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Recommended Citation
Adelstein, Richard, "Four Entries" (1998). *Division II Faculty Publications.* Paper 97.
http://wesscholar.wesleyan.edu/div2facpubs/97

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John Rogers Commons

(1862 - 1945)

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Prepared for *The New Palgrave Dictionary of Economics and the Law*

September 1996

JOHN ROGERS COMMONS (1862 - 1945)

John Rogers Commons, raised in rural Indiana "on Hoosierism, Republicanism, Presbyterianism, and Spencerism" (Commons 1934b: 8), was born in Hollandsburg, Ohio on October 13, 1862. At twenty, he entered Oberlin College, his mother's alma mater, where his classical education was leavened by work as a typesetter and interrupted by the first of several episodes of depression that afflicted him throughout his life. Drawn to the reformist "socialism" of Richard T. Ely by Simon Newcomb's denunciation of it in *The Nation*, Commons began graduate study with Ely at Johns Hopkins University in 1888. Despite his failure to complete the Ph.D. and a chill in their personal relations after 1909 (Henderson 1988: 334), the influence on Commons of Ely's German historicism and faith in the potential of reform grounded in intensive empirical research was profound. Commons embraced his mentor's conviction that economic life is conditioned by a complex of overlapping institutions rooted in custom and law, and in its coupling of economics and law through the idea of property rights, Ely's 1914 treatise *Property and Contract in Their Relations to the Distribution of Wealth* foreshadows both the interdisciplinary scope and the qualitative, inductive method of Commons's later work. Commons's ineffectiveness in the classroom and outspoken sympathy for labour made him an academic itinerant during the 1890s, and for five years after 1899, he lived "in the struggles of human beings" (Commons 1934b: 60), conducting research in the field on immigration and labour for the United States Industrial Commission and the National Civic Federation. In 1904, Ely called him to the University of Wisconsin to complete a definitive history of American labour, a task that engaged Commons and his

students for thirty years and culminated in a series of volumes (1910-11, 1918-35) whose value to scholars has not yet been exhausted (Brody 1993: 76).

Commons's passion for social reform found a home in the Madison of Robert M. LaFollette. He was instrumental in drafting progressive legislation in the areas of public utility regulation, workmen's compensation and unemployment insurance that provided a model for similar federal programmes after 1933, and his commitment to the careful contextualization of facts drew him not just to the history of labour but to the sophisticated economic and legal history that informs *Legal Foundations of Capitalism* (1924) as well. He often generalized from his own experience (1934b: 18, 42, 52, 58-9), and as he struggled to build a conceptual framework to organize the mass of detail he had accumulated over a lifetime of investigation, he found inspiration in the practical questions he had encountered in his legislative work (1924: vii). Though his last years were darkened by personal loss, Commons continued to write after his retirement in 1932, completing both *Institutional Economics* (1934a) and a droll, melancholy autobiography (1934b). With his student Kenneth H. Parsons, he was at work on *The Economics of Collective Action* (1950) when he died in Raleigh, North Carolina, on May 11, 1945.

Institutionalism is sometimes derided as economics without theory (cf. Coase 1984: 229-30), and even Commons's staunchest advocates (Harter 1962: 209-212; Chamberlain 1963: 63-64) have accused him of weakness as a systematic thinker. But Commons's observations of labour relations convinced him that collective bargaining promoted the reconciliation of conflicting interests through the creation of reasonable working rules, and for all his idiosyncratic terminology and penchant for argument by typology, he did expand this basic insight into a complex evolutionary theory that substantially advanced Ely's project by focusing on individual transactions in a variety of circumstances and

