2004

Book Review. Taking Coase Seriously: Neil Komesar on Law's Limits

Daniel H. Cole
Indiana University Maurer School of Law, dancole@indiana.edu

Follow this and additional works at: http://www.repository.law.indiana.edu/facpub

Part of the Law and Economics Commons, and the Law and Society Commons

Recommended Citation

This Book Review is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.
Taking Coase Seriously:  
Neil Komesar on Law’s Limits  

Daniel H. Cole


Neil Komesar is one of the few legal scholars who has taken seriously Ronald Coase’s call for comparative institutional analyses to comprehend and resolve problems of social cost. In his 1994 book, Imperfect Alternatives, Komesar explained why there is no first-best set of legal and economic institutions and organizations for avoiding or resolving social conflicts, elaborated a framework for analyzing institutional choice, and applied that framework to issues in tort law and constitutional law, including the scope of judicial review. In his new book, Law’s Limits, Komesar further develops two principal features of the framework from Imperfect Alternatives: the “two-force model” of politics, with majoritarian and minoritarian biases as twin sources of political malfunction, and the premise of cross-institutional complexity, according to which increasing numbers and complexity similarly hamper all alternative institutional arrangements, greatly complicating institutional-choice decisions. Komesar applies his model in Law’s Limits to current social conflicts between private property owners and public land-use planners. Some of his institutional-policy conclusions might well startle his fellow law and economics scholars.

COASE AND COMPARATIVE INSTITUTIONAL ANALYSIS

Komesar’s analytical approach is truly Coasean, which is not to say common. Ronald Coase may be one of the most oft-cited scholars of the
past half century, but his influence on method has been surprisingly limited. Few economists or legal scholars engage in the analytical enterprise Coase has championed: comparative institutional analysis.

Coase (1964) has written that all of society’s mechanisms for organizing socioeconomic relations, including markets, firms, and governments, are “more or less failures.” They fail in different ways, to different extents, in different circumstances. Given this differential failure, what we require, when confronted with problems of social cost, is comparative institutional analysis. Specifically, we should compare the costs and benefits of various market, firm, and governmental solutions. In Coase’s words, “we have to take into account the costs involved in operating the various social arrangements (whether it be the working of the market or of a governmental department) as well as the costs involved in moving to a new system. In devising and choosing among social arrangements we should have regard for the total effect. This, above all, is the change in approach which I am advocating” (1960, reprinted in Coase 1988, 156).

Coase was hardly the first social scientist to call for comparative institutional analysis of social problems and solutions. The “old institutional” economists did so during the first half of the twentieth century (see Mercuro and Medema 1997, chap. 4; Hovenkamp 1990, 1014–31). But they lacked an objective basis for comparing institutional and organizational alternatives. They could demonstrate different efficient equilibria under varying institutional, organizational, and distributional assumptions, but they provided no theory or metric for choosing between alternative institutional and organizational arrangements. As Coase (1984, 230) has written, the old institutionalists amassed mountains of data “waiting for a theory, or a fire.”

Coase enabled the switch from old institutionalism to the new institutional economics by providing the metric of transaction costs, which positively explained and normatively prescribed institutional and organizational choices: That institutional and organizational structure is best that, under the circumstances, minimizes on transaction costs in order to maximize the social product (or social welfare) (see Coase 1960, reprinted in Coase 1988, 115–19 and 154–56).

It is, of course, possible to disagree with Coase’s normative goal of maximizing the social product, but law and economics scholars would hardly be inclined to do so. Nevertheless, many of them simply ignore Coase’s call to comparative institutional analysis. What one finds in the literature, generally speaking, are articles that either (1) identify some market failure and recommend a government (regulatory or tax-based) solution without consideration for potential government failure or (2) identify some government failure but fail to demonstrate that the price mechanism of the market would operate more efficiently overall.
The failure of law and economics scholars to follow Coase’s call for comparative institutional analysis may be symptomatic of a more general disconnect between Coase and the Coaseans, which Simon Johnson and Andrei Schleifer (1999) have observed. It may also be the case that Coase has not been read so widely or carefully as the frequency of citations to his works in the literature might lead one to believe. Law and economics scholars have built sizeable reputations by theorizing (and mathematizing) about economically optimal legal solutions in the first-best world of the so-called Coase Theorem—a world that, according to Coase (1988, 15), is hardly worth studying. In that mythical world, all forms of social organization would be equally and optimally efficient; no problems of social cost would arise to study or resolve.

However, a small but growing number of economists, legal scholars, and other social scientists have become actively engaged in the kind of research Coase suggested is necessary to achieve progress in understanding and ordering socioeconomic relations. In 1997, Coase and his fellow Nobel laureate Douglass North founded the International Society for New Institutional Economics (ISNIE) to facilitate and promote such research. Today, ISNIE numbers several hundred members from countries throughout the world. But one does not have to belong to ISNIE to engage in Coasean comparative institutional analysis, as Neil Komesar ably demonstrates in *Law’s Limits*.

**KOMESAR’S APPROACH TO COMPARATIVE INSTITUTIONAL ANALYSIS**

**Terminological and Methodological Issues**

Before addressing Komesar’s analytical framework, it is worth clarifying some terminological differences between Komesar’s approach and conventional usages in the ISNIE literature. First and foremost, Komesar does not mean quite the same thing by “comparative institutional analysis” as Douglass North and most other ISNIE scholars. This is not to say that one is correct and the other incorrect—definitions are matters of convention—but a failure to clarify the differences could result in misunderstandings and false disagreements.

North uses the term institutions to refer to “the rules of the game in a society, or more formally, ... the humanly devised constraints that shape human interaction.” These include both “formal constraints—such as rules that human beings devise” and “informal constraints—such as conventions and codes of behavior” (1990, 3–4). Courts and legislatures, in North’s
terminology, are not institutions but organizations. Komesar, by contrast, defines institutions as decision-making processes, which includes courts and legislatures, but excludes the rules themselves.

Komesar's methodology also differs in interesting ways from those of Coase and other ISNIE scholars. Specifically, Komesar's institutional choice set of markets, courts, or legislatures differs from Coase's institutional choice set of markets, firms, or government. Coase generally combines courts and legislative bodies under the rubric of government, while distinguishing carefully between markets and firms—that distinction constituting the very reason for Coase's initial exploration in transaction-cost analysis. Komesar, by contrast, treats courts and legislatures as importantly different social institutions—the first, legal, and the second, political; but he makes no distinction between firms and markets.

Coase's and Komesar's institutional choice sets might be usefully combined to create a broader choice set containing the following four institutions: (1) markets, (2) firms, (3) courts, and (4) legislatures. If our goal is to develop a truly comprehensive institutional choice set, we would need to incorporate other social institutions, such as families, clubs, and churches, all of which play a role in allocating resources and resolving disputes.

Be that as it may, nothing is inherently wrong about limiting the institutional choice set as both Komesar and Coase do. For the most part, it simply reflects the topics in which they are most interested. Coase's institutional choice set, in part, reflects his intense interest in explaining the existence of business firms. With respect to the issues in which Komesar is most interested—land-use planning and regulatory takings—there seems little reason to expect that a distinction between markets and firms as institutions would be very significant; likewise, family, club, and religious institutions or organizations.

1. According to Masashiko Aoki (2001, 22), North excludes organizations from his definition of institutions for functional reasons: His goal is to understand the roles organizations play as agents of formal institutional change.

