COMMENT

Reflections on the Essence of Economics, the Character of Courts, the Role of Ideology, and the Reform of Legal Education

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Dan Cole does me honor. He has carefully read my book (Komesar 2001), taken the time to reflect thoughtfully on what he has read, and shared his thoughts in print (Cole 2003). Moreover, he has associated me with Ronald Coase, one of the most originative analysts of our time. Cole's review raises several issues that deserve comment. In part one of this essay, I show why economic analysis of all varieties must be comparative institutional. In part two, I examine the limits of courts and why those limits make urgent a legal analysis based on comparative institutional analysis. In part three, I explore the revamping of legal education and the limited relevance of ideology in light of comparative institutional analysis.

I. THE ESSENCE OF ECONOMICS

As with other disciplines, there are competing conceptions of economic analysis and, in particular, of the economic analysis of law and public policy. Cole, like most analysts, parses economics into neoclassical, institutional, and new institutional. This categorization masks a fundamental point: The core of economics—every sort of economics—lies in institutional choice and comparative institutional analysis. All varieties of economics already focus on institutional choice. The problem lies in the particularly non-economic way institutional choice is analyzed.

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These points are obscured by issues of definition. As Cole points out, the term *institution* has two meanings in economics. Most commonly, institutions are defined as the rules of the game, and the game is economic activity. Institutional economists believe these rules of the game are central to economic analysis; neoclassical economists see them as secondary. The neoclassical view has dominated the economic analysis of law and public policy.

However, another form of institution and institutional choice dominates even neoclassical economics. Here institutions are decision-making processes. Economists of every ilk spend considerable time examining malfunctions in such decision-making processes as the market and the political process. In the welfare economics tradition, economic analysts ask whether there has been a market failure and then explain, justify, or criticize interventions by courts, legislatures, or administrative agencies according to the character and extent of this market failure. Similarly, another area of economics, public choice, addresses institutional choices such as deregulation, increased property rights, and increased judicial review by analyzing the political process and its imperfections and malfunctions. This type of institutional choice is the focus of Coase's work (1937. 1960) on both the firm and property rights. It is central, not secondary, to both neoclassical and institutional economic analyses of law and public policy.

Paradoxically, however, these orthodox economic analyses of institutional choice are commonly executed in a non-economic way. They are single institutional; they focus on only one institution. In welfare economics, there is no parallel examination of the intervening political process or court and, in public choice economics, there is no parallel examination of the substituted markets or courts. As I showed in *Law's Limits* and earlier in *Imperfect Alternatives*, single institutional analysis is bad analysis. But it is especially bad *economic* analysis.

By ignoring a comparable consideration of alternatives, single institutional analysis breaches the canons of economics. It violates the notion of rational choice. There is considerable debate both within economics and between economists and others about the degree of rationality and knowledge assumed by economics. But it is unassailable that choice entails alternatives. The meaning of *rational* may be in doubt. But the meaning of *choice* is not.

Moreover, the failure to compare alternatives violates the logic of key economic constructs such as opportunity costs and the role of complements and substitutes. In economics, the cost of anything is defined in terms of its alternative uses. These opportunity costs define the supply curve. Similarly, the prices of complements and substitutes, along with the price of the good itself, define the demand curve. The essence of supply and demand is the comparison of alternatives.

Comparative institutional analysis is the only acceptable economic analysis of institutional choice. Yet single institutional analysis prevails. This prevalence reflects the economics of economics. Single institutional analysis is easier and cheaper than comparative institutional analysis. Since, others things being equal, cheaper is better, perhaps single institutional analysis is sensible after all. At the very least, market failure is a necessary, if not sufficient, condition for institutional choices such as government intervention. Moreover, the degree or extent of market failure would seem critical in assessing the case for intervention, and therefore, single institutional analysis would seem a good first approximation of comparative institutional analysis.

But market failure is a trivial necessary condition with little analytic value. It is always fulfilled and, in the complex world in which we live, always significantly fulfilled. More important, a single institutional approach is not a good first approximation of comparative institutional analysis because institutions tend to move together. In particular, all institutions deteriorate as numbers and complexity increase.

Conventional economic analysis is filled with instances in which changes in numbers and complexity make institutions move similarly.[1] As *Law's Limits* shows, increasing numbers and complexity increase transaction costs, information costs, and the possibility of collective action problems, producing failed transactions and externalities in the market, overrepresented concentrated interests and rent seeking in the political process, and underrepresented dispersed interests in the adjudicative process. At base, problems of collective action and transaction (or, more broadly, participation) costs haunt all institutions, and collective action and participation costs are haunted by numbers and complexity.

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 vary in the rate if not the direction of their movement. It is here that comparative advantages and institutional choices are revealed. In works like *Law's Limits*, I have offered my analytical approach to this task and have used it to make the case for various institutional choices. But here the point is simpler: *That institutions move together makes single institutional analysis irrelevant and comparative institutional analysis essential.*

Institutional choice—the choice between alternative decision-making processes—is already central to the economic analysis, both neoclassical and institutional. Having opened the door to institutional choice, however, economists, whatever their categorization, cannot legitimately approach the subject via single institutional analysis. To be true to economics as well as to

1. By *numbers*, I mean the number of individuals impacted by a given transaction.

be relevant, the economic analysis of law and public policy must be comparative institutional.

