in a particular subject matter or geographic area, develop an appreciation for local needs and resources, and become familiar with the practitioners and litigants and the problems they

---

<sup>234</sup> Elise Foley, *Over Half the States Are Suing Obama for Immigration Actions*, HUFFINGTON POST (Jan. 26, 2015, 6:54 PM), [http://www.huffingtonpost.com/2015/01/26/states-lawsuit-immigration\\_n\\_6550840.html](http://www.huffingtonpost.com/2015/01/26/states-lawsuit-immigration_n_6550840.html) [<https://perma.cc/8XS6-HTR8>] (describing lawsuits by conservative states against the Obama Administration related to immigration policies); Tal Kopan, *Blue States Sue Trump Over DACA*, CNN (Sept. 6, 2017, 7:07 PM), <http://www.cnn.com/2017/09/06/politics/daca-trump-states-lawsuits/index.html> [<https://perma.cc/7Y5J-97MH>] (describing lawsuits by progressive states against the Trump Administration over immigration policies).

<sup>235</sup> Timothy Cama, *States Sue EPA Over Carbon Rule for New Power Plants*, THE HILL (July 1, 2016, 3:51 PM), <http://thehill.com/policy/energy-environment/286307-states-sue-epa-over-carbon-rule-for-new-power-plants> [<https://perma.cc/RG7G-V7S3>] (describing lawsuits by conservative states against the Obama Administration over what they believed were overly aggressive environmental policies); David Shepardson, *States Sue Trump Administration over Delayed Fuel-Economy Fines*, REUTERS (Sept. 11, 2017, 10:40 AM), <https://www.reuters.com/article/us-usa-vehicles-suit/states-sue-trump-administration-over-delayed-fuel-economy-fines-idUSKCN1BM1WL> [<https://perma.cc/Q469-TXBX>] (describing lawsuits by progressive states over the Trump Administration’s environmental policies for their failure to protect the environment).

<sup>236</sup> *United States v. Windsor*, 570 U.S. 744, 753–54 (2013).

<sup>237</sup> Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 4 (1989) (describing the jurisdiction of the Federal Circuit).

<sup>238</sup> For an overview of the origins of problem-solving courts, see GREG BERMAN & JOHN FEINBLATT, *GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE* 15–30 (2005).

face.<sup>239</sup> These localized courts are generating better long-term outcomes for their participants and the community as a whole<sup>240</sup> by cultivating their expertise in the subject matter and local contexts impacting the individuals who come before them.<sup>241</sup> Compared to a judge with a specialized focus, judges in a large jurisdiction with general subject matter dockets are generally less likely to develop a nuanced awareness and appreciation of the problems they have been asked to resolve.<sup>242</sup> In attempting to resolve those problems, a judge with a particular focus and a developed expertise is also in a better position to experiment with different strategies to optimize the outcomes for the litigants before her—something a generalist jurist typically cannot do.<sup>243</sup>

In sum, our institutional systems exhibit role heterogeneity that is often reflective of our collective understanding of their different origins, the norms that govern their functioning, and the collective expectations we have about how and when they should carry out their functions. Such subjective factors, as well as the specialization of roles within an institutional system, demonstrate how essential it is to include this dimension in our approach to comparative institutional analysis.

#### **D. Interest Heterogeneity**

The heterogeneity of *interests* among and between institutions reflects the further refracting of institutional characteristics beyond vertical and horizontal differentiation and distinctions in their roles. Looking to the market institutional system as an example, its nonprofit institutional actors will likely have interests different from for-profit entities and individual market actors. Indeed, even

---

<sup>239</sup> For a description of different types of problem-solving courts, see, for example, Greg Berman & Aubrey Fox, *From the Benches and Trenches: Justice in Red Hook*, 26 JUST. SYS. J. 77 (2005) (describing the Red Hook community court in Brooklyn, NY); Dorf & Sabel, *supra* note 233 (describing drug treatment courts); John Feinblatt et al., *Institutionalizing Innovation: The New York Drug Court Story*, 28 FORDHAM URB. L.J. 277 (2000) (describing drug courts in New York City).

<sup>240</sup> On the features and benefits of problem-solving courts, see Raymond H. Brescia, *Beyond Balls and Strikes: Towards a Problem-Solving Ethic in Foreclosure Proceedings*, 59 CASE WEST. RES. L. REV. 305, 315–17 (2009). For a description of the different models of problem-solving courts, see Pamela M. Casey & David B. Rottman, *Problem-Solving Courts: Models and Trends*, 26 JUST. SYS. J. 35, 36–59 (2005).

<sup>241</sup> See, e.g., Jonathan Lippman, Remarks, *Achieving Better Outcomes for Litigants in the New York State Courts*, 34 FORDHAM URB. L.J. 813, 819–22 (2007) (discussing the success of the Red Hook Community Justice Center).

<sup>242</sup> For arguments in favor of judicial specialization, see generally Jeffrey W. Stempel, *Two Cheers for Specialization*, 61 BROOK. L. REV. 67 (1995).

<sup>243</sup> See generally Dorf & Sabel, *supra* note 233.

institutions within the same sub-sector—such as nonprofits in the market system—can, and often do, have very different interests. For example, two different nonprofits may take different positions and have differing interests regarding the environment. On the one hand, an environmental group, Riverkeeper, has interests in promoting the protection of waterways—specifically the Hudson River—and in increasing the availability and quality of clean water in New York.<sup>244</sup> On the other, a group like the U.S. Chamber of Commerce may promote the interests of its members by seeking to limit agency oversight of its members' activities.<sup>245</sup> Riverkeeper may seek to further its interests by advocating for additional regulations within the political process. The Chamber would seek just the opposite.

Another aspect of the complexity and heterogeneity of institutions is that sometimes actors within a particular institutional process may take an adversarial stance against each other in the pursuit of opposing goals. Different actors and entities within the political process can thus oppose one another, pursuing their own policy goals or seeking to defeat the policy goals of other actors within the political process. The head of an executive branch (like a President or mayor), legislators, executive agencies, state governments, and state attorneys general all can have their own policy goals and can pursue them independently, or in coordination with others, and in opposition to still others. We see this phenomenon playing out in the immigration policy setting at present. The Obama Administration introduced several policy approaches to undocumented immigrants found in the United States.<sup>246</sup> State governments led by Republican governors and attorneys general filed suit to enjoin these policies.<sup>247</sup> When the Trump Administration recently announced plans to roll back these policies (arguing, at least in part, that it was forced to do so by the courts and the pendency

---

<sup>244</sup> See *About Us*, RIVERKEEPER, <https://www.riverkeeper.org/riverkeeper-mission/> [<https://perma.cc/WV7D-BEBN>] (last visited Oct. 5, 2018) (“Riverkeeper’s mission is to protect the environmental, recreational and commercial integrity of the Hudson River and its tributaries, and safeguard the drinking water of nine (9) million New York City and Hudson Valley residents.”).