2. North and Komesar, between them, do not exhaust the alternative definitions of institution. The economist Avner Greif (1994, 943), for example, defines institutions inclusively to include both rules and the organizations that design, implement, and enforce them. Another economist, Masashiko Aoki (2001, 26), defines an institution in game-theoretic terms as a Nash equilibrium: "An institution is a self-sustaining system of shared beliefs about how the game is played. Its substance is a compressed representation of the salient, invariant features of an equilibrium path, perceived by almost all the agents in the domain as relevant to their own strategic choices. As such it governs the strategic interactions of the agents in a self-enforcing manner and in turn is reproduced by their actual choices in a continually changing environment."

3. Firms operate within markets, but they displace markets for various transactions. At its essence, a firm is any organization with an employer, an employee, and a hierarchical relationship between the two. Were markets always the cheapest mechanism for organizing economic activity, there would be no employer/employee relations, only discrete, independent, per-transaction contracting. The very fact that firms—hierarchically organized combinations of employers and employees—exist suggests that markets are not always the cheapest way to organize economic activity. See Coase (1937, reprinted in Coase 1988).
Building on Coase's Model

Komesar's comparative institutional analysis stems from Coase's (1964) observation that all forms of social organization are subject to failure. Also like Coase, Komesar's approach is fundamentally economic, for the reason that economic theory—in particular, Coasean transaction-cost theory—“provides a powerful analytical framework with which to organize analysis of law and public policy” (p. 181). In addition, although Komesar does not make this point, Coase's analytical approach allows us to make institutional choices even in the absence of an agreed-upon metric for determining social welfare because its focus is not on maximizing social welfare per se but on minimizing more easily measured social costs of legal conflicts. By minimizing social costs, Coase presumes, we maximize the social product, which he treats as a proxy (however imperfect) for social welfare. In many other respects, however, Komesar's approach to comparative institutional analysis is more nuanced than Coase's.

In Coase's view, certain institutional arrangements simply work better than alternative institutional arrangements, depending on the circumstances. When the cost of using the price mechanism is low, the market (a nonhierarchical institution populated by independent contractors) allocates resources more efficiently than firms (hierarchical organizations comprised of employers and employees or, more typically these days, management, labor, and shareholders) or governments (hierarchical organizations of elected political representatives and unelected bureaucrats). Coase explained why in his article “The Federal Communications Commission” (1959, 18):

> an administrative agency which attempts to perform the function normally carried out by the pricing mechanism operates under two handicaps. First of all, it lacks the precise monetary measure of benefit and cost provided by the market. Second, it cannot, by the nature of things, be in possession of all the relevant information possessed by the managers of every business which uses or might use radio frequencies, to say nothing of the preferences of consumers for the various goods and services in the production of which radio frequencies could be used.

In other cases, it is evidently cheaper to organize economic activities in firms rather than through discrete market transactions. As Coase explained in his landmark 1937 article, “The Nature of the Firm” (reprinted in Coase 1988, 40):

---

4. On the theoretical impossibility of specifying, with certainty, a social-welfare function, see Arrow ([1951] 1970). Throughout “The Problem of Social Cost,” Coase (1960) assumes the normative goal of maximizing the social product. The social product, thus, becomes a proxy for social welfare. But near the end of the article, Coase (1960, reprinted in
the operation of the market costs something and ..., by forming an organization and allowing some authority (an "entrepreneur") to direct the resources, certain marketing costs are saved. The entrepreneur has to carry out his function at less cost, taking into account the fact that he may get factors of production at lower price than the market transactions which he supercedes, because it is always possible to revert to the open market if he fails to do this.

In still other cases, the government can be expected to provide the least-costly resource allocation mechanism. In "The Problem of Social Cost" (1960, reprinted in Coase 1988, 118), Coase wrote:

there is no reason why, on occasion, ... governmental administrative regulation should not lead to an improvement in economic efficiency. This would seem particularly likely when, as is normally the case with the smoke nuisance, a large number of people is involved and when therefore the costs of handling the problem through the market or the firm may be high.

For Coase, the variables involved in institutional-choice determinations are few and presumably simple to evaluate. Governmental/administrative allocations tend to be preferable in social-cost situations involving high numbers of parties. In most other cases, firms or markets tend to be preferable. The choice between firms and markets would be based on which institution would, under the circumstances, organize economic relations at lowest cost. If the price mechanism is the cheapest allocation mechanism, firms will either not form in the first place or will fail. Throughout his comparative institutional analyses, Coase seems to assume that various institutional alternatives respond differently as circumstances—complexity and numbers—change.

It is in this respect that Komesar most clearly expands and improves on Coase's model. Komesar (p. 23) suggests that issues of institutional choice are more complicated than Coase imagines, because "institutions tend to move together" (italics in original). That is to say, all institutional alternatives—markets, courts, politics—function better in cases of low complexity involving fewer parties. By the same token, they each function more poorly as numbers and complexity rise. Expressed in economic terms, our alternative social institutions all suffer from diseconomies of scale. For this reason, the process of institutional choice truly becomes a search for least bad outcomes (for society as a whole).

Coase 1988, 154) notes that "the choice among different social arrangements for the solution of economic problems should be carried out in broader terms than this and that the total effect of these arrangements in all spheres of life should be taken into account."

5. Indeed, in cases involving low numbers and complexity, "we will often have the pleasant task of choosing the best of good or attractive alternatives" (p. 24).
Coase, as we have already seen, recognized that market allocation may be more costly than government/administrative allocation in cases, such as air pollution, involving large numbers of parties. Komesar, in turn, notes that:

As with the market, the courts' ability decreases as the number of parties and the complexity of the issues increases. As the number of potential plaintiffs and defendants increases, the costs of bringing actions increase and the dynamics of litigation become more complex. Larger numbers of parties mean higher litigation costs such as service of process, notice of motions, depositions, and other forms of trial preparation. Larger numbers also mean that negotiations over settlement are more complicated and less likely to reach a value-enhancing result. The problems of collective action that plague market transactions as numbers increase also plague adjudication: larger numbers mean more hold-outs and greater likelihood of a failed settlement. (P. 21)

The political process, too, becomes increasingly prone to failure as numbers and complexity increase:

On the simplest level, time and other resources are needed to investigate, legislate, and implement. The more complex the issue and the larger the number of people involved, the higher these costs. More important, the large numbers, great complexity, and widely dispersed stakes associated with [highly complex issues involving large numbers of parties such as] regional air pollution cause problems for the political process by distorting the political participation of various constituent interests in such activities as lobbying and voting. These distortions of the political process are dramatic enough to be captured in two traditional but polar opposite perceptions of political malfunction—minoritarian bias, which is the over representation of concentrated interests (special interest legislation), and majoritarian bias, which is the over representation of dispersed larger interests (the tyranny of the majority). (P. 22)

Komesar (p. 60) refers to these twin process problems as "the two-force model of politics." Either bias, minoritarian or majoritarian, can cause the political process to malfunction, so that it fails to maximize social welfare (by minimizing social costs), just as markets and courts fail, when "numbers and complexity increase and as the distribution of stakes becomes more complex and more dispersed" (p. 22).

