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 GLOBAL
GOVERNANCE
Programme



UNDERSTANDING
GLOBAL GOVERNANCE:
INSTITUTIONAL
CHOICE AND THE
DYNAMICS OF
PARTICIPATION



NEIL KOMESAR, MIGUEL POIARES MADURO, WENDY WAGNER,
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Understanding Global Governance: Institutional Choice and the Dynamics of Participation

**Neil Komesar, Miguel Poiares Maduro, Wendy Wagner,
Gregory Shaffer and Antonina Bakardjieva-Engelbrekt**

European University Institute

Robert Schuman Centre for Advanced Studies

Global Governance Programme

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Abstract

Global governance is essentially about governance. That is, it is about those mechanisms that make societal or global determinations. Comparative institutional analysis is by its nature focused on governance and governance mechanisms and understanding institutional behavior lies in the dynamics of participation– the bottom-up forces that determine who is influential and who is not. In turn, the dynamics of participation is dependent in turn on the costs and benefits of participation. The works in this book attempt to establish and grow comparative institutional analysis as a general analytical framework for organizing the issues of global governance. The first chapter exams the basic constitutional issues faced by global governance. The second expands these insights to a general framework to analyze global governance. The third explores global governance and the use of comparative institutional analysis in the context of environmental issues. The fourth explores the institutional choice issues raised by trade and more broadly global public goods. The fifth examines what comparative institutional analysis of various sorts tell us about globalization and the role of law. Although this book sets out few answers, it does propose a route to a common understanding of the problems and with it a way to reach meaningful answers.

Keywords

Global governance, comparative institutional analysis, participation, constitution, environment, trade, public goods, globalization, the role of law

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Introduction

As with all questions of governance, a primary question for global governance is the character of the alternative governing mechanisms or decision-making processes. In the terms used in this book, the central issue is the choice among these alternative governing mechanisms, referred to here as institutional choice. Accordingly, analyzing institutional choice requires the comparison of these alternative governing mechanisms, referred to here as comparative institutional analysis. In the case of global governance, institutional choice and comparative institutional analysis are particularly challenging because of the absence of any central authority and, therefore, the presence of a number of partial or nascent decision-making processes. There are formal processes such as the WTO, WHO, UN, whose coverage and, more importantly, ability to enforce their mandates are limited. This leaves global markets and informal bargaining or pressure by nations to fill the gaps. There are a plethora of NGOs, associations and special interests at play attempting to influence these decision-makers. The range of issues that are decided – or perhaps not decided– in this arena is staggering. Issues such as global environment, including global warming, global trade and finance, and with them the issues of financial crises and the distribution of global wealth, the world's health, including question of the trade-off between property rights (particularly patents) and the availability of essential medical services and products, are examples of the potential reach of global governance.

The subject of global governance covers a vast temporal, spatial, structural and intellectual swath. The study of highly varied and complex subjects, like global governance, requires a well-constructed analytical framework. Such an analytical framework must be simple enough to carry across a wide variety of settings and to reveal important issues and the trade-offs involved in each setting. What is not endogenous to such a framework will not be handled or will not be handled in a parallel and integral manner. Therefore, the analytical framework must be both simple and flexible.

It is wise to structure that framework around the essence of the subject you wish to address. Global governance is essentially about governance. That is, it is about those mechanisms that make societal or global determinations. The hoped-for result of these mechanisms may be resource allocation efficiency, equality, community or any such goal. But what is produced will be determined by the workings of these mechanisms. As we have said, the best strategy for this task lies in comparative institutional analysis. Comparative institutional analysis is by its nature focused on governance and governance mechanisms. To implement, comparative institutional analysis we need to understand institutional behavior. Understanding institutional behavior lies in the dynamics of participation– the bottom-up forces that determine who is influential and who is not. The dynamics of participation is dependent in turn on the costs and benefits of participation. The most famous of these costs and benefits is transaction costs.

What is true for understanding existing global governance decision-making is true for assessing reforms. There is a significant need for new and innovative approaches. This need stems from the significant imperfections in existing mechanisms. But the lessons of comparative institutional analysis–in particular the notions that all alternatives are highly imperfect and the correlation between those imperfections and variables like numbers and complexity (particularly relevant in the vastness of global governance) – must be central in any adequate analysis. Failure to address these essential issues will doom the reformation of global governance to a continuing cycle in which today's panacea becomes tomorrow's problem to then be replaced with some dressed-up version of yesterday's problem offered as today's panacea and so forth.

Because there are no easy answers to the complex problems that face the world, the mechanisms for decision-making and the choice among them become even more central. As we attack the subject of global governance, we will need to break down its varying issues for separate consideration and study: world trade, global warming, conservation of common resources, health, justice and so forth. But we will also need to be aware of how the putative solutions for one set of issues interact with

others. The most obvious examples here may lie in the adverse reaction to the WTO's consideration of the trade-offs between trade and issues of social justice and the environment. Basic institutional questions and choices reverberate here. Do we add to the jurisdiction and agenda of the WTO or do we form or increase the mandates of international entities focused on these separate issues? How do we coordinate this decision-making and resolve the conflicts or trade-offs that are certain to occur? These are questions not unique to global governance, but they are made more challenging by this larger, more complex and less structured context. Comparative institutional analysis is required. With its emphasis on the choice among always imperfect decision-makers and on understanding these decision-makers as aggregate and bottom-up decision-making processes whose behavior is determined by the dynamics of participation, it is an invaluable focus for organizing work on these difficult issues of governance on the global level.

The works in this book attempt to establish and grow comparative institutional analysis as a general analytical framework for organizing the issues of global governance. In the first chapter, Neil Komesar and Miguel Maduro exam the basic constitutional issues faced by global governance. In the second, Komesar expands these insights to a general framework to analyze global governance. In chapter 3, Wendy Wagner explores the challenging issues of comparative institutional analysis in the context of environmental issues by contrasting the approaches of the US and the European Union. In chapter 4, Gregory Shaffer explores the institutional choice issues raised by trade and more broadly global public goods. In chapter 5, Antonina Bakardjieva Engelbrekt examines what comparative institutional analysis of various sorts tell us about globalization and the role of law.

This book sets out few answers, but it does propose a route to a common understanding of the problems and with it a way to reach meaningful answers.

Governance Beyond the States: A Constitutional and Comparative Institutional Approach for Global Governance

Neil Komesar* and Miguel Poiares Maduro**

Global impacts are ubiquitous. States do not exist in a vacuum. The actions of any State can and often do affect the welfare of other States. This imposition of mutual externalities and the existence of global goods provides both the need and justification for global governance. But having the justification for global governance tell us nothing about the form that global governance should take. Where should decision-making power and responsibility lie? How much decision-making will be shifted to formally constituted international processes and how should the decision-making of these processes be designed? Should and can States remain the primary actors in these international processes? That still remains the dominant form. But should it be?

In this paper, we will explore the role of governments, governance and constitutions in the world order. The starting point is constitutionalism as framed by the nation state. On one level, this seems straightforward. We are still predominantly a world of nation states and they will remain the building block of the world order. There is some truth to this— but only some. As a matter of description, states are now part of a world order governed away from their control. There are formal and informal international decision-making bodies as well as treaties, networks of private and public officials , and other interconnections between states that impact on how those states and the world are governed. Much of what actually happens in and among states is determined not by governments or by networks of public officials, but by the interactions of uncountable numbers of buyers and sellers. From the inception of trade, global governance has always been partially the product of bottom-up forces beyond governments. In the 21st century, the strength of these market forces is both obvious and pervasive.

Interdependence creates a demand for governance. As world interdependence grows so do the needs and claims for global governance. At the same time, the forms of global governance we see developing are strongly contested and, more importantly, difficult to map and assess. We seem to lack a framework of analysis for global governance and the choices it entails. Furthermore, those forms of global governance seem to increasingly depart from the paradigm of state delegation and erode the distinction between the state as an international and internal actor. And increasingly the growing set of decision-making processes available means that individuals and interests have multiple choices in which to ply out their needs. That it is only a small subset of such individuals and interests that can actually make use of these opportunities itself creates a challenge to both a normative and positive analysis of global governance. But even if the constitutional nature of the emerging forms of global governance is contested, what cannot be denied is their impact on state constitutionalism.

We want to set out an approach to understanding how the constitutions of states and the governance mechanisms of the world interact and how we might begin to understand and reconsider both the is and ought (the positive and the normative) of the role of states. In considering these questions of constitutionalism, we want to avoid a common, but deadly analytical trap: perfectionism or single institutionalism. It is all too common to display the parade of horrors that constitutes any accurate description of existing institutional alternatives and then to suppose that some solution or any solution would be superior. The proposed or supposed alternatives are often ideal forms or at best subjected to much less examination than that supplied to reject present forms. For obvious reasons, none of this will do. All institutional alternatives are imperfect and in the enormous and complex world of global

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governance all institutional alternatives are highly imperfect. Only comparative institutional analysis will suffice.

As we try to understand these institutional alternatives, we will often cast their strengths and weaknesses in terms of the patterns of influence or power created by the dynamics of participation that they promote and which dictate their actual workings. In other words, a central issue will be who is actually represented in the decision-making process. All decision-making processes (political processes, courts and markets) operate through the dynamics of participation and all suffer from inadequacies or incompleteness in participation. There may be many competing goals or values at play in considering constitutionalism and global governance, but how well any of these will be achieved will be determined by the functioning of the decision-making institutions chosen and, in turn, the functioning of these institutional alternatives will be determined by the dynamics of participation.

Processes of global governance change the forms and locus of power at the national as well as the international level. They also challenge the character and conditions supporting state constitutionalism and with it they require a rethinking of constitutionalism itself. We need to consider the consequences of global governance for state constitutionalism and in turn whether it is better or even possible to move to a form of global constitutionalism. This requires us to revisit the ideals of constitutionalism and to discuss its different possible forms. A comparative institutional and participation-centered perspective reveals a set of paradoxes involving many balances such as the procedural balance between inclusion and intensity of participation and the substantive balance between individual autonomy and civic solidarity.¹

The character of the constitutionalism we reveal adopts no particular constitutional model and offers no across the board solutions. Indeed it reveals why such sweeping solutions are suspect. We will identify a series of constitutional choices and provide a set of constitutional criteria, but there are no undisputable or easy answers. The ideals of constitutionalism embody so many paradoxes and tensions that one can never provide a final answer but simply a context for understanding various answers.

In the end, we see the constitutions of states and state decision-making as generally the best political structure for global governance. This result is both qualified and paradoxical. The imperfections of state decision-making produce the need for global governance and yet the states remain the predominant imperfect institutional alternative to make decisions for the globe because they provide the best albeit highly imperfect mechanism for adequate participation. None of this suggests that forming international structures for global governance is not a good idea. In fact, depending on the potential for mutual externalities and also on the conditions determining participation in those structures there may be cases where the state is no longer the best structure for governance. A supranational polity such as the European Union probably provides a good example of the latter and of how global governance regimes may come to develop. But at the global level, we do suggest that states (or other established polities, such as the EU) will and should remain at the center of these structures and that in most instances participation of people is still best (albeit imperfectly) translated through their states as participants in these international structures. This does not mean, however, that global governance and constitutionalism will turn a blind eye to the dynamics of participation within the states of relevance for global governance. On the contrary, states may remain

¹ Comparative institutional analysis has several definitions which track different definitions of the term institution. By institution, we mean societal decision-making processes like political processes, courts and markets. Comparative institutional analysis is then a comparison of these processes. But in economics, the terms often designates the background conditions (laws, rules, customs, norms and so forth) for market or transactional activity. In this world, the market is not an institution and often neither is the political process. The term comparative institutional analysis in this context can mean a comparison of these conditions both across settings and over time. Like most definitional differences, these two approaches have different purposes and uses. For more on this subject, see Komesar, Neil K., *The Essence of Economics: Law, Participation and Institutional Choice (Two Ways)*, in *ALTERNATIVE INSTITUTIONAL STRUCTURES: EVOLUTION AND IMPACT* (Sandra Batie & Nicholas Mercurio eds., 2008).

dominant in global the global order but global governance and constitutionalism will also change those states. What is most interesting and important to us is to trace the interactions between global decision-making processes (both political, judicial and market) and national decision-making processes and see how that impacts on constitutionalism in general.

These interactions produce and are produced by complex patterns of participation where it is often the unintended or the unseen that will prevail. Much of global governance concerns trade and property rights and their interaction with concerns about the environment and world health. Especially in these contexts, the decisions of states and of international governance are driven by the impact of interests operating not only through these political process, but also through international markets which determine what nations have and what nations must react to. States impact on markets and in that way on other states. When nations commit to free trade, they create interdependencies and further potential issues of global governance. But if they limit trade that will produce its own global problems. The only way to penetrate this morass is to try to understand the workings of the markets, states and potential and actual global governance mechanisms. Only from such an understanding will we be able to determine what combination of mechanisms will meet the needs of the globe.

Perhaps the oldest and most intractable issues of global governance occur in the context of mass violence—genocide within nation states and warring among nations. These are extreme examples to analyze—an area in which the continua and trade-offs of comparative institutional analysis would seem ill-suited. In other words, this is a place where the parades are so horrible that single institutional analysis (“anything would be better than this”) would seem enough. Yet history and even recent history shows that this is a context in which the alternatives are either unavailable (because of the power of political process vetoes) or themselves dangerous as they are manipulated into instances of military adventurism. There is very little doubt that comparative institutional analysis looks different in different settings, but we remain sure that it is analytically required in all settings.

In section 1, we consider the impact of globalization and of global governance on the form and locus of power. In section 2, we explain how such processes challenge state constitutionalism and then discuss the relation between constitutionalism and state constitutionalism. In section 3, we argue that state constitutionalism is simply a contextual representation of constitutionalism. In section 4, we argue that state constitutionalism may, however, still be the best available proxy for constitutionalism. Section 5 is devoted to an analysis of different current constitutional perspectives on global governance (pro and against global constitutionalism). There we point to the limits of these approaches. The final section discusses what an alternative approach may look like.

I. Global Governance and the Locus of Power

Traditionally, States were the holders of ultimate authority and had a monopoly over power (encapsulated in the traditional conception of sovereignty); others could exercise such power but only in so far as it was delegated, authorized or tolerated by the State. Constitution and power coincided in the same *locus*: the State. Global governance implies a change in the locus and form of power. It involves transfers of power to global sites and changes in the mechanisms that determine the exercise of such power. Participation and representation are impacted by these changes. This altered authority cannot always be traced back and legitimated through the State’s Constitution and the changes in processes of decision-making and the dynamics of participation can alter the state constitutional order.

In this section, we want to explore the terrain of global governance and the interaction with nation-states. We are exploring the outer-limits of our inquiry. Even aside from a qualified affection for the nation-state, we could not imagine a world of global governance in which states would disappear. Tradition and history create a virtually indestructible place for the nation-state. But, at the same time, it must be recognized that even if our affection for the nation-state were much greater we could never suppose that the place of the nation-state can be held immutable. In fact, nation-states individually

have come and gone and, more relevantly, even as a form the nation-state is constantly changing due to the forces of globalization and global governance. There is a common quandary when nations enter into arrangements within each other and especially when they form a global governance mechanism. It is quite common for nation-states to seek to retain power by use of veto power (the requirement of unanimity). This is the most straightforward means of preserving the central place of the nation-state in the global governance mechanism they are forming. But this power creates a stale-mate in the arrangement for which the global governance mechanism was created. There must be some way to adapt and apply the arrangement. This usually means that the global governance political process will be subject to the unanimity requirement, but that there will be processes for implementation of the provisions of the treaty arrangements or of changes made through the unanimous political process. But it is in the character of drafting that there will be gaps to be filled and with these gaps, decision-making falls to the implementing mechanism. This is either a court or an administrative agency that is court-like. In the name of implementation and interpretation, these seemingly peripheral entities can evolve a global governance mechanism that bypasses the veto thought to protect the nation-state. The role of the ECJ in the establishment of the EU is perhaps the most dramatic example although the functioning of the WTO is a close second. Why nation-states continue to cede power through this process is a fascinating inquiry by itself. Perhaps it is a trade-off that is necessary to achieve important ends or perhaps these nations are continuous dupes. Or perhaps it is simply a reminder that nation-state are not themselves monolithic decision-making processes. Instead there are interests benefited by this ceding of power who are better represented in the decisions that establish these mechanisms. Whatever the reason, the engines of implementation are constantly establishing decision-making power outside the control of the nation-states. Nation-states can always avoid this power by abandoning or nullifying the decisions of the global governance mechanism in question. But they now pay a higher price for control.

Globalization and the influence of global markets is a better recognized source of altering the power and control of the nation-state. Nation-states and important interests within them pay a price when they seek to regulate or exclude market forces. More subtly but no less importantly, market forces alter the dynamics of participation within nation-state. As the stakes (and even the costs) of participation change because market conditions change, the patterns of participation in the public decision-making processes within each nation-state—political processes (legislatures and administrative agencies) and courts—are impacted. These dynamics of participation may create less or more burdens on trade or the environment or world health but when stakes shift so does the behavior of the nation-state. The bottom-line is that there will always be a central place for the nation-state in global governance, but the degree to which nation-states control world decision-making is constantly changing as the forces of implementation and globalization work their changes. These forces can be seen as emanating from and impacting the workings of the nation-states in several ways.

A. International Organizations and Power Changes

Traditionally, the function of international organizations was seen as reducing information and transaction costs and providing the necessary framework for viable cooperation among States. They were not seen as directly changing domestic political policy-making. But this classical conception of international organizations has become increasingly outdated. In the extreme, these organizations operating in regional integration (such as the EU) create or at least move toward new nation-states and, therefore, do more than create the conditions for national cooperation. This is also the case for international organizations such as the WTO or the ILO. The WTO, for example, has evolved independent decision-making authority and once international organizations, like the WTO, are perceived by social actors as possessing independent power, these actors will attempt to pursue their agendas by influencing the decision-making entities directly. As a result, international organizations develop political and social results that may diverge from those of its initial masters (the States). When the decision-making of these organizations profits influential social actors, these actors are likely to

work to reinforce that organization's power. This cycle has promoted the overall power of the WTO and strengthened its role as a global political arena. In the process, the power and control of traditional national political processes decreases.

The social actors that influence the decision-making of these international organizations may be different than those who participate in domestic political processes. Or they may be the same actors but the strength of their influence may be changed by the different dynamics of their participation created in these international organizations. Some actors or interests are disempowered while others are empowered and this change has constitutional and social relevance. All of these changes are likely to work through alterations in the stakes and costs of participation and, therefore, alterations in the dynamics of participation at either the national or international level. In other words, the constitutional balances of representation and participation established by national constitutions are altered. This is perhaps most troubling when these new centers of decision-making assume certain functions of governance that have traditionally been subject to the democratic standards of the State. This raises claims of a democratic deficit. These altered dynamics of participation explain the scepticism with which some social groups see international trade and globalization. But whether and to what extent democracy is harmed or promoted by these changes requires an understanding of the trade-off between the real workings or dynamics of participation of these various decision-making processes.

B. The Transfer of Power to the Market

Trade generates competition between the products and services of different polities which, in turns, leads to a competition between the regulatory frameworks to which those products and services are subject. National political processes reflect the need for the products and services of the nation to be competitive in the global market. Where these pressures overcome pressures to protect domestic resources or interests from this competition, there is in effect a transfer of power from political processes to the global market. Put more in our terms, the relevant decision-making process and dynamics of participation is the international market and the process of market participation (transacting). By generating different pressures on nation-state political processes, it is the "market"² that will choose between competing regulatory policies. Again, it becomes crucial to assess the "constitutional quality" of representation and participation in such a market and to assess the consequences of such changes. The market has the powerful disciplining force of competition. But competition is a process of participation and, therefore, has its own malfunctions which parallel shortfalls in the dynamics of participation in the political process. Interests with dispersed impacts will have a difficult time finding representation in the market for much the same reasons that dispersed interests have problems in the political process. This shortfall in market participation creates social problems such as environmental degradation. As general matter, inequalities in information can skew both market results and political process results (and for that matter, judicial results). These information asymmetries both impact the dynamics of participation and are impacted by them. As always, understanding the extent to which these market failures justify political response (global, regional or national) requires understanding the behavior of both the relevant markets and of the political and judicial decision-making processes called into play to control these markets.

C. Technocratic Forms of Global Regulation

A similar change in power occurs when, instead of trusting the regulation of international trade to the market, we decide to subject it to standards set by international technocratic bodies. Both markets and these technocratic bodies have inherent decision-making processes and, through these decision-making processes, likely produce different sets of outcomes than those that may result from the

² This is a broader market than the simple market of business transactions: it includes, for example, the mobility of market participants (companies, consumers, workers) as a form of influencing decisions.

traditional political processes within national democracies. These institutions decide on the basis of a community and a dynamic of participation and representation that is different from that of national political processes. So long as there are a variety of standpoints that can be translated into technocratic positions— and there almost always are—even the decisions of technocrats will be determined by the bottom-up forces of participation that characterize all political decision-making. Expertise is not a shield against institutional malfunction.

These results depend on characteristics such as the availability of information and the motives of the technocrat. An omniscient public official motivated by the public interest can glean the concerns and interests of his or her constituents and choose superior policies. If we drop the assumption of public-interest motivation, then these results are subject to doubt. Concentrated interests able to marshal pay-offs will be favored. If we drop the assumption of perfect knowledge, but retain good motives, we find distortions and biases analogous to those in the situation where self-interest prevailed. The now partially ignorant, but still public-interested, official must depend on others to provide information. Given that concentrated groups (those whose per capita stakes are higher) have significant advantages in understanding and effectively representing their viewpoints, the public-interested official will garner a distorted picture of public policy implications and the interests of concentrated groups would be given too much weight in final results. This is a result that can occur no matter the motive of public officials or even of participants. Thus, the reason that the road to hell is paved with good intentions can lie in the dynamics of participation.

In addition to being able to present a distorted picture of the public interest to the public-interested but ignorant public official, overrepresented interest groups can alter outcomes through the election or appointment process. Officials with ideological or public-interest perceptions consistent with those of the overrepresented constituent interests are more likely to be elected or appointed. So long as candidates exist who represent a range of views on the public interest, the same biased results can occur by an evolutionary process of replacing public officials whose views of the public interest are inconsistent with the views of the overrepresented group with public officials who have consistent views.

D. Interaction with Domestic Patterns of Representation and Participation

The traditional actors or participants at the international level will most often be nations and it seems straightforward that the positions of these nations will be determined by the dynamics of participation in the national political processes. However, the simple fact that national decision-making is now about the role of the nation as a participant in a global or international decision-making process alters the dynamics of decision-making in national political and judicial processes representation. Once we accept that States do not have an homogeneous national interest and that there are different mechanisms and forms of participation involved in different areas of domestic policy-making, one of the consequences of the increased number of policies that are “appropriated” by global governance issues is that the relevant participants in the framing of those policies change. These changes can take the form of shifts in the role of official decision-makers, such as the empowerment of executives at the expense of parliaments, or by producing new arenas for certain domestic actors to challenge the deliberations of state political processes in the definition of the social good. The emerging global decision-making processes can be used by different social actors to challenge a particular domestic political outcome that they did not favor. The latter can produce the reconsideration of democratically achieved national policies or offer some citizens the option of exit with regard to the decisions of their political community. At its most extreme forms, it may allow interests already well-represented in the conventional political processes another bite at the apple on those few issues on which they have not prevailed.

All of these avenues challenge and change the balance of representation and participation. . This alteration in the patterns of representation and participation alters the realities of state

constitutionalism and explains the suspicion with which such processes are seen by some social groups (particularly, those that see themselves disempowered by such processes). The question arises, therefore, whether demands for constitutional legitimacy should only follow institutionalized political arrangements that coincide with the States or whether they should be altered by the changed dynamics of participation associated with the realities of global decision-making. More generally, if States cannot constitutionally control global governance what ought to?

E. Transfer of Power to Judiciaries

Courts in several forms and at several levels are recipients of decision-making authority in the process of global governance. First, as we have seen, they are often the implementers of the terms of global governance arrangements and make their decisions in a context in which the particular global governance political processes can do little given unanimity rules. If global governance is to come from the particular global governance structure, it will come from the implementation process and, therefore, from a court or a court-like administrative agency. The degree to which courts really have power depends to a significant degree on the decisions of the nation-state and its internal political processes. Nation-states can refuse to follow the decisions of the courts in question—perhaps rationalizing their decisions on the illegitimacy of judicial as opposed to political decision-making. Whether nation-states will use this tactic will largely depend on their internal politics. As a general matter, the power of judicial review is almost always dependent on whether those who wish to ignore the decisions can get away with it in the political process. Courts are always dependent on some political process to force compliance.

In the global governance context, this will mean that the force of a decision of a global governance mechanism—even a global governance political process decision—will vary across context. The willingness of nation-states to resist commands disfavored by active domestic majorities may be significant. Some of these may involve instances of serious majoritarian bias where local majorities are willing to inflict significant and disproportionate harms on easily-targeted minorities or on peoples outside the nation-state. On the global governance level, this can mean a greater willingness to resist orders to desist genocide or military aggression. On issues of trade, the will to resist (and the costs that may go with it) may produce quite different results or at least a more convoluted (and hidden) process of resistance.

Courts are also processes that are limited by their resources. Even on the national level, they are far more limited in size and capacity to grow than are the political processes and markets that they might ostensibly oversee and this in turn means that that oversight will be quite limited in reality if not in rhetoric. This means that eventually court-driven global governance processes must find support in the national or international political processes or wither away. In many ways, the EU faces these issues now. In many ways, these pressures explain why judiciaries need to be so judicious—why they must be aware of the dangers of nullification and of inviting litigation that will exceed their capacity.³

II. The Challenge to National Constitutionalism

According to traditional theory, state constitutions guarantee the democratic self-government of their respective political communities. That guarantee is grounded on three features: establishing the ultimate decision-making authority, providing the political closure necessary to guarantee self-

³ For a more extensive treatment of the functioning of the adjudicative process and the role of resources, competence and the dynamics of litigation, see Neil **Error! Main Document Only.****Error! Main Document Only.****Error! Main Document Only.**Komesar., *Law's Limits— The Rule of Law and the Supply and Demand of Rights* (Cambridge University Press, 2001), chapter 3

government and promising an appropriate balance between all affected interests.⁴ All these features are affected by the processes of global governance and each reflects a connection to and sometimes a tension within the dynamics of participation.

The national constitution is the paramount expression of sovereignty and is, at least in theory, the ultimate source of power in the political and legal organization of society. Political authority is grounded in the people and this focus on the people legitimizes the exercise of power in the constitution. Even the claim of authority for international rules under international monist theories of international law supremacy do not challenge the fundamentals of national constitutional sovereignty since that supremacy is traditionally legitimized through reference to a previous self-binding commitment of the States supported by *pacta sunt servanda*.⁵ In this view, international instances of shared, pooled or even limited State sovereignty do not really challenge State sovereignty since this international sovereignty is delegated by the States and limited by the strict mandates of that delegation.

However, the new forms of regional and global governance increasingly claim a political and normative authority independent from the States. In some cases, such as the EU, the supranational power is, in effect, backed up by a claim of constitutional supremacy. Claims of authority independent of the nation states challenge the traditional conception of sovereignty and requires us to embrace a notion of competing sovereignties. National constitutions are no longer the sole determiners of ultimate authority. The trend towards a framework of constitutional pluralism is one way to rationalize this change.⁶ But the normative justification for any of these positions ultimately depends on basic questions of institutional choice and, therefore, depends on careful considerations of comparative institutional analysis to determine which structuring of decision-making is most sensible. This framework allows us to comprehend the decision-making processes that lie behind the competition between different claims of ultimate authority and then allows us to contrast and compare these processes.

The second affected feature of national constitutionalism is the link between closure and self-government. Democracy requires closure in order for the self-government of a particular political community to be possible. In other words, it guarantees that the democratic deliberations of that political community are translated into effective policies within that political community. The narrative of how globalization challenges this is well known: States are increasingly affected in their capacity to autonomously determine their domestic policies by external constraints derived from both international organizations, competition with other States, and the extra-territorial effects of other State's policies.⁷ As mentioned above, as interdependence grows so do mutual externalities between states. Both these externalities themselves and the international organizations set up to regulate them limit the closure that, in theory, generates the policy autonomy of states. This question of policy autonomy can again be cast in terms of participation in two ways: first, national political communities perceive an "intrusion" (or inclusion...) of "outsiders" in what they have decided; second, less policy autonomy alters the relative power of the voice of each citizen of that polity and more generally alters the dynamics of participation as defined in the national constitution. There are more participants and this can be seen as diluting the influence of the national actors.

⁴ For an explanation of the link between these questions and constitutionalism see: Maduro, Miguel Poiars, Three Claims of Constitutional Pluralism, in *Constitutional Pluralism and Beyond*, Matej Avbelj and Jan Komarek (eds), Hart Publishing, Oxford, 2012.

⁵ It can be said that such principle even if creating an higher norm than national constitutional norms was mainly an operative principle that safeguarded in all other respects the notion of national constitutional sovereignty. Moreover, such conception, itself, reflected the same idea of sovereignty as definition of an ultimate authority.

⁶ Maduro, Miguel Poiars, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in Neil Walker (ed.), *Sovereignty in Transition*, (Oxford: Hart Publishing, 2003) pp. 502-537.

⁷ See generally David Held, *Democracy and the Global Order*, Cambridge and Oxford: Polity Press, 1995.

The externalities resulting from the impacts of the decisions of other States directly decrease the extent to which the national organs of decision-making control national policy and, therefore, dilute from the dynamics of participation that controls these organs. These external effects can be seen as a submission to another political community without participation in its decision-making processes. International organizations or other coordination mechanisms set up a give voice to these excluded interests voice may at the same time change the quality and intensity of participation at the national level. The most straightforward response to mutual externalities is a larger forum for decision-making in which the impacted nations now take part. But larger forums mean larger numbers combined with an increasing complexity of policy solutions and, therefore, they promise a different dynamics of participation. Not uncommonly the new processes of decision-making decrease the power of the many to the advantage of the concentrated few.

The third feature, representative balance, is also linked to participation but in a different manner. When we refer to the democratic autonomy of national political communities protected by national constitutions we are also thinking of the autonomy of the members of such political communities to define the balances of participation and representation in those political communities. In other words, they define how the constitution structures the mechanisms of representation and participation of different members of the political community in different institutions. As noted before, however, interdependence affects the participation of those different groups and, in so doing it, may empower some at the expense of others. It does not simply empower outsiders at the expense of insiders, it also changes the balance of power among insiders. Furthermore, it challenges the ability of any polity to define itself in terms of the interests of a finite population or people. In other words, the means of solving externalities raises the question of what is defined as the internal. This is a definitional paradox or perhaps a paradox of definition.

III. Addressing the Challenge

The challenge brought by globalization to these three pillars of national constitutions can be considered as a challenge to constitutionalism itself. In this strong sense, national constitutionalism is not simply a nation-state expression of constitutionalism but identifies constitutionalism with the borders and conditions offered by national political communities. Faced with such a conception, is it possible to see these challenges as something other than an erosion of constitutionalism? Can constitutionalism survive these challenges to national constitutionalism? In the next section we argue it can. Not because constitutionalism can, at the current moment, survive without national constitutions but because constitutionalism can be distinguished from national constitutions. In our view, national political communities can be seen as the best if imperfect building block of a globalism that allows for the best if imperfect global dynamics of participation. Here global constitutionalism exists beyond the nation-state though, currently, it must depend or bests depends on national constitutions. In other words, what follows is a claim for a constitutionalism beyond the nation state that continues to take into account and rely on national constitutionalism.⁸

A. National Constitutionalism as a Contextual Representation of Constitutionalism

Constitutionalism raises three basic quandaries: defining the polity; balancing the fear of the few and the fear of the many;⁹ and deciding who decides. Resolving these quandaries defines the core of

⁸ For an analysis in the context of the EU, see Maduro, Miguel Poiars, *Three Claims of Constitutional Pluralism*, in *Constitutional Pluralism and Beyond*, Matej Avbelj and Jan Komarek (eds), Hart Publishing, Oxford, 2012.

⁹ See generally Komesar, Neil K., *Imperfect Alternatives -- Choosing Institutions in Law, Economics, and Public Policy* (U. of Chicago Press, 1994), chapter 3.

constitutionalism and each raises fundamental paradoxes. With respect to all of them, national constitutionalism can be seen as both a promoter of and a limit to global constitutionalism.

The polity is the basic parameter of a Constitution. Constitutional questions have always been addressed within a pre-existing polity. Relations of individuals within and with the polity are regulated by constitutional law. Relations among polities, instead, have been concerned with a different set of actors (the nation-states) and defined by a different set of rules (international law). A national constitution both defines and presupposes a polity or political community whose members are bound by that constitution. It is from this political community and its people that the democratic process draws its legitimacy.

Constitutional and democratic theory scholars normally refer to “the people” as the basis of the polity and commonly presuppose that “a people” already exists. But these suppositions leave important questions unanswered. What makes a people? Who has the right to be considered as part of the people? Why should participation and representation in the constituted decision-making processes be limited by the requirement of belonging to such a people?

This is the paradox of the concept of the polity in its relation with constitutionalism and democracy. By its nature, a national *demos* limits democracy and constitutionalism. Participation in national democracies is not granted to all those affected by the decisions of the national political process but only to those affected who are considered citizens of the national polity. Democracy at the national level involves an inherent problem of inclusion when it is defined by national polities. This problem of inclusion is not solved simply by taking the others into account in decisions that affect them. National polities tend to exclude many who would accept their political contract and are affected by their policies simply because they are not part of the *demos* as understood in a certain ethno, cultural or historical sense. In this way, although national polities are the basic instrument of democratic constitutionalism, they also by nature limit full representation and participation.

Like defining the polity, resolving the balance between the fear of the few and the fear of the many creates inherent tension in constitutionalism. All major constitutional arguments and doctrines must confront a complex system of countervailing forces set up by constitutional law to promote the democratic exercise of power (assure that the few do not rule over the many) but, at the same time, limit that power (assuring that the many will not abuse their power over the few). The core of constitutional law is the balance between the fear of the many and the fear of the few. Constitutional law sets up the mechanisms through which the many can rule but, at the same time, creates rights and processes to the protection of the few. Separation of powers, fundamental rights, parliamentary representation are all expressions of these fears.¹⁰ Traditionally, the many have been associated with the decisions taken by the majority through the political process while the protection of the few is associated with individual rights. The function of judicial review of legislation has frequently been argued on substantive or procedural conceptions of minority protection.¹¹

This classical picture of constitutional law has been challenged by the multiplication of social decision-making forums and the insights brought by new institutional analyses. As a general matter, resolving the constitutional balance between the fear of the few and the fear of the many confronts important issues of institutional behavior and institutional choice. First, they require an appreciation of the behavior of political processes. The two basic fears track two traditional concepts of political

¹⁰ Bellamy (The Political Form of the Constitution: the Separation of Powers, Rights and Representative Democracy, in Bellamy and Castiglione (Eds.) Constitutionalism in Transformation: European and Theoretical Perspectives, Oxford, Blackwell Publishers, 1996, 24) highlights three principles who have defined constitutionalism: rights, separation of powers and representative government. However, in his view, the first has come to predominate in recent years: ‘Rights, upheld by judicial review, are said to comprise the prime component of constitutionalism, providing a normative legal framework within which politics operate’, at 24.

¹¹ For the first see Ronald Dworkin, *Taking Rights Seriously*, Cambridge: Harvard University Press, 1977. For second see John Ely, *Democracy and Distrust: A Theory of Judicial Review*, Cambridge: Harvard University Press, 1980.

malfunction: majoritarian and minoritarian biases. Both versions of political malfunction are based on an appreciation of the dynamics of participation. Variation in the dynamics of participation forms a two-force model of politics that reveals the conditions under which the fear of the few or the fear of the many is likely to be most relevant.

Minoritarian bias, most often associated with the interest group theory of politics, focuses on the distribution of the benefits of political action. Interest groups with small numbers but high per capita stakes have sizable advantages in political action over interest groups with larger numbers and smaller per capita stakes. Higher per capita stakes, operating through the economics of information, make it more likely that the members of the interest group will know and understand the issues. In the extreme but not uncommon case, the members of the losing majority (often consumers or taxpayers) do not even have the incentive to recognize that they are being harmed. The majority is not stupid or innately passive. The per capita impact on each member of the majority is just so low that it does not even justify the expenditure of resources necessary to recognize the issue involved.

Even if members of an affected group recognize the impact of the legislation, we may still observe no willingness to contribute from this member and, more importantly, no collective action from this group. The severity of this shortfall in representation depends on the degree or extent to which members of the group free ride. At one extreme, if only a few free ride and the efforts of others take up the slack, there is no underrepresentation. At the other extreme, if all free ride, they will have no political representation and everyone in the group will lose.

When one considers this interaction between the costs and benefits of political participation, it is relatively easy to see why the dominant image of the political process and its biases is minoritarian. There is, however, significant variation in each of the factors we have discussed; consequently, there are significant sources of variation or gradation in the dominance of the few and the dormancy of the many. As the *absolute* per capita stakes for the majority increase (even holding constant the ratio between majoritarian and minoritarian per capita stakes), members of the majority will more likely spend the resources and effort necessary to understand an issue and recognize their interests. In turn, variation within the distribution of the per capita benefits of political action — the degree of heterogeneity — affects the probability of collective action on behalf of the majority by subgroups of higher stakes individuals.

On the cost side, the probability of majoritarian response varies as the costs of political action vary. These costs depend on the rules and structural characteristics of the political process such as size and population of the jurisdiction, size of the legislature (number of legislators), frequency of election, size and scope of the legislative agenda, and the rules of the legislature (and agencies). Smaller numbers of voters are easier to organize and it is easier to prevent free riding and therefore, the probability of majoritarian activity increases. Smaller legislatures with fewer legislators mean that it is easier to understand the position of any legislator and, therefore, it is easier to discipline unwanted action at the ballot box and to make the threat of such voting known and credible. Complexity and, therefore, the cost of information also vary with the subject matter of the issue in question. The degree to which someone understands any issue also depends on that person's stock or endowment of general information. In significant degree, this stock is determined by culture, formal education, and the coverage of the press and media

Thus, the political influence of concentrated minorities varies depending on the complexity of the issue involved, the absolute level of the average per capita stakes of the larger group, the unevenness of the distribution of the larger group and the chance that this heterogeneity will produce catalytic subgroups and the availability of free or low cost information to the larger group. Taken to its logical conclusion, this analysis suggests not just that the relative advantage of the concentrated group will vary, but that there may be instances in which the larger group can dominate and even be overrepresented. This potential for domination stems from the simplest dimension of the difference between larger and smaller groups — the number of members in the two groups. In the most

straightforward sense, larger numbers of members translates to political power via voting. Voting provides large groups with a form of political action that, in the right circumstances, can be a powerful substitute for the organizational advantages of special interest groups.¹²

The extent to which the political process in question is subject to minoritarian or majoritarian bias is only half the necessary analysis. Comparative institutional analysis requires us also to ask about the characteristics of the alternative decision-making processes meant to alleviate the particular political malfunction. Changes within the political process meant to correct minoritarian bias may aggravate majoritarian bias and vice versa. And then there are the courts. When fundamental rights are raised as a source of control on the excesses of the political process so are the characteristics and limitations of the courts meant to interpret and enforce these rights. The adjudicative process like the political process is subject to its own malfunctions and its own dynamics of participation.

All decision-making processes and all proposed reforms, global or national, are made up of combinations of these various processes seen across a wide variety of settings. In this context, old labels and ideas must be subject to examination. Calling something democratic or even the presence of democratic forms such as elections and parliaments does not tell us that the results are democratic or even majoritarian. Interest group theories of the political process have demonstrated, for example, how democratic decision-making may, in effect, be controlled by a few against the interests of the many. An appreciation for the realities of institutional behavior and institutional choice has helped to challenge idealized visions of the workings of national democratic institutions. In this light, there is no reason why instances of supra-national and global governance cannot be seen as correcting instances of majoritarian or minoritarian biases in national institutions that national constitutionalism has not adequately addressed. Alas, there is also the possibility that these changes may also aggravate these national political malfunctions. The important insight, however, is that none of these global governance changes can be viewed a priori as either counter to or supportive of ideals like democracy. An appreciation for the realities of institutional behavior and institutional choice is necessary to yield those insights.

The final paradox is that of who decides who decides. In many ways, this is the ultimate constitutional question. National constitutions have always been conceived as holding the answer to that question. Whether one conceives of constitutional law as a "grundnorm", a set of rules of recognition, positivized natural law, a higher command of a sovereign supported by a habit of obedience, or any other articulation, national constitutions have always been seen as the highest law of the legal system, the criterion for its legitimacy and for the validity of other sources of the law. By challenging the authority of national constitutions, new sites of global governance require a pluralist conception of power. But a pluralist conception means that there is no single answer to the questions of who decides who decides. Although this feature may appear to challenge national constitutions, it does not necessary challenge constitutionalism.

In reality, the question of "who decides who decides" has always been the bedrock issue of constitutionalism and it is never completely resolved even in national constitutions. This tension is a normal consequence of the divided systems of power inherent in most constitutions. This division of responsibility is a design feature of the Madisonian view of separation of powers as a system of checks and balances. Although national constitutions may have developed historical answers to the allocation of decision-making in this world of divided responsibility, these answers vary with historical and cultural context and are not an unchanging systemic feature of those constitutions over time or of constitutionalism in general. On the contrary, the nature of the division of power inherent in constitutionalism requires the question of the allocation of decision-making to be permanently open and frequently reassessed. In this way, the pluralist relations of power brought forward by global

¹² For a fuller discussion of the two-force model of politics see Komesar, *Imperfect Alternatives*, chapter 3.

governance may challenge national constitutions but are consistent with the ideals or at least the actual functioning of constitutionalism.

By understanding the paradoxical character of constitutionalism, we can free ourselves from the intellectual boundaries of national constitutionalism. There is nothing in constitutionalism that makes national polities the natural jurisdiction for full representation and participation. There is nothing that dictates that the fear of the few and the fear of the many must be addressed within a national polity. Good institutional choice and, therefore, good constitutionalism may require that the best balance of these fears lies beyond national jurisdictions. Finally, it is artificial to think that national constitutionalism can provide the final answer to who decides when constitutionalism is precisely about dividing (and, in this way, limiting) authority. Seen in this light, national constitutions become a simple contextual expression of constitutionalism.

Constitutionalism is therefore both possible and necessary outside the State. But what does and should this mean for national constitutionalism? What claims can the latter have with regard to an emerging global constitutionalism? Global constitutionalism does not mean a global constitution. The fact that national constitutionalism is simply a contextual representation of constitutionalism does not mean that it is no longer the best representation of constitutionalism. In other words, national political communities may still provide the best context on which constitutional ideals can be promoted and state institutions may still provide the closest approximation to full participation and representation with respect to many issues. These are issues of institutional choice that require serious and difficult comparative institutional analysis. When that is the case, national constitutionalism can still be considered as the preferred form of constitutionalism and the best way to constitute global governance. In this sense, globalization creates new institutional choices and alters the dynamics of old institutional choice. But it does necessitate that those answers be found at the global level or in any particular form. Globalization is not an answer to institutional choice; it is a set of institutional choice questions to be answered.

B. National Constitutions as a Proxy for Constitutionalism

As we have seen, constitutionalism strikes difficult balances concerning the size of the polity, protection against the excesses of the political process and the choice of which of many complex decision-making processes will decide. Each of these balances requires difficult choices about the allocation of decision-making and about goals like promoting the ideals of freedom and full participation that dominate constitutionalism. National constitutionalism has developed a series of instruments ostensibly meant to promote and preserve these ends such as separation of powers, democratic decision making through representative bodies and the doctrine of fundamental rights. Nations strike these constitutional balances in a variety of ways. This variety may reveal a normative continuum of better and worse responses, a continuum that reflects differences in setting such as the size of the nation and the diversity of its population or in its history and the path that history has dictated. Most often it is a combination of these factors.

There are both analytical and programmatic lessons here. The institutional choices and comparative institutional analysis involved in understanding national constitutional choices carries over to the global level. The constitutional choices inherent in global governance raise the same difficult choices about size of polity, protection against political malfunction and the decision of who decides. At the global level just as at the national level, we need to be suspicious of panaceas and aware of relevant trade-offs. Global governance means an increase in numbers and complexity. In this complex world, the best vehicle for global constitutionalism may paradoxically be national constitutionalism. In this section we will suggest why this odd programmatic alternative may make sense. In subsequent sections, we will expand on the analytical insights gathered here to examine a variety of approaches to and arguments against global constitutionalism.

In understanding the role of national constitutionalism in global constitutionalism, it may be useful to distinguish between achieving process balance and achieving substantive balance in constitutionalism. The common process balance is between intensity and inclusion in the decision-making process. Decision-making processes should not only promote equal participation but ought also to reflect the intensity of the impacts in the different affected interests. More subtly, but also of importance, decision-making processes must resolve the tension created when the relative participation and representation of each individual changes with the number of participants included in deliberation. There are inherent trade-offs here in what interests and people are effectively represented. It is easy enough to see here that process choices yield substantive results.

Substantive constitutionalism is commonly cast as the balance between individual autonomy and civic solidarity. In this perception, constitutionalism ideally safeguards a society of equal and free individuals and provides them with instruments to pursue happiness in the exercise of their freedom. Here are the traditional roles of liberty and equality. Needless to say the underlying assumptions behind these goals or the ways to achieve them are highly contested. These goals require both government action and protection against government action. Freedom and liberty require government and can be destroyed by it. Constitutionalism is forged in the heat of this tension. That this constitutionalism must also embrace the principles of equal treatment and distributive justice makes this tension both deeper and more obvious.

In a world of highly imperfect institutional choices, national constitutions, with national political communities and their artificial borders, can offer advantages in managing these constitutional tensions and implementing global constitutionalism. These advantages stem from the existence of a traditional political community and its underlying long-term political contract. The context provided by the traditional pathways underlying established national political communities make it easier to confront the trade-offs necessary to strike the constitutional balances necessary to create global governance. In a world of high numbers and complexity, these establish contexts for decision-making make it more likely that decision-making tensions can be satisfactorily worked out. They create a better chance of a broader-based and more democratic process by significantly lowering the costs of participation.

Established paths of majoritarian democracy, for example, make deliberation possible by lowering distrust and opportunistic behavior and, in some cases, they can promote the trust or at least the familiarity that can allow a greater sense of empathy and fairness. In a world in which some will win and some lose in political decision-making, the familiar pathways of an established political community make it easier to maintain the balances between the scope and intensity of participation and individual autonomy and civic solidarity. First, they help assure the losing side that their loss in one instance can become a victory in another (there are no absolute losers and winners).¹³ Second, it avoids zero-sum decision-making: those who win, knowing they may lose in the future, have a greater interest in taking all interests into account and in balancing participation with intensity of impacts. In turn, this sense of the long-term supports structural arrangements that qualify and control democratic decision-making in order to safeguard values such as individual autonomy or distributive justice through the role of devices such as fundamental rights. The full development of constitutional ideals and their trade-offs require a context of application that is not dominated by one-shot decisions but is, instead, grounded on the stable framework provided by a political community.

Perhaps more importantly, traditional political processes associated with these communities have important impacts on the dynamics of participation many of which are beneficial. Quite simply they lower the costs of participation by lowering the costs of information in several ways. Political processes are complex even on their most straightforward level. Delivering ones ballot may involve a great deal more than finding the ballot box. There may be requirements of proof of age, residency and

¹³ There can be risks of more insulated groups being subject to majoritarian bias and that is why national constitutionalism provides for other protecting mechanisms.

so forth to understand and meet. When one begins to factor in the knowledge of voting record, agenda and affiliation involved in the choice of political figures, the costs grow steep enough to make voter dormancy and ignorance a pervasive problem in even the best functioning national democracies. These are the reasons why minoritarian bias is so pervasive. In this sense, with all the advantages of familiarity that we are emphasizing, national constitutions are far from ideal antidotes to minoritarian bias. But we are dealing with the world of comparative institutional analysis and at high numbers and complexity with the choice among highly imperfect alternatives. In this world, there are definite advantages to nation-states as the conduit for democratic participation. In many ways, it is a matter of the better the devil you know—or the better the devil whose workings you know.

But awareness of the two-force model of politics reminds us that minoritarian bias is not the only political malfunction that needs to concern us. Where we have traditional communities and a greater chance for the participation that can lead to active majorities, we have the possibility of majoritarian bias manifested in racism and in the extreme in genocide. Majoritarian bias may be far rarer than minoritarian bias but its evils, when they appear, may be greater. Traditional communities can mean traditional animosities and where a minority is situated in such a way as to be a safe target for the majority serious consequences can follow. Safe targets mean that the long-term adjustments that tend to avoid negative sum outcomes are far less likely to operate.

When it comes to the danger of severe majoritarian bias, any affection for nation-states has to be qualified. As we construct a comparative institutional analysis of constitutionalism, we must keep these instances in mind. There is, however, a serious danger of substituting global constitutionalism even here. Even assuming that majoritarian bias is less likely at global levels—an assumption that would have to await a serious examination of the actual form of global government—there is a serious additional risk if majoritarian bias should appear at the global level. Faced with the horror of majoritarian bias at the national level, the most common remedy is exit and the more global the governance, the more difficult the exit.

All of these realizations must be understood in the context of the global decision-making that concerns us. This is far from an ideal world and the institutional alternatives available are far from perfect. No one observing the realities of even the most respected national constitutions and communities can miss the serious and even tragic episodes which formed their character. There is nothing ethereal about national constitutionalism. If it is the best, then it is the best of imperfect alternatives. But it is this difficult and complex context that gives the established and sometimes subtle pathways of national constitutions and communities their advantage. Established institutional pathways matter and they matter most as numbers and complexity increase.¹⁴

Communities are not, in this sense, necessarily contrary even to a liberal perspective. An appropriate theory of liberalism must make room for communities in the pursuit of individual autonomy. There are several reasons operating here which can be phrased in terms of the usual arguments for liberalism. First, communities provide the deliberative space and established decision-making processes necessary for the pursuit of individual autonomy (without participation in deliberative processes there is not true individual autonomy and without the democratically organized institutions of political communities it is difficult to find a context in which to express or realize individual autonomy).¹⁵ Second, communities promote the civic dynamics necessary to the effective individual participation in those common deliberative processes and public spaces.¹⁶ Third, communities enhance individual autonomy by providing joint spaces for differentiation (the existence of different communities promotes a higher possible realm of individual choices even in contexts

¹⁴ We are dealing here with the world of new institutional economics and the basic notion that institutions in this sense generally are the product of evolution and, therefore, need to be respected if not always preserved.

¹⁵ Kant and Habermas.

¹⁶ Something that was highlighted by the Republican tradition.

where collective action is necessary). Individual autonomy in a social setting presupposes choices and negotiation. Communities provide the context and even the language that allows for this choice and negotiation. Again we are far from suggesting that existing traditional communities achieve these results perfectly or even near perfectly. We are suggesting instead the more relevant possibility that, in most contexts, they do it best.

The tensions of constitutionalism to which national political communities and constitutions respond can only be addressed at the global level with an appreciation for the pathways necessary for their resolution. The political contract underlying national political communities and its subtle evolution over history provide both a political and social viability for the normative project of global constitutionalism. Put differently, constitutionalism requires loyalty and the loyalty depends on identity and long term commitment. The most benign form of providing such identity has, in most instances, been the political contract of the Constitutional Nation State. In terms of institutional economics, the existing and familiar arrangements of traditional nation-state constitutions provide the means to lower the transaction costs of participation and provide the possibility of workable political processes. Loyalty here means that it is more likely that people will eschew the sort of opportunistic behavior that undermines all institutional arrangements. Such settings have historically not been easy to come by in either market or political settings and should not be abandoned lightly.

We now must confront the questions raised by attempting to construct global governance on the foundation of national constitutionalism. If the nation is the building block, does that signal the end of any claim for constitutionalizing global governance? And if global constitutionalism can exist in the absence of a global polity community, how do we relate this form of global constitutionalism with the claims of national constitutionalism? In order to move constitutionalism to the arena of global governance, we must somehow move beyond a normative theory of political communities to a normative theory of social decision-making. This emphasis on the realities of decision-making allows us to imagine constitutionalism operating simultaneously on several levels. But even if such a move is necessary and possible, we must consider if and when this form of constitutionalism ought to displace the constitutionalism linked to national political communities, particularly absent a global political community. We will begin to address these questions in the rest of the paper by exploring a number of alternative approaches to global governance. Fuller discussions will need to await subsequent drafts.

III. Constitutionalism at the Global Level

Normative conceptions of global governance tend to reflect a myriad of philosophical perspectives. Constitutionalism is not absent from these discussions but is more frequently assumed than exposed. The tensions and balances we have discussed and the issues of institutional choice and participation that we have emphasized are submerged. When constitutionalism appears in the context of most global governance discussions, it tends to play a rhetorical role: there are those that use it to legitimize the process of global governance and those that use it to oppose the global governance. In this section, we will briefly review various positions for and against global constitutionalism.