<sup>245</sup> See, e.g., *Chamber of Commerce, et al. v. City of Seattle, et al.*, U.S. CHAMBER LITIG. CTR. (Aug. 9, 2016), <http://www.chamberlitigation.com/chamber-commerce-et-al-v-city-seattle-et-al> [<https://perma.cc/ZFP9-TQ26>] (describing a lawsuit filed by U.S. Chamber of Commerce over proposed regulations of ride-sharing companies in Seattle, WA).

<sup>246</sup> For an overview of several of the Obama Administration’s immigration reform efforts, see Anna Oguntimein, Note, *The Struggle to Rise Above the Shadows Before Sunset: A Critical Discussion on the Need to Lift the Expiration and Renewal Requirements of DACA and DAPA*, 18 U. D.C. L. REV. 334, 338–46 (2015).

<sup>247</sup> *United States v. Texas*, 136 S. Ct. 2271 (2016).

of the litigation against the policies),<sup>248</sup> Democratic attorneys general filed suit to challenge that reversal of the Obama policies.<sup>249</sup> This phenomenon—state government actors pursuing challenges to executive actions in the courts—is hyper-partisan, obviously, but is non-partisan in a way as well: it is a tactic of choice of both parties when they do not control the executive branch and executive agencies.<sup>250</sup> This pattern has repeated itself in the early days of the Trump Administration as left-leaning state governments and cities led by liberal officials have sought to challenge federal executive and administrative actions.<sup>251</sup>

In some ways, perhaps, the fact that institutional actors within the political process work towards different and even opposing goals may point to a dysfunction—a bug—in the political process. In others, it is a feature. The very fact that political processes are not monolithic or one-dimensional means that policy goals can be pursued in different communities as, we hope, a reflection of those communities’ political perspectives, choices, and preferences. This clash of interests, as embodied by government actors, helps to create a process that generates policy outcomes that are a reflection of the desires and interests of the electorate.<sup>252</sup> There is no predetermined outcome of the policy-making process. Instead, the outcome is a function of the give-and-take of the political process and the tension between different institutional actors. The institution of the political process is not monolithic or one-dimensional, but that is its strength, not its weakness.<sup>253</sup> Markets and even the judiciary can also work in this way: the interplay

---

<sup>248</sup> Alana Abramson, *White House Says President Trump ‘Wrestled’ with Decision to End DACA*, TIME (Sept. 5, 2017) (describing pressure the Trump Administration faced from litigation commenced by conservative state attorneys general over DACA program); Dara Lind, *A Group of Republican Attorneys General Is Picking a Fight with Trump on Immigration: Not for the Reasons You Might Think*, VOX (June 30, 2017, 9:11 AM), <https://www.vox.com/policy-and-politics/2017/6/29/15895458/trump-daca-dreamers-immigration> [<https://perma.cc/PN85-RGXY>].

<sup>249</sup> Kopan, *supra* note 234.

<sup>250</sup> See Raymond H. Brescia, *On Objects and Sovereigns: The Emerging Frontiers of State Standing*, 96 OR. L. REV. 2, 414–24 (2018).

<sup>251</sup> See, e.g., Patrick McGreevy, *California and San Francisco Suing Trump Administration over ‘Sanctuary Cities’ Funding Fight*, L.A. TIMES (Aug. 14, 2017, 10:10 AM), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-san-francisco-sues-trump-administration-1502729412-htlmstory.html> [<https://perma.cc/Y2JJ-8D2G>] (describing legal actions taken by the State of California and City of San Francisco against the Trump Administration).

<sup>252</sup> On the value and purposes of a robust federalism with competition between different levels of government, see Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1766–68 (2006).

<sup>253</sup> For a discussion of the extent to which federalism and the structure of government in the



of and tensions between different actors within each of these institutional systems can generate particular policy outcomes. These tensions in each of the institutional systems, and the tensions that can arise between such systems, help to reveal the heterogeneity of institutional interests, which further underscores the need for a multi-dimensional understanding of institutions and how they operate.

### ***E. Institutional Interdependence***

The four previously discussed heterogeneities—vertical, horizontal, role, and interest—focus on institutional differentiation, but institutions are also, in many ways, *interdependent*. Institutional actors, from within different institutional systems, can work collaboratively to optimize the pursuit of policy goals when there is, at a minimum, an alignment of institutional interests, the jurisdictional authority to take action, and a shared willingness to take such action.<sup>254</sup> *Massachusetts v. EPA* demonstrates the institutional interdependence of state and environmental groups' capacity to leverage the judiciary, which ultimately forced the EPA to regulate greenhouse gas emissions.<sup>255</sup> Similarly, a trade association or think tank can lobby Congress—a process specifically designed to create interdependence between the political process and the market—in an attempt to

---

U.S. promote experimentation, competition, and the “diffusion of power,” see Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1552–61 (2012).

<sup>254</sup> See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 160–70 (2d ed. 2008) (describing the alignment of interests between courts, Congress, and the executive branch in the advancement of civil rights in the mid-1960s). For a critique of Rosenberg, see generally David Schultz & Stephen E. Gottlieb, *Legal Functionalism and Social Change: A Reassessment of Rosenberg's, The Hollow Hope: Can Courts Bring About Social Change?*, 12 J.L. & POL'Y 63 (1996). The notion of interest convergence was identified by Derrick Bell as a race-neutral basis for the Supreme Court's decision in *Brown v. Board of Education*. Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980). For a further discussion of these forces, see Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 64–66 (1988). At the same time, an institution can have no authority in a given policy-making realm and still take action, hoping, perhaps, to influence those actors that might have some role to play in that setting. So, while an institutional role might be necessary to bring about policy change in a given context, institutions with no formal role or authority in that context can certainly attempt to influence institutions that do have such a role and authority even if those “powerless” institutions have no functional role to play in bringing about the desired policy goal. To effectuate any such goal, however, institutions must both be willing to act and must take action. The decision of an institution to take no action to intervene to stop other actors from taking action, even when that institution has authority to do so, is still an institutional choice.