Komesar's "two-force model" of politics is both intuitive and useful, but it requires a baseline of normal, functional legislation against which to define "malfunctions" due to either minoritarian or majoritarian bias. If it is

---

6. Note that Komesar's definitions of majoritarian and minoritarian bias are representation centered, that is, based on those with voting rights in the specific jurisdiction.
true, as James Madison ([1787], in Rossiter 1961) thought, that all legislation is either minoritarian or majoritarian, then it would seem that “malfunctions” are inherent to, and inevitable in, the political process. Simply put, the political process always malfunctions because legislation is always biased in favor of either the majority or some minority. Komesar is able to avoid this unpalatable conclusion, however, by adopting an econo-utilitarian baseline of “resource allocation efficiency.” That is to say, minoritarian and majoritarian biases, however inevitable, only cause political malfunctions when they result in socially inefficient allocations of resources. A political resource allocation (or reallocation), even if it is biased in favor of the majority or some minority, will not constitute a “malfunction” if it results in an efficient (or more efficient) allocation of society’s resources.

But how can any institution—political, market, or judicial—be comparatively efficient if, as Komesar maintains (p. 25), they all decline in performance as numbers and complexity increase? Komesar has an answer. Even though performance declines for all institutions in our choice set, it might not decline at the same rate. If markets, for example, perform worse at higher numbers and complexity, they may still perform relatively better than courts or legislatures. The important point is that, as institutional performance declines at higher numbers and complexity, institutional choices become increasingly “close calls,” and the process of comparative institutional analysis becomes a far more subtle process than Coase let on.

Among the three institutions—courts, legislative bodies, and markets—that make up his institutional-choice set, Komesar is concerned (p. 3), first and foremost, with the courts and the adjudicative process. In his model of institutional choice, the courts are the social institution associated with law and the rule of law. Legal decisions are, by definition, judicial. But courts do more than render legal decisions; they also decide who decides. That is to say, they engage in their own form of comparative institutional analysis, allocating social decision-making authority and responsibility among themselves, markets, and legislatures.

When the courts recognize “strong” property rights, which cannot be violated without the consent of their owner, they are, in effect, allocating resource allocation decisions to the market. A simple example of this kind of judicial determination of the proper scope of market resource allocation is trespass law. Trespass is a strict liability offense, for which the virtually automatic remedy, at common law, is injunctive relief. The right to exclude, which the law of trespass is designed to protect, constitutes a “strong” property right. A trespasser cannot gain an entitlement to trespass across another’s property simply by agreeing to pay a court-ordered price, denominated as money damages. The only way for the trespasser to acquire an
entitlement to cross the landowner's property is to purchase the right in a free-market transaction.

In the same vein, and implicit in Komesar's analysis, whenever the courts rule in favor of the defendant in a dispute over property rights, they are, in effect, allocating the entitlement to the defendant and allocating to the market any future change in the allocation of entitlements between the defendant and the plaintiff. If the plaintiff seeks to have the entitlement reallocated from the prevailing defendant to herself, she must resort to free-market negotiations with the defendant.

When the courts recognize "weak" property rights—rights that are enforceable not by injunctive relief but by money damages—they are allocating the decision about who should control resources to themselves, rather than the market. For example, in nuisance law one is entitled to reasonably interfere with another's right to use and enjoy their land. The determination of reasonableness is made by the courts, not by the market. When the court deems a nuisance unreasonable, the nuisance creator is generally allowed to continue interfering with the plaintiff landowner's use and enjoyment of land, so long as she is willing to pay a court-determined, rather than a free-market-determined, price, in the form of money damages. The court, rather than the market, determines not only the allocation but the value of entitlements.

Thus, when the court in Boomer v. Atlantic Cement, 257 N.E.2d 870, 871 (1970), refused to simply enjoin the defendant plant from emitting cement dust that harmed neighboring residents, but instead gave the plant the option of paying permanent damages, the court was allocating to itself, rather than to the market, the determination of the value of the plaintiffs' property rights. Moreover, the court in Boomer signaled that, for cases involving large numbers of parties and technically complex matters such as pollution, the political process should take precedence over both judicial and market-based allocations of entitlements:

A court should not try to do this [solve air pollution problems/conflicts] on its own as a by-product of private litigation and it seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution. This is an area beyond the circumference of one private law suit. It is the direct responsibility for government and should not thus be undertaken as an incident to solving a dispute between property owners and a single cement plant—one of many—in the Hudson River Valley.

Similarly, in Moore v. Regents of the University of California, 51 Cal. 3d 120 (1991), the California Supreme Court held that whether an individual has property rights in parts of their own body, which may be used for medical
research, is an issue best left for the legislature rather than the courts to decide.

Interestingly, against the government itself—that is, when the government is a party in a property dispute—nearly all private property rights are "weak" in Komesar's sense. Not only can the government take away private property for public use pursuant to its power of eminent domain (which literally means "highest ownership"), it can also regulate socially harmful uses of private property, so long as those regulations do not go so far as to constitute a "regulatory taking." Eminent-domain takings and legitimate police-power regulations both constitute nonmarket allocations of rights and obligations; the only options available to a reviewing court, in cases pitting the government against a private landowner, concern the extent of its own participation. Whether, and the extent to which, courts should intervene to delimit the political process in this arena becomes a central question for Komesar's application of his analytical model, as we shall see in the next section.

All this may appear as little more than an elaboration of the model first developed by Calabresi and Melamed (1972). But Komesar goes beyond Calabresi and Melamed's model in addressing the limitations of institutional capacity. In particular, as Komesar explains (pp. 3-4, 26, 35-6, 163), courts suffer from "supply" constraints that limit their ability to meet the "demand" for judicially allocated entitlements, virtually forcing them to rule in ways that allocate more entitlement-allocation decisions to markets or the political process, which are alternative institutions with larger supply capacities. Thus, as numbers and complexity rise, the role of the courts, relative to the roles of markets and the political process, in allocating entitlements should decline. This may be a source of frustration for lawyers and other proponents of the rule of law, who recognize that courts are "most needed where alternative decision makers such as political processes, markets, and informal communities work least well" (p. 3). But to focus only on the desirability or demand for judicial intervention without a realistic appraisal of the courts' own failings, including supply-side constraints, is myopic—a failure of noncomparative, single-institutional analysis.

APPLYING THE MODEL: ZONING AND REGULATORY TAKINGS LAW

Zoning

Zoning is a public, regulatory response to actual and potential land use conflicts. But as with all governmental responses to market-related problems, the "solution" creates problems of its own, problems that in some cases may render the cure worse than the disease. Two of the most common
institutional problems associated with governmental land use planning are exclusionary zoning, which is a problem of majoritarian bias, and domination of the process by local land developers, a problem of minoritarian bias.

The problem of minoritarian bias is exemplified in the famous case of Fasano v. Board of County Commissioners of Washington County, 264 Or. 574 (1973), in which a land developer successfully obtained from local zoning authorities a change in zoning restrictions, so that it could build a mobile home park in an area otherwise zoned single-family residential. The Oregon Supreme Court overturned the rezoning, concluding that “special interests, in the form of land developers, have disproportionate influence on the rezoning process” through subversive practices such as “campaign contributions, lobbying, or even plain old bribery” (p. 58). Komesar (p. 61) explains how minoritarian bias can arise:

> the strength of minoritarian bias, most often associated with the interest group theory of politics, lies in the distribution of the benefits of political action. Interest groups with small numbers but high per capita stakes have sizeable advantages in political action over interest groups with larger numbers and smaller per capita stakes, because higher per capita stakes mean that the members of the interest group will have greater incentive to expend the effort necessary to recognize and understand the issues. [By contrast, t]he per capita impact on each member of the majority is just too low to justify the expenditure of resources necessary to understand the issue involved. (Footnotes omitted)

The opposite problem of majoritarian bias is exemplified by the case of Construction Industry Ass'n of Sonoma County v. Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974), rev’d, 522 F.2d 897 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976), in which local land developers were not subversive “special interests” but “victims” of a growth-control ordinance that greatly restricted their livelihood in Petaluma. The ordinance was a popular measure designed to protect Petaluma’s “small town character and surrounding open spaces.” It benefited current residents/voters of Petaluma, but harmed both local land developers/voters and potential residents/nonvoters. But how could this happen, given the assumptions of the interest group theory of politics (a subpart of the theory of collective action), which supposedly leads to minoritarian bias in favor of land developers? Komesar explains that “the prospect of majoritarian activity and influence and, therefore, the majority's ability to offset minoritarian influence are determined by variation in the same factors employed by the interest group theory of politics to generate its conclusion of minoritarian dominance” (p. 62). Specifically, “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" (emphasis in original). The higher the stakes, the more likely the majority will seek to influence the process to their own benefit.