A. Alternative Programs of Global Constitutionalism

1. Rights Constitutionalism

There are several versions of rights constitutionalism, but they tend to share certain standard arguments. E. U. Petersmann speaks of a developing international constitutionalism with as yet

undefined contours.¹⁷ For him, trade law is the major example and even the engine of global integration and its emerging constitutionalism.¹⁸ He conceives of the World Trade Organization and the agreements derived from the Uruguay Round as the primary conduits for such global constitutionalism. He argues for a “rights-based” constitutional development from the ground up, through individual litigants and courts (such as happened in the European Union).¹⁹ Here it is the role of international trade law to guarantee the freedom of individuals in the international arena so that they can fully enjoy their personal autonomy. He seeks to promote global constitutionalism by extending the scope and application of international trade law, human rights documents and dispute-settlement mechanisms. For Petersmann there is an emerging process of global constitutionalism where democracies will operate “in a constitutional framework of national and international guarantees of freedom, non-discrimination, rule of law and institutional «checks and balances»”.²⁰

Petersmann’s vision, shared by others, transfers to the global arena the conception of constitutionalism as a constraint on public power shared by Hayek and the *ordo-liberals*. Under this view, international human rights and international trade law are not in opposition, but are complementary. Both international trade law and international human rights are seen as largely deregulatory. They both set out limits for the State in its attempts to control voluntary activity.²¹

But this conception of both human rights and international trade law is hardly universally accepted. Some conceptions of human rights require strong government intervention. International trade regulation may enhance trade by setting standards to which all economic operators must conform rather than by simply liberalizing trade through the elimination of regulatory standards. The historical evolution of markets and trade has been based on the evolution of private or community systems that impose and enforce standards. Whether the strategy of imposing or removing standards is superior in any setting depends on many considerations. The paramount issue is again institutional choice: the question of whether an imperfect market or any of a number of alternative and imperfect regulatory regimes will be best in promoting trade. There is no *a priori* way to answer this question and, therefore, to define a single conception of human rights even in this narrow sense. Indeed it is likely that different arrangements may be superior in different settings. The answer to these institutional choice questions determines which of the available processes of global governance holds the necessary legitimacy to enforce human rights or international trade.

The conception of global constitutionalism espoused by Petersmann and others is a minimal notion of constitutionalism: non-discrimination, individual rights (mainly economic rights) and dispute-settlement mechanisms. This position is filled with institutional choices many of which are unexplored. It contemplates that this scheme will develop into a set of individual constitutional rights protected at the global level. International trade will fuel the development of an international rule of law through these economic rights and dispute-settlement mechanisms. The emphasis is on the imperfections in the political process at the national level and the substituted institutional alternative is the adjudicative process at the global level. Government on the national level will be limited in favor of market determinations and these limitations will be enforced by courts presumably on the global level.

The problem is that these analyses are single institutional. There can be no doubt that political processes— national or global— are highly imperfect. They may be subject to either minoritarian bias or

¹⁷ E.U. Petersmann, ‘How to Reform the UN System? Constitutionalism, International Law and International Organizations’, 10 LJIL (1997) 421, at 463.

¹⁸ *Ibidem* at 445.

¹⁹ *Op. cit.*, at 423.

²⁰ *Op. cit.*, at 447 and 448.

²¹ See generally Steve Charnovitz, ‘The Globalization of Economic Human Rights’, 25 Brooklyn Journal of International Law 1999, 113.

majoritarian bias or both. But severe imperfection is only a necessary condition for rejecting an institutional alternative and given the setting of high numbers and complexity it is a trivial necessary condition. At high numbers and complexity, all institutional alternatives are highly imperfect. The alternative institutions to which decision-making is transferred by this set of human rights are implicitly cast in an idealized form. These idealized institutions tend to be either courts or markets. But, as our analysis of the paradoxes and tensions of constitutionalism has hopefully highlighted, such institutions are themselves subject to severe malfunctions. They have their own dynamics of participation with their own problems of skewed representation that in many instances parallel those in the political processes. Once again the correct analysis must be comparative institutional not single institutional and that precludes easy a priori conceptions of governance.

2. Political Constitutionalism: The Cosmopolitan View

Another Kantian and liberal trend focuses on the ideal of a cosmopolis. Here the ambition is greater than in the previous case: creating a global civil society that can reconstitute, at that global level, the national political contract without relying on an agreement between the Nations. The existence of a global political community would make it possible to have global democracy. Such an ambition is supported by the liberal normative aspiration of greater inclusion and, therefore, the associated removal of the national borders that restrict the full realization of the ideal of a society of free and equal individuals. In this light, global governance becomes a welcome foundation on which to build this global democracy. The proposals on how to do this vary but they all have both bottom-up elements (for example, promoting the creation of transnational political action) and top-down elements (promoting the democratic reform of international organizations such as the UN).

There are several problems with these programs. The first is how to transform these ideal situations into a workable constitution. Ideal institutional alternatives are not available and, therefore, real institutional alternatives must enter the analysis. When they do, the implicit assumption that higher levels of governing are the obvious means of the realization of these liberal goals is no longer viable. An assumption is now transformed into a problematic inquiry which again cannot be resolved by recourse to ideal types.

The problem is not just pragmatic. Without sufficient care for the realities of institutional choice and comparative institutional analysis, the cosmopolitan expression of global governance can easily yield non-democratic processes. More broadly, focusing on a limited perspective of constitutionalism equated with larger political communities and global constitutionalism assumes away the tensions and balances we discussed earlier. There are essential and non-trivial issues about the realities of participation and representation here such as the balance between the scope and intensity of participation. Larger political communities may in theory be more inclusive, but significant increase in numbers and complexity changes the dynamics of participation and may make these seemingly more inclusive entities less able to provide adequate representation. As polities grow per capita stakes for many may decrease and the costs of effective participation increase. These changes increase the possibility that many individuals will not or cannot effectively participate in any of society's decision-making processes and, therefore, the movement to the global level may actually mean less individual autonomy. Smaller jurisdictions exist not only because large ones are not possible. Their existence may, in some instances, provide for better participation and allow for greater differentiation and individual autonomy. Whether and to what extent smaller or larger jurisdictions better achieve any given desired result is the basic and contested inquiry. It is an inquiry that must not be assumed away.

3. Procedural Constitutionalism: Alternative Deliberative Processes

In an effort to counteract political malfunction at the global level, some have proposed a form of procedural constitutionalism by focusing on the quality of the deliberative processes adopted at the global level. These proposals call for a more inclusive civil society, increased access to the

deliberative process and adoption of higher standards regarding transparency and access to information. These alternative forms of participation are intended to increase the legitimacy of global governance and global constitutionalism. But the legitimacy they promote does not appear sufficient to outweigh the more traditional democratic legitimacy of the State that they seek to replace. They leave unanswered how we should resolve the tough institutional choice between these reformed processes of global governance and the traditional democratic State. Both are imperfect for different reasons.

More importantly, these attempts at deliberative reform fail to recognize the realities of bottom-up political processes in which different forms of participation are relevant. In some cases, more access to the decision-making processes and higher transparency may not solve but aggravate problems of participation. The dynamics of participation depend on both the costs of participation and its benefits. If the individual benefits of most people are low because highly disseminated (as it is often the case with dispersed groups), then the procedural forms that seem to provide increased access and higher transparency may simply make the decision making processes more expensive, decrease the activity of dispersed interests and, therefore, make the political process even more susceptible to capture by concentrated interests. Tactics like delay or skewed representation may undermine rather than aid the interests of the under-represented majority making the global governance less not more democratic. In the world of high numbers and complexity (the world of global governance), concentrated interests may be the ones that exploit the advantages of programs or procedures meant to create easier access and higher transparency. Once again the impact of the dynamics of participation on the real workings of governance at any level is the central inquiry in determining the best strategies for global governance and it is unwise to truncate that inquiry by assuming the validity of a small set of procedural reforms.

B. Positions Rejecting Global Constitutionalism

1. The State View

A first argument against global constitutionalism can be encapsulated in the slogan: “small is better”. The presumption is that small communities work better in processing the different affected interests. Transaction and information costs are lower, participation is more viable, more intense and more effective and a culture of cooperation is more likely. For some proponents of limited size, small communities are associated with the ideals of deliberation where rational discourse is fully possible, different perspectives are taken into account, and decisions are achieved through consensus. There is a central concern about the roots of democracy. The vision is that power should be as close as possible to the people. As the polity moves from the local to the world, democracy may lose its quality and the great ambition of global governance (to include all) becomes its greatest handicap. Although proponents of smallness acknowledge the dangers of exclusion and tyranny involved in small communities, they assume that nations have dominated these risks and, as a consequence, global governance is a step too far.

As with the other positions we have reviewed, smallness captures useful insights. Numbers and complexity make a difference and there are disabilities associated with increasing size. But these insights do not make a case for a sweeping rejection of the big and acceptance of the small. Smallness is an inherently limited view of global constitutionalism: small is not always better. Because of the exclusionary features of small jurisdictions and the frequent externalities of their decisions (lower inclusion) and because the dynamics of participation imply a greater risk of majoritarian bias (a minority may be easy to identify and insulate from the rest of the community), smallness trades one set of problems for another and it is the careful consideration of this trade-off that is the issue that must be central.

Underlying some views opposing global constitutionalism is the normative assumption that it cannot (and not simply that it currently does not) secure the necessary conditions of political loyalty.

There is more than smallness here. This sort of political loyalty would require some form of ethno, cultural or historical identity and not simply civic commitment. Here, constitutionalism is not a producer of values but instead is produced by them. This is a thicker communitarian view. It does not form a community for values deliberation but it embodies, instead, the values of a pre-existent community. The attachment to smallness, on the other hand, does not require such a pre-existent community of values. It simply argues that democracy works better in smaller jurisdictions.

An emphasis on political loyalty detached from any presumption about smallness actually tends to favor the State as the single form of constitutionalism and, therefore, as constituting the optimal form of legitimacy for global governance. Because nations have formed and been formed by long-term political communities, global governance built on national constitutionalism helps solve the absence of an underlying political community in global governance. Thus, Koskenniemi argues that, in spite of the generalized international agreement on a human rights discourse, the lack of a true international consensus on the content of human rights robs global government of its legitimacy.²² For him, preventing an authoritarian definition of the rights and other principles of international law requires the intermediation of the State ‘because its formal-bureaucratic rationality provides a safeguard against the totalitarianism inherent in a commitment to substantive values, which forces those values on people not sharing them’.²³ Following this view, global governance would be limited to cooperation and institutionalized debate among States.²⁴

Even though we lean toward a central place for national constitutionalism in the world order, this view seems troubling. First, it ignores the reality that, as the same author recognizes, international organizations do more than simply enforce pre-existing agreements. They establish and define priorities and policies.²⁵ Even if we could still say that many of these priorities and policies are defined by deliberation where States representatives participate, we still must ask whether the decision-making regime should be national constitutionalism or traditional international law. Second, the Koskenniemi position makes too broad a claim for constitutional legitimacy for the State. As we will argue in more detail below Koskenniemi may be right if he is simply noting a presumption in favor of national constitutional processes, but that presumption should not be absolute and there are even instances where global constitutionalism can be legitimate precisely because of the role it plays in improving national constitutional processes.

2. The Structural Bias View

Another critique of global governance focuses directly on fears about the character of global decision-making. Global governance is illegitimate not because of its global character but because of its structural biases. Its processes are seen, at best, as empowering the market at the expense of political processes and, at worst, as empowering particular economic interests at the expense of the general community. In some cases, these problems are traced to decentralized power. In others, they are associated with the centralized authoritarian imposition of one power over all others.

Despite the fact that these critiques focus on decision-making, they are cast in terms of fears about the imposition of questionable values or at the least of values out of context. They see international trade, for example, as embedding particular moral and societal visions which either embody contestable notions of societal values on all political communities or transpose those values to totally

²² Martti Koskenniemi, ‘The Future of Statehood’, 32 *Harvard International Law Journal* 1991, 397. For example, at 399: ‘The protection of human rights, however, cannot form a meaningful basis for social order. If we are to define our polity in terms of human rights, we must ascertain the number and content of such rights’.

²³ *Ibidem*, at 407.

²⁴ People still disagree about the political good. In normal circumstances, states still provide the means to direct substantive disagreement into institutionalised debate. *Ibidem*, at 410.

²⁵ *Ibidem*, at 403.

different contexts without taking into account the particular characteristics of those contexts. The argument is that these values are often exported in an idealized form that does not even correspond to the reality of their application in their home systems.

There are deeper issues of both goal choice and institutional choice buried in these arguments and this makes it difficult to examine them critically. At base, they are perfectionist and single institutional and, therefore, do not provide much insight into the analysis of constitutionalism. In some cases, they deny the legitimacy of the outcomes of democratic deliberation because they deny that the conditions for such democratic deliberation can be fulfilled by current societies. In other cases, they deny the possibility for rational deliberation. Although it is clear that current constitutional forms do not provide a full realization of constitutional ideals, this will be true for any real-world attempt at constitutionalism—any structure for governing. The best of human decision-making and, therefore, the best of constitutionalism can never provide a perfect reflection of all the involved interests and their intensity. It can only provide approximations.

We have no problem with theories of structural bias and constitutional malfunction. These are the tools of the analytical framework we propose. Nor do we doubt that there are serious malfunctions in existing systems. Considerations of institutional choice and institutional behavior should be the cornerstone of any effective examination of constitutionalism. But an adequate consideration of institutional choice requires institutional comparison. Unfortunately, these theories of structural bias usually do not put forward plausible institutional alternatives and where institutional alternatives are advanced they are not critically examined to see whether they suffer from even more serious constitutional malfunctions.

In summary, the problems of perfectionism and single institutional analysis are hardly exclusive to those who emphasize structural bias in States. We have seen them in many other places. Those that argue for a rights constitutionalism forget that these rights must be defined. They are trusting the definition of those rights to either the market (economic competition under free trade and non-discrimination) or international courts. They distrust national States and highlight the potential malfunctions in their political and judicial processes. But they ignore the potential malfunctions in the transnational institutions which they empower. Their preferred institutional alternatives dwell in transaction costless or frictionless worlds, but the institutional alternatives they attack are assessed and found wanting in real world contexts. The arguments for cosmopolitan perspectives suffer from a similar shortcoming. They stress the gains in inclusion generated by democratic global institutions, but ignore the many democratic malfunctions that arise in the context of larger jurisdictions of participation.

Champions of the State and its sovereign powers in their turn adopt a single institutional perspective. They highlight the democratic deficiencies of global processes but ignore many of the current constitutional malfunctions of the State both in terms of inclusion of outside interests and participation of certain domestic interests. The same could be said of the deliberative theories. They assume that perfect deliberative conditions are easy to establish and function frictionlessly through the right procedures but ignore that in massive and complex societies with high transaction and information costs those procedures may actually increase some of the traditional political malfunctions. Even higher transparency and access to information do not work as universal improvements in constitutional law and, therefore, civil society cannot be espoused without serious examination of its implications in the real world. As always, issues surrounding the realities of the dynamics of participation lurk. The higher participation of the so called actors of the civil society may, in some instances, be part of the solution but, in others, it may be part of the problem.

These realizations do not mean that the solutions embodied in these various positions are without merit. On the contrary, they highlight different aspects of the potential democratic and constitutional issues and possibilities of different institutional alternatives. But, in doing so, they in effect prove that, in a frictionless world, all these institutions provide perfect participation and that, in the real world,

none would do so. In the perfect market, people would freely and knowledgeably express their preferences through transacting. The aggregation of all the voluntary market transactions would bring about the best societal decision (that most preferred by either the higher number of people or by the higher intensity of their different preferences). In States, perfect national political processes would have no problem collecting the necessary information to aggregate collective preferences, expressed according to the intensity of the stakes of the different affected interests (whose full participation was assured by the absence of information and transaction costs). Those States could then frictionlessly coordinate their preferences with those of all other States in a transaction costless world of international relations. In this frictionless world, the same could be done for international organizations which would be capable of collecting all the necessary information and reflecting the interests of all participating States. In fact, international organizations could make the most localized decisions because they would have no problem in measuring the intensity of the different interests to design and harmonize decisions at all levels. All the actions of public officials would be perfectly and costlessly overseen by the populace. Of course, decisions could also be left to local deliberative processes since, in such a costless world, they could perfectly reflect all the local interests and internalize outside costs by frictionless negotiation with other locales. To sum up: in a frictionless world, institutional choice doesn't matter. Anything and everything works.

But we live in a massive, complex and difficult world where the best choices will be highly imperfect. In that world, institutional choice is essential and difficult and comparative institutional analysis matters. When analysts decide to attack existing choices as highly imperfect, they are always correct. But the existence of these severe imperfections provides only a trivial necessary condition for reformation. When these analysts offer solutions that come from the frictionless world, the results are analytically and programmatically unsound. In the highly imperfect world of high numbers and complexity, frictionless solutions are unavailable and, therefore, promoting them is useless and misleading.

IV. In Search of a Comparative Institutional Framework for International Constitutional Analysis

Like others, we are searching for the best mode of constitutionalism for global governance. But we do not expect to find a new constitutional model with a complete architecture of principles and institutions. In fact, it is our position that no such model can be found. There are such a variety of global governance settings that any "one size fits all approach" is at best suspect. Instead, we put forward a methodology for constitutional choices in global governance that can make use of the insights of the theories we have discussed and, in doing so, reflect the paradoxes and tensions upon which constitutionalism is founded. These paradoxes and tensions coupled with the high transaction, organization and information costs of our world mean that the institutional choices that are the building blocks of global governance will always be difficult in two senses. First, the choices will tend to be close and problems in one alternative will often be mirrored by parallel problems in the other. Second, in a world of high numbers and complexity, the real best choices will be far from the ideal. We will often be choosing the best of the bads. We can hide from these realities, but only at the cost of irrelevance.

Pieces of the analytical framework we are proposing have surfaced as we have discussed the various theories of global governance constitutionalism. First, the usual approaches to global governance suffer from a problem shared by many forms of law and public policy analysis. They are single institutional: they focus on a particular set of malfunctions and propose a constitutional alternative without taking into account the paradoxes and balances of constitutionalism and the potential constitutional malfunctions of the alternatives proposed in a world of high transaction and information costs.

In the global governance context, single institutional analysis is commonly accompanied by perfectionism. Perfectionism is in turn manifested in two ways. First, there is the belief that showing serious malfunctions in existing institutions makes the case for reform. There are malfunctions of all sorts: political malfunction, market malfunction, judicial malfunction, administrative malfunction and so on. The argument that existing markets, political processes and courts are subject to severe malfunction is at the same time always true and, standing alone, largely irrelevant. It might seem that this very common sort of single institutional analysis is justifiable because it sets out a necessary condition— in the form of market malfunction or political malfunction— for institutional choices such as government regulation or deregulation. Moreover, the degree or extent of market failure or political malfunction would seem critical in assessing the case for regulation or deregulation and, therefore, single institutional analysis would seem at least a good first approximation of comparative institutional analysis.

Upon closer inspection, however, none of these arguments for single institutional analysis hold. Yes, market failure or political malfunction is a necessary condition for allocation of decision-making to another institution. But these are trivial necessary conditions with little analytic value. They are always fulfilled and, in a complex world, always significantly fulfilled. The best functioning market or political process is far from perfect; transaction costs or political process participation costs are always considerably greater than zero.

More importantly, a single institutional approach cannot be justified even as a first approximation of comparative institutional analysis because institutions tend to move together. The severity of institutional malfunction tells us surprisingly little. The same conditions— usually wrapped around the increasing costs of information— that cause one institution to deteriorate also cause the institutional alternatives to do so. In particular, all institutions deteriorate as numbers and complexity increase creating a similar movement of institutions and ruling out a role for single institutional analysis.

That institutions tend to move in a similar direction does not mean that they move identically. As numbers and complexity increase and, therefore, transaction costs and other participation costs increase, institutions can vary in the rate if not the direction of their movement. It is here that comparative advantages and superior institutional choices lie. But for present purposes the central point is both simple and fundamental: *That institutions move together makes single institutional analysis irrelevant and comparative institutional analysis essential albeit difficult.*

The second version of perfectionism is the mirror image of the first. Proponents of reforms set up idealized visions of these reforms. They tend to see the advantages of their reform in terms of the superiority of some set of social goals which they associate with a given institutional form. Markets are associated with allocative efficiency. Political processes are associated with redistribution. Courts are associated with protection of individual rights. These examples only scratch the surface of the quite sophisticated philosophical considerations of goals and values that accompany these quite unsophisticated considerations of institutions. The realities of institutional choice do not allow these simple associations of goal and institutions. Even if one can establish without doubt a single vision of the good, nothing about institutional choice and, therefore, law and public policy follows. Depending on the setting, courts or political processes as opposed to markets may be the best at producing allocative efficiency, markets or courts as opposed to political processes may be the best at achieving fair distribution and political processes or market as opposed to courts may be the best at protecting individual rights. Assuming a hardwired connection between any goal and any institution is analytically precarious. This failure is compounded when it is accompanied by the assumption that the institutional form wrongly assumed to be associated with the given goal also functions frictionlessly.

Put simply, the normative project of constitutionalism cannot be pursued by assuming perfect or idealized institutions or processes. Participation costs such as transaction and information costs which mediate between constitutional rules, processes and individuals make all institutional alternatives highly imperfect and disrupt the idea that any institution mirrors some constitutional ideal. Any

constitutional argument based on an institutional ideal in comparison with an institution operating in a world of transaction and information costs is doomed from the start. Second, constitutionalism is inherently paradoxical and grounded on a permanent balance between opposing tensions. Any form of single constitutionalism, which advocates for a particular institutional model of constitutionalism, ignores the paradoxes of constitutionalism and how they require different institutional alternatives.

It is in this context that we have attempted to address the interaction between national and global constitutionalism. There is nothing in constitutionalism that requires its limitation to the borders of the States. National constitutionalism is simply a contextual representation of constitutionalism and not its single expression. This does not mean, however, that national constitutionalism is both unnecessary and without normative authority. We tend to believe that, in this complex world of imperfect institutional choices, national constitutionalism is the better alternative because of the advantages created by the existence of traditional national political communities. These communities provide political and social loyalty (linked to a long-term political contract) that allows for the better contextual resolution of the tensions of constitutionalism. They also lower the costs of participation in the processes of national and global decision-making by leaving in place familiar structures and processes. None of these advantages comes without costs and these costs will vary with setting and, therefore, so will the reliance on nations as the participants in global governance. In other words, we cannot ignore that the ultimate need for constitutionalism at the global level. This obviously requires more than a simple reference to the international commitment or obligation of the State. It requires a constitutional form of controlling the extent of autonomous normative decisions that are left for global and regional institutions and of reviewing their impact on national constitutionalism; they also require a constitutional form of balancing the competing national constitutional claims that come into conflict through the mechanisms of inter-dependence (such as those of free trade).

The reality is that, even if we begin with a perception that global governance is or should be built on national constitutionalism, we have not gone very far in understanding the place of global governance. There is an interaction here between normative and positive analysis. As we examine particular forms of global governance and the theory and reality of their attempts to navigate this constitutional balance, we see the various forms of constitutionalism appear. The basic actors in each instance may in theory be the nations. But the reality of decision-making that emanates from the structures lying behind entities like the WTO has evolved beyond a world of national veto and unanimous decision-making. The story of this evolution is different for each such organization. But there are certain shared traits and these traits are a place to begin.

As always, the evolution begins with the nations. The nations that form these global decision-making processes guard their national decision-making powers. This result is weak global governance decision-making at least at the legislative level. Unanimity protects the national political processes by giving them the ultimate control (via the veto) over actions of the global governance political processes. But this protection is purchased by severely constraining the activities of the global governance political processes. The chink in this armor is the existence of a constitution (charter) for these global governance arrangements usually phrased in terms of broad goals or aspirations. It seems easy enough to declare grand aspirations and even fundamental rights when the actual engines of global governance are severely confined. This all works to preserve nation-state power so long as there is no decision-making process empowered to interpret and apply this charter. But sometimes there is. The entity is a court—by any name. And it has court-like trappings—hearings, lawyers and published opinions.

Why would nations concerned with confining the power of these global governance arrangements allow this source of decision-making expansion? One answer is that they often do not. The UN has no such mechanism and remains captured by the veto powers of the Security Council. In fact, the examples of this judicial device are quite limited. The major examples are the WTO and the EU. The second is or began as a regional governance device (so not truly global governance) with confined political branches. But it created a seemingly confined court system with the ECJ at its head. That

decision produced the near-nation that the EU has become. Why would the nations that formed the EU and the WTO create this potential for global governance growth? The answer is both simple and complex. The simple answer is that they wanted these instances of global governance to be somewhat effective. The complex part is achieving a true constitutional arrangement that allows the desired balance of effectiveness and control. This balance is virtually impossible to control *ex ante* and, therefore, like many examples of constitutionalism, these attempts at global governance produced results different from those envisioned. The complexity of setting up charters or constitutions for global governance arrangements suggest familiar quandaries of institutional choice in particular the choice between present and future decision-makers (between Framers and the decision-making institutions that create). This manifests in the traditional trade-off between charters that spell out substantive results in great detail and those that use broad language. This is more or less the trade-off between rules and standards. Even the most code-like constitution will inevitably leave considerable decision-making room to some future decision-making process and, therefore, create the difficult trade-off between control and effectiveness inherent in the design of political processes (the extent of unanimity rules) and the existence of a separate interpreter not subject to the veto power (courts).

If global political processes are controlled and constrained by national veto, this vacuum attracts less encumbered decision-making. The extent of this pressure and its results will vary depending on the reality of the dynamics of participation in these global governance processes and in the political processes of the nations that are its members. This is a story about institutional behavior and about the impacts of different patterns of use of these institutions by various actors. To understand what global governance is, we must take care to follow the interaction between this dynamics of participation and the formal structures that have been established.

All of this description sets the stage for the difficult normative questions that surround the challenges of global governance constitutionalism. In its broadest sense, constitutionalism is a normative theory to allocate, discipline and govern power in such a way as to maximize constitutional ideals such as freedom and full participation and representation. Such a theory is applicable to larger and smaller jurisdictions of social decision-making, to political processes and to courts or markets.²⁶ It is and ought to be applicable to any institution that exercises power. Its expression does not have to be the same as national constitutionalism. We cannot require global governance to be legitimated under the same conditions as those of national constitutional law. But we must require it to be legitimized in constitutional and, therefore, comparative institutional terms.

It cannot be legitimated by the single institutional argument that national decision-making processes are profoundly malfunctioning. The particulars of any global governance mechanism must be examined through the same critical eyes used to catalogue the problems with the national mechanisms they are meant to replace. Romantic images of high minded elites and contemplative judges will not do. Even if the motives and abilities of these decision-makers live up to expectations they are embedded within larger decision-making processes and it is the character of these processes that will determine when and where global governance untethered (or less tethered) to nation-states is superior.

Constitutionalism at the global level means constitutionalism without a political community and, therefore, its mechanisms must focus on exit and voice without expecting immediate loyalty. It cannot therefore be based on simple extrapolations of the traditional democratic model of the State. It must proceed through analogous constitutional choices taking into account the constant trade-offs between the constitutional values of inclusion and intensity of participation, the different stakes of potentially affected interests and the way the different global institutional alternatives interact with transaction and information costs. The normative value of global governance will be found in providing new institutional alternatives to correct some of the malfunctions of national political communities. But

²⁶ For a treatment of market failures as problems of participation, see Komesar, *Imperfect Alternatives*, chapter 4.

that value will depend on a critical assessment of these new mechanisms without romance or rancor. Down this path are inevitable trade-offs and difficult institutional choices. But it is the only path to good global governance.

Governance, Economics and the Dynamics of Participation

Neil Komesar*

- I. Introduction
- II. The Analytic Strategies and Challenges
 - A. The Basic Principles of Dynamics of Participation and Comparative Institutional Analysis
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I. Introduction

The subjects of governance in general and global governance in particular cover a vast temporal, spatial, structural and intellectual swath. The study of highly varied and complex subjects, like governance, requires well-constructed analytical frameworks. Such an analytical framework must be simple enough to carry across a wide variety of settings and to reveal important issues and the trade-offs involved in each setting. What is not endogenous to such a framework will not be handled or will not be handled in a parallel and integral manner. Therefore, the analytical framework must be both simple and flexible.

It is wise to structure that framework around the essence of the subject you wish to address. Governance is essentially about governance. That is, it is about those mechanisms that make societal or global determinations. The hoped-for result of these mechanisms may be resource allocation efficiency, equality, community or any such goal. But what is produced will be determined by the workings of these mechanisms. For me, the best strategy for this task lies in comparative institutional analysis. Comparative institutional analysis is by its nature focused on governance and governance mechanisms. In my terms, “institutions” are governance mechanisms; they are the alternative decision-making processes available in any setting. In these terms, the components of the analysis of governance are institutional behavior, institutional choice and comparative institutional analysis. Understanding institutional behavior (the behavior of governance mechanisms) lies in the dynamics of participation. The dynamics of participation is dependent in turn on the costs and benefits of participation. The most famous of these costs and benefits is transaction costs.

I am by training and inclination an economist. I find the tools of economic analysis used correctly valuable because of their simplicity and generality. But economic analysis comes in many forms and needs adaptation to meet the needs of a study of governance—especially a study of global governance. In this paper, I am attempting to extend the basic intuitions of economic analysis to an analytical framework capable of addressing law and public policy even on the plane of global governance. But to do so I have to adapt neoclassical economics and the perfectly competitive market and address the concerns of institutional economics and in particular the new institutional economics (transaction costs economics). Where do culture, history and path dependence fit? What are the implications of massive changes in numbers and complexity? How do we address the differences between issue areas like trade, the environment, safety and health, property rights, contracts enforcement and war and peace?

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In a sense, this paper has two general purposes: first to understand governance and global governance; second to reform the tools of economic analysis to better reach these subjects and issues of law and public policy in general. Virtually by definition, understanding governance means that we must abandon the comforts of the perfectly competitive market. This valuable tool of neoclassical economics purposely assumes away the frictions that make governance necessary and, in doing so, makes the study of law and public policy trivial. Frictionless models are fine, but not if you want to study the implications of friction. There are, of course, costs to straying too far from the simplicity of models like the perfectly competitive market. Here we must confront the issue of what is exogenous and what is endogenous to the analytical framework. To the extent that factors are exogenous, we must depend on others to fill the gaps. And if we must depend on others to fill the gaps, we are likely to be analytically stuck. Norms and paths are commonly ill-defined and it is often either impossible or too expensive to find them. Adding an exogenous factor adds only a limited amount to the analytical framework. No analytical framework can have all that is important about governance endogenous to its workings. But it is wise to see where these factors and, therefore, the issues they raise can be brought within the basic analytical framework we employ before we yield to other intellectual strategies.

I am at the beginning of the adaptation of my analytical framework to address these issues. I will begin with a presentation of the basic principles of my analytical framework: dynamics of participation and institutional behavior, institutional choice and comparative institutional analysis. I next will examine two alternative forms of economic analysis: neoclassical economics and institutional economics (in particular, new institutional economics). I will then turn to the various challenges confronting any analytical framework and mine in particular: the role of culture and history, the interaction of governance mechanisms, the implications of changes in numbers and complexity from small and simple cultures to the world of global governance and with them the conflicts between transformation and transaction costs, and the implications of variations and problems in the workings of property rights and information.

Before proceeding, it would be wise for me to make a comment on ignorance. In this piece, I will be employing a theory that relies heavily on variation in the costs and benefits of information—which is to say the costs and benefits of ignorance. Accordingly, I am required to recognize my own ignorance. In this paper, I will discuss and question theories about histories and cultures about which I know little. Perhaps even more importantly, I am proposing a theory for global governance with a very limited knowledge of law and public policy outside my own nation. For these reasons, my theory of global governance focuses on governance in general and must leave its global applications to others. My examples will be come primarily from US property and constitution law. I am on dangerous ground, but others have constantly pushed me to go to unfamiliar places and frankly I enjoy the travel. So here I go again.

II. The Analytic Strategies and Challenges

A. The Basic Principles of the Dynamics of Participation and Comparative Institutional Analysis

As I stated in the introduction, it is my view that the essence of understanding governance and of understanding how to get better governance is the understanding of the workings of governance mechanisms. To me this seems self-evident. But it is not the normal mode of analysis for a subject like global governance. Instead, it is common to begin with some conception of the good and to argue for this conception versus some alternatives. These contesting conceptions include communitarianism, cosmopolitanism and liberalism. These conceptions and their role in analyzing global governance are

on exhibition in the Komesar-Maduro paper (hereafter “K-M”) that serves as background for this paper.¹

Such a strategy for the analysis of global governance seems to start at the wrong place for several reasons. First, as I have argued often, goals and goal choice are never sufficient to generate proposals for law and public policy.² They must be accompanied by a parallel consideration of the institutional mechanisms available to carry out the goal. This seems even more primal when we deal with the world of global governance where institutions are large and complex. If governance was a matter of traveling to an oracle and telling this oracle what goal you wish to achieve, then the focus should be on goal choice. That’s because we have already solved the institutional choice question; the oracle is in place. But real world decision-making alternatives don’t operate by top-down instruction. They operate by the interaction of bottom-up forces and the choice among them is hardly obvious and, therefore, constitutes an essential subject for study.

So I will start the study of governance by focusing on the workings of governance mechanisms— in my terms, institutional behavior. In turn, obtaining superior governance is a matter of choosing the best governance mechanism or set of governance mechanisms— in my terms, institutional choice. Effective law and public policy analysis requires the choice of the best governance mechanism in each setting. A central question of global governance, for example, is when and whether global or international governance mechanism should be substituted for national governance mechanisms. The only sensible means of understanding governance (the behavior of decision-making processes and the choice between them) in a normatively meaningful way is through institutional comparison.

Understanding the performance of alternative governance mechanisms means understanding the patterns of participation in each mechanism: which interests are influential in each governance mechanism and which are not. Participation is, in turn, a function of the costs and benefits of participation. This is the dynamics of participation. In other words, those with higher per capita stakes are more likely to understand when participation is worthwhile and to know how to participate effectively. As a general matter, the same set of potential participants operate (or don’t) in all governance mechanisms.

Take the example of product safety. A large scale manufacturer is likely to understand the costs and benefits of better safety, whether there is a market for safety (or whether less safe products will be rejected by the market), whether there is a risk of regulation and how to blunt either the attempt to pass such regulation or to implement it. The manufacturer will also understand the character of judicial remedies for the failure to produce safe products (products liability) – the probability of successful suit and the damages awards to be paid if found liable. The manufacturer also would understand the relative merits of dealing with products liability through litigation, lobbying in the legislature or contributing to the political campaigns of legislators or judges.

By contrast, the average potential victim of product safety is less likely to understand the safety level of products and, therefore, may not be in position to send the market signals to the manufacturer that might produce safer products. Nor would potential victims of product malfunction— a very large group with small per capita stakes – have the incentives to understand the workings of legislatures and the administrative agencies or even where the best interests of that potential victim might lie in connection with a given piece of regulation. The adjudicative process might be somewhat different because the actors are actual victims. But even this depends on whether the form of injury results in many small injuries and, therefore, little possibility of litigation or whether the form of injury results in a small number of large injuries and, therefore, a sufficient incentive for victims to bring products liability claims.

¹ See Neil Komesar and Miguel Maduro, *From Constitutions to Constitutionalism*, chapter one of this book.

² See Neil Komesar, *Imperfect Alternatives* (1994).

Put more generally, manufacturers, as high stakes players, will have the incentive to understand their market opportunities, the potential for seeking advantage in the political process, the dangers of and means to blunt regulation and whether they will be liable for torts damages. Consumers, as low stakes players, will have much less incentive and, therefore, less likely to participate.

This is a crude example which I have dealt with more extensively elsewhere.³ But the basic point is revealed. The behavior of governance mechanisms like the political process, the adjudicative process and the market depend on the dynamics of participation. And the dynamics of participation can vary across subject, setting and interest.

B. The Dynamics of Participation— An Economics Approach to Institutional Behavior

The dynamics of participation and economic analysis fit. Although the term is not used by economists, participation is the core of the economic analysis of institutional (decision-maker) behavior. It generalizes insights that have long existed in economics. Participation lies at the heart of key economics concepts such as externalities and transaction costs and, as such, defines resource allocation efficiency. Transaction costs are the costs of market participation and, as Coase showed, externalities are failures of market participation— a failure of representation via transaction.⁴ Because some transactions are missing, allocative decisions do not reflect all costs and benefits and, therefore, the market mechanism is an imperfect indicator of resource allocation efficiency. Resource allocation efficiency is defined by transaction costs and benefits and violated by externalities. The basic economic version of the market is a participation story.

The same inherent emphasis on participation is also present for the economic analysis of non-market institutions such as the political process and the adjudicative process. Both economic and non-economic models of the political process emphasize representation. Failures of political representation, just like externalities in the market, are failures of participation associated with variations in the costs and benefits of participation. Some interests have more active political participation and are, therefore, better represented in the political process. Sophisticated models of politics like the interest group theory and the economic theory of regulation are defined by these dynamics of participation. The dynamics of participation also underlies the analysis of the adjudicative process in the form of the dynamics of litigation where once again certain interests— commonly concentrated interests— are better represented.

The dynamics of participation already lie at the core of basic economic concepts and analysis. By generalizing these concepts into the dynamics of participation, it becomes easier to compare institutions and to integrate, generalize and evaluate insights about market malfunction from welfare economics and political malfunction from public choice economics into comparative institutional economics. Participation and the dynamics of participation create a more explicit and generally applicable economic analysis of institutional behavior and choice.

Once one sees that the dynamics of participation underlie the behavior of all the institutional alternatives, it is easy to understand the source of one of the most confounding aspect in the study of governance and in particular of global governance: institutions tend to move together. The same conditions— often wrapped around the increasing costs of information— that cause the performance of one institution to deteriorate also cause the performance of institutional alternatives to do so. In particular, all institutions tend to deteriorate as numbers and complexity increase creating a similar movement of institutions and ruling out a role for single institutional analysis. That institutions tend to move in a similar direction does not mean that they move identically. As numbers and complexity increase and, therefore, transaction costs and other participation costs increase, institutions can vary in

³ See Komesar, *Imperfect Alternatives* (1994), ch 6.

⁴ Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ.1 (1960).

the rate if not the direction of their movement. It is here that comparative advantages and superior institutional choices lie.

The problems created for participation by high participation costs and low per capita stakes haunt all the institutional alternatives. It creates dormancy for political majorities and, therefore, a bias in favor of concentrated minorities—minoritarian bias. It creates a similar dormancy in the adjudicative process through the dynamics of litigation. It creates a parallel problem in the market for items like safety and raises the chance of asymmetric information which can either cause market dormancy (the lemons problem) or transactions that may not be value enhancing. The existence of similar movement in institutional alternatives means that any analyst must keep in mind that analogous problems may show up in institutional alternatives and that even a badly functioning institution may in fact be the best available.

Focusing on the dynamics of participation also expands the tools of economics beyond resource allocation efficiency. Participation is the key to the workings of all decision-making institutions and the functioning of these institutions determines the real potential for the achievement of any social goal not just resource allocation efficiency and, therefore, must occupy a central place in any analysis of law and public policy. Constituting a society based on liberty or equality involves the same challenging questions of the design of and choice between decision-making processes that challenge the achievement of efficiency. This means that economic analysis based on the dynamics of participation is a valuable tool no matter what the vision of goals.

Because institutions move together, the institutional choices associated with any goal are close calls dependent on variations in the dynamics of participation and, therefore, there can be no easy, formulaic association of goal and institution. It is no more evident which, among highly imperfect institutional alternatives, is best to produce fairer income distribution (commonly assumed to be the political process) or more protection of individual liberty (commonly assumed to be the courts) than it is which will produce greater resource allocation efficiency (commonly assumed to be the market). Contrary to common assumptions, these are crucial open questions at most of the margins of inquiry relevant in law and public policy analysis. Economics informed by comparative institutional analysis (or comparative institutional analysis informed by economics) can contribute a tight, yet adaptable, analytical framework capable of structuring the quest to understand the workings of institutions whatever the social goal.

Focusing on the dynamics of participation also emphasizes another important attribute of institutional behavior. The same actors function or fail to function in all the institutional alternatives. We could see this in the product safety example discussed earlier. The degree of their participation will vary, but if we look carefully we will see them operating or notice the impacts of their failure to operate in virtually all settings and governance mechanisms.

Thus, in summary, the dynamics of participation provide a way to generalize and integrate the basic instincts of economic analysis into the analysis of governance. This approach emphasizes the central place of information as the determinant of participation costs and traces the participation of the same set of important players across all institutional alternatives. It also helps to understand where and when institutions will move together and the role of central variables like numbers and complexity.

C. Characterizing Economics

Economic analysis has several attractive attributes. It is focused on trade-off. Benefits are always accompanied by costs. If something appears to be free, look a little closer. In turn, these trade-offs generate continua. There is virtually always a range of possibilities and variation within this range is driven by a small set of variables—basically, costs, benefits and budget constraints.

This focus on the same small set of variables allows more to be internal to and determined by the same analysis. In other words, there is a tendency to make more relevant issues and factors

endogenous rather than exogenous to the analysis. Thus, instead of supposing that there is or is not deterrence or at best supposing deterrence is at some particular externally determined level, we can speak about deterrability and see its variation as variations in the costs and benefits of information.

We can carry the same set of considerations across most settings. Whether and when an interest will be represented in the courts is a function the same set of variables that determine whether and to what extent potential injurers can be deterred, whether and to what extent dispersed majorities will be politically dormant or active or whether and to what extent consumers will be misled by advertising. This is the tip of the analytic iceberg— a small sample of the questions pertinent to law and public policy that can be seen as subject to variation based on the same small set of variables. The only limit to this sort of exploration is the ability and creativity of the analyst.

Indeed, here lies a mode of understanding the controversial subject of rational choice. Knowledge, information and understanding are not free and the costs of information matters as do its benefits. We can expect that high stakes players will know more and that low stakes players are easier to fool. That doesn't mean that low stakes players are fools. The same parties may be high stakes players and sophisticated in one area and low stakes players and unaware in another. Using these insights creatively is the way to open inquiry about and access to subjects as seemingly different as the present state of electioneering in the US and the elasticity of demand for products and services in the market.

Last, but not least, the economic vision of institutional behavior is bottom-up. Institutional decisions are the product of the atomistic interaction of many parties such as buyers and sellers in the market, special interests and dispersed majorities in the political process, and litigants in the adjudicative process. The actions of these parties are in turn related to the basic variables. The costs and benefits of participation in these processes matter and these costs and benefits vary significantly both across the population, across issues and over time. Societal participants such as producers and consumers, special interests and the mass of citizens and plaintiffs and defendants react to these costs and benefits including by not reacting.

But that the instincts of economics are useful to the analysis of governance does not mean that all aspects of economic analysis are equally useful. Some parts are virtually by definition excluded and others confront the dynamics of participation with significant problems. On one level, neoclassical microeconomics is all about governance and the dynamics of participation. The perfect market is a governance mechanism. It yields results through the participation or representation of the desires of the people. Given its frictionless assumptions, all the people will participate. They will buy and sell as their desires and budgets allow. The results of this frictionless governance process represent— indeed define— resource allocation efficiency; the results of the perfectly competitive market are by definition efficient.

But there is no room in the perfectly competitive market to analyze governance— to determine what the best system of law and public policy would be. There is no need to consider the performance of such governance mechanisms and activities as constitutions, governments, policing, courts and so forth. As the Coase Theorem shows, in the frictionless world of zero transaction costs (the perfectly competitive market), law in the form of the assignment of property rights or the enforcement of contracts does not matter at least in terms of resource allocation efficiency. If we are to tackle the issues of law and public policy embodied in topics like global governance, we must move away from the perfectly competitive market.

We can do this by extending a central feature of the perfectly competitive market. The costs of producing goods and services are already present in the basic model of the market. But transaction costs (or more broadly participation costs) and in particular the costs of information are excluded. The reasons for this feature again go back to the basic purpose of this simple model. The perfectly competitive market is meant to chart the patterns of participation if the costs of participation are ignored, but all other costs are considered. Consider the costs of transportation. The perfectly competitive market would be incomplete in its own terms if the costs of transportation were ignored. I

picked this particular cost because it is closely analogous to transaction costs. Transactions are also a mode of moving goods and services.

All of this may seem yet another attack on neoclassical economics and the perfectly competitive market. But I intend no such thing. The perfectly competitive market does what it is meant to do—chart the outcomes of changes in price or costs of production, the desires (tastes) of consumers and their budgets (income) on the amount of goods and services produced and consumed given that the costs of market participation are zero.

But frictionless models don't work if you want to study the implications of friction. Law and public policy are important only where these frictions are in play. If participation costs are zero, there is no need for the study of law and public policy. It is a trivial endeavor. If these costs are not zero, then transaction benefits count as well as the desire to minimize participation costs through institutional choice.

In a sense, a viable study of law and public policy only asks that economic analysis add in a few more costs— the costs of participation. These costs are dominated by the costs of information. I am asking in effect that we add the costs and benefits of another product—information— to the study of the market. But of course factoring in the costs and benefits of information and more generally of participation is very difficult and it changes everything. There is a great deal to fear intellectually and analytically if we drop the assumption of zero participation costs. But legal scholars and scholars of law and public policy if they are to be serious about their craft have no choice in the matter.

Now the question is how we should systematically consider the friction-filled world. My way is to focus on governance mechanisms using the dynamics of participation. I have called these governance mechanisms “institutions” and have approached the study of law and public policy by focusing on the choice among these governance mechanisms which I have called “comparative institutional analysis.” But there are other ways to bring the tools of economics to the study of law and public policy. Much of this can be found in the world of institutional economics and in particular new institutional economics.

New institutional economics is also called transaction costs economics and there gives a hint that at least a part of this world is not far from mine. Transaction costs are simply the participation costs of transacting. Economists like Ronald Coase and Oliver Williamson have used transaction costs to explain the existence of governance mechanisms— principally, the firm. These analysts are employing a version of the dynamics of participation. This is especially so when transaction benefits are factored in as they must be if transaction costs are not zero. If transaction benefits enter the analysis, then issues about the distribution of benefits are not far behind and with them come concerns about collective action. These are the ideas that lie behind my use of the dynamics of participation. As I have said many times, my analysis is derived from that of Ronald Coase and Mancur Olson.

But there is another branch of the new institutional economics that has a somewhat different slant on the analysis. It is primarily associated with Douglass North, but also characterizes much of the work of Masahiko Aoki and at least some of the work of Eleanor Ostrom. Here institutions are defined as the rules of the game— laws, regulations, customs, norms, conventions and so forth. The question being asked is the role of these rules of the game in determining transaction costs (or more broadly, in my terms, participation costs). Here governance mechanism like government and its sub-parts— legislatures, executives and administrative agencies or courts— are seen as secondary and they are, at least in Douglass North's terms, called organizations, not institutions. In this world, the market is not a governance mechanism, organization or institution. It is the sum of the activities of people reacting to the rules of the game.

From North's standpoint, the rules of the game determine participation costs. Unlike my analysis, participation costs are the dependent not the independent variable. They are being explained not being used to explain. However, there is a subset of the rules of the game for which the direction of causality

is not quite so clear. The rules of the game as North sees them are divided into formal rules (laws, regulations, constitutions) and informal rules (norms, customs, conventions). When North speaks of the source of formal rules and their variation, one can pick up elements of the dynamics of participation. Thus, as to formal rules, we have causation or explanation running in both directions. Formal rules, like all rules of the game, determine transaction costs and, therefore, determine an aspect of the dynamics of participation. But, in North's analysis like mine, the dynamics of participation also determine the functioning of the decision-making processes that decide on formal rules.

But, as to informal rules (culture), the role for the dynamics of participation in North's approach is not directly evident. North sees these rules of the game as largely exogenous to his analysis. Culture and history (North is an economic historian) are inputs into North analysis of the source of transaction costs, but they are not derived from his analysis and there are only hints about their derivation or even of their definition. North's perceptions— and indeed the role of culture and history (whatever they mean)—force me to consider the role of the rules of the game and, therefore, culture and history in determining participation costs because these costs are important elements in the dynamics of participation. As always, I will seek to make these considerations or at least aspects of them endogenous to my analysis. I will try to trace the role of these factors— both exogenous and endogenous— on the analysis of governance.

III. Culture and history

The propositions seem irrefutable: Culture and history matter and path dependence is important. If, at any point in time, habits, conventions, beliefs or ideologies come into being, they change the way people perceive reality. They become a separate language that requires time and effort to understand and replicate. Overtime, some of these attributes obstruct what might be valuable changes or choices. But there are costs of information and organization that would have to be borne to make the changes and, therefore, despite advantages, there may be no adjustments or the adjustments may come more slowly in one context than in another. Culture and history impact the dynamics of participation by impacting the costs of information and organization and the dynamics of participation determine the functioning of governance mechanisms. The results of the simple neoclassical economics paradigms do not explain all.

Yet there is a great deal more to the interaction between culture and history and the dynamics of participation. It is quite likely that, while dynamics of participation are a function of culture and history, culture and history are also a function of the dynamics of participation. Here lies the crucial issue of the durability of the various aspects of culture and history. Culture and the impact of history change. Some cultures change more easily and some aspects of any culture change more easily. These changes in culture and history like culture and history itself are not necessarily good (however we define the good). But these changes are important in understanding the function and capability of governance and governance mechanisms and, therefore, in forming workable reforms. The durability of culture and of the paths of history counts and, to a significant degree, durability is a function of the dynamics of participation. Or so I will argue in this section.

In fact, the terms that North uses to define culture and history reveal both problems in the analytical power of terms like culture and history and the potential role for the dynamics of participation in solving these problems. North employs a wide variety of concepts that track culture such as customs, norms, conventions, practices, ideologies and belief systems. Those who follow the history of North's thinking see changes and shifts in the terminology as well as in the meaning North gives to these terms as well. I have read some of North's work carefully and find his use of the terms meant to define the informal rules of the game nebulous in both definition and application. In the main, these terms are place-keepers that represent that portion of the explanation of the differences between economies at

any point in time and over time that is unexplained by some variant of economics. In other words, these terms simply indicate the presence of an unexplained residual.⁵

Put differently, culture and history matter, but we don't really know what they are or why they matter. It may be that as William Riker has claimed, they are all that really matters. Riker, who is quoted by North at length, argued that liberty does not come from the functioning of constitutional protections, but that constitutional protections come from and cannot exist without a popular allegiance to liberty. One only needs to see how differently the same constitutional provisions operate in different nations to see the intuition for such an assertion. But of course if the proposition is true, there is a disconcerting message for change (unless you already have the correct attributes of culture, you aren't ever going to get them) as well as for analysis (we don't know what culture is or how it works).

But these do not have to be the messages. We can imagine that there is an iterative process in which prior established beliefs interact with changes in the formal rules of the game to gradually produce deeper change in societies. Although the mechanics of this iterative process remain allusive, I believe that there is a way to begin to understand both the general dynamics of change and the reasons why some societies and some elements of life in any society change more easily than others. It will come as no surprise to learn that I see the path to this understanding in the dynamics of participation.

One can see hints to the connection between the dynamics of participation and the patterns of change in informal rules in North's approach. First, when North discusses the change in *formal* rules of the game (laws), he makes use of elements common to the dynamics of participation. That at least raises the possibility that similar elements are at play in the context of *informal* rules of the game as well. Second, aspects of the dynamics of participation are inherent in the role North sees for informal rules. To North, culture, ideology and world view allow members of a society to deal with the unknown and the uncertain. They provide conventions and language that provide modes of approximating and translating the complex world around them. But there is a fixity in these translations that may mean that when the world around them changes the modes of connecting to it do not necessarily change. As these gaps vary across settings, there may be differential visions of reality between nations and among the various members of a given nation.

But some customs and world views change more rapidly than others and some societies change customs and world views more rapidly than others. Perhaps these different rates of change come from the same source we supposed explained the role of culture or ideology in the first place— ignorance and uncertainty. Put differently, rates of change vary depending on the dynamics of participation or more exactly in the dynamics of information. Some changes in the world are easier to perceive and it is easier to understand what change in behavior would be appropriate. For example, a sociologist friend once suggested to me that the practice of driving five miles over the speed-limit and assuming it was in fact legitimate was an example of a social norm making the real speed limit different than the posted one (by five miles). But if this is a norm, it is likely to be one that would adapt quickly if the practice of the police and the technology of apprehension changed. Compare this to the belief held by most people in the US (and around the Western world) that the value of homes would never go down. When in fact recent occurrences put this belief in doubt, it took time to adapt and the rate and effectiveness of the adaptation differed among people. Most likely those with the greatest sophistication adapted more quickly along with those with the most at stake (large scale buyers and sellers). Or take what I would assume was the long established norm or belief that judicial elections of state appellate judges in the US were largely non-partisan and immune to the electioneering that

⁵ Some of those who have followed North and his career much more closely than I have seem to have reached the same conclusion. Margaret Levi, *Of Rule and Revenue* (Berkeley: University of California Press, 1988), 51 and Jerry Hough and Robin Grier, *The Paradoxical Relationship of Douglass North, Friedrich Hayek, and Karl Marx* (2012) <http://hope.econ.duke.edu/sites/default/files/amerMexscottnorth.pdf> (an exhaustive examination of North's views even including his correspondence).

characterize the election of officials in the political process even though the formal mechanics of election do not differ from those for the political process. But a shift in the stakes (likely associated with tort reform) has caused large-stakes players have pumped significant funds into increasingly partisan judicial elections and the norm has shifted.

The proposition is simple: if norms, customs and ideology are reactions to the complexity and uncertainty of life, then when the circumstances of life change these devices will change at a rate determined by the costs of understanding that a life change has occurred and understanding how that life change should be dealt with as well as the way the impacts of the change are distributed across the populace. Some changes will be understood by everyone rapidly and reaction would be so quick we would never even think to characterize the original positions as cultural. Others will take time and change will come more rapidly for some members of a society than others. Still other life changes will have no impact because the per capita benefits of understanding and reacting do not justify the costs and, therefore, custom remains unchanged even when the world around it has changed. I do not suppose that most people will even be conscious of the choice to adhere to a custom but unconscious adherence to old beliefs in one setting is as likely to be rational as the conscious reaction to change in another. Rational here involves the weighing of the costs and benefits of participation and it is individual not social rationality. Rational is not synonymous with good. Reactions based on individual rationality can drive a wedge between individual good and social good.