<sup>255</sup> 549 U.S. at 534–35.

achieve its policy goals by different means.<sup>256</sup>

Institutional cooperation is not dependent on a one-dimensional view of institutional systems. Institutional actors who are part of different levels of different systems and who have different institutional roles can still choose to cooperate in order to achieve a particular policy outcome.<sup>257</sup> Even in circumstances where theorists have expressed their preference for private ordering—as in studies of private actors in the small rural settings of Shasta County, California,<sup>258</sup> or the cantons of the Swiss Alps<sup>259</sup>—institutions work interdependently to carry out the community's policy goals. The private market does not work independently to secure the interests and goals of the community. Rather, even in these communities that might appear as paragons of private ordering outside of the watchful eyes of the government or the judiciary, the political process, as well as the courts, serve as both backstop and referee, sometimes independently and sometimes interdependently, to achieve community goals.<sup>260</sup> Political actors and the courts may also work collectively to respond to serious breaches of norms or serious infractions of rules in further service of community goals.<sup>261</sup>

Thus, another way in which institutional systems, and the institutions within them, are not monolithic is that they do not exist in silos completely separate from the operation of the others. They often work hand-in-hand in an effort to promote optimal outcomes. There is rarely a setting in which one institution or institutional system operates completely on its own without some kind of interaction with other institutions and systems. Property law has long been a subject of institutional

---

<sup>256</sup> See, e.g., Nancy Scola, *Exposing ALEC: How Conservative-Backed State Laws Are All Connected*, THE ATLANTIC (Apr. 14, 2012), <https://www.theatlantic.com/politics/archive/2012/04/exposing-alec-how-conservative-backed-state-laws-are-all-connected/255869/> [https://perma.cc/4TTX-2Y8D] (describing the influence of the American Legislative Exchange Council, a think tank committed to advancing conservative causes through the promotion of legislation at the local, state, and national levels).

<sup>257</sup> The Regional Greenhouse Gas Initiative (RGGI) is one example of different institutions (state governments) collaborating to seek a market-based solution to lowering carbon emissions. For a description of the RGGI, see Jennie Shufelt, *New York's CO<sub>2</sub> Cap-and-Trade Program: Regulating Climate Change without Climate Change Legislation*, 73 ALB. L. REV. 1583, 1586–89 (2010).

<sup>258</sup> See generally ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1994).

<sup>259</sup> OSTROM, *supra* note 15, at 61–65.

<sup>260</sup> On the function of law's formal legal constraints to operate where informal means fail, see Carol M. Rose, *Trust in the Mirror of Betrayal*, 75 B.U. L. REV. 531, 556 (1995).

<sup>261</sup> For a discussion of the interaction of formal and informal rules, set at different levels of government, in the pursuit of policy goals, see OSTROM, *supra* note 15, at 52–54.

analysis, and Harold Demsetz's defense of the private market for property as the optimal regime for the regulation of property<sup>262</sup> embodies this type of single institutional focus.<sup>263</sup> But without conducting a comparison of different institutional systems—the market, the political processes, and the courts—for the regulation of property, one cannot truly proclaim that one system is better than another. This may sound familiar—Komesarian even. Komesar, in his traditional approach to comparative institutional analysis, advocates for comparison, but for comparison's sake. However, I argue that comparison is necessary because the institutional systems are not truly separate—they all work together. Demsetz's private property regime is a blend of institutions in Komesar's typology—a market backed by the courts and regulators. The institutional interdependence dimension reveals that an institution may be most, or least, helpful in furthering a particular goal *because* of the interdependency among it and other institutions.

The classic argument for the need for private property is the “Tragedy of the Commons,” popularized by Garrett Hardin.<sup>264</sup> For many, a private property regime is best suited to ensure the proper maintenance of order and the promotion of optimal long-term outcomes, including promotion of the best use of the physical property at stake.<sup>265</sup> But as Elinor Ostrom has shown, community management of common-pool resources like pastures and fisheries is possible, and has proven superior to private property regimes in certain settings.<sup>266</sup> These common-pool resources can not only be managed, but managed well, in local settings with certain principles in place.<sup>267</sup> Rather than resort to strict resource divisions through private property constraints, these principles ensure that individuals who utilize the resource have a say in setting the rules, play a part in policing and monitoring the use of the resource, and have recourse to government fora for the resolution of

---

<sup>262</sup> See Demsetz, *supra* note 14.

<sup>263</sup> Cole, *supra* note 25, at 384–85 (describing Demsetz's justification of private property as an example of single institutional analysis).

<sup>264</sup> Garrett Hardin, *The Tragedy of the Commons: The Population Problem Has No Technical Solution; It Requires a Fundamental Extension in Morality*, 162 SCIENCE 1243 (1968). “[T]he commons, if justifiable at all, is justifiable only under conditions of low-population density. As the human population has increased, the commons has had to be abandoned in one aspect after another.” *Id.* at 1248.

<sup>265</sup> Armen A. Alchian & Harold Demsetz, *The Property Right Paradigm*, 33 J. ECON. HIST. 16, 23 (1973).

<sup>266</sup> See generally OSTROM, *supra* note 15, at 182–214.

<sup>267</sup> See generally *id.*

disputes.<sup>268</sup> Thus, these communities have proven that a stand-alone private property regime does not really stand alone as it is often backed by courts and regulators and enforced by the state. The communities also demonstrate that a private property regime is not always necessary to ensure beneficial and successful outcomes.<sup>269</sup> Indeed, a purely free-market system of property is, at best, a fiction, reinforcing the frequency of institutional interdependence. Even Richard Epstein, in arguing for a market-oriented approach to regulation that would subject a wide range of political processes to challenges under the Takings Clause of the U.S. Constitution and its state corollaries, still requires the intervention of the courts to adjudicate such challenges.<sup>270</sup> Thus, a blended institutional approach with private components, backstopping by the courts, and policing by the political processes, is necessary even for some of the most market-oriented theorists.

### ***F. Blurring of Institutional Lines***

The previously discussed dimensions attempted to draw finer lines, both dividing and connecting institutions. However, a relatively recent phenomenon with respect to institutions recognized that these lines can become blurred. This dimension builds on institutional interdependence to further show the difficulty of conducting a one-dimensional comparative institutional analysis when selecting that single dimension. Such a one-dimensional approach is obscured with a web of connections and blurry boundaries between institutions.

For example, the market has produced private actors that, in many ways, attempt to assume the institutional role of the judiciary as a platform for dispute resolution. Organizations like Modria are playing a critical “judicial” role, particularly in disputes that arise in internet commerce, even though they exhibit none of the institutional characteristics that are intended to give us faith in the judiciary.<sup>271</sup> There is little transparency with respect to the selection of “judges,” the rules of these fora, or the bases of their decisions. Similarly, public-private partnerships and public authorities deliver services in the market.<sup>272</sup> Trade

---

<sup>268</sup> *Id.* at 89–102.

<sup>269</sup> *Id.*

<sup>270</sup> See generally RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 262–83 (1985).

<sup>271</sup> For a discussion of ethics in the online dispute resolution context, see Scott J. Shackelford & Anjanette H. Raymond, *Building the Virtual Courthouse: Ethical Considerations for Design, Implementation, and Regulation in the World of ODR*, 2014 WIS. L. REV. 615, 631–43 (2014).