linking the history of Anglo-American law to the economic and social institutions that govern them. Commons rejected both the classical emphasis on commodities and past labour and the present-oriented, subjective individualism of the marginalists, beginning instead with the ubiquitous conflict of interest and uncertainty about the future created by scarcity. Without some form of social control, he argued, conflicts over resources would be settled by force, and it is to forestall the Hobbesian war that a broad range of interrelated rules and sanctions, physical, moral and economic, are continuously evolved to constrain the behaviour of all so that each may act freely in an environment of peace and secure expectations. These working rules and sanctions are the visible face of institutions, which Commons (1931: 651) defined as "collective action in control, liberation and expansion of individual action." Constantly in flux and differing from one institution to the next, the rules operate both implicitly, through custom or informal systems of ethics enforced by social disapproval, and through the more explicit forms of social organization, among them family, church, firm, union and the state itself, that Commons called going concerns. The individual, as Commons (1925: 376) saw him, is "an active person . . . participating in and controlled by the practices common to all," while the many going concerns of which he may at any time be a part "interject between the state and the individual a complex of habits, practices, opinions, promises and customs" that substitute for and place limits on state action. The economy at large is thus seen as a galaxy of traditional institutions and going concerns, large and small, formal and informal, bound together internally and related to one another by a network of collectively enforced rules that govern their interaction. Within and between these concerns are conducted the innumerable individual transactions through which rights, liberties and duties are allocated and men and women earn their livings.

Commons distinguished three types of transactions. Two involved relations

between legal superiors and their subordinates, the rationing transaction, in which a collective authority such as the state issues orders or dispenses wealth to its subjects, and the managerial transaction, typically conducted within a business firm, in which one individual's labour or resources are allocated at the command of another. But his principal focus was the bargaining transaction, in which property rights are transferred by voluntary agreement between individuals or concerns who, though equal before the law, may differ considerably in their ability to exert pressure upon the other so as to influence the terms of exchange. It is the concern's working rules that fix the constraints within which power may be exercised in all three kinds of transactions and thus determine the political or moral quality of the concern itself. Indeed, to Commons, the growth of large corporations in the United States represented an unhealthy enlargement of the domain of rationing and management, but in the subsequent empowerment of labour unions he recognized a characteristic virtue of liberal capitalism (Harter 1962: 228-229). Unlike fascism and communism, in which the rationing transaction reigns supreme, liberalism encourages the voluntary association and countervailing power that can reconstitute rationing and managerial transactions as bargains between legal equals and bring the bargaining power of all sides into closer balance (Commons 1934a: 761-763, 897-903; Chamberlain 1963: 75-76; Rutherford 1983: 725, 736).

A central theme of this analysis is the functionality or, as Commons called it, the workability of the rules, measured by the vitality of the concerns they govern. Working rules exist to solve the problem of order, so "their survival in history is contingent on their fitness to hold together in a continuing concern the overweening and unlimited selfishness of individuals pressed on by scarcity of resources" (Commons 1924: 138). If, within a given concern, the rules are clearly understood and generally accepted, transactions will proceed routinely, with no

need or occasion for change in the rules. But when new conditions render existing rules uncertain or unacceptable, the result is often conflict over the conduct or governance of specific transactions that threatens the survival of the concern itself. Commons called these crucial transactions strategic, and saw the disputes they engender as the engine of adaptive evolution in institutions. Sometimes, the parties themselves are able to resolve the dispute by agreeing to a private revision of the rules to govern their own situation, and in so doing provide a model for others to adopt or modify as they see fit; Commons (1931: 651) called this the common law method, of which the common law itself is just one example. If they cannot, it will be left to the authoritative agency of the concern to formally amend the existing rules by fiat or impose new ones. The identity of this rulemaker varies from concern to concern, though in every modern economy the authority of last resort is the state, speaking through either its political branches or its courts (Rutherford 1983: 726-729). But no rulemaker can act arbitrarily. The rules it promulgates must themselves be workable, able to address specific problems in a way that fits well enough into the existing pattern of individual purposes and general rules that continued operation of the concern is assured. And this requires of the rulemaker a purposiveness of action and awareness of consequences that distinguishes institutional from Darwinian evolution; imposed change in the rules is a process of artificial, not natural, selection (Ramstad 1987, 1994; Biddle 1990).