These twin political malfunctions of minoritarian and majoritarian bias create a demand, under the rule of law, for judicial control of the political process. But as Komesar explains, the courts’ role is not a simple one. Because of the bifurcated nature of the problem, a judicial solution that focuses on one source of malfunction, say minoritarian bias, may exacerbate the other source of malfunction, majoritarian bias. Moreover, courts are constrained by the supply-side problems discussed in the preceding section, which prevent them from resolving all problems associated with a “highly defective political process” (p. 71).

In Fasano, the court was clearly concerned about the prospect for minoritarian bias in the administrative rezoning process. While acknowledging that “there is more reason to fear minoritarian bias at the less observed, more complex administrative level than at the more exposed (publicized) legislative level,” Komesar identifies two problems with the Fasano court’s approach. “First, the subset of cases that would receive Fasano-type judicial review may be neither small in number nor substantively simple.” The demand may, therefore, outstrip the judiciary’s ability to supply legal rules to control minoritarian bias. Second, the court in Fasano may have focused on the wrong bias. Even though minoritarian bias is possible, it is more common in the context of “prototypical administrative agencies—a regulatory agency at the federal or national level applying complex legislation. But one view of administrative agencies does not fit all.” “In the context of local zoning, especially suburban local zoning of the sort in Fasano, majoritarian bias, over representation of local homeowners, and problems of over regulation are likely to be the major threats” (pp. 72–75).7 Thus, whatever developers gain through rezoning is likely to be in the nature of a correction to the larger problem of majoritarian over regulation (p. 115). Moreover, if zoning boards go too far in serving the interests of developers, they are likely to be subject to “majoritarian reaction” in the political process (p. 75).8

Even when courts focus on the correct form of political malfunction, as the court appears to have done in the Petaluma case, the problem of

7. William Fischel (1985, 209) agrees with Komesar that majoritarian bias is the more common form of political malfunction in suburban land use planning. Fischel (1985, 211–21) further notes that minoritarian bias is more likely to be a significant problem in isolated small cities, in “central cities,” and where decisions are made by higher levels of government, including the federal government.

8. Fischel (1985, 40) makes the same point: “If local officials offend enough owners and users of land, they may be voted out of office and replaced by those more sympathetic to the goals of their constituents.” To this extent, at least, the political process itself provides a solution to political malfunctions resulting from minoritarian bias.
majoritarian bias can overwhelm the judiciary's ability to deal with it effectively. As Komesar explains, "the severity of political malfunction that motivates the substitution of the courts makes the task for the courts more uncertain, expensive, and frustrating. Political jurisdictions subject to strong majoritarian bias can be aggressively uncooperative. They make obtaining compliance with court interventions difficult by every delaying and obfuscating tactic that they can employ" (p. 76). In sum, courts "face an enormous strain on both their competence and their resources when they attempt to replace a defective political process at high numbers and complexity" (p. 84).

Komesar illustrates these problems with the famous Mount Laurel cases.\(^9\) In *Mount Laurel I* (South Burlington County NAACP v. Mount Laurel, 67 N.J. 151 [1975], appeal dismissed and cert. denied, 423 U.S. 808 [1975]), the New Jersey Supreme Court overturned a local zoning ordinance that had the effect of excluding moderate- and low-income residents. The evidence showed that the ordinance was intended to maximize property tax revenues while minimizing demand for expensive public services, such as education. To that end, Mount Laurel's zoning plan provided for a good deal of industrial and commercial development—the kind of development that would support the township's tax base without demanding many public services—but provided for virtually no housing for low- and moderate-income families, who typically demand sizeable public services but pay less in property taxes. If the township succeeded in this effort to maximize property tax revenues while minimizing the provision of new public services, the primary beneficiaries would be existing residents—the majority. They would benefit from a relatively wealthy local government, with more money to spend on existing schools—the schools *their* children attended—and other public services *for them*, without competition from new, undesirable residents. A clear enough case of majoritarian bias in land use planning.

Just like the California court in *Petaluma*, the New Jersey court in *Mount Laurel I* recognized the problem of majoritarian bias, and issued a ruling that overturned it, with the presumed intention that Mount Laurel would replace its exclusionary zoning ordinance with one that would be fairer to unrepresented outsiders. But that's not what happened. Instead, Mount Laurel township dragged its feet, and did not quickly (or even slowly) amend its zoning ordinances to provide for more moderate- and low-income housing. "It rezoned for low-cost housing three small, widely scattered areas (less than .25 percent of its land) suffering from high noise levels and proximity to industrial uses" (Dukeminier and Krier 2002, 1084). Other New Jersey communities, with similar circumstances, also "fudged,\(^9\) Komesar also mentions (p. 84), but does not discuss, 50-year-long efforts at school desegregation.
changing their ordinances in such a way as to create the appearance, but not the reality, of compliance." As Fischel has observed, "[i]f the wood fiber in all the books and papers written about the original Mount Laurel decision were converted into construction materials, it would conceivably amount to more low-income housing than was built as a result of the decision" (1985, 320).

After eight years, the South Burlington County NAACP took the township back to court for *Mount Laurel II* (Southern Burlington County NAACP v. Mount Laurel, 92 N.J. 158 [1983]). This confronted the New Jersey Supreme Court with an important choice: It could either "abandon" its project of institutionalizing inclusionary zoning "or increase its already significant commitment to judicial review" (p. 83). It chose the latter option.

This time, the court, instead of simply dismantling exclusionary zoning and leaving it to the local community to rezone in such a way as to provide for low- and moderate-income housing, recognized the need for a stronger, more active judicial role. Good faith efforts would not be enough. The court ordered the township to provide its fair share of low- and moderate-income housing, expressed in numerical units. More specifically, it had to undertake affirmative measures to induce real estate developers to build low-cost homes. This meant more than dismantling exclusionary zoning and other government-imposed barriers; it meant replacing exclusionary zoning with "inclusionary zoning" (Dukeminier and Krier 2002, 1085). Moreover, from this point on, the judiciary announced, it would play a continuing and active role in land use planning in Mount Laurel and other developing townships to ensure that majoritarian bias would not derail its own inclusionary zoning policies.