<sup>272</sup> On the history of public-private partnerships in the U.S., see Erica M. Koser, Note, *Infrastructure-Based Public-Private Partnerships: A Partial Solution to Mitigating Funding Challenges in*

associations or unions may “capture” a single legislator, a majority bloc in a legislative body, or an administrative agency.<sup>273</sup> Thus, through a blurring of the lines between institutional actors, their ability to carry out their institutional roles may also become blurred. This does not necessarily render the pursuit of one’s collective-action goals more difficult, though it clearly bears on the assessment of available and appropriate vehicles to further that pursuit. Depending on one’s interests and policy goals, blurring of the lines may, perhaps, be advantageous, if, for example, one wants to have greater sway over a legislator or agency, or a low-cost and non-transparent outlet for dispute resolution. When the lines between institutions and institutional systems are blurred, it becomes more difficult to engage in comparative institutional analysis that is one-dimensional. I hope this review shows that institutions are multi-dimensional, and the process of comparative institutional analysis must embrace these dimensions in order to conduct such an analysis with greater focus. Finally, one last dimension of such a multi-dimensional approach to institutional analysis helps to reveal, even more, the limitations of such a one-dimensional approach to policy-making when it comes to addressing contemporary collective action problems.

### ***G. Temporal Heterogeneity***

The final dimension of institutions is, perhaps, the most important. All of the different dimensions of institutions are constantly in flux over time. Thus, each institutional characteristic has a *temporal* aspect to it. Temporal heterogeneity affects all institutional systems and all institutional actors within those systems. These systems and actors change and evolve over time, making a one-dimensional view of institutions difficult to square with a realistic understanding of and appreciation for how institutional systems and the institutions within them operate.

The natural progression of national elections can yield institutional actors with very different interests, proclivities, and views of their role in relation to other institutional systems. The Clinton Administration, and later the Bush Administration, used an approach to financial markets that encouraged deregulation in an effort to spur what they saw as financial market innovation.<sup>274</sup>

---

*Public Postsecondary Education*, 46 PUB. CONT. L.J. 437, 440–42 (2017).

<sup>273</sup> For a discussion of agency capture and methods for avoiding it, see generally Rachel E. Barkow, *Insulating Agencies: Avoiding Capture through Institutional Design*, 89 TEX. L. REV. 15 (2010).

<sup>274</sup> On the role of financial market deregulation across presidential administrations and its relationship to the financial crisis of 2008, see FINANCIAL CRISIS INQUIRY COMMISSION, *THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE*

Both administrations went so far as to preempt state governments from regulating such toxic products as subprime mortgages and other financial “innovations.”<sup>275</sup> In the wake of the financial crisis of 2008, the Obama Administration pursued regulations—rather than preempting them—by intervening to convince Congress to rein in abuses of the market by passing the landmark Dodd-Frank financial reform legislation.<sup>276</sup> The Trump Administration has taken a very different tack with respect to immigration policy than the predecessor administration.<sup>277</sup> These changes at the federal (and the state) level also tend to modify local institutional authority as local governments can be given greater leeway to regulate in a particular area or can have that authority stripped and preempted by a “higher” authority.<sup>278</sup>

Within civil society, businesses can change over time, with a greater emphasis on community development one day, and shareholder value the next.<sup>279</sup> Recently, after a raft of scandals, one of the nation’s longest-standing financial institutions, Wells Fargo, has embarked upon a campaign to “re-establish” itself and regain the trust of consumers by professing that it is moving away from a focus on profits to

---

CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES 52–67 (2011).

<sup>275</sup> See Julia Patterson Forrester, *Still Mortgaging the American Dream: Predatory Lending, Preemption, and Federally Supported Lenders*, 74 U. CIN. L. REV. 1303, 1339–44 (2006) (describing federal efforts in the 1990s and 2000s to preempt state predatory lending laws).

<sup>276</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S.C.). See generally Barack Obama, President, Remarks at Cooper Union on Wall Street Reform (Apr. 22, 2010), <http://abcnews.go.com/Politics/transcript-obamawall-street-speech-financial-reform/story?id=10446690> [<https://perma.cc/KXF9-296V>] (outlining President Obama’s support for financial reform through the legislation that would ultimately become known as the Dodd-Frank legislation).

<sup>277</sup> Nicholas Kulish et al., *Trump’s Immigration Policies Explained*, N.Y. TIMES (Feb. 21, 2017), <https://www.nytimes.com/2017/02/21/us/trump-immigration-policies-deportation.html?mcubz> [<https://perma.cc/Z4QX-9MM3>] (describing the Trump Administration’s immigration policies).

<sup>278</sup> For example, the State of Texas recently enacted legislation that limited local government authority to create so-called “Sanctuary Cities.” Recently, a federal judge enjoined enforcement of the statute. Manny Fernandez, *Federal Judge Blocks Texas’ Ban on “Sanctuary Cities,”* N.Y. TIMES (Aug. 30, 2017), <https://www.nytimes.com/2017/08/30/us/judge-texas-sanctuary-cities.html?mcubz=3> [<https://perma.cc/K9F8-T6A3>].

<sup>279</sup> There is a growing awareness among management theorists that good corporate citizenship can be good for business. See, e.g., Michael E. Porter & Mark R. Kramer, *The Competitive Advantage of Corporate Philanthropy*, HARV. BUS. REV. (Dec. 2002), <https://hbr.org/2002/12/the-competitive-advantage-of-corporate-philanthropy> [<https://perma.cc/6PG3-W6S5>] (describing the value of “context-focused philanthropy to achieve both social and economic gains”).

address community needs.<sup>280</sup> The business strategy of automobile manufacturers, and even the definition of what an automobile manufacturer is, will likely shift in the coming years as changes in technology and the perceived evolution of market-demand speed the development and deployment of autonomous vehicles.<sup>281</sup> Nonprofit groups can also have shifting alliances and foci. Similarly, unions are free to modulate their interests, for example, in supporting more restrictive immigration policies or encouraging greater legalization of the immigration status of undocumented workers.<sup>282</sup>

While there are times when an institutional system, like the federal courts, does not possess complete control over the scope of its institutional authority, as when Congress shapes the jurisdiction of such courts,<sup>283</sup> individual constituents of institutions can often play a role in shaping the direction and focus of an institutional actor in the public sphere. While the institutional rules can change over time, one of the main drivers of temporal change within institutions is when the constituents of institutions—the individuals that make up those institutions—change. When those constituents change over time, this can impact many aspects of that institutional actor: its constituents' vision of the institution's own role and authority, its desired policy ends, its interests, and many other characteristics of that institutional actor.<sup>284</sup> For example, a new chief executive officer of a company

---

<sup>280</sup> James F. Peltz, *Wells Fargo Launches Ad Campaign to Leave Accounts Scandal Behind. Not Everyone Is Buying It*, L.A. TIMES (May 9, 2018, 3:00 AM), <http://www.latimes.com/business/la-fi-wells-fargo-ad-campaign-20180509-story.html> [<https://perma.cc/UE4N-BGRC>].