Consider the role of understanding the dynamics of participation in examining two quite different contexts commonly addressed by economics. One shows a different way of looking at a basic construct of price theory. The other lies at the core of all attempts to use economic analysis to address law and public policy. The elasticity of demand is a traditional construct used in price theory. This construct measures the rate of reaction to changes in price. The more inelastic the demand curve the less the amount demanded will go up or down as price goes up or down. The common explanation for differences in elasticity is variation in consumer taste— an exogenous parameter determined outside economic analysis. The common example here is the assertion that the elasticity of demand for necessities is more inelastic than the demand for luxury goods. But it is not necessary to abandon the basic variables of economic analysis and turn to exogenous variables like “tastes” in order to understand this aspect of economic analysis. Variations in the elasticity of demand might alternatively be explained at least in part by variation in the costs and benefits of information.

Because the elasticity of demand is commonly part of a price theory based on the perfectly competitive market, the costs and benefits of information are not considered. Reaction to changes in price supposes that the consumer knows and understands the change. But suppose we make the dynamics of information part of the analysis— as we must do to understand the workings of law and public policy. Now we can appreciate the role of variation in the costs of learning about and understanding price changes. The use of discounts and presence of hidden costs make some price changes more difficult to follow. Even more importantly, variations in the attributes of a product such as quality make changes in price difficult to assess. In addition to this variation in participation costs, there is also the variation in the benefits of learning about and understanding price changes. Low priced items infrequently purchased will justify less expenditure on price information. But once we enter a world in which transaction costs or more broadly the dynamics of participation matter, economic analysis becomes more interesting and exogenous considerations like tastes can be replaced at least in part by an endogenous analysis that focuses on variation in costs and benefits.

The second example focuses on what North and many economists and political philosophers believe is the most important of the rules of the game: property rights. North believes that the rise of England and the fall of Spain as well as the accompanying futures of their colonies in the Americas such as the US and Latin America lies in the relative decentralization of the political processes and the resulting evolution of property rights against the government in the English system. Because of the greater control on usurpation of property by government in the English setting, greater investment and productivity followed than in the more centralized and bureaucratic decision-making in the Spanish

setting. North's rendition of these cultures and histories is not universally accepted. But it is quite influential and more importantly for me it forms a good context to see the interaction between culture and history and the dynamics of participation. In addition, the focus on property rights provides a good vehicle to discuss both formal and informal rules of the game and the similarity of the factors that explain their variation.

There is among all ideological viewpoints a discomfort with the role of the State. (Feel free to throw in your favorite political philosopher.) And yet States not only exist, they are viewed as, and I believe are, necessary. One can speak of spontaneous ordering and the beauty of the bottom-up atomistic market. But this image almost always takes place within the State or in settings of low numbers and complexity. For example, North believes that as societies become larger, enforcement of contracts by 3rd parties (governments) becomes necessary. Dangerous perhaps, but necessary.

But here enters the paradox of property rights. Government is necessary to protect property rights and enforce contracts. But the reality of real-world government creates the need to protect property rights *from* the government. That is certainly North's position. In this vein, he places a great deal of emphasis on the role of an independent judiciary. None of this is unique to North. It is pervasive. But buried in the need of government to protect property rights, the need to protect property rights from government and the desire to see that protection in the courts are lessons about the reality of property rights, the meaning or at least the dynamics of culture and the realities of governance especially as numbers and complexity increase. Analyzing all these essential issues requires an appreciation for the role of the behavior of governance mechanisms (institutional behavior in my terms), the tough choice between these always imperfect governance mechanisms (institutional choice in my terms) and the central place of the dynamics of participation.

We can see all these themes at play in the US law on property rights and, in particular, in the jurisprudence of the US Supreme Court under the Takings (or Just Compensation) Clause of the US Constitution. The US courts are in theory the epitome of the independent judiciary that North finds so central and its Takings Clause jurisprudence is the epitome of US protection of constitutional property rights (rights against the government). But the picture of judicial protection of property rights against the government under the Takings Clause reveals some troubling features. Where the title to a piece of land is acquired by the government, it must pay just compensation. But where the government regulates the use of land and, therefore, creates major changes in its value, the extent of the requirement for just compensation is much more limited. Moreover, even this limited judicial protection against regulatory takings is recent.

It might be supposed that the protection against government usurpation through regulation is unimportant because the threat of this usurpation is limited. But that would be wrong. In the US, land use regulation is pervasive. Zoning, especially local zoning, controls the use of most of the land subject to serious development in the US. Zoning impacts a wide range of social concerns including allocative efficiency, protecting the environment, preserving liberty, providing affordable housing and reducing income and racial segregation. Those adversely affected by zoning often turn to constitutions and, therefore, to courts for relief from political process malfunctions.⁶

Like all regulation, zoning constitutes both an attempt to protect property rights and a threat to property rights. Where markets do not reflect the adverse external effects of development on existing homeowners, the political process through regulation provides a vehicle to do so. But in the process of vindicating effects unrepresented in the market, the political process can create its own external (unrepresented) costs. Homeowners majorities may seek (and in fact do seek) to impose restrictions on new development that make new housing less dense and more expensive than their own housing and impose losses on others that significantly exceed the amount that these homeowner majorities would

⁶ See Komesar, *Law's Limits*, Part II.

be willing to bear themselves. Regulation via the political process allows these politically active homeowners to shift costs to others.

US courts have responded to political malfunction in local zoning in various ways. But, and this is the point I intend to generalize, the same factors that produce the increasing demand or need for judicial review in protection of property rights tend to increase the costs of providing this judicial review and, therefore, create a drag on its supply.

Both the importance and difficulty of property rights protection are evident in the highly publicized attempts of the US Supreme Court to increase protection of property rights. These decisions have been heralded as the foundation for a new era of property rights protection and decried as an immense threat to land use planning. But the gap between the rhetoric about these cases and the weak rights they actually deliver provides valuable lessons about the determinants and limits of property rights. The principal case on regulatory takings is *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992). In 1986, David Lucas purchased two seaside lots near Charleston, South Carolina. In 1988, South Carolina, reacting to problems of beach erosion, passed the Beachfront Management Act which had the effect of barring construction on Lucas' two parcels. Lucas sued arguing that the government could not impose restrictions without paying people like him compensation especially where the restriction prohibited all commercially viable development. The Supreme Court of the United States agreed.

The power of the property rights protection provided by the *Lucas* case depends on how broadly the courts define the notion of total deprivation or total takings. The language of Justice Scalia's majority opinion portends a serious expansion in the regulatory takings doctrine— in the extreme, making every regulation a takings. Such an expansion could provide an antidote to over-regulation by forcing wayward zoning authorities (and local homeowner majorities) to pay for and, therefore, to internalize these adverse impacts. Although protection against governmental excesses under the Takings Clause is usually seen as a “conservative” position, this perception, like many ideological generalizations, misses much. The impacts of excessive land use regulation via local zoning have far reaching impacts on the availability of housing, racial and class integration and public education. It is often the most disadvantaged that suffer the consequences. Thus, judicial protection against such excesses could have crucial impacts on equity (both horizontal and vertical) as well as efficiency and society could benefit greatly if a device existed that would eliminate over-zoning.

But there is a familiar problem. The same factors that produce excesses in the political process make it increasingly difficult to control them— at least by judicial action. In other words, where property rights against the government are most needed, they are the most difficult to provide.

The *Lucas* doctrine shows these strains when it comes to implementing its protections. First, for fairly obvious reasons, the Supreme Court allowed for a necessary exception to its categorical declaration that all “total takings” require just compensation. No property owner can recover if the use they claim to have lost would have constituted a common law nuisance and, therefore, violate the property rights of others. Although the exception makes conceptual sense, it creates problems in execution. In particular, who will decide whether such a nuisance exists? US common law courts (in reality, common law and constitutional law courts in the US are one and the same) have shied away from extending nuisance litigation to encompass situations involving large numbers and complexity. In the famous *Boomer* case (about which I have written endlessly), the court suggests that these sorts of issues should be decided by the political process. Now the *Lucas* Court, reacting to political malfunction in land use decision-making, suggests shifting the decision away from the political process and back to the courts. But, alas, the problems for the adjudicative process recognized in *Boomer* still exist.

Consider just the land use issue in *Lucas* itself. Beach erosion is a complex problem. Changing science and technology mean that activity once considered innocent might now be considered harmful and, therefore, a nuisance. Local zoning authorities can cloak their arguments against compensation in

the credibility of this science and technology. The increasing complexity makes it difficult for courts to separate true from false claims. Contrary to the impression in the *Lucas* case, common law nuisance is not well-defined and its ambiguities can be exploited by local homeowner majorities doggedly determined to preserve their power. In the end, courts will face the very land use decisions that frightened the *Boomer* court— and on a much larger scale.

Even where courts determine that the regulation is restricting activity that is not a nuisance, they must decide whether the regulation imposes a loss and assess the extent of that loss. Lurking here is the confounding issue of reciprocity of advantage. In an effort to maximize the value of their land for sale, private housing developers commonly impose restrictions on all or most of their parcels because they believe that purchasers will find the restriction of their parcel more than justified by the protections provided by restrictions on the other parcels in the planned community. In other words, the benefits of the reciprocal restrictions on others more than compensates for the costs of the restrictions on the particular property.

Public land use authorities, in theory, are providing the same benefits as the private land use arrangements on a grander scale where collective action problems and high transaction costs preclude private land use planning. In theory, the government is fulfilling its obligation to protect property rights. These land use authorities will argue that no compensation is due because the detriments of the restriction imposed on the landowner are compensated by the benefits to that landowner of the restrictions on others. Public land use restrictions may not always or even usually achieve sufficient positive reciprocity. But, and this is the crucial point, it will be very difficult (in reality, impossible on a pervasive level) for courts to determine where, when and to what extent these reciprocal benefits exist.

Lucas presents an easy case because David Lucas was completely barred from building and, therefore, unlikely to gain any reciprocal benefits. If he had been allowed to build even with severe restrictions, the question of reciprocity would have become much more difficult. This difficulty is avoided so long as *Lucas* remains narrowly confined to cases involving complete prohibitions on development. Such an interpretation of *Lucas*, however, would hardly make it the foundation of a significant bulwark of property rights against the government. Quite severe restrictions and quite serious losses will go uncompensated and unexamined by the courts and the conversion of private property to public property will go on without any external control. In order to offer more than a symbolic gesture, however, the Court would need to expand property rights protection beyond the rare instance of a complete refusal of development. But it is precisely this expansion that will trigger all the difficulties for the courts.⁷

There are lessons here about culture, courts and the reality of rights—property and other. The most obvious lessons concern the role of the independent judiciary. Judicial protection of property rights against the government is constrained by the character of the adjudicative process and different aspects of property will receive different judicial protection and, paradoxically, it is quite likely that the aspects most in need of judicial protection will receive the least protection. The US adjudicative process is tiny compared to the mass of local, state and federal political processes whose determinations would have to be reviewed. The most serious forms of political malfunction create the greatest need for judicial intervention. But they often also create the most difficulty for judicial intervention.

⁷ As a matter of description, *Lucas* appears narrow and weak. It looks as though a narrow definition of “total takings” is being used to restrict the number of land use cases the court sees. Such pronouncements are never definitive, however, and recent changes on the Supreme Court have given the *Tahoe* dissenters new allies. But any expansion of *Lucas* will be controlled by systemic factors. If the total takings construct is expanded to bring in partial takings, as some commentators hope, the courts will buy a task easily beyond their capability and retreat is inevitable.

The story of US property rights both supports and undercuts North's analysis. North's reliance on the role of independent judiciaries as the centre of the evolution of property rights seems poorly placed. But if the courts don't hold together US property protection then what does? What constrains the US political processes? The answer must be that these processes constrain themselves or more exactly that the populace as actors in the political processes provide the constraints that make the US different from comparable political processes in Latin America. Why is the US different? Culture and history? If so, it is a strange and malleable picture of culture. Americans may react quite strongly to obvious government usurpation even if compensation is paid. (See the negative popular reaction to the *Kelo* case where the Supreme Court upheld the ability of government to take homes—with compensation-- for an urban renewal project. This reaction was strong enough to impede such attempts by the political process.) But Americans also make generous use of regulation in the form of local zoning to stop generally normal uses by their neighbors just to lower their own property taxes. Moreover, these cavalier uses of regulation occur at the local level where one would expect the ties of culture to be the strongest. These regulations may be justified (although in many instances, there must be doubt), but they hardly represent a very clear allegiance to strong property rights against the government. Yes, the US is not Zimbabwe or Venezuela or Italy or even England. We can ascribe these differences to culture or history so long as we realize that we have largely just said that the US is different because it is different.

This tautology can be broken down by realizing that in fact property rights protection within the US varies across the attributes of property we are examining. These attributes, in turn, correlate with the dynamics of participation. Therefore, although property rights operating through transaction costs and more broadly participation costs may impact the dynamics of participation, the opposite is also true: the dynamics of participation determine the meaning and functioning of property rights. Judicial protection against the simple confiscation of land or other property will be easier than protection against indirect confiscation by regulation.⁸ But it will also be less necessary because the political process will be less likely to misbehave when the actions of officials or high stakes players is more evident to the public.⁹ The real picture of property rights in any system and, therefore, the first step in comparing systems is to realize that what looks like culture and historical path-dependence may be variations in the dynamics of participation and, therefore, endogenous to the analytical framework.

Depending on the area of interest, unexplained residual will remain. We can call this residual culture and history or belief systems or ideology or Ralph or Sophie. But it is our job as analysts to reduce the unexplained and this can be better done if we recognize that the form and variation of the impact of "culture and history" will vary at any point in time and over time and that the source of this variation lies in the dynamics of participation. That is, the influence of customs, norms and historical paths will vary in degree and duration depending on the relevant costs and distribution of stakes (benefits) of change in these customs, norms and paths. The unexplained residual may vary across subject matter and time, but we have an idea of the factors that explain this variation.

The reality is that informal rules like formal rules are a function of the dynamics of participation. It may be that informal rules are, as a whole, more durable than formal roles and so we are more comfortable to speak of path dependence in this context. But there are certainly many exceptions to this generalization about durability. The text of the US Constitution is less likely to change than many customs and norms. We may not know where a given custom came from, but we can begin to understand the likelihood that it will stay in effect and which members of society and which societies

⁸ Compare the popular reaction to *Lucas* (most nonlawyers knew nothing about this regulatory takings case) to that accorded *Kelo* (a case about the power of the government to take land by eminent domain which received wide popular attention).

⁹ See Dan Cole's comparison of just compensation in the US (through the courts) and in England (through the political process). *Political Institutions, Judicial Review, and Private Property: A Comparative Institutional Analysis*, 15 SUPREME COURT LAW REVIEW 141 (2007).

will be the most likely to abandon it and, therefore, reap the advantages (and disadvantages) of change. These are fundamental governance issues.

Property rights are central to economic analysis. But viewed carefully, the story of property rights is filled with irony. At low numbers and complexity, private property rights are easy to establish but, as works by Eleanor Ostrom and by Robert Ellickson show, at low numbers and complexity, it does not matter much what system of property we have. As numbers and complexity increase, it does matter. But now it is more difficult to choose a property rights system and to design the associated mechanisms for enforcement. Political processes become both more attractive and more dangerous. Judicial control of the excesses of government becomes both more desirable and more difficult. For large and complex societies, the path dependence associated with different systems of government and property rights described by North seems increasingly important, but also increasingly difficult to define and analyze. That may be saying little more than that the residual of the unexplained grows as the setting becomes more complicated.

History and culture cannot be ignored. Where an analyst senses their presence, they should be included. But if they are treated as exogenous, they will as an analytically awkward binary parameter—there or not there. Piling on considerations which do not integrate and are not comparable may well detract rather than add to the analytical power of an approach. In order to make these considerations more than ill-defined residuals, it is necessary to understand their dimensions. This I have tried to do by using the dynamics of participation.

IV. Movin' On Up: Lessons for and from Global Governance

In this section, I turn to the vast and ill-defined world of global governance – both as it exists and might exist. I will begin with a look at various themes already raised as they play out in the global governance context. I hope to come closer to understanding the interaction between various governance mechanisms and substantive issues such as trade and the environment by seeing the parallels between market and non-market decision-making. Let's begin where we left off in the last section and consider the implication of the interaction between formal and informal decision-making and then move on to the role of increasing numbers and complexity in global governance.

Formal rule change or decision maker change can run afoul of informal rules or decision making and, conversely, formal rule change or decision maker change can foul up long-established informal rules and decision making. The first proposition is found throughout the work of Douglass North and many others. It warns against believing that the imposition of law and public policy by fiat will have straightforward effects. Instead, any such changes in the formal rules of the game will be distorted or even completely destroyed by the informal rules of the game. I expect that the attempt to control the evils of alcohol through Prohibition in the form of the 19th Amendment to the US Constitution would be an example. The second proposition can be found throughout the work of Eleanor Ostrom¹⁰ and reflects the downside of substituting higher levels of government for established smaller decision-making units— in particular, local communities. Modes of governance and the information and understanding necessary to understand how they work accrues over long periods and is in turn reflected in traditional local practices. When these are swept away, higher costs of participation make even well-meant governance reforms perverse.¹¹

¹⁰ See generally Ostrom, Elinor, *Governing the Commons: The Evolution of Institutions for Collective Action*, Cambridge University Press 1990.

¹¹ This is a theme picked up to some degree in the reluctance to substitute global government for national decision-making in the Komesar-Maduro, Chapter one of this book, although we have made the dynamics of information and, therefore, the dynamics of participation more explicit

These effects create a drag on reform by reducing its effectiveness and raising its costs. But these realizations hardly foreclose reform— even sweeping reform. When we consider global governance, we are dealing with decision-making at high levels of numbers and complexity and, therefore, always with highly imperfect decision-making. As Ostrom and presumably many others have shown, local communities have obvious attractions inherent in the lower costs of political participation. But when we are examining decision-making about issues that spillover not only between small communities but also among nations, small communities are inherently problematic because it is not clear how those outside the community will participate.¹² We can speak of the nesting of decision makers— an image popular with Ostrom and again reflected in the Komesar-Maduro in our hopes for legal pluralism. But like all such seemingly attractive images the reality lies in the details and in particular in the dynamics of participation. Moreover, we are asking about institutional choice at the level of deciding who decides the level of decision-making.

These challenges make it difficult to tailor formal rule change or decision maker change to avoid the interactions with informal rules or decision makers that produced the two propositions that began this section. The most difficult issues lie in defining these background conditions in an operationally useful way and in establishing the rate or propensity to change (the durability) of these conditions— the issues raised in the last section. All too often, as we showed in Komesar-Maduro, these problems are ignored by assuming that appropriate governance mechanisms are simply available and smoothly running. In our view, that sort of thinking simply assumes away the most important and challenging aspects of global governance.

Almost by definition global governance means increase in numbers and complexity. But of course it is also a response to increasing numbers and complexity. Where the number of people impacted is small, the chances are greater that existing jurisdictions already reflect broad-based participation. Where the complexity and therefore the participation costs are low, working out minor extra-jurisdictional impacts through informal bilateral negotiation seems likely. These conditions operate both to decrease the costs of negotiations between communities and to raise the possibility that the needs for these negotiations will be felt by and represented in the negotiating communities through their internal decision-making processes.

As numbers and complexity increase, spillover across borders creates a need and sometimes a demand for a higher level of government. The outlandish costs of war have created long standing attempts to reduce its chances or duration through international organizations like the United Nations. These are entities controlled by nations and, as the structure of the Security Council shows, mainly by the larger and more militarily powerful nations. The limits on the effectiveness of such organizations are the product of their decision-making rules which reflect the unwillingness of nations to cede decision-making power. This unwillingness in turn reflects the dynamics of participation within these nations and in particular the complexity of wartime decision-making and the fact that those most aware of the realities of the war in question often do not bear its costs.

The same general observations albeit with differing results apply to more narrowly defined global decision makers such as the WTO. Here we can more clearly see the interaction between the dynamics of participation within the nation and the existence and behavior of the international decision-making process. The internal dynamics of participation of each nation determines its willingness to support and join these organizations and its behavior in these forums. But the existence of the organizations also impacts the dynamics of participation within the nation. Conflict with these global decision-making processes creates domestic political issues and the sort of media reaction that can alter majoritarian dormancy.

¹² Small communities also have a greater chance for majoritarian bias. This is an example in which greater participation is not an advantage even in the representation of local interests. See Komesar, *Imperfect Alternatives*, chapter 3.

Running in the other direction, however, is the additional layer of complexity and costs of participation created by yet another and more remote layer of decision-making. It will be even more likely that only high per capita stakes players will participate. An important issue here, and one raised by Komesar-Maduro, is the implication of making these global decision makers “directly responsible to the people.” These implications are tied to the issue of which “people” have influence in this new political process and this again is tied to the dynamics of participation. That people have the right to vote for international public officials and to be heard in various international processes does not mean that they will vote in elections or participate in hearings. If the officials of the WTO stood for election on international or even national level, the chances would be that only a small percentage of the relevant population would have the incentive to participate in any meaningful sense. The combination of high costs of participation inherent in the complexity of international issues and decision-making processes and of decreasing per capita stakes works against any real participation. It may be that in some settings even this limited participation is better than the alternative, but that is the central issue and it cannot be determined by rhetorical imagery.

As I noted earlier, there is always a potential cost for moving up due to the negative impacts on existing decision-making structures. Slowly, over time, some problems of collective decision-making can be swept away by moving to higher and more complex levels of decision-making. This is certainly the lesson of Ostrom’s work and of various economic historians who have charted the evolution of trade external to governmental protections.

It is difficult to cabin an attempt at global governance so that this successful small community decision-making is preserved. This occurs for several reasons. There is always the potential for well-intentioned meddling by the new higher level governance structure perhaps aggravated by the dynamics of bureaucratic growth. But, more importantly, there is also the use of the new structure by players in the small community or by interested outsiders. New structures provide new forums for traditional players and opportunities for new players. Here the dynamics of participation will yield results often unforeseen by reformers. As traditional informal structures are bypassed, the costs of participation will rise for small stakes players who rely on their local knowledge to understand and participate. These factors make it difficult to know whether the results of increased size are good or bad. It depends in part of course on the quality of the decision-making in the original smaller scale decision-making process. But it also depends on the real workings of the new process and who will be represented in it. Local decision-making even if attractive in its particular context can yield unattractive impacts on those who are not community members. Compare the story of local zoning discussed earlier to the Ostrom stories.

This in turn focuses us on the real engines of growth for new processes. The evolution of the European Union is instructive. It would appear that the original structure of the European Union was designed by the member states to control the power of this new entity. The EU grew in good part because of the actions of tertiary decision makers like the European Court of Justice.

The institutional choice issue here is common. An international organ is formed by a compact between existing nations. A charter or constitution is established and the political process within the new entity is controlled by devices like unanimity (the veto). But if a new governance structure is to be effective even in a limited way, the substantive rules included in the negotiated charter must be implemented and interpreted to meet the inevitable unforeseen consequence. Courts and administrative agencies do this job and that is the engine of growth for the new entity. This growth is often the product of the actions by the same actors that dominate national decision-making. Although the actors are roughly the same, the new institutional alternative provides another avenue for influence. Whether this new avenue and the actions it engenders are good for society (however society and the good are defined) depends again of the dynamics of participation.

Overshadowing the process of global governance is the behavior of the global market. The interaction between the market and the various other national and global decision-makers is an

example of the broader issues of institutional interaction. The impetus for global governance or at least for changes in national decision-making lies to some extent in the pressures of the global market. Change your internal governance of regulation or taxation or be left behind. But there are also impacts that run the other way. The enforcement of property rights at the global level is the most obvious example of government decision-making that impacts market activity. When the WTO or the conventions of the enforcement on intellectual property expand global market activity, there are tradeoffs. Large scale decision-making whether it is market or political decision-making involves increased transaction or participation costs produced by increased numbers and complexity. These increased costs will impact the dynamics of participation— most commonly by expanding the influence of the high stakes players. This aspect of global governance is uncomfortable.

There are central parallels between the role of the dynamics of participation in the market as well as in non-market contexts. When increased numbers and complexity increase participation costs, it skews the representation of interests in all decision-making processes. When economists speak about externalities or public goods problems, they are really telling a story about problems in the dynamics of participation in the market that parallels the stories we have already seen for non-market governance mechanisms. Trade issues including minimizing the impacts of protectionism have traditionally been part of the action of markets. If political processes won't lower protectionist barriers, market forces will likely make them pay. But large scale pollution has not had any such reaction in the market and seems destined for limited attention by international political processes.

There are analytical insights to be gathered from seeing the parallel nature of institutional behavior in market and non-market decision-making. These parallels and the central place of the dynamics of participation and the dynamics of information can be seen in a brief examination of two activities, advertising and propaganda, important in the functioning of the market and of the political process, respectively. These two activities are instrumental in rent-seeking in their respective institutions. Where the skewed distribution (high per capita stakes on one side of an issue and low per capita stakes on the other) provides an advantage for a concentrated, higher stakes minority over a more dispersed majority, this advantage is often used to obtain monopoly positions for producers by excluding competition through tariffs or unnecessary regulation. These rent-seeking activities have been strongly criticized not only for their adverse effects on competition, but also for their waste of resources on unproductive activity.

But there is a form of market activity that has similar attributes. Various commentators have pointed out that advertising differentiates seemingly identical products and, therefore, produces monopoly rents and decreases resource allocation efficiency.¹³ The classic example is the differentiation of various brands of chemically identical medicine such as aspirin. As with political rent-seeking, these efficiency losses due to monopoly may well be dwarfed by the efficiency losses caused by the waste of resources expended on the advertising used to create these monopoly rents. Thus, although they usually appear in different journals and come from the pens of different analysts, there are parallels between rent-seeking in the market process (often achieved by advertising) and rent-seeking in the political process (often achieved by propaganda and lobbying).¹⁴

The parallel even extends to the connection between market rent-seeking and the skewed distribution. This connection is, in turn, tied to the connection between the skewed distribution and the dynamics of informing or, more exactly, the dynamics of misinforming. In the political process, the

¹³ For good summaries of the literature and the various positions on the role of advertising in the market, see William Comanor and Thomas Wilson, *The Effect of Advertising on Competition: A Survey*, 17 J Econ Literature 453-76 (1979) and Robert Wills, *Do Advertising-Induced Price Differences among Brands Explain Profit Differences among Products?* in Robert Wills, Julie Caswell, and John Culbertson, eds, *Issues after a Century of Federal Competition Policy* at 361 (1987).

¹⁴ The rent-seeking literature is summarized in James Buchanan, Robert Tollison, and Gordon Tullock, *Toward a Theory of the Rent-Seeking Society* (1980).

dispersed low per capita majority may not even have the incentives to recognize that they are harmed by a government action or even that such government action exists, and, even if they recognize the issue, they may be misled by the concentrated minority into perverse support. The concentrated minority can obtain government action favorable to them without opposition. To the extent that the dynamics of information leave the majority completely unaware of the issue, the mechanics of rent-seeking in the market differ from those of political rent-seeking. Producers seeking to convince consumers that their product is different cannot afford to be ignored. Advertising (misleading or not) requires some level of attention.

These similarities and differences can be traced out in three rough categories of interaction between per capita stakes and the possibility of informing or misinforming. Where consumers or voters have relatively high per capita stakes, it is harder to fool them because the higher stakes justify a greater willingness to obtain alternative sources of information or to obtain the sophistication necessary to critically examine any distorted information provided. On the other hand, at the very lowest levels of per capita impact, consumers or voters do not have sufficient interest to even recognize the problem or to be interested in attempting to assimilate any information (false or otherwise). They can neither be led nor misled. This complete failure of recognition produces the dormant majority in politics and unrealized or unrealizable transactions (the dormant consumers) in the market. Both these failures of recognition are problematic, but only the first leads to a potential for economic rents and rent-seeking. The second leaves a potential need unrealized in the market.¹⁵

Lying somewhere between the awareness of high-stakes consumers and voters and the unawareness of low-stakes consumers and voters is a range of mid-stakes consumers and voters capable of being misled. In the political process, we get the possibility of misled majorities convinced to support legislation that is, in fact, detrimental to them. In the market process, we get misled consumers convinced to pay more for a product that is, in fact, no better than a less expensive albeit less advertised product or even to consume a product that is detrimental to them. It would seem to be these consumers and voters in the mid-range who have enough interest to listen but not enough interest to discern.

Whether consumers or voters are misled will, of course, be dictated by cost conditions as well as the distribution of stakes. Both political issues and market products and services vary in complexity and, therefore, in the amount of information or sophistication necessary to understand them. Variation in endowed positions (information already commonly possessed) and the availability of cheap information, such as media coverage, also affect the extent of understanding. These factors can even produce differential understanding about different aspects of the same issue. The two sides of a given substantive issue, whether about a product or a political position, can differ significantly in ease of recognition or understanding. Basic cultural associations or symbols can be important. It appears, for example, that the flag works well in either advertising or propaganda — sometimes overcoming otherwise meritorious but less accessible counter-positions.

The interaction between the stakes and costs of information produces the overall pattern of understanding (and misunderstanding). The degree to which a symbol will be effective in convincing (or misleading) any population of consumers or voters will depend upon the per capita stakes of the relevant population and, therefore, their tendency to either critically examine or largely ignore advertising or propaganda that employs the symbol. This analysis gives us some rough indication of when there will be no reaction from consumers or voters, when consumers or voters will be misled into acting contrary to their interests, and when there will be a consumer or voter reaction that represents their basic interests. To paraphrase Abraham Lincoln, it helps us determine which people can be fooled all of the time, which can be fooled some of the time, and perhaps why they all cannot be fooled all of the time.

¹⁵ Elsewhere I have discussed the market for safety in these terms. See *Imperfect Alternatives*, chapter 6.

There may be some skepticism, especially among those who attack rent-seeking in the political process, that advertising is also insidious and that, therefore, there is a parallel universe of serious market rent-seeking. They might point out, quite correctly, that a significant portion of advertising outlays are beneficial in the sense that they increase rather than decrease competition. That does not, however, differentiate advertising from propaganda and lobbying. The political process depends on the activities of constituents and constituent interest groups in providing the myriad varieties of information necessary to function. There is little doubt that a good part of the information provided is one-sided and intended to enhance the position of the provider. But that is equally true for market advertising. As in the market, competition in providing information in the political process and the need to maintain credibility with recipients can, under the correct conditions, produce public virtue from private vice.

Contrary to the impression created in the rent-seeking literature, propaganda and lobbying activities provide important social benefits in a world in which information in general and information about constituent desires in particular is difficult to come by. This view, which would be unobjectionable in the context of advertising and the market, seems less well understood (or less clearly articulated) in the rent-seeking literature. If we were governed by perfectly informed, benevolent philosopher-kings, expensive, one-sided and potentially distortive information would be wasteful. Although propaganda and lobbying can be misleading and one-sided, a real-world political process cut off from this information — even if such isolation could be achieved — would be too arid, removed, and dangerous to be a viable alternative.

When we turn to the subject of solutions for the problems of rent-seeking in the market and political process, we are confronted with familiar nemeses — the skewed distribution and the parallel movement of institutional alternatives. As we have seen, problems with propaganda and lobbying in the political process and with advertising in the market show up most dramatically when the distribution of stakes is skewed. Without the presence of a concentrated interest to produce them, neither propaganda and lobbying nor advertising would be likely. Without the presence of a dispersed interest, neither activity would be nearly as likely to be misleading and, therefore, socially detrimental. Advertising or propaganda work to mislead the general public (consumers or voters) where the low stakes of consumers or voters leave them with insufficient incentives to obtain the information necessary to check the validity of the propaganda or advertising. Lobbying, where the information is directed to political officials, is particularly distortive where only one side of the issue is presented — a result far more likely with the skewed distribution.

The presence of the skewed distribution, however, also makes it difficult to correct or remove the evils of either advertising or propaganda/ lobbying. Without such plausible reforms, both market and political rent-seeking are only academic observations without any relevance to law and public policy. One reform would be to prohibit all advertising or all propaganda and lobbying. Such an approach, if successful, could help eliminate the monopolies created by and the wasted resources expended on either market or political rent-seeking. Eliminating all advertising and all propaganda and lobbying, even if technically possible, however, is likely to be severely socially detrimental. Advertising and propaganda exist because of the great need for information in the market and in the political process.

More sensitive strategies could be focused on eliminating those forms of advertising or propaganda most likely to have derogatory effects. Only harmful advertising, propaganda, and lobbying would be eliminated. Such sifting of information would, however, require a sifting process, usually a governmental agency. Since we are in the presence of the skewed distribution, such a strategy to remove harmful advertising would run the risk of increasing harmful political rent-seeking.

Any attempts to control rent-seeking within the political process must turn either to the political process itself, to a super-political process in the form of a constitutional convention, or, in the U.S. system, to the courts as constitutional interpreters. Controlling the flow of propaganda or political activity by the political process runs the risk that, rather than increasing efficiency (or any other social

goal), making information less accessible may increase the biases in the political process, thereby decreasing efficiency and a wide variety of other social goods. Much of the story of First Amendment constitutional law concerns the deep and traditional distrust of governmental activities that attempt to control the flow of information either in the political or in the market process.¹⁶

The issue here is not whether speech, political or commercial, can be misleading, inflammatory, or otherwise harmful to society, but rather whether the imperfect political process, if relied upon to curb this evil, will create even greater evil. The same question may then be asked about the imperfect institution put in place in reaction to the perceived excesses of censorship by the political process — usually the courts. The courts have their own institutional limitations. I have explored these limitations in detail elsewhere. For present purposes, it is enough to note that judicial control of false advertising or false propaganda is likely to be a very limited strategy.

The story of advertising and propaganda and of their evil subsets, market and political rent-seeking, shows us that, especially in the context of the skewed distribution, the two most important institutions — the political process and the market — have a desperate and continuous need for information and that the filling of this need creates serious distortions in these institutions. The story also shows us the difficulty of establishing valid, sensible, or trustworthy strategies to correct these problems because lying behind each strategy is the same skewed distribution and, therefore, similar difficult institutional questions for the reform. Addressing these tasks makes comparative institutional analysis both more difficult and more relevant.

Of course all these difficulties can be avoided by assuming an unbiased, well-functioning governance mechanism. This is the most common side-step in the study of law and public policy in general and the consideration of global governance in particular. A popular choice is the contemplative public servant—a figure often resembling the analyst who proposes the move. This imagery has particular attraction in global governance.

As I have said, global governance means an increase in numbers and complexity. This increase in size is likely to be accompanied by an increasing amount of dormancy or non-activity by a significant part of the populace. Increased size may mean that societal benefits increase, but that doesn't mean that per capita benefits increase—or increase enough to meet the increasing costs of participation stoked by the increasing costs of information. Per capita stakes for some actors will increase more than for others and the resulting pattern of participation will determine which viewpoints prevail.

To varying degrees and contexts, commentators have supposed that as size increases and participation decreases, the result will be better decision-making. The image here is of the public-interested government official now left alone to seek the good. This is a position taken by some scholars of the US Constitution who saw the Federalist conception as one in which distance from the action of factions would produce better decision-making. As I have argued elsewhere, this somewhat romantic notion is unlikely to occur and this reality was not lost on the Framers of the Constitution who understood that the choice was not between a biased political process and independent and unbiased public servant, but rather the choice between biases with the Federalists willing to risk more minoritarian bias as the price for less majoritarian bias. Their opponents, the Anti-Federalists clearly explicated the implication of increased minoritarian bias and based their opposition to the Constitution on their greater fear of this political malfunction.¹⁷

¹⁶ That is the interpretation given by the U.S. Supreme Court to Virginia's bar on pharmaceutical price advertising by pharmacies in *Virginia Pharmacy Bd. v Virginia Consumer Council*, 425 US 748 (1976), the case that introduced judicial protection of commercial speech.

¹⁷ See Komesar, *Imperfect Alternatives*, chapter 6 .

This sort of image has entered the global governance literature in many ways. Perhaps the best known and most sophisticated is the work of Anne Marie Slaughter.¹⁸ Slaughter depicts global governance as the works of members of the bureaucracies of various nations working together informally to solve global problems. The decision-making process she describes is subtle and operates through informal networks. The image is seductive, but what does it really imply when we consider the dynamics of participation? It may be that in the short-run, these officials will operate in political silence without the pressures of interest groups. But even this is troubling. We are speaking about decision-making at high numbers and complexity and, therefore, highly complex decisions. The work of interest groups has a bad odor, but they are the engines of information to the political process and their absence is likely to cost the political process dearly. Complex and contentious issues require more than technical expertise. There are trade-offs involved in every law and public policy decision that require some notion of the desires and needs of the populace. The choice even in the short-run is between unbiased (less biased) decision-making by public-interested officials or decision-making by a more biased, but more robust political process. The correct choice is not obvious and it will vary with the issue to be decided. This is very much the same analysis I have employed in understanding the role of the institutional choice between the political process and the courts.

But the Slaughter image of the insulated public official won't hold for long. There are high stakes interests that have the incentive to understand the decision-making and identify where decisions important to them are being made. These interests will lobby these officials or the officials that control these officials and they will seek to remove those that are not sympathetic to their position. The complexity and subtlety of Slaughter's world will likely just aggravate the minoritarian bias we assumed would be present as we moved to the larger jurisdictions of global governance.

Within any given nation, there are a variety of mechanisms that ameliorate minoritarian bias by increasing general participation. Most of these operate by lowering the costs of information. The press or other news organizations are paramount and help to understand the central place of these devices in working democracies. So too are political parties and other political associations. There is also little doubt that the internet has provided far cheaper and quicker access to information. Social media via the internet has limited the ability of government to control the dissemination of information and has allowed the organization of influential demonstrations. Wherever there is the potential for information, there is the potential for dis-information. We saw this at play in the previous discussion of rent seeking and advertising. But there is little doubt the continuing growth of the internet and the connections it produces has and will continue to increase participation in both the political process and the market.

As a general matter, it behooves us to watch for parallels between market and non-market decision-making as various variables change. Thus, the market has rapidly expanded as the internet has allowed both the increase in information and the increased possibility of secure and instantaneous transfers. The adjudicative process and political process can complement this or interfere with it within the workings of devices that attempt to control fraud and guarantee quality. As always, these are real problems whose solution can only increase trust in and, therefore, use of the market. At the same time, the devices involved in these solutions can be used by competitors to limit productive activities. This sort of rent seeking is likely to be controlled if at all by competitive forces in the political process. That is, to the extent that the interests in question have high per capita stakes components on both sides, the regulatory process has some chance for control without the need for participation by the highly dispersed (low per capita stakes) consumers. Notice that this is not likely to be the case where the regulation in question has primarily a skewed distribution of stakes—high per capita stakes on one side and low per capita stakes on the other. This is likely to be the case for many environmental issues.

What happens to this familiar story when we move to global governance? There is always the story of increased minoritarian bias. But this is still the context for the solution of trade problems in good

¹⁸ Slaughter, A.-M. 2004. *A New World Order: Government Networks and the Disaggregated State*. Princeton: Princeton University Press

part because local advantages are reduced. There is, however, the possibility that some minoritarian bias problems at the national level might actually decrease if the global level finds countervailing high per capita stakes constituencies. This may occur where the negative impact of environmental effects fall on nations or industries within nations that are now more directly involved in decision-making. This can also occur if there are high per capita stakes players who can profit from the production of products with less environmental impact. It is not clear whether these situations are more realized on the global level or not.

Much of what I have just discussed depends on seeking the existence of high per capita stakes players somewhere in the fabric of decision-making processes (new or old). It is worth spelling out instances in which this has sometimes occurred so that we may be aware of them as we see global governance proposals appear. There is the instance of the shifted distribution associated with the awarding of damages by courts or administrative agencies. In the safety context, this can sometimes mean that low per capita stakes potential victims where there is a small chance of significant injury (for example, the consumers of risky products) can be protected by damage actions which are brought by those few who are actually injured and have now become high per capita stakes players. This sort of mechanism is limited by several factors, but still can show up in the fabric of regimes meant to deal with other sorts of injuries. There also might be more leeway politically for subsidies given for increasing innovation in the prevention of various social ills than for parallel regulation. An important by-product of the subsidy strategy is the creation of high per capita stakes players to protect them. There is always the danger of stimulating rent seeking by the presence of any program that promises subsidies. No solutions come without such dangers. There is also the possibility that greater national prosperity will raise average incomes and perhaps with it average per capita stakes across the board. The incentive to participate may rise on average and a greater part of the population will be active on any issue and, in particular on issues that directly involve the standard of living. If this effect exists, it is likely to be subtle and picked up only in mass statistics. There is also the real possibility of widespread decrease in the costs of participation inherent in the digital age.

Competition is an important element in both market and non-market decision-making. Market actors, like political process actors, are seeking advantage. Rent seeking is a phenomenon in all institutional settings. Trying to convince low per capita stakes consumers that they should pay extra for your product is the business of advertising. And there are monopoly profits to be made in this manipulation of the dynamics of information and its impact on the dynamics of market participation. The cure for market rent seeking is competition. If there are monopoly profits to be made, it is attractive to competitors. Advertising may counter other advertising and it may profit entities to promote the existence of similarity and lower price—the world of generics. We can enter the role of the political process here by pointing out that the preservation of monopoly profits in the face of competition is sometimes achieved through government action in the form of regulation of the low costs substitutes or government regulation of advertising.

I have also suggested looking for instances in which competition cures political malfunction. Clearly vast amounts are spent contesting elections in the US. Much of this is spent on disseminating information (or misinformation). There is also a considerable amount of competition between interests in the legislatures and in the administrative agencies. There are common references to competition and complementarity within non-market processes in the form of various forms of pluralism—political and legal. But there are important differences between market and political process competition and wishful thinking won't cure problems in either.

In the context of global governance, we are contemplating massive shifts in numbers and complexity and with them the potential for significant deviation between the outcomes hoped for and the outcomes achieved. The existence of significant gaps between the ideal and the actual is not a sign that the actual is not the optimal or, in turn, that reforms are impossible. But it does warn us against the illusion of smooth running decision-making.

Conclusion

The core of global governance is governance and the core of governance is the behavior of alternative governance mechanisms and the choice among them. There are presumably many ways to get at these subjects. My way is to view governance mechanisms as massive bottom-up decision-making processes. Here the central behavioral construct is participation and understanding this behavior lies in the dynamics of participation which is dependent on the costs of participation (dominated by the costs of information) and the benefits of participation constructed around the distribution of stakes. I have depicted the skewed distribution of stakes as a major source of problems in the functioning of decision-making processes (governance mechanisms).

You may have your own way of understanding the behavior of these alternative decision-making processes. But the one thing which is out of bounds in the consideration of governance in general and global governance in particular is the assumption that perfect or near perfect decision-making processes are available. Any such assumption like the assumption of frictionless systems makes the analysis at once easy and useless. This seems self-evident and yet it is violated continuously by analyses that operate solely in terms of arguments about goals and philosophies. Debates about liberty, equality, resource allocation efficiency, communitarianism and so forth cannot be decisive in determining the role of global governance because they ignore the central issue of governance. Identifying a goal tells us nothing about global governance or about law and public policy.

I have tried in this paper to set out a general strategy for the analysis of global governance. But only the efforts of those familiar with the particulars of each area and the existing and proposed governance mechanisms can judge whether this strategy is effective. The people at this workshop are certainly among my best bets.

Solving Domestic Environmental Regulatory Failures with Global Markets: A CIA-Based Analysis

Wendy Wagner*

Domestic lawyers in the U.S. avoid tackling the international dimensions of their specialty areas for good reason. International legal developments are so numerous and dynamic that they outpace the treatises that can be used to understand them. Just in the last few years, in fact, nearly a dozen books were published on international environmental law and five of these focused on comparisons between the EU and the US.¹ At the same time, domestic lawyers find themselves befuddled by the frameworks and conceptualizations developed by internationalists to make sense of the global scene. Yet without some analytical approach, it is impossible to understand international developments. One cannot simply compare the text of laws in the US and the EU to understand differences between the two governments, for example; one must also understand the details of implementation and enforcement. And even then, cultural and parliamentary differences make comparisons at all stages of governance treacherous. As one book title aptly notes, the study of global governance is sheer “chaos”.²

In this complicated world, functional methods for assessing and comparing institutional designs are vital, and this is where comparative institutional analysis comes in. Comparative institutional analysis (CIA) models the capabilities of various alternative institutions based on the institutions’ ability to engage the full range of affected participants through a simple participation-centered model and, in doing so, strips the entire institutional analysis to a few basic variables – the types of participants, their stakes, and the costs of information.³ Because they transcend any one institution, these variables allow for comparisons across institutions, even when those institutions vary between countries or involve hybrid institutions.⁴ As a tool, CIA can thus help identify and explain institutional divergences, both domestically and transnationally, and in some cases even identify the “best” choice among the imperfect institutional alternatives.

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¹ Over the last two years, at least five book-length treatments were been published on comparative environmental law between the U.S. and the EU. *See, e.g.*, MICHELLE EVERSON AND ELLEN VOS, EDs., UNCERTAIN RISKS REGULATED (2009); JOAKIM ZANDER, THE APPLICATION OF THE PRECAUTIONARY PRINCIPLE IN PRACTICE (2010); LINA SVEDIN, ADAM LUEDTKE, AND THAD HALL, RISK REGULATION IN THE EUROPEAN UNION AND THE UNITED STATES: CONTROLLING CHAOS (2010); JONATHAN B. WIENER, MICHAEL D. ROGERS, JAMES K. HAMMITT, AND PETER H. SAND, EDs., THE REALITY OF PRECAUTION: COMPARING RISK REGULATION IN THE UNITED STATES AND EUROPE (2011); SUSAN ROSE-ACKERMAN & PETER LINDSETH, EDs., COMPARATIVE ADMINISTRATIVE LAW (2011); DAVID VOGEL, THE POLITICS OF PRECAUTION: REGULATING HEALTH, SAFETY, AND ENVIRONMENTAL RISKS IN EUROPE AND THE UNITED STATES (2012). Even more books were published that probe some feature of global governance and environmental law. *See, e.g.*, AFSHIN AKHTARKHAVARI, GLOBAL GOVERNANCE OF THE ENVIRONMENT: ENVIRONMENTAL PRINCIPLES AND CHANGE IN INTERNATIONAL LAW AND POLITICS (2011); SEBASTIAN OBERTHÜR AND OLAV SCHRAM STOKKE, MANAGING INSTITUTIONAL COMPLEXITY: REGIME INTERPLAY AND GLOBAL ENVIRONMENTAL CHANGE (2011); WALTER F. BABER AND ROBERT V. BARTLETT, GLOBAL DEMOCRACY AND SUSTAINABLE JURISPRUDENCE: DELIBERATIVE ENVIRONMENTAL LAW (2009); UNITED NATIONS, THE FUTURE OF INTERNATIONAL ENVIRONMENTAL LAW (2011).

² *See* SVEDIN ET AL., *supra* note 1.

³ *See* Neil K. Komesar, Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy 8 (1995).

⁴ Because the methodology is based on the participation-centered formula, a comparison is made between able institutional alternatives with regard to providing the most balanced representation of affected interests. The fact that a market is heavily regulated and thus a hybrid legislative-private market is not problematic. Similarly, the fact that there are two very different legislative/administrative approaches to addressing a particular environmental issue simply offers two very different institutional approaches for comparison using the formula. CIA allows for comparisons between virtually any form of institutional response to a social problem.

This paper explores how CIA can illuminate the global dimensions of environmental problem-solving for problems such as chemical regulation that are plagued by persistent domination by a regulated industry that has higher stakes and more resources to participate than other stakeholders.⁵ CIA is used first to diagnose the core failings in chemical regulations and then to identify some of the most promising paths to reform. While the focus throughout is on the U.S. domestic regulatory program, both the diagnosis and reform are placed in larger global context. Indeed, it is this global context that serves to underscore some of the most important attributes of the best path to reform.

This CIA-based tour of chemical regulation is divided into six parts. The first part uses CIA to explain why some environmental problems, like chemical regulation, by their very nature are likely to lead to badly imbalanced engagement from the affected interests due to the stakeholders' uneven resources, stakes, and access to information to participate. As a result and particularly in the long run, concentrated interests that have high stakes in the issues – regulated industry in the chemical context – not only manage to take control of the regulatory process but do so in a way that makes that process even more obscure and out of reach for the diffuse majority. Called the “minoritarian undertow”, this gradual obfuscation of the public's interest in environmental problems by a well-organized minority can become so pernicious that it effectively leads to cross-institutional failure, at least in chemical regulation.

The second part of the paper then grounds this abstract model in a case study of toxics regulation in the US and tracks the impact of the minoritarian undertow in regulatory processes, the market, and in court claims. Rather than limiting the force of the undertow, which wipes out many of the gains made by majoritarian legislation, U.S. regulatory processes actually exacerbate the power and force of this undertow across all institutions, which further erodes the institutions' capacity to advance the interests of the diffuse majority.

The middle parts of the paper then deploy CIA to identify at least one promising area for reform. Rather than being constrained by a choice between primary institutions (e.g., common law versus the political process versus the market), modular CIA, a variation of the more traditional CIA drawn from Komesar's *Imperfect Alternatives*,⁶ is applied to a problem area to build new institutional structures. Using modular CIA, key steps in an institutional process are spliced out and in their place, alternative institutional approaches are inserted that make the most of the institutional alternatives. In the case of chemical regulation, a market-based standard for chemical safety may prove more resilient to the minoritarian undertow than the current, more politically-based judgment about whether a chemical presents an “unreasonable risk.”

The paper closes with more general observations about the use of CIA in exploring chemical regulation in global governance. CIA has important attributes that illuminate the functioning of institutions in global, comparative, and domestic settings. At the same time, recurring challenges arise in the use of CIA that may require more attention or at least qualification.

I. The Minoritarian Undertow

A number of environmental problems present particularly difficult challenges for institutions in reaching a balance between the interests of the diffuse majority and those of the concentrated minority (e.g., regulated industry). This part uses CIA to help draw out these key problems.

⁵ This is minoritarian bias. See KOMESAR, *supra* note 3, at 76.

⁶ See custom discussion in *id.* at 156-61.

A. Environmental Problems through the Lens of CIA

The participation-centered formula that lies at the heart of CIA not only helps identify which, among the imperfect institutions should decide any given issue like chemical regulation, but CIA also draws out intrinsic features of the problems that impede engagement by the full range of affected stakeholders. Comparative institutional analysis begins with three basic variables that characterize the extent to which different interest will participate in any given social issue; the costs of information, the costs of organizing, and the stakes to each of the affected groups.⁷ CIA then compares the interest groups' characteristics against different institutional alternatives to identify the institutional setting that maximizes engagement by the full range of affected parties while avoiding situations of "bias," where certain groups dominate at the expense of others.⁸

The oversight of potentially toxic chemicals that can cause cancer and other types of neurological, reproductive, and developmental harms presents an especially challenging case for ensuring balanced engagement by the affected parties regardless of the institutional alternatives. The interests of the general public are generally under-represented in these issues not only because of well-known collective action problems,⁹ but also because of the substantial costs associated with understanding and engaging in the issues. A series of information barriers – resulting from asymmetries in information, expertise, and legal complexity – discourage all but the most determined stakeholders from participating. As detailed more fully below, these information costs are so high they even impede the ability of nonprofits and other subgroups in their efforts to catalyze the majority into action.

Equally problematic, the stakes for the diffuse public are quite low since future victims are unknown and the risks of the most problematic chemicals remain uncertain. For many cases of toxic harms, injuries can occur decades after exposure and cause only generic harms (e.g., cancer, reduced fertility, impairments to offspring, neurological deficits) that are hard to trace back to individual chemicals. Even when toxicologists predict that some proportion of the population will suffer long-term harms from exposure to a chemical, then, it is difficult to identify which of the cancers occurring in exposed persons were caused by one or more chemical products.¹⁰

By contrast, regulated industry forms a cohesive, high stakes constituency that is much better prepared to engage in institutional battles that threatens their livelihood.¹¹ The small number of manufacturers and high shared stakes help regulated parties form a strong and united coalition that has proved quite effective in advocating their interests. Industry also enjoys superior, often asymmetrical access to information regarding the safety of their chemical products and they employ a number of scientists to keep ahead of the information that comes in. As a result of their high stakes and lower information costs, the concentrated minority appears to invest large amounts of money into fighting every step in each institutional process that portends greater oversight of the safety of their products. Indeed, as elaborated below, this group may even invest in keeping the needed information

⁷ *Id.* at 8.

⁸ *Id.*

⁹ See generally STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 29–52 (2008) (providing a thorough overview of the public choice concerns about collective action barriers, which also raising questions about some of the conclusions); RONALD J. HREBENAR, INTEREST GROUP POLITICS IN AMERICA 329-30 (1997) (discussing the impediments faced by representatives of the diffuse public in relation to more concentrated interests and their struggles to keep up in recent times); see also KOMESAR, *supra* note 3, at 69-72 (1995) (describing collective action problems with particular reference to how they impede smooth functioning of the political process).

¹⁰ See, e.g., Wendy Wagner, *Commons Ignorance: The Failure of Environmental Law to Produce Needed Information on Health and the Environment*, 53 DUKE LAW JOURNAL 1619, 1626-28 (2004) (laying out these scientific uncertainties in assessing public health risks).