II. THE CHARACTER OF COURTS

Law's Limits opens by confining the meaning of law and the related notions of the rule of law to court-made law. In reaction, Cole at least initially supposed that I must be, like many legal scholars, court centered and that I perceive a separate realm of decisions called "legal" as opposed to "political."[2] He is not the first reviewer to see me as court centered (Merrill 1997). That, however, is not my view. In *Law's Limits*, I focused my discussion of law on courts to show the inherent structural limits of the courts and, therefore, of law and the rule of law. If, as legal scholars, we wish to get the most out of this limited resource, we must understand and respect these limits.

It is also traditional in legal scholarship to see separate types of decisions, which by their nature, belong to the courts. John Ely, Ronald Dworkin, and McDougall and Laswell, among others, envision distinct realms of legal as opposed to political decisions. Institutional choice then becomes simple: Render onto the political process that which is political (or substance or policy or . . .) and render onto the courts that which is legal (or process or principle or . . .). This is a well-worn path.

But it is not my path. In my view, there are not different types of decisions, just different types of decision making. All important societal decisions involve tough and complex choices. The relevant question is which of several imperfect decision-making processes (institutions) should take responsibility for each of these decisions. If institutional choice favors the adjudicative process, then the decisions can be termed legal or process or principle or Ralph. The terms are unimportant. What is important is that institutional choice determines these categories not the other way around.

More subtly, it is essential to realize that no universal comparative advantages adhere to a given institution. The courts may have officials (judges) who have greater independence than the officials of the political process (legislators, executives), but that can cut in several ways, producing advantages in one setting and disadvantages in another. More generally, as we just saw, the same factors that cause increasing problems in one institution often cause parallel problems for the alternative institution. That makes sweeping allocations of decision-making responsibility suspect.

When, in *Law's Limits*, I conclude that judicial review of land use decisions should be reduced, it is not because, as a general matter, the political process is a great determiner of land use issues—which it certainly

2. Dan Cole cured this perception in the draft of his review published here.

is not. Nor is it simply because, as a general matter, the adjudicative process is severely strained by review of these decisions—which it certainly is. I took the position by looking at the particulars of participation in the alternative institutions in the context of land use decisions. The result is a close call. If not for the real potential for serious competition among local zoning jurisdictions for exactions, I might well have preferred the strained courts and called for increased not decreased judicial review. And that would have been a close call.

Once again, as with the economic analysis of law and public policy, the standard approaches to legal analysis seem easier but are useless. Comparative institutional analysis is the only real road, although it promises no easy answers. Ending the reluctance to take the tough road is particularly important for analysts of law and courts. The adjudicative process is inherently limited by the processes and procedures that accompany judicial independence, such as the bottleneck of appeal, and these limitations cannot be easily removed without changing the fundamental nature of the courts. To continue to ignore the impact of these and other limits produces irrelevant analysis and, worse, promotes a drift in the directions of the law.

Increasingly, sophisticated legal commentators are reacting to the limits of the law by denouncing the courts in areas once held sacred (Rosenberg 1991; Tushnet 1999a). Calls for sweeping allocations away from the courts are the predictable reaction to conventional legal analysis where judicial intervention is justified simply by the identification of a laudable goal and perhaps a parade of horribles about the nonjudicial institutional alternative. To most legal analysts, judicial intervention solves all problems. Courts, rights, and the rule of law do not and cannot live up to that billing.

Those who react to the failures of these expectations by wholesale abandonment of the courts are also mistaken. In a world of severely and increasingly imperfect alternatives, the answer is not to jettison an institution like the adjudicative process when we discover its severe and increasing faults. That will only produce cycling, as today's sweeping solution becomes tomorrow's "failure," to be replaced by yesterday's discard dressed in somewhat new garb. The answer is to confront the tough task of institutional choice and comparative institutional analysis.

III. THE REFORM OF LEGAL EDUCATION

What better place to start than legal education. Cole notes that I close *Law's Limits* by tendering basic reforms to legal education. He kindly does not scoff at what he sees as my call to place comparative institutional analysis at the core of legal education along with the teaching of legal doctrine. But even he does not fathom the depth of my chutzpah. My belief is that comparative institutional analysis is the way to teach doctrine and

legal skills as well as providing new lawyers with an analytical framework useful in making a buck or saving the world. It also provides the legal community with a way to replace the standard ideological categories that now define people and positions.