<sup>281</sup> For a description of the state of auto manufacturing in light of technological innovation, see Ed Sappin, *Will Self-Driving Cars End the Big Automakers?*, FORBES (Apr. 13, 2018, 9:00 AM), <https://www.forbes.com/sites/forbesnycouncil/2018/04/13/will-self-driving-cars-end-the-big-automakers/#76a7cc28356d> [<https://perma.cc/F6QA-4B75>].

<sup>282</sup> Michael Kazin, *How Labor Learned to Love Immigration*, THE NEW REPUBLIC (May 13, 2013), <https://newrepublic.com/article/113203/labor-and-immigration-how-unions-got-board-immigration-reform> [<https://perma.cc/KCH2-4KMT>] (describing changes in organized labor's approach to immigration policy).

<sup>283</sup> On the authority of Congress to limit the jurisdiction of the federal courts, see generally Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

<sup>284</sup> I recognize that this is the first time in which I have discussed the role of different constituents (i.e., individuals) within institutions as playing a role in affecting the heterogeneity of institutions. In other dimensional contexts, without the dimension of time, the constituents are generally fixed temporally. It is certainly clear that individual constituents play a significant role in the focus, direction, and interest of institutions. And those constituents' interests, just as those individual constituents themselves, can change over time. Thus, it is within this institutional dimension that it is valuable to focus on who those individuals are and the likelihood

may have a different vision for that company than her predecessor or a new leader of a religious group may have a different approach to doctrine and religious practices than a predecessor. These individual preferences may result in significant changes to their respective institutions, which will likely be recalibrated as new individuals are introduced over time.

There is thus a temporal dimension to all institutions. An institution may at one time appear to serve as an optimal actor or setting by which to achieve particular policy goals, but at another, fall out of favor as a result of its changing institutional dimensions—shifting interests, roles, and interdependent connections. An institutional actor can serve as a linchpin in the achievement of specific policy goals on one day and serve as the barrier to such policy reform the next. One need look no further than the judiciary to see how this phenomenon can play out. The makeup of the judiciary can change to make it more receptive to different claims of different sectors and institutional actors at different times. The federal courts served as critical institutional actors in the struggle for civil rights through the mid-1950s, 1960s, and early 1970s.<sup>285</sup> The federal judiciary then became more conservative due to a concerted and conscious effort that was, in no small measure, a response to the institutional role the courts had played in advancing such rights.<sup>286</sup> As the federal courts shifted toward conservatism and were no longer receptive to efforts to enforce civil rights protections, other institutional actors that sought to advance civil rights looked for alternative fora in which to pursue them.<sup>287</sup>

The temporal dimension has a significant impact on comparative institutional analysis because institutional characteristics, institutions, and even institutional systems shift and change over time. An ally one day can be an opponent the next. The ability of an institutional actor to bring about change in a particular policy setting can ebb and flow over time depending on changes in the specific

---

that those individuals may change over time. The identity and interest of those constituents has clear institutional ramifications, and it is here that the heterogeneous characteristics of institutions is perhaps most salient.

<sup>285</sup> For an overview of nearly a century of attempts to use the courts to combat desegregation, from 1883 to the early 1970s, see generally STEPHEN L. WASBY ET AL., *DESEGREGATION FROM BROWN TO ALEXANDER: AN EXPLORATION OF SUPREME COURT STRATEGIES* (1977).

<sup>286</sup> William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CALIF. L. REV. 613, 618–35 (1991) (describing the transformation of the federal judiciary in relation to its receptivity to civil rights claims from the early 1960s through the late 1980s).

<sup>287</sup> See, e.g., Susan N. Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 BROOK. L. REV. 1057, 1057–58 (1989) (describing state courts as “the new frontier of civil rights litigation” in light of the conservative turn in the federal courts).



institutional constituents of that actor. Other changes can include the authority granted to that actor, the willingness of a particular actor to wield the authority it has or perceives it has, and the resistance from other actors in the setting to such change—which itself may also change over time. Thus, this temporal dimension of institutions, like all of the other institutional dimensions described previously, has profound implications for the pursuit of policy goals in general and the discipline of comparative institutional analysis—issues I discuss in the final Part below.

Institutions are not static over time. Leaders retire or die. Elections usher in new administrations. People have a change of heart. These all have implications on the nature of the institution or institutions such individual constituents populate. Returning to the issue of regulating the financial system, do the different approaches of different administrations mean that the American executive branch, and its attendant agencies, are incapable of regulating the financial sector? No. Does this mean that as an institutional system, government institutions should not regulate financial products? No again. It simply means that, at different times, institutional systems, the institutions within them, and even the constituents that make up those institutions may show more of an inclination towards oversight than at others. Those systems may contain actors within them that have the capacity to do so but choose not to. Thus, while an institutional system at one point in time may be the institution of choice to regulate a particular market, due to changes in the constituent makeup of the actors within the institutional system, they may not be inclined to do so, and therefore might not serve as the institutional system of choice to regulate that system *at a particular point in time*. Thus, time is another critical dimension of institutions.

\*\*\*

As described above, institutions and, in turn, the institutional systems in which they operate are multi-dimensional. As Komesar asserted that it is fruitless to conduct single institutional analysis,<sup>288</sup> I argue it is also futile to conduct comparative institutional analysis with a monolithic or one-dimensional view of institutions. In order to obtain meaningful results, comparative institutional analysis must incorporate and consider the realities of institutions as multi-dimensional entities. In the next Part, I will explore the implications of this multi-dimensional view of institutions and institutional settings.

#### IV. IMPLICATIONS OF INSTITUTIONS WITH MULTIPLE DIMENSIONS

The traditional view of comparative institutional analysis suggests that one

---

<sup>288</sup> KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 11, at 6.

must select the proper institutional system—the markets, courts, or political processes—to determine the appropriate platform through which one can achieve a particular policy goal. But these institutional systems are not one-dimensional and can shift and evolve over time. Furthermore, the systems are interdependent, and their different institutional actors might at times collaborate, but may at other times oppose one another. These choices of institutional alignment may be in pursuit of an institution's own policy goals or to thwart an adversary's efforts to achieve its own policy goals. Institutional systems, and the institutional actors that operate within, between, and across them, exhibit a heterogeneity in many different characteristics that reflects a diversity and complexity that makes one-dimensional comparative institutional analysis difficult. In the same way that single institutional analysis is an insufficient means of achieving desired policy goals and outcomes, a failure to recognize the multi-dimensional aspects of institutions, their interdependence, and their tendency to change over time makes effective comparative institutional analysis in the service of achieving policy goals less effective than it could otherwise be.