But this high level of combined judicial activism and activity lasted just three years, until the New Jersey legislature enacted a complex and relatively weak (compared to the judicial remedies ordered in the two *Mount Laurel* cases) response to exclusionary zoning practices. As Komesar explains (2001 83–85), the New Jersey Fair Housing Act did not displace the state supreme court's jurisdiction over Mount Laurel. And the court was well aware that the legislation "remove[d] the teeth" from its efforts to replace exclusionary zoning with inclusionary zoning. Nevertheless, the court upheld the New Jersey Fair Housing Act as constitutional under the state's constitution, and quietly retired from its activist role in countering majoritarian bias in local land use planning. It has not since come out of retirement even though the New Jersey Fair Housing Act has proved to be almost completely ineffective in correcting the problem of exclusionary zoning.

The lesson, for Komesar (p. 85), is that courts may not be institutionally well suited to "replace a defective political process at high numbers and complexity." When they try, they face "an enormous strain on both their competence and their resources," and with no assurance of successfully
achieving their goals. It is precisely because "judicial review is a taxing response to serious political malfunction" that courts tend to "offer little serious review of land use regulation." It constitutes a tacit admission that they possess neither the institutional capacity nor the resources to resolve deep-rooted political problems.

This is not to say that the political process works well enough, in spite of the malfunctions caused by minoritarian and, especially, majoritarian biases. There is good reason to distrust the political process when these biases are likely to be manifest—that is, in cases of high numbers and complexity. The imperfections of the political process are serious and should be taken seriously. But so should the courts' ability to deal with them effectively. Supply-side and institutional-design features significantly constrain the judiciary's ability to counter majoritarian bias in the political process. Sometimes, as the New Jersey Supreme Court discovered in the Mount Laurel cases, the best means—even if not a very good means—of dealing with the majoritarian biases of local governments is another, higher political process, which may be less prone to majoritarian bias or, at least, less prone to the particular majoritarian biases manifested in the local government legislation.

Takings and Just Compensation

The problems for courts posed by regulatory takings turn out to be quite similar to the problems created by political malfunctions in land use planning. Regulatory takings law describes judicial efforts to enforce constitutional property-rights protections against intended and unintended depredations of government. The emergence of regulatory takings doctrine, which did not exist in constitutional law prior to the twentieth century, reflects growing judicial distrust of legislative motives. That distrust is largely a consequence of the rise of the administrative state, which has increasingly limited the rights of private landowners.

Judicial distrust of legislative motives, as an animating factor in regulatory takings law, is plainly evident in statements made 70 years apart by Supreme Court Justices Holmes and Scalia in two landmark regulatory takings cases.

First, in 1922, in Pennsylvania Coal v. Mahon, 260 US 393, 415 (1922), Justice Holmes virtually invented the doctrine of regulatory takings, out of expressed concern that the state's police power—including its authority to regulate uses of private property to prevent public nuisances—was subject to majoritarian abuse: "When the seemingly absolute protection [of private property] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." But Justice Holmes's distrust of legislative motives was minor compared to the cynicism of his successor Justice
Antonin Scalia, who in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992), wrote that "[s]ince... a [police power] justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff." As I have written elsewhere (Cole 2002, 158), the "unmistakable implication" of this statement is that the government can be expected to avoid paying compensation by describing its action, whenever possible, as a police power regulation rather than an eminent domain taking. This necessitates and justifies judicial intervention to counter the majoritarian bias and its negative effects on constitutionally protected property rights. In this circumstance, the relevant majority are state or local voters who do not like the way an individual landowner or certain categories of discrete landowners may be utilizing their properties. The majority of voters may benefit from the exercise of the state's police power, which curtails such undesirable utilizations; meanwhile, a minority of discrete landowners is left to bear all the costs associated with being prevented from using their land as they see fit.

Neil Komesar believes that there is "much to be said for an expansive vision of the Taking Clause, in general, and of regulatory takings in particular." It could, "provide a powerful antidote to malfunction in the political process," as identified by Justices Holmes and Scalia. "But," Komesar goes on to note, "there are also costs" associated with judicial activism designed to rein in "the excesses of land use regulation" (p. 91). We must, once again, consider the institutional constraints that limit the ability of courts to regulate the regulators.

Komesar conducts his comparative institutional analysis of regulatory takings law largely in the context of critiquing the regulatory takings jurisprudence of Richard Epstein (1985) and William Fischel (1995). Epstein's famous (or infamous, depending on one's ideological perspective) 1985 book, *Takings*, argues that virtually any governmental interference with exiting private property rights should require payment of just compensation under the takings clause of the Fifth Amendment. In Epstein's view, regulatory takings are largely a problem of political malfunction through minoritarian bias (rent seeking): Special interests, that is, concentrated minorities, seek to garner benefits (rents), while imposing costs on others—discrete landowners or even society as a whole—through the regulatory process. Epstein would resolve this malfunction by requiring compensation for virtually any regulatory imposition, including taxation, however minimal. The government need not take title, render the land valueless, or physically invade the land; it just has to regulate or tax the land, or any other property for that matter, in such a way as to reduce the owner's wealth discernibly. Under this rule, virtually "all forms of regulation and taxation would become presumptive takings" (p. 93, emphasis added).

It should be noted that Epstein would exempt from explicit compensation requirements any regulations that provide implicit compensation in
the form of "reciprocal benefits" to the burdened landowner. Thus, if the burdened landowner benefits (sufficiently) from similar and proportionate burdens imposed on his neighbors, that may constitute sufficient in-kind compensation (Epstein 1985, chap. 14). A good deal of land use regulation, conceivably, could be imposed without explicit just-compensation payments under this formula. From Komesar's perspective, however, Epstein's "reciprocal benefits" exemption is precisely the sort of complicating factor that would cause his proposed takings analysis to strain judicial resources to the breaking point. It has the potential to raise enormously the administrative costs of resolving takings disputes.

Epstein's approach to regulatory takings has two chief problems, according to Komesar: (1) It focuses on what is, in most cases, the wrong political malfunction—minoritarian rather than majoritarian bias, and (2) it fails to consider supply-side and other institutional constraints on the courts' ability to effectively police the political process, even where constitutional rights are at issue.

Komesar reads Epstein as viewing the political malfunction associated with regulatory takings largely in terms of minoritarian bias, but he observes that the Fifth Amendment's just-compensation requirement corrects for majoritarian, not minoritarian bias (pp. 94–95). If "concentrated minorities control the political process, the requirement of compensation will not correct the political malfunction and ensure the absence of negative-sum regulation," because the compensation burden will be borne ultimately by taxpayers—the majority—and not be the concentrated minority that benefited from the regulation. Even worse, in Komesar's view, requiring just compensation for regulations serving the interests of concentrated minorities could exacerbate political malfunctions: "in the presence of minoritarian bias, the availability of compensation may itself create negative-sum, rent-seeking government" because "a massive compensation program" would entail "a complex administrative apparatus," which itself would "generate the distinct possibility of minoritarian bias. Influential concentrated interests are likely to be overcompensated, while those less well-heeled and well-connected are likely to be undercompensated (p. 97).

To the extent Epstein is wrong about the nature of the political malfunction associated with land use overregulation, and regulatory takings are really a consequence of majoritarian rather than minoritarian bias, the compensation requirement is far more useful. It internalizes to the majority the costs of the regulatory measures from which they benefit, while offsetting the harms imposed on discrete private landowners (assuming the level of compensation is correct).