But if artificial selection of common law rules by the courts is clearly inconsistent with the idea of natural law, Commons did not reduce it to simple legal positivism either. The requirement of workability means that judicial rulemaking cannot proceed independently of or in contradiction to the matrix of uncodified custom and traditional practice evolved over time through the daily interactions of individuals themselves. As disputes arise, the role of the courts is not to design

novel or optimal solutions to recurrent problems and make them law, but to canvass these spontaneously generated customs and select from them the "good habits and practices of individuals as against bad habits and practices that weaken the group as a whole" (Commons 1924: 138). Commons depicts the common law as occupying a middle ground between the "mechanical and coercive" alternatives of natural law and inalienable rights on the one hand and law as "the mere creature of sovereignty" on the other, developing a

> concept of property as a complex of acquired rights, of imposed duties, and of permitted liberties and exposures, derived from a great variety of customs which landlords, guilds, business men and laboring men have been influential enough to get the courts to authorize; and further, that these fundamental social relations . . . are grounded, not on the state, but in the daily habits, practices and customs of the people (1925: 376).

The task of the courts, and particularly the Supreme Court of the United States, "the first authoritative faculty of political economy in the world's history" (Commons 1924: 7), is thus to discern and administer for the economy at large as a going concern the master working rule of reasonableness, defined not as efficiency or wealth maximization but as workability, "the evolutionary collective determination of what is reasonable in view of all the changing political, moral, and economic circumstances" (Commons 1934a: 683-684).

Commons (1934a: 5) believed that his theory of institutional change was not a substitute for the neoclassical analysis of prices and quantities but a complement to it that, in making endogenous the institutional givens of neoclassical theory, simply gave collective action its due (cf. Backhouse 1985: 235). But his

departures from orthodoxy are far greater than this might suggest, and account for the general indifference and occasional hostility with which his work has been received by academic economists. Part of this response is a reaction to the explicitly evolutionary quality of Commons's thought, its emphasis on the historical description of complex processes of qualitative change as opposed to more "scientific" attempts to predict their outcomes or generate testable hypotheses amenable to statistical analysis (cf. Chamberlain 1963: 87; Spiegel 1971: 629). But as Ramstad (1987) has suggested, more may be due to the central place of volition in Commons's argument, his insistence that, where they exist at all, order and harmony are primarily the result of the purposeful efforts of those responsible for the creation of working rules, not the unintended consequence of an invisible hand that guides individuals toward cooperation and social outcomes toward efficiency (cf. Vanberg 1994: 153-156). As citizens or observers, each of us may hold strong views as to the value or desirability of particular working rules, especially as they are encoded in the law, and these views are part of the data consulted by the rulemaker as it formulates reasonable rules. But in Commons's law and economics, as in Ely's, the normative evaluation of customary practice and the establishment of legal rules are in the end the province not of theorists or critics but of duly constituted legislatures and courts. Bearing no direct responsibility for these determinations himself, Commons, unlike Ely, generally refrained in his scholarly work from advancing his own preferences with respect to them. His evolutionary analysis thus offers neither prediction nor prescription, and for this reason, in the eyes of many, is no theory at all (cf. Kitch 1983: 169-173).

In 1962, Commons's sympathetic biographer Lafayette Harter conceded that his subject's principal legacy lay in the field of social reform, and that as a theorist, he had "failed to achieve much influence either on the professional

economists or even on his own students" (1962: 209). But as these words were being written, Ronald Coase (1960) once again brought the individual transaction and the institutional environment within which it is conducted to centre stage, opening the door to a new, more sharply analytical economics of organization that incorporates some of Commons's method and many of his insights. In its wake has come an efflorescence of scholarly interest in Commons himself, best represented in the penetrating work of Malcolm Rutherford (1983) and Yngve Ramstad (1986, 1990).

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