A look at the current issue of immigration reform can help highlight the implications of a multi-dimensional approach to goal-setting and comparative institutional analysis. Multi-dimensional comparative analysis ultimately provides a more valuable means of furthering policy goals, but the results are dependent on what those goals are. In this context, we can see various policy preferences emerging as potential goals for immigration reform. Thus, before beginning to analyze institutions, we must ask: what does immigration reform even mean? For some, it might mean that we close the border and deport all undocumented individuals in an effort to reduce the perceived threat of terrorism or to preserve job opportunities for U.S. citizens.<sup>289</sup> For others, it might mean that we take an approach that is charitable and generous, recognizing that by making contributions to community life, people deserve a role in that community even if they entered it or remain illegally.<sup>290</sup> Still others might see immigration reform as a road toward greater economic development, as a means of promoting diversity and recruiting

---

<sup>289</sup> For an argument for stronger security and border protections, see Marion Smith, *Solutions for America: Developing a Strong Border and Immigration Policy*, HERITAGE FOUND. (Aug. 17, 2010), [http://thf\\_media.s3.amazonaws.com/2010/pdf/Solutions\\_23.pdf](http://thf_media.s3.amazonaws.com/2010/pdf/Solutions_23.pdf) [archival unavailable].

<sup>290</sup> For a historical overview of the role of immigration policy in U.S. political and economic history, see Faye Hipsman & Doris Meissner, *Immigration in the United States: New Economic, Social, Political Landscapes with Legislative Reform on the Horizon*, MIGRATION POL'Y INST. (Apr. 16, 2013), <http://www.migrationpolicy.org/article/immigration-united-states-new-economic-social-political-landscapes-legislative-reform> [<https://perma.cc/UB94-GVCB>].

individuals who can contribute to economic life and innovation.<sup>291</sup> Still others might focus on notions of fiscal responsibility, appreciating the reality that deportation of millions of undocumented immigrants would simply be unworkable and too costly.<sup>292</sup> Levels of consensus on these issues fluctuate over time. It appears a broad consensus is again emerging—similar to that which emerged in the mid-2000s and again before that in the 1980s—that acknowledges the need to preserve restrictions on immigration, offer businesses opportunities to meet their staffing needs, and provide some sort of recognition for those undocumented individuals and families who are presently in the United States and contributing to their communities a way to achieve a lawful status.<sup>293</sup> We can see that setting policy goals may itself be a complex task, but complexity is not a factor from which multi-dimensional comparative analysis shies away. Regardless of how our policy preferences and choices comport with others' on, for example, immigration reform, my multi-dimensional approach provides the depth and flexibility needed to analyze the institutional aspects of immigration reform without the burden that a one-size solution must fit all.

In the traditional approach to comparative institutional analysis, a central question is one that asks *who decides who decides?* However, to approach institutions with a multi-dimensional view, an additional range of new and discerning questions must be asked to appreciate the diversity and complexity of real-world institutions. Expanding the scope of the questions asked helps to unearth the different qualities of institutions that I have identified here: their various heterogeneities, interdependence, and their shifting nature over time. Identifying the relevant characteristics of different institutional actors in a given context, such as immigration reform, and asking a new set of questions can help determine the best actor or actors and the best institutional setting or settings in which those actors can carry out desired policy goals and outcomes. But to do so, we must formally incorporate questions other than simply *who decides who decides* to achieve a deeper and richer structure for comparative institutional analysis. While it may

---

<sup>291</sup> *Id.*

<sup>292</sup> The conservative American Action Forum estimated that it would cost the U.S. between \$400 and \$600 billion to deport over eleven (11) million undocumented individuals. Laura Collins & Ben Gitis, *The Budgetary and Economic Costs of Addressing Unauthorized Immigration: Alternative Strategies*, AM. ACTION F. (Mar. 6, 2015), <https://www.americanactionforum.org/research/the-budgetary-and-economic-costs-of-addressing-unauthorized-immigration-alt/> [<https://perma.cc/5CQA-L4SN>].

<sup>293</sup> Shoba Sivaprasad Wadhia, *The Policy and Politics of Immigrant Rights*, 16 TEMP. POL. & CIV. RTS. L. REV. 387, 414–20 (2007) (describing efforts in Congress to pass bi-partisan immigration reform).

seem trite or trivializing to utilize the questions that I have identified, they might prove useful in the development of a multi-dimensional approach to institutions. Such questions include the following: *What* are the decisions those institutions might make? *Where* might they make them? *When* might they make them? *How* might they make them? And finally, *why* is the institution interested in making a decision? Thus, we do not simply ask *who decides*, but we also ask the *what, where, when, how, and why* of the institutional actors involved in any policy-making setting.

In Komesar's inquiry, the *who* in the question *who decides who decides* refers only to the institutional system (the political process, the market, or the courts), telling just part of the story. Under a multi-dimensional approach, the definition of "who" is far more nuanced and complex: Is it a particular institutional actor at a particular institutional level? Is there a particular sub-sector of an institutional setting that might effectively enable the pursuit and achievement of the intended policy goal? Are there particular alignments among institutions within institutional systems, across such systems, and between these systems that might help to further that goal? Is there a particular time to advance a particular policy goal? And are there particular institutional allies and interdependencies between or among institutional systems that one might seek out in doing so?

Returning now to the topic of immigration reform, we can apply our appreciation of the multi-dimensional nature of institutions to ask: does a particular political actor, at a particular level of government, with particular interests, with relevant authority, make the decision with respect to questions of immigration reform? The political process system is the obvious place to start in this context relating to determinations of who can enter the country legally and who can obtain citizenship.<sup>294</sup> Congress has the authority to regulate immigration.<sup>295</sup> It has, in turn, delegated much of that authority to the executive branch to carry out Congress's goals as embodied in statutes.<sup>296</sup> So, in terms of the scope of immigration reform, the question *who decides who decides* seems fairly straightforward.

One may be tempted, in such an apparently clear-cut case, to settle for the

---

<sup>294</sup> See generally Kit Johnson, *Immigration Preemption after United States v. Arizona*, 161 U. PA. L. REV. ONLINE 100 (2012) (discussing federal preemption of immigration law and policy).

<sup>295</sup> Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 858–63 (1987) (describing Congressional authority over immigration).

<sup>296</sup> Gregory Fehlings, *Storm on the Constitution: The First Deportation Law*, 10 TULSA J. COMP. & INT'L L. 63, 95–98 (2002) (describing Congress's broad powers to delegate authority to the executive branch to regulate and control immigration and to the judiciary in support of the same).

traditional one-dimensional approach to comparative analysis. But even in this context, the monolithic approach is lacking because the answer to the question *who decides who decides* is still, at best, murky. Litigation over President Obama's Deferred Action for Childhood Arrivals (DACA) program and the ban on travel from several predominantly Muslim countries reveal that other institutional actors have both an interest in and a role to play in answering this question.<sup>297</sup>

So who decides who decides in this context? It would seem that the courts have a role to play in adjudicating the dispute over the proper role of the Constitution and legislation to create limits on the grant of authority to the executive. Moreover, this is not simply a dispute between co-equal branches of government with the courts playing the role of referee. Actors from within the political process institutional system are also asserting a role in the dispute. For example, state attorneys general, suing on behalf of their constituents and their states' public universities, are testing the limits of executive branch authority.<sup>298</sup> Other litigants challenging immigration policies include nonprofit organizations that serve individual constituents affected by these policies, as well as those individual constituents themselves.<sup>299</sup> We thus see this conflict exposing intra-systemic rifts (executive branch against executive branch), tensions across vertical heterogeneity (state against federal), and cross-systemic conflict (nonprofits and private individuals invoking the courts). These cross-cutting conflicts reveal the complexity and multi-dimensionality of institutions, which, particularly in this context of immigration reform, are a function of the role and interest heterogeneity among institutional actors with a stake in immigration policy.

