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INTRODUCTION TO PAPERS ON JOHN R. COMMONS IN the 21st CENTURY

The four papers that follow grew out of a conversation in San Diego at the AFEE meetings in January, 2013, in which we agreed that John R. Commons would have had some important and useful things to say about the financial crisis of 2007-08, the Great Recession that followed, and the ongoing failure of many economies to return to satisfactory function. The result of that conversation was a panel at the AFEE meetings in Philadelphia in 2014. One paper by Glen Atkinson and Stephen Paschall that was part of that panel was published in the June, 2014 issue of the *JEI*. The other papers are presented here.

Each of the four papers developed from the question posed to the panelists: what would Commons' have had to say about the financial crisis and subsequent failures of 21st century capitalism? Four quite different, but overlapping, answers were given that reflect different readings of Commons as well as focus on different aspects of the ongoing evolution of capitalist economies.

Sherry Kasper, in her paper on fringe banking in Tennessee, uses the work of A. Allan Schmid, who built upon the institutional economics of Commons, to frame her study. She writes that Commons focused on the way in which informal and formal institutions shaped individual action. In turn, these institutions are changed through use of political power, legal change, and economic policy. Schmid's contribution was to build a "situation-structure-performance model" to be used in empirical studies as a way of linking "the rules of the game and the performance of the economy—amount, kind, and distribution of welfare" (Kasper, xxx). Kasper provides a detailed description of the growth of payday lending, the reasons why it has proven a popular alternative to bank lending, and the role that the legislature of Tennessee and regulatory agencies have played in shaping the arena in which individuals act.

Kasper writes that "Alternations in the working rules through the use of political power, the process of common law or the implementation of economic policy were mechanisms by which humans can change institutions over time in a social beneficial manner" (xxxx). It is not, however, clear from her analysis of fringe banking in Tennessee that changes in the working rules have benefitted those who use fringe banking. This same contradiction between Commons' essentially optimistic view of the process of institutional change and the outcomes of such change in recent times is reflected in the papers by Philip Ashton and Melody Chiong, Dymski, and Jesus Hernandez.

Chiong, Dymski, and Hernandez build from Commons' proposition in *Legal Foundations of Capitalism*, that economic activity "begins and ends with the purchase or sale of goods or services" in accord with working rules, which are both given by custom and by ever changing law. They then propose to bring Commons' basic model, in which laws and working rules change in accord with changing perceptions of "reasonable value," forward into the 21st century by recognizing the importance of supranational power and to add to the category of "going concerns." As they explain in detail, it is no longer sufficient to think of the nation as the community in which reasonable values are determined. Much of their paper is an exploration of what happens when nations accept "a superior legal power in using its courts to protect its citizens' interests" (xxxx).

Their second extension is similar to one proposed by Mayhew. Chiong, Dymski, and Hernandez propose the addition of "the community" and the "household" to Commons' list of the individual, the firm, and the (national) state, as key actors and recipients of actions in the ongoing evolution of 21st century

capitalism. They then use this widened and expanded lens to analyze the welfare effects (as Commons might have understood them) of the financial crisis and its aftermath.

In her paper, Mayhew focuses on Commons' description of the evolution of eminent domain in the United States in the late 19th century as a guide to examine debates about homeowner protection in the U.S. today. She begins by describing current efforts to use the power of eminent domain in Richmond, California. Changes in the laws of eminent domain were central to Commons story of how, in the U.S., the definition of property changed, and with those changes how legitimate expectations of what property ownership meant were altered. Through time. Using Commons' analysis, she suggests that current conflicts between transactors and, most importantly, between ideas about what is right and what is wrong in application of law, could result in changes that would offer greater protection for households and communities from recurring financial crises.

If Mayhew thinks that such expanded protection might result from judicial evolution, Philip Ashton, in his paper on "The evolving Juridical Space of Harm/Value" is far less optimistic. Like Chiong, Dymski, and Hernandez, Ashton, Ashton is concerned that "the underlying organization and logic of state intervention" (xxx) have so changed in this era of neoliberalism that formal access to the legal system has become relatively meaningless in the face of judicial interpretation and inequality of substantive economic power. Ideology and great vested power may be sufficient to make irrelevant the kinds of contradictions in national social values that, according to Commons, would play a crucial role in determining legal outcomes.

The papers do not reach consensus on what Commons might say were he alive to write about 21st century economies, but they do, we think, offer a number of questions worth asking. Commons champions the role of the nation state and national community as a guide to what and how we value, and what and how we protect. This approach to capitalism highlights the connections between the structure of the laws governing economic transactions and access to power over resources and property, on one hand, and individuals' and organizations' pursuit of their own purposes within this framework, on the other. Commons was optimistic that the legal foundations of capitalism could be governed by courts – ultimately, by a Supreme Court – that would resolve conflicts over rights and obligations by considering what outcome would most expand the wealth of the nation. In the parlance of game theory, courts adjudicating legal conflicts would encourage processes that generate positive-sum outcomes and discourage zero-sum mechanisms: the former expand the national wealth available for sharing, while the latter simply redistribute what already exists. Commons envisioned this law/economy adjudication as negotiating space for "going concerns" to maintain their initiative while not disabling that of others.

Our investigation has highlighted both the importance of keeping the health of the commonwealth in view in resolving law/economy conflicts, and also the fundamental challenges that contemporary crises such as that of subprime lending pose for this perspective. "Going concerns" in distressed macroeconomic environments may look to zero-sum transactions to simply survive in the short run, leaving positive-sum growth for another day. And conflicts among the hierarchical levels of government, market, and law invite the use of power by agents organized at higher levels to restrict the rights of (or even to disenfranchise) those at lower levels. The sovereign nation's capacity to shape the law/economy landscape in the interest of its citizens – its commonwealth – is now reduced, if not compromised, by the growth of supranational financial transactions. These essays have explored the ways in which

redress or a balancing of interests has been sought amidst crises which, because they are wrought in the context of financial globalization, encompass the globalization of legal rights and obligations. Ensuring that the interests of the national commonwealth, not to mention the rights of the socially and economically vulnerable within the commonwealth, are given the consideration that Commons would advise should be a principle objective of economic policy formation in this post-crisis world. For while the subprime and other crises, as we have seen, have already posed fundamental challenges to the logic of the commonwealth and the viability of “going concerns” at many levels within society, future crises will undoubtedly bring the need for a fair and sustainable resolution of the law/economy nexus into even sharper focus.