10. Fischel observes that "[modern growth controls have been shown to raise housing prices both within communities and within entire metropolitan areas" (1985, 209).
Epstein's analysis also ignores the supply-side constraints on the courts' abilities to police the regulatory process effectively:

The amount and scope of judicial activity Epstein proposes violates even the simplest senses of scale. Without regard to the competence of the courts or the chance that they would make worse decisions than even a rent-seeking, liberty-usurping political process, the range and complexity of the issues that the courts must now consider would break the judicial bank several times over. Whatever the evils of government regulation or the goodness of judicial decision making, reallocating such a mass of social decisions from the political to the adjudicative process is impossible without a change in the size of the judiciary so massive that it would alter the basic character of the judiciary. (P. 99)

Komesar correctly notes that Epstein's consideration of this problem is far too simplistic. Epstein recognizes that such a problem could arise, but predicts that it would be fleeting, as the government, responsible for compensating for just about everything it does, would quickly dwindle to a minimal size. But this is implausible where the judiciary is too small in the first place to send the government the kind of price signals necessary to cause a seismic shift from the welfare state to something resembling Robert Nozick's (1974) night watchman state. Epstein also fails to account for the potential political backlash against the courts that might ensue, if the judiciary attempted to require the government to compensate for all manner of popular, majoritarian regulation and taxation.

In contrast to Epstein, the economist William Fischel's (1995) account of the regulatory process and the law of regulatory takings is more nuanced and persuasive. It is also far less radical. In particular, Fischel envisions a more restrained judicial role in land use regulation. Still, Komesar believes that Fischel overestimates the role the courts can realistically play (p. 93).

Fischel's and Komesar's accounts of regulatory takings actually have a good deal in common. Both focus on the political process and its malfunctions as the basis for regulatory takings law, both note that majoritarian bias is the primary cause of political malfunction in takings cases, especially at lower levels of government, and both observe that the nature and extent of political malfunctions differ with the level and type of government involved. The chief difference between them seems to be that Fischel does not focus due attention on the courts' supply-side constraints. Consequently, he overestimates the ability of the courts to correct for political

11. Fischel (1995, 180) suggests that courts need to be sparing in their exercise of judicial review, but not because of supply-side constraints; rather, they need to be careful because "the legitimacy of judicial review in a democratic society is sufficiently limited that it needs to conserve its resources." This implies that courts may well have an adequate supply of judicial review, but that they should constrain themselves. Komesar argues, by contrast, that the supply itself is strictly limited.
malfunctions, even in the more limited range of cases he believes warrant close judicial oversight.

Komesar and Fischel concur that judicial review should focus on regulatory takings by local governments because political malfunctions at the local level of government are more likely the result of majoritarian bias, and the just-compensation requirement can correct that bias.\(^{12}\) They differ, however, in their reasons for urging less judicial review of decisions taken by higher governmental units. Komesar's reason is functional. He believes the just-compensation requirement is less likely to serve its purpose at higher levels of government—or even with respect to large, local governments—where political malfunctions are typically the result of minoritarian, rather than majoritarian, bias. Fischel concurs in this functional reason for greater judicial acquiescence in regulations issued by governments in larger jurisdictions, but he offers additional, institutional reasons with which Komesar might not agree. For one thing, Fischel believes that landowners and those with other economic interests are generally capable of protecting their interests in the political process; they are not the kind of “discrete and insular minorities” likely to be greatly harmed by majoritarian excesses: “[E]conomic interest groups would be able to form alliances to protect themselves from short-sighted populism.” More contentiously, Fischel argues that “[v]oters and representatives in large jurisdictions also are more likely to be concerned with their reputation for fair dealings, since bad reputations are apt to harm future generations” (1995, 180). This amounts to a claim that governments in larger jurisdictions are inherently more trustworthy than governments in smaller jurisdictions. Komesar doubts this (p. 99 n.20). Yet, he might agree with Fischel’s conclusion that, in many circumstances, especially in larger jurisdictions, “political action, which is often disparaged as rent-seeking, is sufficient to protect property without the help of judges” (1995, 324). Fischel supports this conclusion by noting that “it is not clear that property is less secure today than it was during the Lochner era” (1995, 140). Even if that were not the case, Fischel doubts the ability of judges to do a better, that is, more efficient, job than the political process (1995, 317). This is certainly in accord with Komesar’s arguments about the comparative institutional disabilities of courts.

Komesar finds Fischel’s approach to regulatory takings “more focused, more sensible, and more thoughtful than Epstein’s,” but concludes that “it still leaves the courts with an immense and difficult job. The problem is not

\(^{12}\) However, Fischel observes that, even in small jurisdictions, where majoritarian bias is more likely to threaten the property rights of discrete minority groups and individuals, “the external regulation does not always have to be the courts. If the resources subject to regulation are portable, those regulated can threaten to move them beyond the reach of the regulation. Such a threat can restrain even the most opportunistic local government” (1995, 132). Komesar seems to agree with this point, noting, for example, that “competition among local zoning jurisdictions ... should control both excessive exaction and excessive regulation” (p. 117).
one of legitimacy and it cannot be solved by the distinction between substance and process…. The problem lies in basic questions about the functioning of the adjudicative process” (p. 104). The courts simply do not possess the resources to perform even the relatively more limited supervisory role Fischel conceives for them:

Even if the regulatory process is highly flawed (and it is), the severe problems in the market and the adjudicative process may mean that the corrupt, excessive, and repressive regulatory process is the best of bad alternatives. In a quintessential example of the ironies of comparative institutional analysis, it may even be the best friend the Lucases of the world have. (P. 106)

This conclusion may appear surprising at first reading, but it is not inconsistent with Fischel’s findings, and it is supported by a good deal of other evidence that the political process, at least at higher levels of government, can substantially protect property rights. For example, Fischel (1995, 140) notes that the United States ranks at the top of international comparisons of security of property rights, despite the rise of the welfare state, with its increasing limitations on land uses, and limited judicial review of government economic regulation since the decline of the Lochner era. In addition, as I have previously discussed in an analogous context (Cole 2002, 159–60), national and state governments have passed legislation specifically designed to protect property rights against regulatory takings. In Britain, where property rights are not constitutionally protected, Parliament can lawfully take private property, physically or by regulation, without having to pay compensation. Yet, Parliament regularly pays compensation for physical (but not regulatory) takings pursuant to takings legislation it has enacted. Similarly, in this country, states including Florida and Texas have recently enacted fairly radical regulatory takings statutes that provide just compensation even for relatively minor regulatory impositions on private property rights. These laws provide substantially greater protection than current Supreme Court doctrine for private landowners. Such legislation is difficult to reconcile with Justice Scalia’s severe distrust of the political process. To the contrary, takings legislation is fully consistent with Fischel’s more optimistic assessment that the political process itself can be as, or more, effective in protecting (sometimes to the point of overprotecting) private property rights than the courts.13 So, when Komesar concludes that the David Lucases of the world are better off relying on malfunctioning political processes than the imperfect and resource-constrained courts, he may be right, and for more reasons that he recognizes.

13. Whether Komesar would agree is not clear. He seems to distrust legislatures at least as much as Justice Holmes did, though not as much, perhaps, as Justice Scalia does.
In any event, on Komesar's analysis, the David Lucases of the world really have little choice but to rely on the political process. The courts could not do much to help, even if they wanted to.