The impact of the vertical and interest heterogeneity dimensions is evident when we look at the ongoing conflict over so-called "sanctuary cities." On this issue, local executives and legislatures are engaged in an effort to determine the extent of their role in immigration reform because they have an interest in any resulting policy changes.<sup>300</sup> Local governments, concerned with public safety, believe that they should have the authority to set policy that affects immigrants, even if it is not,

---

<sup>297</sup> See Brescia, *supra* note 250, at 421–29.

<sup>298</sup> *Id.*

<sup>299</sup> See Cogan Schneier, *Thorny Battles Loom for Lawsuits Against Trump's DACA Repeal*, NAT'L L.J. (Sept. 5, 2017, 7:06 PM), <https://www.law.com/sites/almstaff/2017/09/05/thorny-battles-loom-for-lawsuits-against-trumps-daca-repeal/> [<https://perma.cc/T3AA-4YCM>] (describing actions by community-based organizations suing over Trump's DACA policies).

<sup>300</sup> Barbara E. Armacost, "Sanctuary" Laws: *The New Immigration Federalism*, 216 MICH. ST. L. REV. 1197, 1250–51 (2016) (describing a "new immigration federalism" that recognizes the public safety interests of local governments in relation to immigration policy).

per se, immigration policy.<sup>301</sup> This creates a vertical conflict with the federal government, where one would typically think that immigration law and regulations need to be set.<sup>302</sup>

Beyond typical institutional alignments, we see that immigration policy is not neatly and exclusively cabined within federal policymaking arenas. Local governments have a deep interest in criminal justice, health and safety, and economic development issues.<sup>303</sup> They are, predominantly, the loci of much criminal justice enforcement and policymaking, health and safety regulation, and economic development.<sup>304</sup> These interests are at the heart of local police powers.<sup>305</sup> Immigration policy affects these domains. At the local level, undocumented immigrants—and even documented immigrants—might not come forward to file criminal complaints for fear that law enforcement authorities might question their immigration status.<sup>306</sup> Consequently, criminal activity may not come to the attention of local authorities who would typically be in the best position to enforce criminal statutes. This sense of lawlessness, or at least the degradation of the rule of law, should concern all levels of government, but especially the local level. There, where these issues tend to play out, local governments will face the prospect of rampant criminality with little recourse against the perpetrators.<sup>307</sup>

Additionally, businesses, in aggressive pursuit of their profit-making interests, might perceive few barriers to engaging in wage theft or worker abuse in an environment where undocumented workers are afraid to speak out.<sup>308</sup> Similarly,

---

<sup>301</sup> For a discussion of the role of local governments in establishing policies regarding immigrants, see Rick Su, *The Promise and Peril of Cities and Immigration Policy*, 7 HARV. L. & POL'Y REV. 299 (2013), and Rick Su, *The States of Immigration*, 54 WM. & MARY L. REV. 1339 (2013).

<sup>302</sup> For the legal and policy arguments in support of sanctuary cities, see generally Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 UC IRVINE L. REV. 247 (2012).

<sup>303</sup> Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253, 258–72 (2004) (discussing the value of local authority over these and other areas of concern for local governments).

<sup>304</sup> See Ong Hing, *supra* note 302, at 297–307.

<sup>305</sup> Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1398 (2006) (describing the interplay between sanctuary policies and local police powers).

<sup>306</sup> Ong Hing, *supra* note 302, at 297–303.

<sup>307</sup> *Id.*

<sup>308</sup> For research on wage violations affecting undocumented workers, see ANNETTE BERNHARDT ET AL., *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES* 42–44 (2009), <https://www.nelp.org/wp-content/uploads/2015/03/>

landlords may flout health and safety requirements in immigrant housing if they believe their immigrant tenants will not report those landlords to local authorities.<sup>309</sup> These actions of market institutions undermine community economics and pose a real threat to the safety of the entire community, not just immigrants. Fires do not discriminate. They do not spread only to buildings where immigrants reside. Local governments, responsible for protecting residents of their communities and promoting economic health, thus have an interest in policies related to immigrants despite the federal government's usual monopoly on immigration legislation.<sup>310</sup>

So the question *who decides who decides* in immigration reform is a complex one. It may be the ultimate question to reach some definitive conclusion on which institution is best suited to further a particular policy goal or outcome. But before one can reach the point of decision, one must ask a number of different questions—*what, where, when, how, and why*—that expose the multi-dimensional aspects of institutions. It is an appreciation for those institutions' multi-dimensionality that helps advance one's policy goals and achieve one's desired policy outcomes more efficiently.

These six questions align with the different dimensions of comparative institutional analysis. The *what* of institutional choice, in fact, corresponds with several dimensions. It first implicates the preliminary question in all types of comparative institutional analysis: what is the policy goal or outcome one seeks? That is the first of the *what* questions. Then we can turn to the issue of vertical heterogeneity, asking in which institutional level might the best entity or actor reside to address or adjudicate a particular problem in order to achieve a particular policy goal or outcome? Of course, institutions and actors have many dimensions;

---

BrokenLawsReport2009.pdf [<https://perma.cc/594Z-C9LW>].

<sup>309</sup> For a description of some of the challenges immigrants face in securing decent, safe, and sanitary housing and avoiding discrimination and bias from landlords and housing code enforcement agencies alike, see generally Stefan H. Krieger, *A Clash of Cultures: Immigration and Housing Code Enforcement on Long Island*, 36 HOFSTRA L. REV. 1227 (2008); see also Graham Rayman et al., *Queens Landlord Demands Tenants Prove Their Immigration Status or Face Eviction*, N.Y. DAILY NEWS (June 18, 2017, 10:40 PM), <http://www.nydailynews.com/new-york/nyc-landlord-demands-tenants-prove-immig-status-face-eviction-article-1.3258067> [<https://perma.cc/26U2-55E7>] (describing landlord threats against undocumented tenants).