¹¹ See, e.g., *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, * (5th Cir. 1991)

inaccessible through such mechanisms as hiding information (asymmetries)¹² and raising the costs to process it (complexifying it).¹³

B. The Majoritarian Wave and the Minoritarian Undertow

After mapping the characteristics of the participants, CIA then takes these findings and matches the participants' capabilities against institutional alternatives to identify, if possible, which institution is best able to decide an issue for any given problem area. In environmental regulation, the institutional matching step of CIA generally begins with an analysis of an administrative/legislative institution's ability to encourage broad participation from all stakeholders, since for environmental problems collective decisions are viewed as the best way to address market failure.¹⁴ Since the information, stakes, and participation constellations are often dynamic, the participation-based formula may be able to do little more than track problems as they move between institutions in areas like environmental regulation. Indeed, in particularly challenging settings, like those considered here, the analysis might ultimately identify institutional failure across all institutions.

In addressing environmental problems, a recurring pattern appears in the administrative/legislative arena in the US -- a wave of majoritarian activity typically arises from a highly salient event and it is then followed by a steady, powerful undertow of minoritarian bias that undermines the majoritarian commitment, often in invisible ways over periods of years or decades. Virtually every environmental statute in the U.S. was passed on the heels of a disaster that triggered public outrage and led to majoritarian legislation. Love Canal led to the Superfund statute, the Exxon Valdez spill led to the Oil Pollution Act, the burning Cuyahoga River spurred passage of the Clean Water Act, the discovery of high and uncontrolled levels of toxic air pollution from major factories led to significant revisions to the Clean Air Act, and Silent Spring prompted significant revisions to the pesticide law. These crises focused public attention on environmental problems that result in concentrated harm and can strike randomly and without notice.

Most of these majoritarian-triggered environmental laws propound quite general goals -- for example, industries must install the best available pollution control equipment to limit air pollution -- and assign the implementation details to the agencies.¹⁵ Developing the implementing regulations thus involves substantial agency discretion. Indeed, under the Clean Air Act the EPA's task of identifying a safe level of particulates in the air was deemed so open-ended that the D.C. Circuit held that the statute violated the nondelegation doctrine of the Constitution.¹⁶ Equally important for purposes of this analysis, the agencies' implementation of an environmental statute involves detailed technical analysis and requires that information be collected from affected industries. It can take years for the agency to

¹² Concerns about competitiveness have led to aggressive trade secret protection policies and even barriers to data access based on the possibility that toxicity testing results might be useful to competitors abroad. These protections are developed through regulations and are also established in some statutes. *See* Section 13(g) of FIFRA; Section 24 of TSCA.

¹³ *See, e.g.*, DAVID MICHAELS, *DOUBT IS OUR PRODUCT* (2008) (inventing the notion of "manufacturing uncertainty" in order to complicate the informative role that science can play in science-based debates); *see also* NAOMI ORESKES & ERIK CONWAY, *MERCHANTS OF DOUBT* (describing how individual scientists working for consultancy fees were able to obscure scientific consensus in important areas of science-policy).

¹⁴ *Cf.* KOMESAR, *supra* note 3, at *.

¹⁵ In a number of statutes, Congress also sets deadlines for some of the regulatory work to ensure that it gets done. These deadlines do not ensure that the regulations are substantively in line with the statutory directions, but they at least ensure that some regulation is in place roughly in time. (Note: If a court does vacate the rule because it violates the statute, there may not be a regulation in place pending the revision).

¹⁶ *American Trucking v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), reversed *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001).

develop a single standard,¹⁷ and the standards are usually quite complicated – a typical regulation typically spans dozens of pages of three-column text in the Federal Register.¹⁸

It is during the agencies' drafting of the dozens or even hundreds of rules necessary to implement the law that high stakes regulated parties typically take control of the process and erode the majoritarian, public-advancing commitments through the minoritarian undertow.¹⁹ The Administrative Procedure Act (APA)²⁰ and related open government statutes actually serve to reinforce the power of high stakes minoritarian coalitions in this effort. For example, the APA places no limit on the number and volume of comments that can be filed with the agency, and yet it is the agency's consideration of these potentially voluminous comments that becomes the basis for evaluating the rule during a court challenges.²¹ As a result, resourceful parties, primarily regulated industry, can exert substantial control over the agency's agenda by inundating the agency with numerous, detailed comments that attempt to frame or reframe the problems in need of resolution. Even worse, agencies themselves develop coping strategies that can increase the ability of the high stakes, resourceful stakeholders to take charge of the implementation process. To avoid accusations of insufficient attention to detail, an enormous record of highly technical and somewhat extraneous comments that delve into tedious and often unnecessary detail will tend to be reflected in the agency's own rule. Along these same lines, if the agency must respond to all comments yet cannot change the rule substantially without starting over,²² it will engage the most litigious and interested parties early in the process of developing a rule, even if doing so is inconsistent with the goal of ensuring balanced and vigorous participation by a diverse set of interest groups. Even litigation threats at the conclusion of a rule may cause the agency to develop nontransparent coping mechanisms for adjusting rules after the fact, an exercise made easier when the rule is generally not understood by most onlookers.²³

As a matter of administrative design, then, the rulemaking process in the US not only tolerates but passively invites dominance of the implementation decisions by the richest, most intensely affected stakeholders (e.g., regulated parties), with few to no checks to address the resulting imbalances in engagement. Even more perversely, since they exert control over the flow and framing of the available information, these resourceful stakeholders can gradually influence the agency's development of rules

¹⁷ Wendy Wagner, Katherine Barnes, and Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMINISTRATIVE LAW REVIEW 99, * (2011).

¹⁸ *Id.* at *; see also Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128 (2006).

¹⁹ See *Sierra Club v. EPA*, 479 F.3d 875, 876, 878 (D.C. Cir. 2007) (finding violations of the statute in EPA's toxic emission standards); *Natural Res. Def. Council v. EPA*, 489 F.3d 1364, 1369, 1371 (D.C. Cir. 2007).

²⁰ 5 U.S.C. § 551 et seq.

²¹ The courts generally require that only parties that file comments during the notice-and-comment period can later be involved in litigation against the agency. See generally *McKart v. United States*, 395 U.S. 185 (1969) (setting out the reasons for exhausting remedies first within the agency before raising the issue with the court). This requirement originates from the notion that before seeking judicial redress, a party must exhaust its administrative remedies. See generally Marcia R. Gelpe, *Exhaustion of Administrative Remedies: Lessons from Environmental Cases*, 53 GEO. WASH. L. REV. 1 (1985) (outlining the rationale behind the exhaustion requirement and arguing for the abolition of exceptions to the exhaustion requirement).

²² See, e.g., *Shell Oil Co. v. EPA*, 950 F.2d 741, 757–63 (D.C. Cir. 1991) (holding that the agency failed to provide meaningful notice-and-comment opportunities on issues in the final rule; the issues were raised by commenters during the notice-and-comment process); *Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098 (4th Cir. 1985) (same); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1021 (D.C. Cir. 1978) (same); see also Jack M. Beerbaum & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 893–900 (2007) (criticizing courts for adding the requirement that agencies go through a second notice-and-comment process when the final rule is not the “logical outgrowth” of the proposed rule and discussing how this requirement impedes agency adaptability to new information during the notice-and-comment period).

²³ These arguments are drawn out in considerable detail in Wendy Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE LAW JOURNAL 1321 (2010).

in ways that raise the costs for others (e.g., nonprofits) to engage in the process. Issues can become increasingly fractured and multi-faceted, for example, as these high stakes interests point out variations between chemicals, regulations, and minor perturbations that only accrue to their interests.²⁴ Technical issues are also disputed, sometimes in ways that cannot be resolved with the available information and thus serve to push many technical decisions into a state of deadlock or trigger substantial transaction costs as issues are resolved.²⁵ Asymmetrical knowledge about the industry and chemicals is used aggressively to impede the ability of the public and regulators to gather basic vital information about chemical risks. And, a form of juridification clicks in where the regulatory process becomes increasingly elaborate, detailed, and complexified so that even understanding the mechanisms for agency action become more and more elusive.²⁶ In his study of pesticide policy, spanning from the 1940s through the 1980s, Professor Bosso similarly observes that the “[o]ne dynamic [that] stands out . . . [is that] objective conditions have evolved to higher orders of complexity, but the fundamental relationships paradoxically remain pretty much the same.”²⁷

These and related features of US administrative processes drive up information costs, making it increasingly difficult for already diffuse majority to understand the stakes arising from institutional failure or chemical risks, which in turn gives rise to the “minoritarian undertow.” Democratic features of administrative design perversely serve only those with the resources to play and hence provide only more and more opportunities for minoritarian coalitions to further control the process by complexifying the issues, raising the information costs, and obscuring the stakes associated with these public issues. More pernicious, the mechanics of the undertow – raising information costs which in turn artificially depress the public’s stakes – serve to effectively inoculate the issues from broader public understanding. The underlying problem may become so complicated that even publicly oriented subgroups find themselves unable to navigate the terrain efficiently and turn to other public battles.²⁸ An occasional lawsuit or salient catastrophe may spark public attention, but these are often single-chemical events that will not illuminate the deficiencies in the larger regulatory program.²⁹ As a result

²⁴ Subcategorization of industries in pollution control statutes, for example, provides a way to produce weaker and weaker standards as the group of affected industries from within which the “best available pollution control technology” must be drawn is whittled down to one. This fragmentation also significantly expands and complicates the regulatory process by producing several standards in place of one and relying heavily on industry-produced information and even the framing of the issues. *See, e.g.*, National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry, 74 Fed. Reg. 21,136, 21,140, 21,144, 21,148 (proposed May 6, 2009) (to be codified at 40 C.F.R. pts. 60, 63) (discussing the permissibility and advantages of subcategorizing industries to provide for higher emission standards for some groups of industry and avoid shutdowns that might otherwise result from a single emission standard, and citing Judge Williams’s concurrence as endorsement of this approach).

²⁵ Indeed, and for this reason, the concept of “stopping rules” that identify a point at which debate should end becomes particularly important. *See generally* Sheila Jasanoff, *Transparency in Public Science: Purposes, Reasons, Limits*, 69 LAW AND CONTEMPORARY PROBLEMS, Summer 2006, at 22, 37-39 (introducing the concept of stopping rules to the science and law literature). Yet agencies do not set stopping rules and hence can be dragged into and held hostage to unresolvable debates over technical issues in settings with highly uncertain and imperfect information from the standpoint of the agency.

²⁶ *See, e.g.*, Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1241 (1995).

²⁷ CHRISTOPHER J. BOSSO, PESTICIDES AND POLITICS: THE LIFE CYCLE OF A PUBLIC ISSUE 235 (1987).

²⁸ *See generally* Wagner, Filter Failure, *supra* note 23 (drawing out these dynamics in greater detail).

²⁹ Not all environmental problems behave this way, of course. Chronic harms – that kill people or ecosystems instantly – create high salient events that often lead to majoritarian waves of activity, in the U.S. often taking the forms of statutes. Oil spills, hazardous waste discoveries, rivers that caught fire from the pollution on the surface, toxic fogs that kill large numbers of residents also produce a more lasting salient event that can lead to majoritarian amendments that strengthen the legislation or provide more specific demands on regulators. There is a history of this roller-coaster interaction between the majoritarian waves and minoritarian undertow, particularly in the early stages of hazardous waste regulation that were actually made salient by the Reagan commitment to under-regulation. As detailed in Part II, however, the safety of toxic chemicals or even toxic pollutants is generally more resistant to this consciousness-raising, short of a very salient catastrophe. The Reagan policies are likely unique in this respect and the result of a sharply divided Congress and

there is a substantial disconnect between regulatory reality and public understanding. In some settings, in fact, the general public is led to believe from vigorous media campaigns that industries are vigorously overregulated by agencies, when exactly the opposite is the case.³⁰

It should be noted that while CIA explains the phenomenon of the minoritarian undertow and resultant washing out of significant majoritarian gains for issues that are informationally complex and impose uneven costs on affected interests,³¹ the inevitability of cross-institutional failure was intuited in political science models developed several decades ago. James Q. Wilson³² and William Gormley,³³ for example, both developed 2X2 models that predict imbalanced policymaking processes for problems that are highly complex and for which the stakes of the general public are low and diffuse. For some particularly stubborn problems like toxic regulations, Wilson and Gormley both predict that diffuse and often under-informed public beneficiaries will ultimately cede control over regulation to the concentrated minority group of regulated parties. While these political science models are single institutional and do not capture the dynamic features of problems, the similarity of the basic variables as well as the ultimate outcome in these models reinforce the power of CIA.

C. Institutional Designs that Exacerbate the Undertow in the US

A CIA-enhanced view of the minoritarian undertow not only helps explain the course of regulatory failure, but also reveals how seemingly benign institutional designs can increase the costs of information and access for thinly financed participants, while artificially decreasing the stakes of this same diffuse majority. Open and transparent rulemaking processes designed to remain responsive to stakeholder input and comment are double-edged swords in settings where there are severe imbalances in the resources, stakes, and access to available information among stakeholders.³⁴

The trend toward a unitary executive model in the U.S. provides still further opportunities for highly engaged stakeholders to enjoy disproportionate influence in the regulatory process. In theory, the unitary executive is more accountable to the public since an elected president can take a firm hand in guiding the work of agency.³⁵ Yet in practice White House control may serve to offer only one more point of control for the vigorous, high stakes groups. Thinly financed organizations cannot invest the time and resources need to lobby the Executive, particularly if the result of these efforts has only an indirect and untraceable impact on the regulatory process. These limitations do not appear to afflict the

(Contd.) _____

Executive branch that butted heads at an early point in the majoritarian legislation at issue, the Resource Conservation and Recovery Act (RCRA).

³⁰ The ability of high stakes interests to control the media and framing of the issue is becoming well established. For excellent book-length treatment of the issue in the U.S., see generally WILLIAM HALTOM AND MICHAEL MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* (2004).

³¹ While the discussion has thus far focused on the administrative/legislative realm, as will be shown below the institutional failure runs across all institutions with small exceptions in aberrational cases, for example, where a chemical can be causally linked to an unusual long-term ailment like asbestos and mesothelioma.

³² See JAMES Q. WILSON, *THE POLITICS OF REGULATION* 367–70 (1980). Professor Wilson’s four quadrants of politics categorize regulation according to the distribution of benefits (concentrated or diffuse) on the one hand, and the distribution of costs (concentrated or diffuse) on the other. The specific categories include not only “entrepreneurial politics,” in which benefits are broad but the costs of a policy are concentrated, but also “majoritarian politics,” in which society in general incurs both the benefits and the cost of the policy; “interest-group politics,” in which both the costs and benefits of a policy are concentrated on a narrow set of interests; and “client politics,” in which the benefits of a policy accrue to a narrow set of interests and the costs are spread over the entire population. *Id.*

³³ See William T. Gormley, Jr., *Regulatory Issue Networks in a Federal System*, 18 *POLITY* 595, 607–08 (1986).

³⁴ JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 190 (1999) (suggesting that “if interest group theory works even somewhat similarly to what the public choice fraternity believes, transparency is a double-edged sword.”)

³⁵ See generally Nina Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 *MICH. L. REV.* 1128 (2010) (explaining succinctly these benefits and citing the relevant literature).

industry groups, however, who as an empirical matter appear to be both a more frequent participant and enjoy more influence in White House oversight of environmental and public health regulations than other stakeholders, regardless of the President.³⁶

Finally, while commons problems suggest that collective resolutions should occur at the highest level possible in order to address all the sources of the problem (like all cattle grazers or all pollutants),³⁷ to the extent that this scaling up leads to a centralized authority it can provide for even more vigorous minoritarian control over the decision. Fragmented authorities, as discussed later, help provide a buffer against a strong minoritarian undertow by diffusing the power of a concentrated minority and by providing space for alternative public perspectives and understandings of the problem. Problems that are addressed centrally and in preemptive fashion by a single institution can be effectively captured by the powerful minority in ways that will further expand their power over the diffuse majority.

II. CIA and Air Toxic Regulation in the US

In this part, the largely abstract discussion of CIA in the prior section is made more concrete by applying it to a case study of toxics regulation in the U.S. A step-by-step account of the EPA's implementation of air toxic emissions standards reveals substantial dominance of the process by regulated industry, with little input from public interest groups. The resulting imbalanced engagement, in turn, affects the substance of the final rules in ways that appear to benefit industry and erodes majoritarian commitments set in the statute itself. Even worse, as information costs increase and the stakes drop for the general public, other institutions fail as well.

A. EPA's Regulation of Air Toxic Emissions: The Minoritarian Undertow Under the Microscope

In 1990 Congress realized that air toxic emissions remained largely unregulated and, in a majoritarian moment it passed legislative amendments to the Clean Air Act that required EPA to set very stringent standards limiting air emissions of toxic chemicals to the equivalent of the toxic emissions achieved by "the best performing 12% of the existing sources."³⁸ EPA promulgated more than one-hundred standards over the next twenty years, under statutory rulemaking deadlines that were enforced by public interest groups.

On its face, the majoritarian statute governing air toxic standards appears to be relatively prescriptive, permitting little discretion to the agency and also requiring that standards be set in a timely fashion. In reality, the EPA used considerable discretion during its rulemaking process in ways that appeared to favor industry and that, at least occasionally, violated its authorizing statute.³⁹

³⁶ See, e.g., Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 78, 86 (2006) (noting that a majority of EPA respondents believe that the White House is more susceptible to faction capture than the EPA); Rena Steinzor, Michael Patoka, and James Goodwin, *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment* (Nov. 2011) (describing the heavy involvement of industry in meetings with OMB).

³⁷ See generally Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968); Alfred Kahn, *The Tyranny of Small Decisions*, 19 KYLOS 23 (1964).

³⁸ See 42 U.S.C. § 7412(d)(3).

³⁹ See, e.g. *Sierra Club*, *supra*, 479 F.3d at 876, 878 (finding statutory violations in EPA's air toxic emission standards); *Natural Res. Def. Council v. EPA*, 489 F.3d 1364, 1369, 1371 (D.C. Cir. 2007) (same).

1. Development of the rule proposal (pre-Notice of Proposed Rulemaking (pre-NPRM))

Like most rulemakings in the US, the agency's first step in setting emission standards involves gathering information and developing proposals in very informal ways. In US administrative law there are no procedures restricting interest group engagement during this early rule development process.⁴⁰ As a result, agencies typically remain receptive to input by all participants, but appear to accept this input passively.⁴¹ Moreover, since the agency is usually eager to produce a rule that will survive judicial review and since the regulated industries have the resources and stakes to participate heavily throughout the process, the unsurprising result is very heavily skewed participation by industry at the expense of the public interest in the development of a number of regulations promulgated by EPA.⁴²

Specifically, in the air toxic emission standards, EPA engaged informally with regulated industry more than eighty times per rule on average, while public interest groups engaged in fewer than one contact per rule, on average.⁴³ Indeed, for more than 80% of the rules, the public interest did not offer any input at all.⁴⁴ The dearth of public interest group engagement occurred presumably because these groups could not claim credit with donors and the general public for successful back-room negotiations, as compared to litigation victories. At the same time, the nonprofits would need substantial resources to keep up with the informal contacts made by industry, at least at the level reflected in the air toxic rulemakings.

The symbiotic relationship between the agency and industry in the development of proposed rules is further encouraged, albeit inadvertently, by the courts' "logical outgrowth" test which requires that the agency's final rule be a "logical outgrowth" of its initial proposal.⁴⁵ If the final rule diverges too significantly, the agency is required to publish a revised proposal to ensure that stakeholders are not deprived the opportunity to comment on all material aspects.⁴⁶ Yet this test encourages the agency to publish a proposal that is largely complete. As a result, agencies are eager to get input from the most litigations groups early in the process.

2. Notice and Comment

Comments are pivotal to preserving the right to seek judicial review of a rule, and yet given the time and expertise required to file credible and comprehensive comments, one would again expect the concentrated regulatory interests to dominate this important stage in the rulemaking process. As the rules become more numerous, complicated, and fragmented, the ability of the public interest groups to keep up on behalf of the general public becomes less likely. Moreover, because there are literally

⁴⁰ See generally William F. West, *Formal Procedures, Informal Processes, Accountability and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66 (2004) (arguing that the pre-NPRM period provides rich opportunities for informal contacts and engagement by agencies with stakeholders).

⁴¹ Some agencies (e.g., FCC, OSHA, and FWS) may actually limit stakeholder input or require that it be recorded in the public docket, but this is not certain. What is clear is the substantial variation among agencies and even program areas with regard to preNPRM proposal development. Thus the discussion of rulemaking processes at EPA and perhaps even some of the peculiarities of EPA's setting of air toxic rules should not be extrapolated directly to other program areas or agencies without further empirical research.

⁴² As one EPA staff noted with regard to this preNPRM engagement "We help them; they help us." See, e.g., Cary Coglianese, *Challenging the Rules: Litigation and Bargaining in the Administrative Process* 94 (1994) (unpublished Ph.D dissertation, University of Michigan) (on file with the *Duke Law Journal*)

⁴³ See Wagner et al., *Rulemaking in the Shade*, *supra* note 17.

⁴⁴ *Id.*

⁴⁵ See *supra* note 22 and accompanying text.

⁴⁶ *Id.*

hundreds of EPA rules each year that are in need of public interest oversight,⁴⁷ and each rule can involve weeks of research, the public interest groups are able to engage in some of these rules, but will tend to drop out for many others and perhaps most rules.⁴⁸

The empirical evidence in air toxic rules again bears out this prediction of skewed engagement by concentrated industry relative to the public interest. The public interest groups filed comments in less than half the air toxic emissions rules; the other half of the rules (approximately forty-two) involved no public interest group involvement, even though each of the rules determined the level of air toxics that could be emitted from large sources of industries. Moreover, even in the rules in which the public interest did engage, they were badly outnumbered; for every one public interest comment there were on average seventeen comments from the affected industry.⁴⁹ Several overlapping empirical studies in other areas of health protection observe similar patterns of dominance by regulated parties during notice and comment.⁵⁰

As discussed below, these disparities in comment activity are legally consequential. In US administrative law, participants are generally deemed to have waived their opposition if they have not placed specific comments raising their concerns in the public record during the notice and comment process. Even flagrant violations of the statutory mandate by the agency are presumably out of reach for these groups if they were not raised during the notice and comment process.⁵¹

3. White House Review

At both the proposed rule and final rule stages, and potentially throughout the process, the White House can also be involved in influencing the content of agency rules.⁵² While this White House intervention can advance either majoritarian or minoritarian interests in theory, empirical evidence reveals that minoritarian interests again dominate during White House review.⁵³ Ongoing research indicates that the air toxic rules entering the White House Office of Management and Budget for Executive Order-directed review tend to be more stringent with respect to regulated industry than the rules that exit that office.⁵⁴ Perhaps not coincidentally, the White House OMB reports about three times more meetings with regulated industry across all EPA rules than public interest groups.⁵⁵

Given the scarce resources of the public interest coalitions and the difficulty of claiming credit for White House interventions that favor the public interest, this skewed engagement by industry again should come as no surprise. Yet much like the US's *laissez faire* approach to rule development and notice and comment, if institutional processes do not actively solicit information from affected groups

⁴⁷ Professor Coglianese estimated that the EPA promulgated 334 rules per year from 1986 to 1990. *See* Coglianese, *supra* note 42, at 2 n.2 & app.1.

⁴⁸ Interview with anonymous public interest litigator involved in HAPs rulemakings during the 1990s, in Chicago, Ill. (May 29, 2009).

⁴⁹ *See* Wagner, *Rulemaking in the Shade*, *supra* note 17.

⁵⁰ *Id.*

⁵¹ *See, e.g.*, Marcia R. Gelpe, *Exhaustion of Administrative Remedies: Lessons from Environmental Cases*, 53 GEO. WASH. L. REV. 1, 10-25 (1985) (outlining the rationale behind the exhaustion requirement and arguing for the abolition of exceptions to the exhaustion requirement). This requirement is also imposed by some statutes, including the Clean Air Act. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7607(d)(7)(B) (2006); *See also* Sierra Club v. EPA, 353 F.3d 976, 982 (D.C. Cir. 2004) (relying on state comments for issues raised on appeal, all of which were rejected).

⁵² Executive Order 12866.

⁵³ *See, e.g.*, Steinzor et al., *supra* note 36; Bressman and Vandenberg, *supra* note 36.

⁵⁴ Wagner ongoing

⁵⁵ Steinzor et al., *supra* note 36, at *.

but rely exclusively on passive routes for accessing concerns, then the groups with the highest stakes and greatest ability to participate will dominate the process.

4. The Final Rule

Since detailed and credible comments submitted during notice and comment provide the participant with a “judicially enhanced voice” that must be taken more seriously because of the credible threat of an appeal, the disparities in comments likely exert an impact on the stringency of the final rule.⁵⁶ Again, the empirical evidence bears this out. Content coding of the air toxic rules revealed that in the rules got weaker over the course of notice and comment in ways that appear to favor industry.⁵⁷

The final rules also appear – from at least snapshots of the process – to grow even longer, more tangled with explanations and exceptions, and more foreboding in terms of ready understanding and accessibility. The resulting, opaque yet strong minoritarian monopolization of the rulemaking process is illustrated most vividly by a micro-case study on an EPA rule promulgated to regulate the emissions of toxic air pollutants from chemical storage tanks in tank farms at large petrochemical plants.⁵⁸ In this rule, the emissions standards were unusually straightforward – for most tanks, EPA required lids with tight seals to keep them from emitting significant quantities of toxic pollutants into the air. But this emissions standard did not resolve all critical regulatory issues; chief among them was how to make sure that these tanks would not leak if the seal became loose or worn. On this issue, EPA could have required the industry to install continuous emissions monitors at the rim of the tanks that would trigger an alert if a worrisome level of toxins was detected at the edge or over the surface of a tank. Or EPA could have required regular inspections of the tanks with a sniffer, much like what natural gas companies use to detect gas leaks. Instead, in the final rule, EPA simply requires visual inspections by a company employee to ensure the seal is intact. With regard to the frequency of this self-monitoring, EPA could have required weekly or even monthly examinations given the seemingly low expense of the visual self-inspection; EPA, instead set the inspection interval at one year. Indeed, under the rule, if a leak is discovered in the course of this annual check-up, the company is given another 45 days to correct the problem, and the opportunity to self-administer up to two additional, 30-day extensions. And to complete the picture, records of the industry’s compliance with these self-inspection requirements are stored onsite and are not filed with the state EPA.

How could these strikingly permissive enforcement requirements survive the fierce adversarial pressures of administrative rulemakings? The docket index, documents in the record, and proposed rule itself provide a clue. The proposed rule, which included three other subparts, was over 187 pages long. Just on the storage tank rule alone, EPA met with industry groups at least three times before publishing the proposed rule, communicated with them through letters, and prepared at least 15 background documents. After publication of the proposed rule, 22 industries and industry associations – nearly all of them household names – and a smattering of public interest advocates – more precisely, two public interest groups and four states or state regulatory associations -- engaged first in formal notice and comment and then presented their concerns at a public hearing. EPA’s final rule that responded to comments identified more than 100 significant issues in contention. The final rule and preamble gained still more girth – this time reaching 223 pages and over 195,000 words in the *Federal Register*. With a statutory deadline looming, the agency pushed the process through in 3 and a half years from start to finish. However, because of a vocal constituency of unhappy interest groups, within 18 days after publishing the final rule, the EPA reopened public comment on one of the key issues in the rulemaking and received another sixty formal communications. Before it could issue a revised rule,

⁵⁶ PETER STRAUSS ET AL., GELLHORN AND BYSE’S ADMINISTRATIVE LAW 1121 (9th ed. 1995).

⁵⁷ Wagner et al., *Rulemaking in the Shade*, *supra* note 17. The agency generally makes about 8 changes to every proposed rule and 2/3 of these changes weaken the rule in some way.

⁵⁸ See 40 C.F.R. § 63.100 – 183.

one of the companies petitioned for reconsideration of the entire rulemaking. The agency ultimately issued a proposed clarification to the original rule two years later, received another 20 comments on its proposed clarification, and issued a final revised rule at the end of 1996.⁵⁹

Despite all this activity, the final rule offers no explanation as to why the regulation of storage tank emissions is so lenient and provides no indication that any stakeholders were unhappy with the approach. One can surmise that there were simply too many battles – each of them intricate and time-consuming – for the two public interest representatives and four state regulatory groups to keep up with all of the moving parts. One can also surmise that in slogging through more than 100 contested issues under a tight schedule, the agency itself had to tread lightly on issues for which the industry might have claimed superior knowledge. Alternatively, perhaps EPA threw bones to industry representatives as a way to get their buy-in on other issues, particularly when it suspected those concessions would not be caught or litigated by public interest groups who would be reluctant to delay the rule with litigation unless it involved a crucial issue cutting to the very heart of EPA’s air toxic program. As the nation’s top environmental lawyers, most of who worked first for EPA before advising industry, observe: “The reason that the Agency is generally receptive to well-reasoned technical comments [from industry] . . . is to withstand judicial review. The heart of a regulatory program is more likely survive over the long term.”⁶⁰

5. Judicial Review

The primary effect of judicial review on implementation may be its use as a threat that can alter the conduct of the agency *ex ante*, in anticipation of litigation.⁶¹ Seen from this vantage point, the fact that industry has loaded the record with comments, relative to the public interest groups, provides these industry comments with a “judicially enhanced voice” that leads the agency to make changes in the rules in order to stave off the risks of having its rule held up in court.⁶² By contrast, if the public interest has not commented in more than half of the rules, then already the probability of a suit by the public interest is reduced twofold as a legal matter as compared to industry. If one instead uses the number of comments as an indicator, then the risks of a suit by industry is seventeen times higher than the risk of a public interest group appeal (industry comments outnumbered public interest comments by 17 to 1).⁶³ Given the notoriously slim resources of public interest groups, moreover, even if the public interest groups could credibly sue in all the rules upon which they commented, they would not do so because of the sheer resources involved.⁶⁴ The process or step of judicial review then further enhances the voices of concentrated minority, at least *ex ante*.

Perhaps most telling in support of the possibility of this *ex ante* impact of judicial review in reinforcing the minoritarian undertow is the fact that just as industry inundated the agency with information during the rulemaking process, after the rules were promulgated, industry appealed only one of the 100 rules to judgment.⁶⁵ Presumably this limited use of the courts to challenge EPA rules does not reflect industry’s resource limitations, but instead suggests that industry was either happy with the rules or agreed to withhold suit if certain compromises were made during rule development, or both. The one case that industry won, in fact, further illustrates just how completely the

⁵⁹ See Wagner, *Filter Failure*, *supra* note 23 for citations for these descriptive facts and figures.

⁶⁰ Andrea Bear Field and Kathy E.B. Robb, “EPA Rulemakings: Views from Inside and Outside,” *5 Natural Resources and Environment*, Summer 7 (1995).

⁶¹ See, e.g., STRAUSS ET AL., *supra* note 56.

⁶² *Id.*

⁶³ See *supra* note 49 and accompanying text.

⁶⁴ Interview, *supra* note 48.

⁶⁵ See, e.g., Wendy Wagner, *Revisiting the Impact of Judicial Review on Agency Rulemakings: An Empirical Investigation*, 53 William & Mary L. Rwe. 1717 (2012).

minoritarian undertow seemed to have taken over the rulemaking process. In the one rule industry challenged, which restricted toxic emissions from polymer manufacturers, regulated parties monopolized each step of the rulemaking process. During rule development, industry and industry associations engaged in more than 450 contacts with the agency; there was no public interest group participation during this multi-year process. At comment time, industry submitted thirty-six comments, but there was not a single comment from the public interest community. In response to the comments, the EPA made twenty changes that further weakened the rule and rejected only six comments.⁶⁶ Still unhappy, two individual industry petitioners threatened to appeal the rule to the D.C. Circuit, arguing that the EPA arbitrarily failed to consider the excessive costs of certain monitoring requirements. After EPA revised the rule twice in an effort to appease these two discontented industries, the industries ultimately filed an appeal and won in the D.C. Circuit.⁶⁷

At the same time that judicial review seems to reinforce the minoritarian undertow through its ex ante impacts on agency rulemakings, ex post the public interest groups' use of the courts do help counteract industry's monopolization of the process. In the air toxic standards, the public interest groups made greater use of the courts to challenge the rules than industry, and the public interest groups won all but one of their appeals. In each of these winning cases, moreover, the courts found the EPA had violated the authorizing statute in the challenged rules, and these statutory violations systematically favored industry.⁶⁸

There were clear limitations in the public interest groups' ability to use the courts to counteract the minoritarian undertow, however, and these limitations circle back to the limited resources of the public interest groups.⁶⁹ In the air toxic rules, the public interest groups only appealed six of the one-hundred air toxic emission standards for judicial review, despite evidence that many more (and perhaps all) were compromised in ways that deviated from the statute and available evidence.⁷⁰ Moreover, while in theory winning lawsuits would seem to provide some means of making the agency's industry-leaning deviations salient, in practice judicial review of agency rules is still sufficiently complicated that the opinions do not appear to serve as useful tools for communicating to the public broader messages about under-regulation.⁷¹

⁶⁶ *See id.*

⁶⁷ *Arteva Specialties S.A.R.L. v. EPA*, 323 F.3d 1088, 1089, 1091 (D.C. Cir. 2003). In *Arteva*, the D.C. Circuit concluded that the EPA's rule was arbitrary on this issue and vacated and remanded the rule to the agency in 2003. *Id.* at 1088, 1092. The court's opinion focused like a laser on the very specific factual complaints of the industry petitioners—namely, that evidence suggested that the EPA's monitoring requirements were not cost-effective in detecting violations from equipment leaks for all affected industries, as opposed to other types of equipment—and found them compelling. *Id.* at 1091.

⁶⁸ For example, in two cases the court reprimanded EPA for interpreting the statute in a way that did not require it to establish any air toxic standards at all for toxic substances, like mercury. EPA based this interpretation of the fact that none of the top 12 percent of industries were actively controlling their emissions. In vacating the rule, the court held that "EPA's rationales ... amount to nothing more than a concern about ensuring that its floor is achievable by all kilns in the subcategory." *Sierra Club II*, 479 F.3d at 881.

⁶⁹ There were other limitations not discussed here that are also problematic, such as the failure of the courts' to impose timelines on the agency's repair of vacated rules. As a result, EPA has repaired only one of the five vacated rules; for the other four rules there are no national emission standards binding on industry. In this sense, the public interest victories were hollow and will demand a great deal of post-judgment litigation that is rarely considered in the literature on judicial review. *See Wagner, supra* note 70.

⁷⁰ Wendy Wagner, *Revisiting the Impact of Judicial Review*, *supra* note 65.

⁷¹ *See, e.g., id.*

6. Beyond Administrative Process

Over the last decade, the concentrated minority has also developed complementary ways to influence and control the implementation process from outside the rulemaking process, primarily through Congress.⁷² In toxics regulation these external mechanisms include the drafting and passage of appropriation riders and related statutes that impose additional process requirements on agencies that slow their implementation work.⁷³ The strategic use of congressional oversight hearings, public relation campaigns, and related political attacks on the agencies can also be used strategically to damage the agencies' reputation, drain their scarce resources, and used to advocate for budget cuts. A number of these extralegal methods for undermining agency implementation are collected in a recent article by Tom McGarity, who documents the effects of this "blood sport" to undermine agency implementation processes that might otherwise advance the public interest.⁷⁴

B. The Minoritarian Undertow in Other Policy Areas

While the focus in this paper is on environmental regulation, there appear to be sympathetic vibrations in other policy areas that may similarly suffer from the same type of minoritarian undertow. The development of regulations governing financial institutions, for example, may parallel the failure of toxic regulation in the US.⁷⁵ In a paper that preceded the market crash, the authors describe evidence of what appears to be a minoritarian undertow eroding implementation in the US:

We have found that those with the least technical expertise—namely the users of financial statements (mostly investors, who additionally face collective action problems)—play hardly any role in the domestic and global governance on accounting standards. This is particularly striking since, at least in the United States, public regulatory authority over financial reporting was established in the 1930s precisely to safeguard the interests of investors. In such situations, some of the procedures of administrative law—such as openness of the standards-setting process to input from all interested parties during notice-and-comment periods—will, by themselves, do little to improve the governance output for the previously disadvantaged group. Such administrative law procedures might be instituted with great fanfare in response to a shift in what we have called the macro-political climate, but they may be quite ineffective.⁷⁶

More recent work demonstrates the minoritarian undertow taking hold even in the few years after passage of majoritarian legislation intended to place greater regulatory oversight over the financial industry.⁷⁷

C. Summary

CIA highlights both the existence and the reasons for institutional failure in much environmental regulation in the U.S. The complexity of the information increases with the minoritarian undertow, making the issues effectively impenetrable to the diffuse majority. Even for those who can keep up

⁷² See generally Thomas McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 *DUKE L. J.* 1671 (2012).

⁷³ These statutes include the Paperwork Reduction Act, the Data Quality Act, and the Data Access Act. The latter two were passed as appropriation riders and drafted by an industry consultant. See generally CHRIS MOONEY, *THE REPUBLICAN WAR ON SCIENCE* (2006).

⁷⁴ McGarity, *supra* note 72.

⁷⁵ Lawrence Baxter, symposium article, *Wake Forest L. Rev.* (forthcoming 2012).

⁷⁶ Walter M. Attli & Tim Buthe, *Global Private Governance: Lessons from a National Model of Setting Standards in Accounting*, 68 *LAW & CONTEMP. PROBS.* 225, 261 (2006).

⁷⁷ See Kim Krawiec, "Don't Screw Joe the Plumber", available on SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1925431

with the complicated and time-consuming rulemaking process, however, the resulting fragmentation and layered complexity impedes the ability of catalytic subgroups to make many of the issues accessible to the diffuse public. The result is a systemic failure across institutions that becomes increasingly vulnerable to the undertow and offers little hope for informational breakthroughs that can spark the dormant majority into action.

An examination of basic administrative process in the US, moreover, reveals that there are effectively no structures in place to buffer this minoritarian undertow. Instead, each step of the rulemaking process provides only reinforcement for this inevitable erosion by a high stakes coalition that was the initial target of the majoritarian activity.

III. Modular CIA to the Rescue

At this point the reader may be thinking “CIA focuses on institutional comparisons, but what good is this analysis when all institutions fail – perhaps miserably – together?” Yet, beyond identifying the least imperfect of the failing institutions, CIA also assists the analyst in identifying viable reform possibilities in the search for the “least imperfect” institutional option.

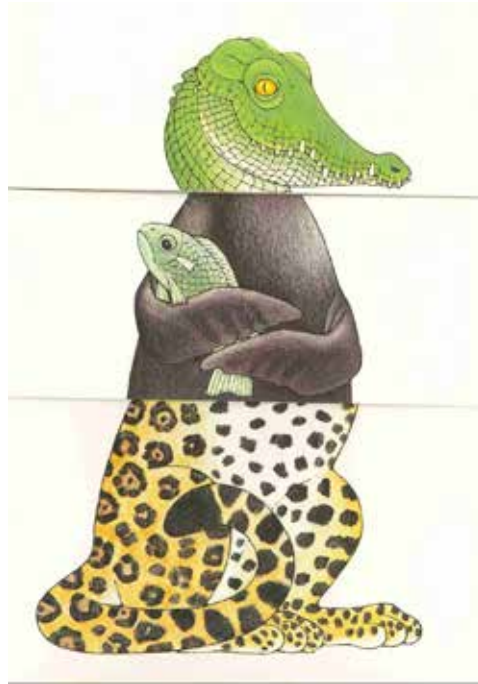
Yet the least imperfect institution need not be a wholesale comparison between the political process, the courts, and the markets. CIA also provides a method for analysts to design hybrid institutions by breaking them into smaller units and then conducting CIA on the discrete institutional slices. Key steps in an institutional process are spliced out and in their place, alternative institutional approaches are inserted to provide a decision process that, in the end, is more able to counteract predictable problems of minoritarian (or other) bias.

A good illustration of this modular CIA is found in Komesar’s discussion of the use of custom in tort cases. The question explored in this short excerpt, located within a larger chapter on courts, is when or whether reference to industry custom provides a useful presumption of reasonableness in tort law. In a duel with Posner, Komesar concludes that in highly technical areas that are fraught with complications and risks if a jury arrives at the wrong conclusions, industry custom via the market is a better gauge of reasonableness than raw jury assessments. Conversely, in areas where juries encounter few obstacles in assessing the reasonableness of industry practices (e.g., the existence of radios on barges), basic jury intuitions of what constitutes reasonable behavior is superior to industry custom in evaluating industry behavior.

While Komesar’s custom analysis is intended primarily to showcase the importance of the relative nature of the inquiry (i.e., which institution - the market or the jury - is better able to determine reasonableness in tort cases involving potentially complex institutional practices), his application of CIA also exposes the core methods of modular CIA -- namely a relative assessment of the attributes and deficiencies of institutional alternatives nested within a larger, essentially noncontroversial institutional choice. Komesar is not suggesting that for complex cases we should defer *only* to the market for regulating safety. Rather, he is suggesting that in identifying the best measure of reasonableness within a tort case, the market in some cases may produce the more reliable standard than a raw jury assessment of reasonable behavior.

In this illustration, two distinct steps become evident in deploying the methods of modular CIA. The first is the identification of key decisions within a larger, singular institutional approach that can be extracted and institutionally changed-out. If the institution of choice for the overall implementation of a reform is the political process, for example, this first step identifies discrete steps nested within the political process where important choices are made with respect to regulatory requirements that could conceivably be based instead on the market, common law, or other institutional options. Similarly, if the institution of choice is the common law or judicial system, important substeps to determining liability would be broken out for further investigation using CIA. The second step of modular CIA then involves comparing alternative institutions at these key junctures. In applying these

two steps, a completely new, hybrid institution can be formed in place of the existing monolithic institutional approach, much like the creation of hybrid animals in a child's flap-book. See Figure below.



The identification of substeps within a decision process that can be changed out and replaced with alternative institutions is an important methodological attribute of modular CIA. At least in environmental law, for example, analysts generally assume a mutual exclusivity between institutional approaches.⁷⁸ Even market-based and liability-based approaches to environmental law, which depend on legislation for their creation, are built in large part on singular institutional approaches; the choice is an all-or-nothing selection of one institutional approach over another, which excludes more elaborate, hybridized models.⁷⁹ Modular CIA forces reform-minded analysts to identify each substep of a decision process and to consider viable institutional alternatives at each step.⁸⁰

IV. Applying Modular CIA to US Toxics Regulation

In settings where all institutions are likely to fail together, modular CIA allows the analyst to slice the decision-making steps into finer increments to identify whether there are joints that can be shifted institutionally to produce more representationally balanced outcomes. In the case of toxics regulation, while the political process may tend to be subject to minoritarian bias and hence fail in a direction similar to the market, there may be steps within the political process that can be adjusted to make it less likely to fail. Each of these steps involves more discrete and fine-tuned comparative institutional analyses.

⁷⁸ See, e.g., David Driesen, Robert Adler, and Kirsten Engel, *ENVIRONMENTAL LAW: A CONCEPTUAL AND PRAGMATIC APPROACH* (2005)

⁷⁹ Climate change regulatory discussions, for example, tend to follow this singular institutional approach and rarely if ever consider more hybrid approaches, beyond "market based" trading regimes.

⁸⁰ In a market context, this more fine-grained approach, for example, might break regulatory permits into multiple smaller steps that involve CIA at each substep. The resulting hybridized institution might involve a more limited use of markets that play a more constrained role in regulatory options, by for example, first allowing regulators to identify which polluters may buy permits (and how many permits) to avoid hot spots.

This section applies modular CIA to reform chemical regulation – a particularly extreme example of the minoritarian undertow. While the methods are inevitably soft, the analysis presented here reveals at least one discrete step within the political process – setting the standard for acceptable toxic products – that can be spliced out of the current regulatory process. Using CIA, a different, better institutional approach can then be substituted in its place.

A. The Minoritarian Undertow in the Regulation of Chemicals

U.S. chemical regulation is one of the most dysfunctional areas of US regulation and is plagued by relatively significant cross-institutional failure. Within tort law, civil remedies fail because of the difficulty of proving causation for long-term invisible harms.⁸¹ These same features, coupled with the lack of incentives for testing, also create significant market failures; consumers, even sophisticated ones, cannot discriminate between products on the market.⁸² As a result, in this undifferentiated market where self-promotions cannot be validated by consumers, there are no rewards for first-movers. The market for toxic products, like chemicals, pesticides, cleaning agents, and other toxin-based products, equates to something like a market for lemons in terms of lacking meaningful incentives for safer products.

While the regulatory oversight of chemicals is the least imperfect institutional approach to this social problem, it too has collapsed as a result of the minoritarian undertow.⁸³ Specifically, the structure of US regulation places exclusive responsibility on the agencies for determining whether a chemical product requires additional testing and also whether, in light of what is known, some market restrictions or even the elimination of the product is justified. Yet for a variety of reasons - some stemming from the placement of the burden of proof on the agency and others from the strong coalitions that unite to oppose regulatory action⁸⁴ - in the nearly forty years of regulatory authority, EPA has issued testing mandates for only a small fraction of chemicals.⁸⁵ Most of the remaining chemicals, which include over 80,000 individual chemical substances, are effectively unrestricted and often unreviewed with regard to their health and environmental impacts. Even when there is information indicating that a chemical is not safe, however, only a handful of chemicals have experienced the “death penalty,” and then only after a long, difficult regulatory struggle.⁸⁶

A significant part of the blame for this abysmal state of regulatory oversight of chemicals lies with an information-intensive, ambiguous statutory mandate that makes the agency particularly vulnerable to concerted pressure from regulated parties, even as compared to similar types of pressures occurring in the setting of air toxic standards discussed in in part II, *supra*. Specifically, under the statutes governing chemical and toxic consumer products, the agency must prove that a product presents an

⁸¹ See generally Margaret A. Berger, Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts, 97 COLUM. L. REV. 2117, 2135–40 (1997).

⁸² See generally Mary L. Lyndon, *Information Economics and Chemical Toxicity: Designing Laws to Produce and Use Data*, 87 MICH. L. REV. 1795, 1813-17 (1989).

⁸³ See my 2012 EUI conference paper.

⁸⁴ Except for chemicals produced in high volumes and posing a substantial risk of exposure, *see, e.g.*, 15 U.S.C. § 2603(a)(1)(A) (2000), TSCA provides EPA with the authority to impose testing requirements on new chemicals only if the EPA can demonstrate that existing data are “insufficient” to assess the chemical and the EPA has reason to suspect that the new chemical “may present” a risk or hazard. *Id.* § 2604(e).

⁸⁵ See U.S. Gov’t Accountability Office, *Chemical Regulation: Options Exist to Improve EPA’s Ability to Assess Health Risks and Manage its Chemical Review Program* 18 (Report No. GAO-05-458, 2005), available at <http://www.gao.gov/new.items/d05458.pdf>.

⁸⁶ See, *e.g.*, *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1214 (5th Cir. 1991) (invalidating EPA’s ban of asbestos under TSCA because (citing *Benzene*) the agency has the burden of proving banned products place an unreasonable risk to the public and EPA did not do a thorough enough assessment (with evidence)).

“unreasonable risk” to health and the environment.⁸⁷ This showing, in turn, has been interpreted by the courts to require evidence that the aggregate costs of each product and chemical to society, such as cancer or environmental degradation, outweigh its benefits to society. If the agency can make this showing, it can then justify restricting or even banning unreasonable products.⁸⁸ As one might expect, the actual showing that a chemical presents “unreasonable risks” – namely that the costs outweigh the benefits – is not a simple or straightforward exercise.

In the case of asbestos, for example, EPA dedicated over ten years to data collection and analysis.⁸⁹ EPA’s proposed partial ban of asbestos was then subjected to 22 days of public hearings and sparked 13,000 pages of comments from over 250 parties. The administrative record spanned over 45,000 pages.⁹⁰ Yet in the view of the Fifth Circuit panel, EPA’s record was still incomplete in showing the agency has selected the “least burdensome” approach to certain asbestos products, nor had the agency adequately demonstrated the cumulative health costs that result from asbestos. These gaps in EPA’s rule were so significant that the Fifth Circuit vacated the rule and remanded it to the agency.⁹¹ Congress ultimately intervened and accomplished much of what EPA endeavored to do through amendments to TSCA that addressed asbestos specifically.⁹² The EPA never repaired the rule itself.⁹³

Even in less elaborate cases, the agency’s analytical work to establish an “unreasonable risk” is non-trivial.⁹⁴ The assessment and ultimate quantification of the potential costs of a chemical to society, integral to the “unreasonable risk” standard, necessarily entails quantitative assessments of the product’s basic toxicity to humans (of all ages) and the environment through all the life stages of the product.⁹⁵ The agency must also evaluate the exposure scenarios to assess the extent to which humans, animals, plants, and other resources will come in contact with the chemical. Much information – even for the crudest regulatory assessments – is necessary for this analysis. Finally, the benefits of the product must be quantified, usually by assuming that the purported uses are important and identifying the extent that the product is or could be used in the future. While the evaluation of benefits is much more determinable, it still entails considerable data-dredging and speculation.

The assessment of risks, exposures, and benefits – followed always by the monetization of these features so that the units can be cross-compared – must then be accompanied by a regulatory plan of

⁸⁷ See 15 U.S.C. §§ 2604(f)(1), 2605(a) of the Toxic Substances Control Act and, for consumer products, the Federal Hazardous Substances Act, [15 U.S.C. §§ 1261](#), and the Consumer Product Safety Act, [15 U.S.C. § 2082](#).

⁸⁷ For an excellent discussion of the current obstacles that afflict the ability of regulators to specify the quantity and quality of testing needed under TSCA, see John S. Applegate, *The Perils of Unreasonable Risk: Information Regulatory Policy and Toxic Substances Control*, 91 COLUM. L. REV. 261, 310-13 (1991).

⁸⁸ See, e.g., John S. Applegate, *The Government Role in Scientific Research: Who Should Bridget the Data Gap in Chemical Regulation?*, in *RESCUING SCIENCE FROM POLITICS: REGULATION AND THE DISTORTION OF SCIENTIFIC RESEARCH* 255, 257 (Wendy Wagner & Rena Steinzor eds. 2006) (discussing how TSCA places the burden on EPA to justify regulatory intervention).

⁸⁹ See, e.g., John S. Applegate, et al., *The Regulation of Toxic Substances and Hazardous Wastes* 291 (2d ed. 2011) (summarizing the history of the asbestos rule).

⁹⁰ *Id.*

⁹¹ *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1214 (5th Cir. 1991) (invalidating EPA’s ban of asbestos under TSCA because (citing *Benzene*) the agency has the burden of proving banned products place an unreasonable risk to the public and EPA did not do a thorough enough assessment (with evidence)).

⁹² See Asbestos Hazard Emergency Response (15 U.S.C. § 2641-2656) Asbestos Hazard Emergency Response (15 U.S.C. § 2641-2656)

⁹³ See, e.g., Thomas O. McGarity, *The Courts, and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 548 (1997) (noting that EPA abandoned the project).

⁹⁴ For an excellent overview of the steps to the assessment of whether a chemical presents an “unreasonable risk” – still in force today, see John S. Applegate, *supra* note 87, at 284-89 (1991).

⁹⁵ For more detail on this step, see EPA, *Handbook for Risk Characterization* (2000), available at <http://www.epa.gov/spc/pdfs/rchandbk.pdf>.

action proved by the agency to be the least disruptive to the status quo.⁹⁶ Chemicals that may appear to come close to having costs that exceed benefits are not necessarily candidates for banning. Restrictions on their use might be developed to mitigate the worst harms while preserving the benefits. Simple labeling changes or use instructions, for example, might take care of the worst of the problems. In all cases, the agency is expected to develop reasonable scenarios and identify the best way to make the most of the product without subjecting it to the “death penalty.”⁹⁷

Two further problems arise from this basic regulatory design that add still more impediments to the agencies’ ability to make progress. First, as mentioned, the agency must have information about a chemical to undertake its analysis, but information is not always cheap and sometimes it may not even exist without concerted testing. For their part, manufacturers will generally not invest voluntarily on testing for latent harms – this type of testing is rarely decisive and the uncertainties typically raise doubts about safety that only hurt, and do not help sell the product.⁹⁸ Since latent harms are difficult to prove in tort cases, moreover, tort liability provides additional incentives to choose ignorance than to invest in robust and complete tests.⁹⁹

In fact, despite the market failure that can arise in creating toxicity information, the agencies’ authorities to require testing are limited. Under TSCA, EPA must first making a regulatory finding that the chemical “may present an unreasonable risk of injury to health or the environment” as a prerequisite to requiring more testing,¹⁰⁰ which requires a “more-than-theoretical” possibility of an unreasonable risk.¹⁰¹ Ironically, where there is effectively no toxicity information at all on a reactive chemical, the agency may not support its demand for testing since it lacks concrete evidence the chemical is risky. The testing standard thus creates a Catch 22 for the agency with respect to ensuring testing on under-tested chemicals.¹⁰² As a result, the gaps in toxicity data for most chemicals in commerce are still substantial.¹⁰³

⁹⁶ See 15 U.S.C. 2605(a) (specifying that EPA’s action must be the “least burdensome” action).

⁹⁷ See, e.g., *Corrosion Proof*, *supra* note 91, at 1214.

⁹⁸ Mary L. Lyndon, *Information Economics and Chemical Toxicity: Designing Laws to Produce and Use Data*, 87 MICH. L. REV. 1795, 1813-17 (1989).