**HOW MUCH JUDICIAL ACTIVISM? HOW MUCH JUDICIAL ACTIVITY?**

At this point, one might be tempted to throw up one's hands in despair. If the courts are incapable of fulfilling their constitutionally appointed role, then what hope is there for the long-run protection of property rights in the republic? Fischel offers one answer to this question: In many circumstances, particularly in larger jurisdictions, property rights are reasonably well protected by the political process itself, so that minimal judicial oversight is probably sufficient. As already noted, Komesar does not trust the political process as much as Fischel does. But he, too, seems to feel that the supply-side and other constraints on the judiciary's ability to police government regulators are not fatal to property rights in America. There are, he suggests, "real answers" to complex social problems, such as those relating to land use, zoning, and regulatory takings; and those answers are provided by comparative institutional analysis (p. 113). The fact that the answers Komesar derives are unlikely to please many property-rights activists, or lawyers for that matter, does not mean he is wrong.

To restate the situation, when dealing with land use issues, we are "in a world of high numbers and complexity" (p. 116). We have, in essence, three alternative strategies for dealing with such issues:

Option 1. We could enforce very strong property rights by prohibiting any regulatory impositions on them, such as zoning. Anyone who does not like the way a neighbor is utilizing her land would have recourse only to a market-based solution—that is, they could buy the neighbor's property in a voluntary, free-market exchange. This solution would involve a high level of judicial activism, but limited judicial activity, as Komesar defines those terms. The level of judicial activism depends on the extent to which the court allows politics to play a role in organizing social relations. When the court enforces strong property rights and denies any political role in organizing social relations, that constitutes a high level of judicial activism. That does not necessarily mean, however, that the court is engaged in a high level of judicial activity. The level of judicial activity is determined

---

14. This comparative distrust of the democratic process depends on the level of government, however. Komesar certainly distrusts state and federal government more than Fischel does; but he seems to have more faith in the decisions of local zoning boards than Fischel does. It is tempting to suppose that Fischel's relative distrust of local decision making might stem from his personal experience serving on a local zoning board.
by the number of cases the courts must resolve to enforce the law. A
bright-line rule, such as a complete prohibition on zoning, would both
enable and require neighbors to organize their activities and relationships
without recourse to the courts (p. 116). Thus, the complete prohibition on
zoning would likely entail a low level of judicial activity, even though it
involves a high level of judicial activism.

Option 2. Combine relatively weak property rights, subject to a good
deal of political and regulatory control, with substantial judicial oversight to
ensure that those regulations do not, in Justice Holmes's famous expression,
"go too far" (Pennsylvania Coal, 260 U.S. at 415). This solution involves
relatively low judicial activism—again, where judicial activism is defined in
terms of legal limitations on the political process—but frequent judicial
activity, as the courts must decide, case by case, which regulations are
legitimate without compensation and which constitute compensable regu-
latory takings (p. 116).

Option 3. Combine low judicial activism with limited judicial activity
by combining relatively weak property rights with even more limited, and
therefore less frequent, judicial oversight of the political process. Instead of
allocating the resolution of all land use conflicts to the market, as with the
first alternative, this alternative would allocate the resolution of nearly all
such conflicts to political institutions.

Based largely on the supply-side constraints faced by the courts,
relative to markets and legislatures, Komesar (p. 116–17), recommends
option 3. He recognizes that it is not a very good solution, but in this world
of high numbers and complexity, all our choices are "far from ideal." So, we
are "left to choose the best of the bads." In his view, the least bad
institutional approach to resolving land use issues would involve "a
significant reduction in both judicial activism and judicial activity." This,
in Komesar's view, "is the best available way of achieving resource
allocation efficiency, protection of property, and protection of the interests
of low-and moderate-income families."

Komesar suggests that his preferred option is closer to the status quo
than either of the other alternatives (p. 117). But that is not clear.
Arguably, option 2 most closely approximates the status quo of regulatory
takings law. The case that best represents the current state of the law is Penn
the Supreme Court announced its intention to base regulatory takings
decisions on "essentially ad hoc, factual inquiries" into the economic
impact of the regulation on the affected property, the extent of regulatory

15. That Penn Central remains the touchstone of Supreme Court takings jurisprudence
was recently confirmed in Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency,
interference with "distinct investment-backed expectations," and the "character of the government action." This is precisely the type of inquiry that Komesar suggests overburdens the courts. In terms of Komesar's three options for dealing with regulatory takings cases, *Penn Central* exemplifies option 2: weak property rights, subject to substantial government regulation, but protected by the courts on a case-by-case basis. A move to Komesar's preferred option 3 would likely require the throwing over of *Penn Central* in favor of an even less restrictive model for deciding regulatory takings cases, based perhaps on the Supreme Court's 1987 decision in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 489 U.S. 470 (1987). In that case, the Court effectively cabined the activist Pennsylvania Coal ruling, and required little in the way of justification for police-power regulations of private land uses. Making *Keystone* the touchstone of regulatory takings law would require a substantial retreat from current takings jurisprudence.

In addition, as Komesar himself recognizes (p. 117), his preferred solution would require the Supreme Court to repudiate or at least substantially restrict judicial review in so-called exaction cases. Together, the Court's rulings in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), imposed just-compensation requirements for government exactions—dedications of private lands to public uses in exchange for building or other land use permissions—unless those exactions were substantially related to a legitimate governmental interest and roughly proportional to the public harm resulting from the individual development activity for which the permit was sought. But, Komesar notes, this kind of intensive judicial policing of government land use regulation is unnecessary to protect private property rights and places great strain on the strictly limited supply of judicial resources.

Komesar observes, with substantial empirical support (see, e.g., Been 1991), that the market for exactions operates effectively. "[C]ompetition among local zoning jurisdictions for these exactions should control both excessive exaction and excessive regulation" (p. 117). Thus, judicial supervision of exactions should be unnecessary. Indeed, to the extent there is no failure in the exactions market, judicial interference in that market would of necessity be inefficient.

Komesar considers another possible approach to resolving exaction cases: complete deregulation. Instead of allocating to the government the initial entitlement to prohibit building without proper permits, which provides the government with leverage for obtaining exactions in the first

---

17. Komesar's view of exactions is generally consistent with Fischel's (1995, chap. 8) assessment of how the possibility of exit—removal of property to some other jurisdiction—disciplines governmental excess.
place, we could select Komesar’s option 1, which combines high judicial activism with low judicial activity. Courts utilizing this approach would deny the government any authority over what people do with their land; would-be developers would require no permits, so that the government would have no leverage to exact concessions of land. Komesar recognizes, of course, that this would not prevent the government from obtaining exactions by eminent domain. But that’s precisely where the problem lies for this alternative solution: If the government were forced to resort to eminent domain to obtain exactions, that would remove exactions from the competitive market that presently exists. Instead of market pricing, exactions by eminent domain would be priced in the courts, which is likely to be much less efficient. “Paradoxically,” Komesar concludes, “a stronger market is produced by initially allocating rights [to regulate development] to the government” (p. 118).

Komesar also notes that the deregulatory solution would likely not work (p. 118). For reasons discussed earlier in the context of the Mount Laurel cases, the public—majoritarians—would probably rebel against judicial activism that overly restricted public regulation of private land uses. And the courts would find it very difficult to resist the political backlash; they would likely abandon option 1 for one of the other two alternatives. Consequently, Komesar concludes, under “quite plausible assumptions about institutional choice, private property owners are better protected with reduced rather than increased property rights. The result may be the most efficient and most equitable for society as a whole and may produce the largest supply of housing. Protection from governmental excesses can be provided by competition among the local governments rather than by rights or courts” (p. 119).

**IMPLICATIONS FOR PROPERTY THEORY AND THE RULE OF LAW**

In chapter 7 of Law’s Limits, Komesar explores some broader implications for property-regime choice, which he believes stem from his comparative institutional analysis of land use planning and regulatory takings law.