<sup>310</sup> For a description of one city government's efforts to accommodate the needs of recent immigrants, and the federal backlash that followed, see John DeStefano, Jr., *Cities and Immigration Reform: National Policy from the Bottom Up*, in HOW CITIES WILL SAVE THE WORLD: URBAN INNOVATION IN THE FACE OF POPULATION FLOWS, CLIMATE CHANGE, AND ECONOMIC INEQUALITY 137–57 (Ray Brescia & John Travis Marshall, eds. 2016).

verticality is just one of them. The final *what* question is to identify the dimension of institutional analysis that reveals where institutional actors might straddle different systems, i.e., where we might see blurred lines between institutions. One would want to identify those institutions that might not have clear institutional alliances or characteristics because they might be agile actors that can take on the institutional roles or capacities of different systems: that is, hybrid institutions. These blurry-lined hybrids will not always provide the optimal means of furthering a select policy goal—hybrids might possess greater enabling powers or authority or may be less effective than an institution with clearer lines and limits. Either way, identifying and understanding hybrid institutions is an important exercise to incorporate into one's comparative institutional analysis.

Proceeding through the other dimension-revealing questions, the next one to ask is *where* a particular decision, policy change, or action could take place—what Elinor Ostrom calls “an arena for action.”<sup>311</sup> For Ostrom, this is the place to explore and carry out particular policy goals.<sup>312</sup> For the question *where*, we should explore the institution's vertical heterogeneity. We will want to look carefully at what level of government, what type of market, or what level of court might be in the best position to address a particular problem in furtherance of a policy goal or outcome. Of course, identifying the appropriate arena for action cannot occur in a vacuum, and we must continue to ask the other questions in order to inform a multi-dimensional understanding of the optimal institution to address a particular policy goal.

Next, we ask *when* an institution should make a particular decision. This question invokes the temporal heterogeneity of institutions—the idea that they can change over time. Thus, when seeking a specific policy goal, one has to ask *when* is the best time to pursue it by inquiring into alliances among particular institutions and engagement in particular arenas of action. Under the political process institutional system, advocacy before the Obama administration on certain issues looked very different from advocacy before the Trump administration. Similarly, one is likely to find varying receptivity to a particular policy goal in different adjudicatory fora at different times. For decades, advocates believed that the Texas state court system was a fertile field in which to bring personal injury actions because of the increased likelihood of a Texas jury granting plaintiffs larger damages awards.<sup>313</sup> Then, the state legislature stepped in to limit the authority of

---

<sup>311</sup> ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY 13–15 (2005).

<sup>312</sup> *Id.* at 13–17.

<sup>313</sup> Kevin M. Clermont & Theodore Isenberg, *Exorcising the Evil of Forum Shopping*, 80 CORNELL L. REV. 1507, 1508 n.1 (1995) (describing plaintiffs' efforts to seek favorable juries in Texas courts).



Texas juries, and such beliefs no longer held true.<sup>314</sup> By the same token, the federal judiciary appeared more receptive to civil rights claims in the 1950s and 1960s<sup>315</sup> and to advocates for property rights in more recent years.<sup>316</sup> As we can see, timing has a significant effect on which institution is most appropriate to use in pursuit of a particular policy outcome or goal, thus compelling us to ask *when*.

The next question to ask is *how*, i.e., how does one go about pursuing a particular policy goal or outcome vis-à-vis the institutions at play and those that have a stake in the particular objective. This leads one to explore not only the institutional roles that candidate institutions may fill with respect to that goal or outcome but also the ways in which those institutions are interdependent. When there is an alignment of interests between institutions, they can work collaboratively to achieve select goals; when those interests are not aligned, they will likely stand in opposition to one another. How institutions go about making decisions speaks directly to role heterogeneity and institutional interdependence, two critical dimensions when considering the multidimensional aspects of institutions.

Then, one asks *why*. Why might a particular institution, at a particular time, have a particular interest in the achievement of a particular policy goal or outcome? This addresses interest heterogeneity. Uncovering the interests of candidate institutions is essential to understanding whether institutional interests align with one's own interest in the pursued policy. Such an understanding is essential for meaningful comparative institutional analysis to weed out institutions with incompatible interests in favor of more synergistic relationships.

By examining these five questions and the institutional dimensions they implicate, one can confidently return to the core question of comparative institutional analysis—*who decides who decides*.

---

<sup>314</sup> For a description of tort reform in Texas, see Frank B. Cross, *Texas Tries Tort Reform*, TEX. BUS. REV. (Feb. 1996) at 1.

<sup>315</sup> ROSENBERG, *supra* note 254, at 49–61 (describing the relative receptivity of federal judiciary to claims of civil rights advocates when compared to Congress and the executive branch, which would follow the courts with their own support for such claims, but not until the mid-1960s).

<sup>316</sup> See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (recognizing broad claim of “regulatory” taking for polices affecting use of coastal land); *Kelo v. City of New London*, 542 U.S. 469 (2005) (challenging takings power of local government). For a discussion of the emergence of a “new property” regime, what that recognizes property rights in many contexts, see generally Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

## CONCLUSION

The term “monolith” is derived from the Greek words for single (*monos*) and stone (*lithos*), representing the notion that monolithic pillars were carved from a single shaft of marble or other stone.<sup>317</sup> As I have argued throughout this Article, comparative institutional analysis in a complex and rapidly changing world should take into account a more nuanced view of institutions—one that is not monolithic, but, rather, multi-dimensional. When we view institutions as one-dimensional—when we define them strictly by whether they are embodied within the market, the political process, or the courts—we fail to develop a full appreciation for all of the characteristics and dimensions of institutions. This makes policy-making more, not less, difficult. In fact, a more robust and durable comparative institutional analysis, which appreciates the multiple dimensions of institutions, is better equipped to facilitate desired policy goals in the contemporary age.

I have identified what I believe are the seven dimensions of institutions that warrant consideration in a new, multi-dimensional comparative institutional analysis. The core purpose of comparative institutional analysis is to support the pursuit of policy outcomes and goals. In order to better achieve selected policy goals and outcomes, one must have an appreciation for the multi-dimensional aspects of institutions. Traditional comparative institutional analysis concerns itself with the question *who decides who decides*, as does my proffered multi-dimensional approach. But importantly, I have argued here that asking several more informed questions can put one in a better position to appreciate and utilize contemporary institutions in their full, multi-dimensional complexity. To that end, the questions one asks must go beyond simply *who decides who decides*. These new and, as I have argued, essential questions ask not just the *who* but also the *what, where, when, how, and why* of institutions. Incorporating these questions into the process of choosing the best institution or institutions to address complex and global social issues such as climate change, degradation of the rule of law, and income inequality puts us in a better position to succeed in doing so. As our ever-changing world grows in scale and complexity, it continues to test the limits of traditional comparative institutional analysis, while simultaneously complicating the collective-action problems facing our contemporary society. Multi-dimensional comparative institutional analysis is an important instrument to solve these increasingly complex issues and holds out the most promise for ensuring society can address the complex and growing problems it now faces and will face in the future.

---

<sup>317</sup> *Monolith*, OXFORD ENGLISH DICTIONARY 467 (Paperback ed. 2013).