⁹⁹ See Margaret A. Berger, *Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts*, 97 COLUM. L. REV. 2117, 2135-40 (1997) (arguing that the current common law causation standard provides perverse incentives for defendants to remain ignorant); Heidi Li Feldman, *Science and Uncertainty in Mass Exposure Litigation*, 74 TEX. L. REV. 1, 41 (1995) (arguing that underdeterrence will occur under current toxic tort liability rules because “placing the burden of proof on the plaintiff creates a perverse incentive for actors to foster strong uncertainty about general causation”); Wendy E. Wagner, *Choosing Ignorance in the Manufacture of Toxic Products*, 82 CORNELL L. REV. 773, 796 (1997) (“The common law requirement that plaintiffs assume the entire burden of proving causation in toxic tort cases . . . creates inappropriate incentives for long-term safety research . . .”).

¹⁰⁰ See TSCA, § 2604(e).

¹⁰¹ *Chem. Mfrs. Ass’n v. EPA*, 859 F.2d 977, 984 (D.C. Cir. 1988).

¹⁰² This prerequisite has deterred EPA from requiring testing. See, e.g., U.S. Gov’t Accountability Office, *Chemical Regulation: Options Exist to Improve EPA’s Ability to Assess Health Risks and Manage its Chemical Review Program* 18, 26 (Report No. GAO-05-458, 2005), available at <http://www.gao.gov/new.items/d05458.pdf> [hereinafter GAO, *Options*]; Applegate, *supra* note 87, at 315-17 (discussing the test rule in more detail). In fact, EPA now negotiates testing largely outside the jurisdiction of TSCA. See, e.g., Sarah Bayko, Note, *Reforming the Toxic Substances Control Act to Protect America’s Most Precious Resource*, 14 *Southeastern Env’tl. L.J.* 245, 255, 267-69 (2006).

¹⁰³ The last assessment of the extent of toxicity testing on chemicals in commerce is somewhat dated, but the conclusion is that there is only limited toxicity data available on about two-thirds of all chemicals in commerce; the remaining chemicals are supported by almost no data. See, e.g., ENVIRONMENTAL DEFENSE FUND, *TOXIC IGNORANCE* (1997); Bureau of National Affairs, *Testing: CMA more optimistic than EDF and lack of data for 100 chemicals*, 230 *Daily Environment Report A-4* (Dec. 1, 1997); Environmental Protection Agency, Office of Pollution Prevention and Toxics, *What do we really know about the safety of high production volume chemicals?*, 22 *Chem. Reg. Rep. (BNA)* 261 (1998). Since the late 1990’s high production volume chemical manufacturers did agree to produce some data voluntarily, but this initiative only applies to some high production volume chemicals, and even with respect to these chemicals as of 2007 (eleven years into the program), expert observers observed that it still “well away from delivering on the promises it made.”

Second, the agency's decisions can be challenged in court.¹⁰⁴ While in theory these challenges can be brought by both public interest groups and manufacturers, in practice the oversight of EPA's regulation of chemicals is dominated by the chemical industry.¹⁰⁵ This is not surprising since chemical manufacturers have immediate and high stakes in the outcome of product oversight and typically have more resources to engage in the battles in relation to public interest counterparts.¹⁰⁶ The result, however, is that the agency received lopsided feedback in favor of weaker standards and the dominant constituency that holds EPA's feet to the fire is this same collective of regulated parties.

Given the diffuse benefits to the public and high stakes to industry, the political process tends to be dominated by those with high stakes and ample resources – namely the regulated parties, much like that described in Part II for the air toxic standards. Even after disasters – like toxic spills -- catalyze majoritarian waves of symbolic legislation, a strong minoritarian undertow predictably follows, aided by basic features of administrative law, that sweeps out most of the gains made by the dormant majority.¹⁰⁷ While the ultimate agency decisions are still subject to notice and comment and are technically transparent, potentially numerous, invisible adjustments to the decisions are made out of the sunlight in ways that are likely to escape notice during the preparation of the proposed rule, White House review, and after publication of the final rule.

B. The Market-Based Standard in Toxics Regulation made Concrete

Against even the most imbalanced process, modular CIA offers a means of cutting through these grim institutional scenarios by constructing institutional hybrids that splice in more effective institutional decision-makers at key steps in the process. Faced with predictable minoritarian undertow in US administrative law, modular CIA thus provides a much richer menu of institutional possibilities that can begin to make headway to counteract unilateral industry pressure.

The first step of modular CIA is to isolate key steps within the existing regulatory process that can be extracted out and reconsidered with regard to the best institutional decision-maker. The most obvious juncture in toxics regulation is the decision about whether a product or chemical presents a risk worthy of regulatory intervention. Chemical regulation in the US looks to regulators to determine whether a product should be restricted or subjected to added testing based on an analysis of whether the aggregate costs of the product exceed its benefits.¹⁰⁸ Not surprisingly, then, this agency decision

(Contd.) _____

RICHARD A. DENISON, ENVTL. DEF. FUND, HIGH HOPES, LOW MARKS: A FINAL REPORT CARD ON THE HIGH PRODUCTION VOLUME CHEMICAL CHALLENGE 3 (2007), available at http://www.edf.org/documents/6653_HighHopesLowMarks.pdf.

¹⁰⁴ See, e.g., TSCA, 15 U.S.C. § 2618; CPSA, [15 U.S.C. § 2060\(a\)](#) (providing for judicial review of agency decisions).

¹⁰⁵ ^Wagner will fill in in Sept. with the results of ongoing empirical work^^. See generally Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 128 (2006) (identifying a “bias towards business”); Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 3 ADMIN. L. REV. 99, 125 (2011).

¹⁰⁶ See, e.g., William T. Gormley, Jr., *Regulatory Issue Networks in a Federal System*, 18 POLITY 595, 607–08 (1986) (describing how this high stakes; high resources feature, when pitted against the general public interest, places the issue in the “boardroom” where the engagement in agency decision-making is lopsided against the public interest).

¹⁰⁷ This is elaborated in Wagner, *The Participation-Centered Model meets Administrative Process*, 2013 WISCONSIN L. REV. 671.

¹⁰⁸ See, e.g., Toxic Substance Control Act (TSCA) 15 U.S.C. §§ 2604(f)(1), 2605(a) (2000) (authorizing regulatory action on new and existing toxic substances “[i]f the Administrator finds that there is a reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or mixture, or that any combination of such activities, presents or will present an unreasonable risk of injury to health or the environment”). This information-intensive assessment is also done, at least in the US, with very little attention to the available substitutes on the market. Additionally, in the US the need and effectiveness of the chemical product is assumed; the only comparison with competitor products – if any are made at all -- is based on the relative toxicity of the products.

about what constitutes a “safe” or unrestricted toxic product also serves as the bull’s eye for industry influence at each stage of the administrative process.

Modular CIA can extract out this key regulatory decision regarding what and when products pose an “unreasonable risk” and replace it with a different institutional decision-maker, while still leaving undisturbed the larger institutional determination that some type of political oversight is necessary given the frailties of both the market and the common law. As discussed in the prior section, this technical regulatory inquiry depends heavily on information that is primarily in the possession of high stakes regulated parties, and these parties are likely to dominate the proceedings given their very high stakes in the outcome. As a result of these pressures, the regulatory process is likely to be characterized by information games, minoritarian domination over regulators, and extensive delays because of the contested nature of the information-intensive inquiry.¹⁰⁹ As discussed above, over the last three decades the number of additional process points added to at last U.S. administrative process provide still more avenues for more direct negotiation and input by industry, leading to a process that approaches a private-public collaboration between agencies and regulated parties, rather than a process that is practically open to all.

Modular CIA then seeks to identify the “least imperfect” institutional decision-maker at this key decision-making step of identifying product standards. Although the market is filled with imperfections, with respect to establishing reliable standards for the safety of toxic products and chemicals, the market is likely to do far better than the regulatory/political process.

The application of modular CIA suggests that rather than a regulatory determination of product safety, safety should be calibrated to what is possible on the market. The regulator is still involved in reaching these decisions, but since the point of regulator-intervention is benchmarked against a market standard, the regulator’s discretion is significantly constrained. Specifically, rather than intervene when a product’s risks outweigh its aggregate benefits, a regulator will restrict (e.g., require more testing) or even ban a chemical when there are superior alternatives that are less toxic and/or more effective in light of the product’s risk. The analysis is a relative one that compares a given product against its competitors on the market. When the product does not meet the “mean” level of safety (or a higher level of safety – this depends on the legislative or other policy-based benchmark), then the product will be regulated in some way.¹¹⁰

After the regulator identifies the appropriate market-based benchmark,¹¹¹ it is up to the individual manufacturers to show their product(s) exceed this floor or standard.¹¹² The burden of proof for establishing safety of individual products or classes of products relative to the market-based standard, once established, would thus rest with the individual manufacturers.

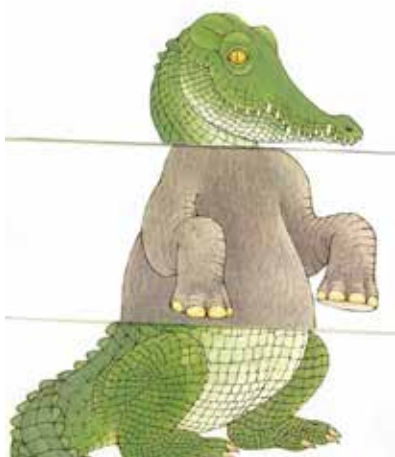
¹⁰⁹ See generally Bruce M. Owen & Ronald Braeutigam, *The Regulation Game: Strategic Use of the Administrative Process* 4–5 (1978).

¹¹⁰ Both the EPA and the states have been experimenting with conducting methods for alternatives assessments and thus the procedures for conducting these comparisons are already becoming well worked out. In 2010 EPA issued a guideline for conducting alternatives assessments in general. http://epa.gov/dfe/alternatives_assessment_criteria_hazard_eval_nov2010_final_draft2.pdf The Toxic Use Reduction Institute, a think tank based at the University of Massachusetts-Lowell, has developed an even more elaborate set of methods and alternatives assessment techniques. See, e.g., http://www.turi.org/Our_Work/Research/Alternatives_Assessment/Chemical_Hazard_Comparison_Tools

¹¹¹ This showing would presumably be subject to some general comment, although it may not require full notice and comment.

¹¹² This approach parallels the emphasis in alternatives assessment advocated by Joel Tickner. See, e.g., Joel Tickner, *Science of problems, science of solutions or both? A case example of bisphenol A*, 65 J. OF EPIDEMIOLOGY AND COMMUNITY HEALTH 649 (2011)

To expedite the analysis, various default presumptions could apply that identify whether the product meets the standard.¹¹³ For example, if a product offers no benefits beyond competitors and yet is more toxic – perhaps by two times or more -- in ways that don't involve trade-offs, then the inferior chemical might be automatically slated for banning or gradual phase-out.¹¹⁴ Since this type of approach has never been applied to toxic products or chemicals before, there may be quite a few chemicals that flunk this relatively straightforward default rule. Other trade-offs, say between acute and chronic harms or energy-saving versus toxicity, might involve more complicated assessments. Ultimately, these complex tradeoffs might lead to the opposite default presumption that when two products cannot be compared against one another due to many incommensurables, both are presumed market-worthy. Using defaults that presumptively but not conclusively compare chemicals, the agency should be able to make considerable progress in culling out useless, toxic chemicals and products from the marketplace.



The “unreasonable risk” standard determined by a regulatory/political assessment is spliced out of the toxic product regulatory programs and replaced with a market-based approach.

This comparative exercise requires vastly less information than is currently demanded to regulate a chemical or even require testing under TSCA because the primary areas of inquiry are relative toxicity, cost, and effectiveness.¹¹⁵ Routes of exposure can be assumed to be similar across similar variations of the same product. The benefits can also be assumed to be the same for products or chemicals within the same use category. Even some features of toxicity can be bracketed if they are shared in common with some chemicals. The primary point of inquiry is the relative question of whether one product is more carcinogenic or more reactive than another.

Since product innovation in the open market may not go far enough, a protective backstop could be added to authorize the agency to intervene in marketing a product if information indicates that, even without superior substitutes, the costs of a product outweigh the benefits. The proposal here is not intended to be a complete replacement for the agency's discretion to intervene in dangerous products; rather the proposal is that in the first instance the agency need apply only a market-based standard to determine whether a toxic product can enter the market. If the product passes the market-based test, it still may be restricted based on larger concerns about its net social value in light of its costs.

¹¹³ Some of the areas for guidance would be in comparing efficacy vs. health; price vs. health; and acute vs. chronic toxicity.

¹¹⁴ Some firms may need time to adjust if key chemicals in their processes are banned. Greenwood raises this concern about a market-based approach. See Mark Greenwood, *Comment on Using Competition-Based Regulation to Bridge the Toxics Data Gap*, 39 *Envl. L. Rep.* 10796, 10797 (2009). A gradual phase out should take care of these concerns.

¹¹⁵ See Tickner, *supra* note 112 (arguing for alternatives assessments rather than detailed singular characterizations of the risk of a substance); see also NRC, *SCIENCE AND DECISIONS 246* (2008) (the NRC's framework for risk analysis attempts to minimize the effects of uncertainties by comparing an intervention (e.g., a suspect chemical) against the status quo).

Even with clean default presumptions, there may be a great deal of analysis and information-collection required to make various judgments about chemicals and products. To address these demands, agency processes, particularly in processing the rebuttal information, could be subsidized in a variety of ways, such as mini-adjudications funded by licensing fees.¹¹⁶ Manufacturers could even petition to eliminate competitors by establishing the superior safety attributes of their own products and emerging as among the market-based for regulatory purposes.¹¹⁷

Ideally, the selection of “best” or “mean” products against which competitors are held would be revisited every few years or at least could be even revised in a dynamic fashion. A standing expert committee could dedicate itself full-time to keep up with green chemistry and related developments in the field and alter product standards accordingly. Additionally, a manufacturer with a new innovative product could petition the agency to revisit the market-based product benchmark for a given functional use of chemicals/products. While all manufacturers could be allowed a several year grace period to come into compliance with a new product benchmark, or at least to affix a label to their product that signals that the product falls below the mean standard (or other intermediate regulatory-backed signals), regulatory standards would reflect at least the developments and innovations in the market and expect the same dynamism from regulatory standards. Indeed, since the target is the regulation of products, there is no reason to permit manufacturers more latitude than the market itself permits.

The proposal here is admittedly ambitious, particularly given the potentially enormous size of the chemical market (there are over 80,000 chemicals in commerce, alone, although some estimate that only about 10 percent of these chemicals are in use at significant levels).¹¹⁸ Some triaging of the chemical universe will likely be necessary, at least at the beginning. The prioritization approach advocated by a number of authors would identify “chemicals of concern” or “extremely hazardous chemicals” and investigate their attributes first.¹¹⁹ This type of technical detail in the shape of the reform is better left for more detailed implementation, but it is worth mentioning even at this early stage an alternate and perhaps better prioritization system would focus initially on identifying chemicals that have no benefit in relation to competitors but involve higher risks. Under this prioritization scheme, the chemicals highest on the list would be those sold for uses that involve numerous competitor products. In such loaded markets there may be particularly useful opportunities for culling out unnecessarily toxic products. Manufacturers might also be invited to nominate competitor chemicals (or products) that are no-brainers in terms of their higher risks which, at least based on the readily available information, are not offset by more beneficial uses.

C. The Benefits to a Market-based Standard in Chemical Regulation

A shifted regulatory focus on the market-based makes several positive moves in instituting more diverse perspectives in chemical regulation. Most important, to the extent the regulatory process looks to the best performers for standards, at least some regulated parties will become involved in building regulatory solutions, rather than lobbying for reduced regulatory oversight. Innovators who expect their products to fare well may even share in-house expertise with the agency in developing comparative processes that are rigorous and allow for smooth comparisons.

Relatedly, as the regulatory process treats regulated parties differently – with winners and losers – the now solidified collective of regulated parties will become more fragmented and could even fracture completely. Rather than finding common ground in arguing for a low floor, manufacturers

¹¹⁶ These specifics can be worked out but currently are considered beyond the scope of this paper.

¹¹⁷ See Part VI, *infra*.

¹¹⁸ See, e.g., Greenwood, *supra* note 114, at 10796.

¹¹⁹ See, e.g., Richard A. Denison, Ten Essential Elements in TSCA Reform, 39 *Env'tl. L. Rep.* 10020, 10021-22 (arguing for the identification and prioritization of chemicals of concern in chemicals regulation).

seem more likely to be pitted against one another in a race to the top. By focusing on the best products, then, the regulatory end game infuses market competition back into the manufacture of products and the political process.¹²⁰ The benefits to collective action are greatly reduced in a regulatory system that provides for winners and losers among manufacturers, with the winners setting the standards for the rest. The incentives within the regulated community will thus be turned from rent-seeking in the political process to a self-interested drive to be selected among the best in the market.¹²¹

By culling out the worst in the market, this regulatory oversight also improves the functioning of the market. Consumers and investors may not have the expertise or resources to make fine comparisons in the toxicity of different products, even if they had this information in accessible formats. Yet by doing this work for them – eliminating the surplus of inferior products that offer no price or efficacy advantages – the bad products are culled out and the market functions more efficiently. And by holding products to the best standards, the adverse selection problems of the market are reversed and transformed into quite the opposite – a race for the top among competitors. In response to this incentive, other companies are more likely to innovate just to keep up, as well as invest to win the regulatory competition and enjoy the privilege of being the “best” against which all other products are compared.¹²²

With more assistance from regulated parties in dredging up relevant information to make relative assessments of products, coupled with far lower analytical demands because of this much more limited comparison (as opposed to a full-fledged cost-benefit assessment), standards will not only be more rigorous but will likely be considerably easier to set as compared to the predecessor approach under TSCA.¹²³ For example, once a functional category of products is identified based on a type of general use, the only relevant issue is whether a product falls below a set of identified “superior” products in terms of efficacy, cost, and toxicity; the entire benefits side of the equation as well as exposure information can be bracketed since the products in a functional use will likely share similar characteristics on these variables. The analysis is thus made immensely simpler since it focuses much more narrowly on toxicity and to a lesser extent the price and efficacy of the product. Since this simpler analysis has not yet been undertaken, it seems likely that some products will likely “flunk” quickly and even be withdrawn by manufacturers voluntarily once a benchmark is established, like asphalt sealant.¹²⁴

The validity and availability of information available to regulators to assess chemicals should also be improved if manufacturers must prove that their chemical does not fall below the market-based standard. Since they will be put into competition with one another, the veracity of the information will

¹²⁰ Political positions are often the result of powerful collective action among regulated parties. *See, e.g.*, Gormley, *supra* note 106. The market-based approach breaks apart this strong collective action and pits manufacturers against one another.

¹²¹ *Cf.* Neil Komesar, *Stranger in a Strange Land: An Outsider's View of Antitrust and the Courts*, 41 LOYOLA UNIVERSITY CHICAGO LAW JOURNAL 443 (2010) (making some of these same arguments in the context of anti-trust regulation).

¹²² Although Akerlof doesn't explicitly identify clear rewards for first-movers as a solution to the lemons problem, surely turning the asymmetrical information into a competition against the top entrants does exactly that type of flipping of a market for lemons into a market that encourages top innovation and gains. *See* Akerlof, *The Market for 'Lemons': Qualitative Uncertainty and the Market Mechanism*, 84 QUART. J. ECON. 488 (1970). Markets also incorporate vastly more expertise and information than regulatory processes can hope to replicate, and they integrate this information much more swiftly, seamlessly, and without the large transaction costs that afflict the regulatory process. Markets work continuously, so the need for updating, which can be a significant cost endemic in regulatory analyses, is eliminated to the extent the regulatory standards can be calibrated adaptively to changes in the availability of safer products.

¹²³ *See also* Tickner, *supra* note 112.

¹²⁴ For example, San Francisco determined that phthalates are a non-essential ingredient in children's toys, and yet they present health hazards. The City banned the use of phthalates in children's toys, which in turn triggered similar actions at the federal level. *See, e.g.*, Debbie O. Raphael & Chris A. Geiger, *Precautionary Policies in Local Government: Green Chemistry and Safer Alternatives*, 21 NEW SOLUTIONS, 245, 254 (2011) (describing this and other similar developments).

be subjected to scrutiny by rival manufacturers. Under the current system, by contrast, manufacturer-produced data is submitted to the agency, but the agency often lacks the resources to investigate its reliability, much less to replicate it, and there are few to no incentives for competitors to provide added oversight.

Beyond the numerous domestic advantages, a shift to market-based determination of safety might also become useful as a global standard that not only draws its information from the best in the global market, but produces an output – a regulatory standard – that is easily exported and communicated across national borders. From the standpoint of regulatory harmonization, market benchmark for product safety provides something akin to the Rosetta stone; it translates a variety of preferences and practices into market outputs. The product mix does not necessarily match the aspirations of a country's culture, yet the range of products provide evidence of at least what is possible technologically and offers some indication of diverse consumer preferences.

Standards based on market analogs also raise fewer concerns about objectivity, political representation, and the like when national standards must be compared against one another. If the test is simply what is a “reasonable alternative design” or even the “best reasonable alternative design” on the market, then this type of simple market-benchmark translates to a variety of political structures regardless of the precise approaches that the decision-maker takes to decision-making. A market-based standard is also dynamic and calibrated to changes in the market that should ideally lead to smoother harmonization across borders over time.

Setting product standards against the best in the global market would also seem in the abstract to satisfy concerns about unfair trade barriers.¹²⁵ A nation that demands only the safest products in the global market across a number of functional product categories would not seem protectionist, particularly when those standards are justified in part by the substantial scientific uncertainties that preclude more precise human and environmental testing and analysis. In contrast to an abstracted regulatory judgment based on national preferences, a basic “demand safer alternatives in the global market when the risks are unspecified” regulatory standard considers all products in the global marketplace and not simply those sold by its own manufacturers.

At the same time, a global market-based determination for product safety should accelerate the race to the top features of this regulatory standard. Manufacturers in a global market may find themselves in competition for possibly the first time, innovating better ways to design products regarding human health and environment in order to be considered an exemplar. Much like the technological revolution, this regulatory-triggered revolution would turn the market for lemons into precisely the opposite regarding product innovation. By focusing on global innovation and rewarding the best, the standards will be set to encourage research, development and safety by singling out market “winners.”

In benchmarking regulatory standards against this global market, there may even be potentially significant gains from the economies of scale in sharing information between governments. Some countries might want to benchmark their product regulatory standard on the “average” best product in the market; others might prefer a higher standard based on the three safest products in a functional class, etc. Yet whatever the determination, methods for identifying and assessing the relative safety of functionally equivalent products should become fungible and easy to translate across borders since

¹²⁵ Although the implications of the market-based standard for fair trade deserves further research, at least facially it would seem to survive one of the most rigorous trade agreements, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) of the World Trade Organization agreement, available at http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm. The SPS Agreement expects that restraints on trade be supported by risk assessments and other legitimate analyses. *See, e.g., id.* at art. 2(2) (Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence . . .”). An alternatives assessment that identifies a chemical as both risky and presenting no additional benefit, particularly as against a global marketplace of analogous products, would seem to meet this test.

they compare global products against one another based on seemingly translate-able features of toxicity and cost. The creation of models for assessing and comparing products may not only improve the functioning of global markets, but streamline domestic regimes in developing standards and sharing information.

V. Existing Hybrid Approaches that Parallel a Market-based Approach to Toxics Product Regulation

Although basing regulatory standards on best performers may seem a relatively dramatic change from the status quo, this hybrid approach resonates with existing approaches found in U.S. tort law, pollution control standards in the U.S., and EU chemical regulation. These complementary, existing approaches are considered in this section. The investigation explores both their similarities to the proposal for toxic product regulation and also how implementing these various programs could be improved, particularly if adapted to toxic product regulation in the future.

A. “Reasonable Alternative Design” in Products Liability Law

In U.S. tort law, negligence is generally determined – implicitly or explicitly -- by comparing a defendant’s behavior or product against alternative courses of action.¹²⁶ Whether a defendant is negligent or unreasonable depends on whether the costs of his activity, as compared against alternative precautions, outweigh the benefits. Negligence is thus relational; it involves a comparison of what a defendant did against what he could have done.

Over time, the largest area of products liability law - governing design defects - has evolved to develop a similar, relative standard for product safety in tort law, namely whether a product’s costs outweigh its benefits when compared against a “reasonable alternative design.”¹²⁷ This reasonable alternative design, or RAD, serves as a comparison point that anchors an assessment of a product’s safety against the market alternatives.¹²⁸ The RAD standard is dynamic -- improvements in product design lead to a constant, upward pressure for innovation by manufacturers. Since the RAD test is applied in individual tort cases case by case, it should be more insulated from politics and collective self-interested action by product manufacturers as compared to the political process.¹²⁹

To stave off liability, product manufacturers must keep up with competitors to produce products at least average in safety. If some cars are designed to prevent mis-shifting when a gear is not engaged¹³⁰ or from allowing power windows to close even if objects (such as children’s heads) are in the way,¹³¹ then plaintiffs injured by cars without these safety features can argue that a RAD would have prevented the accident at little to no additional cost. While in theory the assessment involves quantifications of risks and benefits, in reality the analysis generally considers only whether this

¹²⁶ See, e.g., Mark Grady, *Untaken Precautions*, 18 J. LEGAL STUD. 139, 144 (1989) (“by selecting an untaken precaution on which to rely, the plaintiff defines the analysis that everyone else will use [in a negligence case]”).

¹²⁷ Restatement (Third) of Torts, § 2b.

¹²⁸ Plaintiffs may also be required to create prototypes of the preferred alternative, at least in some states. See, e.g., *Unrein v. Timesavers, Inc.*, 394 F.3d 1008 (8th Cir. 2005) (requiring plaintiff to develop a prototype of the preferred alternative); *Jaurequi v. Carter Manufacturing Co., Inc.*, 173 F.3d 1076 (8th Cir. 1999) (same).

¹²⁹ This is not always the case. See, e.g., Alan Schwarz, *As Injuries Rise, Scant Oversight of Helmet Safety*, N.Y. Times, Oct. 20, 2010, at A1 (documenting the low standards set by an association for football helmets, which are overseen by an association made up of helmet manufacturers and physicians; the standards have been influential in some tort litigation against manufacturers).

¹³⁰ See, e.g., *General Motors Corp. v. Sanchez*, 997 S.W.3d 584 (Tx. 1999).

¹³¹ See Kids and Cars website, at <http://www.kidsandcars.org/power-windows.html>

“reasonable alternative design” is available and affordable. If it is, then the defendant is at risk of liability for choosing a less safe design.

In theory, a RAD standard would ensure reasonable product safety for all products, including toxic products; products that are unreasonably toxic as compared to equally efficacious competitors would trigger liability and manufacturers would reconsider their decision to market unreasonable unsafe products. In practice, however, the “actual cause” requirement necessary for a successful case involving latent injuries absolves most manufacturers from liability for the manufacture of unreasonably unsafe toxic products.¹³² Products that are highly carcinogenic, teratogenic, or otherwise reactive will generally remain unaffected by tort law because there is not likely to be adequate information to connect a plaintiff’s generic injuries to his exposure to the product decades earlier. While tort law provides a RAD standard that should encourage safer toxic products, since tort law requires injured victims to prove causation, the retrospective, information-intensive nature of the proof leaves tort law ineffective in reaching most toxic products that cause latent harm.¹³³

The test advocated here to regulate toxic products is the equivalent of the RAD test, but it would be applied by regulators and not be barred by uncertainties involved in tracing cause and effect. Additionally and in contrast to tort law, rather than a plaintiff, the agency would be in search of a prototype or better reasonable alternative product. And, rather than a jury, regulators will determine whether the case has been made against an unreasonably unsafe product.

B. Pollution control standards in the U.S.

The air toxic standards discussed in Part II, *supra*, as well as a number of other pollution standards in the US must be set according to the capabilities of the best available pollution control technology.¹³⁴ In theory, under these mandates the agency is directed to find the best pollution control technology and promulgate industry-wide pollution control standards based on these top performers. These mandates thus adopt a market-based approach to pollution regulation since the standards are based on the best capabilities of industry.

Given the market-based feature of these standards, one would expect the standards to be relatively immune from the minoritarian undertow since firms compete to be used as the model for this “best technology” standard. In reality, however, the standards have not been implemented in a way that produces fierce competition among firms. Instead, the standards have been set in a lowest-common-denominator fashion that seems to encourage strong industry coalitions that advocate a lax standard.

There are several features associated with the agencies’ development of technology-based standards that have allowed the minoritarian undertow to reach what should be a more competitive standard-setting approach. First, due to asymmetries in information regarding industry capabilities, it has been difficult for the agencies to determine what and whether various pollution control technologies are truly feasible across facilities or to determine with quantitative precision the types of

¹³² See, e.g., Berger, *supra* note 99.

¹³³ This problem – a catch 22 of sorts – has led to its own series of puzzles and possible fixes within the four corners of tort law itself. Leading among them is a suggestion that rather than physical injuries that are causally linked to a toxic product, at least for nontherapeutic drugs (or presumably by extension highly toxic chemicals with high exposure) the plaintiff need only show dignitary harm from the lack of notice or informed consent. By approaching the claim as effectively a battery (without the intent), tort law can offer some deterrence value for some of these problems that otherwise fall through the cracks. See Margaret Berger & Aaron Twersky, *Uncertainty and Informed Choice: Unmasking Daubert*, 104 MICH. L. REV. 258 (2005).

¹³⁴ Technology-based standards made their initial appearance in the first major statute to impose federal regulatory controls on pollution--the Clean Air Act of 1970. Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at [42 U.S.C. §§ 7401-7671g \(1994\)](#)). Section 111 of the Clean Air Act requires the EPA to set technology-based emission limitations for new major sources of air pollution. Id. § 111 (codified as amended at [42 U.S.C. § 7411](#)).

reductions these pollution control technologies can generally accomplish once installed.¹³⁵ These informational hurdles have not only slowed the agency's setting of the standards but may have led the agency to strike compromises with affected industries hoping to stave off judicial challenges.¹³⁶ It should be noted, however, that in market-based benchmarks for product safety, these asymmetrical information problems would not be as significant; products can be compared without more intricate determinations of underlying industrial processes, and a product's feasibility can be assessed by its market price, which is not the case for pollution control technologies, which must be retrofitted and maintained in a wide variety of facilities.

Industry has also weakened the standards by successfully lobbying agencies to subdivide the relevant sets of industrial actors subjected to a "best available technology" into smaller and smaller units.¹³⁷ If there are only five industries within a group, the "best available pollution control technology" is less costly and rigorous than when hundreds of facilities are compared in the search for the single best technology. In products, identifying the set of comparators could be equally slippery and subject to manipulation for determining which products are functionally equivalent. The initial categorization of products and their comparators will need process-based protections to stave off concerted lobbying by regulated parties in order to ensure the categories are rigorous.

Even more problematic, the existing standards for pollution control technology are rarely updated by the agencies.¹³⁸ While Congress requires the agency to revisit the standards every five years, the agency rarely does this in practice. Many of the pollution control standards are based on what the agency identified as among the best technologies in the 1970's and 1980's. These standards lag well behind the actual market-based, technological exemplars contemplated in the original environmental laws.

To produce a successful market-based approach to pollution control, it is essential that the standard-setting process bring out competition among the regulated firms. With the benefit of hindsight and experience, some of the pitfalls in the implementation of best available technology standards should be avoided by the agency and this type of standard could be used to engage diverse perspectives that lead to rising levels of performance. Regardless, these standards provide an illustration of Congress' willingness to demand that at least with respect to public safety, firms must do "their best" in a way that identifies the most innovative firms from the market and holds these best performers out as a standard for others.

C. Chemicals Regulation Locally and Globally

The notion of a comparative approach to toxics regulation – that culls out inferior and dangerous substitutes -- is becoming increasingly well accepted in both the states and Europe. In Maine, regulators may ban children's products that contain priority chemicals if a safer alternative is available

¹³⁵ See, e.g., Sanford E. Gaines, *Decisionmaking Procedures at the Environmental Protection Agency*, 62 IOWA L. REV. 839, 839-64 (1977); D. Bruce La Pierre, *Technology-Forcing and Federal Environmental Protection Statutes*, 62 IOWA L. REV. 771, 810-31 (1977).

¹³⁶ See, e.g., Wendy Wagner, *Revisiting the Impact of Judicial Review on Agency Rulemakings: An Empirical Investigation*, 53 WM. & MARY L. REV. 1717 (2012), (conjecturing on this point).

¹³⁷ One example is the deeply buried discussion of the authority to subcategorize industries to set the standards and the economic advantages to this technique in a court case where this practice was challenged. *Sierra Club v. EPA*, 479 F.3d 875, 885 (D.C. Cir. 2007) (“[Although] authority to generate subcategories is obviously not unqualified . . . one legitimate basis for creating additional subcategories must be the interest in keeping the relation between ‘achieved’ and ‘achievable’ in accord with common sense and the reasonable meaning of the statute.”) (Williams, J., concurring).

¹³⁸ A 2012 GAO study documents this problem in detail under the Clean Water Act. See GAO, *EPA HAS IMPROVED ITS REVIEW OF EFFLUENT GUIDELINES BUT COULD BENEFIT FROM MORE INFORMATION ON TREATMENT TECHNOLOGIES* (2012), available at <http://gao.gov/products/GAO-12-845>.

at a comparable cost.¹³⁹ The core idea is exactly that, at least for children's products, if needlessly hazardous chemicals are used in producing the product that can be replaced with safer chemicals, the product should be banned.¹⁴⁰ The manufacturer of a product can even conduct the assessment.¹⁴¹ Even more far reaching is Massachusetts's law, which requires the state's businesses to identify and use less toxic materials where possible. Alternatives assessments are conducted to identify these opportunities.¹⁴² Other state laws are cropping up that follow this leadership on substitute analysis. Even nonprofits are engaging in ways that help tee up both the ready availability of safer substitutes and that make the information easier to access regarding conducting these comparative assessments.¹⁴³

The EU's renowned effort to regulate chemicals, through REACH, is perhaps the most explicit attempt to integrate a comparative or substitute analysis into toxic regulation. Although the primary thrust of REACH requires basic toxicity testing as a precondition to the sale of chemical products, for extremely hazardous chemicals, the EU legislation requires manufacturers to also justify the continued marketing of their products against the available substitutes.¹⁴⁴ Like RAD, this substitute analysis requires a market-based assessment of the viability of at least a subset of chemicals against their competitors.

Since the REACH program is only just getting started, it is unclear how vigorously this substitute analysis will be implemented.¹⁴⁵ The fact that the substitute analysis requirement is codified in REACH lends at least some credence to a market-based approach to chemicals regulation. While identifying a reliable set of comparators presumably will be difficult, it is apparently not such a great challenge that the drafters and stakeholders will find it necessary to avoid substitute analysis altogether.

Relatedly, REACH is likely to produce considerable practical information about a market-based approach to chemical regulation, at least as applied to extremely hazardous chemicals. Such practical experience can expedite the adoption of this approach in the US and elsewhere. Implementation in the EU should also stigmatize the marketability of at least those extremely hazardous substances that cannot establish their continued market viability in comparison with substitutes.

D. Learning from Experience

Some general lessons for the design of market-based approaches emerge from these analogous experiences in tort law, U.S. pollution control, and REACH. First, a market benchmark must be based on the products or options on the market and not on the manufacturers' collective views of these features, which can lead to self-serving positions that deviate from market realities. In setting market standards, then, there can be no deference to industry collectives in defining the best alternatives or in establishing the appropriate set of comparators. A market-based benchmark simulates the market only when the bona fides are placed in a competitive position that pits them against one another.

¹³⁹ 38 Me. Rev. Stat. Ann. Tit. 38 §§ 1691-1699.

¹⁴⁰ *Id.* at § 1696.

¹⁴¹ *Id.* at § 1696(3).

¹⁴² The Massachusetts legislature established a program to assist businesses in reducing the use of toxics. That program has resulted in a concerted effort to identify safer substitutes and to develop methods for alternatives assessments. See Chapter 21I of the Massachusetts General Laws: the Toxics Use Reduction Act of 1989; see also TURI website, available at http://www.turi.org/Our_Work/Research/Alternatives_Assessment

¹⁴³ See, for example, Good Guide at <http://www.goodguide.com/>, and a database on cosmetics created by EWG, available at <http://www.ewg.org/skindeep/>.

¹⁴⁴ REACH, art. 58(1).

¹⁴⁵ See, e.g., Joanne Scott, *From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction*, 57 *AMERICAN JOURNAL OF COMPARATIVE LAW* 897, 898 (2009).

Second, agency efforts to find the average or best toxic product in the market must be structured to be constantly updated with the emergence of new and better products. Just as the market is dynamic, so the regulatory standards must change as well. Industry may pressure the agency to forgo this updating, so adaptive mechanisms should be hardwired into the authorizing legislation or regulatory program to ensure it occurs. Fortunately, and in contrast to the installation of pollution control technologies, rapid developments in innovation and product design are generally a fact of life for product manufacturers; innovations in preventing immediate risks and acute harms are ever-present in the market. At least facially requiring a similar, dynamic regulatory standard for latent harms seems non-problematic. From the manufacturers' standpoint, provided there are reasonable grace periods – two years or so – to meet the rising product standards, the need for this type of periodic updating should be capable of being factored into manufacturers' research and development plans.

The final challenge involves incorporating a market-based approach into a regulatory system to ensure there is a reliable, relatively objective way to find market analogs or standards. This is more challenging. Under one approach, regulators could identify a presumptive “best” or “average” product against which others are compared and then shift the burden to those attempting to defend their individual products to provide evidence of how their product fares by comparison. In this way, regulators need not find a perfect analog, and the asymmetries and complexity of the relevant information will still rest on the individual manufacturers in distinguishing their product from the presumptive best product.¹⁴⁶

Even if this basic approach is used, there may be regulatory challenges in identifying the average or best products on the market. To supplement this critical inquiry, regulators could provide rewards or other inducements for the discovery of a particularly good product within a functional use category; the rewards could be provided to citizens, nonprofits, and competitors.¹⁴⁷ Regulatory agencies would also benefit from a standing expert committee assigned the task of monitoring the market for examples of innovative products and even reviewing agency determinations of the best in the market. The more independent such a research body, the more successful the regime should be in objectively making comparisons and identifying superior analogs.

VI. Getting from Here (Theory) to There (Reality) Using CIA

There is an unfortunate Catch-22 to a market-based reform designed to sidestep the minoritarian undertow that afflicts the regulatory process; in order to be adopted, the market-based approach must still go through the political process! Indeed, any hybrid institutional arrangements designed to circumvent defects in the political process will generally need political approval to become operational. At first blush, the n, the entire theoretical reform exercise has done little more than run in place, at least with respect to the practical possibilities for reform.

Inevitably, solutions generated in the abstract using CIA will encounter additional, practical impediments that require a second level of CIA to troubleshoot and identify the best paths for their actual adoption. The most obvious obstacle is the likelihood that market-based determinations of chemical safety will not be popular with industry. More specifically, instituting competitive benchmarks in the assessment of product safety will break up the industry's long-held, powerful coalition and turn individual manufacturers against one another in the market with a ferocity that is unparalleled in this product market in the past. A market-based approach will inevitably lead to considerably greater regulatory controls on products, which will also impose on the majority of manufacturers some significant profit losses. And tethering product safety assessments to market

¹⁴⁶ The methods are already being worked out for these comparisons. See *supra* note 110 and accompanying text.

¹⁴⁷ See similar suggestions in Wendy Wagner, *Using Competition-Based Regulation to Bridge the Toxics Data Gap*, 83 INDIANA L. J. 629 (2008).

options will signal a bumpy future ride for manufacturers, where products can quickly grow obsolete as front-moving global firms invest in R&D and put competitors out of business. The reform also stands in stark contrast to the current, failed market and regulatory system that extract no penalties on manufacturers and make few meaningful distinctions among products. Even if market-based determinations provide the best institutional solution with respect to maximizing diverse views and attaining more efficient and just solutions for society, this approach will not be a politically easy pill to swallow.

A more grounded level of CIA analysis is needed to troubleshoot these political obstacles in order to operationalize this solution. Three possibilities for sidestepping this coalition of regulated parties who might oppose market-based standards are identified here. It is important to note, however, that all three options demand strategic intervention by public-minded actors; this type of radical reform is unlikely to occur on its own. Another practical feature of at least some CIA-based analysis, then, is it requires a partnership between theoretical and practical actors.

A first step to importing a market-based approach into EPA's review of chemicals could be accomplished incrementally and through light external pressure using the petition process. A petitioner – either a nonprofit or even the manufacturer of a superior product -- could argue that a chemical presents an “unreasonable risk” if there is a safer substitute that provides comparable benefits at comparable cost. In an earlier article I discuss how this petition process might work.¹⁴⁸ While there are still kinks to be worked out, the statute seems to create space for this type of assessment by the agency.¹⁴⁹

The identification of superior substitutes, at least in some product categories, might also be provided by reliable nonprofits to help fill some of the many information gaps in the market. While this will not cure the regulatory programs, it may create pressure on manufacturers that will lead them to ultimately prefer or at least not resist as strenuously various regulatory interventions that provide this type of comparison.

There are already moves towards providing this type of comparison research and product disclosure, however preliminarily, through public interest groups who partner with academic institutions to generate the information.¹⁵⁰ Front-moving product manufacturers might also partner with public interest groups to develop robust sources of consumer and investor based information to raise the salience of the range of safety risks in diverse chemical products and to highlight the benefits of greater regulatory oversight of chemical products.¹⁵¹ These information-based reforms, albeit expensive, could identify in a primary way the losses to consumers and the adverse selection problems that result without more rigorous information on product toxicity. This salience-raising could then raise the majoritarian interest in reform and may even lead to some fragmentation among the strong industry coalition in resisting political reform.

Cross-national differences might also help raise public awareness of the otherwise invisible institutional failures and tip the political process towards more meaningful regulatory oversight which includes a comparison of similar products based on their relative toxicity. If the EU's REACH succeeds in generating a wealth of new information on toxicity and, even more, to the extent it implements a rigorous approach to substitute-analysis for at least the most toxic chemicals, it ups the ante for other nations by changing the salience of the risks and alternative regulatory approaches. This

¹⁴⁸ *See id.*

¹⁴⁹ *See id.*; but see Richard A. Denison, *Comment on Using Competition-Based Regulation to Bridge the Toxics Data Gap*, 39 ENVIRONMENTAL LAW REP. 10799, 10800-01 (2009) (suggesting the statute may not provide the policy space for this type of decision).

¹⁵⁰ *See, e.g.,* Good Guides, available at <http://www.goodguide.com/>; TURI, available at http://www.turi.org/About/Who_We_Are

¹⁵¹ *See, e.g.,* Coalition for Environmentally Responsible Economies (“CERES”), available at <http://www.ceres.org/>

type of cross-national exporting of information may be an important mechanism for triggering change in domestic settings that are overcome with institutional stasis and perpetual inaction. Although it is circuitous, there is evidence that the salience-raising/information cost-lowering features of chemical regulation in the EU can catalyze activity in local and state regimes in the U.S., which might trickle up to create public pressure for change at the national level.¹⁵²

However it is accomplished, once the market-based approach is incorporated incrementally into toxics control, it will have practical experience upon which to proceed. The experimentation should also affect the coalitions that build to support it that might not otherwise exist. Firms that succeed in a market-based approach may rally behind it, and the current, strong industry coalition might be more fragmented, if not disbanded entirely.¹⁵³

VII. Closing Thoughts about CIA in a Global Context

In comparative law, analysts often begin with an identification of differences between regimes and then attempt to analyze the significance or relative merits of these national differences. This bottom-up approach to comparative analysis has great value since it helps educate about transnational differences, yet the analyst is still left scratching her head with respect to the institutional significance of the comparisons. Which system is better? Or is it apples and oranges because of the very different cultures and political structures?¹⁵⁴

CIA approaches the analysis in the opposite direction by identifying -- in top-down fashion and in advance -- key variables and decisions that are central to the viability of democratic institutions. In CIA, an assessment of different nations or regime approaches does not begin with a checklist of differences between governments that warrant further investigation, but instead assesses diverse institutional approaches on a common metric. From this more global assessment, the analyst can then isolate common problems across different national approaches and identify promising solutions or ways to bypass processes that are consistently overtaken by minoritarian bias, for example.

Precisely because of its universality in method, CIA has a great deal to offer comparative and global studies; yet global studies also have a great deal to teach CIA in return. Indeed, transnational or global application of CIA, at least in theory, may be a necessary precondition for the rigorous use of CIA, at least in some settings. Most obviously, the use of CIA on a transnational or global scale provides the analyst with a larger set of institutional possibilities for investigation. When a domestic system faces cross-institutional failure, the examination of alternative institutional approaches in other countries can yield innovative approaches or at least angles that can refresh the thinking about domestic solutions. In the study of chemical regulation, for example, the EU approaches provide illustrations of market-based approaches that reinforce the possibility of creating new, hybrid institutions. This wider swath of institutional approaches enriches the analyst's institutional alternatives, particularly when these alternative approaches are grounded in experience and have emerged from trial and error.

In addition, evidence of potential cross-institutional failure in the global arena deepens the diagnosis of institutional failure and may ultimately point to the need for modular CIA to broaden the

¹⁵² Cf. Hari M. Osofsky & Janet Koven Levit, *The Scale of Networks?: Local Climate Change Coalitions*, 8 CHI. J. INT'L L. 409 (2008) (discussing the role of cities as leaders in US policy on climate change and the coalition of local governments as an important source of innovation that integrates global policies back into the US).

¹⁵³ Short of this more gradual wearing down of the anticipated strong anticipation through experience, beginning with a legislative approach may be the most risky way to proceed and could even backfire by causing the opposition to sabotage early experimental efforts to get it working.

¹⁵⁴ Susan Rose Ackerman's 1990's book comparing German and U.S. environmental regulation, *CONTROLLING ENVIRONMENTAL POLICY: THE LIMITS OF PUBLIC LAW IN GERMANY AND THE UNITED STATES* (1995), arguably illustrates these challenges.

range of institutional possibilities. The recurring failure of different political governments to counteract minoritarian bias for a particular social issue, for example, will add important information to domestic institutional analysis. It might reinforce a concern that minoritarian bias is ultimately likely to take over political processes; it identifies ways that reforms may be undermined or, conversely could enhance, transnational approaches; and it may serve to focus analysts more immediately on devising hybrid institutions.

CIA applied transnationally also allows analysts to test possible institutional reforms within multiple, different regimes. Given the global marketplace and the inevitable ripple effects of that market on other institutional processes, placing domestic reforms within the larger transnational context seems necessary to ensure the viability of CIA-based reforms, even when they are focused on domestic systems. As the market and public governance become more globalized, analysts cannot credibly bracket these transnational lines of communications, but instead need to account for them. Rather than operating as a constraint on various reforms, in fact, the global context may actually help underscore more and less viable reform proposals when examined from this larger perspective.

In sum, because the basic measure underlying CIA analysis – the participation-centered model – is universal, it is amenable to cross-national comparisons both in diagnosis and in assessing the possible fate of reform proposals. Unlike bottom-up comparisons that suffer from questions about superiority or the significance of institutional differences, CIA ensures a common metric for comparison and analysis. Yet precisely for this reason, CIA methods should attempt to include international and global considerations. The method makes cross-border comparisons possible, and since they inform institutional analysis at all scales, it seems incumbent on the CIA analyst to take them into account where they may offer a different perspective on the diagnosis or viability of reform proposals, particularly in a global market.

Conclusion

This paper engages CIA in a global context for a case study of toxics regulation, which presents a uniquely worst case scenario with respect to minoritarian bias and cross-institutional failure. There are two moving parts to this analysis. The first is the abstract effort to diagnosis and then reform failed institutions using CIA, while also considering the trans-national dimensions to the problem. The second half of the paper then attempts to ground these findings within existing institutional approaches and to troubleshoot implementation obstacles, again using CIA in a transnational context. Through this iterative analysis, the practicality and even abstract wisdom of reformed institutions can be tested preliminarily to determine both their potential to work and to anticipate and hopefully overcome practical obstacles to their adoption.

International Law and Global Public Goods in a Legal Pluralist World

Gregory Shaffer*

“one of our major challenges is to devise mechanisms that overcome the bias toward the status quo and the voluntary nature of current international law in life-threatening issues. To someone who is an outsider to international law, the Westphalian system seems an increasingly dangerous vestige of a different world.”

- William D. Nordhaus, Paul Samuelson and Global Public Goods (2005)

We face imminent financial collapse with scant collective will to address it. Power fragments and states holding nuclear weapons destabilize, risking nuclear proliferation and eventual terrorist use. Climate change intensifies while states that are the main contributors dither and politicians with veto power trivialize repeated scientific findings as “the greatest hoax ever perpetrated.”¹ Fisheries deplete, deserts expand, and aquifers diminish. International law scholarship, in the meantime, takes a turn toward celebrating pluralism without sufficiently accounting for institutional variation to address different contexts. Those writing on global public goods challenges, at the same time, tend to come from disciplines other than law.²

Increased transnational interdependence recasts domestic issues into global ones. To give one mundane example, until 1997, corporate insolvency law in Indonesia was considered a purely local matter. But with the onset of the Asian financial crisis, the World Bank, International Monetary Fund, and Asian Development Bank rethought domestic corporate insolvency law as a global issue in light of the risks of financial contagion, threatening a global public good, financial stability.³ Other examples include domestic banking regulation, tax avoidance (given the impact on state sovereign debt crises), pest control, public health, and civil conflict. In response, states create new international institutions and existing international institutions expand their mandates. The UN Security Council has expanded its mandate for overseeing international peace and security to authorize “humanitarian intervention,” and the World Health Organization has done so to address public health in response to the SARS epidemic and similar threats.⁴ States and state institutions sometimes create international club-like institutions with limited membership, such as the Financial Action Task Force and the Basel Committee on Banking Supervision, with the express aim of affecting behavior in non-members, such as over money laundering and bank capital requirements.⁵

* Melvin C. Steen Professor of Law. This article was initially presented as the opening of the ESIL-ASIL-EJIL-HiIL Symposium on “Global Public Goods and the Plurality of Legal Orders,” EUI, Florence, Oct. 24-25, 2011. I thank Mary Rumsey for her usual research assistance, and David Fidler, Jide Nzeli and the participants at the EUI conference and at a University of Minnesota workshop, for their comments. All errors remain my own.

¹ Barringer, ‘Environmentalists, Though Winners in the Election, Warn Against Expecting Vast Changes,’ *NY Times*, 14 November 2006, at A18 (quoting Senator James Inhofe).

² See, for example, the authors in the foundational UNDP projects on global public goods, in Inge Kaul, Isabelle Grunberg and Marc A. Stern (eds), *Global Public Goods: International Cooperation in the 21st Century* (1999); in Inge Kaul, Pedro Concicao, Katell Le Goulven, and Ronald U. Mendoza (eds), *Providing Global Public Goods: Managing Globalization* (2003). Law was generally missing in the UNDP project. See also the work of economists Scott Barrett, *Why Cooperate: The Incentive to Supply Global Public Goods* (2007); Todd Sandler, *Global Collective Action* (2004); William D. Nordhaus, Paul Samuelson and Global Public Goods (2005).

³ See Terrence C. Halliday and Bruce G. Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (2009).

⁴ David P. Fidler & Lawrence O. Gostin, *The New International Health Regulations: An Historic Development for International Law and Public Health*, 34 J.L. MED. & ETHICS 85, 86 (2006) (“The new IHR transform the international legal context in which states will exercise their public health sovereignty in the future. As examined below, the new IHR expand the scope of the IHR’s application, incorporate international human rights principles, contain more demanding obligations for states parties to conduct surveillance and response, and establish important new powers for WHO”).

⁵ See e.g. Sandler, *supra* note 2 at 9.

So what is international law's role in the production of global public goods? Where are greater international legal constraints and international institutions needed, and where should international law retain slack? In producing global public goods, international law is both required and can potentially impede dynamic processes that are needed to address global public goods challenges. This Article provides a framework for addressing these issues in light of variation in the properties of global public goods (Part 3), their distributive implications (Part 4), and alternative institutional choices for confronting them, as reflected in different theoretical visions for global governance advanced within international law scholarship (Part 5). But first we address the rise of the legal pluralist vision (Part 1) and the tensions between it and the concept of global public goods (Part 2).

1. The Rise of the Legal Pluralist Vision

Legal pluralism seems a bit of a fad in international law scholarship today, just as dialectical federalism may be a bit of a fad in the United States (U.S.), and constitutional pluralism in the European Union (E.U.).⁶ Legal pluralism is a construct, a way of understanding and envisioning the world, both positively (the way the world is) and normatively (the way it should be). The challenge with the legal pluralist construct is how it takes account of the global public goods challenges confronting us.

What has led to the rise of this academic construct, its proliferation, its catching on, its enticement of our imaginations? In part, the concept resonates with our experience of multiple overlapping orders in tension with each other, with no clear center. In part, the concept provides a normative vision of restructuring *plural* orders into *pluralist* ones — that is, re-envisioning them from fragmented, closed, sovereign legal orders into an open, interacting, interlinked, interdependent, multilevel structure of legal ordering. In part, it particularly resonates with those writing in Europe, reflecting the European experience with supranational law. The European experience, encompassing both economic regulation and human rights protection, is viewed as an experimental model and “laboratory” for the ordering of a global legal pluralism, one which provides order without centralized hierarchy, hegemony, or abandonment of public law principles to transnational market forces.⁷

Yet the turn to a pluralist vision also has something to do with our disenchantments, our disenchantment with international law, the limits of the European experiment where a constitutional order exists but has been formally rejected by its citizens, and the failure of progressive politics in the United States at the national level, spurring a strategic retreat out of political necessity to bottom-up progressive initiatives from small municipal activist havens like Berkeley, California and Madison, Wisconsin. There are good reasons for such disenchantment within the United States, with the populist lure of the Tea Party's destructive rhetoric of any sense of collective purpose, its members cheering at Republican debates at the prospect of Americans dying because they do not have health insurance. There are good reasons for this disenchantment in Europe with little sense of solidarity in facing a crisis threatening the Euro, the Union itself, and the world, with the biggest sovereign defaults in history, ones that would dwarf earlier defaults in South America and Asia. It is a crisis which — to play with Hobbes' famous phrase — could be nasty and brutish, but not short. And there are good reasons for such disenchantment globally, with the cynicism of the Bush administration's despising of international law in invading Iraq, its trivializing of torture, and its ordering the freeze of individual

⁶ The legal pluralist perspective certainly resonates, and I have been a part of that trend, both in the positive assessment of how international law works, and in its normative evaluation. See e.g. Nicolaidis and Shaffer, ‘Transnational Mutual Recognition Regimes: Governance without Global Government’, 68 *Law & Contemporary Problems* (2005) 263; and Shaffer, ‘Transnational Legal Process and State Change,’ *Law and Social Inquiry* (forthcoming 2012).