According to conventional economic theories of property rights associated with scholars such as Harold Demsetz (1967) and Robert Ellickson (1993), private property systems emerge in order to minimize the transaction costs and externalities associated with resource scarcity when the rate of demand is increasing.18 By instituting private property, a society (or community) can avert what the biologist Garrett Hardin (1968)

---

18. In Ellickson’s (1993, 1326) theory, private property systems also minimize deadweight losses stemming from failures to exploit potential gains from trade.
called, "the tragedy of the commons," which arises as scarce resources are depleted and degraded by overuse. A private ownership regime controls access and prevents overuse of scarce resources by granting one person (or a small group) an enforceable right to exclude others. Komesar accepts at face value this argument in favor of individual, private property, concluding that "alternative systems of common or collective property seriously disintegrate and true tragedies of the commons show up," as numbers and complexity increase (p. 131). This is not always the case, however. The burgeoning literature on common property regimes demonstrates that they sometimes succeed in conserving scarce resources in the face of rising demand (see, for example, Bromley 1992; Stevenson 1991; Cole 2002, chap. 6). Komesar may be right that all such systems can be expected to degrade as numbers and complexity (including heterogeneity of uses) increases, but we should not underestimate the size of feasible common-property regimes. Ostrom (1991, 188), for example, notes that complex common-property agricultural irrigation systems, with roots in the 15th century or before, continue to operate successfully today in Spanish huertas that include as many as 13,500 irrigators.

Komesar himself questions "the case for private property," noting that it becomes "increasingly more difficult to make as numbers and complexity increase because the simple virtues of parcelization and participation through monitoring are more difficult to establish and describe" (pp. 94, 104). In other words, private property rights are costly to define and allocate—sometimes too costly. As a consequence, we wind up with hybrid systems combining features of various property systems. 19

At high numbers and complexity, the modes of organizing production in private property systems, such as corporations, partnerships, and complex contractual arrangements, must often employ coordinating, cooperating, and ordering strategies that bring "common ownership" attributes into the system. (p. 131)

Komesar stresses that this does not constitute an attack on the preferability of private property systems in circumstances of high numbers and complexity. He strongly suspects that whatever the deficiencies of private property systems under such conditions, they would likely outperform any alternative property system. But he recognizes that high numbers and complexity make decisions about property systems—no less than decisions about specific property rules—more difficult (pp. 131, 133, 135).

This is an important point because it cautions us to avoid knee-jerk reactions against common, or even public, property regimes based on the

19. This perception is broadly consistent with my own observation (Cole 2002) that societies do not rely on single-institutional, private-property-based solutions to environmental problems, but instead rely on multiple and often hybrid property systems.
presumed preferability, in every circumstance, of private property. Even if private property is a generally preferable system, Komesar's comparative institutional approach leaves open the possibility that public or common property may work as well or better in specific situations. For example, when exclusion is costly, either for technological or institutional reasons, but coordination of various uses is easy and inexpensive, it may be more efficient to manage property in common than individually (see Epstein 1994, 20–22; Cole 2002, 131–35).

The implications of Komesar's analysis are even more significant for conceptions of the rule of law, most of which ignore institutional constraints on the ability of the law to rule over politics. In large measure, property rights cannot be protected by law; they depend for their protection on political processes, however dysfunctional. Most unfortunately, as Komesar explicitly notes, the rule of law proves to be least helpful when it matters most. As markets and political institutions malfunction more and more at higher numbers and complexity, the demand for the rule of law increases. But the same factors that lead to political and market failures—high numbers and complexity—also constrain the rule of law from meeting that demand.

But there is always the temptation to try, which can lead to a cycling problem. As complexity and numbers increase, each of the institutional alternatives deteriorates. We try to select the least dysfunctional—that which suffers the least from diseconomies of scale—among them. But we grow dissatisfied when that approach does not function well. When markets fail, the public calls for government regulation. When government regulation begins to display dysfunctions associated with majoritarian or minoritarian biases, the public calls for judicial intervention. When that fails to resolve the problem, especially the problem of majoritarian bias, calls arise for deregulation—a return to the market. And the cycle repeats itself. Today's currently disfavored alternative becomes tomorrow's preferred choice. As Komesar notes, cycling itself is unproductive and costly. But, he notes, the only way of avoiding it is for "judges and other societal decision makers to gain greater sophistication about institutions and institutional choice" (p. 163).

Above all, they must learn that:

The adjudicative process is both smaller than its institutional alternatives and less able to expand. As increasing numbers and complexity continue to increase demand on the courts, courts may do more in an absolute sense but still be forced to allocate a greater percentage of issues elsewhere. We can expect sweeping allocation of responsibility away from the courts to other institutions and, therefore, more rules of abdication. Under this law of rules, the stability, clarity, and protection against the excesses of government envisioned by the Rule of Law cannot come primarily from the courts. (P. 163)
This is not to say that the courts will be completely disabled from imposing the rule of law as a constraint on political malfunctions and excesses, "but the chances are that it can do so on a broad basis for only a short time and that any long-term role for serious judicial intervention will require narrowing the band of societal issues allocated to the courts" (p. 164). Komesar therefore expects the judicial role to "diminish over time... relative to the activity of larger institutions such as the market and the political process" (p. 165).

From the point of view of lawyers and others, including Komesar himself, for whom the rule of law stands as a crucial restraint on unwise democratic impulses, the outlook is not pleasant. But Komesar is trying to be realistic when he cautions that any "attempt to define a role for the courts faces a quandary of increasing proportions: The most serious need for judicial protection and legal rights will generally occur in those settings in which it is most difficult to deliver this protection" (p. 165). This constitutes a significant challenge not only for policymakers, but for legal theorists, such as Joseph Raz (1979), who depend on courts and judicial review, however limited, as bulwarks of the rule of law (pp. 165–67). Similarly, Ronald Dworkin's (1985) account of the rule of law "will remain empty" until he grapples with the institutional issues Komesar raises (p. 169) in *Law's Limits*. The same would be true for any theory of rights that contemplates a central judicial role in defending them from political manipulation, without considering the courts' ability to fill their assigned role.

**CONCLUSION**

Neil Komesar ends *Law's Limits* with a constructive proposal to amend society's approach to legal education. In addition to teaching about legal doctrines, such as property, contracts, and torts, professors should also teach about legal institutions and institutional choice. "Contract law," for example, "is replete with institutional choice ranging from the choice of remedies to issues about the validity of the contract such as unconscionability and issues about the allocation of risk by implied terms. In general, every area of law contains tough institutional choices and most are dominated by them" (p. 178). If we ignore institutional issues in legal education, we risk missing out on many of the most important issues relating to law today. This is clear enough from reading Komesar's book.

Also clear is the need for much more work along the same lines. Komesar has advanced both the method and the application of comparative institutional analysis. But he would be the first to admit that a great deal of room remains for improvement, especially in methodology. Comparative institutional analysis is still in its infancy. Economists, legal scholars, and
other social scientists have only just begun modeling and applying this method. Still, Komesar persuasively argues, it has already become not just an effective tool of legal analysis but an indispensable tool. We have no choice but to think differently, in more subtle and complex ways, about the roles of markets, courts, and legislatures.

REFERENCES


20. For a most interesting, early effort to design a full-bodied, semiformal model of comparative institutional analysis, see Aoki 2001.