Doctrine is defined by well-known constructs, and the role of courts appears to follow from these doctrinal constructs. Unequal bargaining power triggers judicial scrutiny of private contracts under the unconscionability doctrine, representativeness determines the availability of class actions, the presence or absence of physical invasion dictates whether courts will balance impacts under the nuisance doctrine, suspect classifications and fundamental rights dictate the role of courts in U.S. equal protection law, and the takings of private property triggers judicial review of just compensation. Similar constructs are found throughout the law—both in the United States and elsewhere.

On careful examination, however, a curious pattern appears. These constructs seldom correspond to a straightforward definition based on common meaning. *Fundamental rights* do not cover all or even most of what is fundamental. The "taking of private property" falls far short of the full conceptual meaning of either *taking* or *property*. The term *suspect classification* omits many suspicious classifications. *Physical invasion* excludes many physical invasions. All these terms seem distorted and artificially limited.

There is, however, a straightforward way to understand these constucts. Reverse the causality. Although, in theory, these constructs define institutional choices, in reality, they are defined by them. As one examines their application, these constructs are roughly based on considerations of institutional characteristics and the relative merits of judicial versus market or governmental decision making. Thus, although, in theory, constructs like physical invasion, unequal bargaining power, property, and fundamental rights define institutional choice, in reality, they are defined by institutional choice. They do not avoid institutional choice and comparison. They require them. If a doctrinal term seems vague, sophisticated lawyers should look to institutional choice and institutional comparison for guidance.

But doctrine is not the only or the most important competitor to institutional choice as a means of understanding law and legal education. My sophisticated and somewhat cynical friends tell me that legal scholarship and legal education are about ideology. People adhere to or reject an analysis based not on its quality but on its perceived ideological position. This viewpoint is reflected in a parenthetical allusion in Cole's review. He refers to Richard Epstein's work on takings as famous and then parenthetically "or infamous, depending on one's ideological perspective." Cole's allusion accurately captures much of the reaction to Epstein's book. Those on the Right laud it; those on the Left are highly critical. More generally, the view is that law and economics is on the Right and critical legal studies and probably law and society are on the Left. This categorization is rough,

but it roughly captures the prevailing view. Faculties are split along these lines, and students hear different messages from those in each category.

Through the lens of institutional choice and comparative institutional analysis, however, ideology—at least the common forms of ideology—becomes much less relevant as a means of understanding law, legal analysis, and legal education. Commonly, ideologies are either an attachment to a goal, such as equality, liberty, or resource allocation efficiency, or ideologies hold that a given goal is attached to a given institution, or at least, that a given goal means the rejection of or an aversion to a given institution.

Neither version of ideology, however, holds up well to comparative institutional analysis. Goals do not dictate programs. As I have shown repeatedly in both *Law's Limits* and *Imperfect Alternatives*, the same goal is easily associated with quite opposite results. To effectively carry out a goal requires the choice of an institution such as the market, the political process, or the courts. This need is reflected in a distorted way in the second meaning of ideology. Thus, for example, Richard Epstein's ideology is defined by a deep aversion to the regulatory state, and Margaret Radin's ideology is defined by a deep aversion to the market. In the view of Epstein and Radin, their philosophers, Locke and Hegel, are associated with their institutional choices.

But comparative institutional analysis shows that hard-wiring goals and institutions is senseless. Cole believes that my proposal to reduce judicial review of land use regulation and, therefore, limit property rights will shock my law and economics colleagues. I do not come to this "shocking" conclusion because I am a Left-wing adherent of regulation. I see all the problems that Epstein and other proponents of property rights see in land use regulation and then some. Indeed, unlike both Epstein and his opponents, I do not associate the evils of land use regulation solely or predominantly with concerns about the rights of property owners. The most severe problems with zoning lie in its impact on class and racial integration and on the accessibility of housing to the poor. My problem with Epstein's analysis of property rights does not lie with the ideology of property rights as defined by either Epstein or his opponents. My problem with Epstein's theory is that his analysis fails to even begin to grapple with the central issues of institutional choice. As I have shown, the same is true of Radin, Dworkin, Hayek, and so many others. Ideology, either as a focus on goals or the simple association of a goal with an institution, is a questionable way to understand law, legal analysis, and legal education.

AND SO

As Cole notes, Ronald Coase, in his later work, expresses frustration with the failure of the economics community to adopt comparative

institutional analysis. This failure is only the tip of the iceberg. So far as I can tell, no standard approach to law and public policy adopts comparative institutional analysis. On one level, this is startling The logic of comparative institutional analysis is powerful and inescapable, especially for economics. On closer inspection, however, the reasons for this lapse are sadly evident. Although the logic of comparative institutional analysis is strong, and an analytical framework for comparative institutional analysis can be set out employing a small set of variables, it is difficult to reach simple conclusions or to reach conclusions simply. Moreover, comparative institutional analysis means abandoning standard ideological positions. People like easy approaches and the comfort of standard labels. I can understand the reluctance to adopt comparative institutional analysis. But I cannot accept it. Until analysts of law and public policy adopt a comparative institutional approach, little can be done to address the most fundamental issues. A few of us have joined Coase, and the number is growing. But, as Dan Cole points out, there is much to be done.

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