⁷ Mireille Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (2008), at 110 (while noting that Europe ‘holds no monopoly’ as a ‘laboratory’). See also id., at 125-129 (noting the development of the human rights regime in Europe and its impact on the E.U. trade regime, constituting a ‘school of democracies’).

assets through Security Council resolutions with no concern for due process. International law failed to constrain power when power chose to belittle and ignore it, and it served to legitimize power when power deigned to deploy it.

The concept of pluralism certainly captures much going on in the world, better than its occasional foil, the concept of constitutionalism.⁸ There is rarely any central hierarchy in international law. And even where there is a glimpse of a shadow of hierarchy, such as decisions by the United Nations (UN) Security Council or of the World Trade Organization (WTO) Appellate Body, there always follows the challenge of implementation. International law depends on national systems and private actors to implement its dictates, and it has little authority to ensure that they do so.

We have a fragmented plurality of legal orders spatially in at least three senses.⁹ First, as international functional organizations proliferate, we have a plurality at the international level — constituting a horizontal plurality. Different semi-autonomous international institutions address common issue areas in different ways. At times actors may strategically create overlap among international institutions to reorient international legal norms when they are unable to trigger such change within an existing institution. The tensions between the rules of the WTO and the Convention on Biodiversity and its Biosafety Protocol are a salient example.¹⁰ Institutions with overlapping mandates may also compete for leadership on a legal issue, as the World Bank, International Monetary Fund, and Asian Development Bank did during the Asian financial crisis.¹¹

Second, we have a plurality of legal orders between levels of governance — constituting a vertical plurality. Since considerable power remains at the nation state level, whether for producing detailed law, implementing it, or enforcing it, international law must interact with national law to be effective. In practice, domestic law and institutions will always remain critical parts of a recursive process of resistance, adoption, and adaptation of international legal norms, which in turn can reshape those international norms.

Third, in an economically interdependent world, private actors develop non-public legal orders at the state and international levels. They are sometimes encouraged by public actors that may later codify these private legal norms, or enforce them judicially, or collaborate through forming “public-private partnerships.” We thus also have a plurality of public and private legal orders.¹²

The concept of legal pluralism does not signify disorder — per the international relations trope of anarchy. Legal pluralism with its account of interacting legal orders, takes the idea of international law seriously. Otherwise, there is nothing with which national legal systems can interact. The normative vision of legal pluralism rather aims to foster transnational and global legal order out of the plural; it aims to structure out of the many one, but with the one constituted by the interactions of the many.¹³

⁸ See Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2010).

⁹ Delmas-Marty addresses how pluralism also manifests itself temporally, captured in such concepts as ‘multi-speed,’ ‘variable geometry,’ and ‘common and differentiated responsibilities,’ which she labels ‘polychrony.’ Delmas-Marty, *supra* note 7 (chapter 7).

¹⁰ Mark A. Pollack and Gregory C. Shaffer, *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods* (2009) at 113-76; Shaffer and Pollack, ‘Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance’, 93 *Minnesota L Rev* (2010) 706; and Nico Krisch, *Beyond Constitutionalism*, *supra* note 8.

¹¹ See e.g. Halliday & Carruthers, *Bankrupt*, *supra* note 3.

¹² See e.g. Abbott and Snidal, ‘The Governance Triangle: Regulatory Standards Institutions and The Shadow of the State’, in W. Mattli and N. Woods (eds) *The Politics Of Global Regulation* (2009); Cafaggi, Conference Paper.

¹³ See e.g. Delmas-Marty, *supra* note 7, at 2 (‘To break the deadlock, jurists must abandon both utopian unity and illusory autonomy, and explore the possibility of reciprocal procreation between the one and the many. To convey the idea of movement, this process could be called ordering pluralism’).

2. Legal Pluralism and the Challenge of Global Public Goods

Despite the appeal of the legal pluralist vision, one realizes in reading thought-provoking authors on legal pluralism, such as Mireille Delmas-Marty and Nico Krisch, that though they compellingly support their arguments with examples and case studies, their case studies do not focus on the challenges of global public goods. They do not, one might conjecture, because there is a tension between the operation of legal pluralism and the production of global public goods where processes of pluralist interaction will provide too little too late.

What do we mean by a global public good? In economic theory, a public good, in contrast to a private good, is one that is non-excludable (no one can be excluded from the good's consumption) and non-rivalrous (the good's consumption does not reduce its availability to others).¹⁴ Clean air, for example, is a public good because it is not depleted by our breathing it, and it cannot be appropriated by a few. The term 'good' refers to a product, and not a normative attribute. A public good thus can be positive (such as knowledge), or negative, a good that we wish to curtail so that our aim is to produce its absence (such as terrorism).

Those promoting international cooperation often broaden the definition of a public good classically used in economic theory, which was statist in its initial focus, to encompass a larger number of issues for global action. On the one hand, the two-fold 'publicness' of a good in practice often lies along a continuum, so that goods may combine public and private attributes, complicating the assessment of how to generate them.¹⁵ On the other hand, one reason policymakers arguably have developed a broader definition of global public goods is to enhance the scope for global governance projects and thus legitimize their pursuit.¹⁶ The concept of global public goods, for example, was originated under a project sponsored by the United Nations Development Programme which seeks funding for projects. Inge Kaul and her collaborators, leading that project, use a relaxed definition of public good as "goods with benefits that extend to all countries, people, and generations,"¹⁷ while noting that the concept of public good is a social construction.¹⁸ Similarly, the ASIL-ESIL conference organizers broaden the definition to include all "goods which are shaped or even constituted by law, and whose existence and form concern, benefit and are available to all states or humankind as a whole."¹⁹ These expanded definitions, however, risk making the concept of global public goods so malleable that it becomes

¹⁴ See Richard Cornes and Todd Sandler, *The Theory of Externalities, Public Goods and Club Goods* (1986); and Paul Samuelson, 'Pure Theory of Public Expenditure and Taxation', in J. Margolis and H. Guitton (eds), *Public Economics* (1969).

¹⁵ Economists thus often refer to goods that do not fully meet the two criteria, but have significant public attributes, as 'impure' public goods. Richard Cornes and Todd Sandler, *The Theory of Externalities, Public Goods, and Club Goods* (1986) at 255. Goods that are non-rival but excludable are often called "club goods," and those that are non-excludable but rival called "common pool resources."

¹⁶ Similarly, the concept of public goods was developed in the context of public expenditure and provided economic legitimacy for enhancing the size and role of the state. See e.g. Samuelson, Pure Theory, *supra* note...; Richard Musgrave, *The Theory of Public Finance* (1959).

¹⁷ Inge Kaul, Pedro Concicao, Katell Le Goulven, and Ronald U. Mendoza, 'How to Improve the Provision of Global Public Goods', in I. Kaul, P. Concicao, K. Le Goulven, and Ronald U. Mendoza (eds), *Providing Global Public Goods: Managing Globalization* (2003) at 23; and Inge Kaul, Isabelle Grunberg and Marc A. Stern, Defining Global Public Goods, in I. Kaul, I. Grunberg and M. A. Stern (eds), *Global Public Goods: International Cooperation in the 21st Century* (1999). The Nautilus Institute also broadly defines 'global public goods' as 'goods with benefits that extend to all countries, people, and generations.' See <http://www.nautilus.org/gps/applied-gps/global-public-goods-2>.

¹⁸ Inge Kaul and Ronald U. Mendoza, 'Advancing the Concept of Public Goods', in *Providing Global Public Goods*, *supra* note 2, at 80-81 ('consideration should be given to expanding the definition—to recognize that in many if not most cases, goods exist not in their original forms but as social constructs largely determined by policies and other collective human actions According to this revised definition, public goods are nonexclusive or, put differently, de fact public in consumption').

¹⁹ Conference description

abused, leading to skepticism and cynicism regarding its relevance.²⁰ As we will see in Part 3, we rather need to differentiate among different types of public goods in order to meaningfully address the role of international law and organizations in their production.

The major challenge for the production of many (but not all) global public goods, as well as those public goods that are transnational (but not global) in scope,²¹ and thus the challenge of celebrating legal pluralism, is that of collective action and free riding. Nation states and other actors will not invest in global public goods if their independent action will have no impact, or if they can free ride on the investment of others. To produce global public goods often requires a sense of collective purpose based on mutual interests and understandings. To arrive at that collective purpose, we need (for economists) an alignment of incentives, and (for sociologists) socialization processes that lead to a common identity (such as national citizens). We are then more likely to cooperate and create institutions that invest in producing public goods. The creation of nation states with general taxing powers and a monopoly of the legitimate use of force facilitated the production of national public goods. The development of the theory of public goods correspondingly has been statist on account of the existence of centralized decision-making in nation states which produce them.²²

The most salient challenge internationally is that we lack legitimate, centralized institutions with general taxing and regulatory powers. We thus have traditionally depended on cooperation between nation states involving decentralized forms of implementation and enforcement to advance collective goals. International law facilitates this cooperation through creating international institutions and common norms and rules, thereby reducing transaction, monitoring, and enforcement costs and building shared understandings.²³ States created the United Nations and its Security Council to help ensure the global public good of international peace and security. They created the World Health Organization to protect public health from the spread of infectious diseases, the UN Framework Convention on Climate Change to address climate stabilization, the World Trade Organization to address trade liberalization and help manage inter-state trade conflicts so they do not escalate into 1930s beggar-thy-neighbour policies, the Financial Action Task Force to address money laundering of illicit funds, and the International Monetary Fund to stabilize currency and sovereign debt crises. Moreover, aspects of the concerns addressed by these institutions can be viewed in global public goods terms. Yet none of these institutions have a general taxing power to address them. All of them depend on negotiations between states over the amount of “contributions.”

3. The Need to Differentiate between Global Public Goods

In order to assess the place and role of international law and institutions to promote and govern the production of global public goods, we need to differentiate among the range of public goods challenges faced, as opposed to speaking of global public goods and international law in the abstract. Global public goods come in different varieties, calling for different institutional responses, sometimes involving greater centralization through international law and institutions, and sometimes not. There is no one size fits all, no one optimal institutional structure. For the production of many global public goods, legal pluralism, in which different legal orders interact with each other, works fine. There may be little need for international law, at least in its hard (mandatory) law variety, much less centralized international institutions.

²⁰ For a critique of the concept’s vagueness as a rhetorical device, see David Long & Frances Wooley, *Global Public Goods: Critique of a UN Discourse*, 15 *Global Governance* 107 (2009).

²¹ “TPGs are public goods whose benefits and costs reach beyond one country.” Sandler, *supra* note 2, at 76.

²² Meghnad Desai, ‘Public Goods: A Historical Perspective,’ in *Providing Public Goods*, *supra* note 2, at 63.

²³ In international relations, rational institutionalists focus on transaction costs and constructivists on norms.

Since global public goods do not come in one variety, international law plays a variable role in their production. As Scott Barrett conceptualizes in his book *Why Cooperate?: The Incentive to Supply Global Public Goods*,²⁴ some global public goods raise collective action problems and others do not. Barrett, following other economists, classifies global public goods into three varieties: single best efforts goods, weakest links goods, and aggregate efforts goods.²⁵ An example of a *single best efforts public good*, on the cover of his book, is the crashing of a giant asteroid into the earth. All countries are affected by this prospect. Scientists do not know when one will hit and what size it will be, but they find that small ones hit the earth about once a month, and estimate that potentially catastrophic ones that could devastate an area the size of Manhattan hit every two-hundred fifty years, and one that could cause the extinction of most life forms every sixty five million years.²⁶ For this global public good, the United States has the incentive on its own to finance research and implement technology to detect and deter such happenings. No international treaty is required for it to do so. Other countries may free ride on the United States' research, or may engage in complementary research, but that will not deter the United States from investing.

Similarly, countries, companies, and even individual researchers have incentives to invest in basic science on their own which can benefit the world. Joseph Salk's development of the polio vaccine in the U.S. was a gift to the world, as he did not patent the polio vaccine.²⁷ Such a good can be produced by private initiatives (such as those of pharmaceutical companies and of the Gates Foundation), purely national ones (such as those of the National Institutes of Health), or international collaborative ones (such as the UNICEF/UNDP/World Bank/WHO Special Programme in Tropical Diseases).²⁸

Is there no required role for international law in these cases? Even in the asteroid case, Barrett notes the potential negative externalities of other countries relying on the United States. The United States may have the incentive to invest in producing the global public good, but in a way that could create a new risk. If an asteroid is headed toward the earth, and if the existing technology is such that the asteroid could be deflected, but not so that it would entirely miss the earth, but rather crash into a different part of the earth, who should make the decision regarding its deflection? Even if it were to be deflected into the ocean, the location of its impact would raise differential risks for countries of a tsunami.²⁹

Similarly, geoengineering increasingly looks like an important policy option for climate stabilization given the world's inability to reduce carbon emissions. It thus can be viewed as a global public good, at least to avoid abrupt and catastrophic climate change.³⁰ Since engineering the climate may be relatively cheap, it could be a single best efforts global public good. Yet as climate change itself, geoengineering may benefit some countries and harm others. Climate engineering constitutes a huge experiment that poses unforeseeable, differential risks for countries in light of uncertainties. A wealthy country may decide to invest in geoengineering to assist its own climate situation, but in the

²⁴ Barrett, *Why Cooperate*, *supra* note 2.

²⁵ These varieties can be viewed along a continuum and be further broken down, but for our purposes, they highlight the key differences for purposes of discussing international law's role. Sadler, for example, also discusses weighted sum, weaker link, and better shot public goods. See Sandler, *supra* note 2, at 82.

²⁶ Barrett, *Why Cooperate*, *supra* note 2, at 23-26.

²⁷ When asked who owned the patent, its creator Jonas Salk famously responded, "Well, the people, I would say. There is no patent. Could you patent the sun?" David E. Y. Sarna and Andrew Malik, *History of Greed: Financial Fraud from Tulip Mania to Bernie Madoff* (2010) (quoting televised interview of Salk by Edward R. Murrow), at xvi.

²⁸ Knowledge is not a pure public good since it is excludable, although even under the patent system it eventually reaches the public domain.

²⁹ See e.g. 'Tsunami Risk of Asteroid Strikes Revealed', *New Scientist*, 12 May 2006, at <http://www.newscientist.com/article/dn9160-tsunami-risk-of-asteroid-strikes-revealed.html>

³⁰ The view of geoengineering as a global public good is contested in light of its risks, but if successful in stabilizing the climate, it could provide a global public good.

process have negative externalities on others. If different countries engage in climate engineering, their plural efforts will interact, potentially undercutting each other. Coordination over climate change thus raises governance challenges. Who should decide whether and how the climate should be engineered? Once again, there is a role for international law and international institutions in coordinating decisions even though only one or a few wealthy countries may invest in geoengineering on their own.

Eliminating infectious diseases and curtailing the proliferation of weapons of mass destruction are *weakest link public goods*. A wealthy country can invest in preventing an infectious disease within its borders through financing the vaccination of its population each year. The United States does so, for example, with polio vaccines. Yet it would be much more cost effective to eradicate polio, as the world did for smallpox in the 1970s. The benefit-cost ratio for smallpox eradication is thought to be 159:1, if all costs are included, and 483:1, if only international funds for financing eradication efforts in developing countries are considered.³¹ That is a remarkable rate of return. Investing in polio eradication could provide another global public good. Yet, in order to eradicate polio, poor and failed states, such as Somalia, are the weakest links.

The World Health Organization, an international institution created under the auspices of the United Nations and inheriting the mandate of an earlier institution created pursuant to the League of Nations, leads the eradication efforts. The WHO includes distinct voting rules for its regulations on infectious diseases, which facilitate collective action for collective purposes. The general rule of international law of treaties is an “opt in” rule. A state is not bound unless it consents. Under Articles 21 and 22 of the WHO constitution, however, a majority decision is binding on matters involving “procedures designed to prevent the international spread of disease,” unless a state opts out. The WHO created new International Health Regulations in 2005 pursuant to these provisions, which require states to build institutional capacity toward containing communicable diseases, collaborate with each other, and maintain clear points of contact.³² In parallel, the regulations expand the legal authority of the WHO’s Director-General to intervene in response to communicable disease outbreaks, including through a system for convening experts and declaring a public health emergency of international concern. As has been shown experimentally and statistically, opt out rules generate much broader participation than do opt in rules.³³ No WHO member, in fact, opted out of the 2005 International Health Regulations.³⁴

Keeping weapons of mass destruction out of terrorist hands is another weakest link global public good. We do not know where or when such weapons will be used, but the fallout of their use will have global repercussions, whether for life and health, civil rights, or the global economy. Countries thus have the incentive to keep these weapons out of terrorist hands, but the result will depend on the weakest links. The weakest links today are Pakistan, Russia, and North Korea. New weakest links may emerge, as more states invest in nuclear technology to gain advantage or parity with their rivals. States signed the Nuclear Non-Proliferation Treaty (NPT) in 1968, which was extended indefinitely in

³¹ Barrett, *supra* note 2, at 50-51.

³² World Health Organization, Revision of the International Health Regulations, WHA 58.3 (May 23, 2005), available at <http://www.who.int/csr/ihr/WHA58-en.pdf>.

³³ Zimmerman, ‘Funding Irrationality’, 59 *Duke L J* (2010) at 1105, 1140 (stating that opt-out default rules result in greater participation than do opt-in rules); Madrian and Shea, ‘The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior’, 116 *Quarterly J Econ* (2001) 1149, at 1158-61 & tbl.IV, 1171-73 & tbl.VIII, 1185 (showing greater participation in retirement plan under opt-out option).

³⁴ Two states filed reservations; and there were no opt-outs. See http://www.who.int/ihr/legal_issues/states_parties/en/index.html (As of 5 February 2008, 194 States were parties to the IHR (2005)).

1995,³⁵ and the Convention on the Physical Protection of Nuclear Material in 1987, amended in 2005.³⁶ In addition, the UN Security Council passed Resolution 1540 in 2004 which enjoins all states to take measures to prevent nuclear weapons materials from being obtained by non-state actors having “terrorist purposes.”³⁷ The non-proliferation regime, however, has been under some risk of unraveling, as the Bush administration created a special regime for India and reconsidered the United States’ first strike options and weapons development plans.³⁸

The severest global public goods challenge today is what Barrett calls an *aggregate efforts public good* — that is, where the global public good can only be produced through the aggregate efforts of multiple countries. The world appears to have been startlingly successful in addressing the depletion of the ozone layer, starting with a framework convention, then turning to hard law obligations that were progressively enhanced, and then using soft law mechanisms to facilitate compliance, even when formally hard law sanctions were available.³⁹ The Montreal Protocol on Substances that Deplete the Ozone Layer created a variety of sticks and carrots to realign incentives, including potential trade sanctions and a Multilateral Fund for Implementation for developing countries. In contrast, the world has been completely unsuccessful in addressing climate change mitigation, which is a much more complex and difficult issue that is more susceptible to free riding, undermining collective action. Human-induced climate change is happening and it is not clear what if anything effectively will be done to reduce emissions.

There is a varying role for international law and international institutions in producing these different global public goods. For best shot global public goods, an international institution is not needed to develop them. Private foundations could provide some of these goods, such as through prizes for the development of new drugs to combat tropical diseases. Yet where decisions over implementation can have negative externalities, international legal obligations and institutions that constrain unilateral action can better ensure fairness and manage conflicts, as in the case of asteroid deflection and climate engineering. For aggregate efforts public goods, in contrast, there is a greater need for centralized institutions to produce them, leading to a relinquishment of some national sovereignty. The opening quotation from Nordhaus reflects his frustration with the global collective failure to address climate change. In comparison, for weakest link public goods, the challenge often lies not in state sovereignty, but rather the lack of it. The challenge for disease eradication, for example, is with “failed states” that lack functional governing institutions. In other weakest-link situations involving states unwilling to cooperate, such as that of nuclear proliferation, there is greater need for an international institution such as the UN Security Council, combined with financial transfers to secure nuclear materials. Otherwise, pressure for unilateral action will increase.

³⁵ According to the terms of the treaty, non-nuclear weapon states (NNWS) agree not to receive, manufacture, or acquire nuclear weapons and also to accept safeguards and verification inspections conducted by the International Atomic Energy Agency to confirm that nuclear technology is not diverted from peaceful energy use to weapons manufacturing. Five nuclear weapon states (originally the United States, the Soviet Union and Great Britain, later joined by France and China) agree not to transfer nuclear weapons or otherwise assist any NNWS in acquiring or developing nuclear. In addition, all states-parties to the treaty, including nuclear weapon states, agree ‘to pursue negotiations in good faith ... on a treaty on general and complete disarmament under strict and effective international control.’ Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

³⁶ Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, 1456 U.N.T.S. 101, T.I.A.S. 11080, amended by Int’l Atomic Energy Agency, Amendment to the Convention on the Physical Protection of Nuclear Material, GOV/INF/2005/10-GC(49)/INF/6 (Sep. 6, 2005).

³⁷ S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 24, 2004).

³⁸ Handl, ‘The Nuclear Non-Proliferation Regime: Legitimacy as a Function of Process’, 19 *Tulane J Int’l & Comp L* (2010) at 1, 4, 11 (stating that nuclear arms control regime has been referred to as ‘looking battered,’ and describing Bush administration agreement with India); Richardson, ‘Native Prospects’, 4 *Asian-Pacific L & Policy J* (2003) at 598, 616 (noting Bush administration support for first-strike nuclear capability).

³⁹ Richard Elliot Benedick, *Ozone Diplomacy* (1991).

In sum, international law and organizations play varying roles in the production and governance of global public goods. Table 1 summarizes the relation of different types of global public goods with international law and organizations in a legal pluralist world.

Table 1: Varieties of Global Public Goods and International Law’s Role

Type of Global Public Good	Example of Global Public Good	Institutions in a Pluralist World	IL and IO Role
Best shot P.G.	Asteroid collision	U.S. national defense; other national initiatives; potential international scientific collaborations and governance for implementation	Help allocate funding; reduce bias in decision-making on deployment
Best shot P.G.	Polio vaccine	National agencies, private companies & foundations funding research, perhaps complemented by international funding initiatives; patent systems; prizes; WHO and NGO provision in poor countries	Help allocate funding, distribution, and provision in developing countries
Best shot P.G.	Climate engineering	National agencies & private companies funding research, perhaps complemented by international funding initiatives; patent systems	Help allocate funding; reduce bias in decision-making on deployment
Weakest Link P.G.	Polio eradication	WHO for provision of vaccines in weak link countries; national quarantines	Funding of WHO; WHO resolutions on eradication programs, including vaccines
Weakest Link P.G.	Nuclear proliferation	Conference of Parties to UN treaties; inspection regimes	Treaty prohibitions and requirements on storage, transfer, and use
Aggregate Efforts P.G.	Ozone depletion	Conference of Parties to Montreal Protocol; public and private research; national implementing institutions; private companies	Treaties requiring phase out of controlled substances; funding of developing country efforts; monitoring and sanctions
Aggregate Efforts P.G.	Climate change mitigation	Conference of Parties to UN Framework Convention on Climate Change; IPCC; Kyoto Protocol; Copenhagen Accord; Initiatives of regional, national, sub-national institutions and of private associations ⁴⁰	Treaties requiring reductions in emissions; enhancement of carbon sinks; funding of developing country efforts, monitoring and sanctions

⁴⁰ For analysis of the broad array of institutions engaged, see Keohane and Victor, ‘The Regime Complex for Climate Change’, 9 *Perspectives on Politics* 7 (2011); K. Abbott, *The Transnational Regime Complex for Climate Change* (2011),

4. The Challenge of Distributive Conflict and the Production of Global Public Goods

International law, as all law, often has distributive consequences, posing particular challenges for governing the production of global public goods. These distributive issues cannot be elided, although they often are in scholarly discussions. At least three distributive issues arise in decisions over the provision of global public goods: the specific terms of cooperation for producing a global public good; choices among producing different global public goods in a world of limited resources; and the potential of actual conflict in the pursuit of different public goods which can act at cross-purposes to each other.

It is striking that many of the international legal scholars who incorporate rational international relations theory to explain international cooperation have drawn on the familiar Prisoner's Dilemma (PD) situation from game theory.⁴¹ The prisoner's dilemma game, however, elides distributive issues. In the classic PD model, states are assumed to have a defined set of preferences and a common interest in reaching a cooperative outcome, and the primary impediment to be overcome is the fear that other states will cheat on their agreements. In PD models, mechanisms for the monitoring of state behavior and the sanctioning of states that violate the terms of the agreement can be created to address these concerns. International law thus comes to the rescue to facilitate mutually beneficial outcomes. Since concerns over cheating, shirking, and slacking inhibit the production of global public goods through international cooperation, the PD model may seem appropriate.

However, the Prisoner's Dilemma game ignores another important obstacle to successful cooperation, namely conflicts among states with different interests over the *distribution* of the costs and benefits of cooperation.⁴² When states cooperate in international politics, they do not simply choose between 'cooperation' and 'defection,' the binary choices available in PD games. They rather choose among specific *terms* of cooperation, which raise distributive issues.⁴³ Different states and constituencies within them can have competing preferences for different international rules and standards. States, and especially powerful states, thus jockey to employ different forms of international law in a world of fragmented institutions in an effort to influence the development, meaning, and impact of international law.⁴⁴

Second, different states and private actors benefit from the production of some global public goods more than others. Since resources are limited, they face opportunity costs when they make choices regarding the production of different public goods. They must determine not only which public goods to fund, but also how much to fund each of them.⁴⁵ Distributive concerns arise in choice and budgeting decisions, given states and private actors' conflicting views.

Third, the pursuit of different public goods can conflict in a more direct sense. One public good may interfere with the pursuit of another. For example, choices over the generation of at least four public goods arise in the debate over the interaction of public health, pharmaceutical patent protection, human rights, and trade policy: knowledge-generation, liberalized trade, public health, and the right to

(Contd.) _____

available at <http://media.cigionline.org/geoeng/2010%20-%20Abbott%20-%20The%20Transnational%20Regime%20Complex%20for%20Climate%20Change.pdf>.

⁴¹ See, e.g., Andrew Guzman, *How International Law Works: A Rational Choice Theory* (2008).

⁴² For a range of views on the challenge of distributive conflict in international cooperation, see Krasner, 'Global Communications and National Power: Life on the Pareto Frontier', 43 *World Politics* (1991) 336; James Morrow, 'The Forms of International Cooperation', 48 *Int'l Org* (1994) 387; James Fearon, 'Bargaining, Enforcement, and International Cooperation', 52 *Int'l Org* (1998) 269; Daniel W. Drezner, *All Politics is Global: Explaining International Regulatory Regimes* (2007).

⁴³ Distributive issues arise in all games, including collaboration and cooperation games. I just note their role in PD models here, since they particularly elide distributive issues. This point on distributive issues is developed in Shaffer and Pollack, *supra* note 10.

⁴⁴ *Id.*

⁴⁵ Desai, *supra* note 22, at 72.

life and human dignity.⁴⁶ Knowledge has public-good attributes since once knowledge enters the public domain, it is no longer excludable and our consumption does not diminish its availability.⁴⁷ The central issue is how to generate knowledge that facilitates new inventions and understandings most effectively and equitably. Liberalized trade similarly has public good attributes, since all countries benefit from the wider variety of products made available at lower prices that trade liberalization facilitates.⁴⁸ Public health constitutes a third implicated public good since we all benefit from the global eradication of diseases and we do not diminish that good when we benefit from it.⁴⁹ The right to life and human dignity can be viewed as yet another affected public good to the extent that it affects all of our moral sensibilities.

The production of these public goods, however, can conflict, complicating global decision-making over the terms of international law. The recognition and enforcement of patent rights under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) and other conventions can generate incentives for the production of knowledge and new drugs for the protection of human life. But the protection of pharmaceutical patent rights also can diminish the benefits of liberalized trade by reducing the consumption possibilities of citizens, interfere with the provision of public health policies in containing diseases, and raise human rights concerns, as the AIDS epidemic illustrates. Moreover, mandatory vaccination policies to protect public health raise human rights concerns, especially from a libertarian perspective, and in particular given uncertainty regarding the consequences of vaccinations.

In sum, choices over global governance policies involve different values, priorities, and perspectives, considerable uncertainty, and rival public goods. Global public goods, in this sense, are ultimately all rivalrous because choices must be made among them, including in funding their production. Decisions over producing global public goods thus raise the question of alternative institutional choices in light of tradeoffs.

5. Alternative Institutional Choices for the Production of Global Public Goods: Global Constitutional, Administrative Law, and Legal Pluralist Approaches

For the efficient production of pure private goods, we rely on (imperfect) preference revelation through the market. For the efficient production of pure public goods, we rely on (imperfect) preference revelation through democratic voting. The conventional (although not sole) solution is thus to rely on the state for the production of public goods.⁵⁰ State decisions, in turn, are constrained by constitutionally-provided checks and balances involving different state institutions, including democratically elected legislatures and courts which exercise judicial review of legislative and executive decisions. For the production of global public goods, the institutional analogues are

⁴⁶ See Shaffer, 'Recognizing Public Goods in WTO Dispute Settlement: Who Participates? The Case of TRIPs and Pharmaceutical Patent Protection', 7 *JIEL* (2004) 459.

⁴⁷ Patents represent temporary monopolies of exclusion, so that, in practice, knowledge can shift from a public good to a club good before reverting back to a public good. See, e.g., Stiglitz, 'Knowledge as a Global Public Good', in *Global Public Goods*, *supra* note 2, at 306–25, (labelling knowledge an 'impure public good').

⁴⁸ See, e.g., Nancy Birdsall and Robert Lawrence, 'Deep Integration and Trade Agreements: Good for Developing Countries', in *Global Public Goods*, *supra* note 2, at 128, 133. Yet liberalized trade is an impure public good in that it creates individual winners and losers within countries, and is only posited to be good for a country in the aggregate. It also is subject to excludability, such as through restricting membership to the WTO, or entering into bilateral and regional free trade agreements.

⁴⁹ See, e.g., Sandler and Arce, 'A Conceptual Framework for Understanding Global and Transnational Goods for Health', 23 *Fiscal Studies* (2002) 195.

⁵⁰ An alternative for the production of public goods is to tie their production to private goods, as through the recognition of private rights that generate positive externalities (as in the example of patent law to create knowledge). Yet the granting of private rights also gives rise to strategic behavior, and thus also involves tradeoffs.

international organizations. Since centralizing decisionmaking within them raises serious legitimacy concerns, institutional choice poses the ultimate question for the production of global public goods.

Although economists and law and economic scholars tend to address the production of global public goods in terms of substantive effectiveness, and thus start with an assumption of what is to be measured, we first need agreement over the goal. Priorities and goals are determined through institutional processes. Where choices among institutions affect opportunities to participate, institutional analysis is needed to focus on the relative biases of participation in alternative decision-making processes that may define priorities and goals.

Problems of biased participation beset all institutional alternatives on account of informational and resource asymmetries and divergent incentives to participate because of varying per capita stakes in outcomes. A major challenge in relying on national institutions is that they make decisions which affect outsiders who are not represented before them. In the case of many global public goods, moreover, reliance on national decisionmaking raises collective action problems and free rider concerns which undercut each nation's ability to attain its goals. International institutions can help to overcome collective action problems, as well as to reduce bias in participation in national decisionmaking. However, the major challenge with international institutions is their remoteness from affected constituencies and local contexts, raising legitimacy concerns when decision-making has distributive implications.

A key issue from a public policy perspective is thus the assessment of the *relative* merits of institutional processes, and different combinations of them, in terms of the relatively unbiased participation of affected parties compared to other (non-idealized) institutional alternatives.⁵¹ That is, *who decides* regarding the production of global public goods? Or put differently, which institutional process, among alternative political, market, and judicial processes at the national, local, regional, and international levels, should be granted how much authority to decide on the appropriate balancing of different goals in light of their distributive implications? These institutional choices affect how different interests, directly and indirectly, are taken into account. Such an approach is decidedly pragmatist. It recognizes that there is no single best approach to producing global public goods, but rather alternative approaches that involve tradeoffs which vary in light of particular global public goods problems, and from which we can learn through practice.

In current international law scholarship, three analytic frameworks compete for addressing the challenges of global governance, and thus implicitly of the production of global public goods: constitutionalism, global administrative law, and legal pluralism. These frameworks are sometimes put forward as alternatives that better address global governance challenges; yet, for our purposes, they are better viewed as complements that apply differentially to the types of global public goods we have discussed. These frameworks each have attributes and deficiencies which make them more suitable frameworks for some issues compared to others.

⁵¹ See the important work of Neil Komesar on comparative institutional analysis, including *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (1995). See also Gregory Shaffer and Joel Trachtman, *Interpretation and Institutional Choice at the WTO*, Va. J Int'l L. (2011) (applying comparative institutional analysis to dispute settlement over international trade and trade-related issues).

A. The Global Constitutional Approach

Global constitutionalism is one of legal pluralism's chief rivals as a contemporary vision for organizing, constraining, and legitimizing international law.⁵² The constitutional vision of international law comes in different varieties, but relative to the pluralist vision, one of its major attributes is its framing international law and international institutions in constitutional terms that involves centralized international institutions,⁵³ often involving some form of majoritarian or supra-majoritarian decision-making. The global constitutional vision is suitable, in particular, for addressing the production of aggregate efforts global public goods. Centralized institutions operating under international law help to align national incentives and to overcome free rider problems facing the production of aggregate efforts global public goods.

For example, if climate change stabilization is to occur, centralized rules and institutions to oversee their application will be required, as occurred successfully in the case of the protection of the ozone layer. Under the Montreal Protocol on Substances that Deplete the Ozone Layer, amendments to emissions limits can be made by a two-thirds vote of the parties representing at least half of the total consumption of the parties of controlled ozone-depleting substances, if there is no consensus.⁵⁴ Analogous voting arrangements will need to be developed for the international regulation of climate change mitigation that take account of those most implicated.

For global public goods challenges that pose imminent threats, existing UN institutions, and in particular the UN Security Council will need to be reformed and updated. The issue of UN reform was considered in the 1990s and 2000s, but remains needed to reflect today's global context.⁵⁵ Issues such as asteroid collisions and climate change could even be considered within a reformed Security Council where they pose international security risks. Centralized institutions and regulations have become important for coordinating the monitoring of dangerous diseases and declaring international public health emergencies, as we saw under the WHO's 2005 International Health Regulation.

Finally, as we have seen, even the production of best shot global public goods raise distributive concerns that centralized governance can help to address. Centralized institutions, operating under a constitutional frame of checks and balances, can help to keep national decisionmakers accountable. We have seen these issues raised in decisionmaking over geoengineering and asteroid deflection for national defence.

As globalization and technological advance increase the need for centralized international decisionmaking, a constitutional frame will become of growing importance for critically scrutinizing and checking these institutions' exercise of power. Nonetheless, although the global constitutional vision has certain attributes regarding the governance of centralized institutions needed to provide global public goods, these institutions face major legitimacy challenges. The production by national institutions of public goods is beset by tradeoffs, ranging from bureaucratic inefficiencies to political

⁵² Cf. Krisch, *supra* note 8 (chapter 1); Jeffrey Dunoff and Joel Trachtman, *Ruling the World?: Constitutionalism, International Law, and Global Governance* (2009); Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (2009); Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State*, 272, 322, in Dunoff & Trachtman, *supra* (providing "a conceptual structure that allows for the holistic construction of legitimate public authority... [by] reference to the idea of free and equal persons"); Neil Walker, *Taking Constitutionalism Beyond the State*, (2008) *Political Studies* vol. 56 pp.519-543.

⁵³ Dunoff & Trachtman, *A Functional Approach to International Constitutionalization*, in *Ruling*, at 4 ("the distinguishing feature of international constitutionalization is the extent to which law-making authority is granted (or denied) to a centralized authority"). *Id.*, at 8 ("To the extent that fragmentation arises..., constitutionalization can respond by providing centralized institutions or be specifying a hierarchy among rules").

⁵⁴ See Montreal Protocol on Substances That Deplete the Ozone Layer, Article 2.9(c).

⁵⁵ Japan, Germany, India, and Brazil should be designated permanent members of an expanded UN Security Council. See e.g. Annan, Kofi: *In Larger Freedom*, Mar. 21, 2005 (for a set of alternative proposals).

corruption. A vastly greater challenge at the global level is the lack of democratic processes that reveal preferences, reflecting the lack of a global *demos*.⁵⁶ To the extent that we rely on states to represent citizen interests, moreover, many states are not democratic.⁵⁷ States vary considerably in terms of population so that decision-making arguably should take into account differences in the size of states (as opposed to generally relying on consensus voting at the international level). Since international institutions are so distant from citizens and thus it is difficult to conceive of democratic global institutions, we will need to re-conceive or otherwise adapt our concept of democratic checks and balances to the international level,⁵⁸ and rely on other forms of accountability mechanisms. Curiously, the existing literature on global constitutionalism has been largely silent on the issue of global public goods.⁵⁹

B. The Global Administrative Law Approach

The global administrative law approach helps to address the deficiencies of the global constitutional vision through providing other accountability mechanisms, derived from national administrative law, which can be used to check centralized international decisionmaking.⁶⁰ As national governments grew during the twentieth century in response to the growing complexity of national public goods challenges, legislatures delegated increasing powers to agencies. States correspondingly developed administrative law accountability mechanisms to apply to agencies given that legislatures were unable to oversee them sufficiently. International institutions can be viewed analogously to national government agencies in that both involve a delegation of power to an unelected body.

The accountability mechanisms highlighted by the global administrative law project are pragmatically useful for governing the production of global public goods. They include transparency and access to information; engagement with civil society and with national parliaments; monitoring, inspection, reporting, and notice and comment procedures; reason-giving requirements; substantive standards that must be met such as proportionality; and judicial review.⁶¹ These accountability mechanisms can be developed through international treaties, such as under the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters,⁶² and through national and international judicial decisions. Decision-making within international institutions must be overseen, in particular, through pressure placed on public

⁵⁶ Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy', 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 547, 561 (2004) ("A simplistic application of the majoritarian principle in world arenas would be normatively ludicrous").

⁵⁷ This situation calls for a move toward an international norm requiring democracy at the national level, backed by civil rights protections. See e.g. Thomas Franck, 'The Emerging Right to Democratic Governance', 86 *AJIL* (1992) 446.

⁵⁸ Cf. David Held & Daniele Archibugi, (eds.) *Cosmopolitan Democracy: An Agenda for a New World Order* (1995) (Introduction); Grainne de Burca, 'Developing Democracy Beyond the State,' 46 *Columbia J of Transntl L* 102 (2008); Anne Peters, *Dual Democracy*, in Klabbers et al, *supra* note 52, Peters, for example, notes, critiques, and builds upon conceptualizations of deliberative democracy, participatory democracy, and contestatory democracy in relation to representative democracy. *Id.*, at 268-271.

⁵⁹ Global public goods, for example, are not covered in either Dunoff & Trachtman, *supra* note 52, or Klabbers, Peters and Ulfstein, *supra* note 52. But cf. Petersmann, 'De-Fragmentation of International Economic Law through Constitutional Interpretation and Adjudication with Due Respect for Reasonable Disagreement', 6 *Loyola U Chi Int'l L Rev* (2008) 209, at 217.

⁶⁰ See Kingsbury, Krisch and Stewart, 'The Emergence of Global Administrative Law', 68 *Law & Contemporary Problems* (2005) 15; Stewart, *US Administrative Law: A Model for Global Administrative Law*, 68 *Law & Contemporary Problems* 63 (2005).

⁶¹ *Id.* See also Daniel Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 *Yale Law Journal*, 1490 (2006); Benedict Kingsbury & Lorenzo Casini, *Global Administrative Law Dimensions of International Organizations Law*, 6 *International Organizations Law Review* 319 (2009).

⁶² June 25, 1998, 38 *I.L.M.* 517.

representatives by private groups. This pressure is facilitated by making international decisionmaking more transparent.

To give one example of the usefulness of the global administrative law framework in the context of global public health, the WHO is increasingly engaging in public-private partnerships for innovative drug development because of the challenges of obtaining sufficient public financing.⁶³ These partnerships raise conflicts-of-interest concerns that a global administrative law model can help to address through transparency and other administrative law mechanisms.

The global administrative law model also offers the advantage of being applicable to national decisionmaking over the production of global public goods. As we have seen, the deployment of best shot global public goods, such as technologies for asteroid deflection and climate engineering, may not require an international institution. Yet, the externalities involved in their deployment by states calls for accountability checks. Such national decisionmaking can be subject to due process requirements and to monitoring and review before international administrative bodies and courts. The WTO shrimp-turtle case provides an excellent example. The U.S. exercised unilateral action to help preserve an endangered species on the high seas (a global public good). Its efforts, however, had significant implications for developing countries and their traders. The WTO Appellate Body successfully pressed the United States to change its administrative law procedures to better assure due process review of the situations and concerns of these countries and their traders.⁶⁴

C. The Global Legal Pluralist Approach

Although the concept of global public goods poses challenges for the legal pluralist vision, this approach remains extremely relevant. Among legal pluralism's virtues is that pluralism accounts better for divergences in community values, priorities, and perspectives in light of the distributive consequences at stake in the production of global public goods. Enumerating and deliberating over these distributive issues highlights the need for pluralism to contest centralized policies.

The legal pluralist vision calls to the forefront the importance of ongoing interaction with state institutions in order for global-public-goods governance to be accountable and effective. From an accountability perspective, the pluralist approach provides a needed check on centralized decision-making at the global level, such as for the production of aggregate efforts public goods. From the perspective of effectiveness, international law is more likely to be implemented if it engages and takes account of state perceptions and concerns through pluralist interaction.

Legal pluralists focus on the potential pathologies of centralized institutions and the role of pluralism in checking these pathologies. Krisch shows how, in our current socio-political context, the interaction of pluralist legal orders can produce superior ordering to a constitutionalism that is based on hierarchic, centralized decision-making, since mutual accommodation that can result from pluralist interaction will be grounded in greater legitimacy.⁶⁵ Krisch illustrates, for example, how the UN Security Council reassessed and revised its procedures regarding the freezing of individual's assets in the "war on terror" in light of due process concerns, only after states and other actors challenged and resisted implementation of its resolutions.⁶⁶

⁶³ See Kenneth W. Abbott and David Gartner, *Reimagining Participation in International Institutions*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1933562 (2011) (forthcoming, *Journal of International Law and International Relations*).

⁶⁴ See Sabino Cassese, 'Global Standards For National Administrative Procedure,' 68 *Law & Contemporary Problems* 109 (2005).

⁶⁵ Krisch, *supra* note 8 (chapter 3).

⁶⁶ Krisch, *supra* note 8, at 189-224.

Delmas-Marty demonstrates how pluralism can also lead to a unification of legal norms based on a “hybrid” melding of different “ensembles” of law, rather than on hegemony.⁶⁷ Such a pluralist hybrid is more legitimate in that it takes into account, and borrows from, different national legal systems. Because it is more legitimate, it is more likely to be implemented in practice by states.

Ultimately, international law depends on national implementation. Concerns over implementation are particularly salient regarding weakest link public goods. If an infectious disease is to be eradicated, for example, then capacity must be built in a weakest link state. Otherwise, centralized decision making will be ineffective. Weakest link global public goods highlight the need for pluralist interaction with states having meaningful capacity to engage with policies, such as disease eradication. Take, for example, the distribution of antiretroviral drugs to combat the AIDS crisis. Their effective use for constraining the epidemic’s ravages are enhanced where developing countries have the capacity to provide meaningful input to tailor policies and to carry out such tailored programs effectively.

Each of these three leading analytic frameworks for assessing law’s role in global governance focuses in different ways on the issues of accountability and legitimacy. Their relative attributers can be assessed in relation to different global public goods. For the production of *aggregate efforts public goods* where more centralization is needed, the legal pluralist vision is particularly insufficient. The global constitutionalist perspective, which legal pluralists have criticized, offers a complementary frame for building and critically scrutinizing centralized international institutions to which important secondary rule-making powers are delegated in light of imminent global public goods challenges, such as over international security and climate change. The global administrative law project has been particularly important in providing practical tools drawn from domestic administrative law for enhancing the accountability of decisionmaking in the production of global public goods, whether at the international or at the national level. The case of *best shot public goods*, for example, illustrates concerns regarding decisionmaking at the national level. Finally, the challenges of *weakest link public goods* highlight the need for ongoing interaction between centralized entities and nation states if international law and policy are to be implemented effectively. Each approach, in short, has attributes and deficiencies, involving tradeoffs and potential complementarities. They should be viewed in comparative institutional analytic terms in relation to different global public goods challenges. Table 2 summarizes our discussion.⁶⁸

⁶⁷ Delmas-Marty raises the prospect of ‘unification by hybridisation’ involving the melding of different ‘ensembles’ of law. The construction of European and international criminal justice norms and procedures exemplify this provision. Delmas-Marty, *supra* note 7.

⁶⁸ A variant of the global constitutionalist vision — that of constitutional pluralism — can be viewed as combining the attributes of both the legal pluralist and global constitutionalist visions, but it equally could be viewed as combining their deficiencies. Constitutional pluralists view the world in terms of multiple constitutional orders at the *supranational* and national levels which interact. Once more, many of these theorists are European. For expositions of a constitutional pluralist vision, see e.g. Miguel Poiras Maduro, in Dunoff & Trachtman, *supra* note 52; and Walker, ‘The Idea of Constitutional Pluralism’, 65 *Modern Law Rev* (2002) 317.

Table 2: Trade-offs for the Production of Global Public Goods of Global Constitutionalist, Legal Pluralist, and Global Administrative Law Perspectives

	Attributes	Deficiencies	Public Goods Governance Examples
Legal Pluralist	Provides for contestation and exchange among legal orders; grounded in deliberative interaction with national legal orders on which effective implementation depends	Lack of deference to centralized decision-making authority to realign incentives of national decision-makers to collaborate in the production of global public goods	Building state capacity to facilitate interaction and engagement, as for <i>weakest link GPGs</i> ; addressing local contexts as for distribution of retroviral drugs
Global Constitutionalist	Increased focus on centralized international institutions required to overcome collective action and free rider problems; they are analogues of state institutions on which we rely for producing national public goods	Lack of a global demos and democratic accountability of international institutions making decisions with distributive consequences; these institutions exercise agency and constitutional discourse can provide legitimacy to them	Governance, in particular, for the production of <i>aggregate efforts public goods</i> , such as ozone protection, climate stabilization, and monitoring, declaring and combating global public health emergencies
Global Administrative Law	Focus on practical accountability mechanisms for unelected international bodies; builds from analogous techniques used to oversee and check agencies in national systems to which power has been delegated	Relatively technocratic focus on issues of delegation; lack of ambition regarding larger scale questions of governance, especially involving highly political issues such as security	Providing accountability mechanisms for the governance of global public goods production, including <i>best shot public goods</i> , as in the case of climate engineering

Although these analytic approaches are sometimes advanced as alternatives, they play important complementary roles in offering tools for enhancing the legitimacy of the international institutions that we increasingly need to address the different types of global public good challenges faced today.

6. International Law as Facilitator of, and Potential Constraint on, the Production of Global Public Goods

Law (in general) and international law (in particular) can be viewed as a public good in providing for order and stability.⁶⁹ Law (in general) and international law (in particular) also can be viewed as an intermediate public good that facilitates the production of final substantive public goods — such as the avoidance of ozone depletion, the provision of a stable climate through mitigation and geoengineering, financial stability, and peace between nations.⁷⁰ International law, moreover, can help to manage the frictions between pluralist legal orders that govern different public goods. In this way, international law helps to provide for public order.

However, international law can also constrain the production of global public goods. It may do so by creating positive or negative obligations that interfere with their production. Some contend, for example, that the positive obligations under the WTO TRIPs Agreement and other international intellectual property conventions reduce the supply of the global public good of knowledge.⁷¹ Others contend that the negative obligations provided in other WTO agreements could constrain needed national action on climate change, such as through carbon taxes, an emissions-trading system, or a product “life cycle” labelling regime.⁷² To the extent decisions under the Convention on Biodiversity limit research on geoengineering, they too are suspect.⁷³

Unilateral action is problematic because it can be self-serving and fail to take account of the values and perspectives of affected others. Yet unilateral action may also be an important part of a broader transnational process leading to the production of a global public good over time. In a world of interacting legal orders, certain actors will have to act, sometimes unilaterally, to catalyze international and global action. These actors most likely will exercise some form of power, such as market power wielded by the United States and European Union. To advance climate change policies globally, the U.S. or E.U. may need to take unilateral action by creating their own internal system and then imposing some form of a border tax adjustment or penalty applied to applicable imports and cross-border services from countries that do not have a remediation system of comparable effectiveness.⁷⁴ In a world without centralization and hierarchy, there will often be a need for unilateral action to spur the production of global public goods by inciting reactions and interactions which lead to the emergence of international law and international institutions to govern conflicts and maintain order. In practice, unilateralism may help to produce a global public good where common action fails, especially in light

⁶⁹ Cf. traditional sociological perspectives of law providing for social integration and order, going back to the classical works of Emile Durkheim, Max Weber, and Talcott Parsons, and critical approaches viewing law as an exercise of power and control in the context of social struggle. See e.g., discussion in Mathieu Deflem, *Sociology of Law: Visions of a Scholarly Tradition*, chapters 2, 3 & 6, and pp. 275-76 (2008).

⁷⁰ Kaul and Mendoza, ‘Advancing the Concept of Public Goods’, in *Providing Global Public Goods*, *supra* note 2, at 104.

⁷¹ See e.g. Peter Drahos with John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy* 218 (2002) (“under conditions of information feudalism the supply of knowledge goods as public goods will probably suffer”).

⁷² Shaffer and Bodansky, ‘Unilateralism, Transnational, and International Law’, 1 *J of Transnational Environmental Law* (2012). On the latter issue, see Erich Vranes, “Climate Labelling and the WTO: The 2010 EU Ecolabelling Programme as a Test Case Under WTO Law,” available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1567432 (2010).

⁷³ At the Tenth Conference of the Parties of the Convention on Biodiversity in 2010, the parties adopted a decision requesting that “no climate-related geo-engineering activities that may affect biodiversity take place,” subject to certain conditions. See Convention on Biological Diversity, Decision X/33, (Oct. 29, 2010), <http://www.cbd.int/climate/doc/cop-10-dec-33-en.pdf> UN Doc. UNEP/CBD/COP/DEC/X/33 [hereinafter Decision X/33]. Cf. Cinnamon P. Carlane, *Arctic Dreams and Geoengineering Wishes: The Collateral Damage of Climate Change*, 49 COLUM. J. TRANSNAT'L L. 602, 650 (2011) (noting uncertainty about the effect of Decision X/33); Kelsi Bracmort, *Geoengineering: Governance and Technology Policy* 23 (Congressional Research Service Report, Jan. 10, 2011) (listing arguments against moratorium on geoengineering research).

⁷⁴ See Shaffer and Bodansky, *supra* note 72 (discussing the EU’s emissions trading system applied to jet aircraft).

of opt in rules under international treaties. Although international law can help to produce global public goods, it also can get in the way of their production.

The possibility of unilateral action is not available to all and the results may often reflect biases. For example, John Yoo has written of global security as a public good which is not provided by global institutions in order to justify U.S. intervention in Iraq and other unilateral policies.⁷⁵ The example of Iraq makes clear the need for some form of international constraints on unilateral action so that a nation must justify its acts and take into account their impact on others. The WTO provides such a possibility in the area of regulation. It creates constraints and has a mandatory dispute settlement system to hear legal complaints, backed by sanctions. Its dispute settlement system can press a country to negotiate in good faith with third countries and create internal administrative law mechanisms in which non-citizen interests are heard. These constraints are less binding in other areas, such as international security, as represented by the U.S. invasion of Iraq, NATO's intervention in Kosovo, and U.S. missile and drone attacks in the territories of other states.

In sum, international law represents an important "constraint on the unilateral definition of a global public good."⁷⁶ The stringency of this constraint, however, should vary in light of the objective at stake, the effectiveness of a multilateral alternative, and the possibility that the national measure can take better account of its implications on outsiders in a non-biased manner.

⁷⁵ Delahunty & Yoo, 'Great Power Security', 10 *Chi J Int'l L* (2009) 35, 45, 48 ('Armed intervention into the internal affairs of nations may prevent these threats from materializing, even though they do not involve an imminent cross-border attack.... The theory of public goods predicts that activity necessary to secure international peace and security will be less than optimal'); and Yoo & Trachman, 'Less Than Bargained For: The Use of Force and the Declining Relevance of the United Nations', 5 *Chi J Int'l L* (2005) 379, 383-84 (arguing that US invasion of Iraq was justified in part by failure of UN to provide security).

⁷⁶ Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order', 16 *EJIL* (2005) 369.

7. Conclusion

Globalization pressures transform issues that formerly were national in scope into global ones. With globalization, national decisionmaking increasingly has externalities on outsiders, and it is increasingly insufficient to attain national goals. International law and institutions thus rise in importance. Choices over the terms of international law, however, have distributive consequences, and the choice among global public goods and their funding involves rivalry. As a result, the key normative question becomes a comparative institutional one: that is, under what *conditions* are more or less centralization and hierarchy preferable? While the choice among alternatives may be complicated at the national level, the choice becomes much more so at the international level where problems of numbers and complexity multiply.

Legal pluralism's starting assumption is about the need for communities to have a voice in shaping their own destinies. It thus distrusts order imposed by hierarchical, centralized institutional authority. The starting assumption for the production of many global public goods, in contrast, is the need for collective action to cooperate for common benefits. These starting points create a tension. There are risks of too much comfort with the legal pluralist framework as an organizing concept for the production of global public goods. But there are parallel risks with legitimizing centralized international decision-making without global democratic checks. Comparative institutional analysis is thus required which is tailored to the particular challenges raised by the production of different global public goods. International law will play a critical role by facilitating the creation, maintenance, oversight, and constraint of centralized international institutions, and the monitoring and review of national institutions, in relation to decisionmaking implicating the production of global public goods in different contexts. Given the varying contexts of different global public goods, there is no single best, universalist approach. Rather, a pragmatic approach is required in relation to different types of public goods and real world institutional limits. These strategies must include greater international centralization (for which constitutional principles are needed), multi-level institutional interaction (highlighting the key role of pluralism), and hybrids that include public-private partnerships (for which administrative law principles are required).

We face considerable obstacles in producing global public goods in light of free rider problems, distributive concerns, and the challenge of revealing preferences through democratically accountable international institutions. Nationally, at least in the United States, the sense of collective purpose of a *demos* appears to be in decline just when it is needed to address our common challenges. Globally, the challenge of developing collective purpose based on inter-solidarity among peoples remains more daunting. Such are the challenges of producing global public goods in our contemporary legal pluralist world.

Globalisation and Law: A Call for a Two-fold Comparative Institutional Approach

Antonina Bakardjieva Engelbrekt*

1. Introduction

The impact of globalization on law is at the center of intense scholarly debate in law, economics and political science. Open markets, ubiquitous communication technologies, global environmental threats – to name only some of the forces of globalization – obviously challenge the conventional way of production of law, or more broadly, of norms governing social and economic relations. Given the limited capacity of national governments to provide solutions to problems of transnational dimensions, the monopoly of the nation state over law-making and law-enforcement is seriously challenged. Indeed decisions on a growing number of vital issues – from food safety to Internet governance – are nowadays taken (and implemented) in global forums of intergovernmental, or of less formal private, or public-private, character. It suffices to mention the role of the WTO for global economic governance, of ICANN for Internet governance and of the negotiations on climate change within the auspices of the UN, in order to perceive the dimensions of the ongoing transformation.

In Europe, a steady process of deepening and widening of the integration between the now 28 Member States of the European Union implies transfer of new competences from the national to the supranational level. Moreover, the Union takes increasingly the role of a mediator between national concerns and global challenges. With the recent Lisbon Treaty the external competences of the Union have been enhanced and it is increasingly mandated to act as a global actor, representing the interests of the Union and its Member States on the global stage.

Naturally, the shift of decision-making from national to supranational and international arenas has directed the attention to the emerging structures of a global legal order, with focus on international organizations, international tribunals and the role of transnational corporations.¹ Yet, as convincingly argued by theories of multi-level governance, in an era of Europeanisation and globalisation legal orders based on the nation state will not disappear, but will continue to exist parallel to the emerging strata of supranational and transnational governance.² The new governance structures are in many respects a product of the interaction between different national legal rules, interests and practices. At the same time, as a result of the transfer of decision making to transnational arenas, the role of national decision-making bodies is undergoing considerable transformation. We may be seeing a reallocation of decision-making competences, but also changes in institutional design to accommodate supranational and international influences to local preferences and domestic institutional frameworks.

In a recent treatise on global competition law Gerber rightly notes that “national [competition] law experiences structure the lenses through which national commentators and decision-makers view

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¹ Von Bogdandy, A., ‘Democratic Legitimacy of Public Authority Beyond the State – Lessons from the EU for International Organizations’, Paper presented at the Jean Monnet Center, April 27, 2011, on file with the author; Joerges & Petersmann (eds) *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Oxford: Hart Publishing, 2006); Teubner, G., *Global Law Without a State*, (Dartmouth: Ashgate Publishing, 1997); Kingsbury, Benedict, Nico Krisch and Richard Stewart, *The Emergence of Global Administrative Law*, 68 *Law & Contemporary Problems*, 2004-2005, 15-61.

² Scharpf, F., ‘Regieren im europäischen Mehrebenensystem – Ansätze zu eine Theorie’, *Leviatan*, 2002, 65; Joerges, Ch., ‘The Challenges of Europeanization in the Realm of Private Law: A Plea For a New Legal Discipline’, *Duke Journal of Comparative and International Law* 14, 149; Joerges and Petersmann (2006), *supra* note 1.

transnational issues. Similarly, experience at a global level increasingly colors how national decision-makers define and pursue the goals of national [competition] law.”³ One important implication of the above briefly sketched background is arguably that the intertwining between the national and the transnational dimensions of law should be systematically pursued and put at the centre of “law and globalisation” studies.⁴

If we accept the pertinence of this research objective, different type of research questions come to the forefront, such as: How do different national approaches to law and economic governance influence the emerging supranational and transnational governance institutions? And conversely, what changes in national law and governance can be identified under the influence of Europeanisation and globalisation? Can we observe emulation of successful governance models across jurisdictions and governance levels? Is there a trend toward convergence between national legal and institutional solutions? Or do processes of Europeanisation and globalisation increase divergences? What are the factors that facilitate or inhibit legal change?

The answer to these research questions certainly requires that we look closely at the processes taking place at the transnational level. However, and less obviously, I believe it requires that we do not lose sight of the historical, cultural and institutional embeddedness of different national approaches to the economy and continue to engage in comparative studies of legal systems and jurisdictions. At the same time, the design and methodology of such studies is in need of serious rethinking. Classical comparative law has been criticized for a bias toward so called “methodological nationalism”. Methodological nationalism is characterized by the “assumption that the nation state or national society is the natural social and political form of the modern world”.⁵ State legal systems are in such an understanding perceived as discrete, static and resistant to change. Conceived this way, conventional comparative law research remains fairly incapable of providing new insights in the complex interdependencies characterizing today’s pluralistic world of multi-level governance. The discipline, so applied, fails to capture the dynamics of mutual interaction and influence, of resistance and surrender to change and the involvement of private and public-private structures in the global governance process.⁶

There seems therefore to be a pressing need for innovatory comparative research methodology that can meet the exigencies of a changing world. Some elements for such methodology have been suggested by Gerber. According to him the interest of comparative law scholars should be directed at system dynamics, i.e. at the deeper levels of operation of the legal system, and at identifying the main factors for legal change.⁷ As Gerber has suggested, to understand system dynamics we should shift the attention from norms (substantive law) to decision-making processes. The latter according to him comprise the following tentative elements:

- legal texts (authoritative texts: statutes, administrative regulations, judicial decisions, etc);
- institutions (structures of power, decision-making procedures);
- communities (epistemic communities of lawyers, regularized patterns of relationships among actors that affect legal decision-making, in particular between judges, practicing lawyers, legal scholars etc.);
- modes of legal thought (ideas).

³ Gerber, D., *Global Competition: Law, Markets and Globalisation* (Oxford: OUP, 2010).

⁴ See in this sense Gerber, *supra* note 3.

⁵ Beck, U., *What is globalization?* (Cambridge: Polity Press, 2000), 64 ff.

⁶ Joerges (2004), *supra* note 1.

⁷ Gerber, D., ‘System Dynamics: Toward a Language of Comparative Law?’ *American Journal of Comparative Law*, 1998, 719–738.

Needless to say, such broadening of the enquiry calls for richer set of theoretical and methodological approaches. Whereas legal texts can be analyzed with conventional methods of positive legal analysis and classical comparative law, analyses of institutions, communities and modes of thought seem to require closer interaction with other social sciences. I suggest that here comparative institutional analysis can make an important contribution, but it has to be adapted to the specific research objectives at hand.

This paper proceeds from the main premises of a participation centered comparative institutional analysis (CIA).⁸ Its purpose is to propose ways of fine-tuning CIA to the study of Europeanisation and globalization. First, it argues that in order to productively analyze the impact of globalization on law and to be in a position to advance new sustainable forms of global governance, we have to deepen our understanding for national institutional legacies and the ways in which national legal systems struggle to reconcile national legal traditions and cultures with the transnational level at which the economy operates.

Secondly, the paper suggests that CIA can be successfully used for cross-country comparative studies, directing attention to the interaction between different national institutional frameworks and supranational and international decision-making processes. The CIA provides a framework for analyzing actors, interests and participation costs as determinants for institutional choice. Employed in a cross-country comparative setting this framework can help to structure the comparison of varieties in institutional choice and design between legal and political systems, and across levels.

Third, and finally, in order to capture the dynamics of the interaction between the transnational and the national governance levels it is submitted that CIA has to be complemented with a historical institutionalist perspective.⁹ The participation-centered approach does not aim at explaining the evolution of legal institutions and the logic of institutional change. This dynamic aspect of legal institutions is however crucial for understanding the effects of globalization on law and is a central concern of historical institutional analysis. Indeed, the core of the theory of institutional change advanced by Douglass North could be summarized as aiming to explain ‘how the past influences the present and the future, the way incremental institutional change affects the choice set at a moment of time, and the nature of path dependence’.¹⁰

By infusing a historical institutional perspective in CIA the approach advocated in the paper arguably allows for a two-fold comparative analysis – comparative analysis between institutions and comparative analysis between legal systems.¹¹ Theoretically, it purports to offer explanation and conceptualization of processes of both legal continuity and legal change in a comparative cross-country setting. Moreover, it seeks to account for and improve our understanding of the interaction between national and supranational legal systems in a multi-level system of governance. Methodologically, the approach suggests to structure cross-country comparative studies along the factors for analysing institutional choice and institutional design as advanced by CIA, i.e. actors, interests and the modalities of participation in alternative decision-making process. In addition, the approach calls for careful historical ‘process tracing’¹² to capture the institutional trajectories of

⁸ Komesar, N., *Imperfect Alternatives. Choosing Institutions in Law, Economics and Public Policy* (Chicago and London: The University of Chicago Press, 1994); Komesar, N., *Law’s Limits. The Rule of Law and the Supply and Demand of Rights* (Cambridge: Cambridge University Press, 2001).

⁹ North, D., *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990); North, D., ‘Institutions’, 5 *Journal of Economic Perspectives*, 1991, 97; North, D., ‘Institutional Change: A Framework of Analysis’, in: Sjöstrand, S.-E. (ed.) *Institutional Change. Theory and Empirical Findings* (New York: Sharpe, 1993), 35.

¹⁰ North (1990), *supra* note 9, 3.

¹¹ For a full-blown presentation of the approach and application in the particular field of fair trading see Bakardjieva Engelbrekt, A.

¹² Thatcher, M., *Internationalisation and Market Institutions: Comparing European Experiences* (Oxford: Oxford University Press, 2007).

individual legal systems and be in a position to estimate the prospects for and direction of change of institutional frameworks in the course of Europeanisation and globalisation.

In a concluding section the paper provides illustrations of possible applications of the approach for studying the effects of Europeanisation and globalisation in selected areas of economic law and policy, namely fair trading law, competition law and intellectual property law.

2. Participation-centered Comparative Institutional Analysis: main tenets and possible fine-tuning for application in cross-country comparisons

The main tenets of CIA are elaborated in detail in the works of Neil Komesar referred above and will be only briefly recapped here. CIA advances a way of conceptualising the market, the political process and the judicial process as aggregate decision-making processes and as institutional alternatives for solving different law and public policy issues.¹³ As a main factor for comparative evaluation CIA advances participation of affected actors in the respective decision-making process (the ‘participation-centred’ approach). Clearly, participation alters shape depending on the decision-making process, the most typical forms being transacting in the market, voting and lobbying in the political process and litigation in the judicial process. The focus is on the mass of participants, i.e. consumers and producers for the market process, voters and lobbyists for the political process and litigants for the judicial process.¹⁴

Studying the opportunities for participation (and representation) implies on the one hand analysis of the interests involved in a particular public policy issue and, on the other hand, analysis of the issue at hand and the characteristics of the alternative decision-making processes that enhance or reduce participation. Participation opportunities are weighed through assessing the costs incurred and the benefits expected from participation of the actors in the respective decision-making process. Costs and benefits of participation thus become the main units of analysis. They account for the relative efficiency of the alternative decision-making processes with regard to a specific law and public policy issue.

The benefits of participation are measured through the per-capita stakes of affected interests. The stakes of potential participants differ both in terms of size and in terms of their distribution among the group. One can usefully distinguish between high stakes and low stakes and between concentrated and dispersed stakes. The distribution of the stakes between potential participants in a decision-making process is decisive for the probability of successful participation. An even distribution of stakes on both sides of the transaction and a relatively low number of parties involved suggest high benefits and high probability of participation. By contrast, a skewed distribution of stakes with concentrated stakes on one side and dispersed stakes on the other reflects a problematic transaction situation.¹⁵

Participation costs are subdivided into two main categories, i.e. information and organisation costs.¹⁶ More specifically, the costs of participation depend “on the complexity or difficulty of understanding the issue in question, the number of people on one side or the other of the interest in

¹³ Komesar (1994), *supra* note 8, at 9.

¹⁴ Komesar (1994), *supra* note 8, at 7.

¹⁵ In this respect Komesar’s approach resembles Mancur Olson’s classical analysis of collective action. Olson provided a convincing explanation as to why actors would be disinterested in participation in collective action concerning broadly dispersed interests, despite possibilities to improve the situation of the group. Olson argued that due to high costs of organisation and risk of ‘free-riding’ such behaviour was rational. Olson’s pessimistic prediction is that very large groups will normally not, “in the absence of coercion or separate, outside incentives, provide themselves with even minimal amounts of a collective good”. Olson, Mancur, *The Logic of Collective Action. Public Goods and the Theory of the Group* (New York, Schocken Books, 1965), at 48.

¹⁶ Komesar (1994), *supra* note 8, at 8.

question, and the formal barriers to access associated with institutional rules and procedures". Arguably, in final analysis even organisation expenses boil down to information costs.¹⁷

The approach defines itself as truly comparative, in contrast to other, so called "single", institutional analyses, in which the advantages of one decision-making process over another are one-sidedly highlighted (notably the advantage of markets over governments in conventional law and economics). Moreover, it helps to distinguish the matter of goal choice from the matter of institutional choice and to highlight the decisive importance of the latter. The use of the broad concept of 'participation' serves to facilitate the extension of the Coasean transaction cost approach from markets to politics, to public administration and adjudication. It brings the logic of economic theory closer to public policy and law.

In general, comparative institutional analysis stresses that the dilemmas of institutional choice begin with large numbers. Given small numbers of actors (low transaction costs) markets can be expected to cope endogenously with resource allocation through voluntary transactions.¹⁸ But if there are many actors on one side of the interest involved, transaction costs increase and at least potentially the question arises whether resorting to alternative institutions might reduce allocative inefficiencies. Yet, comparative institutional analysis demonstrates convincingly that large numbers of affected parties constitute a problem in every setting. Similar interest constellations cause analogous problems of organisation and representation. Participation malfunctions in the market setting are reproduced in the political process, in the administrative process and in adjudication. In other words, institutions tend to 'move together'.¹⁹ So, rather than searching for the perfect decision-making process, legislators and policy makers should seek to opt for the least imperfect alternative.

CIA is particularly apt for being integrated in legal analysis. It invites the researcher to direct the search light (i) to the actors and interests that are affected and involved in decision-making processes and (ii) to the institutional design of these processes. This means linking substantive law with enforcement and with aspects of constitutional and procedural law.

2.1 CIA as a framework of analysis in cross-country comparisons

The participation centred approach is developed chiefly for the purposes of informing institutional choice in law and public policy within a single jurisdiction. However, it can provide a valuable analytical grid for the cross-country comparative study of institutions.²⁰ First, CIA stresses the importance of the question 'deciding who decides' and of allocating decision making competences between the market, the political (legislative) process, courts and administrative agencies. Obviously legal and political systems may, and do differ in allocating decision-making competences to these institutional processes in specific areas of law and public policy. The question of institutional choice is thus identified as being of central importance for analysing different national approaches to economic governance.

It may be interesting to note that on a macro level, main distinctions between legal families advanced by comparative law scholars can be connected to differences in institutional choice. The prime example here is the paradigmatic (and often contested) divide between common law and continental legal systems, with greater reliance on courts in the former and preference for the

¹⁷ Olson (1965), *supra* note 14, at 47.

¹⁸ Coase, Ronald, 'The Problem of Social Cost', *Journal of Law and Economics*, 1960, 1-44.

¹⁹ Komesar (1994), *supra* note 8, at 23.

²⁰ Mattei, Ugo, *Comparative Law and Economics*, (Ann Arbor MI: University of Michigan Press, 1997); Bakardjieva Engelbrekt, Antonina, *Fair Trading Law in Flux? National Legacies, Institutional Choice and the Process of Europeanisation* (Stockholm: US AB, 2003). See also Komesar stressing diversity in institutional choice and design, Komesar (2001), *supra* note 8.

legislative process in the latter.²¹ Such distinctions have been taken on by economists in the New Comparative Economics school of thought, and used ambitiously to design a grand theory on the link between legal institutions and economic efficiency.²² Despite the many problematic aspects of the theory, it has the merit of highlighting the centrality of institutional choice.²³ On a micro level, analyses of more limited policy issues, for instance aspects of labour law, financial regulation or environmental protection, can also fruitfully be studied through the prism of different point of gravity between market, political process, administrative process and courts in individual national legal systems.

Second, the theory elicits participation as the main factor for evaluation of the efficiency of decision-making processes and of institutional choice. In a cross-country comparison actors, their interests and stakes, as well as their ability to organise and participate in decision making processes typically differ. For instance the existence or absence of powerful cultural industries or of well organised agricultural lobbies will influence the participation dynamics in intellectual property law-making, or in agricultural policy, respectively. Different degree of unionization of workers and businesses will influence welfare law and policy, while a vocal and entrepreneurial legal profession may facilitate (even excessively) participation in court proceedings. These differences in actor constellations in turn depend on a variety of historical, economic, technological and other circumstances.

For instance, in an incisive analysis Bo Rothstein, building largely on Olson's theory of collective action, identifies a link between union membership and unemployment insurance as a crucial explanation for the success of unionization in certain European countries (like Sweden). The unemployment insurance constitutes an important additional benefit, a 'selective incentive' in the terminology of Olson for joining the collective workers' organization. A similar incentive is absent in a compulsory insurance system provided by the state (typical of France and other West European countries).²⁴ Such differences would seem important for understanding and comparing the structural modalities of institutional choice.

Third, the institutional design of non-market decision-making processes like the political process, the courts or administrative agencies emerges as an important determinant of participation costs and benefits. Whereas in his analysis, Komesar mainly scrutinizes the characteristics of the political process and the courts from a single country (i.e. US) perspective, clearly in a comparative cross-country study the emphasis will be on identifying differences in the design of political processes, judiciaries and administrative agencies that facilitate, respectively impede participation. Rules on transparency, participation and consultation in the political process, on access to courts and flexibility

²¹ See Zweigert and Kötz (1998) *Introduction to Comparative Law*, Oxford: Clarendon Press.

²² La Porta, Rafael, Florencio Lopez-de-Silanes and Andrei Shleifer, 'The Economic Consequences of Legal Origins', 46(2) *Journal of Economic Literature*, 2008, 285–332.

²³ For a critical analysis, especially of the grand scale statistical methodology employed and the attempt to organize the worlds manifold national legal systems within three to four main "legal origin" see Bakardjieva Engelbrekt, A. (2010), 'Toward an Institutional Approach in Comparative Economic Law?', in: Bakardjieva Engelbrekt and Nergelius (eds) *New Directions in Comparative Law* (Cheltenham: Edward Elgar, 2010), 213-251; Siems, Mathias, 'Numerical Comparative Law. Do we Need Statistical Evidence in Law in Order to Reduce Complexity?', 13 *Cardozo Journal of International and Comparative Law*, 2005, 521-540; Berkowitz, Daniel, Katarina Pistor and Jean-Francois Richard, 'The Transplant Effect', 51 *The American Journal of Comparative Law*, 2003, 163-203.

²⁴ Rothstein offers then a careful 'process-tracing' of the history of acceptance of the so called Ghent system for unemployment insurance in Sweden and the complex reasons for its success in this country, thus showing the relevance of institutional trajectories (cf. below on historical institutionalism), Rothstein, Bo (1992), 'Labor Market Institutions and Working Class Strength', in: Stenmo, Thelen and Longstreth (eds) *Structuring Politics: Historical Institutionalism in Comparative Analysis* (Cambridge: Cambridge University Press, 1992), 33-54. On the term 'process-tracing' see Thatcher (2007), *supra* note 12.

and openness of the administrative process, rules on litigation costs and procedure will be among the most important components of the comparative investigation.

Summing up, CIA provides a convenient basis for comparison between different legal and regulative approaches on a cross-country basis. Any comparative study, including a legal one has to explicitly or implicitly confront and solve the problem of comparability. This requires a careful selection and delineation of a common denominator (*tertium comparationis*), i.e. of a controlled variable, that has to be kept constant throughout the analysis. Mainstream comparative lawyers find the common denominator in the common function of legal rules. Zweigert and Kötz are particularly categorical that “in law the only things which are comparable are those that fulfil the same function.” Using participation costs and benefits as a common unit of analysis arguably provides the common denominator needed for comparative legal studies. It also offers a point of orientation for the normative evaluation of alternative institutional approaches (see below on adaptive efficiency).

2.2 A historical institutionalist perspective

Despite the many advantages of CIA for application in cross-jurisdictional context, there are certain inherent limitations of the approach that have to be addressed and modified. CIA is advanced chiefly as an analytical framework for normative advice on allocating decision-making competences for specific law and public policy issues between alternative institutions, typically within a single jurisdiction. The approach shows thus limited interest in the institutional evolution and the reasons for the particular shape that institutions in a given jurisdiction have taken. Endowed positions and historical contingencies may be acknowledged but are not central to the analysis.²⁵ Certainly greater attention to the dynamic side of institutional choice is paid in the monograph “Law’s Limits”, where a process of fluctuation of rules and shift in institutional choice is highlighted as a result of the demand and supply of rights.²⁶ However, the focus is still on agency and change. Long term legacies and institutional inertia are not addressed, despite the fact that they may be important for capturing the dynamic of legal changes in a cross-country and multi-level setting. It is therefore suggested that CIA should be combined with a historical institutionalist perspective.

Historical institutionalism adopts a somewhat different perspective on institutions. It highlights the role of institutions as humanly devised constraints, whose main function is to reduce uncertainty by providing structure to everyday life.²⁷ Institutions thus include formal legal rules, but also informal constraints (such as ideologies and customs) and the enforcement characteristics of both.²⁸ The main question is: how do institutions evolve over time and how do present institutions influence future individual and institutional choices? Contrary to claims of evolutionary theories of economic growth²⁹, North convincingly demonstrates that institutions are not necessarily evolving towards increased efficiency in a classical Pareto sense.³⁰ This is particularly so for institutions which are a product of the political process, typically legal rules resulting from legislative processes. Given differential bargaining power in societies, it is not at all certain that these institutions will be created to promote efficiency. Rather they may further the interests of those with greater bargaining strength.³¹

²⁵ See for similar criticism Buzbee, William (2000), ‘Sprawl’s Dynamics: A Comparative Institutional Analysis Critique’ 35 *Wake Forest Law Review*, 509, at 516..

²⁶ Komesar (2001), *supra* note 8, at 157.

²⁷ North (1991), *supra* note 9.

²⁸ North (1993), *supra* note 9, at 36.

²⁹ Alchian, Armen, ‘Uncertainty, Evolution and Economic Theory’, 58 *Journal of Political Economy*, 1950, 211-221.

³⁰ A Pareto-superior (or Pareto-efficient) transaction is defined in economics as a transaction that makes at least one person better off without making anyone worse off. See Posner, R., *Economic Analysis of Law* (Boston: Little, Brown & Co., 1992), at 13.

³¹ North, D, ‘Economic Performance Through Time’ 84 *The American Economic Review*, 1994, 359 ff. 361.

Unlike other institutionalists who treat organizations as institutions, North insists on distinguishing between the two in order to enable stringent analysis of their interaction.³² The distinction is crucial, since in this way the analytical approach is capable of capturing not only processes of stability and inertia but also processes of change at incremental or more dynamic pace. Organizations are conceived as “groups of individuals engaged in purposive activity.” They are designed by their creators to maximize wealth, income, or other objectives defined by the opportunities afforded by the institutional structure of society.³³ This broad definition covers the classical market organization, the firm, but likewise the guild, the political party, the Congress or the executive agency. It allows for parallel consideration of organizations which are product of market, political and adjudicative processes and organizations.

Institutions open new opportunities for gains from trade and thus give rise to organizations and institutional agents who are willing to make use of these new opportunities. The backside of the interaction between institutions and organizations is the ensuing risk of symbiotic relations between organizations and institutional frameworks, leading to situations of institutional lock-in, i.e. pronounced resistance to change despite efficiency losses. So-called ‘path dependence’ is according to North a result of incomplete markets, fragmentary information feedback and significant transaction costs. Under these conditions ‘the subjective models of actors modified both by very imperfect feedback and by ideology will shape the path.’³⁴

Historical institutionalism is also well-suited for cross-country comparative analysis, since institutional variation is one of its main concerns. However, the comparison would rather be designed as parallel accounts of long term institutional legacies. Indeed, within the historical institutionalist line of theorising a rich literature has emerged on so called “varieties of capitalism”, studying comparatively the political economy of market institutions. Scholars distinguish between two types of political economies: liberal market economies and coordinated market economies (CMEs and LMEs). These are conceived as “ideal types at the poles of a spectrum along which many nations can be arrayed”.³⁵ While USA and United Kingdom are the paradigmatic examples of a LME, countries like France, Germany and Sweden are usually analysed as three distinct styles of CMEs. More recently the “varieties of capitalism” literature has been used to explore different paths of transformation of the post-communist countries in Central and Eastern Europe under the label “varieties of post-communism”.³⁶

2.3 Merging CIA with historical institutionalism

CIA and historical institutionalism may be perceived as incompatible and in a sense even diametrically opposite. They adopt different time perspective and largely pursue different goals. Whereas historical institutionalism purports to explain long-term legacies and incremental historical change, CIA is interested in situation-specific, every day policy decisions on allocating competences to different institutional arenas. Historical institutionalist analysis is prevailingly explanatory, while CIA has open

³² Williamson in his early work does not distinguish between institution and organisation. In the school of sociological institutionalism a joint treatment of institutions and organizations is represented by March and Olsen. They include in the definition of institutions not only “social norms and culturally stabilized systems of meaning but also social entities that are capable of purposive action.” March/Olsen (1989). On the definition of institution and the distinction with organisation and corporate actors see Scharpf, Fritz, *Games Real Actors Play. Actor-Centered Institutionalism in Policy Research* (Boulder, CO: Westview Press, 1997), 38.

³³ North (1993), *supra* note 9, at 36.

³⁴ North (1990), *supra* note 9, at 95.

³⁵ Hall, Peter and David Soskice, *Varieties of Capitalism - The Institutional Foundations of Comparative Advantage*, (Oxford: Oxford University Press, 2001).

³⁶ Lane and Myant, *Varieties of Capitalism in Post-Communist Countries* (Houndmills and New York: Palgrave Macmillan, 2007).

normative ambitions. It seeks to provide an operative analytical framework that can generate policy advice on divergent public policy issues. Historical institutionalism attaches secondary importance to agents and interests. By contrast, CIA emphasizes interests and participation. In general, the story told by historical institutionalism is one about institutions as constraints on human behaviour, whereas CIA tells us about individuals who collectively use and shape institutions according to their interests.

Yet despite this *prima facie* incompatibility, I argue that the two approaches in many respects may be seen as complementary and mutually supportive of each other. The evolutionary approach advanced by historical institutionalism allows us to see national institutions as products of an incremental process of institutional change that does not necessarily increase efficiency, but may sustain inefficient institutional solutions (lock-ins). Institutions are in this theoretical perspective embedded in, and to a great extent determined by, a broader institutional context. In that context constitutional constraints, dominant perceptions about the role of government and public administration, as well as the divide between public and private, come into play. Gerber's communities and modes of legal thought are likewise important part of the context. Historical institutionalism also directs the attention to organizations that have evolved as products of institutional frameworks and live in symbiosis with it. It provides rigorous explanation for often observed instances of resistance to institutional change despite declared political will to the contrary.

At the same time, historical institutionalism does not tell us when situations of 'lock in' would be most persistent and pervasive. Indeed, in his Nobel Prize lecture North explicitly addressed the problem of bargaining strength when discussing the process of creating formal rules (the legislative process).³⁷ But North's purpose was not to offer the analytical tools for studying such problems. In this respect the participation-centered approach advanced by CIA represents a welcome opportunity for refinement of historical institutionalism. The combined approach urges us to inquire deeper into the interests lying behind each law and public policy issue, as well as into opportunities for these interests to be adequately represented in the relevant institutional decision-making processes.³⁸

The CIA framework for analysis of costs and benefits of participation in relation to the decision-making process, to the interests and to the issue involved, presents a rigorous tool-box for diagnosing instances of persistent institutional malfunctioning and, respectively, of situations more ripe for change in accordance with the preferences of the actors concerned. CIA is thus not only critical of simplistic evolutionary approaches that predict stable move towards efficiency, but moreover has a convincing answer as to when such predictions tend to fail:

The same may be said of sweeping notions about the evolutionary tendencies of law and public policy to meet social needs. Whether and to what extent the political or adjudicative process will respond to any perceived social need – like the need for a law or a program that reduces transaction costs – depends on how that need will be represented in those processes. When conditions for minoritarian or majoritarian bias are present, for example, these processes may be dormant or even perverse in the face of social need when the need is felt by groups who are underrepresented in these processes.³⁹

In a similar way historical institutionalism may usefully complement and correct the somewhat instrumentalist predisposition hidden in CIA. The approach advanced by Komesar purports to offer insights into the comparative advantages and disadvantages of different decision-making processes, and in relation to different policy settings. The analytical framework thus holds the promise of

³⁷ "Institutions are not necessarily or even usually created to be socially efficient; rather they, or at least the formal rules, are created to serve the interests of those with the bargaining power to create new rules. In a world of zero transaction costs, bargaining strength does not affect the efficiency of outcomes; but in a world of positive transaction costs it does." North (1994), *supra* note 31, at 360 ff.

³⁸ Naturally there are other possible theoretical tools for approaching interests. A classical interest-oriented approach is the game-theoretic one. See Scharpf (1997), *supra* note 32.

³⁹ Komesar (1994), *supra* note 8, at 114.

providing a formula to guide the difficult choice between – admittedly imperfect – institutional alternatives for the efficient implementation of social goals.⁴⁰ Obviously, this is appealing to policy-makers and lawyers who are accustomed to looking at law as an instrument for changing social reality. Here, however, historical institutionalism may introduce a healthy and sobering influence. It warns against overreliance on the efficiency of instrumentalist approaches to law and public policy. Even well-informed and well-intended choice between decision-making alternatives may eventually remain entrenched in inherited institutional solutions. Therefore, endeavours such as legal reform, legal transplants and harmonisation of law need to take the stumbling interference of institutional legacies and inertia into account.

One problem with the linking of perspectives lies in that the very concept ‘institution’ is used differently by the two theories. This only underscores the hidden risks in using a versatile concept that has already been employed in different scholarly and conventional contexts. As noted above, the concept ‘institution’ is used in CIA in a broad sense referring to three main decision-making processes, namely the market, the political process and the courts. This conforms with the understanding of the concept in a whole branch of institutional economics, where institutions correspond to distinct forms of organisational arrangement.⁴¹

North’s definition of institution as presented above is clearly more extensive than that of CIA, covering formal rules, informal constraints and the enforcement characteristics of both. A similar concept of institution is also shared by institutional economists and other social scientists. North furthermore particularly insists that it is essential for his framework to distinguish between institutions and organisations. Organisations are the agents of institutional change, whereas institutions represent constraints that shape the conduct of organisations. Komesar also notes this conceptual discrepancy in his monograph “Law’s Limits”.⁴² One way to maintain a consistent terminology is to stick to the term institution in the historical institutionalist sense, since it captures the essence of institutions as structuring human behaviour, and to use ‘decision-making process’ or ‘system’ when speaking of markets, political processes and courts as institutions in the CIA sense. As Komesar points out, these are large and complex institutional processes, which consist themselves of sub-institutions that might be treated separately. Moreover he uses himself the term ‘process’ interchangeably with ‘institution’.⁴³ He also insists on the central role of Coase for the comparative institutional framework and the analysis of Coase is often called ‘comparative system approach’.⁴⁴ The terminological substitution should therefore arguably not be all too problematic.

2.4 Intersections

There are several specific intersections between historical institutionalism and the participation-centered approach in comparative institutional analysis. The first one concerns the view of enforcement. In institutional terms, enforcement provides the link between actors, organizations and rules. Historical institutionalism demonstrates how institutional frameworks (and enforcement opportunities provided thereof) may produce incentives for new organizations that benefit from the

⁴⁰ Certainly, proponents of comparative institutional analysis may argue that by rigorous analysis of interests (costs and stakes) in a particular situation, historically created institutional dependencies should be taken into account and calculated as high stakes, low costs, or vice versa.

⁴¹ See notably Coase comparing markets and government, Coase (1960), *supra* note 4. Williamson, one of the most famous contributors to the institutional economics and follower of Coase, thus contrasts different forms of market organisations, such as firms, relational contracting and atomistic spot markets. Likewise, it is suggested that the macro institutional processes could be sub-divided for analytical purposes to include trade unions, large corporations, etc. Williamson (1985).

⁴² Komesar (2001), *supra* note 8, at 31.

⁴³ Komesar (1994), *supra* note 8, at 9.

⁴⁴ See Demsetz, H., ‘Information and Efficiency. Another Viewpoint’ 12 JLE, 1969, 1 ff.

institutional framework and through symbiotic relations contribute to its perpetuation and, finally, to lock-in. The participation centred approach suggests that such lock-ins are more likely to occur where the political process suffers of representation malfunctions. In situations conducive to minoritarian bias, the political process is likely to produce formal rules and enforcement mechanisms that excessively favour minority groups at the expense of the majority. The more dispersed and low the stakes of the majority, the more such arrangements are likely to persist. On the other hand, majoritarian bias may assume the form of governmental intervention (e.g. public agency action) shouldering the interest of the majority and converting a skewed distribution into a uniform high distribution of stakes.

The most important intersection between the two approaches appears to lie in the understanding of efficiency. Both historical institutionalism and the comparative institutional analysis advanced by Komesar are characterized by an unorthodox view on efficiency. North in particular elaborates at length on the concept of adaptive efficiency of institutions, according to which efficiency is equalled with generating the highest possible number of trials. An adaptively efficient institutional framework provides incentives to encourage the development of decentralised decision-making processes that will allow societies to maximize the efforts required to explore alternative ways of solving problems.⁴⁵ This concept can be seen as coming close to the participation-centered approach advanced by Komesar. Efficient representation of all interests concerned in the decision-making processes and at all levels, both in rule-making and enforcement, is arguably intimately related, if not synonymous, with ability to generate a high number of trials. Efficient representation will per definition imply high interest awareness and will supposedly bring about challenge of the institutional framework with any perceived inefficiency. Like the analysis of Komesar, North's conceptualisation also finds a productive conjunction between economics, politics and law by demonstrating the immediate economic importance of democratic government and institutions.

If we try to translate this normative component into legal terms, then the question may be: how do we shape legal rules and enforcement mechanisms which can better account for all interests involved and avoid unproductive lock-ins? Cast in these terms, the concept of 'adaptive efficiency' becomes much clearer and appealing for legal analysis. Success in economic history is associated with legal and political institutions including rules on enforcement that have rendered the institutional framework more responsive to changing preferences and costs, assuring more adequate interest representation and making room for new interests and actors as they emerge. Broad representation through democratic procedures thus receives a concrete economic meaning, as it contributes to improved economic performance through better capturing and reflecting the preferences of involved interests. The concept 'deliberation' familiar from legal and political science is close to mind.

Komesar addresses himself the difference between institutional economists, understanding "institutions as laws, rules and customs" on the one hand, and CIA on the other. He stresses that the relationship between laws, rules and customs and decision-making processes is complicated and important, and works both ways – laws, rules and customs determine the costs of participation in decision-making processes, and conversely, decision-making process produce laws, rules and customs. Still he insists that CIA is to be preferred because it treats institutions as endogenous to the analysis. He also claims that the interaction between institutions as laws, rules and customs, and institutions as decision-making processes is built into the participation-centered model.⁴⁶ This view is further developed and refined in Komesar's paper for the Global Governance workshop of 2013, where he devotes special attention to clarifying the relation between CIA and historical institutionalism. He stresses the different questions asked by the two approaches and the different place of institutions, understood as "the rules of the game" in the two types of analysis – namely as independent variable in CIA, used to explain the participation costs, and as dependent variable, to be explained in historical

⁴⁵ North (1993), *supra* note 9, at 36.

⁴⁶ Komesar (2001), *supra* note 8, 31-32.

institutionalism. At the same time, he seems to acknowledge the commonality and congruence in the approaches, for instance that the dynamics of participation determines the functioning of the decision-making processes that decide on formal rules also in North's approach.

Komesar is obviously uncomfortable with leaving residual factors like informal institutions, culture, common beliefs etc vague and unexplained. He suggests that much of these factors can be made endogenous to the analysis and can be fruitfully analysed through the prism of the participation-centred approach. The dynamic of participation can thus explain the long shadow that informal institutions cast over the future and their seeming resistance to change.

While I agree with this account of the links between the two approaches, I believe that there is a need to integrate a historical institutional perspective in a more open and explicit manner. The exact mix between the participation-centered approach and historical institutionalism will to a certain extent depend on the research questions and the subject matter under analysis. The focuses on agency and does not provide tools to account for a range of contextual factors and long-term legacies. Taking a broad view on institutions as laws, rules and customs constraining human behaviour links to Gerber's plea to acknowledge communities and modes of legal thought among the factors determining system dynamic.⁴⁷

3. Advantages of the two-fold comparative institutional analysis for the study of Europeanisation and globalisation

The institutional approach presented above allows for a more productive conceptualisation of the complex relationship between national law and supranational and international law and institutions. Historical institutionalism alone, has been rightly criticised of determinism and overemphasising continuity and incremental change, leaving phenomena such as radical change and the influence of international processes and organisations unaccounted for.⁴⁸ By contrast, CIA seems to overemphasise the transformative power of actors and interests. Combining a participation-centred approach with a historical institutional perspective promises to give insights in the dual forces of continuity and change associated with Europeanisation and globalisation and their influence on national institutional frameworks.

In the nation state law is part of an institutional framework that has evolved through time and is generally changing slowly and incrementally. Actors and organizations have emerged that have adapted their preferences and conduct to the existing framework and contribute to the latter's stability. With the opening of markets and of national borders, new actors enter the institutional stage, which may require accommodation of their interest by national decision-making bodies. These changes are more difficult to detect than the changes in formal rules as a result of compliance with international and supranational harmonization. They may come as a voluntary transformation to reduce adaptation costs or to preempt international regulation.⁴⁹ It is in capturing and analyzing these more subtle institutional changes that I see the main advantage of the approach.

If one looks in particular at European integration one manifest feature of the European Community/Union project from an institutional perspective, is that it offers new arenas for decision-making. The national market flows over into a Common Market. National political and legislative processes are connected by way of dense net of visible and invisible rules to the political process at the Community level. The European judiciary enters as a new decision-making institution, concurring with national courts and acting often as an arbiter and distributor of decision-making competencies

⁴⁷ See Gerber (1998), *supra* note 7.

⁴⁸ Thatcher (2007), *supra* note 12; La Porta et al (2008), *supra* note 22.

⁴⁹ Scharpf, F., Notes Toward a Theory of Multi-level Governing in Europe, MPIfG Discussion paper 2000/5, available at: http://www.mpifg.de/pu/mpifg_dp/dp00-5.pdf.

between Community and Member States as well as between the different Community institutions. For national economic and political actors European integration inevitably changes the established balance of participation, powerfully influencing previously insulated procedures of law-making and rule-implementation. Similar, although not quite as pervasive, interlocking between institutional arenas can be discerned in other forms of global and transnational governance.

Obviously the costs and benefits of participation at the European and decision-making level may vary from those in respective national arrangements, changing the dynamic of participation. If viewed through the lenses of institutional choice the European and transnational political processes offer varying incentives for alternative interests to participate and influence law and policy making. Moreover, as convincingly shown by Maduro, a CIA of transnational political processes has to distinguish between the interests of states and of non-state actors. Maduro qualifies the former as vertical and the latter as horizontal and consequently identifies instances of both vertical and horizontal majoritarian, respectively minoritarian bias.

From a historical institutional perspective the focus in studying globalisation and Europeanisation should be on the different ways in which these processes fit into or challenge long-standing institutional constraints such as ideologies of legal regulation or well-engrained habits in case-law and administrative implementation. Is implementation of transnational measures disrupting efficient institutional equilibria, causing disarray among the actors involved and decreasing coherence and predictability? Or does it expose inefficient lock-ins and, thus, enhance the adaptiveness of the institutional framework? To what extent do globalisation and Europeanisation open for new variations and possibilities of learning and influencing the institutional framework? And when are we to expect the one or the other eventuality?⁵⁰

A central trait of different forms of transnational governance is that they are about institutional change, pursuing openly the effectuation of change in formal legal rules (harmonisation), informal constraints (attitudes in market actors, consumers and citizens) and enforcement (new mechanisms of enforcement before transnational and national bodies). A central theme in the globalisation and Europeanisation debates has predictably been that of convergence or divergence of national legal systems, cultures or regulative approaches in more specific areas. By tracing on the one hand the changed opportunities for participation of affected interests, and on the other, the constraining effects of deeply embedded institutional habits, the institutional approach presented above is able to shed some new light into these debates.

Finally, there seems to be growing interest in the social sciences in finding ways of treating institutions and agency in an integrated manner, obviously in search of a more robust approach to studying the complex relation between law, economy and society. In particular, within the dynamic discipline of Europeanisation studies, scholars have advanced pluralist approaches, probably because purely historical institutionalist or institutional choice perspectives have proven insufficient to account for the intertwining and interdependence of institutions within the multi-level system of governance of the EU (see below).⁵¹

Also in law and globalisation studies recently suggestions have been made to combine institutional and system analysis. In a contribution from 2011, Katharina Pistor notes the importance of not only looking into institutions but also addressing the context in which institutions evolve and change. The term context is conceived as ‘the structures that determine the collective reproduction of allocative and authoritative resources in a given system’. In her view the differences in such structures across time and space “suggest[s] a need not only for comparative institutional analysis, but for comparative

⁵⁰ See Thatcher (2007), *supra* note 12.

⁵¹ See Knill, Christophe (2001) *The Europeanisation of National Administrations* (Cambridge: Cambridge University Press, 2001).

system analysis, and indeed, for a synthesis between the two”.⁵² Likewise in an ambitious treatise on transnational law and state change Shaffer elaborates a pluralist framework for studying state change and elicits a number of dimensions of state change that can be assessed empirically. The factors pertain both to aspects of institutional choice and institutional context and invite to interdisciplinary endeavours of combining legal and social sciences.⁵³ Both Pistor and Shaffer emphasise moreover the need to elaborate theoretical and methodological approaches for productive merging of national with supranational and transnational perspectives.

To be sure pluralist approaches imply higher number of variables and increased complexity. Thus Komesar is probably right when warning that opening the research net too widely, may compromise the analytical strength of such approaches. However, disregarding the role of context and long-term legacies may seriously compromise the predictive force and the normative guidance that can be derived from the analysis.

4. Possible applications: national economic law between global markets and institutional embeddedness

Given the constraints of time and space this paper cannot present full-blown applications of the analytical approach outlined above. In the following I only provide inevitably sketchy examples of actual or possible uses of the approach for studying the effects of globalisation and Europeanisation in three discrete areas of law and policy. All areas belong to the broad field of economic law, or regulatory private law. Within the first area, that of fair trading law, I have in earlier work applied the two-fold comparative institutional approach and can therefore present the results from the analysis, albeit in a very condensed form. The second area, that of copyright law and policy, is at the focus of an ongoing research project, where the ambition is to explore the dynamics of institutional change of copyright institutions in a few EU Member States in the context of Europeanisation and globalisation. Finally, in the third area of competition law and policy I refer to secondary literature which gives in my view support for further possibilities of productive application of the approach.

4.1 Fair trading in the interests of traders or consumers?⁵⁴

Since there are markets there are attempts to ensure standards of good faith in business conduct to enhance trust and certainty in market transactions. The basic problem of fair trading is in economic theory identified as one of information and communication. Following this literature, information asymmetries and public good properties of information are seen as major sources of transaction costs in the market.⁵⁵ In addition, the typically small-stake interests of consumers set limits to their desire to search product-related information and, respectively, to the incentives of sellers or third parties to provide such information. The ensuing undersupply of product information and opportunistic behaviour are among the most common failures in consumer markets leading to suboptimal satisfaction of individual consumer preferences through the market, or suboptimal participation in CIA terminology.

⁵² Pistor, K., ‘Contesting Property Rights: Towards an Integrated Theory of Institutional and System Change, 11(2) Global Jurist, 2011, Article 6, at 1.

⁵³ Shaffer, G., *Transnational Legal Ordering and State Change*, Chapter 1, and ‘The Dimensions and Determinants of State Change’, Chapter 2, in: Shaffer (ed.) *Transnational Legal Ordering and State Change*, Cambridge: Cambridge University Press, 2011, 1-22 and 23-49, at 24.

⁵⁴ The analysis in this part builds on Bakardjieva Engelbrekt (2003), *supra* note 20.

⁵⁵ Akerlof, G., ‘The Market for “Lemons”: Quality Uncertainty and Market Mechanism’, 84 *Quarterly Journal of Economics*, 1970, 488-500; Stigler, G., ‘The Economics of Information’, *JPE*, 1961, 213-225; Stigler, G., ‘The Theory of Economic Regulation’ (1971) 2 *Bell J.*

To be sure, whereas information market failures are generally recognised, more complex views on how information functions in the marketplace and in the regulative process have been elaborated in social sciences. This has produced, on the one hand, stronger reliance on the potential of market forces to cope endogenously with information market failures. Subtle mechanisms, such as the growth of department stores, investment in trademark, in reputation and for that matter advertising, have been identified as performing an important information function, compensating for information failures.⁵⁶ On the other hand, economic and institutional theory have highlighted the information imperfections that plague the regulative process and the sometimes unintended effects of government intervention in the market.

Still, most industrialised countries have opted to put in place a regulatory framework for ensuring fair trade. Efforts for common or coordinated solutions at the supranational and international level abound, with prominent examples such as the provisions on unfair competition in the Paris Convention on Protection of Industrial Property of 1883 and the Codes on Advertising Practices of the International Chamber of Commerce.⁵⁷ Notably, within the European Union a Directive pursuing full harmonisation of national rules and regulations governing unfair commercial practices has been adopted in 2005, seeking ambitiously to wither away previously divergent national rules, legal doctrines and judicial case law and to establish uniform standards of protection.⁵⁸

Yet any attempt to shape a transnational institutional framework for fair trading will be futile if one does not take into account the institutional legacies of different national approaches. Interestingly, despite the relative consensus around the core substantive principles of fair commercial practice, institutional choice has been exercised differently with divergent preferences for and reliance on the market, the political process, administrative agencies and the courts when it comes to the shaping and applying these standards in practice. Moreover, the institutional design of decision-making processes varies widely across national systems, bringing in additional fragmentation and diversity.

CIA partly helps to conceptualize these outcomes. Establishing the rules of fair trading is a policy issue that affects on the one hand the interests of traders, and on the other hand, the broad and diffuse collective interests of consumers. The same problems of information and organisation that lie at the core of market failures account for imperfections in the political, administrative and the judicial process as well. Small and dispersed stakes and information asymmetries explain the low probability for consumers to recognize (let alone defend) their interests in the political and judicial process. The political debate is thus easily dominated by organized industry and can result in inefficient legislative arrangements disregarding the interests of consumer majorities.

To be sure, the regulation on fair trading tends to affect most traders in a given jurisdiction in a horizontal manner. The stakes *ex ante* regulation are typically not high and concentrated and the situation is hardly conducive of severe institutional malfunctions. However, as pointed by Komesar in his brief analysis on the regulation of advertising, a more sensitive policy would normally shift decision-making to either public agency or the courts, where *ex post* regulation the regulated industries can influence the specific standards of regulation to their own advantage.⁵⁹ And even within the legislative process, there are instances where the dominance of certain industry interests and skewed distribution of stakes can bias the legislative process excessively in favour of incumbent

⁵⁶ Akerlof (1970), *supra* note 55; Stigler (1961), *supra* note 55; Spence, Michael, Job Market Signaling, Quarterly Journal of Economics (The MIT Press), 87 (3), 1973, 355–374.

⁵⁷ The codes were initiated in the 1930s and the latest major revision has been carried through in 2011.

⁵⁸ Directive 2005/29/EC on Unfair Commercial Practices (UCPD). See Bakardjieva Engelbrekt (2003), *supra* note 20; on UCPD see Bakardjieva Engelbrekt, A, 'An End to Fragmentation? The Unfair Commercial Practices Directive from the Perspective of the New Member States from Central and Eastern Europe', in: Weatherill and Bernitz (eds) *The Regulation of Unfair Commercial Practices under Directive 2005/29: New Rules and New Techniques* (Oxford: Hart Publishing, 2006).

⁵⁹ Komesar (1994), *supra* note 8.

commercial interests to the detriment of consumer majorities. Examples include legislative regulation on opening hours, on selling space, on rebates and special offers, prohibitions on comparative advertising or on advertising for certain products and services, that typically can be phrased as issues of fair trade, while hiding overtly or covertly protectionist ambitions.⁶⁰

Yet minoritarian bias is not the only possible source of institutional inefficiency in fair trading. Occasionally well-organised catalytic subgroups or political entrepreneurs can threaten to mobilize the dormant majority, in particular if they manage to identify a simple and commanding issue around which the majority can easily unite. Such active catalytic subgroups may then press for legislative measures that overemphasise the interest of the diffuse majority at the expense of legitimate minority interests. What is interesting to observe is that initial biases in the political process can be further exacerbated and perpetuated if designing an enforcement framework that accords privileged position to the same groups and interests that have been influential in the legislative process. An in-depth study of the evolution of the laws and institutions of fair trading in Germany and Sweden provides convincing illustration of the above points.⁶¹

With roots dating back to the mercantilist era, the legal institutions of fair trading (or unfair competition) in Germany were originally conceived with regard to the interests of incumbent traders and industry sectors. The famous Act on Unfair Competition of 1909 reflected in its original version the strong position in the political process of the German *Mittelstand* during the early 1900. The emphasis was on the interests of competitors. The choice for private law enforcement through voluntary business organisations placed considerable reliance on the courts for shaping the standards of fair competition. At the same time, the judicial process was designed to be highly responsive to claims for increased protection of the status quo. Corporate actors were generously admitted to the courtroom and were endowed with broad opportunities to influence the standards of fairness through litigation, notably injunction proceedings. In this way the institutional framework of fair trading law in Germany produced its institutional entrepreneurs – business associations and specialised legal professionals who set as their chief task to enforce and shape the standards of fairness. In particular rules on litigation costs created distorted incentives for business associations (and legal entrepreneurs) to over-enforce fair competition standards in the name of broad consumer majorities, with poor control on the part of consumers over the way their interests are formulated and represented.

The 1950s and 1960s were associated with the growing emancipation of consumers, and a heightened awareness of their particular interests in fair trading. Demands were raised that consumers be admitted to the institutional framework of fair trading and allowed to participate in the shaping of the standards of fairness. These demands were accommodated relatively reluctantly in Germany. Private consumer organisations were set up with the support of the state and were then referred to the established mechanisms of private enforcement under the UWG. Calls for public intervention to compensate for the deficits in consumer representation and power imbalance were turned down. All in all, in analysing the performance of the political process on issues of fair trading, the German experience demonstrated a widely acknowledged source of inefficiency associated with a minoritarian bias.

In Sweden, despite early proclaimed legislative intention to follow the German model, developments took a different turn. Early initiatives for an act against unfair competition stumbled upon misgivings as to the effects of such legislation on free trade and on freedom of the press, the latter being of very high constitutional status in Sweden. Consequently, the regulatory approach in this country had its actual take-off first in the 1960s and was palpably marked by the consumerist spirit of the time. Consumer protection policy emerged as a new policy domain, which was rapidly occupied

⁶⁰ See the discussion on the variety of situations regulated by fair trading laws in Bakardjieva Engelbrekt (2003), *supra* note 20.

⁶¹ For a full-fledged analysis see Bakardjieva Engelbrekt (2003), *supra* note 20.

by powerful trade unions and the dominant social democratic party who actively engaged in the legislative process purporting to represent the broad consumer majority. As a consequence, the resulting Marketing Practices Act of 1970 was conceptualized as a consumer protection statute. Institutional choice was exercised in favour of the administrative process and public representation of consumer interests through a Consumer Ombudsman and a centralised Public Consumer Protection Agency charged with the task of identifying and representing the collective interests of consumers.

The Consumer Protection Agency was conceived as a public agency relying mainly on negotiations with industry and seeking to procure voluntary compliance. In the course of the 1970s the Agency came with a long line of detailed guidelines on marketing in individual market sectors negotiated with the main market players on the respective market.⁶² In a similar manner, initial enforcement design granted the Consumer Ombudsman a privileged standing in proceedings on the basis of the Marketing Practice Act. Individual competitors and business associations had a subsidiary standing and could initiate proceedings only after the Ombudsman had decided not to do so. In this, and some other respects, the institutional framework showed visible signs of majoritarian bias, inhibiting private action by competitors and going well beyond what is effectively in the interests of consumers.⁶³

While the differences in actors, interests and the costs and benefits of participation account for many of the divergences in the legal and institutional framework of fair trading in Germany and Sweden, a historical institutional perspective dictates an interest in the broader institutional context in which the rules on fair trading have evolved. Three groups of institutional factors were elicited as being of most immediate importance for the shaping of fair trading law: the prevailing understanding about the relationship between the political and the economic process, i.e. the balance between liberalism and interventionism; the basic constitutional outlook on division of power between alternative institutional structures and on the role of the judiciary; and finally, the status of private law and the stringency of the distinction between private and public law.⁶⁴

In view of the different starting positions and legacies of the two countries the question of the impact of the process of EU harmonisation on national fair trading law and governance becomes particularly pertinent.⁶⁵ Has European integration brought national institutional frameworks closer to each other, has it enhanced the existing divergences or has it simply left those differences unaffected? Can the full harmonisation approach advanced recently actually achieve the desired level of uniformity and homogenisation? To attempt to answer these admittedly complex questions I traced extensively the dialogue between EU and national judiciaries on specific legal questions of fair trading, but also developments in national doctrine, case law and legislative practice in the course of negotiation and implementation of EU measures.⁶⁶

One straightforward observation from the institutional analysis in the area of fair trading in Germany and Sweden was that the effects of integration have been very dissimilar in the two countries. One and the same EU act has produced strikingly different repercussions in the institutional landscapes of the respective legal system. Generally, both systems have remained within their own

⁶² Closer analysis of agency action reveals hardly severe instances of agency capture, but agreed standards have been tilted to the interests of dominant local players with little room for representation of small-scale players and outsiders.

⁶³ See Bakardjieva Engelbrekt (2003), *supra* note 20, with further references.

⁶⁴ See Bakardjieva Engelbrekt (2003), *supra* note 20.

⁶⁵ Needless to say, another intriguing aspect is the role the two countries and respective national stake-holders have played in the process of harmonisation of fair trading law at the EU level. With a risk of oversimplifying it can be said that while both Germany and Sweden were actively involved in the negotiations of Directive 2005/29 and in previous harmonization initiatives, the Swedish consumer-oriented approach has had greater resonance in the European policy debate. The explanation can probably be found in the congruence of the approach with a political economy based on open markets and free trade, in contrast to the protectionist flavor of the German UWG-approach. See Bakardjieva Engelbrekt (2003), *supra* note 20.

⁶⁶ See Bakardjieva Engelbrekt (2003), *supra* note 20.

macro-institutional constraints in terms of the divide between private and public and the importance of private law and private autonomy in the overall legal system. The distribution of competence between courts, private associations, ombudsman and public agency have also largely remained unchanged. However, a careful scrutiny of the multifaceted impact of European integration demonstrates that it has slightly tilted the point of gravity in institutional choice in both country and has triggered non-negligible fine-tuning of the institutional design of national institutional processes. In Germany the legislative process more actively intervened in the shaping of substantive rule and enforcement modalities, curbing previous excesses of judicial activism. In Sweden, agency activism has been rolled back and private enforcement strengthened. On the whole, Europeanisation may have broken the spell of old lock-in effects and increased the plurality of decision-making instances and the number of 'trials'. For German law the consumer perspective is nowadays more readily recognised in legislation, case law and doctrine. In Sweden private autonomy has received a boost and individual traders enhanced access to the courts. There are strong indications that European integration questions fundamental ideological conceptions and could provide impetus for incremental but profound changes in long-term institutional legacies as well.

At the same time the survey of legislative developments and case law in the two countries suggests that institutional solutions that are a result from majoritarian bias are more difficult to sustain in the long run. If the disadvantages affect a small, but powerful minority the balance will at some point probably be restored. Conversely, situations where the institutional framework has produced a well defined and concentrated group of beneficiaries (as with the competition associations in the case of the German unfair competition act) the pull toward preserving an inefficient status quo is tenacious.

4.2 Shaping the law and policy of digital copyright

Another area of regulation that can arguably be productively analysed through the prism of the institutional approach outlined above is copyright law and policy. As is well known, copyright law is an area of intellectual property law dealing with the protection of original expressions in the form of literary and artistic works. During the last decades, in the industrialised world copyright has expanded vastly in at least three different respects: regarding the subject matter covered, as to the scope of the exclusive rights, as well as concerning the term of protection, now extending to 70 years after the death of the author. In still a forth direction, by way of interlinked international agreements (Bern Convention, Rome Convention, WIPO Copyright Treaties, TRIPS), bilateral trade agreements and European directives, a multilevel international regime of copyright protection has emerged, that has been diffused to a wide range of countries worldwide, not always willingly accepted by local political constituencies.⁶⁷ Copyright thus exhibits the kind of intertwining between national, European and global level, which should be of central interest for the studies of global governance.

- Institutional oscillation

CIA provides I believe a formidable framework to analyze these developments. It highlights the intricate interplay between the market, the political and the judicial process in shaping the regulatory regime of cultural goods at both national and transnational level. Bottlenecks in one decision-making process tend to trigger shifts to alternative processes often under the pressure of vocal minoritarian interests. We observe cycles and fluctuations in the regulatory regime and in institutional choice, driven by the tensions in the demand and supply of rights.⁶⁸

Indeed, the very existence of copyright can in institutional choice terms be explained as a reaction of the political process to the failures of the market for creative goods. Advancement and perfection of

⁶⁷ Sell, Susan, 'Intellectual Property Protection and Antitrust in the Developing World: Crisis, Coercion, and Choice', 45(2) International Organization, 1995, 315-49; see also Sell, Susan, *Private Power, Public Law. The Globalisation of Intellectual Property Rights* (Cambridge: Cambridge University Press, 2003).

⁶⁸ Komesar (2001), *supra* note 8.

reproduction technology (from the printing press via audio-video reproduction technology to digitization) have consistently diminished the importance of the tangible aspects of creative works, bringing forward their nature as information goods. In economic theory information goods are identified as having significant public good characteristics, such as non-rivalrous consumption, non-appropriability and non-exclusivity. Arguably, without statutory IP rights there would be a significant problem of sustaining workable markets for intellectual works. In the hope of costlessly using the works purchased by others, a large number of potential users would understate their realistic preferences and willingness to pay for creative works. This would undercut incentives to create and lead to sub-optimal production of such works.⁶⁹ “Participation” of potential creators and producers (to use Komsear’s term) in such markets would be suboptimal.

The main role of intellectual property rights, and of copyright in particular, is thus seen to lie in enabling markets for information goods. By granting exclusive rights to authors of original works the public goods aspects of information is privatised. With the help of the legislative process artificial scarcity is created and the author and producer are given control over the commercialisation of the work.⁷⁰ The gradual expansion of copyright can accordingly be understood as recurrent attempts of the legislature to respond to new market deficiencies triggered by new technologies.

However, once the issue of defining the scope of rights enters the political process, it follows its own logic. As shown by CIA, depending on the constellation of interests involved in different public policy issues – i.e. the number of affected actors and the size and distribution of their stakes (uniform high, uniform low or skewed) – we may face a neutral, a majoritarian or a minoritarian interest structure. In particular the latter constellation may bring to significant rent-seeking and bias the delicate legislative shaping of the exact scope of copyright.⁷¹ Excessively strong copyrights may negatively affect user participation in information markets through monopolistic prices (deadweight losses). Likewise, too many and too broad copyrights may raise the costs of production of new works and have a chilling effect on “follow-on” creativity.⁷²

Generally, it can be safely submitted that copyright has developed successively from a horizontal area of law affecting in the same manner all authors of creative works (books, music, theatre), into a vertical area of law and policy, being constantly adjusted to cater to the interests of powerful industry groups and actors. Rather than being a policy to protect authors’ interests, copyright is more plausibly conceived as a communication policy governing the position of producers and intermediaries involved in the process of production, marketing and dissemination of cultural goods.⁷³ With the rise of new technologies and ways of transmitting copyright works new actors have been entering the stage of political negotiations trying to influence the political process to their own advantage (publishers, phonogram producers, broadcasting, software, music and entertainment industries). Indeed, the outcomes of several waves of legislative interventions in the field of copyright triggered mostly by new technologies confirm the wisdom of such public choice interpretation. There are numerous accounts about the extensive lobbying pressure exerted by different well organized industry groups in

⁶⁹ Merges, Robert, ‘Contracting into Liability Rules: Intellectual Property Rights and Collecting Rights Organisations’, 84 Cal. L. Rev., 1996, 1293. To be sure there are a number of objections to this benevolent theory of copyright law and policy. There is, in particular little evidence that copyright law influences authors’ incentives to create. See Breyer, S., ‘The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs’, 84(2) Harvard Law Review, 1970, 281-351.

⁷⁰ Merges (1996), *supra* note 69.

⁷¹ Komsear (1994), *supra* note 8.

⁷² Landes, W. and R. Posner, ‘An Economic Analysis of Copyright’, 18 Journal of Legal Studies, 1989, 325-363; Gallini, N. and Suzanne Scotchmer, ‘Intellectual Property: When Is It the Best Incentive System?’, NBER Chapters, in: Innovation Policy and the Economy, National Bureau of Economic Research, Inc., Volume 2, 2002, 51-78.

⁷³ Wu, Timothy, ‘Copyright’s Communication Policy’, 103 Michigan Law Review, 2004-2005, 278-366.

national or supranational legislative proceedings.⁷⁴ One notorious example from the European legislative process is the frantic lobbying activity of the software industry at the time of negotiating the European Software Directive.⁷⁵ With the concentration within the cultural and entertainment industries, the capacity of these industries for rent-seeking through the political process, occasionally at the expense of broad user majorities, is potentially a source of concern.⁷⁶

To be sure, the power of individual copyright industries is in many cases being effectively counterbalanced by the existence of large corporate users (e.g. juke box operators, broadcasters, libraries and educational institutions) with sufficiently high stakes to motivate political involvements. They have typically strong interest of setting limits to the expansion of exclusive rights. The legislative process in such cases has according to some observers often the character of direct bargaining between the affected industries.⁷⁷ Due to complexity of technology and interest constellations, the law makers practically delegate the levelling out of differences and striking of a compromise to the bargaining parties. At the end of the day, the lawmaker has limited insight in the subject matter and the exact meaning and implications of the compromise, making it difficult to seriously speak of legislative intent.

Still, corporate users can hardly be expected to faithfully represent the interests of broad consumer majorities and can only act as a proxy to such representation. First, they can in most cases pass the costs of unfavourable political deals with copyright holders on to consumers. Furthermore, many of the intermediaries are themselves in a dual position of both users and holders of exclusive rights (e.g. broadcasters) and have their own interests in the upward ratchet of IP protection. In the stormy debates on adapting copyright to the digital environment, Internet intermediaries are generally regarded as an ally to copyright users. At least in the initial stage of rolling out broadband frequencies and of gaining market access, these actors appear to have interests in unlimited flow of digital content and minimal policing of consumers' internet activity, largely coinciding with those of users.⁷⁸ However, more recently, commentators have noted a trend of convergence of interests between Internet access providers and content industries.⁷⁹

There are consequently strong indications that the conventional pattern of interest group politics is poorly adapted to the Internet age and fails to take into account the considerable interest restructuring on the side of users and their changing incentives for organisation and participation.⁸⁰ From a

⁷⁴ Litman, Jessica, 'Copyright and Technological Change', 68 Oregon Law Review, 1989, 275; Litman, J., 'Revising Copyright Statutes for the Information Age', 75 Oregon Law Review, 1996, 19.

⁷⁵ Van den Bergh, R., 'The Role and Social Justification of Copyright: A 'Law and Economics' Approach', 1 Intellectual Property Quarterly, 1998, 17-34; Kay, J. (1993), 'The Economics of Intellectual Property Rights', 13 International Review of Law and Economics, 337-48.

⁷⁶ One recent example is the battle in the European Union over the extension of the rights of artists and phonogram producers from 50 to 95 years of protection. The power of the music industry's four record labels in this debate is hardly to be underestimated.

⁷⁷ Dinwoodie, G. and R. Dreyfuss, 'TRIPS and the Dynamics of Intellectual Property Law Making', Case Western Reserve Journal of International Law, 2004, 95-122; Litman (1996), *supra* note 74.

⁷⁸ Barnett, Jonathan, 'What's So Bad About Stealing.', 4 Journal of Tort Law, 2011, 1-39.

⁷⁹ On the one hand, the massive trafficking of infringing material congests networks, lowering the quality of network traffic. On the other hand, access providers gradually start entering the market of content distribution, where their commercial interests might dictate discrimination of user groups and alignment with certain content providers. See de Beer, Jeremy & Christopher Clemmer, 'Global Trends in Online Copyright Enforcement: A Non-Neutral Role for Network Intermediaries?', 49 Jurimetrica, 2009, pp. 375-409; Yu, Peter, The Graduated Response, 62 Florida Law Review, 2011, 1373-1430.

⁸⁰ For a discussion and categorization of different types of consumers of cultural products and their respective interests, see Liu, Joseph, 'Copyright Theory of the Consumer', 44 Boston College Law Review, 2002-2003, 397 ff. Liu distinguishes between passive and active consumers, whereby active consumers have an interest in autonomy, communication and creative self-expression. See on the different modes of consumption of culture and on the importance of self-expression,

relatively small and elitist group of readers and admirers of fine arts, users are nowadays a numerous and diffuse majority of educated persons actively consuming cultural products, exchanging such products via the Internet and willingly transforming digital content to their own needs. Importantly, in terms of political participation, users nowadays have an access to a global communication network, which arguably contributes to an emerging awareness of group belonging and of shared interests. The costs of political activism are diminishing implying growing potential for mobilization and representation in the political process.⁸¹

Indeed, whereas the expansion of copyright has for decades gone largely unobserved, and has even been hailed as progressive advancement of culture and new technology, with the advent of the digital revolution the public sentiments viz. copyright have changed drastically. Copyright has apparently been identified by broad segments of the public as an issue of everyday relevance. The Internet generation has entered voting age and constitutes an important electoral group to be counted with. Given that the main beneficiaries from strengthened copyright are strongly concentrated industries, and that producers often participate and influence the action of collecting societies and thus contaminate the 'author's rights' rhetoric of right-holders, appeals toward constraining industry power and sharpening industry regulation have attracted not insignificant popular appeal.⁸² Aggressive anti-piracy campaigns and litigation policies on the part of (corporate) right-holders have only confirmed the 'David v. Goliath' perceptions of the conflict. The intensified rhetoric of user rights may be seen as a clear sign of majoritarian influence, and occasionally bias, in the political debate on copyright.

To voice their discontent with the political and judicial developments in copyright and more generally internet law and policy, famously, a political party, was founded in Sweden, the so called *Piratpartiet* (the Pirate Party, playing on the name of the Swedish Anti-Piracy Association). The party purports to give voice to the dissatisfaction of many, mainly young people, from the present, as they perceive it overly expansive and one-sided regime of copyright law. The party vows at present a membership of 16136, which is larger than that of some of the established political parties in Sweden (like the Left Party and the Green Party) and has been called the fastest expanding party in the world.⁸³ It managed to attract not insignificant numbers to its pre-election rallies and non-negligible votes in the Swedish elections of 17 September 2006 and in the recent elections of 2010.⁸⁴ Interestingly, the Swedish Pirate Party although not summoning sufficient votes to pass the threshold for entering the National Parliament, was more successful in the European Parliament elections of 2008. This probably reflects the perception of voters that the European political process is nowadays the arena where copyright law and policies are essentially crafted and where crucial impact is needed.⁸⁵ Both the virtual technological platform and the European political platforms have contributed to the propagation of the example of Swedish Pirate party in other countries in Europe and worldwide.⁸⁶

Also established political parties cannot afford dismissing the suddenly awoken public engagement in the politics of digital copyright. An example in point is the political debate following the enactment

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Lessig, L., *Free Culture* (London: Penguin, 2004), at 35 ff; cf. Benkler, Y., 'From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access', 52 *Federal Communication Law Journal*, 2000, 561-79.

⁸¹ Oksanen V. and M. Välimäki, 'Consumer Protection Regulation and Copyright —How to Balance a 'Balanced' System?', paper presented at the Annual Congress of SERCI, Berlin, 2005, on file with the author.

⁸² Komesar (1994), *supra* note 8.

⁸³ See www.piratpartiet.se.

⁸⁴ According to the official statistics of the Swedish Electoral authority (Valmyndigheten) 34918 votes in the 2006 elections, or 0,63% and 38491 of the votes in the recent 2010 election, or 0,65% of the votes. <http://www.val.se/val/val2010/slutresultat/R/rike/index.html>

⁸⁵ An alternative explanation is that the elections to the European Parliament are not taken sufficiently seriously by the mass of voters, leaving more room for marginal political formations to enter the political stage.

⁸⁶ In the local elections in Berlin, Germany, the Pirate Party secured itself representation in local government in 2011.

of the *Infosoc* Directive in the European Union. In Sweden in the 2006 pre-election campaign political leaders on both left and right sides of the political spectrum were expressing dissatisfaction with the present state of Swedish copyright law and policy, and regret that copyright enforcement is increasingly directed at individual users and divorced from wide-spread Internet practices and user expectations. Promises were made for remedying the situation and restoring the balance albeit failing to state the more specific legislative action to be undertaken.⁸⁷ In this, politicians are conveniently served by international agreements, which limit their opportunities for political and legislative action. Although clearly known to politicians, the constraints posed by such commitments are often spared at the stage of electoral rhetoric.⁸⁸ Post-election the sometimes promised, but legally impossible refurbishment of copyright law is often substituted for more modest initiatives.⁸⁹ Another typical alternative is to try and shift decision-making to other institutional arena, notably to the administrative process.⁹⁰

- The shift to the transnational level

When we turn to the international level, there is an apparent discrepancy between the interest in copyright protection among developing countries and developed countries, the first being net consumers of cultural goods and the latter being net producers of such goods. CIA partly explains the dynamic of the constant “upward ratchet” of international IP norm-making. Following the modification of the analytical framework suggested by Maduro for the context of European integration, the outcome of the political process is at the international level determined by the dynamics of participation of both states and private actors, with ensuing risks for horizontal and vertical minoritarian or majoritarian bias.⁹¹ Not surprisingly, the political negotiations on copyright law and policy at the international levels have been strongly dominated by an alliance of industrialised states and corporate representatives for IP-intense industries.⁹²

Given the ubiquity of digital communication and the easy flow of infringing material beyond national borders to free riding users, the national regulative regime becomes largely powerless to harness the flood of infringing uses. The attention of both state and non-state actors is therefore understandably shifted to national and supranational arenas. Remarkably, especially in the debate on digital copyright, we observe instances where decisions are first taken at the supranational and international level, before even having gone through the traditional consultations and deliberations of

⁸⁷ See speeches by Prime Minister Candidates Persson (social democrats) and Reinfeldt (conservative).

⁸⁸ The practice of using international commitments as shields against popular discontent at inconvenient domestic political action is well documented in the political science literature on European integration. See Marks, G./Hooghe, L./Blank, K., ‘Integration Theory, Subsidiarity and Internationalisation of Issues: The Implications for Legitimacy’, EUI Working Papers, RSC No. 7, 1995.

⁸⁹ Thus, the Swedish government has last year set up an investigating committee under the Ministry of Justice with the mandate “to examine the development of lawful alternatives for access to copyright protected content, to weigh and propose measures for speeding up the development of consumer-friendly lawful alternatives for such access.” Ju 2006/6767/P. Whereas the focus on consumer interests is remarkable, the mandate appears limited in terms of prospects for legislative change within copyright.

⁹⁰ See Komesar (1994), *supra* note 8.

⁹¹ See Maduro, M. P. (1998) *We, The Court. The European Court of Justice and the European Economic Constitution*, Oxford: Hart Publishing.

⁹² Sell (2003), *supra* note 67; Shaffer, Gregory, ‘Recognizing Public Goods in WTO Dispute Settlement: Who Participates? Who Decides? The Case of TRIPS and Pharmaceutical Protection’, in Keith Maskus and Jerome Reichman (eds) *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime* (Cambridge: Cambridge University Press, 2005), 884-908; cf. Bakardjieva Engelbrekt, ‘The WTO Dispute Settlement System and the Evolution of International IP Law: An Institutional Perspective’, in: Kur, A. with M. Levin (ed), *Intellectual Property Rights in a Fair World Trade System. Proposals for Reform of TRIPS* (Cheltenham: Edward Elgar Publishing, 2011), 106-165.

national legislative process.⁹³ This reverse pyramid of law making leaves national decision-makers in an awkward position and generally has perverse effects on the opportunities for participation, especially of broad user majorities.

Yet the shift of copyright law and policy making to global and transnational arenas comes with a vengeance. Novel digital and information technologies have challenged the status quo of interest representation and have influenced in an unexpected way the dynamic of participation in decision-making processes at all levels. With the advent of the digital revolution, the costs of political participation in the form of voicing interests in social media, are diminishing. The same dynamics that undermines the market for digital goods through peer-to-peer file sharing, affects the political process. The power of the majority is more easily felt at the political level and international law making has been under powerful pressure to adapt both its substantive outcomes and the modalities of participation.

This new dynamic is in a remarkable way exemplified by the developments surrounding the notorious plurilateral Anti-Counterfeiting Trade Agreement (ACTA), aiming at raising the standard of IP enforcement beyond the level established by the TRIPS agreement. Following an initiative launched by Japan in 2005, the United States and Japan advanced a more formal draft common treaty in 2006, which was supported by Switzerland and the European Community. Nine additional countries participated in informal discussions in the following months. However, controversially, important countries with strong interests in more flexible IP regimes like Argentina, Brazil, India, and China were not invited to participate in the negotiations. ACTA was signed in October 2011 by Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea and the United States. In January 2012, the EU and 22 EU Member States signed as well.

One serious concern about ACTA was that it was negotiated outside the established multi-lateral regime of IP rights, developed within the auspices of WIPO and WTO. This demonstrated “the apparent aim of creating a legal IPR (enforcement) regime amenable to the major capitalist countries and their industries, without involving the “BRICs” countries (Brazil, Russia, India and China, the countries accused of being the main producers of counterfeit goods), which could then be effectively imposed on the rest of the world (including the BRICs countries) through economic and political pressure”.⁹⁴

Importantly, persistent complaints from activists and scholars have focused on the insufficient openness to civil society, by way of transparency, or public consultation.⁹⁵ Negotiations on the agreement, which began in 2008 were initially kept largely confidential. However, several drafts were leaked to the public in March, July and September 2010. The leaks triggered widespread protest and criticism of the secretive character of the negotiations from various quarters. Furthermore NGOs complained of having been denied access to draft texts under both the U.S. FOI Act and EU access to information rules, on the basis that that would endanger “national security” (USA) or “might affect relations” with the other parties (EU), while negotiating drafts had allegedly been provided to “the major copyright moguls, such as Google, eBay, Dell, Intel, Business Software Alliance, Rupert

⁹³ See Dinwoodie and Dreyfuss (2004), *supra* note 77.

⁹⁴ Korff, Dowe and Ian Brown, ‘Opinion on the compatibility of the Anti-Counterfeiting Trade Agreement (ACTA) with the European Convention on Human Rights & the EU Charter of Fundamental Rights’, Report prepared at the request of the Greens/European Free Alliance Group, European Parliament, 2011, available at: http://www.greens-efa.eu/fileadmin/dam/Documents/Studies/ACTA_fundamental_rights_assessment.pdf.

⁹⁵ See Malcolm, Public interest representation in Global IP Policy institutions, Program on Information Justice and Intellectual Property (PIJIP), Research Paper no. 6, American University Washington College of Law, Washington, DC, 2010, available at: <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1006&context=research>.

Murdoch's News Corporation, Sony Pictures, Time Warner, the Motion Picture Association of America, and Verizon".⁹⁶

On the part of the EU, the controversies were exacerbated with the more active involvement of the European Parliament in the negotiations, enabled by the Lisbon Treaty. In March 2010 the Parliament issued a resolution on the transparency and state of play of the ACTA-negotiations in which the Parliament deplored the choice to negotiate outside of WIPO and WTO and stressed that under the Lisbon Treaty the Commission is obligated to provide immediate and full information to the Parliament on ACTA.⁹⁷ The following year, January 2011, a large number of European academics released a critical opinion on ACTA arguing the agreement went beyond EU *acquis*.⁹⁸ The Commission replied by releasing a working paper detailing why the European academics did not "in a convincing manner" show that ACTA changes or expands EU *acquis*.⁹⁹

Still, shortly after the EU-signing in January 2012, Kader Arif, the European Parliament's rapporteur for ACTA, resigned from his position chiefly due to the lack of transparency in the negotiations.¹⁰⁰ ACTA negotiators repeatedly denied these charges and the European Commission (Commission) insisted that it had availed the public and the European Parliament (Parliament) every opportunity to participate by sharing the "general thrust" of the negotiations, through several conferences open to the public and by keeping the Parliament's Committee on Trade abreast in doing so.¹⁰¹

As the signing of ACTA in 2012 evoked widespread protests across Europe,¹⁰² ratification by EU Member States was delayed. In response, the European Commission requested the opinion of the EU Court of Justice (CJEU) on whether the ACTA agreement violated EU fundamental rights and freedoms, urging the Parliament to withhold their vote on ACTA until the Court rendered its opinion. However, the International Trade Committee of the European Parliament—in view of the secrecy of the negotiations and the ongoing protests, moved to have the vote on the ratification take place in summer 2012 as planned, in spite of the European Commission's objections.¹⁰³ Eventually, in July 2012 the EP rejected ACTA with an overwhelming majority, which made it impossible for the EU and its Member States to ratify the agreement.

This brief chronology of the ACTA negotiations demonstrates the powerful political leverage of Internet users in the digital ages. The mobilization was a result mainly of the misgivings of the broad Internet community of leveling up of enforcement and sanctions for non-commercial copying and communication to the public of protected digital material and curtailing users privacy rights. Both EU

⁹⁶ See Korff and Brown (2011), *supra* note 94; see also Knowledge Ecology International, White House shares the ACTA Internet text with 42 Washington insiders, under non disclosure agreements, available at <http://keionline.org/node/660>, and Letter to President Obama, October 28, 2010 (75 American law professors call for a "halt" to ACTA) <http://wcl.american.edu/pijip/go/academics10282010>

⁹⁷ European Parliament resolution of 10 March 2010 on the transparency and state of play of the ACTA negotiations www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0058+0+DOC+XML+V0//EN.

⁹⁸ Opinion of European Academics on Anti-Counterfeiting Trade Agreement: www.iri.uni-hannover.de/acta-1668.html.

⁹⁹ Commission Working Paper 27/04/2011, Comments on the 'Opinion of European Academics on Anti-Counterfeiting Trade Agreement'.

¹⁰⁰ BBC, 'European Parliament Rapporteur quits in ACTA protest', available at www.bbc.com/news/technology-16757142 see also Kader Arif's blog www.kader-arif.fr/actualites.php?actualite_id=147 (new rapporteur for ACTA in the Parliament is David Martin.)

¹⁰¹ See e.g. Fact Sheet: Anti-Counterfeiting Trade Agreement, European Commission, 23 October 2007 (updated November 2008) http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_140836.11.08.pdf

¹⁰² See e.g. BBC News, 'Thousands take to the streets across Europe' www.bbc.com/news/technology-16999497

¹⁰³ European Parliament, ACTA: reasons for committee vote against referral to Court of Justice, ref. 20120327IPR41978 (updated 28-03-2012 - 14:36) www.europarl.europa.eu/news/en/pressroom/content/20120327IPR41978/html/ACTA-reasons-for-committee-vote-against-referral-to-Court-of-Justice (different parties had different reasons)

and US official representatives dismiss such concerns as unfounded. However, it is a fact that after the leakage of earlier versions of the Agreement, the provisions on Internet “piracy” and on the responsibilities of Internet intermediaries were substantially watered down. Certainly, in their resolve to sustain free access to copyright works the activists of the Internet, mobilized by catalytic subgroups such as the Pirate party, may be pushing the supranational legislative process in a direction of majoritarian bias. Predictably, the EP has been the European institution most susceptible to majoritarian pressures. At the same time it is interesting to note the attempt of the European commission to shift decision-making to the EU judiciary. This confirms some of the predictions of CIA: being arenas insulated from public pressure, courts are often perceived as institutions better equipped to harness majoritarian bias. However, the story also suggests that there is a need to consider new forms of public participation in the transnational and supranational decision-making processes, that would be more effective in filtering and structuring public input and deliberation, avoiding the inevitable “noise” inherent in spontaneous majoritarian activism.

- Institutional variation

In the account so far I have tackled copyright law and policy as being largely steered by the same actors, interests and modalities of participation across national jurisdictions. Such tacit assumption of uniformity is not uncommon in the academic and political discourse around copyright. It is induced by the extensive homogenization of terminology in major international copyright conventions and sustained by a tight network of copyright professionals. However, despite considerable convergence around the model of exclusive property rights in the industrialised countries and widely accepted substantive standards, the assumption of institutional uniformity is of course flawed. Institutional analysis of copyright law and policy would be incomplete if we do not take into account the variations of institutional choice and design. A closer look reveals that even among countries with similar-sized creative industries the shaping of copyright policies involves alternative decision-making processes. In addition, the degree and form of actor organisation and representation in decision-making processes and the design of these processes differ considerably, partly as a result of deeper institutional legacies both within the narrow domain of copyright and the broader constitutional context.¹⁰⁴

A panoply of measures are at present being discussed to restore the balance of interests in domestic and international copyright.¹⁰⁵ Among these recalibrating the exceptions and limitations to copyright appears as one possible alternative. Another one is providing legal support for novel governance arrangements of digital rights management with involvement of private and public-private actors and organisations. In both cases we can trace the effects of cross-country institutional variation and of national institutional legacies.

We consider first the approach to shaping copyright limitations and exceptions which are central for achieving the balance between the interests of right holders in effective protection and users interests in access to information. The choice is between open-ended fair use clauses and closed lists of copyright exceptions (or user rights). Not surprisingly this choice has important, but often neglected implications for institutional choice tilting the fine-tuning of rights and limitations either to the courts

¹⁰⁴ It may be instructive to mention that in the ACTA controversy discussed above, Sweden played a front role in pressing for greater openness and transparency in the negotiation process, both as a direct party and as Member State of the EU. A vigilant and informed Internet community voiced powerful protest against the secretive way the negotiations were carried out. Accordingly, the Swedish government and representatives in the ACTA negotiations, were early sensitized of the heated public sentiments around this issue. Being an exponent of a centuries long tradition of open access to public documents, Sweden then took upon itself the role of channeling the discontent to the transnational decision-making arena. This comes as another evidence of the interconnectedness between the layers of national and transnational decision-making institutions.

¹⁰⁵ Grosse Ruse-Khan, Henning & Kur, Annette, ‘Enough is Enough - The Notion of Binding Ceilings in International Intellectual Property Protection’, in: Kur, A. with M. Levin (eds) *Intellectual Property Rights in a Fair World Trade System. Proposals for Reform of TRIPS*, Cheltenham: Edward Elgar Publishing, 2011, 359-407.

or to the legislative process.¹⁰⁶ The debate in this respect appears to differ on both sides of the Atlantic. For instance, responding to the concerns about excessive length of copyright in the wake of the *Eldred v. Ashcroft* decision of the US Supreme Court, Posner advances a proposal of more extensive application of the fair use doctrine in American law as an instrument of regaining the balance.¹⁰⁷ He acknowledges, however, that one drawback of the doctrine as currently applied by US courts, is its vagueness and unpredictability despite its partial codification. Therefore Posner argues for what he labels a “categorical approach”, i.e. precise statutory statement of exceptions that would be much less dependent on judicial interpretation and thus would provide greater legal certainty and predictability. This proposal arguably indirectly acknowledges the importance of shifting the balance of decision-making to the legislative process. The analysis is, however, single institutional. What Posner disregards is that any attempt to formulate “categorical” fair use exception may unleash the dynamics of interest group politics and lead to other imperfections.

In the European context, (re)defining the exact scope of statutory exceptions from copyright is also topical in connection with the transposition of the Infosoc Directive, with its notoriously rigid exhaustive list of exceptions. In this context the opposite concern has been expressed, namely that the precise statutory definition of exceptions deprives the system of flexibility and does not allow for equitable solutions *in casu*.¹⁰⁸ Quite independently from the debate on the substance and exact scope of specific exceptions, my point is that attention should be paid on which institution should decide on these important issues in the future. Moreover, the broader institutional context and the legacies which shape the status and operation of legislatures and courts across jurisdictions has to be carefully considered before assessing the plausibility and viability of reform proposals.

Another cluster of reform proposals is directed toward reshaping, in one way or another, the role of collective management organizations (CMOs) in the governance of copyright. In economic theory CMOs are largely seen as institutions of private ordering that by monitoring and cashing payments for mass and pulverized uses of copyrighted works solve transaction cost problems and have a pivotal market facilitating task. At the same time they perform an important function of interest mobilisation and representation in political, judicial and administrative processes, both domestic and international. At the European as well as at the US American level, collective management organizations are carrying out massive lobbying and relatively extensive litigious activity, being often accused of less benevolent effects, such as driving copyright’s limits to questionable proportions.¹⁰⁹

The story of collective rights management of copyright is very much one of institutional emulation, where a successful model of collecting societies as first conceived and practiced in France has been diffused and imitated across different jurisdictions in Europe and also world-wide.¹¹⁰ CMOs emerged first in France with the Agence Framery founded by the famous playwright Pierre Beaumarchais as early as 1777 and with the emblematic Society for authors, composers and publishers of music (Société des auteurs, compositeurs et éditeurs de musique, SACEM) in 1847. Other European countries followed suit with the German GDT and AFMA (to later become GEMA) founded in 1903, Sweden with STIM in the 1920s and UK with MECOLICO and PRS in 1911, respectively 1914.

¹⁰⁶ See Komesar (2001) on fluctuations in laws and in institutional choice, Komesar (2001), *supra* note 8.

¹⁰⁷ Posner, Richard, ‘Eldred and Fair Use’, 1(1) *The Economists’ Voice*, 2004, Article 2.

¹⁰⁸ Dusollier, S., ‘Exceptions and Technological Measures in the European Copyright Directive of 2001: An Empty Promise’, 34(1) *International Review of Intellectual Property and Competition Law*, 2003, 62-75. See however Hugenholtz and Senftleben (2011) arguing that the list is more flexible than commonly understood, Hugenholtz, P. B. and Martin Senftleben, ‘Fair Use in Europe: In Search of Flexibilities’ (November 14, 2011), available at SSRN: <http://ssrn.com/abstract=1959554> or <http://dx.doi.org/10.2139/ssrn.1959554>.

¹⁰⁹ See Bakardjieva Engelbrekt, A., ‘Copyright From an Institutional Perspective: Actors, Interests, Stakes and the Logic of Participation’, *The Review of Economic Research on Copyright Issues*, December, 2007, 65-97.

¹¹⁰ For a comprehensive comparative overview of the history of collecting societies see Gervais, Daniel (ed), *Collective Management of Copyright and Related Rights*, Aalpen vaan den Rijn: Kluwer Law international, 2010.

Nevertheless, despite largely similar core functions and intense international networking, CMOs remain firmly embedded in their respective national institutional environment, which to a great degree determines the main modalities of governance, such as transparency, accountability, degree of public control, etc. A closer look at the history, design and governance of collecting societies reveals a considerable degree of cross-national variation. In terms of legal status, although collective management organisations (CMOs) are typically classified as non-profit corporations of private law, there are considerable differences in their status and the degree of supervision by the state. Probably most extensive is the regulative regime of collecting societies in Germany. Technically, it forms part of German copyright law, and is set out in a separate statutory act, the so called Law on the Administration of Copyright and Neighbouring Rights (Urheberrechtswahrgesetz, UrhWahrG) of 9 September 1965.¹¹¹ This in itself already demonstrates that the law maker views the CMOs as indispensable for a workable system of copyright protection. At the same time, the legislator has shown impressive concern for the governance of the collecting societies. Detailed rules frame the activities of the societies from the moment of their establishment and set standards for the relations of the societies both internally, vis-à-vis their members, and externally, vis-à-vis their users. The principle of transparency to a considerable extent permeates the activity of the societies, although coexisting in a delicate balance with their self-regulative autonomy. Societies are accountable to their members in terms of information on royalties size, distribution, etc. This approach to the governance of collecting society is aptly dubbed by commentators as “benevolent regulation”.¹¹² Dietz speaks of a comprehensive approach, noting as well the overall supportive stance of the state toward collective management organisations.¹¹³

A different approach can be discerned when shifting attention to the UK. Although the Copyright, Designs and Patents Act 1988 contains express rules on the collecting societies, these rules are mostly concerned with the setting of tariffs and preventing the abuse by societies of their monopoly position in tariff negotiations. Even the term “collecting societies” is by commentators seen to avow the generally suspicious attitude toward these institutions. Dietz defines this approach, characteristic also in other countries of the common law family, as an antitrust approach. The hostile attitude to cartels and anticompetitive practices is a famous trait of the common law system and well in line with the liberal pro-competitive stance of the political economy.

Compared to the continental and the common law model, the Swedish approach to governance of CMOs confirms the view of the Scandinavian legal family as having its particular style. Whereas the model shares the benevolence and respect for the role and activity of CMOs, the attitude toward governance is different. In the case of Sweden, the hands-off approach is particularly pronounced. CMOs are certainly mentioned in the Copyright Law, in the section about compulsory and extended licenses. However, there are neither special rules on authorisation, nor any rules on monitoring and supervision of the activity of the organisations.

A number of commentators note that this very specific approach toward collective societies builds in many respects on the model of the well developed and powerful Swedish labor movement, including reliance on ‘soft corporatist’ negotiation procedures for conflict settlement.¹¹⁴ A look at Swedish industrial relations indeed confirms that there are a number of parallels to be drawn. According to the Swedish labour law scholar Fahlbeck, “corporatism is the single most important trait for the Nordic model of labour law and industrial relations”. He further defines corporatism as:

¹¹¹ See Bundesgesetzblatt, Teil I, 1965, p. 1294.

¹¹² Reinbothe, Jörg, ‘Collective Rights Management in Germany’, in: Gervais, D. (ed), *Collective Management of Copyright and Related Rights* (Aalpen vaan den Rijn: Kluwer Law international, 2010), 215-250.

¹¹³ Dietz, A., ‘Legal Regulation of Collective Management of Copyright (Collecting Societies Law) in Western and Eastern Europe’, 49 *Journal of the Copyright Society of the U.S.A.*, 2002, 897.

¹¹⁴ See Petri, Gunnar, ‘Upphovsrätten och dess intressenter’, *Nordisk Immaterialrättslig Tidskrift*, 2005, 428.

... a societal model where the political sphere is not the exclusive arena of professional politicians but where organised groups are accepted as legitimate political actors in their own right as well. Such groups are not reduced to act as pressure groups only but are co-opted into the political system. A closely-knit mesh of contact points is established, partly fusing private and public spheres and indeed blurring the very notion of these as two separate realms.

Within a model building on closely-knit mesh of relations between organized groups and the state the rules of the game are not written in law, but are determined by the closed circle of participants by the force of long-term practice and habit. Such a system may have a number of advantages from a number of vantage points and is certainly apt to ensure viable and effective protection of rights of those within the collective. At the same time it is less accessible and understandable for outsiders. The organizations that have emerged as clients of this system have adapted their expectations and working patterns to the system and any change appears painful. However, there is a considerable risk that the costs to parties outside the system, as well as the social costs from keeping a national market insulated from foreign competition may be disproportionately high.

One proposal for coping with the challenges of global P2P networks and pervasive cross-border copyright infringing activity, has been to entrust CMOs with a more extensive task of licensing the world repertoire through a one-stop-shop procedure and a single collective license. In this respect particular interest has been shown in an institutional innovation born in the context of the Nordic copyright system of governance, namely the so called extended collective license (avtalslicens).¹¹⁵ Following this statutory construction, the concept refers to licensing agreements on remuneration for certain uses of copyright works. The agreement is entered into voluntarily by a representative collecting society, on the one side, and users, on the other. However, unconventionally, the effects of the agreement extend even to non-members of the collecting society. Such members cannot make subsequent claims for remuneration directly from the users and have to accept the conditions negotiated by the parties of the agreement.¹¹⁶ Obviously, such a “collectivist” scheme would be particularly helpful to solve problems of fragmented rights and the near impossible clearing of rights with one single procedure.¹¹⁷ Yet deeper understanding of institutional legacies would warn against all too high expectation from such a legal transplanting exercise. The viability of the scheme in the Nordic context may not be readily transferable to other collecting societies in countries with different institutional tradition and history.¹¹⁸

CMOs have also featured prominently in recent attempts in the EU (notably by the European Commission) to prise open competition between national CMOs through non-discrimination provisions and abolition of territorial restrictions in reciprocal licensing arrangements. While the logic of such policy is straight-forward and understandable, it has so far been largely unsuccessful, probably underestimating the considerable leverage these organisations can produce in the political process, but

¹¹⁵ See Karnell, G. (1985-1986), ‘Extended Collective License Clauses and Agreements in Nordic Copyright Law’, *Colum.-VLA J.L. & Arts* 10, 73-81. For a contemporary analysis of the spread of the model to new uses and to other countries see Riis, Th. and Jens Schovsbo, ‘Extended Collective Licenses and the Nordic Experience – It’s a Hybrid, but is it a Volvo or a Lemon?’, 33(4) *Columbia Journal of Law and the Arts*, ; Schovsbo, Jens, ‘The Necessity to Collectivize Copyright – and the Dangers Thereof’, in Rosén, Jan (ed) *Individualism and Collectiveness in Intellectual Property*, Cheltenham: Edward Elgar Publishing, 2012, 166-191.

¹¹⁶ For detailed description of the model with extended licensing agreements see Koskinen Olsson, Tarja (2010), *Collective Management in the Nordic Countries*, in: Gervais, D. (ed), *Collective Management of Copyright and Related Rights*, Aalpen van den Rijn: Kluwer Law International and Axhamn, Johan and Lucie Guibault, *Cross-border extended collective licensing: a solution to online dissemination of Europe’s cultural heritage*, at: http://www.ivir.nl/publicaties/guibault/ECL_Europeana_final_report092011.pdf

¹¹⁷ The problematic side of such extension is revealed in case law in the European Court of Justice on the so called “negative” freedom of association.

¹¹⁸ See Recital 17 Infosoc Directive, recognising the institutional embeddedness of collective administration: “This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences.”

also the strong conservative power of institutional inertia, given the very different conceptions of the social function of CMOs. In the literature it has been observed that the reasons for the diversity in the governance of collective management organisations are to be sought in the underlying philosophies of copyright.¹¹⁹ This is certainly so. However, at a more general level, both copyright philosophy and copyright governance can be seen as closely related with the particular model of political economy and of structuring market institutions characteristic of the countries analysed.

On a general note, it can be confidently inferred that institutional choice is not only (and not chiefly) influenced by efficiency considerations and by participation concerns as to the specific public policy issues at hand, but rather is significantly coded into an institutional environment and builds on past institutional choices. This is not surprising. The organisations that are repeated beneficiaries of the institutional framework of copyright are well-adapted to enforcement patterns and institutional structures at both judicial and administrative level. They exhibit a marked pre-disposition for keeping the *status quo*, which will involve less adaptation costs and substantial benefits. Such path dependence may occasionally, however, prevent new institutional actors to participate in decision-making processes and thus to infuse information and articulation of their interests in these process, which might eventually lead to inefficient shaping of substantive outcomes.¹²⁰

4.3 Competition law: global, regional or decentralised?

Finally, I will briefly touch upon competition law and policy, which in my view demonstrates clearly the importance of analysing national and transnational levels of governance in their interrelation, as well as the advantages of a two-fold comparative institutional perspective. Among competition law scholars there is a tendency toward treating competition law as a universal discipline subject increasingly to the laws of economic analysis. The interest toward the minutiae of national competition law and policy, and institutional design, has been limited, apart from the gross comparisons between US and European competition policy. Therefore it is unusual that in a recent treatise “Global Competition: Law, Markets and Globalisation” David Gerber after providing a succinct analysis of (largely failed) attempts to build a transnational institutional framework for governing global competition, turns to an in-depth analysis of individual approaches to competition law in a number of jurisdictions, among others US, EU, but also briefer accounts of competition law developments in Japan, South Korea, Latin America, Sub-Saharan Africa etc. Gerber acknowledges that his interest in experiences at the domestic level may surprise some, because as he puts it

“transnational competition law issues are typically treated as if they were in a world of their own – separate and distinct from national competition law experience and dynamics”.¹²¹

Gerber, however takes a different view, namely that “the national and the international domains are not only interrelated, but inseparable. The interplay between them is the key to understanding the dynamics of global competition law development.”¹²²

Gerber’s study is in yet another crucial aspect very close to the two-fold comparative institutional analysis advocated here. He devotes substantial part of his analyses of domestic competition law to the dynamic of antitrust application and enforcement and puts this into the context of long-term domestic institutional legacies. In a similar manner, if we follow CIA in cross country comparison of national

¹¹⁹ Dietz (2002), *supra* note 113.

¹²⁰ North (1990), *supra* note 9.

¹²¹ Gerber (2010), *supra* note 3.

¹²² Gerber outlines three aspects of the interaction that are relevant also for this analysis. First, as many other areas of law and regulation, the international legal regime for global markets constitutes in fact of interrelated set of domestic regimes without obligation to coordinate with other regimes. Secondly, although being a chiefly economic phenomenon competition is embedded in culture, institutions, norms that are primarily national and local. And third, national experiences in turn influence the shaping of transnational coordination in the field. Gerber (2010), *supra* note 3, at 119.

competition law regimes, the attention should be directed to the institutional choices that are exercised differently across legal and political systems. Surprisingly, despite the extensive scholarly attention devoted to competition law, the focus has almost invariably been on substantive law issues and on the preferable shaping of competition law doctrines and policies. A rule of reason approach is weighed against a strict prohibition, regulatory approaches to vertical and horizontal restrictions of competition are discussed at length, as are the vices and virtues of static versus dynamic views on competition. By contrast, relatively limited attention was until recently paid to the institutional choice implications of different substantive law doctrines and to the institutional modalities of competition law making and law enforcement. While this unsatisfactory state of affairs seems to be changing¹²³, still few studies offer a long-term historical institutional perspective that would improve the understanding about the reasons for the institutional divergences between jurisdictions.¹²⁴

Once a two-fold comparative institutional perspective is adopted, aspects like the interplay between private and public enforcement in the US, the existence of two separate and often competing enforcement agencies with different competences and mandates for enforcement (of which the Department of Justice is wholly dependent on the courts and the FTC depends on Congress for federal funding) become crucial factors to understand the dynamics of US American antitrust.

Turning to the competition law in the European Union, a central, but often overlooked characteristic is that it builds on an interaction between national and supranational layers of competition law. Thus EU competition law consists of a supranational layer and 27 (soon to become 28) national competition law orders. While there is an influential substantive law “blueprint” in the competition law rules in the Treaty (TFEU), rule-making and enforcement differ substantially between EU countries. Therefore it is understandable that the reform of EU competition law enforcement carried out with Council Regulation 1/2003 has by some observers been called a “legal and cultural revolution”.¹²⁵ Following the Regulation, national competition authorities and national courts in the Member States of the EU, are expected to actively apply the competition rules of the Treaty. The underlying assumption of the reform is the existence of a common “competition culture” throughout the Community. This confidence in shared values is presumably derived from the almost 50-year long experience of application of the Community competition rules.

Yet under the surface of cohesion differences persist among the Member States in terms of institutional modalities of competition law and policy. National competition authorities differ in enforcement powers and in their constitutional status within respective systems of government. The “institutional thinking” of these agencies has formed in communication with different “clients”, in turn influenced by the structure of national markets and rules on access to, and participation in, decision-making procedures. There are also discrepancies in the tradition of private law enforcement of competition law and the experience of national courts in competition matters. Importantly, the time of exposure to Community competition law and policy differs between the founding states of the Community and the new Member States.

Nothing makes the diversity in institutional background more apparent than the accession of the Central and East European (CEE) countries to the Union. Whereas the CEE countries have been eager recipients of EU competition rules, they still grapple with legacies of a planned economy and authoritative styles of public administration.¹²⁶ The brief exposure to EC “competition culture” in these states interacts with deeper institutional habits forged under different economic and political

¹²³ See Möllers, Thomas and Andreas Heinemann (eds), *The Enforcement of Competition Law in Europe* (Cambridge: Cambridge University Press, 2010);

¹²⁴ See however Gerber, D., *Law and Competition in Twentieth Century Europe* (Oxford: Clarendon Press, 1998).

¹²⁵ Ehlermann (2000), ‘The Modernisation of EC Antitrust Policy: A Legal and Cultural Revolution’, *CMLRev.*, 537.

¹²⁶ Varady, T., ‘The Emergence of Competition Law in (Former) Socialist Countries’, *42 American Journal of Comparative Law*, 1999, 229.

realities. The independence, experience and resources of competition authorities and judicial bodies in the new Member States are being questioned by scholars and policymakers, and so is the capacity of local businesses to comply with competition law.¹²⁷ More specifically, in order to facilitate harmonised enforcement, Regulation 1/2003 and other Community policy documents envisage a comprehensive network for cooperation between national competition authorities, the Commission and national courts. The problem is that meaningful cooperation presupposes recognition of the underlying differences in national “competition culture” and institutional context.¹²⁸

My purpose is obviously not to embark on comparative analysis of institutional choice and institutional legacies in competition law. Such analysis has to a great extent been delivered by others. What this brief overview hopefully demonstrates is that even in areas where on the surface there is common understanding about main goals and principles, there is a need of comparative research of institutional variation in both meanings – across alternative institutional decision-making processes and across countries and governance levels.

5. Concluding reflections

Admittedly, the approach outlined above is time- and resource extensive. It does not promise a simple formula to cut through the thicket of institutional complexity. It suggests combining an analysis of variation in institutional choice and design across jurisdictions, with careful institutional evolution-tracing. The latter requires in turn, deeper insights into national legacies and idiosyncrasies and a sort of immersion in the broader institutional context in which national institutional choices are made.

The reward from such an analytical approach is arguably that it provides a framework for exploring in a comparative manner, the subtle ways in which supranational, international and transnational law and policy interact with national institutional choices and institutional frameworks. The research I have carried out so far in selected areas of law and public policy suggests that national institutional frameworks play the role of refractors. Refraction is defined in physics as: “the bending of rays or waves of light, heat, sound, or the like when passed obliquely from one medium to another with a different rate of transmission”. In a similar manner influences are ‘bent’ under different angles as a result of their contact with different national institutional environments. Given the existing institutional diversity on the national level, supranational and transnational law is inevitably ‘refracted’ through a different institutional prism and splits into a wide spectrum of influences, often unpredicted or undesired. The extent to which common rules and policies will induce change in national institutional frameworks will depend on how deeply actors and organisations are symbiotically related with the existing framework, and on the extent to which global rules challenge the core of national institutions.¹²⁹ Rather than moulding national institutional frameworks into a uniform regulatory model, it seems that globalisation tends to expose instances of unproductive ‘lock in’ and decision-making biases, while rarely radically changing the direction of institutional evolution.

At the same time, the two-fold comparative institutional approach demonstrates that globalisation and Europeanisation should not be conceived as one-way streets running from the transnational governance structures to the nation states, but rather as a two-way process of dialogue and interaction.¹³⁰ This implies on the one hand that national institutional frameworks adjust so that they

¹²⁷ Ehlermann (2000), *supra* note 125; Thielert/Schinkel, Estonia’s Competition Policy: A Critical Evaluation Towards EU Accession, ECLR, 2003, 165; Riley, A. EC Antitrust Modernisation: Part I & II, ECLR, 2003, 604; 657.

¹²⁸ Gerber (1998), *supra* note 7; Gerber, D., ‘Modernising European Competition Law: A Developmental Perspective’, ECLR, 2001, 122 ff.

¹²⁹ Knill (2001), *supra* note 51.

¹³⁰ Héritier/Mingers/Knill/Becka, Die Veränderung von Staatlichkeit in Europa: Ein regulativer Wettbewerb (Opladen: Leske und Budrich, 1994)

achieve better representation of national interests and actors at the supranational and international level. On the other hand, national actors and decision-makers, when acting outside the national context, inevitably remain influenced by their national institutional environment. Their action at the supranational or global level are often guided by a desire to change perceived national institutional malfunctions, or to the contrary by attempts to bring the global institutional framework closer to the familiar domestic institutional landscape, not least as a way of reducing information and other transaction costs. This conceptualisation carries a dual message. It is pessimistic in predicting persisting incoherence and imperfection of a pluralistic multi-level institutional framework, an unwieldy hotchpotch of national approaches. It nevertheless holds a promise of constant interaction and learning, challenging unproductive and inefficient equilibria. Certainly, the opportunities for institutional change and the likelihood of institutional convergence will vary between different areas of law and regulation. There is in other words, considerable room for empirical studies to improve our understanding about the role of institutions and to fine-tune our theoretical and methodological tools.

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